IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2006 HCV 04385

BETWEEN	**ANTHONY REID**	**CLAIMANT**
AND	**MAC'S PHARMACEUTICAL AND COSMETICS LIMITED**	**DEFENDANT**

Mr. S. Kinghorne, instructed by Kinghorne & Kinghorne for the Claimant.

Ms. Audrée Reynolds, instructed by Messrs. Patrick Bailey & Co., for the Defendant.

Personal Injury – Injury to worker on the job- Loss of phalanx of finger- Claim for handicap on the labour market; whether sustainable- Whether employer liable – If so, whether claimant contributorily negligent.

Heard: September 24, 2009; and January 8, 2010.

F. Williams, J (ag.)

Background

In this matter, the claimant (the defendant's employee at the material time) was injured whilst working on a machine at the defendant's premises on September 23, 2005. The terminal phalanx (or the joint at the tip) of his right index finger was severed.

Special damages were agreed by counsel for the parties in the sum of eighteen thousand, five hundred dollars ($18,500) – if judgment was entered for the claimant at the end of the day.

Issues

Two main issues fell to be determined by the court in this matter: (i) whether there was in existence at the defendant's place of business at the material time, what could be regarded as a safe system of work. If there was not such a system, and the claimant was injured as a consequence of this, the other issue was (ii) was the claimant contributorily negligent in any way. If he was, then the respective liabilities would have to be apportioned.

Claimant's Case

The claimant, a machine operator at the defendant company, was on the day in question operating a pill blister machine: that is, a machine that packages pills. He has been employed to the defendant company since February, 2002. He worked with the company up to June of 2008 – that is, some three years after the incident.

The claimant contends that when he began working at the company, he "did not receive any real training". The company's managing director "just showed [him] how to use the machine". (See paragraph 4 of his witness statement).

A summary of the claimant's contentions is that he did not receive any or any adequate training or supervision; and that there was no or no adequate system in place to prevent injury to a worker such as he. He operated the machine by himself, as he was taught. He also removed any blockage to the machine by using his bare hands, as he had observed the company's managing director (Mr. Noel McFarlane) do.

The Defendant's Case

On behalf of the company, on the other hand, Mr. McFarlane contended that there was adequate training of the staff; that they were taught that no one person was to operate the machine (but, always two). He also gave evidence to the effect that a pair of pliers was supplied and kept by the machine to be used in clearing

blockages. Also, that the workers were taught that the machine was to be stopped before any attempt was made to remove any blockage. Adequate supervision was also provided.

The Law

The applicable principles of law are well known. They are (the more important of them), accurately summarized in the following statements and excerpts: -

(1) The duty of an employer, at common law, is to take reasonable care for the safety of his/her/its employees - see, e.g., **Davies v New Merton Board Mills Ltd.** [1959] 1 All ER, 346. This duty includes a requirement to provide a safe system of working and a safe place of work.

(2) An employer is expected to provide "competent staff, safe equipment, a safe place of work and a safe system of work", per Brooks, J in **Walter Dunn v Glencore Alumina Jamaica Ltd. (t/a West Indies Alumina**

Company (Windalco), 2005 HCV 1810, delivered on April 9, 2008.

(3) "The obligations are threefold, as I have explained (i.e., 'the provision of a competent staff of men, adequate material, and a proper system and effective super-vision'" per Lord Wright in **Wilson's & Clyde Coal Co. Ltd. v English** (1938) A.C. 57, 84.

(4) "The common law places a duty on the employer to provide a safe system of work for his employee, and further to ensure that the system is adhered to", per Campbell, J in **Schaasa Grant v Dalwood & Jamaica Urban Transit Company Ltd.**, 2005 HCV 03081, delivered June 16, 2008, (page 5, para. 13).

(5) "The duty to supervise includes the duty to take steps to ensure that any necessary item of safety equipment is used by them", per Lord Greene in **Speed v Thomas Swift & Co. Ltd.** [1943] K.B. 557, 567.

(6) It has also been observed that "safety obligations are placed on an employer for the purpose of protecting not only workmen who are careful, but also those who are careless", per Rattray, J in **Hutchinson v Sunny Crest Enterprise Ltd.**, suit no. C.L. 1999/H017, delivered in October, 2001.

So, these principles are well known and may be easily stated. The challenge normally arises in their application to the facts and circumstances of each case; no two cases ever being exactly alike.

Analysis and Findings of Fact

In this case, the system of work that, on the evidence of Mr. McFarlane, obtained, was that the claimant was apparently free to do jobs as he saw fit. Mr. McFarlane said in evidence that he did not assign anyone to work on the machine that day. Additionally, the claimant was not (as might have been expected) appointed "senior machine operator", after rigorous training and years of satisfactory

performance; but, on the evidence, somehow "assumed" that title. And the assumption of that title by the claimant seems to have been accepted by the defendant. The defendant's evidence was that he (the claimant) knew that there was work to be done and went and did it.

