[2015] JMSC Civ.24

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011HCV06092

BETWEEN	**PATRICK MORTON**	**CLAIMANT**
AND	**OJAY KOOLERS LIMITED**	**DEFENDANT**

Mr. Sean Kinghorn and Ms. D Archer instructed by Kinghorn & Kinghorn for the Claimant

Mr. B. Frankson, Ms. Sykes and Ms. West instructed by Frankson & Richmond for the Defendant

Heard: July 22 and 23, 2014 and March 3rd, 2015.

Negligence – Employer's Liability - Whether Claimant Contributorily Negligent - Quantum of Damages

LINDO J. (Ag.)

[1] The cause of action in this claim is in negligence and breach of statutory duty under and pursuant to the Factories Act and Regulations

[2] The claimant Patrick Morton by his amended claim form and particulars of claim filed on March 27, 2013, alleges that on or about May 26, 2010 he was in the lawful execution of his duties as a Production Assistant under a contract of service with the defendant when as a consequence of the negligent manner in which the defendant executed its operations in the course of its trade, he was exposed to risk of injury and as a consequence has sustained serious personal injury and suffered loss and damage.

[3] The defendant by its amended Defence filed on May 1, 2014 has denied that it executed its operations in a negligent manner and states that "if the claimant received injuries from the defendant's machine, then such injury was caused and/or contributed by the negligence of the claimant."

[4] The defendant is contending that Mr Morton was not authorized to operate the "bag juice" machine as he was just a "Packer" and that he failed to have any or adequate regard for his own safety and put his hand in the machine while it was in operation.

[5] The matter came on for hearing on July 22, 2014 and claimant's witness statement dated April 10, 2014, was accepted as his evidence in chief after it was identified by him and paragraph 1 corrected to read "8" instead of "18" and where it is stated that he turned off the machine corrected to state that he "didn't turn off the machine".

[6] His evidence is that he has been employed to the defendant company since August 8, 2007 and that on May 26, 2010 his duties entailed operating the bag juice machine. He states that he would change the rolls on the machine and operate the machine to allow the juice to run freely and that sometimes the bags would get stuck in the machine and he would have to use his hands to fix the bags and loosen them.

[7] He describes the machine as being "like a box... about 2ft wide, 6 ft high". He states that in the mornings he would "put on the roll of bag juice bags. The roll comes flat. You have to pull something called the element at the top of the machine. The element is a sealer which seals the bag at the top. There is another element at the bottom that cuts the bag once it is filled."

[8] Mr Morton further states that a lot of times the bags would pile up as they are going through the top element where no juice is going into the bags. This he says is called "ravelling" and he says there is no formal training procedure to correct the problem so he would have to make up his own system. He states, "... I would have to push my hand fast down in the machine to push the bags down to ensure that the bags are properly lined up so that the juice can fill them again. There is no special equipment or other tools that I was given by the company to perform this procedure... This is how I have been doing it for as long as I have been at the company. My employers are aware

of this because the bags oft times pile up and my supervisor has been present on many occasions when I have had to use my hand to free the bags".

[9] The claimant states that on the day in question while the machine was filling the bags with juice, the bags got stuck and the juice began to waste and while he was fixing it "by pushing down my hand in the machine to straighten out the bags, my right hand got between the elements...the machine shut down and clamp my hand for about 5 -6 minutes...". He indicates that he was feeling a lot of pain as the elements use a heating mechanism, so in addition to the pressure from the clamping there was a lot of heat from the sealing as well and that a co-worker got a wrench to take the elements from the machine in order to get his hand out and when his hand was finally released his fingers were badly burnt, in particular his right index, middle, ring and little finger.

[10] After the incident he was taken to the Good Shepherd Medical Complex where he was given injections and tablets for the pain and he attended on two consecutive days after for his hand to be "dressed", and that on the third day he was sent to the Spanish Town Hospital where he was admitted for two months and two weeks during which time he was taken to the National Chest Hospital (NCH) where he did surgical operations which included a procedure where "my right hand was pasted to my right side for a period of four weeks...and ...another surgery was done to detach the right hand from my right side...did another surgery on 7th January 2011 to separate the finger...". He indicates that after being discharged from hospital he had to go back weekly to be examined and thereafter he went to the NCH clinic "where the nurse continued to dress my hand" for about one year.

[11] In cross examination Mr Morton maintained that he did not stop the machine and that when bags get stuck he devised a system whereby he would "pull the top element to put on the roll to fold the bags so that it can run properly...if I don't do it, the batch will waste and I will have to pay for wastage...". He also maintained that he was not just a "Packer" as he would "put the roll around the back, fold it over and see to it that the machine run properly ... Me turn on machine, heat up machine and start production..."

[12] When questioned about the system he made up, Mr Morton said “when bags piling up and element cut it off...have to use hand to shub down bag quick ... you cannot lock off machine as temperature takes 10 -15 minutes to heat up, so temperature drop and hold up production...”

