

IN THE ROYAL COURT OF THE ISLAND OF JERSEY

85/112

Before: P.L. Crill, C.B.E. Deputy Bailiff  
Jurat H. Perree  
Jurat G.N. Simon

28.1.86

BETWEEN Eton Winston Le Brun PLAINTIFF  
AND Barette and Gruchy Limited DEFENDANT  
Advocate F. Benest for the Plaintiff  
Advocate K. Hooper Valpy for the Defendant

This is a continuation of the hearing of this case following upon our judgement in favour of the Plaintiff on the issue of liability, with a reduction of 25 per cent in respect of his own negligence. Since the last sitting when we gave our judgement, special damages have been agreed and when we resumed sitting to deal with the issue of quantum on the 10th December, we were told that these amounted to £7,664.69 with interest totalling £688.27 and accordingly we entered judgement for these two amounts. We were left, therefore, with the claim for general damages. We have divided this into two parts, first that for pain and suffering and, second, that for general pecuniary compensation. As regards the latter, the position is unusual inasmuch as the Plaintiff has not claimed for loss of profits, for unfortunately there were none to claim, nor loss of expected future earnings. Instead, he has based his claim on money which he has to expend to provide extra labour, either in the form of his wife assisting at weekends for his cattle, or for paying overtime to his permanent farmhand.

We deal first with the question of pain and suffering. The Plaintiff was born on the 25th November, 1949, and the accident happened on the 28th January, 1981. In his first report, Mr. J.G.B. Myles, the Senior Consultant Surgeon at the General Hospital, described the Plaintiff's injuries as follows:

1. Shock.
2. Deep bruising of the right lower leg and both feet.
3. Superficial bruising of the skin over the lower part of the right lower leg.

The Plaintiff was treated in Hospital until he was discharged on the 12th February. Unfortunately, a small part of an area of skin on the right lower leg did not heal. A skin graft was therefore carried out on the 8th May, and he was discharged from Hospital on the

21st May. The opinion Mr. Myles gave in his report of the 12th November, is as follows:

"Mr. Le Brun underwent a very frightening and painful experience in which he sustained extensive deep bruising to the right lower leg and foot, and to a lesser extent in the left foot. He also sustained damage to the skin over the lower part of the right leg and the area of skin subsequently died and eventually required skin grafting in order to obtain healing. As a result of the accident, he now has two permanent scars on his right leg. The one on the front of the thigh will fade with time but will never disappear. Apart from their appearance, the scars will cause no further trouble.

He has now made a complete recovery from the injuries to his left foot and there will be no residual disability here.

Due to the bruising of the muscles in the right lower leg and foot, he is still not using these muscles normally. In order to walk with the correct heel and toe gait, it is necessary to move the foot upwards on the ankle but this causes stretching of the calf muscles. When he does this he experiences pain and therefore in order to reduce the amount of movement taking place in the ankle, he walks with his leg twisted out. This makes walking difficult as well as giving him a limp. If he is to regain full normal function in the calf muscles, he must learn to walk properly and use the muscles in a normal fashion. If he does this, they will eventually make a complete recovery but he will experience a certain amount of pain while this is happening. It is likely to be some months before he is walking normally and without a limp but provided he perseveres I think the eventual outcome will be a complete recovery, apart from the presence of the two scars.

The risk of his developing a degenerative arthritis in the ankle or any of the joints of the foot has not been increased by this accident."

In his evidence Mr. Myles described the injury as ...."moderately severe". At the time of the first report, Mr. Le Brun had started to work again, albeit in a restricted way. On the 26th June, 1982, he was re-examined by Mr. Myles. On that occasion Mr. Myles gave his opinion as follows:

"It is now apparent that in addition to severe muscle bruising he has also sustained some damage to nerves in the right leg. Although damage to the nerves usually results in loss of function, there is occasionally abnormality of function. When this happens nerves which supply sensation cause areas of skin with which they are connected to become hypersensitive. Although at first sight it may appear that Mr. Le Brun's areas of hypersensitivity are rather oddly distributed, it is in fact exactly correct on an anatomical basis. The areas of skin involved and the muscle weakness can be satisfactorily explained by a partial lesion of the lateral popliteal nerve.

