

NMCL

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

HCV1010/2003

BETWEEN	ROSELAND RICHARDS	CLAIMANT
AND	K'S ROOFING CO. LTD.	1 <sup>ST</sup> DEFENDANT
AND	ABE KAWASS	2 <sup>ND</sup> DEFENDANT

A. Campbell for the Claimant

A. Williams instructed by Clinton Hart & Co. for the Defendants

Heard: December 13, 14 and 15, 2005 and May 12, 2006

**Beswick, J.**

Mr. Roseland Richards filed this suit against his former employers, K's Roofing Company Limited. (K's Roofing) and Mr. Abe Kawass (its manager), seeking compensation for what he describes as their negligence, and/or breach of statutory duty.

He claims that on October 1, 2002, whilst he was working at the premises of K's Roofing, under the instructions of Mr. Abe Kawass, their machine did serious damage to his hand.

The defence is that Mr. Richards caused or contributed to his injuries by his own negligence. It is contended that he had not been authorized or instructed to be where he was, and that he failed to have any or adequate regard for his own safety and put his hands in the gears of the machine while it was in operation.

Mr. Richards' evidence is that he had been employed as a welder but that Mr. Abe Kawass, one of the bosses of K's Roofing had indicated that sometimes he would be required to do non-welding work in the factory.

According to him, on October 1, 2002, two weeks after he had been employed, Mr. Abe Kawass directed him to make some sheets of zinc and accompanied him to the factory where that was to be done.

He finished making the zinc and was passing the zinc machine to go and pick up fillets for continuing his work, when the machine grabbed his glove. The gears of the machine were uncovered on the outside of the machine and they ran on uncovered rollers. His hand was caught in the chest-level gear and parts of his fingers were chopped off and fell to the ground.

It is his evidence that he was hospitalised for two (2) weeks and thereafter returned daily for dressing for about a month. He also received physiotherapy, orthopaedic and plastic surgery treatment, making 75 trips with his mother for these purposes at \$440 per day for travelling. He was still attending the Plastic Surgery Clinic up to 2004.

Mr. Richards was 19 years old at the time of the incident. It was his mother who cared him daily for nine months after the injury, tending to his most personal needs.

Mr. Richards testified that his only skill is welding in which he is trained but the pain in his right wrist since the accident prevents him from welding or from even sweeping. He was the best welder in his class at school though he does not have a certificate. He anticipates that, were it not for the accident, he would have been a first class welder now, earning up to \$25,000 per week if he did his own work, although at the time of his injury he was being paid approximately \$2,300 per week.

It is Mr. Richards' evidence that immediately after the two-week stay in hospital, he returned to K's Roofing. Mr. Kawass had told him he should work because he could

not pay a man who was not working. Mr. Kawass offered him a job, at the same pay as his welding job, to walk around the factory and report on what was occurring. His hand was in a sling and he could hardly stand. His stomach had been cut by the doctor and his hand inserted in it for healing purposes. His stomach was "tearing off". He told Mr. Kawass that he could not work. He received pay twice after the incident.

Mr. Brian Fuller testified in support of Mr. Richards, his cousin. He too had worked on the offending zinc machine. He described it as being about 25 feet long and about 3 feet wide and made of iron. His evidence is that the gears have no guard over them. They haul anything they grab. One's clothing or hand can be caught in the gears whilst one is passing the gears. At first he said that on the right side of the machine are rollers, then he said he was mixing up gears with rollers and that he does not in fact know what rollers are.

On October 1, 2002 he heard Mr. Abe Kawass instruct Mr. Richards to help him, Mr. Fuller, to push the zinc through the machine. They did that and Mr. Fuller left the machine. Then he saw Mr. Richards running towards him with his hand cut and bleeding.

Initially he said that that was about three minutes after they had finished working and then he later agreed that it was about fifteen minutes after.

Mr. Fuller's evidence is that on the ground below the gears he saw blood, pieces of fingers and pieces of gloves with blood.

It is his evidence that he was fired from K's Roofing when Mr. Richards' hand was injured. His entreaties to be re-employed fell on deaf ears but he carries no ill feelings towards Mr. Kawass because he, Mr. Fuller is in fact a tradesman. Mr. Williams,

for the defendants urged the Court to regard Mr. Fuller as a person who is angry at the defendants and was consequently lying.

Ms. Gloria Richards, mother of Mr. Richards, testified *inter alia* as to the cut in her son's stomach in which the doctor put his fingers for four weeks for rehabilitation.

