[2020] JMSC Civ 260

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2009 HCV 01894

BETWEEN	**URIEL DAVIS**	**CLAIMANT**
AND	**UNIVERSITY OF THE WEST INDIES**	**DEFENDANT**

IN OPEN COURT

Miss Jodian Gaff instructed by Vaccianna & Whittingham Attorneys at Law for the Claimant

Miss Stephanie Eubanks and Mr Yakum Fitz-Henley instructed by Myers Fletcher & Gordon for the Defendant

March 9, 10 and 11 2020 and September 25, 2020.

Negligence - Whether defendant provided a safe system of work, safe place of work and safe equipment - whether defendant in breach of duty – causation - Quantum of damages.

PETTIGREW-COLLINS J

THE CLAIM

[1] The Claimant is seeking to recover damages against the Defendant for injuries he allegedly sustained during the course of his employment. The Claimant was employed to the Defendant as a Grounds Assistant. It is the undisputed evidence that on the 28th of September 2007, the Claimant was instructed to remove linoleum from the floor of a room located on Rex Nettleford Hall, one of the students' hall of residence on the campus of the Defendant, the University of the West Indies. He alleges that

whilst in the process of using what he described in some instances as a scraper and at other times a putty knife to carry out the task on the 29th, the instrument hit a bump on the floor, causing injury to his right shoulder.

[2] In his Particulars of Claim, the Claimant alleged that he sustained the following injuries:

(i) Partial dislocation of right shoulder;

(ii) Ruptured muscle;

(iii) Mild superior subluxation of the shoulder joint;

(iv) Right partial thickness rotator cuff tear;

(v) Partial thickness supraspinatus tear;

(vi) Repaired rotator cuff muscle;

(vii) 10% upper extremity impairment;

(viii) 6% whole person impairment.

[3] The following are the particulars of negligence alleged:

(i) Failing to provide the Claimant with the proper equipment to carry out his duties.

(ii) Failing to provide a safe place of work.

(iii) Failing to take the necessary steps to get proper medical assistance for the Claimant.

(iv) Failing to make a suitable and sufficient assessment of the risk to the health and safety of its employee to which he is exposed whilst he is at work.

THE DEFENCE

[4] The Defendant denied the particulars of negligence alleged and asserted inter alia, that proper equipment and a safe place of work were provided to the Claimant. The defendant also asserted that the injuries to the Claimant resulted from the Claimant's own negligence or alternatively his contributory negligence.

THE ISSUES

[5] I will examine the issues in this case having regard to whether the requisite elements of negligence have been made out against the Defendant. Therefore, the first issue arising is whether the Claimant was owed a duty of care. Secondly, whether that duty of care was breached. Thirdly, did the Claimant sustain injury, damage or loss and if he did, was the injury, damage and loss a result of that breach of duty? Was that injury loss and damage foreseeable. If all the elements of negligence are satisfied, what is the quantum of damages to be awarded to the claimant?

[6] One of the sub issues which arises on the facts of this case which is subsumed under the general question of whether the Defendant was in breach of its duty of care, is whether there was a safe system of work in place. This issue entails examining the question of whether the task assigned to the Claimant was such that there was need for him to be supervised in the carrying out of the task. There is also the question of whether adequate equipment was provided to him in order to enable him to carry out the task. I shall firstly address the issue of causation.

THE CLAIMANT'S EVIDENCE

[7] The Claimant's witness statement was filed on the 18th of September 2013. It stood as his evidence in chief. In that document, he stated that he has been employed

to the University of the West Indies (hereinafter referred to as the Defendant) since 2002 and was so employed up to the time of the filing of his witness statement. His duties involved taking care of the lawns, empting bins, sweeping and general cleaning of the clusters on the Rex Nettleford Hall of residence. He said that on the 28th of September 2007, he was directed by Ms. Donna Mae Jackson Student Services Manager, and Mr Dave Hyman Resident Advisor, to remove linoleum from the floor of cluster 8 in preparation for the arrival of new students to the hall.

[8] According to the Claimant, he objected to carrying out the task, since he was of the view that what he was being asked to do did not fall within his job description and the work would have to be done on a Saturday, which was outside of his assigned work days and would therefore have to be done as overtime work. The Claimant also stated that both persons further informed him that it was the Defendant's policy that in circumstances where workers were directed to do work outside of their job description, they were required to comply. He said that Ms Jackson also told him that if he failed to comply, he would be reported to the Human Resources Office for disobeying a direct order from his supervisor.

[9] The Claimant also stated that he was told on the 28th to advise a fellow worker, one Mr Kenneth Smith to attend work on the Saturday (the 29th) in order to assist with the task. He said that although Mr Smith was told by him that they were required to remove the linoleum, Mr Smith did not attend.

[10] It was also the Claimant's evidence that he was not provided with any particular tool to remove the linoleum. He stated that he retrieved a scraper, a broom and wheel barrow from the workmen's utility room and proceeded to do the task by himself. He said that the linoleum proved more difficult to remove than he had anticipated, and could not be removed using the scraper without difficulty and the application of force.

[11] According to the claimant, he applied water to the floor and he also said that students assisted him by using what he described as a butter knife but the linoleum still proved difficult to remove. He said that he was aware that the student who would be

occupying the room was already on hall and he was mindful that she would be inconvenienced and he was also apprehensive because of what his supervisors had said to him. I understand his reference to such matters to be an indication that he was really making concerted efforts to remove the linoleum.

[12] He said that whilst he was scraping the linoleum from the floor with the scraper, and applying pressure in doing so, the scraper broke, causing the impact to his right shoulder which he said resulted in his injuries. I will refer to other aspects of his evidence contained in his witness statement and that which was elicited in court only to the extent that I find it necessary in order to address the issues raised.

THE MEDICAL EVIDENCE

[13] A total of four medical reports were entered into evidence. One came from Dr Carlton Chambers. He holds a MBBS and is a Senior Orthopaedic Resident to Dr Kenneth Vaughan. That report is dated the 20th of October 2008. The doctor outlined the history given to him by the Claimant which is in similar terms as the Claimant explained in his witness statement. A part of that history was that after hitting the elevation in the floor, the Claimant started experiencing pain in the right arm but he continued working and he in fact completed the job. The pain persisted over the weekend. He sought medical attention about a week later for the persistent pain and stiffness in the right shoulder. This pain became worse and his movement of the arm was limited.

[14] It was indicated in the report that the Claimant was evaluated on the 10th of January 2008 in the Out Patient Orthopaedic Department of the University Hospital and an x-ray was requested. The x-ray suggested mild superior subluxation of the shoulder joint and the Claimant was assessed as having a rotator cuff tear of the right shoulder. An MRI was done on the 27th of June 2008. That investigation showed a partial thickness rotator cuff tear involving the supraspinatus. Dr Chambers also said that an arthroscopy debridgement was planned.