[13] Mr Morton also maintained in cross examination that when he went to the company he was given no training, he was shown around and “others in the company show you what to do. You deal with it and ketch on...” He also stated that there were about ten machines and ten workers and they all used that system when there was “ravelling”.

[14] The claimant did not call any witnesses.

[15] Miss Tabeta Samuels and Mr Dave Allison gave evidence on behalf of the defendant.

[16] Miss Samuels’ evidence is that she started working at the company in May 2010 and at the time of the incident she was the Production Supervisor. She states that she would gather the raw material needed for production for the day. “... I checked to ensure that the production area and the machines were clean and that the films were weighed before placing them on the machines”.

[17] She describes the film as “the packaging material made of plastic which is wrapped and comes on a roll resembling a hand towel” and states “the team leader puts the film on the back of the machine where it sits, opens the former door, then pulls the film down vertically through the former then closes the former door. After the former door is closed, the plastic film is formed and goes through the vertical seal, then through the pulling arm (which will pull the plastic down once the machine is on), then through the horizontal sealing and cutting jaw”.

[18] She gave further evidence as to the process of preparation for production and states that she would give instructions to start the machines, which she states do not require any manual operation once turned on. She states that if there is a problem after the machine were turned on, “the standard procedure was that the Team Leader would stop the machine and then speak to me the Production Supervisor. I would then notify the Maintenance Supervisor, Mr. Allison...”

[19] In cross examination she indicated that there was no one employed to the company for the safety of workers. She indicated that when there is a problem with production it is rectified by maintenance person at the factory and if there was a problem with the machine such as “ravelling”, the Packer would have to signal the team leader to “sort it out”. She added that ravelling is obvious and a team leader who was on the floor would be able to notice.

[20] Ms Samuels stated that the defendant did nothing to ensure that the workers complied with their system of safety and that since the accident the period of orientation is now longer than that given to the claimant.

[21] Mr. Dave Allison’s evidence is that he is employed to the defendant as a Maintenance Supervisor and has been there for over ten years. He is responsible to supervise the maintenance of equipment and supervise the training of factory workers and he is part of a maintenance team comprised of four persons, “...responsible for the implementation and upkeep of safety procedures...”

[22] He evidence further is that he is aware of the extent of the training given to the claimant as he supervised the training and that Mr. Morton was given one week orientation which he says involved “a clear outline of the company’s policies relating to safety...”. Additionally, he states that “as part of his training, Mr Morton was made fully aware of the dangers of operating the machine...” and that “in addition to what was orally communicated to Mr Morton, the machine itself has safety features in that it displays a warning sign...”

[23] In cross examination, Mr Allison stated that he was the Safety Manager at the defendant company and his training was limited to his nine years experience at Natural Cane Products, at Bernard Lodge where he received in house training, attended seminars “outside of the company” and additional training by way of attendance at seminars while at the defendant company.

[24] His further indicated that when employed, persons go through two weeks of on the job training and every six months they attend a food handler’s seminar and are required to pass a test. He also stated that every two weeks there are meetings to refresh workers on safety procedures but this did not include the factory workers as the Team Leaders and Safety Manager attend the meetings and “pass it on to the factory workers”.

[25] In response to Counsel for the claimant about training given to the claimant, Mr Allison conceded that he was not responsible for his training as he was working at another department prior to coming to the bag juice section. When questioned as to what if anything the defendant did to ensure that workers complied with the safety system devised, he indicated that he did not know.

[26] Mr Allison also indicated in cross examination that since the accident, a conveyor belt system has been put in place so that there cannot be a recurrence of such an accident.

[27] Counsel for the claimant submitted that the common law duty of care owed by an employer to an employee is to take reasonable care of their safety: **Davie v New Merton Board Mills Limited** [1959] 1 All ER 346. He noted that the traditional definition of a safe system is to be found in the celebrated case of **Speed v Thomas Swift & Co. Ltd**. [1943] KB 557.

[28] Counsel submitted that the safe system of work includes the type and quality of training an employee receives and noted that although the defendant attempted to

assert that the claimant received training and warning in relation to the machine, the evidence presented fell short of establishing it. He noted that the evidence of Dave Allison was that the actual workers were not part of the two week refresher courses which he said he deemed necessary to keep. Counsel was therefore of the view that Mr Allison was not speaking the truth when he said that there was such a system.

[29] In relation to whether the defendant is liable for breaching its statutory duty under the Factories Act and Regulations, Counsel for the claimant examined the law, and the statements of case and amendments and in treating with the issue of whether the machinery is dangerous, cited the case of **Samuel Thomas v BRC Jamaica Limited** (1990) 27 JLR 242. He noted that the defendant intentionally failed to respond to the amendments thereby making the claimant's claim under the Factories Act undisputed as the defendant can present no evidence in response thereto.

