[2014] JMSC Civ. 103

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008 HCV 0538

BETWEEN	**EHOAN GREEN**	**CLAIMANT**
AND	**THE CAPTAIN'S BAKERY LTD.**	**DEFENDANT**

Aon Stewart and Ano Miller, instructed by Knight, Junor & Samuels for the Claimant

Alexander Williams and Anthony Williams, instructed by Usim, Williams & Company for the Defendant

Heard: May 26, 27 and 30, 2014, June 11, 2014 and July 18, 2014

CLAIM FOR BREACH OF STATUTORY DUTY AND/OR NEGLIGENCE – DUTY TO SECURELY FENCE ANY DANGEROUS PART OF ANY MACHINERY IN A FACTORY – DUTY TO SECURELY FENCE IS NOT DEPENDENT ON WHETHER MACHINE CAN BE USED AS INTENDED WITH SECURE FENCING OF SAME IN PLACE – DEFINITION OF 'DANGEROUS PART' – WHETHER PROTECTION AFFORDED TO THOSE WHO UNAUTHORIZEDLY INTERACT WITH DANGEROUS PARTS OF MACHINERY IN A FACTORY

Anderson, K., J

[1] This claim is for damages for breach of statutory duty under the **Factories Act** and/or negligence.

[2] The claimant has listed in his particulars of claim, the respective circumstances which he has alleged occurred, on the 7th day of October, 2003, whilst he was then an employee at the defendant's workplace. Those listed circumstances are as follows:

'(a) The defendant was in breach of their common duty of care under the Factories Act in that they caused or permitted the claimant to be exposed to conditions in which the defendant knew or ought to have known that the said dough machine was extremely dangerous and could cause serious injury in particular to the claimant.

(b) Failed to ensure that the claimant was properly trained in the use of the said dough machine.

(c) Failed to give the claimant protective gear and/or garments for his protection while using the said dough machine.

(d) Failed to have a supervisor monitoring the work that the claimant was doing on the said dough machine.

(e) Failed to consider that the claimant was not trained in the use of the said dough machine and thereby exposing the claimant to danger.

(f) Failed to ensure that the claimant would not be at risk of injury by the said dough machine.

(g) Failing to take any or any adequate precautions to ensure the safety of the users of the said dough machine and in particular the claimant.

(h) Failed to fence and/or provide a safety fence around the said dough machine.'

[3] Of all the aforementioned particulars of breach of statutory duty and/or negligence, it is noteworthy that only the averments listed as (a), (f), (g), and (h), are of particular importance and thus are worthy of serious consideration by this court, based on the particular facts of this particular case. This is so because the other averments made as regards alleged negligence and/or breach of statutory duty by the defendant in relation to the claimant, could only have been successfully proven if it had been the claimant's case, that at the time when the injuries to him, which form the subject of this claim, occurred, he had been assigned by the defendant to work either on or with the defendant's dough break machine. That though, has never been the claimant's case,

as will be addressed in further detail, further on in these reasons for judgment. As such, in these reasons, this court will address its mind to issues concerning the safety of the defendant's dough break machine, at the material time, considered particularly in the context of both that which the claimant's counsel has quite properly conceded, was the claimant's unauthorized use of that machine, at that time and the **Factories regulations** of Jamaica.

[4] The claimant was born on May 7, 1976 and was aged 27 when he suffered injury while working at the defendant's workplace, which is admittedly a 'factory' within the definition of that term as set out in the **Factories Act**, as it was then a location at which the defendant had in place, machinery and equipment and employees, who baked bread and pastries and cakes, there, using that machinery and equipment.

[5] The claimant suffered serious injuries and deformity of his left hand, arm, elbow and forearm. He has proven those injuries, by means of his own evidence and also, by means of expert evidence which was provided to this court in an expert report which was prepared by Dr. Melton Douglas.

[6] The claimant gave evidence of loss of amenities, but did not at all allege same in his amended particulars of claim. In the circumstances, **rule 8.9A of the Civil Procedure Rules (CPR)**, precludes him, even if he is successful in proving the defendant's liability, from recovering any damages for loss of amenities.

