

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. C.L.1999/A-042

BETWEEN	CURTIS ARTHURS	CLAIMANT
A N D	JAMES JACKSON (Trading as Negril Tree House Resort)	DEFENDANT

Crafton Miller and Suzette Wolfe for Claimant instructed by Crafton S. Miller and Company

Leonard Green for Defendant instructed by Chen, Green and Company

Heard: May 30<sup>th</sup> and 31<sup>st</sup>, 2007, July 11<sup>th</sup> and 13<sup>th</sup>, 2007, October 29<sup>th</sup>, 2010.

Cor: Rattray, J:

1. The last year of one's teenage years is always a special time for those standing on the brink of a new decade. Although they have passed the legal age of being able to exercise their franchise, for them the portals of life are just beginning to open. And so it must have been for Curtis Arthurs, who at nineteen (19) years of age in 1993, had been employed in the water sports department as a spotter at the Negril Tree House Resort in the tourist mecca of Negril, on the north coast of the island.
2. Two (2) years had passed since the commencement of his employment with the resort, and as a spotter, his were the eyes of the driver of the boat, ensuring that the vessel's projected path was clear of swimmers, other sea craft and any form of floating debris. His primary function was to alert the operator of the boat of any likely

- danger in the water, so that timely measures could be taken to avoid injury or damage.
3. His duties as a spotter provided Curtis Arthurs with what must have been exhilarating exposure to sun, sea breeze and the thrill of an accelerating power speedboat, propelling adventurous tourists skyward in their enjoyment of parasailing activities. While perhaps his involvement with the visitors' experience could only be enjoyed vicariously, it was nevertheless a good life for a young man of his age. Alas, it was not to last.
  4. On the 25<sup>th</sup> May, 1993, at about 4:30 pm, after water sports activities had ended, Curtis Arthurs and Gladstone Bailey, the driver of the marine vessel 'Seacraft' set out to dock the boat at Bloody Bay for safe keeping, which was approximately three (3) to four (4) miles away from the Resort. Suddenly and without any warning, Gladstone Bailey caused the speedboat to surge forward and swing out to splash a passing boat. That manoeuvre resulted in Curtis Arthurs being thrown from the boat into the water, where he came in contact with the boat's propeller and suffered severe traumatic injuries, in particular, the amputation of his right leg above the knee.
  5. He instituted legal proceedings against the owner of Negril Tree House Resort, James Jackson, his servants and/or agents claiming damages for negligence, breach of duty and/or breach of the contract of employment, as consequence of which he suffered loss and damage and incurred expense. In the Defence filed on James Jackson's behalf, save for an admission that Curtis Arthurs was on the boat belonging to the Defendant at the material time, the issues raised were twofold;- firstly, a denial that Curtis Arthurs was acting in the course of his employment when he sustained the injuries and suffered the

damages itemised in his claim, and secondly, a denial that injuries and losses sustained were occasioned by any breach or conduct on his part or for which he was liable.

6. In his evidence before the Court, Curtis Arthurs indicated that his duties as a spotter included looking out for people swimming, as well as other objects in the water, and ensuring that the ropes being used for parasailing were in order. He stated that after parasailing activities were finished for the day, he and the driver of the boat would pack up the equipment, that is the ropes and harnesses, and bring them back to the Resort. In the event of there being rough seas, they would then take the boat to Bloody Bay for it to be parked for safety reasons. It was the supervisor, Rohan Myrie, who made the necessary arrangements to send a taxi to pick them up and bring them back to the Resort. Then he would shower, put on his regular clothes and go home. He also stated that it was when all that had been completed that his day's work was at an end.
7. On the day of the unfortunate accident, Curtis Arthurs was seated in the spotter's seat, which was located in the middle of the boat, in front of where the driver was standing. That particular boat was, in his estimation, eleven (11) to twelve (12) feet long and six (6) feet wide, and when positioned in the seat provided, he observed that the side of the boat was about three (3) feet high. He contended that he had never been advised of any safety regulations or guidelines, nor was he present at any meeting attended by James Jackson at which the issue of splashing was raised. Curtis Arthurs' evidence was that he was taken completely by surprise by the action of the boat's driver in suddenly picking up speed and swinging out to splash a passing boat, which caused him to be thrown into the water.

