IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

AT COMMON LAW

SUIT NO:	**C.L. 2000 R - 030**	
BETWEEN	**JOSEPH REID**	**CLAIMANT**
AND	**MOBILE WELDING AND ENGINEERING WORKS LIMITED**	**1st DEFENDANT**
AND	**NEWTON RODNEY**	**2nd DEFENDANT**

Heard: December 6, 7and 8, 2006 and January 26, 2007

Mrs. A. Haughton-Cardenas, Ms. Tamara Francis and Ms Sherry-Ann Robinson instructed by Haughton & Associates, for the Claimant;
Mr. Ronald Paris instructed by Paris & Co for the Defendants.

CORAM: ANDERSON, J.

Whatever version of the facts in the incident giving rise to this case that is ultimately believed, whether that alleged by the Claimant or by the Defendants, this was a singularly unfortunate accident with significant, if as yet unquantified, consequences.

Joseph Reid, who at the time of hearing a teacher was, in December 1995, a welder by trade and had been employed in that capacity by the 1st Defendant, since January of that year. The 2nd Defendant, Newton Rodney was, and is, the chief executive officer and agent of the 1st Defendant. The business of the 1st Defendant, which was carried on at Lot 29, Marian Road in Montego Bay involved sheet metal forming. On a fateful evening of December 12, 1995, the Claimant was severely injured when his foot was crushed as he stood on a sheet of metal, 20' by 6' by ¼ inch which was being rolled for configuration to particular specifications, in a machine which was being operated by the 2nd Defendant.

The Claimant's Statement of Claim alleges that the 1st Defendant, and the 2nd Defendant, as its servant or agent, are liable for his injuries, loss and damages because of negligence and/or, a breach of statutory duty. Among the particulars of negligence

pleaded were, a failure to provide a safe place of work and a failure to fence dangerous machinery; a failure to instruct the plaintiff in the safe use of the machine or to keep a proper look-out for the safety of the plaintiff and, switching on a dangerous machine when it would have been obvious to a reasonable person that danger or injuries would befall the plaintiff.

According to the Claimant's Witness Statement, at approximately 8:40 p.m. on the evening in question, the Claimant was on the premises rolling sheet metal. Along with him were, Mr. Gladstone Johnson who operated the crane which was used to lift the metal sheets into position for insertion into the rolling machine, and the 2nd Defendant who was responsible for actually operating the rolling machine. The sheets of metal are shaped by the rolling machine for use in making things such as tanks. It is common ground that the processes involved sliding the sheets of rectangle-shaped metal of various thicknesses between cylindrical rollers, into a rolling machine consisting of two rollers at the bottom which move, and one roller above them, (the "beam") which does not move. The position of the rollers at the bottom is adjusted in order to produce the shape desired for the particular item required.

In lifting the sheets of metal onto the machine, chains from a crane are attached to the metal by connectors called jigs which also hold the metal in place while it is passed through the machine. Once the metal has passed through the machine to a sufficient length on the other side of the rollers, it is necessary to move the jigs to the other side of the rollers to hold the metal sheet in place while the rolling continues. When the rolling process is reversed so the metal is being pushed in the opposite direction, there then comes a time when the jigs again have to be moved to be attached to the metal sheet on the other side of the rollers; that is, the side in which direction the metal sheet is being rolled.

According to the Claimant's evidence, during the time when they were rolling the "second sheet" of metal, it became necessary to move the jigs from one side of the rollers to the next. He said he was instructed by the 2nd Defendant to climb on top of the metal sheet to detach the jigs, throw them over the rollers and to re-attach them to the metal on the other side. However, when he had climbed onto the sheet, he said he noticed that Mr. Rodney had in his hand, the remote control which may be used for

starting the machine. It is common ground that there is a panel with levers or gears. The levers on this panel are normally used in the operation of the machine and the remote control is a wired remote in that it is connected by an electrical cord to the motor. According to the Claimant, he had stooped to adjust the jigs and when he attempted to stand up, he realized that his leg was caught between the sheet of metal and the roller. Soon thereafter he realized that the rolling machine was on and he screamed "Mi foot" but the machine did not stop until he had shouted "mi foot" about four times.

It should be noted that in the witness statement, the Claimant said that while his foot was being crushed, he could hear the sound of his boot being crushed but he could not hear the sound of the machine. As a result of the accident he lost the five toes on his right foot and had to have a skin graft by which skin was transferred from his thigh to his foot to replace dead skin on the foot. He remained in the Cornwall Regional Hospital for about a period of about fifty-eight (58) days until the 4th of February 1996. Thereafter, he was an out-patient of the hospital for a further period of a year. The Claimant admits that as a result of the accident he received benefits under the National Insurance Act, although it is not at all clear what amount was received. It is also not in dispute that the Claimant received the proceeds of an insurance policy maintained by the employer.

The Defendants on the other hand, deny that there was any negligence on their part and instead say that if there was any negligence, it was on the Claimant's part or he had contributed to his own injury and loss. According to the evidence of the 2nd Defendant, the accident occurred that evening as they were rolling the eighth sheet of metal (not the second, as alleged by the Claimant). The sheet had already been rolled through the rollers from West to East, that is from the side on which sheet had been loaded, and they were now about to roll from East back to the Western end of the machine shop. The jigs, or "grabs" as Mr. Newton refers to them, had to be moved over to the Western side of the rollers. He said that at the time just before it became necessary to move the jigs, he had been talking to the Claimant. As they finished talking, he moved towards the control panel on which the levers for operating the machine are located and started the rollers.

In his witness statement he said: "After I started the rollers and looked up from the control panel I saw Mr. Reid up in the air and I shouted: "Hell, what is this?" And I immediately pressed the emergency shut down button which stops the rollers and then I re-started and reversed the rollers while he shouted; "Leggo mi foot". Further along in his witness statement he alleges that the Claimant told both himself and Mr. Johnson after the accident that he saw the chain lying on the top roller (the beam) and he thought it would go over and damage the metal sheet, so he jumped onto the machine to move the chain and in so doing his foot slid under the rollers.

In the defence filed, in addition to denying any negligence on their own part, the Defendants listed particulars of negligence on the part of the Claimant. In that regard, the Defendants claimed that Mr. Reid had failed to obey express instructions given to him by the 2nd Defendant with respect to the safe system of work to be carried out by him in assisting the 2nd Defendant. It was also pleaded that the Claimant had climbed or jumped onto the roller machine after it had been switched on by the 2nd Defendant to stand on the metal which was being rolled in breach of instructions. The Claimant also allegedly failed to call out or shout to or warn the 2nd Defendant that he was intending to jump on the machine. It was also pleaded that the Claimant had had no regard for his own safety and had voluntarily assumed the risk of injury when he climbed onto the machine which was switched on.

