[2023] JMSC CIV 230

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018HCV00230

BETWEEN	**DEAN MARTIN**	**CLAIMANT**
AND	**SIGNTEX LIMITED**	**DEFENDANT**

IN OPEN COURT

Mr. Sean Kinghorn instructed by Kinghorn & Kinghorn for and on behalf of the Claimant

Ms. Natalia Casado Deslume and Mr. Jahmar Clarke instructed by Young Law for and on behalf of the Defendant

Dates Heard: July 10, 11, 12, 18 and November 30, 2023

Civil Practice & Procedure – Negligence- Breach of Duty of Care – Duty to Provide a Safe System of Work – Occupiers' Liability Act – Breach of Statutory Duty of Care – Contributory Negligence – Assessment of Damages – Loss of Earning Capacity

PALMER HAMILTON J

BACKGROUND

[1] By way of a Claim Form, the Claimant claims against the Defendant for the following:

> *…Damages for Negligence, Breach of Occupier's Liability Act and Breach of Contract. Between the period April 1998 to October 2014, the Claimant, while engaged under a contract of service with the Defendant as an Artisan and while in the lawful execution of his duties as an Artisan, was exposed to the Defendant to noxious, dangerous and harmful chemicals and fumes as a result of which the Claimant was unreasonably exposed to injury and did sustain serious personal injury.*

> *Further, or in the alternative, the Claimant's claim is against the Defendant to recover damages for Breach of Contract for that in or around the year 1998, the Claimant and the Defendant entered into a contract of service whereby it was agreed that in consideration of certain remuneration the Claimant would provide his servies as an Artisan to the Defendant. It was an expressed or implied term of the contract that the Defendant would take all reasonable care to execute its operations in the course of its trade in such a manner so as not to subject the Claimant to reasonably foreseeable risks of injury. In breach of the said contract the Defendant has exposed the Claimant to reasonably foreseeable risks of injury as a consequence of which the Claimant has sustained serious personal injury and has suffered loss and damage.*
>
> *Further, or in the further alternative, the Claimant's claim is against the Defendant to recover damages for Breach of the Occupier's Liability Act. In or about the period 1998 – 2014, the Claimant while lawfully in the execution of his duties as an Artisan upon premises owned and/or controlled and/or occupied by the Defendant, was exposed to noxious and dangerous chemicals as a result of the negligent, unsafe and dangerous manner in which the Defendant kept and maintained its premises. Consequently, the Claimant has sustained serious personal injury and has suffered loss and damage.*

[2] The Claimant alleged that he commenced working under a contract of service with the Defendant in or about the year 1998 and upon commencing he was exposed to dangerous chemicals such as diesel, gas oil, oil based paints, kerosene, thinner, enamel, furniture spray among other dangerous chemicals. The Claimant further alleged that he was also exposed to an environment which was extremely high in dust and fumes. As a result of this exposure, the Claimant stated that he developed sinusitis which worsened to chronic sinusitis. The Claimant's chronic sinusitis then worsened into asthma. It was further alleged that throughout the development of the Claimant's illness and the worsening of that illness the Defendant did not improve the Claimant's condition of work although he was aware. In October 2014, the Claimant was made medically redundant by the Defendant.

[3] The Defendant in its Defence stated that the Claimant was never exposed to the chemicals as alleged in the Claimant's documents. The Defendant further stated that if there was in fact any exposure to these chemicals it was done so purposely and outside the scope of his duties and if there was any injury to the Claimant it was caused by his own negligence. The Defendant denied that the Claimant

suffered the injuries as claimed due to the Defendant's place of business. The Defendant further denied that they were made aware that any illness of the Claimant was due to or worsening as a result of the Claimant's working conditions.

SUBMISSIONS

[4] I wish to thank Counsel for their submissions and supporting authorities which provided valuable assistance in deciding the issues. They were thoroughly considered and will be dealt with under each issue below. I also wish to note that I do not find it necessary to address all the submissions and authorities relied on but I will refer to them to the extent that they affect my findings.

ISSUES

[5] The issues for my determination are:

(a) Did the Defendant owe a duty of care to the Claimant?

(b) Did the Defendant breach the duty of care, if any, which resulted in the injuries suffered by the Claimant?

(c) Is the Defendant in breach of the Occupier's Liability Act? and

(d) The quantum of damages, if any, to be awarded to the Claimant.

[6] In addition to the above-mentioned issues, the question of the credibility of the parties is also an issue to be considered.

