IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. C.L. M-185 OF 1997

BETWEEN	CARL MARCH	CLAIMANT
AND	ALCAN JAMAICA LIMITED	DEFENDANT

Mr. Kirk Anderson and Miss Marcia Burke instructed by Dunn Cox for the Claimant
Mr. Christopher Kellman and Miss S. Harrison instructed by Myers, Fletcher & Gordon for the Defendant

Breach of contract – Negligence – Damages – Credibility of witnesses – System of work - Injury –Nexus – Occupational hazard

Heard on 3rd, 4th and 13th February 2009 and delivered on 29th July, 2009

CORAM: MORRISON, J

The genesis of the case at bar springs from the factual divide between the parties both of whom have urged me to embrace their singular disparate accounts. It is apparent at once that there is a credibility gap between the two versions but of that, more later. It suffices now to set out the background, the system and its *modus operandi* as it relates to its administrative procedure of reporting accidents occurring in the field and of its recording and subsequent discussion.

The Claimant in his Writ of Summons with endorsement thereon filed on 17th June 1997 reads thus: "The Plaintiff's claim is for damages for breach of contract and/or negligence arising from an incident on the Defendant's farm in

Grier Park in the parish of St. Ann. On or about September 1991 the Plaintiff while in the course of his employment with the Defendant had inserted his arm into the rectum of a cow for the purpose of pregnancy testing, when due to the negligence of the Defendant, their servant or agents the cow was released from its restraint and bolted, thereby causing injury to the Plaintiff."

The ensuing amended statement of claim filed on 10th March 2008 enlarged on the particulars of the endorsement adumbrated above: To précis, it amounts to this.

The Defendant is accountable to the Claimant as he was their employee in seeing that they provided him with a safe and proper "system of working". This endeavour exhorted the defendant to take all reasonable precautions for the safety of the Plaintiff;" that while the Claimant was engaged in the process of pregnancy testing a particular cow there occurred a negligent breach of one of the Defendant's employee, Mr. Kevin Wright, who had prematurely released the said cow from its restrained position, causing the cow to bolt whereas the claimants arm had not yet disengaged from the probing of the cows rectum thus results in the Claimant being hurtled into the bar poles of the chute, thereby causing the Claimant bodily hurt and injury.

The Medical Evidence

It is I think apposite to look at the particulars of injury as filed to ascertain the nature of the injury. At the institution of the suit the Claimant particularized his injury in this way:

a) cervical nerve root irritation

b) intermittent neck pain

c) spasms of the neck muscles with abrasions in the left upper limb and right fourth and fifth fingers

d) radiation of pain from the neck to the upper back

e) pains along the left trapezius muscle with radiation of pain into the dorsal spine

f) seven percent permanent partial disability of the whole person.

It is significant, and not merely noteworthy, that the suit bears the date of 17th June 1997 whereas the offending incident, the *fons et origio* of the complaint is, "on or about September 1991."

From his witness statement, that was received into evidence as his evidence-in-chief, the Claimant visited Dr. Owen James' office a day after the incident. Sometime in 1992 he visited the office of Dr. Ivy Turner where he was examined. In 1994 the Claimant visited the company's doctor. In that same year upon a referral the Claimant was sent to Dr. Rose, Orthopaedic Surgeon, who examined him and produced a report. More on that latter report shortly, except to say that in 1996 following upon a request by the Defendant the Claimant was examined by Dr. Kenneth Vaughn whose report was also annexed to the Claimant's witness statement.

Of the doctors referred to above one gave evidence for the Defendant while the other gave evidence for the Claimant. Of these two

witnesses Dr. Rose for the Claimant produced a medical report and his evidence is quite telling.

Dr. Rose's report is dated February 15, 1997. In this report he states that the Claimant came to him on June 2, 1994 by way of a referral from a Dr. L. Quarrie. On examination of the Claimant Dr. Rose said, "he was a healthy looking male in no obvious painful distress. The significant findings were confined to the cervical spine in which there was restriction in left lateral rotation. There was tenderness on palpation of the left trapezius muscle ..."

