[2019] JMSC Civ. 212

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015HCV05629

BETWEEN	**DWIGHT HUNTER**	**CLAIMANT**
AND	**BERGER PAINTS JAMAICA LIMITED**	**DEFENDANT**

IN OPEN COURT

Mr. Sean Kinghorn and Ms. Danielle Archer instructed by Messers Kinghorn and Kinghorn Attorneys-at-Law for the Claimant

Mr. Maurice Manning and Ms. Jaavonne Taylor instructed by Nunes, Scholefield DeLeon and Co. for the Defendant

May 1, 2, June 11,12 and November 13, 2019

Civil Practice and Procedure– Negligence– Employer's liability–Whether employer provided safe system of work–Whether premises were reasonably safe for the purpose for which the claimant was permitted to be there–Personal injury– Pre-existing chronic lower back pain– Damages

CORAM: PALMER HAMILTON, J

BACKGROUND

[1] The Claimant has filed a Claim Form accompanied by Particulars of Claim seeking damages for Negligence and/or breach of the Occupiers Liability Act against the Defendant. The Claim Form also disclosed that the Claimant was relying on the doctrine *of res ipsa loquitur* to prove his Claim. His Claim emanated from an

unfortunate incident which occurred on or around the 17th day of June 2014 while he was carrying out his duties.

THE CLAIM

[2] The Claimant, Mr. Dwight Hunter was at all material times a Colour World technician employed to the Defendant, a limited liability company with its registered office at 256 Spanish Town Road in the parish of Kingston. In his witness statement, the Claimant detailed that as a part of his responsibilities, he was to install and maintain the Colour World machine.

[3] The Claimant disclosed that on the 17th day of June 2014 in keeping with his responsibilities as Colour World technician, he attended upon the premises of DIB Hardware in Port Antonio to repair the Corob Banco Dispenser (hereinafter referred to as "the machine"). He averred that the area that the machine was located was most unsafe and uncomfortable. He further stated that the area was so clustered and crowded that it made it extremely difficult for him to access the machine and carry out repairs.

[4] Mr. Hunter also indicated that to carry out repairs he had to contort his body in awkward positions to get to the areas on the machine that needed to be addressed. He contended that he has been carrying out repairs to the machine at that particular area for over two (2) years and that on every occasion that he had to repair the machine, he reported the difficulties to his supervisor.

[5] The Claimant disclosed in the Particulars of Claim that the Defendant placed the machine under a staircase. The machine was located beside another machine known as Chamelion Vibro Shaker which weighed over Three Hundred Pounds (300 lbs). The Chamelion Vibro Shaker was to the right of the machine and a stock of paints was to the left of the machine. He stated that where the paints were stocked, the staircase also tapers off thereby reducing the space.

[6] He further elaborated that the area of the machine that he had to access to repair was to the back and to the right of the machine. Mr. Hunter stated that the room was no more than five (5) feet. He estimated that the machine was about three (3) feet in length, four (4) feet in height and about four (4) feet wide and with limited space, it was impossible for him to pull the machine forward. He stated that it was also impossible to push the machine to the left or to the right as the stock of paints were to the left and the Chamelion Vibro Shaker was to the right.

[7] The Claimant indicated that the room was congested with material, paints and other paraphernalia on the floor further limiting the space available to access the machine. He indicated that in light of this difficulty, he had to remove the front panel and then the front canisters in order to reach the back canisters. He then attempted to stretch himself from the front of the machine, into the belly of the machine and downwards to remove the electrical connection at the rear. Mr. Hunter stated that as he manoeuvred himself in that awkward position to repair the machine, he felt a twist or pull-like motion in his back. He thereby sustained an injury to his back and/or aggravated a previous injury to his back. He initiated this Claim indicating that he has sustained serious personal injury and has suffered loss and damages.

[8] Four (4) photographs were agreed and admitted into evidence as exhibits. They were employed to demonstrate the working area where the Claimant carried out his duties.

[9] The Defendant denied that it exposed the Claimant to any risk of injury resulting in serious personal injury, loss and damage. The Defendant company averred that the Claimant had a pre-existing injury or condition which could have aggravated the alleged injuries sustained.

ISSUES

[10] The salient issue to be determined by the Court is whether the injuries and loss suffered by the Claimant was as a result of the Defendant’s negligence and/or a

breach of the duty to provide a safe place and system of work for the Claimant. If the answer to this question is in the affirmative, the Court will have to determine whether the Claimant contributed to his injuries and what quantum of damages he is entitled to, if any.

[11] Both parties provided written and oral submissions to the Court. I have considered all the submissions proffered by both Learned Counsel however, I will reference the evidence and submissions only to the extent necessary to explain my findings and decision made at the civil standard of the burden of proof, that is, on a balance of probabilities.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[12] Learned Counsel Mr. Kinghorn outlined the law relating to employer's liability. He stated that the common law duty of care owed by an employer to an employee is to take reasonable care for their safety. It includes a duty to provide a competent staff of men, adequate plant and equipment, a safe system of working with effective supervision and a safe place of work.

[13] Mr. Kinghorn submitted that the employer must organise a safe system of working for his employees and must ensure as far as possible that the system of work is adhered to. He cited the case of **Speed v Thomas and Company Limited** [1943] KB 557. He averred that the employer's duty to provide a safe system of work is not static but rather it is dynamic and flowing as a river or stream. It depends on a multiplicity of issues that arise throughout the course of the operations of an employer's company.

[14] Learned Counsel further submitted that the duty is to constantly monitor the system of work itself, to evaluate it periodically to determine its efficacy in ensuring that workers are safe and not exposed to unreasonable risks of harm whilst they carry out their daily activities or where they undertake special tasks.

[15] Mr. Kinghorn also submitted that the employer ought to take reasonable steps to see if there are more efficient and safer ways for workers to carry out their tasks and to implement them. It is incumbent upon the employer to have an effective team of safety managers and/or supervisors whose role it is to conduct these evaluations and to make recommendations or suggestions for improvement. It is the duty of upper level management to implement these suggestions, once they are reasonable.

[16] It was proffered that the duty to supervise includes a duty to take steps to ensure that any necessary item of safety equipment is used by the employees. Learned Counsel stated that in devising a system of work, an employer must take into account the fact that workmen are often careless as to their own safety. Therefore, an employer should organise a system which itself reduces the risk of injury from the workmen's foreseeable carelessness. He cited the cases of **Bish v Leathercraft Limited** (1975) 24 WIR 351 and **General Cleaning Contractors v Christmas** [1953] AC 180 in support of this submission.

[17] Learned Counsel for the Claimant indicated that the safe system of work includes the type and quality of training an employee receives and whether or not refresher courses are given in a timely manner to ensure that workers are kept up to speed and compliant with established works safety procedures as well as to implement new safety procedures from time to time as they become necessary. The case of **Schaasa Grant v Salva Darwood and Jamaica Urban Transit Company Ltd.** (unreported), Supreme Court, Jamaica, Suit No. 2005/HCV 03081, judgment delivered on the 16th day of June 2008 in support of this submission.

[18] On the aspect of an employer taking steps to ensure an employee's compliance with safety measures, Learned Counsel cited the cases of **Speed v Thomas Swift and Company Limited** (supra) and **Walter Dunn v Glencore Alumina Jamaica Limited** (unreported), Supreme Court, Jamaica, Suit No. 2005 HCV 1810, judgment delivered on the 9th day of April 2008 to buttress his position.

