**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2007HCV03341**

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| **BETWEEN** | **ORETH HILL** | **CLAIMANT** |
| **AND** | **SUPER PLUS TRUCKING AND EQUIPMENT LIMITED** | **DEFENDANT** |

**Leonard Green instructed by Chen Green & Company for the claimant**

**Matthew Ricketts instructed by Samuda and Johnson for the defendant**

**30 November 2015, 2 October 2019, 4 June and 10 July, 2020**

**Negligence – Employer's duty of care – Safe system of work - Whether there was a breach of that duty**

**SIMMONS J**

[1] On the 10 January 2007, the claimant who was employed to the defendant as a driver was injured when the crane section (the crane) of the boom truck which he was operating came into contact with one of the Jamaica Public Service Company's power lines (the power lines).

[2] He has claimed damages for injuries, damage and loss as a result of the defendant's failure to provide a safe system of work.

**The particulars of claim**

[3] The claimant stated that on 10 January 2007 he went to premises at Sunset Drive, Mandeville in the parish of Manchester to pick up and deliver motor vehicle parts, as instructed by the defendant's managing director, Mr. Charles Chen.

[4] It was averred that the claimant was instructed to use the boom truck although he had no previous training in its operation.

[5] Whilst loading the motor vehicle parts onto the truck, the crane came into contact with power lines and the claimant was electrocuted and he sustained injuries to various parts of his body.

[6] Based on the circumstances, it was averred that the defendant was negligent in that it failed to provide a safe system of work.

[7] The particulars of negligence were stated to be as follows:

(i) The defendant's failure to ensure that the claimant was properly trained or had sufficient experience to operate the boom truck.

(ii) The defendant's failure to ensure that there was another worker to assist the claimant in the loading of the motor vehicle parts on the truck.

(iii) The defendant's failure to provide the claimant with proper safety gear in carrying out the job.

(iv) The defendant's failure to provide another person who would have been able to alert the claimant to the danger of operating the crane in the area where the claimant was directed to carry out the job, thereby leaving him to operate the crane without any or any due regard to the danger that he was being exposed to at the time.

(v) The failure of the defendant to take reasonable care to ensure that the claimant was not injured whilst operating the boom truck.

[8] The particulars of injuries are stated to be:

(i) Severe burns to the body

(ii) Unconsciousness

(iii) Electrical burns to the right shoulder and foot, left leg and buttocks.

[9] Special damages were claimed in the sum of twenty-five thousand six hundred and ten dollars ($25,610.00).

**The Defence**

[10] The defendant admitted that the claimant was asked by its managing director to deliver the truck chassis to a customer. It was however denied that he had been instructed to collect motor vehicle parts. The defendant also asserted that the claimant was told not to operate the crane as the customer was responsible for off-loading the chassis. It was also stated that a forklift had been used to load the chassis onto the truck.

[11] In breach of the directive issued by the defendant's managing director, the defendant attempted to operate the crane and was electrocuted. Liability for the injuries suffered by the claimant was denied and it was asserted that the accident was either caused by or contributed to by the claimant's negligence.

**The claimant's evidence**

[12] The claimant in his witness statement gave evidence that he was employed by the defendant as a driver. He stated that on the day before the accident he was called by the defendant's dispatcher who told him that Mr. Chen had some iron which was to be delivered and that he was to speak with "Larr" at the defendant's garage in Lacovia to get instructions.

[13] The next day, he reported to "Larr" but was unable to get any instructions. He was instructed to wait for Mr. Chen. When Mr. Chen arrived he told him about the iron

that was to be delivered. The iron was loaded onto the truck by another employee. Mr. Chen then instructed “Juds” who was an operator at the garage and who also did welding to show the claimant how to operate the crane. She did so for about five to ten minutes.

[14] Mr. Chen further instructed the claimant to pick up two pieces of iron at the same location where he was to deliver the chassis. On arrival at the location he spoke to a man who instructed him where the iron was to be offloaded. That exercise was conducted without incident.

[15] Whilst using the crane to load the second piece of iron he felt “…bare fire” in his hands. The next thing he remembered was that he was being taken in a car to the hospital. He gave Mr. Chen’s telephone number to the driver who contacted Mr. Chen.

[16] He was admitted in hospital. The claimant indicated that he has scars all over his body and does not have the same amount of energy as he did before the accident. He can no longer play football due to the injury to his toe and his sex drive has diminished.

[17] His evidence is that he still drives trucks but cannot do so for long hours. Prior to the accident he earned between twelve and twenty-two thousand dollars ($12,000.00 - $22,000.00) per fortnight depending on the number of trips he made. He expressed doubt regarding his future as a truck driver.

[18] He was hospitalised for four (4) days but could not work for one year. He was paid sixty thousand dollars ($60,000.00) representing ten thousand dollars ($10,000.00) per fortnight for twelve weeks.

[19] In cross examination, the claimant indicated that he had never been asked to use the crane before and had never done so. On the day in question, he was asked to drive the boom truck. When asked if other trucks were available he declined to

answer and when it was suggested that that was the case, he said that he didn't know.

[20] He agreed that a forklift was used to place the chassis on the boom truck. He had never seen "Juds" operate the crane but thought she was a trained operator because Mr. Chen had asked her to instruct him in its operations. He maintained that Mr. Chen had asked "Juds" to instruct him. He was unable to state which levers were used to raise the crane and did not remember how many levers it carried. He then said that there could have been six levers. He also indicated that he couldn't remember which levers he had used whilst off-loading the chassis.

[21] He maintained that he had been given instructions on how to operate the crane and denied that it was his decision not to wait for assistance to offload the items.

[22] The claimant stated that he was a driver and he accompanied side men who would deliver boxed goods to customers. He would sometimes assist to offload the boxes but it would sometimes be done by persons at the location. He maintained that Mr. Chen did not instruct him that he was only required to transport the items and that someone at the location would offload them.

[23] When challenged in relation to his diminished sex drive he said that he had told Doctors Kidd and John about the problem. When it was suggested to him that he said nothing about the issue to Dr John, he declined to answer. He did however state that he got medication for the problem but could not recall the name of the medication.

[24] It was the claimant's evidence that he no longer drives trucks. He said that he had continued to drive trucks until April 2014. He said that he used to deliver marl from a quarry to customers in Black River, New Market and other locations. He stated that one bag of marl would cost approximately thirty-five thousand dollars ($35,000.00) and he would pay cash for the marl or sometimes purchase it on credit.

[25] Counsel referred to paragraph fifteen (15) of the claimant's witness statement which states as follows:

> *"There is no way I can do that type of work anymore because of my injuries and I am not sure how long I will be able to continue to drive trucks in order to make a living"*

When it was suggested to him that the above statement was not true. To this suggestion, the claimant said "I don't drive for long hours".

[26] The claimant told the court that his employer required him to drive seven (7) days per week.

[27] During re-examination counsel for the claimant sought clarification on what the claimant meant by long hours. The claimant said that long hours meant every day. He said that he would work from 7am to 3pm.

[28] He gave evidence that he has known "Juds" since he started working for Mr. Chen but he has not had any contact with her since the day of the accident.

[29] The claimant stated that he did not know anyone at the garage where he went to deliver the chassis. He said that it was located on the roadside and had no gate, fence or yard. He also said that when he went there he saw men working on trucks on the roadside and a man who told him where to place the chassis.

[30] He also stated that when he arrived no one came out so he proceeded to offload the chassis. It was his evidence that he had looked around and he saw that the place was clean in that there was nothing which would have prevented him from doing what he did. The claimant said that he had never been to the location before.

[31] The claimant gave evidence that as a result of his injuries his sexual performance has been affected as he does not feel strong. He also indicated that he used to take nerve pills.

**The defendant's evidence**

[32] Mr. Charles Chen, the defendant's managing director gave evidence on its behalf. He indicated that the defendant had been contacted by a customer to transport two pieces of truck chassis to a location in Knockpatrick in the parish of Manchester. The boom truck was the only truck available that day which could transport those items. They were loaded onto the truck using a forklift.

[33] This evidence is that the claimant was the only driver who was available at the time. He confirmed that the claimant had not been trained to use the crane and was instructed not to operate the crane under any circumstances to offload the chassis.