LAW & ANALYSIS

[7] The burden of proof rests with the Claimant and he must prove on a balance of probabilities that the Defendant owed him a duty of care, that the duty was breached and that the said breach resulted in damage to him. I am guided by the words of McDonald-Bishop J in **Alvan Hutchinson v Imperial Optical Limited**

and Hugh Foreman (unreported) Suit No. C.L. H 035 of 1999 delivered on September 16, 2005, where she stated that-

> *It is the Claimant who must satisfy the Court on a balance of probabilities that they have proven the allegation of negligence against the Defendants. It has to determine which of the accounts put forward by the Claimant and the Defendant is more believable. Credibility plays a pivotal role in this exercise, and the Court in assessing credibility will have due regard to the demeanour of the witnesses.*

A. *Did the Defendant owe a duty of care to the Claimant?*

[8] It is not in dispute that the Defendant owed a duty of care to the Claimant. The Claimant has been employed to the Defendant Company since 1998 until 2014. It is trite law that an employer has a duty at common law to have reasonable care for the safety of its employees, provide competent staff, adequate plant and equipment, a safe place and system of work and adequate supervision. If an employer fails to fulfil this duty, then it may amount to negligence.

[9] The *locus classicus* of **Davie v New Merton Board Mills** [1995] 1 All ER 340 established that one of the duties that an employer owes to an employee is the duty to take care reasonable care for their safety in providing a safe place of work and a safe system of work. Learned Counsel for the parties relied on several cases which all dealt with the provision of a safe system of work by an employer to an employee. The parties are *ad idem* on the law surrounding a safe system of work and I therefore see no need to mention all the cases relied on. I will rely on Lindo J's summary in **Donna Watson v Couples Ocho Rios Limited T/A Couples Tower Isle** [2020] JMSC Civ 75, where it was stated that:

> *[35] A safe system of work includes the manner in which it is intended that the work is to be carried out, the giving of adequate instructions and the taking of precautions for the safety of workers. Where there is a duty to provide a safe system of work, the duty is not discharged by merely providing it. The employer must take reasonable steps to ensure it is carried out and this involves providing instructions in the system as well as some measure of supervision.*
>
> *[36] The case of **Speed v Thomas & Swift Co. Limited** [1943] KB 557 provides support for the proposition that part of an employer's duty*

> *in providing a safe system of work is to provide supervision. At page 567 of the judgment, Lord Greene said:*
>
> > *"...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 to their own safety"*
>
> *[37] Under the **Occupiers' Liability Act**, an occupier of premises owes a common duty of care to all his visitors. Section 3(2) provides as follows:*
>
> > *"the common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there"*
>
> *This duty extends to an employee who enters the employer's premises under a contract of employment.*

[10] Section 3(2) of the **Occupiers' Liability Act** states that, "*The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there."* There is no dispute that the Claimant was employed to the Defendant Company and that at the time of the incident which gave rise to this claim, he was carrying out his duties as assigned. Therefore, the Claimant is a visitor within the meaning of the Occupiers' Liability Act and as such the Defendant Company owed him a duty of care.

[11] The Defendant is not disputing that the Claimant has suffered some injury, loss and/or damage. However, the main issue of contention between the parties is whether the Defendant breached the duty of care owed to the Claimant resulting in those injuries, loss and/or damage to the Claimant.

B. *Did the Defendant breach the duty of care, if any, which resulted in the injuries suffered by the Claimant?*

[12] Learned Counsel for the Claimant submitted that the sole issue in this matter is whether on a balance of probabilities the Claimant has proven that as a result of

the negligence of breach of statutory duty on the part of the Defendant, his client sustained injury, loss and damage. It was contended that the description of the Claimant's dismissal as "medical redundancy" is a clear admission that the Claimant's injuries were suffered in the course of his employment. It was further contended that the Defendant's position that the Claimant did not sustain his injuries during and as a result of his employment is untenable. Learned Counsel also contended that Ms. Beverly Martinez, who gave evidence on behalf of the Defendant, attempted to vary from this position and failed to do so.

[13] Learned Counsel for the Claimant contended that it is also an untenable position that the Claimant did not sustain injury in circumstances where the Defendant is responsible for these injuries. Learned Counsel stated that Ms. Martinez also admitted that safety gears were intentionally not provided to the Claimant. Learned Counsel for the Claimant submitted that the ultimate position is that the Company did not provide the Claimant with the requisite safety equipment in the course of his duties and are therefore solely responsible for his resulting injuries.

