2016 JMSC Civ.44

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2009 HCV 02263

BETWEEN	**GLENFORD DYER**	**CLAIMANT**
AND	**MECHANICAL SERVICES COMPANY LIMITED**	**DEFENDANT**

Mr. Sean Kinghorn and Ms. Danielle Archer, instructed by Kinghorn and Kinghorn for the claimant.

Ms. Georgia Hamilton and Mr. Hadrian Christie, instructed by Georgia Hamilton and Company for the defendant.

Heard: 29th, 30th July 2015 & 29th March 2016.

Employer's Liability – Claimant injured by grinder's blade –Defendant's duty to provide a reasonably safe grinder – Whether res ipsa loquitur applied– Contributory negligence considered – Assessment of damages.

EVAN BROWN, J

Introduction and background

[1] Mr. Glenford Dyer sustained injuries when the blade of a grinder broke while he used it. The grinder was owned by his employer, Mechanical Services Company Limited, and was issued to him to perform his work. At the time of the incident, he was working with his supervisor at the Breezes Runaway Bay Hotel, as it was part of his employer's business to provide plumbing services to hotels.

[2] The grinder was electrically powered and used for cutting and grinding. It operated by rotation as its blades rotated anti-clockwise. The blades used on the grinder were an abrasive blade for grinding and another for cutting. For the installation of either blade, it was mounted to the metal shaft of the grinder and the blade was then secured by a metal locknut, which was tightened by the operator with a two-pronged spanner.

[3] The blade was further tightened while in motion, as the blade rotated in an anti-clockwise motion, while the locknut was tightened in the opposite direction. It was an additional security feature of the tool. If the blade became loose while in motion, it would go in the direction the shaft was pointed.

[4] The defendant's storekeeper issued the tools, work material and safety gears to the workmen. He also checked the tools and safety gears to ensure they were fully operational before he issued them. Where the grinder's blades became worn, the workmen were to bring it to the storekeeper's attention. The workmen were required to attend the storeroom and request new blades which they installed.

[5] At this point, when the new blades were issued, the grinder itself was not examined by the storekeeper. Safety gears, after they were supplied to the workmen, were also replaced when they became worn or lost. Though the workmen were issued with safety gears, not all wore them. Those workmen were either reprimanded by the defendant, or they were requested to wear those gears.

Case for the claimant

[6] It was about 1:30 pm on the 1st December 2006. Mr. Dyer was in a room on the hotel with his supervisor Mr. Ryan Tomlinson. Mr. Tomlinson suggested using the grinder to test the room for electricity and then plugged the grinder into the electrical socket. He then instructed Mr. Dyer to start the grinder. Mr. Dyer then held the grinder by the handle closest to the blade and did as he was instructed.

[7] While the grinder operated as evidence of flowing electricity, the blade suddenly broke and became dislodged. The pieces of the dislodged broken blade struck Mr. Dyer to the right side of his neck and chest, and to his left hand. He was knocked unconscious. He was taken to the St. Ann's Bay Hospital where he regained consciousness and received treatment for the injuries.

[8] Under cross examination, the claimant recalled that he did not see anything wrong with the blade though he did not check it. In terms of safety equipment, he agreed that he received gloves from the storeroom. Though he knew they were to be worn when operating the grinder, he was never told at any point to wear them. His reason for not wearing them on the day of the incident was that he had not started working as yet. The gloves, he described, were thick and made of canvas.

[9] At the start of the workday, he was issued a different grinder from the storeroom. Then, at the end of each workday, he customarily returned the grinder to the storeroom. He recounted that the grinder which caused his injury was different from the one he got the previous day. The difference was that there was no guard on the grinder issued to him last.

Case for the defendant

[10] The grinders were inspected by Mr. Brown, the storekeeper, who checked to ensure that the guard was in place. He also inspected the blades for cracks and whether they fitted properly. A record of all tools issued was also made by him. These records however were not produced at trial.

[11] Mr. Brown also said there were only two circumstances that warranted the tools being returned to the storeroom: (1) where the workmen completed the work, and (2) where the tool operated ineffectively. Ordinarily, the tools were stored in the tool pans at the end of the work day.

