[2016] JMSC Civ. 211

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

[DIVISION]

CLAIM NO. 2010 HCV 03711

BETWEEN	**ORLANDO ADAMS**	**CLAIMANT**
AND	**DESNOES & GEDDES LIMITED t/a Red Stripe**	**DEFENDANT**

IN CHAMBERS

Mr. Sean Kinghorn and Ms. Danielle Archer instructed by Messrs. Kinghorn & Kinghorn Attorneys At law for the claimant

Mrs. Tana'ania Small Davis, Ms Kerry Ann Allen and Mr. Joshua Sherman instructed by Messrs. Livingston Alexander and Levy attorneys at Law for the defendant**.**

HEARD: 22nd - 26th February, 2nd May and 25th November 2016.

Negligence - Employer's liability - Occupiers Liability - Duty of care - Whether Employer provided a Safe system of work - Whether defendant liable for claimant's medical diagnosis - Occupier's liability - Whether premises were reasonably safe for the purpose for which the claimant was permitted to be there - Breach of contract - Whether the defendant provided adequate plant and equipment necessary for the safety of the claimant.

CORAM: BERTRAM LINTON, J. (AG.)

[1] Let me from the outset register my gratitude to the parties for their forbearance in this matter which saw an estimated three day trial burgeoning into six days,

including a visit to the '*locus in quo'*. I also note that the matter was challenged by its scheduling in and around the national elections in February 2016.I do not intend to repeat the evidence of each witness or the detailed submissions of the parties. I will however reference as much of the evidence or the submissions as I consider necessary to explain the reasons for my decision.

THE CLAIM

[2] Orlando Adams has brought this claim against his former employer; he says he has been diagnosed with bronchial asthma and contends that it is the defendant's place and system of work that has caused him to be suffering from this chronic illness. His allegations centre on his assignment as a bottle washer operator in 2006 when he says that he was exposed to several dangerous chemicals namely caustic soda, stabillion, and ferisol, as well as extremely high temperatures which he says was responsible for him developing an incessant cough as well as difficulty breathing.

[3] He recounts that he made numerous complaints to his employer, and when he sought medical attention, was diagnosed as suffering from bronchitis and asthma as a result of the inhalation of irritant fumes. When this was disclosed to the defendant in 2006, he was transferred to work on the Depalletizer machine, which was in a different work space and did not involve the use of the chemicals mentioned above. Sometime in 2008 Mr. Adams was assigned to work on the bottle filler machine which was in close proximity to the bottle washer machine where he had been working when he first experienced his medical difficulties, and he gave evidence that as a result of being back in the offending environment his symptoms returned.

[4] He was engaged under a contract of service with the defendant as a member of the production team from 2003 until 2010, and worked in various areas of the packaging department until he was made redundant. He has sought damages for Negligence and /or Breach of Contract and for breach of the Occupiers Liability

Act. He also alleges that the defendant is liable for a breach of the common duty of care owed to him under the Employer's Liability Act.

THE DEFENDANT'S CASE

[5] The defendant is a limited liability company incorporated pursuant to the Companies Act of Jamaica with its registered offices at 214 Spanish Town Road, Kingston Jamaica. The company has held the claimant to proof in respect of his alleged diagnosis of Asthma and denies liability for the 'alleged injuries', they contend that the claimant could not have sustained the injuries described, because the Bottle washer machine which is identified as the source of the complaint is enclosed, fully automated and no operator, including the claimant, is exposed to dangerous levels of caustic soda or any other chemicals, and/or extremely high and intolerable temperatures in the course of operating that machine or at all while at the defendant's premises.

[6] Other chemicals like Stabilion and Ferisol are used as additives in the process employed, but the defendant maintains that these are dispensed by a third party directly into the machine and the claimant would not have occasion to interact with them as part of his duties. The general area is described by them as well ventilated and even though temperatures are admittedly up to 80 degrees Celsius in the compartments of the machine it is contained in a closed space and the operator is not exposed to these temperatures.

[7] The defendant maintains that all reasonable steps were taken to safeguard the claimant from any negative effects of the production process, and says that there are safety procedures in place to protect the claimant and all its employees. He was issued with appropriate safety gear, encouraged to wear it as part of a safe system of work and appropriate to his duties. Further, it is denied that the claimant complained about the environment in which he worked, it was only during a routine 'back to work' fitness assessment that the medical concern peculiar to the claimant was raised, and he was removed to another area.

