IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2006 HCV 03392

BETWEEN	**CARLOS CAMPBELL**	**CLAIMANT**
A N D	**LEROY STEWART T/A STEWART'S MACHINE SHOP**	**DEFENDANT**

Miss Danielle Archer instructed by Kinghorn & Kinghorn for the Claimant.

Mr. Debayo Adedipe for the Defendant.

HEARD: 20th September, 2010 and 20th December, 2010

CORAM: E.J. BROWN, J

On the 20th September, 2010, at the close of the case for the defence Judgment was entered for the Defendant. It was further ordered that costs be the Defendant's, to be taxed if not agreed below are the reasons for entering judgment for the Defendant.

THE CLAIM

In his Claim Form filed on the 26th September 2006, Mr. Campbell alleged that he sustained serious personal injury resulting in loss and damage, while in the defendant's employment. First, during the

execution of his duties as a machine operator under a contract of service, he was exposed to risk of injury by virtue of the negligent manner in which the defendant executed his operations in the course of his trade.

The second or alternative prong of the Claim was grounded in contract. Mr. Campbell charged that it was either an expressed or implied term of his contract of service that the defendant would take all reasonable care to execute his operations in such a manner so as not to subject them to reasonably foreseeable risk of injury. That, in breach of that duty, Mr. Stewart exposed him to reasonably foreseeable risk of injury. That exposure resulted in serious personal injury, loss and damage.

The Claimant particularized the allegation of negligence as appears hereunder:

(a) Failing to provide a safe place of work.

(b) Failing to provide the requisite warnings, notices and/or special instructions to the Claimant and his other employees in the execution of his operations so as to prevent the Claimant being injured.

(c) Failing to provide a safe system of work.

(d) Failing to provide a competent and sufficient staff of men.

(e) Failing to modify, remedy and/or improve a system of work which was manifestly unsafe and likely at all material times to cause serious injury to the Claimant.

(f) Causing the Claimant's hand to get caught in the gears of the machine (a Mixer) to which the Claimant was assigned.

(g) Causing the said gears of the said machine to slip thereby catching the hand of the said Claimant.

(h) Failing to secure the said machine in such a way that the Claimant's hand was not caught in the said machine.

(i) Instructing the Claimant to use a defective machine.

(j) Providing a defective and unsafe machine for the use of the Claimant.

(k) Failing to implement a safe system which would prevent the Claimant sustaining injury to the hand as was sustained by the Claimant.

(l) Failing to take reasonable care to prevent the said gear box catching the hand of the Claimant.

(m) Failing to warn or take reasonable care to warn, the Defendant of the possibility or probability of the said gear box catching the hand of the Claimant.

(n) Failing to take reasonable care in all the circumstances to carry out its operation in such a manner so as not to expose the Claimant to reasonably foreseeable risks.

THE DEFENCE

In the defence filed, Mr. Stewart averred that Mr. Campbell was a trainee welder and denied he was a machine operator under a contract of service. Further, it was denied that at the material time Mr. Campbell was performing duties as a machine operator. Additionally, the circumstances under which Mr. Campbell came to sustain his injury were also denied, along with the particulars of negligence.

The defendant counter-averred that Mr. Campbell was sent along with a workman, Alney Bodley, and another trainee, to observe and assist by passing tools to Bodley. Mr. Bodley had been sent to fit up a block-making machine at Wiltshire Hardware. Mr. Campbell was instructed to stay near to Mr. Bodley in addition to passing him tools, as and when so requested.

It was asserted in the defence, that contrary to his instructions, Mr. Campbell left the side of the machine where Mr. Bodley was and went to the opposite side. That in doing so, Mr. Campbell negligently caused his hand to get caught in the gears on the machine. It was also alleged that Mr. Campbell had no assigned task which required him to put his hand in or on the machine or otherwise touch or interfere with it. That he did not expose Mr. Campbell to any foreseeable risk of injury. Mr. Stewart further posited that Mr. Campbell sustained the injury "as a result of his own folly, negligence and disobedience."

