IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV00664

BETWEEN	**ALLAN LEITH**	**CLAIMANT**
AND	**JAMAICA CITRUS GROWERS LIMITED**	**DEFENDANT**

Mr. Sean Kinghorn instructed by Kinghorn & Kinghorn for the Claimant.
Tashia H. Madourie instructed by Nunes, Scholefield, DeLeon & Co., for the Defendant.

Negligence-employer's liability-employee exposed to chlorine gas-effect of exposure life threatening-necessary medical treatment resulting in diabetes-quantum of damages-contributory negligence.

Heard on May 27, and July 23, 2010

Edwards J (Ag.)

The Claim

1. This a claim by an employee against his employers for damages. The claimant was employed to the defendant as a plumber. As part of his duties he was responsible for the water treatment system which involved the changing of the chlorine cylinders, whenever they became empty.
2. To carry out this work, the claimant was given a mask to wear, the effect of which was to prevent accidental inhalation of the chlorine gas from the cylinders whilst they were being exchanged.
3. On the 28th August 2007, whilst in the process of exchanging what was supposed to be an empty cylinder at the defendant's premises,

chlorine gas escaped from the said cylinder, resulting in injury to the claimant.

4. As a result of that accident and the resulting injury he brought this claim against his employers alleging negligence arising from breach of employer's duty, breach of occupier's liability and breach of contract.

5. The Particulars of Claim indicated that the claimant was in the lawful execution of his duties as a plumber under a contract of service with the defendant; during this time the claimant was in the process of removing a chlorine cylinder when he suffered a fall. The mask of the claimant came loose and chlorine which was in the cylinder escaped in the air and in the face of the claimant.

6. As a result the claimant suffered shortness of breath, wheezing, lung inflammation which was life threatening and onset diabetes.

7. The particulars of negligence averred by the claimant against his employers were;

I. Failing to provide the claimant with an efficient and effective mask.
II. Failing to provide a safe place to work.
III. Failing to provide the requisite warnings, notices and or special instructions to the claimant and its other employees in the execution of its operations so as to prevent the claimant sustaining injury.
IV. Failing to provide a safe system of work.
V. Failing to provide a competent and sufficient staff of men.
VI. Failing to maintain its equipment in a safe manner.
VII. Causing chlorine to escape in the air
VIII. Failing to provide the claimant with the requisite assistance especially regard to the claimant's age, with the removal of the chlorine tank.
IX. Causing the claimant to remove a heavy chlorine tank.

X. Requiring the claimant to continue to work in this particular area well knowing that the claimant had experience two previous episodes of chlorine inhalation.

XI. Failing to modify, remedy and/or improve a system of work which was manifestly unsafe and likely at all material times to cause serious injury to the claimant.

8. Further, in the alternative the claimant also averred that it was an implied term of the contract of service that the defendant would take all reasonable care to execute its operations in the course of its trade in such a manner so as not to subject the claimant to reasonably foreseeable risks of injury. In breach of the said contract the defendant exposed the claimant to reasonable foreseeable risks of injury as a consequence of which he sustained serious personal injury and suffered loss and damage.

9. The defence, except for admitting the fact of the injury to the claimant, averred that the claimant was a part time employee and denied the particulars of claim and the particulars of negligence alleged therein. It was averred by the defendant that the claimant's injury was caused wholly and or was materially contributed to by his own negligence.

10. The alleged negligence of the claimant as particularized by the defendant were; failing to have any or any adequate regard for his own safety; failing to affix or to properly affix his mask before attempting to change the chlorine cylinder; failing to follow the written instructions clearly exhibited in the chlorine room on how to remove and replace old cylinders; attempting to remove the chlorinator from the cylinder without first ensuring that the valve on the chlorine cylinder was properly closed; failing to ensure that the

chlorine cylinder was empty before attempting to change same; and finally removing a cylinder at a time and in a manner that was dangerous and manifestly unsafe.

The Evidence

11. The claimant is now in his eighties. He had been employed to the defendant for 18 years before his service was terminated in 2007. He had previously worked with the defendant in the 1970's and left in the 1980's. He renewed his employment with them in 1989.

12. His job at Jamaica Citrus Growers was that of a plumber. His duties included the repair of pipes, toilets and kitchen sinks. He also did the installation of pipes in the factory and pipes in the cottages. He was also required to change the chlorine cylinders in the factory.

13. The claimant was the only plumber employed by the defendant from 1989 to 2007. When a plumbing project required more than one person, the defendant would provide the claimant with the services of a labourer or labourers to assist, as they saw fit.

14. Raymond Wynter was the defendant's sole witness in this case. He was their Facilities and Maintenance Manager. He was also the claimant's immediate supervisor. He told the court that the claimant had been responsible for the maintenance of the water treatment since 1992.

15. In his witness statement the claimant described the changing of the chlorine cylinders as the most dangerous part of his job. He said it was dangerous because it entailed dealing with poisonous gas.

16. The evidence of the claimant was that the water used by the defendant came from the Bybrook River. Chlorine was used by the defendant to purify this water in an irrigation plant.

17. The irrigation plant was in the factory. Within the irrigation plant there were:

I. Two Filters
II. A pump house
III. A chlorine Room
IV. A storage Tank

18. The evidence was that the defendant company had a pipe leading from the river that carried water into the irrigation plant. The water then flowed into the storage tank. Beside the storage tank was a pump house and the chlorine room. Inside the chlorine room were two chlorine cylinders.

19. The two tanks in the chlorine room were connected to the storage tank. They were connected by two lines that lead chlorine from the chlorine tank into the storage tank. After the chlorine went into the storage tank, the chlorified water then flowed into two filters for further purification and then on into the factory.

20. There was further evidence that the irrigation plant operated automatically. The water was tested in the factory by a chemist, who, when necessary, would inform the claimant that the chlorine level in the water was low. It was then the claimant's duty to exchange the empty chlorine tank with a full one.

The Accident

21. On August 27, 2007, the claimant was instructed that the chlorine level in the water was low. As a result he proceeded to the chlorine room to exchange the chlorine cylinder. In his witness statement the

claimant said he went to remove the chlorine cylinder which was supposed to be empty. However, he noticed that it still had a little chlorine gas left in it. He nevertheless removed it and went to get a full cylinder for installation.

22. The claimant said that whilst walking away, he heard a noise as if air was escaping from the cylinder. He then realized that air was escaping from the valve at the top of the cylinder. He said this was not suppose to happen as the cylinder valve was suppose to be tightly closed at all times. He went on to state that he went for a big wrench and proceeded to try to tighten the valve. However, as he tightened the valve more chlorine escaped from the cylinder and sprayed forcefully unto him. Due to the force of the gas his mask became loose. He stumbled and held on to the tank but it too tilted onto him. He pushed it off and ran from the room leaving the gas still spraying from the cylinder.