[19] The case of **Wayne Howell v Adolph Clarke t/a Clarke's Hardware** [2015] JMSC Civ. 124 was cited by Learned Counsel and he quoted paragraph 45 where the Honourable Mrs. Justice Dunbar Green reviewed the authorities on employer's liability.

[20] Learned Counsel for the Claimant submitted that there are several undisputed facts which are determinative of liability in this matter. He stated that the fact that the Defendant has no knowledge of the work space in which the Defendant was instructed to work is a clear breach of its common law duty as an employer. He indicated that an employer is mandated to be aware of the state of its work space so that it can take the necessary steps to make it safe for its employees.

[21] It was also highlighted by Mr. Kinghorn that the Defendant did not challenge the Claimant on his evidence of how he sustained his back injury on the 17th day of July 2014. He indicated that no alternative suggestion was made to the Claimant, challenging his evidence of the germane issues and facts before the Court. Learned Counsel cited the case of **Phillip Granston v The Attorney General of Jamaica** (unreported), Supreme Court, Jamaica, Claim No. 1680 of 2003, judgment delivered on the 10th day of August 2009 to demonstrate the approach the Court should take when opposing Counsel does not challenge areas of the evidence in cross-examination. He urged that in light of this authority, the Court ought to accept the unchallenged evidence of the Claimant without reservation.

[22] Learned Counsel proffered that the Defendant failed to present any evidence to establish that it had a safe system of work and that it complied with its common law duty of care as an employer. He further stated that no evidence of the discharging of this burden exists in the case presented by the Defendant.

[23] In light of the knowledge of a pre-existing condition which pre-disposed the Claimant to the type of injury he sustained, Learned Counsel rhetorically asked what steps did the Defendant take to minimize the Claimant's exposure to injury? What system or measures were put in place by the Defendant in respect of the

duties the Claimant had to perform? He stated that there is no evidence from the Defendant that answers these queries and submitted that the Defendant has failed in its particular duty to the Claimant as an employee. The case of **Schaasa Grant v Salva Darwood and Jamaica Urban Transit Company Ltd.** (supra) was cited in support of this position and Learned Counsel concluded that liability should be determined in favour of the Claimant.

[24] On the issue of quantum, the medical reports of Dr. Fidel Fraser and Dr. Konrad Lawson were admitted into evidence. Mr. Kinghorn stated that Dr. Fraser saw the Claimant no less than six (6) occasions and has been the Claimant's treating physician since the time of the incident in 2014. His final diagnosis of the Claimant was chronic lower back pain secondary to lumbar spondylosis with stenosis and nerve root irritation, depression and total impairment of nineteen (19) percent of the whole person.

[25] Dr. Lawson saw the Claimant on one occasion and saw the Claimant approximately three (3) weeks before the trial of this matter. His final diagnosis of the Claimant was disc herniation of the lumbar region with nonverifiable radicular complaints at the time of examination and total impairment of seven (7) percent of the whole person.

[26] On the issue of handicap on the labour market, Learned Counsel submitted that both doctors spoke to the serious level of disability suffered by the Claimant. He highlighted that the Claimant's injuries are such that he has a distinct disadvantage on the labour market. The Claimant indicated in his Witness Statement that the injury has dampened his future and that he is unable to get full employment because of his injury. The Claimant stated that he has tried to work a full day but he is unable to manage and whenever he does a full day's work he would be bed ridden the following day as his body would be riddled with pain. It was further indicated that the pain makes it difficult for the Claimant to move or walk.

[27] The Claimant also stated that he would intermittently receive phone calls to fix a machine and most of the times he would carry an assistant as without one, he would not be able to carry out the task as the pains in his back prevented him from bending. He disclosed that most, if not all of the machines that he was required to work on requires him to bend and repair them.

[28] The medical report of Dr. Fraser revealed that the Claimant, since retiring, has supervised a car detailing facility/garage with no hands-on requirements. He has also attempted farming and has since returned as a private Consultant Paint Machine Technician on his own terms with ample assistance and markedly reduced hands on.

[29] Learned Counsel submitted that the Claimant would be entitled to an award under this head and suggested an award of Three Million Dollars ($3,000,000.00). He cited the following cases in support of this submission: -

1. **Icilda Osbourne v George Barnes and Others** (unreported), Supreme Court, Jamaica, Claim No. 2005 HCV 294, judgement delivered on the 17th day of February 2006;

2. Carline Daley v Management Control Systems (unreported), Supreme Court, Jamaica, Claim No. 2008 HCV 00291, judgment delivered on the 4th day of May 2012; and

3. **Robert Minott v South East Regional Authority** [2017] JMSC Civ. 218.

[30] In relation to pain and suffering, Learned Counsel proffered that it is not disputed that the Claimant has sustained a most serious injury. He indicated that the doctors opined that the Claimant will continue to have pain permanently. Mr. Kinghorn also highlighted that the Claimant has been suffering with the pain to his back for over five (5) years and that he has undertaken extensive orthopaedic and pain treatment care. Learned Counsel stated that the Claimant will continue to make life changing

alteration to his lifestyle and submitted that an augmented award of Eighteen Million Dollars ($18,000,000.00) is appropriate under this head of damages in the circumstances. The following cases were cited in support of this submission: -

1. **Marie Jackson v Glenroy Charlton and George Stewart** reported at page 167 of Recent Personal Injury Awards made in the Supreme Court of Judicature of Jamaica Volume 5 by Ursula Khan;

2. **Schaasa Grant v Salva Darwood and Jamaica Urban Transit Company Ltd.** (supra);

3. **Marcia McIntosh v Elite Wholesale and another** (unreported), Supreme Court, Jamaica, Claim No. HCV 1973/2005, judgment delivered on the 31st day of March 2009;

4. **Brenda Gordon v Juici Beef Limited** (unreported), Supreme Court, Jamaica, Claim No. 2007 HCV 04212, judgment delivered on the 14th day of April 2010; and

5. **Stephanie Burnett v Metropolitan Management Transport Holdings and the Jamaica Urban Transit Company Limited** reported at page 185 of Recent Personal Injury Awards made in the Supreme Court of Judicature of Jamaica Volume 6 by Ursula Khan.

[31] Learned Counsel stated that the comprehensive medical reports of Dr. Fraser in this matter diagnosed the Claimant with depression and recommended that he receives psychiatric consultation. He stated that the fact that the Claimant has continued to be traumatised years after the incident an award of One Million Five Hundred Thousand Dollars ($1,500,000.00) is appropriate in the circumstances. Mr. Kinghorn relied on the cases of: - **Angeleta Brwon v Petroleum Corporation of Jamaica Limited and Juici Beef Limited** (unreported), Supreme Court,

Jamaica, Claim No. 2004 HCV 1061, judgment delivered on the 27th day of April 2007, **Celma Pinnock v The Attorney General of Jamaica** reported at page 289 of Recent Personal Injury Awards made in the Supreme Court of Judicature of Jamaica Volume 5 by Ursula Khan and **Neil Colman v Air Jamaica Limited** reported at page 224 of Recent Personal Injury Awards made in the Supreme Court of Judicature of Jamaica Volume 6 by Ursula Khan.