Some five other visits by the Claimant to Dr. Rose were interspersed after the initial visit culminating in his November 9, 1996 visit whereupon Dr. Rose found that the Claimant suffered from, "pains along the left trapezius muscle with radiation of pains into the dorsal spine. These pains were most marked when his arms were at 90° such as when driving. The neck and dorsal spine pains were aggravated by sudden turning movements of his neck, lifting heavy objects (greater than 40lb). He continues to experience occasional tingling sensation in the left upper limb."

In his explication Dr. Rose said that lateral rotation of cervical spine simply meant the turning of the head either to the right or left. Dr. Rose opined, from the history of the Claimant given to Dr. Rose by him, that the injury could have been caused by a traction injury, that is, a pulling against resistance for eg. "arm is pulled from one direction to

opposite direction." As to the tenderness of the left trapezius muscle Dr. Rose is of the view that this neck muscle tenderness usually indicate a nerve problem.

Significantly, in his examination-in-chief, Dr. Rose admitted that repetitive motion task could have caused the injury to the Claimant and he exampled repetitive motion task to occur when someone bends repetitively.

Further, Dr. Rose says, "that the Claimant was concerned about the swelling which I didn't think was significant. Swelling was a soft tissue swelling over the left trapezius muscle. My clinical impression was it was a hypertrophy and not a tumor." He continued, "the testing of large animals such as cows in respect of his injuries bearing in mind his diagnosis, his continued symptoms of having to perform such manoeuvres could play a significant role on his neck. He would have obtained the same result if it involved having to lift heavy things."

In cross examination his answer was even more starkly profound: "the history of the Claimant does not necessarily relate back to 1991; the traction injury and cervical Injury could be caused by any kind of pull; the repetitive nature of the Claimant's task could have caused the injuries I diagnosed."

In fact, to one of the questions put by the Claimant's counsel to Dr. Rose, upon the granted request for amplification of Dr. Rose's evidence, the indicated answer to the question received a resounding affirmation.

Question: "In your opinion, could repetitive motion tasks, such as repeatedly bending forward, stretching his hands and leaning forward,, so as to conduct pregnancy testing of cows on a frequent basis have caused the injuries which you have diagnosed Dr. March as suffering from? (See Witness Statement of Dr. Owen James)

Answer: Yes.

Not a mere bland yes but a resounding yes. So much for Dr. Rose. Now onto Dr. James's evidence.

This holder of a Bachelor of Science degree in Microbiology and member of the American College of Occupational and Environmental Medicine had joined the Defendant company in 1987. He joined the Defendant as Medical Director specializing in Occupational Medicine which deals with illnesses and injuries relating to the work place.

He says in his evidence-in-chief, "I know Dr. Carl March who was formerly employed to Alcan as a Veterinarian. He was a colleague, friend and an occasional patient of mine. I was not however, his regular doctor." At paragraph 5 of his witness statement he says that Dr. March consulted with him for the first time in 1992 complaining of neck pains. He (Dr. March) said, "while doing a pregnancy test on a cow in or about 1992 it moved and jerked his shoulder". Further on in his witness statement, he continues, "I have no recollection or notes of having been consulted by Dr. March in September 1991 for neck pains. The only incident history I can recall from Dr. March is an incident that occurred

in June 1992. His attachment in support of this statement is reproduced. It is addressed to Dr. Charles DeCeular. It is dated 21 September, 1992:

It reads: "Dr. Charles DeCeular
Rheumatologist
Daveria Medical Centre
111 Constant Spring Road
Kingston 10

Dear Charles:

Re: Carl March – Veterinarian, Alcan

This introduces Carl about whom we spoke last week. He has recurring neck and left shoulders pains, recently exacerbated while at work. His duties involve doing pregnancy test on cows, inserting the left arm into the cows rear end. On at least one occasion the cow made a sudden move during this procedure and the pain recurred some days after (he will describe in greater detail).

Examination showed tenderness on the left side of the neck (C5-7). X-rays confirmed muscle spasm and degenerative changes from C4-7 with apparent narrowing of foramina at C6 C7. Kindly see and manage. With many thanks

Alcan will be responsible for settlement of fees.

