[2017] JMSC Civ.42

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013 HCV 05052

BETWEEN	**RICHARD HENRY**	**CLAIMANT**
AND	**MARJOBLAC LIMITED**	**DEFENDANT**

Ms. Christine Mae Hudson for the Claimant

Mrs. Stacia Pinnock-Wright for the Defendant

NEGLIGENCE – SAFE PLACE OF WORK-DUTY OF EMPLOYER-CONTRIBUTORY NEGLIGENCE

HEARD: January 27, 2017 and March 17, 2017

WINT-BLAIR, J (AG)

[1] I have been assisted greatly by the written submissions prepared by counsel appearing in this matter. In this judgment I will reference the evidence and submissions only to the extent necessary to explain my findings and decision. The parties should rest assured that in order to arrive at my decision I have considered all the evidence and counsel's submissions.

The Claim

[2] The claim filed by Richard Henry is against the defendant, his former employer. It is brought in negligence as Mr. Henry alleges that during the course of his employment, he was instructed by Mr. Roy Jones, the owner and operator of the

defendant company to assist him in removing the curling rod from the jack on a front - end loader. Mr. Henry experienced difficulty in the execution of these instructions. Mr. Jones then went into the machine, pressed the switch that controlled the hydraulic system and the curling rod suddenly and without warning shot out speedily from its barrel into the path of Mr. Henry. This caused him to shift to avoid being hit. Mr. Henry lost his balance, fell onto the loader bucket on his back and then to the ground. He sustained injuries, loss and damage and has incurred expense as a consequence.

Evidence of Mr. Richard Henry:

[3] The evidence of Mr. Henry was that he commenced his employment with Mr. Jones' company in 2005. He was hired to operate a front-end loader ("the loader") and was possessed of 25 years of prior experience operating this type of machine. He worked as a machine operator earning $20,000 per fortnight. He safety gear, boots and a hard hat as safety gear which he was expected to wear at all times. He used the loader to move materials from the stock pile to the crusher and also to load trucks.

[4] On July 5, 2011 at approximately 8:30am Mr. Henry went to work. The loader he normally operated was being driven by another worker. He asked for that day off as vacation leave. Mr. Jones refused and sent him to the garage saying "I'm going to turn you into a mechanic today." Mr. Jones then gave him instructions to tighten the slack bolts on another loader that was leaking. Mr. Henry can and does operate more than one loader at the defendant company. When that task was completed Mr. Jones told Mr. Henry that he should switch loaders with a worker by the name of 'Indian'.

[5] Having done that, Mr. Henry was instructed by Mr. Jones to remove the curling rod from the loader he had taken from Indian. Mr. Henry had never done this type of work before, but he did what he had seen other employees do, he loosened the bolts on the curling jack and unscrewed the pins from the rod. He then

climbed into the cabin and attempted to use the lever to push the curling rod out. He was engaged in this solitary pursuit until he recognized that he was unable to get the curling rod out of its barrel and called for reinforcements from Mr. Hacker and Mr. Burrell aka "Jubbie", who are welder and mechanic respectively on the site. Mr. Hacker and Mr. Burrell remained on the ground using their manpower to pull the rod from its barrel. They could not accomplish this feat and so they got Mr. Jones who climbed up into the cabin of the machine and sat in the driver's seat. At this time, Mr. Henry was atop the machine at the location of the curling rod tightening hoses. His feet were not placed on a level surface. The loader bucket was on the ground beneath the barrel. He came down from that position to retrieve a 9/16 spanner to tighten the hose on the left side of the cylinder and climbed back up onto the loader. Mr. Jones then revved the loader and shouted, "Watch It."

[6] Mr. Henry heard a loud explosion the curling rod flew out past his face. Hot oil from the hose sprayed out and onto his face. He was frightened and covered his face he made a step, slipped and fell backwards onto the bucket then onto the ground. The fall was from a height of some six feet. He and Mr. Jones were the only ones on the loader when the incident occurred. The other men were never on the loader. They had remained on the ground at all times.

Mr. Jones had not given him any instructions regarding his safety nor did he tell the men what he was going to be doing. Mr. Jones did not tell Mr. Henry to get down from the loader even though the other two men had moved to the side of it. It was the shock of the oil being sprayed into his face and the curling rod being suddenly ejected from the barrel which caused him to lose his balance.

In Mr. Henry's particulars of claim he described his movement as a shift as the curling rod flew by.

<u>Evidence of Mr. Calvin Jones</u>

[7] The evidence of Calvin Jones was that Mr. Henry could not have removed the curling rod by himself, as two people were needed to knock out and remove the

pin. He gave no instructions to Mr. Henry to work on the hoses. He paid Mr. Henry $10 -12,000 per week. Mr. Henry was a good worker, with whom he had had no problems whom, he described as respectful. Problems with the curling rod occurred three or four times per year among his four loaders. Mr. Jones told Mr. Henry to operate the lever and that Messrs. Hacker and Burrell would perform the mechanical aspects of the removal operation. The effluxion of oil was to be expected during the removal exercise, this is oil that is used in the operation of the loader and is expensive. This oil though not re-used is caught.

