

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCVP2019/0010

BETWEEN:

ANNE MARGARET HENRY

Appellant

and

DR. HORATIUS JEFFERS

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mde. Gertel Thom
The Hon. Mr. Brian Cottle

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Dexter Theodore, QC with him Ms. Sueanna Frederick for the
Appellant
Ms. Patricia Augustin for the Respondent

2020: December 9;
2022: August 17.

Civil appeal — Negligence — Medical negligence — Test of materiality — Whether there was a failure by the respondent to alert the appellant to the possibility of occurrence of a material risk — Whether learned judge wrongly failed to consider uncontroverted evidence of the appellant that she was only persuaded to undergo the operation because of the respondent's assurance that the procedure would resolve her medical difficulties — Whether judge fell into error when he found that there was loss of alignment of the appellant's leg — Whether learned trial judge fell into error when he found it was acceptable for the respondent to wait for 10 months to see whether fusion of the bone would occur — Whether learned judge was wrong to conclude that the failure of the osteotomy to heal caused the non-union - Whether surgical technique and post-operative aftercare utilised by the respondent fell below the standard to be expected of a reasonably

competent orthopedic surgeon - Appellate court's reluctance to interfere with trial judge's findings of fact

The appellant, Anne Margaret Henry, was afflicted with severe pain of her right knee accompanied by a valgus deformity of the joint. The respondent, Dr. Horatius Jeffers, an orthopedic surgeon, recommended that the appellant undergo surgery to correct the problem, more specifically, a varus-producing distal femoral closing wedge osteotomy. The appellant agreed to the surgery proposed and signed a patient consent form in which she agreed that she had been warned of the risks involved in the surgery. The risks specifically mentioned were those of non-union and infection. The surgery was performed by the respondent and the appellant was discharged from the hospital. In the months following the surgery, the appellant had several follow-up consultations with the respondent. The appellant's x-ray imagery suggested non-union of the bone and signs of failure of the surgical implant. However, the respondent did not reveal this to the appellant as he retained hopes that there would eventually be healing.

Ten months after his performance of the surgery, it had become clear to the respondent that there was non-union of the bone, and he informed the appellant of this. The appellant sought the advice of another orthopedic surgeon, who noted non-union of the osteotomy and failure of the surgical implant. This orthopedic surgeon recommended revision surgery, which the appellant elected to have at a clinic in Georgia, USA. This revision surgery left the appellant's right leg shorter than her left leg by ¼ inch, with unsightly scars on both sides of the right knee as well as the inner thigh, chronic knee pain, muscle weakness and an increased chance of developing arthritis.

The appellant brought a claim against the respondent. She claimed damages for negligence in the performance of the surgery and in his medical care of her after the surgery. The respondent pleaded in his defence that his performance of the surgery had not been negligent and that his post-operative care did not fall below the standard expected of a reasonable competent orthopedic surgeon practicing in Saint Lucia. Both parties relied on the expert evidence of Dr. Richardson St. Rose and Dr. Jerome K. Jones. The learned judge, considering the evidence before him concluded that the respondent did not fall below the standard expected of a reasonably competent orthopedic surgeon in his performance of the surgery and his post-operative care of the appellant. He therefore dismissed the claim and awarded prescribed costs to the respondent.

Being dissatisfied with the judge's ruling, the appellant has appealed to this Court, relying on several grounds of appeal. The main issues for this Court's determination are: (i) whether there was a failure by the respondent to alert the appellant to the possibility of occurrence of a material risk; (ii) whether the judge wrongly failed to consider the uncontroverted evidence of the appellant that she was only persuaded to undergo the operation because of the respondent's assurance that the procedure would resolve her medical difficulties; (iii) whether the judge fell into error when he found that there was loss of alignment of the appellant's leg on 10th September 2015; (iv) whether the learned trial judge fell into error when he found it was acceptable for the respondent to wait for 10 months to see whether fusion of the bone would occur; (v) whether the learned judge was wrong to conclude that the failure of the osteotomy to heal caused the non-union rather

than the failure of the surgically implanted hardware; and (vi) whether the surgical technique and post-operative aftercare utilised by the respondent fell below the standard to be expected of a reasonably competent orthopedic surgeon.