[8] They are also contending that the claimant was quite eager to be moved to the bottle filler machine and say that even if the alleged illness was caused by the defendant, it was not reasonably foreseeable since at all times the defendant took all reasonable care not to expose the claimant to unnecessary and foreseeable risk of injury .

[9] When it was made aware of the medical circumstances peculiar to the claimant, and out of an abundance of caution, he was removed from washer operating duties to the Depalletizer machine, in its bid to ensure that they did all a reasonable employer could be expected to do not to expose the claimant to unnecessary and foreseeable risk.

THE LAW

[10] The case for the claimant and/or the alleged Negligence of the defendant is pleaded under three headings:-

Employer's liability

Breach of Contract

Breach of Occupier's liability

EMPLOYER'S LIABILITY

[11] The obligations of employers for the safety of their employees are governed in part by the common law. In addition to long standing common law duties, several statutes address employee safety. However, the majority of claims for injuries suffered at the work place are still brought under the common law. For the claimant to succeed under this heading he must show that the several obligations of the employer were not complied with.

Several of the cases have been cited in detail in the submissions of the parties.

Those authorities establish that under the common law, an employer owes four duties to his employees, namely duties to provide:

- A competent staff of employees

- Adequate plant and equipment

- A safe place of work and;

- A safe system of work with effective supervision.

(McDonald –Bishop, J (as she then was) in Ray McCalla v Atlas Protection Limited and Ringo Company Ltd. 2006HCV 04117 citing **Wilson v Tyneside Window Cleaning Co. [1958) 2 QB 11o at 123-124**

[12] This obligation requires the employer to provide and maintain in proper condition a proper plant and equipment. This will involve the implementation of regular inspection of both plant and equipment, including necessary maintenance and repairs deemed necessary. Where the nature of the work being carried out makes it reasonable for employees to be provided with protective devices and clothing, the employer is fixed with a duty not only to provide those items but to take reasonable care to ensure that they are actually used.

(Edwards, J (as she then was) in Leith v Jamaica Citrus Growers Limited 2009 HCV00664 citing Lord Greene MR **in Speed v Thomas Swift and co. Ltd. [1943] KB 557**

[13] While the previous duty deals with outfitting the plant, this one requires the employer to make the workplace as safe as reasonable skill and care permits. This will require provision of protective clothing and devices, appropriate warnings (even of temporary dangers, such as wet floors), guard rails, hand rails, fire escapes, among others. The courts have determined that a safe system of work describes the organisation of the work, provision of adequate instructions (especially to inexperienced workers); the taking of safety precautions and the part to be played by each of the various workmen involved in relation to particular employees.

(Dunbar-Greene, J in Wayne Howell v Adolph Clarke t/a Clarke's Hardware [2015] JMSC Civ.124 citing Mason, J in **Wyong Shire Council v Shirt [1980] HCA 12.)**

[14] In deciding whether the system devised is reasonable, the court will consider the nature of the work and whether it required careful organisation and supervision. Naturally, operations of a complicated and unusual nature will require more systematic organisation and planning than ones of a more simple nature. However, even operations falling in the latter category will require the institution of a safe system of work when necessary in the interests of safety, for instance work done in factories and mines (for which there are specific statutory obligations). It is not enough for the employer to prescribe a safe system of work; he must ensure that the system is followed by providing efficient supervision.

[15] The duty cast on an employer is to take reasonable care for his employee's safety. What is reasonable in any situation will ultimately depend on the facts of the case. The essence of the duty is that operations are not carried out in a way that subjects employees to unnecessary risks.

(**Parker, L J in Wilson v Tyneside Window Cleaning Co. (1958) 2 QB 110 where he said**

> *"…it is no doubt convenient, when one is dealing with any particular case to divide that duty into a number of categories; but for myself I prefer to consider the master's duty as one which is applicable in all circumstances, namely, to take reasonable care for the safety of his men"*

[16] Where the employee does work in an area or field where there is a risk to his health because of a known predisposition, the courts have held that the defendant was liable for failing to remove the claimant from the work in question or dismissing him. **(Withers v Perry Chain Co. Ltd [1961] 1WLR 1314)**

[17] However it seems that in order to fall into the boundaries of the **"Withers**" principle it depended on the actual nature and extent of the known risk and whether it was "small", "slight" or there was just "some risk" thereby obliging the employer to prevent a willing employee from doing the job in question.