The Defendant further denied that there had been any breach of statutory duty or any other obligation imposed on the 1st Defendant under the Factories Act. In particular, it was pleaded that the machine was not dangerous and therefore there was no obligation to fence it.

The Issues to be decided by this Court.

The issues to be determined in this matter may be summarized as follows:

1. Were the accident and subsequent injuries and loss suffered by the Claimant the result of the negligence, or a breach of the duty to provide a safe place of work with proper and effective supervision, on the part of the Defendants?
2. If the answer to question 1 above is "Yes", was the Claimant contributorily negligent in his acts or omissions?

3. Was the rolling machine on which the accident occurred "dangerous" for the purposes of the Factories Act, so as to require it to be fenced, in the absence of which there was a breach of statutory duty? If it was, was this the cause of the accident?

The Witnesses

The Claimant was the only witness called in support of his case, while the Defendants called both the second Defendant and an Expert Witness, Mr. Louis Aiken, Managing Director of Tank Weld Fabrication Limited, a company with a similar kind of operation as the 1st Defendant.

While Mr. Aiken was able to assist the court on the limited question as to how machines of the kind on which the injury took place operated, and whether there was ever a need for anyone to stand atop the metal during the course of rolling metal, he had little else to contribute. The court, however, did have the benefit of a video showing the rolling machine in operation. The video had been produced pursuant to an Order on Case Management by my brother Jones J. and was made in the presence of both counsel for the litigants. I found this video to be quite instructive as it demonstrated exactly how the machine operated.

The Claimant, under cross-examination, seemed to be unsure of the precise chronology of events of that evening, although it must be recognized that this was a severely traumatic event which had happened ten years previously. He indicated that he had worked on the rolling process along with the 2nd Defendant before on previous occasions, and had gone on the metal before this occasion, and yet on further cross examination, he stated that this was the "first time" that he had worked with Rodney. At the same time, he claimed that it was the "practice" for persons assisting in the rolling process to get up onto the metal sheet in order to shift the jigs, without explaining the evidentiary basis of that knowledge. It is also instructive to note that in the Claimant's Pre-Trial Memorandum, it had been asserted that "it was necessary" for someone to climb up on the metal to move the jigs. However, that assertion may be at variance with the assertion that he had been "instructed" by Mr. Rodney to go up onto the metal. During cross examination, the Claimant also first asserted that he had no way of going around the machine to get to the jigs on the other side but then conceded that it was possible to do just that. It was also stated in cross examination

that Mr. Rodney had not gone with the Claimant to the Cornwall Regional Hospital. Nor did the Claimant admit to any recall of Mr. Rodney being there at the hospital to assist with his admission. However, as counsel for the Defendants pointed out, in the Interim Report for National Insurance purposes (admitted as Exhibit 10) the Claimant had stated that on the evening of the accident, he had been taken to the hospital by Mr. Johnson in a service vehicle and that they were accompanied by Mr. Rodney who drove his own vehicle and assisted with his admission to hospital.

The evidence of the 2nd Defendant was to the effect that the accident did not happen in the way the Claimant alleged. He denied giving any instructions to the Claimant to climb atop the metal sheet. He further denied that there was any practice for workers so to do while in the process of rolling sheet metal, and confirmed that it would have been possible to walk around the machine with the sheet metal to the other side. He denied having any remote control device in his hand at the time the accident happened. One stark contradiction between the evidence of the Claimant and that of the 2nd Defendant, was the latter's assertion that the Claimant had explained to both himself and Mr. Johnson that the reason he had got up on the sheet metal was that he saw the chain on the top roller and feared that if it fell onto the metal, the rollers would be damaged as it was the chain was pulled between the rollers. This was an assertion strongly denied by the Claimant

Submissions For Defendants

Mr. Paris for the Defendant submitted that the Court should find that on a balance of probabilities the Claimant had failed to prove his case and the defence should succeed both in relation to the charge of negligence and breach of statutory duty. Firstly, he referred to the significant inconsistencies in the Claimant's evidence between his witness statement and his oral evidence in direct and cross examination. He suggested that the credibility of the Claimant had been seriously compromised and that he was not a credible witness. Accordingly, where there was a conflict between the evidence of the Claimant and that of the Defendants, the evidence of the latter should be preferred. He also referred to the pleadings and noted that there was no allegation in the Statement of Claim that the Claimant had been instructed to climb atop the rolling machine as he had alleged in his witness statement. Nor was there any pleading that Mr. Rodney had had the remote control in his hand at the time of the accident,

although this had now been raised latterly. Counsel for the Defendants pointed out that this averment had only been made at the time of the preparation of the Claimant's witness statement on August 18, 2006, more than ten years after the event. He felt that it should be rejected. There had not been any such averment at the time when the Interim Report of the accident had been prepared pursuant to the National Insurance Act. Counsel submitted that it was a reasonable inference that this was a belated fabrication by the Claimant and raised further issues about his credibility, and it ought not to be believed.

Counsel further submitted that even if the court believed the story of the Claimant was to be believed, he had been contributorily negligent. He urged the court to the view that at Common Law, an employee had a duty to act responsibly and that the Claimant had failed to do so when, on the defendants' case, he jumped unto the sheet metal as it was being rolled. He submitted that the employer's Common Law duty to his employee is correctly summarized by **Gilbert Kodilinye's** text, "**Commonwealth Caribbean Tort Law"** at page 141 where it is stated, and he adopts the views there expressed:

> The Common Law duty of an employer to his employees was enunciated in **Davie v New Merton Board Mills [1959] All E.R. 346**, as a duty to take reasonable care for their safety. This duty is not an absolute one and can be discharged by the exercise of due care and skill which is a matter to be determined by consideration of all the circumstances of the particular case".
> Every employer has a duty at Common Law to provide:-
> 1. A competent staff of men
> 2. Adequate plant and equipment.
> 3. A safe system of work with effective supervision; and
> 4. A safe place of work.

