

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

COMMONWEALTH OF DOMINICA

CIVIL

SUIT NO: DOMHCV2009/0327

BETWEEN:

KELVIN FIRMIN

Claimant

AND

E.H. CHARLES & CO. LTD

Defendant

Appearances:

Mrs. Laurina Vidal Telemaque for the Claimant

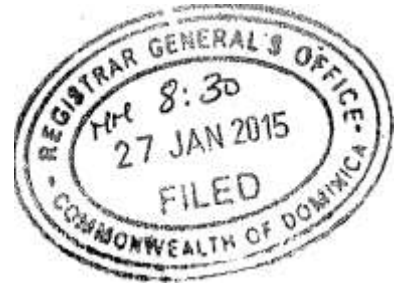
Mrs. Hazel Johnson for the Defendant

2014: October 20th, 21st

2015: January 27th

JUDGMENT

[1] THOMAS, J (Ag.): In this claim form filed on 10th September 2009, Kelvin Firmin, the claimant is seeking damages flowing from the alleged negligence of the defendant, E.H. Charles & Co. Ltd.



- [2] It is the claimant's case that at all materials time he was employed by the defendant as a construction worker/handyman and that on 3rd February 2007, as part of his duties he was directed to place bat proofing in the ceiling of the defendant's building at Fond Cole. It is further pleaded that in order to perform his duties he was given certain items, namely: a fiber glass ladder and a bucket with bat proofing soaking in copper green wood preservative with an oil base. Further, that he was required to go up and down the ladder repeatedly to a height of up to fourteen feet. And further still that in the process of executing the said bat proofing the ladder on which he was doing the work slipped and he fell to the floor thereby sustaining serious injury.
- [3] In terms of the injuries the claimant's plea is apart from both of his elbows being placed in plaster of paris, he had to be operated on by Dr. Julian De Armas on 13th June 2007.
- [4] In his statement of claim the claimant pleads: particulars of negligence, particulars of injury and particulars of damages, including exemplary damages.

Defence

- [5] At paragraph 3 of the amended defence, the defendant denies the claimant's pleadings regarding the equipment supplied for the purposes of work. The averment is as follows:
- "(a) The Claimant and other workmen were supplied with aluminum ladders, adjustable up to 14 feet with rubber grips at the base.
- (b) The Claimant was provided with bat proofing which had been soaked in a solution and which was dry at the time of use. The Claimant was not provided with a bucket containing the solution and was not required to keep the solution in the bucket while installing the bat proofing. If, which is not admitted, the Claimant had a bucket with the bat proofing soaking in the solution as alleged then the Claimant was acting contrary to the practice, policy and instructions of the Defendant."
- [6] With respect to the claimant's fall while executing his work, this is admitted. Also admitted is the claimant being taken to the Princess Margaret Hospital, but it is averred that the defendant is not aware as to what caused the claimant to fall.
- [7] In the remainder of its defence the defendant: (a) disputes that the calcification and displacement of the claimant's elbows and the surgical removal of the radial heads were directly occasioned by

the claimant's fall; (b) the particulars of negligence pleaded by the claimant are denied and the provision of a safe system of work is pleaded; (c) it is averred that the claimant's alleged fall, injury and damage were caused by or contributed to by the negligence of the claimant; and (cl) that the claimant is not entitled to exemplary damages or any damages or any relief against the defendant.

Evidence

[8] The evidence in the case was given by the following persons:

- (a) Kelvin Firmin, the claimant,**
- (b) Dr. Julian De Armas, Orthopedic surgeon;**
- (c) Marietta Johnson, girlfriend of the claimant;**
- (d) Egbert Charles, Managing Director of the defendant company;**
- (e) Hilroy Lloyd, an employee of the defendant**
- (D Dr. Basil Fadipe whose report on the claimant was entered by consent;**
- (g) Dr. Hendricks Paul whose report on the claimant was also entered into evidence by consent.**

[9] All witnesses, except Dr. Fadipe and Dr. Paul, were cross-examined. Aspects of the evidence will be quoted in the judgment.

