[2025] JMSC Civ 20

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2020CV03512

BETWEEN	**KEITH MCKENZIE**	**CLAIMANT**
AND	**UC RUSAL ALUMINA JAMAICA LIMITED (t/a WINDALCO)**	**DEFENDANT**

IN OPEN COURT

Ms. Christine Mae Hudson, Attorney-at-Law, and Ms. Judaska Shaw, Attorney-at-Law, instructed by K. Churchill Neita & Co, Attorneys-at-Law for the Claimant

Mr. Matthew Royal, Attorney-at-Law, and Mr. Jamaiq Charles, Attorney-at-Law, instructed by Myers, Fletcher & Gordon, Attorneys-at-Law for the Defendant

Heard: February 28 and 29, 2024 and February 20, 2025

NEGLIGENCE - Employers Liability - Duty to Provide Adequate Plant and Equipment - Safe System of Work - Whether adequate training provided - Whether the Defendant is liable.

MASON, J (AG.)

INTRODUCTION

[1] On or about January 3, 2017, the Claimant, a Plant Repairman and Certified Electrician, who was at all material times an employee of the Defendant was assigned to dismantle and assemble a No. 2 Alfa Laval Plate Heater. While using

a sledgehammer to strike a Sputnik wrench, he missed his target thereby resulting in injuries, loss and damage. The Defendant, UC Rusal Alumina Jamaica Limited (t/a Windalco) is a registered company incorporated under the laws of Jamaica trading as Windalco, a bauxite and alumina production company. They maintain that they are not liable as the method used is the accepted method of performing the assigned task.

THE CLAIM

[2] On September 21, 2020, the Claimant filed a Claim Form and Particulars of Claim alleging that the injuries he sustained were as a result of the negligence of the Defendant, its servants, and/or agents. The Defendant was served with the pleadings on October 22, 2020. An Acknowledgement of service was filed on October 27, 2020. The Claimant stated that it was an implied term of his contract of employment and/or it was the duty of the Defendant to take all reasonable precautions for the safety of the Claimant while he was engaged in carrying out his work not to expose him to any risk of damage or injury. The Claimant contends that the Defendant knew or ought to have known to provide an adequate and safe working environment and to take reasonable care to provide a safe and proper system of work.

[3] In his Particulars of Claim, the Claimant further stated that he was trained to use two (2) air wrenches to dismantle and assemble the No. 2 Alfa Laval Plate Heater. He further stated that on January 3, 2017, he was assigned along with another employee to dismantle and assemble the No. 2 Alfa Laval Plate Heater. In order to perform this task, he was provided with a 16-pound sledgehammer and a Sputnik wrench despite repeated requests to be provided with the air wrench. He would use the sledgehammer to strike the sputnik with great force several times to release each Nut on the Alfa Laval Plate Heater. He averred that while carrying out the task, he missed the sputnik and immediately felt a sharp jerk in his left shoulder and neck.

[4] The Claimant further alleges that the Defendant, and its servants/agents were negligent and/or breached their statutory duty in that they:

a) *Failed to provide appropriate and adequate tools to carry out the assigned task;*
b) *Failed to heed the repeated request of the Claimant to be provided with the air wrench to carry out the assigned task;*
c) *Failed to provide the Claimant with a safe system of work;*
d) *Failed to warn the Claimant of the dangers in using a sledge hammer to carry out the assigned task;*
e) *Required the Claimant to carry out the assigned task using the sledge hammer and sputnik wrench when they knew or ought to have known same could cause injury or damage to the Claimant;*
f) *Allowed and/or permitted the Claimant to carry out the assigned task contrary to the training received;*
g) *Exposed the Claimant to the risk of injury or danger of which they knew or ought to have known;*
h) *Failed to have due regard for safety of its employees and in particular the Claimant, when engaged upon the work;*
i) *Failed to provide or maintain a safe and proper system while the Claimant was engaged up on work;*
j) *Failed to take any or any adequate precautions for the safety of the Claimant while he was engaged upon the work;*

THE DEFENCE

[5] The Defendant filed its Defence on December 3, 2020, and an Amended Defence on July 14, 2023. The Defendant stated that it discharged each of the implied terms pleaded by the Claimant.

[6] The Defendant admitted that it was an implied term of the contract and/or it was the duty of the Defendant to take all reasonable precautions for the safety of the

Claimant while he was engaged in carrying out his work, not to expose him to any risk or damage or injury of which the Defendant knew or ought to have known. The Defendant is to provide an adequate and safe working environment for the Claimant and other employees. The Defendant maintains however, that it fully discharged each of the implied terms pleaded.

