[2013] JMSC Civ 6

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2006 HCV 03638

BETWEEN	**CURLON ORLANDO LAWRENCE**	**CLAIMANT**
AND	**CHANNUS BLOCK AND MARL QUARRY LIMITED**	**DEFENDANT/ ANCILLARY CLAIMANT**
AND	**OWEN BAILEY**	**ANCILLARY DEFENDANT**

Sean Kinghorn, Alithia Leith and Danielle Archer instructed by Kinghorn and Kinghorn for the claimant

Symone Mayhew and Michael Deans for the defendant

Ancillary defendant unrepresented

January 7, 8 and 11, 2013

NEGLIGENCE – VICARIOUS LIABILITY – WHETHER ACT OF EMPLOYEE SUFFICIENTLY CONNECTED TO EMPLOYEE'S DUTIES TO MAKE EMPLOYER LIABLE – BREACH OF DUTY TO PROVIDE SAFE SYSTEM OF WORK

SYKES J

[1] Mr Anthony Charley, managing director of Channus Block and Marl Quarry Limited ('the company'), seem agitated by the possibility that the company may be held liable for injuries suffered by Mr Curlon Lawrence on September 23, 2006 while working as a labourer at the company's plant at Brown's Town, St Ann. Mr Lawrence suffered severe injury to both legs, which resulted in both legs being amputated above the knee, when Mr Owen Bailey, another employee of the company, switched on the paddle of a mixer on a block making machine. Mr Lawrence was inside the mixer cleaning it. He has framed his claim in both the torts of negligence and breach of the employer's duty to provide a safe system of work. In respect of the tort of negligence, Mr Lawrence is relying heavily on the principle of vicarious liability, that is, the company is to be held liable for the negligence of Mr Owen Bailey even though the company may not be at fault.

[2] The company took the uncommon but legally valid step of bringing an ancillary claim against its former employee Mr Owen Bailey. The company is asking the court to find that Mr Owen Bailey is to make a contribution to the company in the event that it is found liable to Mr Lawrence. Mr Owen Bailey's defence was struck out some time ago. He attended this trial but in his capacity as a witness for Mr Lawrence and not as the ancillary defendant. Indeed, Mr Owen Bailey took no part in the proceedings other than in the manner just indicated.

The background

[3] The context of this claim is a horrific accident that took place on September 23, 2006 in which Mr Lawrence lost both legs above the knee. He was assigned the task of cleaning a machine known as a mixer. This mixer was controlled by four switches. Two are known as isolator switches and the other two are called on/off switches. One on/off switch operates paddles in the mixer where Mr Lawrence was. The other activates the conveyor belt which is connected to the mixer. The isolator switches prevent electricity from reaching the on/off switches. In order to get the machine working, both isolator switches have to be turned on and even then the machine does not work. The on/off

switches have to be turned on as well. In this case it is alleged that the isolator switches were turned on and the paddle switch turned on and this led to Mr Lawrence's injuries.

Whether the company is vicariously liable for the acts of Mr Owen Bailey

[4] It has been said that vicarious liability is based on social and economic policy. That policy has decided that the employer should bear the damage arising from any negligent acts by his employee if the negligent conduct is sufficiently connected to the employee's job so that it can be said that he was acting on the employer's behalf at the crucial time. Vicarious liability does not depend on the employer being at fault. Indeed, the employer need not be at fault and no such conclusion is necessary. In fact, the employer may have done all that he could possibly have done to avert or prevent the injury which has occurred but the law, based on social and economic policy, will still hold him liable because he has engaged in an activity that carries with it certain risks. The employer, like the injured party, may be innocent of any blameworthy behaviour. The serious social question that arises in vicarious liability is this: of the two innocent parties which of them should bear the actual loss that arises from the negligent conduct of the employee? It has been said that justice and fairness dictate that the employer be responsible for those torts which are reasonably incidental to the business he operates. Why should this be so? The very general proposition is that anyone who employs another (excluding independent contractors) for his own purposes inevitably creates the risk that the person so employed may act negligently and therefore once the employer creates that risk (by employing another) then social and economic policy concludes that he should bear the risk of loss or damage which may arise (**Lister v Hall** [2001] 2 AC 215, [64] Lord Millett). The negligent conduct of one employee to another employee or to a third party is one of those risks which are reasonably incidental to any kind of business or activity. In practical terms, vicarious liability is loss-distribution device (**Lister** [64] Lord Millett).

[5] The concept is not applicable only to business entities. Thus householders who employ gardeners take the risk that he may light a fire that escapes and burns the

neighbour's house. Persons who offer care to children take the risk that the caregiver might molest the children under their care.