In the instant case, the Claimant has focused on the adequacy of the plant and equipment and the safe system of work and in particular, the failure to fence the rolling machine. Counsel for the Defendants submitted that it goes without saying that where the cause of the injury and damages is equally explainable on the basis of the allegations by the Claimant as with some other cause, the Claimant must fail. He cited **Brown v Rolls Royce Ltd. [1960] 1 W.L.R. 210** and in particular the judgment of Lord Denning at page 216 where he said:

> At the end of the day the Court has to ask itself whether the defenders were negligent or not. It is sufficient if there is greater probability on

> one side or the other: but if at the end of the case the evidence is so evenly balanced that the court cannot come to a determinate conclusion, the legal burden comes into play and requires the court to reject the case of negligence alleged against them.

Counsel also suggested that even if negligence were established, the Claimant must also show that it was the negligence which was the cause of his loss and damage. It was his further submission that where the Claimant's own conduct was the *cause* of his loss and damage, he would not be entitled to any damages. Thus he cited and adopted **Norris v W. Moss and Sons Ltd. [1954] 1 W.L.R. 346.** The headnote is as follows:

> The plaintiff, an employee of the defendants, had, with another workman, been ordered by the foreman to ascend the tubular scaffolding already erected at the building for the purpose of adding another lift or platform. On reaching the top lift already erected, the plaintiff noticed that one of the uprights was not vertical but was inclining away from the building in breach of Regulation 10 (1) (a) of the Building (Safety, Health and Welfare) Regulations, 1948. He thought it his duty, as a competent scaffolder, to remedy the defect, but, as was found by the trial judge, he did so in a way which caused the putlogs that attached the scaffold to the wall to be drawn out and the platform on which he was standing collapsed, the plaintiff falling and suffering injury.

It was held that the plaintiff's injury was caused solely by his own negligence and not by the defendants' breach of the appropriate regulation.

In that case Somervell L.J. said:

> I have come to the conclusion that the claim fails on the point of causation. On the judge's finding of fact, it seems to me plain that the sole cause of the accident was the method which the plaintiff unfortunately adopted in carrying out the work.

In similar vein, in the same case, Burkett L.J. stated at page 350:

> "What was the cause of the accident? The evidence points unmistakably to the cause of the accident being the improper manner in which the Plaintiff endeavoured to straighten the leaning standard. Had he performed that work in the natural and proper manner, there would have been no accident at all".

It was submitted that this was the case here with this Claimant, and the way that he had chosen to carry out his task was the reason for his injuries.

In any event, counsel submitted that even if the employer's negligence was proven, the level of contributory negligence on the part of the Claimant must also be assessed.

In dealing with the issue of the alleged failure to fence the machine on the basis that it was dangerous, counsel for the Defendants suggested that the approach to making a determination of whether machinery was dangerous and liable to be fenced was to be gleaned from the dicta of Lord Cooper in **Walker v Bletchley Flettons Ltd [1937] 1 All E.R. 170:**

> The necessary and sufficient condition for the emergence of the duty to fence imposed by section 14 of the Factories Act is that some part of the machinery should be "dangerous". The question is not whether the occupiers of the factory know that it was dangerous nor whether a factory inspector has so reported nor whether previous accidents had occurred nor whether the victims of those accidents had or had not been contributorily negligent. The test is objective and personal. Is the part such in its character and so circumstanced in its position exposure method of operation and the like that in the ordinary course of human affairs danger may reasonably be anticipated from its use unfenced not only to the prudent alert and skilled operative intent upon his task but also to the careless or inattentive worker whose inadvertent or indolent conduct may expose him to risk or injury or death from the unguarded part".

Counsel conceded that regulation 3(1) of the Factories Regulations (1961), made pursuant to the Factories Act (and which is in similar terms to the then section 14 of the U.K. statute), imposed an *absolute duty to fence dangerous machinery*. It provided that:

> "every dangerous part of any machinery shall be securely fenced unless it is in such a position or such construction as to be safe to every worker as it would be if securely fenced"

He submitted, however, that in the instant case, the rolling machine was not inherently dangerous and there was accordingly no obligation to fence it. Counsel cited and adopted the views of **Charlesworth & Percy 8th Edition on Negligence** who, in considering whether machinery was dangerous at paragraph 11-100 stated:

> Machinery is dangerous where it is a reasonably foreseeable source of injury to a person acting even carelessly if the carelessness is of a kind which may be reasonably expected to occur from time to time. If the carelessness is outside of the ordinary expectation the fact that the machine has caused injury to the person who has committed such carelessness is not conclusive proof that it is a dangerous machine.

Based upon the authorities cited above, counsel submitted that it could not be said that the machine in the instant case was inherently dangerous, as it posed no threat to anyone unless, as in this case, the person had decided to climb onto the metal sheet while rolling was in progress.

Defendants' counsel referred to the Jamaican case of **Henry v Superior Plastics Limited, Suit No: C.L. H – 104 of 1994**, heard by Sykes J (Ag) as he then was, in June 2002.The learned judge adopted dicta of Lord Reid in the case of **John Summers & Sons Ltd v Frost [1955] 1 All E.R. 870**, adopting words from the earlier case of **Mitchell v Northern British Rubber Co. Ltd [1945] S.C. (J)**, in which he opined that the test of whether machinery was "dangerous" was "objective and impersonal". In the **Henry** case, the judge indicated that in determining whether the test was met for what is dangerous, it was open to the court to "take into account the history of the machine. It may be that no one has been injured since the machine has been in use. This is not conclusive proof that the machine is not dangerous but it certainly cannot be ignored". It was submitted that since the instant machine had been in use from the time of its acquisition in 1987 and there had been no accident, nor had there been any request by factory inspectors to have it fenced as being potentially dangerous, despite there having been an annual inspection of the factory from the time of its establishment.

In any event, it was submitted, even if there had been a breach of the relevant statutory provision, if the plaintiff's conduct was the entirely cause of the injury and loss, the defendants would still not be liable. Thus in **Rushton v Turner Brothers Asbestos Co. Ltd [1960] 1 W.L.R. 96**, it was held by Ashworth J. that although the cases where the employer is in breach and still escapes liability would be rare, the deliberate act of folly of the plaintiff in that case was the cause of the injury and loss and should be borne by the plaintiff alone. In **Ashton Fitten v Michael Black Ltd. and Ken Henry [1987] 24 J.L.R. 252,** Wolfe J. (as he then was), held that an employee who was injured by a machine, which it was conceded by the defendants, was dangerous and unfenced, found the plaintiff's own action to be 60% the cause of his own injuries. He said:

> The act by the plaintiff was in my view not mere momentary inattention. I bear in mind that the category of acts which may amount

> to momentary inattention is not closed. This was almost recklessness on the part of the plaintiff. To my mind the sort of momentary inattention contemplated is where a workman using machinery suffers injury by a temporary lapse on the part of the workman. The plaintiff in the instant case, it might be said, was being a mere busybody.
>
> In all the circumstances of the case, I hold that the plaintiff must bear the greater blame. His act in inserting his hand into the machine under the circumstances in which he did so was in my view, and I so hold, the more substantial cause of the accident. But for the breach of the statutory duty, the plaintiff would have been adjudged the author of his own injury.