Yours sincerely,

Owen B. O. James
M.B. Edin.
Medical Director

It is to be noted that some five witnesses gave evidence on behalf of the Defendant: Kevin Wright, Paul Campbell, Owen James, Lloyd Myrie and Owen Dixon.

Both Wright and Campbell gave their witness statements on 2nd April 2007and on 26th March 2007, respectively. They both refute and deny any incident occurring in September 1991 as alleged by the Claimant. They are steadfast that the only incident of which they are aware as involving an injury to Dr. March was at Rhoden Hall, as opposed to Grier Park, and which took place in 1992.

The Reporting System

Lloyd Myrie's evidence is to the effect that he worked for the Defendant from 1967 to 1996. In 1992, he says, "I was working there and knew Dr. Carl March then employed to Alcan as a Veterinarian in the Agricultural Division." Mr. Lloyd Myrie's post at Alcan was as a Safety Coordinator. He was responsible for preparing monthly and quarterly reports regarding safety within the division. The reports, he continues, included documents of a list of Dangerous Occurrences and Incidents for the month of June 1992.

Further, his evidence speaks to the established procedure for reporting incidents in that anyone could do so in writing. He dilated, that the reports from the field came to him as the Safety Coordinator.

The annexture and his attachment to his witness statement is to the effect that in respect of Dr. March on June 16, 1992 that the latter received very slight injury while attending animals at Rhoden Hall. The obvious implication being that in respect of the September 1991 incident, he received no such report.

Mr. Owen Dixon's evidence is chiefly in respect to the non-receipt of any complaint from Dr. March for the entire year of 1991 about an incident involving a cow during pregnancy testing.

He had overall responsibility for the accuracy of all the Agricultural Division reports, including safety.

The net effect of the evidence of the witnesses for the Defendant is that the September 1991 incident never occurred at all.

The Issues

For and on behalf of the Claimant it is proponed that it was a term of the contract of employment between the Claimant and Defendant and/or it was the duty of the Defendant to take all reasonable precautions for the safety of the Claimant while he was engaged upon his employment not to expose the Claimant to a risk or injury of which they knew or ought to have known, and to provide a safe and proper system of working.

In the second case they propound whether the Defendant's servant negligently released the cow causing injury to the Claimant.

The Defendant, for their part, having posited that there was in place at the Defendant's field including their farms an established procedure for the reporting of accidents occurring thereon that in respect of the year 1991, absolutely no report was received from the Claimant or any other person of an accident involving injury to the Claimant during pregnancy testing. The accident reports, they maintain, are compiled into quarterly reports and that such reports are discussed at divisional meetings at which the Claimant, a Senior Officer of the Defendant's company, at that, attends and participates.

Thus they contend, refute and confute, that no incident occurred in September 1991 in which the Claimant was injured as is claimed by him.

Analysis of the Facts

The Claimant's witness statement is dated 17th Mach 2006. As far as the materiality of the Claimant's case is concerned, the Claimant is the only person that speaks to the facts. Preliminarily, he asserts, without contention, that he was a Veterinarian employed to the Defendant. His duties included pregnancy testing of the Defendant's cows. It must not be overlooked that, according to Mr. Owen Dixon, Dr. March was one of five senior members of the division. To quote him: "We tried to discuss the contents of the quarterly reports with all members at staff meetings. Dr. March was present at these meetings."

As the procedure involved in pregnancy testing of cows is not in dispute, it is well that I state its modus operand here and now. The prospective cows are herded into a holding area and then singly diverted into a chute. This method, more fully described below, is known as the chute system. The chute is an enclosed area known also as the "race". It is comprised of a front gate, a back gate and a side gate. The sides of the enclosure are fitted with vertical and horizontal bars made of board. The purpose of the chute is to restrain the cow's movement during the Veterinarian's proctological probing. There was also a bar stick between the cow and the Veterinarian. During a typical examination a cow is herded into this holding area by a cattleman employed by the Defendant. The front gate is pre-secured on entry of the cow and post-secured by a back gate which is immediately to the rear of the cow after the animal's entry. This having been done, the Veterinarian then enters the holding area through a side gate that adjoins the chute. The Veterinarian then inserts his gloved hand into the rectum of the cow to ascertain its pregnancy status. On completion of this manual task the Veterinarian would bellow the words, "pregnant" or "not pregnant," in accordance with his clinical findings. While exiting from the side gate the Veterinarian would yell the word, "Bubble!," to indicate to the cattleman operator of the front gate that he is authorized to open it, thus enabling the cow to go free from its restraint.

