JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 76/91

COR: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (AG.)

BETWEEN	UNITED ESTATES LIMITED	DEFENDANT/APPELLANT
AND	SAMUEL DURRANT	PLAINTIFF/RESPONDENT

Garth McBean for the Appellant

Ainsworth Campbell & Malcolm Rowe for the Respondent

November 2 & December 7, 1992

WOLFE, J.A. (AG.)

Samuel Durrant, the respondent, was employed to the appellant company as a sideman. On the 26th day of February, 1986 he was injured while attempting to fasten a chain which was used to secure cane which was being conveyed in a truck belonging to the appellant. In an action to recover damages for negligence, Smith J., adjudged the appellant liable for the injuries sustained by the respondent and accordingly, awarded damages in favour of the respondent.

The appellant now seeks to set aside the judgment of the Court below. The respondent, on the other hand, has entered a respondent's notice seeking to have the award in respect of general damages increased.

On the question of liability, only a brief reference to the evidence adduced at the trial is necessary, having regard to the ground of appeal argued viz:

> "(2) That the Learned Trial Judge erred in finding that the Defendant/Appellant could not rely on the Plaintiff's/ Respondent's skill as an experienced sideman to detect defects in the chain and chain dog."

The appellants are cane farmers and as such they are concerned with transporting cane from the fields to the sugar factory on trucks. When the cane is loaded on to the truck, it is secured by a chain being placed across the truck and buckled with what is known as a "dog." On the day in question as the truck travelled along, the chain became loose and the cane was falling apart. The respondent attempted to tighten the chain when, to use the respondent's words "notch fly out of it and I was flung on the ground on my hands."

The evidence disclosed that the chains are hired by the appellant from Worthy Park Estates Ltd. There was no evidence before the court below as to what checks were performed by Worthy Park Estates Ltd., to ensure that the chains are in good working order. Upon receipt of the chains from Worthy Park Estates Ltd., no examination is conducted by the appellants to satisfy themselves that the chains are in good working order. Lawrence P. Bowie, Assistant Cultivation Manager, employed to the appellant said:

> "We do not re-examine the chains. All the sidemen can recognize bad chains. If there is a bad one they would take it out. The system is that the sideman would collect the chain. They would run them out to ensure that the dog is flying and is in proper working order."

It is obvious from the above quoted passage, that the appellant relied upon the sideman to ensure that the chains are in good working order.

The question which arises therefore, is whether or not the appellant can escape liability by saying I relied upon the experience of my workmen to ensure for themselves that the equipment and the system of work are both safe.

The common law duty of a master to his servant was enunciated in **Davie v. New Merton Board Mills Ltd** [1959] A.C. 604 where the House of Lords defined it as a duty to take reasonable

care for their safety. This duty, the House observed, was not an absolute one and could be discharged by the exercise of due care and skill. The question therefore arises as to whether or not the appellant did exercise due care and skill in ensuring the safety of the respondent.

In the determination of this issue, consideration must be given to all the circumstances of each case. What were the circumstances of the instant case? The evidence disclosed that the chains were obtained by the appellants from Worthy Park Estates Ltd. There is no evidence as to whether or not Worthy Park Estates Ltd., were the manufacturers of the chain and if so, whether they could be categorised as reputable makers. Secondly, if Worthy Park Estates Ltd., were not the manufacturers but mere suppliers, there was no evidence to support that they were a reputable source of supply. Thirdly, there was positive evidence that the appellants, in the light of the foregoing, took no steps to examine the chains in an effort to satisfy themselves as to the suitability of the equipment. The appellant left it entirely up to the sidemen to select the equipment and to satisfy themselves as to the safety of the equipment. Can it be said, in those circumstances, that the appellant exercised reasonable care?