CLAIMANT'S CASE

The Claimant, Carlos Campbell, said in examination in chief that he was a welder, working in the defendant's machine shop. He had been so employed for two (2) months prior to the incident. However, he was not a trained welder, having previously only learnt welding in high school. Alney Bodley was charged with the task of instructing him in this vocation.

On the day in question, Mr. Stewart took him to the block factory, along with the equipment. Mr. Stewart showed him the places on the machine that needed welding. He was further counselled to help Mr. Bodley, if so required. Mr. Campbell said he was brought along to expedite the work as Mr. Stewart had made time of the essence for completion, being constrained to be paid the following day.

Some of this welding had taken place off site. That is, the gear for this machine had been taken to Mr. Stewart's machine shop welded and brought back for replacement. This was no ordinary gear. Mr. Campbell said it was big and very heavy, putting the other men to shame if they tried to fit it by themselves. Nevertheless, apparently being possessed of Hercules strength, Mr. Campbell was instructed by Mr. Bodley to lift the wheel and put it onto the machine.

Mr. Campbell did so, then used a bar to hit it onto the spoke. After that was done, the spinning of the gear commenced. That was to facilitate the fitting of the gear heads into the grooves. Mr. Campbell

said, "At this time my hand was near the groove." During the spinning of the wheel, 'one of the gear heads caught in the groove of the other bigger gear head.' That resulted in the crushing of his right middle and ring fingers.

On the central issue of how the incident occurred, Mr. Campbell was first asked in cross examination to describe the machine. At the front of the machine is a blade that mixes the concrete. To the right are two big gears, each spinning in the opposite direction. For the blade to spin, the two big gears, have to be connected. Mr. Campbell initially said there was nothing to the left side of the machine. However, he later said he couldn't recall if at the left side are pulley and pulley wheels.

One gear was said to be about three (3) inches across and the other about nine (9) feet. The gear is made of heavy iron. He denied no one man could lift the gear but it needed more than one man to put it into place. While admitting that he knew a 'comalong' is used to lift things such as the gear, he assert that none was there. He disagreed that no gear was being lifted.

It was suggested to Mr. Campbell that the only work being done that day was the fitting up of the blade on the machine. To that came the remarkable response, "blade is what I call gear." He went on to say the only job there was not the fitting up of the blade. When the court enquired of Mr. Campbell why he said the blade is what he called the gear, he said he didn't hear the question correctly.

Mr. Campbell testified that he and Mr. Bodley lifted the gear, Fathead, another apprentice, took over from him then it was rested on the spoke. The task was Mr. Campbell's to 'beat' it on with a hammer. He later expanded that this was a big sledge hammer. He admitted that in his statement he had said that he used a bar for this purpose.

While denying that he saw Mr. Bodley fitting the blades that day, Mr. Campbell agreed Mr. Bodley told Fathead to make the blade spin. Mr. Campbell contended however, that he too was told to make the blade spin. Mr. Campbell said Fathead was told first to perform that task. He continued, "after he told me to spin it, the gear, then my finger caught in it." He didn't resile when confronted with his evidence in chief. In chief he had said "as they were spinning it one of the gears caught my hand, crushing it."

Finally, he denied seeing any warning sign on the machine. Mr. Bodley did not warn him to stay clear of the gears because they were dangerous. Neither did the operator of the machine give him similar instructions. He stoutly resisted the suggestion that he suffered the injury because he needlessly allowed his hand to come into contact with the gears.

DEFENDANT'S CASE

Leroy Stewart swore in chief that Mr. Campbell was required to accompany Mr. Bodley, observe the latter and pass tools to him.

Specifically, Mr. Campbell was not sent to work on the machine. Under cross examination, Mr. Stewart said the Claimant was not a skilled worker, he was just going there to observe. Mr. Stewart further agreed that Mr. Campbell had just left school and had no experience. He never gave Mr. Campbell any instructions regarding a mixer prior to the day in question.

