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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. F004/82

BETWEEN	ASTON FITTEN	-	PLAINTIFF
AND	MICHAEL BLACK LTD.	-	FIRST DEFENDANT
AND	KEN HENRY	-	SECOND DEFENDANT

Mrs. Pamela Benka-Coker and Paul Beswick for Plaintiff
W.K. Chin See, Q.C. and John Vassell for Defendants.

Heard: 10th, 12th, 13th, 14th, 18th, 19th, 20th,
25th, 26th, 27th, 28th November, 1986,
17th June 1987.

Coram - WOLFE, J.

This claim arises out of an industrial accident which occurred on the 4th day of May, 1982, at a Block Making Factory, situated at Seven Miles, Bull Bay in the Parish of Saint Andrew, owned and operated by the First-named Defendant and to whom the Plaintiff and the Second-named Defendant were employed. The claim is grounded in negligence and Breach of Statutory Duty.

The Plaintiff in his evidence stated that he was employed in the business of manufacturing Concrete Blocks since 1963. In his previous employment at Lieba's Block Factory he worked in every capacity in the manufacturing of blocks. It may properly be said of the Plaintiff, if his evidence is believed, that he is a "Jack of all trades". In his employment at the First Defendant's Company he was employed primarily as a fork lift operator. As a forklift operator his duties consisted of loading empty racks unto a conveyor belt line for the purpose of having them filled with concrete mixture. As soon as the racks are filled with the mixture the plaintiff would unload them and take them to the drying yard to be dried. In addition to these duties, the Plaintiff said he performed the duties of cleaning the pit, cleaning and washing the block machines, assisting in cleaning the mixer, as well as assisting in repairing machines whenever there was a break down. Further the

Plaintiff testified that he was sometimes required to operate the mixer machine.

The mixer is the machine in which aggregate is mixed. Aggregate is the name given to a mixture of sand, crushed stone, cement and water. It is this mixture which is used to make concrete blocks.

The mixer is a steel cylindrical drum 7' X 5' X 4' 6" in which there is an iron shaft. Attached to the shaft are four billions to which are attached two 4' blades of casted steel. The blades are located one to each end of the drum and on the opposite side of the shaft. The weight of the blades is such that they can only be removed from the drum by using a crane or forklift.

It is important for purpose of this action to understand how the mixer machine is operated. I shall therefore proceed to explain the operation of the machine.

The machine is energised by an electrical motor which is controlled by two switches - green to start and red to stop. The blades are rotated by a clutch which is operated by air. The clutch is engaged and disengaged by a lever which is manually operated.

The plaintiff testified that on the day of the accident the second-named Defendant, who was engaged in cleaning the mixing machine requested him to assist. Cleaning the mixer involved, chipping the hardened aggregate from the blade by means of a hammer and from the back of the drum by means of a crow bar.

The Plaintiff stated that the hardened portions of aggregate chipped off from the blades and the back of the machine are removed from the drum manually. This requires the plaintiff to insert his hands into the drum and remove the waste. It must be noted that during this procedure the machine is not in motion. The Plaintiff contends that whilst he was performing this procedure, to the knowledge of the Second Defendant, the mixer was switched on, without prior notice, causing his right hand to be amputated. As a result of the injury received the plaintiff was admitted to St. Joseph's Hospital where he remained for fourteen (14) days. No evidence was adduced on behalf of the Plaintiff as to who switched on the machine.

195

Kenneth Henry, the Machine Operator and the second Defendant herein, testified that on the day of the accident, some time about 2.30 P.M. he was engaged in cleaning the blade of the machine when the Plaintiff came to the area in which he, the Second Defendant was working and enquired of him what had happened. He informed the Plaintiff that he was cleaning the blade of the machine. Having spoken to the Plaintiff he left and went to turn on the motor. The motor having been switched on, the Defendant said, he then activated the blades of the machine by lifting the clutch. The Second Defendant said that after the blades were activated he observed Fitten, the Plaintiff, and noticed that he had "no arm". Whereupon he immediately disengaged the clutch thereby stopping the blades of the machine from rotating.

That is the sum total of the evidence adduced on both sides as to how the accident occurred.

The issue which must now be resolved is whether or not the machine was activated by the Second Defendant at a time when the Plaintiff was assisting him to clean the machine or at a time when he knew or ought to have known that the Plaintiff had inserted or would have inserted his hand into the drum.