[7] The claimant has claimed for damages, interest and costs and in respect of special damages, has claimed $24,000.00 for a medical report. That expense has been proven. He has also claimed $4,400.00 for medication. That expense has also been proven, as has his transportation expense of $2,850.00. He has also claimed for loss of income, but as was admitted by his counsel, the claim for loss of income has been wholly unproven. The claim for legal costs cannot properly be claimed for as special damages and not surprisingly, the claimant's attorney has also conceded on this point.

[8] **Section 12 of the Factories Act** permits 'the Minister' to make regulations from time to time, for the purpose of ensuring the safety, health and welfare of persons who are employed in any factory, or in connection with machinery and in that regard, the Minister is specifically empowered to make regulations for the fencing and covering of all dangerous places or machines, as well as securing safety in connection with all operations carried out in a factory, as well as in connection with the use of any machinery.

[9] Such regulations, under the **Factories Act**, do exist in Jamaica. Those regulations are the **Factories regulations**, 1961. In particular, those regulations provide that – '*Every dangerous part of any machinery shall be securely fenced unless it is in such a position or of such construction as to be as safe to every worker as it would be if securely fenced*.'

[10] Only one defence witness testified in this case, namely, Wayne Saulter, who functions as the defendant's Chief Executive Officer and who also functions as the defendant's financial controller and as the person responsible for matters pertaining to the defendant's personnel. He was functioning as the financial controller with responsibility for the defendant's personnel, at the time when the claimant began working with the defendant and thus, is aware of training which the claimant received in respect of the use by the defendant's employees, of the dough break machine at the defendant's factory.

[11] The claimant's work history at that factory has been far less than beneficial to him, this insofar as he had been employed by the defendant on March 10, 2003, as a general production worker. On June 2, 2013, while being trained to operate the dough break machine, the claimant's right arm was injured as a result of an accident with the said machine, following on which, the claimant underwent medical treatment and physical therapy completely at the defendant's expense, inclusive of payment of the claimant's weekly salary. The claimant had gone on sick leave as a result of that accident and he returned to work on September 29, 2003, while still then undergoing

physical therapy. The claimant was then assigned lighter work duties. Not long thereafter, the accident at that factory, for which the claimant is now seeking redress, occurred. The same occurred on October 7, 2003, while the claimant was assigned to work only with the divider machine. That accident though, occurred during the claimant's unauthorized use at that time, of the dough break machine.

[12] All of the facts as hereinbefore referred to, are undisputed and have been derived either from the evidence of the sole defence witness – Mr. Saulter, or from the claimant himself, or from a combination of both of these sources. It is equally too, uncontradicted, that the claimant failed to follow the defendant's standard operating procedure when using and/or operating the dough break machine at the defendant's factory, on the relevant occasion for the purposes of this claim, and that his injuries resulted from his left hand having been dragged onto the dough break machine, during a process whereby the defendant was, without having been authorized to do so, grabbing dough which had previously been falling to the ground from the dough break machine and throwing that dough which was falling, back onto that dough break machine. During the process of throwing the dough back onto the machine, the dough wrapped around the claimant's left hand, as a consequence of which, his left hand was then dragged onto the rollers of the dough break machine and the fingers of that hand was crushed and additionally, he suffered injury to his left arm, his left elbow and his left forearm. As a consequence, the claimant has suffered permanent partial disability to the extent, as certified by Dr. Douglas, of 38%. Those portions of the claimant's body have also been significantly disfigured and this court did, during trial, see that.

[13] The defence witness has made it clear to this court, while he was undergoing cross-examination, that if the dough break machine were to be fenced, the same could not be used, since, according to his evidence, which is uncontradicted in this respect, the dough break machine would not be able to pick up the dough, if it were to be guarded. Whilst that evidence has not been contradicted, this court is, of course, not obliged to accept it. See: **Industrial Chemical Co. (Jamaica) Ltd v Ellis** – [1986] 35 WIR 303. As such, this court had to consider such evidence, as indeed all other

evidence in this case, carefully. This court has done just that. This court knows nothing of the working of a dough break machine other than to the limited extent that it learnt of same from the defence witness' evidence. Furthermore, what the defence witness gave evidence of, as to whether, if the dough break machine were to have been guarded, it could nonetheless have been functional, is not a matter of ordinary knowledge. Expert evidence as to how that machine functions should, at least in most cases such as this, be provided to the court. Since the claimant has the burden of proof, it would be generally incumbent on a claimant to provide such evidence.

