IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L 1999/H017

BETWEEN	KENTON HUTCHINSON	PLAINTIFF
AND	SUNNY CREST ENTERPRISES LTD	DEFENDANT

Lowell Morgan, Maurice Manning and Sherry-Ann Mcgregor instructed by Nunes Scholefield Deleon and Co. for the Plaintiff.

Debayo Adedipe for the Defendant.

Heard on 16th, 17th and 19th October, 2001

JUDGMENT

RATTRAY J:

This action stems from a most unfortunate incident which occurred on November 17, 1997 in which the Plaintiff suffered severe injuries to his right hand.

In the suit filed by the Plaintiff, Kenton Hutchinson, against his employer, Sunny Crest Enterprises Limited the Defendant, the Plaintiff seeks to recover damages for breach of statutory duty under the Factories Act and for negligence, which led to his sustaining personal injuries amounting to the loss of three (3) fingers of his right hand, which is his dominant hand.

It is the Plaintiff's case that he was employed to the Defendant as an apprentice/trainee woodworker in or about 1993/1994. The Defendant operated a business that made furniture for COURTS and other places and was a factory within the meaning of the Factories Act.

Initially when he started working with the Defendant, his tasks included cleaning up the sawdust and packing board. He started doing carpentry work about a year after, that is, in or about 1994/1995.

His supervisor at the date of the incident was a Mr. Joseph Legister, but on the day in question, at the time when the incident occurred, Mr. Legister was not at the factory. The Plaintiff had been given certain instructions by Mr. Jakes Wallace, as a result of which he started cutting up some wood into 2½" pieces, using a circular saw - a process known as ripping. The Plaintiff had used this machine before on several occasions, but he got no training in the use of this machine. Instead, he had been instructed to look and learn and he was told this by the foreman, who was there before Joseph Legister.

The Plaintiff's further evidence was that he was cutting the last piece of about forty (40) pieces of wood and was pushing it with his hand, when it stuck and his hand slipped and went onto the blade. That was how he sustained injury to his right hand, as the blade of the circular saw tore away the first, second, and third fingers of that hand.

The Plaintiff stated that the circular saw he was using had no protection around the blade at all, and he was never provided with a push stick.

In fact, the Plaintiff emphatically stated that he had never seen a push stick while he was employed at the Defendant's premises at all. His evidence was that he had never been provided with a push stick, which he described as a stick used to push wood through the machine and, had he been provided with a push stick, he would have used it instead of using his hand.

Under cross-examination the Plaintiff stated that apart from doing woodwork at the Defendant's premises, he learnt woodwork at school. There he was shown how to use a circular saw similar to that used by him at the Defendant's premises, but he said he was never taught about a push stick and he had never used a push stick.

Although Joseph Legister had shown him how to use the circular saw, the Plaintiff maintained that he was never shown how to use a push stick. He admitted that there were pieces of wood in the workshop which could have been used as a push stick and agreed that if he had been using a push stick that day, he would not have suffered the injuries sustained.

The Defendant's case as set out in the Statement of Defence, in essence was a denial that the injuries sustained by the Plaintiff were caused by alleged breaches of the Factories Act and a denial of any negligence on its part. The Defendant

however admitted that no guard was affixed to the circular saw. It further stated in its Defence that a safe system of work was in place at all material times and that the incident could have been avoided had the Plaintiff used a push stick, which he knew was required to be used for his safety.

The main thrust of this aspect of the Defence was that the Plaintiff was the author of his own misfortune, or was contributorily negligent.

Evidence was given on the Defendant's behalf by Mr. Joseph Legister, the Plaintiff's supervisor.

His evidence in summary was as follows:

(1) He has been in woodworking business for about twenty-three (23) years and had been using circular saws for about twenty (20) years. When he started working at the Defendant, the Plaintiff was already employed there.

(2) The Plaintiff was an advanced apprentice at the time of the incident and was under his supervision and at that time was able to do jobs on his own.

(3) The Plaintiff was a capable workman and could use the circular saw. He had seen him use it several times.

