THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF ANGUILLA
(CIVIL)
AD 2009

CLAIM NO. AXAHCV2006/0090

BETWEEN

NIGEL MASON

Claimant

and

MAUNDAYS BAY MANAGEMENT LTD.
(Trading as Cap Juluca Hotel)

Defendant

Appearances:
Ms. Paulette Harrigan for the Claimant
Ms. Nicola Byer for the Defendant

2009: March 23rd, 25th, 26th
June 23rd

JUDGMENT

[1] MICHEL, J. (Ag.): The Claimant, Nigel Mason, was employed by the Defendant, Maundays Bay Management Limited, as a Technical Supervisor at its Cap Juluca Hotel in Anguilla. His duties at the hotel included the maintenance of the hotel's swimming pools with chlorine powder.

[2] On 6th December 2000 the Claimant, in the course of his employment with the Defendant, was carrying two fifty-pound buckets of chlorine powder around the main swimming pool area of the hotel when he accidentally fell and sustained personal injuries.

[3] The Claimant remained in the employ of the Defendant in his same position and with the same remuneration until 21st June 2004 when he was made redundant.

[4] On 5th December 2006 the Claimant filed a Claim Form and Statement of Claim alleging that the injuries sustained by him were the result of the negligence of the Defendant, its servants and/or agents, and claiming against the Defendant special damages in the sum of US$17,062.85, general damages, interest, costs and further and/or other relief.

[5] The Defendant filed a Defence on 28th February 2007 denying that it was negligent and alleging that the injuries sustained by the Claimant on 6th December 2000 were caused or contributed to by the negligence of the Claimant.

[6] The trial of the matter took place on 23rd, 25th and 26th March, 2009 with two witnesses giving evidence on behalf of the Claimant and two witnesses on behalf of the Defendant. There were also several documents admitted into evidence by agreement of the parties or by order of the Court.

[7] The issues to be determined by the Court arising from the trial are:

1. Did the Claimant's injuries result from the negligence of the Defendant, its servants and/or agents, or was the Claimant the cause of his own injuries?

2. Did the Claimant negligently contribute to his injuries and, if so, to what extent?

3. What damages, if any, is the Claimant entitled to?

[8] In terms of the first issue to be determined, the evidence in this case can only produce a single conclusion, that is, that the Claimant's injuries resulted from the negligence of the Defendant. The evidence of the Claimant in essence was that on 6th December 2000 he was performing his duties at his workplace in the same manner as he had done for the last five years when he fell and injured himself because the Defendant had, through its servants and/or agents, left loose tiles and debris in the area around the main swimming pool where the Claimant had to pass

and to work and that the Defendant gave no warning of this lurking danger to the Claimant.

[9] Although the Defendant denied the allegation of negligence on its part and alleged negligence on the part of the Claimant, not a scintilla of evidence was presented by the Defendant either to counter the allegation of negligence on its part or to substantiate the allegation of negligence on the part of the Claimant. There being no doubt that the Defendant, as the Claimant's employer, owed a duty of care to the Claimant to provide him with a safe place of work and safe access thereto, and that this duty was breached by the negligence of the Defendant by virtue of its servants and/or agents allowing loose tiles and debris to remain in the area where the Claimant had to pass and to work in the performance of his duties, and with no warning given to the Claimant of this lurking danger, the first issue is therefore determined by the uncontested evidence of the Claimant in his witness statement and in his oral testimony.

[10] In terms of the second issue, the evidence of the Claimant was also uncontested, but it was tested under cross examination with a view to establishing some want of care by the Claimant in the performance of his duties on 6th December 2000 contributing to his falling and/or his injuries. But, as vigorous and valiant an attempt as Learned Counsel for the Defendant made in seeking to attach some culpability to the Claimant in the occurrence or the extent of his injuries on that day, the Court is not satisfied on a balance of probabilities that the Claimant contributed by any negligence on his part either to the occurrence or to the extent of the injuries which he suffered at his workplace on 6th December 2000. His evidence remained uncontested that he was not aware of work being done on the tiles in the area of the swimming pool so as to alert him to the possibility that they might be loose or that there was any threat of danger to him in performing his duties on that day. No evidence was presented or no challenge was made to the Claimant's evidence to infer that his carrying of the two fifty-pound buckets of chlorine was an act of negligence on his part or in any way contributed to his fall or to the injuries thereby sustained. There was not therefore a situation akin to that

in the unreported English case of Wayne Evans v Thistle Hotels (2002), referred to in the skeleton arguments of both the Claimant and the Defendant, in which it could be said that the Claimant caused or contributed to his injuries by the negligent manner in which he chose to carry out his duties at his workplace. The evidence is that the injuries sustained by the Claimant on 6th December 2000 were caused solely by the negligence of the Defendant in not providing and maintaining a safe place of work and access to it for the Claimant on that day, as would be legally required of the Defendant as the Claimant's employer. The Court therefore finds that the Defendant is solely liable for the injuries sustained by the Claimant on the said 6th December 2000.