[14] For the purposes of this case however, because of the claimant's uncontradicted evidence of what he was doing in relation to the dough break machine, when he was injured by same and also, because of the very strict nature of Jamaica's **Factories regulations**, insofar as the duty to fence 'dangerous machinery' is concerned, the absence of any expert evidence having been relied on by the claimant, will not detrimentally affect the outcome of his claim.

[15] What then, do Jamaica's **Factories regulations** stipulate in that respect? Regulation 3 (1) stipulates that – '*Every dangerous part of any machinery shall be securely fenced unless it is in such a position or of such construction as to be as safe to every worker as it would be if securely fenced*.' What that regulation makes apparent, firstly, is that the duty of a factory owner/operator to 'securely fence' 'dangerous machinery' is not at all contingent or dependent on whether said machinery can either be functional with such fencing, or not. Also, it is not at all dependent on whether said machinery is on or off at any particular moment in time. The law requires, as per **regulation 3 (1) of the Factories regulations**, that once there exists in any factory, 'dangerous machinery,' that such machinery be 'securely fenced,' as a general rule. There is only one exception to this legal requirement and it is that such 'dangerous machinery' need not be 'securely fenced,' 'if it is in such a posititon or of such construction as to be as safe to every worker as it would be if securely fenced.' Clearly, that sole exception could not have availed the defendant in the present case and thus, the defendant, wisely, did not at all seek to rely on same. Equally clearly though, it is no

defence to a claim for a breach of a party's statutory duty to securely fence dangerous machinery, that to do so, would have prevented such machine from being able to effectively function in carrying out the purpose for which it was intended. If indeed that is so, then it would be the duty of the factory owner/operator to ensure that the said 'dangerous machinery' is not being used in a 'factory' – as that last – quoted term is widely defined by the **Factories Act**. Regrettably for the defendant though and even moreso, regrettably for the claimant, the relevant dough break machine was not at all fenced at the defendant's factory, as at the date when the claimant got injured while interacting with it. England's House of Lords decided, in: **Summers and Sons Ltd v Frost** – [1955] AC 740, that once machinery is 'dangerous,' the fact that to securely fence such machinery would render the same unusable, did not absolve the factory owner from the duty to securely fence that machinery.

[16] This court though, must consider whether that dough break machine was required by law, to have been securely fenced. In order to answer that question, this court must first determine what constitutes 'dangerous machinery.' There is no dispute between the parties and rightly so, that the dough break machine is properly to be categorized as constituting 'machinery.' There is though, dispute raised during the parties' respective oral closing submissions to this court, as to whether or not such machine was, in the particular context of this particular case, 'dangerous.' The defendant did, in the context of making it an issue as to whether or not the relevant dough break machine was required to be fenced, pursuant to the relevant provisions of the **Factories Act and regulations**, state in their defence, that – '*No fence or safety fence was required around the dough machine. Hence, no breach of statutory duty*.' Although, that particular averment was set out in the defendant's defence as a particular of the claimant's alleged negligence, it is apparent, from the wording of that averment, that it ought not to be considered by this court, as relating at all, to the claimant's alleged negligence. It is though, nonetheless, an averment which notified the claimant that the alleged duty to fence the dough break machine, was being made a disputed factual and legal issue for the purposes of this claim and therefore, this court has considered same, in that context.

[17] It is the claimant's contention that the relevant dough break machine is 'dangerous machinery,' as the facts of this case speak for themselves – this insofar as the claimant was injured while interacting with that machine and was injured by parts of that machine. Furthermore, the defendant's witness had himself testified that if the said dough break machine was in operation with the dough going through it, it could cause harm to someone whose hand got between the rollers. This court has carefully also noted though, that the defence witness also testified that he would not agree with the claimant's counsel's suggestion that the rollers, of the dough break machine, while rotating, could be considered as being 'dangerous'.

[18] As a mixed question of law and fact this court had to determine whether, in the particular circumstances of this particular case, the said dough break machine is to be viewed by this court as being 'dangerous' for the purposes of the **Factories regulations**. The term 'dangerous' has not been defined, either in those regulations themselves, or in the parent statute – the **Factories Act**. Courts though, have, at common law, reached a settled definition, not only in England, but also in Jamaica and the rest of the commonwealth caribbean countries which have the same legislative and regulatory framework as regards factories, of what constitutes 'dangerous machinery.'