[7] The Defendant avers that at the material time, the Defendant's settled practice was the use of sledgehammers and air wrenches were not a part of its stock. It also averred that the Claimant who was an experienced workman was fully trained in the use of the sledgehammer, along with sputnik wrench (slogging spanner) and ought to have been able to use the sledgehammer safely without injuring himself and had performed the task repeatedly, over 9 years without injuring himself including on the day in question.

[8] The Defendant admitted that it provided the Claimant with a sledgehammer but denied that the Claimant had made repeated requests for an air wrench. The Defendant that the Claimant would use the sledgehammer to strike the sputnik wrench with great force several times to release each nut on the Alfa Laval Plate Heater and added that this was the sole method used to perform the job.

[9] The Defendant further denied that the incident took place and stated that if it did, it was not due to its negligent acts or omission. Mediation was attempted but it was unsuccessful.

THE EVIDENCE

[10] I will briefly outline the evidence insofar as it assists me in making my decision. The Claimant's evidence in his Witness Statement, filed on June 9, 2023, is that he was a contracted worker who was attached to another company and was assigned to work at the Defendant's company to carry out general maintenance work including dismantling and reassembling the No 2 Alfa Laval Plate Heater

("The heater"). He indicated that there are usually 4 to 5 persons assigned to work on the heater.

[11] The Claimant indicated that the dismantling and reassembling of the heater was required when the heater was leaking and not working properly. He indicated that once there is a leak, it means that the heater is losing pressure and he would dismantle it to find out what is wrong with it.

[12] The Claimant further indicated that he received no formal training as to how to dismantle the heater. He further stated that in order to carry out the work he was assigned; he was provided with a 16 lbs. sledgehammer and a Sputnik wrench.

[13] The Claimant's evidence is that in order to dismantle the heater, the nuts have to be removed in pairs either side to side or diagonally. He stated that as the nuts are removed more pressure is left on the remaining nuts making them difficult to pull. In removing a nut, the Sputnik is placed over the nut and the workmen assigned would strike the Sputnik several times until the nut is unscrewed or loosened.

[14] The Claimant further indicated while some of the nuts are easy to unscrew or loosen, others take a very long time even lasting up to 3 days.

[15] The Claimant further stated that he was employed by the Defendant as a Plant Repairman in 2012 and continued to use the same method and tools to disassemble and reassemble the heater as he previously did. He stated that he was never warned about the risks associated with this method by his Supervisor or anyone else, and neither was he trained or introduced to any alternate methods.

[16] Over time, the heater started to malfunction frequently as it was leaking and required repeated disassembly and reassembly which proved time-consuming. Shortly thereafter, a white man was introduced to the department as the person who would be training them about the heater and gave each member of the team a booklet for that purpose. Training was done by way of both a practical and theory.

[17] The Claimant's evidence is that during the practical, the trainer demonstrated how to use a pair of air wrenches to remove the nut and how to reassemble the heater. The Claimant indicated that the air wrench required no pressure or force and that it was able to loosen or tighten two nuts simultaneously whether side by side or diagonally. The Claimant emphasized that, based on the method required to operate the air wrench, the nuts, and screws could be loosened in minutes, whereas using a sledgehammer takes significantly more time and manpower.

[18] The Claimant further stated that he was made to understand that air wrenches would have been provided by the Defendant to disassemble and reassemble the heater since it was still malfunctioning from time to time. The Claimant further stated that he would ask his Supervisor about the air wrench but no air wrench was provided to him.

[19] The Claimant's evidence is that on the day of the incident, he was assigned along with another coworker to dismantle the heater. While the Claimant was striking at the Sputnik with the sledgehammer, he missed the target and thereafter felt a sharp pain in his neck. He stated that it was like "something bust in my neck".

[20] The Claimant further reiterated that he was never trained by the Defendant as to the proper use of the sledgehammer. He further stated that his use came from watching others.

[21] In the Witness Statement of Dwight Hart, the Manager of the Maintenance and Reliability Department at the Defendant company, Mr. Hart provides information regarding the Claimant's employment history. Prior to joining the Defendant company, Mr. McKenzie was employed by a third-party entity contracted by the Defendant to perform services, including the assembly and disassembly of the Heater. According to Mr. Hart, during the Claimant's tenure with the third-party entity, he used a 12lb sledgehammer to strike a Sputnik wrench to tighten and loosen the nuts and bolts of the Plate Heater, a practice he referred to as the "Accepted Method." Mr. McKenzie utilized this method for approximately four years

before joining the Defendant company, where he continued to service the Plate Heater in the same manner.