[15] On the 20th of November 2008, according to the Dr's report, the Claimant still complained of persistent pain to the shoulder but less than previously. The diagnosis was partial thickness rotator cuff tear.

[16] Dr Kenneth Vaughan also provided a medical report in the matter. Dr Vaughan is a Consultant Orthopaedics Surgeon and is registered to practice in Jamaica. He holds a MCh (Ortho) and is a Fellow of the American College of Surgeons (FACS). He stated that the Claimant was seen in the Orthopaedic Department on the 10th of January 2008. He indicated the history of the injury and treatment received by the Claimant. He also stated that the Claimant was reviewed in the Orthopaedic Department on the 19th of April 2010 and he was discharged from the clinic and advised to resume work and to continue his home strengthening exercises. Dr Vaughan stated that the Claimant had a genuine problem with his shoulder which took some time to be sorted out. He opined that whether the Claimant's injury caused his partial tear is a matter of opinion and that he rather doubted that that was the case. He concluded that in all probability, the Claimant had degenerative changes and tear ahead of the injury, and that the injury simply aggravated the problem, bringing it to the fore.

[17] Dr Rory Dixon also examined the Claimant. Dr Dixon gave his qualifications as holding a MBBS and a DM (Ortho). He is an Orthopaedic Surgeon registered with the Medical Council of Jamaica. He stated that he is the Senior Medical Officer at the Sir John Golding Rehabilitation Centre and Medical Advisor to the board of the Jamaica Paralympic Association. He is also a member of the American Academy of Orthopaedic Surgeon and an International Classifier attached to the International Paralympic Committee. He provided a report which is dated May 18, 2011. He stated that he first examined the Claimant on April 26 2011, at the Sir John Golding Rehabilitation Centre. Dr Dixon recounted the history given to him, part of which was that the Claimant jerked his right shoulder and sustained abrasions to the knuckles of his right hand in the process of removing the linoleum. The Claimant he said, reported a progressive increase in pain and stiffness in the right shoulder.

[18] Dr Dixon stated that at the time of the examination, the Claimant complained of intermittent pain in the right shoulder which is more pronounced when the time is cool and is aggravated whenever he lifts heavy objects.

[19] In speaking of his examination and findings, Dr Dixon stated that a surgical scar was noted to the right shoulder and there was no significant atrophy of the right shoulder muscles compared to the left. He said there was full range of passive and active movements and pain was noted at the extremes of movement and there was crepitus of the right shoulder compared to the left shoulder. An x-ray done to the right shoulder on the 3oth of April 2011, showed a decrease of the joint space of the inferomedial aspect of the right shoulder, particularly with internal rotation. This was significant compared to an x-ray of the left shoulder. The Claimant was encouraged to do swimming to maintain the strength in the shoulders.

[20] Under the heading 'Assessment of Permanent Impairment', Dr Dixon said the following;

> *"Uriel Davis sustained an injury to his right shoulder which incapacitated him for at least three years. He has had surgery to repair a partial tear in the rotator cuff muscle and his activities have been limited to some extent by the intermittent pain in the shoulder which is in keeping with early degenerative changes in the shoulder joint. In the long term, he may develop worsening of arthritis in the right shoulder. The shoulder is a non-weight bearing joint therefore the progression of osteoarthritis would be slow and would be related to the type of exertion that is done. Thus, if Mr. Davis refrains from doing a lot of heavy lifting and does maintenance exercises, there may not be any significant worsening of the arthritis within the next ten to twenty years. With respect to the rotator cuff injury, the extent of impairment is about 10% of the upper extremity or 6% whole person."*

[21] Dr Dixon was cross examined at length. He accepted during cross examination that he did not review any of the Claimant's previous medical records before preparing the report, but said that he requested x-rays of both shoulders. He accepted that when he said in his report that the Claimant had no significant medical condition that

predisposed him to the injuries sustained to the right shoulder, this statement was based on what was told to him by the Claimant. Asked to comment on Dr Vaughan's conclusion, Dr Dixon stated that unless the MRI was done immediately after the injury, one cannot conclude categorically about the status of the shoulder prior to the alleged injury and that it was therefore fair for Dr Vaughan to say that he could not conclude categorically that the incident caused the injury that was found on the MRI. Dr Dixon however said that he disagreed with the assertion that from an objective medical perspective, it was reasonable to have doubts as to the cause of the claimant's injuries to the right arm.

[22] He went on to say the obvious, which is that Dr Vaughan merely gave an opinion, that he doubted that the injury caused the partial tear to the rotator cuff. In re-examination, Dr Dixon pointed out that the MRI which was done some 10 months after the incident, showed changes and that what changes represent is a chronic injury that was not healed and that it correlated with the history that the alleged injury caused the Claimant to have pain. He explained that by injury in this latter context, he meant the incident which the claimant alleged took place; in other words, the mechanism of the injury.

THE DEFENDANT'S EVIDENCE

[23] Ms Donna Mae Jackson gave evidence on behalf of the Defendant. Her evidence in chief is contained in her witness statement dated the 19th of September 2013. She is the Student Services Development Manager at the Rex Nettleford Hall. Among her many and varied responsibilities are: managing the physical plant and the hall environment, planning, organizing and assigning responsibilities for staff, supervising administrative and support place staff, ensuring adequacy and proper maintenance of inventory, and ensuring that adequate safety and security measures are in place and observed. She stated that in preparing the hall of residence for incoming students at the beginning of the semester, on the 29th of September, she assigned the task of removing

linoleum from the floor of one of the rooms to the Claimant. She also said that it was usual for employees during the period just prior to the beginning of the semester, to work overtime and assume additional duties.

[24] According to her, she took the view that the task assigned to the Claimant was a simple one, which was not beyond his competence and one which he could have undertaken without risk of injury to himself, since he would have been working in broad daylight.

[25] She also stated that she was made aware of the incident involving the Claimant weeks after it allegedly took place and therefore could not verify the occurrence of the incident. In accordance with the Claimant's evidence, Ms Jackson said that the Claimant turned up for work on the Monday following the alleged incident but that he made no report to her.

THE LAW

[26] It is by now well established that the law relating to the liability of an employer to an employee is an aspect of the general law of negligence. Therefore, the elements of negligence, which are the existence of a duty of care, breach of that duty of care, a causal connection between the breach of duty and the damage to the Claimant and the resulting damage not being too remote, must all be established.