8. Under cross-examination from Counsel Mr. Leonard Green, Curtis Arthurs admitted that he gained his experience with water sports activities on the job at the Resort. He asserted that he felt secure when positioned in the spotter's seat, once the vessel was traveling at the normal speed for parasailing activities. However, he denied having any prior knowledge of the practice known as "splashing" and stated that the only time he had seen splashing was the day of the incident in which he lost his leg. He also denied that the 'Seacraft' had any metal handrails on the side of the boat as suggested by Counsel. He stated that it was another of James Jackson's vessels, the 'Boston Whaler' which had metal handrails and not the 'Seacraft'. Further, he emphatically denied being part of any romping or frolicking with the boat or that he was part of the 'splashing practice'. He responded that he was instructed by the supervisor to take the boat to Bloody Bay, and that was what he was doing when the incident occurred.
9. James Jackson gave evidence that for over twenty-seven (27) years, he had been the owner of the Negril Tree House Club, a small hotel in Negril in the parish of Westmoreland. Over the years, he operated a water sports facility from that property which was managed by Rohan Myrie. In May, 1993, Curtis Arthurs had been employed as a spotter with responsibilities to assist the boat's operator in handling parasailing and skiing operations. From his personal knowledge, he was aware that Rohan Myrie communicated on a daily basis with the boats' staff and set guidelines as to how they conducted themselves, to ensure the safety of the visitors as well as their own safety, while providing a quality service to the patrons.

10. He further testified that a least once per week Rohan Myrie and himself would have a meeting with the water sports staff to deal with any issues concerning the water sporting activities. James Jackson stated that in or around 1993, some two (2) weeks before the incident involving Curtis Arthurs, the practice of splashing involving the boat operators and spotters was brought to his attention. This activity was taking place after they had finished their daily job and had changed over into their regular clothes. Once he was aware of this practice, he instructed Rohan Myrie in the presence of all water sports staff members that they should desist from that activity, as it was dangerous and he did not want them to be injured or to injure swimmers who may be in the water. He also pointed out that he did not want his boats, which were very expensive to be damaged. He therefore instituted a rule that boats should leave at least fifteen (15) minutes apart when they were being parked.
11. James Jackson admitted that he was informed by the driver of the boat, Gladstone Bailey that “they were splashing when the incident happened.” The employer maintained however that at the time Curtis Arthurs sustained his injuries, he was not operating within the scope of his employment as a spotter and that the boat operator was acting on a frolic of his own. He also maintained that he never allowed splashing as part of water sporting activities and that that practice was part of the operator's private fun and games. When asked by Mr. Crafton Miller, Counsel for Curtis Arthurs, to whom he was referring as the operator, Mr. Jackson replied that he “was talking about the operator and the spotter as a team.”
12. When further cross-examined by Mr. Crafton Miller, James Jackson at first admitted that it was he who employed Gladstone Bailey, initially

as a spotter, who later became the driver of one of his boats. He also admitted employing Curtis Arthurs as a spotter to work in his water sports business. He however did not recall the exact dates of their employment. When further cross-examined, he then indicated that he did not employ the persons working in the water sports department of his hotel, as this was the responsibility of Rohan Myrie, the manager. It was Mr. Myrie he stated who was in charge of the everyday activities of water sports and the personnel employed in that department. The hotelier testified that Gladstone Bailey was no longer an employee with his business as his employment was terminated a few days after the incident, once he had carried out a proper investigation with respect to the accident.

13. James Jackson agreed with Counsel Mr. Miller that he would send his boats to be parked overnight at Bloody Bay, when the sea was likely to be rough in order to keep them safe. The vessels would be taken there by their driver and a spotter. When asked whether the taking of the 'Seacraft' to Bloody Bay for safe harbour was part of the job functions of Curtis Arthurs and Gladstone Bailey, James Jackson replied that their action in doing so was voluntary and that he did not pay them to do that. He however was not aware of the arrangement for them to be picked up and taken back to the resort after safely parking the boat. Such an arrangement he stated, would have been put in place by Rohan Myrie who was in charge of the water sports department.
14. In his Witness Statement, the Defendant emphasized that his employees were trained to carry out water sporting activities and that they ensured that operators and spotters adhered to strict safety regulations. When questioned, James Jackson described those strict

- safety regulations as instructions to spotters not to leave their seat in the boats, and if any emergency should occur, the operator and spotter were to work as a team. In order to ensure compliance with those regulations, the hotelier told the Court that he held regular monthly meetings with his staff.
15. On being made aware of the unauthorised use of his boats for splashing, James Jackson contended that he had a meeting with his employees, but was unable to ascertain which of the drivers were involved as none of the drivers or spotters admitted to taking part in such conduct. He was therefore surprised when some two (2) weeks later, the incident occurred in which Curtis Arthurs was injured and he was told by Gladstone Bailey that they had been splashing. This led to the boat operator being fired within days of the incident. The hotelier also stated that he instructed the manager to fire both of them, as he was one hundred percent sure that they were both involved in the unauthorised activity.
  16. In answer to questions put to him by Mr. Miller, James Jackson admitted that the practice of splashing was a very dangerous one and that the 'Seacraft' operated by Gladstone Bailey was a powerful 250 horsepower speedboat. He further admitted that the driver was the person in control of the boat, while the spotter was the look out for any danger ahead in the sea. He also admitted that the boat must be manoeuvred by the driver to be involved in the splashing activity.
  17. In answer to the Court, James Jackson gave evidence that the spotter's seat was located approximately two (2) feet from the front of the boat, and that the driver operating the vessel stood about eight (8) to nine (9) feet behind the spotter's seat. There was no seat belt on the spotter's seat, but the hotelier stated that he was not aware of such

boats being equipped with safety belts. He went on to state however that there was a bank in front of the spotter's seat about one and one quarter (1¼) inches wide, which extended around the inside of the boat on which there was a sturdy steel bar. He further stated that it was duty of the spotter to hold on to that railing, which was right in front of him.

