IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISON

CLAIM NO. C.L. 1999/H136

BETWEEN	**DONALD HARRIS**	**CLAIMANT**
AND	**GIRVAN & ASSOCIATES LTD**	**1ST DEFENDANT**
AND	**OSCAR WRIGHT**	**2ND DEFENDANT**
AND	**COSMO BROOKS**	**3RD DEFENDANT**

Mr. Jeffrey S. Mordecai for the Claimant

Mr. David Henry instructed by Mrs. Winsome Marsh for the 1st Defendant

Mr. Oscar Wright – 2nd Defendant not appearing or represented

Mr. John G. Graham instructed by John G. Graham & Company for the 3rd Defendant

Heard: March 4, 6; October 22, 28; December 12, 2008 & October 13, 2009

MCDONALD, J

The Claimant's claim is for damages for negligence for that on or about July 15, 1999 at 11 Norbrook Acres Road in the parish of St. Andrew, the Defendants, jointly or severally, and/or their servants or agents so negligently managed, operated or controlled a construction site that the Claimant while using a hammer and chisel was struck in his left eye by a metal object causing him to suffer injury loss and damage and to incur expense.

The Particulars of Negligence allege that the Defendants were negligent in the following ways:-

(a) failing to have a safe system of work in effect;

(b) failing to provide the Claimant with any or any sufficient safety equipment to protect his eyes;

(c) failing to train the Claimant in safety procedures;

(d) failing to warn the Claimant of the danger of using a hammer and chisel without appropriate safety equipment.

The Claimant contends in his further Amended Claim Form and Particulars of Claim that:

1. At all material times he was a construction worker employed to the Second Defendant at a construction site on the Third Defendant's premises.
2. The First Defendant was a company doing business as architects and designers and was at all material times contracted by the Third Defendant as architect for a construction site on the Third Defendant's premises.
3. The Second Defendant was at all material times under contract to the Third Defendant as foreman on the construction site on the Third Defendant's premises and was at the material time the servant and/or agent of the First Defendant and/or Third Defendant in employing the Claimant.
4. The Third Defendant was at all material times the owner of 11 Norbrook Acres Road in the parish of St. Andrew and contracted the services of the First Defendant as architect for a construction project at those premises with authority to contract a foreman and workers to supervise and complete that project for which services the Third Defendant paid the First Defendant and/or Second Defendant.

The Second Defendant failed to enter an appearance, consequently interlocutory judgment was entered against him on the September 29, 2000, and the claim against him is before this court for Assessment of Damages.

The First and Third Defendants have not denied the negligence of the Second Defendant and both accept that his acts and/or omissions occurred in the course of his employment.

The First Defendant in its pleadings contends that it was contracted by the Third Defendant to prepare design and working drawings and to inspect the construction work for conformity with the architectural drawings and further to discuss advise and instruct the person carrying out the construction (on behalf of the Third Defendant) on modification as desired by the Third Defendant.

The First Defendant denies that the Second Defendant was its servant and/or agent and says that the Second Defendant was at all material times employed by the Third Defendant as the foreman/supervisor on the site.

The First Defendant denies that it had any obligation to provide the Claimant with any safety equipment or any equipment at all. The First Defendant says that it was the duty of the Third Defendant as employer/contractor and or the Second Defendant as foreman to provide the Claimant with safety equipment and be responsible for safety at the work site.

The First Defendant denies that it had authority to contract or did contract a foreman and workers to supervise and complete the construction project for which service it was

paid. However they admit that on the request of the Third Defendant they did recommend the foreman/supervisor the Second Defendant.

The Third Defendant in his pleadings contends that the Claimant was employed by the Second Defendant who was acting in his capacity as contractor responsible for the supervision of workmen on the site. The Third Defendant further asserts that the First Defendant as architects on the project was responsible for the general supervision of the construction site.

In determining liability the Court has to pay due regard to the pleadings of the respective parties and assess the evidence adduced in light of these pleadings.

In addition this exercise involves the Court assessing the credibility of the witnesses called.

The Court has to determine

(i) To whom was the Claimant employed.

In deciding this issue the Court has to also decide if the principle of vicarious liability arises

(ii) Was the Claimant contributorily negligent

(iii) Who is liable for the injuries sustained by the Claimant

(iv) The quantum of special damages and general damages to which the Claimant is entitled.

On the issue of general damages the Court will have regard to whether the Claimant has substantiated with evidence his claim for loss of future earnings, future care and handicap on the labour market.

Mr. Mordecai submitted that the Claimant claims in negligence on the basis that (1) the Defendants are jointly or severally and directly liable to the Claimant. (2) the First and/or Third Defendants are jointly or severally liable by way of the "no fault" principle of vicarious liability for the tortuous act of the Second Defendant.

