IN THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO.: SLUHCV2013/0435
BETWEEN:

SHAUN DENIS

Claimant

and

(1) THE HOSPITAL ADMINISTRATOR OF THE VICTORIA HOSPITAL
(2) THE ATTORNEY GENERAL OF SAINT LUCIA

Defendants

Appearances:
Alvin St. Clair for the Claimant
Jan Drysdale for the Defendants

2017 : September 29;
November 22.

JUDGMENT

[1] **SMITH J**: Shaun Denis says that the Government of Saint Lucia should compensate him for the Victoria Hospital's (the "hospital") negligent handling of a surgical procedure to straighten his right little finger, which resulted in a segment of that finger being amputated.

[2] His medical negligence claim is based on two allegations: (1) that Dr. Felix, the orthopedic surgeon at the hospital, fell below the standard of care expected of an orthopedic surgeon in the circumstances of this case, in his treatment and management of Mr. Denis's surgical procedure; (2) that the hospital never advised him of the risk of amputation and therefore had not obtained his informed consent for the procedure.

Issues

[3] The two fundamental issues upon which the outcome of this case is hinged are therefore:

(1) Did the treatment and management of Mr. Denis by Dr. Felix fall below the standard of care expected of an orthopedic surgeon in the circumstances of that particular case?
(2) Did the hospital obtain the informed consent of Mr. Denis and did it have to be in writing?

The Background

[4] The first issue fell away following the evidence of the expert witness, Dr. Horatius Jeffers, who both sides had agreed upon as the single expert witness on the issue of whether Dr. Felix was negligent in his treatment of Mr. Denis. It is therefore no longer necessary to set out the background facts with the same careful degree of particularity required if that issue had remained live. What is set out below will therefore center more on the question of informed consent. It is perhaps helpful to start out with what is not in dispute.

[5] It is not in dispute that (1) Mr. Denis injured his finger in 2010 and sought the services of Dr. St. Rose for that injury; (2) Dr. St. Rose operated on his finger and subsequently his finger became deformed as a consequence of his failure to follow the instructions on therapy given by Dr. St. Rose; (3) two years later, on the 27th day of November 2012, he consulted with Dr. Felix at the orthopedic clinic of the hospital, in the presence of Dr. Davids, because he wanted the deformity corrected; (4) prior to consulting Dr. Felix, he had consulted Dr. St. Rose who had advised him to live with the deformity; (5) Mr. Denis signed consent forms to undergo surgery but none of the forms made any mention of or reference to any risk of any kind.

[6] What is, however, vigorously contested is whether Mr. Denis was informed of any risks involved in the surgery to correct the deformity of his little finger. Dr. Felix in his witness statement said that he advised Mr. Denis of the various risks associated with the surgery, including reduced grip strength, reduced flexion and

the possibility that the surgery may not be successful in correcting the deformity and may result in the loss of the finger due to infection or spasm of the finger.

[7] He said that he even discussed medical literature with Mr. Denis on the matter. Mr. Denis strenuously denied that any such risk was ever mentioned to him. He said that when he told Dr. Felix that Dr. St. Rose had advised him to live with the deformity, that Dr. Felix had replied, in the presence of Dr. Davids, that Dr. St. Rose was an old man who should go home and rest himself. Dr. Felix denied making such a statement.

[8] On 11th December 2012, Dr. Felix performed the first stage of the surgery to straighten the right little finger. He alleged that he instructed Mr. Denis on the gentle range of motion exercises necessary, provisionally rebooked him for the second stage of the surgery on 17th December 2012 and prescribed medication to be taken. Mr. Denis denied that Dr. Felix told him anything about gentle range of motion exercises.

[9] Mr. Denis was re-admitted to the hospital on 16th December 2012 for surgery the following day. According to Dr. Felix, mild swelling with no discharge was noted, the second stage of the surgery was therefore cancelled and Mr. Denis was prescribed medication for two days with a review to follow. On 19th December 2012, he was readmitted to the ward. His finger was noted to be swollen with purulent discharge and was assessed as being septic. He was advised that surgery had to be undertaken immediately and that an amputation had to be performed.