(Coxall v Goodyear Great Britain Ltd [2002] EWCA 1010)

For the claimant to succeed on this limb of the arguments he must show inter alia that the Employer did not live up to the obligations as required by the law.

BREACH OF CONTRACT

[18] The claimant has said that the defendant has breached the contract of service they had, as there was an express or implied term that all reasonable care would be taken in the carrying out of its operations, so as not to injure him or not to subject him to any reasonably foreseeable risk of injury. Based on the aforementioned claim, the defendant has exposed him to the injury sustained and this has caused him loss and damage.

[19] For the claimant to succeed on this limb of the argument he must show that the defendant/ employer did not live up to his duty and did not provide a safe working environment in general and that it was this deficit that caused his injury and loss. The claim in Breach of contract is bound up with the allegations of negligence and is sustainable only in that context.

THE OCCUPIERS LIABILTY ACT

[20] The claimant also says that the defendant is liable for breaching its duties under this Act since while he was on the defendant's premises he was exposed to the noxious fumes and dangerous chemicals; so that his condition must be directly related to the way the defendant kept and maintained his premises.

The Occupier's Liability Act outlines the duty

> *Section 3 (1)*
>
> *An occupier of premises owes the same duty (in this Act referred to as the "common duty of care") to all visitors, except in so far as he is free to and does restrict, modify or exclude his duty to any visitor by agreement or otherwise.*
>
> *(2)*
>
> *The common duty of care is to take such care as in all circumstances of the case is reasonable to see that the visitor will be reasonably safe in*

using the premises for the purposes for which he is invited or permitted by the occupier to be there.

(3)

The circumstances relevant for the present purpose include the degree of care and the want of care, which would ordinarily be looked for in such a visitor and so , in proper cases and without prejudice to the generality of the foregoing-;

a)…

b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances.

(5)…

Section 6

(1)

Where persons enter or use or bring or send goods to any premises in exercise of any right conferred by a contract with a person occupying or having control of the premises, the duty he owes them in respect of dangers due to the state of the premises or to things done or omitted to be done on them, in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right, shall be the common duty of care.

Again in **Wheat v E Lacon & Co ltd [1966] A. C. Denning, L.J said-:**

"…wherever a person has a sufficient degree of control over premises that he ought to realize that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an 'occupier' and the person coming lawfully there is his 'visitor' and the occupier is under a duty to his visitor to use reasonable care."

[21] Our Court of Appeal has said that the principle of the 'common duty of care' has to be looked at and applied in context and in **Wayne Ann Holdings Limited (T/A SuperPlus Food Stores v Sandra Morgan [2011] JMCA Civ 44** Harris J. A. interpreting Section 3(3) said the occupier is not in breach of his duty to the

visitor if the hazard complained of was incidental to the job, and arose inevitably along with a system appropriate to deal with its occurrence.

The duty must also be viewed by the known or reasonably foreseeable characteristics of the individual employee.

[22] THE ISSUES

1. Is the claimant asthmatic
2. And if so when did the defendant know?
3. Did the defendant's place and system of work cause, contribute to or exacerbate the Claimant's medical condition
4. Did the defendant owe a duty of care to the claimant, and if so whether that duty was breached resulting in harm that was foreseeable.
5. Did the defendant company provide a safe system of work, adequate plant and equipment as well as a safe environment which was reasonably safe for the purpose for which the claimant was there? If not
6. Is the claimant entitled to damages and if so in what amount?

ANALYSIS AND DISCUSSION

[23] The evidence was assisted by several photo boards of various sections of the production floor (which were agreed), these assisted during the taking of the evidence in positioning the court along the various sections of the plant as the evidence unfolded, and as mentioned before the court eventually made its way to the defendant's premises to view firsthand the process as described. Fact finders may visit the locus in quo in order to understand the evidence and the judge and jury may inspect it as part of court proceedings.

1. IS THE CLAIMANT ASTHMATIC

[24] The defendant has not accepted or agreed that the claimant is suffering from asthma. In its detailed submissions the defendants says that one of the factual issues in dispute is whether the claimant has been conclusively diagnosed with

the illness. The court will then, from the outset be obliged to make a finding on the issue based on the evidence.