The learned judge in giving his decision in that case found that there had been no negligence at Common Law on the part of the defendants. It had however been conceded by the First Defendant that the machine was dangerous and ought to have been fenced, so there was an admitted breach of the duty imposed by the statute. Notwithstanding that concession, the learned judge still found that the plaintiff had been 60% the cause of his own injury and consequent loss. It is logical to conclude that what he was saying was that, even where there is a breach of the statutory duty to fence, one must still look at the issue of causation and determine to what extent, the breach was the real cause of the injury.

In the English case of **Stapley v Gypsum Mines Ltd. [1953] A.C. 663,** in the House of Lords, the issue of causation was also considered. In that case, there was a breach of the statutory duty imposed upon the employer under the Metalliferous Mines General Regulations 1938, as amended. Their Lordships, (Lord Porter and Lord Asquith dissenting) held that the plaintiff was 80% responsible for the accident and the damages awarded against the defendant company should be reduced by this amount to take account of the extent of responsibility for that accident.

It was Defendants' counsel's position that the Claimant had failed to make out his case on a balance of probabilities; that he had failed to establish negligence or a failure to provide a safe place of work with proper supervision, on the part of the Defendants or that there had been a breach of statutory duty, and one which had caused injury, loss and damage to the Claimant.

Submissions for Claimant

Mrs. Haughton-Cardenas, counsel for the Claimant submitted that the employer had a Common Law duty to provide a safe place of work for his employees and that the Defendants had failed in that duty. The duty she said was reinforced by the Factories Regulations. Claimant's Skeleton Submissions also made the point that the employer is vicariously liable for the tortious act of its employee and it was submitted that here the 2nd Defendant, acting as servant or agent of the 1st Defendant, had been negligent. In particular, it was submitted that an employer is "required to operate machinery without subjecting the employee to un-necessary risk". Further, that "un-necessary risk" is "any risk that the employer can reasonably foresee and which he can guard against" (See **Harris v Bright Asphalt Contractors Ltd [1953] 1W.L.R. 341**). It was submitted that by "permitting the employees to stand on the metal sheeting so as to manually move the jigs, is an un-necessary risk that employees, such as the Claimant, was (sic) exposed to".

It was further submitted that there was a statutory duty under Regulation 3 of the Factories Regulations 1961 that "every dangerous part of any machinery shall be securely fenced unless it is in such a position or of such construction as to be safe to every worker as it would be if securely fenced". It is not denied that the duty is, as noted above, an absolute one. Nor is it denied that the regulation is designed to prevent injuries, not only to careful and attentive workers, but also to inattentive ones. (See **Uddin v Associated Portland Cement Manufacturers Ltd 1965 2 All E.R.213 582**, where the worker was doing an unauthorized act in a place he was not authorized to be) But, it should be noted that Sykes J's dicta in **Henry** (above) is also true. "The fact that a careless person is injured by the machine is not, without more, conclusive and irrefutable proof that the machine is dangerous". The Claimant's counsel submits that the roller bars were dangerous and that "the roller bars are dangerous because it was foreseeable that it was a source of injury to a person". Claimant's counsel cites **Summers & Sons Ltd v Frost** (supra) as authority for this proposition and further submits that this principle has been adopted by the courts in Jamaica and refers to **Amy Pitters v T. Houghton 16 J.L.R. 100.** I believe that this submission is misconceived as it relates to **Amy Pitters**. One of the holdings of the court (Carey J. as he then was) in that case was that:

> "In determining whether machinery is dangerous, the test to be applied is that of ***reasonable foreseeability of the accident*** (My emphasis). In

> the instant case the defendants themselves seemed to have *admitted* the danger of the particular area of equipment".

I need hardly point out that there is no such admission here and, *au contrere*, the suggestion that the rollers might be dangerous is strongly contested by the Defendants. The submissions cite **Midland and Low Moor Iron Steel Co v Cross [1965] AC 343** supporting the proposition that roller bars are inherently dangerous. However, it will be clear even on Claimant's own submission that "it is a question of fact and degree as to whether a part is dangerous" and therefore it is easy to distinguish these cases on their facts.

Counsel also submitted that since, if the machine had been fenced the accident would not have happened, then it must follow that it should have been fenced and is dangerous. I am afraid I cannot agree with that syllogistic reasoning. Nor am I convinced that the Claimant's case is in any way advanced by the submission that, notwithstanding that fencing would render the machine commercially impracticable or mechanically impossible, the employer cannot avoid his liability to fence, if indeed, the machinery or part thereof is dangerous. In my view, there was no evidence that such would be the effect of fencing the rolling machine.

Counsel for the Claimant correctly points out that the fact that the machinery has historically been operated without incident, is not proof that it is not dangerous, and cites in support of that proposition, the dicta of Lord Cooper in **Mitchell v North British Rubber Co Ltd [1945] S.C. (J) 69 at p 73**, which was itself cited with approval by Lord Reid in **Summers**.

> The test is objective and impersonal. Is the part such in its character, and circumstanced in its position, exposure, method of operation and the like, that in the ordinary course of human affairs danger may reasonably be anticipated from its use unfenced, not only to the prudent, alert and skilled operative intent upon his task, but also to the careless or inattentive worker whose inadvertent or indolent conduct may expose him to injury or death from the unguarded part.

In **Midland,** the court found that leading-in rollers used in straightening dented metal bars were dangerous and should have been fenced. However when one looks at the judgment of Lord Reid, it is clear that the *ratio decidendi* of the case was that "whether a part of machinery was dangerous within sec. 14 (1) of the Factories Act , 1961, must be determined on consideration of the machine when in normal operation

doing the work which it was designed to do ordinarily". There was no finding, nor could there have been, given the fact that each case has to be determined on its own facts, that all rollers are per se dangerous and should be fenced.