[19] As has been clearly stated in the High Court Trinidad and Tobago, in the case – **Anthony Skeete v Electroplaters Ltd** – [1976] 28 WIR 266, a part of machinery is 'dangerous,' if it is a reasonably foreseeable cause of injury to anyone acting in a way in which a human being might be reasonably expected to act, in circumstances which might be reasonably expected to occur. See per Des Iles, J. at, p. 271 f and g, relying on **Walker v Bletchley Flettons** – [1937] 1 ALL ER 175 and **Hindle v Birtwistle** – [1897] 1 QB 192 and **Lauder v Barr and Stroud** – [1927] SC (J.) 21 and **Carr v Mercantile Produce Co. Ltd** – [1949] 2 ALL ER 531 and **Smithwick v National Coal Board** – [1950] 2 KB 335. In the Jamaican case of **Walker v Clarke** [1959] 1 WIR 143, the Court of Appeal upheld a resident magistrate's conclusion that a dough break machine is to be considered, for the purposes of Jamaica's **Factories regulations**, as being 'dangerous machinery' and therefore, ought to be securely fenced. Indeed, the

same was decided in respect of a similar machine which was used to roll out puff pastry, in the case: **Smith v Chesterfield** and **District Co-operative Society Ltd** – [1953] 1 ALL ER 447.

[20] Acting not only on the weight of those authorities, but also, on the careful consideration of the particular facts of this particular case, it is evident to this court, that the defendant's dough break machine which caused the claimant's injuries, arising from which he has made this claim, is to be considered as being wholly, 'dangerous machinery,' for the purposes of Jamaica's **Factories regulations**. As such, the same should not only have been fenced, but instead, ought to have been 'securely fenced.' The relevant dough break machine for the purposes of the present case, was not at all 'secured,' or 'fenced,' much less, 'securely fenced.'

[21] Of course too, as a matter of law, although **regulation 3 (1) of the Factories regulations** refers to the need to securely fence every 'dangerous part' of any machinery, it is to be noted that as a matter of law, the reference in statute or statutory regulations, to the singular, includes the plural, such that, if the entire parts of the relevant machine are to properly be viewed as being 'dangerous,' then it would be the duty of the relevant factory owner/operator, to entirely fence the same. As to the singular including the plural and vice versa, in statutes and regulations, see: **Section 4 of the Interpretation Act**. At the very least though, the rollers of the relevant dough break machine, surely must be viewed as being 'dangerous,' since it is reasonably foreseeable that a person may become injured if that person were to come into contact with those rollers and in having so come into contact with same, the person injured had been acting in a way in which a human being might reasonably be expected to act, in circumstances which might be reasonably expected to occur. That is exactly what led to the claimant's injuries which constitute the substratum of the present case.

[22] Another important matter of fact to note in respect of the present case, is that immediately prior to the claimant having been injured as a consequence of his

unauthorized interaction with the dough break machine, that machine was then on and dough was going onto the rollers, using that machine. There was an operator of that machine nearby, but he had gone to the rear of the machine and left the same partially unattended to, or certainly at least, not very closely and/or carefully attended to, at the time when the claimant began interacting with same on October 7, 2003. The claimant, having seen dough dropping out of the machine, which is something that, according to the defence witness' evidence, would, in the ordinary course, happen after the passage of some time, if the dough break machine were to be left unattended to, not only prevented some of that dough from falling onto the ground, but also, after having collected same into his hand, sought to throw same, onto the machine's rollers. Alas, that was clearly a regrettable action on his part, albeit that he has given evidence, which this court must state, it does not accept, that at the time, he did so as a matter of reflex action. Clearly, that cannot truly be so, since that sort of action, particularly in a circumstance wherein one is not, at that time, either working with or on, or authorized to work with/on that machinery, required the taking by the claimant, of deliberate and thoughtful action. To have been thoughtful about something though, does not necessarily mean that one has given either careful, or properly reasoned thought to that thing. There is though, a significant difference between lack of properly reasoned thought about something and the taking of reflex action. This court is of the view that it is the former of those two scenarios that occurred with respect to what led to the claimant's injuries, on October 7, 2003.