[14] On the other hand, Learned Counsel for the Defendant submitted that the Claimant has failed to establish that the Defendant caused or contributed to injuries he allegedly suffered. It was further submitted that the Claimant had also failed to establish any nexus between the type of injury he allegedly suffered and the work he was authorized to do at the Defendant Company. It was contended that that the Defendant provided a safe place of work for the Claimant and that the Claimant himself admitted in his Witness Statement that he was given the required gears. Learned Counsel for the Defendant further submitted that it can be gleaned from the evidence of Ms. Martinez that the Defendant had a safe place of work with a reasonable and safe system implemented where gears were distributed at intervals to its workers. Learned Counsel further argued that the evidence before this Honourable Court supports the Defendant's position that it provided a safe place of work and a safe system of work for the Claimant with effective supervision.

[15] Learned Counsel for the Defendant contended that the Defendant did not directly or indirectly cause the Claimant to be exposed to dangerous and unsafe chemicals. This position was bolstered by the evidence of Ms. Martinez who stated that he worked at the postering department where his use of chemicals was described as “minimal” and the evidence of the Claimant where he stated that he was never assigned to work at the spray station. It was further contended that there is no evidence before the Court that exposure to thinner, paint and rubbing alcohol cause chronic sinusitis or severe asthma, however there is evidence that over exposure can aggravate those conditions.

[16] It is not in dispute that certain chemicals were used to carry out the business of the Defendant Company. It is also not in dispute that the Claimant was exposed to these chemicals. However, the Defendant has maintained that the Claimant was never exposed to the chemicals as he has claimed and any exposure was purposely and outside the scope of his duties. The evidence from Ms. Martinez on behalf of the Defendant Company is that respiratory masks were not issued to the Claimant. She further stated that as far as she is aware it was not necessary for employees in the postering department to be issued with respiratory masks as they were only necessary for the employees in the spraying department.

[17] In my view, some of the evidence from the Ms. Martinez does not assist me or the Defendant’s position. Ms. Martinez was not working for the Defendant Company when the Claimant started working there, therefore, she would be unable to say with any certainty what instructions if any were given to the Claimant at that time regarding the carrying out of his duties. Throughout her evidence she maintained that the Claimant’s supervisor was directly responsible for ensuring that the Claimant was issued with the necessary gears for work and to ensure that he complied with the safety protocols. However, there was no evidence from this supervisor, even though Ms. Martinez stated that the said supervisor was still working at the Defendant Company and has been working there for 38 years. Although, the Defendant has nothing to prove, I find it odd that there was not even an attempt to put forth such evidence.

[18] The cases are clear, that the duty imposed on an employer is not just simply to provide a safe system of work. It also a part of an employer's duty to provide supervision to its employees. Under cross-examination, Ms. Martinez stated that warning signs were erected at the factory which had written rules and she further stated that the rules were verbalized to the staff for those who could not read. She further stated that a number of persons, including herself, the Claimant's supervisor and the owner of the Defendant Company would be the ones to verbalize these rules. I must note here that the evidence before the Court is that the Claimant is not a good reader and having had the opportunity to observe the witness I was also able to see that he had sometimes faced a difficulty in understanding and answering some of the questions put to him. Additionally, the medical report from Kingston Public Hospital, which was in the Bundle of Agreed Documents, stated under history that the Claimant was diagnosed with Social Anxiety Disorder. While this issue is not one for consideration, in my view, it gives insight as to the Claimant's behaviour while he was giving evidence and being cross-examined.

[19] Respectfully, I cannot agree with the submissions of Learned Counsel for the Defendant where it was stated that the Defendant did not directly or indirectly cause the Claimant to be exposed to dangerous and unsafe chemicals. It cannot be said that because the Claimant was assigned to the postering department and not the spraying department he would not have been exposed to certain chemicals. Based on the evidence given by both the Claimant and Ms. Martinez, the premises where the Defendant Company is located is an open concept and no area is fully enclosed. This means that if there is spraying taking place in the spraying department then those fumes would escape into the air. Ms. Martinez stated that, in her opinion, those fumes would be dispersed in the air because the spraying department is at the farthest end of the premises. The evidence from the Claimant does not contradict this. The Claimant has maintained that it is exposure to the chemicals and fumes in the factory along with the chemicals that he works with that caused the injuries he has suffered. I am also mindful of the Claimant's

evidence where he stated that when he started working at the Defendant Company he was given some masks but from the year 2000 and onwards he did not receive any masks. Ms. Martinez tried to explain that masks were available at any time and the Claimant could get them from his supervisor. However, there is no evidence from the supervisor to support this.