Findings of fact

[10] It is the finding of the court that on February 3rd, 2007 Kelvin Firmin, the claimant, went to work at his work place of the defendant before 7:00 am. The work on that day consisted of repairing the roof by replacing the galvanize sheets and placing bat proofing in the groove of the galvanize before they are nailed.

[11] The claimant initially was handing up galvanize sheets to the men on the roof. At this time too, Egbert Charles was on the outside of the building giving instructions to the workers in the roof concerning the sheets to be nailed. The workers on the roof were Riviere, Brother Lewis, and Anselm. Three workers were on the inside of the building on ladders doing the bat proofing.

- [12] Egbert Charles told the claimant to leave what he was doing and go on the inside to do bat proofing since another worker, Damien, was working too slow.
- [13] The rollers to be placed on the roof on Saturday, 3rd February 2007 were soaked on the day prior, being Friday, and there is no evidence that these rollers were completely dried on the Saturday. This led to the use of pails to hold the wet rollers while the workers were on the ladders.
- [14] The removal of the wet rollers gave rise to some of the liquid used falling on the floor. Egbert Charles also wanted the bat proofing to be done quickly given the reason for putting the claimant to do the bat proofing in place of Damien.
- [15] Both Hilroy Lloyd and Egbert Charles gave evidence about the chemical solution. Lloyd said it was dangerous with a strong scent; while Charles testified that it "was hazardous." And without contradiction, the claimant said the chemical solution is "an oil based chemical called Copper Greenwood preservative." Hilroy Lloyd also said in his evidence that gloves must be used. None of the workers doing the bat proofing had gloves.
- [16] Given the un-contradicted evidence that the claimant suffered broken bones in both of his elbows a reasonable inference is that he fell forward which the claimant said at paragraph 18 of his witness statement. This rules out a fall sideways because he was stretching out beyond his normal reach. The court accepts also paragraph 18 of the claimant's witness statement which reads thus:
- "While I was working on the ladder I felt the ladder slide back and I was falling forward. I then placed my hands down to protect my face. I fell to the floor and shouted out because I felt a lot of pain in my arms."
- [17] The court also finds that Egbert Charles is not a witness of the truth for the following reasons:
- (a) Charles did not recall who put the rollers to dry or who was assigned to this task.
 - (b) Charles later in his evidence testified that the rollers could have been soaked 2 to 3 days prior.
 - (c) Under cross-examination Charles said that the rollers have to be dried 48 hours before.
 - (d) Charles could not recall who had rollers in their pockets.

- (e) In evidence in chief the witness said that Copper Green Wood Preservative is "very strong and hazardous to keep it in the buckets while the rollers are being placed."
- (D Under cross-examination Charles said that the [oil based chemical: Copper Green Wood Preservative] may be hazardous.
- (g) Under cross-examination Charles said that he could not remember when he went to see the claimant at the hospital. He went on to say that it had to be the day after. In fact the claimant was released on the same day he was admitted.
- (h) Did not see how the accident happened.
- (i) Did bat proofing numerous times compared with a few times by the claimant.
- (U) Could not remember the exact amount of the insurance.
- (k) Said he was not standing on a plank resting on 3 planks.
- (l) Could not recall Damien or if he worked for him.
- (m) Could not remember the details about the galvanize or who moved them.
- (n) Could not remember moving Kelvin to do bat proofing rather than handing up the galvanize.
- (o) Could not remember Copper Green Wood Preservative or if he sold it.
- (p) Did not agree that giving the men gloves on the day in question was prudent.

Issues

[18] The issues for determination are:

1. Whether the accident was as a result of the defendant's negligence in failing to provide a safe system of work and safe equipment, and, if so, whether the claimant was contributorily negligent?
2. If the defendant is liable, liability for damages?
3. Whether the claimant is entitled to interest?
4. Who is liable in costs?

Issue No.1

The first question is whether the accident was as a result of the defendant's negligence in failing to provide a safe system of work and safe equipment, and, if so, whether the claimant was contributorily negligent?