[23] In the previously cited Jamaican case of **Walker v Clarke** (*op. cit.),* the words of Ld. Cooper as expressed in **Mitchell v North British Rubber Co.** – [1945] SC (J) 69, at p. 73, were cited with approval – '*In the ordinary course of human affairs, danger may reasonably be anticipated from its use unfenced, not only to the prudent, alert and skilled operator intent upon his task, but also to the careless or inattentive worker whose inadvertent or indolent conduct may expose him to risk of injury, or death from the unguarded par*t.' As such, this court rejects the submission made to it by defence counsel, that parts of machinery, or machinery, can only be 'dangerous' in respect of someone who has been specifically authorized to use that machinery, either at a single

given moment in time, or at all times, or from time to time. This court also, for the very same reason, which is as per the quotation set out immediately above, rejects the defence counsel's submission that as such, since the claimant was doing something which, at the material time he ought not to have been doing, that being: working with the dough break machine in any way whatsoever, there was no duty owed to him by the defendant, as regards the alleged duty to securely fence either the entire dough break machine, or the rollers of that machine, which was breached.

[24] With the greatest of respect to defence counsel, neither of those latter – mentioned submissions, are correct in law. Whilst it is true that there are some factual distinctions between the **Walker v Clarke** case (*op. cit.)* and this case, even in the **Walker** case (*op. cit*.), the Court of Appeal accepted that the protection afforded by **regulation 3 (1) of the Factories regulations**, is so afforded not only to the careful and/or prudent worker and also, not only to the assigned operator of that machinery, or to a person assigned to work with any dangerous part of that machinery, but also, is protection which is afforded to even careless and/or indolent workers, in respect of whom, it could be reasonably foreseen that said workers may, come into contact with same and thereby, be injured by same.

[25] All of the following other authorities, make this pellucid. See: **Uddin v Associated Portland Cement Manufactures Ltd** – [1965] 2 ALL ER 213**; Dorothy Henry v Superior Plastics Ltd** – Suit No. C.L.H. – 104 of 1994 per Sykes J, esp. at p. 16; **Lewis v High Duty Alloys Ltd** – [1957] 1 ALL ER 720; **Smith v Chesterfield and District Co-operative Society Ltd** (*op. cit.)*

[26] In the circumstances, this court has no hesitation whatsoever, in concluding that the defendant breached its statutory duty to the claimant and thereby caused the claimant to suffer injury and loss, for which the claimant is entitled to recover damages.

[27] The defence has contended that the claimant's injuries were suffered as a consequence of his own negligence. The defendant raised this in its defence. The claimant filed no reply in response to the averments of negligence that were made against him by the defendant. As such, there having been no issue joined by the claimant with respect to same, it is beyond doubt that this court must accept either that the claimant's negligence was the sole cause of his injuries and consequential loss, or at the very least, a contributing factor thereto. The claimant's counsel has rightly accepted that in the absence of there having been a reply filed on the claimant's behalf, the allegations of negligence as made against the claimant in the defendant's statement of case, are to be treated with by this court, as having been proven. That is this court's view of the law.

[28] This court though, is not of the understanding that it is open to a defendant to contend that a claimant is completely responsible for his own injuries and losses, by reason of his sole negligence, if that is raised solely as a matter of defence. See: **Pitts v Hunt and another** – [1990] 3 ALL ER 344, which has been applied by this court, in at least one decided case. See: **Neil Lewis v Astley Baker** [2014] JMSC Civ. 1. Contributory negligence, at best for a defendant, can and will only constitute a partial defence.

[29] It can be though, that in an appropriate case, a defendant can properly contend that his actions and/or inaction, did not, as a matter of law, 'cause' the claimant's injuries and/or loss. Causation is always an issue in tort cases such as this. This court takes the view that, applying the renowned 'but for' test, were it not for the defendant's breach of statutory duty in having failing to securely fence the relevant dough break machine, the claimant's injuries could not and would not have occurred. Whilst it is also true and indeed, this court has concluded as a matter of fact, that the claimant's injuries also would and could not have occurred, if the claimant had not been as negligent as he undoubtedly was, in having interacted with the dough break machine on the relevant day, any at all – this having been contrary to that which he had been instructed to do on

that day, nonetheless, it is always open to a court, to conclude in a case such as this, that both the defendant's breach of statutory duty and the claimant's concomitant negligence, were substantial causes of the claimant's injuries and loss.