[6] The difficulty many have in accepting this principle of vicarious liability is compounded when one is dealing with intentional torts (that is torts where the employee embarks upon a deliberate course of conduct such as killing, maiming or drafting documents that facilitate fraud), or where the tort is not presented by the claimant as an intentional one but the employer's defence resists the claim on the basis that the conduct of the employee was motivated by malice, spite or ill will. The problem also arises even if the tort is not presented in the forms just indicated by either the claimant or the defendant but the defendant asserts that the employee acted beyond 'the scope of his employment.'

[7] Any of the responses by the defendant just indicated always necessitates a close examination of the facts to see whether vicarious liability arises. In this regard the language now used is that of closeness of the alleged tortious act with the employee's job. This new found language is said to be more appropriate than the hitherto now-frowned-upon phrases such as 'within the scope of employment', 'on frolic of his own', 'unauthorised mode of doing the job', 'unauthorised act' and such like. The new language, it is said, has not introduced a new concept but simply sharpened the focus of the analytical lens. This analytical model was triggered by the Canadian Supreme Court's decisions in **Bazley v Curry** (1999) 174 DLR (4th) 45 and **Jacobi v Griffiths** (1999) 174 DLR (4th) 71. These decisions greatly influenced the House of Lords in **Lister** and **Dubai Aluminium Ltd v Salaam** [2003] 2 AC 366. These influences were eventually felt in Jamaica through the Judicial Committee of the Privy Council's decisions in **Bernard v The Attorney General of Jamaica** (2004) 65 WIR 245 and **Brown v Robinson** (2004) 65 WIR 258 – both decisions from Jamaica. The Board also considered the matter in **Attorney General v Hartwell** (2004) 64 WIR 103, an appeal from the Court of Appeal of the Eastern Caribbean (British Virgin Islands). The Court of Appeal of Jamaica in **Wright v Morrison** [2011] JMCA Civ 14 held that the new

language found in the advice of Privy Council and the judgments of the House of Lords applies to torts generally and is not restricted to intentional torts.

[8] This sharpened analysis necessitated the reinforcement of some basic ideas. First, in order to make the defendant liable, the claimant must do more than show that the job created the opportunity to commit the tortious act. Second, he must show that the conduct complained of was so closely connected with the job functions of the employee at the material time that it is fair and just to hold the employer vicariously liable.

[9] The Court of Appeal of England and Wales have held that where it can be said that the tortious act is closely connected to the job function of the employee then it will normally be fair and just to impose liability on the employer liable (**Gravil v Redruth Rugby Football Club Ltd** [2008] IRLR 289; [2008] EWCA Civ 689).

[10] The focus is on the nature of the employment, the duties of the employee and the act complained of. If, looking at the matter broadly, the act is closely connected with the employment and duties required then the employer will be held liable. The analysis by Lord Steyn of **Lloyd v Grace, Smith & Co** [1912] AC 716 in **Lister** provides a classic example of what is intended by the new language. In the **Grace, Smith** case, had the managing clerk rummaged through the bag of the client while she was sitting in the waiting room to see an attorney and stole the document to commit his tortious act then that would be a case of the job providing the opportunity to commit the tort. However, the firm held out the managing clerk as someone to whom the claimant could legitimately hand the documents which she did. Likewise in **Morris v C W Martin & Sons Ltd** [1966] 1 QB 716, the claimant handed the fur to a furrier who in turn handed over to the defendant for cleaning. The defendant's employee stole the fur. The defendant was has held liable because their employee got the fur in his capacity as an employee to clean the fur. He took it and stole it. The result would have been different if the employee had broken into the claimant's house and stole the fur.

[11] As these cases have shown the employer cannot deflect liability by saying that what was done was a crime. The tortious acts ranged from dishonest misrepresentation in order to steal the client's property (**Grace, Smith**), to larceny (**Morris**), to preparation of a document to facilitate a criminal conspiracy (**Dubai**), to homicide (**Robinson**) and serious bodily harm shooting (**Bernard**). None of these actions could be remotely described as 'unauthorised modes of doing the job.' The conduct ranged from deliberate calculated acts of thievery to deliberate acts of physical maiming and unlawful killing. Unless the partners or employers were themselves an organised crime syndicate, it could hardly be contended that the managing clerk was employed to filch clients of the law firm out of their property (**Grace, Smith**), or that the thieving servant was employed to steal customers' property (**Morris**), or that the partner in the law was authorised to draft documents to assist in a criminal conspiracy (**Dubai**), or that a security guard was employed to kill (**Robinson**), or a police officer is employed to main (**Bernard**). Similarly, Mr Lawrence could not seriously argue that Mr Owen Bailey was employed by the company to maim him.

[12] The court has gone extensively into this issue of vicarious liability because Mrs Mayhew was labouring to make the point that if the court concluded that the allegedly tortious acts in this case were done deliberately and with intent to kill, injure or maim the claimant then that would be sufficient to take the case out of the net of vicarious liability. The premise of this submission would have to be that Mr Owen Bailey was not employed to maim and so any maiming done by him cannot implicate the company. Mr Charley, the witness for the defendant, was equally strident in this view that the turning on of the machine that caused injury was deliberately done and so his company could not be liable. Unfortunately for counsel and Mr Charley, Lord Millett in **Dubai**, insisted that it is no answer to a claim against the employer to say that the act complained of was criminal ([121]).