[22] Further, Mr. Hart's evidence is that the Accepted Method for assembling and dismantling the Plate Heater is approved by the Defendant and widely recognized in the industry as a reliable practice. Although other methods exist, the Accepted Method remains the standard used at the Defendant company. The Defendant provided training to its employees, including Mr. McKenzie, on safely executing the Accepted Method, but did not train them in the use of air wrenches or pneumatic tools, as these were not part of their inventory for the heater at the time of Mr. McKenzie's incident.

[23] In 2016, the Defendant hired an overseas contractor who used air wrenches, which the Defendant's employees, including Mr. McKenzie, observed. They received no formal training in using these tools, nor was any training provided by the contractors. He stated that the air wrench was not intended to replace the sledgehammer but was to tighten and loosen bolts. When asked if he agreed that the air wrench machine was simple and fast when disassembling and reassembling the heater compared to the sledgehammer, he agreed. He further agreed in cross-examination that using the sledgehammer was a repetitive action and it required more manpower and it took longer to remove the nut particularly if there was a lot of corrosion around the nut. He also agreed that using the sledgehammer required more precision. That the handle of the sledgehammer could fly off and be dangerous. When asked if a pair of air wrenches was more efficient than the sledgehammer, he said it depends. He further agreed that from his observation and experience, the hammer could miss the target. Mr. Hart disagreed that the tightening and loosening process was to use the air wrench.

[24] Mr. Hart further stated that on or about January 3, 2017, the Defendant received a report indicating that the Claimant sustained an injury while servicing the Plate Heater. At the time of the incident, the Claimant was utilizing the Accepted Method but missed the slogging spanner while swinging the sledgehammer. He further

stated that the Claimant, possessing over nine (9) years of experience with the Accepted Method, was qualified to execute the procedure safely and effectively, as he had successfully done on numerous prior occasions.

[25] The Defendant did not receive any requests from Mr. McKenzie or any other personnel for the provision of an air wrench or pneumatic tool. Although the Defendant acquired a pneumatic tool in approximately 2017, this tool was found to be unreliable and frequently fell into disrepair.

[26] As of April 2022, the Defendant procured a battery-powered impact wrench for tasks similar to those performed under the Accepted Method. The Plate Heater in question is no longer utilized in the Defendant's operations; however, comparable machinery and equipment remain in use, which are assembled and dismantled using methods akin to the Accepted Method.

[27] Mr. Hart's further evidence is that there had been no incident prior or subsequent to the incident reported by the Claimant resulting from the use of the accepted Method.

ISSUES

[28] The issue before the court is whether the Defendant breached its duty of to take reasonable care to ensure the safety of the Claimant, in:

i. Failing to provide the Claimant with the appropriate and adequate tools to carry out the assigned task;
ii. Failing to provide the Claimant with a safe system of work;

LAW

[29] It is well established in law that an employer owes a duty of care to its employees. This principle is articulated in **Halsbury's Laws of England, 5th Edition**, as follows:

> ***At common law an employer owes to each of his employees a duty to take reasonable care for his safety in all the circumstances of the case. The duty is often expressed as a duty to provide safe plant and premises, a safe system of work, safe and suitable equipment, and safe fellow-employees; but the duty is nonetheless one overall duty. The duty is a personal duty and is non-delegable****. All the circumstances relevant to the particular employee must be taken into consideration, including any particular susceptibilities he may have.*

[30] Harris J.A. (Ag.) (as he then was) in the Court of Appeal case of **Marjorie Walker, Michael Costa and Kenneth Neysmith, Executors of the Estate of Neville Walker v Victor Lobban** Supreme Court Civil Appeal No. 132/02 delivered on December 20, 2005 emphasized that the law demands a high standard of care from an employer for the safety of his employees which therefore means that the employer's duty to its employees is stricter than the duty required by the employee to take reasonable case for himself. His Lordship stated thus on page 13 of the judgment:

> *The law demands from an employer a high standard of care for the safety of his employees. In keeping with this proposition, in* ***Cavanagh v. Ulster Weaving Company Ltd.*** *[1960] AC 145 at 165, Lord Keith declared:*
>
> *"The ruling principle is that an employer is bound to take reasonable care for the safety of his workmen, and all other rules or formulas must be taken subject to this principle."*
>
> *Consequently, an employer's duty to his employee is stricter than that which is required by an individual to take reasonable care for himself. This duty prevails. irrespective of whether the employment is inherently dangerous. See* ***Speed v. Thomas Swift & Co Ltd*** *[1943] KB 557. Although the duty imposes on the employer a high*