[32] For future medical expenses, the sum of Twelve Million Eight Hundred and Twenty-Five Thousand Dollars ($12,825,000.00) was submitted as an appropriate award under this head. The future medical expenses are set out in the medical report of Dr. Fraser dated the 29th day of January 2019.

[33] At the date of trial, the Claimant is forty-Nine (49) years of age and Learned Counsel submitted that a multiplier of ten (10) is appropriate in the circumstances. The items of special damages are set out in the Claimant's Witness Statement. Receipts totalling the sum of One Hundred and Thirty-Six Thousand Seven Hundred and Nine Dollars ($136,709.00) have been submitted in support of the Claimant's Claim under this head of damages.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[34] The Defendant adumbrated its submission by challenging the credibility of the Claimant. Learned Counsel Mr. Manning indicated that the Claimant stood in the witness box for almost two (2) hours without any apparent discomfort in circumstances where he alleges complaints of chronic back pains.

[35] Learned Counsel highlighted that Mr. Hunter could not recall whether the reports he claimed he made to the Defendant were written reports and offered in uncertain terms that they may have been included in his service logs reports.

[36] Mr. Manning submitted that there are inconsistencies as to whether the previous back injury had resolved itself or persisted. Learned Counsel averred that the Claimant was as at the 17th day of June 2014, still suffering from a back injury first

occurring in March 1997. However, on probing in cross-examination, the Court learned that Mr. Hunter had flare-ups of his pre-existing injury. His 2008 flare-up was not mentioned by any doctor.

[37] Learned Counsel proffered that there is no evidence led to suggest that in the Seven (7) years leading up to the incident there was ever any injury caused by his job or his working conditions. Further, Mr. Manning indicated that the Claimant gave no evidence of any occurrence that would put the Defendant on notice that he was working in an unsafe environment.

[38] Learned Counsel for the Defendant highlighted that the photographs entered into evidence were taken a year after the June 2014 incident and this was admitted by Mr. Hunter. Mr. Manning stated that the photographs do not show the state of the premises at the time of the incident, however, they show the general position of the Colour World Tinting System including the machine that was being serviced that day. Mr. Manning indicated that the photographs do not support a finding that the Claimant was required to do work in a dangerous and unsafe work environment. He stated that the space shown appears to allow for the machine to be moved forward so that the Claimant could access the rear of the machine and in any event, the space also clearly allowed the Claimant access to the front panels of the machine which was a legitimate way to access the “guts” of the machine to service same.

[39] It was also submitted by Learned Counsel for the Defendant that whether the Claimant accessed the machine from the front or from behind, the Claimant was always going to bend or stoop to service the machine, given that the machine was only about four (4) feet high. The fact that he could not stand up under the stairwell was irrelevant as the Claimant could not access the machine from a standing height based on the configuration of the machine and its height.

[40] Learned Counsel further stated that the “clutter” of the type seen in the photograph, was of no significance in what happened to the Claimant. Mr. Manning indicated

that the Claimant gave no evidence as to how this clutter caused him to be injured. Learned Counsel stated that it was part and parcel of Mr. Hunter's job as a maintenance technician that he would be required to fix and repair issues with the machine which would sometimes involve going into the machine, which would require him to bend, stretch and contort his body to do this repair.

[41] It was proffered that the Claimant was trained by the Defendant to repair the machine. Learned Counsel indicated that on the 17th day of June 2014 Mr. Hunter did not speak to the supervisor about the conditions he observed or for assistance from the client's supervisor, the manager or other store personnel to remove the paint tins which the Claimant said surrounded the machine that day to enable him to properly access the machine.

[42] Learned Counsel submitted that the Claimant obviously made a calculated decision to proceed to do the servicing and he determined it was possible to do so. Mr. Manning stated that this means either the alleged conditions were no impediment to his being able to safely service the machine or he was himself reckless in deciding to proceed having regard to the same conditions. The fact that he did not alert a manager to what he now complains about, and his decision to service the machine suggests that he is materially responsible for what transpired thereafter. It was further submitted that the Defendant does not own the property on which the repairs were carried out and the Defendant was not present on site directing the Claimant that he must perform the task notwithstanding the alleged conditions.

[43] On the issue of occupier's liability, Learned Counsel for the Defendant averred that the Claimant did not lead evidence as to breach of the Occupier's Liability Act and it would appear that the Claimant abandoned this portion of his claim. Learned Counsel also highlighted that the Claimant in his viva voche evidence expressly stated that the Defendant did not own the DIB Hardware premises.

[44] In relation to the issue of employer's liability, Mr. Manning submitted that it is undeniable that the Defendant owed the Claimant a duty of care, however, what is

critical for the Court to ascertain is whether there was a breach of this duty. Learned Counsel contended that the Claimant did not produce copies of the reports he claimed he made prior to the incident, neither did he ask the Defendant for specific disclosure of the alleged service logs.

[45] Learned Counsel maintained that in the absence of the Claimant producing documentary evidence in support of his contention that the Defendant had prior knowledge of the risk that one could be injured while carrying out their duties, is a matter of credibility. Mr. Manning stated that in cross-examination the Claimant sounded doubtful, stating he believed it would have been in a service log report. Mr. Manning indicated that the Claimant has failed to prove that the Defendant breached its duty of care in circumstances where there are no reports from the Claimant regarding the alleged unsafe state of work at a third party location. Therefore, it is unreasonable for the Claimant to argue that it would have been reasonably foreseeable for the Defendant that the Claimant would be injured in the manner alleged.

[46] As for the Claimant's prior injuries, Learned Counsel averred that it is significant that the Claimant's own physician Dr. Fraser described the Claimant as suffering from chronic lower back pain. Mr. Manning stated that Dr. Fraser in cross-examination said that the Claimant's lower back pain was of long standing duration. Further, in his third report Dr. Fraser described the date of incident as "about March 1997". Learned Counsel submitted that this was not an error and that the Claimant admitted that he has had more flare-up incidents other than the two flare-up incidents reported to the doctors. It was contended that this is not a case for compensation for an injury on the job in 1997. The Defendant further contended that if this is not a new injury caused by the negligence or breach of employer's duty in 2014, the Claimant cannot establish that the Defendant is liable to answer for it. Mr. Manning stated that this would mean that if a breach of employer's duty or negligence were found, the Claimant's compensation, if any, would be limited to

recovery for the aggravation and not for the full sequelae of injuries in the medical reports.

[47] Learned Counsel highlighted that recommendations were made to ameliorate the Claimant's working conditions in a report from Dr. Fraser. However, there is no evidence to suggest that these or similar recommendations were made or even required and communicated to the Defendant before June 2014. The Defendant submitted that the Claimant did not allege that there were alternative ways to do his job as a Colour World Technician that were denied to him.

[48] Also, Learned Counsel submitted the Claimant was aware of the type of job he would be required to do and notwithstanding his previous injury in 1997, the Claimant accepted the promotion and took on the responsibilities associated with the job. Mr. Manning declared that there is no evidence that the Claimant reported to the Defendant at any time that the task and duties he had to perform caused him any physical discomfort or aggravation of his pre-existing injuries.