Did Dr. Felix fall below the standard of care?

[10] In relation to the standard of care expected of a doctor in treating his patient, the Caribbean Court of Justice in the 2013 judgment **Meenavalli v Matute**[1] stated that:

[1] CCJ Appeal No. CV 4 of 2012.

> "The classic statement of the standard of care of a professional exercising some special skill or competence is contained in the direction of McNair J in **Bolam v Friern Hospital Management Committee**[2] which was cited with approval by Sir Hugh Wooding in **Chin Keow v Government of Malaysia**:[3]
>
> '... where you get a situation which involves the use of some special skill or competence, ... the test ... is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.'
>
> Medical negligence therefore means the 'failure to act in accordance with the standards of reasonably competent medical men at the time.' Thus, a doctor is not liable for medical negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art."

[11] As previously stated, in this case, both parties agreed on a single expert, namely, Dr. Horatius Jeffers, an orthopedic surgeon, to provide his opinion as to whether Dr. Felix acted in accordance with practice accepted as proper by a responsible body of doctors skilled in the art of orthopedic surgery. When specifically asked by the Court whether there was anything in Dr. Felix's treatment and management of Mr. Denis that would fall below the standard of a reasonably competent orthopedic surgeon in the circumstances of that case, Dr. Jeffers' stated:

> "My emphatic answer is 'No'. There is nothing I have observed that would suggest that Felix fell below the standard. What he undertook was in keeping with what a body of clinicians would have undertaken, given the specifics of that case."

[12] In commenting on Dr. Felix's treatment and management, Dr. Jeffers also stated:

> "What was done was quite appropriate…Dr. Felix's management was exactly right."

[13] Dr. Jeffers left no doubt that, in his opinion, Dr. Felix did not fall below the standard of care expected of an orthopedic surgeon in his medical treatment and care of Mr.

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[2] (1957) 2 All ER 118.
[3] (1967) 1 WLR 813.

Denis, in the circumstances of this case. This unequivocal and emphatic opinion given by Dr. Jeffers, which was not challenged in any way by counsel, therefore disposed of the first issue. The Court therefore concludes that Dr. Felix was not negligent in his treatment of Mr. Denis. I turn now to the issue of informed consent.

Informed Consent

[14] The Hippocratic Corpus advises physicians to reveal nothing to the patient of his present or future condition, "for many patients through this cause have taken a turn for the worse' (*Decorum XVI*). This paternalistic approach that existed at the early beginning of the practice of medicine has fallen into desuetude. As observed in **Montgomery v Lanarkshire Health Board (General Medical Council Intervening)**[4], legal developments now point towards an approach to the law which, instead of treating patients as placing themselves in the hands of their doctors (and then being prone to sue their doctors in the event of a disappointing outcome), treats them so far as possible as adults who are capable of understanding that medical treatment is uncertain of success and may involve risks, accepting responsibility for the taking of risks affecting their own lives, and living with the consequences of their choices.

[15] **Montgomery**, decided by the United Kingdom Supreme Court in 2015, appears to be the most recent and authoritative statement of the modern law in relation to informed consent:

> "[87] The correct position, in relation to the risks of injury involved in treatment, can now be seen to be substantially that adopted in **Sidaway** by Lord Scarman, and by Lord Woolf MR in **Pearce**, subject to the refinement made by the High Court of Australia in **Rogers v Whitaker**, which we have discussed at paras [77]–[73]. An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable

[4] [2015] UKSC 11

> alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.
>
> [88] The doctor is however entitled to withhold from the patient information as to a risk if he reasonably considers that its disclosure would be seriously detrimental to the patient's health. The doctor is also excused from conferring with the patient in circumstances of necessity, as for example where the patient requires treatment urgently but is unconscious or otherwise unable to make a decision. It is unnecessary for the purposes of this case to consider in detail the scope of those exceptions."