He contended that the Claimant's injury was caused by the negligent breach of duty by two or more of the Defendants failing to provide the Claimant with the necessary safety equipment and a safe system of training and work that included warning of the dangers of 'chiseling' without the appropriate safety equipment. He said that this duty owed to the Claimant, by either the First or Third Defendant is an instance of direct liability, quite distinct from the issue of vicarious liability of either or both of these Defendants for the tortuous act of the Second Defendant.

He said that it is open to the Court on the evidence to find either the First Defendant or the Third Defendant directly negligent for the breach of their direct duty to the Claimant to provide him with the necessary safety equipment. If this Court so finds on the basis of fault that the First and Second Defendant or the Second or Third Defendants are liable in negligence to the Claimant the issue of vicarious liability or dual vicarious liability would not arise for the Court's consideration.

He contended that if the Court is unable on the evidence, in the circumstances of this case, to find direct negligence on the First Defendant and Third Defendant because the Court is not satisfied that either of these two Defendants were directly at fault, he submitted that on the evidence in this case, a non-fault based finding of vicarious liability should result against one or both of the First Defendant and/or the Third

Defendant as being vicariously liable for the admittedly tortuous acts of the 2nd Defendant.

He asked the Court to ignore the First Defendant's attempt to belatedly introduce LNG Service Ltd as relevant to these proceedings and submitted that the First Defendant cannot benefit from what it has not pleaded and is estopped from putting up at trial an unpleaded defence.

It was submitted on behalf of the Third Defendant that the Third Defendant was not the employer of the Claimant and that therefore the Third Defendant has no primary liability to the Claimant.

Further that the Second Defendant was the employer of the Claimant and it was his sole responsibility to provide the appropriate safety equipment to the Claimant.

Mr. Graham submitted that in order to find the Third Defendant vicariously liable for the Second Defendant's negligence, the Court would have to find that the Third Defendant at the material time was the employer of the Second Defendant and was thus responsible for his actions or omissions.

He submitted that on the evidence of this case, the Court cannot properly find that the Third Defendant was the employer of the Claimant; neither can the Court find that the Third Defendant was the employer of the Second Defendant so as to be vicariously liable for his actions.

<u>To whom was the Claimant employed (including who had supervisory control over the Claimant).</u>

The Claimant in his witness statement (treated as his examination-in-chief) outlined a history of his working relationships with the First and Second Defendants, and his understanding of that relationship.

It was his understanding as these projects "that Mr. Girvan was the one who got the work and after getting the work would employ Mr. Oscar Wright to engage a work force and supervise that workforce in the doing of the work."

The Claimant also stated that he was told by Mr. Wright on many occasions "that Mr. Girvan was his boss and he worked under Girvan's orders."

In respect of the project the subject of this suit, the Claimant indicated that Mr. Wright told him that "things would work a little bit different at this now job. He told me that unlike the other jobs where Mr. Girvan would pay money directly to Oscar Wright, on this job Oscar Wright would be working with the owner, Mr. Brooks who would pay Mr. Wright. Mr. Wright said Girvan had drawn the plans and had recommended Oscar Wright to Mr. Brooks. Oscar Wright said we had to be careful in the new situation as the owner would be on the site and be the one paying out the money .... on this site payment for work was dealt with by Oscar Wright and Mr. Brooks .....on other sites I worked on for Oscar Wright, Mr. Wright would leave the site and go to Mr. Girvan's office and come back with the money and pay the workers."

Based on the above I find that it was the Claimant understands that this project was being handled differently from the way previous work situations were dealt with in which he worked for Oscar Wright and 'Mr. Girvan'.

It is the Claimants undisputed evidence that on the day of this accident it was Oscar Wright who gave him the hammer and chisel and pointed to the place to chisel into the wall "to see a piece of steel so that the additional building could be supported by the old building."

The Claimant said that whilst 'licking the hammer and chisel he felt something lick him" in his eye. He noticed that he could not see out of his left eye.

He was eventually taken to the University Hospital of the West Indies where he underwent emergency surgery to remove a piece of metal from his eye which he recognized as part of the chisel.

At the time of the accident he was not wearing goggles. He had asked Mr. Wright for goggles and he told him that he "soon deal with it". He never asked Mr. Girvan or Mr. Brooks for goggles.

According to the Claimant's evidence at no time did Mr. Wright say that he was going to ask Mr. Girvan about goggles.

The Clamant said that he worked on the site for three weeks before the accident and had no dealing with either Mr. Girvan or Mr. Brooks only Mr. Wright was paid by Mr. Brooks.

He stated that Mr. Brooks was on site everyday and that he communicated with Mr. Wright, not directly with the workers.

The Claimant said that over the three week period that he was on the job, Mr. Girvan came to the site two times. This understanding on the Claimant's part that this project

was being handled differently from pervious projects was based on what he was told by Mr. Wright as well as what he learned from his observations on the site.

In cross-examination the Claimant said that when he came out of hospital he asked Mr. Wright "like how I get injured on the job who is responsible for me and he told me Mr. Brooks."

