

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

SAINT LUCIA

CLAIM NO.: SLUHCV2019/0313

BETWEEN:

KEEGAN JERVAIS CHARLES

Claimant

and

- 1. CIE LIMITED**
- 2. KURT CLEARSON**

Defendants

APPEARANCES:

Mr Tiris Frederick for the Claimant

Mr Leslie Prospere and Mrs Megan Du Boulay-Lee for the Defendants

2021: September 28;
October 27 & November 1 (written
closing submissions);
2023: October 4.

JUDGMENT

Introduction/Background

- [1] **PHILLIP, J:** The claimant, Mr Keegan Jervais Charles, filed this claim for damages for personal injuries sustained while an employee of the first defendant, CIE Limited ("CIE"). The second defendant, Mr Kurt Clearson, also spelt Clersaint ("Mr Clearson"), was also CIE's employee at all material times. The claimant alleges negligence and CIE's breach of duty in failing to provide a safe working environment for him. The defendants have vigorously defended the claim, alleging that the claimant's negligent actions caused his injuries suffered. Still, CIE concedes that an accident occurred on its premises that caused the claimant injury, and it is vicariously liable for the negligent acts of its employees, servants and agents that arise during their employment.

The Claimant's Case

[2] The claimant claims on 8th March 2017, whilst operating a wagon drill ("the Drill Rig") in preparation for blasting, Mr Kim Khodra (since deceased) ("Mr Khodra"), his then supervisor, instructed him to train Mr Clearson to operate the Drill Rig. Mr Clearson, a labourer and or drill helper at the time, had no previous training in working the Drill Rig. During the training process, Mr Clearson stood on the step attachment in front of the controls of the Drill Rig. The claimant sat on another part of the Drill Rig, directing Mr Clearson's operation and manoeuvring of the Drill Rig. The claimant contended that Mr Clearson operated the Drill Rig negligently, causing it to jerk repeatedly and that his foot got stuck in the Drill Rig's tracks. The claimant acknowledged that the Drill Rig, by its design, does not provide any seating accommodations.

[3] The claimant contended further that CIE was negligent, having failed in its duty to provide:

- (1) a safe working environment for him by not providing a tractor head or a lowboy to transport the Drill Rig at the quarry pit and forcing him to track the Drill Rig to the quarry pit and train Mr Clearson at the same time;
- (2) adequate plant and equipment for the work at hand; and
- (3) at common law a competent staff.

He alleges that Mr Clearson was negligent by:

- (1) not exercising reasonable skill and care in manoeuvring and controlling the Drill Rig;
- (2) not keeping the Drill Rig under proper control;
- (3) causing the Drill Rig to be jumpy and throw him (the claimant) off in the process;
- (4) not doing all that was necessary to avoid placing him (the claimant) in peril; and
- (5) generally in all the case circumstances, failing to act and exercise the skill and care expected of a prudent and careful operator.

[4] As a result of these matters, the claimant claims he suffered personal injury, loss and damage. He was 25 years old when he sustained the amputation of his right great toe at the interphalangeal joint and his right second toe at the distal interphalangeal joint. Thus, he has difficulty standing for prolonged periods, walking distances and running, with a whole-person impairment of 4%. Dr N. A. Dagbue ("Dr Dagbue") operated on the claimant at Tapion Hospital for surgical debridement and repair of the stump of both toes, and he was discharged after four days.

- [5] The claimant asserted that he was an avid basketball player and enjoyed walking and running before the accident. However, he can no longer play basketball and run because he would have to sit and massage the two lost toes every time he stands for too long. After his discharge from the hospital, the claimant relied totally on his mother, Rosana Charles, to administer care to him, including his hygiene and cooking and accordingly claims for nursing care. Also, he claims all medical expenses and losses incurred due to the accident, which he particularised as Medical Report - \$750.00, doctor's visit - \$150.00, and Nursing Care at \$750.00 monthly for three months - \$2,250.00.
- [6] There is also an averment for loss of earnings by the claimant for \$3,900.00. He states on average, he earned about \$650.00 fortnightly, and if he worked an entire month would make \$1,300.00. However, CIE did not pay him immediately after the accident for three months. He worked with CIE for approximately six years and had to leave in June 2018 because of the injury he sustained and the long hours he expected to work.

The Defendants' Case

- [7] In their amended defence, the defendants deny personal knowledge of the claimant's averment. They put him to strict proof that he hesitated and stated that it was not part of his job or duties to train Mr Clearson to operate the Drill Rig and that Mr Khodra, the supervisor, insisted that because he was the only person operating the Drill Rig and would be out on vacation leave, he had to train Mr Clearson to operate it.
- [8] The defendants further deny Mr Clearson manoeuvred the Drill Rig so negligently, causing it to jerk repeatedly, resulting in the claimant's foot getting stuck in the Drill Rig's tracks and losing the right great toe and the right second toe. They aver that the claimant was supervising and training Mr Clearson in the Drill Rig's use and operation. The claimant was aware that the Drill Rig was not designed for passengers. Still, during the training process, the claimant negligently proceeded to sit on the Drill Rig, thereby using it in a manner inconsistent with its intended use.
- [9] Mr Clearson contended that the claimant's legs were dangling at the side of the Drill Rig while he was transporting it to the quarry. He warned the claimant that he was not in a safe place, but the claimant disregarded his warning. The claimant received a phone call on his mobile phone, and while answering, the phone slipped off the Drill Rig, resulting in his foot getting stuck in the Drill

Rig's track. Mr Clearson further states that the claimant yelled for him to stop and reverse the Drill Rig, with which he complied - he jumped off the Drill Rig and proceeded to help the claimant by pulling his foot out and removing his torn boot.