> *standard of care, the duty is not an absolute one. It is possible that such duty can be performed by the exercise of due skill and care. An employer ought not to be exposed to tortuous liability in circumstances where he has taken all reasonable care to provide a safe system of work. He must however endeavour to meet the obligation cast on him.*

[31] This common law duty owed by the employer is usually broken down into 4 categories, namely the duty to provide the following:

1. *Competent staff of men*
2. *Adequate plant and equipment*
3. *A safe system of working with effective supervision*
4. *A safe place of work*

[32] For the purposes of the matter currently before the Court, I will only delve into the duty to ensure that there is adequate plant and equipment and a safe system of working with effective supervision as these duties are directly relevant to the issues presented in this case.

DUTY TO PROVIDE ADEQUATE PLANT AND EQUIPMENT

[33] According to *G. Kodilinye* in the book, **Commonwealth Caribbean Tort Law,** an employer will be held liable for injuries sustained by an employee where those injuries were sustained due to the employer's failure to provide equipment that is obviously necessary or which a reasonable employer would recognize as being necessary for the safety of the employee. This duty also encompasses the obligation to take reasonable measures to maintain plant and equipment.

[34] The author referred to the case of **Morris v Point Lisas Products Ltd** (1989) High Court, Trinidad and Tobago, No 1886 of 1983 (unreported) stating thus at page 142:

> *In the Trinidadian case of Morris v Point Lisas Steel Products Ltd, the plaintiff was employed as a machine operator at the defendant's factory. While the plaintiff was using a wire cutting machine, a piece of steel flew into his right eye, causing a complete loss of sight in that eye. Holding the employer in breach of its common law duty of care in failing to provide goggles, Hosein J said that:*
>
> *…**since the risk was obvious to the defendant and not insidious, the defendant ought to have made goggles available and also given firm instructions that they must be worn, and the defendant ought to have educated the men and made it a rule of the factory that goggles must be worn, since, if an accident did happen, the probability was likely to be the loss of sight of one or both eyes.** [Emphasis mine]*

[35] Edwards J (as she then was) in the case of **Leith v Jamaica Citrus Growers Limited** 2009 HCV00664 in citing Lord Greene MR in the case of ***Speed v Thomas Swift and Co. Ltd.*** [1943] KB 557 describes this duty as such:

> *This obligation requires the employer to provide and maintain in proper condition a proper plant and equipment. This will involve the implementation of regular inspection of both plant and equipment, including necessary maintenance and repairs deemed necessary. Where the nature of the work being carried out makes it reasonable for employees to be provided with protective devices and clothing, the employer is fixed with a duty not only to provide those items but to take reasonable care to ensure that they are actually used.*

DUTY TO PROVIDE A SAFE SYSTEM OF WORKING WITH ADEQUATE SUPERVISION

[36] An employer has a duty to provide a safe system of working for his employees with adequate supervision to ensure that same is being done. In the case of **Speed v Thomas Swift and Co Ltd** [1943] KB 557, Lord Greene MR described what could what constitute a safe system of work. He said:

> *"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 the circumstances, such matters as the physical lay-out of the job the setting of the stage so to speak; the sequence in which the work is to be carried out, the provision in the proper cases of warnings and notices and the issue of special instructions."*

[37] Moreover, in the case of **Orlando Adams v Desnoes & Geddes Limited t/a Red Stripe** [2016] JMSC Civ 211, Bertram Linton, J (A.G.) (as she then was) referenced the remarks of Dunbar-Greene, J in **Wayne Howell v Adolph Clarke t/a Clarke's Hardware** [2015] JMSC Civ. 124, who, in turn, cited Mason, J in **Wyong Shire Council v Shirt** [1980] HCA 12, regarding the definition of a safe system of work. She articulated the following:

> *While the previous duty deals with outfitting the plant, this one requires the employer to make the workplace as safe as reasonable skill and care permits. This will require provision of protective clothing and devices,* ***appropriate warnings (even of temporary dangers, such as wet floors),*** *guard rails, hand rails, fire escapes, among others. The courts have determined that a safe system of work describes the organization of the work, provision of adequate instructions (especially to inexperienced workers); the taking of safety precautions and the part to be played by each of the various workmen involved in relation to particular employees.*

[38] Her Ladyship further elucidated the concept of reasonable care as it relates to a safe system of working with effective supervision. She stated thus:

> *In deciding whether the system devised is reasonable, the court will consider the nature of the work and whether it required careful organisation and supervision. Naturally, operations of a complicated and unusual nature will require more systematic organisation and planning than ones of a more simple nature. However, even operations falling in the latter category will require the institution of a safe system of work when necessary in the interests of safety, for instance work done in factories and mines (for which there are specific statutory obligations). It is not enough for the employer to prescribe a safe*

system of work; he must ensure that the system is followed by providing efficient supervision.

