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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 0805 OF 2003

BETWEEN	WILLARD MORGAN	CLAIMANT
A N D	VALLEY FRUIT COMPANY LIMITED	DEFENDANT

Heard on October 28, 2005 and February 15, 2006

Ms. Nesta Clare Smith instructed by Ernest Smith and Co for the Claimant; Ms. Sherry-Ann McGregor instructed by Nunes, Scholefield, DeLeon & Co for the Defendant

ANDERSON, J.

On the 11th June 2001, the Claimant a 56 year old employee of the Defendant, received a crush-injury to his right leg which resulted in the amputation of the leg below the knee. The Claimant was sitting on the connection between a tractor and a trailer to which it was coupled. The tractor was pulling the trailer in which were being conveyed, several sacks of fertilizers as well as about ten workers. The tractor and trailer were held together by way of a metal bar at the back of the tractor (the "drawbar") and a metal projection from the front of the trailer. Each part had a hole through which a metal pin was inserted to secure the coupling. It was this pin that broke causing the trailer to run into and under the rear of the tractor and the Claimant's leg was pinned under the tractor.

The particulars of injuries according to the medical report are as follows:

1. Crush injury which lacerated the proximal leg.
2. Bleeding with laceration and exposed bone
3. Swelling deformity and inability to bear weight.
4. Seven (7) cm transverse laceration to the lateral aspect of the wound in the proximal tibia.
5. Comminuted fracture of the proximal third of the tibia and fibula.
6. Fracture site displaced and angulated.
7. Crush injury to leg with 111 B open fracture of proximal tibia.

The above are factual issues about which there is no dispute. The Claimant at the time when the accident occurred was sitting on the metal which connected the trailer to the tractor, which he claimed was used as a seat, but which the Defendant claimed was a step used by the ladies who worked on the Defendant's farm to get into the trailer for the purposes of being transported around the farm. This alleged seat was a piece of metal which was attached to the chassis of the trailer. According to the evidence, the trailer was a "make-shift trailer" converted from the back of a tipper truck. It is not in dispute that as the Claimant sat on this connection the pin which held the tractor and the trailer together snapped and when the tractor stopped the trailer continued moving forward, running under the rear of the trailer causing the injury to the Defendant's leg.

There are relatively a few issues for the court to consider in this claim which is both a claim in negligence as well as a claim for a breach of duty to provide a safe place of work for an employee.

The Claimant accepts that it is trite law that he must prove his case on a balance of probabilities but his counsel urges the court to the view that he may be assisted here by the doctrine *res ipsa loquitor*. In support of this, Miss Smith cited the judgment of Earle C.J., in the case **Scott, v. London & St. Katherine Docks Company**, where the learned Chief Justice quoted the following: -

> "Where the thing is shown to be under the management of the Defendant or his servants and the accident is such an ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the Defendant that the accident arose from want of care."

I accept as Claimant's counsel does, that in order to rely on this doctrine, the Claimant must establish that the thing causing the damage was under the management or control of the Defendant his servants or agents and, secondly,

that the accident was of a kind such as would not, in the ordinary course of things, have happened without some negligence on the part of the Defendant or his servants. I believe that the Claimant clearly here can rely upon the principle of *res ipsa loquitor* in support of his claim that the Defendant has been negligent.

The Defendant, in its defence, denied all of the Claimant's claims. However, at the end of the day it was conceded by the Defendant that the breaking of the pin was the proximate cause of the accident and is *prima facie* evidence of negligence. Further it seemed to be conceded that the Claimant may, because of this, rely upon the doctrine, *res ipsa loquitur*. However, in her response submissions Ms. McGregor cited **Woods v Duncan [1946] 1 All E.R. 420** as suggesting that the doctrine does not apply. I do not believe that the case assists the Defendant in responding to the Claimant's submission that res ipsa applies. It was submitted that in that case, the House of Lords determined that the principle only shifts the onus of proof, and the defendant may discharge that burden even if the accident remains inexplicable. The defendant ought **not** to be held liable if the court is satisfied by affirmative evidence that he was not negligent. I agree. However, I do not agree with the submission that, "in this case, the defendant has proved that there was no want of reasonable care in its inspection and maintenance of the tractor/trailer". In fact, I hold to the contrary.