[11] The remaining issue then to be determined is – what damages is the Claimant entitled to for the injuries which he sustained?

[12] According to Dr. Lowell Hughes, who was a witness in the case, the injury suffered by the Claimant as a result of the accident of 6th December 2000 was disc herniation of or at L5/S1, which he described in layman's terms as a slip disc in the lower back region. Dr. Hughes gave evidence that this produced sciatica, which is defined in the Oxford English Dictionary as pain affecting the back, hip and outer side of the leg caused by compression of a spinal nerve root in the lower back. Dr. Hughes also gave evidence that the injury was still present when the Claimant was examined in April 2004 and that the symptoms had worsened.

[13] The Claimant, who was 37 years old at the time that he suffered the aforesaid injuries and 45 at the time of the trial, is entitled to special damages for medical and other expenses incurred by him as a direct result of his injuries, provided that these expenses are pleaded and proved by him. He is also entitled to general damages for pain, suffering and loss of amenities, loss of income and future medical expenses.

[14] In terms of general damages for pain, suffering and loss of amenities, Learned Counsel for the Claimant suggested a figure of $50,000 for pain and suffering and $30,000 for loss of amenities and cited the case of Monica Lansiquot v Geest

PLC[1] in support. Learned Counsel for the Defendant, on the other hand, suggested a figure of $48,240 for pain, suffering and loss of amenities and cited the following authorities in support: Seepersad v Persad[2], Danny Bramble v William Danny et al[3], the unreported English cases of Evans v Thistle Hotel and Kevin Frederick Legray v Post Office et al (2003) and the 6th Edition of the British JSB Guidelines.

[15] Having regard to the submissions by Counsel for the parties on the quantum of general damages for pain, suffering and loss of amenities and the authorities cited in support, and having regard also to this Court's views on mitigation which will be elaborated on shortly, this Court considers that a figure of $50,000 for pain, suffering and loss of amenities is appropriate in the circumstances.

[16] In terms of general damages for loss of income or loss of pecuniary prospects, Learned Counsel for the Claimant suggested that the multiplicand should be US$50,880, which she arrived at by taking the Claimant's salary at 6th December 2000 of US$2,000 monthly, adding to it a monthly service charge of US$1,000, a monthly sum of US$540 made up of meal allowance and insurance benefits and a monthly sum of US $2,000, which it is claimed that the Claimant earned from private work done in his spare time, subtracting from it US$500 monthly for social security deductions and US$800 monthly, which it is claimed the Claimant is currently earning, and then multiplying the total by 12. Learned Counsel further suggested that the multiplier should be 12, based on the fact that the Claimant would have been 45 years old at the date of the trial and with 20 years remaining before retirement age of 65. The sum suggested by Counsel for loss of pecuniary prospects was US$549,504, being US$50,880 x 12 discounted by 10% for the contingencies of life.

[17] Learned Counsel for the Defendant, on the other hand, argued that the Claimant was not entitled to any damages under this head. She grounded this argument on

[1] Civil Appeal No. 1 of 1999
[2] (2004) 64 WIR 378
[3] Civil Suit No. ANUHCV 1990/0160

the basis that the Claimant's employment with the Defendant came to an end in June 2004 by reason of redundancy and there was no expectation of further employment with the Defendant. She argued that no reference could therefore be made to his income from that employment; it had come to an end; he was paid in full upon his redundancy and he made no claims arising therefrom.

[18] This Court is prepared to accept the basic contention of Learned Counsel for the Defendant that the Claimant's employment with the Defendant came to an end in June 2004 by reason of redundancy and that he was paid whatever was due to him consequent on his redundancy. This is the undisputed evidence in the case and the fact that the Claimant averred in his witness statement that he was made redundant within two months of his notifying the Defendant of his intention to seek legal advice does not alter its indisputability. Indeed, the Claimant himself contradicted his own averment in another part of his witness statement when he stated that in late 2003 he told the Defendant that he (the Claimant) was going to have to seek legal advice on his claim, remembering of course that he was made redundant in June 2004, six months after the end of 2003.

