THE EASTERN CARIBBEAN SUPREME COURT

THE HIGH COURT OF JUSTICE

HIGH COURT CIVIL CLAIM NO. 212 OF 1999

BETWEEN:

THOMAS RAMAGE	**CLAIMANT**
v	
ROSEMAN ADAMS	**FIRST DEFENDANT**
LYNDEN NEVERSON	**SECOND DEFENDANT**
ST. VINCENT INSURANCES LTD.	**ADDED DEFENDANT**

Appearances:
Mr. R. Williams for Claimant
Ms. N. Sylvester for Defendants
Mr. S. E. Commissiong for Added Defendant

2006: April 20

DECISION

This matter is before me for assessment of damages. The history of this sad episode needs to be recounted fairly fully in order for this assessment to be seen in context.

Facts:

[1] On 20th September 1998, the Claimant was involved in a motor vehicle accident. He had been riding his bicycle along the Clifton Public Road when he was struck by a motor omnibus driven by the Second Defendant and owned by the First Defendant. He suffered injuries which included a seriously broken right leg. His bicycle was destroyed. The Claimant then brought the present action against the First and Second Defendants. The Defendants were directed by their insurers (the Added Defendants) that the defence would be handled by Mr. S. E. Commissiong

of the firm Commissiong & Commissiong. The matter proceeded to trial on the issue of liability only. After a hotly contested trial Webster J found that the Defendants were wholly liable. He dismissed the counterclaim of the defendants and gave judgment for the Claimant for damages to be assessed and costs of both the claim and the counterclaim on 31st July 2001.

[2] The parties could reach no agreement as to the quantum of damages to be paid and the Claimant applied to the Court to have his damages assessed. This application was filed on 23rd April 2002 and was supported by, inter alia, a medical report of Dr. Charles Woods. He described the medical condition of the Claimant, then age 57 as including:

1. Post traumatic circulatory stasis, causing edema, pain and ulceration of the right foot.
2. Severe stiffness of the knee, possibly due to soft tissue contracture caused by prolonged immobilization after the injury and/or adhesions of the thigh muscles to the femur.
3. External rotation of the lower limb due to malunion of the fracture of the tibia.
4. Shortening of the right limb secondary to the fracture of femur and tibia.

[3] Dr. Woods thought that removal of an intramedullary nail which had been surgically inserted would bring some relief but that the Claimant would "have permanent moderate to severe disability of his right leg even if reconstructive surgery is attempted due to his age and present condition."

[4] Counsel for the defendants then had the Claimant attend on Dr. Jerry Thorne of Barbados for evaluation and a second opinion. Dr. Thorne saw the Claimant on 28th September 2002. In his report dated 4th October 2002, Dr. Thorne stated that

he had reviewed the previous medical reports, including that of Dr. Woods and Dr. Adesanya, who was the first doctor to render medical assistance to the Claimant.

[5] Dr. Thorne thought that the initial medical care of the Claimant's fractured femur was inadequate. The k-nail which had been inserted was inadequate both in length and diameter. The result was a non-union of the fracture. To return the claimant to maximal health the good doctor proposed:

1. Open exploration of the right femoral diaphysis.
2. Debridement of the fracture.
3. Removal of the fractured k-nail and the insertion of a appropriately sized locked reamed femoral nail together with an arthrosepic examination of the right knee. ... followed by a period of non-weight bearing for three months with physical therapy..."

[6] Dr. Thorne expected that after some six months the Claimant's disability would be reduced to less than five per cent. The cost of this surgery was given as $22,500 Barbados Dollars. Dr. Thorne also reported that the Claimant, having had this explained to him was "keen to undergo this surgical intervention." Without it, Dr. Thorne said, the Claimant would remain incapacitated and unable to return to full time employment as a shop keeper and part-time ship mate.

[7] The Claimant expected the Defendants to pay for the cost of the operation and therefore wished to postpone the assessment of damages to await the outcome of the operation. The Defendants, (the insurers at this stage who were conducting the defence on behalf of the First and Second Defendants) did not pay.

[8] On 17th December 2002, the Claimant applied for an interim payment for the purpose of financing the operation recommended by Dr. Thorne. On 19th December 2002, the Defendants filed an affidavit in opposition. It was sworn by a clerk in the chambers of Mr. S. E. Commissiong. She deponed that the

application for the interim payment was "hasty and premature." The Defendants insurers were awaiting word from their re-insurers. And in any event it would not be possible to have the operation performed before the middle of January 2003. The Defendants were also exploring the option of having the operation performed in the United Kingdom.