Held: dismissing the appeal; and awarding costs on the appeal to the respondent to be assessed by a judge of the High Court if not agreed within 21 days, that:

1. The respondent did inform the appellant of the material risks associated with the surgery. The judge upon considering the evidence before him and applying the test of materiality was correct to conclude that the appellant was informed of all the material risks when she was informed of the possibility of non-union of the bone.

Chester v Afshar [2004] UKHL 41 considered; **Montgomery v Lanarkshire Health Board** [2015] UKSC 11 applied.

2. The signed consent form where the appellant acknowledged that no assurances or guarantee of any particular result of the surgery had been made to her was sufficient evidence that she was not only persuaded to undergo the operation because of the respondent's assurance that the procedure would resolve her medical difficulties.
3. The learned judge did not fall into error when he found that there was loss of alignment of the appellant's leg on 10th September 2015. The evidence revealed that the appellant was initially informed of the non-union by the respondent on 28th July 2015. However, the loss of alignment only became apparent on viewing the x-ray film of 10th September 2015.
4. The learned judge, having had the benefit of seeing and hearing the expert evidence of both Dr. Jerome K. Jones and Dr. Richardson St. Rose, was entitled to accept the evidence of Dr. Jerome K. Jones that the respondent did not fall below the standard expected of a reasonably competent orthopedic surgeon in waiting 10 months to disclose to the appellant that there was non-union. Further there was ample evidence upon which the judge could rely to support his finding that it was acceptable to wait 10 months before informing the appellant that there was non-union of the osteotomy.
5. It was open to the judge to find that the failure of the hardware was not the cause of the non-union and that union was still possible even in the presence of hardware failure once alignment was maintained. The learned judge was therefore correct to conclude that the failure of the osteotomy to heal caused the non-union rather than the failure of the surgically implanted hardware.
6. An appellate court will be reluctant to interfere with a trial judge, not only on findings of primary fact based on the credibility or reliability of witnesses, but also where conclusions of fact involve an assessment of a number of different factors which have to be weighed against each other and involve an evaluation of the

facts. In this case, the learned judge having assessed and weighed multiple factors was entitled to accept the evidence of Dr. Jones that the technique used by the respondent was one that was acceptable in that field of medicine. Additionally, there was no evidence before the learned judge to suggest that the respondent, after 17 years of experience, was not sufficiently experienced at his craft to perform the surgery and post-operative care. There is therefore no reason to disturb the findings of the learned trial judge.

Rawle Hannibal v The BVI Health Services Authority BVIHCVAP2017/0002 (delivered 13th December 2019, unreported) applied; **Henderson v Foxwoth Investments Limited and another** [2014] UKSC 41 applied.

JUDGMENT

Background

- [1] **COTTLE JA [AG.]**: The appellant, Anne Margaret Henry, was dissatisfied with the judgment of the learned trial judge dismissing her claim against the respondent, Dr. Horatius Jeffers. She appealed against the decision on several grounds which will be set out fully below. It will also be useful to set out the factual matrix to better understand the reasons for the appeal.
- [2] The appellant was a senior registered nurse of a certain age. In July 2014 she was attended on by the respondent, an orthopedic surgeon, complaining of a swollen, painful right knee. After examining the appellant, the respondent prescribed non-steroidal anti-inflammatory drugs and recommended physiotherapy. By September 2014 there was no resolution of the difficulty. In fact, things appeared to have worsened. The appellant complained of increasingly severe pain of the right knee accompanied by a valgus deformity of the joint. The respondent recommended that the appellant undergo surgery to correct the problem, more specifically, a varus-producing distal femoral closing wedge osteotomy.
- [3] The appellant agreed to the surgery proposed. She signed a patient consent form in which she agreed that she had been warned of the risks involved in the surgery. The risks specifically mentioned were those of non-union and infection. A week later the surgery was performed by the respondent. The appellant was discharged

from hospital two days after the surgery. In October, November and December 2014 the appellant had follow-up consultations with the respondent. The respondent reviewed the x-ray imagery which suggested non-union of the bone and signs of failure of the surgical implant. The respondent did not reveal this to the appellant as he retained hopes that there would eventually be healing. The follow up reviews continued to February 2015. Still, there were signs of non-union and possible implant failure. This was not told to the appellant.