[13] Where the law stands the position is as follows: a defendant cannot escape liability by arguing that what was done by the employee was deliberate, intentional or even criminal. He has to show that what was done was not closely connected to the

employee's job. On the other hand, the claimant cannot simply say, 'He is your employee. He injured me, so compensate me.' He must show that the tortious act was so closely connected to the job of the employee that it is fair and just to hold the employer liable.

[14] Turning now the facts of this case. In the view of this court there is a far more reasonable explanation than malice for what Mr Owen Bailey did. This is the absence of proper training of Mr Owen Bailey and Mr Lawrence for the task of cleaning the mixer as well as lack of implementation of proper safety procedures, on the day in question, that the company said that it had.

[15] The evidence from Mr Charley was that two of the safety procedures for cleaning the mixer were (a) the isolator switches should be padlocked and (b) the key for the padlock should be in the pocket of the person cleaning the mixer. This meant that on the day in question the isolator switches should have been padlocked Mr Lawrence should have the key in his pocket if the mixer was to be cleaned. None of this happened. In this context, Mr Owen Bailey was fiddling with the switch not because he was malicious but because he was negligent. However, there will be more on this aspect of the case when examining whether the company is liable on the ground of breach of duty to provide a safe system of work. This was only mentioned at this point in order to indicate why the court does not accept the malice theory. A civil court does not easily or readily come to the conclusion that a tortfeasor was attempting to murder or maim unless the evidence is compelling. There are other reasons which will be dealt with later.

[16] The evidence in the case from Mr Lawrence and Mr Owen Bailey is that both men were assigned to clean the mixer. The method of cleaning was to use a two pound sledge hammer to chip away at hardened concrete which formed whenever the machine was used to make concrete blocks. In paragraph 18 of his witness statement Mr Lawrence said that he and Mr Bailey were assigned to clean the mixer. He did not

provide the details of the conversation that led up to that. He was not cross examined in detail on this during his time in the witness box.

[17] Mr Owen Bailey stated in evidence that he, Mr Lawrence and Mr Donovan Bailey, one of the company's supervisors, were in a space between the two mixers. It was at that moment that Mr Donovan Bailey assigned Mr Lawrence to clean the mixer. According to Mr Owen Bailey, he told Mr Donovan Bailey that he (Owen) would assist Mr Lawrence and in response to this, Mr Donovan Bailey agreed. Mr Owen Bailey also stated that he was instructed to clean the area around the mixer.

[18] On the other hand, Mr Donovan Bailey said that no such conversation occurred. He assigned Mr Lawrence to clean the mixer and Mr Owen Bailey to clean the area around the mixer.

[19] There is evidence from Mr Donovan Bailey that in the normal course of things, two persons are assigned to clean the mixer. However, he assigned only one person to clean the mixer that day.

[20] Mr Charley cannot assist with what actually took place because he was not on the property at the material time when this alleged conversation was taking place.

[21] From what has been said so far, it is common ground that (a) initially, Mr Owen Bailey was assigned to clean the area around the mixer and (b) Mr Lawrence was assigned to clean the mixer. The difference arises in relation to whether Mr Owen Bailey told Mr Donovan Bailey that he was going to assist Mr Lawrence to clean the mixer and Mr Donovan Bailey agreed.

[22] This court concludes, on balance of probabilities, that Mr Donovan Bailey agreed to Mr Owen Bailey's suggestion that he assist Mr Lawrence. This is the more probable conclusion because Mr Donovan Bailey indicated that in the normal course of things two persons would clean the mixer. There was nothing in the evidence from the company

indicating why there would be a departure from the normal course of conduct. The practice of deploying two person to clean the mixer is consistent with Mr Lawrence's evidence that when cleaning the mixer it was usually done by himself and someone name Cory. The evidence from the claimant and his witness is consistent with the usual practice outlined by Mr Donovan Bailey. The court accepts Mr Lawrence and Mr Owen Bailey's account on this aspect of the case. The legal significance of accepting this version is that Mr Owen Bailey was authorised to clean the mixer on the day in question and thus handling the machine was directly connected to his assigned task of cleaning the mixer.

[23] Mr Donovan Bailey stated in evidence that the various switches for the mixer were padlocked so that they could not be switched on. He testified that he removed the padlock and after a short time returned to the office. He also said that he turned off the isolator switches. What this means is that when the mixer was switched on, the isolator switches and other switches were not padlocked.

