IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM No. 2007 HCV 01697

BETWEEN	**RONALD EDWARDS**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL**	**DEFENDANT**

Mr. David Henry and Ms. Winsome Marsh instructed by Mrs. Winsome Marsh for Claimant.

Ms. Lisa White instructed by the Director of State Proceedings for the Defendant.

Employer/employee relationship – Accident on job - System of work – whether safe – Is employer totally to blame – Is employee totally or partially to blame – Damages – Quantum – Pleadings – Evidence – Medical evidence – Nexus between injuries and medical reports.

Written submissions filed.

Written Judgment delivered on 22nd December, 2010

Heard: 1st March, 2010 and 22nd December, 2010

Coram: Morrison, J.

I go on record in publicly acknowledging the lateness of my written judgment, even as I bemoan the late receipt of the written submissions, submissions I am confident were filed in the Civil Registry in keeping with the Civil Procedure Rules. Nevertheless, attorneys-at-law are encouraged to

follow up on their matters to ensure that their submissions are put before the Judges in good time.

Pleadings

From the Claim Form dated April 23, 2007 Ronald Edwards, pump operator of Springfield District, Guys Hill P.O., St. Catherine, the Claimant asserts that the defendant is under an obligation to him in that the Defendant breached its contract of employment with him or was negligent in discharging its duty towards him while he was on the job.

The Claimant's amended particulars of the events of 25th April 2001 is dated 23rd April, 2007 though filed on September 18, 2009. It adumbrates the particulars of the Crown's negligence and/or breach of contract, the particulars of negligence of the driver of the motor truck, particulars of the Claimant's injuries and the particulars of special damages.

Particulars of the Crown's' Negligence And/Or Breach Of Contract

In gradation, the Claimant avers that the defendant failed to:-

a. provide the Claimant with a safe system of work or a safe place to work;

b. take any or any proper steps to ensure the safety of the Claimant whilst he the Claimant was on the job;

c. provide any or any proper adequate equipment or tools for the Claimant so that he could safely perform his job;

d. provide any or any proper supervision; and

e. take any or any sufficient steps to ensure the Claimant's safety whilst working on top of the said motor truck.

Particulars of Negligence of Driver of the motor truck

With economy of itemization the Claimant propounds that the Defendant's driver:

a. drove at an excessive speed and/or improper speed;

b. failed to keep any or any proper look-out or to have due regard for the Claimant's safety;

c. failed to give the Claimant any or any sufficient warning of his intention to operate the said water truck at a time when and in a manner in which it was manifestly unsafe to do so;

d. failed to exercise any or any proper judgment;

e. failed to do what was necessary to have avoided the accident.

Particulars of injuries to Claimant

Resulting from his fall the Claimant alleges that he suffered from moderate pain in the neck; severe lower back pain; pain in the testicle; possible lumbar-spine fracture; fractures to tip of transverse process of L3 and L4 both on the left and 5% whole person disability of the whole person. As to his confirmed injuries the Claimant reposed on the expert medical reports of Dr. S. Nesbeth dated 30th April, 2002 and 31st December, 2006; by Dr. G. Dundas dated 17th November, 2003 and Dr. A. Campbell dated 29th August, 2006.

As to the special damages claim $68,650.00 was attributed to medical treatment and $16,000.00 was claimed in respect of transportation costs from

Springfield, St. Catherine to Spanish Town, Linstead and to Kingston. Under this head his total claim is $85,150.00.

The Defence

In the round, the Defendant deflects the material contentions of the Claimant as to the crown's negligence and/or breach of contract. They trenchantly assert that their driver, Mr. Everton Wellington, was not negligent at all in respect of the allegations of negligence mounted against him by the Claimant. In counter point, they proclaim that the Claimant was wholly or partially to blame for any injury or injuries he may have received and the Claimant was enjoined in proof thereof.