Finally, it was submitted by Claimant's counsel that no contribution to the cause of the accident should be laid at the feet of the Claimant. This was because the relevant Regulations are meant to protect even the "dull and the indolent" among the workforce. It was accordingly argued that the worker in the position of the Claimant must be forgiven some measure of "carelessness" so as not to defeat the protection of the regulations. Claimant's counsel cited **Staveley Iron & Chemical Co. Ltd. v Jones [1956]AC627** in support of this submission. However, that case was one which appears to be dealing more with a claim in negligence simpliciter, and not breach of statutory duty. Thus the head note of the case ends:

> *Quaere* whether the principle in Caswell's case that "it is not for every risky thing which a workman in a factory may do in familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence", in cases of breach of statutory duty, applies to a simple case of common law negligence such as the present where there was no evidence of work people performing repetitive work under strain or for long hours at dangerous machines.

The Claimant also purports to find support for this submission in the case of **Hutchinson v London & North Eastern Railway Co [1942]1KB 481**, and the dicta of Lord Goddard where he said, in a passage subsequently cited with approval by Wolfe J in **Fitten v Michael Black:**

> I have always directed myself to be exceedingly chary of finding contributory negligence where the contributory negligence alleged was the very thing which the statutory duty of the employer was designed to prevent.

Counsel concludes Claimant's submissions with the proposition that Carey J. in **Amy Pitters** had opined that in order for an act to constitute contributory negligence, there had to be a high degree of negligence on the part of the Claimant. With respect to this submission, I do not believe that that is what the learned judge said. What is to be extracted from that judgment which was one where there had been a breach of statutory duty, was that in such cases, the claimant's contribution to the cause of the

mishap, (which I would characterize as "contributory causation" rather than "contributory negligence"), should be significant before it is taken into account.

For completeness, I should note that in cross-examination, Claimant's counsel had suggested to the 2nd Defendant Rodney that the cause of the accident was that he had been in a hurry to complete the job as he was leaving the Island the following day, needed to complete a rush job and so was less than fully attentive to the operation of the machine; that the Claimant and the 2nd Defendant had worked long hours and that they were tired. These suggestions were refuted by the 2nd Defendant and no credible evidence was led before me in either regard.

I had suggested above that there were three questions or issues which had to be addressed in this case. In light of the extended discussion on the machinery and the Factories Act and Regulations, I would wish to start with the issue of whether the machine or its parts, (the rollers) was of such a character that it required fencing under the relevant legislation. It is correct to start with the general proposition that where machinery is dangerous, it must be fenced and that this is an absolute duty. (**John Summers & Sons, Ltd. v Frost [1955] 1All ER 870; Davies v Thomas Owen & Company, Limited[1919] 2 K.B. 39**). A review of the cases on the subject of the danger associated with machines and the need to fence leads, inexorably in my view, to the conclusion that each set of circumstances must be examined individually to arrive at a determination. I am not convinced that the rollers in the ordinary course of its operation constituted a threat of injury to the Claimant, and certainly not in the way it occurred. I make a finding of fact that the rolling machine was not per se dangerous for the reasons set out below..

In recounting the submissions of the Claimant on the issue of the danger of the machine and the duty to fence above, I have made comments in relation to those submissions which will indicate that I viewed most of those submissions as flawed. Thus, for example, the submission that the Defendants' "permitting" the Claimant to stand on the metal sheet while rolling was in progress was an un-necessary risk is not borne out by the evidence which I have accepted. I have no credible evidence of the Defendants "permitting" the Claimant to climb atop the sheet metal while it is being rolled. I note in particular, that because of the unreliability of the Claimant's own testimony, I am loathe to accept his evidence without some other supporting evidence.

There is another reason why I do not accept the Claimant's counsel's submission about characterizing (the machine or) the rollers as being dangerous on the basis that they "are dangerous because it was foreseeable that it was a source of injury to a person". If that were the test, almost any implement could be regarded as dangerous. I am of the view that in **Amy Pitters** Carey J's (as he then was) focus on the reasonable foreseeability *of the accident*, is the more correct and appropriate consideration. Was that the kind of accident which might reasonably have been anticipated? Nor do I concur with the view implicit in the submission about the rollers, that because they have been held to be dangerous in one situation, they will be so considered in all situations. It is, I believe, a question of looking at all the facts in the particular case.

I cite with approval as the correct approach to this question, the judgment of Sykes J. in the **Henry** case referenced above. I adopt the reasoning of the learned judge in this regard. At page 15 of the unreported judgment, Sykes J. said:

> Whether a part of a machine can be described as dangerous is decided by asking whether "in the ordinary course of human affairs danger may be reasonably be anticipated from the use of them without protection" (per Wills J in **Hindle v Birtwistle [1897] 1 Q.B. 192, 195)** The full description of the test of Wills J is:
>
> > Machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection. No doubt it would be impossible to say that because an accident had happened once therefore the machine was dangerous. On the other hand, it is equally out of the question to say that machinery cannot be dangerous unless it is so in the course of careful working. In considering whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency with which that contingency is likely to arise, are matters that must be taken into consideration. It is entirely a question of degree.
>
> This was approved by Lord Reid in the House of Lords in the ***Summers' case*** (supra)
>
> A more fulsome and perhaps more understandable way of putting the matter is to be found in **Mitchell v North British Rubber Co., Ltd. (1945) S.C. (J) 69, 73** as quoted by Lord Reid in **Summers'** case (supra) at page 883 B-E
>
> > The necessary and sufficient condition for the emergency of the duty to fence imposed by s. 14 of the Factories Act is that some part of some machinery should be "dangerous". The