[49] The Defendant submitted that it could not reasonably foresee that that Claimant would have been injured in the manner alleged given that this appeared to be an aggravation of his injuries by performing his ordinary duties which were not inherently dangerous.

[50] Mr. Manning contended that the Claimant had a duty to protect himself from harm and he failed to have any due regard for his own safety. Accordingly, Learned Counsel submitted that the Claimant was the author of his own misfortune as having stated that the hardware space was cramped, he still went ahead and attempted to effect repairs to the machine without advising any manager or supervisor that he would need more space before effecting repairs.

[51] Learned Counsel maintained that causation in this matter is critical in the determination of liability and based on the evidence led by the Claimant causation is still in dispute. The Defendant submitted that considering the Claimant's history

of back pain, the resultant pains and injury complained of by the Claimant cannot be attributable entirely to this alleged incident. The authority of **Dray v Schneider** [1966] CA No. 30 was cited in support of this submission.

[52] In relation to the medical evidence, the Defendant submitted that the report of Dr. Lawson should be accepted viz a viz that of Dr. Fraser. Learned Counsel indicated that Dr. Fraser's reports seem to contradict each other. Dr. Fraser stated in his medical report dated the 21st day of October 2015 that the Claimant had reached maximal medical improvement and ascribed a disability rating of eleven (11) percent yet in his report dated the 29th day of January 2019, Dr. Fraser states that the Claimant had reached maximal medical improvement yet again and ascribed a nineteen (19) percent whole person disability to him, without much justification for his change. The Defendant submitted that based on the change in circumstances, the Claimant who had reached maximal medical improvement in 2015, ought not to have had any change in his whole person impairment, especially not such a drastic one. Even more so in the circumstances where Dr. Fraser himself stated that the Claimant had made lifestyle modifications and kept up with all forms of treatment regimens prescribed.

[53] It was submitted by the Defendant that Dr. Lawson's report is to be preferred as against Dr. Fraser's as Dr. Lawson's several years of expertise enables the Court to view him as a reliable witness, also Dr. Lawson would have had all the medical evidence before him to arrive at his assessment. The Defendant highlighted that Dr. Lawson would have been the last doctor to see the Claimant and would have been best poised to make his assessment when the Claimant had in fact reached maximal medical improvement. The Defendant further submitted that Dr. Lawson took the witness stand and the evidence he gave was coherent, unbiased and measured in assisting the Court with his findings and his reasons for arriving at the disability rating of seven (7) percent.

[54] Learned Counsel for the Defendant contended that should the Court find the Defendant liable, the following authorities may be useful to the Court in arriving at its decision for quantum: -

1. **Kevin Gilbert v Romane Grant and Adani Dixon** [2017] JMSC Civ. 89;

2. **Melvin McCurdy v George Campbell & Jin Hee Kim** [2014] JMSC Civ. 5;

3. **Shereen Mattison v Couples Resort Limited** [2017] JMSC Civ. 80; and

4. **Barbara Brady v Barlig Investment Co. Ltd & Vincent Loshusan & Sons Ltd** reported at page 252 of Recent Personal Injury Awards made in the Supreme Court of Judicature of Jamaica Volume 5 by Ursula Khan.

[55] Learned Counsel submitted that in light of the authorities, a reasonable award to make for pain and suffering and loss of amenities is Two Million Nine Hundred Thousand Dollars ($2,900,000.00). The Defendant stated that this is before applying a discount for account of the fact that the entire sequelae of injuries and the degenerative age related changes are not attributable to the Defendant's alleged negligence of the 17th day of June 2014 so they being pre-existing and also for the fact of contributory negligence.

[56] In relation to the head of damage Depression, Learned Counsel for the Defendant stated that all the cases where the Court gives any such consideration was guided by an expert doctor specializing in the field of psychiatry. The Defendant further submitted that no evidence was led under this head and Dr. Fraser is not a psychiatrist and is therefore unable to make such a diagnosis. Accordingly, no award should be made under this head.

[57] For handicap on the labour market Mr. Manning submitted that no award should be made under this head as the Claimant has failed to lead any evidence concerning his income whether previous or current. He also stated that the principle is that such an award is to be made in circumstances where the claimant's capacity to work on the labour market has been diminished, and to claimants who were unemployed at the time of trial. The case of **Kenroy Biggs v Court of Jamaica Limited and Pert Thompson** (unreported), Supreme Court, Jamaica, Claim No. HCV 00054/2004, judgment delivered on the 22nd day of January 2010 was cited to support this submission.

[58] Learned Counsel for the Defendant indicated that in the case of **United Diary Farmers Ltd et al v Lloyd Goulboure et al** 13 SCCA 65/81, judgment delivered on the 27th day of January 2019 Carberry JA at page 5 stated that: -

> *"Awards must be based on evidence. A Plaintiff seeking to receive an award for any of the recognized heads of damages must offer some evidence directed to that head however tenuous it may be."*

[59] Learned Counsel submitted however, that if the Court is inclined to accept the Claimant's position under this head, the sum of Five Hundred Thousand Dollars ($500,000.00) is an appropriate award relying on the authority of **Icilda Osbourne v George Barnes and Others** (supra).

[60] The Defendant indicated that special damages in the sum of One Hundred and Thirty-Six Thousand Seven Hundred and Nine Dollars ($136,709.00) was agreed between the parties.

[61] For future medical expenses Learned Counsel urged the Court to reject Dr. Fraser's evidence as unreliable as Dr. Fraser gave some estimates for medical treatment that includes all modalities without any attempt at differentiating between them and without any indication for how long each is to continue. Also, there are no receipts for any medications prescribed by Dr. Fraser. However, in light of Dr. Lawson's evidence that non-surgical management is recommended, the Defendant submitted that the sum of one hundred thousand dollars ($100,000.00) in respect of ten (10)

physiotherapy sessions at Five Thousand Dollars ($5,000.00) per session for two (2) years is appropriate in the circumstances.

[62] Learned Counsel concluded his submissions by stating that only if liability is found on the part of the Defendant company the sums awarded should be awarded less a sixty (60) percent discount for contributory negligence and/or for the pre-existing injuries and degenerative changes and for their effect on the issue of causation.

LAW AND ANALYSIS

Did the Defendant breach its duty to the Claimant resulting in harm that was foreseeable?

[63] I have considered and assessed the evidence of the three (3) witnesses in this case and the circumstances surrounding what transpired on the date of the incident. The Claimant has a duty to prove on a balance of probabilities that his injury was caused by the negligence of the Defendant or that there was a breach of duty under the Employer's Liability Act. I am guided by the relevant principle stated by Harrison JA at para 26 in the case of **Glenford Anderson v George Welch [2012] JMSC Civ.43**: -

> *"It is well established by the authorities that in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to a claimant by a defendant, that the defendant acted in breach of that duty and that the damage sustained by the claimant was caused by the breach of that duty. It is also well settled that where a claimant alleges that he or she suffered damage resulting from an object or thing under the defendant's care or control, a burden of proof is cast on him or her to prove his case on the balance of probabilities."*

[64] It is trite that every employer has a duty at common law to his employees to provide a competent staff of men, adequate plant and equipment, a safe system of working with effective supervision and a safe place of work. These duties were summarized as such by the Honourable Mr. Justice Roy Anderson at page 18 of the case of **Joseph Reid v Mobile Welding and Engineering Works Limited and Newton Rodney** (unreported), Supreme Court, Jamaica, Suit No. C.L. 2000 R-30, judgment

delivered on the 26th day of January 2007. There is an overriding managerial responsibility to safeguard the employees from unreasonable risk of personal injury in regards to the fundamental conditions of employment such as the safety of the premises and the method of work.