(4) He had given instructions that if you were cutting wood and your hand had to pass close to the blade, you must use the push stick, which was provided on the machine.

(5) It was his (this witness') responsibility to service machines everyday and to ensure that the push stick was on the machine. On the day in question, he serviced the machines and there was a push stick on that machine.

(6) A guard was provided with the circular saw. This machine was used for cross cutting and ripping. Whenever you were ripping, you could not use the guard on the circular saw, and so it was removed. The guard was a "humbug". The presence of the guard would prevent you from ripping wood. He was aware that the machine was used regularly without a guard.

Both the evidence of this witness and the pleadings of Defendant admitted that no guard was on the equipment at the material time. Under cross examination, the witness admitted that the circular saw was a dangerous machine and stated that when new, a push stick came with the machine, but this had to be changed regularly because it was often damaged.

This witness was not at work at time of the incident although he had been there earlier. He had to leave about 8:30a.m, and he left Mr. Wallace as the supervisor in charge of the Plaintiff and the other apprentices.

Interestingly, this witness commented that if he saw the Plaintiff cutting pieces of wood on that machine without using a push stick, he would have immediately turned off the machine and removed the Plaintiff. That is exactly what the Plaintiff said he was doing and yet no one in charge stopped him before the accident occurred.

This witness adamantly maintained that a push stick was always on that machine and when he left the workshop at about 8:30a.m, a push stick was on that machine.

Regulations have been passed under Section 12 of the Factories Act for the purpose of ensuring the safety, health and welfare of persons employed in a factory, and those regulations provide for the secure fencing of dangerous machines.

It is clear on the evidence of the Defendant's witness that the circular saw in question fell into the category of dangerous machinery within the meaning of the Factories Act and the regulations made thereunder.

The Defendant, through its servants or agents deliberately chose to remove the protective guard from the machine. It was argued by the Defendant's witness that ripping could not be carried on with the guard in place. That which had been provided as a form of protection for the employee was removed by the employer, on the basis that the machine could not be utilised in the manner required by the employer with the guard in place. In such an instance, this Court agrees with the submission of Plaintiff's Counsel that the machine ought not to have been used for ripping at all.

The case of Pugh vs Manchester Dry Docks Co. Ltd. 1954 1 All E.R. 600 provides guidance in this matter, the headnote to which reads: -

> "The workman operated a grinding machine. He was grinding a spanner towards the left of the face of the grinding wheel, the spanner, in consequence, not being supported by the metal rest. The grinding wheel, which was revolving at a thousand revolutions a minute, carried

> the spanner with it, the workman's hand came into contact with the wheel, and he was injured.
>
> HELD: the grinding wheel was a dangerous part of the machinery and so was required by the Factories Act, 1937, s. 14 (1), to be securely fenced; the fact that to provide fencing which would prevent any workman from making contact with the wheel would render the machine practically unusable did not absolve the employers from their duty so to fence; and, therefore, they were in breach of their duty under s. 14 (1)."

Mr. Morgan also cited the following passage from "Employer's Liability at Common Law" 10th edition, by John Munkman at pages 309 – 310, Chapter 10 entitled 'The fencing of machinery in factories'

> "Earlier authorities are now superseded by the decision of the House of Lords in *John Summers and Sons Ltd. vs. Frost* 1955 1 A.E.R 870. In this case the House reached the following conclusions:
>
> (1) The duty to fence machinery is a strict or absolute obligation.
>
> (2) It is no defence to say that it is impracticable to fence the machinery, or that the machinery, if securely fenced, will become useless.
>
> (3) Fencing is not secure unless it gives complete protection against the danger contemplated by the sections, which is in general the danger from contact with machinery;...."

This Court accepts the authorities cited and finds the Defendant in breach of its statutory duty to securely fence dangerous parts of machinery in accordance

with the Factories Act and Sections 3(1) and 3(1) (*l*) of the Factories Regulations 1961.

Safety obligations are placed on an employer for the purpose of protecting not only workmen who are careful, but also those who are careless.