23. His evidence was that the chlorine sprayed out of the cylinder and caught him in his face and all over his body. He was drenched in it.

24. There was evidence that the cylinder carried a flow metre which showed the level of gas which was in the cylinder. It had a tube marked with numbers and a little ball. When the top of the tube was opened, the little ball rises in the tube and goes to the number 2; this meant that gas was in the cylinder. When there was no gas in the cylinder the ball rest at the bottom. If the ball moved from the bottom it meant that gas was present in the cylinder pushing it upwards.

25. The cylinder had a valve which was capable of being opened and closed. A wrench was used to open and close it. This valve had to be tightened before the cylinder was removed. The valve prevented the

chlorine from escaping from the cylinder. It was agreed for instance, that if the metre was at level 2 and the valve was not tightly sealed, the gas would escape.

26. In cross-examination the claimant asserted that when he went to remove the cylinder he saw the ball at the bottom. He locked the valve tightly. He then took off the empty cylinder and went to get the fresh one. He got assistance from an employee passing by to replace the new one. He told the court that he alone could not pull the cylinder bottle. The person assisted by holding the cylinder while he pulled it. He then locked the valve.

27. After he locked the valve he then stepped off and smelled gas. He went back and realized it was coming from the empty cylinder. He then used a bigger wrench to tighten the valve. While tightening the valve he felt it move. He told the court that he was not sure if the valve broke off but he then heard a whoosh sound; he then slid and bottle fell and hit him and the mask fell off. He said as he ran from the room the gas was still spraying from the cylinder.

28. In his witness statement he stated that chlorine was not supposed to escape from the valve. The escape of the gas meant that the cylinder was defective.

29. In cross-examination he denied that he had said in his witness statement that he changed the cylinder even though it still had gas in it. He accepted that he was not supposed to remove the cylinder if it still had gas in it.

30. He was shown a document which he denied were instructions for the chlorine room; instead he identified it as a set of instructions for the cooking gas in the pump house.

31. He also gave evidence that chlorine had escaped from the tank and injured him on two prior occasions. He said he was exposed in July 2004 when although he was wearing a mask, the escaping gas still got into his eye. Again in June 2007 his then supervisor warned him that gas was leaking. He did not smell any gas but removed his mask and the chlorine got into his nostril. When he re-entered the chlorine room he discovered that the washer had burst whilst he was tightening the valve. He then changed the washer.

32. The claimant submitted that there was no challenge to his version of how the accident on August 27, 2007, took place. Indeed there was none.

Training

33. The claimant asserted that he had never received any training from the Jamaica Citrus Company on how to change or manage the chlorine cylinders. What he knew about the dangers of chlorine was learnt on the job. He strenuously denied that any training sessions were held in which he participated. He said also that he was given the mask by the defendant and told to wear it whenever he was in the chlorine room. He however, denied ever being shown how to put on the mask.

34. The defendant's witness Raymond Wynter, as the Maintenance and Facilities Manager at the defendant's factory, was responsible for amongst other things; the maintenance of equipment used in the factory and maintenance of all facilities. As such he was the claimant's immediate supervisor but was not on the compound at the time of the accident on August 27, 2007.

35. His evidence was that there were eight people, including the claimant and himself, trained to change the cylinders. He said he did not personally tell the claimant anything about how to change cylinders.

36. In his witness statement Mr. Wynter stated that one training session was conducted in 2004 on the safe handling of liquid chlorine. This was a six hour work shop. He noted that this training involved practical demonstrations on how to properly change a chlorine cylinder and how to put on the chlorine mask. He claimed that the claimant was a participant at this session. He was sure of the claimant's participation because he sat beside him. He said the training was conducted by a Mr. J. A. Brown of Jamaica Water Treatment Company Limited.

37. He said the training involved them doing a physical (by this I accept he meant practical) and they were trained for one person to change the cylinders.

38. This was however, denied by the claimant who maintained that no training workshop had been held. He said what he knew about changing the cylinders he learnt on the job. Significantly however, Mr. Wynter testified that only one other training session was held dealing with the changing of the chlorine cylinders and this was in 2008.

39. According to the evidence of Mr. Wynter the claimant was responsible for the water treatment from 1992, but the first training was held in 2004. It is clear therefore that between 1992 and 2004 the claimant was indeed learning how to change the cylinders on his own.

40. Mr. Wynter further stated that manuals were provided which contained detailed descriptions of the chlorination process as well as

the component parts of the system. It also contained detailed instructions. He claimed that a copy of the manual was made available to the claimant. Again this was denied by the claimant and more significantly, no such manual was produced by the defendant to the court.

41. He also claimed that detailed instructions were laminated and posted on the walls in the chlorine room in the vicinity of the cylinders for all to see. Again the claimant denied that there were any such instructions posted in the chlorine room.

42. In his witness statement, Mr. Wynter outlined the proper procedure for changing the cylinders. The procedure that he outlined was as follows:

(a) The valve stem is turned clockwise to turn the cylinder valve.

(b) The flow metre is to drop to zero to indicate no gas is in the cylinder.

(c) Float should remain at zero. If it flutters or does not drop to zero, the valve may not be tightly closed. Ensure valve is tightly closed.

(d) Ejector water supply to be turned off while ensuring still at no gas position. Turn reset knob. If reset occurs there may still be gas present or there may be an air leak.

(e) The gas feeder yoke screw is loosened and the gas feeder is then removed from the valve.

(f) The chlorine gas cylinder is then removed.

(g) The old lead gasket is removed, mating surfaces of gas feeder and valve is cleaned and new lead gasket installed.

(h) Gas feeder is positioned on the new chlorine gas cylinder and yoke screw tightened.

(i) Chlorine gas cylinder valve is opened and closed quickly checking for leaks. If there are leaks steps (b), (c), (d) and (e) are repeated and leaks corrected.

(j) The chlorine gas cylinder valve is opened ¼ turn while leaving the cylinder wrench on valve reset indicator

(k) The ejector water supply is then turned on.

43. He claimed that he had used this procedure to change the cylinders and had never had an accident or inhaled chlorine. He also claimed that the claimant's accident would not have occurred if he had followed the proper procedures.

44. According to the claimant, when full, the chlorine tank is over 175 pounds in weight. Mr. Wynter agreed that an empty cylinder was over 100 pounds and estimated that a full cylinder would be approximately 150 pounds.

