[2023] JMSC Civ.149

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018 HCV 03367

BETWEEN	**JOSETTE MILLS-MCLARTY**	**CLAIMANT**
AND	**JAMAICA URBAN TRANSIT COMPANY LIMITED**	**DEFENDANT**

IN CHAMBERS

Mr Clifton Campbell instructed by Archer Cummings and Co. for the claimant.

Mr Leslie Campbell instructed by Miss Kimberlee Dobson for the defendant.

Heard: June 20 and 21, 2023 and July 27, 2023

Negligence - Breach of contract - Breach of Employers Liability Act – Breach of Occupiers Liability Act - Assessment of damages.

PETTIGREW-COLLINS, J

[1] The claimant was at all material times a forty-three years' old auto mechanic employed to the Jamaica Urban Transit Company Limited (herein after referred to as the JUTC).

[2] The JUTC is a company duly incorporated under the Companies Act of Jamaica and carries on the business of transportation.

[3] The claimant brought her claim in negligence and/or for breach of contract and/or breach of the **Employers Liability** Act and/or breach of the **Occupiers Liability Act**. She claims that on or about October 14, 2016, at the defendant's garage located at the Portmore depot, she was engaged in a task assigned to her when

on completing the task in the pit which was poorly lit, she fell in an oil spill and the fall resulted in injuries to her back.

[4] The particulars of negligence and/or breach of contract and/or breach of **Employers Liability Act** are set out as:

a. Failing to provide a safe place of work

b. Failing to provide a safe environment/system of work with effective supervision

c. Failing to provide adequate plant and equipment

d. Failing to provide a competent staff of employees

e. Failing to provide proper lighting in the work area for the employees

f. Failing to cause oil spoilage in the “pit” to be cleaned before the Claimant started working

g. Having the Claimant working in poor lighting conditions

h. Failing to ensure that the cleaning staff properly cleans all work areas

i. Failing to ensure that all reasonable care was taken while the Claimant carries out the company’s operations

[5] The breaches of the **Occupiers Liability Act** are particularized as follows:

a. Failing to take any or any reasonable care to see that the claimant would be reasonably safe in working on the premises

b. Exposing the claimant, while she was engaged in work, to a risk of damage or injury from working in a poorly lit and unkempt area

c. Failing to take any or any adequate or effective precautions to ensure that the claimant’s work area was properly lit and cleaned

d. Failing to discharge the common duty of care to the claimant in breach of the Act.

THE DEFENCE

[6] The defendant admitted that it was an express and/or implied term of the contract of employment to provide a safe system and safe place of work for the claimant, but says it discharged its duty by maintaining a procedure for the daily cleaning of the pit by janitorial staff and ensuring the use of personal protective equipment by all employees including the claimant.

[7] The defendant also alleges that the claimant was contributorily negligent. That negligence was particularized as follows:

i. Failing to have any or any regard for her safety;

ii. Failing to take any adequate measures to prevent herself from slipping;

iii. Walking through the pit when she knew or ought to have known that it was unsafe to do so;

iv. Failing to take adequate care while walking through the pit; and

v. Exposing herself to the unnecessary risk or injury.

[8] On the morning of the trial, the defendant was permitted to amend its defence and the following particulars of negligence on the part of the claimant were added:

i. Failing to alert supervisor to presence of oil in pit.

ii. Failing to look while walking

iii. Failing to use or make use of available additional lighting and protective equipment if necessary, in the circumstances.

iv. Performing the assigned task in a way contrary to company procedure.

v. Failing to adhere to the company's system as it relates to degreasing of the pit.

[9] The defendant, by its amended defence, also alleged that it provided degreasing agent and denied that the pit was poorly lit. It also averred that the lighting in the pit was sufficient. The defendant also claimed that it provided staff as well as additional lighting equipment. It was also averred that the presence of oil spill was incidental to the nature of the job of the claimant.

FACTS NOT IN DISPUTE

[10] The following facts are not disputed:

i. that the claimant was assigned to undertake work on one of the defendant's motor buses at the Portmore depot.

ii. that she had to enter the pit in order to carry out the work assigned.

iii. that she made a report the same morning that she had fallen in the pit.

iv. that there was an oil spill on the floor of the pit on the morning in question.

v. The pit can accommodate two buses over it at the same time.

THE EVIDENCE

[11] In the interest of brevity, I do not intend to set out all the evidence in this matter. I will state the salient facts and indicate those which are accepted and those which have been rejected in so far as those facts are relevant to the claim or the defence.

[12] The evidence as it stood at the end of the case regarding the lighting in the pit, was that there was one bulb that was working, although the area was made to accommodate four bulbs. The claimant's evidence was that this bulb was only partially working in that it was not fully lit. Mr Wilson's evidence is that that bulb was fully functional. I accept the claimant's evidence and reject that of Mr. Wilson that the bulb was fully working.

[13] The claimant's evidence was that there were two buses over the pit at the time that the incident took place. It was Mr. Wilson's evidence that when the accident was reported to him and he went to look, there was only one bus. I accept the claimant's evidence in this regard. There is no need for the court to decide whether Mr Wilson's assertion is true, as the second bus could have been removed before Mr. Wilson's arrival at the pit.

[14] Mr Andrew Grant, one of the defendant's witnesses, agreed that if two buses were over the pit, they would have to be parked close to each other in order to fit over it. He also agreed that the buses would block the light from the shed from entering into the pit and a mechanic could not rely on the light from the shed while in the pit. Neither would he/she be able to rely on natural light entering the pit. The claimant's evidence that the buses would be parked one behind the other, back to front, was not contradicted. Given my finding that there were two buses over the pit, I accept the evidence that much of the natural lighting as well as the light from the shed would have been blocked out of the pit by the presence of the two buses over it. My finding is that the area was not sufficiently lit.

[15] The claimant's evidence in cross examination was also that JUTC provided a work light at the time of her employment, but she was not supplied with a replacement throughout her employment, although she had returned the one she was initially issued with. She stated that once the light initially issued was "mashed up" it would be returned. I accept the claimant's evidence that she utilized her phone light in order to see to carry out the task that she had been assigned that day.

[16] The claimant's evidence was also that she was not issued with a helmet with headlights. However, she was issued with a helmet that had no headlights, but she was not wearing it on the occasion in question. Her evidence that she was wearing her work clothing and the boots assigned to her was not disputed.