This Court is of the view that where a Defendant acts in a deliberate manner calculated to breach the provisions of the statute, in this case, the Factories Act, by removing protective fencing that comes with dangerous machinery, the obligation is greater on such a Defendant to ascertain and ensure that its employers who use that equipment are properly and effectively supervised in the said use. Where such supervision is not in place, the employer is negligent in failing to provide a safe system of work for its employee.

The Court finds that the Plaintiff, having been instructed to carry out certain tasks using the circular saw, admittedly a dangerous machine, without its protective guard, was left to operate same without any proper or effective supervision. Any reasonably competent supervisor observing the Plaintiff carrying out the task assigned without the use of a push stick ought, in the words of the Defendant's witness, "to have turned off the machine immediately and removed him". Sadly however, such supervision was absent on the day and at the time in question. I therefore find the Defendant liable also in negligence.

The next issue to consider is whether the Plaintiff is guilty of contributory negligence. In coming to a decision in this regard, the Court must consider all the issues of the case. In the unreported case of Stanley Peterkin vs Francis Myton Trading as Superior Bakery – Suit No. CL. P114 of 1990 – the late Mr. Justice Courtney Orr, in his Judgment, cited several authorities dealing with the issue of contributory negligence.

At page 10 of that Judgment, he stated –

> "It is important to note that in John Summer's case, Lord Keith pointed out that to fix a Plaintiff with negligence in cases such as the instant case where there is a duty to fence machinery, momentary inadvertence is not enough; something like reckless disregard of his own safety is necessary."

In the present case, the Plaintiff though an apprentice, had been an apprentice for some years up to the time of the accident. He steadfastly held to his position that there was no push stick on the machine and that he had never seen any push stick in the factory, and that he was never taught to use a push stick by his supervisor or anyone else at the factory. Equally steadfast was the Defendant's position to the contrary. There is no evidence here that the Plaintiff's injuries were caused or brought about by an instance of momentary inadvertence on his part.

Having heard and considered the evidence of the witnesses on this issue, this Court accepts the testimony of Joseph Legister, the supervisor, that a push stick

was made available to the Plaintiff for use on that machine. This Court does not find as truthful, the allegations of the Plaintiff that:

(1) he was never provided with a push stick

(2) he has never seen one at Sunny Crest

(3) he has never used a push stick

(4) he has never seen a push stick used

Where the Plaintiff's evidence conflicts with that of Joseph Legister with respect to the push stick, this Court finds the evidence of Mr. Legister more credible.

I therefore find the Plaintiff guilty of contributory negligence and, in the circumstances of this case, would apportion liability as follows:

Plaintiff - 30%

Defendant - 70%

I now turn to the question of damages.

SPECIAL DAMAGES

By virtue of an application made at the request of the Plaintiff's Counsel on his client's behalf during his closing submissions, the items of Special Damages were amended to read as follows:

(a) Medical Expenses - $12,500.00

(b) Loss of Earnings from April 1998 to the present, i.e. 42½ months at $2,000.00 per month - $85,000.00

With respect to the first item, the major part of this claim was agreed to by the Defendant's Counsel and as regards the portion not consented to, no challenge was raised. I therefore award the sum of $12,500.00 as Medical Expenses.

As regards the matter of loss of earnings, up to the time of filing of the Statement of Claim in February 1999, no claim had been made for loss of earnings. However, the Plaintiff's evidence was that "he was paid by the Defendant up to March 1998. Since then, he has got no salary from the Defendant."

The application for the amendment was made by Plaintiff's Counsel to bring the pleadings in line with the evidence. It is therefore necessary to look at the evidence carefully to ascertain whether or not the Plaintiff is entitled, in the circumstances of this case, to an award under the heading Loss of Earnings.

The Plaintiff's evidence is that he was paid by Defendant up to March, 1998. After that, he did not go back to work with the Defendant and he could give and, in fact, gave no reason for this action. He further testified that he did not seek employment after the accident and did not look for work anywhere else. Again, no reason is given for his behavior.

