[2017] **JMSC Civ.178**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2014HCV01572

BETWEEN	**WILBERT YOUNG**	**CLAIMANT**
AND	**LYNBERTH SEBRUN**	**1ST DEFENDANT**
AND	**ALSTON SYBRON**	**2ND DEFENDANT**

Ms. Khadine Dixon for the claimant

Mr. George Clue for the defendants

IN CHAMBERS

HEARD: May 8 and 9, 2017

S. WINT-BLAIR, J (AG.)

[1] I appreciate the effort that went into preparing the written submissions of 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.

[2] The instant claim concerns employer's liability. The claim further amended claim was filed on March 31, 2016 in negligence. That further amended claim did not contain any indication that a breach of statutory duty under the Workmen's Compensation Act was being pleaded. It was the particulars of claim that accompanied the claim which revealed this part of the claimant's case. The defendant's counsel argued that the claim should have contained this pleading,

the court allowed counsel for the claimant to proceed on the further amended particulars of claim as filed applying the overriding objective. The defendant had been put on notice by the particulars of claim as further amended. There would be no prejudice to the defendants' case. In any event, the breach of statutory duty pursuant to the Workmen's Compensation Act is inapplicable to this case.

[3] The claim as pleaded is set out below verba ipsissima

i. "The defendants required the claimant to climb onto the truck.

ii. The defendants caused or allowed the claimant to handle the faulty chain.

iii. Failing to ensure that it was safe before instructing the claimant to carry out his duties working from the top of the said truck.

iv. Allowing the claimant to carry out a duty for which he was not trained or had the know how.

v. Exposing the claimant while he was engaged upon the work to an unnecessary risk or damage or injury from physical contact with the said faulty chain while it was being operated by the claimant which they knew or ought to have known.

vi. In the circumstances failing to provide and/or maintain a safe and proper system of work.

vii. Allowing the claimant to work in an unsafe area.

viii. Causing or permitting the claimant to fall sixteen feet from the ground. [sic].

ix. The claimant will further contend that the fact that the chain broke in itself gives rise to a presumption of negligence of the part of the defendant."

[4] The claimant's case was that he was a driver employed to the defendants' haulage company. On the 20th day of March, 2010, he climbed up onto the truck he had been driving in order to release the chain which holds the cane onto the truck. In doing so, the chain broke, he fell off the truck and was injured. He contends that the defendants are liable for his injuries as they were sustained during the course of his employment.

[5] The defendants case was that they employed the claimant as a driver, he was to work with a sideman at all times. The sideman was the one responsible for releasing the chain on top of the truck and not the claimant. They had provided a safe system of work, the claimant as a driver did not require supervision. The chain was not defective and that it was the claimant who was therefore acting outside the course of his employment for which they could not be liable. The claimant was the author of his own misfortune.

[6] I accepted the evidence of both defendants as to the system of work. Their evidence of the safe system of work was stated thus by the second defendant: "there would be no work for the claimant if his sideman was absent." The policy was that the claimant was to park the truck in the defendant's garage and they would make other arrangements to get the cane to the factory. The claimant was under no obligation to get the cane to the factory if there was no sideman. His obligation was to report the sideman's absence and to bring the truck in. This policy had been communicated to the claimant verbally when he first started the job and at meetings with the workers at the start of crop.

[7] The instant claimant admitted operated the truck in breach of company policy by driving the truck alone, delivering the cane alone and releasing the chain himself. He also collected the pay of the sideman when the sideman was absent. This is an inference I am able to draw from his pay packets tendered as Exhibit 10. There were 42 of them in total. A number of those pay packets with the name of the claimant on them contained the hours worked by the sideman and were clearly marked sideman or "SM" for sideman as the first defendant explained.

[8] The claimant claimed in his particulars of special damages to have earned the sums marked for the sideman on his pay packets. I interpret the claim for the total sum paid for both himself and the sideman to mean that the claimant regarded the entire packet as his pay. There was no reckoning of the figures to distinguish the pay for both men.

[9] The first defendant's evidence was that there was an arrangement between the claimant and his sideman in respect of pay, he did not know the details of that arrangement. In other words, the first defendant noted that the claimant was claiming the pay of the sideman and paid it to him without question. It would also explain why both defendants had no inkling that the claimant was making deliveries without a sideman until the day of the incident.