[20] In response to a suggestion by Learned Counsel for the Defendant, the Claimant stated that whenever he enters the compound, if there is painting or spraying going on, then they will assist him with one of the masks and take him around to his area. However, there is no evidence of when this took place. It was not clear whether it was before 2000, when the Claimant stated that he was provided with masks or even if it was after the Defendant Company became aware of his diagnosis. I therefore, see no merit in Learned Counsel for the Defendant's submission that the Claimant himself stated that masks were provided to him and that they were available.

[21] Where there is a duty to provide a safe system of work, the duty is not discharged by merely providing it. The employer must take reasonable steps to ensure that a safe system of work is carried out and this involves providing instructions in the system as well as some measure of supervision. Erecting rules in the factory and verbalizing them would not be enough in my view, to operate as a safe system of work given the fact that the Claimant is not a good reader. There must be supervision of the employees by the employer. Based on the evidence before me, it is my view that, the Claimant while employed at the Defendant Company, was exposed to noxious, dangerous and harmful chemicals and fumes.

[22] Having found that the Claimant was exposed to the said chemicals and fumes, it must now be determined whether or not these chemicals and fumes caused the injuries suffered by the Claimant. Two (2) doctors gave evidence in relation to the health of the Claimant. Dr. Paul Scott, stated that he first examined the Claimant in 2016, which was 2 years after he had stopped working at the Defendant Company. A lung examination was done and the findings were reported as normal.

Dr. Scott also stated that the sinusitis symptoms that the Claimant suffered were not consistent with allergic reaction. At the initial visit, Dr. Scott assessed the Claimant as having sinusitis and possibly bronchial asthma.

[23] The other doctor was Dr. Ashley Wright, who was the medical doctor who first saw the Claimant in 2006, while he was working at the Defendant Company. Dr. Wright first wrote to the Defendant Company regarding the Claimant's exposure to the chemicals in October of 2013, however there were quite a number of Sick Leave Certificates that he had completed prior to that. It is important to note that none of those certificates made mention of the reasons for the sick leave. In fact, Dr. Wright even completed a medical form for the Defendant Company on behalf of the Claimant in February of 2013 and he only indicated that the Claimant had severe epilepsy. There was no indication of asthma, whether mild or severe. Dr. Wright in October of 2014, wrote to the Defendant Company recommending that the Claimant not be exposed to the chemicals used as he has been diagnosed with severe chronic sinusitis which is aggravated by the said chemicals.

[24] It is clear from the evidence from both Doctors that the chemicals and/or fumes do not cause sinusitis, however it does aggravate same and over exposure to same can cause a case of severe chronic sinusitis. Even though Dr. Wright did not visit the Claimant's workplace, he was able to make a diagnosis of the Claimant based on the history he presented with. The evidence from Dr. Wright is that the Claimant's symptoms for sinusitis became progressively worse. In fact, based on the Dr. Scott's evidence when he saw the Claimant, even though he made a diagnosis of chronic sinusitis and possibly bronchial asthma, the examinations of the lungs of the Claimant were normal. This shows that there was some improvement in the Claimant's symptoms since his employment at the Defendant Company.

[25] Learned Counsel for the Defendant submitted that the Defendant Company went the full extent or as close as possible to what is reasonable when trying to carry out its obligations to protect the Claimant. He further submitted that the Defendant

Company mitigated against the risk by ensuring that dusk masks were available and accessible to the Claimant. However, there is no evidence of the Claimant being aware that the said masks were accessible to him or that he was mandated to wear a dust mask. As was stated earlier, there is no evidence forthcoming from the Claimant's supervisors, who were directly responsible for issuing gears to him.

[26] I am guided by the case of **Allan Leith v Jamaica Citrus Growers Limited** (unreported) Claim No. 2009HCV00664 delivered on July 23, 2010 where Edwards J stated that, *"the duty to ensure the safety of…employees extend to taking care to ensure that the premises where employees are required to work are reasonably safe. It is a duty which also obliges the employer to carry out his operations in such a way as to not subject those employed by him to unnecessary risk. See* ***Wilsons & Clyde Coal Co. v English*** *(1938) A.C. 57 at p78."*