- [10] The defendants contended that the claimant was to safeguard himself against injury and damage as per CIE's policy but failed to do so. Mr Clearson asserts that the claimant was wearing boots, but he was unsure what type of boots they were. CIE covered all the reported medical expenses incurred by the claimant without admitting liability and maintaining that the injuries suffered loss and damage were caused solely by the claimant's negligence and not that of the defendants.

Issues for Determination

- [11] The parties filed their pretrial memorandum on 6th August 2020. The claimant raised the following issues:

- (1) Whether the defendant owed a duty of care to the claimant.
- (2) Whether CIE at all times satisfied the common law duty of an employer to its employee having regard to the degree of risk posed to the claimant by the nature of the work.
- (3) Whether CIE is vicariously liable for acts done by Mr Clearson to the claimant?
- (4) Whether the claimant was negligent in the performance of his duties?
- (5) If the defendants were liable, what measure of damages should the claimant receive?

While the defendants raised these issues:

- (1) Whether the defendants owe the claimant a duty of care?
- (2) Whether the defendants breached their duty of care towards the claimant?
- (3) If so, whether the breach caused the injury or loss suffered by the claimant?
- (4) Whether CIE is vicariously liable for the acts/omissions of Mr Clearson in the circumstances?
- (5) If the above are answered in the affirmative, what is the likely measure of damages?
- (6) Whether the claimant was negligent in the performance of his duties?

- [12] In his pretrial memorandum, the claimant also raised, as legal contentions, questions of CIE compliance with the provisions under the Employees (Occupational Health and Safety) Act, Chapter 16.02 and Factories Act (Act 8 of 1973 and 9 of 1983). However, he did not plead any breaches of these statutory regimes or adduce any evidence regarding them. Indeed, due to the

defendants' counsel industry filing supplemental closing submissions on 1st November 2021, it was apparent that the Labour Act¹ repealed and replaced these Acts with saving².

[13] Likewise, although both the claimant and the defendants have raised the issue of whether the claimant was negligent in performing his duties, the defendant did not plead and particularise contributory negligence against the claimant. However, the defendants relied on the well-known authorities³ that the objective of pleading and particularising was to enable the other party to know the case they must answer. They submitted this objective was met because the defendants did raise in their amended defence⁴, and the witness statement of Mr Clearson⁵ that the Drill Rig was not designed for passengers, and the claimant was aware of this. Still, during the training process, the claimant negligently proceeded to sit on the Drill Rig, using it in a manner inconsistent with its intended use. Thus, the claimant's injuries were due to his own negligence, which contains a plead of contributory negligence.

[14] I do not accept the defendants' submissions; to my mind, a general provision of pleading cannot supersede or trump a specific principle that contributory negligence must be expressly pleaded and particularised. Indeed, **Cleston Maynard v Wayne Jeffers**⁶ confirmed that a defence of negligence or fault of the claimant does not include the lesser plea of contributory negligence. Further, as the Court of Appeal observed, a party must comply with the CPR 2000 (as amended) in setting out their case. Failure to do so cannot be cured by merely including it as an issue in the pretrial memorandum.⁷ Even where the other side did not raise the issue, it cannot be satisfactory that one case is pleaded, and the judgment is pronounced on a different case.⁸ Consequently, I will heed the guidance of the Court of Appeal and not consider these matters extant issues in this case.

¹ Cap 16.04 of the Revised Laws of Saint Lucia

² Ibid, section 462

³ Eastern Caribbean Flour Mill Limited v Ormiston Ken Boyea, Hudson Williams, Civil Appeal No. 12 of 2006; Mc Philemy v Times Newspapers Ltd, [1993] 3 All ER 775; Cedar Vally Springs Homeowners Association Incorporated v Hycintha Pestiana & Kenneth and Hild Meade, ANUHCVP2016/0009 & 0010 (18th January 2017)

⁴ Paras 6 and 8

⁵ Para 7

⁶ NEVHCV2004/0131; [2015] ECSCJ No. 286

⁷ Gaston Browne v AG Antigua and Barbuda et al, Antigua and Barbuda HCVAP 2009/024 (13th August 2010)

⁸ George Knowles v Elaine Knowles, Antigua and Barbuda Civil Appeal No.17 of 2005 (18th September 2006), para [13]

[15] Given CIE's concession that it is vicariously liable for the negligent acts of its employees, servants and agents that arise during their employment, I have summarised the issues for determination raised by the parties as follows:

- (1) Whether the defendants were in breach of their duty of care towards the claimant, particularly whether CIE, as the employer, breached its duty to the claimant considering the degree of risk posed to him by the nature of the work.
- (2) Whether the defendant(s)' breach of duty caused the claimant injury or loss suffered.
- (3) Whether in the circumstances, the claimant is entitled to any damages and how much.

Duty of Care (issues 1 and 2)

[16] I intend to address these issues together because they are interrelated. However, at the outset, I must distinguish between the case against CIE and that against Mr Clearson, although from his closing submission, it does not appear that the claimant is pursuing the case of negligence against Mr Clearson as he did not address this issue.