[34] About two hours after the claimant was dispatched, he was informed via telephone that the claimant had been electrocuted while using the crane.

[35] He stated that "Juds" is not employed to him and the claimant was never required to work seven days per week.

[36] In cross examination, Mr. Chen stated that although he had seen the claim form and the particulars of claim he did not recall that the claimant had asserted that he was not given proper instructions on how to operate the crane as that was six years ago.

[37] He indicated that he had instructed the claimant to take the material to Knockpatrick and that it was the first time that he was driving the boom truck. He was unable to recall if he had asked the claimant if he knew how to operate the crane.

[38] Mr. Chen indicated that when the claimant was being dispatched with the items other employees were present and could have heard the instructions that were given. He could not recall whether he gave his Attorney-at-law that information although he agreed that what he told the claimant was very important. He also

stated that it was not important for him to present any evidence to buttress his assertion that “Juds” was not employed to him.

[39] He agreed that the accident occurred during the course of the claimant’s employment and that the operation of the crane required skill, experience and training and that lack of proper training may result in an accident. The claimant, he said, was trained as a truck driver.

[40] Mr. Chen’s evidence was that he had concluded that the claimant was injured as a result of his failure to follow instructions and his own negligence.

[41] He indicated that he had not visited the location before the accident and could not say whether or not it was safe. He maintained that he gave no instructions to “Juds” as asserted by the claimant.

[42] When asked about the boom truck he said that the levers are located on both sides of the chassis of the truck right behind the cab. It was his evidence that the crane could be operated from either side of the truck by using the levers. Mr. Chen stated that an operator generally operates the lever from the side where he or she is not lifting the weight. He said that the operator would focus his or her attention on the item that he or she is lifting.

[43] When it was suggested to Mr. Chen that a trained operator would be better able to safely operate the crane, Mr. Chen agreed.

[44] It was further suggested to him that he failed to ensure that the person whom he dispatched with the load had the experience to do the job. Mr. Chen did not agree.

[45] When it was suggested that when he sent the claimant to Knockpatrick the claimant had full control of the boom truck, Mr. Chen disagreed. Mr. Chen stated that he could not know whether the claimant had full control over the crane.

[46] He indicated that he did not tell the claimant who was to accept the delivery or who was to offload the items. He disagreed that he failed to ensure that the claimant was competent to do the job he was instructed to do.

[47] It was suggested to Mr. Chen that he was reckless in that he failed to take sufficient steps to ensure that in carrying out his (Mr. Chen's) instructions the claimant would not act in a way that was detrimental to his safety. Mr. Chen disagreed with that suggestion.

[48] He indicated that he did not expect the claimant to operate the crane.

[49] In re-examination, Mr. Chen gave evidence that the boom truck is a truck with a crane mechanism at the back of it. He stated that operating the crane required skill, expertise and training. He said that if a person operated the crane without proper training this could lead to accidents and then damage could be done to persons and property. He spoke to his own expertise, having been in the business for a long period of time.

[50] Mr. Chen stated that the claimant had the requisite knowledge and training to drive trucks and that no special skill was required to drive a boom truck. In fact, he stated, that the claimant would normally drive a truck that was more technical than the boom truck. However, it was his evidence that when the claimant operated the crane he was not doing what he had instructed or expected him to do.

**Claimant's submissions**

[51] Counsel for the claimant submitted that the central issue for determination is whether the defendant was negligent in how he assigned the responsibility for the transportation of the truck parts. He stated that the court has a duty to find what is the proximate cause of the accident, and in seeking to make that determination, it must be ascertained whether it was an act of folly for the claimant to try to use the crane to load the truck parts or whether it was an act that the employer ought

reasonably to have taken into account when he dispatched an untrained driver to deliver to and collect parts from persons he did not know personally.

[52] It was also submitted that it is a question of fact whether the claimant knew the person to whom he was to deliver the truck chassis and if that person had the requisite skill and training to safely offload the items.

[53] Counsel directed the court's attention to paragraph "e" of the particulars of negligence contained in the defence and paragraph "i" of the particulars of negligence in the particulars of claim. It was submitted that it is possible to conclude from the pleadings that both parties agree if it is proved that the defendant instructed or facilitated the operation of the crane by the clamant without training and experience that would be evidence of negligence. In so doing the defendant, would have exposed the claimant to "unnecessary risk".

[54] Counsel submitted that there is no issue in this case that the claimant ought to have known better when he sought to load or offload the truck chassis in the vicinity of the Jamaica Public Service Company high tension lines. It was argued that this issue is not raised on the defendant's case.

[55] It was contended therefore that the only question for the court is whether on the facts before it, the defendant had directed the claimant who was untrained and inexperienced to operate the crane or whether the driver engaged in an unauthorised act that was risky notwithstanding the instructions of the defendant for him not to do so.

[56] Counsel submitted that when the law is applied to the facts of the case, it is reasonable to conclude that the defendant cannot escape liability even if the claimant took on a risk of his (the employee's) own.

[57] Counsel referred to the general nature of the duty owed by an employer to an employee and cited a passage from the 12th edition of Charlesworth and Percy on Negligence.

[58] Counsel cited the case of ***Amy Pitters v T Haughton*** (1978) 16 J.L.R 100, which was applied in ***Desnoes and Geddes Ltd v Garry Stewart*** (unreported), Court of Appeal, Jamaica, SCCA 74/2002, judgment delivered 3 November 2005, where Carey J said:

> *"One starts with the basic assumption that the Plaintiff had done a "risky thing" and then goes on to enquire the nature and quality of the riskiness for if it amounts to extravagant folly, or if the safeguards are circumvented by perverted or deliberate ingenuity, then contributory negligence may be found"*

[59] Counsel indicated that the learned Judge in ***Pitters*** said that the claimant in deliberately placing her hand on the machine had done a risky thing but it was a risk which the defendant was required to guard against. The court found that it was the defendant's failure to fence the machine securely which was the cause of the accident and not the plaintiff's misguided and risky act of placing her right hand in the position she did. In the circumstances, the respondent was not found contributorily negligent.

[60] Counsel submitted that in the case at bar, it was reasonable to expect that the claimant would have attempted to move the items and as such, the defendant should be found liable in negligence.

[61] He stated that the defendant had a duty to guard against the risk that the claimant may have felt compelled, during the course of making the delivery, to use the crane which was under his control.

[62] Counsel urged the court to find that there was an employee by the name of Judy Barton otherwise called "Juds" who was given instructions to give the claimant a crash course training in how to operate the boom truck.

[63] He stated that it was reasonable to infer that since a forklift had been used to load the chassis onto the boom truck, that it was heavy and that it was intended for the claimant to use the crane in order to accomplish the task at hand.

[64] In the circumstances, the court was urged to find that the claimant's version of the events was more plausible as it is unlikely that Mr. Chen would have sent the boom truck to a location he did not know and to persons he did not know for these unknown persons to offload and load the items. It is more likely that the claimant was given that responsibility.

**Defendant's submissions**

[65] Mr. Ricketts submitted that in order to resolve this matter the following issues of law will have to be determined:

(i) whether the defendant provided a safe system of work;

(ii) whether the defendant provided adequate plant and equipment to the claimant to carry out his duties;

(iii) whether there existed a competent staff of employees; and

(iv) whether there was a safe system of work with effective supervision

[66] He submitted that the following issues of fact were critical to the determination of liability:

(i) the instructions which the claimant received from the defendant on the day in question;

(ii) whether at the material time the claimant was instructed to operate the crane;

(iii) whether the defendant had properly trained the claimant in operating the crane;

(iv) whether the claimant had sufficient experience in operating the crane; and

(v) whether the claimant was provided with adequate safety gear in performing his duties.