[10] This is why the claimant would have been climbing up onto the truck to perform the duties and function of a sideman. The claimant delivered the cane as if he had picked up the sideman and they both had travelled to the factory. This was why the pay packets given to the claimant included pay for the sideman. I construed that bit of evidence to mean that the claimant claimed to have worked with a sideman but had not, he collected the pay of the sideman as if he had.

[11] The defendant's evidence is that they were unaware that the claimant had been doing this. Undoubtedly, the claimant would have had no vested interest in alerting the defendant's to his scheme.

[12] How then are the defendant's responsible for the claimant's injuries? Counsel for the claimant argued that he had to do it or the defendant's would say he was lazy, or replace him as a driver if the sideman was absent. It is simply incredulous that the claimant, having agreed that he acted outside the course of his employment, and that he knew that if he had reported the absence of the sideman his employers would make alternate arrangements, could then pursue this hopeless claim.

[13] Counsel for the claimant submitted that the defendant allowed the claimant to release the chain as it was in their financial interest for him to deliver cane to the factory. This submission was not based on any evidence. The claimant's own evidence was that he knew that he would be replaced as a driver if he had no sideman to work with. This means that it was in the claimant's financial interest to work as if he had picked up the sideman, delivered the cane and thereby collect both pay packets. The defendant's could not have suffered financial loss

as the established policy was for alternate arrangements to be made in the event that a driver showed up for work but the sideman did not. Again, the claimant was under no obligation to get the cane to the factory if there was no sideman. His obligation was simply to report the sideman's absence and to bring the truck in. An obligation the claimant elected not to fulfil.

[14] The claimant agreed that he took a chance on the day of the incident of delivering the cane without the sideman. This is at odds with his witness statement in which he said he had delivered cane in this manner four times before. In fact, the claimant also said that Christopher Brown was his sideman for three crops before the day of the incident and he agreed that he would have had no contact with the chain for those three crops before the day of the incident. It begs the question, when would the claimant have discovered that the chain was faulty. He also did not call Christopher Brown on his case to lend support to this aspect of claim. These were important inconsistencies.

[15] There was not one scintilla of evidence of a faulty chain established by the claimant. He led no evidence to establish his qualifications as an expert in the field of faulty chains, nor did he call as a witness, anyone who possessed that expertise. Further, having argued that the chain was faulty, it means that he having acquired that knowledge, recklessly went on to take an even greater risk by releasing it himself.

[16] Additionally, despite the claimant's assertion that he knew the chain to be faulty, he also said that he had found no time to take the truck in for servicing when his employers to whom he had complained, told him to take the truck in. If this were so, it would be inconsistent with his earlier evidence of having no contact with the chain and another example of the claimant acting in breach of the instructions given to him by his employer. This further weakened the claimant's already struggling case.

[17] The particulars of claim as regards special damages were a work of fiction. The evidence of the harvesting of the sugar cane crop was for 4 to 6 months each

year between December or January to June. The incident happened in March which left only three months in the crop or 12 weeks at a maximum. Nevertheless, the claimant claimed loss of income for 62 months. The claimant's evidence was that he had a chicken farm when he was not driving the truck. There was no evidence of loss of income from that farm.

[18] The claimants own medical report of the findings of Dr. Rory Dixon dated the 10th day of November, 2014, indicated that it was he who told the physician who reviewed him on the 3rd day of November, 2014, that: *"he was unable to resume any farming activities till at least four months after his injury. He reported that he was able to perform his daily activities of self care without much difficulty."* This is in keeping with the inconsistent positions advanced by the claimant.

[19] The claimant also claimed household help for 52 weeks when the medical evidence was at odds with his need for this help after four months.

[20] The falsehoods continued with a claim for $20,000 for shoe raises when in fact he had only spent $2,000 for 1 shoe raise. There was an attempt by counsel to explain this as a future expense under the head of special damages which failed.

[21] An employer is not obliged to give constant or repetitive reminders to an employee. Counsel Miss Dixon cited no case for the proposition that the converse is true.

[22] 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 breached 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.

[23] Similarly 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. 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."

[24] She 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 saw 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.

[25] The instant case is similar to both cases in that the claimant knew that climbing atop the truck was not his job, he had been told that he should bring the truck in if the sideman was absent yet, he chose to disobey those instructions, climb atop the truck and release the chain. He is the author of his own misfortune.

[26] He was an unreliable witness, and a stranger to the truth. A court could have no option but to find that the claimant had not proven his case against the defendants on a balance of probabilities. Consequently, judgment was entered for the defendants with costs to be taxed if not agreed.