In repudiating the Claimant's negligence claim and in affirmation of the Claimant's self-injurious disposition on the material day the Defendant proferred the following in respect of the Claimant, thus:-

a. remaining on top of the truck as the driver positioned the motor truck to fill the tank compartment;

b. failing to take any or any adequate measures for his own protection to prevent himself from falling from the motor truck;

c. (i) failing to use the ladder on the motor truck as the driver positioned the motor truck to fill the tank compartment; or in the alternative;

(ii) positioning himself on the Catwalk of the motor truck as the driver positioned the motor truck to fill the truck compartment.

d. failing to remove himself altogether from the truck to give directions as the driver positioned the motor truck to fill the tank compartment;

e. failing to alert the driver to stop moving the truck in sufficient time before he slipped to leave the truck;

f. failing to communicate effectively and frequently with the driver or at all as the driver positioned the motor truck to fill the truck compartment;

g. failing to properly guide and assist the driver to position the truck properly at the loading bay;

h. failing to keep a proper look out;

i. being careless for his own safety;

j. standing on the truck but not on the catwalk as the driver positioned the Motor Truck to fill the tank compartment;

k. improperly positioning himself, losing his balance and slipping from the Motor Truck while the driver positioned the Motor Truck to fill the tank compartment; or in the alternative

l. removing himself from the Motor Truck when it was unsafe for him to do so;

m. failing to take any or any adequate precaution as to his own safety while on top of the truck; and

n. Failing to secure himself or hold on while the truck was moving.

From the foregoing and the ensuing traverse the Defendant either denied or did not admit the allegations. The Defendant resolved to put the Claimant to proof in the entirety of his claim.

Submissions by Claimant and Defendant

Analysis of the Evidence

The evidence in this case arises from two sources, one each from the parties at bar. The Claimant gave evidence on his behalf whereas for the

defendant it was Mr. Everton Wellington, driver at the material time of the Rapid Response Truck of the Ministry of Water and Housing.

As regards the system of work in its theoretical and practical aspects, the evidence of the Claimant is preferred to that of Mr. Wellington on two bases. Firstly, Mr. Edwards in his own testimony, said that "we have to protect ourselves. We are trained to stoop down. One cannot, stand up on top of truck for overhead pipes." By the use of the word "we" Mr. Edwards has in mind pump operators like himself.

In contrast, Mr. Wellington says that he received training as a driver for the unit and did not directly receive training as a pump operator.

Secondly, it was Mr. Edwards' duty to see to it that the water truck was properly aligned with the overhead pipes. To meet that stated objective he had to climb atop the water truck and had to assume a crouching position on the catwalk while balancing himself with his hands to his sides or on his knees to minimize or avert himself from falling therefrom. Whereas, *ex concesso,* Mr. Wellington was only able to speak in general terms of there being a training centre and, without descending to particulars at that, was categorically forthcoming in saying 'I did not prescribe how Mr. Edwards should operate in the truck. This was based on his training and for his own safety."

In fact, though Mr. Wellington was quick to point out that he had been on top of the truck on several occasions he did not speak to doing so when the

truck was in motion. Therefore, his opinion that, "one could hold on to the catwalk though it didn't have rails on it", has to be viewed with askance.

Notwithstanding, he gives limited support to Mr. Edwards that, "you would have to be in a crouching position to do so to ensure your safety." In that they are not athwart.

This is how the process works.

The Rapid Response Unit, as part of its remit, had the responsibility to collect and deliver water to various locations in the parishes of St. Mary, St. Ann, Kingston and St. Andrew, Portland and St. Catherine. The mode of transport is a water truck comprised of a cylindrical tank that forms the body of the truck as distinct from its cab. This tank has atop it two compartments affixed with hinged lids which permit their manual opening and shutting by a pump operator. Also on top of this tank is a catwalk made of sheeted iron about 1 – 1½ thick that runs along its length. The surface of the catwalk is serrated to prevent slipping or sliding by the pump operator whenever he has to walk on it. There are no handrails atop the tank. In order to get water into the tank the water truck goes to a designated area called a waterbay. Enroute to the bay it is the pump operator's duty to so guide and direct the truck driver so as to ensure that a proper alignment takes place with the truck compartments and the overhead pipes from which the water issues into each compartment. Each compartment is filled separately. Thus, this manoeuvre

requires the movement of the truck, whether forward or backward depending on the desired alignment by the pump operator.