[17] The claimant alleges negligence against Mr Clearson for not exercising reasonable skill and care in the manoeuvring and controlling of the Drill Rig; not keeping the drill under proper control; causing the machine to be jumpy and throw the claimant off in the process; not doing all that was necessary to avoid placing the claimant in peril, and generally in all the case circumstances, failing to act and exercise the skill and care expected of a prudent and careful operator. Instinctively, it is illogical, to say the least, considering the claimant's case that Mr Clearson was his trainee, who had no previous training in working the Drill Rig and was in the training process, being directed by him in the operation and manoeuvring of the Drill Rig.

[18] On the facts of this case, I cannot conceivably see how a court can consider it fair, just and reasonable to impose a duty of care on Mr Clearson for the benefit of the claimant based on the particulars of negligence alleged. Indeed, the Civil Code of Saint Lucia⁹ ("the Civil Code") acknowledges (at the very least by analogy) that a trainer (or tutor) was responsible for the act or negligence of their trainees (or pupils). Article 986 provides:

"He or she is responsible for damage caused not only by himself or herself, but by persons under his control and by things under his or her care.

⁹ Cap 4.01 of the Revised Laws of Saint Lucia

The father, or, after his decease, the mother, is responsible for the damage caused by minor children.

Tutors are responsible in like manner for their pupils.

Curators or others having the legal custody of persons of unsound mind, for their wards.

Schoolmasters and artisans, for the damage caused by their pupils or apprentices while under their care.

The responsibility attaches in the above cases only when the person subject to it fails to establish that he or she was unable to prevent the act which has caused the damage.

Masters and employers are responsible for damage caused by their servants and workmen in the performance of the work for which they are employed."

[19] I turn now to consider the case against CIE.

The Evidence

[20] The parties filed witness statements on 14th February 2020. The claimant gave evidence and called Dr N. A. Dagbue, a consultant orthopaedic surgeon and traumatologist, who treated his injuries after the incident. On the other hand, the defendants called four witnesses: Mr Gordon Anthony Smith ("Mr Smith"), a driller and a former employee of CIE; Mr Clearson; Mr Anselm Clauzel ("Mr Clauzel"), operations manager of CIE; and Mr Robert Robert ("Mr Robert") supervisor at CIE.

[21] The undisputed evidence from the claimant and Mr Clearson, the only ones present during the incident, states: They were employees of CIE, the claimant was a drill operator, and Mr Clearson was a labourer and or plant assistant. The claimant began working for CIE on 25th February 2013 as a labourer and was responsible for clearing under the crusher. He remained in the position for about four months and then transferred to the pit as a drill helper. While the claimant worked as a drill helper, he lifted the rods, cleared around the holes and greased and oiled the drill. A guy alias 'Roots' was the driller, who encouraged the claimant to learn how to operate the Drill Rig. The Drill Rig the claimant learnt from was a very old machine, and they never had to track it. They always used a lorry to transport the Drill Rig. That Drill Rig had an engine, and it basically worked on air. When Roots left the job to work with another company, CIE offered the claimant the job as a driller.

[22] On 8th March 2017 (the date of the incident), Mr Khodra, the claimant's since-deceased supervisor, directed the claimant to train Mr Clearson to operate the Drill Rig. Mr Clearson had absolutely no experience in the Drill Rig's operations. Mr Khodra instructed the claimant to wash and clean the Drill Rig and transport it to the blast site. While transporting the Drill Rig to the site, Mr Clearson operated the Drill Rig by standing on the sidestep and working the controls. The claimant sat on

the side of the Drill Rig where there was no accommodation for sitting. There was no built-in seat, seat belt or harness. Still, he sat there to direct and instruct Mr Clearson on operating and manoeuvring the Drill Rig. When tracking the Drill Rig to the blast site, the claimant's foot got stuck in the track, and his toes (his great toe and second toe) were severely damaged. The claimant was taken to Tapion Hospital for treatment.

[23] The claimant also acknowledged in cross-examination that the Drill Rig was dangerous equipment, so he must always operate it properly. That is to say, following the manufacturer's instructions. Also, he is responsible for his safety as a drill operator. Still, he maintained that he had not seen those instructions, nor did he insist that CIE provide him with a copy of the Drill Rig manual. He indicated that he could not read or write.

[24] The witnesses' evidence parted ways, where the claimant stated that he hesitated to train Mr Clearson in operating the Drill Rig. Still, Mr Khodra insisted that if he was to go on vacation, he had to train Mr Clearson because no other driller or driller assistant was available. He asked Mr Khodra for a lorry to carry the Drill Rig to the pit but was told that none was available, so he was forced to track the machine to the drilling pit. The Drill Rig has some speed, so walking and training Mr Clearson was impractical. When the claimant was trained, he sat next to Roots, who showed him how to change the gear and manoeuvre the Drill Rig. Also, when he was forced to train a guy named Donally (aka Ti Couphre), he sat next to him to show him the ins and outs of the Drill Rig.

[25] The claimant denied in cross-examination that he could walk along the Drill Rig and train Mr Clearson. He stated that he would have had to be running, and the distance from where the Drill Rig was to the drilling pit was approximately one mile. He did not accept there was any greater risk of his foot being stuck in the Drill Rig tracks if it jerked suddenly or being told by Mr Clearson not to sit where he was sitting because it was dangerous. The claimant also denied that he got a call and answered his phone. He stated this was a huge lie and only a fabrication, as it was virtually impossible to hear a telephone ring because of the kind of noise the machine would keep. Moreover, even though he took/answered a call, there was no way you could have any conversation because the machine was very loud and would shake plenty.