[65] The liability of an employer to an employee has two aspects. There is the employer's liability to his employees for harm suffered by them and there is his liability for harm caused by them in the course of their employment. The test for liability is dependent on whether the victim of the tort is classified as an employee or an independent contractor. In this case, the nature of the work relationship is not in dispute as it is clear that the Claimant was an employee of the Defendant company. The Defendant also admitted this fact in its submission. Therefore, liability of the Defendant as an employer arises in this case. It is also noteworthy that the Defendant acknowledged in its written submission that the Defendant owed the Claimant a duty of care. Its contention however, is that it did not breach this duty of care.

[66] The Claimant's main contention was that the Defendant breached its common law duty by exposing him to reasonably foreseeable risks of injury. In determining whether this is so, I will examine the employer's duties to provide a safe place of work and a safe system of work.

[67] As I mentioned earlier, the employer is under a duty of care to ensure that the premises where his employees are required to work are reasonably safe. Whether the place of work is reasonably safe depends on the circumstances and the nature of the premises. The duty is not absolute and it demands no more than the provision and maintenance of a work premises in as safe a condition that a reasonably prudent employer can make them. This is illustrated in the case of **DeVerteuil v Bank of Nova Scotia** (unreported), High Court, Trinidad and Tobago, No. 2121 of 1995, judgment delivered on the 12th day of July 2002 where the defendant was not held liable to an employee who slipped in the kitchen, as the defendant had employed professional cleaners to clean up after working hours and the staff had

the responsibility for cleaning up during the day. The floor's surface was not inherently slippery and there had been no previous mishaps or complaints about the safety of the floor.

[68] The employer's responsibility to maintain a safe place of work extends not only to the actual working site but to any area the servant uses in connection with or in furtherance of his employment. Chase J, in the case of **Watson v Arawak Cement Company Limited** (unreported), High Court, Barbados, No. 958 of 1990, judgment delivered on the 24th day of December 1998 stated at page 6: -

> *"Another aspect of the employer's duty to exercise reasonable care and not to expose his servants to unnecessary risk is his duty to provide a reasonably safe place of work and access thereto. This duty does not come to an end merely because the employee has been sent to work at premises which are occupied by a third party and not the employer. The duty remains throughout the course of his employment."*

[69] The authorities have established that although an employer is not under a duty to inspect the premises where his employee will have to work, he is still under a duty to provide proper instructions and the necessary implements.

[70] In relation to the duty to provide a safe system of work, this duty is one of the most important facets of the employer's duty. An employer must organize a safe system of working for his employees and must ensure as far as possible that the system is adhered to. A safe system of work has been defined in the seminal case of **Speed v Thomas Swift and Co Ltd** (supra) at pages 563-564: -

> *"…the physical layout of the job; the setting of the stage, so to speak; the sequence in which the work is to be carried out; the provision in proper cases of warnings and notices, and the issue of special instructions. A system may be adequate for the whole course of the job, or it may have to be modified or improved to meet the circumstances which arise."*

[71] In **McDermid v Nash Dredging and Reclamation Co. Ltd** [1987] AC 906 Lord Brandon at page 919 stated that the provision of a safe system of work has two aspects: (a) the devising of such a system and (b) the operation of it. This duty is non-delegable, therefore, the employer will be liable for non-performance of the

duty despite the fact that he delegated it to a person he believed competent to perform it.

[72] The duty to provide a safe system of work was also comprehensively explained in **Schaasa Grant v Salva Dalwood and Jamaica Urban Transit Company Limited** (supra) where the Court decided that the defendant was liable for failing in its duty to provide the proper system to ensure the use of safety equipment on its buses. The claimant was a conductress on one of its buses, she was thrown from her seat when the bus driver braked to avoid colliding with a vehicle in front of it. The Honourable Mr. Justice Lennox Campbell (now retired) said at paragraphs 12-13: -

> *"The employer's liability, although it is derived from the general law of negligence, gives rise to a special duty owed by an employer to his employee. The duty is owed by the employer to each employee as an individual. Therefore each employee has an individual right of action against his employer for breach of duty. Further, the duty will vary according to the individual nature of the employee…*
>
> *The common law places a duty on the employer to provide a safe system of work for his employee, and further to ensure that the system is adhered to. The employer's duty is to take such precaution as a reasonably prudent employer in the similar situation… It is not to be assumed that even a usually reliable employee will heed directives given for the employee's own safety."*

[73] There is a series of robust evidence which discloses that the Defendant breached its duty to the Claimant. During the taking of the evidence, the Court admitted as exhibits four (4) photographs of the area of work which assisted the Court in having a visual understanding of the physical layout of the work site. These photographs mirrored and buttressed the Claimant's description of the work area. They in fact showed that the area in which the machine was placed was incommodious and congested.

[74] I accept the Claimant's evidence that access to the machine was difficult. The Claimant described the awkwardness and hardship he endured to access the machine to carry out his duties and I find that, giving the nature of the work area in the circumstances, he was exposed to foreseeable risk of harm.

[75] I reject the Defendant's submission that the photographs do not support the Claimant's argument that the location of the machine contributed to the Claimant's injury and find on the contrary that the photographs bolster the Claimant's position. The Claimant indicated that photographs were taken a year after the incident but they show the state of the of the work area on the date of the incident and I accept his evidence in that regard, as I found him to be a credible witness.

[76] The Defendant in written submissions have conceded that the photographs show the location and general position of the machine. In my view, the area in which the machine is located and positioned is one that will hinder and restrict free access to effect the repairs as described by the Claimant, in terms of removing the front and back panel of the machine. Unhindered access was further complicated by the staircase that ran transversely to the machine as well as tapered above it.

[77] The Defendant submitted that the Claimant's duty involved and required him to bend, stretch and contort his body to do repairs. This, in my view, establishes that the Defendant company was aware that there is an element of risk of physical injury, however slight, that the Claimant may be exposed to in the performance of his duty. Since the risk of physical injury was obvious and not insidious in the circumstances, the Defendant should have taken reasonable steps to provide a system which will be reasonably safe, having regard to the dangers necessarily inherent in the operation. By placing the machine in a clustered environment, the Defendant exposed the Claimant to unnecessary risk and further compounded the foreseeable risk of injury that is associated with the Claimant's duty.