The Claimant's immediate supervisor, Mr. Alney Bodley, next took the stand. Having previously pulled down and repaired parts of the mixer, the assignment was his to fit it up on the day in question. He was accompanied by Fathead and the Claimant. His task had been to correct the problem of the blade touching the bottom of the mixer. Mr. Bodley agreed with Mr. Stewart concerning the role of the Claimant that day. Additionally, he instructed the Claimant to stay close to him.

The machine stood at a height of five (5) inches, four (4) feet. There was a pulley on one side and gears on the other. Mr. Bodley was working on the pulley side of the machine. Having fitted the blade of the mixer, he asked Fathead to turn the pulley. That was to verify if the problem had been corrected. Fathead turned the pulley and Mr. Bodley confirmed the persistence of the problem. When Fathead stopped turning the pulley, at Mr. Bodley's instructions, Mr. Bodley looked up to see Mr. Campbell holding the injured hand. Mr. Bodley did not see how that happened.

In cross examination Mr. Bodley said he had removed the blade to work on it. To remove the blade, all he had to remove was a band around it. He was positioned on the top of the mixer where it is loaded and Fathead was standing on the side of the pulley. Mr. Campbell was close by the gear, though Mr. Bodley didn't know why. From his vantage point he was unable to observe Mr. Campbell.

Mr. Bodley denied showing Mr. Campbell where to weld, as no welding was being done that day. Neither did the work involve fixing the gears. He couldn't affix the blade without Fathead's assistance.

In so far as pulling on the pulley was concerned, only Fathead was requested so to do, not Mr. Campbell. Mr. Bodley said he needed to adjust the blades. Pulling on the pulley would provide him with the information relevant to how much adjustment the blade needed.

He first said that didn't need the gear but later retracted. His evidence was that the adjustment of the blade involved both the pulley and the gears. Further, although he had warned Mr. Campbell to stand clear of the machine, it did not occur to Mr. Bodley to tell Mr. Campbell to go on the side of the pulley.

REASONING

It is accepted that upon the pulling of the pulley, the gears turned so that the blades spun. However, the Claimant had no assigned task at that time even on his evidence. The Claimant's evidence is that he lifted

the gear with his supervisor and Fathead replaced him. Fathead along with his supervisor then placed the gear onto the spoke. That having been done, the Claimant used, in examination in chief a bar and in cross examination a sledge hammer, to "beat it onto the spoke thing." Thereafter the spinning of the gear commenced. That was to see if the blade was touching the bottom of the mixer.

While the testing of the blade was being done, the supervisor was on top of the mixer and Fathead was on the opposite side of the gears, that is, the side of the pulley. Fathead had the task of pulling on the pulley. The Claimant was not a part of this exercise. The Claimant's case is that after the gear was fitted 'they' started to spin it to allow the gear heads to synchronize, that is, fit into the groves. His hand was near the groove and got crushed.

But that begs the question. It does not prove that his crush injury resulted from the negligence of any breach of duty of his employer, or the employer's servant or agent, the supervisor. Accepting, *arguendum*, that Mr. Campbell was required to hit the gear into place, that task required the use of a tool. The claim is not that as he was hitting the gear the tool slipped and his hand became entangled or that he was instructed to turn the gear or other such part with his hand and during that exercise his hand became entangled. Even if they had been working on the gear, when the testing of the blade commenced, everyone else was away from

the gears and, with no assigned task, why was the Claimant loitering on that side?

During the oral addition to her closing written submissions, learned Counsel for the Claimant posited that the turning started before Mr. Campbell was clear of the mixer. Three things militate against that argument. First, what the Claimant was instructed to do, accepting his evidence for the moment, did not require him to become entangled with the gear. Secondly, the turning of the gears would not have begun before the supervisor went on top of the mixer. So the fitting of the gear had to have been completed before. Therefore, he had no reason to be where he was. Finally, he had been warned of the dangers of the gears. On this score his Counsel submitted that had Mr. Stewart been present he could have enforced the instructions to stand clear of the gears, especially since Mr. Bodley was unable to do so once the testing started. It must be borne in mind that Mr. Bodley was not there with a group of sixth graders, although trainees. They were adults, even if young adults, and perfectly able to appreciate an obvious danger, even without a warning.