[12] The tool pans were owned by the defendant and were provided on the worksite. The supervisors had custody of the keys for these tool pans and issued the tools to the workmen at the start of each workday. At this point, the storekeeper was not responsible for the tools. Though ultimately the tools were returned to the storeroom, he said he had not seen the grinder that caused Mr. Dyer's injury nor was it returned to the storeroom.

[13] The Production Controller Mr. Omri Dunstan had daily interaction with the workmen. He spent 10 to 30 minutes with each crew. An aspect of these interactions was to ensure the workmen wore their required safety gears. He, however, did not have any interaction with the Mr. Dyer on the day of the incident.

[14] Mr. Dunstan said the tools were either returned to the storeroom at the end of the workday or the supervisors kept them in their vehicles, if they drove. However, the procedure was that the tools should be returned to the storeroom.

[15] The Project Director, Mr. Alvin Blake, confirmed that the company provided tools and safety gears for its employees. These supplies were also replenished regularly. Like Mr. Dunstan, he too sought to ensure that the workmen wore their safety gears. This he did on his occasional visits to the worksite.

[16] He then confirmed that Mr. Dyer was employed to the company from March 2005 to October 2008. Mr. Dyer, he said, was paid wages between January 2007 and October 2008 for regular, overtime and weekend work done in this period.

Submissions

The claimant's submissions

[17] Mr. Kinghorn for the claimant submitted that Mechanical Services Company Limited was liable for the injuries Mr. Dyer sustained. He contended that Mr. Brown, as an agent for the defendant, did not do his due diligence in checking the grinder before he issued it to Mr. Dyer. He further submitted that the grinder

was already in a dangerous state as there was no protective guard in place at the point of being issued.

[18] Mr. Brown's evidence that he could not recall when he issued the grinder amounted to speculation that he exercised due diligence to examine it. Mr. Kinghorn contended that the defendant had no other system in place to detect this failure by Mr. Brown. The result then, counsel concluded this point, was that the defendant was unable to provide an explanation for the blade becoming dislodged.

[19] Mr. Kinghorn then submitted that, applying *res ipsa loquitur*, the defendant was liable due to its inability to explain the cause of the accident. He then sought to rely on ***Courage Construction Limited v Royal Bank Trust (Jamaica) Ltd and Jennifer Colleen Silvera (Administrator of the Estate of Clifford Anthony Silvera)*** [1992] 29 JLR 115, for this point.

[20] Finally, Mr. Kinghorn submitted that the defendant did not prove that the Mr. Dyer was guilty of contributory negligence. The defendant, he said, has failed to support its averments of the claimant's negligence. He relied on ***Ramon Burton v Wilburn Barton and others*** Claim No. CL 1996/B110, delivered March 13, 2008, paragraph 16, in contending that the averments must be rejected for want of evidence in support.

The defendant's submissions

[21] On the other hand, Ms. Hamilton for the defence submitted that it was Mr. Dyer's responsibility to report any defect with the grinder to Mr. Brown. The absence of this report, counsel said, placed the grinder outside of the defendant's power to remedy any perceived issue.

[22] Counsel then submitted in the alternative that if the grinder was indeed defective, then Mr. Dyer was liable for contributory negligence for failing to wear protective gloves and using the grinder without a protective guard. She then sought to rely

on the English case ***Haynes v Qualcast (Wolverhampton) Limited*** [1958] 1 WLR 225 as basis that the claimant should be found liable for contributory negligence to the degree of 75%.

[23] Ms. Hamilton further submitted that *res ipsa loquitur* does not arise in this case. She cited ***Jeffrey Johnson vs Ryan Reid*** (2012) JMSC CIV. 7 to submit that Mr. Dyer must prove: the grinder was under the control and management of Mechanical Services Company Limited, and the accident would not have occurred without negligence by the defendant.