[16] The *ratio decidendi* of **Montgomery** might perhaps be distilled into the following five essential points:

(1) A doctor has a duty of care to take reasonable care to ensure that the patient is informed of any material risks involved in the recommended treatment as well as any reasonable alternative treatments.
(2) A risk is material if a reasonable person in the same position of the patient would be likely to regard a particular risk as significant.
(3) It is impossible to reduce to percentage terms the assessment of materiality of risk.
(4) The doctor may withhold disclosure if he reasonably considers that disclosure would be detrimental to the patient's health (this is the "therapeutic exception") or in cases of necessity as where treatment is urgently required and the patient is unconscious.
(5) The doctor has a responsibility to explain why one of the available treatment options is medically preferable to the others.

[17] From the above statement of the law, it is clear that the hospital and Dr. Felix were under a duty to take reasonable care to ensure that Mr. Denis was aware of any material risk involved in the surgery to correct the deformed little finger.

[18] It is not in dispute that there was a risk. Dr. Felix in fact stated that Mr. Denis needed to have been informed and was in fact fully informed. Dr. Jeffers also testified that amputation was a risk attendant to that particular surgical procedure. In his report to the Court, Dr. Jeffers stated:

> "Given that there existed a distinct possibility of digital gangrene with the need for amputation as a well-recognized complication of the proposed surgical intervention, written informed consent should have been obtained prior to the index operation."

[19] Was it a material risk? I think that any reasonable person in Mr. Denis's position would be likely to attach significance to the risk of amputation of a segment of the little finger if informed about it. The test of materiality of risk has therefore been satisfied. The question now is whether Dr. Felix and the hospital discharged that duty of care owed to Mr. Denis to make him aware of the risk of amputation involved in correcting the deformity of his little finger. This is a question of fact that must be determined on the evidence.

[20] To reiterate, it is not in dispute that the consent forms signed by Mr. Denis mentioned nothing about any risk involved in the surgical procedure. I have not been provided with any authority which states that informed consent must be in writing. Indeed, if credible and otherwise satisfactory evidence is adduced that a patient was fully informed orally of risks and options in comprehensible terms, I would have difficulty concluding that the patient was not fully informed simply on the basis that the informed consent was not in writing.

[21] The fundamental objective of the principle of informed consent is making the patient fully aware of risks and options so that he might make an informed decision for himself. As it was put in **Montgomery**: "a doctor's advisory role is dialogue the aim of which is to ensure that the patient understands the seriousness of her condition, the anticipated benefits and risks of the proposed treatment and any reasonable alternatives so that she is in a position to make an informed decision." This is obviously satisfied whether advice and information is oral or in writing. The touchstone is that it be full and comprehensible.

[22] It must certainly, however, be a counsel of prudence that a doctor should obtain a patient's informed consent in writing to avoid precisely what occurred in this case: the doctor said the patient was fully informed of the risk orally but the patient

denies it. In the wake of the 2004 United Kingdom House of Lords decision in **Chester v Afshar**, the UK General Medical Council issued revised guidance that where risks are beyond the minor or routine, the patient's written consent should be obtained. I am not aware that this has cystallized from a counsel of prudent practice to a rule of law. It therefore comes down to the evidential crunch of whether I believe the doctor or the patient on the question of whether there was oral advice of the risk involved in the surgery.

Evidence of Shawn Denis

[23] In his witness statement which stood as his evidence in chief, Mr. Denis denied that he was ever informed of any risk of amputation. Under cross examination, he maintained his position and denied that Dr. Felix: (1) told him that because he had already gotten an infection he stood the risk of getting another infection; (2) discussed any medical literature with him; (3) told him that the operation would have to be done in phases; (4) told him there would be a risk of him losing the finger; (5) told him to inform him (Dr. Felix) if at any time the finger was not pink and told him about therapy after that first phase of the surgery; (6) demonstrated any modest movement in the finger; (7) advised him not to over-extend the finger because that would lead to the loss of the finger. He admitted that he did not read the consent forms before he signed them.