[67] The resolution of those factual issues, it was argued, was dependent on the court's assessment of the credibility of the witnesses. It was submitted that the claimant was severely discredited during cross examination as his case was rife with inconsistencies and that in the circumstances, the court ought to reject his version of the events which culminated in him being electrocuted. Reference was made to ***Freemont (Denbigh) Ltd v Knight Frank LLP*** [2014] EWHC 3347 (Ch) in which the court discussed the issue of credibility. The court stated:

> *"116. There is a conflict of evidence between these witnesses as regards the parts of the file notes which I have set out or referred to earlier in this judgment. It is not possible to resolve that conflict without finding that either Mr Bhailok or Mr Vose and Mrs Leece-Roberts have not told the truth in their evidence. If I have to resolve the conflict, I have to choose between them; and if I decide that it was Mr Bhailok who was not telling the truth, it will follow that he (or someone in cahoots with him) is guilty of having concocted a significant number of documents with a view to trying to improve Freemont Denbigh's prospects of success in the litigation by misleading the Court.*
>
> *117. I have asked myself whether it is necessary for me to resolve this conflict. I understand that each party contends that it may prevail, irrespective of how the conflict is resolved. However, each party also contends that if the conflict is resolved in its favour, I cannot do otherwise than answer the preliminary issues in its favour. I therefore have no option but to decide whether Mr Bhailok, on the one hand, or Mr Vose and Mrs Leece-Roberts, on the other, have not told the truth.*
>
> *118. In his instructive article entitled **The Judge as Juror: The Judicial Determination of Factual Issues**, published in Current Legal Problems 38, Bingham J (as he then was) made this observation:*
>
> > *'The main tests needed to determine whether a witness is lying or not are, I think, the following, although their relative importance will vary widely from case to case:*

> *(1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;*
>
> *(2) the internal consistency of the witness's evidence;*
>
> *(3) consistency with what the witness has said or deposed on other occasions;*
>
> *(4) the credit of the witness in relation to matters not germane to the litigation;*
>
> *(5) the demeanour of the witness.'*
>
> *119. Bingham J went on to conclude that the first three of the tests may be regarded in general as giving a useful pointer to where the truth lies, whereas the fourth test is more arguable. As regards the fifth, he was of the view that "the current tendency is … on the whole to distrust the demeanour of a witness as a reliable pointer to his honesty."*

[68] Counsel submitted that the claimant's evidence that "Juds" showed him how to operate the crane was not credible as he was unable to describe the levers, state how many there were or where they were situated on the boom truck. Counsel also referred to the claimant's evidence in cross examination that he only knew "Juds" to be a welder despite his evidence in chief that she was a "trained equipment operator". When that evidence is considered with his admission that he had never seen her operate the crane or show anyone else how it was operated, it was submitted that the claimant was not being truthful when he stated that "Juds" had instructed him in its operation.

[69] It was also submitted that the claimant was contributorily negligent, as based on his evidence that he had looked around and did not see any electrical wires it was clear, that he did not know what he was doing and did not take reasonable care for his own safety.

**Discussion and analysis**

[70] In order to ground a claim in negligence it must be established that the alleged tortfeasor owed a duty of care to the claimant. Harris, JA in ***Glenford Anderson v. George Welch*** [2012] JMCA Civ 43 stated the principle in the following 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 has 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."*[1]

[71] Where the relationship of employee and employer is concerned, in addition to the general duty of care, an employer has a duty to take reasonable care to ensure the safety of his employees. The standard of care which an employer must observe is, as Lord Oaksey pointed out in ***Paris v Stepney Borough Council*** [1951] 1 All ER 42, that which an ordinarily prudent employer would take in all the circumstances. The learned judge said:

> *"The duty of an employer towards his servant is to take reasonable care for the servant's safety in all the circumstances of the case. The fact that the servant has only one eye, if that fact is known to the employer, and that, if he loses it he will be blind, is one of the circumstances which must be considered by the employer in determining what precautions, if any, shall be taken for the servant's safety. The standard of care which the law demands is the care which an ordinarily prudent employer would take in all the circumstances."*[2]

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[1] Paragraph 26
[2] Page 50

[72] In ***Wilsons and Clyde Coal Co Ltd v English*** [1938] AC 57 Lord Wright outlined what has often been regarded as components of this single duty to take reasonable care.[3] It includes the provision of:

(i) A competent staff of men;

(ii) Adequate material; and

(iii) A proper system and effective supervision

[73] An employer should also ensure that the premises where his employees are required to work are reasonably safe. (See ***Wilson v Tyneside Window Cleaning Co*** [1958] 2 All ER 265).

[74] In ***Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd.*** [1968] 1 WLR 1776, it was described thus:

> *" …the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probably effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent."*[4]

[3] Page 78
[4] Page 1783

[75] The duty of care which is owed is a personal one which is non-delegable. It is owed to each individual employee.

[76] The main issues for the court's consideration are as follows:

(1) Whether or not the defendant employer breached its duty to take reasonable care to ensure the safety of the claimant? and

(2) If so, did the breach result in injury to the claimant?

[77] Several questions arise in respect of the first issue. They are:

*a. Whether the claimant was instructed not to use the crane?*

*b. Whether or not the claimant was trained to operate the crane?*

*c. Whether any arrangements were made for the offloading of the chassis?*

*d. Whether or not the claimant was instructed to collect motor vehicle parts?*

[78] The answer to those questions is dependent on the court's assessment of the credibility of the witnesses. I will now proceed to highlight the areas in the claimant's and Mr. Chen's, evidence which raise questions in respect of their credibility.

The claimant

(i) When he was asked if the boom truck was the only one available on the day in question he declined to answer. When it was suggested to him that that was the case, he said he didn't know. It is in my view, highly unlikely that the claimant who had been employed to the defendant for approximately two years as a driver would not know whether there was another truck available.

(ii) His assertion that “Juds” was a trained operator. When juxtaposed with his evidence that he had known her from the commencement of his employment with the defendant and had never seen her operate the crane on the boom truck that assertion is at best, suspect. That statement by the claimant, to my mind was an attempt to buttress his evidence that Mr. Chen instructed “Juds” to show him how to operate the crane.

Mr. Chen

(i) His evidence that he could not recall if he had asked the claimant if he knew how to operate the crane. That question in my opinion would have been one that any prudent employer would have asked in the circumstances. How then would he know whether the claimant could operate the crane? On what basis would he have given the claimant specific instructions not to use the crane?

(ii) He could not recall whether he had told his Attorney-at-law that when he was giving instructions to the claimant, persons were present and within hearing distance, although he agreed that that was important information.

(iii) His failure to address in his witness statement the claimant’s assertion that he had directed “Juds” to instruct him how to operate the crane. In this regard I have noted that the claimant’s witness statement was served on the defendant’s Attorneys-at-law on 14 May 2014 and the defendant’s witness statement was signed and filed on 27 November 2014. There was ample time to rebut the claimant’s assertion.

(iv) He did not think that it was important to present evidence in respect of whether “Juds” was an employee of the defendant.

(v) When asked whether the claimant had full control of the boom truck having been dispatched to Knockpatrick, he said he did not know. That

question in my view was a simple one which required an equally simple answer.

[79] Having assessed the evidence of both witnesses, I find the claimant's evidence to be more credible. Counsel for the defendant placed great emphasis on the fact that the claimant was unable to state the number of levers on the boom truck and how they worked. His inability to do so, does not in my view affect his credibility. The uncontroverted evidence is that he was not trained to operate the crane. In the circumstances, it is not surprising to me that he was unable to recall the mechanics of its operation. I accept his evidence that Mr. Chen instructed him to deliver the truck chassis and also pick up certain items at the location.

[80] However, I reject his evidence that Mr. Chen asked "Juds" to show him how to operate the crane. It is my view that had that been so, the loading of the chassis would have provided the defendant with the perfect opportunity to assess whether the claimant would have been able to accomplish that task safely. Instead a forklift was used to load the chassis onto the truck.

[81] Where the evidence of Mr. Chen is concerned, I accept his evidence that the boom truck was the only available truck that day. The claimant's evidence when asked whether that was so was at best vague, in circumstances where as a truck driver employed to the defendant, such matters would have, in my view been within his knowledge.

[82] In respect of his evidence that he gave specific instructions to the claimant not to operate the crane, I have borne in mind Mr. Chen's admission that he did not provide the claimant with any information pertaining to who would accept the delivery of the chassis or how it would be offloaded at the location. I have also noted that he was unable to recall whether he had asked the claimant if he knew how to operate the crane. This I find to be quite odd, in light of the fact that the chassis had to be lifted onto the truck using a forklift. I infer from that bit of evidence that it was quite heavy and the task could not have been accomplished without

assistance unless the crane was used. It is also undisputed that the claimant travelled alone.