[19] This case involves injuries to the claimant's elbows when he fell forward on a ladder on which he carried out his duties of installing bat proofing as an employee of the defendant. The narrow question then becomes where the negligence, if any, lies.

[20] Clerk and Undsell on Torts¹ in discussing the employer's personal duty to his employees says this:

"The duty is often explained under four heads: the provision of safe staff; safe equipment; safe place of work; and a safe system of work. These heads provide a useful framework for analysing the duty but it should be remembered that they are part and parcel of one duty within the law of negligence..."

[21] The law of negligence is constituted by four elements: a duty of care owed, breach of the duty of care by the defendant, a causal connection between the defendant's careless conduct and the damage and the particular kind of damage to the particular claimant is not so unforeseeable as to be remote².

[22] In the case of the employer and employee the duty of care has special requirements which in broad terms may be described as a safe system of work.

Submissions

[23] Learned counsel for the claimant in furthering her client's case submits that: the employer's duty of care towards his employees is to see that reasonable care is taken to provide safe fellow servants, safe equipment, safe place of work and access to it, a safe system of work³. Also that the employer's duty further extends to the duty to provide a safe system of work for its employees and

¹ At para 13-06

² Clerk and Undsell on Torts, (19th edition.) at para 8-04 et seq.

³ Wilson and Clyde Coal v English [1928] AC 81-85 and Davies v New Meron Board Mills Ltd [1959] 1 AC 84 are cited

must ensure as far as possible that the system is adhered to. In devising a system of working the employer must take into account the fact that workers are often heedless to their own safety⁴. Further, the employer must also exercise reasonable care to see that the system of work is complied with by those for whose safety it is instituted and that the necessary safety precautions are observed.

[24] The submissions on behalf of the claimant continue:

- "29 The employer must however take reasonable care to see the system of work is followed, and it is a question of degree and of fact whether this has been done in every individual case. In the case of *Nolan v Dental Manufacturing Co. Ltd.* A workman was blinded while sharpening a tool on a grinder when a chip flew off and entered his eyes. It was held that the common law duty of the defendants was not only to provide him with goggles but also to issue 'strict orders that they were to be used', and to supervise their workmen, at any rate to a reasonable extent, in order to ensure that their orders were obeyed.'
30. The Defendant's evidence is that the solution used for the purpose of soaking the rollers in hazardous. The rollers were soaked in it the night before and placed to dry. In cross examination, Mr. Egbert Charles admitted that the rollers **should be** placed to dry 'at least 48 hours' before they are used. It is the submission of the claimant that the defendant did not provide a safe system of work when it soaked the rollers a day before use instead of 48 hours before use.
31. In the present case Hilroy Lloyd (for the Defendant) stated in examination in chief that he soaked the rollers the day before use. In answer to a question posed to him by Counsel for the Defendant he stated that the "rollers dry overnight for us to work the next day". In cross-examination he stated that he placed the rollers to soak the Friday before he left work. The accident occurred on Saturday morning.
32. The claimant submits that based on the evidence led by the Defendant the rollers were placed to soak less than 24 hours before they were used. It is submitted that work ended at 4:00 p.m. the day before. The evidence before the Court is that the accident occurred at about 9:30 a.m on Saturday.
33. The Claimant submits that this supports his evidence that the rollers were wet and still in the solution. The rollers could not have been dry for use 17 hours later. It was not left to dry for 'at least 48 hours', which is what is required.
34. The Defendant, therefore, through its employee (Hilroy) and based on the explanation given by Mr. Charles about the bat proofing process, caused its employees to use rollers which were not left out to dry at least 48 hours before use. In this case, less than 24 hours.
35. Mr. Charles was not able to tell the court that in this instance the procedure of putting the rollers to soak the day before was in fact followed. He could not tell the court that he did

⁴*General Cleaning Contract v Christmas* [1953] AC 180, 180-190 AND *Gilbert Kodilinye, Commonwealth Caribbean Laws of Torts*, (2nd ed) at pp. 173-174 are cited

not see any solution in the Claimant's pail. He could not tell the court when the rollers were soaked."