[24] The isolator switch enables power to go the on/off switches that turn on the mixer. Mr Charley said that there are two isolator switches would both have to be turned on and then the on/off switch for the paddle of the mixer would have to be pressed in order for the paddle to move. The company, through Mr Charley and Mr Donovan Bailey, is endeavouring to say that Mr Owen Bailey must have turned on the two isolator switches and then pressed the on/off switch thereby activating the paddle and injuring Mr Lawrence. Mr Owen Bailey accepts that he pressed only one switch which was the on/off switch. This switch turned out to be the one that activated the paddles. This is why the company defended the claim on the basis that the act(s) causing injury to Mr Lawrence must have been deliberately done with malevolent intent and therefore it is not liable.

[25] Mr Owen Bailey said that he pressed only one button and it was after he did this that the mixer was activated. When he heard Mr Lawrence exclaim he realised something had happened. On inquiring, he found Mr Lawrence severely injured. On Mr

Owen Bailey's account, he did not turn on the isolator switch. It does not matter whether he did or did not switch on the isolator switch. What is clear is that he pressed the switch that actually activated the mixer.

[26] Even accepting Mr Donovan Bailey's evidence that he turned off one or both isolator switches, Mr Owen Bailey's action of turning on one or both switches and then turning on the mixer was so closely connected with what he was assigned to do (assist Mr Lawrence to clean the mixer) that the deliberate nature of his conduct does not exonerate the company from liability.

[27] When the company asked Mr Lawrence to clean the mixer and accepted the suggestion from Mr Owen Bailey that he would assist Mr Lawrence the risk of injury to Mr Lawrence was created if a negligent employee switched on the machine while Mr Lawrence was actually in the mixer. It was therefore incumbent on the company to put in place measures to eliminate or reduce that risk. The evidence is that the company had the measure but regrettably it was not fully implemented on that fateful day. The negligent conduct of Mr Owen Bailey was the switching on of the paddle while Mr Lawrence was cleaning the mixer.

[28] From all that has been said the court concludes that the company is vicariously liable for the injuries to Mr Lawrence.

Whether the company failed to provide a safe system of work for Mr Lawrence

[29] It is well established that an employer must provide a safe system of work for his employees. The concept of a safe system of work is not restricted to providing proper functioning equipment. It extends to providing adequate training and supervision of employees where that is necessary for a safe working environment. In this case, the type of breaches alleged which cumulatively amounted to the breach of duty are (a) the lack of safe system; (b) the lack of proper or adequate training and (c) the poor implementation of safety procedures.

[30] The evidence is that there are at least three switches that must be activated before the mixer can be operated. There are the two isolator switches which, as the name suggests, prevent electricity from reaching the other two switches unless the isolator switches are turned on. Even if they are turned, the mixer does not come to life. Either of the other two switches must be turned on as well.

[31] Mr Donovan Bailey told the court that a padlock was in place to secure the switches in order to prevent them from being turned on. Mr Donovan Bailey and Mr Charley testified that this was a safety precaution designed to prevent injury to persons.

[32] It is Mr Donovan Bailey's evidence that he unlocked the padlock and then eventually returned to the office to tend to a customer. Unforunately, he did not relock the switches before he left. This meant that one of the safety features was absent thereby facilitating the very thing that the lock was designed to prevent. There is no evidence that he put any other safety precaution in place other than turning of one or both of the isolator switches.

[33] Mrs Mayhew said that the addition of the padlock was super cautious and unnecessary. Having the two isolator switches in place was already sufficient provision in fulfillment of the duty to provide a safe system of work. Anything else was superfluous.

[34] The court does not agree with Mrs Mayhew on this. It seems obvious that the company (evidenced by placing the padlock on the switches) appreciated that there was indeed a risk of the paddles of the mixer being turned on at the wrong time. If this was the thinking when the mixer was not being cleaned then all the more reason why that appreciation should be at the forefront of the company's mind when someone is inside the mixer cleaning it.

[35] Mr Charley's evidence at paragraph 15 above simply reinforces the safety point. He said that one of the safety protocols in place at the time was that the person cleaning

the mixer should not only have padlocked the switches but also have the key in his pocket. Why this specific protocol? It was designed to prevent anyone from turning on the mixer while it was being cleaned because there was the risk of serious injury if that happened.

[36] The company's safety protocol for cleaning the mixer has been stated. Let us now look at what happened. Mr Donovan Bailey's evidence is that he took off the padlock. He turned off the isolator switch. He went to the office. He was the one who assigned Mr Lawrence to clean the mixer. He never said, in accordance with the safety protocol outlined by Mr Charley, that he relocked the switches or instructed Mr Lawrence to do so or saw that it was done before he left for the office. He did not testify that he gave the key to Mr Lawrence with clear and explicit instructions to lock the switches and keep the key in pocket. In short, Mr Donovan Bailey did not ensure that the company's safety protocol was followed. Mr Donovan Bailey breached the crucial parts of the safety protocol as outlined by Mr Charley. This translates into a lack of supervision and breach of the safety protocol which means that there was a breach of the duty to provide a safe system of work.