[24] Finally, Ms. Hamilton submitted that for Mr. Dyer to successfully rely on *res ipsa loquitur* he must prove both limbs. She placed reliance on ***Easton Marsh vs Guardsman Limited*** 2006 HCV 01819, then submitted that Mr. Dyer's failure to prove that the grinder was under the management and control of the defendant was fatal to the application of *res ipsa loquitur.*

Issue for determination

[25] The primary issue for my determination is: whether Mechanical Services Company Limited, through its agents, failed to provide Mr. Dyer with a reasonably safe grinder.

Brief statement of the applicable law

[26] The liability of an employer for an employee injured in the course of employment is twofold. Firstly, he may be liable for breach of his personal duty of care which he owes to each of his employee. Secondly, he may be vicariously liable for breach by one employee of the duty of care which that employee owes to his fellow employees. The second limb does not arise in the case at bar.

[27] The learning from ***Wilson and Clyde Coal Co. Ltd v English*** [1938] A.C. 57, 78 and 86, is that every employer has a duty at common law to provide; a competent staff of men, adequate plant and equipment, and a safe system of work with effective supervision.

[28] So, in ***Ifill v Rayside Concrete Works Ltd*** (1981)16 Barb LR 193, the employers continued to employ undisciplined employees and were held liable for not providing a competent staff of men, as by this breach, the employers exposed their employees to the risk of injury.

[29] Similarly, ***United Estates Limited v. Samuel Durrant*** (1992) 29 JLR 468, considered the liability of an employer to provide adequate plant and equipment. The appellants, who were cane farmers, were liable to a sideman employed by them. The sideman suffered injuries when he attempted to tighten the chain to secure the canes being transported to the appellant's factory from the field. The notch suddenly flew out and he was flung to the ground and fractured both wrists.

[30] There was no evidence of the appellants taking steps to satisfy themselves of the chain's suitability. In finding the appellants liable in negligence, Wolfe JA, at page 470, held that the duty of the employer is to take reasonable care for the employee's safety. This duty may be discharged with the exercise of due care and skill.

[31] An employer must provide a safe system of work for his employees. In ***Speed v. Thomas Swift and Co. Ltd***. [1943] K.B. 557, 563-564, a system of work was said to include: the physical layout of the job, the sequence of the work, the provision of proper notices and warnings where necessary and issuing of special instructions.

[32] Further to a safe system of work, an employer must give general safety instructions to workmen: ***General Cleaning Contractors v Christmas*** [1953] A.C. 180,190. The instructions must be as from a reasonably careful employer who has considered the problem presented by the work.

[33] In the same manner, the employer has a duty to provide a safe place of work. Though this limb was not discussed in ***Wilson and Clyde Coal Co. Ltd v English*** *supra*, it has been generally accepted as a duty of the employer. The employer has a duty to ensure the premises are reasonably safe for his

employees to work. The nature of the place of work must be taken into consideration when deciding whether it is safe.

[34] In ***Jenner v Allen West & Co. Ltd*** [1959] 1 W.L.R. 554,the employer was held liable for failing to provide a safe place of work. In that case the employees' place of work was a roof and a scaffold. The standard of safety applied was that of a reasonably prudent employer who provided a safe roof and scaffolding for his men to work. The employer's failure to provide crawling boards for this risky operation and relying solely on the workman's experience constituted negligence.

Analysis

[35] The claimant pleaded eight averments in his particulars of negligence. However, the evidence he adduced tended to countenance only three of those averments. Together, they may be treated as whether Mechanical Services Company Limited, through its agent, failed to provide Mr. Dyer with a reasonable safe grinder.

Res Ipsa Loquitur

[36] In attempting to prove this averment, Mr. Kinghorn sought to place reliance on the doctrine of *res ipsa loquitor*, "the facts speak for themselves". He submitted that the absence of an explanation for the dislodged blade was fatal to the defence, and therefore negligence must be inferred on the part of the defendant.

[37] Ms. Hamilton for the defence submitted, however, that the maxim must fail as the grinder, at the material time, was under the control and management of the claimant. In assessing these competing submissions it is necessary to examine the relevant case law. The maxim is a rule of evidence and not a principle in law. It is therefore not necessary to be specifically pleaded as was held in ***Bennett v Chemical Construction (G.B.) Ltd*** [1971] 1 W.L.R. 1571, 1576.