- [4] Between March and June 2015, the respondent advised the appellant to progress from light to moderate then to full weight bearing on the affected limb. By the end of July 2015, it had become clear to the respondent that there was non-union of the bone. He explained this to the appellant. In September 2015 the appellant sought the advice of Dr. Richardson St. Rose, another orthopedic surgeon. He noted non-union of the osteotomy and failure of the surgical implant. The valgus deformity was once more in evidence, and there was displacement of the femoral fragments. He recommended revision surgery.
- [5] The revision surgery was carried out at a clinic in Georgia, USA in October 2015. At the end of this second procedure the appellant was left with her right leg shorter than her left leg by ¼ inch. There were unsightly scars on both sides of the right knee as well as the inner thigh. She had chronic knee pain and muscle weakness. There was also an increased probability of developing arthritis. Dr. St. Rose examined her in April 2016. He noted advanced healing and good bone alignment.
- [6] The appellant brought a claim against the respondent. She claimed damages for negligence in the performance of the surgery and in his medical care of her after the surgery. She averred that she had been left with the physical disabilities noted above after the revision surgery to correct the non-union apparent after the first surgery by the respondent. The respondent pleaded in his defence that his performance of the surgery had not been negligent and that his post-operative

care did not fall below the standard expected of a reasonably competent orthopedic surgeon practicing in Saint Lucia.

- [7] In a careful and well-expressed judgment, the learned trial judge, after correctly advertent to the test for medical negligence, concluded that the evidence before him persuaded him that the respondent did not fall below the standard expected of a reasonably competent orthopedic surgeon in his performance of the surgery and his post-operative care of the appellant. He therefore dismissed the claim and awarded prescribed costs to the respondent in accordance with the relevant parts of the **Civil Procedure Rules 2000**. The appellant now relies on several grounds of appeal as set out in her notice of appeal.

Grounds of Appeal

- [8] The appellant challenged the learned judge's findings on several grounds of appeal, namely:
- (a) the learned judge's finding that the appellant gave informed consent to the medical procedure which the respondent performed is against the weight of the evidence that the operation, which was discussed, and to which the appellant agreed, was a varus distal femoral closed wedge osteotomy (with a cortex hinge), not the open wedge procedure that was performed;
 - (b) the learned judge erred by failing to appreciate that the nub of the appellant's argument on informed consent was that while every osteotomy involved a controlled fracture, a closing wedge osteotomy did not involve a complete fracture which is what occurred during the surgery;
 - (c) the learned judge erred by misconstruing the appellant's case and the evidence that increasing weight-bearing contributed not just to failure of the surgery but to bone destruction and in particular Dr Jerome K. Jones' evidence that the introduction of weight-bearing should only have been

recommended when there were signs of healing (which never manifested);

- (d) the learned trial judge erred in failing to draw the inference from the expert testimony of Dr. Jones, under cross-examination, that a reasonably competent surgeon would have informed his or her patient of the risks of continued pain after surgery, the complete fracture, mal-union, hardware failure and stiffness;
- (e) the learned judge's finding that the loss of alignment first manifested on 10th September 2015, was against the weight of the evidence;
- (f) the learned judge's finding that the respondent acceptably waited to see if fusion occurred, and alignment was maintained and that there was no conflicting medical evidence on the point, is erroneous since Dr. Jones supplied literature to the court that a doctor can wait for 9 months provided there is evidence of healing for 3 consecutive months. No x-ray showed signs of healing, yet the respondent waited for 10 months in the absence of any evidence of healing
- (g) the learned judge's finding that the failure of the osteotomy to heal caused the non-union was against the weight of the evidence that it was the hardware failure that caused the non-union;
- (h) the learned judge's finding that the respondent was not responsible for any financial loss or disabilities suffered by the appellant was against the weight of the evidence and in particular the evidence of the respondent's own expert that movement against loose plate and screws can cause bone loss;
- (i) the learned judge in analysing the cause of the appellant's loss and damage erred by confining his inquiry to the evidence and failed to

consider, adequately or at all, the issue of causation at law and in particular the learned judge failed to consider, or apply, the test of causation at law regarding successive causes;

- (j) the learned judge erred in treating the evidence of the respondent as expert evidence despite the fact that he was the defendant and in the absence of an order appointing him an expert in the proceedings, whilst simultaneously refusing to accept the evidence of Dr. Richard L. Thomas because he had not applied to be, and had not been appointed as an expert by the court;
- (k) the learned judge abdicated his function by relying entirely on the direct testimony of the 'experts' to determine whether the respondent fell below the acceptable standard of care while failing to draw the reasonable inferences that were available; and
- (l) the learned judge erred in finding that based on the medical evidence presented, the respondent's surgical procedure and post-surgery management of the appellant were in accordance with the standard expected of a reasonably competent orthopedic surgeon.