I accepted the Defendant's witnesses as being truthful. Indeed, I am aware that the witness statements of Kirk Wright and Paul Campbell show aspects of dovetailing. Yet, in spite of that similarity I find that their evidence was not controverted by the Claimant.

The other witnesses for the defendant point to a system being in place, be it in its infancy at the time of the alleged September 1991 incident or not, for reporting serious accidents on the job and the making of reports with respect thereto.

I find that there was a signal and singular failure on the part of the Claimant to report the incident to the appropriate personnel of which he complains, if the incident did occur, which I find it did not, because if it did his quondam friend and colleague Dr. Owen James, would have had sufficient reason to remember that incident equally as he remembered seeing Dr. March in 1992 about a 1992 incident. That, I say, is more probable than not having regard to the fact that no reason was advanced by the Claimant for Dr. James as either lying or of being mistaken. Dr. James' evidence was given with lucidity, and in my view, remained unscathed even with the passage of time.

I find that the injuries of which Dr. Rose speaks are incidental to Dr. March's veterinarian job which, when unforensically put, is an occupational injury. In any event I find that there is no nexus between the incident of which he complained and the medical report generated by Dr. Rose

Even if I were to accept, which I do not, that the incident did happen, I find that there was no reporting of it occurring until sometime in 1994. This I find to be elliptically inscrutable. In his insouciance, I find, that he in his reticence and noble imperturbability was content to sit, as it were, "patience on a monument smiling at grief," and was only inspired into action upon his coincidental job loss with the Defendant and thence, "thereby loathed melancholy".

I find the Claimant to be less than veracious concerning the September 1991 incident. His unsubscribed and unconfirmed description of the incident and certainly his inaction up to 1992 June beggars credibility. One wonders as the character in Hamlet inquiringly asks: "Is this a dagger which I see before me, the handle toward my hand. Come let me clutch thee: I have thee not, and yet I see thee still: Art thou not fatal vision sensible to feelings as to sight or art thou but a dagger of the mind, proceeding from the heat oppressed brain?"

The Law

It is elementary that in our system of jurisprudence it is recognised that before a fact is accepted and acted upon it must be proved or otherwise established. Evidence is the foundation of proof. Proof is that which leads to a conclusion as to the truth or falsity of alleged facts which are the subject of enquiry.

In legal proceedings the general rule is that he who asserts must prove. This proposition is sometimes more technically expressed by

saying that the burden of proof rests upon the party who substantially asserts the affirmative of the issue.

In applying the rule, however, a distinction is to be observed between the burden of proof as a matter of substantive law or pleadings, that is, the burden of proving an issue or issues, sometimes termed the legal burden and the burden of proof as a matter of adducing evidence during various stages of the trial. The former burden is fixed at the commencement of the trial by the state of the pleadings or their equivalent and is one that never changes under any circumstances whatever. However, if after all the evidence has been given by both sides, t`he party having this burden on him has failed to discharge it, the case should be decided against him: **Wakelin v. London & South Western Rail Co. (1886) 12 App. Cases 41, H.L.**

Of course the standard of proof is on a balance of probabilities or, to put it another way, one account of the event is more likely than the other.

In the instant case, Dr. Carl March bears the burden of proof not only to show that he was injured due to the premature opening of the chute by the Defendant's servant but also Dr. March needed to prove the casual nexus between his injury and the report engendered by Dr. Rose's examination of him as arising from the incident over which he Dr. March complains. That he has failed to do, on a balance of probabilities, as I have adverted to earlier, not only on the equivocality of the nexus

between the injury and his visit to a doctor with respect thereto but also, the Claimant's undeniable failure to report the accident coupled with the inconclusiveness of Dr. Rose's report that the injury is akin to that of an occupational injury.

Judgment is therefore entered for the Defendant. Costs are to go to the Defendant and are to be agreed, if not, then the costs are to be taxed.