[37] To put it bluntly, Mr Donovan Bailey's evidence really amounts to an admission that no safety protocol was used on the fateful day when the mixer was being cleaned. No measures were put in place after he removed the padlock to ensure that the very thing that the padlock was used to prevent did not happen.

[38] In addition to what has been said so far on breach of the duty to provide a safe system of work must be added evidence (which the court accepts) of lack of training of Mr Lawrence and Mr Owen Bailey. There is no evidence that Mr Lawrence was specifically instructed about the safety protocol relating to cleaning the mixer. There is no evidence that he was told that he should padlock the switches and keep the key in his pocket. It appears that Mr Lawrence's training for cleaning the mixer was less than rudimentary regarding the safety aspect of the job as distinct from actual mechanics of cleaning the mixer.

[39] The court's impression of the lack of adequate training was reinforced by Mr Donovan Bailey's testimony on the point. When cross examined his testimony was that the only precaution he told Mr Lawrence to take when cleaning the mixer was that he should not go in it while it is running.

[40] Mr Owen Bailey's testimony is also consistent with Mr Lawrence's testimony regarding exposure to the safety protocol of the company. He swore that he was unaware of the safety procedures of the company. He does not recall seeing any signs about safety anywhere. He received no rules about cleaning the mixer. The method was 'watch and learn.' To place an untrained man to clean a machine that could inflict serious injury if it was improperly turned on was really an accident waiting to happen. The untrained man, Mr Owen Bailey, fiddled with the switch or switches, and Mr Lawrence was injured. This act of placing untrained persons to clean the mixer was a breach of the common law duty to provide a safe system of work. Clearly, the absence of training and the lack of supervision meant that Mr Owen Bailey did not have brought home to him in a forceful way the dangers that lurked nearby and there was nothing in place to stop this untrained man from doing what young men may do in the presence of machinery – push buttons to see what would happen.

[41] The company is liable for breach of the duty to provide a safe system of work on two bases: the failure to execute the safety protocol on the day in question and failure to train adequately Mr Lawrence and Mr Owen Bailey for the task of cleaning the mixer.

Aspects of the defence

[42] Before leaving the issue of liability something must be said about the company's allegation that Mr Lawrence, in conversation, with Mr Charley said that Mr Owen Bailey tried to kill him because of a dispute over money and a female. The theory was that Mr Owen Bailey from his vantage point could have seen inside the mixer and he also could have heard when Mr Bailey was using the hammer to clean the mixer.

[43] The court wishes to say that none of this was established by reliable and cogent evidence. Any serious allegation of this nature must be established by strong evidence. They involve very serious imputations on the character of a person and ought not to be lightly made.

[44] It became clear from the evidence that the company did not have good evidence to back up its assertions of malevolence. The case of malice because of a dispute over money turned out to be false. The explanation given by Mr Lawrence and Mr Owen Bailey was that on the day of the incident Mr Owen Bailey borrowed JA$1,000.00 from Mr Lawrence who asked for JA$500.00 extra when the money was being repaid. Mr Owen Bailey agreed to this Shylockian interest rate of fifty percent. The court accepts this explanation.

[45] There was no evidence that Mr Lawrence and Mr Owen Bailey had a long running dispute or at least an issue with money before the date of the injuries.

[46] Regarding the alleged dispute over a female, Mr Owen Bailey said that on a particular day a young lady came to the quarry site to visit her paramour (not Mr Lawrence or Mr Owen Bailey) and all three (Mr Lawrence, Mr Owen Bailey and the young woman) sat down talking.

[47] The court accepts Mr Lawrence's testimony that he did not have such a conversation with Mr Charley. Mr Lawrence's evidence was a plain unvarnished account. It was internally consistent. He answered questions asked and did not try to explain away answers before answering the question posed even if they might be, on one view, unfavourable to him. The court does not accept the defence theory that Mr Owen Bailey was motivated by a desire to kill or maim Mr Lawrence. Mr Owen Bailey was simply a young man who interfered with the mixer switches and this interference had catastrophic results.

The ancillary claim

[48] The company brought a claim against Mr Owen Bailey. In its ancillary claim, the company is seeking either a contribution or an indemnity from Mr Owen Bailey in the event that it is held liable to Mr Lawrence. This is permissible under section 3 (2) of the Law Reform (Tort-Feasors) Act. In this case, the indemnity does not arise for consideration because there is no indication that the company has any contract with Mr Owen Davis by which it can be claimed and neither is there any statute which confers such a right on the company.

[49] The wording of the section suggests that the court has a discretion whether to make an order for contribution. In this case, Mr Owen Bailey's defence to the ancillary claim was struck out and so there is no defence before the court. He attended the trial and gave evidence on behalf of Mr Lawrence. He said that he pushed only one button. His negligent conduct was the effective cause of the injuries. He advanced no reason why he pushed the button that turned on the mixer.