THE DUTY OF CARE

[27] In relation to whether a duty of care is owed in a given situation, the principle was stated as follows in **Caparo Industries plc v Dickman** [1990] 1 ALL ER 568,

> *"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and*

> *the party to whom it is owed a relationship characterized by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other."*

[28] The employer's duty to the employee requires an employer to provide competent staff, a safe place of work, safe equipment, and a safe system of work. The duty has been described as non-delegable; that is to say, if the duty is not performed, it is no defence for the employer to show that he assigned or entrusted its performance to a competent person or persons. See **Mc Dermind v Nash Drudging and Reclamation Co. Ltd.** [1987] 2 All ER 878. The duty is not an absolute one and does not require perfection. (See **General Cleaning Contractors Ltd. v Christmas** [1953] A.C. 180)

[29] In **Wilson and Clyde Coal Co. v English** [1938] AC 7, Lord Wright had this to say:

> *"The whole course of authority consistently recognizes a duty which rests on the employer and which is personal to the employer to take reasonable care for the safety of his workmen, whether the employer be an individual, firm, or a company and whether or not the employee takes share in the conduct of the operations. The obligation to provide and maintain proper plant and appliances is a continuing obligation. It is not broken by a mere misuse or failure to use proper plant or a merely temporal failure to keep in order or adjust plant and appliances or casual departure from the system of work."*

Safe Equipment

[30] As it relates to the safety of equipment, where a piece of defective equipment is used by a workman on a job for which it is not intended and he is injured because of the extra strain which the use places on the equipment, this gives rise to a question of whether or not the injury is attributable to the defect or to the wrong use of the equipment. If it is determined that the injury is attributable to the defect, the question

which then arises, is to what extent if at all did wrong use contribute to it. The latter situation gives rise to the question of whether it is a case of contributory negligence. (Paragraph 13-14 of **Clerk and Linsell on Torts**). Equipment includes the tool with which the employee works. (**Knowles v Liverpool City Council** [1993] 1 WLR.

Safe System of Work

[31] Providing a safe system of work involves giving appropriate instructions to workmen as to the safe performance of the task assigned. Where the task involved is one of some complexity, it requires the use of a safe system of work. This may involve organizing the work, setting the procedure to be followed in carrying it out, the sequence in carrying out the work, the taking of safety precautions, the stage at which such precautions are to be taken, the number of workers to be employed and the parts to be done by each employee and the provision of any necessary supervision. In **Winter v Cardiff RDC** [1950] 1 AllER819 823, it was observed by Lord Oaksey that where ”the mode of operation is complicated or highly dangerous or prolonged or involves a number of men performing different functions” or in circumstances where the job is “*of a complicated or unusual character*” a system should be prescribed, but “*where the operation is simple and the decision how it shall be done has to be taken frequently, it is natural and reasonable that it should be left to the workmen on the spot”.*

[32] It is a question of fact whether a system should be prescribed. In making a determination in this regard, the nature of the operation and whether it is one which requires proper organization and supervision in the interest of safety, should be taken into consideration. It is to be noted that an experienced workman does not need to be warned about risks with which he is familiar. (**Qualcast (Wolverhampton) Ltd. v Haynes** [1959] A.C. 743.

[33] Providing proper supervision entails giving instructions to the employee in terms of seeing to it that the steps to be taken in carrying out the task are complied with. In expounding upon the area of supervision, it was noted in **Clerk and Lindsell on Torts**

Twenty Second Edition, at paragraph13-23, that this does not mean “that an employer is bound, through his foreman, to stand over workmen of age and experience every moment they are working and every time that they cease to work, in order to see that they do what they are supposed to do”.

BREACH OF DUTY

[34] It is a well- established principle that a defendant will be in breach of his duty of care if his conduct falls below the standard which is expected of the reasonable and prudent man. What is reasonable is determined by the circumstances of the case. There is no breach of duty on the part of an employer where there is no reasonably foreseeable risk that a workman charged with carrying out a simple task will injure himself in performing that task. Further where the task assigned is a simple one, no precise or elaborate instructions as to how the task is to be carried out will be necessary. See **Vinneyey v Star Paper Mills** [1965] 1All ER 175

RES IPSA LOQUITUR

[35] The Claimant has asked the court to say that the doctrine of Res Ipsa Loquitur is applicable in the circumstances of this case. For the doctrine to be applicable, the Claimant would have to show that the nature of the accident was such that it suggests negligence on the part of the defendant. In **Scott v London and St. Katherine Docks** (1865) 3 H&C 596 at 601, it was explained that the doctrine applies where the occurrence is such that it would not have happened without negligence, and the thing that caused the damage was under the sole management and control of the defendant, or of someone for whom the defendant is responsible, or whom the defendant has a right to control. There is also the further requirement that there is ordinarily no evidence as to how or why the occurrence took place. The Claimant would therefore not have to

allege and prove any specific act or omission. Where the maxim is applicable, the defendant is then called upon to rebut the allegation of negligence.

[36] Without further exposition, it seems clear to me that the doctrine is inapplicable in the circumstances of this case. The Claimant was able to explain precisely how the incident occurred. The question is whether the circumstances under which the injury occurred as explained by the Claimant amounted to negligent conduct or omission on the part of the defendant.

CAUSATION

[37] There are a number of basic considerations as it relates to causation, two of which are relevant to the case at hand. One is the 'but for' test and another is that one must take his victim as he finds him. In regards to the latter, if a tortfeasor injures an already injured claimant, he is liable for the additional damage that he has caused. I have mentioned this latter principle because the Defendant has asserted that there is medical evidence which supports the position that the Claimant's condition pre-existed the incident which occurred on the 29th of September 2007 and his condition may have been aggravated by the injury (injury in the context understood by me to mean the act of hitting the bump in the floor whilst undertaking the task). The but for test requires that the defendant's wrong doing is a necessary condition for the occurrence of the claimant's injury. The Claimant's Attorney at Law cited the case of **McGhee v National Coal Board** [1972] 3 All ER 1008 in support of the proposition that a defendant will be liable to a claimant if the defendant's breach of duty has caused or materially contributed to the injury suffered by the claimant, notwithstanding that there are other factors for which the defendant is not responsible, which contributed to the injury.

CONTRIBUTORY NEGLIGENCE

[38] The onus rests with the defendant to prove contributory negligence where this defence is pleaded. (See **Flower v Ebb Vale Steel, Iron and Coal Co** [1936 A.C.206). In the case of **Neil Lewis v Astley Baker** [2014] JMSC Civ 1 cited by the Claimant, Anderson J said

> *"What must be considered by a court therefore, in order to properly determine whether a claimant was contributorily negligent in respect of the loss he suffered, is whether a reasonable man faced with those then prevailing circumstances would have acted as the claimant did".*

DISCUSSION

(1) **Causation**

[39] Based inter alia on Dr Vaughan's expression of doubt as to the origin of the Claimant's injuries, and Dr Dixon's statement that Dr Vaughan's assessment is a fair one, the Defendant has submitted that the conclusion of Dr Dixon that the alleged incident caused the Claimant's injury to his shoulder is of no value to the court and should therefore be disregarded. The Defendant also contends that Dr Dixon's conclusion that the claimant had no significant medical history that predisposed him to injury should be disregarded since he came to that conclusion based on information given to him by the Claimant.