[25] As far as the defendant the submissions expand on the pleaded case that the defendant is not in breach of his duty of care. The submissions, in part, run as follows:

"6 *Competent staff of men*: the case raises no issue as to the competence of the co-workers of the Claimant

7. *Adequate plant/ and equipment*: An employer is required to take necessary steps to provide adequate plant and equipment for his workers and he will be liable to any workman who is injured through the absence of any equipment which obviously necessary or Vhich a reasonable employer would recognize as being necessary for the safety of the workman (*The Law of Torts in the West Indies*, G. Kodilinye, p. 113-114)
8. The evidence in the matter, which is confirmed by the Claimant, is that all equipment and safety gear required for specific jobs were provided by the Defendant when those were being undertaken.
9. In the case of !he bay proofing exercise the Defendant provided the Claimant with all the implements required, that is a fibre glass ladder with rubber padding at the footing, a bucket and the bat proofing rollers.
10. The Defendant's evidence is that other gear such as gloves, hard hats, special shoes and overalls, referred to by the Claimant, were not required for the exercise. The Claimant also states in cross examination that the provision of those items would not have prevented him falling and injuring his elbows.
11. The Claimant alleges that scaffolding ought to have been used instead if ladders. However, he admitted that on all previous occasions that he had done bat proofing or saw other workers do it ladders were always used. Further it is the unchallenged and uncontroverted evidence of Mr. Egbert Charles, who has over 45 years of experience in the construction sector, that scaffolding is not used to do bat proofing. His further evidence is that the use of ladders is easier and more practical having regard to the varying heights of the sloping roof (Para 10 W.S. of Egbert Charles p. 30 of T.B.) It is submitted therefore that the use of ladders was obvious and reasonable.
12. *A safe place of work*: There is no allegation that the premises where the work was being undertaken were unsafe.
13. *A safe system of work*: An employer must organize a safe system of work for his employees and ensure, as far as possible, that the system is adhered to. The system of work is the physical lay-out of the job- the setting of the stage- the sequence in which the work is to be carried out (op cit).
14. The system of work that was in place at the material time is set out in detail in the witness statement of Egbert Charles at paras 5 to 15 (T.B. p30-31) and the witness statement of Hilroy Lloyd at para 7 (T.8. p.28).
15. The Claimant has not disputed those accounts of the system of work, except that he claims that he was required to keep in the solution in his bucket on that day. Interestingly, he stated in cross examination that in all the 14 years that he worked there it was the first time that he was required to keep the solution in his bucket.
16. It is submitted that the evidence of the witness for ihe Defendant clearly demolish.es this allegation by the Claimant. Mr. Charles and Mr. Lloyd presented themselves as witnesses of the truth and were unshakable in their evidence that on the day of the

accident, no worker was required to keep the solution in the bucket, that the rollers had been soaked previously to use and were dry when being used, that the floor where the Claimant fell was dry when they went to assist him after he had fallen.

17. We urge the Court to believe the evidence. It is all too convenient that this was the time in 14 years that workers were asked to keep the solution in the bucket. Further, it makes no sense that the Claimant would be asked to keep a hazardous chemical in his bucket and he would not use or insist on being provided with gloves. This makes no sense for the simple reason that it is untrue.
18. *Supervision:* The evidence of Mr. Charles at para · 15 of his witness statement (T.B. p31) speaks to the fact that he supervised the works both on the roof and inside the building. This aspect of his evidence was never questioned or challenged in cross examination nor was it controverted by any evidence whatsoever by the Claimant.
19. It is therefore submitted that the Defendant fulfilled its duty of care to the Claimant in every aspect and is therefore not liable for his fall and resulting injuries.