As it is nearly eighteen months since the accident, I think that further spontaneous recovery in both muscle strength and hypersensitivity are unlikely to occur and that his residual symptoms will now be permanent. The muscle weakness is due to damage to that part of the nerve which supplies impulses to the muscles and there is no treatment available to improve this. It might be possible to abolish the areas of skin hypersensitivity by cutting the appropriate nerves which are supplying these areas of skin. There are, however, certain risks to be considered before undertaking this. It is difficult to be absolutely certain which part of the nerve is supplying the skin and which is supplying the muscles and it is essential that those fibres which go to muscles are not cut otherwise the weakness would

be increased. When the nerves to the skin have been cut the appropriate areas will lose their feeling altogether and there is therefore the risk that he could damage those areas of skin without knowing it. However, I do not think that this complication is likely to be much of a problem. It is the risk of further weakening of the muscles which makes me hesitant to recommend that he undergoes this operation.

If no further treatment is undertaken, his present condition is likely to be the final and permanent one".

Mr. Myles saw Mr. Le Brun again on the 14th January, 1984, and his opinion, as a result of that examination, is as follows:

"I consider that Mr. Le Brun has fully recovered from the bruising of the calf muscles and his only residual symptoms are related to nerve damage. There is no significant muscle weakness and the nerve damage is confined to the sensory side. The distribution of the sensory changes may seem to be rather bizarre but can be adequately explained on an anatomical basis.

When sensory nerves are damaged, they either lose their function or it becomes abnormal. In Mr. Le Brun's case, the sensory nerves to the areas of skin affected are functioning but are producing abnormal signals so that when the areas are touched he feels pain. I am, however, unable to explain why he should have such severe pain if he tries to carry a heavy weight as there is no evidence of damage to the bones and the muscle power has returned to normal. In order to try and

establish the cause of this pain, it will be necessary for him to have nerve conduction studies done and I think he should have an opinion from a Consultant Neurologist".

In order to try to establish the cause of his pain, which he told Mr. Myles he was still feeling in January, it was decided that he should be examined by a Consultant Neurologist, Dr. P. Kennedy, whose report described the sensitivity felt by Mr. Le Brun in his right leg. The relevant parts of the report are as follows:

"Mr. Le Brun tells me that as a result of his accident he has difficulty putting weight on his right leg because of sensitivity. He describes this as a sensation as if one had hit his funny bone. It starts in the web space between the 1st and 2nd toes i.e. the large toe and the toe next to it and runs up the foot to the outer aspect of the right shin, particularly in the area which has received skin grafting. Secondly he describes a constant burning sensation on the outer aspect of the right calf particularly in the area of the scar midway between the knee and the ankle. He tells me that since the accident he has been unable to left a loaded wheelbarrow because the right leg tends to giveaway under him at the knee because of pain shooting up the leg. He is aware

of great sensitivity between the 1st and 2nd toes of that foot and tingling on the lateral aspect of the right calf if he stamps his foot on the ground to get mud off of it. He is not aware of any weakness. He is of course aware of some deadness around the area of the skin graft.

In response to my question as to what he was unable to do as a result of this accident he cannot as indicated above lift heavy weights, he says he cannot walk between the cauliflowers because the foliage of the plants touching the right calf will cause discomfort. He says he has developed a rather unusual gait particularly later in the day as the foot tends to swing out. He thinks his back is also somewhat worse because of this abnormal gait.

On examination the area of scarring relating to the skin graft is only too obvious on the outer aspect of his right leg. There is no focal evidence of muscle wasting, I measured the calves bilaterally, that on the right is 16 $\frac{1}{2}$  inches and on the left 16 $\frac{1}{2}$  inches. As far as weakness was concerned there was some fluctuant weakness in various muscle groups but because he had pain in his leg that made the assessment difficult. The reflexes were perfectly normal. Sensory abnormality was rather difficult to assess because it seemed to involve parts of the skin supplied by the following nerves, the medial plantar nerve, the saphenous nerve and the sural nerve. There were no other abnormal findings.