- [26] In contrast, Mr Clearson stated before the incident, in his presence, Mr Khodra directed the claimant to train and supervise him in the operation of the Drill Rig, and the claimant agreed to do as directed. While transporting the Drill Rig, the claimant proceeded to sit on the side of the Drill Rig where there was no accommodation or sitting. Upon seeing this, Mr Clearson mentioned to the claimant that he was not in a good position and should not sit there. The claimant responded that he was safe and that nothing would happen. Mr Clearson also noticed that the claimant's feet were near the track of the Drill Rig and, at times, would be touching the track. He continued to voice concern about the claimant's position on the machine, but the claimant ignored him. When they were near the blast site, the claimant received a phone call, and in his attempt to answer, he slipped, and his foot got stuck in the track of the Drill Rig.
- [27] Mr Smith, in his witness statement, stated he was a drill operator at CIE stationed at R.G. Quarry Ltd, located in Cul de Sac, in the Quarter of Castries and is personally unfamiliar with the facts giving rise to the instant proceedings against the defendants. Still, he has extensive knowledge of the Drill Rig machine involved in the incident and its operational guidelines. He has been a licensed drill operator since 2012. Mr Smith acquired his knowledge or learning from MACORP in Guyana, a company that builds excavators and other heavy machinery. They also offer training courses for the operation of heavy machinery. His licence was recently submitted for renewal in Guyana.
- [28] There are various makes and models of drills. However, most operate similarly, although the position of certain controls may differ throughout. That said, an experienced or professionally trained drill operator should be able to operate most drills without using the manual. The Drill Rig was a small to medium size machine. It moves on two tracks and has an extended arm which carries the drill rod/bar. The Drill Rig consists of a side step to accommodate the drill operator and has nine controls. When the drill operator is on the side step, facing the machine, from right to left, the first two controls move the Drill Rig forward or backward. The following five controls are used to position the arm up, down, left or right, and the last two control the Drill Rig itself, moving either up or down and in a circular clockwise or anti-clockwise motion.
- [29] Mr Smith indicated that before the drilling process begins, it is necessary to inspect the machine to ensure everything is in working order and intact, most notably the track. He usually double-checks the hoses, oil and water levels to ensure they are at the required level to prevent damage to the

Drill Rig. Following this, he would start the Drill Rig and let it idle for approximately two to five minutes. After the necessary idle time, the Drill Rig is ready to drill. To fully operate the Drill Rig, two people are required. The drill operator would stand on the side step and control the Drill Rig, while the drill assistant/helper would assist in directing, changing drill rods or bars when necessary and refuelling.

- [30] The job of a drill operator is dangerous, which he would rate as a ten on a scale of 1 - 10. Observing the required safety and operating guidelines when operating such a heavy-duty machine is necessary to avoid serious injuries. Additionally, coupled with the rocky terrain, the job becomes even more dangerous, so safety must be observed. The Drill Rig does not provide any seating accommodations. Based on his knowledge, he would not advise or recommend anyone to sit on a Drill Rig machine where there is no seating accommodation provided, as this could result in serious injury, especially where anybody part can come into contact with the track of the machine. The Drill Rig is a hydraulic drill. As a result, the movement is vigorous and sudden when operating. Therefore, anybody seated on the Drill Rig could be thrown off or caught by one of the gears, especially when manoeuvring rocky terrain.
- [31] In cross-examination, Mr Smith largely corroborated his evidence in his witness statement. He elaborated that his heavy-duty or industrial machinery licence training involved a written and practical examination. It was two weeks of theory on how the drill was made, the parts of it, and generally to know the operations and four weeks of practicals on how to use the drill and what to do and not do. Mr Smith indicated that the Drill Rig is designed to track, but there is no need to track the Drill Rig if a lowboy is available. A lowboy would be used depending on the distance the drill is going or not to damage the road, but it is not required when the drill reaches its destination.
- [32] Mr Smith stated that one would have to train someone before being asked to track the Drill Rig at the same time. You would have to ensure they have some knowledge to move the Drill Rig. He continued that after you show the person how to operate the Drill Rig a few times, you will know they can do it. You would at least let them stand beside you and show them and show them what is going on physically. For someone with no knowledge of the Drill Rig, there should be at least four weeks of training before being placed on the Drill Rig. He confirmed that he would not take a labourer and simply let him go learn how to operate the Drill Rig.

[33] The evidence-in-chief of Messrs Clauzel and Robert largely confirmed the position or roles of the various parties in CIE, which were not in dispute. In cross-examination, Mr Clauzel indicated that, to his knowledge, the claimant was trained to reduce injuries on the job. He acknowledged that CIE is responsible to the claimant to provide him with personal protective clothing and gear to undertake the work he did. Still, to his mind or knowledge, CIE would have provided the claimant with everything necessary for the job. Mr Clauzel could not confirm that the claimant only received a hard hat and a yellow vest for the last six years as protective gear. He accepted that the Drill rig was dangerous and that CIE did not provide the claimant with footwear, although he should have been, to his knowledge.

[34] Mr Clauzel also acknowledged that Mr Khodra failed to provide for the claimant's safety according to CIE procedures. He indicated that there was a written safety policy for CIE. He would be very surprised if the claimant had never seen the policy for the six years he worked with CIE. He confirmed that more or less just a police record is required; one's educational background is more secondary. If you are hired to operate a machine, you need experience, but if you were there before and showed aptitude and interest, then it is not required. No educational background would be required - only if recruited to do the job then education and experience be required. Still, it would not be required if you are already on the job and show interest and aptitude. However, Mr Clauzel was unaware that the claimant could not read and assumed that for persons who could not read, verbal instructions would be given to operate a dangerous piece of equipment, as they would not take away an opportunity if one cannot read or write. He could not confirm that verbal lessons were given to the claimant because someone else would have given them.