Reasoning

- [26] It is clear to the court that the aspect of the duty of care that emerges is safe system of work. In this connection in Clerk & **Lindsell on Torts** the learning is in part as follows:

"This is an over-arching obligation, supporting and supplementing the other aspects of the personal duty. At its lowest, it requires appropriate instruction of the workforce as to the safe performance of the task. But with a task of any complexity, it requires the use of a safe system of work. This may involve the organisation of the work, the procedure to be followed in carrying it out, the sequence of the work, the taking of safety of precautions and the stage at which they are to be taken, the number of workers to be employed and the parts to be taken by them, and the provision of any necessary supervision..."⁵

- [27] At the center of the safe system of work are the bat proofing, the soaking of the rollers in a chemical and the fitting or placing of the rollers.
- [28] Learned counsel for the claimant concentrates her argument essentially on the soaking of the rollers to show the alleged breach; while for the defendant's learned counsel contends that all that was required to be done with the ambit of the duty was done. But there is more.
- [29] In the view of the court the safe system of work and safe equipment bear heavily on the rollers and the chemical in which they are supposed to be soaked prior to use, and the method of application.

⁵ At para. 13-13

[30] It cannot be doubted that the claimant said that the chemical involved was copper green wood preservative. And Egbert Charles of the defendant said that this solution was "hazardous". This was echoed by Hilroy Lloyd who worked with the claimant. But beyond the solution being hazardous, the claimant testified that it was oil based. This was not contradicted neither by Charles or Lloyd.

[31] Part of the defendant's contention that the all that was necessary in the circumstances was done rests on the procedure detailed by Lloyd in his witness statement. This is what he said at paragraph 7:

"7. The process involved in bat proofing a roof is that:

- "(i) 3" x 1" wooden rollers are put to soak in a chemical solution to treat them to resist termites. I am usually the one who puts them to 'soak. For that job I am the one who had put them the day before.
- (II) Before we leave work on the day before we are supposed to use the rollers, I take them out of the solution and lay them out to dry on a piece of plastic overnight. The chemical solution is dangerous and it has a strong scent. Gloves must be used when putting the rollers in and taking them out of the solution.
- (III) When we come to use the rollers the next day they are dry. We place the dry rollers in our pockets or in buckets. We are not supposed to have any of the solution or any other liquid in the bucket when using the rollers.
- (IV) The company provides each one of us, including Kelvin Firmin, with a 14 foot adjustable aluminium ladder with rubber grips at the footing.
- (V) The ladder is positioned between the truss of the roof and placed in a stable position on the floor. We check that it is stable before climbing. We climb up the ladder and place the rollers where the workers on the roof direct us to place them. When the roller is put in place the workers on the roof nail it down. We place them by lanes and go according to where our hands can reach. When the next one is out of our reach or we need more rollers, we tell those on the roof to wait, we climb down the ladder, reposition it, or get more rollers and climb back up."

[32] It will be recalled that the learning quoted above, in summary spoke to: appropriate instructions of the workplace as to safety, organization of the work, the procedure to be followed in carrying it out, the sequence of the work, the taking of safety precautions and the different stages of the application; the number of workers to be employed and the parts played by each and the necessary supervision.

[33] Against the foregoing the court notes the following:

- (a) the use of a hazardous chemical solution which is hazardous and designed to be termite resistant;
- (b) according to Lloyd the solution is dangerous and has a strong scent;
- (c) the solution is oil based which was not contended;
- (d) the ladders had rubber grips on the legs;
- (e) the soaking of the rollers in the solution should be done 48 hours prior;
- (D) with respect to the day in question the rollers were soaked the day before and were used on the following date prior to 9:30 a.m which the alleged accident occurred;
- (g) the rollers could not be dry as they were soaked the night before and there is no evidence that the rollers were put out to dry, prior to use;
- (h) Hilroy Lloyd said that he is the one who put the rollers to soak the day before; but the claimant said it was Letang;
- (i) according to Egbert Charles no gloves were provided on the day in question;
- (U) in re-examination the claimant testified that wet and dry rollers were used in Picard, Portsmouth, Fond Cole and River Estate;
- (k) the claimant's further testimony is that Mr. Charles would provide protective gear such as gloves, respirators and goggles; but on February 3rd 2007 he provided nothing.

[34] Even in the absence of expert evidence as to composition and nature of the oil based chemical product known as copper green wood preservative, certain reasonable inferences can be drawn by the court. And in this regard some of the claimant's evidence regarding the chemical can be accepted by the court.