45. The claimant told the court that the material used to make the cylinder was also extremely thick. He asserted that he could not lift it on his own. In order to move it, he had to rock and roll it on a part of its circular edge. He did so by tilting it at an angle. He said this became even more difficult as he advanced in age. No one was assigned by the

defendant to assist him. To install a full cylinder he had to call for assistance from someone in the factory.

Employer's Liability

46. Mr. Kinghorn in his submissions on behalf of the claimant pointed to the common law duty of care owed to an employee by an employer, as expounded in ***Davie v New Merton Board Mills Limited*** *(1959)1 ALL ER 346;* a duty which included the provision of a competent staff of men, adequate plant and machinery and a safe system of work with effective supervision. Subsequent cases added the element of a safe place to work.

47. It was submitted that the duty meant that the employer must organize a safe system of work for his employees and put in place a means of ensuring it was adhered to. He pointed to the well known definition of a safe system of work per Lord Greene MR in ***Speed v Thomas Swift and Co Limited*** *(1943) KB 557 at 563-4,* where he stated;

> ***"I do not venture to suggest a definition of what is meant by system, but it includes, in my opinion or may include according to circumstances, such matters such matters as 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 the proper cases of warning notices, and the issuing of special instructions."***

48. Lord Greene then went on to express his recognition of the fact that while a system may be adequate for the whole course of the job, it may have to be modified or improved to meet any circumstances that may arise.

49. The attorney, in his submissions, accepted that by this definition there may be instances where the existing system of work had to be modified or improved. He further submitted that it was incumbent upon the employer to have an effective team of safety managers and/or supervisors to conduct evaluations and make recommendations or suggestions for improvements. He cited Stanwick J in ***Stokes v GKN (Bolts and Nuts)Ltd*** *(1968) 1 WLR 1776 at p 1783* where the learned judge stated the test to be that of:

> ***"the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know."***

50. Mr. Kinghorn also pointed to the duty to supervise which included the duty to ensure that workmen utilized the safety equipment provided for use by employees. He reminded that the law recognized that workmen were often careless of their own safety so that the onus was on the employer to devise a system which reduced the risk of injury to their employees resulting from their own carelessness.

51. Citing ***General Cleaning Contractors v Christmas*** *(1953) AC 180,* it was submitted on behalf of the claimant that it was not open to the defendant to say that the claimant was experienced and could reasonably be expected to devise a safe system for himself.

52. On the issue of training, Mr. Kinghorn submitted that a safe system of work also included the type and quality of the training provided.

53. Ms. Madourie submitting on behalf of the defendant accepted that there was a duty owed to the claimant as an employee. She contended that based on the evidence of Mr. Wynter, the defendant had in fact discharged its duty to the claimant. Counsel also pointed to the

training conducted in 2004 in which the claimant was a participant. She pointed to the fact that instructions were posted in the chlorine room and the requisite safety equipment (the mask) provided.

54. In her view the defendant was not negligent. However, she submitted that in the event that the court were to find that the defendant was in fact in breach of its duty of care owed to the claimant, the claimant was also contributory negligent, as he did not take reasonable care for his own safety. It was his own want of care which contributed to his injury.

55. Counsel denied that the defendant had failed to discharge its duty to the claimant. It was submitted that after the first two accidents the claimant knew that there was a risk of injury if he did not take reasonable care. It was solely the claimant's responsibility to tighten the valve before the cylinder was removed.

56. The attorney pointed out that the claimant was aware that if the valve was not tightly sealed off the gas would escape. He also knew the indicators when gas was in the cylinder. He knew that if gas was in the cylinder he was not supposed to change it. Although he denied saying in his witness statement that he noticed gas was in the cylinder but he took it off anyway, Ms. Madourie pointed out that his son was present when he gave his statement and it was read over to him and he signed it.

57. The attorney submitted that given the presence of markings on the chlorinator and the evidence that the ball was at the number two when the cylinder was changed, the claimant would have removed the cylinder when it was clear to him that gas was still in it. The claimant must have appreciated the danger of the gas escaping if the cylinder

was removed with gas in it. By removing it knowing of the danger involved, the claimant exposed himself to the foreseeable risk of gas escaping causing him injury.

58. It was contended that the claimant's pleadings and evidence disclosed that he was guilty of contributory negligence as he did not act reasonably in his own interest and by his own want of care, contributed to his own injury.

59. The contributory negligence in this case referred to the claimant's injury. The claimant is required to act reasonably to avoid the foreseeable risk of injury to himself. It was submitted that the claimant failed to properly close the cylinder valve before removing it from the chlorinator as a result of which chlorine gas escaped and overpowered him.

60. It was submitted that liability should be apportioned equally between the claimant and the defendant. The defendant cited the case of ***Clifford v Charles H. Challen and Son Limited*** *(1951) 1 ALL ER 7.* In that case a workman contracted dermatitis from using glue. There was a protective cream provided but he did not use it. The foreman did nothing to enforce the use of the protective cream. It was held that the cream should have been available in the shop itself. Also that there should have been an established system whereby the men used the cream in accordance with government guidelines and the employers were held liable for failing to take such measures. The workman was held guilty of contributory negligence. Liability was apportioned equally. The court determined that the workman knew that the glue was dangerous and he knew what precautions to take to minimize the danger but failed to take them.

61. It was further submitted that in this case the claimant knew that chlorine gas was dangerous, he knew that if the valve was not tightly closed it would likely escape and cause injury. He also knew he was not to remove the cylinder with gas still in it because of the likelihood that gas could escape. By removing the cylinder nevertheless he contributed to his own injuries and damages should be reduced by 50%.

Was The Defendant Liable?

62. It was accepted by both parties that the claimant was employed to the defendant as a plumber under a contract of service. There was no dispute that as between the claimant and the defendant there had been a relationship of employer and employee. As such, the defendant employer owed the claimant a duty of care to take reasonable care for his safety and not to expose him, during his employment, to any foreseeable risk of injury. The duty involved the protection of his health and safety.

63. In this case the claimant was 78 years old, indeed an elderly gentleman, at the time of his accident. He was assigned by his employers to work alone handling extremely heavy and potentially lethal cylinders, both while full as well as when empty. No reasonable assistance was provided to him while he was involved in this process. The fact that he had to rely on a passerby for assistance was untenable. This aspect of the claimant's evidence was completely unchallenged by the defendant.

64. The claimant by having to rock and roll the cylinder by himself in order to move it, ran the risk not only of exposure to the gas but also to the heavy tank slipping and falling causing serious injury.