[35] Mr Robert also indicated he was responsible for ensuring the manual for the Drill Rig machine was readily available to the drill operators if needed but acknowledged in cross-examination that there was nothing in place for persons who could not read the manual.

Legal Framework

[36] A helpful start in considering this issue would be setting out the legal framework in the Civil Code. The relevant Articles state:

“985. Every person capable of discerning right from wrong is responsible for damage caused either by his act, imprudence, neglect or want of skill, and he is not relievable from obligations thus arising.

986. He is responsible for damage caused not only by himself, but by persons under his control and by things under his care.

....”

- [37] The parties did not dispute the now-settled position that an employer owed their employee a duty of care recognised at common law to take reasonable care for their employee’s safety and not expose them to unreasonable risks by providing a competent workforce, adequate plant and equipment, a safe system of working (including effective supervision), and a safe place of work. In this regard, the claimant and the defendants respectively referred the court to the authority of ***Stokes v Guest Keen and Nettleford (Bolt and Nuts) Ltd.***¹⁰ and ***Latimer v A. E. C. Ltd.***¹¹ In ***Stokes***, the test for an employer’s common law liability was stated by Swanwick, J. thus:

“... the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent.”

Discussion

- [38] In summary, the burden of proving CIE’s negligence regarding its common law duty of care rests with the claimant. He must prove on a balance of probability by the evidence before the court that CIE failed to provide a safe working environment for him to track the Drill Rig to the quarry pit and train Mr Clearson on the operations of the Drill Rig at the same time; and or failed to provide adequate plant and equipment for the work at hand by not providing a tractor head or a lowboy to transport the Drill Rig to the quarry pit; and or failed to provide at common law a competent staff.

¹⁰ [1968] 1WLR 1776, 1783

¹¹ [1952] 1 T. L. R. 1349, 1353

Therefore, there must be evidence of the adequate or appropriate standard that CIE was reasonably required to meet as obtained in the industry so that the court can determine that there was a failure or breach to meet these requisite standards. Also, it must have been in CIE's knowledge or reasonable foresight that such an accident as the claimant suffered might occur from its failures, as alleged.

- [39] The claimant has not adduced any evidence as to the appropriate industry standard for tracking the Drill Rig and training someone on its operations; however, the evidence of Mr Smith (paras [27] to [32], in particular [32], above) may be instructive in this regard. He indicated that for someone with no knowledge of the Drill Rig, there should be at least four weeks of training, both theory and practical, before being placed on the Drill Rig. He would not take a labourer and simply let him go learn how to operate the Drill Rig.
- [40] Whatever the industry standard, I am satisfied that the practice engaged by CIE through Mr Khodra for the training of Mr Clearson by the claimant on the Drill Rig, an undoubtedly dangerous machine, was below the appropriate standard that was reasonably required. Indeed, in cross-examination, Mr Clauzel acknowledged that one's educational background is secondary, and only if recruited to do the particular job will education and experience be required. It would not be necessary if you are already on the job and show interest and aptitude. Also, without elaboration, he accepted that Mr Khodra failed regarding safety according to CIE procedures.
- [41] Further, although there is no evidence that there has been any accident similar to that which involved the claimant, the consistent position is that the operations of the Drill Rig are inherently dangerous. There is unchallenged evidence from the claimant that when he was trained (albeit on a different Drill Rig), he sat next to 'Roots', who showed him how to change the gear and manoeuvre the Drill Rig, and when the claimant trained Donally (aka Ti Couphre), he sat next to him to show him the ins and outs of the Drill Rig; and that of Mr Smith that the Drill Rig is a hydraulic drill, so the movement is vigorous and sudden when operated and anybody seated on the Drill Rig without seating accommodation provided could be thrown off or caught by one of the gears, especially when manoeuvring rocky terrain. Therefore, CIE ought to have foreseen that the claimant, when directed by Mr Khodra to train Mr Clearson, would have engaged in a similar practice of sitting on

the Drill Rig next to Mr Clearson to instruct him. Also, it ought to have been in the knowledge or reasonable foresight that with such a practice, an accident might occur.

[42] For these reasons and the fact that CIE made no alternative arrangements or had procedures with specific instructions and guidelines for the training of a drill operator on the Drill Rig, I find that the claimant has made out his case for a breach of the common law duty to provide a safe working environment for him to track the Drill Rig to the quarry pit and train Mr Clearson on the operations of the Drill Rig at the same time, which caused or resulted in the claimant injury or loss suffered.

[43] As regards the failure to provide adequate plant and equipment for the work at hand by not providing a tractor head or a lowboy to transport the Drill Rig to the quarry pit, I accept that the Drill Rig was designed to track or move without the need for a lorry or lowboy to transport it to the quarry pit. Still, in this case, where the claimant had to train Mr Clearson while tracking the Drill Rig, it would not have been reasonably practical to do so with the claimant on the ground, walking or running alongside, as the case may be, as suggested by the defendants. The Drill Rig is a noisy machine when operating; thus, to my mind, the claimant on the ground would have been in equal if not greater risk of injuries from the tracks of the Drill Rig, unprotected by a guard while trying to walk or run alongside, communicating instructions and observing Mr Clearson's performance to ensure he was following the instructions properly. Consequently, I agree with the claimant that CIE failed to provide adequate plant and equipment for the work at hand, which, in my view, may also amount to a failure to provide a safe system of work and work environment.

