IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. M185/1997

BETWEEN	CARL MARCH	PLAINTIFF
A N D	ALCAN JAMAICA CO.	DEFENDANT

Miss Carol Davis instructed by O.G. Harding & Co. for the Plaintiff

David Batts and Miss Daniella Gentles Instructed by Livingston, Alexander, Levy & Co., for Defendant.

Heard: 16th, 17th March; 19th, 20th, 21st, 22nd, 23rd June 2002 22nd, 25th January 2001 and 16th July, 2002

DUKHARAN, J

In an amended Statement of Claim the Plaintiff is seeking Damages against the Defendant in Contract and in Tort.

The Plaintiff was employed to the Defendant as a veterinarian and his duties included pregnancy testing of the Defendant's cows. In September 1991 during and in the course of his employment The Plaintiff inserted his arm deep into the cow's rectum for the purpose of testing for pregnancy, when it is alleged, due to the negligence of the Defendant's agent, Kevin

Wright the cow was released from its restrained position. The animal then bolted forward pulling the Plaintiff by the arm resulting in him being slammed into the restraining bar poles.

As a result of this the Plaintiff suffered a cervical nerve root irritation, with spasms of the neck muscles with numbness in the left upper limb and right fourth and fifth fingers. He was assessed of having a 7% permanent partial impairment of the whole person.

The Defence is a denial of any incident in September 1991, but that on the 16th June 1992 while the Plaintiff was examining a cow at Rhoden Hall the cow jumped. The jump of the cow was not caused by the negligence of the Plaintiff or its servants and/or agent. That the or any alleged injury to the Plaintiff was due to inevitable accident and was part of the risk involved and inherent in the course of large animal husbandry. The principle of *Volenti Non Fit Injuria* is also prayed in Aid and that the Plaintiff voluntarily consented to the risks of pregnancy testing. The Defendant is also saying that the Plaintiff suffered no loss, since he received payment which he would not have received but for the accident.

There are several issues for determination by the Court. Firstly, the Court has to determine whether there was an incident at the Defendant's Grier Park farm in September 1991 in which the Plaintiff says he was

injured. Secondly, whether the injury was as a result of the negligence of the Defendant's servant and agent Kevin Wright. Thirdly, whether or not the incident was as a result of inevitable accident. Fourthly, whether the Plaintiff voluntarily consented to the injury and in particular, the Defendant's negligence.

The Plaintiff, Dr. Carl March is a Veterinary Surgeon who studied locally and in the United States of America where he earned his Phd in 1985. He was employed by the Defendant company in 1985 until November 1996. His interest was ~~in~~ large animals e.g. cows, horses etc. He specifically looked after cattle for the company and was in charge of the health aspect of animals, and par~~ticular~~ly fertility testing.

The Plaintiff says that in September 1991 he was testing cows at the Defendant's Grier Park farm in St. Ann. He would test approximately three thousand (3,000) heads at that location, testing 400 – 600 per day over 8 – 10 working days. He outlined to the Court the procedure used in testing cows. Several photographs were exhibited and the Court had the benefit of seeing the various stages during testing. The cows pass through a chute. There is a system of two gates. A bar stick is used to prevent the animal from coming back and also to restrain it. The Plaintiff said he would step inside the chute directly behind the restrained cow and insert his left hand

into the rectum of the animal as far is necessary to ascertain pregnancy. Sometimes his hand would go in past his elbow. He would then step out of the chute and close the side gate at which time he would say the word "Bubble" which means the second gate would be opened by an attendant. The operation calls for four (4) persons in the area, a supervisor and cattlemen.

On the day of the incident the supervisor was Courtney Miller, and Kevin Wright was the attendant at the front gate. The Plaintiff said a red pole animal came into the chute. The animal was barred from behind and the front gate closed with the head of the animal just behind it. He did the pregnancy testing and discovered the animal was pregnant. He was informed by Courtney Miller, the supervisor, that the animal had been found pregnant the year before and still had not calved. He said he re-inserted his hand deeper in the animal's rectum with his hand past the elbow. He said while giving his findings to Courtney Miller he felt himself being pulled forward with a sudden movement from the cow and he slammed into the bar stick. He said Kevin Wright had opened the second gate and the cow ran off while his hand was deeply inserted in the animal. The movement caused his left arm and neck to be jerked when he hit the bar. He said Courtney Miller asked Kevin Wright why he opened the gate while he was still testing the

animal and he the Plaintiff had not given the pass word "Bubble" to do so. Kevin Wright admitted his mistake and apologised.