Relying upon **Richardson v. Stephenson Clarke Ltd** [1969] 1 W.L.R. 1695, the appellants contend that they have discharged their duty to the respondent. A critical examination of the circumstances in **Richardson's** case will show that it is readily distinguished from the instant case. In that case:

> "The plaintiff, a man of long experience, was employed as a yard foreman rigger at the defendant's quay in Hartlepool. It was among his duties to supervise the conveyance of cargo to a suitable point on the quayside from which the dockers could load it on vessels. He was instructed to move two large pieces of equipment, a conveyor and a shelter, from one end of the quay to the other

> "to be put on board a vessel, part of whose equipment they were. He accordingly instructed the driver of the defendants' mobile crane to move the equipment. The conveyor was attached to the crane hook by two slingers by means of a wire rope and two shackles, which were inadequate to carry the load. In the nearby stores, as the plaintiff knew, there was available perfectly adequate lifting equipment for this task. Whilst the crane driver was moving the conveyor under the directions of the plaintiff, one or more of the shackles broke and the conveyor fell on the plaintiff, causing him serious injuries.
> In an action for damages on the ground of failure to carry out the employers' common law duty of care to provide safe plant and equipment:
>
> Held, that although the selection of safe equipment for the work in hand was the responsibility of the employer, whether he made the choice personally or acted through his servants, the defendants had fulfilled their common law duty by making available safe and adequate equipment and could not be held negligent in leaving the selection of the equipment to the plaintiff, since he was a competent and experienced man: the sole cause of the accident was the plaintiff's failure to select safe equipment and the defendants were therefore not liable."
> [Emphasis supplied]

Here the defendants had exercised due care by providing safe and adequate equipment for the use of the workman. The workman was only required to make a choice as to which equipment was suitable for a particular task. In such circumstances, the defendant was entitled to rely upon his competence and experience that he would make the proper choice. However, in the instant case, there is absolutely no evidence that the equipment provided by the appellant was safe and adequate. Accordingly, we concur with the view of the trial judge that the appellants failed to exercise reasonable care in providing equipment which was safe for the use of the respondent in performing his work.

In addition thereto, the trial judge found that to require a workman to stand on cane which is packed ten feet high and tighten a chain was an inherently dangerous operation and that the failure to instruct the workman that the cane ought not to be packed to a height of two feet above the body of the truck, and that he ought not to stand on the loose cane, packed at such height to tighten the chain was a failure to exercise reasonable care. With such a finding, we agree entirely.

In the light of what we have said, we find no merit in the complaint that the trial judge erred in adjudging the appellants liable for the injuries sustained by the respondent.

We turn now to the respondent's notice, seeking to have the award for pain and suffering and loss of amenities increased from $45,000 to a sum which is in keeping with awards made for injuries similar to those sustained by the respondent.

At the trial, the doctor who treated the respondent at the time the injury was sustained, was unavailable to testify. Dr. Barbara Hutchinson who examined him on July 2, 1990, verified that he had sustained a fracture of both wrists and that he was unable to make a fist. There was tenderness at the joints, with pain on movement. The condition of the wrists was arthritic and there was a 20% loss of movement in the wrists. Up to the time of examination the fractures were not completely healed. Worthy of note is that these injuries had been sustained in 1986.

We were referred to three cases for purpose of comparison. Mr. Rowe for the respondent, cited the case of **Clovis Bryan v. Leonard Hines** C.L. 1985 B441 reported at Volume 3 of Recent Personal Injury Awards made in the Supreme Court of Judicature of Jamaica by Mrs. Ursula Khan at p. 108. In that case the plaintiff, a painter/decorator/stock and poultry owner/cultivator, aged 58 was injured in a motor vehicle accident on 23rd February 1980, and sustained the following injuries:

1. Laceration to right forearm, dorsum of right hand.

2. Fracture of distal end of right radius.

3. Fracture dislocation of right elbow.

4. Headaches and pain.

Residual Disability

Mal-united wrist

very restricted movement at elbow

Scarring and disfiguration.

Award

General damages: $130,000

As reported, we find this citation less than helpful. However, such an award would have been worth $160,092.59 in June 1991, using the Consumer Price Indices All Jamaica All Items 1975 - 1991 (Base Period - January 1988).

Mr. McBean made reference to two cases reported in the same publication.

1. C.L. 1984 A 180 Charles Alexander v. Evelyn Beckford et al page 112

Plaintiff: Salesman, 43, passenger injured in a motor vehicle accident on the 4th October, 1980 - alleged earnings $200.00 per week.

PERSONAL INJURIES

Whiplash

Pains in shoulder

Dislocated left elbow (radial head)

Compound fracture of left radius and ulna at junction of middle and lower third.