[38] The three pronged test was succinctly laid out in ***Coke (Igol) v Rhooms (Nigel) and others*** [2014] JMCA Civ 54 at paragraph 19. Justice Brooks JA, delivered

the judgment of the Court of Appeal and held that for the maxim *res ipsa loquitur* to apply: (i) the occurrence was such that it would not normally have happened without negligence, (ii) the thing that inflicted the damage was under the sole management and control of the defendant, and (iii) there must be no evidence as to why or how the accident took place.

[39] In respect of the second test, the editors of ***Clerk & Lindsell on Torts*** 19th Ed, at para. 8-153, observed from ***Hardy v Thames and General Lighterage*** [1971] 1 Lloyd's Rep. 228 that: "Where the claimant himself was in charge of the thing that did the harm and had seen nothing amiss with it, the maxim obviously cannot apply". Mr. Dyer clearly had control of the grinder, and there was no indication that the blade would have broken.

[40] Accordingly, Mr. Kinghorn's submission on the application of the maxim must fail. As Mechanical Services Company Limited did not have sole management and control of the grinder at the time of the incident, the doctrine could not apply for want of this limb. The claimant's failure to show that the maxim applied means that he had to discharge his burden of proof of the liability of the defendant.

The duty to provide a reasonably safe grinder

[41] Mr. Kinghorn sought to discharge this burden by submitting that Mr. Brown failed to do his due diligence in checking the grinder. Counsel placed reliance on Mr. Brown's evidence that he did not recall the day nor the time he issued the grinder. He then said that Mr. Brown could only speculate that he did his due diligence in examining the grinder. Mr. Kinghorn further submitted that as no other system was in place to check the grinder after it was issued, the defendant could not escape liability when the blade suddenly broke.

[42] Mr. Kinghorn also relied on the evidence of Mr. Dyer that the grinder did not have a protective guard on it. This, he submitted, added to the duty placed on Mr. Brown to ensure a protective guard was in place. In reply, Ms. Hamilton submitted that it was the defendant's system that Mr. Dyer must report the

defective grinder. Failing this report, she said, the defendant could not address this issue.

[43] Mr. Dyer's evidence was that he received the grinder without a protective guard from Mr. Brown, and that the blade broke when he started it. Mr. Brown's evidence, on the other hand, was that Mr. Dyer received the grinder from the tool pan as ordinarily the tools were kept there overnight. Mr. Dunstan however said otherwise.

[44] Mr. Dunstan's evidence was that the workmen returned the tools to the storeroom or to the supervisor at the end of the day. It must be highlighted at this juncture that only Mr. Brown mentioned the presence of tool pans for the storage of tools. Also, it was never put to Mr. Dyer that tool pans were provided on the site. Nowhere in Mr. Dunstan's evidence did he make mention of tool pans provided to the workmen and neither did Mr. Blake.

[45] The conflicting evidence showed that the Mechanical Services Company Limited, through its agents, had storage of the tool at the end of the workday. I find that on a balance of probabilities, that Mr. Dyer in fact returned the grinder to the storeroom, and he was then issued another grinder from that storeroom.

[46] The duty was then on the defendant to check the grinder for any defects and to ensure a guard was on it. Grinders were clearly fitted with guards to avoid the kind of mishap suffered by the claimant. This was accepted by the defence in their submission that Mr. Dyer should have returned the grinder if the guard was missing.

[47] However, it was already within the purview of the defendant to ensure that a guard was in place on the grinder. Similarly, it was also within their grasp to ensure that the blade was safe to use. The defendant's agents, as was shown, had custody of the grinder at the end of the workday and were responsible to ensure it was reasonably safe to use. The fact that the blade broke, in the

manner as alleged by Mr. Dyer, established a prima facie failure of the defendant to ensure its reasonably safe use.

[48] Again, it was also within the defendant's purview to examine both the grinder and the fragments of the broken blade, to ascertain what caused the blade to break. However, Mr. Brown's evidence was that he had not seen the grinder after the incident and neither was it returned to the storeroom. The defendant also did not show the steps taken, if any, to retrieve either the pieces of the blade or the grinder itself.