65. The duty of care owed by an employer to an employee must be measured by the known or reasonably foreseeable characteristics of the individual employee. (See the decision of the English House of Lords in ***Paris v Stephney Borough Council*** *(1951) AC 367)*. In this case the employee was an elderly gentleman working well beyond the normal retirement age in an area carrying some degree of risk. The advantages of his years of experience were equally matched by the disadvantages of the frailties of advancing years.

66. In fact it is doubtful whether the claimant should have been employed in this area at his age. Certainly after the first two accidents, it is clear he should have been relieved of this duty. In ***Withers v Perry Chain*** *(1961) 1 WLR 1314 at 1320* Devlin LJ opined that there was no legal duty upon an employer to prevent an adult employee from doing work which he was willing to do. But in ***Coxall v Good Year Great Britain Ltd.*** *(2002) EWCA Civ 1010 (2003); 1WLR 536 at (29)*, Simon Brown LJ held that this was not an absolute rule and found in the case before him that despite the employee's desire to remain at work, there was a duty to dismiss him for his own good and to protect him from danger. Brook LJ however, agreed the employer was liable on the facts but only for failing to discuss with the employee what his options were in light of his vulnerability.

67. I agree with the approach of Simon LJ and in applying it to this case before me, I would hold that the employer had a duty to this particular employee to either relieve him of this particular duty or terminate his employment, once it became clear, that with advancing years, he could no longer conduct that work accident free.

68. Although the duty of care is enumerated in the authorities by categories, I would be so bold as to borrow from the words of Parker L J in ***Wilson v Tyneside Window Cleaning Co.*** *(1958) 2 QB 110 at p.124,* where he said:

> ***"it is no doubt convenient, when one is dealing with any particular case, to divide that duty into a number of categories; but for myself I prefer to consider the master's duty as one applicable in all circumstances, namely, to take reasonable care for the safety of his men."***

69. Duty is a relative concept and it is owed to the foreseeable victim, that is, to the individual workman within the scope of the risk created. The employer will not be held responsible for unforeseeable consequences. The question of whether there was a breach of duty relates to the precaution the ordinary reasonable and prudent man would take in light of the risk of an accident occurring and the gravity of the injury should an accident occur. The gravity of the injury is a relevant consideration in assessing whether an employer acted with due care.

70. The duty to ensure the safety of his employees extends to taking care to ensure that the premises where employees are required to work are reasonably safe. It is a duty which also obliges the employer to carry out his operations in such a way as not to subject those employed by him to unnecessary risk. See ***Wilsons & Clyde Coal Co. v English*** *(1938) A.C. 57 at p78.*

71. There is a duty to instruct, warn, and supervise. In ***Lewis v High Duty Alloys Limited*** *(1957) 1ALL ER 720,* the plaintiff was given minimal instructions on how to oil the machines at the work place. He was in

the habit of oiling the machine while it was in motion but was never reprimanded. His employers were held liable for failing to issue proper instructions to him and to reprimand him to oil the machines in the proper way. In failing to provide adequate training they failed in their duty at common law not to expose the plaintiff to unnecessary risk.

72. This duty also involves the provision of a competent staff, adequate plant and equipment and a safe system of working, with effective supervision. The employer's duty is not an absolute one and is discharged if he exercises reasonable care in all the circumstances. See Wolfe J in ***United Estates v Durrant*** *(1992) 29 JLR 468 at p 470.*

73. There is no doubt that the defendant provided the claimant with the necessary safety equipment; in this case a gas mask. The claimant was issued with the mask and instructed to wear it when exchanging the cylinders. When worn the mask prevented the claimant from inhaling chlorine gas accidentally. There was no evidence that when worn properly the mask did not function as it should. In fact it was the claimant's evidence that on one occasion gas was leaking but he was wearing his mask and did not smell it. It was only when it was brought to his attention by his supervisor and he removed the mask, that he smelled the gas.

74. I find that the failure of the mask to prevent the accidental exposure to gas on August 27, 2007, was not due to any defects in the mask itself but resulted from the inability of the elderly claimant to manage the heavy cylinder on his own, in the face of the unexpected gush of gas onto him. It was the falling cylinder which knocked the mask from his face. I reject his evidence in cross-examination that when he was

leaving he smelled gas and went back into the room. If this were so, he would in all probability have been overcome and would have had to run for milk long before the cylinder knocked the mask from his face.

75. The smell of gas while wearing the mask would have been a clear indicator that the mask was not working. On the contrary I accept his witness statement that on leaving he heard a sound as if air was escaping, which caused him to go back into the room to check the cylinder. He was operating by sound and not by smell when he went for the larger wrench and turned the valve.

76. I find on a balance of probabilities that the mask was generally adequate to prevent the claimant from inhaling the chlorine gas.

77. The next question is whether there was a system of work and if so whether it was safe. It is not for every simple task that a system of work needs to be devised. Where the task is complicated or prolonged, involving many workmen performing different tasks at different times or where it is dangerous or unusual then it is generally accepted that is reasonable to have a safe system of work in place.

78. Where the task is routine and lacking in danger it may be possible and reasonable to leave it up to the individual workman. However, in my view even if the task is simple and routine but fraught with inherent dangers, it may be necessary to provide a reasonable safe system of conducting this task taking into consideration the dangers which lurk in its operation.

79. It is a question of fact for the court whether a system of work is reasonably required having regard to the nature of the operations at

the employers place of work and if one exists, whether it is reasonably safe with all the attendant necessary supervision.

80. The claimant's task, though appearing to be a simple one, was fraught with inherent dangers. In my view the danger was obvious. The defendant failed to take any precaution against this obvious danger. The defendant cannot be heard to say that he left it to the claimant who was experienced to devise his own system. For example did the defendant provide for a minimum amount of persons to be in the chlorine room at all times to assist the plumber when the cylinders were being changed? What provision was made for the heavy cylinders to be moved? What was the safety protocol in case of a leak? Should assistance be called for in the case of a leak before rehabilitative measures are taken? Are spare masks available in the chlorine room in case of emergencies?

81. In my view the defendant failed to provide a safe system for the claimant to change the cylinders and was therefore in breach of its duty of care.

82. The evidence was that there was no staff of men working in the chlorine room. The irrigation plant operated automatically. Whatever was the exact weight of the cylinder, I have little doubt they are quite heavy, even when empty. There was no staff designated by the defendant to assist with moving or handling the cylinder. There was inadequate equipment and staff provided to move the cylinders both the empty as well as the full cylinders.

83. The cylinders were changed based on the level of chlorine in the water. This was determined by the chemist in the quality control department. However, it was left to the claimant to determine the level

of chlorine gas in the cylinder when exchanging it. For instance what was the protocol if the chlorine level in the water was low but chlorine was still in the cylinder to be changed? This was the dilemma facing the claimant in this instance.