[17] In her first witness statement, the claimant said that the area was dark and she did not see the oil spill, but in her supplemental witness statement, she claimed that she had observed that the pit was dirty and she reported the fact of the dirty pit to Mr Wilson who insisted that she carried out the work assigned, as he was under pressure to return the bus. Mr Wilson of course denied that the claimant had told him about the spill, or that he had any conversation about being under pressure to return the bus. Further, he said he would not have sent the claimant to the pit had he known it was not cleaned. Mr. Wilson disputes the claimant's evidence that the pit was dirty. The claimant stated that the cleaning staff should have come in and cleaned at about 6 am.

[18] There is this critical piece of evidence which emerged when the claimant was being cross examined by Mr Leslie Campbell:

> Q. What if anything did you see on the floor over the distance from the first bus?
>
> A. I know there was an oil spill. I saw filters.
>
> Q. At the point when you saw it, what did you do to avoid slipping?
>
> A. When I saw the filters, I returned before working on the bus to my supervisor and tell him that the area is dirty. There is oil spill there.

From the above evidence, it therefore emerged that the claimant saw the oil on the floor of the pit prior to the point at which she fell.

[19] Although initially the claimant had said that the spill was some 6 or 7 feet into the pit from where she had entered, it became apparent from her later evidence that

the spill was closer to the second bus on which she had worked. That the spill was not six or seven feet from the entrance was confirmed by Mr Wilson who said that the spill was more to the back of the bus, between the engine and transmission area. It will be recalled that his evidence was that there was one bus over the pit. He was clear that he was not saying that the oil had come from the bus on which the claimant had worked, and in any event, I accept the claimant's evidence that she had worked on the air system and that the work she did would not have resulted in oil coming from the bus.

[20] It was Mr Wilson's evidence in his witness statement that saw dust was usually available and accessible to apply to an oil spill and that when an oil spill is reported by a mechanic to a supervisor, that supervisor would usually get a groundsman to apply saw dust to the oil spill because mechanics were unwilling to do it because it was the task of the groundsmen. However, in cross examination, Mr Wilson said that he could not speak to the availability of saw dust at the time of the incident. Although Mr Grant had also said in his witness statement that saw dust was available to place over oil spills, in cross examination, he too stated that he could not say whether saw dust was provided. The claimant admitted that she received training on safety methods at the commencement of her employment but received no further training in that regard. Mr Grant also accepted that there was a shortage of groundsmen and janitorial staff at the depot.

THE CLAIMANT'S INJURIES

[21] I will adopt the claimant's summary of the medical reports as set out in the submissions, with the omission of the commentary and some modifications and additions where necessary, in order to accurately reflect the contents of the doctors' reports.

Medical Report of Dr. Andrew G. Greene dated the 19th of July 2018

[22] Doctor Greene's medical report was prepared following consultations with Ms. Mills-McLarty starting on the 18th of October 2016. Doctor Greene relayed the claimant's history of falling over while working in a pit in the Maintenance Department during her employment to the Jamaica Urban Transit Company (JUTC) on the 14th of October 2016. Doctor Greene noted that Ms. Mills-McLarty usually enjoyed general good health and was free of any chronic illnesses. On examination on the October 18, 2016 visit, she was found to be in painful distress and the pain was confined to her musculoskeletal system. He found "tenderness and pain to her left gluteal region and a reduced range of motion to her spine."

[23] Doctor Green said that Ms. Mills-McLarty was instructed to return to the doctor should her symptoms persist, and Doctor Greene indicated that she did so on numerous occasions. Upon Ms Mills-McLarty undergoing an MRI on the 17th of February 2017, the following was revealed:

1. L4-5 annular fissure and disc herniation with exit foraminal stenosis.

2. L5-S1 annular fissure and disc herniation with impingement and displacement of the left S1 & S2 nerve roots.

3. Possible occult fracture of the left aspect of the sacrum.

[24] Doctor Greene ultimately diagnosed her as suffering from the following:

1. Blunt trauma to left gluteal region and lower spine.

2. Possible occult fracture of sacrum.

3. Degenerative disc disease.

[25] Ms. Mills-McLarty was placed on sick leave and prescribed an anti-inflammation analgesic and a muscle relaxant for pain relief. She was also referred to physiotherapy which elicited a minimal response. On the 24th of February 2017,

Doctor Greene referred her to Doctor Dean Wright, a specialist Orthopaedic Consultant, for further management. As of the 19th of July 2018, she had resumed normal working duties. Doctor Greene opined that her injuries were very significant and consistent with the mechanics of the incident. Doctor Greene said that x-rays done on November 1, 2017, revealed degenerative disc disease.

Medical Report of Dr. Paul Wright dated the 26th of July 2019

[26] Doctor Paul Wright reported that he saw Ms. Mills-McLarty on the 26th of June 2019 at the request of JUTC. He said that she reported that on the Monday following the incident she was able to go to work, but because of the pain she reported to the company nurse who arranged for her to see the company doctor. The latter diagnosed her with a muscle spasm. She was prescribed medication and given time off work to recover. The pain did not subside even with a change of medication, which was accompanied by adverse side effects. She did not return to work until sometime in December 2016.

[27] Dr. Paul Wright further reported that Mrs Mills McLarty was eventually referred to an orthopaedic surgeon. She underwent surgery on the 8th of June 2017. Dr. Paul Wright indicated that his examination found a woman in pain with a most peculiar gait, which he termed as a "stamping gait." He noted a surgical scar at the base of her spine and tenderness over the dorsal spines of L3, L4 and L5.

[28] Dr. Paul Wright closed by noting that despite the assistance of medication, specialist treatment and surgical intervention Ms. Mills-McLarty's condition had in fact deteriorated. She was unable to resume her occupation at the JUTC and, she was made redundant effective on or about the 30th of August 2019. Dr. Paul Wright recommended further consultation with a neurosurgeon.

Medical Report of Dr. Dean Everett Wright dated the 24th of June 2020

[29] Dr. Dean Wright prepared a detailed and very comprehensive medical report which chronicles Mrs. Mills-McLarty's treatment. He indicated that he saw Mrs. Mills-McLarty on approximately twenty (20) occasions for consultation between the 12th of March 2017 and the 31st of May 2019, including several home visits and at least one (1) admission.