[25] A number of medical reports were provided from different doctors. Here I refer to documents contained in the Agreed bundle submitted by the parties.

i) Dr. Winston Stewart has said that the claimant had "acute wheezing bronchitis with possibility of development of bronchial asthma" (June 30th,2010)

ii) Dr. Paul Scott, a pulmonologist who examined the claimant says "Mr. Orlando Adams is assessed at this time as likely case of bronchial asthma. The diagnosis is based on the symptoms and the reproduction of chest tightness on methacholine challenge test."(January 23rd,2011)

iii) Dr. Horace Fisher says of the claimant, "based on the information available to me from Mr. Adam's medical and family history, the contents of the report from his doctor and my clinical findings, it appears that he has developed an asthmatic like respiratory problem…"(March 11th,2013)

iv) Dr. Mikeal Tulloch-Reid who had occasion to review all the previous reports says, "It is my opinion that: the physical findings as determined by the three independent medical practitioners at different times are consistent with bronchial asthma."

[26] Dr. Mikeal Tulloch-Reid was the first witness called by the defence and this was in the context of their prior application to treat him as an expert and to have his reports treated with in that regard. Under cross examination he said it was correct that the claimant was diagnosed with asthma. There is therefore no doubt in my mind that the claimant is asthmatic.

2. WHEN DID THE DEFENDANT KNOW OF THE CLAIMANT'S MEDICAL ISSUES?

[27] The claimant's undisputed evidence is that once he realized he was getting sick frequently and having trouble breathing, he told the packaging manager, Mr. Carl Phillips and requested to be moved to another area. Mr. Phillips directed him to a Hector Stephens to whom he also spoke and he advised of his difficulty breathing. He saw Dr. Winston Stewart, of his own volition, on the 19th and 24th

March, 2006, who gave him medication and advised him to take sick days from work. He never had a problem with asthma before and did not know of a family history which included it, even though it is unclear if his mother and son had ever been diagnosed as such.

[28] Upon his return to work on the on 27th March, 2006, he was still experiencing persistent wheezing and coughing and was directed by the defendant to the company doctor, Dr. Horace Fisher who examined him, gave him medication and further sick leave. He then returned to work feeling better on 3rd April, 2006.

Dr. Fisher's notes and record of the visit is instructive. (Page 175 of agreed bundle)

> *"Seen on 27/03/06-back to work assessment. Developed acute bronchitis after exposure to caustic fumes. Was treated. Still has a cough and wheezing .On examination then-rhonchi both lung fields .Unfit to return to work, for reassessment on 30/3/06.Say still had a wheeze then, feels well now, no cough or wheeze. On examination chest clear. Back to work today.* ***To avoid exposure to caustic fumes must wear the appropriate respirator if cannot be avoided."*** *(Emphasis mine)*

So that Dr. Horace Fisher, the company's Occupational health Physician had identified a possible diagnosis and a cause or irritant at that time in March of 2006 and it was the company doctor who suggested that he should use a respirator in the carrying out of his duties.

3. Did the defendant's place and system of work cause, contribute to or exacerbate the Claimant's medical condition?

[29] The claimant has a duty to prove on a balance of probabilities that his asthma was caused by the negligence of the defendant or that there was a breach of duty under the Employer's liability act and/or the Occupier's liability Act.

At page 84 of the agreed bundle of documents, paragraph 6, Dr. Tulloch Reid the court's expert witness says "I concur with the statement that based on the timing of the original symptoms and the report that he felt better during the days he was away from work, this would be consistent with asthma brought on by or exacerbated by the work environment."

[30] In cross examination Dr. Mikeal Tulloch Reid said, “We are certain he has asthma, the type of asthma indicates that there is some evidence it is work related. That means symptoms have been exacerbated or contributed to by the conditions under which he worked.”

Lord Griffiths in **Ng Chung Pui and Ng Wang King v Lee Chuen and another** Privy Council appeal No.1/1988 said

> *“The burden of proving negligence rests throughout the case on the plaintiff. Where the plaintiff has suffered injuries as a result of an incident which ought not to have happened if the defendant had taken due care, it will often be possible for the plaintiff to discharge the burden of proof by inviting the court to draw the inference that on a balance of probabilities the defendant must have failed to exercise due care, even though the plaintiff does not know in what particular respects the failure occurred.*
>
> *… it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established.”*

[31] I adopt this statement of the law in my analysis of the case at bar, and find it particularly useful in this context since the claimant is not able to identify any one particular incident of exposure but a set of circumstances which would lend themselves to various inferences which the court feels is reasonable to draw in the current circumstances.