[19] Be that as it may, the Claimant is not thereby altogether deprived of a claim for loss of earnings. He did give evidence that he sought alternative employment as an electrical consultant with another establishment and of his becoming a self-employed maintenance consultant for private individuals and businesses on the island, but that his employability and earning capacity were affected by his injury. And this is where the Claimant's case runs into difficulty.

[20] The Claimant's evidence is that in March 2001 – within three months of his injury – Dr. John Gill – a specialist to whom he had been referred by Dr. Lowell Hughes – "recommended surgery to rectify [his] problem." He said that the cost of the surgery was quoted to him as being BDS$11,200 or US$5,600, although an examination of the actual estimate given to him by Dr. Gill – which was a document admitted into evidence by agreement – shows that the figure was BDS$10,200 or US$5,100. But the Claimant never undertook the surgery. Not

then when he was still employed with the Defendant and earning, according to him, total emoluments of between US$5,040 and US$5,540 monthly, not when he was made redundant by the Defendant over three years later and received redundancy pay, not even up to the time of the trial more than eight years later. Instead, the Claimant continued with his injury, which could have been "rectified" in 2001 at a cost of US$5,100, and claims US$549,504 as a result of the continuation of that injury. He also claimed for continuing pain and suffering and loss of amenities for over eight years after his injury could have been, in the words of his witness, Dr. Lowell Hughes, "rectified".

[21] To what is this egregious failure to mitigate attributable?

[22] The Defendant's Director of Human Resources, Dr. Phyllis Banks, said in her evidence – both in her witness statement and in her oral testimony – that the Claimant informed her in 2001 that he had been advised by a medical doctor to undergo surgery for his back injury but that it was his decision not to undergo surgery at that particular time and that the Claimant gave no reasons for his decision.

[23] The Claimant, on the other hand, denied that he said that he did not want surgery. Instead, he says, he was anxious to have surgery because he was in constant pain and the injury was restricting his ability to enjoy his life. He further said, and I am quoting here the full text of paragraph 27 of his witness statement: "I was aware that following the operation I would be incapacitated for at least three months and would be unable to work and therefore I would need monies not just for the surgery and post operative care but also my loss of earnings for that period so that I could pay my household expenses which at that time included rent of US$200 per month, utilities of US$280, bank loan US$760, food US$300 per month and child maintenance of US$400 per month. As a result I could not afford to pay for the surgery myself."

[24] The Claimant effectively said in paragraph 27 of his witness statement that he did not undergo the recommended surgery to rectify his problem because he would be

incapacitated for at least three months after the operation and would be unable to work and so would not be able to meet his monthly expenses of US$1,940 in addition to the cost of surgery and post operative care. Remember though that the Claimant was still then employed by the Defendant and still then earning a monthly income from the Defendant of between US$3,040 and US$3,540, in addition to his extra income of up to US$2,000. And there is no reason to assume that if he had to undergo surgery for the injury which he sustained at work that the Defendant would stop his salary during his period of post operative incapacitation.

[25] I cannot on a balance of probabilities accept the evidence of the Claimant that he was in fact anxious to have the recommended surgery in 2001 but did not do so because, although then employed and earning between US$5,040 and US$5,540 per month, which figure appeared to exceed his compulsory monthly expenses enumerated by him in paragraph 27 of his witness statement by between US$3,100 and US$3,600 per month, he could not afford to pay for the surgery himself, at a cost of some US$5,100, and that he feared a loss of income for three months which might prevent him from meeting his monthly expenses of US$1,940, although he was still then employed by the Defendant whom it would be difficult to imagine would have stopped his salary at such a time. I prefer the evidence of Dr. Banks that the Claimant decided not to undergo surgery at that time.

[26] Once the Court accepts the evidence of Dr. Banks in preference to the evidence of the Claimant on the reason for the surgery not having been done in 2001 when it was first recommended by Dr. Gill, the next question to be decided is whether it was reasonable for the Claimant to have declined to undergo surgery in 2001 to rectify his back problem.

[27] The cases on the refusal of surgery clearly indicate that a Claimant is entitled to decline surgery being performed on him if he so chooses but, unless the surgery is so speculative or so risky as to create a genuine dilemma for the Claimant as to whether or not to undertake surgery which might be either unnecessary or unsafe, the Claimant is solely responsible for the consequences of his choice and he

cannot expect the Defendant to bear the cost of his decision not to undertake surgery which was likely to "rectify" his injury.