[30] Counsel submitted that the undisputed evidence presented by both claimant and defendant is that there was nothing restricting the claimant from putting his hand inside the machine and that the dangerous parts are not fenced. He therefore submitted that once the court finds as a matter of law that the machine was dangerous and ought to be fenced, then the claimant would have made out his claim under the Factories Act.

[31] On the issue of whether the claimant is contributorily negligent, counsel indicated that it is trite law that it is the defendant that is to prove contributory negligence which is a question of fact to be decided on the evidence presented. He notes that the defendant has wholly failed to provide any evidence of this and that the evidence of the two witnesses for the defendant confirms the liability of the defendant in the unsafe system it employed in its production of bagged juice.

[32] Counsel referred to the ruling and reasoning of the Court of Appeal in **Desnoes & Geddes v Garry Stewart** SCCA 74/2002 (unreported), delivered November 3, 2005 where on facts similar to the case at bar, the defendant countered with a defence of contribution arguing that in sticking his hand in the machine the claimant committed a

deliberate folly and disobeyed instructions and the court referring to cases such as **Amy Pitters v T Houghton** (1978) 16 JLR 100, said, inter alia that in Pitters, the court made reference to a statement of Lord Wright in **Flower v Ebbw Vale Steel, Iron and Coal Company** Ltd. [1936] A.C. 206 where he said that contributory negligence in connection with breach of a statutory duty meant misconduct, namely disobedience of orders.

[33] Counsel therefore concluded that the evidence presented by the claimant is "credible, coherent and cogent", is supported to a great extent by the defendant and the defendant has failed to show that it should not be held liable for the accident on the job. He therefore submitted that liability be determined in favour of the claimant.

[34] On behalf of the defendant, Mr Frankson submitted that the machine owned by the defendant is not dangerous within the meaning of regulation 3(1) of the Factories Regulations 1961. He quoted from the case of **Dorothy Henry v Superior Plastics Limited** CLH 104 of 1994 (unreported) delivered June 6, 2002 to make the point and indicated that the claimant would not be near "that portion of the machinery where the plastic rolls would be loaded...The bag juice machine is therefore not dangerous within the meaning of the Regulations as the claimant's injuries would not have occurred had it not been for his deliberate and reckless conduct and/or operation and/or interference with the bag juice machine".

[35] He further submitted that the defendant has not failed to provide a safe place of work and/or a safe system of work and noted that the "unsafeness of the system can only be assessed vis-a-vis the assigned task of the workman" and that "the employee is to have regard for his personal safety". He submitted that, alternatively, the claimant by his own acts, is in breach of R. 79(b) of the Factories Regulations 1961 whereby no person employed in any factory shall wilfully and without reasonable cause do anything likely to endanger himself or others and that the claimant was the engineer of his own misfortune by acting contrary to instructions.

[36] Counsel further submitted that if the claimant's injury was caused by the defendant's machine, the claimant was contributorily negligent and should bear the larger share of any liability determined. He cited the case of **Morris v Seanem Fixtures Ltd**. (1976) 8 WIR 64 where it was held that the accident would not have happened but for the unauthorized use of the offending machinery.

[37] Counsel therefore suggested that if the defendant is found liable, the claimant is contributorily negligent for all injuries, loss and damages suffered and the larger share of the responsibility of the injury must be attributed to him.

[38] It falls to be determined whether the defendant is in breach of its common law duty of care as an employer, whether the defendant is in breach of its statutory duty under the Factories Act and the Regulations made thereunder and whether the claimant has contributed to the accident giving rise to his claim.

[39] It is not disputed that the claimant was a Production Assistant under a contract of service with the defendant, a limited liability company incorporated under the Companies Act of Jamaica and that on May 26, 2010 during the course of his duties he sustained injury to his right hand when he attempted to clear bags that were piling up ("ravelling") in the bag juice making machine. It is also not disputed that the claimant's pay depends on the number of the bagged juice that he packages and if he does not work for a day due to the malfunctioning of the machine, he is paid the minimum wage.

[40] It is well established that an employer has a duty to have reasonable care for the safety of its employees. In **Davie v New Merton Board Mills Ltd,** Supra, the common law duty of care owed by an employer to an employee is stated to be to take reasonable care for their safety. This includes provision of competent staff, provision of adequate plant and equipment and provision of a safe place and a safe system of work and adequate supervision. The failure to fulfil this duty may amount to negligence on the part of the employer.

[41] A safe system of work includes the way in which it is intended that the work shall be carried out, the giving of adequate instructions and the taking of precautions for the safety of workers. Where there is a duty to provide a safe system of work, this duty is not discharged by merely providing it. The employer must take reasonable steps to ensure that it is carried out which involves providing instructions in the system as well as some measure of supervision.