[50] As far as the evidence in the case was concerned, there was no equipment failure. The isolator switches were in place. Even the removal of the padlock did not in and of itself cause the injury. There was still the need for human action and the person who provided this was Mr Owen Bailey.

[51] In all the circumstances of this case the company is entitled to a contribution from Mr Owen Bailey. There are no mitigating circumstances in favour of Mr Owen Bailey. The company is not entitled to an indemnity. That usually arises if (a) there is a contractual agreement to that effect, (b) imposed by operation of law or (c) a statute. None of these applies here.

[52] The company is entitled to a contribution from Mr Owen Bailey. That contribution should be the total sum of damages awarded against the company. The court's position on the ancillary claim is based on the judgments of the majority in the case of **Lister v Romford Ice** [1957] 1 All ER 125 (HL); [1955] 3 All ER 460 (CA).

Assessment of damages

The nature and extent of the injuries

[53] There can be no question that a bilateral amputation of both lower limbs above the knee is a catastrophic injury. When Mr Lawrence arrived at the St Ann's Bay Hospital he was in hypo-volemic shock; vital signs were unstable; he had severely mangled lower limbs; muscles of right thigh were exposed and contaminated with cement or concrete; the right femoral artery was exposed; the right knee and distal two thirds of femur were crushed; the right leg was cold and insensate; the left lower limb was attached only by 5cm of skin; laceration with crush to muscle of distal third of left thigh; severely contaminated wound to left thigh; middle third of left femur dangling on the outside; complete severance of all neurovascular structures in left leg; no distal pulse in left leg; left leg cold and insensate; 4cm laceration to the left side of the scrotum and abrasions to penis.

[54] On admission, Mr Lawrence was resuscitated. There was a bilateral amputation above the knee with surgical debridement and irrigation of the wounds. He received pain killers, antibiotics and tetanus prophylaxis. He developed symptoms of phantom limb syndrome.

The nature and gravity of the resulting physical and mental disability

[55] Mr Lawrence now has a 64% whole person disability. There is no evidence of any permanent physical injury to the upper part of his body.

[56] Mr Lawrence was interviewed once by Dr Wendel Abel, a psychiatrist, for a two-hour period on June 30, 2011. He was diagnosed with post-traumatic stress disorder and major depression. These conditions were linked to the trauma suffered by him when he was injured.

Pain and suffering

[57] Mr Lawrence said that his legs were numb with severe pain on his way to the hospital. He was in the hospital for three months and he was in pain.

Loss of amenities

[58] Mr Lawrence is no longer able to walk about. He cannot play football. He is now quite dependent on other persons to assist him despite the great effort he has made to do domestic chores for himself.

Extent to which pecuniary prospects were affected

General damages

[59] Mr Kinghorn submitted that JA$60m would be adequate compensation. He was not able to point to any case in Jamaica where any court had made such an award so that, by way of comparison, the basis of such an award could be assessed.

[60] Counsel submitted that the compensation should fit the case and therefore this figure fits this case. As was indicated to counsel, the final award, if any, would be nowhere near the figure suggested by him.

[61] A far more rational approach was suggested by Mrs Mayhew which was that the court should start by looking at cases in which there was a single amputation and double the figure there in the present case. Then when this was done, adjustments could be made upwards or downwards to take account of the facts of this case in comparison to other cases.

[62] It does not appear that even the great industry of Mrs Ursula Khan, who has produced some six volumes of personal injury awards from the Supreme Court and Court of Appeal, has found many cases of bilateral above-knee amputations. Her

volumes go back at least twenty years. This suggests that the Supreme Court has not had to assess damages in many cases with injuries received by Mr Lawrence.

[63] This court will adopt Mrs Mayhew's approach. It was observed in **Kenroy Biggs v Courts Jamaica Limited and anor** 2004 HCV 00054**,** unreported, delivered on January 22, 2010 that awards of JA$4m were made in cases of single above-knee amputation. The award is then increased by factors such as (a) urological damage; (b) impairment of sexual function and (c) complete loss of sexual function.

[64] In the present case there is no evidence that Mr Lawrence has urological damage and there is no evidence that such injury may occur in the future arising from the incident. Equally, there is no impairment of sexual function never mind complete loss of sexual function. There is no evidence of any permanent physical damage to Mr Lawrence's upper body.

[65] Dr Abel's examination of Mr Lawrence found that he lacked energy, was irritable, suffered from sleep disturbance and was tearful. He has suffered psychological harm. He reported to Dr Abel that his self image has been adversely affected.

[66] There has been a loss of independence and there has been the loss of playing sports. There is no doubt that his overall quality of life has been severely affected.