[49] It seemed as though both the grinder and the fragments of the blade disappeared after Mr. Dyer was injured. The court is compelled to ask: what became of the grinder? Why was it not seen after the incident? What was the state of the blade before it broke? Did the blade break because of a latent defect?

[50] The court is unable to examine whether the blade broke as a result of prolonged or inappropriate usage, as averred by the defence. There was nothing before the court to indicate the state of the grinder before or after the incident. The defendant and its agents have in effect placed the matter beyond the court's consideration. Neither could Mr. Dyer give evidence of this as his unchallenged evidence was that he was unconscious.

[51] The burden was on the defendant to furnish the evidence that was within its purview to do. In light of this failure to adduce this evidence, the prima facie case of Mr. Dyer stands unshaken. The court is then left to conclude that Mechanical Services Company Limited failed in its duty to provide a reasonably safe grinder to Mr. Dyer.

Contributory Negligence

[52] Ms. Hamilton submitted in the alternative, that the claimant showed disregard for his safety in engaging the grinder without a guard on it. Counsel further submitted that Mr. Dyer's admission that he was not wearing his gloves at the

time of the incident, made him liable for contributory negligence. She placed reliance on ***Haynes v Qualcast (Wolverhampton) Limited*** [1958] 1 WLR 225 to argue that the claimant should be found liable for contributory negligence to the degree of 75%.

[53] There, in the judgment of Sellers LJ at paragraph 235, he said the evidence revealed that the plaintiff thought the protective gears to be unnecessary. He also held that the defendant nevertheless had to do more by way of notices to inform employees of the availability of safety gears, and to impress upon them that these should be worn.

[54] Mr. Kinghorn submitted however that it is trite law that the defendant must prove contributory negligence. Counsel relied on the House of Lords decision in ***Flower v Ebbw Vale Steel, Iron and Coal co.*** [1936] A.C. 206 where Lord Wright at page 216 reasoned that the burden of proof of contributory negligence rested on the respondent (the defendant at the trial). His lordship held, at page 220, that contributory negligence was not made out as the respondents presented no evidence of the instructions that the appellant disobeyed which resulted in his injuries.

[55] This, I find, is the correct principle of the law, that the defendant bears the burden of proving contributory negligence. The required standard of proof is on a balance of probabilities: ***Neil Lewis v Astley Baker*** [2014] JMSC Civ 1, para. 3. It becomes necessary therefore, to review the case for the defence in this regard.

[56] The defence averred that Mr. Dyer was instructed on several occasions to ensure that the blade of the grinder was properly fitted and he disobeyed. It is interesting that not one scintilla of evidence was proffered by the defence to support this averment. A further averment was that it was Mr. Alvin Blake who often issued these instructions to Mr. Dyer.

[57] However, nothing in Mr. Alvin Blake's evidence even remotely suggested that he issued any such instruction to Mr. Dyer. In similar fashion, nothing in his

evidence showed that he knew Mr. Dyer personally. Mr. Kinghorn relying on ***Ramon Burton v Wilburn Barton and others*** (2008) (unreported), delivered 13th March, 2008, para. 16, submitted that this averment must be rejected for want of evidence in support. I agree with counsel and find that this averment was not made out.

[58] Ms. Hamilton again submitted that Mr. Dyer saw that the grinder did not have any guard but proceeded to operate it nonetheless. Counsel further submitted that Mr. Dyer held the grinder by the handle closest to the blade while not wearing the gloves.

[59] Was Mr. Dyer, in those circumstances, also blameworthy for his injuries? He admitted that he knew the gloves were to be worn when operating the grinder, but was never told to do so. His reason however, for not wearing the gloves at the time of the incident, was that he had not started working as yet. By this, he meant that he had not commenced the cutting and grinding of pipes which were incidental to his plumbing work.

[60] Further, the glaringly unchallenged evidence was that Mr. Dyer was instructed by his supervisor to operate the grinder. His instructions were to operate the grinder as part of an exercise in testing a room for the presence of electricity. The exercise was: supervisor inserted the plug into an electrical socket while the claimant activated the grinder upon his beckoning.

