IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011HCV04261

BETWEEN	**TREVOR FACEY**	**CLAIMANT**
AND	**PHIL'S INCORPORATED LIMITED**	**1ST DEFENDANT**
AND	**BASIL PHILLIPS**	**2ND DEFENDANT**
AND	**EVERTON WELLER**	**3RD DEFENDANT**

Miss Renee Barker instructed by K Churchill Neita and Co. for the Claimant

Mrs. Pauline Brown Rose for the 1st and 2nd Defendants

Occupier's Liability – Negligence - Contributory negligence - Apportionment of liability – Quantum of damages

Heard: June 17 and September 3, 2015

LINDO J. (Ag.)

[1] This is a claim for damages filed on July 1, 2011, for negligence arising out of an incident which took place on May 11, 2006 at the premises of the 1st Defendant. The 2nd Defendant was the managing director of the 1st Defendant company while the 3rd Defendant was employed as a forklift operator.

[2] The claimant's claim is that he was at the premises owned and operated by the 1st Defendant to collect a delivery of cement when the 3rd Defendant negligently maneuvered a forklift while loading a pallet of cement onto the truck as a consequence of which he sustained injuries, suffered loss and incurred expenses.

[3] On September 13, 2011 the 1st and 2nd Defendants filed a defence denying negligence and asserting that the Claimant was the author of his own demise by improperly interfering with the pallet while it was being loaded. The Claimant filed a

Reply on September 27, 2011 indicating that he instructed the 3rd Defendant to lift the pallet so that he could realign the board but the 3rd Defendant lowered the pallet before he told him to do so.

[4] The court has to determine whether the 1st Defendant is in breach of its duty under the Occupier's Liability Act and whether the Claimant has contributed to the accident giving rise to his claim and if so, to what extent and how liability is to be apportioned and what are the appropriate damages in the circumstances.

[5] The claimant's evidence is that he is employed as a driver and delivery man and that on the day in question he went to the Defendant's hardware in Spanish Town to pick up cement and he told the forklift operator to lift the pallet of cement so he could fix the boards and while he was fixing the boards the forklift operator lowered the pallet on his hand causing injury to his finger.

[6] In cross examination he admitted that it was not the first time he was going to the premises of the 1st Defendant and that it was his responsibility to adjust the boards. He agreed that it was not safe to put his hand on the truck while it was being loaded.

[7] The 3rd Defendant gave evidence that he operated the forklift on the day of the incident and that he loaded pallets onto the truck and when he was attempting to load the last pallet and brought the pallet down he heard the Claimant shout and saw that the claimant's finger was injured. He stated further that when a pallet is on the forklift his vision is extremely limited and stated that the Claimant did not give him any signals or instructions to lift the pallet.

[8] In cross examination he admitted that the Claimant was three feet away from him while he was operating the forklift and that the forklift was ten feet tall. He also admitted that he did not receive training as a forklift operator.

[9] Mr Schloss gave evidence that he was a supervisor at the 1st Defendant's premises and that he is aware of the standard procedures for loading cement on a truck. He confirmed that the alignment of the board on the truck would be the responsibility of the truck driver or his side man. He indicated that from where he was

sitting on the day of the incident he did not hear the forklift operator ask the Claimant to realign the boards and that the standard procedure would be for the sideman or truck driver to indicate to the forklift operator to stop and lift the load so that it could be reset.

[10] In cross examination he stated that there are no signs at the premises except those above fire extinguishers. He also indicated that there was nothing to indicate how trucks are to be loaded by the forklift operators and when asked if the forklift operator is trained before being put on the job, he indicated that the Defendant had no training process for forklift operators.

[11] On behalf of the Claimant it was submitted that the Claimant was a visitor on the 1st Defendant's premises within the meaning of the Occupiers' Liability Act and consequently the 1st and 2nd Defendants owed a duty of care to take all reasonable steps to ensure that he was reasonably safe in using the depot. It was further submitted that on the evidence of Mr Schloss and Mr Weller, the 1st and/or 2nd Defendant failed to discharge its duty to the Claimant in failing to employ sufficient personnel to ensure that the process of loading the truck with the forklift was efficient to avert all reasonably foreseeable risk to the claimant.