Among the issues of fact which the court must determine is whether to accept the evidence of the Claimant in respect of the following:

(a) that he had assisted other workers to load the trailer with bags of fertilizer that morning;

(b) that he had then gone back to fetch his machete, and that upon his return he attempted to board the trailer, but the trailer was already full because of the fertilizer and personnel, and

(c) the only place where he could sit was on what he called the "seat", being the metal piece in the front of the trailer. The Claimant further avers that he had seen other workers sit on that particular spot from

time to time and he was not aware of any prohibition against workers sitting there.

There was some attempt by the Defendant to argue that the Claimant, being an irrigation worker, could not have been required to assist with the fertilizing of the plants on the 69 acre papaya farm as that would not have been his job. It was the evidence of the Claimant, however, that on the farm, "everyone did everything. Only some persons did spraying, but everyone certainly did fertilizing. The Court can take judicial notice of the fact that in Jamaica, on relatively small farms such as this one, employees are often required to be "jacks of all trade" and to assist wherever there is need for such assistance, and indeed, such was Claimant's evidence.

As far as (a) and (b) above are concerned, I accept the evidence of the Claimant as those facts are not seriously challenged. On the issue at (c), the Defendant, through its witness Mr. Somerville, strongly asserted that workers had been specifically told not to sit on that particular part of the trailer because it was dangerous. Mr. Somerville's evidence was also to the effect that at the time when the Claimant got onto the piece of metal which he described as a seat, the vehicle was some three or four chains away from where the trailer had been loaded. Although he noticed the Claimant doing what, he claims, had been expressly prohibited, he was unable to take any action to prevent his so sitting as he was too far away from Mr. Somerville.

On a balance of probabilities, I also accept the Claimant's evidence he was not aware of any prohibition concerning sitting where he had and that workers were accustomed to sitting there on being transported to different places on the farm. Moreover, as I observe below, if there had been such prohibition there was clearly no proper policing of the policy, if indeed it did exist.

Based upon the submissions of the Defendant's counsel, it is clear that the Defendant is prepared to accept some liability for the injuries, loss and damage which his Claimant has suffered. However, it is asserted by counsel that the

liability for the injuries should be apportioned as to 70% for the Claimant and 30% for the Defendant and any damages should be apportioned appropriately. It will therefore be necessary for the Court to look at the authorities in so far as they relate to negligence and safe place and conditions of employment to determine whether, and if so to what extent, the Claimant may be held to have contributed to his own demise and therefore be liable to at least bear some damages which he has suffered. I shall do that here.

Claimant's case simply put is as follows: I was at work and being transported to another part of the farm by a method used by my employer to transport workers. That there was a break in the pin holding the tractor and trailer together and this break can only be explained on the basis of negligence: i.e. *res ipsa loquitur*; that my employer did not provide me with a safe work environment and as a result of the negligence or the failure to provide a safe work environment, I received injuries and suffered loss and damage.

It was the essence of Defendant's case that the piece of metal at the front of the trailer which was attached to the chassis, was a "step" which was used by the female employees to get into the trailer. The Claimant had no business being there as it was dangerous and the defendant had warned workers not to sit there. Any injury, loss or damage caused to the Claimant was essentially of his own making and the Defendant ought not to be penalized for that. Evidence as to how the trailer was constructed indicated that it was enclosed by rails on three (3) sides, at least three (3) feet high to the front and two sides, while it was open at the back. Mr. Somerville, in answer to my query, indicated that while the drawbar was about a foot from the ground, the "step" attached to the chassis of the trailer, was a about eighteen inches off the ground. It seems logical to infer that it would have been easier to attach a step at the back of the trailer if the intention was to assist persons in getting into it, rather than have a step at the front on which they would stand and then have to climb over a three foot high rail to get into the

trailer. I have grave doubts about the veracity of the evidence that the piece of metal was a "step".