It is while the truck is in motion or while it is moving either way that the pump operator perches himself on the catwalk in a crouching position to effectively guide the positioning of the truck.

A ladder is to the back of the truck which is used to gain access to the catwalk. The height of the truck from the ground to tank top is about 17 feet. The overhead pipes are about another 2 ½ feet from the top of the truck.

Once the positioning of the truck is deemed acceptable by the pump operator he then communicates with the truck driver who obeys his instructions.

On the unthreatingly inauspicious day of April 24, 2001, Messrs. Edwards and Wellington were deployed as a two man team to collect and deliver water. Being the pump operator Mr. Edwards went on top of the truck to guide the driver under the water pipe. He was in a crouched position. The truck misaligned. That being so Mr. Edwards issued instructions to Mr. Wellington in obedience to which the truck moved off and in the process imbalanced Mr. Edwards who valiantly strove to avoid his imminent fall by holding onto the overhead pipes. Being a portly man of over 200 lb weight and 6" tall and, owing to the slippery surface of the pipe, both factors combined to unavail him of further assistance and in order to avert his "headway downward" movement he fell heavily on his feet. He jerked his

back on falling to the ground. He felt pain over the next of day or two culminating in a series of visits to the doctors.

The Medical Reports

There are (3) reports that are relevant to the case at hand: one from Dr. Grantel Dundas, FRCS, Consultant Orthopaedic Surgeon of Orthopaedic Associates dated November 17, 2003; another from Dr. Audley S. Campbell, MBBS, (UWI) dated August 29, 2006 and finally one from Dr. Sandra Nesbeth, MBBS, dated 31st December, 2006.

It is within the framework of the above reports that the defendant's submission is to be viewed to wit: "there is no medical evidence before the Court to establish a nexus between the events of April 25, 2001 and the old fractures .... in the context where Dr. Nesbeth had diagnosed Ronald Edwards in June 2001 as having severe pain....."

Of the trilogy of doctors reports the Campbell report speaks to seeing the Claimant on 26th April, 2002, "at which time he reported sustaining lower back injury as a result of falling from a Rapid Response Water Delivery Truck in the same month of 2002." Clearly, the reference to the injury in the report as occurring in April 2002 is an error.

It suffices to repeat the diagnosis therein contained: ".... tenderness of the lumbar vertebral region of the back and of the erector spinal muscles of the back." Mr. Edwards at the time walked with a limp and was only able to move from sitting to standing position with great difficulty."

The doctor in dilating, diagnosed soft tissue injury of the lower back of Mr. Edwards for whom he recommended treatment with analgesics and skeletal muscle relaxants.

Notwithstanding, Mr. Edwards' other three visits to Dr. Campbell suggested a recurrence of the problem.

The doctor concluded by saying that although, "there is no obvious permanent disability there appears to be some spondylosis resulting from the injury causing recurrence of the spondylosis. An orthopaedic consultation was recommended to the patient."

Two months thereafter, Mr. Edwards had now gone to see Dr. Nesbeth to whom he complained of pain in the neck, lower back and testicles. In the result Dr. Nesbeth ordered x-rays to be done. Having been so done they revealed no bone fractures or spasm.

Apart from medication Dr. Nesbeth recommended back brace. The Claimant, she says, returned to work and as a result of work the back pain was aggravated this caused her to send him to Dr. Dundas along with the x-ray.