> question is not whether the occupiers of the factory knew that it was dangerous; nor whether a factory inspector had so reported; nor whether previous accidents had occurred; not whether the victims of these accidents had, or had not, been contributorily negligent. ***The test is objective and impersonal.*** Is the part such in its character, and so circumstanced in its position, exposure, method of operation and the like, that in the ordinary course of human affairs danger may reasonably be anticipated from its use unfenced, not only to the prudent, alert and skilled operative intent upon his task, but also to the careless or inattentive worker whose inadvertence or indolent conduct may expose him to risk of injury or death from the unguarded part?
>
> The essence of the test as gleaned from the passages cited is this: when determining whether a part of a machine is dangerous one has to take into account its nature, where it is actually located, how it operates and such like. The court has to take account of the scrupulously careful person as well as the careless, the misinformed and the indolent. The court must not assume that all persons will be careful. Bearing these in mind the court then asks itself whether in the ordinary course of human events and activity in the factory where the dangerous part of the machine is located, it can be said that the workman would be in danger. If this question is answered in the affirmative, then the part of the machine is dangerous and there arises an absolute obligation to fence unless its position and construction are such that it is as safe as if it were securely fenced. This is why it is no answer to say, "If you were careful in the use of the machine you would not have been injured". Equally, the fact thata careless person is injured by the machine is not, without more, conclusive and irrefutable proof that the machine is dangerous. It also means that there will be borderline cases when applying this ***"objective and impersonal"*** test.
>
> If in applying this test the court concludes that the part of the machine is dangerous and its position and construction did not make it as safe as if it were fenced then there is breach of the regulation. It is as simple as that. A finding that the machine is dangerous is not necessarily a poor reflection on the employer. He may think that he has installed the safest machine that money can buy. He may even be the most caring employer in the world. His benevolence and munificence may be legendary. On the other hand, the employer may be a penny-pinching curmudgeon presiding over a sweat shop. A factory inspector may think that the machine is dangerous or he may think it is quite safe. None of this matters. The test is objective and impersonal.

Given my view of the cases referred to above and my adoption of the above dicta, I am of the view and so hold, that the rolling machine and in particular the rollers, were not inherently dangerous so as to require fencing.

Notwithstanding the finding that the machine and/or the rollers did not constitute dangerous equipment for the purposes of the statute, that is not, however, the end of the matter. The question still remains whether there was a breach of the common law duty of care on the part of either or both Defendants. Was there a failure to provide a safe place of work and proper supervision which are obligations of the employer? It is trite law that an employer has responsibilities to his employees at common law and these may be summarized as follows:

- to provide competent co-workers, and
- to provide adequate plant and machinery, and
- to provide a safe place of work, and
- to provide a safe system of work.

There is evidence before me which I accept, that shortly before the accident Mr. Rodney had been speaking to the Claimant. In fact, in light of the conclusions at which I have arrived, it is necessary to set out what Mr. Rodney said in his witness statement.

> I was standing near to the control panel and Mr. Reid was standing on the same side of the metal sheet as I was but on the other side of the control panel, i.e. to the East of the control panel. Mr. Johnson the crane operator was standing on the crane. Mr. Reid and I stood up talking until I noticed that Mr. Johnson was looking sleepy so I then told Mr. Reid to let us finish. As we finished talking I moved to the control panel and started the rollers. When I moved to the control panel, Mr. Reid who had been standing on the ground on the other side of the control panel talking with me, also moved to go around back to the other side of the metal sheet. ***After I started the rollers and looked up from the control panel, I saw Mr. Reid up in the air*** and I shouted "Hell, what is this"? and I immediately pressed the emergency shut down button which stops the rollers and then I re-started and reversed the rollers while he shouted "leggo mi foot". (Emphasis Mine)

As I read this evidence of Mr. Rodney, when he says he saw the Claimant "up in the air", he meant on top of the metal sheet, rather than "suspended" in mid-air. It seems to me that, on this evidence, it is open to the court to find that there was a point between the end of the conversation between Mr. Rodney and the Claimant and when he "looked up from the control panel" and "saw Mr. Reid up in the air", when the 2nd Defendant had failed to take due notice of where the Claimant was. As the one who was controlling the operations of the machine, albeit as I find, not with the remote

control but from the panel, he had a duty to be aware of where the Claimant was when he started the rollers. There is nothing in his evidence which indicates that his eyes followed the Claimant when he allegedly went around to the other side of the machine. He did not see him in the process of getting up on the metal sheet. I believe that, on a balance of probabilities there is evidence of negligence in classic **Donoghue v Stevenson {1932} AC 31** terms. Lord Atkin, in that seminal case, said:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be–persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

I believe that this finding is reasonable and appropriate, whether I accept the averment by the Claimant that he went up on the metal to move the jigs, or that of Mr. Rodney that the Claimant told him and Mr. Johnson that he was moving the chain which was on the top roller to prevent it falling on to the metal causing damage thereto. In fact, I find it interesting that Mr. Rodney said that before he started the machine, he had shouted to Mr. Johnson, the crane operator that he was ready, but he does not say that he shouted to Mr. Reid who was closer and in more immediate personal danger from the turning on of the machine.

I reject as unreliable, the evidence of the Claimant that Mr. Rodney had "instructed" him to go on the metal to move the jigs. The defence pleaded indicated that there had been specific instructions given by the 2nd Defendant against climbing or jumping on the machine. However, no evidence of such instructions appeared in the witness statement of the 2nd Defendant. Indeed, it was only in answer to Claimant's counsel in cross-examination that the 2nd Defendant adverted to safety signs, and safety rules in the office, on the machine and in the building. There was no evidence that there were any such warnings specifically about the dangers of going onto the sheet metal while rolling was in progress. In addition, although I was not generally impressed by the evidence of the Claimant, I believe that he probably was telling the truth when he said that climbing on the metal was something that had been done before. I am of the view that this was not the first time that this action had been taken by the worker whose role it was to move the jigs as the metal was passed through the rollers. In my view, it was reasonably foreseeable that a workman, either in a hurry or just enthusiastic about

getting his job done, to move the jigs would hop onto the sheet metal to cross over to get to the jigs on the other side of the metal.

Safe system of work

That an employer must provide safe equipment and a safe workplace is uncontroversial. There are, of course, borderline cases, but the principles are relatively well accepted. Many of the troublesome cases concern the employer's duty to provide a "safe system of work". Since almost any injury that occurs in the workplace can, at a pinch, be attributed to an unsafe system of work, there has to be some way to limit the liability of the employer to a reasonable level. As always, the standard expected of the employer is that standard of a 'reasonable employer'. The employer cannot be expected to protect his employees from their most egregious follies, but at the same time he must take steps to eradicate obviously dangerous practices, however well-established. According to **Clerk and Lindsell On Torts, (Sixteenth Edition) paragraph 10-130**:

> When there is a duty to provide a safe system of work, the master has not discharged his whole duty merely by providing it; he must take reasonable steps to see that it is carried out. (See **Crookall v Vickers-Armstrong Ltd. [1955] 1 W.L.R. 659**). This involves instruction of the workman in the system as well as some measure of supervision. It does not mean "that an employer is bound, through his foreman, to stand over workmen of age and experience every moment they are working and every time they cease work in order to see that they do what they are supposed to do". He must take reasonable care to see that the system is followed and it is a question of fact and degree whether he has done so in every individual case.