The Plaintiff said as a result his left arm and neck was in pain. The following day he saw the Medical Director of the Defendant company, Dr. Owen James who prescribed medication for him. He said he saw several doctors and in 1994 he got a letter from Dr. James to see Dr. Christopher Rose.

As a result of the injury sustained in September 1991 the Plaintiff is now unable to deal with large animals.

The Plaintiff was cross-examined and it was suggested to him that there was no incident of the type described by him in September 1991. It was also suggested to him that there was an incident in June 1992 with the Plaintiff which did not result in the injury described. The Plaintiff denied this and insisted that it was in September 1991 he received the injury. He denied that he told Dr. Rose he was having pains since 1990. He said he saw Dr. Ivy Turner-Jones in 1989 but he never complained to her of pain in the neck. He said he did a 'check up' every two years at Alcan. He said when he got the injury he did not make a report as it was the duty of the farm supervisor to do this. He said that the cattleman, who opens the gate before the signal would be guilty of negligent conduct and that the gate

should not be opened until he was out of the chute and he gave the password "Bubble".

The Plaintiff was supported by Courtney Miller who told the Court that he was a farm manager at Alcan Jamaica Ltd. (Defendant) for nineteen (19) years up to the 31st January 1999. He said that in 1991 he was a farm supervisor and he recalls an incident in September 1991 in which Dr. March was involved. He said this incident happened at Grier Park. He said a cow was restrained for testing and the Plaintiff went through the normal procedure. Kevin Wright was at the front gate and Paul Campbell was manning the bar sticks. He said the Plaintiff inserted his hand inside the cow which was up to his elbow at the time and was talking to him about the diagnosis of the animal when Kevin Wright released the cow at the front gate. As a result the Plaintiff was pulled forward by the animal and he came crashing in the bar sticks at the rear of the animal. He said this was not in accordance with proper procedure to open the gate. The proper procedure would be for the Plaintiff to come out of side gate and say "Bubble". He said that Kevin Wright said that he was sorry and he thought he heard the word "Bubble". He said he wrote a Dangerous Occurrence Report and sent it to Mandeville at the Head Office of Alcan. He did not see the report again when he sent it off neither did he examine any quarterly report.

In cross examination he said that Kevin Wright was careless in opening the gate before being instructed to do so. He said he saw him pull the gate but it was not intentional. He said his conduct could be deemed as accidental. It was suggested to the witness that there was no such incident in September 1991 but he maintained it did take place. He said the Plaintiff never came out of the enclosure.

Dr. Christopher Rose an orthopaedic Surgeon, gave medical evidence for the Plaintiff. His report was exhibited. He said that in circumstances where a cow ran off with his hand in the cow was consistent with his findings. He also said that the ordinary examination of cows for pregnancy would not cause the findings he found on the Plaintiff. He said the force had to be a jerk or pull.

That was the case for the Plaintiff.

In opening the case for the Defendant, Mr. Batts maintained that there was no incident at Grier Park as outlined by the Plaintiff and his witness. To support this contention Kevin Wright gave evidence for the Defendant. He told the Court that he has been a cattleman for the past ten (10) years. He said that as a cattleman he would assist in the pregnancy testing of cows. He knows the Plaintiff Dr. March and he has assisted him in pregnancy testing of cows. He said he remembered an incident in the month of May or June

but he can't remember the year and that it occurred at Rhoden Hall property, one of the Defendant's farm, He said he was at the back tending cattle when an incident happened with the Plaintiff and a cow. He denied that he was at the front gate in September 1991 and that he never opened any gate while the Plaintiff was examining the animal. In cross examination he admitted however that in September 1991 he did assist in pregnancy testing of animals at Grier Park and that he did handle gates.