In his evidence-in-chief the Claimant states that the same day after he left hospital Mr. Wright had driven him to Mr. Brooks house and he asked him who was responsible and he said "Mr. Brooks because Girvan and Brooks have a contract."

He also said that Mr. Brooks called him one side and said Mr. Girvan was responsible for him because he and Mr. Girvan signed a contract and Mr. Girvan was responsible for him.

It was the Claimant's evidence that he was never shown a contract. The undisputed evidence in this case is that there was a no written agreement between the Third Defendant and the First Defendant on both the 1988 project and the 1999 project. The specific terms of an oral agreement have not been made known to the Court.

In determining what were the contractual terms and conditions agreed between the First Defendant and the Third Defendant the Court in addition to looking at the evidence of the Claimant, has to examine the evidence of Louis Girvan and Cosmo Brooks as well as the exhibits tendered in particular exhibits 7 and 11.

It is noteworthy that the Claimant has made no assertion in his evidence of being engaged on this project through Mr. Oscar Wright working for Mr. Girvan.

The First Defendant's Case

It is the First Defendant's case that Mr. Wright was at all material times employed by Mr. Brooks as the foreman/supervisor on the Brooks construction site.

Based on the pleadings, none of the parties including the Second and/or Third Defendant have contended that the Second Defendant was employed by the First Defendant on this project. Neither have they contended that the Claimant was employed by the First Defendant on the project.

Mr. Girvan in examination-in-chief asserts that the First Defendant was engaged by Mr. Brooks to prepare design and working drawings for the construction improvements to his house.

He indicates that after completing this, Mr. Brooks also asked LNG Services Limited (a company of which he was the Managing Director and Principal shareholder) to produce a proposal to carry out the construction work.

Mr. Girvan said that an estimate was prepared for both architectural and design services on the one hand and construction services on the other (see exhibit7). He said LNG Services Limited were however never contracted to carry out the said construction as Mr. Brooks decided to undertake the construction project himself and merely asked for his recommendation of someone he could employ on the project as his foreman/supervisor.

He recommended Mr. Wright, as he was regularly employed by LNG Services Limited in the capacity as foreman on the construction projects which that company was contracted to undertake. This evidence is uncontraverted.

Mr. Girvan's evidence is that the First Defendant and LNG Services are and were at the material time two separate companies which carried out different junctions. The First Defendant as architects and designers and the latter as construction contractors.

Paragraphs 4 – 11 of Mr. Girvan's witness statement are also pertinent and I will repeat same.

It states:

"4. The 3rd Defendant directly engaged the 2nd Defendant so that at all material time the 2nd Defendant was paid by and under contract to the 3rd Defendant as foreman/supervisor on the 3rd Defendant's construction site.

The 3rd Defendant was at home in the days and was involved with the day to day running of the project, in the ordering and delivery of materials and in instructing the 2nd Defendant where and what work he wanted carried out on a daily basis. He paid the 2nd Defendant and other workmen.

5. My understanding of the arrangement was that the 2nd Defendant, as the 3rd Defendant's foreman/supervisor, would employ the workmen on the 3rd Defendant's behalf, prepare the pay bill fortnightly, bring it to me for checking the rates and then present it to the 3rd Defendant for final checking and payment.

6. The 1st Defendant was engaged on the project as Architect only, that is, its terms of employment were limited to:-

   (a) providing Architectural Design Drawings

   (b) providing Architectural Working Drawings

(c) inspecting the work as necessary for conformity with architectural drawings and to discuss, advise and instruct the 2nd Defendant on modification as desired by the 3rd Defendant and his wife.

7. LNG Services Limited had been previously contracted by the 3rd Defendant to carry out construction services and initially it was expected that it would provide these services on the project the subject of this suit. However when the 3rd Defendant decided not to hire the said company and do the work himself the 1st Defendant's estimated fees were adjusted accordingly and reflected in the invoices provided to the 3rd Defendant (see exhibit 8 – 11)_ ..... I also advised him to ensure that his home owners' insurance policy covered his workers because if my company were doing the project it would have the requisite insurance.

8. The 1st Defendant was not engaged to contract nor supervise any workmen on the 3rd Defendant's site, neither was it expected to nor did it have the authority to contract or supervise any workmen there employed, including the Claimant and the 2nd Defendant. The 1st Defendant did not carry out any of these functions and so was not paid accordingly.

9. In keeping with the 1st Defendant's terms of engagement with the 3rd Defendant the 1st Defendant was therefore not expected nor obligated to provide and did not provide the Claimant not any other workman on the said construction site with any safety equipment or any equipment at all. They were simply not the 1st Defendant's employees neither were they its agents.

10. On my visit to the site on July 16th, I was informed by the 2nd Defendant that the Claimant had been injured and that the 3rd Defendant had given him some money .....that the workman had been admitted to hospital and was being treated and that the 3rd Defendant had said that he would look after the Claimant's bills.