[8] To remove the rod, the pin is disconnected. This pin is connected to a lever which had to be “prised out” after which the hose had to be disconnected. One would then start the engine and force the rod out to a point. At that time others are needed to take out the rod out so it doesn’t fall. The usual process allows it to be easily removed. When it sticks the workers are trained to know what to do. Sometimes they use the forklift. In this case the forklift could not remove it and, this signalled a larger problem.

[9] Having inspected the equipment himself, Mr. Jones decided to do things differently. While standing on the ground he told the men he was going to use the hydraulic system to force the curling rod from the barrel. He explained this to the men as the cylinder would move forward and he did not want anyone to get hurt. He told Mr. Burrell to connect one hose. All three men were then standing on the loader. As Mr. Jones climbed onto the loader, or and he told the three men on the loader to get down from the machine. Mr. Henry had one foot on a tyre and the other on the bucket, one foot forward, one to the side.

[10] Mr. Jones had never used the hydraulic system to remove the curling rod with these workers before. He said, “if someone was in front of it when I move it, it could damage or kill someone.” Thus, he told the men to come off the loader because there was a risk of danger. Messrs. Hacker and Burell complied then, he sat down in the seat. He asked Mr. Henry to get down, who instead responded that he was ‘alright.’ Mr. Jones said he had used a loud, stern voice

yet Mr. Henry remained. Mr. Jones admitted that he did not insist that Mr. Henry get down. He could see Mr. Henry clearly standing some 4 to 5 feet below his level. He looked around and no one was in any danger. He tapped the lever and the curling rod shot out with sudden force falling some ten to twelve feet away from the machine.

[11] There was oil leaking from the barrel which did not splash as it was captured in a bucket he had sent Jubbie for earlier. He denied telling Mr. Henry to tighten loose bolts that morning. He denied when pressed that one person can do the operation up to the point when the rod is to be taken out physically. The accelerator was pressed, the machine revved and then he gave a tap to the lever and shouted "Watch It!" There was a loud noise. There was no splash of oil. Mr. Henry somersaulted off the machine into the bucket then, fell to the ground. This was just about when the shout was made and the rod was on the ground. The rod passed two to three feet from Mr. Henry within an arms length. A film of oil would have been on the rod itself and oil would have been in the cylinder to force the rod out. Mr. Henry did not cover his face with his hands. His hands went down onto the bucket and he flipped over onto it. The safest way of removing the curling rod would have been to take off the jack and use a tractor to pull it out. There were tractors on site that day.

[12] Issues:

1. Whether Mr. Jones had provided a safe system of work for Mr. Henry.
2. Whether the defendant discharged this burden to Mr. Henry
3. Whether Mr. Henry is to be found contributorily negligent.

Submissions on behalf of the claimant:

[13] Ms. Hudson submitted that there was a failure on the part of Mr. Jones to provide adequate training and supervision to Mr. Henry before asking him to remove the curling rod. Mr. Henry was an operator of the front-end loader and had been so for many years, he was not a mechanic.

She disagreed with the suggestion that Mr. Henry had been asked to get down from the machine before the operation to remove the curling rod by Mr. Jones and that Mr. Henry disobeyed this instruction. The fault was attributed to Mr. Jones in that it was he who allowed Mr. Henry to remain on the machine while undertaking the removal operation which was fraught with danger. It was Mr. Jones she contended who controlled the proceedings and accordingly he failed to properly supervise Mr. Henry. He further failed to ensure that Mr. Henry got down and moved to a safe distance before attempting to remove the curling rod.

[14] Ms. Hudson relied on a number of authorities, the first being **Morton v Dixon (Williams) Ltd**. (1909) SC 807 at 809 for the proposition that in omission lies proof of fault of two kinds, either that the omission was commonly done by others in like circumstances or the omission would be folly to anyone failing to provide it. More importantly, Lord Dunedin in that case said:

> *"It is a question of fact whether or not there is a need for a safe system of work, to be prescribed in any given circumstances. In deciding it, regard ought to be had to the nature of the work, that is whether it properly requires careful organization and supervision in the interest of safety of those persons carrying it out, or it can be left by a prudent employer confidently to the care of the particular men on spot to do it reasonably safely."*

[15] In **Schaasa Grant v Salva Dalwood and the Jamaica Urban Transit Company Limited** 2005 HCV 03081 delivered June 16, 2008, Campbell J decided that the defendant was liable for failing in its duty to provide the proper system to ensure the use of safety equipment on its buses. The claimant was a conductress on one of its buses she was thrown from her seat when the bus driver braked to avoid colliding with a vehicle in front of it. The learned judge said:

> *"The employer's liability, although it is derived from the general law of negligence, gives rise to a special duty owed by an employer to his employee. The duty is owed by the employer to each employee as an individual. Therefore each employee has an individual right of action against his employer for breach of duty. Further, the duty will vary according to the individual nature of the employee." See* ***Paris v Stepney Borough Council*** *(1951) 1 All ER 42 at 44.*

> *"… The common law places a duty on the employer to provide a safe system of work for his employee, and further to ensure that the system is adhered to. The employer's duty is to take such precaution as a reasonably prudent employer in the similar situation…* ***It is not to be assumed that even a usually reliable employee will heed directives given for the employee's own safety".***

[16] In **General Cleaning Contractors Limited v Christmas** [1952] 2 All ER 1110 the respondent, was employed as a window cleaner by the appellants to clean the windows of a club. He was standing on the sill of one of the windows to clean the outside window, holding one sash of the window for support. This was the practice usually adopted by employees of the appellants. The sash came down on his fingers and he let go. He fell to the ground suffering injury.