[40] The court's attention was directed by the Defendant's Attorney at Law to the case **of Dewight James v West India Alumina Company** Claim no. 2006 HCV 04478. This case dealt primarily with the need for a causal link between the Claimant's injury and the defendant's breach. The Learned judge in that case found that there was an absence of that causal link. The circumstances in that case were somewhat different

from those in the present case, in that the claimant had overtime developed pain which he alleged was due to repeated exposure to elements which created and subsequently increased the risk of injury to him. The allegation was that the job was of a very physically vigorous nature and that overtime his job made him put a great deal of stress and pressure on his back. He also alleged that he was exposed to unreasonable and foreseeable risk even after he was diagnosed with serious back injury.

[41] The court found in that case that there was no failure on the part of the defendant to provide a safe system of work. The court also accepted the evidence of the defendant's witness as it relates to the nature of the work that the claimant was required to do. Part of that evidence was that the weight that the claimant was required to lift during the course of his duties was some object weighing 10 to 15 pounds and that was not excessive for a normal man. Critical to the outcome in that case too, was the fact that the claimant could not relate his initial injury to any particular incident.

[42] I disagree with the Defendant's position on the matter of causation. Firstly, as the Defendant has pointed out, the MRI showed degenerative changes in the Claimant's right shoulder. The Defendant added to this observation that one cannot conclude categorically as to the status of the Claimant's shoulder prior to the alleged injury. (Understood by me to mean the alleged incident resulting in the Claimant receiving the injury to his right shoulder) and that the Claimant's shoulder joint may have been abnormal before as pointed out in Dr Vaughan's report. There is no requirement for there to be a very high degree of certainty as to the cause of the claimant's injury, and certainly no need to be able to conclude categorically. As the defendant reminded the court, the standard is on a preponderance of the probabilities.

[43] Secondly, as is well known, and as was pointed out by Dr Dixon, an injury such as a tear to the rotator cuff can result in degenerative changes over time. Therefore, the accepted fact that there were degenerative changes does not necessarily mean that this was a condition which pre-dated the incident which the Claimant complains of. It is to be remembered that the MRI was done some time after the incident in which the claimant said he sustained the injury.

[44] Thirdly, in determining the aetiology of an injury, a doctor must necessarily consider information conveyed to him by the patient claiming to be injured. It is usually based on a recount of history as to an incident (where relevant), symptoms where they exist, the time at which those symptoms began, duration of the symptoms and a whole host of other factors, information in relation to which would usually come from a patient, that a doctor would rely on, in order to come to a diagnosis. Diagnosis made by technological aids such as x-ray and MRI are also critical in certain instances such as the present case. Of course previous medical records may be relevant. That is certainly not to say that an accurate diagnosis cannot be made without having regard to existing medical records.

[45] Dr Dixon did nothing different from Dr Chambers or Dr Vaughan in this regard. All of the doctors who examined the Claimant at some stage relied on the history as narrated by the Claimant. Dr Vaughan expressed an opinion with which Dr Dixon disagreed. Dr Dixon was entitled to disagree with what was an expression of opinion on the part of Dr Vaughan. Both doctors are eminently qualified professional men who are in a position to express their expert opinion. I strongly disagree with defence counsel's position that Dr Dixon was less than impressive in his presentation.

[46] In the case of **Maynard v West Midlands Regional Health Authority** [1984]1 WLR 684, Lord Scarman made observations on the scope for genuine differences in opinion when it came to diagnosis and treatment, and observed in particular that "differences of opinion and practice exist and will always exist in medical as in other professions" and that "there is seldom any one answer exclusive of all others to problems of professional judgment…"

[47] It is a question of fact for the court to determine firstly, whether the incident related by the claimant did in fact occur and whether his problems with his right shoulder began on the occasion of that incident. As the Defendant's Attorney at law correctly pointed out, Dr Dixon is not in a position to vouch for the reliability of the claimant's evidence. The court's finding on this matter is largely dependent on the view to be taken of the Claimant's credibility and reliability. I find him to be credible and

reliable in this regard. For the most part, he responded honestly and in a forthright manner to questions put to him in cross examination, although there were instances in which he was dilatory and somewhat argumentative in responding to questions.

[48] I do not find it necessary to explore in detail the concept of taking one's victim as he finds him. Suffice it to say, that even if the Claimant had an existing problem with his shoulder, that problem was, in Dr Vaughan's opinion aggravated by the indirect impact to his shoulder which is the incident giving rise to this claim. Indeed, Dr Vaughan's opinion is, as was stated before, that "in all probability he had the degenerative changes and tear ahead of the injury, which simply aggravated it, bringing it to the fore". On Dr Vaughan's theory, the Defendant would still be liable. The question would be the extent of the liability which really would translate ultimately to a matter affecting quantum of damages.

[49] The 'but for' principle is in my view the more applicable one given the evidence that I accept in the circumstances of this case. There is no evidence except Dr Vaughan's opinion which supports the likelihood that the Claimant had a pre-existing condition. On a balance of probabilities, I accept the Claimant's evidence which must be understood to mean that his problems with his shoulder began with the incident. The defendant sought to say that it could not be verified that the Claimant sustained an injury on the day in question because he had failed to make a report to Ms Jackson until weeks after the incident. This is against the background of the Claimant's evidence that he reported the incident to Ms Jackson the same day. I will state at this juncture that I accept Ms Jackson's evidence over and above the Claimant's evidence on this point.

[50] The Defendant did not effectively dispute the Claimant's evidence that he reported the incident to Mr Dennis at some point during the following week. I accept that the Claimant reported the incident to Mr Dennis.

[51] The suggestion put to the Claimant was that his first visit to the Health Centre was on the 25th of October and his second visit was in December. In his witness statement he had said that it was around the second week of October that he first

visited the doctor but he did not seem very certain when cross examined on the matter. I accept that the Claimant may not have been accurate regarding the date. Relying on evidence contained in paragraphs 14 and 15 of the Claimant's witness statement, I accept his evidence in relation to his assertion that he began experiencing discomfort in his shoulder the day of the incident and that at some point, he sought medical attention, and further that the pain intensified and persisted to the point where he had to seek further medical attention in January 2008.