84. It was generally recognized that there was a possibility that there may be gas in the cylinder at the time it was being removed. It is obvious that the defendant recognized that there was a possibility of exposure to the gas. Thus the provision of the mask. Therefore, there ought to have been a system in place to prevent exposure to that gas over and above the mere provision of a mask when in the chlorine room. It is clear from the evidence of the second accident which was unchallenged, that the gas was capable of escaping beyond the chlorine room.

85. During his tenure at the defendant's company the claimant has had four different supervisors. They were all aware of the difficulties he encountered in changing the cylinders and his previous exposures to the gas. At no time was any adjustment made to the system neither was anything done to remedy the problem. This is a matter of supervision. Based on the evidence it is clear that there was no adequate supervision of the claimant's work in the chlorine room.

86. If the defendant was to be believed there was one training in 2004 to which the claimant was exposed. The incident occurred in 2007. There were at least two accidents before the one the subject of this claim. As in ***Lewis v High Duty Alloys Limited,*** no steps were taken to have the claimant conform to the training procedures or to provide refresher courses which were clearly needed. Neither was any step

taken to remove or transfer the claimant from his duties involving the water treatment.

87. The defendant's witness itemized the procedures to be followed in changing the cylinders but no steps were taken to ensure the claimant was indeed following those procedures.

88. I am not to be understood to be saying that it was necessary to stand over the claimant and watch him change the cylinders on each occasion. But the duty involves refresher instructions on the proper procedures to be followed and periodic supervision and inspection. This was even more crucial not only in light of the nature of the gas but also in light of the claimant's age and previous exposures.

89. At the time of the accident there was no safety manager on the compound. The Human Resources Department dealt with safety issues. There was a designated individual. The department was supposed to be responsible for the safety of Mr. Leith while on the job.

90. There was no evidence that the requisite officer in the human resource department conducted any safety checks in the chlorine room or did anything to ensure that the claimant was adhering to proper safety standards especially after they were alerted to his previous accidents.

91. An employer is expected to take all reasonable steps to maintain plant and equipment at the workplace and will be held liable for any harm which results from the breakdown or defect which he ought to have discovered through reasonable diligence.

92. In this case there was no evidence of safety standards at the plant with respect to the chlorination process and especially the changing of the chlorine cylinders. Despite the fact that there were reportedly two

earlier incidents of exposure to leaking gas the defendant failed to implement any training or safety code or procedure to deal with the issue. There is no evidence that cylinders were subjected to any testing before installation or whether the earlier defective cylinders were replaced. In ***Young v Hoffman Manufacturing Co***. (1907) 2 KB 646 cited with approval by Lord Wright in ***Wilsons & Clyde,*** Kennedy L.J. in his judgment stated that:

> ***"The employer, as against his employees, undertakes , inter alia, (a) to use reasonable clear judgment in the selection of competent fellow servants; (b) in having and keeping his machinery the use of which might otherwise be dangerous to the servant in his employment, in proper condition and free from defect.***

93. There was no evidence provided of any maintenance records kept by the company on the cylinders used in the irrigation plant or any safety protocols involving the removal of defective cylinders from service. Also there was no evidence of any system in place for the periodic monitoring and testing of the cylinders to detect defects.

94. Though it is accepted that the defendant removed the cylinder when he knew there was still a little gas left in it, on the facts of the case this was not the major cause of the accident. It is clear from the evidence that the valve on the cylinder was defective so that when the claimant attempted to tighten it, the defect resulted in an outpouring of gas which over powered him.

95. The burden of proof rest on the claimant to satisfy the court, on a balance of probabilities, that Jamaica Citrus Growers was negligent and that their negligence caused his injury. This he has done.

Contributory Negligence

96. Ms. Madourie submitted that even if the company was found liable the claimant was equally liable. Lord Diplock in ***Jones v Livox Quarries Ltd*** *(1952) 2 QB 608, at p 615* expounded on the principle of contributory negligence and amongst other things said this;

> ***"A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man, he might hurt himself, and in his reckonings he must take into account the possibility of others being careless."***

97. The principle of contributory negligence recognizes that a man is expected to take ordinary care of his own safety. There is some debate in the law as to what extent an employee is to be held contributory negligent for injuries sustained on the job. There is some view that the standard of care which is expected of a claimant is less when that claimant is a workman in a factory. This has been more generally recognized however, in cases where the claim is for a statutory breach.

98. In ***Flowers v Ebbw Vale Steel, Iron and Coal Co. Ltd.*** *(1934) 2 KB 132, at p 40,* Lawrence J in considering the extent to which an employee was contributory negligent, took the view that the court should take into account all the circumstances of work in a factory. He concluded that it was not every risky thing which a workman did in a factory due to his familiarity with the machinery, for which he should be held contributory negligent.

99. The court starts with the basic assumption that the claimant had taken a risk, then goes on to assess the nature and quality of the risk taken, whether it was momentary inattentiveness or pure folly, whether it

amounted to recklessness or carelessness on the part of the claimant in circumventing any existing safeguards or whether it was done in a moment of instinct or emergency.

100. In ***Bailey v Gore Brothers Ltd.*** *(1963) 6 WIR 23,* Lewis JA said;

> ***"Where contributory negligence is set up as a defence, it is only necessary to establish to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by his own want of care, to his own injury; for where contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that where a man is part author of his own injury he cannot call on the other party to compensate him in full.."***

101. The test is whether the workman ought reasonably to foresee the likelihood of injury to him and whether he took reasonable steps to avoid it.

102. In this case the evidence of the claimant in his witness statement was that he proceeded to change the cylinder although there was a little gas still in it. He said while walking away he heard a noise as if air was escaping from the cylinder. He knew this was not supposed to happen and said that this meant the tank was defective. Yet he still went back alone to attempt to tighten the valve. He did so even though he had previously been exposed to leaking gas which he claimed went into his nostrils despite the fact that he was wearing a mask. He therefore knew the danger but decided to take the risk any way.

103. In cross-examination the claimant went even further and alleged that when he stepped off he smelled gas. This despite the fact that he was wearing the mask. Yet he claimed that he went back to close the

valve. Even if I were to believe this evidence, which I do not, he still would have deliberately exposed himself to the leaking gas.

104. I also find from the fact that, despite the leaking gas he still went to tighten the valve, that this was indeed an admission that he knew he had not previously tightened the valve before changing the cylinder. He therefore took the risk of the leaking gas to do that which he had previously failed to do. This I find on a balance of probabilities contributed to his injuries.

105. The claimant also knew that with his advancing age he was no longer able to properly manage the heavy cylinders but failed to communicate this to his employer and ask for adequate assistance or to be relieved from this duty. In that regard I also find this failure to be a contributing factor.