Dr. Dundas saw Mr. Edwards eleven months later. He diagnosed that there was possible lumbar spine fracture. From Radiographs that were done the following were revealed: ".... he had old fractures of the tip of the transverse process of L3 on the left. There were degenerative changes from T10/11, T11/12, T12/L1.... The Radiographs suggested that there may have been an

old wedge fracture of L1 but further studies would have been required... to confirm this..."

In the end Dr. Dundas, using the American Medical Association Guide for the Evaluation of Permanent Impairment, accorded to Mr. Edwards an impairment rating of 5% of the whole person.

It is clear to me that, at the very minimum, having seen both Dr. Campbell and Dr. Nesbeth that Mr. Edwards suffered from "severe lower back pain at L2-L5." Then follows, in parenthesis, from Dr. Nesbeth, the nebulous, if not, cryptic, "L2 and L5, after this select quote.

I have to observe that no elucidation was sought from Dr. Nesbeth as to what she meant by the designations of 'L2-L5' and 'L2 and L5' in the context of spondylosis, which is, a condition affecting slipped vertebra. Significantly too, no elucidation is forthcoming from Dr. Dundas' speculative reports of "old fractures" and "old wedge fractures of L1 ..." I ask myself, is there a correlation between L1 and 'L2-L5' or indeed 'L2 and L5'?

Also, there is a perplexing and unexplained differential between the reports of Dr. Nesbeth and Dr. Dundas. Whereas Dr. Nesbeth speaks to L2 – L5, Dr. Dundas speaks to the transverse process of L3 on the left and also L4 on the left as being old fractures to their tips. He then elaborates about degenerative changes from T10/11, T11/12, T12/L1.

The question to be answered in the light of these revelations is: is there a connection between the designations L2-L5, as used by Dr. Nesbeth, and the designation of T10/11, T11/12, T12/L1 as used by Dr. Dundas?

It seems to me that for the Claimant to succeed he must demonstrate to this Court that the Dundas report in relation to its referenced points are in concord with that of Dr. Nesbeth. Is it the case that in between the time of Mr. Edwards seeing Dr. Nesbeth at first and then seeing Dr. Dundas that the injuries had became old? Is there a causal connection, given the time interval, between both doctors reports where one is referencing 'L2-L5' or 'L2 and L5' and the other saying that there were fractures to L1, L2, L3 and degenerative changes from T10/11, T11/12, T12/L1?

It will do well to remember also what Mr. Edwards had to say in cross-examination. "Dr. Dundas told me that there is no correction for my condition." This is entirely unsupported by the Dundas report. Also, the Claimant in cross-examination in relation to the time span of 30th January 2002 and July 31, 2007 said that "I have been seeing doctors every year since I got this injury," is without any documentary support. I therefore lean in favour of the Defendants submissions that there is no nexus between the old fracture and the fall and that there is no relation between the degenerative changes and the fall. The medical evidence as tendered is insufficient to establish such connections, if there were, indeed, any.

Submissions by the Claimant

The Claimant has urged the court to accept the factuality of his contention and in so doing has asked this court to find in law that the Defendant had a duty of care in respect of the Claimant. They have invited this court to say that there was a breach of this duty of care which resulted in damage to the Claimant. Also, they have asked this court to pronounce on the threshold question of whether the kind of harm to the Claimant was reasonably foreseeable by the Defendant.

Submissions by Defendant

In summary the Defendant contends, through their written submissions, that the Claimant knew, by dint of practice, that the catwalk was there to the held onto by him whilst he was atop the moving truck, in the crouching position, as he was wont to do. In this respect, the Defendant contends, that any deviation from this observed practice, as testified to by Mr. Wellington, must mean that the Claimant was either totally or partially to blame for his injuries as a result of his fall from the truck.

Further, they say, that the unvarnished witness statement, had it been allowed to stand in that state, suffered from deficits as it had failed to address with sufficiency, not only what had happened on the material day but also, what was the nature of his training for that particular job.

Further, that the Claimant has not indicated or intimated to the Court by way of evidence, anything to prove the allegations as pleaded.