Conclusion - as far as the history is concerned much of the discomfort he describes is compatible with a causalgic pain in keeping with partial damage to the lateral popliteal nerve. Happily there is no good evidence that there has been any residual paralysis resulting from this nerve but I am in a little difficulty in trying to assess the sensory abnormalities because these seem to encompass three other peripheral nerves named above in addition to the sensory deficit that might be

explicable on the basis of damage to the lateral popliteal nerve.

I felt that much really depended in terms of objective findings in relationship to neurophysiological tests to assess the integrity of this nerve and we arranged these whilst he was in Southampton. Firstly electro myography showed no evidence of abnormality in the muscles supplied by the lateral popliteal nerve confirming the fact that the motor fibres in that nerve are normal. Similarly the nerve conduction studies for the lateral popliteal nerve were including the sensory branches.

We have no objective evidence that this patient has sustained any residual injury to this nerve but the small pain carrying fibres in the nerve are not always demonstrably effected by current neurophysiological tests and so this lack of objective evidence should not be taken as negating the patient's story, it just means that it is difficult for us to quantify how much pain he is appreciating. I would feel it fair to say that I agree with Mr. Myles that he has had lateral popliteal nerve injury which has left him with a residual pain problem. Unfortunately some aspects of the examination, namely the apparent weakness when the patient was being examined (but I would not want to make much of that because of the pain he was in) but more particularly the sensory abnormality could not in any way be obviously explained in its entirety as a result of this injury. In terms of trying to help him I think either a percutaneous electrical stimulation or a vibrator may well give symptomatic relief. It is unlikely that Nature in its own right would come to his rescue bearing in mind that it is now some 3½ years after the accident".

As a result of that report Mr. Myles in his evidence <sup>said he</sup> /was satisfied that Mr. Le Brun was a truthful patient and was not malingering. Whilst, therefore, the injury may have been described as "mere bruising" the residual effects are permanent and painful.

We accept the evidence of Mr. Le Brun that he cannot carry heavy weights; cannot assist in heavy work with mucking out the cow stables; cannot assist with heavy work in the fields, nor can he climb ladders, for example, to obtain fodder for the animals. Furthermore, whilst he can drive a tractor and other vehicles, he has difficulty in getting on and off a tractor, and he cannot walk in crops which brush against his leg because of its sensitivity. It would not be fair to say that his pain is perpetual but it is persistent and he is still taking analgesics. Both he and his wife testified that quite often he has to get up in the middle of the night and take further analgesics and walk about to ease his pain. On the recommendation of Dr. Kennedy he uses what was described as a percutaneous electrical stimulation, or a vibrator, which does give him some symptomatic relief but that is not permanent.

As a result of the accident he can no longer play the organ fully, that is to say he cannot use the pedals with his right leg, and whilst we had evidence that he has now resumed, to a very limited extent, his previous pastime of riding - he does so at the moment on an aged horse - he is unable to wear a proper riding boot on his right leg. It is evident therefore, to us that this form of recreation whilst still undertaken, is very limited.

We were informed that he has a 25 per cent Disability Pension from the Social Security Department. No medical officer of that department or doctor employed by it, however, was called to substantiate the grounds upon which that pension is paid. We have no reason to doubt that it is paid but we have relied on the evidence we had before us from Mr. Myles and Dr. Kennedy as well, of course, from the Plaintiff and his wife.

A further matter to be considered is that he walks with a limp to ease his discomfort and as far as we could see that also is going to be a permanent disability for him. What he is left with, therefore, is a sensory disability with a fairly high degree of intermittent pain.

As Mr. Valpy pointed out it is difficult to assess what that pain is, except by relying on the Plaintiff's own evidence. We see no good reason to disbelieve his evidence in this connection. We have examined a number of cases cited to us by both Counsel and we are indebted to them for their industry in finding them for us, but they have not been of much assistance except to indicate the kind of awards that have been made by the English Courts. It must be very rare to find an identical case and we have not been able to do so. The nearest case as regards injury to the popliteal nerve is that of Gall -v- Manchester Slate Company Limited (1974) 2 Lloyd's Rep. 525. In that case, in addition to the damage to the popliteal nerve of the left foot, the victim sustained a fracture of the left tibia and fibula on the lower third of the left leg, and some bruising of the left hip and knee. The fracture of the tibia took a long time to unite and heal. After a year, he was able to walk with a stick, but progress towards recovery was good thereafter, but he was left with a slight shortening of the left leg. He returned to his normal occupation about 18 months after the accident and was able to work normally. The damages awarded were £3,000 but reduced on appeal to £2,000. Taking into account the fall in the value of money the equivalent award in December, 1984, would be somewhere in the region of £7,000.