106. This brings me to the question of apportionment. On this point I find Lord Reid's statement in ***Stapley v Gypsum Mines Ltd*** *(1953) AC 66,* most instructive. He said;

> ***"A court must deal broadly with the problem of apportionment and in considering what is just and equitable, must have regard to the blame worthiness of each party, but the claimant's share in the responsibility for the damage cannot, I think be assessed without considering the relative importance of his acts in causing the damage apart from his blame worthiness."***

107. In ***Froom v Butcher*** *(1976) QB 286,* Lord Denning in applying the principle to seat belt cases noted that the issue was not what caused the accident but what caused the damage. In taking that approach to this case I find that the damage was caused partly by the defendant's negligence and partly by the claimant's actions.

108. In this case the claimant's attempt to tighten the valve on a cylinder he knew to be leaking and therefore defective and which was too heavy for him to manage alone was an act of sheer folly. The claimant had experienced this problem before and ought to have been alerted to the danger. On the previous occasion the valve needed a new washer. This time he made no effort to check the valve before using the bigger wrench to tighten it. I find the claimant's conduct relevant and where his injury partly results from his own folly the defendant may escape partial liability.

109. However, I take into consideration the fact that the claimant had received no training or instructions on what to do or what not to do in the event of a leak. It is understandable therefore, that in the absence of any contrary instructions, his concern was to fix the leak so as not to expose the entire factory and did not give thought to his own safety.

110. This case is distinguishable from ***Clifford's*** case and I find the claimant to be 15% liable for his own injuries.

111. Having made this finding on the question of liability I will now consider the question of the quantum of damages in light of the submissions made by counsel for both parties.

Damages

112. The claimant's evidence was that after the accident on August 27, 2007 he was given a box of milk which he drank. He was assisted to the first aid clinic at the factory and then to the hospital. At the hospital he lost consciousness. When he revived he was in the offices of Dr. Bent. His evidence was that Dr. Bent blew the chlorine from his nostrils. Doctor Bent also sent him to a Dr. Donaldson in Kingston.

Following that he was admitted to the Medical Associates Hospital where he spent 5 days.

113. At the hospital he was x-rayed. He experienced shortness of breach and could not breathe. His blood pressure was elevated.

114. The medical report of Dr. Donaldson dated February 15, 2008 was exhibit 3 in this case. It indicated that the claimant was seen and admitted with stridor, wheezes and crackles in all lung fields, as well as mild respiratory distress and moderate obesity. He also noted he had a past history of hypertension and hypercholesterolaemia. Other than the chest signs noted, mild respiratory distress and moderate obesity there were no other significant findings.

115. His chest x-rays were normal except for an inflammatory patch. He was started on IV steroids on admission, which continued in full dose until he was 24 hours wheeze free. The report went on to note that on the 4th post-admission day he was found to have a 2 hour post prandial blood sugar of 17.6 mmol/L. He remained euglycaemic on his last two follow up visits.

116. The doctor in his report noted:

> "***While it's obviously difficult to assess the antecedents of his diabetes, I note that he had components of the metabolic syndrome (obesity, hypertension, hypercholesterolaemia and impaired glucose tolerance) so he was a good candidate to develop steroid induced diabetes. He should continue on his present anti-diabetic drugs and of course diet, exercise and weight loss.***"

117. The medical report of Dr. J.M. Bent dated November 25, 2008 was exhibit 2. When seen in Dr. Bent's office on August 27 after the accident, he was wheezing. He was nebulized with ventolyn and

steroids. He was then referred by Dr. Bent to Dr. Donaldson at the Medical Associates Hospital. It was Dr. Bent's opinion that the lung inflammation was life threatening.

118. The claimant was 212 pounds in August 2007 but was not diabetic and had no family history of diabetes. In 2008 his induced diabetes as a result of the steroids had not resolved itself and he was on medication. On September 29, 2008 he did a sugar test and his sugar was stable on medication.

119. The claimant therefore sustained inflammation of the lungs as a result of the exposure to the chlorine gas which caused shortness of breath and wheezing. He was nebulized and treated with steroids. After 5 days the wheezing stopped but unfortunately his blood sugar level went up. However, his lungs were totally clear by October 2007.

120. There is no medical evidence pointing to any long term effects on the claimant's lungs resulting from the accident. The claimant, however, stated that he suffers shortness of breath when he walks too long a distance.

121. The claimant has however, developed diabetes as a result of his treatment with steroids.

122. It is clear that the claimant developed this disease as a result of the exposure to the chlorine gas and resultant treatment. The necessary causal link has been established between the defendant's negligence and the claimant's injury.

123. I believe it is trite law that where a claimant develops a disease as a result of cumulative exposure to a noxious substance, even if it is only partly attributable to the defendants breach of duty, it is not necessary to show that he would not have suffered the disease at all but for the

breach. The claimant need only prove that the breach of duty was a material contributor out side of the de minimis range.

124. In this case, the claimant was a healthy man in his late seventies at the time of his accident. He was exposed to a noxious gas for which he needed to be treated. The side effect of that treatment was onset diabetes. The defendant's liability extends to the consequences of the claimant's injury even if it is unknown or not reasonably foreseeable.

125. In ***Brewster v Davis*** *(1992) HC Barbados No. 944 of 1989* unreported and ***Crandall v Jamaica Folly Resorts ltd.*** *(1999) CA Jamaica Civ App No. 102 of 1998* unreported both accepting the egg shell skull principle, that you take your victim as you find him. In ***Crandall*** the claimant suffered injury for which he had to have two surgeries. As a result of the surgery he suffered a heart attack. It was held that the heart attack resulted from the surgeries which he would not have had to have but for the injuries. The defendant was therefore liable both for the injury and for the heart attack. In ***Brewster*** the claimant who had lupus became stressed and anxious following a car accident with the defendant. Her condition was exacerbated by her anxiety resulting in renal failure. The defendant was held liable for the consequences of the renal failure.

Submissions on Damages

126. In pointing out that this particular case had no exact precedent the claimant's attorney cited the case of ***Icilda Osbourne v George Barnes,*** *Claim No 2005 HCV 29,* a judgment of Mr. Justice Sykes where he said:

> ***"I should state at the outset that there are broad principles that must be taken into account when assessing personal***

injury claims. One is that while there ought to be consistency in personal injury awards in a particular jurisdiction, this must not outweigh the fact that the court is not compensating an abstract claimant but the one before the court."