Submissions and Discussion

- [9] At the hearing of the appeal, counsel representing the appellant conceded that they were no longer suggesting that the respondent had performed an open wedge osteotomy. Grounds 3.1 and 3.2 (as detailed in the notice of appeal) thus fell away. The appellant contended that there was a failure by the respondent to alert her to the possibility of occurrence of a material risk. Counsel relied on the decision in the case of **Chester v Afshar**¹ where the House of Lords held that a surgeon who, in breach of his duty, failed to advise a patient of a potential risk of injury inherent in a surgical procedure, was negligent if that risk in fact materialised

¹ [2004] UKHL 41.

although the probability of occurrence had been only 1% or 2%. The issue which the learned trial judge had to resolve was whether the risks which in fact occurred in the appellant's case were material risks. He correctly set out the legal principles governing materiality. He said at paragraph 21 of his judgment, applying **Montgomery v Lanarkshire Health Board**:²

“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.”

The judge then went carefully through the evidence, and at paragraph 32, he concluded that, keeping the test of materiality in mind, the respondent informed the appellant of the material risks associated with the surgery. In my view, the learned judge was correct that the appellant was informed of all the material risks when she was informed of the possibility of non-union of the bone. This was the eventuality that occurred.

- [10] The appellant also contended that the judge wrongly failed to consider the uncontroverted evidence of the appellant that she was only persuaded to undergo the operation because of the respondent's assurance that the procedure would resolve her medical difficulties. This contention is at odds with the signed consent form where that appellant acknowledged that no assurances or guarantee of any particular result of the surgery had been made to her.
- [11] The appellant also complained that the judge fell into error when he found that there was loss of alignment of the appellant's leg on 10th September 2015. The evidence revealed that the appellant was initially informed of the non-union by the respondent on 28th July 2015. However, the loss of alignment only became apparent on viewing the x-ray film of 10th September 2015. This complaint against the finding of the judge fails.

² [2015] UKSC 11.

- [12] The appellant listed as a ground of appeal that the learned trial judge fell into error when he found it was acceptable for the respondent to wait for 10 months to see whether fusion of the bone would occur. The judge had before him the evidence of Dr. Jones and Dr. St. Rose. He explained clearly why he preferred the evidence of Dr. St. Rose. He had the benefit of seeing and hearing both experts and I can find no fault in his decision to prefer the evidence of Dr. Jones. While there was evidence of hardware failure, the alignment of the bones continued to be acceptable until revealed to be otherwise by the x-ray of 10th September 2015. Dr. Jones opined that as long as alignment was maintained it was medically acceptable to wait to see if union would occur. The judge enquired specifically of Dr. Jones whether in his opinion, Dr. Jeffers fell below the standard expected of a reasonably competent orthopedic surgeon in waiting 10 months to disclose to Ms. Henry that there was non-union. His answer was that Dr. Jeffers did not. There was, in my view, ample evidence upon which the judge could rely to support his finding that it was acceptable to wait 10 months before informing the appellant that there was non-union. There is no merit in this ground of appeal.
- [13] The next ground of appeal advanced by the appellant complained that the learned judge was wrong to conclude that the failure of the osteotomy to heal caused the non-union rather than the failure of the surgically implanted hardware. In my view, the judge had ample evidential support for his finding. As noted earlier, Dr. Jones stated that union was still possible even in the presence of hardware failure once alignment was maintained. There could be healing by secondary intention. Obviously, given that union could still occur despite hardware failure, it was open to the judge to find, as he did, that the failure of the hardware was not the cause of the non-union. The cause was the failure to heal.
- [14] The appellant also contended that the surgical technique utilised by the respondent fell below the standard to be expected of a reasonably competent orthopedic surgeon and the trial judge was in error not to so find. The judge had before him the expert evidence of Dr. St. Rose on this point. He did not have Dr.