[67] The case of **Percival Swaby v Metropolitan Parks and Markets Limited,** Khan's Volume 6 at page 2 is the closest to the case at hand. There, Mr Swaby suffered a bilateral above-knee amputation arising from negligence attributable to the first defendant. The claimant suffered post-operative complications that led to upper intestinal bleeding and acidosis. He even developed pneumonia. The award was JA$7,300,000.00. Mr Swaby's state of health (mental health apart) was worse than Mr Lawrence's. There was no evidence of the effect the injury had on Mr Swaby's mental health as there is in this case.

[68] This court accepts that an award of JA$19,000,000.00 is sufficient having regard to the injuries received, the absence of sexual impairment or loss of sexual function, the lack of any injury to the internal organs or impairment of their function and the post-traumatic stress disorder and depression.

Cost of future medical care – prosthetic device

[69] Of the information presented, the court prefers the evidence of Dr Dixon who actually examined Mr Lawrence and has obvious experience with amputation injuries.

[70] Mr Kinghorn urged the court to accept an attachment to Dr Barnes' report which spoke to various costs of securing prosthetic devices. Dr Barnes had email attachments showing conversation with a Mr Herman Luna. He describes himself as a licensed prosthetist/orthotist. The court does not know what Mr Luna's expertise is and so places little weight on his recommendations. The court has no indication of is training, certification, length of experience and such like. The court is not saying that Mr Lunan is not competent and neither is it being said that he is. What is being said is that there is insufficient information to assess properly Mr Lunan's competence and experience.

[71] Dr Dixon also gave details of the full cost including the cost of any adjustment necessary arising from weight loss or weight gain. Mr Lawrence may need to even change the socket of the device if there is a large variation in the size of the stump.

[72] Having regard to the submissions of both sides and taking into account the cost of the prosthetic device (JA$308,000); the need for replacement (at least 2 taking into account Mr Lawrence's age (now 28 years old) at a cost of JA$616,000.00; the need for gait training (3 sessions per week for eight weeks at $2,000.00 per session = $48,000.00); the adjustments that may be made to the prosthetic device (4 adjustments per year at JA$10,000.00 per adjustment for 22 years = JA$880,000.00) and socket changes (10 socket changes at JA$30,000.00 each = JA$300,000.00), the total award under this head should be JA$2,152,000.00.

Handicap on the labour market

[73] An award under this head is also appropriate. The court is aware that there is authority from the Court of Appeal which says that medical evidence **must** be presented before an award under this head can be made (**Dawnette Walker v Hensley Pink** S.C.C.A No. 158/01 (June 12, 2003)). The same case also held that the claimant **must** in fact be working at the time of the trial before such an award can be made.

[74] The purpose of this head of damages is to compensate for the loss of income that may arise because of the loss of the ability or capacity to compete on the open labour market should there be job loss and not so much the risk of losing the job if the claimant is working at the time of trial. This was the principle reaffirmed in **Smith v Lord Mayor, Aldermen and Citizens of Manchester** (1974) KIR 1 where counsel submitted that Mrs Smith was tied to her job because the injuries prevented her from walking out onto the open labour market to compete with her able bodied competitors. But for the council's willingness to take her back she would have found it virtually impossible to find another job. The consequence was that even if Mrs Smith was dissatisfied with her job she would have to think long and hard before leaving because one of the questions should would have to ask herself is, would I be able to compete, without any special dispensation from the employer, in the competitive open labour market? She had what was known as a frozen shoulder which was painful when moved. The evidence made it clear that she had difficulty doing her current job. Indeed the trial judge described her injury as severe.

[75] In respect of the leading judgment in the important case of **Moeliker v Reyrolle** [1977] 1 W.L.R. 132, it is now known that the initial published version ([1976] ICR 263) was corrected ([1977] 1 All ER 9, 15) by its author Browne LJ (**Cook v Consolidated Industries** [1977] ICR 635, 640 by Browne LJ). In the initial version, Browne LJ had held that this award would only be available if the claimant was working at the time of trial. His Lordship changed the 'only' to 'generally.'

[76] Thus the statements of principle in **Walker** are understood by this court to be very strong general statements but can be departed from in clear and obvious cases such as the present one. Some injuries are so severe that the claimant is not only at a disadvantage in the labour market but would not only have lost their job and remain unemployed at the time of trial, and quite unable to find another job having regard to their level of skill, literacy, training and so on. Under this head, the claimant is being compensated for his diminished capacity for work because the injury has placed him at a disadvantage compared to other workers in his field of endeavour should he lose his job or is currently unemployed and the injuries are such that he will become unemployed at some point if he is working at the time of trial or is unlikely to get a another job.

[77] As this court understands it, the Court of Appeal in **Walker** was applying the law as developed before **Smith** through **Moeliker** to **Cook** and so must be taken as agreeing on the correctness of these decisions. Thus if all these decisions are to live harmoniously then the pronouncements in **Walker** must be seen as strong general statements and not absolute statements.