11. When I discussed this with the 3rd Defendant he confirmed what the 2nd Defendant had told me.

12. A few days after the incident I asked the 2nd Defendant how the Claimant was doing and he informed me that the Claimant was out of the hospital and that he had taken him to see the 3rd Defendant who had given the Claimant some money and indicated that he was reviewing the hospital bills and would deal with same.

13. At no time, in the days immediately following the incident did the Claimant or the 2nd Defendant approach the 1st Defendant with respect to the injury as it understood that the 3rd Defendant would be dealing with the matter as per the terms of engagement between the parties.

14. At no time was either the Claimant or the 2nd Defendant paid by me. On this particular project the 1st Defendant had no contractual or other agreement with either the Claimant or the 2nd Defendant and so was surprised when the 1st Defendant received correspondence from the Claimant's Attorney-at-law about this matter and was even further surprised that the 1st Defendant had been sued."

Mr. Girvan said that the general duties of an Architect doing a job of supervision and inspection for his client was – to take instructions from the client to relay them to the contractor, and to inspect quality of the work and corrections of measurement – all to be in keeping with the working drawings.

He agreed that the person he relayed the information to in this case was Oscar Wright.

He said Exhibit 7 which stated inter alia project management fee was an estimate prepared to provide a budget for the project.

He said project management would not have been written in the letter if they did not have a discussion with respect to providing that service.

Mr. Girvan said supervision and inspection was not mentioned because if LNG Services was doing the project management they would not charge clients for supervision and inspection.

He said that Exhibit 7 is an estimate dated April 9, 1999 made before the commencement of the project. On completion of the drawings and at the commencement of the construction stage, it was agreed with Mr. Brooks that he would only carry out Architectural supervision and inspection.

Exhibit 11 – which is the invoice for architectural services dated November 9, 1999 some four months after the Claimant's accident, includes an item for supervision and inspection which is the same amount as the cost of project management in Exhibit 7. except that the said figure is discounted at 33%.

Mr. Girvan explained that the sum of $121,187.50 was used as a benchmark and as a reference figure.

The First Defendant's case is that their estimated fees were adjusted downwards because of the work that Mr. Brooks took on in respect of the project.

Under cross-examination it was Mr. Brooks that it was not his understanding and if there was any discount, that had to do with general discounting through negotiation and there was no indication or understanding that such a scenario would result in reduced supervision or responsibility.

It is noteworthy that there was no denial in the Third Defendant's witness statement of the alleged adjustment in the estimated fees because of the change of arrangements between the parties as alleged in paragraph 7 of Mr. Girvan's witness statement.

It is Mr. Girvan's evidence that supervision and inspection in the context of Exhibit 11 meant architectural supervision and inspection and that his relationship with Mr. Brooks was special and that the services of project management and supervision and inspection were interchangeable on this particular project.

In amplification of his evidence Mr. Girvan pointed out that supervision with respect to Exhibit 11 meant supervising the contract between the owner and contractor and that inspection meant inspecting the progress of the work for adherence to the proper construction principles. I accept his evidence in this regard.

The First Defendant's case is that its objections under the contract for construction was limited to providing architectural services and did not include the work of a contractor – or more specifically supervising the workmen on the Third Defendant's site.

Mr. Henry submitted that apart from indicating what the previous arrangements were in relation to the First Defendant's doing work for the Third Defendant on other projects,

there is no denial in Mr. Brooks witness statement that the agreement for the present construction was on terms contrary to that advanced by the First Defendant. Such contrary averments were expunged from the witness statement is not according with the Third Defendant's pleadings.

His company LNG services were not providing management services and were therefore not responsible for the supervision of the safety of the workmen on the site, in particular the Claimant's safety. He said that Mr. Brooks undertook that function himself and that Mr. Wright as employee of Mr. Brooks would be reasonable for the safety of the workmen including Mr. Harris.

He said that Mr. Brooks understood that function himself, and that Mr. Wright as employer of Mr. Brooks would be responsible for the safety of the workmen including Mr. Harris.

The Third Defendant's Case

In respect to the Third Defendant's pleadings there is no allegation that the Claimant was the servant and/or agent of the First Defendant. That is not the Third Defendant's case.

The Claimant was employed to the Second Defendant and was his servant and/or agent at all material times.

The Second Defendant was the contractor on the project not the First Defendant.

The Second Defendant was responsible for workmen on the site.

There is no particularizing of what this entails but what is clear is that there is no averment that the First Defendant is responsible for workmen on the site. This is the responsibility of the contractor according to the Third Defendant's pleadings.

Mr. Henry submitted that based on these pleadings, it is not open to the Third Defendant to lead evidence or suggest that the role of the Architect was other than that pleaded and in particular that it included playing the role of contractor, having responsibility for workmen on the site. This was not the Third Defendant's case.

Mr. Brooks' evidence is that he did not undertake the project himself – he engaged Mr. Girvan and whatever entity he sought to execute the project.