On a balance of probabilities I am prepared to accept the Claimant's evidence that the attachment at the front of the trailer was no step. Another fact which I find in favour of the Claimant on a balance of probabilities is that the workers were not warned not to sit on the step and I accept the Claimant's evidence that the workers sat there on several occasions. Alternatively, if the workers had been told not to sit at that particular place, there had been inadequate policing of the policy inherent in those instructions. This was therefore in breach of the view expressed by Lord Wright in **Wilsons & Clyde Coal Company v English [1938] A.C. 57 at page 78** that one aspect the employer's common law duty of care to his employees was to provide a safe system of working *with effective supervision*.

Very central to this issue of the employer's duty of care, however, is the question whether the tractor/trailer had been properly maintained. There is evidence that there was a small garage on the farm which handled minor repairs. However, more serious repairs were carried out on another farm some distance away in Falmouth. There was also some suggestion in the Mr. Somerville's evidence that the tractor and trailer had been examined that morning, not only for gas and oil as was practice, but that also the pin had been examined. On a balance of probabilities I reject this evidence as it seems that had a thorough examination been made of the pin on the morning in question, it is difficult to envisage that it would not have shown sufficient signs of wear to have raised concerns about the safety of potential passengers in the trailer and, indeed, the driver of the tractor, given the fact that the workers were often carried in the trailer. So, on a balance of probabilities, I am prepared to accept that there was a lack of proper maintenance in relation at least to the pin which held the tractor and the trailer together when they moved.

In dealing with the employer's duty of care, the Attorney-at-law for the Defendant

correctly submitted that the duty is not an absolute one but rather it is a duty to take such reasonable care as may be necessary in the circumstances. It was also submitted that based upon the pleadings of this case there are two aspects of the duty which are relevant in relation to the question of liability here: firstly, whether a safe system of work had been provided and secondly, the adequacy of plant and equipment. I agree with those submissions. I also agree that the dicta of Lord Greene M.R. in **Speed v Thomas [1943] K.B 557 at page 663** cited by the Defendant's counsel is apposite, in considering what constitutes a safe system of work. These are said to "include according to the circumstances, such matters as the physical layout of the job – the setting of the stage, so to speak – the sequence in which the work ought to be carried out, the provision of proper warnings and notices, and the issue of special instructions."

In the case of **Wilson's & Clyde Coal Company v English** (supra), Lord Wright delivering the Judgment of the House of Lords also agreed that while the liability of the employer was not an absolute one, it was made up of three parts. Firstly, there is the requirement for the provision of competent staff of men, secondly, the provision of adequate material, and thirdly a proper system and effective supervision. It seems to me that in this case, at least in relation to the proximate cause of the accident and injury, the breaking of the pin, this may be explained on the basis that the equipment that was provided was not adequate.

Despite the evidence of Mr. Somerville to the contrary, I accept what the claimant says that other employees often rode on the section of the metal connection between the tractor-head and the trailer. As such it would appear that there was also a failure in relation to provide proper supervision and in light of these conclusions I hold that the employer/defendant was in breach of its obligation to provide a safe system of work for his employee. In the **Wilsons and Clyde** case, Lord Wright also cited **Young v Hoffman Manufacturing Company [1907] 2 KB 646**. He quotes the judgment of Kennedy L.J, where he states: "the employer, as against his employees, undertakes (inter alia) (a) to use reasonable clear in the

selection of competent fellow servants; and (b) In having and keeping his machinery the use of which might otherwise be dangerous to the servant in his employment, in proper condition and free from defect." I would hold that the breaking of the pin used on the connection between the tractor and the trailer must be seen as evidence of the failure of the Defendant to fulfill this latter obligation.

The Defendant does not accept that this is the end of the matter. It was submitted that where a Claimant showed a lack of reasonable care for his own safety, that will be negligence sufficient to ground a claim for contributory negligence. In other words the Claimant who is negligent must bear his proper share of responsibility for the consequences. Indeed, both counsel in their submissions addressed the issue of contributory negligence.