[27] I find that the premises where the Claimant worked was not reasonably safe. Even if the Defendant only required those employees who worked in the spraying department to wear masks, the place of work provided would not be safe. The evidence shows that even though the premises is not an enclosed one, the chemicals and fumes from the spraying department can and does still affect the other departments therefore exposing the Claimant to unnecessary risk. In fulfilling the duty to provide safe place of work, an employer is to provide a safe place of work by providing a place that is as safe as skill and care can make it having regard to the nature of the place. It must have been reasonably foreseeable that working with noxious, dangerous and harmful chemicals and fumes could have resulted in injury to an employee, which is the reason why those who worked in the spraying department were equipped with respiratory masks. There was no need for the Claimant to be working in the spraying department to be affected by the chemicals and fumes of that department. Not only was the Claimant exposed to those chemicals and fumes, but the work he did in the postering department also exposed him to some chemicals and fumes.

[28] Although there may be some inconsistencies in the evidence of the Claimant, I found the Claimant to be a truthful and honest witness. I accept the evidence from the Claimant and his wife, who also gave evidence, that the Claimant did not have any of the injuries as claimed before he started working at the Defendant Company. The Claimant's wife stated, and I accept as being truthful, that she has known the Claimant for over 34 years and that when she met him in 1988, he was never ill and had no problems with seizures, allergies or asthma. I find that on a balance of probabilities that the injuries suffered by the Claimant were in fact due to exposure to the noxious, dangerous and harmful chemicals and fumes as a result of working at the Defendant Company.

[29] There is also an issue surrounding the medical redundancy that the Claimant received while he was working at the Defendant Company. Learned Counsel for the Claimant submitted that as a matter of law and fact, the Defendant Company, by making the Claimant medically redundant, indicates a clear admission that the Claimant's injuries were suffered in the course of his employment. On the other hand, Learned Counsel for the Defendant submitted that the Claimant did not satisfy the prerequisites of the **Employment (Termination and Redundancy Payments) Act** to suggest that he was made redundant as a result of asthma or sinusitis. Learned Counsel for the Defendant further submitted that it was under the guise of a redundancy exercise that the Defendant Company separated from the Claimant in an effort to protect him and that the dismissal was not by reason of redundancy in the strict sense of the law. The evidence shows that the Defendant Company made the Claimant medically redundant and the **Employment (Termination and Redundancy Payments) Act** is very clear. Making an employee medically redundant under section 5 of the **Employment (Termination and Redundancy Payments) Act** is attributable, wholly or partly, to the fact that the employee has suffered personal injury arising out of and in the course of his employment or has developed any disease, prescribed under the Act being a disease due to the nature of his employment. I agree with Learned Counsel for the Defendant that the injuries suffered by the Claimant are not the kind

prescribed under the Act. However, in using that section of the **Employment (Termination and Redundancy Payments) Act,** some inference may be drawn that the Defendant Company has admitted liability, as ignorance of the law is no defence. However, I will not pursue that angle. The issue of the medical redundancy had no bearings on my findings as there was enough evidence independent of this issue that led me to my findings and which is outlined in great detail above.

C. *Did the Claimant in any way contribute to the injuries suffered on the 23rd day of April, 2010?*

[30] Learned Counsel for the Defendant submitted that the Claimant contributed to his injuries or failed to have regard to his own safety when he, being aware of his respiratory condition failed to use dust masks that were provided by the Defendant Company. No submissions were advanced on this aspect on behalf of the Claimant.

[31] In order to establish the defence of contributory negligence, the Defendant must prove that the Claimant failed to take *"…ordinary care for himself, or, in other words, such care as a reasonable man would take for his own safety, and, secondly, that his failure to take care was a contributory cause of the accident."* (see **Lewis v Denye** [1939] KB 540 and **Caswell v Powell Duffryn Associated Collieries Ltd.** [1940] A.C. 1)

[32] Section 3(1) of the **Law Reform (Contributory Negligence) Act**, states that-

> *"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damages".*

[33] There must be evidence that the Claimant did not act as a reasonable and prudent man in the circumstances and he ought to have foreseen that their actions or omissions might cause harm to himself. Following the principle in **Lewis v Denye**

and **Caswell v Powell Duffryn Associated Collieries Ltd.**, there is no evidence before me to show that the Claimant contributed to the cause of the injuries he suffered while he worked at the Defendant Company. While I can appreciate that the Claimant ought to have brought this to the attention of the Defendant Company sooner than he did, my earlier finding is that the place of work is not safe and there was nothing to suggest that the Claimant did not act as a reasonable and prudent person in the circumstances. The evidence from the Defendant Company is that employees who do not work in the spraying department would not need masks due to the open concept of the premises. Any failure on the part of the Claimant to not notify the Defendant Company earlier of the respiratory issues he faced was not a contributory cause of the injuries he suffered. Therefore, in my view, there is no contributory negligence on the part of the Claimant in the case before me.