[83] In addition, Mr. Chen was unable to recall whether he told his Attorney-at-law that there were persons nearby who could have heard what he had said to the claimant. This casts serious doubt on his credibility. Such information, as conceded by Mr. Chen was important and in my view, vital to the defence. I therefore reject his evidence on this point.

[84] My findings are as follows:

(1) The claimant was asked by Mr. Chen to deliver the chassis and collect other items at the location.

(2) He was given charge of the boom truck without any enquiry as to whether he knew how to operate the crane.

(3) He was sent to the location alone and without any information and/or instructions on how the chassis would be offloaded and the other items loaded.

(4) The claimant made the decision to use the crane mechanism on the boom truck to offload the chassis and load the other items.

(5) Mr. Chen did not ask “Juds” to instruct the claimant how to operate the crane.

***Whether or not the defendant employer breached its duty to take reasonable care to ensure the safety of the claimant?***

[85] There is no dispute that the accident occurred during the claimant’s course of employment. Consequently, the defendant owed him a duty of care. The issue is whether that duty was breached.

[86] The claimant in order to succeed in his claim, is required to prove on a balance of probabilities, that the defendant failed to take reasonable steps to secure his safety and was therefore in breach of its duty towards him. It must also be proved that

that breach of duty, resulted in damage to the claimant and that the damage was reasonably foreseeable.

[87] In the particulars of claim it was averred that the defendant failed to provide someone to point out to the claimant the danger of operating the crane at the location. That failure it was said, left him to operate *"without any or any due regard to the danger to which he was being exposed…"*.[5] It is my understanding that the claimant is asserting that the defendant was negligent in not providing anyone to accompany the claimant to point out the dangers of operating the crane in the area nor did it's managing director point out to the claimant the danger of operating the crane in the area. This allegation may be subsumed under the broad category of a safe system of work.

[88] An employer has a duty to institute a safe system of working for his employees. In the case of ***Speed v Thomas Swift and Co Ltd*** [1943] KB 557, Lord Greene MR provided a useful guide as to what constitutes a safe system of work. He said:

> *"I do not venture to suggest a definition of what is meant by a safe system, but it includes, in my opinion or may include according to the circumstances, such matters as the physical lay-out of the job the setting of the stage so to speak; the sequence in which the work is to be carried out, the provision in the proper cases of warnings and notices and the issue of special instructions."*[6]

[89] A short passage from the judgment of Lord Reid in ***Winter v Cardiff Rural District Council*** [1950] 1 All ER 819 is also pertinent. It reads:

> *"A system of working normally implies that the work consists of a series of similar or somewhat similar operations and the conception of a system of working is not easily applied to a case where only a single act of a particular kind is to be performed. Recently, however, this obligation has been extended to cover certain cases when only a single operation is involved. I think the justification for this is that, where an operation is of a complicated or unusual character, an*

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[5] Paragraph 8 (iv)
[6] Pages 563

> *employer, careful of the safety of his men, would organise it before it was begun and in that sense provide a safe system of working for it…but cases in which such a duty has been found to exist are comparatively few and it has never been suggested that such an obligation arises in every case where a group of the employer's servants are doing some work which may involve danger if negligently performed. In the most recent reported case,* ***Rees v Cambrian Wagon Works Ltd,*** *Tucker LJ who delivered the judgment of the court said (175 LT 221):*
>
> > *"…the operation was one which required proper organisation and supervision, or, in other words, a reasonably safe system."*
>
> *I think that this is the right criterion"*[7]

[90] In Charlesworth & Percy on Negligence, 12th ed., the learned authors have stated that the term "safe system of work" describes:

(1) The organisation of the work;

(2) The way in which it is to be carried out;

(3) The giving of adequate instructions (especially to inexperienced workers);

(4) The sequence of events;

(5) The taking of precautions for the safety of the workers and at what stages;

(6) The number of such persons required to do the job;

(7) The part to be taken by each of the various persons employed; and

(8) The moment at which that shall perform their respective tasks.[8]

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[7] Page 825 per Lord Reid
[8] Para. 11-66

[91] This duty is applicable wherever the employee was engaged and is assessed based on the degree of control which the employer has over premises that are not his own. As was stated by Lord Porter in ***Winter v Cardiff*** (supra), the issue is *"whether adequate provision was made for the carrying out of the job in hand under the general system of work adopted by the employer or under some special system adapted to meet the particular circumstances of the case."*[9]

[92] The issue of whether the defendant has discharged its duty to the claimant is a question of fact. The court must however bear in mind that this duty is not an absolute one and does not require perfection. In ***General Cleaning Contractors Ltd. v. Christmas*** [1953] A.C. 180 Lord Tucker said that it is a duty:

> *"… to take reasonable steps to provide a system which will be reasonably safe, having regard to the dangers necessarily inherent in the operation. In deciding what is reasonable, long established practice in the trade, although not necessarily conclusive, is generally regarded as strong evidence in support of reasonableness".*[10]

[93] As was stated by Lord Denning in ***Qualcast (Wolverhampton) Ltd. v. Haynes*** [1959] A.C. 743:

> *"What is a 'proper system of work' is a matter for evidence, not for law books. It changes as the conditions of work change. The standard goes up as men become wiser."*[11]

[94] In other words, the factors which may be considered in assessing whether an employer has breached his duty to provide a safe system of work are dependent on the circumstances of each case.

[95] In my view, reasonable steps in this case would have required: (i) the claimant to be properly trained before he was dispatched to deliver the chassis to the location

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[9] Page 822
[10] Page 195
[11] Pages 760-761

and collect the other items; (ii) the making of arrangements to offload the chassis and load the other items onto the truck if the claimant was not authorised to do so; (iii) in the event that he was so authorised, the provision of an experienced employee or employees who could assist the claimant in light of his inexperience; (iv) if no one was assigned to accompany the claimant, warning him of the need to look out for electrical wires in the vicinity of the premises.

[96] Mr. Chen gave evidence that the claimant who was a truck driver was not trained to operate the crane. He also stated that training, experience and skill were required of persons who were called upon to undertake that task and that there was likelihood of damage being done if that was not the case. Mr. Chen by his own admission, did not seek to ascertain whether the claimant could operate the crane. He was also not in a position to warn the claimant about the presence of the electrical wires as he had never visited the location where the claimant was sent until after the accident.

[97] I do however, bear in mind that the off-loading of the chassis was accomplished without incident. The claimant was electrocuted whilst loading items for delivery to the defendant. Mr. Chen denied that he gave the claimant any instructions to collect anything. I do not accept that evidence. However, even if that evidence is accepted, that will not assist the defendant.

[98] In spite of the obvious fact that the claimant had full control of the boom truck at the time, Mr. Chen's evidence was that he did not know if that was the case. His dispatch of the claimant using a truck which was equipped to lift heavy items in circumstances where no information was given pertaining to how the chassis was to be offloaded and the other items loaded, was inherently negligent. The possibility that the claimant would attempt to use the crane was not farfetched and was within his contemplation. It was, in my view, also reasonably foreseeable that the claimant who was untrained and inexperienced in the operation of the crane may have encountered difficulties and sustained injuries of the type suffered. Utility wires are a common feature of our everyday landscape.

[99] Having found that the claimant who was dispatched alone, was given no information pertaining to the person or persons who were to accept the delivery of the chassis or how it was to be offloaded and the other items loaded, I have concluded that the defendant breached the duty of care owed to the claimant. I find that the defendant was negligent in that it failed to provide a safe system of work.

**Did the breach of duty cause injury to the claimant?**

[100] Mr. Chen's evidence was that approximately two hours after the claimant had left the defendant's premises he received a telephone call that the claimant had been electrocuted and was taken to the Mandeville Regional Hospital. The medical report from that institution indicated that he had suffered electrical burns to his right shoulder, right foot, left leg and buttock. There has been no challenge that the injuries were caused by the accident.