[61] In order to decide whether the claimant was guilty of contributory negligence, the dictum of Anderson J in ***Neil Lewis vs Astley Baker,*** *supra,* is instructive:

> *All that is required is that which may generally be described as carelessness, considered, generally, in an objective context, in view of the prevailing circumstances at the material time and that such carelessness on the claimant's part, contributed to some extent, in causing him (the claimant), 'damage' (loss). What must be considered by a court therefore, in order for that court to properly determine whether a claimant was contributorily negligent in respect of the loss which he suffered, is whether a reasonable man, faced with those then prevailing circumstances, would have acted as the claimant then did.*

I find that a reasonable man faced with the circumstances of the claimant would have acted as he did. He would certainly not disregard the expressed instructions of his supervisor to activate the grinder to ascertain whether or not electricity was in the room. A reasonable man would think that the gloves were to be worn while the grinder was being used for cutting or grinding, not when testing for the presence of electricity.

[62] Within this objective context, the claimant could not be guilty of carelessness for diligently following expressed instructions. This must be contrasted with ***Flower v Ebbw Vales Steel, Iron and Coal Co*** *supra,* which ascribed contributory negligence to a workman who disobeyed expressed instructions. The supervisor, as the defendant's agent, placed the claimant in a position from which he suffered harm. The claimant cannot be guilty of contributory negligence in these circumstances.

[63] I find, on a balance of probabilities, that the defendant issued the grinder with a defective blade and without a protective guard. I also find the defendant fully liable for failing to exercise due care and skill for the claimant's safety. That takes me to an appropriate award in damages.

Assessment of Damages

Special Damages

[64] I found special damages of $15,000.00 for medical expenses proved. In respect of special damages for transportation, I accept that the Mr. Dyer sought medical attention on at least two occasions. However, no indication was given as to the mode of transportation, cost of transportation, places travelled or the number of trips made. He nevertheless submitted that the sum of $15,000.00 was a reasonable award.

[65] The court however is still able to find on this head. In ***Barbara McNamee v Kasnet Online Communications*** (2009) RMCA No. 15 of 2008, McIntosh JA

(Ag.), as she then was, reasoned at para. 10, that: the court must be reasonable when applying the considerations of strict proof. That is: what is reasonable to ask of the plaintiff to strictly prove in the circumstances, and what is reasonable as an award as determined by the experience of the court.

[66] The system of transportation in Jamaica is largely informal. That is, a ticket is not always issued to commuters. It was accepted that Mr. Dyer sought medical attention on at least two occasions and so had incurred transportation expenses. Requiring Mr. Dyer to prove every transportation for medical attention would be, in the words of Bowen LJ in ***Ratcliffe v Evans*** (1892) 2 QB 524, page 532, of the "vainest pedantry". Accordingly I accept sum of $15,000.00 as claimed for transportation, as it is not an unreasonable sum in the circumstances.

[67] The award for special damages is, therefore, $30,000.00 with interest at 3% from the 1st December, 2006 to the 29th March, 2016.

General Damages

[68] Mr. Dyer was treated by Dr. Denton Barnes on the day of the incident. In his report dated 27th January, 2009 the examination revealed the following:

> *i. 15 cm laceration to the right side of the neck extending down to the anterior chest wall*
>
> *ii. 9 cm laceration to the left hand on the radial border extending into the left index finger*
>
> *iii. Full range of movements of the fingers*
>
> *iv. No distal neurological deficit in the left hand*
>
> *v. Chest was clinically clear*
>
> *Radiographs of his left hand revealed a foreign body embedded in the hand at the level of the left index metacarpal, there were no fractures.*

The treatment prescribed was analgesia, antibiotics, tetanus prophylaxis and cleaning and suturing of all lacerations. The claimant remained relatively stable while in the hospital and on the 5th December, 2006 he was discharged.

[69] He, however, did not have the foreign body removed until the 20th December, 2006. He did this as an outpatient, under local anaesthesia and debridment of the necrotic tissue surrounding the foreign body. On the 1st January, 2007, the claimant was reviewed and assessed to be doing well with the wound granulated and healing.