[30] There are several notable aspects of Dr. Dean Wright's Medical Report which are worth highlighting. He referred to a plan radiograph of the lumbar spine that Ms. Mills-McLarty underwent on the 5th of March 2016. Same only revealed early degenerative changes to her lumbar spine and a mild loss or lordosis. The plain radiograph of the 5th of March 2016, the MRI of the 13th of February 2017 and the MRI (repeat) of the 28th of October 2017 indicate that the claimant's condition appeared to have rapidly and seriously degraded following the accident. The MRI (repeat) of her lumbar spine revealed:

1. Loss lumbar lordosis
2. Normal vertebral alignment
3. Multilevel degenerative changes/marked at L45 and L5S1 levels
    a. Disc height loss and disc bulges
    b. Facet joint hypertrophy
    c. Moderate ligamentum flavum hypertrophy
4. Theca sac compression/cauda equina compression
5. Narrowed inferior recesses and exit foramina
    a. Bilaterally L45 level
    b. Left side L5S1 level

6. L1 haemangioma

[31] Doctor Dean Wright also provided details concerning the surgery of the 8th of June 2017.He said that a surgical lumbar discectomy was done. The surgery was complicated by a cerebrospinal fluid leak and left the claimant with a persistent post-operative headache syndrome which took the form of weekly migraines which he said had not been resolved. There was initially some resolution of the acute weakness at her great toe and ankle dorsiflexion. However, the muscle groups, he said, were easily fatigued despite some gains from physiotherapy and she had a reduced tolerance for sitting or standing for long periods.

[32] Doctor Dean Wright further stated that the function of the L5 left side nerve root was recovered, but her stress tolerance gradually reduced. He said that she further experienced frequent bouts of neuralgic symptoms in her left and then right lower limb with increasingly frequent attacks of parathesia in both her lower limbs, pain and occasional weakness in both lower limbs and neurologic claudication that was worse on her left side. Dr. Dean Wright believed that this pointed to lumbar spinal stenosis and ultimately opined that her recovery had plateaued at an unacceptably non-functional level.

[33] He therefore recommended an additional surgical procedure. He also summarised that Ms. Mills-McLarty has difficulties with bathing, dressing, standing, sitting, reclining, walking, climbing stairs, lifting, with her sexual functions, sleeping, etc. He said that she could not do home and yard work properly, and her lower back pain was generally moderate, but rose to being severe when aggravated or episodic. She experienced a similar level of pain in her lower limbs and is unable to run. Dr. Dean Wright also noted that she exhibited moderate somatic concern, anxiety and depression.

[34] Doctor Dean Wright further stated that since the accident, Ms. Mills-McLarty's doing of home exercises, walking, running and occasional swimming has been curtailed. He stated that she is an instrumentalist who expressed her talents at

church, but this too has been hampered by her injuries. Dr. Dean Wright ultimately opined that she suffered from thoracic spine impairment of 2% and lumbar spine impairment of 21% whole person impairment (W.P.I.) and a total of 23% whole person impairment.

[35] The doctor's statements on maximum medical improvement were somewhat conflicting. That matter will be further explored when dealing with future medical care as a head of damages. He set out the breakdown of the cost of surgery. He gave a provisional cost of $6,217,611.00.

THE LAW

[36] The court relies for the most part, on the parties' outline of the relevant law. I will reproduce with minor modifications aspects of the written submissions of each party on the law as well as adding as I see necessary.

Negligence/Breach of Contract

[37] In the case **of Wayne Howell v Adolph Clarke t/a Clarke's Hardware** [2015] JMSC Civ. 124 Justice Dunbar-Green succinctly recapped the law of negligence. In that case the employer alleged negligence against his employee. At paragraphs 43 and 44, The learned Judge stated:

> *Harris, JA in **Glenford Anderson v George Welch** [2012] JMSC Civ 43 at paragraph 26, enunciated the relevant principle in these terms:*
>
> > *It is well established by the authorities that in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to a claimant by a defendant, that the defendant acted in breach of that duty and that the damage sustained by the claimant was caused by the breach of that duty. It is also well settled that where a claimant alleges that he or she has suffered damage resulting from an object or thing under the defendant's care or control, a burden of proof is cast on him or her to prove his case on the balance of probabilities.*

[38] Lord Griffiths in **Ng Chung Pui and Ng Wang King v Lee Chuen and Another** Privy Council Appeal No. 1/1988 delivered on 24 May 1988, pp 34 dealt with the burden of proof and role of the Court. His lordship said:

> *The burden of proving negligence rests throughout the case on the plaintiff. Where the plaintiff has suffered injuries as a result of an incident which ought not to have happened if the defendant had taken due care, it will often be possible for the plaintiff to discharge the burden of proof by inviting the court to draw the inference that on a balance of probabilities the defendant must have failed to exercise due care, even though the plaintiff does not know in what particular respects the failure occurred. ... it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established.*

[39] The Claimant also alleges that the Defendant breached their contractual obligations by failing to exercise reasonable care in their operations, thus resulting in injury to the Claimant or subjecting her to foreseeable risks of harm, The Claimant argues that this breach caused her to suffer loss and damage. The defendant has accepted that it was an express/or implied term of the claimant's contract of employment that she be provided a safe place of work and a safe system of work. Those criteria will be addressed when looking at employer's liability.

EMPLOYERS LIABILITY

[40] Under the common law, the employer has a duty to provide:

a. A competent staff of men

b. Adequate plant and equipment

c. A safe system of working, with effective supervision; and

d. A safe place of work

See for example the case of **Ray McCalla v Atlas Protection Limited and Ringo Company Ltd** 2006HCV04117 citing **Wilson v Tyneside Window Cleaning Co** [1958] 2 QB 110 at 123-124.

[41] The employer's duty is to take reasonable care so that his workmen are not subjected to unreasonable risk. What is reasonable in any situation will depend on the facts of each case. The onus is on the claimant to establish on a balance of probabilities that the defendant's conduct was such that it fell below the standard of care. See **Glenford Anderson v George Welch** [2012] JMCA Civ 43.