[32] The claimant first developed his symptoms while working on the bottle washer which was evident from the evidence and buttressed by his complaints, the medical reports and the fact that the doctor saw fit to suggest that he should wear a respirator at work. When he was moved to the Depalletizer, his asthmatic condition improved. He was later moved to the Bottle filler machine which (on the evidence) was located in the same general area of the bottle washer and which had been identified as a possible cause or trigger for the claimant’s asthma.

[33] I accept as truthful the evidence of the claimant that certain “automatic” systems were not working as they should while he was there which resulted in him having to perform some tasks manually thereby exposing him to the circumstances

which precipitated his diagnosis of Asthma. In addition I accept that the evidence of Dr. Tulloch Reid that " The defendant moving the claimant to an area further away from the washer machine would have reduced the risk of harm. Further, if he was moved back or close to the environment such a move would increase his risk of exacerbating his conditions assuming the environment remains the same.

I therefore find that the defendant's place and system of work caused and/or contributed to the claimant's medical diagnosis of Bronchial asthma.

4. DID THE DEFENDANT OWE A DUTY OF CARE TO THE CLAIMANT, AND IF SO WHETHER THAT DUTY WAS BREACHED RESULTING IN HARM THAT WAS FORESEEABLE

[34] Harris J.A in **Glenford Anderson v George Welch [2012] JMSC Civ.43** at para 26 outlines the relevant principle in these terms:

> *"It is well established by the authorities that in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to a claimant by a defendant, that the defendant acted in breach of that duty and that the damage sustained by the claimant was caused by the breach of that duty. It is also well settled that where a claimant alleges that he or she suffered damage resulting from an object or thing under the defendant's care or control, a burden of proof is cast on him or her to prove his case on the balance of probabilities."*

[35] The courts have also said that the duty of care owed to an employee must be measured by the known or reasonably foreseeable characteristics of the individual employee. (See the decision of the English House of Lords in **Paris v Stephney Borough Council (1951) AC 367), where** the court said that Employers have a duty to take reasonable care for worker safety with particular regard to each of their employees' circumstances.

[36] In Paris **v Stephney** the claimant only had sight in one eye due to an injury sustained in the war. During the course of his employment as a garage hand, a

splinter of metal went into his sighted eye causing him to become completely blind. The employer did not provide safety goggles to workers engaged in the type of work the claimant was undertaking. The defendant argued there was no breach of duty as they did not provide goggles to workers with vision in both eyes and it was not standard practice to do so. There was therefore no obligation to provide the claimant with goggles.

[37] It was held that there was a breach of duty. The employer should have provided goggles to the claimant because the seriousness of harm to him would have been greater than that experienced by workers with sight in both eyes. The duty is owed to the particular claimant not to a class of persons of reasonable workers. At the trial the court held that the standard of care required in the duty to the worker was breached because of Paris' specific circumstances (having one eye). There is no duty to provide goggles for two-eyed workers, but there should be a duty to provide them to one-eyed worker. The employer must weigh the risk of injury and the extent of the damage in deciding what a reasonable employer would do.

[38] It can be seen from the evidence in the case at bar that Dr. Horace Fisher the defendant’s occupational health and safety doctor had identified that the claimant had at the very least a breathing issue and at best asthma either from a predisposition or whether developed from his exposure to caustic and other chemicals at the defendant’s premises.

[39] This then created a duty on the defendant to provide the relevant safety apparatus, environment and instructions to the claimant based on his identified idiosyncrasy and the foreseeability of the situation progressing to a point of becoming a chronic illness. The test of foreseeability is relevant to the employer’s duty of care. In fact the company doctor, Dr. Fisher suggested that the claimant should wear a respirator from his initial examination in 2006.

5. DID THE DEFENDANT COMPANY PROVIDE A SAFE SYSTEM OF WORK, ADEQUATE PLANT AND EQUIPMENT AS WELL AS A SAFE ENVIRONMENT WHICH WAS REASONABLY SAFE FOR THE PURPOSE FOR WHICH THE CLAIMANT WAS THERE?