We think it fair to consider the position of the Plaintiff in relation to his day-to-day work as a farmer. Mr. Myles told us that the area of hypersensitivity between his toes on his left leg was a nuisance and also the outer side of his calf. He said that he and Dr. Kennedy believed what the Plaintiff says and had every reason to believe that he was getting the pain he described. When muscles were used by placing extra strain on the muscles, that caused pain as described by the Plaintiff. It was not possible, however, he said, to test the sensation of the senses, only the motor side of the Plaintiff's condition. One was forced to rely, therefore, first on what the patient said, secondly by observation of the loss of hair surrounding the area, and thirdly the anatomical distribution of the sensation as described by the Plaintiff. Furthermore, the pain fibres in the nerves have been made hypersensitive and when there is contact with the skin in the areas described by the Plaintiff, he gets the

pain as mentioned by him. He was neither exaggerating nor underplaying it. Furthermore, what he had hoped for, that is to say a complete recovery, did not occur. The Plaintiff does not walk steadily and it is something that he is unlikely to recover from. If one could remove the pain, then the muscle power would be normal. As regards the fact that the reference to the Plaintiff's leg giving way in Dr. Kennedy's report, not being in Mr. Myles' report, it did not always follow that every patient gave the full list of their feelings or disabilities to every doctor.

In Mr. Le Brun's case there has been considerable pain and suffering, and some pain or discomfort to be endured for the whole of the foreseeable future with some slight degree of disability. Under the heading in this claim, we award the Plaintiff £10,000.

The second head for extra expenses is only sustainable if we were to be satisfied that at the time the accident occurred, his farming business was solvent, at least in the sense that even if he was not paying his way each year, there was a reasonable likelihood of his being able to improve his position, given understanding by his creditors who were mostly his trade creditors, that is to say the merchants who supply his fodder and other farm items, reasonable security of tenure and a fair return for his produce. As regards the latter, that is something which no one can foretell and we had no evidence on this particular point except as regards potatoes.

In addition to the present claim, as formulated in the Order of Justice, Advocate Benest for the Plaintiff suggested in his address that the Court ought to take into account the weakening of the Plaintiff's competitive position in the open labour market, as a particular additional form of loss. This was not pleaded and we find this argument unacceptable. The Plaintiff is a farmer as we shall set out in more detail in a moment. He has been trained for nothing else and we think it highly unlikely that he would enter the ordinary labouring market. Accordingly, we had no evidence that his knowledge of farming would not be able to be used in some way in or around the farming industry, should he no longer, by reason of his disability, be able actively to farm. Thus we have made no award in respect of this head.

The Plaintiff in this action is, as we have said, a farmer. He was 31 at the date of the accident and is now aged 35.

Sofar as the claim for expenses is concerned, we were told that this has now been reduced inasmuch as such expenses as were incurred between the date of the accident and the 4th January, 1984, have been covered in the agreed special damages. We were asked, therefore, to apply a multiplier from the 4th January, 1984, for future extra labour expenses. Even if we were to take the view that the Plaintiff's financial position had altered drastically for the worst following his accident, so that as of the 1st January, 1984, we could not be satisfied that the farm was solvent, we nevertheless think that in looking at the question of solvency, we should consider the position as it was at the date of the accident first. For a farmer to continue farming, of course, he requires the necessary land. At the date of the resumed hearing the Plaintiff held the following lands:

1. La Ferme du Carrefour, Trinity, which is a farmhouse and outbuildings with land - 40 verges.
  2. Land at Ville a l'Eveque - 18.20 verges.
- Both these properties are held from Professor A. Messervy with their leases finishing at Christmas, 1986.
3. Approximately 20 verges of land adjoining Le Carrefour from Mr. C.L. Gruchy, which is on a lease for three years from Christmas, 1984.
  4. 22 verges at Mont-a-l'Abbe from Mrs. R.G. Mundy and Miss A.M. Mundy. The leases for these lands finish at Christmas, 1988.
  5. 28 verges at Les Haies, Trinity, from Mr. J. Warry (formerly Mr. C.J. Howeson), finishing on the 25th December, 1986.
  6. Two areas of grasslands, totalling 33 verges, in two other areas of Trinity for which no rental is paid, and which he really holds under licence.