[101] The defendant in its defence alleged that the claimant was either the author of his own misfortune or was contributorily negligent. The defence of contributory negligence may be pleaded where it is alleged that the injury was due to concurrent causes. In ***Caswell v Powell Duffryn Associated Collieries Ld.*** [1940] AC 152, Lord Atkin stated:

> *"…the injury may be the result of two causes operating at the same time, a breach of duty by the defendant and the omission on the part of the plaintiff to use the ordinary care for the protection of himself or his property that is used by the ordinary reasonable man in those circumstances. In that case the plaintiff cannot recover because the injury is partly caused by what is imputed to him as his own default."*[12]

[12] Pages 164-165

[102] This concept involves the foreseeability of harm to oneself as was recognized by Lord Denning LJ in ***Jones v Livox Quarries Ltd.*** [1952] 2 QB 608, who stated:

> *"Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself.* ***A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself;*** *and in his reckonings he must take into account the possibility of others being careless."*[13]
>
> [My emphasis]

[103] The issue is one of causation. The court ultimately has to determine whose negligence caused the accident. In ***Caswell v Powell Duffryn Associated Collieries Ltd.*** (supra) Lord Atkin stated:

> *"I find it impossible to divorce any theory of contributory negligence from the concept of causation. It is negligence which 'contributes to cause' the injury, a phrase which I take from the opinion of Lord Penzance in* ***Radley v. London and North Western Ry. Co.*** *[(1876) 1 App. Cas 754] And whether you ask whose negligence was responsible for the injury, or from whose negligence did the injury result, or adopt any other phrase you please, you must in the ultimate analysis be asking who 'caused' the injury;.."*[14]

[104] The particulars of the claimant's negligence were stated to be as follows:

(i) Failing to take any or any adequate precautions for his own safety

(ii) Exposing himself to a risk of damage or injury of which he knew or ought to have known

(iii) Failing to heed or comply with the defendant's directive regarding the use of the crane attached to the defendant's truck

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[13] Page 615
[14] Page 165

(iv) Operating or attempting to operate the crane attached to the defendant's truck in breach of the defendant's express directive

(v) Operating or attempting to operate the said crane without proper training and/or experience

(vi) Operating or attempting to operate the said crane too close to the Jamaica Public Service Company Limited's high tension wires

(vii) Causing the said crane to come into contact with the high tension wires and electrocuting himself

(viii) Failing to take any or any adequate steps to ensure that the said crane did not come into contact with the said high tension wires

(ix) Failing to take any or any adequate steps to ensure his safety in the circumstances

[105] The claimant, having not been adequately trained or trained at all, ought to have foreseen that he could have had an accident and hurt himself, when he operated the crane. It was also reasonably foreseeable that if he sought to load or offload items in the vicinity of the utility wires he may be electrocuted.

[106] The **Law Reform (Contributory Negligence) Act** enables the court to reduce the damages in proportion to the degree of fault between the parties. Section 3(1) of that Act, states:

> *"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 an extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage..."*

[107] However, the apportionment is not solely dependent on causation. The court is required to take into account the blameworthiness of each party. In ***Davies v Swan***

***Motor Co (Swansea) Ltd, James Third Party*** [1949] 2 KB 291, Denning LJ stated the principle in the following terms:

> *"Whilst causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless, the amount of the reduction does not depend solely on the degree of causation. The amount of the reduction is such an amount as may be found by the court to be "just and equitable," having regard to the claimant's "share in the responsibility" for the damage. This involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness."*[15]

[108] On the issue of contributory negligence counsel for the claimant referred to ***Pitters v Haughton*** (1978) 16 JLR 100 where the claimant was not found to be contributorily negligent though she had undertaken the risky act of placing her hand on a dangerous piece of machinery. That case, can in my view, be distinguished on various grounds.

[109] In ***Pitters***, the accident occurred in a factory, in the instant case the accident occurred on the premises of a third party. The law demands more of an employer as regards premises under his control. Also, in ***Pitters*** Carey J averred that it was the failure to securely fence the machinery which was the cause of the accident and not the plaintiff's misguided, albeit risky act of placing her hand in the position she did. It was therefore concluded that if the machine had been securely fenced, the claimant would not have been able to engage in the risky act that led to her injury. Carey J stated that although the plaintiff had done a risky thing, it was a risk which the defendant was required to guard against. In the circumstances, the court found that the employer's act was the actual proximate cause of the accident.

[110] In the case of ***Desnoes & Geddes Ltd v Garry Stewart*** (supra), McCalla JA, (Ag) referenced the case of ***Pitters*** and stated as follows:

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[15] Page 326

> *"In Pitters (supra) the court held that where a statute required a factory owner or employer of labour to provide security or fencing for the machinery and, in default by the employer or factory owner, an employee sustains injury in the course of carrying out his duty on the same, the employer will be liable for breach of statutory duty.*
>
> ***The court also held that in cases involving breaches of statutory duty by an employer which resulted in injury to the employee, for the employee to be found liable for contributory negligence, such contributory negligence must have been of a high degree****."*[16]
>
> [My emphasis]

[111] The question is whether the employee acted reasonably in taking the risk. In other words, was it justified. In this regard I bear in mind that it has been decided that the taking of a deliberate risk in the employer's interests did not amount to negligence. In ***Neil v Harland & Wolff*** (1949) 82 Ll L Rep 515 the plaintiff who was a plumber and jointer electrician was burned whilst using a chisel to loosen pitch that had penetrated a cable carrying electrical current. The evidence was that he had been ordered by the defendant's foreman to remove the distribution cables which had become embedded in pitch lying in a channel behind the main switch panel. The chisel was used instead of a blow lamp because it would have taken much less time for the completion of the task although both methods were risky. The court found that it was the foreman's duty to have removed the fuses and the plaintiff was not contributorily negligent.

[112] Where however, the employee disregarded obvious dangers that is evidence of negligence (see ***Leach v Standard Telephones and Cables Ltd.*** [1966] 2 All ER 523, in which the employee was found to be contributorily neglect in respect of injuries sustained when he used a machine having not been trained in its operation).[17]

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[16] Pages 10-11

[17] The employee was found to be 25% liable for the accident

[113] In ***Chu v Demerara Distillers Ltd*** (2015) 86 WIR 350, it was stated that whilst there was always a duty upon an employer to take all reasonable steps for the safety of his servants, there equally devolved onto the employee a duty to take care and to act as a reasonably prudent man would so as to avoid injury.

[114] The claimant gave evidence that he looked around and he did not see anything to prevent him from doing what he did. However, as he was not a trained or an experienced boom truck operator, he was not in my opinion, able to appreciate the danger to which he was exposing himself. He should not have attempted to use the crane at all.

[115] The accident was in my view, caused by: the defendant giving the claimant control of the boom truck without enquiring whether he knew how to operate the crane; the defendant sending the claimant to the location alone in the absence of any directions on how the items were to be handled; and the claimant using the crane without having been trained and/or experienced in its operation. I find that the claimant was contributorily negligent as he failed to take reasonable care for his own safety. I find that he was 25% liable for the accident.

**Assessment of Damages**

**General Damages**

[116] The claimant relied on the medical reports of:

(1) Dr Jason Copeland dated 6 July 2007;

(2) Dr Geoffrey D. Williams dated 22 December 2014; and

(3) Dr Paul A. Kidd dated 29 June 2015.

[117] By order dated 21 May 2015 Dr Geoffrey D. Williams was appointed as an expert witness and permission granted to tender his report in evidence without the need to call him to give evidence unless the claimant indicated its objection on or before 31 July 2015. A similar order was made in respect of Drs Copeland and Kidd on 3

July 2015. However, I have noted that on 2 July 2015 an objection was filed in respect of Dr Kidd. That notice appears to have been filed in respect of the Notice of intention to tender the report that had been filed on 1 July 2015. No notice of objection was filed after the order was made and no objection was raised at the trial.

[118] The report of Dr Jason Copeland stated that the claimant had 7% full and partial electrical burns to the right shoulder, right foot, left leg and buttock. It indicates the prognosis as follows:

> "Patient was referred to plastic surgery clinic; National chest hospital for skin grafting to burn wound to foot. ***Outlook favourable; will have scar formation, but normal function anticipated***."
>
> [My emphasis]

[119] Dr Paul Kidd, a general practitioner, in his report stated as follows:

"…since he received the electrical shock in January 2007, Mr. Hill has been seen here for the following complaints.

1. Muscular pains mainly of limbs

2. Generalized weakness with early fatigability

3. Nervousness and tremors involving his hands and feet on exertion

4 Sexual Dysfunction with associated abnormal lethargy after ejaculation

These symptoms have been confirmed by his wife who he married two years prior to the accident.