[78] I am guided by the principle in the case of **General Cleaning Contractors Limited v Christmas** [1952] 2 All ER 1110 in this regard. The respondent in this case, was employed as a window cleaner by the appellants to clean the windows of a club. He was standing on the sill of one of the windows to clean the outside window, holding one sash of the window for support. This was the practice usually adopted by employees of the appellants. The sash came down on his fingers and he let go. He fell to the ground suffering injury. The House of Lords held that: -

> *"The appellants were under a duty to ensure that the system that was adopted was as safe as it could be made and that their employees were instructed as to the steps to be taken to avoid accidents; the appellants had not discharged their duty in this respect towards the respondent; and therefore they were liable to him in respect of his injury."*

[79] Further, although the Claimant was aware that his duty involved these peculiarities and inherent risk, the general principle is that the employer will not be necessarily absolved of liability if he proves that his employee was aware of the danger and not objected to it. The reasonable employer would in the particular circumstances have taken measures to avoid the accident or would have taken different measures from those in fact taken. It is my view that had there been an alternative system in place, for example, the place or area of work was free from clutter and congestion or the machine was in a different position and/or positioned in such a way that would allow the Claimant freedom and latitude to repair the machine, the risk of injury reasonably available might have been eliminated or significantly minimised. These alternative methods of working are what a reasonably prudent employer would be expected to take. In my judgment, reasonable care by the employers would have lessened the inherent risk of injury.

[80] Also, I adopt the principle in the seminal case of **Smith v Baker** [1981] A.C 325. This case laid down that the plea of assumption of the risk as a defence could not be sustained unless the plaintiff, with the full knowledge of the risk, has expressly or by implication agreed to waive his right to redress for any injury he might sustain therefrom, thus not only assuming the physical risk, but also the legal risk of harm. I find no evidence to support that the Claimant waived his right to redress in this regard and the Defendant's claim must fail on this aspect.

[81] The Claimant stated that he alerted his supervisors as to the dangers and difficulties he had accessing the machine. Although I was not generally impressed with this aspect of the Claimant's evidence, I believe he was truthful in that he had made reports to the Defendant and that there were risks. The case of **Yarmouth v France** (1887) 19 Q.B.D. 467 has established the principle that the fact that notwithstanding protests, a claimant continued with work, this destroys any

inference that he voluntarily assumed the risk of his employment. Further, the fact that the Claimant alerted the Defendant to his challenges, reveals that they were aware of the challenges and failed to modify, devise and supervise a safe system of work.

[82] The Defendant submitted that the Claimant accepted the responsibilities associated with the job despite knowledge of his previous injury. The authorities have shown that the duty of care owed to an employee must be measured by the known or reasonably foreseeable characteristics of the individual employee. In the case of **Paris v Stephney Borough Council** (1951) AC 367), the court said that employers have a duty to take reasonable care for worker safety with particular regard to each of their employees' circumstances.

[83] John G. Flemming in his book **The Law of Torts**, 8th Edition at page 510 stated: -

> *"Although an employer need not take active steps to acquaint himself with any special weakness or predisposition to injury, he must take special precautions once he has, or had the means to become aware of it..."*

[84] There is evidence to suggest the Defendant had knowledge that the Claimant had a pre-existing back injury before the incident in question. This would require the Defendant to take due care and provide relevant safety conditions based on his susceptibility to aggravation of his pre-existing condition. I am also guided by the well-established principle from the case of **Smith v Leech Brain & Co. Ltd and Anor** [1962] 2 Q.B. 405 that a tortfeasor must take the victim as he finds him. I accept that the Claimant had flare-ups of the pre-existing back injury however, I find that he was not consumed by this injury and was able to perform his duties effectively until the June 2014 incident which aggravated the injury. I am of the view that the injury that the Claimant seeks damages for is, on a balance of probabilities, consequent on the June 2014 incident.

[85] The Defendant also contended that Mr. Hunter was trained in his profession. At this juncture I will say that an employer cannot disclaim responsibility for devising a safe method of work merely because his workers are experienced and might, if

they were in the position of their employee be able to lay down a safe system of work themselves. It is not reasonable to expect the employee to take the initiative in formulating precautions. The case of **Wilson v Tyneside Window Cleaning** [1958] 2 Q.B. 110 established that it is the duty of the employer to establish a suitable system, warn the employee of unexpected risks and instruct him how best to secure himself against injury.

[86] As per the Honourable Mr. Justice Lennox Campbell at paragraph 14 of the case of **Schaasa Grant v Salva Dalwood and Jamaica Urban Transit Company Limited** (supra): -

> *"One must also be mindful of the duty that an employer must take into account the fact that workmen are often careless as to their own safety. Thus in addition to supervising the workmen, the employer should organize a system which reduces the risk of injury from the workmen foreseeable carelessness."*

[87] I therefore reject the Defendant's averment that the Claimant was the author of his own misfortune. There is no evidence to support that it was lapse on Mr. Hunter's part, whether slight or otherwise or that he failed to exercise reasonable care for his own safety. Consequently, I do not find that he contributed to the June 2014 incident.

[88] In the light of the Defendant's contention that they do not own the property at DIB Hardware and is not on site directing the Claimant, I adopt the principle in the case of **Watson v Arawak Cement Company Limited** (supra) that establishes that the responsibility to maintain a safe place of work extends not only to the actual working site but to any area the servant uses in connection with or in furtherance of his employment. Respectfully, there is therefore no merit in this submission.

[89] Based on the evidence presented, I hold that the Defendant failed to present any evidence to establish that it had a safe system of work and that it complied with its common law duty of care as an employer. The Defendant did not present to the Court whether it had safety procedures, whether it provided a safety equipment,

supervisor or other safeguards, but purely denied that it breached its duty to the Claimant. The case of **Wayne Howell v Adolph Clarke** (supra) established that: -

> *"This burden will be discharged where, as practicable and necessary, there are: established safety procedures; the provision of safety equipment, information and training; and adequate safeguards, including effective supervision and warning signs…"*

[90] In the light of this authority and the absence of any evidence, documentary or otherwise that the Defendant provided a safe system of work, I find that the Defendant has failed to discharge this burden.

[91] The Claimant's pleadings disclosed that he was relying on the doctrine of *res ipsa loquitor* to prove his case against the Defendant. The Honourable Mr. Justice Kirk Anderson in the case of **Oscar Clarke v The Attorney General of Jamaica** [2016] JMSC Civ. 65 at paragraph 26 stated: -

> *"Res ipsa loquitur, which stems from the judgment of Erle C.J in **Scott v London and St. Katherine Docks** – [1865] 3 H and C 596, at 601, applies where:*
>
> *(i) The occurrence is such that it would not have happened without negligence; and*
>
> *(ii) The thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible, or whom he has a right to control; and*
>
> *(iii) There must be no evidence as to why or how the occurrence took place."*

[92] I am of the view that this doctrine will not avail the Claimant in establishing a prima facie case of negligence against the Defendant as the third condition has not been satisfied. For the doctrine to be applicable, there must be no evidence presented as to how or why the incident took place. There is evidence that the Claimant has always asserted his knowledge as to how the injury occurred and I agree with the Defendant's proposition in that regard.

[93] I also agree with the Defendant that it would appear that the Claimant has abandoned his portion of the Claim in relation to breach of the Occupier's Liability Act. There was no evidence led in relation to this breach and there was no mention

of this aspect of the Claim in both written and oral submissions. I therefore will not venture to consider this issue.

[94] For the reasons stated above, I therefore find that the Defendant's place and system of work was unsafe and resulted and/or contributed to the Claimant's foreseeable injury. The Defendant did not discharge its duty under the Employer's Liability Act. The Claimant is therefore entitled to recover damages for the Defendant's negligence and breach. I will now go on to assess and determine the quantum of damages to which he is entitled.