[70] The claimant was again examined by Dr. Barnes, and the results were recorded in a report dated 17th December, 2010. This report did not state when this examination was done. The claimant's evidence on this point was that he returned to the doctor once between 2007 and 2009 as his hand was swollen.

[71] The results were that all his wounds had healed and he was doing well. Particularly, the medical findings showed that both wounds were healed with scars and no scar tenderness. They were an 8 cm scar to the upper chest and into the base of the neck, and an 8 cm scar to the dorsum of the left hand. The scar on the left hand was across the metacarpal phalangeal joint at the left index finger. There was defused swelling of the left metacarpal joint of the left index finger and 20 degrees fixed flexion deformity.

[72] Mr. Dyer also had full range of movements of the proximal inter-phalangeal, distal inter-phalangeal joints of the left index finger and the thumb of the left hand. His grip strength was Grade 4/5 on manual testing with a 20% strength index loss. He was then assessed as "being at a steady state" and was discharged.

[73] The injury he sustained to his neck, which, extended to his chest wall was described as superficial with no injury to the internal organs. He was assessed to have no long term deficit from this injury. The injury he sustained to his left hand however resulted in significant contracture of the left index finger metacarpal phalangeal joint. The result was decreased range of movement of that joint. The claimant will continue with this range of disability and will have 9% impairment of the whole person.

[74] Mr. Dyer was also examined by Dr. Warren Blake on the 27th January 2012. Dr. Blake relied on both reports of Dr. Barnes and noted that the claimant had no cardio-respiratory distress. In particular his findings revealed:

> *i. A 9 centimetres oblique scar running from the lateral aspect of the right sternomastoid over the sternoclavicular joint to the area of the upper sternum.*
>
> *ii. A 9 centimetres longitudinal scar from the radial border of the index metacarpal across to the dorsum of the basal shaft of the proximal phalanx of the index finger.*

Mr. Dyer had no sensory loss and his grip strength was normal. He found the metacarpo-phalangeal joint of the claimant's index finger was from 0-65 degrees of flexion. The motion of the inter-phalangeal joints of this finger was normal. He assessed the claimant as 2% whole person total impairment. This he attributed to improved grip strength and improved index finger motion.

[75] Mr. Kinghorn submitted that Dr. Barnes' reports are to be preferred to that of Dr. Blake. As the basis of his argument, he submitted that Dr. Blake's report was handicapped for a number of reasons. The reasons were; he did not have first-hand knowledge of the injuries, he had no x-rays and limited his findings to the range of movement of the left index finger. He challenged the report that it did not elaborate on the grip strength as did Dr. Barnes.

[76] Ms. Hamilton on the other hand submitted that Dr. Blake's report represented the most recent assessment of the claimant. The fact that Dr. Barnes examined the claimant twice was irrelevant given the time that elapsed since then. The difference between the reports was explained as improvement in the claimant's grip.

[77] I will have regard to rule 32.3 (1) which makes it the duty of the expert witness to help the court impartially on matters relevant to his expertise. I will therefore consider both reports so far as they are relevant to the issue. Dr. Blake had regard to Dr. Barnes' reports when he made his findings. At the very least, two

years have elapsed prior to Dr. Blake's report. I view his report as an updated examination of Mr. Dyer and not as a contradiction with Dr. Blake's.

[78] Mr. Kinghorn submitted on behalf of Mr. Dyer that an award of $4,250,000.00 would be appropriate in the circumstances. He relied on two cases. The first was ***Trevor Clarke v Partner Foods LTD and Marlon Scotland***, Suit No CL 1989/C 256, delivered 12 June, 2000 reported at page 112 of Khan Volume 5. The claimant sustained bruises to his ankle, right knee and right shoulder. He also sustained pain, swelling, open injury and a compound fracture of his right index finger. He was awarded the sum of $565,000.00 by consent. Using the Consumer Price Index (CPI) of 225.3 for June, 2015, the updated award was $2,357,305.56.