[30] This court did, whilst they were presenting to the court, their respective oral closing submissions, enquire of respective counsel for the parties, as to whether a plea of negligence of the claimant, as made by a defendant, in response to a claim for damages for breach of statutory duty, can, if that plea is proven, constitute a defence to such a claim. Both counsel informed me that such a plea cannot, even if proven, constitute a defence to such a claim. Notably though, it did not appear to this court from the respective answers to that question as were given by counsel, that they recognized that not only is contributory negligence, if proven, a partial defence to a claim for damages for negligence, but also, it is a partial defence to a claim for damages for breach of statutory duty. Thus, from as long ago as 1939, this being even before England had passed into law, their **Law Reform (Contributory Negligence) Act 1945**, Ld. Atkin had concluded, in the case: **Caswell v Powell Duffryn Associated Colleries Ltd** – [1939] 3 ALL ER 722, that contributory negligence was a defence to a claim for damages for breach of statutory duty. See p. 729 of the reported judgment in that case, in that regard. The same was cited with approval, by the High Court of Trinidad and Tobago in the case: **Skeete v Electroplaters Ltd** (*op. cit.*), by Des Iles J., at pp. 272d – 273f. In the **Skeete** case (*op. cit.),* his Lordship Mr. Justice Iles, held that as, it was his conclusion of fact in that case, that the claimant had, by his own negligence, contributed to the causation of the injuries and loss which he suffered, this meant that the claimant's claim would, on that ground alone, fail. Indeed that legal approach by His Lordship – Mr. Justice Iles, would, if the issue of contributory negligence is addressed by a court, as it was addressed at common law, prior to the passing into law in England, in 1945 of the **Law Reform (Contributory Negligence) Act**, undoubtedly be a correct one. No reference has been made by the judge whose judgment in the **Skeete** case (*op. cit.)* is referred to above, as that is the court's judgment in that case, to any statute in Barbados, as at the date when that judgment was delivered, that being January 1, 1976, which addresses the matter of contributory negligence.

[31] This is important to note, because, at common law, contributory negligence constituted, a complete defence to claim for damages for negligence, or even in respect of a claim for damages for breach of statutory duty. See: **Butterfield v Forrester** – [1809] 11 East 60, in that regard. It was because of the perceived harshness of the common law at that time, that the **Law Reform (Contributory Negligence) Act** came into being in England in 1945 and later, in Jamaica, in 1951. Jamaica's statute of the same name, adopted the wording of the said English statute, *ipassima verba*. Jamaica's statute has put it beyond peradventure, that contributory negligence is a partial defence to a claim for damages for breach of statutory duty. **Section 3 (1)** of that statute, provides that:

> *'Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable, having regard to the claimant's share in the responsibility for the damage.'*

Importantly, the word 'fault' has been defined in that statute as meaning '*negligence, breach of statutory duty of (sic) other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to a defence of contributory negligence*.'

[32] There can be no doubt in this case, even if the allegations of negligence made against the claimant by the defendant had been replied to and thus contested, that this court would inevitably have had to have concluded that the claimant was negligent and that such negligence contributed to the causing of his injuries and/or loss. This court has formed the view that the claimant should be awarded 25% of the sum, which he otherwise would have been able to have recovered, if he had not been contributorily negligent. As such, it is this court's view that the claimant's negligence is 75% responsible for, or in other words, the cause of, the injuries and consequential loss which he has suffered.

[33] As regards the matter of the sum to be awarded to the claimant as damages (monetary compensation), the only caselaw which was cited to this court by any of the parties' counsel, was the caselaw cited and referred to by the claimant's counsel. The defence counsel did not at all object to either of said cases being considered and applied by this court, for the purposes of assessing damages herein. The first case so cited and referred to, was: **Dennis Brown v Jamaica Pre-Mix Ltd** – Suit no. C.L. 1999 B118. The other cases cited were: **Sheldon Beckford v Noel Willey** – Suit no. C.L. 1990 1 B184 (as reported at **p. 257 of Ursula Khan's text – Assessment of damages for personal injuries, Vol. 5** and **Dervin Taylor v Logan McLormick and others** - Suit no. C.L. 1990/T 075 (as reported at p. 255 of same text).