General Damages

[95] In determining general damages, I adopt the guidelines which were laid down in the case of **Corneliac v St. Louis** (1965) 7 WIR 491 that the court should take into account: (a) the nature and extent of the injuries sustained (b) the nature and gravity of the resulting physical disability (c) the pain and suffering which had to be endured (d) the loss of amenities suffered (e) the extent to which, consequentially, the plaintiff's pecuniary prospects have been materially affected.

[96] Based on the medical reports that were agreed into evidence, the injuries are as follows: -

1. Chronic lower back pain secondary to lumbar spondylosis with stenosis nerve root irritation;

2. Disc herniation of the lumbar region with nonverifiable radicular complaints at the time of examination.

[97] With regards to the total impairment rating assigned I prefer and accept the seven (7) percent impairment assigned by Dr. Lawson as this report is later in time than that of Dr. Fraser. I accept the Defendant's submission that Dr. Lawson at the time of examination would have had all the medical evidence before him to arrive at his assessment and would be best poised to make an assessment when the Claimant

had reached maximal medical improvement. Further, I was not satisfied with the explanation provided by Dr. Fraser to justify the escalation of his disability ratings in light of his findings. I am also guided by the case of **Veronica Irving v Brian Rowe and Phillip Peart** (unreported), Jamaica, Supreme Court, Claim No 2006 HCV 03177, judgment delivered on the 8th November, 2013 where the Honourable Mr. Justice Morrison at paragraph 30 stated: -

> *"What ought to matter is not the percentages that have been assigned as the permanent impairment rating but rather the injuries and the period of total incapacity."*

[98] In seeking to arrive at an appropriate award for pain and suffering and loss of amenities, I adopt the dicta of Lord Hope of Craighead at page 507 of the case of **Wells v Wells** [1998] 3 All ER 481: -

> *"The amount of award for pain and suffering and loss of amenities cannot be precisely calculated. All that can be done is to award such sum within the broad criterion of what is reasonable and in line with similar awards in comparable cases as represents the court's best estimate of the claimant's general damages."*

[99] The injury suffered by the Claimant is a serious one. He continues to experience pains to his back and will continue to do so. The Claimant explained that he is not able to sleep comfortably at nights and he cannot sit for long hours without feeling pain. He has to be careful of sudden movements and avoid heavy lifting.

[100] Having considered the authorities submitted, I found the cases of **Schaasa Grant v Salva Darwood and Jamaica Urban Transit Company Ltd.** (supra) and **Barbara Brady v Barlig Investment Co. Ltd & Vincent Loshusan & Sons Ltd** most instructive.

[101] In the case of **Schaasa Grant v Salva Darwood and Jamaica Urban Transit Company Ltd.** (supra) a JUTC conductress was flung from her seat when the bus driver suddenly applied the brakes. She was made redundant. She was diagnosed with, inter alia, chronic mechanical lower back pains with subjective lumbar radiculopathy. Her permanent atrial disability was assessed at ten (10) percent of

the whole person. She was awarded Three Million Dollars ($3,000,000.00) for pain and suffering and loss of amenities in June 2008. Using the CPI 258.8 for May 2019 the award is updated to Five Million Nine Hundred and Fifty-Eight Thousand Five Hundred and Fifty-Seven Dollars and Eighteen Cents ($5,958,557.18). The injuries suffered by the claimant in that case are similar to those suffered by the Claimant in the instant case, in that, both were diagnosed with chronic lower back pains.

[102] In the case of **Barbara Brady v Barlig Investment Co. Ltd & Vincent Loshusan & Sons Ltd** the claimant, aged sixty-four (64) years old suffered severe lumbosacral strains and marked tenderness along the lumbo-sacral spine and joints. She was plagued by lower back pains aggravated by her sitting for more than half-an-hour, through bending and prolong walking. The doctor opined that she would have permanent intermittent lower back pains, aggravated by physical activities, although the pains could be reduced by back strengthening exercises. Her permanent partial disability rating was assessed at five (5) percent of the whole person. The award for pain and suffering was Three Hundred Thousand Dollars ($300,000.00) which updates to One Million Five Hundred and Ninety Thousand Three Hundred and Thirty-One Dollars and Eighty-Three Cents ($1,590,331.83). This case is useful as the Claimant in the instant case, like Mrs. Brady suffers from intermittent pains as a result of his injury and has difficulty sitting for long hours. The whole person impairment however of Mrs. Brady, was lower than that of the instant Claimant and unlike the instant Claimant, Mrs. Brady was able to resume normal work. The award would therefore have to be adjusted.

[103] I also found the cases of **Candy Naggie v The Ritz Carlton Hotel Company of Jamaica** reported at page 198 of Recent Personal Injury Awards made in the Supreme Court of Judicature of Jamaica Volume 6 by Ursula Khan, and **Kevin Gilbert v Romaine Grant and Adani Dixon** [2017] JMSC Civ. 89 to be useful guides.

[104] In **Candy Naggie v The Ritz Carlton Hotel Company of Jamaica** (supra) the claimant, a hotel employee was injured whilst lifting a heavy urn with ice and falling backwards at work. She was diagnosed with mechanical lower back pains and it was opined that she would be plagued by intermittent lower back pains aggravated by prolonged sitting, standing, bending and sitting. Her total permanent partial disability was assessed at ten (10) percent. She was awarded the sum of One Million Seven Hundred and Fifty Thousand Dollars ($1,750,000.00) for pain and suffering and loss of amenities in December 2005. This award updates to Four Million Seven Hundred and Eighty-Seven Thousand Five Hundred and Twenty-Six Dollars and Forty-Three Cents ($4,787,526.43).

[105] In **Kevin Gilbert v Romaine Grant and Adani Dixon** (supra) the claimant was injured in a motor car collision. He had a pre-existing back injury that had resolved on its own but was aggravated by the accident. He was diagnosed with, inter alia, discogenic back with radiculopathy and intermittent back pain. His permanent partial disability was assessed at five (5) percent. He was awarded the sum of Two Million Three Hundred Thousand Dollars ($2,300,000.00) in June 2017. This award updates to Two Million Four Hundred and Sixty-Seven Thousand Eight Hundred and Twenty-Seven Dollars and Fifty-Three Cents ($2,467,827.53). The injuries are similar to that of the Claimant at Bar but Mr. Hunter has a higher disability rating and his period of incapacity was longer than the claimant in the case. The award will therefore have to be adjusted to reflect same.

[106] In the circumstances I find that the sum of Four Million Dollars ($4,000,000.00) is adequate to compensate the Claimant for his pain and suffering and loss of amenities.

[107] The Claimant has pleaded handicap on the labour market. The Defendant has submitted that an award under this head should not be made based on the principle that an award under this head is to be made in circumstances where the claimant's capacity to work on the labour market has been diminished, and to claimants who were unemployed at the time of trial.