If specific instructions about not climbing on the sheet metal had been given, as the Defendants allege, then it would seem all the more important for the 2nd Defendant to be paying attention to the Claimant while they were working together, to ensure compliance with the instructions. On Mr. Rodney's own testimony, this was not done.

If my view about the action of the employee climbing on the sheet metal is correct, then the case of **General Cleaning Contractors v Christmas [1952] 2 All ER 1110** is of assistance in considering whether a safe system of work had been provided. There, the plaintiff, a window cleaner, was employed by the defendants, a firm of

contractors, to clean the windows of a club. While, following the practice usually adopted by employees of the defendants, he was standing on the sill of one of the windows to clean the outside of the window and was holding one sash of the window for support, the other sash came down on his fingers, causing him to let go and fall to the ground, suffering injury.

On a claim by him against the defendants for damages, it was held by the House of Lords that even assuming that other systems of carrying out the work, eg, by the use of safety belts or ladders, were impracticable, the defendants were still under an obligation to ensure that the system that was adopted was as reasonably safe as it could be made and that their employees were instructed as to the steps to be taken to avoid accidents; the defendants had not discharged their duty in this respect towards the plaintiff; and, therefore, they were liable to him in respect of his injury.

(Per Lord Reid). Where a practice of ignoring an obvious danger has grown up it is not reasonable to expect an individual workman to take the initiative in devising and using precautions. It is the duty of the employer to consider the situation, to devise a suitable system, to instruct his men what they must do, and to supply any implements that may be required.

Did the Claimant contribute to his accident, injury and loss?

Whether there is a breach of statutory duty or a breach of the Common Law duty of care or duty to provide a safe system of work, the question of causation must be considered. The claimant must establish not only that he was owed a duty of care, and that the defendant was in breach of that duty, but that the breach was the cause of the injury or loss he suffered. There are two parts to this question of causation: causation in fact, and causation in law. Whether the Claimant's loss has, in fact, been caused by the breach of duty is to be determined on the basis of the evidence. Whether there is causation in law is usually answered by determining the question of remoteness.

In the instant case, while there is evidence of breach of duty, I would hold that the greater responsibility for the accident, loss and injury was the behaviour of the Claimant in jumping onto the sheet metal at a time when it was unsafe to do so, even if at the time he went up, the machine had not yet started. How then is the apportionment to be made between the responsibility of the Claimant and the Defendants? In **Stapley v Gypsum Mines Ltd. [1953] A.C. 663,** Lord Reid said:

> A court must deal broadly with the problem of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party, but 'the claimant's share in the responsibility for the damage' cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness.

It is clear that his mind was being directed to the principle of causation and seeking to determine apportionment in light of the contribution to causation. In looking at the cases in which there was apportionment notwithstanding a breach of statutory duty such as **Stapley v Gypsum Mines Ltd.** plaintiff found 80% responsible; **Norris v Moss**, plaintiff found 100% responsible; **Uddin v Associated Portland Cement Manufacturers Ltd**, plaintiff found 80% to blame for accident; **Rushton v Turner Brothers Asbestos Co. Ltd**. plaintiff held to be 100% to blame for injury; and **Fitten v Michael Black Ltd.,** plaintiff held to be 60% liable for accident above, I have formed the view that the liability of the Claimant in this case should be fixed at 60% and that of the Defendants at 40%.

In the **Fitten** case, Wolfe J. referred to **Uddin** and the judgment of Lord Pearce as being instructive insofar as the issue of apportionment of liability is to be considered. He cited the following passage from the judgment of Lord Pearce, which I adopt for the purposes of this case.

> "The question of proportion is one of fact, opinion and degree. The onus of proving contributory negligence is on the defendants. They seek to show that they have on the finding of the judge established facts on which a tribunal cannot properly attribute to the plaintiff less than 100% of the blame, or at all events any figure as low as 80%. That is a difficult task in a case where the judge has obviously considered the matter with care and no error is imputed to him save the actual percentage. On the one hand the plaintiff was guilty of extreme folly outside any reasonable anticipation and was doing an unauthorized act in an unauthorized place for his own purposes. No accident had previously occurred, and but for the plaintiff's foolish and unauthorized act, this act would never have happened. On the other hand, the defendants (who should have known better) failed to carry out their statutory obligations to fence. It was not a bad failure, but without their failure to fence, this accident would never have happened. The plaintiff was a foreigner, who may not have had any industrial experience before he came to this country. His unintelligibility may have led the judge to think there were reasons which would palliate his folly though they could not excuse it. "

As the learned Wolfe J. said in **Fitten**

> The act of the plaintiff was, in my view, not mere inattention. I bear in mind that the category of acts which may amount to momentary inattention is not closed. This was almost recklessness on the part of the plaintiff. To my mind the sort of momentary inattention contemplated is where a workman using a machine suffers injury by a temporary lapse on the part of the workman.

Damages

Having determined a proper apportionment of blameworthiness as between the parties, the next issue is what award of damages is appropriate. Counsel for the defendants did not cite any authorities in relation to quantum but indicated that he would be prepared to use the authorities which had been cited by the Claimant in the event that the court found against his clients in respect of liability and were of a mind to award damages.

General Damages

The report of Dr. Geoffrey Williams, Consultant Plastic and Reconstructive Surgeon of the Cornwall Regional Hospital indicated that the Claimant had suffered a crush injury to his right foot. This had caused extensive loss of tissue of his foot and the entire skin and most of the underlying muscles of the fore-foot were lost and replaced by skin graft. He had also lost all his toes save for a remnant of the great, second and third toes. Because of the delicate nature of the skin graft, he is prone to injury of the foot, is unable to stand for long periods and will be unable to engage in any vigourous physical activity involving the use of the feet. Claimant's counsel intimated that the medical report of Dr. Warren Blake, Consultant Orthopaedic Surgeon had indicated that the Claimant had suffered a 24% PPD of the lower extremity and a 10% PPD of the whole person

She referred the court to a couple of authorities which it was suggested should guide the court if arriving at the award. She cited **Marriot v D & K Farms C.L. 1990 M 278,** Harrison's P 380, (Coram Ellis J.), damages assessed July 24, 1991. In that case, the plaintiff a farmer and plumber, sustained serious injuries when he was struck from behind by a motor vehicle. He had fractures and dislocation of the bones of the right foot and toes; laceration of the right foot, haematoma and abrasions to the right elbow

developing into partial right wrist drop. He was hospitalized and underwent surgical operation. There was an open reduction and internal fixation of the fracture dislocations. He was given physiotherapy and a brace for the partial wrist-drop. He was assessed with a ten percent permanent partial disability of the right foot with arthritic changes. He was awarded general damages for pain and suffering and loss of amenities of One Hundred and Twenty Thousand Dollars ($120,000.00) a figure which counsel now advises would convert to One Million, Three Hundred and Twenty Three Dollars Thousand dollars ($1,323,000.00).