Without beating around the bush, let me say that I do not accept that Kenneth Henry activated the machine knowing that the Plaintiff had placed his hand into the drum or in circumstances where he ought to have known that the Plaintiff would have placed his hand into the drum. I am fortified in this belief by the testimonies of both the Plaintiff and the Second Defendant. Both men testified that the relationship between them was, to say the least, cordial. In fact it was Henry who introduced Fitten to Mr. Black for purpose of obtaining employment and up to the time of the accident the relationship was harmonious. In those circumstances, at the risk of being called naive, I am unable to find that Henry would have activated the machine knowing that the Plaintiff had inserted his hand into the drum or was about to do so. The circumstances of the relationship between the two men also lead me to find that had Fitten been assisting Henry to clean the machine,

as Fitten alleged, Henry would not have turned on the machine without giving the Plaintiff notice that he was about to do so. I accept the Plaintiff's evidence that Henry did not tell him he was going to switch on the machine. I find that there was no necessity for Henry to inform him of his intention to switch on the machine because the Plaintiff was not engaged in assisting to clean the machine. Let us examine the Plaintiff's evidence. The Plaintiff says that prior to going to assist Henry with cleaning the machine he was engaged in removing racks with Concrete Blocks from the Block-making Machine to the drying yard. At the time that he went to assist Henry he had on the forklift a rack with blocks but instead of taking same to the drying yard and then returning to help Henry, he left the rack on the forklift and went to Henry's assistance. I find this difficult to accept. This is so because from the procedure outlined the cleaning procedure takes some time. It would therefore be expected that he would deposit the newly made blocks in the drying area and return to clean the machine, rather than to embark upon cleaning the machine while the newly made blocks are left on the forklift. This extract from the Plaintiff's evidence supports my view.

> "I had left a rack on the forklift before I went to the drum. The rack had in freshly made blocks. In the normal procedure I should have taken that rack with blocks to the drying area before. I did not take the rack with blocks to the drying yard because the machine was going out of material which means it would have stopped in a few minutes."
>
> [emphasis mine].

I am satisfied that there was no negligence on the part of Henry when he switched on the motor and activated the blades of the mixer. This finding is based on the fact that the Plaintiff was not assisting to clean the machine and Henry could not have anticipated that the Plaintiff would have inserted his hand into the machine at the material time or indeed at all.

I turn now to consider the question of the Breach of Statutory duty:

Section 3(1) of the Factories Regulations 1961 made under the Factories Act stipulates as follows:

> "Every dangerous part of any machinery shall be securely fenced unless it is in such a position or of such construction as to be as safe to every worker as it would be if securely fenced."

Machinery will be deemed to be "dangerous" within the meaning of Section 3(1), if the risk of injury is reasonably foreseeable from the use of it without protection, but not if there is merely an extremely remote possibility of it causing injury. See Close v. Steel Co. of Wales Ltd. [1962] AC 367 H.L. From the description of the machine, that is, the mixer, I am satisfied that the blades may properly be deemed to be "dangerous".

This finding made it necessary for the particular machine to be fenced. Indeed, Mr. Chin See, Q.C. for the Defendants conceded that the spacing between the bars, which fenced the machine, could not be regarded as adequate fencing and further posited that this could have been one cause of the accident. This concession by Mr. Chin See does not, however, dispose of the question of the Breach of a Statutory Duty. It is necessary to consider the question of contributory negligence as raised by paragraph 9 of the Defence.

In Flower v. Ebbw Vale Steel, Iron and Coal Co. [1936] AC 206 where the question of contributory negligence on the part of an employee arose, arising out of an accident which occurred as a result of the Breach of a Statutory Duty to fence dangerous machinery, the Trial Judge, Lawrence, J. said that the question was:

> "whether the plaintiff by the exercise of that degree of care which an ordinary prudent workman would have shown in the circumstances could have avoided the result of the defendant's breach of duty . . . . . .
>
> I think, of course, that in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of the work in a factory and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence."

On appeal to the House of Lords, Lord Wright delivering the Judgment of the House approved of the approach adopted by Lawrence, J.

In Hutchinson v. London and North Eastern Railway Company [1942] 1 KB 481 at P. 488.

Goddard, L. J. expressed the following view:

> "In such a case I always directed myself to be exceedingly chary of finding contributory negligence where the contributory negligence alleged was the very thing which the statutory duty of the employer was designed to prevent."

Lord Greene, M.R. opined to the same effect in Hopwood v. Rolls-Royce Ltd. [1947] 176 LTS 14 at 520.