Mr. Ibrahim (Abe) Kawass, testified he had not instructed Mr. Richards to go into the factory area. According to him, for ten (10) weeks after the injury he continued paying Mr. Richards' salary because his parents had indicated Mr. Richards wished to continue working at K's Roofing Limited. Further, he granted them a loan of ten thousand dollars (\$10,000) to help them pay his medical expenses. When Mr. Richards did not return to work, his parents advised Mr. Kawass that they would repay the loan in the future. Mr. Richards' net pay was \$2,338.75.

Mr. George Kawass' evidence is that it was he who had purchased the zinc-forming machine. He knows how to operate the machine and instructs his operators. He says that the rolling parts of the machine that form the sheets have to be exposed because they spin to form sheets.

The gears are attached to the side of the machine and are about 5 feet above the ground. Rollers are on the centre of the machine.

Mr. Kawass testified that he is an engineer for 35 years but he did not study engineering, he practised it.

According to Mr. Kawass, the machine can be quite dangerous if it is not fenced and is running. The guard was off the machine on the day of the accident because an adjustment had been made to the machine that day. However, he said that the machine cannot pull in a glove unless the glove is intentionally put in. In order for something that

a person has on to catch the machine, the person would have to have his hand held at shoulder height and outstretched. It would be impossible for that to happen at three feet above the ground.

Mr. Kawass' evidence is that on October 1, 2002 he gave Mr. Richards no instructions to do any work in the factory area. He gave him instructions to make fillets in the welding department

Earl Hillary, testified that he is a supervisor at K's Roofing. He has worked there since its inception for about 23 years. He last worked as a casual worker and became a supervisor about a couple months before the trial commenced.

His evidence is that on October 1 he was running an order on the Roll Forming machine with other workers when Mr. Richards came over to where he was working and was watching the running of the sheets on the machine. At that time he was standing about seven feet away from the gears on the machine. When the last sheet was fed into the machine and Mr. Hillary was waiting on it to form, he heard a scream and saw Mr. Richards hold up his bleeding hand and run past. He surmised that his hand had reached inside the machine.. He took him to the office where Mr. Abe Kawass gave instructions for his medical care.

That day there were sheets to be made into zinc sheets and five persons were doing that. Mr. Richards was not one of those. They were Rambo and Mr. Dumby feeding the machine, Fuller and Stewie receiving and Mr. Hillary himself at the switch. None of these other men was still at K's Roofing. According to him, one has to be very careful in working around that machine because the machine can grab a person's hand and the gears can injure it if there is no guard on it.

It is not disputed that Mr. Richards was injured by a machine owned by K's Roofing Limited. It is the circumstances under which he was injured that are to be determined.

Mr. Williams for the defendant argued that there has not been clear evidence as to how the accident occurred. He highlighted the fact that the witnesses had each described the gears as being on different sides of the machine. He urged the Court to infer that Mr. Richards had placed his hand on the moving gears thereby injuring the hand through his own negligence. Further, Mr. Richards had no business by the machine at that time because he had already finished pushing the zinc through and in fact had received no instructions from Abe Kawass to go to the machine.

He argued that, alternatively, Mr. Richards is 90% liable for the injury. Even if the machine had been securely fenced, submits Mr. Williams, that would be no barrier to a worker such as this who deliberately puts his hand on the machine.

The claimant pleads that both defendants breached a statutory duty but does not identify the statute which was allegedly breached. It follows that it cannot be determined if the facts allow for a finding of any breach. That claim must fail.

However, Mr. Richards also claims that his injury resulted from the negligence of both defendants.

I accept as true the evidence that Mr. Richards was instructed by Mr. Kawass to work at the particular machine in the factory on that occasion and was therefore authorized to be in the vicinity of the machine in the K's Roofing factory.

K's Roofing has a duty to keep the machine in such a manner that it does not cause injury to persons. They breached that duty. It is agreed that the gears and rollers of the machine were not fenced. Exposed gears and rollers have the potential to be dangerous to workers.

K's Roofing Limited breached its duty to provide a safe work environment for its worker, Mr. Richards. K's Roofing and Mr. Kawass also had a duty to properly instruct/warn Mr. Richards of any dangers surrounding the machine. There is no evidence of that having been done. That duty was breached.

I accept on a balance of probabilities that Mr. Richards' hand in his glove was caught in the gears of the machine as he passed it. There is no evidence to support the suggestion that he deliberately put his hand in the gears nor that he was involved in unauthorized activity or that he did something to contribute to his injury.

It was the order of Mr. Kawass that caused him to be in the factory. It was the negligence of K's Roofing Limited and Mr. Kawass that resulted in Mr. Richards' injury.

I now consider the damages to which he is entitled. As it concerns general damages, Mr. Williams argued that there was no evidence of Mr. Richards not being able to use his left hand or of its movement being restricted because of injury to the right hand. He submitted that \$700,000 would be appropriate for general damages.