18. Rohan Myrie the water sports manager/supervisor at the Negril Tree House was the sole witness called on behalf of the Defendant. He had been working with James Jackson for nineteen (19) years. In his Witness Statement, he testified that at about 5 pm on the 25<sup>th</sup> May, 1993 after work had finished, Gladstone Bailey, Curtis Arthurs and Andre Scarlett volunteered to take marine vessels 'Seacraft' and 'Thunderbird' to be docked safely at Bloody Bay because of rough seas. As a result of the practice called 'splashing' of which he had been informed, he instituted a system of sending the boats out at 15 – 20 minute intervals in order to prevent such conduct. He also held meetings with the workers to inform them not to play with the employer's boats.
19. Under cross-examination, Rohan Myrie admitted that when the accident happened, as manager/supervisor he would have been the individual who authorised Gladstone Bailey, Curtis Arthurs and Andre Scarlett to take the boats to Bloody Bay for safe keeping. He declared that in 1993, James Jackson was the person who employed the drivers and spotters for the boats. Further, when Curtis Arthurs came looking for a job, it was Mr. Jackson who employed him for the position as spotter and determined how much he was to receive as remuneration. Rohan Myrie went on to state that Gladstone Bailey continued in his job for about eighteen (18) months after the accident



occurred and then he migrated. According to the manager/supervisor of the water sports department, no one was fired as a result of the accident in which Curtis Arthurs was injured because “we understood what clearly happened”.

20. When asked by Counsel Mr. Crafton Miller as to who would be in control of the boat in which Curtis Arthurs was the spotter and Gladstone Bailey the driver, Rohan Myrie agreed that the driver had control of the boat. It was he who stood in the centre of the boat by the steering wheel and was the one who guided the course of the vessel by determining and implementing the direction the boat would take. Mr. Myrie also contended that the ‘Seacraft’ had rails to the bow of the boat made of metal, one and a quarter (1¼) inch thick and eight (8) feet in length, which formed part of a support system for the spotter to hold on to. He described the spotter’s seat as being about three (3) feet from the front of the boat, positioned to the side of the boat and stated that the spotter could choose to sit either to the left or right of the driver. That eight (8) foot rail was on one side of the boat where the spotter would be seated while the driver would be standing in the centre of the boat by the steering wheel. He characterized the rail as a “hold onto rail” on the frontal section of the boat, which ran from where the spotter was seated and which was used as a safety device. Mr. Myrie went on to state that the rail was attached to the boat and was behind the spotter, with which he could hold with both hands. He reiterated that the rail was not in front of the spotter, but behind him.
21. When asked by Counsel Mr. Miller whether there was a safety belt to strap the spotter in his seat, Rohan Myrie replied that the boat was not designed to have such a feature and he did not see any such safety belt

on the craft. He admitted that harnesses were provided for customers, but no provision made for similar protective gear for the spotter or operator of the vessel. He maintained that the boat was not designed to have a safety belt for the spotter's seat and that to attach a seat belt to that seat, would destroy the hull of the boat. He further maintained that he had never seen such a device locally or overseas. He went on to identify the safety features on the 'Seacraft' as including fire extinguishers, floatation devices and the boat's anchor.

22. Counsel Mr. Leonard Green in his closing submissions on behalf of James Jackson asserted that Curtis Arthurs, on that ill-fated day in May, 1993, was a passenger in his client's boat when he fell into the water while Gladstone Bailey was engaged in splashing activities. It was the splashing, he argued that caused Curtis Arthurs to fall overboard and sustain personal injuries. Those activities were not a part of the normal duties the driver of the Defendant's vessel was employed to carry out. He further argued that where an employee acts outside of his designated functions and outside the scope of his employment, such conduct renders his actions independent of the actions of the employer. As such, Counsel contended that his client would not be vicariously liable for the actions of the boat operator, Gladstone Bailey.
23. Mr. Green went on to submit that as no explanation was given to the Court as to why the boat suddenly accelerated and swung in the direction of the other boat, the inference to be drawn is that those men on the vessel were frolicking. If they were, the Court would have to determine whether the said employees, indulging themselves in splashing after parasailing activities had finished, were carrying out normal working duties sanctioned by their employer. If they were