Evidence of Dr. Felix

[24] Although Dr. Davids was present when Mr. Denis consulted Dr. Felix, the only witness called on behalf of the hospital was Dr. Felix. In his witness statement which stood as his evidence in chief he stated that Mr. Denis was fully informed of the risk of amputation but insisted on the surgical procedure. Under cross-examination, he denied the assertion put to him that at no time did he tell Mr. Denis that there would be no difficulty in releasing his finger. He insisted that he did tell him that accepting the deformity was the best and safest option. He admitted, however, that it was not in the written record that he had stated that it was the "safest" option and that the words "safest option" was not used in the

record anywhere. He denied the assertion put to him that he in fact never spoke of the possibility of amputation arising.

[25] Later on in the cross-examination, Dr. Felix admitted that it was crucial that he inform Mr. Denis that amputation was a possibility but stated that he had so informed him. When pressed as to why that advice did not appear in the hospital records, he stated that his notes were incomplete. He said he wrote in his notes when he saw the patient but he was not in possession of those notes, which were kept at the hospital. He said when he saw Mr. Denis on 22nd January 2013, his notes were incomplete; his docket was incomplete. He said there are problems at Victoria Hospital with keeping the notes together. He denied that the only time he mentioned amputation was when he told Mr. Denis that either he amputate a segment of the little finger or he would die. He admitted that he had not stated in his witness statement that he had written down his advice to Mr. Denis on risk of amputation.

Evidence of Dr. Jeffers

[26] For his part, Dr. Jeffers informed the Court that Mr. Denis had also consulted him prior to seeing Dr. Felix about the possibility of straightening the finger and that he had advised Mr. Denis that it was possible to correct the deformity but that there were certain inherent risks associated with the surgical procedure. Dr. Jeffers also testified that he advised Mr. Denis that he could do the procedure at the Tapion Hospital but that Mr. Denis never returned. He also stated that, that in accordance with best practice, the risks of such procedures should not only be explained to the patient but also documented to obviate any assertion thereafter of the failure to inform.

[27] In his witness statement, Dr. Jeffers had stated the following:

> "One of the well-established complications of finger/digital surgery for correction of post traumatic/infectious digital stiffness is loss of skin flaps, digital vascular injury and infection, which singularly or collectively may lead to digital gangrene with the need for digital amputation.

> From the details of the clinical consultation and signed consent form referred to…., Mr. Denis appears to have opted for surgical release/correction of the deformed right little finger during the said consultation.
>
> However, there is no documentation that the attendant risks of the proposed surgical procedure soft tissue release of the right little finger, including gangrene and possible loss of digit via amputation was explained to Mr. Denis.
>
> Given that there existed a distinct possibility of digital gangrene with the need for amputation as a well recognized complication of the proposed surgical intervention; written informed consent should have been obtained prior to the index operation."

Analysis of the Evidence

[28] Under cross-examination, Mr. Denis responded in a direct and straightforward manner; he was not evasive. He answered all questions put to him without hesitation, clearly and confidently. Even when answers would seem to go against his interest he did not attempt to prevaricate, as when he was asked whether his failure to follow Dr. St. Rose's advice led to the deformity of his finger. Notwithstanding the clarity and firmness with which he presented his narrative, the Court considers that the overall credibility of his narrative is weakened somewhat by the following: (1) he never mentioned anywhere that he had consulted Dr. Jeffers who had advised him that the finger could be straightened but that there were certain risks; this came out incidentally when the Court was asking Dr. Jeffers certain questions; (2) Dr. St. Rose advised him to live with the deformity and the inference might be drawn that the reason for so advising was because there was a risk; indeed, Mr. Denis stated in his evidence that in hindsight he wished he had listened to the advice of Dr. St Rose; (3) Dr. Felix noted the following in Mr. Denis's patient docket:

> "Advice re options - 1. Non operative – accept deformity
> pt does not accept this option"

[29] Dr. Felix, under cross-examination, answered all questions with equal clarity and directness. The weaknesses in his overall narrative were that: (1) he never stated

in his witness statement that he had noted in Mr. Denis's patient record that he had informed him of the risk; he stated this for the first time in cross-examination; (2) this notation did not appear in the hospital records.