[52] I also accept Dr Dixon's evidence that there is the likelihood that the injury led to the degenerative changes observed from the MRI. The likelihood that this is what happened is supported by Dr Chambers' statement in his medical report that the injury to the right rotator cuff predisposed the claimant to degenerative joint disease.

(2) The Duty of Care

[53] It cannot be disputed in the circumstances of this case that a duty of care was owed by the defendant to the Claimant, given the existence of an employer/employee relationship which is an established category in which it has always been held that such duty is owed.

(3) Whether there was a Breach of Duty

[54] The Claimant contends that the Defendant failed to provide him with the proper equipment to carry out his duties. Counsel submitted that the Defendant's failure in essence was a failure to satisfy itself as to the suitability and adequacy of the tools provided to the claimant to execute the task and thus the Defendant was in breach of its duty to provide safe equipment. The Claimant also alleges a failure to provide adequate supervision and a safe system of work.

[55] The undisputed evidence in this case reveals that the Claimant having been assigned the task to remove the linoleum, neither of the Defendant's servants who assigned the task nor anyone else on the Defendant's behalf, dictated what tools were

to be used, or how the task was to be carried out, neither is it contended by the defendant that the Claimant was in anyway supervised in the execution of the task.

[56] The defendant contends essentially that the removal of linoleum is a simple task that the Claimant, an experienced workman would reasonably have been expected to be able to carry out without supervision and without being directed as to how and with what tools the task was to be carried out. Further, that in the circumstance, adequate equipment was provided in that the Claimant's evidence revealed that he retrieved certain items, namely; a wheel barrow, a scraper and a broom from the Defendant's workmen's utility room which was accessible to him. The Defendant of course argues that a scraper was an adequate tool for the purpose.

[57] The Claimant agreed during cross examination that he was an experienced workman. However, his evidence that he had never been assigned the particular task of removing linoleum stands undisputed and therefore although I accept the evidence of Ms Jackson that a task such as the removal of linoleum fell within the Claimant's job description, I also find that he had no experience doing that particular task. As to whether the task in question was a simple one, the Claimant agreed that generally, the task of removing linoleum was a simple one but that the removal of the linoleum in this instance was not a simple task.

[58] In enlarging upon her evidence contained in her witness statement, Ms Jackson said that she did not ask the Claimant whether he had experience removing linoleum because she did not think that there was any technicality involved in carrying out such a task and she took the view that for someone who had worked in the University community for a period of five years, that was a task that he could manage. Cross examined on the matter, she stated that she did not think the task was outside of his competence and experience.

[59] When asked whether she agreed that the Claimant received no guidance from either herself or the Operations Manager in relation to the removal of the linoleum, her response was "let me answer this way, the same way I would not tell him how to wash

the garbage bin and the same way I wouldn't tell him how to operate the lawn mower, I wouldn't tell him how to." My immediate reaction was a temptation to agree with the view Ms Jackson took of the matter, on the basis that there is nothing esoteric in nature about the removal of linoleum in that it was not a task that would require any kind of specialized knowledge or skill and that it is a job that in the ordinary course of things, could be done by an unskilled labourer. I am however quite mindful of Ms Jackson's evidence that she had never directed the Claimant to remove linoleum before and the Claimant's evidence that this was a task that he had never done before as well as the undisputed evidence that the task proved to be difficult in this instance. The effect of this evidence is that the Claimant was inexperienced as far as the task of removing linoleum was concerned and inexorably at the task of removing linoleum that was difficult to remove.

[60] It was the Claimant's evidence in cross examination, that if it was just a general job of removing linoleum, he would not have needed a scraper. He said if it was just the ordinary linoleum on the floor, one could just lift it up with the hand. He agreed that he, on his own initiative, went to the workmen's utility room and secured a scraper in order to remove the linoleum. In the circumstances, it is accepted that the Defendant provided the equipment although it did not select the equipment. The question is really whether proper equipment was provided.

[61] The Claimant's evidence is silent on whether or not he had inspected the job and firstly determined that a scraper was needed before he went to retrieve the scraper, wheel barrow and broom. There was much in the way of evidence in relation to the question of whether or not the scraper is the customary tool used for the removal of linoleum. The Claimant accepted in cross examination that the usual and common way to remove regular linoleum is with a scraper. It is instructive that the Claimant could not in fact say whether he had retrieved a scraper or a putty knife when the distinction between the two was pointed out to him. It is also noteworthy that the Claimant said that a scraper was not a tool with which he was ordinarily provided, in that one would not usually be found in the utility room, but that the scraper that he used had been left in that utility room by the painter, and that the painter has a separate utility room. Ms

Jackson had stated in her witness statement that the scraper was the customary implement used for removing linoleum. However, during cross examination on the matter, she said that she had never seen the contractors employed to remove linoleum on occasions, actually do so. It is inaccurate to say as the Claimant's Attorney at Law submitted, that the defendant's basis for saying that the scraper was the customary tool was because she saw workmen walking around with scrapers. It turned out that her reason for saying it was the customary tool was based on hearsay.

[62] There is no evidence to support the position that generally a scraper was an inadequate tool for the purpose. Indeed, it was the Claimant's evidence that ordinarily, a scraper would not even have been necessary. However, even if on the basis of the Claimant's evidence it is accepted that generally a scraper is used to remove linoleum, there is no reliable evidence which would lead me to conclude that the scraper is the customary and/or an adequate tool for removing linoleum in all instances, particularly when the task entails some degree of difficulty as happened in the instant case

[63] It was the claimant's evidence that a company had in the past been employed to remove linoleum on Rex Nettleford Hall. Ms Jackson explained that that course had been adopted because of sheer volume, but at the time the claimant was assigned the task, there was need to remove the linoleum from that particular room only. The claimant's evidence was that the company contracted to remove linoleum had used a machine to do so. When asked if this was so, Ms Jackson was not able to say.

[64] The case of **Vinneyey** referred to by the Defendant's Attorney at Law is instructive. In that case the claimant was a workman at a factory. He along with another workman were instructed to clean up viscous fluid from the factory floor. The Foreman did not give them any instructions except that they should move the pallets away from the mess and clean the floor. The men were provided with a forklift truck and squeegees to carry out the task. The claimant decided to clear a wider area of floor by removing pallets before squeegeeing any part of the floor. He fell because he stood on an area covered with the viscous fluid he was assigned to clean up, and injured himself. The court held that there was:

(i) no need for precise or elaborate instructions for such a simple task and

(ii) no reasonably foreseeable risk that a workman who was brought to such a scene and charged with the duty of cleaning up the messing would slip in the course of performing so simple a duty.