At the same time, the Defendant urges, that the Claimant has failed to prove what would have amounted to a safe system of work and its entrained ramifications.

Lastly, the Defendant bemoans the unpersuasiveness of the injuries to the Claimant relative to his doctor's visits. *Ex abundante cautela*, the Defendant fulminates against aspects of the special damages claim as well as the general damages claim.

The Law

In order for the Claimant to fix liability on the Defendant it is necessary for three conditions to be fulfilled. There must exist a duty of care; there must be a failure to take care which can reasonably be expected in the particular circumstances and, there must ensue damage suffered as a result of that failure. All three elements must cohere. Additionally, forseeability of what might happen if care is not taken is a relevant issue in the circumstances of the case: **Chairman of the Governors of St. Thomas Becket RC High School v. Hatton** [2002] EWCA, Civ. 76.

In the referenced case four appeals were consolidated. They concerned stress induced psychiatric illness to the Claimants. The circuit court having found in favour of the Claimants against their employers in the contest of industrial accidents, the defendants were aggrieved.

In the course of a dissertation on the law the court made the poignant observations: "the existence of a duty of care can be taken for granted. All

employers have a duty to take reasonable care for the safety of their employees; to see that reasonable care is taken to provide them with a safe place of work, safe tools and equipment, and a safe system of working..."

The crucial question in the current imbroglio is:

"Was there a safe system of work?"

There is a duty that is put upon the employer in respect of his employee that a reasonable safe place of work is provided and maintained. The place of employment should be as safe as the exercise of reasonable care and skills permits; it is not enough for the employer to show that the danger was known and fully understood by the employee. In considering whether it is safe or not regard must be had as to its nature: **Newland v. Rye Arc [1971] 2 Lloyds Rep. 64.**

In this connection a safe system of work means the organization of the work, the procedure to be followed in carrying it out, the sequence of work, the taking of safety precautions and the stage at which they are to be taken by them, and the provision of any necessary supervision. **Speed v. Thomas Swift & Co. Ltd**. [1943] KB 557.

In point of fact, according to the **Becket** case, supra, "what is reasonable depends upon the forseeability of harm, the magnitude of the risk of that harm occuring, the gravity of the harm which may take place, the cost and practicability of preventing it, and the justification for running the risk."

In the context of the above summary of the law the Defendants submissions quoted hereunder has failed to scintillate. In her written submissions Miss White says, inter alia, that the Claimant has not said:

> "a. what would constitute a safe system of work for a safe place of work;
>
> b. what were the proper steps, if any, that ought to have been taken to ensure that the claimant was safe whilst on the job;
>
> c. what equipment or tools would be regarded as being proper or adequate for the Claimant so that he would safely perform his job in."

By the nub, pith and tenor of these submissions the Defendant has sought to impose a duty on the Claimant. Clearly, this position is counter-informed and is unsupported by authority. It is the reverse which is true.

It is the incontrovertible duty of the Defendant to have provided a safe system of work in view of the inherently dangerous nature of the job. Not one iota of evidence was led by the Defendant to show what system was in place to ensure the Claimants safety while on the job. Even so, the Defendant proceeded to invite speculation as to what the Claimant could have done in the circumstances. That, it seems to me, is a signal failure of responsibility on the part of the Defendant towards the Claimant. Thus, I hold on a balance of probabilities, that the question of negligence as posed has not been deflected by the Defendant.

Re: General Damages

The Claimants reliance on the cases of **Dawnette Walker v. Hensley Pink,** reported in Khans, Volume 5, p. 170 and **Dalton Barrett v. Poncianna Brown, Khans Volume 6** at pl 104 are unhelpful. **Milton Goldson v. Knockley Buckley,** unreported case, 2009 **HCV O1260** is more apposite. This updated award gives $880,000.00.