[40] The answer to this must be seen in light of the duty owed by the defendant to this claimant. When the defendant became aware of the breathing difficulties along with the recurrent coughing and wheezing that the claimant was having, they were obliged to take steps to address his situation in the context of his duties, his issues and the system of work that existed.

[41] The evidence is contradictory as to whether the defendant provided the claimant with a respirator. The defendant in its documents (Karl Phillips) and oral evidence (Sheldon Sharpe) on the one hand says that the claimant was provided with a mask .This is a far cry from a respirator and at times the defendant's evidence was confusing on this issue as the terms were seemingly used interchangeably.

[42] The defendant had a duty, once the recommendation of the use of the respirator was made, to ensure it was provided and supervise and enforce the claimant's use of it and as Lord Greene said in **Speed v Thomas Swift and Co. Ltd [1943] KB 557**

> *"The duty to supervise workmen includes a duty to take steps to ensure that any necessary item of safety equipment is used by them. In devising a system of work, an employer must take into account the fact that workmen are often careless as to their own safety. Thus in addition to supervising the workmen, the employer should organize a system which reduces the risk of injury from the workmen foreseeable carelessness." (Paragraphs 13-14)*

[43] In light of the foregoing discussion and analysis my finding is the claimant has satisfied the court on a balance of probabilities that the defendant breached its duty at common law as well as the duty owed under the Employers liability Act.

[44] I am also of the view that the defendant did not discharge its duty under the Occupiers liability Act. I refer specifically to Section 3(2) which speaks of an

obligation to "…take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

[45] This duty also applies to the claimant, who was an employee and who entered the employer's premises lawfully under a contract of employment.

6. IS THE CLAIMANT ENTITLED TO DAMAGES AND IF SO IN WHAT AMOUNT?

I therefore find that the claimant is entitled to recover damages for the defendant's negligence and breach. Judgment will therefore be entered for the claimant.

I will now go on to assess and determine the quantum of damages to which he is entitled.

i) General damages

PAIN AND SUFFERING AND LOSS OF AMENITIES

[46] The general principle for assessment of an award under this head is that this is done in accordance with previous decisions of similar types of injuries. In addition I adopt the guidelines for this procedure which were laid down in the cases of **Corneliac v St. Louis (1965) 7 WIR 491** and where the court takes into account:

a) The nature and extent of the injuries sustained
b) The nature and gravity of the resulting physical disability
c) The pain and suffering which had to be endured
d) The loss of amenities suffered
e) The extent to which, consequentially, the plaintiff's pecuniary prospects have been materially affected.

[47] Similarly I am mindful of "the fact that the court is not compensating an abstract claimant but the one before the court…This is not to say that compensating the particular claimant means that the court ignores similar awards." **Icilda Osbourne v George Barnes 2005 HCV 294 .**The main principle here is that

there are both objective and subjective issues to take into account. The objective has to do with the actual physical injury and its effects, while the subjective portion relates to the claimant's awareness and knowledge that he will live with asthma for his lifetime and the anticipated accommodation which must be made.

[48] Based on the medical reports in the Agreed bundle of documents the claimant's injuries may be cited as follows:-

PARTICULARS OF INJURY
Chest tightening

Coughing

Wheezing

Decrease air entry on right lung

Acute bronchitis secondary to inhalation of irritant fumes

Acute wheezing bronchitis with possible development of Asthma

- Dr Mikeal Tulloch Reid in his report concludes (at page 53 agreed bundle) "T*he finding of wheezing on physical examination by three independent medical practitioners at different times is strongly suggestive of bronchial asthma"*

[49] The claimant's attorneys have submitted that his injuries most closely relate to those of the claimant in **Allan Leith v Jamaica Citrus Growers Limited (2009) HCV 00664.** Some of Mr. Leith's injuries are similar to Mr. Adams' although I would agree with the defendant's attorney that Mr. Leith's injuries were more severe. In that case he sustained injuries at work when chlorine escaped from a tank that he was attempting to close, and doused him in the face. His injuries were:-

Shortness of breath

Wheezing

Onset of diabetes

Life threatening lung inflammation

[50] In fact Leith required hospitalization and had at least one episode where he passed out. Adams was never hospitalized or lost consciousness at any time. Neither did he have any issue with diabetes.