[42] The employer is required to provide proper plant and equipment. This duty necessarily involves regular inspection of both plant and equipment. Where the work being carried out requires it, protective devices and clothing must be provided, and the employer must also take reasonable care to ensure that such clothing and devices are actually used. See **Leith v Jamaica Citrus Growers Limited** 2009 HCV00664 citing **Speed v Thomas Swift and Co Ltd** [1943] KB 557.

[43] The employer is also required to make the workplace safe as reasonable skill and care permits. Appropriate warning signs for example, are to be placed where necessary. It is insufficient for the employer to show that the danger was known by the claimant and fully understood by her. It has been said that a place which is safe may become unsafe through the presence of slippery substance on the floor. In that instance, the test is whether a reasonable employer in the particular circumstances would have caused or permitted the existence of the state of affairs complained of. See **Latimer v AEC Ltd** [1953] AC 643.

[44] A safe system of work includes giving appropriate instructions to the workforce regarding the safe performance of the task. This may involve the organization of the work, the procedure to be followed in carrying out the work, the sequence of the work, the taking of safety precautions, and the stage at which such precautions are to be taken, the number of employers to do the task and the part to be played

by each. This is not a case where the task involved any complexity and thus some of these prescriptions would not be applicable. The employer must not only devise a safe system of work but must put adequate supervision in place to ensure that reasonable steps are taken to ensure that the system is adhered to.

[45] The case of **Winter v Cardiff Rural District Council** [1950] 1 All ER 819, cited by the defendant, sets out the principle relating to the circumstances under which the duty of the employer would be properly discharged. In that case, Lord Oaksey said as follows,

> *"In my opinion, the common law duty of an employer of labour is to act reasonably in all the circumstances. One of those circumstances is that he is an employer of labour, and it is therefore, reasonable that he should employ competent servants, should supply them with adequate plant, and should give adequate directions as to the system of work or mode of operation, but this does not mean that the employer must decide on every detail of the system of work or mode of operation. There is a sphere in which the employer must exercise his discretion and there are other spheres in which foremen and workmen must exercise theirs. It is not easy to define these spheres, but where the system or mode of operation is complicated or highly dangerous or prolonged or involves a number of men performing different functions, it is naturally a matter for the employer to take the responsibility of deciding what system shall be adopted. On the other hand, where the operation is simple and the decision how it shall be done has to be taken frequently, it is natural and reasonable that it should be left to the foreman or workmen on the spot. The extent to which the employer is responsible for putting the system of work in place, is directly proportional to the complexity of the task to be performed."*

THE OCCUPIERS LIABILITY ACT

[46] The Occupier's Liability Act outlines the duty of employers in Section 3

> a) *An occupier of premises owes the same duty (in this Act referred to as the "common duty of care") to all visitors, except in so far as he is free to and does restrict, modify or exclude his duty to any visitor by agreement or otherwise.*

b) *The common duty of care is to take such care as in all circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.*

c) *The circumstances relevant for the present purpose include the degree of care and the want of care, which would ordinarily be looked for in such a visitor and so, in proper cases and without prejudice to the generality of the foregoing-; a) … b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.*

d) *In determining whether the occupier of premises has discharged the common duty of care to visitor, regard is to be had to all the circumstances.*

e) *… Section 6(1) where persons enter or use or bring or send goods to any premises in exercise of any right conferred by a contract with a person occupying or having control of the premises, the duty he owes them in respect of dangers due to the state of the premises or to things done or omitted to be done on them, in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right, shall be the common duty of care.*

[47] In **Wayne Ann Holdings Limited (T/A Super Plus Food Stores v Sandra Morgan** [2011] JMCA Civ 44, Harris JA, as she then was, opined that the occupier is not in breach of his duty to the visitor if the hazard complained of was incidental to the job, and arose inevitably along with a system appropriate to deal with its occurrence. The duty must also be viewed by the known or reasonably foreseeable characteristics of the individual employee.

CONTRIBUTORY NEGLIGENCE

[48] The defendant, in their skeleton submissions, set out the law regarding contributory negligence. Section 3(1) of the **Law Reform (Contributory Negligence) Act** is instructive. It empowers the court to reduce the amount of damages recoverable by a claimant who is partly at fault for his damages he has suffered, as the court thinks fit and having regard to the claimant's share in the

responsibility for the damage. Fault is defined to include, inter alia, negligence or any act or omission giving rise to contributory negligence.

[49] In **Umek v London Transport Executive** (1984) 134 NLJ 522, the claimant who was employed to the defendant was killed whilst crossing the railway lines. The subway had been flooded and a notice was placed at its entrance stating that persons should use the footbridge and not cross the railway lines. This was ignored by some of the staff and the defendant was aware of the situation. The court held that the defendant was negligent by its failure to warn the train drivers that members of staff were walking across the tracks. The damages awarded to the claimant were reduced by 25% on the basis that she was contributorily negligent.

[50] In **Uddin v Associated Portland Cement Manufacturers Ltd** [1965] 2 All ER 213 at 218, Lord Pearce stated that the onus of proving contributory negligence is on the defendant.

[51] Where workmen are concerned, it is not in all cases that they will be held liable for negligent acts. The test is whether the workman ought reasonably to have foreseen that his actions may have resulted in injury to him and took steps to avoid such injury. This was acknowledged by the court in **Flower v Ebb Vale Steel, Iron and Coal Co. Ltd** [1935] UKHL J0724-1 and **Allan Leith v Jamaica Citrus Growers Limited** (unreported, 2009 HCV 00664). The principle was subsequently applied in the case of **Caswell v Powell Duffryn Collieries Ltd** [1940] AC 152 at 166 where Lord Atkin said:

> *"I am of opinion that the care to be expected of the plaintiff in the circumstances will vary with the circumstances; and that a different degree of care may well be expected from a workman in a factory or a mine from that which might be taken by an ordinary man not exposed continually to the noise, strain, and manifold risks of factory or mine. I agree with the statement of Lawrence J. in **Flower v Ebb Vale Steel, Iron and Coal Co. Ltd**…, cited by my noble and learned friend Lord Wright… "I think of course that in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of facts has to take into account all the circumstances of work in a factory, and that it is not for every risky*

thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence" This seems to me a sensible practical saying, and one which will afford all the protection which is necessary to the workman."