[17] The House of Lords held that:

> *"The appellants were under a duty to ensure that the system that was adopted was as safe as it could be made and that their employees were instructed as to the steps to be taken to avoid accidents; the appellants had not discharged their duty in this respect towards the respondent; and therefore they were liable to him in respect of his injury."*

[18] Ms. Hudson also relied on the case of **Speed v Thomas Swift and Company Ltd** (1943) L.B. 557 at 567 which was cited for the proposition that an employer's duty to provide a safe system of work includes proper supervision. She cited **Wayne Ann Holdings (T/A Superplus Food Stores) v Sandra Morgan** [2011] JMCA Civ. 44 for the approach the court should take in reviewing the evidence which I shall come to later on.

[19] At common law, the duty of an employer to his employees is to take reasonable care for their safety. This was established by the case of **Wilsons v Clyde Coal Co. Ltd v English** [1938] A.C. 57 at 84. There the duty owed by an employer to an employee was described by Lord Wright as follows:

"I think 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, a firm, or a company and whether or not the employer takes any share in the conduct of the operations. The obligation is threefold, as I have explained [i.e. 'the provision of a competent staff of men, adequate material, and a proper system and effective supervision']."

Lord Wright at page 78 added to the threefold obligation, a 'safe place of work'.

[20] This duty has evolved into a single personal duty in which the employer must see to it that care is taken by all those persons engaged by him. The duty of an employer towards his servant is to take reasonable care for the servant's safety in all the circumstances of the case: Per Lord Oaksey in **Paris v Stepney Borough Council** [1951] A.C. 367 at 384. The ruling principle is that the employer is bound to take reasonable care for the safety of his workmen, and all other rules of formulae must be taken subject to this principle. The employer's duty is more than the duty to take reasonable care and exists whether or not the employment is inherently dangerous. (See **Speed v Thomas Swift and Company Limited** [1943] K.B. 557 per Lord Goddard, L.J.)

"The duty to supervise workmen includes a duty to take steps to ensure that any necessary item of safety equipment is used by them. In devising a system of work, an employer must take into account the fact that workmen are often careless as to their own safety. Thus in addition to supervising the workmen, the employer should organise a system which itself reduces the risk of injury from the workmen's foreseeable carelessness."

… I do not venture to suggest a definition of what is meant by a safe system, but it includes, in my opinion or may include according to circumstances, such matters as the physical layout of the job, the setting of the scene so to speak; the sequence in which the work is to be carried out, the provision in the proper cases of warning, notices and the issuing of special instructions."

Submissions on behalf of the defendant*:*

[21] Counsel for the defendant Mrs. Pinnock-Wright relied on the case of **Thomas v Quartermaine** (1887) 18 Q.B.D. 685, a decision of the UK Court of Appeal which turned on the construction of the Employers Liability Act, 1880. It stands for the proposition that continuing to work with knowledge of the existence of danger does not give rise to a claim in negligence. The fact of knowledge was but one factor for the consideration of the judge. The portion of the dissenting judgment of Lord Bowen cited by counsel can be considered obiter dictum. It stated that the duty of care owed by an occupier to those coming onto his premises vanishes when those who are cognizant of the full extent of the danger voluntarily run the risk, applying volenti non fit injuria.

[22] This decision is distinguishable from the instant case on the facts and law. Mr. Henry cannot be considered to have been cognizant of the danger in an operation he had never been trained for nor had ever participated in. The defendant also did not rely upon volenti non fit injuria in the case it presented.

[23] Counsel further submitted that the fact of many years of employment in a particular locale, knowing the danger, appreciating the risk yet continuing to work constituted negligence on the part of the claimant which cannot be held against the defendant. She cited two cases in support **Milton Nolan v Staples Electrical Contractors Limited** Claim No. C.L.N – 052 of 2001 a decision of Marsh, J which was delivered on November 9, 2007 **David Lawrence v Nestle-JMP Jamaica Limited** Suit No. C.L. 019 of 2002 a decision of Mangatal, J (as she then was) which was delivered on July 31, 2008. Counsel also submitted that an employer is not obliged to give constant or repetitive reminders to an employee.