[42] The case of **Speed v Thomas Swift & Co**. (supra) provides support for the proposition that part of an employer's duty in providing a safe system of work is to provide supervision. At page 567, Lord Greene said:

> "*the duty to supervise workmen includes a duty to take steps to ensure that any necessary item of safety equipment is used by them. In devising a system of work, an employer must take into account the fact that workmen are often careless as to their own safety. Thus in addition to supervising the workmen, the employer should organise a system which itself reduces the risk of injury from the workmen's foreseeable carelessness"*

[43] The evidence is clear that the defendant operates a factory. No evidence was presented by the defendant to challenge the claimant's assertions that the defendant has breached the Factories Act. The defendant has a duty to keep the machine(s) in such a manner that it does not cause injury to persons. The evidence discloses that there was nothing to restrict the claimant from putting his hand in the machine and that the dangerous parts of the machine are not fenced. I find that in leaving the claimant to take precautions against what are obvious risks of danger and in not implementing or maintaining a safe system, the defendant has failed to discharge its common law duty of providing a safe system of work and has therefore breached its statutory duty under the Factories Act.

[44] In relation to the provision of adequate plant and equipment, I find that on the evidence of the defendant's witnesses it has been revealed that the machine was dangerous, it had parts which were unfenced and it was prone to malfunction "at least

once per day". It follows that the claimant has made out a case against the defendant as being in breach of the Factories Act by operating a factory which falls under the provisions of the Act and the claimant operated machinery which had dangerous parts which were unfenced. The claim under the Factories Act and regulations remains uncontroverted.

[45] No evidence has been brought before the court to challenge the competence of the claimant. On the other hand, in the cross examination of Mr Allison, it was revealed that the defendant did not provide a competent staff of men. Mr Allison indicated that he was safety manager and that a school leaving certificate is the extent of his qualifications and that he received additional on the job training at the defendant company, and at his previous places of employment. Ms. Samuels' evidence is that there was no one in charge of the safety of the workers.

[46] There was no evidence that the claimant was involved in any orientation at which time he was given any instructions to stay clear of the moving parts of the machine neither is there any evidence that he was involved in any course of training in relation to the duties he was assigned to perform.

[47] The defendant had a duty to fully instruct the claimant and not just to give cursory instructions as shown by the evidence of Ms. Samuels who indicates that she would tell all the workers to be careful. I find that the evidence of Mr. Allison also gave an indication of the limited training procedures at Ojay Koolers Limited and fell short as it related specifically to the Claimant. There was no formal training as it relates to safety rules and procedure.

[48] The defendant by its defence and on the evidence of the two witnesses called on its behalf, has shown that it failed to provide the requisite warning notices or special instructions to the claimant.

[49] The evidence reveals that the Claimant in the operations that day, went about his duties in the usual way. In addition to failing to warn and provide notices to the Claimant, I do not accept that there were safety policies in relation to the operation of the bag juice making machine. In fact, I find that even if there were any such safety policies, these were not adhered to as they were not at all implemented, monitored, controlled and insisted upon by the Defendant. These failings would also amount to a breach of the Defendant's duty to provide a safe system of working and exposed the Claimant to a significant risk of injury. I therefore find on a balance of probabilities that the defendant failed to provide a competent staff of men, a safe system of work and also failed to provide training and instructions to the workers and to the claimant in particular.

[50] A defence of contributory negligence operates, if made out, to reduce the claim of a claimant to the extent to which the court finds such a claimant to be at fault.
Section 3 of the Law Reform (Contributory Negligence) Act states:

> "3. (1) *where any person suffers damage as the result of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."*

[51] The defendant has asserted that the injury to the Claimant "was caused and/or contributed by the negligence of the Claimant...". It therefore has a duty to provide evidence from which this court can accept on a balance of probabilities that this is so. The Defendant is not only required to specifically plead contributory negligence, he must also prove that the injury of which the Claimant complains resulted from the particular risk to which the Claimant exposed himself by virtue of his own negligence.

[52] I find that on the evidence of the two witnesses for the defendant, the defendant has failed to prove this. I find that they spoke in general terms of what obtains or should

obtain at the factory, but provided very little evidence to counter what the claimant says is the usual practice or what happened on the day in question. Miss Samuels was not working at the factory when the claimant started working there and Mr Allison did not assist with any orientation of the claimant at the time he started working there. They could not therefore give any evidence as to any training given to the claimant. Further, Mr Allison indicated that there were no records showing the type of training employees, and the claimant in particular, would undergo.

[53] Although the employer cannot be expected to protect the employees from their "most egregious follies", at the same time the employer should take steps to eradicate obviously dangerous practices and it is clear from the evidence that the floor supervisor was not nearby supervising what was happening.

[54] It is clear that the claimant placed his hand in the machine and that he knew that it was unsafe to do so. However, I find that there were no safety training given to the claimant and I find on a balance of probabilities that it was an established practice to clear the machine when there was "ravelling", by putting the hand in the machine.