- not, Mr. Green asserted that it could not be said that the activities of those men were the activities for and/or on behalf of their employer.
24. Counsel maintained that the only evidence before the Court as to how this unfortunate accident occurred came from the Claimant himself, unsupported by any witnesses. The Court is therefore obliged, he argued to give careful consideration to the credibility of the Claimant. Counsel sought to characterize the testimony of Curtis Arthurs as unbelievable, when he stated that he had no prior knowledge of splashing until the day of the accident. Having come to the conclusion that Curtis Arthurs was not being truthful in that regard, Mr. Green urged the Court to find the totality of his evidence unreliable.
25. Mr. Green is correct that the issue of the credibility of the Claimant is a crucial factor to be considered in this case. The obligation lies on he who alleges, to prove his case. But it goes further than that. The Court is mandated to carefully consider the evidence given by, as well as to assess the credibility of, all the witnesses. The mere fact that no witnesses were called to corroborate the testimony of a Claimant does not in and of itself weaken a party's case, if it is found by the Court that that party gave evidence in a frank and forthright manner. Similarly, the fact that a litigant may not be believed on one aspect of their evidence, does not necessarily condemn in its entirety as unreliable the whole of that person's testimony. An examination of the totality of the evidence before the Court, as well as the demeanour of the witnesses in giving their evidence are factors which come under the searchlight of the Court's scrutiny in its attempt to determine, on a balance of probabilities, which of the parties the Court is more likely

to believe. Credibility then is the gauge by which truthfulness is measured.

26. A perusal of the evidence given by and on behalf of the Defendant reveals several discrepancies and inconsistencies. James Jackson had stated in his testimony that Gladstone Bailey's employment with him as a driver ceased within a few days of the accident, after he carried out his investigations into the incident. Further in his evidence he said,

"I fired him within days of the accident. He never worked again for me. I told the manger to fire both of them."

His water sports manager Rohan Myrie however attested that Gladstone Bailey continued in his job for about eighteen (18) months after the accident occurred, when he migrated. According to Mr. Myrie no-one was fired as a result of the incident. James Jackson indicated that on the 'Seacraft' there was a bank which extended around the inside of the boat in front of the spotter's seat, on which there was a sturdy railing. This was for the spotter to hold on to, as it was right in front of him. Again Rohan Myrie's evidence painted a different picture. He stated that that rail, the purpose of which was a safety device, was not in front of, but was behind the spotter. Curtis Arthurs denied that there was any such rail on the 'Seacraft' and went on to state that it was another of Mr. James' boats, the 'Boston Whaler' that had such a railing.

27. The hotelier stated that the spotter's seat was about two (2) feet from the front of the boat with the driver standing behind the spotter, operating the vessel with something looking like a steering wheel.

Curtis Arthurs also gave evidence that his assigned seat was positioned in front the driver of the boat. James Jackson's manager testified that the spotter's seat was three (3) feet from the front of the boat and was positioned to the side of the boat. He went on to state that the spotter could choose to sit either to the left or to the right of the driver.

28. The issue of the employment of staff for the water sports department of the Resort also generated inconsistencies. James Jackson initially maintained that Gladstone Bailey and Curtis Arthurs were employed by him, but could not recall any details of their employment or give any specifics as to their hours of work. He was also unaware of the arrangements in place for them to be transported back to the Resort after the boat was docked at Bloody Bay. Subsequently, he admitted that it was the manager who employed personnel for the water sports section, but it was his (Mr. Jackson's) money with which they were paid. Mr. Myrie on the other hand unhesitatingly stated that it was the hotelier who employed Curtis Arthurs for the job he was doing at the time of the accident. He went on to state that in 1993, James Jackson was the person who employed the drivers and spotters to work on his boats.
29. In his Witness Statement, the owner of the Negril Tree House Resort asserted that he and his manager, Rohan Myrie had meetings with the water sports staff at least once per week. Under cross-examination however, he stated that meetings were held with those staff members once per month. It is to be expected that evidence given by one side would most likely contradict that advanced by the other. What is surprising in the present case is the number of occasions where the

evidence of James Jackson not only differed from that of his witness Rohan Myrie, but also came into conflict with his own testimony.

30. Gladstone Bailey was never called as a witness. Neither James Jackson nor Rohan Myrie was present when the accident took place. The only other person on board the 'Seacraft' was Curtis Arthurs. Both James Jackson and Rohan Myrie admitted that the control of the boat and the direction in which it traveled lay on the hands of the driver, Gladstone Bailey. However the hotelier sought to remove himself from the distressing glare of liability arising from this tragic incident, by contending that he had expressly prohibited splashing activities. He further contended that what took place on that ill-fated day were the actions of the boat operator. In his Witness Statement the resort owner declared,

“... the boat operator was in the truest sense of the word on a frolic of his own. I never allowed splashing as part of the activities carried out at the Tree House, this was part of the operator's private fun and games.”

When asked by Counsel Mr. Miller as to he whom he was referring as the operator, the Defendant replied that he treated the operator (boat driver) and the spotter as a team.