Against this background of the law one must now examine the evidence adduced in the instant case to ascertain whether or not the Plaintiff was guilty of Contributory negligence. I have already indicated that in my view there was no negligence at Common Law on the part of the Defendants. On the basis of the evidence adduced, having seen and observed the demeanour of the witnesses I have rejected the contention of the Plaintiff that at the material time of the accident he was lawfully assisting the Second-named Defendant to clean the machine, when without notice, the blades of the machine were activated. The Plaintiff was therefore not injured whilst working on the machine.

In resolving the question of contributory negligence, I ask myself what was the effective cause of the accident? No evidence was adduced by the Defendant to show how the Plaintiff came to be injured, although paragraph 7 of the Defence asserts that "the Plaintiff inserted his hand through the guard rails of the mouth of the mixer in an attempt, subsequently described by him, to retrieve a particle of hardened cement which he had seen in the mixer".

I accept the evidence of the second named Defendant that whilst the machine was being cleaned the cover of the machine remained on the machine. Having rejected the contention of the Plaintiff that he was engaged in cleaning the machine along with the secon-named Defendant, it is reasonable to infer that the Plaintiff came to his injury when he inserted his hand through the guard rail which covered the mouth of the machine.

The question therefore arises, would the accident have occurred had the machine been properly fenced? I answer the question in the negative. Had the space between the guards rails been smaller the Plaintiff would not have been able to insert his hand between them to come into contact with the blades. This is the very thing which Section 3(1) of The Factories Regulations 1961 seeks to prevent. I am, therefore, constrained to hold that the failure of the First Defendant to have the dangerous part of the machine adequately fenced was a substantial cause of the accident.

The evidence adduced discloses that the Plaintiff is an experienced worker in the block making industry. The Plaintiff under cross-examination had this to say:

> "when I put my hand in the machine, I was satisfied that both blade and shaft had been cleaned. In the course of the operation if blades and shaft have been cleaned the next step is to start the machine."

In the light of this statement and bearing in mind the vast experience of the Plaintiff, it is reasonable to conclude that he ought to have contemplated the probability of the machine being switched on at the time when he inserted his hand into the machine. The Plaintiff in my view contributed to his injury. In holding the Plaintiff guilty of contributory negligence, I am mindful of the admonition of Lord Tucker in Stanley Iron and Chemical Co. Ltd. v. Jones [1956] AC 627 at P. 648.

> "The purpose of imposing the absolute obligation is to protect the workmen against those very acts of inattention which are sometimes relied upon as constituting contributory negligence so that too strict a standard would defeat the object of the statute."

Sachs L. J. in Mullard v. Ben Line Steamers Ltd. 1970 WLR 1414 and McGuiness & Key Markets Ltd. [1972] 13 KLR 249 C.A. reiterated the principle and has urged that "the courts must be careful not to emasculate the protection given by the regulations by a side wind through apportionment; thus the workman must not be judged too harshly for a momentary error where there was a continuing breach of the law by his employers."

Having concluded that the Plaintiff contributed to the accident it now remains to resolve the difficult question of apportionment of responsibility.

The Judgment of Lord Pearce in Udden v. Associated Portland Cement Manufactures Ltd. [1965] 2 AER 213 at p. 218 is instructive in this regard.

> "The question of proportion is one of fact, opinion and degree. The onus of proving contributory negligence is on the defendants. They seek to show that they have on the finding of the judge established facts on which a tribunal cannot properly attribute to the Plaintiff less than one hundred percent of the blame, or at all events any figure as low as eighty percent. That is a difficult task in a case where the judge has obviously considered the matter with care and no error is imputed to him save the actual percentage. On the one hand the plaintiff was guilty of extreme folly outside any reasonable anticipation and was doing an unauthorised act in an unauthorised place for his own purposes. No accident had previously occurred, and but for the plaintiff's foolish and unauthorised act, this accident would never have happened. On the other hand the defendants (who should have known better) failed to carry out their statutory obligation to fence. It was not a bad failure, but without their failure to fence, this accident could never have happened. The plaintiff was a foreigner, who may not have had any industrial experience before he came to this country. His unintelligibility may have led the judge to think there were reasons which would palliate his folly though they could not excuse it."
>
> [emphasis mine]

In the instant case it is not contended that the Plaintiff had been forbidden to enter the area in which the machine was sited. There is also no evidence that he had been forbidden from putting his hand into the machine whilst it was stationary for cleaning purpose. However, this is understandable as the Defendants contend that the Plaintiff was never ever required to or had ever operated the machine or cleaned it. Based upon his experience in the entire operation I would have expected that the Plaintiff upon seeing the piece of hardened material would have brought it to the second Defendant's attention rather than insert his hand to remove it. This is even moreso when one considers that Henry, the second Defendant and operator of the machine, was nearby.