[34] This court has, for the purpose of assessing damages in respect of this claim, relied on the case: **Dennis Brown v Jamaica Pre-Mix Ltd** (*op. cit.).* The extent of injuries suffered by the claimant in that case though, this court has carefully noted, were not nearly as extensive as those suffered by the claimant herein, arising from the accident in which he was involved, at the defendant's factory, on October 7, 2003.

[35] Further, in assessing damages, this court will not pay any regard to the claimant's evidence of loss of amenities, such as for instance, his evidence that he used to spend his Sundays playing cricket, but he cannot do so any more, as also his alleged loss of the ability to play freely with his children. This court has not given any consideration to that evidence for the purpose of assessing damages, as the same was not even hinted to, much less particularized, in the claimant's amended particulars of claim. **Rule 8.9A of the CPR** provides that – '*The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless that court gives permission*.' No such permission to rely on evidence of loss of amenities, notwithstanding that same was not all referred to in the claimant's amended particulars of claim, was ever sought by the claimant and thus, no such permission was granted by this court. As such, the claimant's evidence as to loss of amenities, is of no moment whatsoever. Furthermore, the claimant's

evidence that he can no longer do chores around his house and that he cannot sweep up his yard, was also not all foreshadowed in the claimant's amended particulars of claim and thus, cannot properly constitute the basis of any award of damages in the claimant's favour, based on the particular circumstances of this particular case. In any event though, this court does not consider that the inability of someone to do household or yard chores, would constitute 'loss of amenities,' for which that person could lawfully recover compensation through a court, in the form of damages.

[36] In the **Dennis Brown** case (*op. cit.)*, the claimant was injured in a motor vehicle accident which occurred on June 30, 1997, but the last date for the assessment of the award of damages in respect of his claim, was: March 23, 2001. This later – mentioned date is therefore the date to be utilized for the purpose of ascertaining the applicable Consumer Price Index (CPI) for the **Brown** case. As a consequence of that accident, Dennis Brown suffered being dazed and near unconsciousness for a brief period of time, as well as pain and deformity of left upper extremity, back pain and fracture of distal third of left humerus and both bones to the left forearm with displacement. The claimant had, as a consequence of those injuries, undergone surgery. The claimant was thereby limited in the use of his left upper limb and that, in turn, affected his daily and working life – as a labourer/mason. The medical expert who testified on the claimant's behalf at trial, certified the extent of the claimant's disability as amounting to 19% of the whole person, permanent disability. In law, that is what is known as a permanent partial disability. It is a partial disability, since it relates to 19% of the whole person – this as distinct from the entirety of the whole person (100%).

[37] In the present case, the claimant's injures were: Fracture left humerus mid shaft; fracture left olecranon of elbow; fracture both left forearm bones; impending compartment syndrome; and left radial nerve palsy. The claimant herein, also underwent surgery and his left arm is now deformed as a consequence of the injuries received to it. The claimant sustained bruises, abrasions and lacerations from his left shoulder to his left fingers. While being taken to the hospital on the day of the accident,

the claimant had fainted. The claimant was assessed by the only expert who provided expert evidence to this court, by means of an expert report, namely, the expert report of Dr. Melton Douglas, as being permanently partially disabled to the extent of 38%.

[38] In the circumstances, this court has decided that the award handed down by this court in the **Brown** case (*op. cit.),* should be relied on as a starting point for the assessment of damages herein and for that purpose, should be adjusted upwards, by 25% after the award of general damages in that case, has firstly, been upgraded to the present time.

[39] The CPI as at March 23, 2001, was: 56.6, whereas, as of May 30, 2014, the CPI was: 213.6. The latter - mentioned CPI figure, is the current CPI.

[40] According to this court's mathematical calculation therefore, since the award of general damages in the **Brown** case (*op. cit.),* was in the sum of $1,823,409.98, that sum when updated to June 11, 2014, is: $6,881,278.65 (calculation: new CPI ÷ old CPI × $1,823,409.98).

[41] The claimant in the present case, would, as a consequence of the extent of his contributory negligence in having caused the relevant accident, only be entitled to recover 25% of the update of the award as was made in the **Brown** case (*op. cit*.), taking into account that such sum would have to be increased by 25%, based on the more significant extent of the injuries and no doubt also, the attendant pain and suffering, as would no doubt have been suffered by the claimant herein, in comparison to the injuries and attendant pain and suffering of Mr. Brown. The award in the **Brown** case, when increased by 25%, is: $8,601,598.31.