[39] In proving whether an employer has breached his duty to provide a proper system of working, the employee must provide evidence to show that the particular system adopted by the employer was unsafe. In the Jamaican Court of Appeal case of **Paramount Dry Cleaners Ltd v Rita Bennett** (1974) 22 WIR 419, Graham-Perkins JA (as she then was) citing the case of *General Cleaning Contractors, Ltd v Christmas* ([1952] 2 All ER 1110, [1953] 2 WLR 6, [1953] AC 180) elucidated this principle as such:

> *It is true that in General Cleaning Contractors, Ltd v Christmas ([1952] 2 All ER 1110, [1953] 2 WLR 6, [1953] AC 180) Lord Oaksey, in commenting on the foregoing dictum, said ([1952] 2 All ER at p 1115):*
>
> > *'In the course of the argument questions were raised as to the adequacy of the pleadings and attention was called to the dictum of Viscount Simon LC, in Colfar v Coggins and Griffith Ltd ([1945] 1 All ER 326, [1945] AC 197, 114 LJKB 148, 172 LT 205, 61 TLR 238, 89 Sol Jo 106, 78 L1 L Rep 177), that a plaintiff in such a case as the present must prove that the system adopted is not reasonably safe and also prove what system is safe, but, in my respectful opinion, what the noble and learned Viscount was dealing with was the evidence which would go to show that the system adopted was unsafe, that is to say, by proving a possible safe system. It cannot, in my opinion, be that as a matter of law a plaintiff cannot succeed in such a case unless he proves a particular system in which the work can be performed.'*
>
> *Be it observed, however, that the point made by Lord Oaksey was that although a plaintiff was not required to prove a particular system,* ***he was at least required to raise a live issue by leading evidence to show that the particular system adopted was unsafe. By so doing a plaintiff would***

> ***almost always be able to show, inferentially, a possible safe system of work****. Whether, therefore, the problem be looked at from the point of view of pleadings and evidence, or from the point of view of evidence alone, the result is necessarily the same, although it is not a little difficult to appreciate why a plaintiff who relies on the breach of an employer's common law duty to provide a safe system of work should not so plead.*
> *(Emphasis mine)*

[40] Further, the duty to provide a safe system of working is not discharged by an employer if he merely provides it, he must ensure reasonably as far as is possible that it is carried out. Gilbert Kodilinye in **Commonwealth Caribbean Tort Law** stated thus:

> *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 organize a system which itself reduces the risk of injury from the workmen's foreseeable carelessness.*

[41] *Gilbert Kodilinye*, in highlighting circumstances in which an employer failed to provide a safe system of working cited the case of **Bish v Leathercraft Ltd.** (1975) 24 WIR 351. In that case, the plaintiff was operating a button-pressing machine in the defendants' factory when a button became stuck in the piston. While attempting to dislodge the button with her right index finger, her elbow inadvertently struck an unguarded lever, causing the piston to descend and crush her finger. The Jamaican Court of Appeal found that the defendants breached their common law duties to provide adequate equipment and a safe system of work by: (a) failing to preheat the button, resulting in it becoming stuck; (b) not providing a three-inch nail, which could have effectively dislodged the button, forcing the plaintiff to use her finger; and (c) failing to equip the lever with a guard, which would likely have prevented the accident.

Failing to provide the Claimant with the appropriate and adequate tools to carry out the assigned task;

SUBMISSIONS

[42] Counsel for the Claimant submitted that due to the danger inherent in the use of a 16 lbs. sledgehammer to strike a Sputnik wrench 1 ½ inches wide, the Defendant had a duty to ensure that the Claimant received adequate plant and equipment to safeguard him from and injury and further, to devise a safe system of work.

[43] Counsel argued that although there is a dispute as to the weight of the sledgehammer used, a tribunal would be hard-pressed to find that lifting a heavy sledgehammer (12-16 lbs) above one's head and striking a 1 ½ inch wide Sputnik wrench is inherently dangerous. She further contended that a host of potential mishaps might occur, a point further corroborated by the Claimant's testimony that the task of dismantling a heater requires more than one person. Counsel further noted that the fact that a job has been done without incident over time does not negate its inherent danger.