D. *The quantum of damages, if any, to be awarded to the Claimant*

[34] Having found the Defendant liable for the injuries sustained by the Claimant, I now move on to the issue of damages. The particulars of injury were set out as follows:

> *(i) Sinusitis*
>
> *(ii) Severe Chronic Sinusitis secondary to prolonged exposure to volatile hydrocarbons*
>
> *(iii) Severe allergy*
>
> *(iv) Shortness of breath*
>
> *(v) Bronchial hyper responsiveness*
>
> *(vi) Bronchial Asthma secondary to prolonged exposure to volatile hydrocarbons*

[35] There was evidence led in relation to the Claimant being epileptic as a result of the Defendant Company. However, I am unable to make a finding that the chemicals and fumes that the Claimant was exposed to caused him to be epileptic. I accept that environmental factors can act as a trigger factor for someone who already has epilepsy. There was a Medical Certificate from Dr. Wright dated October 12, 2014 which stated that exposure to these chemicals often cause syncope. In fact, there

is a Medical Report from Dr. Wright which states that the Claimant was diagnosed with seizure disorder prior to him seeing the Claimant as a patient. I accept the diagnosis from the Doctors and it is my judgment that the injuries the Claimant suffered are:

(i) Chronic sinusitis secondary to prolonged exposure to volatile hydrocarbons,

(ii) Restrictive pulmonary disease, and

(iii) Asthma secondary to prolonged exposure to volatile hydrocarbons.

[36] I wish to note here that Learned Counsel for the Defendant made no submissions in relation to damages and as such the only assistance before this Court is the submissions of Learned Counsel for the Claimant.

(1) Special Damages

[37] It is trite law that every item of special damages must be specifically pleaded and proved, however the Court may accept and rely on oral evidence. In such a case, justice may demand that an award should be made but there must be cogent facts and circumstances available to the Court in order for it to exercise flexibility. (see **Central Soya of Jamaica Limited v Freeman** (1985) 22 J.L.R. 152, **Caribbean Cement Company Limited v Freight Company Management Limited** [2016] JMCA Civ 2, **Attorney General of Jamaica v Tanya Clarke (*nee* Tyrell)** (unreported) Suit No. C.L. 2000/C164 delivered December 20, 2004 and **Julius Roy v Audrey Jolly** [2012] JMCA Civ 53).

[38] Special damages were particularized as follows:

(i) Medical Expenses (and cont)		
Medical Report	-	*$55,000.00*
Medical Visit	-	*$5,500.00*
MRI	-	*$40,000.00*
Prescription	-	*$11,325.71*
(ii) Loss of Earnings ($11,500.00 per week for 156 wks and cont)	-	*$1,1794,000.00*
(iii) Transportation Expenses (and cont)	-	*$50,000.00*

[39] Learned Counsel for the Claimant submitted that the total medical expenses for the Claimant amount to $149,512.00 and listed the following:

(i) Medical Report of Dr. Paul Scott	-	*$75,000.00*
(ii) Consultation (14/6/2023)	-	*$8,000.00*
(iii) Dr. Ashley Wright (Office Visit)	-	*$5,200.00*
(iv) Dr. Paul Scott (Office visit)	-	*$5,500.00*
(v) Medication	-	*$24,812.64*
(vi) Endoscopy Centre	-	*$31,000.00*

[40] The Claimant stated in his Witness Statement that he is unable to work because of his condition. However, the Medical Reports all state that with appropriate management and limited exposure to respiratory irritants the Claimant should see significant improvements with the symptoms. As a matter of fact, when he visited Dr. Scott after he had stopped working at the Defendant Company, his lung examination was normal. Even though the evidence is that these conditions are permanent, limiting exposure to the irritants should cause an improvement in the Claimant's symptoms.

[41] I see no further evidence led in relation to the loss of earnings claimed. The Claimant did indicate that he is unable to work, however, the evidence does not support this. At the time when the Claimant was made medically redundant he was about 48 years old and the recommendation at the time was that he could continue working but he was to limit exposure to respiratory irritants. Even though he was made medically redundant, there is no evidence that the Claimant made any attempts to find another job. The Claimant has just stated that he is unable to work. Even if I am wrong, there is no evidence of the salary the Claimant was earning while he worked at the Defendant Company. In light of that, I am unable to find any justification in making an award for loss of earnings.