[42] As regards special damages, the claimant has made claim for losses under the following heads and in the following sums:

(a) Medical Report - $24,000.00; and

(b) Medication - $ 4,400.00; and

(c) Loss of income from July 1, 2008 and continuing at $3700.00 per week; and

(d) Legal Costs - $75,000.00; and

(d) Transportation costs - $ 2,850.00.

[43] The claimant's counsel informed the court during the trial, that the claimant would no longer be pursuing his claim for either transportation, or legal costs, or loss of income and that as such, the claimant should recover as special damages, a sum of no more than $28,400.00 (being cost of medication and medical report). This court awards the sum of 25% of $28,400.00, to the claimant, as special damages, herein. As such, the claimant is awarded the sum of $7100.00 as special damages.

[44] As regards interest on damages, this court had initially informed the parties that it would award interest at a rate of 6% on both general and special damages and that, with respect to general damages, such interest sum should be calculable from date when cause of action arose (October 7, 2003) up until date of judgment, whereas, with respect to special damages, such interest sum should be calculable from date when claim was served on the defendant (November 13, 2008), up until date of judgment.

[45] This court had though, not long thereafter, recognized that said interest rate of 6% with respect to both general and special damages, was erroneous, since, the interest to be awarded should be half that of the interest rate which was applicable to judgment debts, as at the date when the cause of action arose (this with respect to interest on general damages) and as at the date when the claim was served on the defendant (this with respect to interest on special damages). See: **Central Soya of**

Jamaica v Freeman – [1985] 22 JLR152; and **AG of Jamaica v Arthur Baugh** – SCCA No. 101/06; and **Jamaica Observer Ltd and Paget de Freitas and Gladstone Wright** – Supr. Ct. Civil Appeal No. 73/08. See also: **The Judicature (Supreme Court) (Rate of Interest on Judgment Debts) order 1999**, which came into effect on July 1, 1999; and the **Judicature (Supreme Court) (Rate of Interest on Judgment Debts) order**, 2006, which came into effect on June 13, 2006.

[46] Prior to June 13, 2006, the rate of interest on judgment debts was 12%, but as of that date, the said rate of interest was reduced to 6%. As such, the applicable rate of interest for both general and special damages, in respect of any matter wherein the legal wrong determined by this court as having been proven, following upon which, this court makes an award of damages, occurred after June 13, 2006, the applicable interest rate should be 3% and that rate should be the same, for both general and special damages. In that regard, see: **Dacres and Dacres v Reid** – SCCA 103/00 – delivered April 11, 2003.

[47] This court had thus, initiated and scheduled with the parties' counsel, a discussion concerning the stated initial error of this court as regards the applicable interest rate and during that discussion, which was held before the draft formal order had been perfected by the court and was held as a conference call via telephone, this court then informed the parties' counsel of that error and that as such, the applicable interest rate would be 3% for both general and special damages. Neither party's counsel expressed any demurrer to this court, in that respect. What this court had not then recalled though, is that in respect of this claim, the claimant's injuries occurred on October 7, 2003. As such, the interest rate on general damages for the claimant in the present case, will be 6% until June 13, 2006, but 3% as of June 14, 2006 to date of judgment. Having at a later stage, recalled same, this court therefore held a further conference call with the parties' counsel and then informed them of this. Once again, on that occasion, no demurrer was expressed by either party's counsel in that respect.

[48] This court's judgment orders therefore, are as follows:

(i) The claimant is awarded general damages in the sum of $2,150,398.57 and interest on general damages at the rate of 6% with effect from the date of the injuries (October 7, 2003) until June 13, 2006 and 3% with effect from June 14, 2006 to date of judgment (May 30, 2014).

(ii) The claimant is awarded special damages in the sum of $7100.00 and interest on special damages at the rate of 3%, with effect from November 13, 2008 (date of service of claim form), to May 30, 2014 (the date of judgment).

(iii) Each party shall bear their own costs.

(iv) The claimant shall file and serve this order.

[49] This court did invite and hear from the respective parties' counsel, on the matter of costs, in view of the judgment which was then being made. Having so heard from the parties' counsel, in exercise of its discretion, this court formed the view, as now reflected within its judgment order, that each party should bear their own costs.

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Hon. K. Anderson, J.