[55] Additionally, on the evidence of Mr Allison it is shown that a system was put in place after the accident to ensure that there could not be a recurrence of an accident of the nature sustained by the claimant. I also find that if the defendant had rules in place and had enforced compliance with any rules relating to the operation of the machine, the claimant could not have devised his own means of "unravelling" the bags.

[56] I am guided by the Court of Appeal decision of **Desnoes & Geddes v Garry Stewart,** supra, which I find to be almost materially indistinguishable in the circumstances, from the case at bar. There the claim was for damages for negligence and for breach of statutory duty under the Factories Act brought about in circumstances where the claimant was injured when he stuck his hand in a machine which was in operation in order to clear it. It was contended by the defendant that the claimant had committed a deliberate folly and had disobeyed safety instructions.

[57] The Court of Appeal in that case noted that the respondent placed his hand on the machine while it was in motion, he knew it was unsafe to do, but the evidence in the court below supported the trial judge's finding that there was an established practice to "clear foreign objects without stopping the machine".

[58] In **Amy Pitters v T Houghton** (1978)16 JLR 100, referred to by the court in the case of Garry Stewart, where the plaintiff was feeding a table cloth into a machine, a portion folded over and she tried to correct it and was injured when her right hand got burnt, leading to the amputation of four fingers. The court held that where a statute required a factory owner or employer of labour to provide security or fencing for the machinery and, in default by the employer or factory owner, an employee sustains injury in the course of carrying out his duty on same, the employer will be liable for breach of statutory duty. It was also held that in cases of breach of statutory duty by an employer which resulted in injury to the employee, for the employee to be found liable for contributory negligence, such contributory negligence must have been of a high degree.

[59] The Court of Appeal in **Pitters** considered the case of **Smith v Chesterfield & District Co-operative Society Limited** [1953] 1 All ER 447 where the plaintiff was held 40% to blame because she had done a deliberate act against which she had been warned. It was noted that if the "risky thing" is in disobedience of orders, the court will apportion the degree of responsibility.

[60] Carey J. (as he then was), in considering the issue of contributory negligence, noted that the facts of the case showed that "*the plaintiff did deliberately place her hand where it became caught. It was a risky thing. It was a risk which the defendant was required however, to guard against. A measure of criticism can forcibly be suggested against the plaintiff's conduct. I have nevertheless come to the conclusion that any deficiencies on Miss Pitter's part fall short of the negligent conduct required in the case of a workman where breach of statutory duty is concerned. She should be absolved from any responsibility. I so hold. It was the failure to fence securely which was the*

cause of the accident and not the plaintiff's misguided, albeit risky act of placing her right hand in the position she did".

[61] The Defendant in this case failed to guard against the risk of the claimant putting his hand in the bag juice machine as it had no safety policy about this and the dangerous part of the machine was not fenced. The risk of injury would have been reasonably foreseeable. The claimant's voluntary exposure to that risk was as a result of doing his job the way it has always been done due to the lack of an adequate and safe system of work being in place and due to lack of proper supervision.

[62] In **Flower v Ebbw Vale Steel, Iron and Coal Co**, Supra, ...Lawrence J said *"...I think of course, that 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 the 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 may be held guilty of contributory negligence"*

[63] It is my view that the failure of the defendant to fence the dangerous part of the machine was the proximate cause of the accident and that the defendant has failed to show that the claimant was injured as a result of any misconduct by way of disobedience of orders.

[64] The claimant's evidence has been consistent and I am of the view that his version of events is more probable than the evidence of the defendant's two witnesses. Based on the totality of the evidence presented before me, I accept the evidence of the claimant as to how the accident happened and find that on a balance of probabilities, the system of work at OJay Koolers on May 26, 2010 was not safe.

[65] There is no evidence that information emanating from the seminars, said to be held by the two witnesses for the defendant, were ever imparted to the claimant. Additionally, Ms. Samuels, in cross examination, agreed that "the machine only need

time to warm up in case where water or juice spill" although she wasn't sure that if there was something called "element" on the machine, and admitted in cross examination that she didn't know much about the machine.

[66] I find that the claimant, although called a "Packer" by the witness Samuels, was in fact employed as a Production Assistant, and was not properly trained for the job he was employed to do, as I find on a balance of probabilities that he was also required to place rolls of bags on the machine and monitor the machine while the bags were being filled. I also find that the claimant followed a system which was accepted by the defendant notwithstanding that it involved risk taking, the defendant having failed to provide or to maintain a safety policy.

[67] I reject as unreliable the evidence of Mr. Allison, who said he was the safety manager. What is clear from his evidence is that the defendant became aware of the danger in the way it operated its plant and machinery so that changes were made subsequent to the accident so that an accident of that nature would not recur.