[44] This latter position is consistent with the observation by Lord Greene, M.R. in ***Speed v Thomas Swift & Co. Ltd.***¹², that:

“A system of working may consist of a number of elements and what exactly it must include will, it seems to me, depend entirely on the facts of the particular case. For example, one element may be the sequence in which a particular job ought to be carried out, e.g., in a combined job of demolition and excavation it may be dangerous to begin to excavate before a neighbouring structure is demolished. The decision as to which task is to be performed first appears to me to lie within the master's province and to be a matter of system. It is part of the lay-out of the job which it is the master's duty to decide, and, in doing so, he must pay proper regard to the conditions affecting the safety of his men. The lay-out of the job is logically prior in time to the commencement of the work although, of course, it may have to be modified as the work proceeds, e.g., if in the course of the work a neighbouring bank

¹² [1943] K.B. 557 at 563

threatens to collapse on the workmen, the taking of proper steps to shore it up is, it appears to me, a matter of system. It is logically prior in time to the continuance of the work and is concerned not with the work itself, but with the safety of the conditions in which it is performed. I do not venture to suggest a definition of what is meant by system, but it includes, in my opinion, or may include according to 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 proper cases of warnings and notices, and the issue of special instructions. A system may be adequate for the whole course of the job or it may have to be modified or improved to meet circumstances which arise. Such modifications or improvements appear to me equally to fall under the head of system.”

- [45] Given my findings above, it may not be necessary to consider the further issue of failure to provide competent staff, which the claimant has not pursued considering his closing submission. In any event, at its most robust, this allegation would have to be directed to the claimant’s supervisor for not providing adequate supervision of the training of Mr Clearson. I believe it would be subsumed in the failure to provide a safe environment, which must naturally include adequate supervision. To be otherwise would be illogical to suggest that Mr Clearson’s lack of knowledge and experience in the management and operations of the Drill Rig as a trainee being trained by the claimant was a failure by CIE to provide competent staff.

Damages (issue 3)

- [46] It is settled that an employee who suffered injury or loss due to an employer’s breach of its duty to provide for their employee’s safety and not expose them to unreasonable risks by providing a competent workforce, adequate plant and equipment, a safe system of working (including effective supervision), and a safe place of work will recover damages to so as far as possible to compensate for the injuries and loss sustained. Accordingly, CIE was liable to the claimant in damages for his injuries and loss.

Special Damages

- [47] By his statement of claim, the claimant prayed for special damages of \$3,150.00 and general damages. He particularised his loss and damages as medical report - \$750.00, doctor’s visit - \$150.00, and nursing care at \$750.00 monthly for three months - \$2,250.00. There were also pleadings of loss of earnings by the claimant for \$3,900.00 at an average earning of about \$650.00 fortnightly.

- [48] The claimant provided receipts for his medical report and doctor's visit but no evidence supporting his claim for nursing care. In his witness statement, the claimant confirms that he needed his mother's assistance doing most things; however, he does not say how long this was necessary and at what cost. Neither does the medical evidence of Dr Dagbue assist, as it is silent when the claimant would have needed assistance with his basic daily living activities.
- [49] Regarding the loss of earnings, though, the claimant did not claim it as part of his special damages in his statement of claim. Further, he did not substantiate his loss of earnings despite stating he worked for \$8.00 per hour in his witness statement. There was no evidence of the period he was out of work.
- [50] At this juncture, it is instructive to recall the immortal words of Lord Diplock in *Ilkiw v Samuels*¹³ and Lord Chief Justice Goddard in *Bonham-Carter v Hyde Park Hotel*¹⁴, respectively:
- "Special damages in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularise. It is plain law that one can recover in an action only special damages which has been pleaded and of course proved."
- And,
- "... plaintiffs must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down particulars, and so to speak, throw them at the head of the court saying 'This is what I have lost, I ask you to give me these damages.' They have to prove it."
- [51] However, the court is mindful of the possibility of a nominal award for special damages without specific evidence in proof when there was at least a logical basis for the same.¹⁵ In this regard, by their submissions, the defendants accepted it was reasonable that the claimant was incapacitated for some time and offered (generously, in my view) that if the court is inclined to award a nominal sum, it should be \$1,500.00 (two months at \$750.00) for nursing care and \$1,950.00, half of the sum claimed, as loss of earnings. In the circumstances, I will accept the concession of the defendants and award the claimant special damages of \$4,350.00, being medical report - \$750.00, doctor's visit - \$150.00, nursing care at \$750.00 monthly for two months - \$1,500.00, and loss of earnings at \$650.00 fortnightly for three fortnights - \$1,950.00.

¹³ [1963] 1 W.L.R. 991 at 1006.

¹⁴ (1948), 64 T.L.R. 177 at 178.