THE ISSUES

[52] The issues arising in this claim are whether the claimant has established the necessary elements of negligence. The case is more conveniently assessed as one involving liability on the part of an employer to an employee. There is also the question of whether the claimant was contributorily negligent. The court must also consider under which head should damages be awarded and the quantum.

DISCUSSION

[53] On the evidence presented before the court, the claimant has on a balance of probabilities, established some of the allegations of negligence/breach of contract and breaches of the **Employers' Liability Act** and the **Occupiers Liability Act** as were set out in her particulars of claim. The court notes the overlap in the various breaches listed under the different causes of action. The law is clear that employer's liability is not a separate tort with its own rules. Thus, in order to establish the tort, a claimant essentially has to establish negligence. It is just that the specific duties, as established, are uniquely between the employer and employee. It is on that basis that the court grounds the defendant's liability primarily in the claim as breach of employer's liability. The allegations of negligence established are as follows:

a. Failing to provide a safe place of work

b. Failing to provide adequate plant and equipment

c. Failing to provide a competent staff of employees

d. Failing to provide proper lighting in the work area for the employees

e. Failing to cause oil spillage in the “pit” to be cleaned before the Claimant started working

f. Having the Claimant working in poor lighting conditions

g. Failing to ensure that the cleaning staff properly cleans all work areas

h. Failing to provide a safe environment for work, with effective supervision.

[54] The defendant’s servants who were in a supervisory capacity, and particularly those with responsibility for the Portmore depot knew or ought to have known of the state of the lighting in the pit and that it would not have been adequate especially if two buses were situated over that area. Mr Wilson’s evidence that he became aware that extra lighting was needed in the pit from the first day he became acting supervisor is quite instructive.

[55] The court acknowledges that he was referring to a scenario where two buses are parked over the pit which was not his evidence as to what obtained at the relevant time. It seems clear enough that it was not an uncommon practice for two buses to be there at once. Even if the claimant had been provided with a replacement light, which I do not believe happened, I do not believe that that light would necessarily have enabled her to see to move around in the pit. The evidence reveals that the light in question would have been attached to the helmet or some kind of headband and would have been more effective in enabling the claimant to see the mechanisms of the bus whilst she was working on them.

[56] The long bulbs as described by the claimant and Mr Grant, three of which were not working, is what would have enabled her to see properly in order to walk inside the pit. To the extent that the lighting provided was inadequate, the items at (a), (d) and (f) above have been established.

[57] It is true that an oil spill would not be an occurrence that is unusual or unexpected in that setting. The defendant's position is that janitorial staff is responsible for the cleaning of the pit. The evidence is that the pit had not been cleaned that morning and Mr Wilson was alerted to that fact, yet he did nothing. That failure represents a failure to provide a safe environment for work, with effective supervision, that is, (g) at paragraph **[53]** above. The evidence which has not been effectively refuted is that the depot was short staffed as it relates to groundsmen and/or janitorial staff. This court places no emphasis on Mr Lumley's evidence regarding what happened at the depot regarding cleaning of the pit and the lack of use of degreaser in the pit. His evidence in cross-examination was that he had not been actively working at the Portmore depot since 2016.

[58] His evidence regarding the state of the lighting and the use of saw dust are somewhat different in that he stated that the lights fell into disrepair over the years and were never replaced and that the use of saw dust was discouraged. Despite the efforts to establish that he had an interest to serve in that he was dismissed for dishonesty, it was never suggested to him that he was being untruthful about the state of the lighting in the pit over a matter of years or that he was being untruthful when he said that the use of saw dust was discouraged.

[59] By failing to ensure that groundsmen were available to pour saw dust on the oil spill and janitorial staff to clean the pit, then items (e), and (g) at paragraph **[53]** above have been established.

[60] Based on the claimant's evidence in cross-examination, which was reproduced at paragraph **[18]** above, the inescapable conclusion, is that the claimant was aware of the oil on the floor of the pit prior to slipping on it. The fact of not wearing a helmet on the occasion in question could not be said to have in anyway caused or contributed to her injury. Her evidence that she was wearing her work clothing and the boots assigned to her was not disputed. The wearing of the protective clothing and boots did not prevent her from falling or lessen the effects of the fall.

[61] Although the defendant's pleaded case was that degreasing agent was provided, that was not borne out by evidence. It is noteworthy that although Mr Wilson and Mr Grant in their witness statements outlined proper systems and proper procedures, Mr Grant in particular was not able to say at all whether what should have obtained was what in fact occurred in practice.

[62] At minimum, there was some degree of negligence on the part of the claimant. She was alert to the existence of the oil on the floor of the pit. That knowledge required her to apply much caution when she re-entered the pit in order to carry out the task assigned, albeit, she said that she re-entered in circumstances where she felt forced to do so before the pit was cleaned. She ought reasonably to have foreseen that if she did not pay particular attention to where she was walking, then that failure might result in injury to her. She could easily have taken steps to avoid walking in the oil so as to avoid falling. This is not a case where she could not have avoided walking in the oil. Mr Wilson's evidence that the oil covered a small area of the floor of the pit was not contradicted. Even if in fact the spill covered a large area, that would not have prevented the claimant from taking particular care about how and where she stepped. He failure to take sufficient care for her safety gives rise to contributory negligence on her part.

[63] The prior awareness and subsequent falling do not in the circumstances completely absolve the defendant, given the duty of the employer to make the workplace safe as reasonable skill and care permits and that the duty of care necessarily involves carrying out regular inspection of both plant and equipment. Further, because it is insufficient for the employer to show that the danger was known by the claimant and fully understood by her.

[64] The combination of the oil spill and inadequate lighting made a workplace that might otherwise have been safe, unsafe. A reasonable employer in the circumstances which obtained would not have permitted those conditions to remain as they were.

[65] The court has to consider two factors: namely the respective causative potency of what each party did or failed to do which amounts to the negligent conduct and their respective blameworthiness. Bearing those two factors in mind, the contributory negligence to be assigned to the claimant may be assessed at 30%.

DAMAGES

SPECIAL DAMAGES

[66] The claimant set out the following as her particulars of special damages:

Medical expenses Andrews Memorial Hospital and continuing	$451, 756.94
Other medical expenses and continuing	$ 34,365.00
Medical Report Dr Andrew Greene	$20,000.00
Extra Help @$18,000.00 per fortnight (and continuing)	$216,500.00
Loss of earnings and continuing	$1753,041.60
Transportation	$32,000.00

[67] Loss of earnings will be considered separately. The total cost of the other items listed above is $754,612.94. The defendant contends that the claimant has proven the sum of $560,000 for special damages.