[68] Having carefully considered all the evidence and the cases, I find that although the claimant is required to act reasonably to avoid any foreseeable risk of injury to himself, the failure of the defendant in providing a safe system of work including the failure to ensure that the dangerous part of the bag juice machine was fenced, was the actual proximate cause of the accident.

[69] In view of the all circumstances of this case, I find that the injury sustained by the claimant is as a result of the failure of Ojay Koolers Limited to provide and maintain a safe system of work as opposed to a departure from such a system by the negligence of the claimant.

There shall therefore be judgment for the claimant against the defendant.

DAMAGES

I will now consider the damages to which he is entitled.

Special damages:

The following receipts were agreed:

1. Receipt No. 7240 dated January 14, 2014 from Dr Guyan Arscott
2. Receipt No 1842277 dated January 16, 2014 from National Chest Hospital
3. Unnumbered receipt dated January 16, 2014 from National Chest Hospital

The claimant has pleaded special damages as follows:

a.	Medical expenses (and continuing)	$12,000.00
b.	Loss of earnings (12 months @ $20,000.00 pm and cont.)	$240,000.00
c.	Transportation expenses	$ 5,000.00

[70] In the case of **Ilkiw v Samuels** [1963] 2 All ER 879, Diplock LJ made the point clear that special damages must be specifically pleaded and proved. If evidence is led regarding special damages that is not pleaded, if there is no amendment to the pleadings the court cannot take account of that evidence.

[71] In **Thomas v Arscott & Anor** (1986) 23 JLR 144 Rowe P at page 151 I – 152A said:

> "*In my opinion special damages must both be pleaded and proved. The addition of the term 'and continuing' in a claim for loss of earnings etc is to give advance warning to the defendant that the sum claimed is not a final sum. When, however, evidence is led which established the extra amount of the claim, it is the duty of the plaintiff to amend his statement of claim to reflect the additional sum. If this is not done the court is in no position to make an award for the extra sum"*

[72] In **Arscott**, the Court of Appeal reduced the damages awarded from the amount proven to the amount pleaded. In relation to medical expenses, there has been no

amendment to the Particulars of Claim in that regard. I accept that the sum for medical expenses is as pleaded

[73] The principle that a judgment may not be entered for more than the sum claimed is founded on established authority. In **Chattell v Daily Mail Publishing Company (Limited)** (1901-1902) 18 TLR 165 (CA) the Court of Appeal ruled that a judgment entered for a sum greater than that which had been claimed, was bad. In **Chattell** the plaintiff claimed £1000.00 as damages for libel. An interlocutory judgment in default of defence, with damages to be assessed, was entered. At the assessment hearing, the speech of her counsel so inflamed the jury that it awarded damages in the sum of £2,500.00. Judgment was entered in the latter sum.

[74] On appeal, Collins MR, with whom the rest of the court agreed, ruled that the judgment could not stand as there had been no amendment to the claim. He said in part (at page 168 of the report):

> *"To entitle the plaintiff to judgment for £2,500 the claim required amendment. The claim was not got rid of by the interlocutory judgment. The claim was a factor in that which went down to trial – namely, the amount of damages to be assessed. The judgment was therefore bad."*

[75] The court was prepared, on the condition that the plaintiff would accept a judgment for the sum that she had claimed, to refrain from ordering a new assessment of damages. It was clear from the judgment of the court, however, that the judgment for £2,500.00 could not stand.

[76] In the Court of Appeal, Harris JA in **Lyndel Laing and Another v Lucille Rodney and Another** [2013] JMCA Civ 27 relied on the reasoning in **Chattell**.
She emphasised that a judgment could not properly be entered for a sum in excess of the amount claimed. The learned Judge of Appeal did, however, contemplate an amendment to the pleadings, so as to have the claim increased, prior to the judgment being entered. The learned Judge of Appeal said, in part, at paragraph [25]:

> "...*As a matter of law, a claimant cannot recover by a judgment, more than that which has been pleaded* ..."

[77] Based on that principle, the sum allowed for medical expenses is $12,000.00 as pleaded.

[78] The sum pleaded for transportation is $5,000.00 and I accept that the claimant had to make several visits to the doctors and the hospitals for treatment so I believe the sum claimed is reasonable in the circumstances.

[79] In relation to his claim for loss of earnings, the claimant's evidence is that he has not worked since the accident, and that before the accident he earned an average of $6700.00 per week. This has not been disputed by the defendant. The claimant has pleaded loss of earnings for "12 months and continuing". No amendment has been sought or made to his Particulars of Claim in this regard so the sum awarded will be as particularised.

[80] The claimant has given evidence that he needs assistance with his domestic duties at home due to the impact of the injury on him. Counsel for the claimant suggested that the multiplier approach be used to calculate this cost. However, he had not pleaded such special damages and neither has he provided any documents to substantiate this claim. In keeping with the authorities I will make no award under that head of special damages.

The **special damages** awarded is $17,000.00 for medical expenses and transportation and the sum of $240,000.00 for loss of earnings.