Defendant's counsel reminded the Court that the Claimant had conceded in cross examination that based upon where he sat, he would be in danger of being run over by the trailer if he fell. In light of the Claimant's admission, the Defendant submitted, the Claimant contributed to his own injury, loss and damage. The Court, therefore, ought properly to hold that the claimant was contributorily negligent. Defendant's counsel relies upon the dicta of Lord Denning in the case of **Jones v. Livox Quarries 1952, 2Q.B. 608** where he states "If a man carelessly rides on a vehicle in a dangerous position and subsequently there is a collision in which his injuries are made worse by reason of his position than they otherwise would have been then his damage is partly the result of his own fault and the damages recoverable by him fall to be reduced accordingly." Lord Denning then went on to say: "A person is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable prudent man, he might hurt himself". It was further submitted by the Defendant that in determining whether a person is guilty of contributory negligence one looks at what a reasonable prudent man might do in the circumstances.

Counsel for the Claimant accepts the general framework of the doctrine of contributory negligence as outlined in the Defendant's submissions, but submits, on the other hand, that the *standard of care* which ought to be expected of the Claimant in proceedings such as these, is reduced where the person being dealt with is a workman or a child. In support of that proposition she cited Kodlinye Commonwealth Caribbean Tort Law pages 359 – 360. She also found support for a more liberal view of the principle of contributory negligence in the Jamaican case **Amy Pitters v. T. Haughton [1992] 29 JLR 68** and the Judgment of Carey J, (as he then was). In that case, which was a case involving a breach of statutory duty, Carey J had this to say

> "The approach of the courts on this issue of contributory negligence can be discerned in the words of Lawrence J, in **Flowers v. Ebbw Vale Steel, Iron and Coal Company Limited 1937 2 K.B. at page 140.** I think of course, in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of work in a factory and that it is not for every risky thing a workman may do in his familiarity with the machine that a plaintiff ought to be held guilty of contributory negligence".

He went on to say that one starts with a basic assumption that the plaintiff has done a very "risky thing" and then goes on to enquire into the nature and quality of the riskiness, for if it amounts to extravagant folly, or if the safeguards are circumvented by perverted or deliberate ingenuity then contributory negligence can be found. If the risky thing is in disobedience of orders, then the court will apportion the degree of responsibility". I find myself in entire agreement with the learned Judge in that case, and would hold as well that the court can take a common sense approach to the question of the likely reasoning capabilities of persons who operate at the level of the Claimant, as field-hands on farms in our countryside.

In further considering the applicability of this principle of contributory negligence, it is clear that where the cause of the injury loss and damage may be two-fold, one of which is the responsibility of the Defendant and the other the responsibility of the Claimant, the question of contribution arises and the Court has to

determine the relative proportion to be allocated to each of the litigants in such an action. It will be clear by this point that I have come to the view that notwithstanding of Mr. Somerville's evidence that workers were warned not to sit on the draw-bar or the lead from the trailer, if indeed those instructions were given, that there was inadequate supervision of such instructions. However, the Claimant as a mature adult ought to have recognized and seemingly did recognize, that there was some possibility of danger in his position. There is, here, some indication of recognition of some degree of risk. In this regard I have looked at the case of **Morris v. United Estates** which is a case that I had decided some three years ago. Counsel for the Defendant has submitted that that division which was arrived at in that case ought to be used here making the Defendant liable only to 30% and Claimant himself as to 70% in relation to the loss and damage claimed and proven. With respect I do not accept that submission. The cases are significantly different on their facts. In the Morris case, it was clear that the Claimant was quite unmindful of his own safety and, in fact, was not paying attention when the tractor stopped for the driver to have a conversation with persons on the roadside. Moreover, there the Claimant was standing on the drawbar *without the knowledge of the driver*. Furthermore, in **Morris** it was the claimant's foot that slipped off the drawbar and he fell because he was standing. In the instant case, as found by the Court on a balance of probabilities, the cause of the accident was the fractured pin. In this case all that we have is, on the evidence that I accept, a trailer full of workers who according to Mr. Somerville, all helped to load fertilizer on the trailer that morning. I also accept the evidence of the Claimant that the trailer was full and that was the reason why he sat where he did.