127. The learned judge then went on to state that compensating the particular claimant did not mean that the court would ignore similar awards. He noted that in personal injury cases compensation involved both an objective and a subjective element. The objective element being the injury itself which the claimant sustained and the subjective element being the awareness of the claimant and the knowledge that he will have to live with the injury for however long.

128. In this case the claimant is an 81 year old man who is now diabetic. His diabetes was brought on by the steroids used to treat him for his exposure to the chlorine gas. He says his life expectancy has been reduced as a result.

129. The claimant also cited the case of ***DeSouza v Trinidad Transport Enterprises Ltd and Nanan (No.1)*** *(1971) 18 WIR 138* where Hassanali J outlined the considerations for assessing general damages. These include the nature and extent of the injuries sustained; the nature and gravity of the resulting physical disability; pain and suffering which was endured; loss of amenities suffered and the extent to which consequently the plaintiff's pecuniary prospects have been materially affected.

130. The evidence in this case was that the claimant was already in advanced age at the time of the accident. However, he appeared to have been in reasonably good health. He had been working well beyond the age when most men would have retired.

131. The claimant's attorney submitted that there were no authorities which were on all fours with this unusual case. He cited for the guidance of the court the case of ***Pelter v The University of the West Indies*** 30 Barb. L.R. 169. In that case the claimant suffered a bronchial asthmatic attack and allergic reaction to certain scents. She had inhaled certain noxious substance in the laboratory. She pleaded acute bronchial irritation with persistent cough, intense chest pains and discomfort associated with shortness of breath. At first instance she was awarded the sum of $32,000.00 Barbadian dollars in April 1994. This sum translated to $535,200.00 Jamaican dollars at April 1994. Applying the current price index it updates to a sum of $3,347,134.38 Jamaican dollars.

132. On behalf of the claimant it was asserted that his injuries were more serious and permanent with debilitating consequences and as a result the view was expressed that a sum of $10,000,000.00 was a reasonable award.

133. On behalf of the defendant however, it was submitted that the injuries for which the claimant had sued were those suffered on August 28, 2007. Those injuries were particularized in the claim as shortness of breath, wheezing, onset diabetes, lung inflammation.

134. The attorney for the defendant pointed to the fact that none of the medical reports indicated any long term effects to the claimant's lung. She noted that the lung inflammation had resolved itself by October 2007 when the lung was declared by Doctor Bent to be totally clear.

135. She accepted that there was onset diabetes caused by the treatment with steroids but observed that it was being controlled with medication.

136. Agreeing that this case was unique in the sense that it lacked precedent, counsel however, rejected the utility of ***Pelter's*** case. She indicated firstly, that the award in that case had been set aside on appeal. Secondly there was no guidance offered to the court on how that case was to be used in this jurisdiction. In particular there was no evidence of any similarities in the social, economic and industrial conditions between Jamaica and Barbados, which was necessary to assist the court when attempting to utilize in this jurisdiction an award made in a foreign jurisdiction.

137. In support of this contention she cited the Privy Council case of ***Singh (an Infant) v Toong Fong Omnibus Co. Ltd.*** (1964) 3 All ER 925 at p 927. In that case Lord Morris of Borth-y-Gest giving judgment in the privy council in a case on appeal from Malaysia approved the proposition that:

> ***"To the extent to which regard should be had to the range of awards in other cases which are comparable, such cases should as a rule be those which have been determined in the same jurisdiction or in a neighbouring locality where similar social, economic and industrial conditions exist."***

138. Following the practice in local courts of citing English authorities as guides for assessing damages, she went on to cite ***Sola v Royal Marsden Hospital*** *(1997)C.L.Y. 1948.* In this case a 51 year old theatre nurse was retired on the grounds of ill health after she suffered from occupational asthma brought on by exposure to the chemical cidex while working as a theatre nurse. She also became depressed as a result of the stress of working in nuclear medicine and the

uncertainty of her continued employment. She was awarded general damages in a sum of 14,000 pounds sterling in 1997.

139. The formula for converting such awards was applied by the Court of Appeal in ***JPS v Winston Barr*** *25 JLR 326.* It was subsequently set out in the case of ***Linden Palmer v Donald Mendes*** *Suit No. C.L. 072/1990 and C.L. P 176/1990 (unreported) March 20, 1997.* Using that formula the award updated would be 51,800 pounds sterling.

140. It was submitted that the figure would have to be reduced for contingencies of life and for the fact that it was an immediate lump sum payment. In ***Barr*** the court applied a reduction of 50%. The claimant in ***Barr*** was 24 years old. This was held by the Court of Appeal to be too high in the circumstances of that case and they reduced it to 30%.

141. It was submitted that in the circumstances of this case, given the age of the claimant and the kind of injury sustained (it being less severe than in ***Barr***) a 50% reduction should be applied. With a 50% reduction the figure amounts to 25,900 pounds. When converted using an exchange rate of the pound sterling as at June 9, 2010 of 125.39, the award is $3, 247,601. When this is reduced by 1/5 for the immediacy of the payment the award is $2,598,080.8

142. It was submitted that the injuries in ***Sola*** were more severe. In ***Sola*** the claimant had a permanent injury to the lung in the form of occupational asthma. She was also diagnosed as clinically depressed. There is no medical evidence or any other evidence regarding the effect that the onset of diabetes has had on the claimant's quality of life. The medical evidence is that he is on medication and stable.

143. It was submitted that an award of $2,000,000.00 was adequate compensation for injuries sustained and that this should be reduced by 50% on the basis of the claimant's contributory negligence.

General Damages

144. In cases such as these all that a court can seek to do is to make an award that is fair. Fairness is usually achieved by ensuring consistency in the level of awards. Consistency is achieved when there is an award of a conventional sum assessed after comparison is made with awards made in similar cases in the past. This case however, has no precedent. I think it may be relevant here to quote from Lord Woolf MR in ***Heil v Rankin*** *(2001) QB 272* where he said:

> ***"Excessive importance must not, however, be attached to consistency. Care must be exercised not to freeze the compensation for non-pecuniary loss at a level which the passage of time and changes in circumstances make inadequate. The compensation must remain fair reasonable and just. Fair compensation for the injured person. The level also must not result in injustice to the defendant, and it must not be out of accord with what society as a whole would perceive as being reasonable."***

145. Guidelines for assessing general damages were laid down by Wooding CJ in the case of ***Cornilliac v St Louis*** *(1965) 7 WIR 491 CA, T&T at p. 492.* There the learned Chief Justice suggested that the court in assessing damages should take into account the nature and extent of the injuries sustained; the nature and gravity of the resulting physical disability; the pain and suffering which had to be endured; the loss of amenities suffered; and the extent to which, consequentially, the claimant's pecuniary prospects have been materially affected.