From the evidence it is palpable that the gears of the block making machine presented an element of danger to those working on it. Therefore, there was a corresponding duty on the employer to take reasonable care for the safety of his workmen. Consequently, the system of work deployed for the particular task of fitting the blade to the

machine ought to have been such as manifested the employer's need to take reasonable care for the safety of his workmen.

The standard of care required of the employer has been characterized as "high". However, this means no more than that the precautions required vary with the circumstances, and the dangers involved in a work situation may require considerable care, in the words of the learned authors of **Clerk and Lindsell on Torts**, 19th edition.

In the same vein, it is now settled to the point of being fossilized, that where there is knowledge of the risk, the response of the employer must be reasonable: **Clerk and Lindsell**, *supra*. The inevitable corollary of that is a corresponding duty on the employee to have regard for his personal safety. Authority for this proposition is located in **Clerk and Lindsell**, *supra*. According to the learned authors, "the mere foreseeability of a risk does not give rise to a breach of duty if it is one which could be met by employees taking obvious precautions."

Against this background, it appears that the question which falls for determination is, is it reasonable in the peculiar circumstances of this case to expect it to have been within the contemplation of the defendant that there was a high degree of probability that the Claimant would have casually rested his hand in perilous proximity to the potentially pernicious gears of the machine? And if there was indeed such a high degree of probability of harm to the Claimant, what could have been done to make the systems adopted safe?

Accepting the Claimant's case *arguendum*, he was required to weld and hit the gear into place, using either a sledge hammer or a bar. If welding took place, that would have occurred while the machine was not in motion. Likewise, getting the gear in place did not require the machine to be in motion. There is therefore no complaint with the system adopted up to this point.

Since the complaint is that the system adopted was unsafe, that is a fact that must be found on the evidence. That Mr. Campbell received his injury when the machine was in motion does not *ipso facto* make the system adopted unsafe. The unsafeness of the system can only properly be assessed vis-à-vis the assigned task of the workman.

That proposition may be demonstrated by a cursory glance at any of the decided cases in the area but perhaps most poignantly so in **Novelett Bish v. Leathercraft Ltd. (1975) 24 WIR 351**. In **Bish** the appellant sustained a crushed finger when her right elbow came into contact with the unguarded lever which caused the piston to descend on her finger. It was held, *inter alia*, that the respondent had failed to provide a proper system or method of work.

In the instant case, even on the evidence for the Claimant, he was not performing any assigned task at the material time. If he was indeed required to hit the gear onto the spoke, that was a task antecedent to and independent of setting the machine in motion. Unlike **Novelett**

Bish, Mr. Campbell's role, on his case, did not compel him to do anything in relation to the machine when he received his injury.

Since to find the system or method of work unsafe, the workman must have met his fate while performing some function resulting in his exposure, what then may be said of the system in this case? While the pulleys were being manipulated to set the gears in motion, only warnings had been issued to stand clear of the gears. Could the system have been made safer by, for example, the temporary erection of a guard over the gears? It is accepted that even if a system of temporary guards was impractical, the defendant was still under an obligation to ensure that the system adopted was as reasonably safe as it could be made: **General Cleaning Contractors Ltd. v. Christmas [1953] AC 180**.

It is important to keep in mind the *locus* of this incident. This was not at Mr. Stewart's machine shop where one could perhaps assess the system's adequacy by reference to industry standards, if that evidence were available. This was at Wiltshire's Hardware. Consequently, it may well have been impractical to erect a temporary guard. However, no absolution is to be found in that impracticality: **General Cleaning Contractors Ltd.**, *supra.*

However, before the gavel falls on the question of impracticality the necessity to take other measures to ensure safety must be demonstrated. Both sides are agreed, the Claimant tacitly and the defendant explicitly, that no work was being done on the side of the machine where the gears

are located at the moment of trauma. Even if Mr. Campbell was alternating the manipulation of the pulleys with Fathead that would not have exposed Mr. Campbell to the risk of injury.