¹⁵ *Brentlie Charles aka Brentley Charles v Marcus Corridon*, Claim No. SVGHCV2002/0506 at para. 27

General Damages

- [52] Both sides referred the court to **Cornilliac v St. Louis**¹⁶ as authoritatively laying down the well-recognised matters for consideration in assessing general damages, namely: the nature and extent of the injuries suffered, the nature and gravity of the resultant physical disability, the pain and suffering endured, the loss of amenities suffered, and the extent to which financial prospects have been affected.
- [53] The claimant's evidence of his injuries is that while Mr Clearson operated the Drill Rig, it jerked, his foot got stuck in the track, and he noticed that his toe was severed. He removed the boots and socks, and Mr Khodra gave him a rag to tie around the bleeding. He was taken to Tapion Hospital, where Dr Dagbue told him his toes were crushed, would be impossible to save, and had to be amputated. At about 9 p.m. the same day, he underwent the operation and remained hospitalised for four days. Upon discharge, he visited the doctor every week at Tapion Hospital.
- [54] The claimant stated that he experienced even more pain when he got home than when his toes were severed. He had a problem with my walking and his balance. He had to depend on his mother for doing practically everything for him. He still experiences a lot of discomfort in the toes, particularly when he walks or stands too much. It is a challenge when he drives because of the loss of the big (great) toe. He sometimes has to use his heel to stop or accelerate the motor vehicle. Before the accident, he enjoyed a game of basketball and jogging, but he was no longer able to do so. The injury to his toes has changed his life entirely - he is no longer the person he used to be.
- [55] Further, two years after the accident, the claimant visited Dr Dagbue's offices at Doxa Specialist Clinic, and he prepared a medical report for him, which was adduced in evidence. In the medical report, Dr Dagbue posited the view that he had a whole-person impairment of 4 %, but he honestly feels it is much more than 4%.

¹⁶ (1965) 7 WIR 491

[56] Dr Dagbue also gave evidence at the trial that the claimant was under his care from 8th March 2017 and confirmed the claimant did sustain the amputation of his right great toe at the interphalangeal joint and his right second toe at the distal interphalangeal joint. Dr Dagbue's detailed assessment following the claimant's final visit on 18th March 2019 states:

- The claimant was initially treated with surgical debridement and repair of the stump of both toes. At his last visit, he complained of difficulty standing for prolonged periods of time, walking distances and running.
- The claimant was stable, and over the next year, he is not expected to suffer sudden incapacitation because of the injuries he sustained in the accident.
- The loss of the great toe and second toe are permanent, so even though they have healed well, he will continue to have balance, running and jumping issues.
- The claimant can perform most basic activities of daily living like bathing, cooking, eating, washing, etc., but with some difficulty, as he will have some pain when he stands for prolonged periods.
- He cannot perform work or leisure activities requiring running or jumping.
- Since it was two years since the accident, the claimant is determined to have reached maximum medical improvement. According to the American Medical Association (AMA) guide to the evaluation of permanent impairment, he has a whole-person impairment of 4% from the amputation of the first and second toes.

[57] Dr Dagbue differentiated between "disability" and "impairment". The AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition indicates that:

1. "Impairment" is a significant deviation or loss of use of any body structure or body function in an individual with a health condition, disorder, or disease.
2. "Disability" has been defined as activity limitations or participation restrictions in an individual with a health condition, disorder, or disease.
3. "Impairment rating" has been defined as a consensus-derived percentage estimate of loss of activity reflecting the severity for a given health condition and the degree of associated limitations in terms of activities of daily living.

He explained by way of example: Both a lawyer and a pianist sustain an amputation of the non-dominant little finger. Both have the same "impairment" under the AMA Guides: 100% of the digit,

10% of the hand, 9% of the upper extremity or 5% of the whole person. The lawyer has no “disability.” The pianist could not perform their occupation and was therefore totally disabled from his occupation, although fully capable of many other jobs.

[58] Further, the AMA Guides Sixth Edition indicates that disability was a determination made by an administrative law judge and may or may not have a relationship to an impairment. All editions of the AMA Guides state that an impairment rating is not equal to a disability rating and was not intended to measure disability since disability has to do with limitations or restrictions in job functions rather than the actual anatomic limitation.

[59] The defendants have not disputed the claimant’s injuries nor challenged the medical evidence of De Dagbue.

[60] Both parties referred the court to **Cleston Maynard v Wayne Jeffers**¹⁷. In that case, the claimant, a 27-year-old labourer at the time of the accident, lost his right great toe and half of his right second toe to an accident when offloading golf carts from a large shipping container when the moving parts of the forklift truck engaged in the offloading exercise severed his right great toe. He required immediate surgical amputation of that toe. Attempts by his surgeon to save his right second toe, which was also severely injured in the unfortunate accident, ultimately proved futile and had to be partially amputated some eight days later. The physical pain he endured in the immediate aftermath was excruciating. He continued to experience severe pain during the two weeks of hospitalisation despite a regimen of antibiotics and painkillers. He was, in his own words, “devastated to say the least”, when it became apparent that his right great toe and [second toe] could not be saved after all. He feared he might have to amputate the entire foot. He was emotionally distraught and experienced waves of depression during his hospitalisation. The claimant was discharged from the hospital just over two weeks after the accident. He had outpatient follow-up treatment twice over the next ten days. When he last saw the doctor as a patient, he complained of gait abnormality because of the loss of the great and second toe, right foot pain, which was at its worst at the bone of the right first metatarsal, inability to walk for long periods, and difficulty and pain if running. The claimant gave evidence that he was never pain-free. He was embarrassed to show his feet in public. He feels like an invalid and still gets depressed from time to time. His lifestyle has changed

¹⁷ Ibid, footnote 6

dramatically. Before the accident, he was an active basketball player. He played every day after work and played cricket and football occasionally. He can no longer do so because of his injuries. Also, he used to climb trees and engage in many outdoor activities with his son, who was three years old at the time of the accident. He was not able to do that after the accident. Based on the doctor's testimony, the claimant is never pain-free and has diminished lower limb function. He concluded that the claimant had suffered a fifteen per cent permanent partial disability. The claimant should still be able to play sports, particularly basketball, but with impeded or diminished capacity. Jumping, running or walking for long periods would be difficult for him. The court awarded the claimant \$95,000.00 for pain and suffering and loss of amenities.