[68] The claimant tendered into evidence receipts evidencing expenditure. The receipts are numerous and all of them are not particularly clear. In submissions the claimant claims to have proven $708,771.94. The court has identified receipts in proof of that sum if not more. The claimant is therefore entitled to recover $708,771.94.

LOSS OF EARNINGS

[69] It was the claimant's evidence in her witness statement that besides being employed to the JUTC, she was a musician and she used to travel and perform with bands, and she use to play at church on Sundays, but since her injuries, she has been unable to travel and play the drums or the keyboard. She said she would earn up to $25,000,00 for four Sundays playing for churches and when she went overseas, she would earn up to US$2000.00. She also stated she would still receive the payments from her church.

[70] When cross examined, she explained that she would only be paid for playing overseas at churches she would visit, and this happened only when she was on her vacation. She did not state with what regularity she went on vacation. I am of the view that there should be no recovery in respect of loss of earnings from playing at churches overseas during vacation as the evidence was not sufficiently specific in terms of the regularity with which she went on vacation overseas and on how many occasions per visit she would receive payment for playing.

[71] It was also the claimant's evidence that she ceased being employed to the defendant company as of August 2019. Her employment ceased on account of the injury giving rise to this claim.

[72] She claimed the sum of $1, 753,041.60 for loss of earnings. The basis for claiming that sum is the evidence that she earned $277.38 per hour and that she worked 5 or 6 days weekly. That sum she says is her entitlement for the period September 2019 to the date of judgment. She is, in my view, entitled to that sum.

LOSS OF FUTURE EARNINGS

[73] The claimant's attorney-at-law has submitted that the claim for "loss of earnings and continuing" as particularized in the claim for special damages should be read as including a claim for loss of future earnings. I would not readily accept that by setting out the pleadings in this way, it adequately reflects a claim for loss of future earnings. There are two reasons for this view. Firstly, the claim is made as an item of special damages and future earnings is not an item of special damages. Secondly, a claim for any element of damages stated in this way is usually intended to be and is so treated, as a claim for damages up to the time of trial. But there is precedent for the interpretation contended for. Mr Campbell relies on the dictum of K Anderson J in the case of Robert **Minott v South East Regional Health Authority and the Attorney General** [2017] JMSC Civ.

[74] K Anderson J's interpretation is not a wholly unreasonable or untenable interpretation and in keeping with the doctrine of stare decisis and of certainty in the law, I will adopt that interpretation. Further, loss of earnings is an item of general damages, and it is not a requirement that it be specifically pleaded as a separate item. It is nevertheless necessary that the defendant be made aware of the case it was required to meet. The facts of this case are such that the defendant could not have been taken by surprise by this aspect of the claim. The court is alert to the fact that the claimant's injury has caused her some level of handicap. In fact, her dismissal from the company was based on medical redundancy as the claimant puts it. That assertion was never refuted.

[75] The traditional position was that damages would be awarded under this head where a claimant is still employed but apprehends that he or she will at some point be unable to retain employment because of the injury and will therefore be unable to compete in the labour market. The more recent approach is that reflected in the dictum in the case of **Thompson v Smith and another** [2013] JMCA Civ. 42. Morrison JA, as he then was, had the following to say on the question of loss of future earnings:

> *"Once the court is satisfied that there is a substantial risk that the claimant will at some point in the future find himself on the labour market, "what has somehow to be quantified in assessing damages under this head is the present value of the risk that a plaintiff will, at some future time, suffer financial damage because of his disadvantage in the labour market"*

[76] Thus, although the instant claimant is not now employed, she is eligible for an award of damages under this head.

[77] It should be noted that there are two different methods of calculating the claimant's entitlement to a sum which represents her inability to earn or to earn as much as she was able to, in her pre-injury state. There is the option of awarding a lump sum and that of utilizing the multiplier/multiplicand method. Carey JA in **Kiskimo Ltd. v Salmon** (1991) SCCA No. 61/89 unreported explained that:

> *"The method adopted by a judge will depend more often than not, on the adequacy of the evidence before him and in some instances on the nature of the injuries which might well create many imponderables as to the plaintiff's future. But I think, if we are to ensure some uniformity in awards under this head, the arithmetic approach should be preferred as it allows this court to maintain some equilibrium in the figure taken as the multiplier by trial judges."*

[78] In **Iclilda Osbourne v George Barned and Others** (Claim No 2005 HCV 294, judgment delivered 17 February 2006), Sykes J, as he was then, also made the observation that the question of which method is to be adopted in making an award for loss of future earnings will depend on the information that was made available to the court.

[79] In this instance, the court has been provided with precise information regarding the claimant's pre-injury earnings. This information provides a basis for the court to make an award on the multiplier/multiplicand basis, as the claimant has asked the court to do. The claimant's attorney-at-law has also asked that a multiplier of 10 be used. The defendant's attorney-at-law has not addressed the issue at all.

[80] A multiplier of 10 is not appropriate for a female whom the evidence reveals is now 50 years old. A multiplier of 7 seems more reasonable. Mr Campbell has also utilized as the multiplicand, the hourly sum indicated by the claimant. It was not stated that this was a net sum. It is the net earnings that form the basis for the multiplicand. The amount, however, does not seem to attract income tax as it is below the threshold. Further, considering that the sum is not being updated to take into account increases in earnings overtime, no harm will be done if the hourly rate indicated is used. Utilizing an hourly rate of $277.38 and a multiplier of 7, the claimant's entitlement is $4,038,652.80.

PAIN AND SUFFERING AND LOSS OF AMENITIES

[81] The claimant relied on the authorities of **Stephanie Burnett v Metropolitan Management Transportation Holdings Ltd and Jamaica Transit Co. Ltd**., Khan's Vol. 6, page 195, **Schaasa Grant v Salva Dalwood and Jamaica Urban Transit Company Ltd** Suit. No. 2005 HCV 03081, and **Naggie v The Ritz Carlton Hotel Company of Jamaica**, Khan's Vol. 6, page 198, to support her claim for general damages for pain and suffering and loss of amenities.