[24] It was argued in **Milton Nolan v Staples Electrical Contractors Limited** that the accident complained of by the claimant was caused by his own negligence in failing to take reasonable care for his own safety in that he failed to obey

instructions given to him by his supervisor. The claimant was an experienced climber of utility poles and in breach of the defendant's safety policy, remained on the pole during an operation to clear a piece of equipment which was stuck. Marsh, J found that the claimant had failed to prove on the evidence that the defendant was liable in negligence as there was no finding that the defendant had breach a duty of care owed to the claimant who had ignored safety instructions and remained on the pole when the machine was being cleared against policy. He was found to have been the author of his own misfortune.

[25] A similar finding was made in the case of **David Lawrence v Nestle-JMP Jamaica Limited** Suit No. C.L. 019 of 2002 delivered on July 31, 2008, a decision of Mangatal, J. (as she then was) which dealt with the question of whether the defendant had provided a safe place of work. The learned judge stated at the end of paragraph 38 that:

> "The question of what constitutes a breach of an employer's duty in any given set of circumstances is a question of degree."

[26] The learned Judge ultimately found that the defendant had not provided a "perfect" system of work, describing it as adequate in the circumstances. The claimant had a duty to ensure his own safety as he had seen ice on the floor, knew it was slippery, did nothing to get rid of it and had had a duty to break up and rid the floor of ice when it formed as this was company policy. The claimant had even been provided with tools to break up the ice. She held that the claimant in failing to break up the ice upon which he slipped was the author of his own misfortune.

[27] In the instant case counsel, Mrs. Pinnock-Wright has made the argument that Mr. Henry is the author of his own misfortune in that it would have been prudent for him to have come down from the machine before Mr. Jones ejected the curling rod. She therefore, argued that he was the sole cause of the accident herein.

[28] These cases involve companies with clear safety policies which had been communicated to trained workers supplied with the necessary equipment. The

case at bar is one in which none of these factors apply to the defendant's operation.

[29] Counsel also relied on **Smith v Chesterfield and District Co-perative Society Ltd**. [1953] 1 All E.R. 447, a decision of the UK Court of Appeal concerning the construction of section 14(1) the Factories Act. The action had been filed under that section which dealt with the statutory duty to securely fence dangerous machinery. The decision of Jenkins, LJ affirmed the dictum of DuParcq J in **Walker v Bletchley Flettons Ltd.** [1937] 1 All ER 175 which said:

> *"In considering whether machinery is dangerous you must not assume that everybody will always be careful… a part of machinery is dangerous it if is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur."*

Contributory negligence was also pleaded, by the defendant on its case.

<u>Law</u>:

[30] I adopt the law in respect of the approach the court should take in resolving the issues raised in a claim for negligence as set down in the case of **Ng Chun Pui and Ng Wang King v Lee Chuen Tat and another** PC Appeal No. 1/1988. Lord Griffiths delivered the judgment of the Board and stated as follows:

> *"The burden of proving negligence rests throughout the case on the plaintiff. Where the plaintiff has suffered injuries as a result of an accident which ought not to have happened if the defendant had taken due care, it will often be possible for the plaintiff to discharge the burden of proof by inviting the court to draw the inference that on the balance of probabilities the defendant must have failed to exercise due care, even though the plaintiff does not know in what particular respects the failure occurred…*
>
> *So in an appropriate case, the plaintiff establishes a prima facie case by relying upon the fact of the accident. If the defendant adduces no evidence there is, nothing to rebut the inference of negligence and the plaintiff will have proved his case. But if the defendant does adduce evidence that evidence must be evaluated to see if it is still reasonable to draw the inference of negligence*

from the mere fact of the accident. Loosely speaking this may be referred to as a burden on the defendant to show he was not negligent, but that only means that faced with a prima facie case of negligence the defendant will be found negligent unless he produces evidence that is capable of rebutting the prima facie case… it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proven and on the inferences he is prepared to draw he is satisfied that negligence has been established."

[31] The above mentioned decision of the Privy Council had been cited by Harris, J.A. in **Wayne Ann Holdings Ltd. (T/A Superplus Food Stores) v Sandra Morgan** (supra) where at paragraph 17 of the judgment of the Court of Appeal the learned judge of Appeal stated:

"In a negligence action, a legal burden is cast on a claimant to prove his case on the balance of probabilities and this burden remains throughout. If he establishes proof of negligence on the part of a defendant the burden then shifts to the defendant to give an explanation as to how the accident happened."

[32] The learned judge of appeal went on to state as follows:

"…a legal burden is placed on a claimant to prove negligence and not on a defendant to disprove it. If facts are proved which raise a prima facie inference that an accident resulted from the failure of a defendant to exercise reasonable care, then the claimant's action will succeed unless the defendant, proffers an explanation which is sufficient to displace the prima facie inference that he had failed to take reasonable care."

[33] It would seem to me to that Mr. Henry had to establish a prima facie case by relying on the fact of the accident, from which an inference of negligence can be drawn. He had to show that this accident occurred because Mr. Jones failed to take due care. Mr. Henry need not prove in what particular respects this failure occurred. He may instead invite the court draw the inference of the defendant's failure to take due care on a balance of probabilities. Mr. Jones will be found negligent unless he produces evidence that is capable of rebutting the prima facie case which displaces the inference. The court must then evaluate that evidence to determine whether it is still reasonable to draw the inference of

negligence from the mere fact of the accident. At the end of the case it is for this court to examine all the evidence and to decide whether on the proven facts found and on the inferences drawn, negligence has been established.