[12] Counsel for the Defendants submitted that the Claimant caused his injuries by adjusting the board on his truck while the pallet was being loaded onto it and that he is contributorily negligent. She expressed the view that the Claimant has not established on a balance of probabilities that the system in place for the loading of cement was unsafe as no evidence was given to suggest that. She noted that the Claimant was not an ordinary visitor to the Defendant's premises as he admitted that he was a regular visitor and she urged the court to find that there was no inherent danger in the 1st Defendant's system of loading cement and that the 1st Defendant and its servants or agents are entitled to assume that an experienced cement delivery man such as the Claimant will exercise sufficient care for his own safety and that he will guard against the dangers normally associated with loading cement onto a truck using a forklift.

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[13] It is well established that an occupier of premises has the statutory duty under the Occupiers' Liability Act to his visitors or licensees. Section 3 provides in part, as follows:

"(1) An occupier of premises owes the same duty (in this Act referred to as the "common duty of care") to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.

(2) The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor is reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there"

[14] Section 6 states:

"(1) *Where persons enter…any premises in exercise of a right conferred by a contract with a person occupying or having control of the premises, the duty he owes them in respect of dangers due to the state of the premises or to things done or omitted to be done on them, in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right, shall be the common duty of care*

(2) …"

[15] A defence of contributory negligence operates, if successful, to reduce the claim of the Claimant to the extent to which the court finds such a Claimant to be at fault. Section 3 of the Law Reform (Contributory Negligence) Act reads:

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

[16] The 1st and 2nd Defendants in their defence are seeking to rely on the statutory defence. It has been pleaded and particulars have been provided.

[17] On the evidence it is not disputed that the 1st Defendant was the occupier of the premises at Twickenham Park, Spanish Town in the parish of St Catherine and that the 3rd Defendant is its employee. It is also not disputed that the Claimant was a regular visitor to the premises where he came to collect cement and that he was familiar with the operations of the depot and it was his responsibility to ensure that the boards on his truck were properly aligned, as he operated his truck without a sideman.

[18] I therefore find that the Claimant was a visitor within the meaning of Section 3 of the Occupiers' Liability Act and as such the 1st and 2nd Defendants owed him a duty of care to take all reasonable steps to ensure he was safe in using the depot.

[19] On the day in question, the Claimant injured the little finger of his left hand while he was in the process of aligning the boards on his truck as it was being loaded with cement by the forklift operator.

[20] I find on the evidence that in order for cement to be loaded onto the truck, it is necessary for someone to assist the forklift operator, as there is the likelihood of the boards shifting during the process and the 1st Defendant did not employ anyone to carry out that function. It is reasonable to conclude that the Claimant had no alternative but to fix the boards and with his experience, I find that he should have reasonably foreseen and appreciated the risk associated with his action. He was familiar with the operations at the Defendant's premises therefore it is baffling to think that he would willingly place his hand in the path of the forklift without first getting the attention of the forklift operator or ensuring that the operator was aware of his intention. .

[21] The Defendants have advanced the argument that the 3rd Defendant is an experienced forklift operator of fifteen years who has been employed by the 1st Defendant for at least three years. They admit that the depot is noisy owing to the continuous flurry of activities and the parties have confirmed that the truck driver who operates alone has the responsibility of issuing directions regarding the lifting and lowering of the pallet.

[22] I find that in the course of loading the pallets of cement on the truck, the boards were displaced requiring the Claimant to realign them. It is therefore reasonable to conclude that the claimant, being familiar with the operations of the depot, requested that the 3rd Defendant lift the pallet to allow the boards to be fixed. I also find that it was not an unreasonable course of action for the 3rd Defendant to have checked to ensure that the Claimant had completed the act of fixing the boards before lowering the pallet and that it would be more likely that the Claimant would be the one to tell the forklift operator to lift the pallet so that the boards can be realigned.