[28] In the present case there is no evidence that the recommended surgery was either unnecessary or unsafe and, in one of the agreed documents in the case, Dr. Gill stated that he had advised the Claimant that within three to six months of surgery he was likely to regain 80 to 90 per cent of his pre-operative mobility. He also stated though that it was likely that the Claimant's pre-morbid ability would not be fully achieved because such extensive surgery tends to lead to mild back ache and some limitation of bending.

[29] In the circumstances, this Court finds that the Claimant unreasonably declined to undergo surgery when it was recommended by Dr. Gill in March 2001 and in so doing failed to mitigate the damage occasioned to him by the negligence of the Defendant on 6th December 2000. In the light of Dr. Gill's statement earlier referred to forming part of the evidence in this case, the Court is however minded to make an award of loss of earnings to the Claimant of 20% of the total amount that he would have been awarded had he not failed in his duty to mitigate, on the basis that his pre accident earnings were likely to have been diminished by up to 20% after surgery if he had undertaken the surgery when it was recommended.

[30] I turn now to the task of assessing the Claimant's pre accident earnings.

[31] While accepting the submission of Learned Counsel for the Defendant to the effect that the Claimant cannot base an entitlement to or expectation of future earnings on the salary that he earned while employed with the Defendant because this employment and the salary entitlement or expectation with it ended in June 2004 when the Claimant was made redundant, there was no evidence that the Claimant's employment with the Defendant was a special arrangement that could not have been replicated or at least approximated with another employer if the Claimant had not been injured or that he could not have earned equivalent amounts working on his own minus his injury. It is therefore not unreasonable to

take a figure in the region of the Claimant's earnings with the Defendant, along with his extra earnings, as his likely pre accident earning capacity.

[32] The Claimant alleged that on a monthly basis he earned a salary of US$2,000, service charge of between US$500 and US$1,000, meal allowance and insurance benefits of US$540 from his employment with the Defendant and an extra US$2,000 from extra jobs. The Defendant admitted the Claimant's monthly salary of US$2,000, averred that the Claimant earned approximately US$500 per month in service charge during the peak season of the Defendant's operations and did not address the issue of any meal allowance and insurance benefits. The Defendant also did not address the Claimant's allegation of extra earnings of US$2,000.

[33] This Court is prepared to treat the Claimant as having a pre accident earning capacity of US$$4,500, using the lower end of the service charge range and disregarding the meal allowance and insurance benefits which are not admitted and which in any event are dubious items for inclusion in a computation of earning capacity. The Court however has great difficulty in accepting that the Claimant could have earned US$2,000 per month working on evenings and on his off days, while holding down a full time job, but that because of his injuries the Claimant can only earn US$800 per month working exclusively on these jobs seven days per week, both daytime and evening time. Because if the Claimant wishes to claim loss income from private jobs that he would be doing on evenings and on his off days, he would have to now account for work that he would do not just during the working day but so too on evenings and weekends. It is true that he said in his witness statement that "on average" he can only work three to four days per week now because of his pains, but three to four days per week working exclusively on private jobs should amount to more than working on these private jobs on evenings and off days only while holding down a full time job. The Court cannot therefore accept loss income of US$2,000 for extras and simultaneously accept current full time income of US$800. The same figure of US$2,000 would accordingly be used for both. This would result in monthly loss of income of

US$2,500, which would – as suggested by Learned Counsel for the Claimant – be discounted by US$500 for deductions for social security, there being no income tax in Anguilla, resulting in a multiplicand of US$2,000 per month or US$24,000 per annum.

[34] Accepting the multiplier of 12 suggested by Learned Counsel for the Claimant, which is consistent with the position of the Court of Appeal of the Eastern Caribbean Supreme Court in Lansiquot v Geest PLC and Martin Alphonso et al v Deodat Ramnath[4], the total loss of income would be US$288,000. This amount will be discounted by 10% to cater for the contingencies of life, as suggested by Learned Counsel for the Claimant, and consistent with the approach of the Court of Appeal in Alphonso v Ramnath, yielding a total of US$259,200. The Claimant will be entitled to 20% of this amount or a total award for loss of income or loss of pecuniary prospects of $139,968, being the EC equivalent of US$51,840.