[34] In Charlesworth and Percy on Negligence, the learned authors have indicated that there is a duty owed to each employee as an individual. There is also a higher duty of care owed where a workman has insufficient experience of the job in hand and is unfamiliar with its dangers. Such a workman requires adequate supervision and guidance in order to protect him from his own incompetence: **Byers v Head Wrightson & Co. Ltd**. [1961] 1 W.L.R. 961.

[35] They go on to state that:

> *"Where a job involves certain risks to health and safety, which are not common knowledge but of which an employer knows or ought to know and against which he cannot guard by taking any precautions, he is under a duty to inform the prospective employee of the risks, if knowledge of the risks would be likely to affect the decision of a sensible level-headed workman on whether or not to accept the job in question:* ***White v Holbrook Precision Castings*** *[1985] I.R.L.R. 215*

[36] An employer's duty is to be considered under the heads of:

a. A safe place of work.

b. The employment of competent employees and supervision.

c. The provision of a safe system of work.

d. The provision and maintenance of adequate plant and appliances

<u>Analysis:</u>

[37] The evidence of Mr. Henry was that he had not been trained to remove and replace parts of the loader. This evidence was unchallenged. In asking Mr. Henry to go outside of his job description, Mr. Jones exposed Mr. Henry to risk. There was no expert evidence before the court on the knowledge of risks an employer ought to have had on the material date or, the information which should passed

from employer to employee as a consequence and whether safety precautions should have been taken.

[38] I find that Mr. Henry was not asked to get down from the loader. The other two workers had moved to the side of the loader. There is no evidence of the point at which they moved to the side from the evidence of Mr. Jones. It is unchallenged that none of these three workers had done this type of operation before. It is logical and more probable that the men moved to the side because they heard the warning “Watch It!”

[39] This command ought to have been heard by Mr. Henry at the same time the other men heard it. He could not move to the side then as he was still on the loader. In fact, Mr. Henry had come down from the machine to retrieve a 9/16 spanner and climbed back up onto the machine to tighten the hose. This simply means that if Mr. Jones had given the men an explanation of the nature of the operation as he said in evidence, Mr. Henry would have heard it and yet still put himself in the position for Mr. Jones to have to tell him to get down from the machine. This is unlikely as with all three men on the ground, Mr. Henry would no longer be careless but reckless had he, knowing the risk, gone back onto the loader. There was no evidence of this weighing and measuring of the risk involved on the part of Mr. Henry.

[40] Had Mr. Jones not instructed Mr. Henry to do any of the mechanical work on the machine, then when he arrived and saw Mr. Henry atop the machine with the other two men as was his evidence, he made no enquiry nor gave any commands for him to either do what he was trained to do, which was to operate the machine or to get down and allow the trained mechanics to carry out repairs. Mr. Henry as has been accepted was an untrained and unskilled worker in the area of mechanics. Why then if he was unable to assist the mechanics, which on Mr. Henry’s version is not what he was doing, (he was tightening hoses) was he allowed to stand on the machine (if Mr. Jones’ evidence is to be believed), instead of operating the lever from the cabin.

[41] Why did Mr. Jones shout “Watch It” to the men? This is an exclamation of apparent and imminent danger. Danger which was apparent to Mr. Jones. This danger would not have been apparent to any other worker which would be the reason for the warning given by Mr. Jones. These workers had never before participated in an operation of this nature. When the apparent danger became imminent danger there was no insistence that the claimant go to a safe position. The evidence of Mr. Jones was that he did not insist that Mr. Henry get down from the loader. In so doing, Mr. Jones demonstrated a tacit acceptance of the risk of danger posed by allowing Mr. Henry to remain standing on the machine. To whom then was Mr. Jones directing this warning?

[42] Mr. Jones had full control of the situation. There was no evidence of a need for speed or haste. It was he who climbed into the cab and elected what method of removal to employ: It was his decision to use the hydraulic system. It was he who chose to employ this method while Mr. Henry was still on the machine. It was he who had opted to allow Mr. Henry to remain standing there before and during the use of the hydraulic system. Mr. Jones knew that the cylinder would move forward and emit oil during the removal operation. His evidence was that he had sent Jubbie for a bucket to catch the expected oil. He was also “revving” the engine. Beyond the oil which was discharged into the bucket however, was the admission by Mr. Jones that the curling rod itself would have borne a film of oil and there would have been oil in the cylinder. There was also oil in the hose Mr. Henry had been tightening.

[43] I find that as the curling rod passed within two to three feet of Mr. Henry, oil would have sprayed out from the hose he had been tightening. The engine was on and Mr. Jones was “revving” it at this point. This led Mr. Henry to adopt an instinctive and protective covering of his face. Mr. Henry’s evidence was that he took a step and the inference can be drawn that the surface where he stood had become slick with oil. He lost his balance despite wearing his safety boots. On the facts, Mr. Jones exercised a series of decisions which had dire consequences for the safety of Mr. Henry.