It follows that if we were satisfied that it would be proper to make an award for future expenses, and this means that we would also have to find that, on a balance of probabilities, the position of insolvency was not proved, we would have to ask ourselves for what period of time this should be and what would be the likelihood of the Plaintiff either continuing his present tenancies, or obtaining other lands. If on the other hand he were to obtain other lands and had to leave his present premises we heard no evidence as to whether he would be able to farm on the same scale and whether his expenses would be anything like those at present claimed.

Sofar as the solvency of the farm business is concerned we have examined the balance sheets prepared by his accountants from 1976 to November, 1984. It is fair to say that the farm has not been profitable. On the other hand the position in December, 1980, was not, for want of a better word, desperate. It is quite true there was a figure of nearly £7,000 of capital deficit but a good deal of that figure would either have been completely removed or turned round to a small profit had it not been necessary to stock up with an extra amount of fertiliser over and above the normal requirements, as shown in the previous accounts and at a much higher figure. That the Plaintiff is a competent farmer in the sense of being a good herdsman is apparent from the evidence of Professor Messervey himself, a distinguished Veterinary Surgeon, and from Mr. D. Frigot, a very experienced dealer in Jersey cattle.

In 1980 the Plaintiff obtained loans from the States to increase his livestock and to purchase appropriate machinery. He was advised by the Committee of Agriculture and Fisheries advisers to cut down on his non-productive crops, such as cauliflower, and to concentrate on potatoes on his early land at Mrs. Mundy's at Mont-a-l'Abbe and his cattle breeding. He was starting to carry out this policy when the accident occurred. After the accident his wife attempted to carry on, but due to the accident the potatoes which had been prepared to supplement the programme of planting this potentially lucrative crop

was started very late. Moreover, the season was late and Mrs. Le Brun, even with the extra labour and help of neighbours, was not able to harvest the crop in time. Accordingly, there was a substantial loss and in order to pay the contractors who eventually had to be brought in, Mr. Le Brun had to sell his seed potatoes which deprived him of the means of planting for 1982 and subsequently. We were told that he had started planting again in 1984 and has sufficient seed to plant again in 1985. His position is still not secure because he owes one years rent to Professor Messervy, although six months has been paid of the arrears so that in fact he, whilst owing the above amount, has paid six months rent due to June, 1985.

In the course of examining the accounts we came across a figure of £10,000 as cash introduced during 1983. We were told that this had been a payment on account by the Defendant Company which itself was one of the major trade creditors of the Plaintiff. Since the special damages were under £8,000 it follows that notwithstanding the arguments advanced by Counsel for the Defendant Company at that time it did not appear to have raised the issue that as regards projected expenses the Plaintiff was not entitled to recover. The payment was made generally on account of damages as a whole.

We were told by Mr. Goldsworthy, the then agricultural adviser of the Agriculture and Fisheries Committee, that 1982 and 1983 were good years for the potato industry and that had the Plaintiff's plans to utilise to the full his early land been realised, he could have expected to make a gross profit on his lands, over the two years at Mont-a-l'Abbe, of some £15,000. This suggestion, of course, does not take into account the vagaries of the weather and the possibility of disease nor of incompetent production. However, it was not suggested that any of these things would necessarily have applied to Mr. Le Brun and we are satisfied and we have heard no evidence to the contrary, that he is a good husbandman. Accordingly, the suggestion by his Counsel that he

might have looked forward to increasing his profit and thus reducing his losses by the utilisation of his early land for growing potatoes in 1982 and 1983 is one we feel able to accept.