Paul Campbell, another cattleman employed to the Defendant gave evidence. He said he cannot recall any incident in September 1991 with the Plaintiff. However he recalls an incident with the Plaintiff in June 1992 where a cow jumped forward during testing and the Plaintiff flashed his hand and said it was hurt badly. He said also that Kevin Wright did not handle any gates in 1991.

Mr. Owen Dixon testified that he was responsible for administration and that he would deal with safety reports for the agricultural division. He said he received no reports pertaining to Dr. March for 1991. He received a report however of an incident in 1992 involving the Plaintiff. He admitted in cross examination that in 1991 the system of safety reporting was not so efficient as the actual delivery of the reports to him was problematical. He

said they were difficulties throughout the division. Everybody had problems in making reports.

Mr. Lloyd Myrie gave evidence. He said that inter alia he was Safety Coordinator for the Division. He said he was required to prepare monthly and quarterly reports. For some documents he was not able to find the original. In cross examination he admitted that after 1993 the system improved with more accurate reporting. He also admitted that there was a reluctance to report incidents.

Dr. Lloyd Quarrie gave evidence on behalf of the Defendant. He said he was on the panel of doctors who looked after the employees. He said the Plaintiff had come to him on three occasions for periodic medicals. The first was in July 1991 where the Plaintiff had a history of hemorrhoids. However there was no indication of any pain in the neck. The incident took place in September 1991 according to the Plaintiff. However in 1993 and 1994 he gave a history of severe pain in the neck. He was given medication. He was then referred to Dr. Rose in 1994.

Dr. Ivy Turner-Jones also gave evidence. She saw the Plaintiff in 1989 who complained of neck pains and made a diagnosis of muscular spasms. She recorded "whiplash". She saw him again in 1996 where he again

complained of recurring neck pains. She made a diagnosis of "cervical spondylosis" based on an x-ray taken in 1992.

The Plaintiff also saw Dr. Winston Chutkan who gave evidence for the Defendant. It is noteworthy that both Dr. Rose and Dr. Chutkan makes no mention of "cervical spondylosis" diagnosed by Dr. Turner-Jones. In cross examination Dr. Chutkan basically agreed with Dr. Rose's report although he gave the permanent partial disability as 3%. It is also important to note that in the opinion of Dr. Chutkan the injury to the Plaintiff is likely to what he reported to him, that is the injury he received when the cow bolted during the testing. Dr. Chutkan said his assessment was based purely on objective findings. That was the case for the Defendant.

In her submissions Miss Davis for the Plaintiff urged the Court to find for the Plaintiff and to accept the Plaintiff and his witnesses as witnesses of truth. She urged the Court to find that the animal could not have bolted unless someone opened the gate to let the animal out and the Court should find that the Defendant's agent Kevin Wright was negligent.

Mr. Batts for the Defendant urged the Court to find that there was no negligence on the part of the servant or agent of the Defendant. He said that based on the weight of the evidence the Court should find that there was no incident of the type described in September 1991. He also said that the

Plaintiff has failed to prove that there was any causative relationship between the Plaintiff's injury and any alleged incident. He also urged the Court to find that any injury to the Plaintiff while examining a cow was due to inevitable accident.

Since the Defendant is saying if the Plaintiff did receive an injury it is the result of inevitable accident it may be best to deal with this defence before giving an analysis of the evidence.

A Defendant may escape liability by establishing that the cause of the Plaintiff's injury was an accident rather than any willful or negligent act on his part. This is one where no human foresight could have prevented. In actions for negligence the consideration that an event is a pure accident will be part of the general consideration as to whether reasonable care had been taken by the Defendant.

It should be clearly noted that inevitable accident is a defence in which the burden of proof is on the Defendant to show what happened was an unforeseeable accident. To demonstrate this the case of **Stanley vs Powell** [1891] 1 Q.B. 86 is a good example of this. In that case the Defendant successfully pleaded inevitable accident when he accidentally shot the Plaintiff. The Defendant was shooting pheasants when a pellet from

his gun ricocheted off a tree at an unusual angle and injured the Plaintiff. This certainly was an unforeseeable accident.

Inevitable accident is a very limited defence as it cannot apply as such in negligence. Once the Plaintiff proves negligence then the defence of inevitable accident is no longer relevant.