[44] Further to these decisions on the part of Mr. Jones, he allowed Mr. Henry to stand in a position where on his own evidence, the rod passed within 2 to 3 feet or within arms, length of Mr. Henry. Mr. Jones had performed this manoeuvre before, however, his three workers had played no part in a similar operation prior to that day. For Mr. Jones then to say in evidence that the workers were trained what to do if the curling rod was stuck does not accord with the evidence. Therefore the risk of danger during the operation and in particular to Mr. Henry given where he had been standing was foreseeable on the part of Mr. Jones and this is so despite any carelessness on the part of Mr. Henry.

[45] With respect to contributory negligence, the question is whether Mr. Henry neglected to consider his own safety by remaining on the loader during the operation. Mr. Henry's evidence is that he was not told to get down. Mr. Jones did not insist that he did. However, it was contained in the witness statement of Mr. Henry that he did what he had seen other workers do. He would therefore also have been in a position to appreciate what the removal of the curling rod entailed. He would not have seen the use of the hydraulic system however and therefore would be unable to appreciate the risk. I do not accept that Mr. Henry has contributed to the accident on these facts.

[46] If Mr. Henry had not expressly or impliedly agreed to expose himself to risk, he cannot be blamed for doing the work the way his employer had instructed him to do it. Had Mr. Jones employed proper safeguards, the accident would not have happened. Mr. Jones failed to take all reasonable steps to see that the work he required Mr. Henry to do was made as safe as possible.

[47] A prima facie case has been established by Mr. Henry. The evidence of the defendant has not displaced it and therefore the evidential burden has not been discharged. The claimant succeeds on a balance of probabilities in establishing that the defendant is liable in negligence

Assessment of damages:

[48] By way an of assessment of damages, all the medical reports as indicated below were agreed between counsel. Mr. Henry relied on the medical report of Dr. Lincoln Robinson dated November 30, 2011. This report was agreed and contains a statement of how Mr. Henry received his injury which is inconsistent with the evidence. Dr. Robinson examined Mr. Henry on August 2, 2011. Nonetheless, he was diagnosed as having sustained “blunt trauma to the back with resultant muscle spasm. He had difficulty bending forward and tension of the muscles to the low back. He was in pain. He was referred for physical therapy and prescribed a muscle relaxant, and anti-inflammatory and analgesic medicines. The doctor recommended five days sick leave.

[49] Mr. Henry returned complaining of feeling “hooked up” for further review on August 9, 2011 and was referred to an orthopaedic surgeon for further management. Dr. Robinson recommended ten days of sick leave. On August 22, 2011, Mr. Henry returned feeling pain on heavy lifting and less back pain. Ten more days of sick leave was recommended. On August 25, 2011 when he returned, Dr. Robinson referred Mr. Henry to the physiotherapy clinic at Mandeville Regional hospital. On August 30, 2011 Mr. Henry was referred by Dr. Robinson to another Orthopaedic Surgeon who recommended a further three days of sick leave. On November 25, 2011 as Mr. Henry was still complaining of pain and burning in his lower back made worse by working, he continued his physiotherapy sessions.

Mr. Henry was seen by Dr. Steve Mullings, Consultant Orthopaedic Surgeon on September 3, 2011. Dr. Mullings issued a report dated May 1, 2012 in which he diagnosed Mr. Henry’s condition as blunt trauma to the lower back with lumbosacral spasm. He gave Mr. Henry two weeks sick leave and prescribed oral medication. On further review on September 21, 2011 Mr. Henry was advised to continue physiotherapy and prescribed oral analgesic or anti-inflammatory medicines with an additional twenty-one days sick leave. On

October 5, 2011 Dr. Mullings gave Mr. Henry an additional two weeks sick leave. On October 19, 2011 Mr. Henry was off the medication and continuing in therapy. Dr. Mullings advised him to resume work with light duties to start, to complete physiotherapy and to take his oral medication when necessary. On November 1, 2012, a further examination revealed mild tenderness and decreased range of motion. Oral medication was prescribed for the flare up of pain. Mr. Henry was assessed as having a 2 percent (2%) whole person impairment and was at risk for developing degenerative joint disease of the lumbosacral spine. An MRI was recommended but not done. There was no further review.

[50] On March 25, 2013, Mr. Henry was seen by Dr. Grantel Dundas whose report was dated April 14, 2013 which diagnosed a suspected lumbar disc prolapse. Radiographs showed sclerosis of the left sacroiliac joint and loss of the lumbar lordosis. An MRI of the lumbar spine was recommended.

[51] Mr. Henry had MRI scanning of the lumbar spine on June 18, 2013 and returned to Dr. Dundas for further review. In a report dated July 23, 2013, Dr. Dundas having examined the MRI report gave a final diagnosis of lumbar disc prolapse with a whole person impairment of seven percent (7%).