[78] It would be very difficult to argue that Mr Lawrence, a labourer, who has had a bilateral above-knee amputation is not impaired on the labour market. In his case there was not just the risk of losing the job he had; he is in fact out of a job. The risk has been realised. He cannot compete with other labourers in the market place. It is no secret that physically impaired persons do not fare well in the Jamaican labour market. There is nothing in the evidence to suggest that his skills enabled him to do anything other than a labourer.

[79] The remaining issue is the method of assessment. There are three methods available. First, an increase in general damages to reflect an award under this head. What factors determine the size of the increase? Is it a percentage of the damages or an arbitrary figure? Second, a lump sum award. Under this second method, the vocabulary used is that a conventional award should be made. But what is a

conventional sum and what determines its size? Is the conventional fixed for all time or are there adjustments and if so, on what basis? Third, the multiplier/multiplicand method. Unfortunately, the case law from appellate courts has not identified the criteria or test to determine when any particular method is used save that in **Moeliker**, Browne LJ said that where the risk of losing the job is not imminent then the multiplier/multiplicand should not be used. Presumably, his Lordship would agree that where the risk has become reality then the multiplier/multiplicand method is appropriate. But this does not help with whether one should use method one or two if the multiplier/multiplicand method is used. The situation is made more acute by the dictum of Browne LJ in **Cook** to the effect that an award under this head should be separately assessed and not be reduced by reference to the sum awarded for general damages. Put another way, the court is not to look at the general damages, look at the award under this head and reduce the award for handicap on the labour market if the court thinks that the general damages are generous. It is a separate stand-alone head of damages.

[80] This court will use the multiplier/multiplicand method for the reasons implicit in Browne LJ's reasoning in **Moeliker**. There is no risk of losing his current job; he is unemployed. The lump sum method seems arbitrary when the figures and facts are available to make a precise calculation. So too, the first method of simply increasing the general damages by an amount which the court 'feels' would be appropriate should only be used when there is insufficient material available to make use of the multiplier/multiplicand method. Perhaps too this first method should only be used if the handicap is not severe. In effect, the court is saying that the multiplier/multiplicand method should be used unless there is some reason not to (recalling Browne LJ's observations noted in paragraph 79). It is precise and certainly more objective than the other two. The other two methods should be seen as second best and only used when the multiplier/multiplicand method is unworkable or would lead to overcompensation on this head or is inappropriate for some reason.

[81] The evidence is that Mr Lawrence earned JA$3,500.00 per week. He is now 28 years old. Both sides accepted that a multiplier of 14 would be appropriate. All this yields an award of JA$2,548,000.00. JA$3,500.00 were used instead of JA$4,000.00 because the latter sum was earned on overtime. The former was the usual wage.

Loss of future earnings

[82] It was common ground that if liability was established Mr Lawrence would be entitled to an award of loss of future earnings. Both sides have quite sensibly worked out that the figure to be awarded here is JA$2,548,000.00. This is based on a multiplier of 14 with a weekly income of $3,500.00.

Cost of future domestic care

[83] There is undisputed evidence that Mr Lawrence will need assistance to carry out his domestic chores for the rest of his life. The cost has been worked out at JA$7,000.00 per week. Mr Kinghorn is asking for JA$8,008,000.00 based on a fifty-two week year and a multiplier of 22. Since this is a life-long need then the multiplier seems reasonable. The court awards the sum of JA$8,008,000.00.

Special damages

Pre-trial loss of earnings

[84] The evidence showed that Mr Lawrence lost earnings up to the date of trial JA$3,500.00 per week. The total is JA$1,145,000.00.

Medical expenses and transportation

[85] The medical bills inclusive of medication and cost of medical certificates are JA$632,012.18. The transportation cost was JA$5,000.00.

Conclusion

[86] Channus Block and Marl Quarry Limited is liable for the injuries inflicted to Mr Lawrence. It is liable either on the basis of vicarious liability for the negligence of Mr Owen Bailey or breach of its common law duty to provide a safe system of work.

[87] The claimant is awarded the following:

General damages:

a. pain, suffering and loss of amenities JA$19,000,000.00 at 3% interest from the date of service of the claim for to January 11, 2013;
b. handicap on the labour market – JA$2,548,000.00 with no interest;
c. loss of future earnings - JA$2,548,000.00 with no interest;
d. cost of future domestic care - JA$8,008,000.00 with no interest;
e. cost of prosthetic device - JA$2,152,000.00 with no interest

Special damages

f. pre-trial loss of earnings – JA$1,145,000.00;
g. medical expenses - JA$632,012.18;
h. cost of transportation – JA$5,000.00

[88] Judgment on the ancillary claim to Channus Block and Marl Quarry Limited against Mr Owen Bailey. The sum of contribution to be made by Mr Owen Bailey is the full sum for which the company is liable to Mr Lawrence.

[89] Cost of the claim to the claimant to be agreed or taxed. Costs of the ancillary claim to Channus Block and Marl Quarry Limited to be agreed or taxed.

[90] Execution of judgment stayed until February 28, 2013.