GENERAL DAMAGES

Pain and suffering and loss of amenities

[81] The evidence of the claimant's injuries are contained in the medical reports of Doctors Vassell, Taylor, Dixon and Arscott (agreed and tendered in evidence as exhibits 1-4). The reports indicate that the claimant sustained crush injury and severe burns and tendon injury to his right hand necessitating surgery. He underwent three surgical procedures, June 21, 2010, August 4, 2010 and January 7, 2011. The most up to date medical report, that of Dr Rory Dixon dated April 29, 2014, indicates the following:

> *"The index, middle and ring fingers were attached together by the skin flap. There was ankylosis (stiffness) of the proximal interphalangeal joints...He was assessed as having a crush injury of his right hand with loss of function of the fingers except the thumb....He has lost approximately 50% of the use of the hand...the loss of function of the fingers corresponds to a hand impairment of 50% which is equivalent to a whole person impairment of 27%. ...Surgery can be performed to improve the function of the hand by fixing the fingers in a position of flexion so that he can grip large objects such as a drinking glass; cost of such surgery is approximately $US 6000.00 .."*

[82] Counsel for the claimant has suggested an award of $7,500,000.00 for pain and suffering, noting that there can be no issue that the claimant has sustained extremely serious and debilitating injuries. He pointed out that the doctors are all agreed that the claimant has lost the use of between 48% and 50% of his right hand.

[83] He sought to rely on the case of **Robert Johnson v Tankweld Construction Company Limited [2013] JMSC 3**.a decision of Batts J. delivered January 18, 2013 (CPI 193.8) where the claimant sustained a crush injury to his right hand, was left with a 17% whole person disability. Counsel indicated that the judge, in giving his judgment, went through a long line of authorities "which essentially adumbrated the salient principles in relation to assessing damages".

[84] He further indicated that the claimant in Robert Johnson sustained less severe injuries than Mr Morton so the amount of $5,000,000.00 which the award would convert to using the CPI of 215.9 for June 2014, should be augmented.

[85] Counsel also referred to the Court of Appeal decision of **Desnoes & Geddes v Garry Stewart** Supra where the CA approved an award of $1,225,000.00 to the claimant for a crush injury. This award updates to $4,300,447.15. Counsel however noted that there was no evidence of the level of permanent disability sustained by the claimant.

[86] Counsel for the defendant suggested the following cases as being instructive in assessing general damages:

i. **Leslie Gunnis v Clarendon Sugar Co**. CL 1985 G 139, Khans Vol. 5 pg 115 where the claimant suffered amputation of 5th digit of right hand, fracture of proximal phalanx of ring and middle finger and deformity of the index, middle and ring fingers and was awarded $366,913.00 which updates to $1,846,538.85 for pain and suffering and $293,530.00 for handicap on the labour market, which updates to $1,475,852.98

ii. **Leroy Mills v Roland Lawson & Keith Skyers** CL 1987 M 497, Khans Vol. 3 pg 124 CL1987M497 where the claimant's injuries resulted in deformity of distal phalanx of right index finger, reduced power in right hand and a PPD of 20% of the right upper limb and he was awarded $50,000.00 which updates to $2,795,248.30

iii. **Joseph McLaren v Kenty's Block Supplies Co. Ltd & Norman Noel** CL 1985 M359, Khans Vol. 2 pg 124 CL1985 M359 where the claimant's injuries resulted in him having no firm grip with his right hand and pain when he tries to grip, ankylosis and was assessed as having 25% PPD of the function of the right hand. He was awarded $15,000.00 which upgrades to $886,438.56

iv. **Stanley Campbell v Innswood Estate Ltd & Linton Roger**, CL1980 C240, Khans Vol. 3 pg 126 CL 1980 C 240 where the sum of $40,000.00 was awarded to the claimant who sustained crush injury to his right hand and fingers and fracture of distal phalanx of 3rd , 4th and 5th fingers of the right hand.

[87] He suggested that the injuries to the claimant's hand are not as severe as those cited in the cases referred to and as such recommended, if the defendant was found liable, "a global sum of $1,500,000.00 to compensate the Claimant".

[88] I cannot agree with Mr Frankson that the injuries to the claimant are not as severe as in the cases cited by him. The assessment of the permanent impairment of the claimant by Dr Dixon reveals that the loss of function of the fingers corresponds to a hand impairment of 50% which is equivalent to a whole person impairment of 27%. The cases of Leroy Mills and Joseph McLaren, the two cases in which there is an indication of the PPD speak to 20% PPD of the right upper limb and 25% PPD of the function of the right hand, respectively.