[82] In the first mentioned case, Ms. Burnett was 69 years old. She was injured on the 2nd of April 2003 when she was boarding a bus and became trapped in the door with her upper body inside and her lower body outside of the bus. She was dragged for some time in that position. She suffered from tenderness of abdomen and back, tenderness in her lower regions especially in her iliac and lumber area, probable soft tissue injuries and subcapsular haematoma of her spleen. She was discharged on the 24th of April 2003 for follow-up and physical therapy.

[83] Dr. R. C. Rose examined her on the 17th of February 2005 and found compression of her lumbar nerve roots, degenerative disc disease and acute chondromalacia of her left patella. On further evaluation on the 14th of April 2005, he opined that the nerve root compression was precipitated by the trauma to the lumbar-sacral

spine which resulted in an oedema around the nerve roots which were already situated in narrow canals. An MRI on the 14th of June 2005 revealed the following:

a. Mild retrolisthesis of L2 on L3
b. Scoliosis convex to the right
c. Bony degenerative changes with anterior osteophytes in L2-L4 with disc herniations at L2-L3, L3-L4 & L4-L5 levels
d. Severe bilateral foraminal stensosis at L2-L3, & L3-L4 on the left and at L4-L5 on the right.
e. Lumbar roots were compressed

[84] The radiological findings of both plain X-rays and MRI were not a result of degenerative changes involving the lumbo-sacral spine. However, the severe trauma to the lumbo-sacral spine produced oedema around the nerve roots with resultant irritation and inflammation caused by the surrounding narrow foramina. She required surgical decompression as these symptoms were unlikely to be resolved otherwise. Physiotherapy did not assist. Dr. R. C. Rose assessed her whole person disability at 13%.

[85] Ms. Burnett was awarded $3,000,000.00 for pain and suffering and loss of amenities in December 2006 (CPI of 38.3) which updates to $9,469,973.89 using May 2022's CPI of 120.9.

[86] In **Schaasa Grant v Salva Dalwood and Jamaica Urban Transit Company Ltd,** Ms. Grant was a 29-year-old conductress who was injured on the 3rd of February 2005 when Mr. Dalwood suddenly applied the brake of the JUTC bus he was operating and she was flung from her seat. She suffered from serious back pains and was given ten (10) days of sick leave and an injection. Ms. Grant indicated that the pain was so intense that she had to seek private transportation to return home. She saw various doctors and physiotherapists, was initially placed on a four-hour office shift and she was unable to resume work as a conductress as this

caused her great pain and discomfort. Her social and sexual activities were hampered. In August 2005, Ms. Grant was assessed as suffering from:

a. Right side lumbar radiculopathy secondary to a prolapse intervertebral disc.
b. Mechanical lower back pain
c. Mild back pain

She also suffered from muscular spasms in right shoulder and neck. Following pain management with Dr. Dawson, it was noted that there was a re-aggravation of her neck pain, back pain and right lumbar radiculopathy. Her final diagnosis was:

a. Chronic cervicothoracic pain with subjective radiculopathy
b. Chronic mechanical low back pain with subjective lumbar radiculopathy

[87] As occurred in the instant case, JUTC made the claimant redundant on the 2nd of February 2008. Ms. Grant was assessed with a W.P.I rating of 10%. Her prognosis was that her problems were expected to continue to affect activities of daily living, her social life and her ability to carry out her profession. She was advised against working on a bus. Ms. Grant was awarded $3,000,000.00 for pain and suffering in June 2009 (C.P.I. of 49.9) which updates to $7,268,537.07, using May 2022's CPI of 120.9. Ms. Grant was able to resume work for a time and there is no reference to any recommendation for her to undergo surgery.

[88] In **Naggie v The Ritz Carlton Hotel Company of Jamaica**, Ms. Naggie was a 25-year-old Hotel Employee who was injured on the 19th of November 2000 when she slipped and fell at work while lifting a heavy urn. She was diagnosed with:

a. Severe back pain across lower back radiating to the right thigh
b. Protrusion of L4/L5 to the right side

She was admitted to the MoBay Hope Medical Centre and treated. She developed a depressive condition and was given anti-depressants. She was discharged much improved, on the 11th of December 2000. A myelogram on the 8th of March 2001

showed minimal protrusion L4/L5 without enhancement of the neuronal issue. Physiotherapy was strongly recommended.

[89] Dr. R. C. Rose saw her on the 30th of March 2005. She complained of intermittent lower back pains aggravated by sitting or standing for more than 15 minutes, an inability to perform household chores, requiring analgesics to sleep, occasional pains along the posterior aspect of the right thigh, impaired sexual activity and inability to resume sporting activities like water sports. Dr. R. C. Rose diagnosed her with mechanical lower back pains and opined that she would be plagued by intermittent lower back pains aggravated by prolonged sitting, standing, bending and lifting. Dr. Rose assessed her as having a 5% whole person impairment in restriction in extension of the lumbosacral. Her total permanent partial disability was 10% of the whole person.

[90] Ms. Naggie was awarded $1,750,000.00 for pain and suffering and loss of amenities in December 2005 (CPI of 38.3) which updates to $5,844,613.25 using May 2022's CPI of 120.9

[91] The observation was made by the claimant's attorney-at-law that Ms. Naggie's permanent disability was less than half of Ms. Mills-McLarty's and she was not recommended to undergo surgery.

[92] The claimant's attorney-at-law submitted that $13,000,000.00 is a reasonable sum for the claimant's pain and suffering and loss of amenities.

[93] The defendant relied on the case of **Merdella Grant v Wayne Hotel Company** Suit No. C.L. 1989 G045, at page 370 Harrison Assessment of Damages where the injuries suffered by the claimant were as follows:

- Fracture of the transverse process of the 5th lumbar vertebra of the spinal;
- Acute lumbar strain;
- Severe back pain;
- 25% PPD;
- Physiotherapy for rest of life;

The award in this case in July 1996 was $1,400,000.00 which updated to approximately $11,579,354.83 using the current CPI May 128.2.

[94] The defendant submitted that in the **Merdella Grant** (supra) case, the claimant had a greater PPD with considerably greater level of suffering. Additionally, in the present case, the claimant had a pre-existing condition which has been exacerbated by the trauma and thus the award should be less. The sum suggested was $8,000,000.00.