The act of the Plaintiff was in my view not mere momentary inattention. I bear in mind that the category of acts which may amount to momentary in attention is not closed. This was almost recklessness on the part of the Plaintiff. To my mind the sort of momentary inattention contemplated is where a workman using a machine suffers injury by a temporary lapse on the part of the workman. The Plaintiff in the instant case, it might be said, was being a mere busy body.

In all the circumstances of the case, I hold that the Plaintiff must bear the greater blame. His act in inserting his hand into the machine under the circumstances in which he did so was in my view, and I so hold, the more substantial cause of the accident. But for the breach of the statutory duty, the Plaintiff would have been adjudged the author of his own injury. I find the Plaintiff 60% to be blamed for the accident and the First Defendant 40% to be blamed. In my view the Second Defendant is not in anyway blameworthy.

Re: Damages

On the question of Special Damages no issue was joined as to the following:

1.	Travelling to and from hospital 35 visits at $30.00 per visit	-	$1,050.00
2.	One pair of trousers	-	60.00
3.	One shirt	-	35.00
4.	Cost of household help at $50.00 per week for 34 weeks.	-	1,700.00
			$2,845.00

Loss of Earnings

The Plaintiff claims loss of earnings from the date of the accident up to the time of the hearing. The evidence discloses that the Plaintiff resumed work in September 1982 and continued to work up to the 3rd January, 1983 when he was dismissed. Since then the Plaintiff has not worked and has not sought employment. The Plaintiff's evidence is relevant on the question of loss of income. Before quoting an extract from his evidence, I must make the point that there is no contest in respect of loss of earnings for the period 2nd May, 1982 to September 1982,

which amounts to One Thousand Four Hundred and Forty Dollars ($1,440.00).

However, in respect of the period 3rd January, 1983 to the time of trial it is contended that the Plaintiff was justifiably dismissed and therefore not entitled to an award in respect of the said period.

The Plaintiff's evidence is -

> "After the accident I returned to work at the factory. I was paid the same wages. I wouldn't say I was doing my fair share of work. I worked to the best of my ability. I think I can still operate the forklift. This type of forklift is used generally in the block making industry. I have not been to seek a job since the accident. I don't feel anyone will employ me with one arm."

Michael Black, Managing Director of the First Defendant's Company had this to say of the Plaintiff.

> "After accident and on his return to work he resumed as a forklift operator. Notwithstanding his disability his work was satisfactory. His work was as good as when he left. After three months he began to display lack of interest in the job. Other workers had to beg him to work. He use to leave the job and go to gamble outside the road. On the first day in January 1983 he continued his nonchalant attitude, so I dismissed him on 4th January, 1983."

The traumatic injury which the Plaintiff received must have affected his mental attitude to work. In addition thereto the question of compensating the Plaintiff seemed to have been proceeding, in the Plaintiff's view, very slowly. Hence his approach to his job, as outlined by Mr. Black, is understandable. Notwithstanding, he was injured on the job the Company was entitled to demand of him a fair day's work for a fair day's pay and if he failed to perform accordingly the Company was entitled to dismiss him. I find that it was under these circumstances that he was dismissed and in my view he is therefore not entitled to an award for loss of income, during the period from 1st March, 1983 to date of hearing. In any event a Plaintiff is under an obligation to mitigate his loss. The Plaintiff himself said that he was able to operate a forklift. However, he failed to seek other employment because he was of the view that no one would employ him because of his handicap.

In James v. Woodhall Duckham Construction Co. [1969] 1 WLR 903 C.A. the plaintiff was medically advised about a year after the injury that the psychosomatic pain which was incapacitating him from work would cease only after his claim against the defendant had been settled or determined by the Court. Nevertheless he did not issue a writ for another year. A further two and a half years passed before a statement of claim was delivered, and the case was not heard until six and a quarter years had elapsed from the time of Inquiry. In these circumstances it was held that since the plaintiff had unnecessarily prolonged the period of his incapacity for work, he could not recover for loss of earnings for the period in respect of which he had delayed his return to work and accordingly loss of earnings for only three of the six and a quarter years should be allowed. See also Lines v. Harland and Wolf [1966] 2 Lloyd's Rep. 400. The principle enunciated in James' Case would in my view be applicable herein, the facts notwithstanding. The claim for loss of earnings for the period 1st January, 1983 to present time is therefore denied. The Plaintiff was out of a job not because of the injury received but because he was justifiably dismissed.