[9] Bruce-Lyle J ordered the Defendants to make an interim payment of $50,000 by 28th February 2003. On 30th January 2003 the Defendants insurers paid $10,000 into court claiming that this was the statutory maximum payable. The notice of payment into court was accompanied by an affidavit of Samuel Goodluck, Managing Director of the added Defendants. He exhibited a copy of the insurance policy. That policy on the face of it limited liability to a maximum of $50,000 "in respect of death or bodily injury to any one person."

[10] On 21st February 2003, Mr. Commissiong applied to be removed from the record as acting for the Defendants on the ground that he had been hitherto instructed by the insurers. Mr. Commissiong also wrote to the Defendants advising them that the insurers had paid $10,000 into court and that this was the limit of their liability. The Defendants were told that "it would be in their best interest to return Counsel of your own" as they were now "absolutely free to retain their own solicitor to complete their case.

[11] The First Defendant, the owner of the vehicle and the insured, was a man of limited means. He retained new solicitors who contacted Mr. Commissiong who had previously represented the Defendants though instructed by the insurers. Letters were written in on 5th May 2003, 13th May 2003 and 17th July 2003 requesting that the insurers pay the balance of $40,000 ordered by Bruce-Lyle J as in interim payment. No payment was forthcoming until the Defendant in desperation brought a separate claim on 1st July 2004 to compel the insurers to make the payment.

[12] On 8th December 2004, the insurers paid to the First Defendant the balance of $40,000 due under the policy of insurance. This was promptly paid over to the Claimant who had been trying to enforce his judgment against the defendants. His attempt to seize and sell the motor vehicle was thwarted by a bank which held a lien over the vehicle. The Defendants had no other goods.

[13] The Claimant immediately contacted Dr. Jerry Thorne. The operation was performed on 15th January 2005 at the first available appointment. Unfortunately, the operation has not had the hoped for result. Dr. Thorne expected the Claimant to recover and advised him to access physiotherapy focused on his right knee to improve the range of movement and strength of the knee. Such services are not available on Union Island. The Claimant has done the best he can by following a regime devised by Dr. Woods but clearly the lack of professional physiotherapy services must have some impact.

[14] Dr. Woods, Orthopedic Surgeon reported on 23rd March 2005 that the Claimant continues to have severe stiffness of the knee and chronic swelling of the affected leg. These he says are an expected consequence of the length of time it took for the Claimant to get definitive treatment. The Claimant is now permanently moderately disabled. He cannot return to his job as a ship's mate as his leg does not possess the required strength or agility.

The Added Defendant

[15] On 30th June 2005 the First Defendant applied to have the insurers joined as added Defendants "for the purpose of assessment of damages." This application was served on the insurers. They did not attend at the hearing. Thom J. ordered the insurers to be joined as added Defendants. They took no steps to apply to have this order set aside. They did not appeal the order. At the hearing of the assessment of damages before me counsel Mr. S. Commissiong for the added Defendant attended and cross-examined the Claimant on his affidavit in support.

The Assessment:

Special Damages

[16] Some items of special damages have been pleaded particularised and proved to my satisfaction. I have no difficulty in awarding these. They are –

Cost of Bicycle	$1,000.00
Medication	500.00
Hospital Bills	700.00
Medical Reports, Dr. Lovie & Dr. Adesanya	100.00
Cost of Remedial Surgery	20,538.20
Departure Tax SVG	40.00
Departure Tax Barbados	40.50
Taxi, Barbados	108.00
Total	$23,026.70

[17] Other items have not been supported by any independent evidence – no bills have been shown for these and I disallow them entirely. These are cost of accommodation in St. Vincent (Room and Board at $50.00 per day for 63 days), laundry $40.00 per week for 118 weeks, cost of shop assistance and cost of domestic assistance.

Lost of Earnings

[18] The Claimant says he was a shopkeeper and part-time ship's mate. Obviously whenever he was engaged in the latter activity he could not simultaneously operate his shop. He has also provided no supporting evidence by which one could objectively assess his income from either activity. I accept from the medical evidence that the Claimant has not been able to engage in any maritime activity since the accident. He will not be able to do so at any future date. Similarly, it is unclear why his injuries, now that they have been surgically managed, prevent him from operating a shop. Still I must do the best I can on the available evidence. The Claimant swears that he has hired assistants to operate

his shop and has had to pay them $400.00 per month. I accept this evidence and conclude that his loss of income was only the sum of $400.00 per month during the period for which such assistance was required. By 23rd March 2005 when Dr. Woods examined the Claimant, his x-rays were satisfactory. While the Claimant can no longer be a seaman, he can operate his shop. I do not consider his restricted mobility to be such an impediment as to prohibit his shop keeping. I award the Claimant loss of earnings of $400.00 per month from the date of the accident to 23rd March 2005 that is from September 1998 to March 2005 a period of 6 years and 6 months. The total is $400.00 x 80 = $32,000.00.