[44] Counsel averred that given that the Claimant's job was dangerous, the Defendant had a duty to provide suitable and adequate equipment to protect against injury. Counsel disagreed with the Defendant's position that the sledgehammer method was settled practice and therefore would have been adequate.

[45] Counsel referred to the Claimant's Witness Statement where he spoke of the training he received in the use of the air wrench rather than the sledgehammer and Sputnik method and the fact that the Claimant repeatedly made requests for the air wrench after the training. Counsel argued that the Defendants had a duty to source the air wrench in order to reduce the danger to which the Claimant was exposed.

[46] Counsel noted that the Defendant, in its Defence, did not deny that the air wrench was the proper tool, it merely stated that the sledgehammer method was the accepted practice of the Defendant's company. Counsel urged the court to find that the air wrench was the appropriate tool to be used in carrying out the duty for which the Claimant was assigned and further submitted that the Defendant knew that the air wrench was the appropriate tool.

[47] Counsel for the Defendant submitted that the Defendant had no duty to provide an air wrench. Citing the case of **Wilson and Clyde Coal Co v English** (1937) AC 57, Counsel submitted that whilst an employee has a duty to provide and maintain appliances for the undertaking of tasks in the workplace, there is however, no duty to provide the most recent state of the art appliance, and there is no breach of duty where the employer did not adjust the plant and appliances used in an undertaking. Counsel further relied on the case of **The Toronto Power Company Limited v Kate Paskwan** (1937) AC 57.

[48] Counsel argued that the court in ***Paskwan*** considered that the jury was entitled to find that the frequency of accidents resulting from over winding of the machinery was "by no means uncommon" and that due to the great likelihood of occurrence, the employer should have provided the safety appliance in question. Counsel further submitted that in this case the Board also considered the fact that the employer's attention would have been called to the need for come safety appliance due to previous accidents two years prior.

[49] Counsel, in reliance on ***Paskwan (supra)*** submitted that since the present case is devoid of the special features referred to in the ***Paskwan*** **(supra)** case which would support a finding that the Defendant breached its duty of care to the Claimant by not providing an air wrench. Counsel in distinguishing ***Paskwan (supra)***, submitted that there have been no prior accidents in the present case or subsequent to the incident alleged by the Claimant.

[50] Counsel further submitted that based on the authorities, the failure of the Defendant to provide an air wrench which is a more modern/advanced method does not constitute a breach of duty. Counsel further argued that the Claimant has not called any expert evidence to establish any inherent unsuitability of the sledgehammer and Sputnik wrench method. It was further submitted that the fact that the method engages manual labour is not a basis to conclude that the engagement of that method is unreasonable and/or makes the employer negligent. Counsel cited the case of **Winston Hall v Glencore Alumina Jamaica Limited** 2004 HCV 03020.

[51] Counsel further argued that the undisputed evidence shows that the sledgehammer and Sputnik wrench method was the accepted method used for the performance of the same task the Claimant himself before he was employed by the Defendant and for several years after without incident or injury.

ANALYSIS

[52] The Defendant as the Claimant's employer owed him a duty to take reasonable care so that he would not be subject to unnecessary risk. What is considered reasonable is dependent upon the facts of the case. The burden is on the Claimant to establish on a balance of probabilities that the Defendant's conduct was such that it fell below the standard of care.

[53] There is no dispute that it was the repeated use of the sledgehammer which requires great force that resulted in the injury to the Claimant who missed his target. What the court is tasked with determining is whether this occurred due to the Defendant's failure to take reasonable care to ensure the Claimant's safety.

[54] In determining whether the Defendant has breached its duty to provide adequate plant and equipment, I will therefore consider whether it is proven on the facts that the Defendant failed to provide adequate equipment which accounted for the Claimant's safety. The Claimant's evidence is that he was quite astonished to see

how the air wrench was an efficient and fast method of disassembling and reassembling the heater. The Defendant submitted that the sledgehammer and sputnik method was the acceptable method utilized in its organization.

[55] Based on the facts presented that the use of the sledgehammer and Sputnik wrench method constituted an arduous task, necessitating the involvement of more than one individual for its completion. I must note that there exists some dispute regarding the weight of the sledgehammer, specifically whether it weighed 12 or 16 pounds. However, I am of the opinion that the difference between these figures is negligible, and I find that the weight of the sledgehammer can be reasonably assessed to be between 12 and 16 pounds.