[61] In the instant case, the claimant urged the court to make a comparable award of \$95,000.00 for pain and suffering and loss of amenities, as the injuries suffered by the claimant were very similar to those in the **Cleston Maynard** case ("the cited case"). On the other hand, the defendants argued that while both claimants have similar injuries, the claimant in the cited case experienced more complications and limitations due to his injuries. As such, the claimant in the instant is not justified in receiving a similar award and proposed the sum of \$65,000.00 for the instant claimant's pain and suffering and loss of amenities.

[62] The defendants contended that, unlike the claimant in the cited case, who was hospitalised for two weeks and had two surgeries, the claimant was hospitalised for four days with only one surgery. The cited claimant suffered a 15% permanent partial disability, while the claimant has a whole-person impairment of 4% from the amputations. The cited claimant also experienced depression during his hospitalisation, suffered gait abnormality, and must wear special footwear. Also, the loss of the toe function may increase stress elsewhere, leading to other further problems such as arthritis, bone inflammation (osteomyelitis) and inflammation of the joint lining (synovitis) due to extra dependence for balance on the remaining toes. The cited claimant was never pain-free, was embarrassed to show feet, and felt like an invalid from time to time. Before the accident, he was an active basketball player - playing every day after work, and played cricket and football occasionally. However, he can no longer do these things because of the injuries. In contrast, the claimant can perform the most basic activities of daily living but with some difficulty, and he will have some pain when he stands for prolonged periods. The claimant cannot perform work or leisure activities that

require him to run or jump. The claimant's evidence is that he used to enjoy a game of basketball and jogging but could no longer do so.

[63] While the overall evidence, particularly the medical report, herein was not as detailed as that in the cited case, I am satisfied that both parties suffered almost identical injuries. Indeed, their specific operative and post-operative situations were different, and apparently, how they managed and coped with their new reality. Still, this is not unusual or unexpected because people are unique. I believe that the inherent uniqueness of the respective cases should not significantly affect the claimant's award, as assessing general damages in personal injury cases is not pure science. The court strives for reasonable compensation to the aggrieved party for their pain and suffering and loss of amenities.

[64] Recalling the often-cited dictum of Lord Hope of Craighead in **Wells v Wells**¹⁸ that:

“The amount of the award to be made for pain, suffering and loss of amenity cannot be precisely calculated. All that can be done is to award such sum within the broad criterion of what is reasonable and in line with similar awards in comparable cases as represents the Court's basic estimate of the plaintiff's damage”.

I considered the nature and extent of the claimant's injuries; he underwent surgery and was in severe pain even after his discharge from the hospital. Also noteworthy is the distinction between “disability” and “impairment” and the fact that an impairment rating was not equal to a disability rating nor intended to measure disability. Indeed, despite the claimant's whole-person impairment of 4%, given the almost identical injuries in both cases, I can see no good reason why the degree of disability would not be comparable. Equally, I can see no basis for the loss of amenities to vary significantly, even if the cited claimant may have engaged in an additional activity or two more than the claimant. The real test is the deprivation of the enjoyment of the activities they could no longer participate in and enjoy, which seems to me to be the same. Also, bearing in mind the age of the cited case award of almost eight years, inflation adjustments will be needed over the years.

[65] In all the circumstances, I find an appropriate award for the pain and suffering and loss of amenities for amputation of the claimant's right great and second toes at the interphalangeal joint would be \$95,000.00, comparable to the cited case.

¹⁸ [1998] 3 All ER 481

[66] Finally, the claimant also submitted that from his injuries, there could be no doubt that he suffered damages to his capacity to work or, put another way, he could not compete with able-bodied persons on the open job market. He relied on ***Smith v Manchester Corporation***¹⁹ to support this submission and invited the court to award a lump sum of \$25,000.00 for handicaps on the labour market. Yet again, the claimant did not plead this in his statement of case, nor was there any evidence on which I may consider this matter. Accordingly, it must fail.

Conclusion and Disposal

[67] Interest in personal injury cases²⁰ is usually awarded on special damages from the date of the incident to the date of judgment at half of the applicable rate of interest, while on general damages from the date of service of the claim to the date of judgment at the applicable rate, and both species of damages at the applicable rate from the date of judgment until payment. However, given that the special damage strictly proven was dated 18th March 2019, the defendant paid all previous medical expenses and the defendant's concession on its other aspects, I would award interest only from the date of judgment on both species.

[68] The defendants presented a joint defence so that I would make a single award of prescribed costs.

[69] I, therefore, enter judgment for the claimant and now order CIE to pay the claimant:

- (1) Special damages of \$4,350.00.
- (2) General damages for the pain and suffering and loss of amenities for amputation of the claimant's right great and second toes at the interphalangeal joint of \$95,000.00.
- (3) Interest under Article 1009A of the Civil Code at the statutory rate of 6% per annum on the total damages from the date of judgment to payment.
- (4) Prescribed costs.

**Justice Rohan A Phillip
High Court Judge**

By the Court



Dp. Registrar

¹⁹ (1974), 17 KIR 1

²⁰ *Alphonso v Ramnauth* (1997) 56 WIR 183, 195.