31. It is difficult to comprehend the assertions of the Defendant that Curtis Arthurs was involved in the splashing activities, which cost him his leg, as well as other injuries. There is no evidence before the Court to show what action if any, the Claimant took which could be viewed as an active step in the prohibited pastime, thereby causing him to be deemed to be a part of the unauthorised activity. The fact of his being present on the boat at the time 'splashing' was going on does not without more, in the circumstances of this case, lead to a

- conclusion that he was involved in that activity, and I am not prepared to make such a finding.
32. I am satisfied, after a careful perusal of all the evidence presented in this matter, that Curtis Arthurs testified in a frank and forthright manner. I find him to be a witness of truth and whenever there is a conflict between his evidence and that given by or on behalf of the Defendant, I accept his evidence. I find the evidence given by James Jackson and Rohan Myrie riddled with inconsistencies and not at all believable. I find as a fact that the accident which brought about the severe injuries sustained by Curtis Arthurs was occasioned by the actions of Gladstone Bailey in suddenly swinging the power speedboat in the direction of another vessel, which caused Mr. Arthurs to be thrown from the 'Seacraft' into the water.
  33. I do not accept as credible the assertions of the Defendant and his manager that the taking of the 'Seacraft' to safe harbour at Bloody Bay on the day in question by the employees was done on a voluntary basis. I find that they were instructed to carry out that particular task, as indicated by the evidence of Rohan Myrie and that that task was part of the duties for which they employed. My finding in this regard is fortified by the unchallenged evidence of Curtis Arthurs, where he stated that his working day ended after returning from parking the vessel and being transported by taxi back to the Resort, where he showered and changed into his normal clothes before going home. I am therefore satisfied on the evidence and I so find that at the time this regrettable incident occurred, both Curtis Arthurs and Gladstone Bailey were acting in the course of their employment.
  34. The next issue to determine is whether James Jackson is liable for the actions of Gladstone Bailey in the circumstances of this case. As a

general principle, “an employer is liable for the negligence of the employee, if committed in the course of his employment, but is not liable for negligence, which is committed outside the scope of his employment.” See **Charlesworth and Percy on Negligence** 9<sup>th</sup> Edition, paragraph 2 – 246, page 153. The case of **Canadian Pacific Railway Company v. Lockhart** 1942 A.C. 591, a Privy Council decision on Appeal from the Supreme Court of Canada is also instructive. The head note reads:-

“Where a servant of the appellant company in disregard of written notices prohibiting employees from using privately owned motor cars for the purpose of the company’s business unless adequately protected by insurance, used his uninsured motor-car on a journey for the purpose of, and as a means of execution of work which he was ordinarily employed to do, and by negligent driving injured the respondent:-

Held, that the means of transport was incidental to the execution of that which he was employed to do, and that the prohibition of the use of an uninsured motor-car merely limited the way in which, or by means of which he was to execute the work, and that breach of the prohibition did not exclude the liability of the company to the respondent.”

Lord Thankerton who delivered the Judgment of the Court stated at page 599:-

“The general principles ruling a case of this type are well known, but, ultimately, each case will depend for decision on its own facts. As regards the principles, their Lordships agree with the statement in Salmond on Torts, 9<sup>th</sup> ed. p. 96, namely: ‘It is clear that the master is responsible for acts actually authorised by him: for liability would exist in this case, even if the relation was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not



authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes-although improper modes-of doing them. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it....”

35. Counsel for the Defendant, Mr. Green contended that his client gave express instructions to staff members prohibiting the use of his boat for ‘splashing’, once he was aware of this activity. In addition, he also instituted the practice of his boats departing within a specified time of each other in an attempt to prevent this activity. Was this enough to extricate James Jackson from the tentacles of liability? To answer this question, the nature and scope of Gladstone Bailey’s employment must be examined. Lord Thankerton in the **Canadian Pacific Railway Company case** opined at page 600:-

“In these cases the first consideration is the ascertainment of what the servant was employed to do. The existence of prohibitions may, or may not, be evidence of the limits of the employment.”

36. There is no dispute that at the material time, Gladstone Bailey was employed as the driver of the ‘Seacraft’, which entailed his maintaining control over and the selection of the direction in which the vessel travelled. On that particular afternoon, he was instructed to take the boat to Bloody Bay for safe keeping, which is what he was doing when he embarked upon the ‘splashing’ of another vessel. I am of the view that the prohibition issued by the employer merely limited the way on which the boat operator was to carry out the work for which he was employed. The breach of that prohibition then does not exclude the liability of the employer to an injured third party. In the circumstances, I find that by his actions, Gladstone Bailey was

performing, in an unauthorised and improper manner, an act that he was employed to perform. As such, I find his employer James Jackson liable for the consequences of the actions of his employee, Gladstone Bailey.

37. Two other complaints of Curtis Arthurs, which can be dealt with together, are that his employer breached an implied term of the contract of employment and was in breach of the duty of care owed to the Claimant by failing, inter alia, to-

- (i) take all reasonable precautions for the safety of the Claimant while he was engaged in his work as a spotter;
- (ii) take all reasonable measures to ensure that the place where he carried out his work was safe;
- (iii) provide a safe system of work.