[35] As to the nature of the chemical, the court can draw the reasonable inference that since it is a chemical designed to resist termites, it must of necessity have a long residual effect. From the strong smell and it being hazardous, this is where the matter of the pails comes in, since on the day in question the court accepts that the rollers were not dry. And it follows further that having to place the rollers in the roof involved; placing the hand above the head with wet rollers, the solution dripping on the claimant's hands and then on to the floor several times completes the cycle.

[36] The fact that the claimant did bat proofing four times before and nothing happened is no room for comfort for the defendant. In this connection there are two distinct features: first it was being done

- indoors on the inside of a warehouse as distinct from a residence in which the roof would be different; and secondly no respirators or gloves were provided. Both of these factors go to the hazardous nature of the chemical solution in relation to humans.

[37] In the face of the foregoing, the question is what did the defendant do to create a safe system? In particular, in the face of wet rollers being used, what did the defendant do to safeguard the slipping of the ladder, whether fibre glass or aluminum slipping on the oil based chemical or otherwise? And what safety precautions did the defendant put in place in order to safeguard the claimant and other workers against the effects of the strong smelling and hazardous chemical while indoors? Again, the fact that there was nothing in evidence of prior accident while doing bat proofing does not excuse the defendant from its legal obligations to the claimant.

[38] As indicated before, the court does not accept that the evidence that the claimant was stretching beyond his reach which caused him to fall. There are two pieces of evidence which contradict this assertion. Further, the claimant damaged both elbows which implies falling forward which is the claimant's evidence. Indeed, the claimant's evidence is that he felt the ladder going backwards and while falling he put up his hand to guard his face. Second, Hilroy Lloyd gave evidence that he was constantly watching the claimant and seeing him stretching beyond his reach; however, with regard to the material time he did not see when the claimant fell. This was testimony in cross-examination. .

[39] In terms of supervision, there is no evidence in this regard. By implication Egbert Charles was in charge and his evidence is that at the material time he was on the roof but heard the commotion in the warehouse and then went to investigate.

Conclusion

[40] It is the conclusion of the court that the defendant failed to satisfy its legal obligation to provide a safe system and safe equipment and as such is liable in negligence because:

- (a) the defendant is in the business of construction and trades in building materials, hardware and house items;

- (b) it Managing Director, Egbert Charles, was the person in charge of the bat proofing on February 2007 and is a Building Contractor by trade and has been in that field for 45 years;
- (c) the procedure respecting the soaking and drying of the rollers was not followed since the rollers were soaked on the day prior and then used early on the following day;
- (d) the Managing Director of the defendant, Egbert Charles and Hilroy Lloyd, an employee, said in evidence that the chemical was hazardous, dangerous and strong smelling;
- (e) the evidence does not reveal that the defendant implemented any precautions to safeguard the claimant against :-
 - (I) the inhalation of the dangerous, strong smelling and hazardous chemical,
 - (II) the wet rollers dripping the chemical on the claimant and then on to the floor of the warehouse,
- (111) the effect of the oil based chemical on the ladder with rubber grips
- (n failed to provide appropriate safety equipment such as gloves and respirators which were provided on other occasions.
- (g) the claimant's injuries flowed from the defendant's breach of its duty to the claimant.

Contributory negligence

- [41] Contributory negligence arises where a person fails to act as a reasonable and prudent man in the context of damages arising from negligence⁶. This is the submission of learned counsel for the defendant who contends that the claimant was aware of the safety equipment but did not ask for the same. On the other hand, learned counsel for the claimant submits that if the court is minded to make a finding of contributory negligence, it should be limited to 10%.

⁶See: James v Livox Quarries Ltd [1952] 2 QB 608, 615 per Denning LJ; Barley v Gore Bros Ltd [1963] 6 W.L.R. 23

- [42] There can be no doubt that the claimant was aware of the safety equipment provided, on other occasions and did not request these items on the occasion in issue. The court therefore fixes the claimant's contributory negligence at 10%.

Issue No. 2

If the defendant is liable, what is its liability in damages?