Mr. Brooks' evidence is that there was no difference between the 1988 project and the 1999 project and that the arrangement between himself and Mr. Girvan was that Mr. Girvan would do the drawings, put a construction team together as he did on the 1988 project, a fortnightly pay bill was presented to Mr. Girvan by Mr. Wright who would check it and make adjustments as he saw fit and that Mr. Girvan would instruct him to make a cheque payable to Mr. Wright who would then pay the workers.

Further the Third Defendant points out that he had always understood Louis Girvan, LNG Services Limited and Girvan & Associates to be tenets of one entity in the way they related to him and further that when there is an arrangement with Mr. Girvan, regardless of whether the foreman is Mr. Gayle or Mr. Wright, he was dealing with Mr. Girvan so the supervision would flow from Mr. Girvan whether it be architectural supervision or the building process. He asserted that he had no arrangement with Oscar Wright, and that he always dealt with Mr. Girvan.

The Third Defendant gave three examples of specific instances where he discussed changes he wished to be made with Mr. Girvan who in turn instructed Mr. Wright to effect these changes.

I find that in that each of the instances cited by the Third Defendant in support of the position that the First Defendant supervised the work, were cases where the First Defendant as Architect was effectively ensuring that the work done was on accordance with architectural drawings. This was, as the First Defendant indicated in his evidence, his responsibility under the architectural contract, acting on behalf of the owner.

Mr. Brooks said that whenever construction is taking place at his home, he usually tries to be present as much and as far as is possible but not in a supervisory capacity. He did not have the technical competence to supervise men on a daily basis re construction – and that was not the agreement.

I reject Mr. Brooks evidence that he engaged Mr. Girvan "and whatever entity he sought to execute the project."

I reject his evidence that Mr. Girvan would instruct him to make a cheque payable to Mr. Wright.

Although the Third Defendant in his pleading stated that the Claimant was employed by the Second Defendant in cross-examination he said that he doesn't know if the Claimant was employed by Oscar Wright. He does not know who employed the Claimant but he engaged the services of Mr. Girvan who employed the services of Mr. Wright who must have engaged the services of other workmen.

He asserted that he used the word employed in the sense that Oscar Wright got the workmen, but he does not know what contractual relationship he had with them, by himself or through Mr. Girvan, but he took it to mean that they were part of his team.

The Third Defendant in his pleadings stated that Oscar Wright was the contractor on the project, yet in cross-examination he maintained that he did not have a contractor, he had a foreman who was Mr. Wright. Mr. Brooks told the Court that he did not know the legal definition of contractor, therefore he used 'contractor' in context of a foreman. I reject this explanation.

He said that Mr. Wright was brought there as foreman, not to work with him, Oscar Wright was introduced as head of the workforce and the foreman. The role of foreman as he observed it was that he was the headman, the chief who would be responsible for general supervision of the men on the project.

In cross-examination he said that Mr. Wright like Mr. Gayle before him was the foreman/supervisor reporting to Girvan.

It appears that the Third Defendant's retreat was complete when he stated that he used the word 'contractor' synonymous with 'foreman'.

Mr. Brooks said his function did not include ordering materials. He also said that he ordered the materials 'having gotten from Mr. Girvan and Mr. Wright what was to be ordered." Infact he paid the pay bill fortnightly.

I reject Mr. Brooks testimony that he had no arrangement with Mr. Wright in times of payment on the general project and that all arrangements were through Mr. Girvan.

I accept Mr. Girvan's evidence that Mr. Brooks complained to him after Mr. Wright had been on the project a couple of weeks that monies being paid to him seemed excessive based on his level of supervision and that Mr. Girvan agreed with him that he could reduce the amount paid.

I accept Mr. Girvan's evidence that Mr. Brooks asked for his advice, that he gave him his advice and that was the limit of his involvement. He did not tell Oscar Wright about the reduction in wages.

I accept Mr. Givan's evidence as true that he advised Mr. Brooks to ensure that his home owners' insurance policy covered his workers.

On the pleadings it is the Third Defendant's case that the Second Defendant was the contractor on the project. As an independent contractor he would be employed under a contract for services. The Third Defendant in his Defence alleged that the Claimant was employed by the Second Defendant in his capacity as contractor responsible for the supervision of the workmen on the project. If the court were to so find, liability would rest solely on the Second Defendant. However the Third Defendant by his evidence no longer supports that position.

At trial he reneaged from this original stance and I find him to be an unreliable witness.

On a balance of probabilities

I find that:-

1. The Third Defendant employed the Second Oscar Wright as his foreman on the site and as such Oscar Wright was his servant/or agent. In these circumstances the Third

Defendant would be vicariously liable for the injuries suffered by the Claimant for whose work his agent (foreman) was responsible for overseeing.

2. The Third Defendant exercised control over Oscar Wright

3. The Third Defendant undertook responsibility for the project, in order to save costs.

4. The Third Defendant was involved in the day to day running of the project, and the ordering and delivery of materials.