It is agreed by the parties that there was no written contract of employment. At common law, the duty of an employer to his employee is to take reasonable care for their safety in all the circumstances of the case. See **Paris v. Stepney Borough Council** [1951] A.C. 361, per Lord Oakley at page 384. In commenting on this duty of care, Lord Keith in the case of **Cavanagh v. Ulster Weaving Company Ltd.** [1960] A.C. 145 at 165 opined:-

“...the ruling principle is that the employer is bound to take reasonable care for the safety of his workmen, and all other rules or formulas must be taken subject to this principle.”

The learned authors of **Charlesworth and Percy on Negligence** 9<sup>th</sup> edition, paragraph 10 – 08 at page 165 point out a qualification of that duty of care when they state:-

“Irrespective of whether the duty of the employer arises in or out of a contract of employment, it is not an

absolute one. It can be performed by the exercise of due care and skill...”

38. Counsel for the Defendant submitted that his client had discharged his duty to the Claimant, by providing a safe system of work for him in his capacity as a spotter. This included the provision of a special spotter’s seat and the fitting of the ‘Seacraft’ with rails, which operated as a safety device for the spotter to hold on to while the boat was in motion. Mr. Green further submitted that by holding regular meetings with staff members and putting measures in place to ensure that the boats did not leave at the same time, his client had discharged his duty to Curtis Arthurs and had discharged his common law duty to take reasonable care for his safety.
39. The evidence of James Jackson and his manager Rohan Myrie as to the location of the rails on the boat diametrically opposed each other—one insisting that the rails were in front of the spotter, the other maintaining that they were behind him. Curtis Arthurs testified that there were no rails on that vessel, but was aware of such a device on another of his employer’s boats the ‘Boston Whaler’. I accept the evidence of the Claimant and find that there were no rails on the ‘Seacraft’. It is to be noted that it is the evidence of Curtis Arthurs, which has been accepted by the Court, that he was seated in that same special spotter’s seat, provided for him by his employer and from which he was thrown, when the boat operator swung to splash a passing boat. No safety harness, seat belt or such device was affixed to that seat. The explanation proffered was that the boats were not structured with such attachments. But does that mean that no form of protective harness or belt could have been affixed to the seat to ensure the safety of the spotter, bearing in mind the powerful 250 horse

power speedboat on which he was employed to work? I am not satisfied with that explanation. The hotelier in his Witness Statement maintained that they ensured “that the operators and spotters adhered to strict safety regulations.” When asked about those strict regulations as they related to the spotters, he identified them as being instructions that they were not to leave their seat in the boat once it was in operation, as this was an offence under the Tourist Board Act and if there was an emergency, the employees on board were to work together. Stripped to its bare bones, the safety measure put in place for the protection of the spotter was the instruction not to leave his seat, while the boat was in operation.

40. I find that the employer James Jackson failed to take reasonable care for the safety of his employee, Curtis Arthurs while he was employed as a spotter on his boat the ‘Seacraft’. I am satisfied that Mr. Jackson was in breach of his contract of employment with Curtis Arthurs, as he failed to take any reasonable precautions for his safety at work or to institute measures to ensure that the area in which he worked was safe or to provide a safe system of work. In light of my findings outlined above, Curtis Arthurs is entitled to an award of damages against James Jackson for negligence, breach of duty and breach of contract of employment.
41. As a result of the accident on the 25<sup>th</sup> May, 1993, Curtis Arthurs was admitted to the Cornwall Regional Hospital that same day. The Medical Report of Dr. George Donaldson revealed the following:-
- (i) Severe compound fracture to his right leg
  - (ii) Severe injury to right foot
  - (iii) Severity of injuries necessitated an amputation of his right leg above the level of the knee.

- (iv) Laceration to right upper thigh
- (v) Two (2) lacerations to his left thigh
- (vi) Laceration at his left knee
- (vii) Laceration to his left arm
- (viii) 100% loss of use of right lower limb
- (ix) He was discharged on the 3<sup>rd</sup> June, 1993, and made regular subsequent visits to the Orthopaedic Clinic.

A further Medical Report obtained from Dr. Delroy Fray, an Orthopaedic Surgeon dated the 13<sup>th</sup> July, 1999, indicated that the emergency above-knee amputation was done as a life saving measure. Dr. Fray advised that Mr. Arthurs' post-operative period was uneventful, that his stump had healed satisfactorily and he was subsequently fitted with an above-knee prosthesis. His current disability with respect to this inquiry is approximately forty five percent (45%) with respect to the total person, which is permanent.

42. Having cleared the first hurdle of liability, the Claimant is now obliged to satisfy the Court, based on the evidence presented and/or documents tendered, as to the quantum of damages which ought to be awarded for the injuries sustained and the loss and expenses incurred due to the accident.