[95] The defendant further opined that the issue of mitigation arises, and Mrs. Mills-McLarty has elected not to do the surgery which she is entitled to do but that she cannot visit upon the defendant the costs of her jolly.

[96] The claimant has not specifically stated that she cannot afford the surgical procedure that has been recommended but she has said that she is struggling financially, she can hardly meet her day-to-day expenses, and that she receives some financial assistance from her eldest daughter and that that situation creates arguments between them. Further that she is unable to work and was about to be evicted from her residence. That evidence demonstrates that she could ill afford surgery costing in excess of six million dollars.

[97] The claimant's attorney-at-law made the observation that both Ms. Burnett in **Stephanie Burnett** (supra) and Ms. Mills-McLarty suffered from pains resulting from the narrowing foramina in their lower backs which extended to their legs. They both required surgical intervention. However, Ms. Burnett's W.P.I. was far lower than Ms McLarty's, despite her not undergoing surgery at the time of the hearing. The first observation made is that the present claimant does not have that element of the damaged spleen as did Miss Burnett.

[98] It is reasonable to say that Miss Merdella Grant's injuries were somewhat more severe in that she suffered a fracture. Miss Merdella Grant did not, however, have the added complication from the surgical procedure of leak of cerebral fluid and the prolonged post-operative headache.

[99] The court also takes note that a number of Miss Burnett's complaints were associated with chronic longstanding disorders rather than being precipitated by any accidental cause. The judge must therefore have considered aggravation of her existing condition in order to have made the award in that matter.

[100] Unlike Ms Naggie, who complained of **intermittent** and **occasional** pains, the instant claimant complains of almost constant pain, albeit more severe at certain times than at others. The claimant has chronicled her pain and suffering and her numerous visits to the doctors over the years since the incident in 2016. In summary, she cannot manage her household chores, she cannot sit or stand for long periods, and she now walks with a cane, Dr Paul Wright described her gait as being most peculiar. According to Doctor Paul Wright, the claimant had a stamping gait. The medical report of Dr Dean Wright indicates that the claimant kneels with difficulty, is unable to run, she does not jump or kick, that she stoops and squats inefficiently, and she has difficulty climbing stairs and inclines. At the time of giving evidence, she explained that she was overseas receiving medical care and that family members were helping her to fund the medical expenses.

[101] The court recognizes that the claimant had degenerative disc disease which was detected as far back as November 1, 2017. It seems fair to say that that condition may not have developed because of her injuries, given that the incident occurred just about one year and a month prior to the diagnosis. That is a factor that must be taken into consideration. It is significant however that the claimant had no complaints prior to the incident. The doctor has of course said that her existing condition was exacerbated by the injury.

[102] I believe that a reasonable sum to compensate the claimant for pain and suffering loss of amenities is $10,500,000.00

FUTURE MEDICAL CARE

[103] The defendant urged that the claim for future surgery should not be allowed as in the opinion of Dr. Dean Wright, Mrs. Mills-McLarty has reached maximum medical improvement. What follows in the submission after this statement, was that "the expert said that the surgery would improve her condition".

[104] On the morning of trial, the defendant's attorney-at-law sought an adjournment of the trial primarily for the purpose of being able to put questions to Dr Dean Wright in light of his findings that the claimant had a PPD of 23% and his recommendation in 2020 that the claimant undergo a second medical procedure. This court refused the application for adjournment.

[105] The court was fully cognizant that counsel who appeared in the matter at trial had only very recently been retained in the matter and would not have had the opportunity to seek to put questions to the doctor, in the light of the court's previous order that the doctor's report should be admitted as an expert report without the need for the doctor to attend at trial to be cross examined. The court considered, however, that the defendant had been represented by a firm of attorneys-at-law. That representation lasted for years, and no application was made to put questions to any of the doctors. The fact that new counsel would have conducted the case differently is not a reason this court would have granted an adjournment in order to address matters regarding the contents of a medical certificate which had been made available to the defence from at least October of 2022.

[106] The claimant's attorney-at-law submitted that the clamant is entitled to $6,300,000.00 for future medical care.

[107] The first observation of this court is that regarding whether or not the claimant has reached maximum medical improvement. Doctor Dean Wright's observation, in the medical report, under the heading "final diagnosis" is that "Mrs Mills McLarty has plateaued at the point of Maximal Medical Improvement". He thereafter indicated her injuries. In giving his prognosis, he said that "chronic residual symptoms are not expected to improve significantly although continued self-directed and

supervised physiotherapy, analgesics and muscle relaxants on an as needed basis are helpful". He went on to say that "the lifestyle changes" she has described so far, are real and that "maximum medical improvement for all injury sets has not yet been attained." He further stated that surgery is advised. This court must admit that the summary is inconsistent in that regard. However, the doctor's earlier statement that she has plateaued at an unacceptably non-functional level cannot be ignored.

[108] It seems safe to say that once the doctor has recommended further surgical procedure, then maximum medical improvement has not been attained. The doctor has clearly and unmistakeably recommended surgery in circumstances where he has already done a surgical procedure. It is not for this court to determine that she should not be awarded the costs of the future surgery. The claimant will therefore be awarded the sum of $6,217,611.00 for future medical care, which is the sum indicated in the doctor's report.

ORDERS

[109] In the final analysis, the claimant is entitled to the following orders:

1. Judgment in favour of the claimant against the defendant.

2. Damages are assessed as follows:

    i. Special damages excluding loss of earnings in the sum of $708,771.94 with interest at the rate of 3% per annum from October 14, 2016, the date of the incident giving rise to this claim, to the date of Judgment.

    ii. Cost of future medical care in the sum of $6,217,611.00 with no interest.

iii. Loss of earnings awarded in the sum of $1, 753,041.60 with no interest.

iv. Loss of future earnings in the sum of $4,038,652.80 with no interest.

v. General damages for pain and suffering and loss of amenities assessed at $10,500,000.00 with interest at the rate of 3% per annum from September 19, 2018, the date of service of the claim form.

3. The sums awarded for damages are reduced by 30% on account of the claimant's contributory negligence.

4. The claimant is entitled to recover 70% of the costs in this claim, to be taxed if not sooner agreed.

A. Pettigrew-Collins
Puisne Judge