5. The Third Defendant paid Oscar Wright and the other workers including the Claimant.

6. The Third Defendant advised Oscar Wright as to the adjustment in his wages.

7. Oscar Wright acted as servant and/or agent of the Third Defendant in employing the Claimant.

8. 'Chiseling' a wall without goggles or safety glasses is a reasonably incidental risk in the construction business in which the Claimant and the Defendants in one way or another were involved.

9. The First Defendant as Architect was not responsible for Oscar Wright or the supervision of any workers on the site. The First Defendant is not liable for the injuries suffered by the Claimant.

10. Mr. Girvan's company LNG Limited was not retained as contractor.

11. The First Defendant did not provide project management services for the Third Defendant.

12. The First Defendant's obligations under the contract for construction was limited to providing architectural services and did not include the work of a contractor and more specially supervising the workmen on the Third Defendant's site.

13. There was no payment claimed or made to the First Defendant for such work.

14. The Claimant is not contributory negligent.

General Damages

Three medical reports were exhibited, one from Dr. Z. Wynter dated November 25, 1999 (Exhibit 1) and two from Dr. Donovan Calder, dated June 11, 2007, (Exhibit 2) and August 3, 2007 (Exhibit 3) respectively.

Exhibit 2 states inter alia:-

"In summary Mr. Harris is blind in his left eye following an injury. He has lost approximately 16% of his visual function."

Exhibit 3 states:

"Based on the American Medical Association Guides to the evaluation of permanent impairment (5th Edition) there will also be a sixteen percent (16%) loss of whole body function".

It was the complaint of Mr. Harris that he still suffers from headaches if he stays in the sun. He does not see very well out of his left eye. He is only able to make out movements out of his left eye in the bright light.

Both attorneys Mr. Mordecai and Mr. Henry placed reliance on **Pat Belinfanti v National Housing Trust** et al Khan's Volume 5 at page 221 in which Harrison J (as he then was) awarded the 47 year old public relations consultant $1,000,000.00 in February 1997. That award is now worth $3,382,698.6 (using CPI of 143.9).

In the case above **Movado Wilson v Caribbean Apparel Group Jamaica Limited** Harrisons at page 238; and **Jillian Cameron (nbf Yolando Hutchinson) v Basil Wilson** Harrisons 239 were considered.

In Pat Belinfanti (supra) – the Claimant's injuries and debilitating sequlae thereto were more severe than the case at hand. Bellinfanti had his total eye removed and wears prosthesis. He is still subject to infection for which he has to be treated and examined regularly. He also had several lacerations all over his face and right hand.

There was evidence regarding the effect of his injury which is absent from the present case. It can also be inferred from the judge's findings that he felt that Mr. Bellinfanti ought to receive more damages than 'casual workers/carpenters' given the nature of his occupation (a public relations consultant) and his evidence that he was a voracious reader.

The Claimants in Mirado Wilson and Jullian Cameron were casual workers similar to Donald Harris.

Mr. Mordecai submitted that the award on the present case ought to be increased to $4,000,000 and not discounted as Mr. Graham submitted for the following considerations.

1. Donald Harris was twenty (20) years old whereas Belinfanti was forty-seven (47) years old at the time of their respective accidents and therefore Harris would have to endure his permanent physical and cosmetic disability for a significantly longer period.

2. The medical evidence in the Donald Harris case states a 16% whole person disability whereas there is no stated disability in the Belinfanti case.
3. Contrary to Harrison J's assessment it is likely to be more difficult for a young labourer to 'bounce back' or rebound from a sever debilitating injury when compared to Belinfanti who as a consultant employed to the Government would have greater skills and support systems to aid his post accident recovery.

In **Movado Wilson v Caribbean Apparel Group Jamaica Limited** (supra), Wilson a carpenter/mason had his eye removed after serious injury (acid splashed into same) He suffered cosmetic disability and will need prosthesis and future medical care and will be handicapped in and about his daily and working life.

He was unable to watch television or read as before. At nights he had a focus of 3. He experienced pain when soap got into the socket and had to wear protective glasses to keep off dust.

On December 13, 1999 Wilson was awarded $60,000 for pain and suffering and loss of amenities. When updated is now worth $1,619,887.3. In the instant case there is sparse evidence regarding the Claimant's handicap in his daily living.

In **Jillian Carmeron v Basil Wilson** (supra) this infant suffered laceration of the left temple above and below the left eye; cornea – sclerol laceration and total hyphema of the left eye resulting in total loss of visual acuity. Carmeron was awarded $180,000 for pain and suffering in January 1992 which updated is now worth $1,974,237.6.

The cases of **Willard Tulloch v Fitz Henry** (Khan's Volume 3 at page 182 and **Derrick Pinnock v The Attorney General Claim No, C.L. 1998/P176** were also brought to the attention of the Court.

