*IN THE SUPREME COURT OF JUDICATURE OF JAMAICA*

*SUIT NO. C.L. 1995/B-139*

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| *BTEWEEN* | *CALVIN BROWN* | *CLAIMANT* |
| *A N D* | *TANKWELD CONSTRUCTION LIMITED* | *DEFENDANT* |

Mr. Maurice Frankson instructed by Gaynair and Fraser for Claimant

Mr. John Graham and Miss Michelle Smith instructed by John G. Graham and Company for Defendant.

**Heard: February 21 & 22, 2006 and April 20, 2007.**

**Hibbert, J.**

From the evidence presented the following facts emerge:-

Calvin Brown was employed to Tankweld Construction Limited as a serviceman and was so employed during the construction of the Boundbrook Wharf in Portland on the 28th October, 1992. As a serviceman he was required to ensure that water and oil levels were properly maintained in engines which used water and oil and to ensure that all nuts and bolts on machinery being used on the site were securely fastened. Also employed by Tankweld at the Boundbrook site were three mechanics whose function was to effect repairs to machinery owned by Tankweld. Repairs to rented machines would be undertaken by their respective owners.

On the 28th October, 1992 Calvin Brown, on his own volition, undertook the task of effecting repairs to the motor of one of the rented welding plants. While tightening a

nut, the wrench he was using slipped, causing his hand to make contact with the cooling fan which was in motion, thereby causing injury to his right thumb and index finger.

Consequently Brown sued Tankweld, claiming that the injuries he sustained were occasioned by the negligence of Tankweld or by breach of statutory duties on the part of Tankweld.

The Particulars of Negligence were itemized as follows:

i. Failing to take any or any sufficient or proper care for the safety of Plaintiff.

ii. Causing or permitting the Plaintiff to participate in work that exposed him to risk of damage or injury which they knew or ought to have known.

iii. Failing to provide a safe system of work for the Plaintiff

iv. Failing to have any or sufficient regard for the safety of the Plaintiff or to take adequate measures.

The Particulars of Breach of Statutory Duties were stated as follows:-

Causing and/or permitting the Plaintiff to work in conditions which are in breach of Section (84) and Section (49) of the **Building Operations and Work of Engineering Construction (Safety Health and Welfare) Regulations**.

In their Defence Tankweld denied being negligent or being in breach of any statutory duty and claimed that the injuries to Mr. Brown were caused either wholly or partially by his negligence and listed the following as Particulars of Negligence.

a) Failing to de-energize the motor before attempting to do any work on relation thereto;

b) Placing his hand in the path of the radiator fan at a time when the same was in motion;

c) Attempting to repair an injector on the said motor while same was in motion;

d) Placing his hand on or too close to the fan belt at a time and in a manner which was manifestly unsafe.

**Breach of Statutory Duty**

It appears that the breaches to the **Building Operations and Work of Engineering Construction (Safety, Health and Welfare) Regulations 1968, made pursuant to Section 12 of the Factories Ac,** as pleaded in the Statement of Claim, must have been alleged in error.

Section 84 of the Regulations State:

> "No person shall ride or be required or permitted to ride on the buffer, running board or other insecure position on any vehicle to which regulation 83 applies or on any other part thereof except the place thereon provided for that purpose"

Section 49 states:

(1) A lifting appliance shall not be operated otherwise than by a person trained and competent to operate the appliance except that it shall be permissible for the appliance to be operated by a person who is under the direct supervision of a qualified person for the purpose of training.

(2) No person under eighteen years shall be employed (except under the direct supervision of a competent person for the purpose of training) either to give signals to the operator of any lifting appliance driven by mechanical power or to operate any such appliance.

(3) If the person operating a lifting appliance has not a clear unrestricted view of the load or, where there is no load, of the point of attachment for a load and of its vicinity, throughout the operation, except at any place where such view is not necessary for safe working, there shall be appointed and suitably stationed one ore more competent persons as may be necessary to give necessary signals to the operator.

In his closing submissions, the attorney representing Mr. Brown placed no reliance on these sections but instead relied on, though not pleaded, section 3 of the Factories Regulations 1961 which requires that every dangerous part of any machinery shall be securely fenced. He cited in support of submissions the decision of the House of Lords in **John Summers and Sons Limited v. Frost [1955] AC 740** which emphasized that the duty of a factory owner to fence the dangerous parts of any machinery is an absolute one.

The provisions of this section cannot, however, avail Mr. Brown even if properly pleaded unless it can be established that he sustained his injury in a place which falls within the definition of a factory.

The term '**factory**' is extensively defined in section 2 of the Factories Act and having carefully examined the definitions I must agree with the submissions made by Mr. Graham on behalf of Tankweld that the construction of a wharf at Brandbrook in Portland could not be said to be a factory operated by Tankweld within the meaning ascribed by section 2 of the Factories Act.

**Breach of Common Law Duty**

Undoubtedly every employer owes a duty of care to each employee. In **Smith v. Baker and Sons** [1891] AC 325, Lord Herschell at page 362 stated:

> "It is quite clear that the contract between employer and employee involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk".

In **Wilson's and Clyde Coal Company v. English** [1938] AC 57, Lord Wright redefined the employer's duty as:

> "the provision of a competent staff of men, adequate material and a proper system and effective supervision"

In order to succeed in this claim, the claimant would have to provide evidence to satisfy me on a balance of probabilities that Tankweld was in breach of its duty of care. On the basis of the evidence which I have accepted, the Claimant has failed in this regard.

I accept that he knew that he was not authorized to effect repairs to any machinery operated by Tankweld at Boundbrook, as mechanics were employed for that purpose. Furthermore I accept that no employee of Tankweld was authorized to repair the plant which caused the injury to Mr. Brown as it was not owned by Tankweld.

I find therefore that Mr. Brown was the author of his own misfortune and so his claim must fail.

Judgment is therefore entered in favour of the Defendant with costs to be taxed if not agreed.

It is unfortunate that Mr. Brown received his injuries while attempting to make himself useful. This, therefore, might be a fitting case in which another offer of an ex-gratia payment may be made.