146. It has generally been accepted that these considerations, all told, would include the three general headings found in the English authorities, that is, pain and suffering, loss of amenities and loss of future earnings. ***(Heerallall v Hack Brothers (Construction) Co Ltd.*** *(1977) 25 WIR 117, p.125*). All a judge can do is work out a conventional sum based on a pattern which the ordinary reasonable man would not consider as too meager or too extravagant but regard it as sensible and fair.

147. The question is what would be a reasonable award in all the circumstances. No amount of money can adequately compensate for the loss of good health. But it can go a long way with easing the claimant's burden.

148. The claimant suffered a lung inflammation. It was life threatening. He could not breathe. He suffered shortness of breath. His blood pressure went up. He felt as if he was going to die. At one point he passed out. He spent five days in hospital and was treated with steroids. There is no evidence of pain in the strictest sense but there is evidence the claimant suffered as a result of the exposure. He was discharged with onset diabetes. It was expected to be temporary. It did not turn out that way. He is still diabetic.

149. The Lung inflammation had resolved itself. However, he is still easily out of breath. The diabetes is a chronic lifestyle disease for which medication is continuously required. In later years it can become debilitating. The claimant is already in his later years. He continues to visit the doctor regularly. The claimant had been a healthy elderly man who had still been able to undergo the rigors of work. Because of the shortness of breath he can no longer walk for long distances. He

has stopped working. He will have to be constantly on medication, diet and exercise. He fears he will die soon.

150. I have considered the submissions of both counsels. Counsel for the claimant urged the use of English authorities in the absence of any direct local precedent. Using her own arguments, there is no evidence on the economic and social conditions in Britain vis a vis Jamaica. Barbados on the other hand, is a neighbouring jurisdiction and as a part of the West Indies with all its antecedent history and development, in my mind should be much closer in its social and economic conditions to Jamaica than England. Unfortunately the award in the case cited by counsel for the claimant was set aside. It cannot therefore be relied upon.

151. In light of the necessity to have a starting point and there being no guide to be had from similar awards here or in any neighbouring jurisdiction, I adopt the approach of Ms. Madourie and rely on the case of ***Sola*** as a guide. However, I part company with her on two accounts. Firstly, I do not agree that ***Sola's*** case is more serious. The claimant now suffers from occasional respiratory distress. Diabetes is a chronic and potentially debilitating illness. Secondly, I do not accept the proposition that the award should be discounted by 50% for contingencies. I believe 30% is a more reasonable discount to take into account the differences in the economic and social conditions between Jamaica and England, as well as the uncertainty as to when or if the disease will become debilitating.

152. Scaling down for immediacy of payment, I am of the view that an award of $3,600,000.00 is a reasonable sum in all the circumstances.

Loss of Future Earnings and Loss of Earning Capacity.

153. Citing ***Icilda Osbourne v George Barned and Others*** *Claim No. 2005 HCV 294* unreported, delivered February 17, 2006, the claimant sought to be compensated under both these heads. For loss of future earnings it was submitted that the claimant will not be able to work again. It was submitted that the fact of the claimant having worked beyond his years of retirement suggests that he had a need to do so. A period of three years was suggested using the multiplier/multiplicand approach.

154. This suggest that the claimant but for the accident, would have worked into his eighties.

155. Loss of earning capacity is generally described as Handicap on the Labour Market. A lump sum of $800,000 was sought under this head.

156. The attorney for the defendant on the other hand, citing ***Dawnett Walker v Hemsley Pink*** *SCCA No. 158/01 (unreported) delivered June 12, 2003*, submitted that there was no medical evidence to indicate that the claimant could not have worked if he so desired. It was submitted that on the contrary, the medical report of Doctor Bent indicated that his chest was completely clear in October 2007 and Doctor Donaldson deemed him fit for work in 2008.

157. It was submitted that the claimant's inability to work was a feature of his age and not a consequence of his injury. There was also no evidence on which the court could determine the claimant's remaining working life in order to make these awards.

158. I accept the argument of the defendant's attorney in this regard. The claimant had been working well into his seventies; there was no evidence as to how much longer he intended to or would be able to

work even if there had not been an accident. His services were terminated by the defendant in October 2007 with a gratuity payment. The medical report of Dr. Bent suggested he was deemed fit to work as at January 2008 even though he was still diabetic. There was no evidence that he subsequently attempted to find work and failed to do so.

159. I see no basis for an award under either of those two headings.

160. There was also a claim for loss of expectation of life. The submission was that the claimant had lost some years of his life; that as a result of the injury he had become unhealthy and could not expect to live as long as he had hoped.

161. The claimant based this claim on the authority of ***Flint v Lovell*** *(1935) 1 K.B. 354.* It was argued that a sum should be awarded for 2 years loss of expectation of life. A sum of $720,000 was suggested under this head.

162. The defendant's attorney further submitted that this claim could not be sustained. In the first place the case of ***Flint*** is distinguishable from the claimant's case. In ***Flint*** the plaintiff sustained serious injuries and the doctors gave him only 12 months to live. His medical evidence showed that he was facing impending death of which he was fully aware. In this case there was no medical evidence supporting this claim and it was submitted that on that basis no award should be made.

163. Diabetes is a lifestyle disease. Many persons live for a long time with this disease when controlled by medication. This claimant has only recently developed the disease. There is no evidence to support the

notion that his life span has been cut shorter than expected due to the disease. I make no award under this head.

Special Damages

164. Special damages pleaded were for medical expenses of $20,000.00 and transportation costs of $10,000.00. No other special damages were specifically pleaded or proved. The defendant raised no objections to special damages as pleaded. However the witness statement of the claimant indicated that he had to visit the Doctor in Kingston on various occasions, each visit costing four thousand dollars round trip by taxi. The medical evidence speaks to the claimant's visits to the doctor Donaldson in Kingston. He made 6 visits at $4000.00 per visit. I will award this additional sum of $24,000.00 for transportation costs.

Loss of Earnings

165. I agree with counsel for the defendant that loss of earnings as a feature of special damages was neither specifically pleaded nor proved. The claimant made no allegations in his pleading of any such loss for the period between the accident and the date of trial, for which he should be compensated.

166. I make no award under this head.

The Award

1. **General damages for pain and suffering and loss of Amenities in the sum of $3,600,000.00 with interest at 3% from March 31, 2009 to July 23, 2010.**
2. **Special Damages in the sum of $54,000 with interest at 3% from August 27, 2007 to July 23, 2010.**

3. **Costs to the claimant to be agreed or taxed.**

In light of my finding on the apportionment of liability, the above awards will be as to 85% of the figures.