In Tulloch's case, the Claimant a labourer suffered traumatic injury to his right eye when he was struck with a bottle. He lost sight in the eye and had unsightly scarring in the areas of his right eye; cosmetic impairment, incised wound over right eye, approximately 5 inches long, 3 inch laceration below right eye, laceration to right eyelids and prolapse of uveal tissue through laceration. He was awarded $65,000 for pain and suffering in October 1990 which updated amounts $1,454,665.6.

In Pinnock's case the Claimant was battered all over his body and in particular punched in his eye. The eye injury could not be corrected despite surgical interventions. He has practically no vision in the eye. He cannot watch television for more than 15 minutes at a time and there is a thick cloud over his eyes.

In May 2004 he was awarded $1,500.000 for pain and suffering and loss of amenities which updated amounts to $2,833,420.8 (using CPI 143.9 August 2009).

Having examined the cases submitted and noted the similarities and differences between them and the instant case, I find that a reasonable sum to award for pain and suffering and loss of amenities is $2,400,000.

Handicap On The Labour Market/Loss of Earning Capacity

Mr. Mordecai has submitted that an award of $500,000 should be made for handicap on the labour market.

He contended that based on the medical evidence the Claimant qualifies for an award under this head, as despite his best efforts, his ability to find and hold a job has already been greatly affected and there is no evidential basis to conclude that the situation will improve.

He said that the construction industry in which the Claimant competes is characterized by frequent job changes and the risk of being thrown on the labour market is far greater than other industries where jobs for life are the norm.

Mr. Mordecai recalled the Claimant's evidence that though he constantly sought jobs and sometimes succeeded he never succeeded in returning to the regular employment he had at the time of the accident. The best situation was in 2004 when he secured a job paying $4,000 per week.

He said that at the trial the Claimant was unemployed though he admitted he had obtained some work earlier in the year.

He stated hat his recent job enquires were unsuccessful and he was told there were no openings.

Mr. Mordecai submitted that current world economic crisis is certain to make jobs even more scarce and the labour market more competitive and the Claimant should be compensated under this head given his significant whole person disability of 16% and the fact that his injury is to his eye.

The Claimant was unemployed at the time of trial. He is a casual labourer with no qualification or subjects. His evidence is that he did not get any work in 2000, in 2001

and in 2002 he got labouring work on and off. In 2003 he did not work between April 2003 and March 2004, the construction sites he checked were full.

It was also his evidence that between June 2001 and April 2003 he got irregular work, but it was difficult to keep those jobs because as soon as he went into the sun his head and eyes hurt and he would see dark spots and feel dizzy.

The Claimant gave evidence that three weeks before testifying in court he went for an interview to go on the farm work programme and failed because of his eye.

He said that in March 2004, he got full time work with Mr. Barrett building stands for satellite dishes and helping in his store. There is no evidence as to how long he was so employed.

The basis of an award under this head has been set and in **Moeliker v Reyrolle & Co. (1977) 1 WLR 132** by Browne LJ at page 140 who said:

> "This head of damage generally, only arises where a plaintiff is at the time of the trial in employment, but there is a risk that he may lose this employment at sometimes in the future, and may then, as a result of the injury, be at a disadvantage in getting anther job or an equally well paid job. It is a different head of damage from an actual loss of future earnings which can already be proved at the time of the trial."

I am of the view that based on case law, in particular the decision in Cook v Consolidated Fisheries Ltd (The Times January 17, 1977) an award for handicap on the labour market is possible whether or not the Claimant was working at trial.

I am of the view that in the future when the Claimant goes to find work, there is a real or substantial risk that he will be at a disadvantage in competing with others for employment on the labour market due to his disability.

I accept his evidence which is unchallenged that this has already materialized.

The court is well aware that the mere fact that the Claimant suffers a disability is not by itself sufficient to ground an award under this head.

In weighing up the risks and chances in the particular circumstances of the present case in order to arrive at a reasonable award, and using the lump sum method, I make an award of $165,000 for handicap on the labour market/loss of earning capacity.

I have also in the process looked **at Icilda Osbourne v George Barned** et al (Claim No. 2005 HCV 294 and **George Guscott v V.G. Scott Trucking and Tractor Ltd** Claim No. 644 of 1995. In the former case a 57 year old practical nurse was diagnosed with chronic mechanical lower back pains and chronic cervical strain. She was assessed as having a total partial percentage disability of ten percent of the whole person. On February 17, 2006 she was awarded $500,000 for loss of earning capacity.

Unlike the above Claimant, the present Claimant is a casual labourer whose employment is in the nature of periodic employment.

In the latter case, the Claimant a forklift operator was on May 17, 2002 awarded $150,000 for handicap on the labour market. His permanent partial disability of the lower limb was estimated to be 10 – 12 % of the whole person.

Loss of Future Earnings

The Claimant claims $2,496.00 for loss of future earnings (12 years at wage of $4,000 per week earned in 2004).