The next case referred to by counsel was ***Rose v. Satchwell, Khan's Vol. 4 page 70***. There the plaintiff was involved in a motor vehicle accident on the 6th September 1988 when she was struck down on an embankment. She suffered hypovolemic shock and a severe crush injury involving soft tissue and bony components of left leg and foot, amputating the left heel. The wounds of the left leg and foot were embedded with dirt and debris and soft tissue was completely de-gloved from two thirds of the left leg to the left heel. She underwent two separate surgeries and her injuries left her with a number of disabilities including a limp and unsightly scar on her left thigh, weeping ulcers, an unstable graft of skin over her left heel and a deformed foot. There was also total absence of movement of the left ankle and the four toes of the foot and only slight range of motion in the great toe. There was finally a complete fusion of ankle and subtalar joins. Her permanent partial disability of the left extremities was assessed at seventy percent which was equivalent to 28% of the whole person disability. In that case, the award of general damages for pain and suffering and loss of amenities was Two Million Five Hundred Thousand Dollars, ($2,500,000.00) a figure which now converts to Five Million Eight Hundred and Sixteen Thousand Dollars, ($5,816,000.00). In the circumstances, counsel suggested that an award of $2.6 million would be appropriate for this Claimant..

While it is true that, as Mrs. Haughton Cardenas pointed out, injury to the foot can be extremely painful, I have come to the view that both authorities cited consisted of far more serious injuries than in the present case. It is to be noted that at the present time the Claimant walks with a very slight limp and he now pursues a different profession as a teacher in a school. However, having considered the authorities which were cited and as I indicated above having formed the view that those were more serious injuries, I believe that a figure of Two Million Dollars, ($2,000,000.00) is an adequate

award for pain and suffering and loss of amenities of the Claimant. Bear in mind that it is not the extent of the impairment that determines the level of damages, but the court's assessment of the pain and suffering endured and the amenities lost. The Claimant herein confirms that he is now unable to do some of the things that hitherto he had done and the medical reports confirm that the nature of the injuries will limit the Claimant's activities. In light of the apportionment of blame which I had indicated above, the Claimant is to receive 40% of the figure assessed for damages ($2,000,000.00) or Eight Hundred Thousand Dollars, ($800,000.00).

Interest is normally awarded either from the service of the Writ or other origination process or from the date of the entry of appearance. In the material before me, there is no affidavit of service and the bundles do not contain an entry of appearance. What is clear is that the Defence is dated May 12, 2000 and was filed in the Supreme Court on June 1, 2000. The Writ and Statement of Claim were prepared and filed on March 7, 2000 and so it is fair to conclude that service was effected at some point before the 12th of May 2000. I shall, accordingly, treat this date as the appropriate date from which interest on general damages is to run. Interest will be at 6% from May 12, 2000 to June 13, 2006 and then 3% thereafter.

Special Damages

The Claimant's Statement of Claim included claims for hospital fees, medication, transportation costs and loss of income. With respect to special damages, it was conceded that the claim for hospital fees in the sum of $20,000.00 was not payable as this had already been met by the defendants or at least one of them. The claim for medication was supported by receipts tendered confirming that such had been paid for. This was for a sum of $2,475.95 and can be allowed. The Claimant's pleadings included a claim for $4,500.00 being the cost of medical reports. The tendering of the reports had been ordered pursuant to the Orders on Case Management. Although no receipt for the medical reports was tendered, the fact is that two reports were submitted. I believe that the Court can take judicial notice of the fact that doctors do charge for preparing such reports. The Claimant in his evidence in chief stated that he paid about $4,000.00 for each of three reports and that he paid $13,000.00 for the report from Dr. Warren Blake. Although these figures were adduced in the evidence,

no amendment to the pleadings was sought and the court is unable to award more than the figure of $4,500.00 claimed for medical reports in the pleadings.

There was a claim for the cost of transportation for trips to the hospital for treatment. In the sum of $10,000.00 and although this claim was also unsupported by any documentation, the figure was given by the Claimant in amplifying his witness statement and was not challenged by the Defendants. Notwithstanding the lack of challenge, it has long been established that one cannot just throw figures at the head of the Court and ask the Court to make the award accordingly. And while it has also long been accepted that it is not for every single item that documentary evidence be required, it seems that at least some receipts for transport should have been available, or at least, an explanation given. In the circumstances, I am not prepared to award the Claimant the full $10,000.00 claimed. I award transport costs of $5,000.00.

There was a further claim for loss of income for two months at a figure of $4,000.00 per week "and continuing". The witness statement of the Claimant spoke of being in hospital for some fifty-eight (58) days, and the Claimant in his evidence averred that he had been off work for eight (8) weeks and that he had been earning $4,000.00 per week for a total of $32,000.00. Again, this evidence is not contradicted. However, the Claimant also admitted that he had received some payments from the National Insurance Scheme although there was no evidence as to how much this sum was. This sum should have been disclosed and been reflected in a reduction of the damages for loss of earnings. In the circumstances the items of special damages which are recoverable are the $2,475.95 for medication, transportation of $10,000.00 and the cost of medical reports, ($4,500.00) in the pleadings, and the loss of earnings $32,000.00 which total Forty-three Thousand Nine Hundred and Seventy Five Dollars and Ninety Five Cents, ($43,975.95.) The Claimant's entitlement for special damages is also to be apportioned 40%/60%.

Although it was not part of the pleadings, in her address Mrs, Haughton-Cardenas also sought for the Claimant to be awarded a figure for handicap on the labour market. It is clear that upon the authorities in that area of the law of damages, the basic premise of such an award is that the Claimant is in danger of losing or has lost his job and is now likely to be handicapped on the labour market when seeking to compete