The defendant's further evidence was that a supervisor was present when the claimant was injured.

Findings

The court finds on the basis of this and other evidence that the defendant's operations lacked "a proper system and effective supervision" in the words of Lord Wright in **Wilson & Clyde Coal Co. Ltd. v English** (cited above).

The incident leading to the claimant's injury occurred primarily because of a "lax standard" – as Brooks, J found obtained in the **Walter Dunn v Glencore** case (cited above).

If a supervisor was indeed present, as the defendant's witness testified, then the supervision being provided was clearly inadequate and ineffective. The system of work was clearly unsafe.

The court, however, notes that the claimant was able to operate the machine without injury for a period of nearly two years before the incident. What then, could have led to the incident on the day he was injured? It is noteworthy, as well, that he also operated the machine without injury for some three years after the incident – again without being injured. What was the reason for this – especially as regards the period prior to the injury?

There is no evidence of any malfunction of the machine or of any act on the part of the defendant that made the operations more unsafe that day than on any other.

A contributory factor for the injury on the day in question is, in the court's view, an act on the part of the claimant – in pushing his hand in the chute of the machine to clear the blockage – that is, in an area

where, (from the photographs that are in evidence), he could not have been able to see what moving parts there were.

This act on his part was more than careless: it was foolhardy. He placed his hand where he did in reckless disregard for his own safety.

So the ultimate finding of the court is that, although the unsafe system that obtained was the primary cause of the incident that led to the injury, the claimant's reckless action was also a contributing factor.

The court apportions liability 60 % to the defendant and 40 % to the claimant.

Damages

Special Damages

As indicated previously, these have been agreed in the sum of eighteen thousand, five hundred dollars ($18,500). This is the amount that will therefore be awarded.

General Damages

The report of Dr. Rory Dixon is very important in a consideration of the quantum of general damages.

This report discloses that the claimant "has no significant limitation to his daily living". Among the other significant findings were that there was "no significant tenderness in the tip of the stump and no neurological deficit". There is a permanent partial disability of 7 % of the whole person.

Additionally, although the report speaks to a period of incapacity of some three months, the claimant testified that he returned to work after some two weeks. In cross-examination the doctor later described the stated three-month period of incapacity as based on an assumption – as to the recovery period for this type of injury generally.

The claimant is still employed today (at the date of trial) and there is no evidence of any reduction in his earnings.

Two cases were cited in respect of pain and suffering and loss of amenities: - (i) **Mark Scott v Jamaica Pre-pak Ltd**. – page 102 of Volume 4 of Khan; and (ii) **Michael Jolly v Jones Paper Co. Ltd**. – page 120 of Volume 5 of Khan. The former case would be some $817,375 in today's money. The latter would be some $2.3 million.

The court finds that the injury in the instant case approximates more closely that in the **Mark Scott** case than those in the **Michael Jolly** case. That case (**Scott**) in fact deals with a 13% permanent partial disability (PPD) of the whole person. It also features some apparent findings of the shortened limb being a handicap in that plaintiff's relations with members of the opposite sex; and that he endeavoured to hide from women as a result. There is no such finding in this (the instant) case.

It was pointed out in submissions that there is an error in the final figure stated as the award in the **Mark Scott** case. Having considered

this, the court accepts the individual figures arrived at as being correct; and regards only the total as having been incorrectly added.

Reducing the amount in the **Mark Scott** case (to take the above-mentioned findings and the difference in PPD into account), by say $150,000, we are left with a total of $667,375. Sixty per cent. (60%) of that amount is $400,425.

There was also a claim for handicap on the labour market. However, the court has to have careful regard to the contents of the medical report and the claimant's evidence that he has not lost employment (but for some two weeks) and is still gainfully employed today. The court considers, too, that there really is a paucity of evidence on this score as would enable it to be able properly to assess the risk of his being thrown onto the job market. In light of this, no award will be made under this head. In this regard the court is guided by general principles and in particular by the approach of Harrison, P (ag.) in **Walker v Pink** – Supreme Court Civil Appeal # 158/01 – "... no evidence of a chance of a risk of the loss of [his] job".

In the result, the order of the court is as follows:-

1. Liability apportioned 60% and 40% between the Defendant and the Claimant respectively.

2. Special Damages agreed in the sum of eighteen thousand, five hundred dollars ($18, 500), with interest thereon at the rate of 6% p.a. from 23.9.05. to 21.6.06. and at 3% from 22.6.06 to 8.1.2010.

3. General Damages in the sum of four hundred thousand, four hundred and twenty-five dollars ($400,425), being 60% of the sum of $667,375; with interest thereon from 16.1.'07 (date of acknowledgement of service) at the rate of 3% p.a. to 8.1.2010.

4. Costs to the Claimant to be agreed or taxed.