[52] Dr. Dundas provided an addendum to his medical report of July 23, 2013 dated September 15, 2013, having received questions from the claimants' counsel in respect of Mr. Henry's ability to carry out his occupation. Dr. Dundas' prognosis was that prolonged sitting would likely aggravate his back pain with some degree of radiation. Working on a machine on uneven road surfaces would also likely aggravate his injury. He would likely experience some degree of deterioration as he aged likely leading to lumbar spinal stenosis with compression of nerve roots, which would probably lead to surgery later in life. He recommended that Mr. Henry change his occupation if possible.

[53] **<u>Submissions on quantum – on behalf of the claimant:</u>**

The variation between the assessments of whole person impairment as between both consultant orthopaedic surgeons can be explained in that though Dr. Dundas saw the claimant one year after Dr. Mullings, he then also had the benefit of the MRI report which Dr. Mullings had not seen.

Mr. Henry's witness statement is unchallenged in terms of his physical impairment since the accident. I therefore accept that he continues to experience pain which dominates his daily activities. It affects his ability to do his domestic duties and prevents him from sleeping. The pain has prevented him from finding another job operating a loader as driving on rough surfaces aggravates his back injury He has been unable to find work and has no other skill. He cannot chop wood for his eighty year old mother with whom he lives. He used to fetch water for her but now has to make several trips as he cannot carry a full keg any longer. He cannot help out at home as he was accustomed to doing. He is not as active as he used to be.

[54] Counsel cited the case of **Korrie Jason Williams v Racquel Antoinette Jarrett-Foster** 2013 HCV 00589 where the thirty-five year old claimant suffered soft tissue injury to his neck and back. He was assigned a 2% impairment of the lower back and was awarded Two Million Dollars ($2,000,000) with interest at 3% for pain and suffering on April 6, 2016 with a CPI then of 228.4 which updates using the CPI in January 2017 of 237.3 to $2,077,933.45.

[55] She also cited **Schaasa Grant v Salva Dolwood and the Jamaica Urban Transit Company** 2005 CV 03081 where the twenty nine year old claimant suffered serious back pain and was assessed as suffering from right side lumbar radiculopathy, secondary to a prolapse intevertebral disc, mechanical lower back pain and mild back pain. She was in pain management and thereafter diagnosed with chronic cervicothoracic pain with subjective radiculopathy. She had a whole person impairment rating of ten percent (10%). It was recommended that she find a new occupation. She was awarded Three Million Dollars ($3,000,000) with

interest at 3% for pain and suffering on June 16, of 2008. The award updates to $5,463,923.06.

[56] Counsel argued that the latter case was more serious and accordingly that award ought to be discounted as reflective of the claimant's injuries. She recommended an award between $4,000,000 and $4,500,000 as the appropriate figure for general damages.

[57] In respect of handicap on the labour market or loss of future earnings Ms. Hudson relied on the medical evidence of Dr. Dundas which recommends a change of occupation for Mr. Henry.

<u>Submissions on quantum on behalf of the defendant</u>

[58] Mrs. Pinnock-Wright submitted that there were no medical reports or receipts before the court for an assessment to be made. It is my note that these matters were dealt with before the claimant was sworn and that these items had been agreed by both sides.

[59] She relied upon **Ann Lutas v Lilieth Hanson & Rohan Baker** 2003 HCV 0563 in which the claimant sustained pain and tenderness to her neck, shoulder blades and lumbar region. She was diagonsed with chronic whiplash injury and a lumbar disc prolapse. She was assessed at 6% permanent impairment. On July 23, 2012, she was awarded $800,000 with interest at 6% which updates to $1,036,244.54. (These were consolidated claims heard together by Fraser, J who made separate awards on each claim.)

[60] She also cited **Candy Naggie v The Ritz Carlton Hotel Company of Jamaica** at page 198 of Khan's Volume 6. The claimant here was diagnosed with mechanical lower back pains, she would be plagued by intermittent lower back pains aggravated by prolonged sitting, standing, bending and lifting. Dr. Rose assessed her as having a 5% whole person disability relating to the lumbo sacral spine and 5% whole person impairment in restriction in extension of the lumbo

sacral. Dr Rose found the claimant to have a permanent partial disability of 10% of the whole person. The award of $1,750,000.00 was handed down by Sinclair-Haynes, J on December 13, 2005 with interest. This award updates to $4,389,799.15.

[61] Counsel also relied on **Michael Baugh v Juliet Ostemeyer et al** 2010 HCV 05699. This claimant suffered:

- cervical strain,
- permanent lumbar spondylosis,
- mildly desiccated and mild posterior disc bulge at disc L2-3,
- posterior annular tear at disc L3-4, at L4-5 disc narrowed and desiccated
- diffuse posterior disc protrusion associated mild facet hypertrophy
- At L5-51 a central postrio disc protrusion
- Permanent partial disabilty assessed at 4%

[62] On February 4, 2014 Morrison, J awarded $1,200,000.00 with interest at 3% which updates to $1,343,841.43.