[65] Ms Jackson accepted that she had not inspected the room in question before the task was assigned to the claimant. There is no evidence that the Operations Manager or any other person on behalf of the Defendant did so. Thus there is no evidence that any person, whether or not such person stood in a supervisory capacity to the Claimant ascertained the status of the linoleum that was to be removed before the task was assigned to the Claimant. No assessment was made as to whether the particular task entailed any difficulty.

[66] Therefore, even though the task of removing linoleum generally may have been a simple one, it cannot be said that the particular task assigned was in fact a simple one. It ought not to have been left up to the Claimant, an unskilled workman and inexperienced as far as the removal of linoleum was concerned, albeit an experienced labourer, not only to choose what if any was an appropriate tool, but to determine in all respects how and in what manner, the task was to be carried out.

[67] What is clear from the Claimant's evidence, is that having gone to the room and seen the state of the linoleum, he proceeded to perform the task of removing it. Someone experienced in the job of removing linoleum would no doubt have been mindful of the likelihood of hitting a bump on the floor and would therefore have been alert to the fact that he should exercise caution. Based on what actually transpired, it cannot be said that the carrying out of the task was an inherently safe operation. This is one of those situations when an individual was taken outside of his sphere of competence and more particularly the realm of his experience. This was not a task that the Claimant was trained to do. While the task was not one which required a high degree of skill and training, if the Claimant was experienced in the particular task, or if he had received even some minimal level of direction, the risk of injury might have been

averted. I rely heavily on the undisputed fact that he was employed in the capacity and worked in the capacity of an unskilled labourer.

[68] The defendant's Attorney at Law submitted that the Claimant, having observed the state of the floor and determined that it was not particularly easy to remove the linoleum, he could simply have advised the persons who instructed him to carry out the task, or either of them, that he was experiencing difficulty carrying out the instructions. This omission to my mind is more relevant to a consideration of whether the Claimant was contributorily negligent. Ultimately, according to the evidence, he was able to remove the linoleum using another scraper after the one initially used by him, broke. The claimant alleges that the scraper provided was defective. The evidence does not indicate that the scraper broke because it was defective, but rather that it broke because a greater degree of force than it could withstand was being applied and it hit a bump on the floor. The fact that it is the Defendant who has the duty to provide safe and appropriate equipment cannot escape me. It seems to me that a scraper, whether others had been in the habit of using it for that purpose or not, may not have been an appropriate implement to be used for the purpose in this particular instance.

[69] The question is whether this failure amounts to breach of duty on the part of the defendant. I am of the view that an inspection of the room before the task was assigned could have made the defendant aware that the linoleum was stuck to the floor and hence the task may not have been a simple one as was envisaged. It cannot be said that there was no foreseeable risk that the claimant could have been injured in the course of executing the task. In all the circumstances, there was inadequate supervision and a failure to make a suitable and sufficient assessment of the risk to the safety of the claimant.

[70] The defendant's Attorney at Law has asked the court to say that the Claimant in the instant case was given a task much simpler than the claimant in **Vinnyey** was given and since the court found that no direction or supervision was required, then it follows that none was required in the instant case. To say that the court found that no supervision or direction was required, is a misquotation of the findings of the court in

Vinnyey. That no precise or elaborate instructions were necessary is different from saying that no direction or supervision was required. In the instant case, there was no instructions or supervision whatsoever.

[71] Ms Jackson was cross examined as to whether the room contained furniture and whether it required more than one individual to do the work. It is to be remembered that it is the Claimant's evidence that he was told to advice another workman, one Mr Smith to assist him, but that Mr Smith never turned up. Much ado was made of the fact that Ms Jackson stated that she was not available the Saturday; that she does not work on Saturdays, and hence would not have been available to take a report that day. The evidence from the Claimant is that the Operations Manager was at work on that Saturday and so the fact of the absence of Mr Smith could have been reported to him. In any event, it could not be said that the fact that the Claimant was attempting to remove the linoleum without the assistance of the second workman necessarily contributed to him receiving the injury.

[72] In **Richardson v Stephenson Clarke Ltd** 1 WLR 1695 another case cited by the defendant's Attorney at Law, the basis on which the court determined that the defendant had fulfilled the duty of care was that the defendant had made available safe and adequate equipment. Although the choice of equipment had been left to the claimant, this conduct was found to be acceptable on the basis that the claimant was a competent and experienced workman. As stated before, the Claimant in the instant case was not experienced in the task he was required to execute; he was no more than a handyman albeit with 5 years' experience.

[73] The defendant also cited the case of **Fitzroy Reid v West Indies Alumina Company Limited (WINDALCO)** 2012 JMSC Civ. In that case, the claimant who was employed as a Trade Helper received injuries whilst in the process of removing tubes from a heater at the defendant's plant. He alleged that he sustained the injuries when a crimping tool which was being picked up by him fell from his grasp as a result of the rocking of the heater cover on which he was standing. The decision in that case turned largely on the judge's findings of fact. The court there found that the claimant's evidence

had been discredited on important and critical matters. The claimant's evidence that the heater cover shook was rejected. Part of the allegations of negligence was that the claimant was ordered to do millwright work in circumstances where he had no or no proper millwright training. The court found that he was in fact so trained and that he was being supervised by a trained person. The court also found that although the defendant did not provide scaffolding, the claimant's injury did not result from that failure.

[74] One of the bases on which the Claimant in the instant case says that the Defendant was negligent, is a failure to take steps to get proper medical assistance for the Claimant. The Claimant's evidence relevant to this aspect of the claim is that he reported the incident to Ms Jackson after he had completed the task assigned to him. I have already said that I reject his evidence that he did so on the day of the incident. He said that up to that point he was not experiencing any significant pain. According to him, it was the Monday following the incident that he began feeling some pain and discomfort, and even then, didn't consider it a significant matter. He said he reported the fact of his discomfort to Mr Milton Dennis, the Operations Manager, who apparent formed a similar view to that which the Claimant had of the matter viz; it was not a significant issue.

[75] By the second week of October, according to the Claimant, his pain worsened and he decided to visit the Health Centre on the 9th of October. He again visited the Health Centre in November. He was examined by a doctor and put on 7 days' sick leave. No diagnostic testing was done. He again visited the Health Centre on the 17th of December and it was then that he was referred to the Orthopaedic Department of the University Hospital. I am unable to fathom what if anything the Claimant is saying that the defendant ought to have done as it relates to getting proper medical assistance for him. I am also unable to discern any negligent conduct on the part of the defendant in this regard.