[42] I also see no evidence in relation to the sum claim for the Endoscopy Centre. The Claimant went to the Kingston Public Hospital for an injury he suffered while he was cutting the yard and fell into an unconscious state. However, there is no evidence of any respiratory irritants which resulted in this unconscious state. It is unclear what caused this as there was no evidence of gas or chemical being present during this incident.

[43] Even though the Court may rely and accept oral evidence in relation o special damages, there are no cogent facts and circumstances which would allow me to do that in this case. The Court cannot accept figures placed before it without some objective proof of accuracy or veracity. Therefore, in my judgment the Claimant is only entitled to **ONE HUNDRED AND FORTY-FIVE THOUSAND FOUR HUNDRED AND SEVENTY-THREE DOLLARS AND THIRTY-EIGHT CENTS ($145,473.38)** for special damages, which was arrived at using the following:

(a) Bill dated August 9, 2017 from Dr. Paul Scott in the sum $5,500.00;

(b) V&R Pharmacy receipt dated September 15, 2017 in the sum $24,160.74;

(c) V&R Pharmacy receipt dated December 19, 2017 in the sum of $24,812.64;

(d) Receipt dated June 14, 2023 for Medical Report (Legal) in the sum of $75,000.00;

(e) Receipt dated June 14, 2023 for Consultation in the sum of $8,000.00; and

(f) Receipt dated June 14, 2023 for Spirometry in the sum of $8,000.00;

(2) General Damages

[44] Learned Counsel for the Claimant relied on 2 cases, namely **Allan Leith** *(supra)* and **Orlando Adams v Desnoes & Geddes** [2016] JMSC Civ. 211. The cases proved to be useful, however the claimants in **Allan Leith** suffered more serious injuries than the Claimant in the case at bar. In **Allan Leith** the claimant while he had some injuries which were similar to the Claimant in the case at bar, he was diagnosed with onset of diabetes and lung inflammation which was life threatening. The Claimant was awarded $3,600,000.00 in July, 2010 which updates to $7,800,000.00 using the Consumer Price Index (CPI) for October 2023.

[45] The Claimant in **Orlando Adams**, while some of the injuries are not the same, I find that this case proved to be the most useful. The injuries of the claimant in the **Orlando Adams** were chest tightening, wheezing, decreased air entry on right lunch, acute bronchitis secondary to inhalation of irritant fumes and acute wheezing bronchitis with possible development of asthma. The claimant in **Orlando Adams** was not asthmatic and did not require the use of an inhaler for the rest of his life, which is not the case with the Claimant in the case at bar. The Claimant in the case at bar was diagnosed as being asthmatic and that will follow him for the rest of his life. The claimant in **Orlando Adams** was awarded 5,530,284.70 in November 2016 which updates to $8,200,500.00 using the CPI for October 2023.

[46] Learned Counsel for the Claimant submitted that an award of $8,000,00.00 was a reasonable sum for compensation for general damages. I am persuaded by the

award given in **Orlando Adams** and I am of the view that a similar award ought to be made in the case at bar. While the claimant in **Orlando Adams** had decreased air entry on right lung, that in my view should not affect the award to be given to the Claimant as the Claimant in the case at bar suffers from chronic sinusitis which was not present in **Orlando Adams**.

[47] I wish to rely on paragraphs 46 – 47 of **Orlando Adams** where Bertram Linton J stated that:

> *[46] The general principle for assessment of an award under this head is that this is done in accordance with previous decisions of similar types of injuries. In addition, I adopt the guidelines for this procedure which were laid down in the cases of **Corneliac v St. Louis (1965) 7 WIR 491** and where the court takes into account:*
>
> *a. The nature and extent of the injuries sustained*
> *b. The nature and gravity of the resulting physical disability*
> *c. The pain and suffering which had to be endured*
> *d. The loss of amenities suffered*
> *e. The extent to which, consequentially, the plaintiff's pecuniary prospects have been materially affected.*
>
> *[47] Similarly I am mindful of "the fact that the court is not compensating an abstract claimant but the one before the court…This is not to say that compensating the particular claimant means that the court ignores similar awards." **Icilda Osbourne v George Barnes 2005 HCV 294**. The main principle here is that there are both objective and subjective issues to take into account. The objective has to do with the actual physical injury and its effects, while the subjective portion relates to the claimant's awareness and knowledge that he will live with asthma for his lifetime and the anticipated accommodation which must be made.*