In my view the Claimant's earning of $4,000 per week in a particular job in 2004 for a limited time cannot be used as a yardstick for calculation, and there is no evidence as to

his income on other jobs labouring and/or mason work apart from his evidence that he earned $550 per day while working at the Brooke's site in 1999.

There is no principle of law which states that loss of future earnings and loss of earning capacity cannot both be recovered in an appropriate case.

Loss of future earnings are calculated specifically and generally in circumstances where the injured party is earning a settled wage and there is likely to be a diminution in his future earning capacity due to his disability.

The method of calculation of an award is by way of a global sum or by use of the multiplicand/multiplier principle.

The Claimant in the instant case was not continuously employed, he has not lost a steady job.

In making an award under this head, the court has to look at the pattern of the Claimant's employment ie the period for which he would be employed for and the net income earned for the year.

Before the accident the Claimant was working as a labourer on construction sites up to the time of the accident he worked on and off. Sometimes he did not have work for a month and sometimes he would have two or three jobs.

At the time of the accident he earned $550 per day. There is no evidence from the Claimant as to his earnings on these jobs during this period apart from his earning $550 per day on the Brooke's site.

Based on the Claimant's evidence that sometimes he did not have work for a month the court cannot speculate that he worked for only six months for the year.

In order to make an award under his head the court has to ascertain how many weeks in the year the Claimant works and at what rate in order to calculate for the rest of his working life what he would lose.

The Claimant's evidence is that between July 1999 to June 2001 he worked on and off, sometimes he "got a two week, basically a two week, no longer than two weeks "..... he was not getting work every single two week in the month .....but like now and then I get a little thing crop up and that is basically it until March."

The Claimant further said that he did not work two weeks every month. His evidence is that in 2001 a little house "crop up" and he worked on it for about a month and stopped again until something came up.

It is clear that employment in the construction industry is not continuous but in the absence of evidence as to how many weeks for the year the Claimant worked, the court is unable to make an award albeit there is some evidence that he used to be employed.

Claim for Future Eye Care (to include protective glasses and Medical Care

Under this head the Claimant claims $50,000. Dr. Calder's medical report advised the Claimant to wear protective glasses for the rest of his life.

Mr. Mordecai relies on the medical evidence of the doctor that the Claimant will require protective glasses for life as the basis for an award for future care.

There is no medical evidence that the Claimant needs eye care. No award is made under this head.

Special Damages

The following items of special damages were agreed

Transportation	$ 3,800.00
Medical Report Dr. Wynter	$ 1,200.00
Dr. Calder	$10,000.00
Medical Expenses	
UHWI	$12,915.00
Ultrasound	$ 2,500.00
Drugs	$ 2,163.90
Dr. Calder's examination	$ 4,000.00
	$ 36,578.90
Less paid by third defendant	$ 2,500.00
	$34,078.90

Claim for loss of Income

520 working days @ $550 per day

Between July 1999 and June 2001 $286,000.00

260 working days at $550 per day

Between April 2003 and March 2004 $143,000.00

Mr. Mordecai submitted that the sum of $463,078.90 for loss of income has been pleaded and proved.

During the course of the trial permission was granted to the Claimant to give evidence as to his employment status after 2004.

He told the court that he learnt mason work, but it is an on and off business and that he did mason work up to earlier 2008.

No application was made by the Claimant's attorney to amend the Particulars of Special Damages to claim for additional loss of income after March 2004 and the Claimant's Attorney quite rightly did not address the court on that issue.

The Claimant's evidence is that during this period July 1999 to June 2001 he got "two weeks work". However he did not tell the court the amount of two week periods (or less) for which he was employed.

I award him loss of income of $143,000 representing 260 days at $550 per day (using a 5 day work week).

I make no award for loss of income for the period April 2003 to March 2004. The Claimant's evidence is that between April 2003 and March 2004 he did not get work because the sites were full. His lack of income was not due to his disability. There is no evidence that he would have been employed for the period claimed even if he had not been injured.

Judgment for the Claimant as against the Third Defendant.

Damages are assessed as against the Second and Third Defendant as follows:-

Special Damages	-	$ 34,078.90 (agreed)
Loss of Income	-	$143,000.00
Total		$177,078.90

Interest at 6% per annum from July 15, 1999 to June 21, 2006 and at 3% per annum from June 22, 2006 to date of judgment.

General Damages

Pain and suffering and loss of amenities - $2,400,000.00

Interest at 6% from date of service of Writ of Summons to June 21, 2006 and at 3% per annum from June 22, 2006 to date of judgment.

Handicap on the Labour Market/Loss of Earning Capacity $165,000.00 (no interest)

Costs to the Claimant to be agreed or taxed as against Second and Third Defendants.

Judgment for the First Defendant as against the Claimant.

The Second and Third Defendants to pay the costs awarded in favour of the First Defendant against the Claimant.

Stay of execution for six (6) months

The six (6) weeks to commence after the delivery of the written judgment.