***These symptoms have been diagnosed to be Disorder of the Nervous System secondary to massive electric shock***. There are physical signs of the burns over his right shoulder, on his left leg and right foot.

***These injuries are likely to be permanent***, having received available medical treatment along with physical therapy."

[My emphasis]

[120] In the medical report of Dr Geoffrey Williams (Consultant Plastic Surgeon) noted:

"(i) There is a patch of scarring of his right posterior shoulder comprising 3 distinct hyperpigmented scars measuring 2 ×3, 4 ×5 and 4.5 ×6 cm, respectively.

(ii) There is a faint, barely perceptible scar of his right thumb just below the nail.

(iii) There is an area of scarring on the dorsum (top) of his right foot measuring 7 ×5 cm. The outer portion is hypopigmented and there is a 3.5 × 2.5 cm hyperpigmented patch within it.

(iv) There is a 9 × 18 cm patch of hypopigmented scar to the front of his left leg just below the knee."

[121] It is also noted that it was *"quite likely that Mr. Hill [**could**] suffer from neurological symptoms in the future as a result of his electrical injury".* The doctor notes that these *"include but are not limited to peripheral neuropathy (numbness and weakness), seizures (fits) and memory disturbance".* The Doctor stated that the claimant's medical condition was satisfactory and that his only complaint was fatigability. (My emphasis)

[122] Significantly, the doctor's statements are not clothed with any certainty that the claimant will suffer from those neurological symptoms.

[123] In paragraph thirteen (13) of his witness statement the claimant asserted that due to the injuries sustained, he was unable to exert the same amount of energy. He also indicated that he suffers from bad headaches if he does not get an extra amount of sleep.

[124] In paragraph fourteen (14) he averred that since the incident he has had a diminished sex drive. He stated that he now has to limit himself because his body feels nervous.

**Claimant's Submissions**

[125] Counsel referred to the medical reports of both Dr Kidd and Dr Williams which indicate that the claimant's injuries are likely to be permanent. He also pointed out that the claimant will have to undergo surgery to minimise the appearance of his scars.

[126] Reference was also made to paragraphs 11-15 of the claimant's witness statement and submitted that those paragraphs are instructive as it relates to the pain and suffering and loss of amenities sustained by the claimant.

[127] With respect to general damages, it was submitted that an award of the sum of four million dollars ($4,000,000.00) would be reasonable compensation for the pain and suffering and loss of amenities suffered by the claimant.

[128] Counsel relied on the following cases:

(i) ***Lincoln Nembhard v Wayne Sinclair and Linton Harriot*** (unreported), Supreme Court, Jamaica, Claim No. 2004 HCV 3081, judgment delivered 25 July 2008; and

(ii) ***Walter Dunn v Glencore Alumna Jamaica Ltd t/a West Indies Alumina Company (Windalco)*** (unreported), Supreme Court, Jamaica, Claim No. 2005 HCV 1810, judgment delivered 9 April 2008

**Defendant's Submissions**

[129] It was submitted that based on ***Dorrel Steel v Midel Distributors Ltd*** (unreported), Supreme Court, Jamaica Suit No. C.L. 1994 S 034 judgment delivered 18 June 1999 and ***Pamella Gabbidon v Oscar Mills*** (unreported), Supreme Court, Jamaica, Suit No. C.L. 1992 G 085, judgment delivered 24

November 1998,[18] an appropriate award would be between one million forty thousand dollars ($1,040,000.00) and one million five hundred thousand dollars ($1,500,000.00) for pain and suffering. Counsel stated that an award of general damages in the sum of one million three hundred thousand dollars ($1,300,000.00) would be appropriate.

**Discussion**

[130] In addition to the information gleaned from the medical reports the claimant indicated that after the accident he felt pain all over his body and his skin was burnt. He said:

> *"11. My clothes were burnt and I was feeling pain all throughout my body, my skin was burnt all over in more places than I could count. Even my thumb, neck and shoulder were badly scorched and I have huge permanent scars all over my body. Before the accident I had smooth skin and my right toe could function normally"*

[131] He also stated that his skin was now ugly and he feels uncomfortable taking his clothes off at the beach because he is ashamed of the scars. His evidence is that he used to go to parties but he no longer has the energy to stay awake for long periods. He also indicated that he used to play football but he is no longer able to do so because of the damage to his toe and the tenderness of the scars on his feet.[19] He also gave evidence that his sex drive has diminished and that he spoke to Dr Kidd about that issue. He said that his wife has complained but he is unable to do anything about it.

[132] He also indicated that he was hospitalised for four (4) days.

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[18] See Khan, Ursula. 'Recent Personal Injury Awards made in the Supreme Court of Judicature of Jamaica' Volume 5, page 210

[19] See paragraph thirteen (13) of his witness statement

[133] In ***Lincoln Nembhard v Wayne Sinclair and Linton Harriot*** (supra), the claimant who was a carpenter and mason was electrocuted while working on the construction of commercial units. His injuries were as follows:

(i) Deep third degree electrical burns to left hand

(ii) Burns to left chest

(iii) Burns to right arm, forearm and hand

(iv) Burns to left foot

[134] The claimant was noted as having:

(1) Multiple healed scars involving the right palm, right forearm, right leg, chest wall and occipital region of the scalp

(2) The left hand/wrist was deformed and there were circumferential scars (keloid) to the left wrist

(3) Hypertrophied scars to the left palm

(4) Reduced range of motion in the thumb, interphalangeal joint and the carpometacarpal joint

[135] His left hand was useless and was assessed as having a permanent partial disability of 49% of the whole person.

[136] On July 25, 2008, general damages were assessed in the sum of four million dollars ($4,000,000.00) for pain and suffering and loss of amenities and eight hundred thousand dollars ($800,000.00) for handicap on the labour market. When

updated this amounts to eight million twenty-three thousand eight hundred and eighty dollars and sixty cents ($8,023,880.60).[20]

[137] Mr. Green readily admitted that the injuries suffered in the above case were more serious than those suffered by the claimant in the case at bar.

[138] In the case of ***Walter Dunn v Glencore Alumna Jamaica Ltd t/a West Indies Alumina Company (Windalco)*** (supra) the claimant who was a 39 year old Grade 1 Millwright sustained chemical burns to his left leg. He was hospitalized for three (3) weeks during which he underwent surgery. He had tangential excision and split thickness skin grafting. Skin was taken from the thigh and grafted to the injured site. He complained of wound pain and stiffness of the ankle and suffered pain and itching at the injury and donor sites. He developed hypertrophic scars at both sites. He was assessed as having a permanent partial disability of 3% of the whole person as a result of pain and itching. The doctor however opined that it was possible for both conditions to improve with time and even disappear completely. There was no disability as far as mobility was concerned.

[139] On April 9, 2008, he was awarded general damages of one million three hundred and twelve thousand five hundred dollars ($1,312,500.00). The updated award amounts to two million eight hundred and twenty-six thousand nine hundred and twenty-three dollars and seventy-six cents ($2,826,923.76).

[140] In ***Walter Dunn*** the claimant had circumferential burns on the leg. This amounted to 3% of his total body surface. He was hospitalized for approximately three (3) weeks during which he underwent surgery. In the instant case, the claimant suffered burns to 7% of his body and has not yet done surgery. In ***Walter Dunn*** the claimant developed hypertrophic scars. The claimant the instant case, according to the report of Dr Williams has both hyperpigmented and

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[20] Consumer price index for March 2020 was 268.8

hypopigmented scars. Furthermore, in ***Walter Dunn*** the claimant's permanent partial disability was assessed at 5% whole person as a result of pain and itching. It was however acknowledged that it was possible for the claimant's condition to improve with time. There was no disability as far as mobility was concerned.

[141] In ***Dorrel Steel v Midel Distributors Ltd*** (supra), which was cited by the defendant, the plaintiff suffered partial thickness flame burns to the face, left hand, both legs and the left side of the neck. She was hospitalized for five (5) days when the burns became infected. When examined four (4) years later it was observed that there was:

(1) mild hypopigmentation in the upper limbs as compared with unburnt areas;

(2) minimal scarring and no permanent disability; and

(3) The main long term problem was likely to be pruritus (itching) at the burn sites.