[56] The Claimant indicated that he was trained to use an air wrench. There was some dispute as to whether the training occurred however, the Defendant's witness made an admission in cross-examination that it in fact occurred. On reexamination when asked what he meant by training, however, he indicated that:

> *Whenever a contractor or overseas supplier comes in, especially in areas of big issues, one of the key things is that we try to extract from the expert for our guys to observe what's happening. However, we have formal training, goes through the HR department, training division of that department, in a sense when we bring these guys in and our guys just to observe.*

[57] I find that permitting employees to observe the operation of the equipment constitutes a form of on-the-job training. Accordingly, it is my view that the Claimant received some form of training in the use of the air wrench through this observational learning process.

[58] While there is evidence tending to show that the Claimant was trained to use the air wrench method, there is no evidence that the Defendant trained the Claimant in the sledgehammer and sputnik wrench method. According to the Claimant, the sledgehammer requires a specific technique which requires using his left hand to

stay at the end of the stick, while his right hand starts close to the end of the sledgehammer as he swings downwards, his right hand slides towards from the head to where his left hand is at the end. If it was not so, he would feel the shock of the impact to his chest when he hits the target. This technique was learned strictly by observation.

[59] At this juncture, I will consider whether there is evidence tending to show that the Claimant was more likely to be injured using the sledgehammer as opposed to the air wrench. According to the Claimant's evidence, the air wrench was simpler and more efficient. The Defendant's witness in cross-examination, agreed that using the air wrench was a modern, simple, efficient, and fast method of disassembling and reassembling the plate heater.

[60] Further, it was submitted by the Claimant and further confirmed by the Defendant's witness that using the Sputnik wrench and sledgehammer method required more than one individual and that one bolt would take up to 3 days to loosen. I accept the submission of the Claimant that lifting a heavy sledgehammer (12-16 lbs.) above one's head and striking a 1 ½ inch wide Sputnik wrench is inherently dangerous. Based on the evidence before me, I am of the view that there existed a greater risk of injury using the Sputnik wrench and sledgehammer method than using the air wrench.

[61] The Defendant stated that the air wrench was not in its stock however, I am of the view that the Defendant had a duty to source the air wrench so as to reduce the potential danger to which the Claimant and other workers were exposed.

[62] The Defendant submitted that the sledgehammer and sputnik method was the accepted method. However, I am of the view that irrespective of whether this constituted the accepted method, the evidence shows that the Defendant was aware of an alternative method that would have mitigated the risk of injury to the Claimant. In any event, there is no evidence before me to support the Defendant's claim that this was the accepted method.

[63] I reject the submission of Counsel for the Defendant that since there was no frequency of incidents or prior accidents, then the Defendant was not in breach. I look to the case of **Durnan Barnes v Stockton-on-Tees Borough Council** (1997) EWCA Civ 2594 submitted by Counsel for the Claimant. In that case, a particular system had been consistently employed for several years in the dismantling of an inflatable slide at a swimming pool. Notwithstanding the absence of prior incidents, during the course of this particular operation, an employee, while standing on the wet slide to untie the ropes secured beneath it, fell and sustained serious injuries. The Court determined that, despite the longstanding adherence to this procedure without incident, there existed "inevitably a potential risk" inherent in that method of work.

[64] I am therefore of the view that the absence of prior incidents does not absolve the Defendant of its duty to the Claimant to exercise reasonable care in ensuring his safety. There was an inherent risk of injury associated with the use of the Sputnik Wrench and sledgehammer method and the Defendant could have taken steps to mitigate the risk of injury to the Claimant.

[65] I therefore find, on a balance of probabilities that the Defendant breached its duty to provide adequate equipment and failed to provide a safe system and training for the Claimant which ultimately resulted in the injuries he sustained on the job.

Failing to provide the Claimant with a safe system of work

SUBMISSIONS

[66] The Claimant submitted that the Defendant did not provide him with a safe system of work because the Defendant company did not train him to use the Sputnik wrench and sledgehammer method efficiently. The Claimant averred that he did not receive warnings about the dangers associated with carrying out his duties or associated with the continuous use of the sledgehammer and did not receive proper tools despite repeatedly requesting same.

[67] The Claimant urged the court to find that the Defendant did not provide a safe system of work and further, that the onus is on the Defendant company to show that the system of work it devised was safe enough so as to safeguard the Claimant from the risk of injury.

[68] The Claimant further submitted that in the event that the court finds that the Claimant received training on the use of the air wrench, there can be no other interpretation than that the Defendant was aware that their system of work was not as effective or reasonably safe.

[69] In reliance on the case of **Stokes v Guest, Keen, and Nettleford (Bolts and Nuts)** Ltd [1968] 1 WLR 1776, counsel further submitted that the Defendant company had a duty to keep abreast with developments within its industry so as to incorporate these developments into the system of work.