[48] In keeping with the principles of an award of general damages, the award should be comparable, reasonable and moderate in relation to the 2 abovementioned cases. I took into account the fact that the injuries the Claimant suffered are permanent and he will live with them for the rest of his life. I also took into account the fact that, the Claimant will be able to live and work with these injuries, meaning that once he limits his exposure to respiratory irritants, his symptoms will be manageable. I was also mindful of the seriousness of the injuries the claimant in **Allan Leith** faced in relation to the injuries that the Claimant in the case at bar

suffered. Therefore, it is my judgment that an award, taking into account the 2 abovementioned cases, of **EIGHT MILLION DOLLARS ($8,000,000.00)** would be appropriate given the circumstances.

[49] Learned Counsel for the Claimant also submitted that the Claimant's injuries are of such that he has a distinct disadvantage on the labour market and the unchallenged evidence is that the Defendant has made the Claimant medically redundant. It was further submitted that the Claimant would be entitled to an award for loss of earning capacity in the sum of $1,000,000.00. Learned Counsel for the Claimant relied on the case of **Icilda Osbourne v George Barned, Metropolitan Management Transport Holdings Limited and Owen Clarke** (unreported) Claim No/. 2005HCV294 delivered on February 17, 2006, where the claimant was awarded $500,000.00 for loss of future earnings.

[50] Respectfully, I do not agree with the submissions of Learned Counsel for the Claimant. Even though an award under this heading is generally made where a claimant is in employment and there is a corresponding decrease in his ability to earn income, there is no requirement that one must be employed in order to get an award. (See **Icilda Osbourne** and **Orlando Adams**). The evidence from the doctors show that the Claimant's injuries are permanent and he will live with them for the rest of his life, even if the symptoms are not persistent and constant. However, even though there is no clear definition of what "permanent" is, I will rely on the words of Bertram Linton J in **Orlando Adams**, where she stated that, *"The cases suggest the following general rule: an injury is "permanent" when it involves some constant, visible loss, or where it will likely produce persistent symptoms (though perhaps not constantly so) into the future. In the latter instance there must apparently be medical evidence to establish the likelihood of future symptoms. So, even the classic soft tissue injury may support a charge on diminished earning capacity if competent evidence established that the injury has not resolved itself and that a regular pattern of symptoms may occur in the future."*

[51] Further, a claimant seeking an award under this head must prove that the injury has some effect on employment prospects. There is no evidence of that before me. The medical report of Dr. Wright states that with appropriate management and limited exposure to respiratory irritants, the Claimant should see significant improvements in his symptoms. There is no evidence that the injuries had any effect on employment prospects of the Claimant or his earning capacity.

[52] I am guided by the case of **Dovan Pommells v George Edwards et al** Khans Vol 3, pp.138-144 relied on by T. Hutchinson Shelly, J in **Janice Gordon v The Statistical Institute of Jamaica** [2023] JMSC Civ 53. where she stated that:

> *To succeed in obtaining an award under the head of Handicap on the Labour Market, there must be evidence of the following;*
>
> *(a) the claimant's earnings at the time of the trial,*
>
> *(b) evidence of loss of these earnings,*
>
> *(c) evidence of difficulty finding alternative employment and*
>
> *(d) evidence that any subsequent employment would result in diminution of earnings.*

[53] While I understand that the Claimant was made medically redundant, there is no evidence that this medical redundancy has placed him at a disadvantage on the labour market. There is no evidence of difficulty finding alternative employment or no evidence of diminution of earnings in subsequent employment. In fact, the Claimant has only stated that he is presently unable to work because of his condition. In light of that, I was unable to find any justification in making an award for this head of damages. Therefore, no award will or can be made.

ORDERS AND DISPOSITION

[54] Having regard to the forgoing these are my Orders:

(1) Judgment for the Claimant.

(2) Special damages awarded in the sum of **ONE HUNDRED AND FORTY-FIVE THOUSAND FOUR HUNDRED AND SEVENTY-THREE DOLLARS AND THIRTY-EIGHT CENTS ($145,473.38)** with interest at a rate of 3% per annum from October 28, 2014 to November 30, 2023.

(3) General damages awarded in the sum of **EIGHT MILLION DOLLARS ($8,000,000.00)** with interest at a rate of 3% per annum from February 27, 2018 to November 30, 2023.

(4) Costs to the Claimant to be taxed if not agreed.

(5) Claimant’s Attorneys-at-Law to prepare, file and serve Orders made herein.