Having accepted those facts, it seems to me that they militate against the Defendant seeking to urge upon me the kind of division which I arrived at in the **Morris v. United Estate's** case, which I had earlier decided. In my view, a proper apportionment in the circumstances of this case ought to be as to 85% liability to the Defendant and 15% liability to the Claimant. In light of the findings

of fact and the consequential finding of liability, I will proceed to look at the question of the quantum of damages under the various heads as submitted by counsel for both sides.

General Damages – Pain and Suffering

On the question of the quantum of damages, the Claimant's counsel refers to the medical report of Dr. Derrick McDonald. According to that report, the patient suffered a crush injury to the right leg. There was laceration and exposed bone. There was swelling, deformity and inability to bear weight bear. X-rays done revealed a comminuted fracture of the proximal third of the tibia and fibula and contributed to the reason for a finding that he had suffered a 28% whole person permanent partial disability. According to the Claimant he has lost the ability to play football and cricket which he used to enjoy and he also lost his wife because of his inability to support her.

Claimant's counsel agrees that the court may usefully be guided by the cases cited by Defendant. In that regard, the following cases were cited.

JOSEPH FRASER v TYRELL MORGAN Khan's Vol. 5 page 19.

In that case, the claimant was a fifty (50) year old messenger who suffered a high below knee amputation and was classified as having a 32% PPD as compared to this claimant who suffered a 28% PPD. In Fraser's case, on June 2, 2000, he was awarded $2,000,000.00 for main and suffering and loss of amenities. Using the CPI for September, 2005 of 2272.4, that award would be worth $3,465,609.27. Counsel for the Defendant pointed out however, there were several differences between Joseph Fraser's case and this Claimant's: For example

(a) Joseph Fraser was 5 years younger than this Claimant.

(b) This Claimant here was left with a lower whole person disability than Joseph Fraser.

(c) This Claimant's amputation left him with full range of

movement in the knee and it would appear that his amputation was not as high as Joseph Fraser's.

Oswald Espeut v K. Sons Transport Ltd. et al Khan's Vol IV at page 39

There, the Claimant, a 55 year old janitor, had an above knee amputation. He was assessed as having an 80% disability of the lower extremity. On June 6, 1997, he was awarded $1,501,360.2 0 for pain and suffering and loss of amenities. This award would be worth $3,298,231.75. However, Defendant's counsel submits that this Claimant's injuries were less severe than that of Oswald Espeut's and that the permanent disability there was higher. It was submitted that a figure of $2,750,000.00 should be considered adequate compensation for pain and suffering and loss of amenities for this claimant.

While agreeing that the cases are useful, Claimant's counsel feels that the defence overstates the differences and fails to recognize that compared to the three (3) days spent in hospital by Fraser, Mr. Morgan spent thirty-one (31) days. Further, Mr. Morgan also developed an infection which, she submits, would add to his pain and suffering. On the other hand, in Espeut, while the lower limb disability was given as 80%, there was no opinion on his whole person disability and therefore no basis for direct comparison. She therefore argues for an award of $3,300,000.00 as being reasonable in all the circumstances.

Having considered the cases cited, I am of the view that the Claimant should be awarded general damages for pain and suffering and loss of amenities in the sum of three million two hundred thousand dollars ($3,200,000.00)

Special Damages

The parties agreed certain items of Special Damages amounting to Forty Nine Thousand Three Hundred and Fifty Dollars ($49,350.00). There are differences as to whether a hospital bill for $37,350.00 was paid by the Defendant as it claimed or was still outstanding as claimed by the Claimant. The other item of special damages which was outstanding was the claim for loss of earnings for 78

weeks) at $2038.59 per week, totalling One Hundred and Fifty-Nine Thousand, and Ten dollars and two cents ($159,010.02). Although counsel's written submissions asked for loss of earnings for one hundred and four weeks, the pleadings only claimed for seventy-eight weeks and there was no application to amend the claim. The claim is therefore for the sum set out above.