General Damages

Pain Suffering and Loss of Amenities

[19] The Claimant pleaded no special loss of amenities but I consider that he should be compensated for the loss of enjoyment of life that comes with full health and vigour. I award the Claimant $10,000.00 under this head.

[20] For pain and suffering we must consider the nature and gravity of the injury as well as the severity of the resulting disability. The Claimant suffered a badly broken right leg. His right tibia and fibula were also broken though thankfully these fractures healed uneventfully. Again, pain connected with this would have been relatively short lived. The major problem had to do with his fractured femur. Because of the limited surgical facilities available locally and because the Claimant could not afford the cost of medical care abroad he continued to suffer severe pain and discomfort for many years after the accident. Had the Claimant received the best medical care his pain from the broken femur would have resolved by the end of 1998 at the very latest. I would then have considered an award of $50,000.00 for pain and suffering to be adequate. But this Claimant continued to suffer for more than six years. At least a portion of that suffering is due to the refusal of the added defendants to make the interim payment ordered by

Bruce-Lyle J. in February 2003. There must also have been an element of mental anguish to the Claimant due to the manner in which he was being treated by the added defendants who were at that time instructing the solicitors who represented the defendants. In the circumstances I consider that an additional sum of $40,000.00 for the years of pain and suffering to 2002 in October when Dr. Thorne's report was available should be awarded. From then until 2005, I award $50,000.00 for pain and suffering and mental anguish as by then Dr. Thorne had described the Claimant as 'keen' to have the remedial surgery performed to ameliorate his condition. The frustration on the part of the Claimant is evident in the increasing desperation with which his litigation was conducted from that point.

Loss of Future Earnings

[22] I make no award for loss of future earnings as the Claimant has not demonstrated that his injuries have reduced the income which he can earn in the future.

The Resulting Disability

[23] I also award the Claimant an amount of $7,000.00 to reflect his physical disability. I accept the evidence of Dr. Woods that this is a result of the extended period that it took to have the corrective surgery performed. I also accept the evidence of Dr. Thorne who suggested that had the operation been performed in 2002 when he saw the Claimant or shortly thereafter, the resulting disability would have been minimal. I consider this amount to be due entirely to the behavior of the added Defendants.

Apportionment of damages as among the Defendants

[24] Mr. Commissiong in his submission identifies as issues the following:

(i) Can the insurer become liable to pay damages to a third party in excess of the sum limited by the policy itself?

(ii) If yes, how is that liability to be established?

(iii) Is the Court assessing damages competent to deal with such an issue without the benefit of evidence, especially cross-examination?

[25] I view the matter in this way. The added defendants instructed Mr. Commissiong who represented the defendants at the trial for liability. They had every opportunity to raise any defence they wished. I understand the Claimant to be saying that the conduct of the added Defendants has caused him additional and unnecessary suffering and anguish. This is borne out by the medical evidence of Dr. Thorne procured and paid for by the added Defendants themselves. I consider this a fit case for the appointment of the damages paid. As noted before the added Defendants are not exactly strangers to the litigation. I consider the sums of $50,000.00 for pain & suffering (and mental anguish) from the end of 2002 to the early part of 2005 and the sum of $7,000.00 to be payable exclusively by the added Defendants. The balance of the award is to be paid by the Defendants jointly and severally. For the purposes of clarity, I note that a sum of $50,000.00 has already been paid by the Defendants. This is to be taken into account as having been paid by the First & Second Defendants.

[26] Thus the total awarded is:

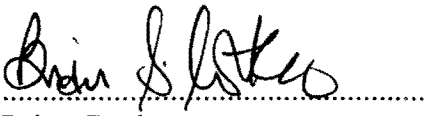
Special Damages			$ 23.026.70
General Damages			
Defendants 1 & 2	90,000 – 50,000	=	$ 40,000.00
Added Defendants			$ 57,000.00
			$120,026.70

[27] Interest is awarded on the special damages at 3% from 20th September 1998 to today and at 5% from judgment to payment on the global sum.

Costs

[28] On the basis of prescribed costs I award costs of $27,004.00.

[29] I direct that these cost be paid by the added Defendants. I do so as I have had regard to be factors laid out in Civil Procedure Rules 64.6 (6) (a) and (b).



Brian Cottle
MASTER