[51] The defendants suggest that the case of **Joyce Robson v Grampian Country Chickens (Rearing) Limited [2008] CSOH 100** is more akin to the case at bar in terms of the injuries and damages related to occupational asthma. This case originated in Scotland, and the facts are as follows:-

Between March 1999 and April 2004 the claimant was employed by the defendants at their premises in Inverurie. In this action the claimant sought damages for personal injuries which she said she suffered as a result of being exposed to formaldehyde and other chemicals during her work in the chicken hatching unit of the defendant's company. She claimed that as a result of the defendant's failures in duty, she contracted occupational asthma and sought damages of £100,000. At trial, liability was admitted and the only issue was restricted to quantum of damages. Her injuries were:-

- *Pain in her chest*
- *Chronic Asthma causing breathing difficulties on exposure to a wide range of triggers* such as fumes and smells, smoke, cold weather and sufficiently demanding exercise
- Rendered incapable of carrying out physically demanding work
- The need to use a preventative steroid inhaler on a daily basis
- Mrs. Robson will in all likelihood require the use of an inhaler for the rest of her life.

She was awarded 17,500 Pounds for pain and suffering, in 2008 which updates to some J$3,156,125 using the current exchange rate to the Jamaican dollar of 160.67

[52] I regard this case as very persuasive authority and agree that this case more closely resembles the circumstances of the case at bar, even though it would

seem that the claimant there requires daily use of her inhaler unlike the claimant here .However I do not see it fit to consider this as significant a criteria to affect the award, because of the unpredictable nature of the malady and the fact that it depends on 'triggers' which are themselves situational and unpredictable.

[53] That award was made in July 2008; some eight years ago, so would need to be updated in keeping with a calculation relative to the CPI (Consumer Price Index) then and now. The CPI in Jamaica for July 2008 was 184 while the current one as at October 2016 is 234.80.Even though the award was made in another country, to which our Consumer Price index does not necessarily apply, I regard the award as a good and fair one in the circumstances, given for similar injuries, and so apparently does the defendant's attorney as this is the main thrust in their submissions. (See page 47 Defendant's written submission on Liability and damages.) .

THAT FIGURE UPDATED USING THE CURRENT CPI AMOUNTS TO $5,530,284.70.

[54] I reject wholeheartedly the bases of 'contingency' and 'Immediacy of payment' that the defendant puts forward as criteria for discounting the award. In the case of 'contingency', they have not explained the reasoning behind it and in the case of 'immediacy of payment' if I am to understand this to mean that the defendant is prepared to pay as soon as the award is made, then it need not be considered since all judgments are due for payment when ordered, and are usually subject to interest if there is delay.

I therefore order that amount of **$5,530,284.70** to be paid as compensation for pain and suffering and Loss of amenities.

HANDICAP ON THE LABOUR MARKET/LOSS OF EARNING CAPACITY

[55] The concept of diminished earning capacity recognizes that every individual, given his mental and physical abilities, has an inherent and/or acquired ability to

earn money, i.e., the person has a certain “economic horizon”. When that person is injured and suffers a loss of those mental or physical capabilities, there is a corresponding decrease in his ability to earn income. That, in essence, is the claim for lost earning capacity or handicap on the labour market.

[56] An award under this heading is generally made in the case where, at the time of trial, the claimant is in employment and has suffered no loss of earnings, but there is a risk that he may lose that employment at some time in the future, and may then, as a result of his injury, be at a disadvantage in getting another job or any equally well-paid job. **Moeliker v A Reyrolle Co. Ltd [1977]1 WLR 132.**

[57] The starting point in the proof of any diminished earning capacity claim is the existence of a “qualifying injury”. In order to be worthy of a charge on diminished earning capacity, the injury must be a permanent one.

No clear definition of the term “permanent” is recited in any of the reported cases; rather, one must fashion a definition be inference from the particular injuries which have been deemed sufficient to support the charge.

[58] The cases suggest the following general rule: an injury is “permanent” when it involves some constant, visible loss, or where it will likely produce persistent symptoms (though perhaps not constantly so) into the future. In the latter instance there must apparently be medical evidence to establish the likelihood of future symptoms. So, even the classic soft tissue injury may support a charge on diminished earning capacity if competent evidence established that the injury has not resolved itself and that a regular pattern of symptoms may occur in the future.