The Claimant does not claim to have paid the former sum nor does the defendant assert that it has been paid. However, it does not dispute its liability to make the payment. In those circumstances, I would order that the Defendant is to indemnify the Claimant in respect of any claim by the hospital for payment of this sum. Interest will only be paid to the extent that the hospital claims interest on the outstanding sum.

In so far as the loss of earnings is concerned, the Defendant says that at least part of the reason for Claimant's inability to earn was his failure to avail himself of Defendant's offer to pay for a prosthesis which would have allowed him to get around. Further, the Defendant says that Claimant's allegation of being dismissed is not supported by the evidence and, parenthetically, cannot be used to justify the suggestion that the Defendant would not have followed through on its promise. In short, this is a submission that the Claimant has not fulfilled his duty to mitigate his losses. I agree that there is some truth to this and hold that in the circumstances, the claim for loss of earnings should be set at no more than one hundred thousand dollars ($100,000.00)

Finally there is a claim for handicap on the labour market. Both counsel seemed agreed that the Claimant is entitled to an award under this head. The authorities to which reference is made when this head is considered seem to suggest that damages for handicap on the labour market are awarded where the Claimant is *currently employed* but it is felt that if he lost his job he would be unlikely to be able to compete successfully in the labour market for a job comparable to that

which he has. (See **DAWNETT WALKER v HENSLEY PINK** (**SUPREME COURT CIVIL APPEAL NO: 158/01**) per Harrison P (Ag) (J as he then was).

> An award for handicap on the labour market may be made in circumstances where a plaintiff suffers injury and resumes his employment at the same wage or with an increased wage, but the injury is of such a nature that a risk exists that he may lose his job in the future. If the risk materializes and he is thrown out on the labour market because of his injury he would be at a disadvantage in competing for a job with other injury free persons (***Monex Ltd et al v. Grimes*** (unreported) SCCA No. 83/96 delivered 15th December 1996 following ***Moeliker v. Reyrolle & Co Ltd*** [1977] 1 All E.R. 9). There must however be some medical evidence confirming the likelihood of such a risk. It was referred to in the latter case as "... a substantial or real ... risk." In making an award under this head, the Court assesses the value of the risk by awarding a global sum as opposed to a conventional sum [***Monex Ltd]*** (supra)] or employing the multiplier/multiplicand method, if the circumstances of the case demand it: (***Campbell et al vs. Whylie)*** SCCA No. 68/97 delivered 3rd November 1999 (unreported) following ***Kiskimo Ltd vs. Salmon*** SCCA No. 61/89 delivered 4th November 1991 (unreported). In the instant case the learned trial judge made an award of a conventional sum of $100,000 for handicap on the labour market. Again, he gave no reasons for his choice in doing so. Mr. Campbell for the appellant argued that there was a risk that the appellant could lose her employment as a police officer, that her prospects for promotion were affected, that the award of $100,000 was too low and that the Court should make an award based on a loss of two years as the multiplier.

Here the Claimant, Morgan, is unemployed except for "a little farming" from which he earns insubstantial amounts. He does however receive National Insurance benefits at a level roughly comparable to the salary he received before his injury. While both counsel appear agreed that an amount should be awarded, it is worth recalling that his unemployed status would appear to deny him a right to a claim under the line of authorities cited above. Happily, and I am indebted to my brother Sykes J. for this, there is a case from the English Court of Appeal which provides persuasive authority for the proposition that the Claimant's unemployment at the time of the trial is not a bar to him getting an award under this head. I refer to In **Cook v Consolidated Fisheries Ltd, [1977] I.C.R 635**. The following is the head-note.

because at the date of the trial the plaintiff was not in work at all, although his previous employer would have been willing to employ him and he could have continued to work as a deckhand if he had ignored the advice of his doctor.