Re; General Damages

It is conceded by Attorneys-at-Law for the Defendants that a prosthesis will be necessary. The issue is whether the Plaintiff ought to be awarded the cost of the mechanical device or the myoelectric device. On the question of the type of device appropriate in the circumstances of the Plaintiff three eminent Orthopaedic Surgeons and one certified Prosthetist testified. Without engaging myself in a detailed analysis of the evidence, the balance of probabilities after consideration of all the medical evidence favours the award of the mechanical device. Professor Sir John Golding a renowned Orthopaedic Surgeon as well as Dr. Gary Dundas another distinguished Orthopaedic Surgeon agree that the myoelectric device poses innumerable problems. I quote one extract each from the evidence of these distinguished surgeons.

Professor Golding

> "For someone living in Jamaica I would say the myoelectric would be unusable most of the time. This is because of the complicated nature of the unit. These units give rise to all sorts of trouble which we cannot cope with here."

Dr. Dundas

> "Myoelectric device is subject to corrosion from sweat. When this occurs the affected part of the device has to be changed. More likely to be affected by corrosion in a tropical country."

It is agreed that the Plaintiff will require three (3) prosthesis for the rest of his working life at a cost of Five Thousand Dollars ($5,000.00) each and an additional Two Thousand Five Hundred Dollars for maintenance of each amounting to Twenty-two Thousand Five Hundred Dollars ($22,500.00).

Loss of Earning Capacity

The Plaintiff was aged 37 at the time of the accident. The agreed weekly income of the Plaintiff is Two Hundred and Fifty Dollars ($250.00) per week.

It cannot be doubted that the loss of the Plaintiff's right hand will reduce his earning capacity. This is conceded by Counsel for the Defendants.

In Taylor v. Bristol Omnibus Co. Ltd, [1975] 2 A.E.R. 1107 at p. 1111.

Lord Denning M.R. observed:

> "It must be remembered that, when assessing compensation for loss of future earnings, the Court is not seeking to replace week by week the sums which the plaintiff would have earned. It is only giving compensation for loss of future earning capacity."

In Moeliker v. Reyrolle & Co, Ltd. [1977] 1 A.E.R. 9 at p. 17 Browne L.J. said, when considering the award of damages under this heading,

> "I do not think one can say more by way of principle than this. The consideration of this head of damages should be made in two stages.
>
> 1. Is there a 'substantial' or 'real' risk that a plaintiff will loose his present job at some time before the estimated end of his working life?
>
> 2. If there is (but not otherwise), the Court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff's chances of getting a job at all, or an equally well paid job."

At the moment the Plaintiff is unemployed. Whilst there is remarkable improvement of attitude in the Jamaica of today towards the employment of handicapped persons, it cannot be denied that handicapped persons are at a distinct disadvantage in obtaining employment in certain areas of work, moreso in industry. Using a multiple of fourteen (14) on the basis that the Plaintiff would be able to continue working until age 65 at the rate of $250.00 per week this would produce an amount of $182,000.00 which will be sealed down by one-fifth making the amount $145,600.00.

For loss of amenities, the inability to indulge in his favourite past times of playing cricket and swimming and his loss of litudo as attested to by De. Aggrey Irons the Plaintiff will be awarded an amount of <u>$8,000.00.</u>

I move now to the award for Pain and Suffering. The Plaintiff suffered a serious injury. He underwent two surgical operations. The pain was excruciating, if the Plaintiff's evidence is believed. He bled profusely. He had phantom symptoms. Disability as a result of the amputation amounts to 100%. His disability as a man resulting from the amputation was assessed by Dr. Dundas to be 57% permanent partial disability.

Considering all the circumstances of the Case and the trend of awards in cases of a similar nature, I am satisfied that an award of

806

$80,000.00 would be adequate for Pain and Suffering.

SUMMARY OF DAMAGES

Special Damages	$2,845.00
General Damages	
Cost of and maintenance of prosthesis	22,500.00
Loss of earning Capacity	145,600.00
Loss of Amenities	8,000.00
Pain and Suffering	80,000.00
	$258,945.00

On the basis of the Plaintiff being 60% to be blamed for the accident he is hereby awarded 40% of the sum of $258,945.00 which amounts to $103,578.00, with interest on $2,845.00 at 3% and $88,000.00 at 3%.

Costs to the Plaintiff up to and including 13th November, 1986 to be taxed if not agreed.

Cost to the first Defendants from and including 14th November, 1986 to 17th June, 1987 to be taxed if not agreed.

Cost to the second Defendant to be taxed if not agreed.