In considering Mr. Le Brun's position we also have to remember that he has taken advantage of an administrative agreement with the Agriculture and Fisheries Committee to carry over two interest payments. We were told, but we heard no evidence on this point, that it is Committee policy to allow borrowers to carry over three such interest payments.

Mr. M.J. Cotterill, an accountant called for the Defendants, suggested that the farm was insolvent and had been from 1976, and certainly in 1980 and at the present day, and could only be continued, first by an injection of capital, secondly by an expansion which was not possible because of the physical limitations of the outbuildings at La Carrefour, and thirdly, by the continued indulgence of the creditors. As against this Mr. D.W. Bisson, who had prepared Mr. Le Brun's accounts for some ten years, gave his opinion that in considering the balance sheet of 1980, if the stock was valued at its proper worth, that value would practically wipe out the bulk of the deficiency. Furthermore, in 1981 there had been an increase in the deficiency due to the high rate of interest charged by the trade creditors. He did admit, however, that at some stage between 1976 and 1984 an insolvency situation had arisen. The profits had never been enough to pay for the running expenses and also make a profit. He agreed with Mr. M.J. Cotterill that if the herd could be larger then the position might become different. If he could find some other profitable crop with further diversification there is no reason why he should not continue farming. Even if there had been a continuing deficit, that is no reason why the work should not continue, provided there could be an extension of his tenancies.

It was clear to us that it is trite economic law that a continuing deficiency each year in a farm, if allowed to progress and even allowing for the proper value of the stock at disposable

prices, results inevitably in a state of chronic insolvency. Was that the position in 1980, and is it the position in January, 1985? On balance we do not think it was in 1980, having regard to the proposals for improving his method of farming and because of his having a fair number of years still to run on his tenancies. When one looks at the position in November, 1984, it has of course seriously deteriorated. If one adds back the £10,000 introduced by way of capital which was how it was shown in the accounts as we have said in 1983, we find that there is a net debtor balance on the balance sheet of something like £52,000. This is a considerable sum and even allowing for the true value of the herd, that would still leave something well over £30,000 to be made up in the years to come, always assuming continuity of farming. As against this Mrs. Le Brun has now taken full-time work and Mr. Le Brun is now in a position to start refarming his early productive land. There is also a trend which is to be welcomed, from the point of view of Mr. Le Brun, that in 1984 whilst not showing a profit, nevertheless the loss on the running account was comparatively small. Moreover, we were told that he was to receive considerable sums by way of a bonus for his milk production, but more particularly the quality of it. But yet again his future will depend, if he is allowed to continue farming, not only on his own efforts, but on the forbearance of his present creditors.

Again, as in the case of 1980 on balance we cannot say that Mr. Le Brun is in a state of insolvency, although the position has, as we have already said, deteriorated. We have had no evidence from any of the creditors that they have been waiting until the settlement to see whether to allow Mr. Le Brun to continue farming or not. This being so we must assume that they are content to wait until the turn round comes, if it does, with the present acreage used and the present size of his herd. It may well be that with the proper use of his early land, the position could be back to where it was in 1980, before the accident. However, the

matter is complicated inasmuch as there is a doubt in our mind whether Mr. Le Brun could look forward to keeping La Carrefour and the land that goes with it, and indeed Mr. Gruchy's land which, without La Carrefour is unlikely to be of use on its own, beyond December 1986. We say this because Professor Messervy told us that when the leases expire he proposes to hand over his properties to his children. We have set out the rest of Mr. Le Brun's lands to show that even if he were to lose ~~La~~<sup>c</sup> Carrefour, he would still have some land, but clearly it would be insufficient for him to continue farming as hitherto. In our view, therefore, it would be unwise to set any term of years to a figure which in itself is speculative inasmuch as we do not know, as we have already said, whether the overheads which are being claimed would necessarily be the same if a smaller acreage of land was worked, or indeed if a different farm was rented. Figures were produced to us to support the annual extra expenses in respect of overtime worked by the farmworker and weekends by Mrs. Le Brun, but we do not propose to use these except other than a guide. Under all the circumstances we think that we are entitled to make a modest award for general damages over and above pain and suffering but this should be realistic and accordingly we award Mr. Le Brun the sum of £7,500.