[142] In June 1999 she received an award of three hundred and fifteen thousand dollars ($315,000.00) for general damages. When updated this amounts to one million six hundred and eight seven thousand three hundred and sixty-five dollars and forty-eight cents ($1,687,365.48).

[143] In ***Dorrel Steel*** the claimant sustained partial thickness flame burns to the face, left hand, both legs and left side of her neck. She was treated as an outpatient and it was only when her burns became infected that she was hospitalised for approximately one week. This is to be contrasted with the claimant in the instant case, who sustained burns to his right shoulder, right foot, left leg and buttock and was hospitalised from the very beginning for approximately four (4) days.

[144] Surgical intervention was not recommended in ***Dorrel Steel*** as it was noted that there was no material improvement to be gained from it. In the instant case, the claimant was referred to a plastic surgery clinic for skin grafting for the burn wound

to his foot. Additionally, the report of Dr Geoffrey Williams states that the claimant can benefit from reconstructive plastic surgery to minimise the scarring.

[145] I have also noted that in ***Dorrel Steel*** the claimant's burns, though fairly extensive, were almost all of a superficial nature and would likely heal without scarring. In the case at bar, the claimant has scars on his right shoulder, right foot and left leg. In ***Dorrel Steel*** there was no permanent partial disability and the instant case is similar in that regard.

[146] In my opinion, the injuries sustained by the claimant in the instant case are more serious than those suffered by the claimant in ***Dorrel Steel***. The award in that case would need therefore need to be adjusted upwards.

[147] In ***Pamella Gabbidon*** ((supra) the plaintiff was diagnosed as suffering from:

(1) 2nd degree burn injuries to both lower limbs

(2) 2nd degree injuries to forearms

(3) 2nd degree injuries to face

(4) 20% of her skin was affected.

She was hospitalized for approximately three (3) weeks and she was not assessed with any permanent partial disability as her wounds, though producing scars, had healed significantly. Surgical intervention was not necessary. She was awarded general damages in the amount of four hundred and fifty thousand dollars ($450,000.00) in November of 1998. When updated this amounts to two million five hundred and nine thousand five hundred and forty-three dollars and fifty-six cents ($2,509,543.56).

[148] It was submitted on behalf of the defendant that the injuries in the above case were far more severe than those suffered by the claimant. In ***Pamella Gabbidon*** the plaintiff had a longer period of convalescence than the subject claimant (3 weeks

compared to 4 days). The claimant has also received a favourable prognosis as can be seen from the medical report of Dr Williams.

[149] The injuries suffered by the claimant in ***Lincoln Nembhard*** as indicated by counsel for the claimant, were far more serious than those suffered by the claimant in the instant case.

[150] Having assessed the preceding cases, it is my opinion that sum awarded in ***Walter Dunn*** can be used to assess the damages for pain and suffering and loss of amenities in the instant case. Although there is no indication that the claimant in the case at bar, has any permanent partial disability, that case is largely on point as he suffered burns to a greater area of his body than the claimant in ***Walter Dunn***. In addition, the report of Dr Williams indicates that the claimant will require two separate operative procedures over a period of one year to address the scarring.

[151] In the circumstances, it is my view that an award of two million six hundred thousand dollars ($2,600,000.00) would be appropriate. In light of my finding that the claimant is twenty-five per cent liable for the accident, the final award under this head would be one million nine hundred and fifty thousand dollars ($1,950,000.00).

Loss of future earnings/handicap on the labour market

[152] In order to ground a claim under this head, the claimant is required to prove that he can no longer work or that his prospects of employment have been adversely affected as a result of the accident.

[153] In the case of ***Lennard Garcia v Point Lisas Industrial Port Development Corporation Limited*** (unreported), High Court, Trinidad and Tobago, CV2010-03061, judgment delivered 19 September 2013, it was stated that to cross the

threshold for an award of loss of future earnings, a claimant must demonstrate that there is a continuing loss of earnings attributable to the accident.[21]

[154] In the 2nd edition of "Harrisons' Assessment of Damages" [Cases on Personal Injury and Fatal Accident Claims], the author notes that a claim for loss of future earnings is only sustainable if there is some diminution in the income or earning capacity of the injured party.[22]

[155] The sum total of the claimant's submissions was that he is unable to drive for long periods. I have noted that the claimant when challenged in cross examination indicated that by "long hours" he meant every day.

[156] The claimant also gave evidence that his right toe does not function normally. However, Dr Copeland's prognosis was that normal function was anticipated. No other medical evidence was presented to indicate that the prognosis was not as expected. The symptoms noted in the report of Dr Kidd, such as generalized weakness with early fatigability and nervousness and tremors involving his hands and feet on exertion, were diagnosed to be a disorder of the nervous system. However, the medical reports do not indicate that the claimant has suffered any permanent partial disability.

[157] Paragraph fifteen (15) of the claimant's witness statement reads, in part:

> *"...At the time of the accident I used to make $12,000.00 to $22,000.00 per fortnight depending on the amount of trips I get. There is no way I can do that type of work anymore because of my injuries and I am not sure how long I will be able to continue to drive trucks in order to make a living."*

[158] The claimant also gave evidence that after the accident he was engaged in a business venture where he would source and deliver marl from a quarry in Black

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[21] Paragraph 17
[22] Chapter 3, page 37

River to various places. He stated that one load of marl would cost approximately thirty-five thousand dollars ($35,000.00) and he would pay cash for the marl or sometimes purchase it on credit. After his expenses were deducted his earnings would be between fifteen and sixteen thousand dollars ($15,000.00 – $16,000.00). The claimant did not give any evidence as to the frequency of those trips. However, he stated that he no longer drives trucks and the last time he did so was in August 2014. There is no indication why he stopped driving although he had continued to drive for approximately seven (7) years after the accident.

[159] The claimant testified that he would earn approximately twelve thousand dollars ($12,000.00) to twenty-two thousand dollars ($22,000.00) before the accident. After the accident his earnings were reduced to between twelve and fifteen thousand dollars ($12,000.00 - $15,000.00) per fortnight. This, he said, was dependent on the number of trips he made. He said that most of his income would be sent to his account at the National Commercial Bank in Santa Cruz in the parish of St. Elizabeth. The claimant said that he would receive pay stubs. He informed the court that he handed these stubs over to his attorney. No documentary proof of his earnings was presented to the court.

[160] I have found the following passage from ***Smith v Manchester Corporation*** (1974) 17 KIR 1 to be quite instructive in my assessment of whether sufficient evidence has been presented to ground a claim under this head of damages:

> *"Loss of future earnings or future earning capacity is usually compounded of two elements. The first is when a victim of an accident finds that he or she can, as a result of the accident, no longer earn his or her pre-accident rate of earnings. In such a case there is an existing reduction in earning capacity which can be calculated as an annual sum. It is then perfectly possible to form a view as to the working life of the plaintiff and, taking the usual contingencies into account, to apply to that annual sum of loss of earnings a figure which is considered to be the appropriate number of years" purchase in order to reach a capital figure.*
>
> *…….*

> *The second element in this type of loss is the weakening of the plaintiff's competitive position in the open labour market: that is to say, should the plaintiff lose her current employment, what are her chances of obtaining comparable employment in the open labour market? The evidence here is plain – that, in the event (which one hopes will never materialise) of her losing her employment with Manchester Corporation she, with a stiff shoulder and a disabled right arm, is going to have to compete in the domestic labour market with women who are physically fully able. This represents a serious weakening of her competitive position in the one market into which she can go to obtain employment. It is for that reason that it is quite wrong to describe this weakness as a "possible" loss of earning capacity: it is an existing loss: she is already weakened to that extent, though fortunately she is protected for the time being against suffering any financial damage because she does not, at present, have to go into the labour market."*[23]

[161] I am also mindful of the following passage from ***British Transport Commission v Gourley*** [1956] AC 185, that general damages in personal injury cases include:

> *"compensation for pain and suffering and the like, and if the injuries suffered are such as to lead to continuing permanent disability, compensation for loss of earning power in the future."*[24]

[162] In ***The Attorney General of Jamaica v Ann Davis*** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal 114/2004, judgment delivered 9 November 2007, the judgment of Harrison J.A refers to the case of ***United Diary Farmers Ltd. & Anor v Goulbourne (by next friend Williams)*** (1984) 21 JLR 10[25] where Carberry J.A, at page 5 of the judgment, made the following statement in relation to awards:

> *"Awards must be based on evidence. A plaintiff seeking to secure an award for any of the recognized heads of damage must offer some evidence directed to that head, however tenuous it may be"*

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[23] Page 7-8
[24] Page 206
[25] See paragraph 13 of ***Ann Davis***

[163] Although Dr Kidd has indicated that the injuries detailed in his report as disorders of the nervous system were likely to be permanent, there is no indication of how they were likely to impact the claimant's ability to work. The claimant has also not provided any evidence of why he stopped working, whether he has tried to obtain employment or if and how his "marl business" was affected by his injury. In addition, no evidence of any diminution in the claimant's earning capacity has been presented to the court. I therefore find that there is no basis for any award under this head.