[35] In terms of future medical expenses, the Court accepts the submission of Learned Counsel for the Defendant that this is to be addressed in the context of general damages and not in the context of special damages and that the Claimant cannot choose the cost of surgery in Trinidad and then use the Barbados estimates for accommodation and other post operative costs. Since the more complete estimate for future medical expenses comes from Dr. Gill in Barbados, the Court will therefore use the Barbados estimates to arrive at the appropriate award for future medical expenses.

[36] The estimate of the cost of surgery in Barbados (as per the undated document from Dr. Gill admitted into evidence by agreement) is BDS$10,200 (US$5,100); the estimate of the likely cost of a 14 day stay at a guest house in Barbados is US$840 (being the higher end of the scale of US$50 - $60 per day); the estimate of the likely cost of 24 hours of post operative private nursing care in Barbados is US$480 (being the higher end of the scale of US$15 - $20 per hour); the estimate of the likely cost of a brace is US$500; the estimate of the likely cost of three

[4] Civil Appeal No. 1 of 1996

surgical outpatient follow up visits is US$180. This would yield a total cost of US$7,100, to which can be added a further US$2,000 for uncosted but recommended elements like post operative physical therapy sessions, follow up CT scans, Xrays and MR imaging, to yield a total cost for future medical expenses of US$9,100. It would be noted that the higher end of the scale of likely costs was used throughout, which is justified by the fact that these costs were extracted from Dr. Gill's memorandum of 30th November 2006 (forming part of the agreed documents in the case) and the figures quoted would have been likely to have increased by inflation, although the basic cost of surgery remained the same as per the undated estimate given to the Claimant in 2001.

[37] As part of his claim for future medical expenses the Claimant asked for loss of income for 3 months on the basis that this was the forecasted period of total incapacity following surgery. The Court considers this to be appropriate and although Learned Counsel for the Claimant claimed a figure of US$2,400, being US$800 x 3, this Court is minded to award US$6,000, being US$2,000 x 3, consistent with its earlier determination that the current income of the Claimant would be calculated at the rate of US$2.000 per month and not US$800. The sum of US$6,000 will however be discounted by 20% since the Claimant will be receiving 20% of his income by way of general damages for loss of income. This would yield an amount of US$4,800 which, added to the US$9,100, would result in a total award for future medical expenses of US$13,900 or EC$37,530.

[38] Special damages must be specifically pleaded and proved if they are to be awarded and, quite frankly, the task of determining what was specifically pleaded and proved by way of special damages in this case has turned out to be particularly troublesome. In the end the Court felt constrained to merely accept the submission by Learned Counsel for the Defendant that the only special damages proved amounted in total to US$1,915.77 or its EC equivalent of $5,172.58.

[39] The Court must now determine the interest payable by the Defendant on the amounts awarded here. In making this determination reliance is being placed on the judgment of the Court of Appeal of the Eastern Caribbean Supreme Court in the case of Alphonso v Ramnath already referred to. In that case the Court of Appeal laid down the following guidelines for the award of interest in a personal injury case:

1. With regard to general damages, no interest should be awarded before judgment on loss of future earnings;

2. On damages for pain, suffering and loss of amenities interest should be awarded from the date of service of the writ to the date of trial at the rate payable on money in court placed on short term investment and, in the absence of evidence of that rate, the statutory rate of interest would be used;

3. With regard to special damages, interest should be awarded for the period from the date of the accident to the date of trial at half of the rate payable on money in court placed on short term investment.

[40] In terms of costs, it was determined by the Pre Trial Review Order that costs would be prescribed costs.

[41] The order of this Court therefore is as follows:

1. The Defendant shall pay to the Claimant general damages for pain, suffering and loss of amenities in the sum of $50,000 with interest thereon at the rate of 5% per annum from 5th December 2006 until today's date.

2. The Defendant shall pay to the Claimant general damages for loss of income/loss of pecuniary prospects in the sum of $139,968 without interest.

3. The Defendant shall pay to the Claimant general damages for future medical expenses in the sum of $37,530 without interest.

4. The Defendant shall pay to the Claimant special damages of $5,172.58 with interest at the rate of 2½ per cent per annum from 6th December 2000 until today's date.

5. The Defendant shall pay to the Claimant costs in the sum of $45,003, being the prescribed costs on the total amount hereby awarded.

6. From the amounts payable to the Claimant by the Defendant shall be deducted all amounts paid by or on behalf of the Defendant to the Claimant (with or without prejudice) towards the cost of medical or other expenses incurred by the Claimant arising from his injuries sustained on 6th December 2000.

Mario Michel
High Court Judge (Ag.)