[59] In addition to being “permanent” in nature, a claimant seeking to establish a diminished earning capacity claim must prove that the permanent injury has some effect on employment prospects.

[60] A review of the relevant cases indicates that expert medical testimony will generally be required except where an injury akin to loss of a limb is involved. In

any of the cases involving less “obvious” injuries (i.e., bone fractures, soft tissue injuries, etc.), a physician invariably testified that symptoms would persist into the future. This distinction between obvious and non-obvious injuries is understandable.

[61] By their very nature, obvious injuries such as loss of a limb are perpetual and their permanence is easily comprehended by a lay person or a court. On the other hand, a typical court would not normally know what, if any, symptoms of a soft tissue injury will persist in the future. Hence, in most cases expert medical testimony will be necessary on the “permanence” element.

[62] Evidence that permanent injury has been sustained is not equivalent to evidence that future earning capacity has been impaired. There must be some evidence from which a court can reasonably infer that earning power will probably be reduced or limited in the future.

[63] The claimant’s attorney has asked for a global figure of $1.5m under this heading. On the strength of the evidence, the claimant continued to work for the defendant until he was made redundant and would have continued carrying out his tasks had he not been terminated. He is now employed as the manager of Orlando’s Ultimate Auto Body and Repair Services. No evidence has been led as to a diminution in his earnings or his earning capacity.

There is therefore no evidence that he suffers a handicap on the labour market and so no basis for an award under this heading.

FUTURE MEDICAL EXPENSES

[64] Future medical expenses are reasonable and necessary health care expenses required for the treatment of injuries sustained as a result of the negligent act at issue. To recover future medical expenses, the claimant must show a “reasonable probability” his injuries will require him to incur medical expenses in the future. The claimant may recover future medical expenses if he shows the

existence of an injury, that medical care was rendered for the treatment of that injury prior to the time of trial, the cost of that past medical care, and that he is still injured to some degree at the time of trial. At a bare minimum, the claimant must show the reasonable value of his past medical treatment and the probable necessity of future medical treatment. **AG v Tanya Clarke Supreme Court Appeal No.109/2002**

[65] The claimant says that he requires the use of a Ventolin Pump which he uses once weekly and whenever there is the need for it. Most importantly though is the fact that he gave evidence that his symptoms are decreasing with time. Even though it is recognized that the condition is a chronic one, none of the medical evidence has assisted the court with a timeline for the use of medication or the type required for the future.

[66] What is gleaned is that he now uses the pump but its use is becoming less and seemingly subject to the presence of certain "triggers." The court is prepared to accept that his use of the pump or at least some medication is necessary for alleviation of his symptoms. I therefore accept that a valid claim is made for future medical expenses.

[67] The claimant has asked for the multiplicand amount of $9,600.00 to be subject to a multiplier of 10. The court however, is of the view that a multiplier of 5 is more appropriate, based on the expenses anticipated and the age of the claimant as well as the anticipated decrease in the use of the medication, as the claimant is outside of the hazardous environment which is a major trigger for his occupational asthma. There is need for an award under this headlining and I therefore make an order for an amount of $48,000 for future medical expenses.

[68] This is accepted as a reasonable award under this heading and I therefore make the order in keeping with that request for an award of $48,000.00 for future medical expenses.

ii) Special Damages

Special damages are compensatory and are designed to return persons to the position they were in prior to the injury and based on measurable dollar amounts of actual loss. They are normally reduced to a "sum certain" at the trial. (**Barbara Mc Namee v Kasnet Online Communications RM Civil Appeal No.15 of 2008)**

These are the sums proved according to the receipts submitted and contained in the bundle of agreed documents.

Angel Health Care (visit and medication)	$3,600.00
Amadeo Medical (visits)	$6,100.00
Dr. Paul Scott (visits)	$5,200.00
Dr. Paul Scott (Medical report)	$20,000.00
Kingston Radiology (K.R.I.S)	$600.00
Prescriptions	$5400.00
Total	$40,900.00

The final awards are therefore as follows;

General damages	**$5,530,284.70**
Future Medical expenses	**$48,000.00**
Special Damages	**$40,900.00**
Total	**$5,619,184.70**