**Special Damages**

It is refreshing to note from the written submissions tendered by Counsel for both parties, that there was no dispute with respect to the claim by Curtis Arthurs for Special Damages. The sum agreed was **\$241,859.00** being comprised as follows:-

- |     |                        |             |
|-----|------------------------|-------------|
| (a) | Cost of Airline Ticket | \$40,359.00 |
| (b) | Travel Tax             | \$ 400.00   |

(c)	Hotel accommodation London	\$75,600.00
(d)	Loss of Earnings	\$124,000.00
(e)	Dr. Fray's Medical Report	<u>\$ 1,500.00</u>
		<b><u>\$241,859.00</u></b>

That sum is therefore awarded as Special Damages in this matter.

43. The claim however with respect to General Damages was strenuously contested.

**Pain and Suffering and Loss of Amenities**

Curtis Arthurs stated that as a result of the accident and the injuries he suffered, he was unable to move about as he did before. He used to play football and volley ball, but he is unable to take part in those activities because of the loss of his right lower limb. He is also unable to work or participate in the area of water sports as a consequence of his injuries. Such a loss must have impacted heavily on a young man nineteen (19) years of age. No amount of damages can restore him to his pre-accident condition. The Court can only try to arrive at a sum it considers reasonable and adequate compensation in all the circumstances.

44. Another interesting feature of this action is that both sides, as regards the quantum of damages to be awarded under this head of damages, relied on the same case of **Trevor Clarke v. National Water Commission, Kenneth Hewitt and Vernon Smith** reported at 5 Khan 21. In that case the Claimant was a farmer and fisherman aged fifty four (54) years at the date of the accident and sixty three (63) years at the date of trial. He was injured on the 10<sup>th</sup> November, 1992, when the car in which he was a passenger collided with a National Water Commission truck, which reversed into it. As a result of the collision, he sustained a fracture of the lower third of right tibia bone,

amputation of leg above the knee and a further amputation due to the spread of infection in the leg. He was hospitalized for two (2) months and sent home with part of the wound unhealed. Total healing was not achieved until June, 1993. He had been fitted with artificial lower limbs prosthesis, but was unable to wear it as it pained him. As a result he had been using crutches. He complained of pains in his right limb and phantom limb sensation. Dr. Warren Blake diagnosed the right amputation stump with femoral nerve neuroma and assessed his total permanent disability at ninety percent (90%) impairment of the lower extremity equivalent to thirty six percent (36%) whole person impairment. Since the accident, he was unable to carry out his occupation of fisherman and farmer and he could no longer swim or play cricket. His marital relationship with his wife was also adversely affected. The learned trial Judge awarded \$3,000,000.00 for Pain and Suffering and Loss of Amenities. Applying the Consumer Price Index (CPI) for the month of August, 2010, of 162.0, that award updated would be approximately \$8,000,000.00.

45. At the time Counsel Mr. Miller made his closing submissions, he updated the award for Pain and Suffering and Loss of Amenities using the CPI for May 2007. That sum came to \$5,119,818.51. He however highlighted certain distinguishing features which he argued would warrant an increase in the amount to be awarded under this head of damages. These included the ages of the respective Claimants at the date of each accident, with Trevor Clarke aged 54 years old while Curtis Arthurs was 19 years old. Further Trevor Clarke sustained thirty six percent (36%) whole person impairment while Curtis Arthurs' permanent disability amounted to forty five percent (45%) of the whole person. He also pointed out that Curtis Arthurs would have

to endure the greater part of his adult life under tremendous disability. These factors he submitted would lead to an increase in the award to \$7,000,000.00. That sum in 2007 updated to the present time would amount to \$10,600,000.00.

46. Mr. Green on the other hand urged the Court to move the award in the other direction. He contended that the injuries suffered by Trevor Clarke were far more serious than those sustained by Curtis Arthurs, as Mr. Clarke's stay in hospital lasted two (2) months, while that of Mr. Arthurs was less than two (2) weeks. Mr. Clarke had to undergo two (2) surgeries, the second of which was a re-amputation due to the spreading of infection. He submitted that the award ought not to be more than \$3,500,000.00. I am of the view that a reasonable award as compensation of Pain and Suffering and Loss of Amenities in this matter is **\$7,500,000.00**.

47. **Future Cost of Prosthesis**

Curtis Arthurs indicated in his evidence that he was presently wearing a prosthesis on his right leg which was broken and the hydraulic section was not functioning properly. He stated that it also made loud noises and squeaked when he walked. Dr. Delroy Fray in a letter dated 1<sup>st</sup> June, 2005, in response to questions raised by Counsel for the Claimant, advised that the above knee prosthesis required by Curtis Arthurs must have a hydraulic knee component and that the cost for such prosthesis ranged between US\$15,000.00 and US\$25,000.00. He also pointed out that the life span of this article ranged between five (5) to ten (10) years. In a follow up letter dated 5<sup>th</sup> July, 2005, Dr. Fray indicated that the hydraulic knee component



was necessary to allow extension of the knee. Both letters were tendered in evidence.