[30] The evidential picture that emerges is that Dr. St. Rose had advised Mr. Denis to live with the deformity and not do the surgery; Dr. Jeffers said he advised him that the deformity could be corrected but had certain risks; Dr. Felix said he too advised of the risk of amputation; Mr. Denis says that Dr. Felix made it clear to him that the process of straightening and lengthening his finger was a simple process with no risks whatsoever; Dr. Felix made a notation that the patient did not accept the option of deformity. While Mr. Denis might have been aware of risk involved from Dr. St. Rose and later Dr. Jeffers, I have to be satisfied that Dr. Felix made him aware of the risks.

[31] After weighing up the totality of the evidence, the Court is inclined to accept the evidence of Mr. Felix that he was not informed of the risk of amputation, based on the following: (1) the evidence of Dr. Jeffers that Dr. Felix did not document that he had explained to Mr. Denis the well-established risk of amputation which required written informed consent; and (2) the fact that though Dr. Felix insisted that he had made a notation that he had advised Mr. Denis of the risk of amputation, this was nowhere in his witness statement or in the hospital records placed before the Court. It is a regrettable feature of this case that Dr. Davids, who was present during the consultation with Mr. Denis, and who could have been a crucial witness of fact, could not provide any evidence to the Court. I am therefore satisfied on a balance of probabilities that Dr. Felix did not inform Mr. Denis of the risk of amputation.

Damages

[32] In **Cornilliac v St. Louis**[5] the Court held that in assessing damages for personal injuries the following factors ought to be considered:

[5] 1965 7 W.I.R 491

(1) "the nature and extent of the injuries suffered;
(2) the nature and gravity of the resulting physical disability;
(3) the pain and suffering which had to be endured;
(4) the loss of amenities suffered; and
(5) the extent to which, consequentially, the plaintiff's pecuniary prospects have been affected."

[33] It should be noted from the outset that according to the evidence of Dr. Jeffers, Mr. Denis was assessed as having a 3% whole body impairment as a consequence of the amputation of the little finger. However, prior to the amputation, he would have had a whole body permanent partial disability of between 1 – 2% owing to the previous injury he had suffered. The permanent partial disability to be considered by the Court is therefore between 1 – 1.5%.

[34] Mr. Denis relied on the Trinidad and Tobago case of **Nanan v Trinsulate 2 Caribbean Limited**[6] to claim damages of between $38,000 - $45,000.00. In **Nanan** the Court had awarded the equivalent of about EC $30,000.00 for the amputation of a right middle finger. There are however important distinctions between **Nanan** and the instant case: (1) the permanent partial disability in **Nanan** was assessed at 12% compared to 1-1.5% in this case; (2) in **Nanan**, the claimant was only capable of doing light tasks and supervisory work and testified that he could no longer lead the active lifestyle he enjoyed prior to the surgery, while there is no similar evidence in this case; (3) there was no evidence before this Court that the disability has affected Mr. Denis continued employment or the enjoyment of his lifestyle in any way, there can therefore be no award for loss of past income or future income. Further, Mr. Denis did not prove any special damages

Disposition

[35] I therefore make the following orders:

1) Judgment is entered for the Claimant
2) General damages are awarded in the sum of $8,000.00

[6] Republic of Trinidad and Tobago, CV2015-02920

3) Interest is awarded at the statutory rate of 6% from the date of the judgment until payment.
4) Prescribed costs are awarded in accordance with CPR Part 65 (5).

JUSTICE GODFREY SMITH, SC
HIGH COURT JUDGE

BY THE COURT

REGISTRAR