WHETHER THE CLAIMANT WAS CONTRIBUTORILY NEGLIGENT

[76] The claimant's evidence discloses that he was experiencing difficulty removing the linoleum. He said that the task was much more difficult than he had envisaged. He nevertheless decided to carry on with the task. The defendant's Attorney at Law pointed out that the task was being done in broad daylight and that the Claimant would have been able to see clearly what he was doing. The defendant is also saying in essence that the Claimant caused the occurrence resulting in the injury and that the Claimant in any event, contributed to the extent of the ensuing injury in that he failed to promptly report the incident and to promptly seek medical attention, and further that any injury the Claimant had (which was likely caused by degenerative changes and tear ahead of September 29) was exacerbated by the Claimant's own repeated exertion and delay in obtaining treatment. In the absence of medical, or any other evidence to show that the fact of the Claimant continuing to work after receiving the injury exacerbated the injury, and therefore he contributed to his loss and damage, is simply a finding that is not open to this court to make. Moreover, the Claimant could not be faulted in circumstances where in essence his evidence was that he did not view the injury as serious in the initial stages but became concerned when the pain intensified.

[77] It must be borne in mind, as was indicated before, that the evidence is that the claimant had no prior experience in the task he was asked to execute. However, having made the determination that the task was more difficult than he had envisaged and having encountered difficulties in carrying out same, it was open to him to advise his superior of that fact. I am of the view that a reasonable man, faced with the circumstances with which the claimant was faced, would have advised his superior of the difficulty. To that extent, he was in my view contributorily negligent.

[78] It is often difficult to determine the degree to which a claimant contributes to his injury and consequent loss. At paragraphs 65 and 66 of her judgment in **Natalie Gray v Donald Pryce and Noel Newsome and Donald Pryce v Noel Newsome** [2015] JMSC Civ. 118, P. Williams J as she then was, stated that:

> *65. "In determining the apportionment of liability one instructive authority is that of Brown v Thompson [1968]2 All ER 708 as noted in Bingham's and Berryman's Motor Claim Cases, 10th edition paragraph 22. It was there held inter alia:*
>
> *"… regard must be had not only to the causative potency of the acts or omissions of each of the parties, but to their relative blameworthiness (citing The Miraflores 1967 1 AC 826."*
>
> *66. I also bear in mind the point made by Lord Pearce in* ***Uden v Associated Portland Cement Manufacturing Ltd.*** *[1965] 2 All ER 213 at page 218. He reminded us that the question of apportioning blame "is one of fact, opinion and degree."*

[79] In all the circumstances, I would say that the Claimant is 25%to blame for the injury which resulted.

[80] I should point out that although I have arrived at a conclusion adverse to the Defendant, that position has no bearing on my view of Ms Jackson as a witness. Overall I believe she was a completely honest witness. On the occasions that she did not respond to questions promptly, I formed the very distinct impression that she was attempting to carefully formulate her response in an effort to be accurate. This case represents one of those instances in which I do not believe that either the Claimant or the Defendant's witness deliberately lied to the court. Both were in a few instances less than accurate but I took the view that such inaccuracies were due to faulty recollection or a failure to appreciate the weightlessness of hearsay responses. For example, Mr Davis' evidence that he made a report to Ms Jackson on the day of the injury, while I do not accept that that in fact happened, I don't believe he deliberately lied to the court.

DAMAGES

[81] Having determined that the claimant is liable, I now embark on the task of assessing damages to which he is entitled.

SPECIAL DAMAGES

[82] The documents contained in the agreed bundle of documents were tendered and admitted into evidence as exhibits1 through 65. Exhibits 1 through 25 consists of receipts and invoices evidencing payments said to have been made by or in respect of the Claimant. It is taken that the Defendant is not disputing the expenditure evidenced by those receipts and invoices. The total of the sums reflected in those receipts and invoices is $318,352.66. The Claimant's Attorney at Law says that the sum of $293, 725.00 has been strictly proven. Subject to any errors in adding those sums, I award the sum which represents the monies indicated by the receipts and invoices.

GENERAL DAMAGES

[83] In support of the claim for general damages, the claimant's Attorney at Law relied on the cases of **Ellie Kean v Bridgette Officer and Leroy Stewart** reported at Khan's Vol 5 pg 172, **St. Helen Gordon v Royland Mc Kenzie** Khan's Vol 5 pg152 and **Dalton Barrett v Poinciana Bowen,** Claim No. 2003 HCV1358, delivered November 2006. In **Ellie Kean**, the claimant received injuries in a motor vehicle accident and consequently suffered pain in the neck and cramps in the right upper limb extending to the hand. She was treated with anti-inflammatory and anti-spasmodic medication, received physical therapy and had to wear a cervical collar. She was referred to an Orthopaedic Surgeon for further treatment. Her diagnosis was flexion-extension injury of the cervical spine and her permanent partial disability was assessed at 5% of the whole person. Damages for pain and suffering and loss of amenities was assessed at $850,000.00 in May 2001. That figure updated to $3,991,549.05.

[84] In the case of **St. Helen Gordon**, the claimant received whiplash injury accompanied by pain to her neck and shoulder. Her disability was assessed at 3% of the whole person. In July of 1998 damages for pain and suffering was assessed at $400,000.00. That figure updated to $2,045,069.25.

[85] In **Dalton Barrett**, the claimant was diagnosed with mechanical lower back pain, and mild cervical strain, He also had pain to the left shoulder and left wrist. His injury was said to have significantly affected his quality of life. General damages in the sum of $750,000.00 was awarded. That sum updated to $2,028,960.05.

THE EVIDENCE RELATING TO PAIN AND SUFFERING AND LOSS OF AMENITIES

[86] The Claimant's evidence is that the scraper broke and his knuckles hit the floor. He stated that initially, he was not feeling any intense pain and he in fact completed the task after he received the injury. By Monday the 1st of October, he started to feel what he described as "a heaviness" in his shoulder, and he said that whilst he was carrying out his usual duties that day, he began to feel a small amount of pain and discomfort to the shoulder. According to him, this pain intensified during the second week in October.

[87] For the purposes of assessing damages, not much turns on my findings that the claimant's evidence was not completely accurate as it relates when he first attended the doctor. I accept the Claimant's evidence in relation to his assertion that he began experiencing discomfort in his shoulder the day of the incident and that the pain intensified and persisted. The evidence also reveals that the Claimant underwent physiotherapy for a period of approximately a year and he also underwent surgery to the affected shoulder in February 2010. He claims that the injury has resulted in an inability to lift objects with his right hand, a surgical scar to his right shoulder, decreased joint space of the inferomedial aspect of his right shoulder, particularly with internal rotation, early degenerative changes to his shoulder and persistent pain. His whole person impairment was assessed at 6%. Dr Dixon's report details these findings. The claimant also stated that between November 2007 and January 2008, he was limited in the performance of functions such as cooking and doing his laundry.