It is patent that the employer had knowledge of the risk of injury. That much is evidenced by Mr. Bodley warning Mr. Campbell to stand clear of the gears. But knowledge of risk does not necessarily morph into a breach of duty. That position is amply supported by **Jaguar Cars Ltd. v. Coates [2004] EWCA Civ. 337**. There the Court of Appeal held that steps without a handrail posed no real risk to those using them with reasonable care.

So, what of Mr. Campbell? The workmen engaged with fitting of the blade were not exposed to any risk of injury by the gears, since the manipulation of the pulleys to set the gears in motion took place on the opposite side of the machine. The risk of injury by the gears was only to anyone remaining on that side of the machine. With no work being performed on the side with the gears, a warning ought to have sufficed.

The Court accepts that the warning was given to Mr. Campbell. That notwithstanding, when Mr. Bodley saw Mr. Campbell standing on the side of the gears should he have told Mr. Campbell to retreat to the side of the pulleys? Mr. Campbell said it did not occur to him to give that further instruction. Was that failure a breach of duty?

That question has to be answered in the negative. As was said earlier, the employee is to have regard for his personal safety. Alternately

expressed, the employee must take reasonable care not to injure himself. Having completed his assigned task, Mr. Campbell's continued presence on the side of the gears remained unexplained at the close of the case. Indeed, it may well be inexplicable. The onus was on Mr. Campbell to have regard for his personal safety; to take reasonable care not to come in contact with the gears.

The risk of injury by the gears would have been eliminated by heeding the warning given. Although Mr. Campbell was a trainee welder, he was still a person who had attained majority. By virtue of that fact, in the absence of any evidence to the contrary, he's to be treated as a reasonable prudent person capable of making informed decisions. Mr. Bodley did not have under his charge a wayward imp. Mr. Bodley was consequently under no duty to tell Mr. Campbell to go to the side of the pulleys. Stand clear was a sufficient warning.

The implication of holding otherwise would be to open the flood gates of litigation to make employers liable for a legion of wanton acts of carelessness by their employees. Surely that would be the inexorable result of a judgment tantamount to applying the contributory negligence standard for a child to an adult. For who but a child, a very young one no doubt, would so casually allow his hand to come into contact with moving gears, one of which required the strength of two men or the Hurculean strength of the Claimant to lift. That act made the Claimant solely responsible for the injury he received.

This claim was bound to founder and not flourish, even on a less than rigorous analysis. However that might be, the Court did not accept either that Mr. Campbell was required to do any work on the machine or that work was done on the gears that day. The Court preferred the evidence of Mr. Bodley that the welding that was involved took place at the machine shop. Further, the Court accepted that there was no necessity to dismantle the machine, removing the gears in order to remove the blade. Consequently, the Court accepts that Mr. Campbell's role was that of an observer. However, on any view of the evidence, on a balance of probabilities, there was no breach of the employer's duty to take care.

As an observer, the system of work deployed was safe. That system could only have been rendered unsafe if a part or particle from the machine invaded Mr. Campbell's space, not vice versa. As a trainee he was to observe the work that was being done on the machine, not wander off to the side of inactivity like the proverbial curioso.

Ergo, it is not reasonable in the peculiar circumstances of this case to expect it to have been within the contemplation of the defendant that there was a high degree of probability that the Claimant would have casually rested his hand in perilous proximity to potentially pernicious gears. That foresight is the *sini quo non* of any portions liability for negligence. Since the Claimant's conduct fell outside of Mr. Stewart's reasonable contemplation, he cannot be taxed with liability for the

Claimant's own reckless act. Judgment is therefore given for the Defendant.