I accept the medical evidence that the partial amputation of the second, third and fourth right fingers resulted in 19% disability of his whole person, being 35% impairment of the right hand.

I have considered the authorities submitted and find two particularly useful. In **Mark Scott v Jamaica Pre-Pack Limited** CL 1992/S279, a 19 year old machine operator suffered amputation of his right index finger causing disability of 13% of the whole person. The award for pain and suffering was the equivalent of \$555,512.79.

**Icilda Lammie v George Leslie** CL 1984/L098 was also useful where Miss Lammie lost two fingers and was awarded the equivalent of \$658,432.00.

For the pain and suffering Mr. Richards endured in the amputation of portions of his three fingers, I view \$750,000.00 as being appropriate.

Mr. Williams urged the Court to find that there is a low risk of handicap on the labour market as there is no medical evidence of an inability to work or a total inability to use the right hand. Further, there had been an offer of alternative employment by K's Roofing.

I do not regard this job offer to walk around and report on factory activities as providing suitable alternative employment.

There is no evidence as to what type of occupation Mr. Richards can now pursue but I take judicial notice of the fact that his choice would be limited. In my view, since he is educated, jobs may be available to him but certainly not likely in his chosen field of welding and probably lower paying jobs.

I consider that this injury has robbed Mr. Richards of fully pursuing his chosen trade of welding.



I accept that Mr. Richards was earning \$2,338.75 weekly as a welder. The minimum wage in 2002 was \$1,800 per week and I accept that he would be able to earn that in some endeavour.

I am not satisfied on a balance of probabilities that he would have been a master welder in 10 years. He has yet to even gain certification in the field.

I therefore use as the multiplicand the difference between pre-accident earning of \$2,338.75 and \$1,800 being approximately \$550 x 52 weeks = 28,600.00. The multiplier I use for Mr. Richards who is now 22 years old is 15.

**Loss of future earnings** is therefore \$429,000.00.

Some **special damages**, including specified medical expenses, were agreed at \$47,465.23.

Mr. Richards **lost earnings** of \$2,338.75 weekly from October 1, 2002 to May 12, 2006 being three years and seven months. Mr. Kawass' evidence was that Mr. Richards received \$23,387.50 as ten (10) weeks' salary after the accident.

On the other hand Mr. Richards' evidence is that he received two (2) weeks salary. Neither provided documentary evidence concerning salary. K's Roofing had exhibited proof of other payments made. It is my view that a business would keep a record and documentation of payments made by them. In the absence of documentary proof in this particular instance, I do not accept that the Company paid Mr. Richards for ten (10) weeks after the accident. I prefer Mr. Richards' evidence of a two (2) week payment.

I award for three (3) years (156) weeks making allowance for some absences from work, when wages would not have been paid. The amount for **loss of earnings** is  $\$2,338.75 \times 156 = \$364,845.00$  less  $\$4,677.50$  being  $\$360,167.50$ .

The claim for **travel costs** was not supported by documents but I accept as accurate Ms. Richards' evidence that the cost was \$260 each for the week day round trip from Essex Hall where Mr. Richards lived to Mona where the hospital was.

I find that it was reasonable for this 19 year old lad to be accompanied by his mother for medical attention. He was travelling long distances on public transportation with amputations still in the recovering stage.

The **travel costs** I award are therefore for transportation for Gloria Richards and/or Roseland Richards during his recuperation period. After a detailed examination of the evidence Mr. Williams submitted that  $\$31,820.00$  should be allowed for travel costs. Mr. Campbell for the claimant agrees. That is my award for travel costs.

Mr. Richards needed **extra help** to attend to his daily personal activities during the time of his recuperation. During one period, his hand was strapped inside his stomach. He required care significantly above that of normal family life care. **Giambrone et ors v. J M C Holidays Limited** [2003] 4 All E. R. 1212. The amount of \$2,000 per week claimed for Ms. Richards to leave her job to stay home and give additional care to her son, I find is reasonable. I award  $\$48,000.00$  for that service, being  $\$2,000$  weekly for six (6) months (24 weeks).

The total award for **special damages** is therefore \$487,452.73:

Doctors and medication agreed	-	\$47,465.23
Travel	-	31,820.00
Extra help	-	48,000.00
Loss of earnings	-	<u>360,167.50</u>
		\$487,452.73

The total award for **general damages** is \$1,179,000.00:

Pain and suffering	-	\$750,000.00
Loss of future earnings	-	429,000.00

The Order is therefore judgment for Mr. Richards against both defendants in the amount of \$1,179,000.00 for general damages with interest of 6% per annum on \$750,000.00 from June 24, 2003 to date of judgment and in the amount of \$487,452.73 for special damages with interest of 6% per annum from October 1, 2002 to date of judgment.