[63] Mrs. Pinnock-Wright argued that the claimant's inuries were similar to all three cases she cited. However, in the case of **Ann Lutas** the claimant at bar suffered a greater whole person impairment. He did not suffer the musculoskeletal spasm nor whiplash injury of **Ann Lutas**. As regards the case of **Candy Naggie**, the claimant did not suffer from radiating thigh pain, nor impaired sexual function. That award should therefore be discounted. In the case of **Michael Baugh**, the instant claimant suffered neither lumbar strain nor cervical strain. However as his whole person rating was higher, than the case at bar, it merited an increase as against the case of **Michael Baugh**.

Assessment

[64] The claimant is seeking to obtain satisfaction against the defendant for his injury. A pecuniary award should compensate the claimant for enduring the negative experience and symptoms attendant upon the receipt of such an injury such as shock, pain and the loss of amenities and the expectation of enjoyment of life. In arriving at an assessment of damages both the objective and subjective elements of an actual injury suffered must be taken into account as enunciated in the judgment of Sykes, J in the case of **Icilda Osbourne v George Barned, Metropolitan Management, Transport Holdings Ltd and Owen Clarke** Claim No. 2005 HCV 294 delivered on February 17, 2006. At paragraph 3 of the judgment Sykes, J held:

> *"… there are broad principles that must be taken into account when assessing personal injury claims. One is that while there ought to be consistency in personal injury awards in a particular jurisdiction, this must not outweigh the fact that the court is not compensating an abstract claimant but the one before the court."*

[65] In **Rose v Ford** [1937] A.C. 826, Lord Roche held:

> *"I regard impaired health and vitality not merely as a cause of pain and suffering but as a loss of a good thing in itself."*

[66] Some of the factors I have considered in making this assessment for pecuniary damage are:

1. age of the plaintiff;
2. nature and extent of the injury;
3. severity and duration of pain;
4. emotional suffering; and
5. impairment of physical abilities and loss of lifestyle

General damages:

[67] The findings of Dr. Dundas are significant. The claimant was a 47 year old machine operator at the time of the accident. All of the above factors must have impacted and resulted in the deprivation of the vigour he had enjoyed up until the accident and which he might have expected to enjoy for some long years. He has no resultant disability. There has been no evidence of any particular emotional suffering, however there has been an impact on his daily living, and he has been assessed by Dr. Dundas as having a seven percent (7%) whole person disability.

[68] Having considered all the authorities cited by counsel, I am of the view that the case of **Ann Lutas v Lilieth Hanson & Rohan Baker** gives the greatest assistance. The injuries are close to those of Mr. Henry and while he has suffered a greater whole person disability, he had not suffered the other injuries. I would accept that the award of Fraser, J as updated is appropriate in all the circumstances which as earlier indicated updates to $1,036,244.54.

Loss of future earnings:

[69] A claim for loss of future earnings must result from the injuries sustained. The court must seek to put the injured party in the position that the party would have enjoyed if the accident had not occurred. There was agreed evidence that the claimant earned $20,000 per fortnight. It was unchallenged that the claimant was told to change his occupation and that he only had one skill and that was operating front-end loaders which he had done for 25 years up to the date of the accident. In this regard counsel commended the approach using the multiplicand as the claimant was unemployed at the date of trial. Therefore the claim would be for the minimum wage of $6,200 per week x 52 weeks x 7 totalling $2,256,800.00.

[70] There were no submissions from Mrs. Pinnock-Wright on this head. I accept that the age of the claimant is a factor his skill set is such that he is able to work wherever his skills are needed. In his occupation, he has no age at which he

need retire, but if he chose to retire at age 60 he would have had 13 more years of useful working life. I have considered the evidence of his earnings with the defendant company, the fact that he can perform light duties such as painting that he was on the path to recovery as he continued his physiotherapy and did the exercises at home. He managed his pain with over the counter medication, hot towels and exercise. Some five years have elapsed since the accident. Mr. Henry gave evidence that he is also a singer and he is not handicapped in any way, in the talent market.

[71] That he is now unemployed means his earnings have been reduced to minimum wage from $10,000 per week to $6,200. His income would have been $520,000 per annum and this will be the multiplicand. I accept Ms. Hudson's submission a reasonable multiplier given the claimant's age is 7. Applying the multiplicand that yields a gross sum of $2,256,800.00.

<u>Special damages:</u>

[72] On this head, Ms. Hudson submitted a total of $201,979.08 had been proved. Mrs. Pinnock-Wright submitted a total of $200,479.08 was more appropriate.
The parties are at variance in the amount of $1,500.00 The court will accept the figure proposed by Mrs. Pinnock-Wright as in her written submissions she states that the figure she propsed to the court was also proposed to the claimant and was one which could have been agreed. The claimant had not confirmed up to the end of the trial whether or not he would accept this figure. This decision has now been made for him.

[73] Orders:

1. Judgment is hereby entered for the claimant.
2. General damages of $1,036,244.54 to the date of judgment with interest at 6% from October 2, 2013 to the date of judgment.
3. Loss of future earnings $2,256,800.00

4. Special damages of $200,478.08 with interest at 6% from July 5, 2011 to the date of judgment.

5. Costs to the claimant if not agreed then taxed.