He went on to state that since he stopped working with the Defendant, he has not worked again, nor has he gone back to school. When asked by his Counsel as to what he did for a living, his response was, "don't do anything – can't make up my mind".

No evidence has been led by the Plaintiff that he was fired or laid off by the Defendant. Inexplicably, he just did not go back to work. He has not sought employment and has not worked since the incident. There is no evidence before this Court that the Plaintiff has tried to find a job but, due to his injuries, he has been unable to obtain employment. There is no evidence before this Court that the only form of employment he could have obtained was of a type where his earnings would have been less than what he previously earned.

"He who alleges must prove" and Special Damages must be specifically pleaded and proved for the Plaintiff to obtain an award under this heading. This Plaintiff has failed to put one scintilla of evidence before this Court for it to properly assess and thereafter award a sum for Loss of Earnings in this matter.

I find therefore that the Plaintiff is not entitled to damages under this heading.

GENERAL DAMAGES

I will deal firstly with the issue of Lost of Future Earnings as the comments of this Court on the claim for Loss of Earnings under Special Damages are also relevant here to a certain extent.

There is no evidence that the Plaintiff cannot work again as a carpenter, or that he cannot work again as was submitted by his Counsel at page 7 of his written

submissions. There is no evidence of a medical nature that shows that his right hand is useless. In fact, the testimony of the Plaintiff on this point was to the effect that:

(i) At the time of the accident, he could build a dresser, bed, bed-head and other such items. However, he did not try after his hand got fractured.

(ii) Although he cannot use the hammer, he can hold the saw with his left hand, but was not perfect in the use of it.

(iii) He can use the circular saw now by trying to use his left hand.

In this Court, the Plaintiff held the Bible in his right hand and when asked to sketch the circular saw, he used the same injured hand to hold the pen and to draw the requested object.

The medical report of Dr. Fray indicates permanent disability of sixty percent (60%) loss of function of his right hand, amounting to twenty-five percent (25%) loss of function with respect to the total person.

No evidence has been presented to show that this Plaintiff will never work again or that he is unemployable. The evidence is that he has not tried to find any form of employment. The burden rests solely on the Plaintiff to put material before this Court to prove an entitlement to an award under heading Loss of Future Earnings. This he has failed to do and, sympathetic though the Court may be, an award has to be based on evidence and not on sentiment. No award is therefore made in this category.

It is clear however, that were the Plaintiff to explore the job market in search of employment, particularly in today's economy, the chances of his being successful would be lessened as a consequence of his injuries.

This Court is of the view that the Plaintiff is entitled to an award under the heading Handicap on the Labour Market.

In the case of Stanley Peterkin vs Francis Myton Trading as Superior Bakery where the Plaintiff in that case lost three (3) of the fingers of his right hand, the late Mr. Justice Courtney Orr in 1994 awarded him the sum of $80,000.00 for Handicap on the Labour Market.

I am of the view that the sum of $180,000.00 would be adequate compensation in that regard.

PAIN AND SUFFERING AND LOSS OF AMENITIES

In looking at the cases cited by Counsel for the respective parties, I am of the view that the injuries in the case of Stanley Peterkin vs Francis Myton Trading as Superior Bakery are more similar to those suffered by the Plaintiff Mr. Hutchinson. I therefore award the sum of $1,400,000.00 as compensation for Pain and Suffering and Loss of Amenities.

Judgment is therefore awarded in favour of the Plaintiff as follows:

Special Damages -		$12,500.00
General Damages		
Pain and Suffering & Loss of Amenities -	$1,400,000.00	
Handicap on the Labour Market -	$180,000.00	$1,580,000.00

Interest on the Special Damages at the rate of 3% per annum from November 17, 1997 to the date hereof.

Interest on the General Damages of $1,400,000.00 at the rate of 3% per annum on from the date of service of the Writ of Summons, February 3, 1999 to the date hereof.

The Plaintiff is to receive 70% of amount awarded.

Costs to the Plaintiff pursuant to Schedule A of the Rules of the Supreme Court (Attorneys-at-Law's Costs) Rules, 2000.