After a careful analysis of the evidence the main issue for determination is whether or not the Plaintiff was involved in an incident in September 1991 in which he was injured. The Plaintiff has given a very graphic account of the incident. His witness Courtney Miller also gave a graphic account of the incident. The case for the Plaintiff stand or falls with the credibility of himself and Mr. Miller. Have they deliberately lied to this Court about the incident? Both the Plaintiff and Mr. Miller were the senior officers present at the time. Mr. Miller said it was his duty to make a report of the incident which he did. The Defendant is saying that because there was no record of it in the Safety Reports the 1991 incident did not occur. It is to be noted that both Mr. Dixon and Mr. Myrie who gave evidence about safety reports admitted that it was not an efficient system. Mr. Myrie admitted that there was reluctance to report incidents and that after 1993 the system improved.

There were discrepancies between the cattlemen who were present. Kevin Wright admitted that in 1991 he would handle the gate during pregnancy testing with the Plaintiff. He spoke of an incident in 1992 in which the Plaintiff damaged his hand but he never handled the gate on that occasion. Paul Campbell said that Kevin Wright never handled a gate in 1991, a notable discrepancy.

The only way the animal could have bolted from its restrained position is if someone had opened the gate based on the system as outlined.

The Plaintiff had been seeing doctors both before and after the incident complained of. From the evidence of Dr. Chutkan it is likely that the injury he saw on the Plaintiff could have been as a result of what he complained of.

On a balance of probability I accept the Plaintiff and his witness, Courtney Miller as witnesses of truth. I find that the Plaintiff was injured in an incident that occurred in September 1991. I find also that the Defendant's servant and agent Kevin Wright was negligent in opening the gate prematurely before being given the signal to do so. Having found that the Defendant through Kevin Wright is negligent the defence of inevitable accident can no longer avail the Defendant. Although several authorities were cited in none of those cases did the Plaintiffs prove negligence.

I also find that *volenti non fit injuria* does not apply as there is no evidence that the Plaintiff voluntarily accepted the risk in testing animals without recourse if the Defendant was negligent.

Having found that liability lies with the Defendant the question of damages now arises.

The Plaintiff was made redundant in November 1996. There is no evidence that this was done for medical reasons. The Defendant was downsizing its operations and a number of persons were made redundant including the Plaintiff.

The Plaintiff got employment in Trinidad in November 1998. For the two year period he is claiming a total of $3,842,383.00 for Loss of Earnings under the head of Special Damages. It is contended by the Defendant that the Plaintiff is not entitled to an award for Loss of Earnings as any alleged loss was not caused by his injury. The cases are clear that lost earnings must be caused by injury in order for an award to be made.

The Plaintiff gave evidence of his income and expenditure in his private practice for the period May 1997 to September 1998. He did admit that some of the expenses were extraordinary expenses and did not represent the average monthly expenses. He also admitted that by the Christmas of 1998 the partnership's monthly net income was $220,000.00.

This figure would represent more than if he was still in the employ of the Defendant. There was a partnership that was growing. The Plaintiff took up a job offer in Trinidad of US$5,000.00 per month.

I am of the view that in all the circumstances the Plaintiff has no loss of earnings.

Under the heading of General Damages the Plaintiff is entitled to an award for Pain and Suffering and loss of amenities.

Several doctors gave evidence in relation to the Plaintiff's injury. The reports I am most concerned with is that of Dr. Rose and Dr. Chutkan. They are both orthopaedic surgeons.

Dr. Rose's report dates back to 1994 when the Plaintiff was referred to him. The significant findings of Dr. Rose was confined to the cervical spine in which there was restriction in left lateral rotation. The Plaintiff was evaluated by Dr. Rose several times in 1994. His last evaluation was in January 1997 and had the following complaints:

> "Pains along the left trapezus muscle with radiation of pains into the dorsal spine. These pains were most marked when his arms were at ninety degrees such as when driving. The neck and dorsal spine pains were aggravated by sudden turning movements of his neck, lifting heavy objects (greater than 40

pounds). He continues to experience occasional tingling sensation in the left upper limb."