RESIDUAL DISABILITY

Non union of ulna

Permanent stiffness in elbow

Fingers held in flexion with inability to extend same

Wasting of forearm muscles

Stiffness in wrist

Left hand disabled and deformed

Ugly scarring of left arm

AWARD

General Damages as follows:

Pain and Suffering and Loss of Amenities $27,000.00

Such an award would be worth $33,665.62 in June 1991.

2. Suit No. C.L. 1987 M 497 - Leroy Mills v. Roland Lawson & Keith Skyers - p. 124.

Plaintiff: Mechanic, 43 (approximately), right handed - fell from bus 20th October, 1987, whereupon rear wheel ran over fingers of right hand and left toes.

PERSONAL INJURIES

(a) Fracture of all the digits of the right middle finger

(b) Compound dislocation of the middle phalanx of the right index finger

(c) Posterior dislocation of the distal inter phalangeal joint of the right ring finger

(d) Compound fracture of the distal phalanx of the left second and third toe

(e) Laceration across the middle, ring and index fingers

(f) Laceration to the right elbow.

RESULTANT DISABILITY

A. Deformity of distal phalanx of right index finger
Reduced power in right hand

Permanent partial disability of right upper limb assessed at 20%

B. Dr. Emran Ali, Orthopaedic Surgeon, gave evidence and opined that the plaintiff would have difficulty in using tools such as a wrench in his occupation as a mechanic. That he had recovered from the injuries to his toes.

AWARD

General Damages: Pain and suffering and loss of amenities $50,000.00. Such an award would be worth $71,698.11 in June 1991.

This Court has in two recent cases - S.C.C.A. 64/91 Desmond Walker v. Carlene Mitchell (unreported) delivered June 2, 1992 and S.C.C.A. 60/91 Donald Williams v. Ennette Cope (unreported) delivered October 5, 1992, discussed fully the circumstances under which it will interfere

with an award made by the court below. Suffice it to say that this Court will only adjust an award where such an award is wholly erroneous i.e. it is so excessive or so very low or was arrived at on some wrong principle of law. Whether an award is wholly erroneous is determined on the basis of whether the award falls within the bracket of awards in comparable cases. In the cited cases, the bracket lies between J$34,000 and J$161,000 approximately. The award of J$45,000 made by Smith J., falls within the bracket, hence it cannot properly be categorized as being excessive or too low. However, it must be noted that in the cited cases, the victims suffered injuries to one limb only. In the case before us, the victim suffered fractures to both wrists. He was completely immobilised insofar as the use of his hands were concerned. This we think, makes the injury sustained by him most unusual.

It is to be observed that the range of the bracket is indeed a wide one. This, we think, has been occasioned by the generous award made by Clarke, J. in Suit C.L. 1990 B Clovis Bryan v. Leonard Hines (supra). For this reason we are of the view that an award within this bracket can adequately compensate the respondent for the injuries sustained. However, to adequately compensate him, the award should be in the upper half of the bracket rather than the lower half.

In the recent decision of Donald Williams v. Ennette Cope (supra) this Court increased an award of $110,000 for pain and suffering and loss of amenities to $130,000. The injuries sustained in that case were far more serious than in the present case. The injuries included a fracture to the roof of the right acetabulum of the pelvis; separation of the pubic symphis; displacement of the sacrio illac joint and a compound comminuted fracture of the tibia and fibula of the left leg. The left leg healed with a "bow leg" deformity and a one inch shortening. The severity of these injuries and the resultant deformity and shortening of the leg must, of necessity, attract a higher award than the injuries in the present

case. In all the circumstances, we are of the view the award for pain and suffering which meets the justice of the case is the sum of J$80,000.

The appeal by the appellant is therefore dismissed. The respondent's appeal is allowed. The judgment of the court below is varied to read:

> Judgment for the plaintiff with damages assessed as follows:
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> Special damages - $16,550.00 with interest at 3% from the 26th February, 1986.
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> General damages $94,880 with interest on $80,000 at 3% from the 17th November, 1986.

Costs of the appeal to the respondent to be taxed if not agreed.

WRIGHT, J.A.

I agree.

DOWNER, J.A.

I agree.