[70] It was further submitted that in having a training session in which the air wrench was being represented as the appropriate tool, the Defendant was aware that there was a safer method than the sledgehammer method. On that basis, counsel concluded that the Defendant did not have a safe system of work.

[71] Learned Counsel for the Defendant submitted the case of **Qualcast (Wolverhampton) Limited v Haynes** [1959] 2 All ER 38 where the court observed that the nature of the duty owed to the worker in that case was modified by the worker's knowledge and experience with the result that it was not liable for injuries which resulted from the worker's failure to wear protective equipment while performing a dangerous task. Reference was further made to the case of ***Winston Hall*** (supra) where Brooks J (as he then was) considered the fact that the Claimant was an experienced workman having performed the task repeatedly for a 6-month period immediately preceding that accident.

[72] Counsel also submitted, relying on ***Winston Hall*** (supra) that the manner in which the work was done was controlled by the Claimant as he controlled the force with

which to swing the sledgehammer and was responsible for aiming accurately at the target. He further submitted that there was nothing further for the Defendant to do to prevent the injury that allegedly occurred.

ANALYSIS

[73] I accept the Claimant's evidence that he was not trained by the Defendant in the use of the Sledgehammer neither was he warned about the dangers associated with the use of the sledgehammer. This evidence was unchallenged by the Defendant's witness who failed to provide any evidence which would tend to show that the Claimant was in fact trained or warned.

[74] I do not accept the Defendant's evidence that the duty owed to the Claimant was modified by his knowledge and experience. Reference is made to the case of **Dwight Hunter v Berger Paints Jamaica Limited** [2019] JMSC Civ. 212, where Palmer Hamilton J stated the following regarding circumstances where the employee was aware of the inherent risk in his job:

> *Further, although the Claimant was aware that his duty involved these peculiarities and inherent risk, the general principle is that the employer will not be necessarily absolved of liability if he proves that his employee was aware of the danger and not objected to it. The reasonable employer would in the particular circumstances have taken measures to avoid the accident or would have taken different measures from those in fact taken*

[75] I therefore make a similar finding. I am of the view that even though the Claimant was experienced in the use of the sledgehammer and sputnik method, this did not absolve the Defendant of its duty to take reasonable steps to provide the Claimant with a safe system of work.

[76] I must also make reference to the case of **Smith v Baker** [1981] A.C. 325 also referred to by Palmer Hamilton J in paragraph 80 of the ***Dwight Hunter*** case. She stated as follows:

> *Also, I adopt the principle in the seminal case of **Smith v Baker** [1981] A.C 325. This case laid down that the plea of assumption of the risk as a defence could not be sustained unless the plaintiff, with the full knowledge of the risk, has expressly or by implication agreed to waive his right to redress for any injury he might sustain therefrom, thus not only assuming the physical risk, but also the legal risk of harm. I find no evidence to support that the Claimant waived his right to redress in this regard and the Defendant's claim must fail on this aspect.*

[77] There is no evidence that there was any such agreement in this case.

[78] I am of the view that the evidence tends to show that the particular system of work adopted by the Defendant was unsafe. This is evident in the fact that the sledgehammer itself was between 12 and 16 pounds. One nut took up to three days to pull and required more than one person to complete the tasks. It is evident that there was a risk of physical injury in the continuous swinging of a sledgehammer to strike a sputnik. The Defendant had a duty to take reasonable steps to provide a system which was reasonably safe having regard to the inherent dangers in doing the task to which the Claimant was assigned. An alternative and efficient method in the use of the air wrenches was not introduced although they were capable of dismantling and reassembling the heater without any force. In a matter of minutes, the nuts are unscrewed or tightened, the evidence shows that it was simple, fast and efficient. Instead, the Defendant persisted with the use of the sledgehammer as the Defendant deemed its use as the accepted method.

[79] The Defendant has presented no evidence which would show that any steps were taken to provide a safe system of work. Additionally, there is no evidence of

warnings, guidelines or even supervision provided to ensure that the task was being properly or safely carried out.

[80] I therefore find that there was an obligation on the Defendant to provide a safe system of work. I further find that on a balance of probabilities, the Defendant failed to provide such a system and is liable for any and all injuries sustained by the Claimant in his line of employment as a Plant Repairman.

ORDERS

[81] In the circumstances, I therefore make the following orders:

(1) A date is to be fixed for pre-trial review, if necessary.
(2) Assessment of damages is fixed for hearing on ……
(3) Cost to the Claimant to be agreed or taxed.