Dr. Rose is of the view that the Plaintiff will be plagued by intermittent neck pains with occasional radicular symptoms into his shoulders and upper back for the rest of his life. These symptoms will be aggravated by lifting heavy objects in his upper limb and any sudden movement of his neck..

Dr. Rose assessed his permanent partial disability to be 5% of the whole person. He added 2% due to restriction in lateral rotation of the cervical spine. This gives him a total of 7% impairment of the whole person. It is to be noted that DR. Rose's diagnoses is a cervical nerve root irritation and has recommended that the Plaintiff switch to smaller animals to prevent the exacerbation of his neck pains.

Dr. Chutkan's report is not dissimilar to that of Dr. Rose. He estimated that the Plaintiff has about 3% permanent disability. He admitted however that the injury is a category 2 injury and objectively this is 5% permanent partial disability.

I therefore accept Dr. Rose's assessment of 7% impairment of the whole person.

What therefore is a reasonable figure to award for Pain and Suffering and Loss of Amenities?

The case of **Earl vs Graham** (p. 173 of Khan's Report) Vol. 4) was cited as a case similar to that in the instant case. In this case the Plaintiff was injured in a motor vehicle accident and as a result suffered (1) sudden onset of neck pains and headache. (2) Marked spasms along the paracervical and rhomboid muscles. (3) Exquisite tenderness along the above muscles. (4) Marked restriction in range of motion of cervical spine due to pain. Dr. Rose diagnosed a severe whiplash. He thought that her condition was chronic and that she would be left with permanent squeal. He assessed her permanent disability at 10% of the whole cervical spine, which is equivalent to 6% whole person disability. She was awarded (in 1996) $800,000.00 for Pain and Suffering and Loss of Amenities which when updated is about $1,074,505.

The Plaintiff in this case is asking the Court for an award of $1,500,000.00 for: Pain and Suffering and Loss of Amenities.

Mr. Bats for the Defendant has suggested that a reasonable figure to award for general damages for Pain and Suffering and Loss of Amenities is $300,000.00. In support of that figure he is relying on the case of **Cooper vs. Smith** (1997 Khan's Report page 159) the Plaintiff suffered a whiplash injury, severe neck pains radiating into the shoulders, marked restriction in all movements of cervical spine. There was a whole person disability of 6%.

The award for Pain and Suffering and loss of amenities was $275,000 and when updated is over $360,000.00.

It was submitted that the injuries in the Cooper case are more severe than those sustained in the instant case. It was further submitted that whatever award the Court makes for damages ought to be discounted by 50% as the Plaintiff already had neck pains and the four-car collision of 1995 that exacerbated these.

However there is no evidence that the Plaintiff suffered any injuries in the 1995 car accident and the Court will not take that into account.

I am of the view that, taking the injuries of the Plaintiff into account a reasonable award for Pain and Suffering and Loss of Amenities is $850,000.00.

The Plaintiff is entitled to damages for the loss of his earning capacity resulting from the injury and his handicap on the Labor Market.

From the medical evidence of Dr. Rose it is now clear that the Plaintiff's activities with large animals will be severely restricted. He now has to shift to small animals or get an administrative job. His handicap will limit his job offers.

Normally in such a situation the Court would be mindful to use the multiplier/multiplicand method of assessment in arriving at a reasonable

figure for Handicap On the Labor Market. However when one takes into account that after the Plaintiff became redundant he was able to form a partnership and after the second year netted over $200,000.00 monthly. Certainly this was more than what he was getting had he continued to be employed by the Defendant. He also left that practice and earned US$5,000.00 per month in an administrative capacity in Trinidad although for a contractual period which is now over. Despite his handicap the Court will find it difficult to use the multiplier/multiplicand method of assessment. However the Court will make an award by fixing a sum without reference to the multiplier/multiplicand method. Taking the handicap into account and the probability that the Plaintiff could be employed in an administrative capacity a fair award would be Five Million Dollars $5,000,000.00.

So there shall be judgment for the Plaintiff in the following:

General Damages

(1) Pain and Suffering and Loss of Amenities

$850,000.00 with interest @6% per annum

from 4th October, 1997 – 16th July, 2002.

Handicap on the Labour Market

$5,000,000.00

Cost to the Plaintiff to be taxed if not agreed.