I resort to Dr. Dundas' words. Quoting from his report of November 17, 2003 he says, inter alia: "the diagnosis entertained was possible lumbar spine fracture..."; Mr. Edwards has not been seen or examined since that one visit. His current status is not known..." there was no scoliosis or focal tenderness...".

In spite of the above, Dr. Nesbeth was prepared to give a 5% evaluation of permanent impartment, "as it stood at examination", of the whole person.

Thus, I place reliance on the cases of **Anthony Gordon v. Chris Meikle and Esrick Nathan,** reported at Khan's supra, volume 5, page 142. In that case the Claimant suffered from pains in the lower back, left knee and left side of the chest, multiple bruises to the right hand and left calf; tenderness to left hip on movement. After being seen at the Mandeville Hospital he was discharged. However, he was seen by Dr. Rose years later who found that he had moderate tenderness of the midline of the whole of the lumbar spine. Also, that the x rays of the cervical spine, lumbosacral spine, chest and left

knee revealed no abnormalities. In this end Dr. Rose diagnosed, *inter alia*, lumbosacral strain.

He was awarded the sum of $220,000.00 on 7th July, 1998. Translated into the money of today, using the Consumer Price Index (CPI) of 155.9 in February 2010 and multiplied by the award of $220,000.00 it yields approximately $710,000.00. In agreeing with the Defendant I award the sum of $1,000,000.00 for general damages.

The **Walker** case, *supra,* and the **Barrett** case, *supra,* were rejected in view of their positive and conclusive findings as opposed to the uncertain and speculative findings of Dr. Dundas in the current case. At best, stripped of the undemonstrated and unconnected degenerative changes, bearing in mind that Dr. Dundas says that, "his lumbar spine was normal in contour", I deem the injuries to Mr. Edwards to be akin to those of **Gordon,** *supra.*

It is the law with respect to special damages that they be strictly proved. Thus, like the Defendant, I place no store on Exhibits 5, 6 and 7 for the reason that they bear no correlation to any of the medical report in respect of the dates on which the Claimant was seen by a medical doctor.

No documentary proof in the form of receipts were tendered in respect of payments to Dr. Nesbeth of $7,000.00, $3,000.00 or $600.00 for each visit to her. Indeed, none was forthcoming to show that he paid her the sum of $1,750.00 for her medical report. No receipt was tendered in respect of payment to Dr. Dundas for the sum of $10,000.00.

In the upshot then I award the sum of $52,000.00 for special damages.

As to the claim for an award for handicap on the labour market I find this to be unsustainable. It is not supported by any medical evidence or report. On this the law is clear.

In **Walker,** *supra,* on appeal, Harrison, P, (Ag.) as he then was, in respect of the self-same submission have this to say: "there must however be some medical evidence confirming the likelihood of such a risk... medical evidence placing the injuries as having merely a 'mild impact' in her employment, is a contrary indication of any probability of a risk of employment."

In the instant case Dr. Nesbeth's report says that the patient went back to work after he was medicated. However, she says, that he returned with aggravated pain and was thusly referred to Dr. Dundas.

The latter's examination is objectively illuminating: "examination revealed a fit man ... his lumbar spine was normal in contour. There was no scoliosis or focal tenderness. There was no spasm in his muscles. The spine was mobile ... muscle power and tone were normal..."

Absolutely no information was forthcoming form the doctor in support of the Claimant's contention that he had to resign his job on account of his injury. That perforce along with the quoted passage from Harrison, P disentitles the Claimant to any award under that head of claim.

In the final analysis I award general damages in the sum of $1,000,000.00 with interest thereon at 5% from the date of service of the Claim Form to the 21st June 2006, and thereafter at 6% to the date of judgment. An award of $52,000.00 for special damages with interest thereon at the rate of 4% of thereon from the 25th April 2001 to the 21st June 2001 and thereafter at 6% to the date of judgment. No award is made for handicap on the labour market.

Costs are awarded to the Claimant in respect of one Senior Counsel and one Junior counsel for one day and are to be agreed failing which they are to be taxed.