[79] The final case was ***Michael Jolly v Jones Paper Co. Ltd and Christopher Holness***, Suit No. CL 1996 J 014, delivered 26 November 1998 reported at page 120 of Khan Volume 5. The claimant received lacerations along the dorsal ulnar aspect of the forearm and hand. Particularly he sustained severed extensor tendons of the middle, ring and little fingers at their musculo-tendinous junction. He was awarded $800,000.00 in November 1998. This award was updated to $3,691,929.54 using the said CPI.

[80] Ms. Hamilton submitted on behalf of the defence that a reasonable sum for award would be no more than $1,100,000.00. Four cases were cited in support of its argument. The first was ***Norman Facey v Leonard Pinnock*** (1985), assessed on 7th June 1989, 3 Khan's page 122. That claimant had a 2 ½" laceration to the left palm involving the skin and deeper tissues. The sum of $36,000.00 was awarded which updates to $1,379,387.85.

[81] Secondly, the case of ***Hiram Anderson v Urban Maintenance Limited*** (1987), assessed 20th June, 1990, 3 Khan's page 131. Here the plaintiff suffered a 7 cm laceration to right forearm. The wound was sutured, but was later re-examined to

remove particles of debris lodged in it. The claimant was awarded $18,000.00 in general damages. That award was updated to $700,000.00.

[82] Thirdly, the case of ***Robert Thompson v Cedar Construction Co. Ltd*** (1989), 4 Khan's page 113. Here the claimant was a mason and his finger was crushed whilst he constructed a wall. He was awarded $150,000.00. The updated figure, the defendant submitted, was $1,205,672.50. Finally, the defendant relied on ***Anthony Reid vs Mac's Pharmaceutical & Cosmetics Limited*** (unreported) Claim No. 2006 HCV 04385. Here the claimant was injured at work and lost the tip of his finger. His award is valued at $985,318.40 today.

[83] The court must bear in mind the principle of *restitutio in integrum* in arriving at an appropriate award. That is, the claimant must be placed in the position he would have been, had the incident not occurred on December 1, 2006. This must be done as far as money can do it. Equally to be borne in mind is the dictum of Lord Reid in ***H. West & Son Ltd. V Shepherd*** [1964] A.C. 326, 341, that "compensation should be based much less on the nature of the injuries than on the extent of the injured man's consequential difficulties in his daily life". Further, in as far as reference to previous awards is concerned, the reasoning in ***Beverley Dryden v Winston Layne*** SCCA 44/87 delivered 12 June 1989 is that awards are to be reasonable, moderate and comparable.

[84] The claimant, like those in the cases cited, suffered a laceration to his left hand. The evidence was that the claimant resumed working at the Breezes Runaway Bay project in January 2007. He continued working with the defendant up to October 2008. As no other complaint was made of his hand after the cleaning of the debris, it will be assumed that those symptoms were resolved. A distinction with ***Trevor Clarke v Partner Foods Ltd,*** *supra* must be made. There the claimant's index finger, at maximum medical recovery, stuck out when making a grip. This affected his use of the firearm necessary for his employment.

[85] The extent of Mr. Dyer's injuries also did not reach the level of those cited in ***Michael Jolly v Jones Paper Co. Ltd*** *supra.* There the claimant suffered a laceration to the forearm and three of his fingers. Though intensive physiotherapy commenced on his forearm, there was still marked stiffness to his metacarpophalangeal joints. Two years after he sustained these injuries, he complained of difficulty using the arm and that he felt pains after work.

[86] Mr. Dyer required antibiotics, cleaning and suturing of the wound similar to the claimant in ***Hiram Henderson v Urban Maintenance Limited*** *supra.* Mr. Dyer's evidence was that he was at home for six (6) weeks after he was discharged. This was similar to the four (4) weeks of incapacitation of the claimant in that case.

[87] Unlike the claimant in that case however, Mr. Dyer was also knocked unconscious and in addition received a 15cm laceration to the right side of his neck. This laceration extended down to the anterior of his chest wall.

[88] Having considered the matter, the court is of the view that a just award for general damages should be $1,100,000.00 with interest at 3% from 17th June 2011 to 29th March 2016. Costs are awarded to the claimant, to be agreed or taxed.