[108] In the case of **Andrew Ebanks v Jephter McClymont** (unreported) Supreme Court, Jamaica, Claim number 2004 HCV 2172 judgment delivered on the 8th day of March 2007, the Honourable Mr. Justice Bryan Sykes (as he then was) outlined the following at page 28: -

> *"It is my view that when **Smith** is understood in the way I have stated it is apparent that the view that claimant has to be working at the time of trial to be eligible for this award is not a legitimate deduction from Smith. None of the judge's (sic) in the **Smith's** case said so. Lord Justice Browne who authored what is considered to be the leading judgment in **Moeliker v A Reyrolle** [1977] 1 W.L.R. I32 came eventually to this understanding when he stated in **Cooke v Consolidated Industries** [1977] I.C.R. 635, 640-641*
>
> > *I agree that this appeal should be allowed and the figure increased from £500 to £1,500 for the reasons given by Lord Denning M.R. I only add anything because I was a party to the decisions in Moeliker and Nicholls to which Lord Denning M.R. has referred, and this give me a chance of correcting something which I now think is wrong which I said in Moelkier's case.*
> >
> > *This case differs in one respect on the facts from any of the three previous cases cited. In all those cases the plaintiff was in fact in work at the date of the trial. In fact, in all the cases he was still in all the cases he was still in the employment of his pre-accident employer. This case is different because at the date of the trial the plaintiff was not in work at all, although his previous employer would have been willing to employ him and he could have continued to work as a deckhand if he had ignored the advice of his doctor.*
> >
> > ***In my view, it does not make any difference in the circumstances of this case that the plaintiff was not actually in work at the time of the trial…In Moeliker's case at age 261 of the report in [1976] I.C.R. 253 I said: "This head of damage only arises where a plaintiff is at the time of the trial in employment." On second thoughts, I realised that was wrong; and when I came to correct the proof in the report in the All England Reports, I altered the word "only" to "generally," and that appears at [1977] 1 All E.R. 9, 15…"** [My emphasis]*

[109] Sykes, J (as he then was) continued at paragraph 29: -

> *"Since Lord Justice Browne is now of the view, as was clearly established in the **Smith's** case, that **whether the claimant is working or not at the time of the trial does not affect the award of loss of earning capacity, then it necessarily follows that what is being compensated is not so much the risk of job loss (since an employed person, by definition***

> ***cannot lose what they do not have) but rather the inability to compete on the labour market which is a loss in and of itself. The inability to compete on the open labour market, once established, is a fact****. If this is so and it is accepted that this inability is an appropriate subject of compensation then the role that the risk of job loss plays in the assessment process must be carefully isolated and analysed. This is consistent with cases before* ***Moeliker****." [My emphasis]*

[110] I adopt these principles and it is for this reason why I respectfully disagree with the submissions of Learned Counsel for the Defendant. It is immaterial whether Mr, Hunter was employed at the time of trial and it does not affect a compensation being awarded under this head. The evidence reveals that Mr. Hunter is unable to get full employment because of the injury. I accept that the Claimant is unable to compete on the open labour market as a result of the commission of the tort by the Defendant.

[111] The issue now arises as to what assessment would be made in relation to Mr. Hunter being handicapped on the labour market. In relation to the selection of the appropriate method for determining an appropriate award for damages for handicap on the labour market, I am guided by Sykes J (as he then was) at paragraph 53 in the case of **Andrew Ebanks v Jephter McClymont** (supra): -

> *"If the claimant is not working at the time of the trial and the unemployment is the result of the loss of earning capacity then the multiplier/multiplicand method ought to be used if the evidence shows that the claimant is very unlikely to find any kind of employment or if employment is found by the job is very likely to be less well paying than the pre-accident job, assuming that the person held a job. The reason is that the financial impact of the loss of earning capacity would have begun already and the likelihood of the financial impact being reduced by the claimant finding employment would be virtually none existent;"*

[112] In the light of this pronouncement, I am of the view that the multiplier/multiplicand method is to be used. However, the Claimant has not assisted the Court with any evidence of his income to enable the court to make an assessment. There is no evidence before me for a multiplier/multiplicand method is to be used. Therefore, it is impossible for the Court to make such an award.

[113] In relation to future medical care **Orlando Adams v Desnoes & Geddes Limited t/a Red Stripe** [2016] JMSC Civ. 21 the Honourable Mrs. Justice Sonia Bertram-Linton (Ag) (as she then was) stated at paragraph 64: -

> *"Future medical expenses are reasonable and necessary health care expenses required for the treatment of injuries sustained as a result of the negligent act at issue. To recover future medical expenses, the claimant must show a "reasonable probability" his injuries will require him to incur medical expenses in the future. The claimant may recover future medical expenses if he shows the existence of an injury, that medical care was rendered for the treatment of that injury prior to the time of trial, the cost of that past medical care, and that he is still injured to some degree at the time of trial. At a bare minimum, the claimant must show the reasonable value of his past medical treatment and the probable necessity of future medical treatment.* ***AG v Tanya Clarke Supreme Court Appeal No.109/2002****."*

[114] I do accept that the Claimant at the time of trial is still injured to some degree and that it is a probability that he will require future medical assistance. However, there was no conclusive evidence that the Claimant will require all the treatments proposed by Dr. Fraser. Further, he made only blanket statements pertaining to most of his recommendations and failed to provide time periods required for most. In the light of the evidence, I am prepared to accept that the Claimant will need continued medical follow up and analgesics to alleviate his injuries. The Court is of the view that a valid claim is made for these future medical expenses.

[115] Dr. Fraser recommended continued medical follow up at Twenty Thousand Dollars ($20,000.00) per year for two (2) reviews. He recommended analgesics at Two Hundred and Fifty Thousand Dollars ($250,000.00) per year but did not specify the amount of years required. In my judgment it is reasonable for the period to be slated for two (2) years given the continued degree of injury that the Claimant will likely face. Also, Dr. Lawson recommended non-surgical management. The Defendant submitted that the sum of One Hundred Thousand Dollars ($100,000.00) in respect of ten (10) physiotherapy sessions at Five Thousand Dollars ($5,000.00) per session for two (2) years is appropriate in the

circumstances. I am prepared to award this sum. The total sum is therefore Six Hundred and Forty Thousand Dollars ($640,000.00).

[116] Learned Counsel for the Claimant suggested a multiplier of 10 but the Court is of the view that a multiplier of 5 is more appropriate in the circumstances, having consideration to the Claimant's age and the expenses anticipated. I therefore make an award of Three Million Two Hundred Thousand Dollars ($3,200,000.00) for future medical expenses.

[117] In relation to the claim for depression I accept the Defendant's submission that no award under this head should be given as it was not ascribed by an expert doctor specialising in the field of psychiatry. In the absence of such evidence I am unable to make an award under this head.

Special Damages

[118] Special damages in the sum of one Hundred and Thirty-Six Thousand Seven Hundred and Nine Dollars ($136,709.00) have been agreed between the parties and I make that award.

ORDERS & DISPOSITION

[119] In the light of the foregoing, judgment is awarded to the Claimant in the following terms: -

1. General Damages for: -

   (a) Pain and suffering and loss of amenities: Four Million Dollars ($4,000,000.00) with interest at a rate of 3% per annum from the 23rd day of November 2015 to the 13th day of November 2019;

   (b) Future medical expenses: Three Million Two Hundred Thousand dollars ($3,200,000.00).

2. Special damages in the agreed sum of one hundred and Thirty-Six Thousand Seven Hundred and Nine Dollars ($136,709.00) with interest at a rate of 3% per annum from the 17th day of June 2014 to the 13th day of November 2019;

3. Costs to the Claimant to be taxed if not agreed.