In my view, it does not make any difference in the circumstances of this case that the plaintiff was not actually in work at the time of the trial. The trial judge said: "Looking ahead as best I can with the information before me, I expect that [the plaintiff] will obtain employment pretty well immediately." The judge turned out to be quite right, because he did. In Moeliker's case at p. 261 of the report in [1976] I.C.R. 253, I said: "This head of damage only arises where a plaintiff is at the time of the trial in employment." On second thoughts, I realise that is wrong. That was what I said, but on second thoughts I realised that was wrong; and, when I came to correct the proof in the report in the All England Reports, I altered the word "only" to "generally," and that appears at [1977] 1 All E.R. 9, 15. Accordingly, in my judgment, the trial judge here was absolutely right to apply the principles of Moeliker's case and Nicholls'; case. Those cases were cited to her by counsel in some detail, and it is plain from the judgment that she did apply those cases.

In the result, I am satisfied that an award for handicap on the labour market being a specie of loss of earning capacity may properly be awarded and I believe that a lump sum in the amount of $350,000.00 would be appropriate, and I so make that award.

In summary, I make the following awards:

General Damages pain and suffering and loss of amenities, $3,200,000.00 with interest at 6% from the 16th June 2003, the date of receipt of the Claim Form;

Special damages agreed at $49,350.00 with interest at 6% from June 11, 2001 to the date of trial;

Loss of future earnings, a figure of $100,000.00

Handicap on the labour market, a figure of $350,000.00

The Defendant will indemnify the Claimant for his hospital bill in the sum of $37,350.00 together with any interest demanded by the hospital thereon and paid by the Claimant

> The plaintiff, Raymond William Cook, appealed from so much of the judgment of Lane J. given on April 29, 1976, at Lincoln as adjudged that he should receive the sum of £500 by way of damages for the impact of the injuries sustained by him on his working capacity and future prospects of employment and in particular in respect of ***handicap and disadvantages on the open labour market*** (my emphasis) and asked for an order that that part of the judgment might be varied by increasing the sum by such amount as the court might deem just. The grounds of the appeal were that (1) the judge failed to give sufficient weight to the uncontroverted medical evidence of the extent of the persisting disability suffered by the plaintiff, the impairment of function of the forearm and wrist function and likely effects of the development and progression of osteoarthritis in his right arm and resulting restriction on his employability and in particular the already present need for him to refrain from serious bi-manual effort; (2) that she failed to allow sufficiently for the weakening of the plaintiff's competitive position in the open labour market; (3) that she misdirected herself that the measure of damages to be awarded for handicap on the open labour market and the weakening of the plaintiff's competitive position in the open labour market should be affected or reduced by reference to the sum in fact awarded for pure general damages in respect of the pain suffering and loss of amenity and that she was wrong in law in so holding; and (4) that the sum of £500 for handicap on the open labour market was not sufficient compensation, was erroneously low, was wrong, and ought to be increased.

Browne L.J. whose judgment in **Moeliker** is often cited as the fons et origo of the view that a claim for this head is available only where the Claimant is employed at the time of trial, was one of the Court of Appeal panel which decided this appeal. He said:

> I agree that this appeal should be allowed and the figure increased from £500 to £1,500 for the reasons given by Lord Denning M.R. I only add anything because I was a party to the decisions in Moeliker and Nicholls to which Lord Denning M.R. has referred, and this gives me a chance of correcting something which I now think is wrong which I said in Moeliker's case.
>
> This case differs in one respect on the facts from any of the three previous cases cited. In all those cases the plaintiff was in fact in work at the date of the trial. In fact, in all the cases he was still in the employment of his pre-accident employer. This case is different

In light of the fact that I have found the Claimant 15% responsible for his injuries, all the above awards will be as to 85% of the figures set out and the Claimant will also be entitled to 85 % of his costs to be taxed if not agreed.

ROY K. ANDERSON, J.