[23] I find that the Claimant being familiar with the operations at the depot was able to fully appreciate the risk he undertook by trying to fix the boards when it is possible that the 3rd Defendant had not heard him if he issued instructions as he contends and that his action would be as a result of poor judgment.

[24] It is worthy of note that with the nature of the operations at the depot it has not been so organized to assist in the way its functions are carried out. I accept that the depot is a very busy place and the fact that there is no designated delivery area and there are no warning signs which make the process of loading the cement with a forklift an inherently dangerous activity.

[25] I agree with Counsel for the Claimant that the depot presents itself as being fraught with logistic challenges. I find that it is dangerous for the forklift operator to seek to maneuver the objects before him and not have the benefit of another employee with a better vantage point to assist the operations.

[26] I therefore find that the cement depot operated by the 1st Defendant was not the safest system of work as the visibility of the forklift operator is limited, the noise level on the premises presents a challenge, there is no designated loading area and neither are there any warning signs. It cannot be safe if visibility for the employee is limited. The cement depot operated by the 1st Claimant cannot therefore be considered as truly an “adequate plant and equipment”. The 1st Defendant’s premises were therefore not safe and the 1st and 2nd Defendants have failed to ensure that the Claimant was reasonably safe in using the premises.

[27] Having made the above findings, I will now determine whether the Claimant willingly accepted the risk of injury by aligning the boards, knowing that it was unsafe to do so.

[28] Section 3(7) of the Act provides that the common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor.

[29] I find that the Claimant being familiar with the operations at the depot was able to fully appreciate the risk he undertook by trying to fix the boards when it is possible that the 3rd Defendant had not heard him if he issued instructions as he contends and that his action would be as a result of poor judgment. However, I accept that the situation as existed, necessitated the Claimant taking action while the truck was being loaded as this is the inherently dangerous manner in which the operations are carried out.

[30] Despite the inconsistency in his witness statement and his evidence from the witness box as it relates to whether he was the one who told the 3rd Defendant to lift the pallet to allow the boards to be fixed, I found the Claimant to be straightforward and forthright. I accept him as a witness of truth and accept his evidence as credible. I find that it was necessary for the pallet to be lifted for the board to be fixed and it is more probable that he would be the one to see that the boards had shifted and to give instructions to the forklift operator.

[31] Section 3 of the Law Reform (Contributory Negligence) Act reads:

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

[32] It is the 1st and 2nd Defendants' case that the Claimant is the author of his own misfortune as he caused his injuries by adjusting the board on his truck while the pallet was being loaded onto the truck. It was however submitted that if the court is minded to find that there is contributory negligence, the Claimant should bear the greater part of the blame and an 80:20 apportionment of liability should be made in favour of the Defendants.

[33] It has been established on the evidence that there was contributory negligence on the part of the claimant. It is more probable to believe that in the course of depositing the first set of pallets the boards were displaced thereby requiring the Claimant to reposition them. He admits to the fact that it is risky to try to fix the boards when the truck is being loaded. This is something he has done before. He had no sideman on his truck and no employee of the 1st Defendant was assigned to carry out this function. I find that the Claimant gave instructions to the 3rd Defendant but that he did not exercise sufficient care to ensure that the 3rd Defendant heard his instructions clearly.

[34] I therefore find that the Claimant was injured partly due to his own negligence and is 30% responsible for his injury.

Damages

General damages

[35] The medical report of Dr Rose, Consultant Orthopaedic Surgeon indicates that there is hypersensitivity at the pulp of the left little finger due to a neuroma which resulted from the crush injury and that the Claimant will continue to experience sharp pains at the site of the neuroma whenever the finger comes in contact with a firm surface. The Claimant was assessed as having 4% whole person impairment.

[36] The Claimant stated that for about one month he had to attend the Greendale Medical Centre to have his finger "dressed" and that now he is unable to fully grip anything with his left hand and is unable to play dominoes and cricket as he did before.