[88] The evidence, based on Dr Dixon's report, reveals that the Claimant suffered pain for at least period of three years. The indication from that report is that at the time he examined the Claimant in 2011, there was still intermittent pain. It is observed that Dr

Vaughan indicated in his report that the Claimant's injury took some time to be resolved. Dr Vaughan's last examination of the Claimant was in April 2010. The impression from that statement is that the injury had been resolved at the time of the examination. Even if I accept the more conservative view as to the length of time during which the claimant suffered from his injury, what is evident from the report is that the Claimant suffered for a significant period, and is likely to have problems in the future with arthritis, although such likelihood may be mitigated if the Claimant desists from carrying out load bearing activities with his arm.

[89] Not surprisingly, none of the cases cited by Counsel for the Claimant reflects injury precisely in the nature of the Claimant's injuries but the claimant in Ellie Kean suffered injuries most nearly resembling the instant Claimant although Ms Kean also suffered the additional injury of pain to the neck. There is no indication however that she had to undergo any surgical procedure. I believe in all the circumstances than an award of $4,000,000.00 for pain and suffering and loss of amenities is reasonable.

HANDICAP ON THE LABOUR MARKET

[90] The claimant has also sought to recover damages for handicap on the labour market. It is now well established that a Claimant whose capacity in the labour market has been diminished as a consequence of injuries received, is entitled to be compensated for loss of that earning capacity. That capacity is regarded as an intangible asset. At paragraph 51 of the judgment in **Wayne Ann Holdings Limited (T/A Super Plus Food Stores and Sandra Morgan)** [2011] JMCA Civ 44, Harris JA said:

> *"A claim for loss of the ability to earn by being handicapped on the labour market may be sustained whether or not a Claimant is employed at the time of trial – see **Moeliker v A. Reyrolle & Co. Limited** [1977] 1 WLR 132 and **Cook v Consolidated Fisheries Ltd.** [1977] ICR 635. It is well recognised that a partial disability may not affect a Claimant's income immediately but may do so at*

> *some time in the future. Accordingly, a disability places him at a disadvantage in the labour market as opposed to a fit person. Where appropriate, the court should make an award for this head of damage to compensate him for the physical handicap produced by the injury."*

[91] The question also arises as to the method of calculation that should be utilized in calculating the compensation if the court takes the view that an award should be made under this head. In **Campbell and others v Whylie 50 WIR 326,** Forte JA in addressing the question of the appropriate method to be utilized in calculating loss of earning capacity, quoted Carey JA in **Kiskimo Ltd. v Salmon** (1991) unreported. Carey JA had the following to say:

> *"The method adopted by a judge will depend more often than not, on the adequacy of the evidence before him and in some instances on the nature of the injuries which might well create many imponderables as to the plaintiff's future. But I think, if we are to ensure some uniformity in awards under this head, the arithmetic approach should be preferred as it allows this court to maintain some equilibrium in the figure taken as the multiplier by trial judges."*

[92] In the case of **Icilda Osbourne v George Barned, Metropolitan Management Transport Holdings Ltd. and Owen Clarke** claim no. 2005 HCV 294, Sykes J. (as he then was) observed at paragraph 18 of his judgment that:

> *"The cases suggest that the choice of method is influenced by the information available to the court, that is to say, where the Claimant has been working for some time before the accident so that the court has some reliable data concerning her income, her remaining work life and so on, then the multiplier/multiplicand method may be used."*

Sykes J cited **Campbell v Whylie** (supra). Then at paragraph 21, he said:

> *"Unfortunately, the case law both here in the West Indies and England does not provide much help in determining which method is used.* ***Campbell's*** *case comes closest to suggesting a criterion,*

> *namely, the type of information about the Claimant that is available to the court. It seems to me that the matter has to be resolved by taking in to account that the aim of assessment is adequate compensation and not over compensation. What this means is that it is permissible for the judge to use the two methods and then look at it in the context of the global award on general damages is appropriate for the harm suffered."*

The learned judge went on to make an award on a lump sum basis but distinct from and in addition to damages for pain and suffering.

[93] In the instant case, Counsel for the Claimant has sought an award in an amount which presumably was determined on a conventional basis. Counsel observed that the Claimant did not place before the court evidence of his earnings. The Claimant did however give an indication of the earnings he has lost.

[94] The Claimant's evidence in support of damages under this head is that subsequent to the incident, he has been unable to carry on working at the Credit Union which was a part time job from which he earned an additional $1500.00 for each day he worked. He worked at this job once weekly. He also said that although he still works at the University, he is now engaged in office work as he is now unable to carry out his usual activities as a Grounds Assistant. He states however that he receives the same pay and there is no change in his job title. He has not spoken of the terms of his employment or of his skill level and qualifications. It is noted however that his job description as gleaned from a document put in evidence involves tasks of a manual nature such as maintaining the grounds by pruning hedges, sweeping, cleaning rubbish bins, incinerating rubbish, and minor maintenance to lawn mowers and power generating plants. The caution in relation to the claimant doing heavy lifting must have some bearing on the types of activities that he will be able to undertake moving forward.

[95] This evidence as to what the Claimant's job description entails in a Jamaican context suggests that he is someone of limited education who, more likely than not, is unskilled. If he were to be placed on the labour market, his options would be limited. His injury has rendered him less able to do manual work and to that extent, he would suffer

a handicap on the labour market. He is therefore in my view entitled to compensation for this diminution in his capacity to obtain employment. In light of the paucity of information regarding his earnings, I will make an award in a conventional sum.

[96] In seeking to assist the court in deciding on a reasonable award, Counsel commended to the court the case of **Roger Mills v The Attorney General** [2018] JMSC Civ.136, in which an award of $2,000,000.00 was made. She opined that a sum of $1,500,000.00 would be appropriate in the circumstances. I believe that a sum of $1,300,000.00 is reasonable.

[97] The trial of this claim involved a very pleasant experience in open court with impressive young Attorneys at law on both sides. I am grateful to them for the very helpful submissions filed post- trial in this matter.

THE ORDERS

[98] Based on my findings, I make the following orders:

(i) Judgment for the Claimant.

(ii) Damages are assessed as follows:

(a) Special damages in the sum of $293,725.00 with interest thereon at the rate of 3% per annum from the 29th of September 2007, until judgment.

(b) General damages in the sum of $4,000,000.00 with interest thereon at the rate of 3% per annum from the 29th of April 2009, until Judgment.

(c) Damages for Handicap on the labour market in the sum of 1,300,000.00 with no interest.

(iii) Damages awarded under each head is reduced by 25% on account of the Claimant's contributory negligence.

(iv) Costs of the proceedings are awarded to the Claimant but reduced by 25% on account of his contributory negligence and are to be taxed if not sooner agreed.