48. Mr. Miller asked the Court to award his client US\$25,000.00, being the cost of a new prosthesis. He further asked that an award be made for future costs of prostheses, which would be required every five (5) to ten (10) years. Utilising a life expectancy of 40 years, based on information from the Statistical Institute of Jamaica found at Volume 5 of Khan's Personal Injury Awards at page 314, he submitted that Curtis Arthurs would have to replace the prosthesis approximately 4 to 8 times throughout the rest of his life. Applying an average of six (6), Counsel asked the Court to award US \$150,000.00 for future cost of prostheses.
49. Mr. Green contended that no sum should be awarded for this item of the claim. He argued that Dr. Fray had no specialised knowledge in assessing and determining the prices of prostheses and therefore his opinion ought not to be relied on. I am of the view that Dr. Fray, in the conduct of his practice as an Orthopaedic Surgeon, would have had to deal with patients whose injuries led to loss of limbs. In his letter of the 1<sup>st</sup> June, 2005, he responded to questions raised by the Attorneys at law for Curtis Arthurs. I am satisfied that from his experience as an Orthopaedic Surgeon, he would have knowledge of and/or would have been able to obtain the answers to the questions put to him by those Attorneys at Law. I therefore accept the figures indicated by Dr. Fray as regards the costs and life span of the prosthesis. However, in light of the fact that any award made under this head of damages is a lump sum payment for expenditure to be incurred in the future, I would use the average cost of US\$20,000.00 for each of six (6) prostheses making a total of US\$120,000.00.

50. **Loss of Future Earnings**

Curtis Arthurs suffered a severe, traumatic devastating injury in having his right leg amputated above the knee, particularly for a young man with his whole life ahead of him. He was thirty three (33) years of age at the trial. He gave evidence that he was unable to obtain employment in the water sports arena, his chosen field because of his disability. He had not worked for some time and the few job opportunities he has had, have been at best sporadic. A claim has been made under this category based on his pre accident net average earnings of \$1,000.00 per week, using a multiplier of fifteen (15). This total comes to \$720,000.00. Counsel for the Defendant, Mr. Green made no submission on this aspect of the claim made on behalf of Curtis Arthurs. I am prepared to accept the multiplicand of \$1000.00 per week, but would instead apply a multiplier of ten (10). This total comes to \$520,000.00. The amount awarded for Loss of Future Earnings then is **\$520,000.00**.

51. **Handicap on the Labour Market**

An award is made under this head of damages to compensate a litigant for his reduced eligibility for employment as a result of the injuries sustained. Any such award must be based on evidence. See **United Dairy Farmers Limited v. Gouldbourne (by next friend Williams)** 1984 (unreported) Civil Appeal No. 65 of 1981, per Carberry J.A. Curtis Arthurs testified that after he fitted his prosthesis, he returned to his former place of employment in search of work and was advised by James Jackson that he would not be able to manage. Subsequent attempts to obtain employment met with limited success, including a period working in his aunt's pastry business. However he was unable to continue working there because of his knee. Referrals by friends to

do painting jobs were also limited by his lack of mobility in reaching what he described as “anything on height”.

52. I am satisfied that the nature and extent of the injuries suffered by Curtis Arthurs are such that he would be at a clear disadvantage when vying competitively for jobs on the labour market. I find myself in agreement with my brother Mr. Justice Sykes in his comprehensive review and analysis of the authorities dealing with this head of damages in his unreported Judgment in **Icilda Osbourne v. George Barned and others** delivered on the 17<sup>th</sup> February 2006. I too am of the view that the fact of unemployment at trial does not preclude a Claimant obtaining an award of damages for loss of earning capacity, once there is evidence to support such a claim. I am of the view that the Claimant in the present case has satisfied the evidential burden in that regard, and I award the sum of **\$300,000.00** as compensation for Handicap on the Labour Market.

53. In light of my findings in this matter, there will therefore be Judgment in favour of Curtis Arthurs against James Jackson in the sum of J\$8,561,859.00 and US\$120,000.00 being made up as follows:-

Special Damages	\$ 241,859.00
General Damages	
Pain and Suffering and Loss of Amenities	\$7,500,000.00
Loss of Future Earnings	\$ 520,000.00
Handicap on the Labour Market	\$ 300,000.00
Future Cost of Prostheses	US\$ 120,000.00

Interest is awarded on Special Damages at the rate of 6% per annum from the 25<sup>th</sup> May, 1993 to the 21<sup>st</sup> June, 2006 and thereafter at the rate of 3% per annum to the date hereof.

Interest is awarded on the General Damages of \$7,500,000.00 at the rate of 6% per annum from the 29<sup>th</sup> May, 2000 to the 21<sup>st</sup> June, 2006 and thereafter at the rate of 3% per annum to the date hereof.

Costs to the Claimant to be taxed if not agreed.