Thomas's evidence and little weight was attached to his reports. Dr. St. Rose offered three reasons for saying that the respondent's surgical technique was poor. He opined that one or more cancellous screws could have been used and inserted through the offset of the plate and parallel to the blade, all within the distal femoral bone. This would have considerably increased the fixation of the angled plate in the distal fragment. He also thought that the cortical screws were inadequate in length and diameter. The screws did not fully engage the distal cortex. Those screws should never have been used in the cancellous bone of the distal femoral. Finally, Dr. St. Rose said that the appellant should have been more experienced in dealing with that type of work. The judge examined the three areas of concern and discounted them all. At paragraph 35 of the judgment, he said:

"[U]nder cross-examination, however, Dr. St. Rose made certain admissions that undermined his credibility and the coherence of his evidence. Firstly, he admitted that he was wrong when he said that the cortical screws were inadequate in length. He stated: 'I will not quarrel with the length. I was wrong in talking about the length.' Secondly, he admitted that, though he had stated that the cortical screws were inadequate, he was merely 'suspicious of the diameter of the screws, but just suspicious, no proof.' He admitted he never saw the screws; he just looked at the x-rays. Dr. St. Rose offered no explanation as to why he changed his initial opinion that the cortical screws were inadequate in both length and diameter. He had the opportunity to correct this before he was cross-examined but did not do so, lending some whimsicality to his testimony. He simply withdrew what he had said in a cavalier manner and, in doing so, eliminated the second of the three reasons he had advanced for opining that Dr. Jeffers' technique was poor."

- [15] The way in which expert evidence is to be approached was recently considered by the Court of Appeal in the case of **Rawle Hannibal v The BVI Health Services Authority**.³ Baptiste JA stated at paragraph 22:

"An appellate court will be reluctant to interfere with a trial judge, not only on findings of primary fact based on the credibility or reliability of witnesses, but also where conclusions of fact involve an assessment of a number of different factors which have to be weighed against each other and involve an evaluation of the facts. The law is settled as to the need for appellate caution in overturning findings of fact."

³ BVIHCVAP2017/0002 (delivered 13th December 2019, unreported).

[16] Baptiste JA continued at paragraph 24 that:

“A first instance judge’s assessment of or evaluation based upon expert evidence adduced at trial must be approached by an appellate court with similar caution. Since the evaluation of expert evidence is likely to be bound up with a wider evaluation of matters of fact, an appellate court will still be very slow to intervene. An appeal court always proceeds with caution in considering appeals against findings of fact or findings based on an assessment of expert evidence.”

[17] This Court keeps that salutary admonition firmly in mind when considering the complaint made against the finding of the learned trial judge that he preferred the expert evidence of Dr. Jones to that of Dr. St. Rose. The learned trial judge in this case accepted the evidence of Dr. Jones that the technique used by the respondent was one that was acceptable in that field of medicine. The judge went on to note that there was no evidence before him to suggest that the respondent, after 17 years of experience, was not sufficiently experienced at his craft to perform the surgery. I find no reason to disturb the findings of the learned trial judge on this point. Similar complaints were made about the findings of the learned judge on the post-operative care of the appellant. These complaints are also similarly ill-founded. The factual findings of the learned trial judge merit respect. He had advantages which a Court of Appeal does not. This principle has been stated many times. One example is in the case of **Henderson v Foxwoth Investments Limited and another**.⁴

“[I]n the absence of some other identifiable error, such as (without attempting and exhaustive account) a material error of law or the making of a critical finding of fact which has no basis in the evidence or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial court only if it is satisfied that his decision cannot be reasonably explained or justified.”⁵

[18] There was no material error of law on the part of the trial judge. I do not consider that his finding of facts cannot reasonably be justified. The learned judge carefully

⁴ [2014] UKSC 41.

⁵ Ibid at para. 67.

set out why he arrived at his findings of fact. This Court finds no reason to disturb them.

Conclusion and Orders

[19] For the reasons above, I would make the following orders:

- (i) The appeal is dismissed.
- (ii) Costs on the appeal to the respondent to be assessed by a judge of the High Court if not agreed within 21 days.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Deputy Chief Registrar