Cost of Future Medical Care

[164] Dr Williams' report which was admitted in evidence indicates that the estimated cost of the surgery to address the scarring on the claimant's right shoulder, the top of his right foot and the front of his left leg is one million six hundred thousand dollars ($1,600,000.00).

**Special damages**

**Claimant's submissions**

[165] Mr. Green submitted that the claimant is entitled to recover the sum of one million six hundred and thirty-three thousand nine hundred and thirty-four dollars and thirty-seven cents ($1,633,934.37) for special damages and three hundred and ninety thousand dollars ($390,000.00) for pre-trial loss of earnings.

[166] Reference was made to the following particulars of special damages as listed in the claimant's witness statement in support of that submission:

| | |
|---|---|
| Hospital Expenses | $37,934.37 |
| Medical Report | $11,000.00 |
| Transportation | $4500.00 |
| Estimated cost of surgery | $1,600,000.00 |

| | |
|---|---|
| TOTAL | $1,663,934.37 |

[167] Counsel in his explanation of how the sum for pre-trial loss of earnings was arrived at stated that the claimant was unable to work for one year and lost earnings for forty (40) weeks amounting to three hundred and ninety thousand dollars ($390,000.00). The court was also reminded that the defendant paid the claimant for twelve (12) weeks after he was injured. He stated that the sum claimed was based on the claimant's evidence that prior to the accident he would earn between twelve thousand dollars ($12,000.00) to twenty-two thousand dollars ($22,000.00) per fortnight.

**Defendant's submissions**

[168] Counsel began his submissions by directing the court to the particulars of special damages set out in paragraph nine (9) of the particulars of claim which reflect a total claim of twenty-five thousand six hundred and ten dollars ($25,610.00) comprised of hospital expenses, medication and transportation costs. It was submitted that no other item of special damages was pleaded which could form the basis of an award for a greater sum. Consequently, it was submitted that the claimant is bound by his pleadings and is not entitled to advance any additional claim for special damages especially in light of the fact that the relevant limitation period had expired on January 9, 2014.

[169] With respect to transportation costs, it was submitted that no award should be made. Counsel stated that although the court can make an award in the absence of receipts in light of the informal nature of the transport sector in Jamaica, there must be evidence of the trips made. In this regard it was stated that the claimant has presented no evidence pertaining to the method of transportation utilized and the cost associated with same.

[170] It was submitted that based on the documentary evidence an award of twenty-one thousand one hundred and ten dollars would be appropriate.

**Discussion**

[171] It is a well-established principle that special damages must be specifically pleaded and proved. In ***Murphy v. Mills*** (1976) 14 J.L.R. 119 Hercules J.A cited the following passage from ***Bonham-Carter v Hyde Park Hotel Ltd*** [1948] 64 TLR 177 where Lord Goddard CJ said:

> *"On the question of damages I am in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage; it is not enough to write down the particulars and, so to speak, throw them at the head of the court saying: 'This is what I have lost; I ask you to give me these damages'. They have to prove it.'*

[172] Similarly, in ***Caribbean Cement Company Limited v Freight Management Limited*** [2016] JMCA Civ 2, Brooks JA stated:

> *"There is a principle that special damages, such as the damages claimed by FML, must be specifically pleaded and strictly proved. This court has accepted that principle in many cases, including* ***Robinson and Co and Another v Lawrence****. In that case, this court set aside an award of special damages on the basis that the claimant had not proved his claim."*[26]

[173] Plaintiffs it has been said *"…ought not to be encouraged to throw up figures at trial judges, make no effort to substantiate them and to rely on logical argument to say that specific sums of money must have been earned."*[27]

[174] Special damages were claimed as follows:

(1) Hospital expenses $15,940.00

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[26] Paragraph 64

[27] Per Rowe P in ***Hepburn Harris v Carlton Walker*** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal no. 40/90, judgment delivered 10 December 1990

| | | |
|---|---|---|
| (2) | Medication | $5,170.00 |
| (3) | Transportation | $4,500.00 |
| | | $25,610.00 |

[175] At the trial, receipts totalling nineteen thousand two hundred and fifty-one dollars and seventeen cents ($19,251.17) were tendered and admitted in evidence. Those receipts related to hospital expenses and the cost of medicine.

[176] The claimant's witness statement also indicates that the sum of four thousand five hundred dollars ($4,500.00) was incurred for travelling expenses although no documentary proof was presented to substantiate that sum. That aspect of his evidence however, was not challenged in cross examination.

[177] I have noted that the cost of the medical report prepared by Dr Williams was not specifically pleaded as an item of special damages.

Pre-trial loss of earnings

[178] The claimant testified he was unable to work for one year after the accident and that the defendant paid him the sum of sixty thousand dollars ($60,000.00) which he said represented his salary for twelve (12) weeks. It was submitted that in the circumstances, he lost earnings for forty weeks. Counsel submitted that the sum of three hundred and ninety thousand dollars ($390,000.00) would be an appropriate award under this head of damages.

[179] Pre-trial loss of earnings, in order to be recoverable, ought to be claimed as an item of special damages. In ***British Transport Commission v Gourley*** (supra) it is stated as follows:

> *"In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage, which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies*

> *and is not specially pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future."*[28]

[180] Rule 8.11 (5) of the **Civil Procedure Rules, 2002** states:

> *"The claimant **must** include in or attach to the claim form or particulars of claim a schedule of any special damages claimed".*
>
> [My emphasis]

[181] In McGregor on Damages, 17th ed. at page 1584 the learned authors state:

> *"On a strict view, the claimant will be debarred from proving special damage not only where he fails to plead it at all but where he fails to plead it with sufficient particularity…*
>
> *In more modern times, however, the tendency is to adopt a more lenient approach and to allow a claim for special damages to be proved provided that the existence of such a claim is clear from the statements of case."*

[182] The object and purpose of pleadings is to ensure that when the litigants come to trial they have been given ample opportunity to prepare their respective cases and treat with the issues raised by the other party. In this case, the pleadings do not clearly contain any information pertaining to visits to the doctor or payment for any medical report. There is also no reference to pre-trial loss of earnings. In addition, there was no indication at the trial that those sums were agreed as special damages. In the circumstances, I am in agreement with the submission of counsel for the defendant that the claimant is bound by the pleadings and is not entitled to advance any additional claim for special damages.

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[28] Page 206 per Lord Goddard

[183] Although counsel for the claimant made submissions pertaining to pre-trial loss of earnings there is no claim for loss of earnings in the particulars of claim. In the circumstances, no award can be made for pre-trial loss of earnings.

[184] I find that special damages in the sum of twenty-three thousand seven hundred and fifty-one dollars and seventeen cents ($23,751.17) has been proved.[29]

**Disposition**

[185] Liability in negligence for the injuries suffered by the claimant is apportioned 25% to the claimant and 75% to the defendant.

[186] Damages payable to the claimant are therefore assessed as follows:

(1) General Damages for Pain and Suffering and Loss of Amenities in the amount of ($2,600,000.00 x 75%) = $1,950,000.00 with interest thereon at 3% per annum from 7 September 2007 to today.

(2) Future medical care ($1,600,000.00×75%) = $1,200,000.00.

(3) Special Damages in the amount of ($23,751.17 x 75%) = $17,813.37 with interest thereon at 3% per annum from 10 January 2007 to today.

(4) Costs (75%) to the claimant to be agreed or taxed.

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[29] See paragraphs 175 and 176 of this judgment