[89] I find the case of **Leslie Gunnis** to be instructive in dealing with the issue of damages for pain and suffering and loss of amenities. However, I find that that claimant did not undergo the pain and suffering which the claimant in the case at bar faced, neither is there any evidence that Mr. Gunnis had to undergo any surgical procedures, or that he was unable to grip objects as the claimant in the case at bar. Additionally, I consider that a PPD rating is a factor to consider in coming to a determination, so I believe the award to Mr. Gunnis would have to be significantly augmented in order to compensate Mr. Morton.

[90] The case of **Garry Stewart** referred to by Counsel for the Claimant, although a case of crush injury, did not refer to any permanent partial disability suffered by the claimant as in the case of the claimant in this case.

[91] Taking into consideration all the circumstances including the pain the claimant had to endure, the fact that he had to undergo three surgical procedures and needs further surgery, I believe an appropriate award is $6,000,000.00

<u>Future medical expenses</u>

[92] The medical reports of Dr Arscott and Dr Dixon indicate that the claimant needs further medical care. Dr Arscott states that surgical management for the release of the web spaces would cost a total of about $420,000.00. Dr Dixon states that the claimant sustained a crush injury of his right hand with significant loss of flexor tendons and ankylosis of the fingers and that surgery can be performed to improve the function of the hand by fixing the fingers in a position of flexion so that he could grip large objects such as a drinking glass. He notes that the cost of such surgery is approximately US$6,000.00.

[93] The evidence as to the costs of future medical has not been challenged by the defendant and as such the sums of $420,000.00 and US$6,000.00 are awarded for future medical expenses.

Handicap on the labour market

[94] Under this head of damages, the claimant has to provide evidence, however tenuous it may be for the court to make an award. The court is being asked to assess the claimant's reduced eligibility for employment or the risk of future financial loss. Evidence therefore has to be led to prove the loss even though in arriving at an award there has to be some degree of speculation.

[95] In his evidence Mr Morton stated that since the incident he is unable to function properly. He is unable to wash, cook or clean for himself because his right hand cannot bend and he continues to suffer terribly from the effects of the accident. He further indicated that he is unable to write, has not worked since the accident and he is not educated so he is only able to do manual labour to earn a living and the injury has robbed him of his potential to earn. His evidence also is that he has not been paid by the defendant since the accident.

[96] The medical evidence also discloses that the claimant has lost approximately 50% of the use of his right hand which is his dominant hand. In view of the medical

evidence provided, I find that the claimant has sustained a handicap on the labour market.

[97] Counsel for the claimant has suggested that an award within the range of $2.5 - $3m. is appropriate, citing the cases of **Icilda Osbourne v Barned** Claim No. 2005 HCV 00294 (unreported) delivered February 16, 2006 and **Robert Johnson v Tankweld Construction Company limited** [2013] JMSC 3 (unreported). delivered January 18, 2013

[98] He indicated that in Icilda Osbourne the court allowed an award of $500,000.00 in circumstances where the claimant had suffered 5% disability, while in Robert Johnson, an award of $2,000,000.00 was made. In view of the fact that I accept the evidence that surgery can be performed to improve the function of the hand by fixing the fingers in a position of flexion so that he could grip large objects, and taking into consideration that an award will be made for loss of future earnings, I believe a lump sum award of $800,000.00 is appropriate.

Loss of future earnings

[99] In considering the sufficiency of an award for loss of future earnings, the court is cognizant of the fact that no precise mathematical calculation is possible due to the level of uncertainty presented by such matters. These uncertainties include the type of work, if any, the claimant will be able to secure, to what extent his condition will improve or deteriorate, whether he would have secured a better paying job had it not been for the accident and whether he would work to retirement age or leave the job early due to illness or otherwise. The court therefore tries its best by using the multiplier/ multiplicand approach and by following the guidelines set out in decided cases.

[100] The claimant's evidence in respect to his earnings before the accident is that it was an average of approximately $6,700.00. per week. Using this as the minimum, and taking into account his age at the time of the assessment, 27 years, the retirement age

being 65, he would probably have another 38 years of working life. However, taking into consideration the uncertainties mentioned above, I believe a multiplier of 11 and a multiplicand of $6,700.00 is not unreasonable in the circumstances, and as such I will make an award of $3,832,400.00 which will be discounted by 25% to take into account the issue of taxes and other statutory deductions and the fact that it would be paid in a lump sum**.**

[101] There shall be judgment for the claimant with damages as follows:

<u>Special damages</u>	-	$17,000.00 with interest at 3% from May 26, 2010 March 3, 2015 Loss of earnings - $240,000.00 with interest at 3% from May 26, 2010 to March 3, 2015
<u>General damages</u>		
Pain and Suffering and Loss of amenities	-	$6,000,000.00 with interest at 3% from the date of service of the claim form to March 3, 2015
Handicap on the Labour market	-	$800,000.00
Loss of future earnings	-	$2,874,300.00 (no interest)
Future medical expenses	-	JA$420,000.00 and US$6,000.00

The claimant is also entitled to costs to be taxed if not agreed.