[37] Counsel for the Claimant referred to the following cases:

1. **Everald Slater v Adolph Sherriff** CL1988/S070…. Harrisons' Assessment of Damages for Personal Injuries, 2nd Edition, pg. 292. The Claimant sustained laceration to left index finger and comminuted fracture of the proximal phalanx of the left index finger and his disabilities included stiffness to the proximal and terminal interphalangeal joints of the left index finger and ½ inch shortening of the left index finger with a PPD of 10% -15% of the left hand. An award of $35,000.00 was made in March 1990 (CPI 5.61) which updates to $1,417468.80
2. **Robert Thompson v Cedar Construction** CL 1989/T 034 Khan Vol. 4, page 113, where the Claimant sustained a blow to the left index finger. He was awarded $150,000.00 for pain and suffering and loss of amenities in September 1994 (CPI 28.03) which updates to $1,199,785.94 (CPI 227.2 for July, 2015)

[38] Counsel submitted that the injury to the Claimant in the case at bar was akin to that sustained by the claimants in the cited cases. She noted that the Claimant currently experiences more serious residual deficits, as there is hypersensitivity to the tip of the finger with the need for surgical intervention if this condition persists. She also referred to the opinion of Dr Rose who stated that normalcy cannot be restored to the finger, and recommended an award in the range of $1.5m to $2m.

[39] Counsel for the Defendants submitted that a reasonable award for general damages should be $800,000.00 and referred to the following cases as providing useful guidance for quantifying the award:

1. **Wayne Griffith v Detective Duncan, Beckford and the Attorney General** Khan, Vol. 3. Page 114, where the Claimant suffered loss of distal phalanx of right fourth finger; laceration to right foot; soft tissue swelling to left elbow and bruises. He was awarded $15,000.00 for general damages in October 1989 (CPI 5.09) which equates to $669,548.13(CPI 227.2 July 2015)
2. **Jermaine Butler v Hugh Rose**, Harrisons' Assessment of Damages for Personal Injuries, 2nd Edition, pg 164 where the Claimant suffered injury to the tip of his left thumb when it was caught in a machine. He was held contributorily negligent to the extent of 50%. In March 1999,(CPI 49.20) the sum of

$100,000.00 was awarded for general damages which revalues at $461,788.61 (CPI 227.2 July 2015)

3. **Icilda Lammie v George Leslie** Harrisons' Assessment of Damages for Personal Injuries, 2nd Edition, pg. 291 where the Claimant lost all of her phalanges of the left index and middle fingers and an award of $35,000.00 was made in September 1989 (CPI 5.06) which updates to $1,571,541.50
4. **Stanley Campbell v Innswood Estate Ltd & Roger Linton**, Harrisons' Assessment of Damages for Personal Injuries, 2nd Edition, pg 291 where the sum of $40,000.00 was awarded to the Claimant in….. (CPI..) The Claimant sustained crush injury to his right hand and fingers and fracture of distal phalanx of the 3rd, 4th and 5th fingers of the right hand. of $1,634,432.23

[40] I do not find the cases of **Icilda Lammie** and **Stanley Campbell** as being good guides in coming to a decision as in those cases the injuries were far more extensive than the injury suffered by the Claimant in the case at bar.

[41] It is my view that the injury sustained by the Claimant is more comparable to that of the claimants **Everald Slater** and **Robert Thompson**. However, the Claimant in this case sustained lacerations which required suturing. I have taken into consideration that the PPD is a factor to be considered, and in these cases there is no indication that a whole person PPD rating was assessed, and these are very old cases. In looking at the period of incapacity of the Claimant and the PPD rating as well as the fact that he is now unable to play dominoes or cricket, I am of the view that a reasonable award in the circumstances would be $1,300,000.00.

Award:

[42] For pain and suffering and loss of amenities the sum of $1,300,000.00(reduced by 30%), is awarded with interest at 3% from the date of service of the claim form, July 20, 2011, to today

Special damages awarded in the agreed sum of $73,600.00 with interest at 3% from May 11, 2006 to today

Costs in this claim to be taxed if not agreed and apportioned 70:30