- [43] At issue are the personal injuries with the attendant medical ramifications. The particulars of injury pleaded are: "bilateral radial head fracture with calcification and displacement of both elbows. As a result the claimant has suffered severe injuries, loss and damages.

General damages

- [44] It is common ground that in Commonwealth Caribbean the seminal case of *Cornilliac v St. Louis*⁷ is authority for the proposition that in relation to personal injuries the heads to be considered are: the nature and extent of the injuries sustained; the nature and gravity of the resulting physical disability; the pain and suffering endured; the loss of amenities resulting; and the extent to which, the injured person's pecuniary prospects have been materially altered.

Extent of injury, pain and suffering and loss of amenities

- [45] In the case of *Kathleen Mc Nally and Eric Lotte Citco (BVI) Limited*⁸ *Rawlins J* (as he then was) in the context of damages for personal injuries, noted that:

"The practice is to grant a global sum for general damages for pain and suffering and loss of amenities, considering these against the background of the nature and extent of the injuries suffered and the nature and gravity of the resulting impairment and physical disability. There is usually an attempt to calculate pecuniary loss (actual and future earnings) and, in addition, loss of earnings capacity (compensation for diminution of earning capacity) where applicable."

- [46] Dr, Julian De Armas in his report dated 10th November 2007, in part states:

"Re: Kelvin Firmin

The above mentioned patient was seen at my office on 1st May 2007, complaining of pain both elbows. Mr, Firmin related that on 3rd February 2007, he fell from a ladder at work. He

⁷ [1965] 7 W.I.R 491, 492

⁸ BVIHCV 2001/0068

received treatment for his injuries at Princess Margaret Hospital; a bilateral cast was set for a period of six weeks starting 3rd February 2007.

11 X-ray of both elbows showed bilateral radial head fracture with calcification and displacement. On 13th June 2007, Mr. Firmin underwent surgery where both radial heads were removed. Mr. Firmin was to take part in a physiotherapy programme.

As of 14th August 2007 a review of Mr. Firmin's condition showed limitation and pain during examination of both elbows.

Taking into consideration Mr. Firmin's present occupation, the limitation of the injuries sustained his inability to use his hands and also the inability to lift any weight; I am recommending Mr. Kelvin Firmin for Total Disability as these limitations are permanent and progressive."

- [47] A subsequent examination of the claimant by Dr. Hendricks A. Paul, MBBS, FRCS on 19th December 2012 revealed the following:

"There is good range of movement of both elbows. No stiffness. However he complains of pain at the extremes of movement. The grip is strong. Pulling and pushing is decreased by 30%.

Conclusion: Mr. Firmin is not totally disabled. He may however have recurrent pain with over use of his upper limb."

- [48] By way of submission, learned counsel for the claimant contends that the damages are awarded for the reduction in the ability of the claimant to perform tasks and enjoy life and it matters not that whether he is conscious or not of the effect upon his life.⁹ On the other hand, learned counsel for the defendant after referring to the awards in the cases of Peter Cherry et al v Trevor "Frim"¹⁰ and Laura Morrocco v AG of Antigua and Barbuda¹¹ submitted that while the injuries in these cases were not identical they served as a guide in respect of multiple, serious injuries with some level of resulting disability¹².

- [49] Having regard to the nature of the medical evidence that the claimant suffered initial pain which is recurrent and the authorities cited, the court awards \$40,000.00 for pain and suffering and loss of amenities.

Loss of future earnings and earning capacity

- [50] According to McGregor on Damages:

⁹ At paras 84 and 99-100 of closing submissions and the case of Novena Daniel v Peter Nicholas 2006 is also cited

¹⁰ SLUHCv2011/0073

¹¹ ANUHCv2001/0240

¹² At paras. 41 and 42 of closing submissions.

"The claimant is entitled to damages for the loss of his earning capacity resulting from the injury: this generally forms the principal head of damage in a personal injury action. Both earnings already lost by the time of the trial and prospective earnings are included."¹³

- [51] It is common ground that the method of arriving at damages under this head is by a mathematical combination of an appropriate multiplier and multiplicand. This is also explained in **McGregor on Damages** in this way:

"The courts have evolved a particular method for assessing loss of earning capacity, for arriving at the amount which the claimant has been prevented by the injury from earning in the future. This amount is calculated by taking the figure of the claimant's present annual earning less the amount, if any, which he can now earn annually, and multiplying this by a figure which while based upon the number of years during which the loss of earning power will last, is discounted so as to allow for the fact that a lump sum is being given now instead of periodical payments over the years. This latter figure has long been called the multiplier; and the former has come to be referred to as the multiplicand. Further adjustments, however, may or may not have to be made to multiplicand or multiplier on account of a variety of factors."

- [52] It is common ground that at the time of the accident, the claimant earned \$336.00 weekly or \$1,344.00 monthly. It is also not in dispute that at the time of the accident the claimant was 36 years old and 44 years old at the date of the trial.

- [53] There can be no dispute that the multiplicand is \$1,344.00. The issue arises as to the multiplier. Learned counsel for the claimant cites *Alphonse et al v Ramnauth*¹⁴, *Robert Antoine v Johnson International et al*¹⁵ and *McNally v Eric Lotte Citco (BVI) Ltd* to and submits that multiplier should be 13. On the other hand, learned counsel for the defendant submits the following:

"At the time of the accident the claimant was 36 years old. The normal retirement in the private sector in Dominica is 60 years old. In the recent case of *David Robin v Ulysses Auguiste* (DOMHCV2003/0141) the court applied a multiplier of 8 in respect of a 41 year old man (para. 15). We submit that a similar multiplier is applicable to the claimant in this case."

- [54] The court considers that the weakness in the submission of behalf of the defendant lies in application of the retirement age of 60 in the private sector to the claimant's case. The fact is that

¹³ At para. 35-047

¹⁴ [1997] 56 W.I.R 183

¹⁵ BVIHCV2001/0068

the claimant is a mason by trade, weekly paid and without security of tenure. Accordingly, the court agrees with the reasoning in *Alphonse et al v Ramnauth*¹⁶ and as such a multiplier of 12 would be appropriate.

- [55] Using the multiplier of 12 years or 144 months and the multiplier of \$1,344.00 this yields \$193,536.00. This figure is subject to the usual 10% discount on account of the lump sum payment plus the fact that the medical examination by Dr. Paul in 2011 revealed that the claimant is not totally disabled. However, Dr Paul's opinion did contradict the earlier medical opinion that the claimant would be unable to lift anything in excess of 221bs. The difficulty the court has is that Dr. Paul did not give any indication as to the extent claimant's ability, except that he may have recurrent pain with over use of his upper limb. In this context learned counsel for the defendant submits that there is a possibility of training that may be involved and the cost thereof. Further, the court must bear in mind the fact that the award is a one off payment to a man who is substantially disabled.

Loss of earning capacity

- [56] The reasoning applied with respect to the claimant's disability is also applicable to the loss of earning capacity. This rests on the rule laid down in *Alphonso v Ramnauth*¹⁷ in which Singh JA, speaking for the Court of Appeal ruled that an award would arise in circumstances where the claimant, at the time of the trial had a job, but there is a risk that he may lose it in the future because of his injuries. By parity of reasoning, the claimant had a job as a mason but lost it because of his injury. And based on the medical evidence he will be unable to do any job involving the over use of his upper limb.

- [57] Based on the awards in **Alphonso v Ramnauth** and other cases¹⁸ counsel for the claimant has urged the court to award \$25,000.00 under this sub head.

- [58] In the circumstances the claimant is awarded \$20,000.00 for loss of earning capacity.

¹⁶ Loe cit

¹⁷ Loe cit

¹⁸ *Fariley v John Thompson (Design and Contracting Division) Ltd.* 2. Lloyd's Rep. 40; *Moeliker v A. Reyrolle & Co. Ltd* [1997] 1 ALL E.R.q.

Special damages

- [59] The rule regarding special damages is that they should be pleaded and proved¹⁹. In this regard the claimant pleads: medical costs to date- Princess Margaret Hospital \$3,120.00; Dr. Julian De Armas \$960.00; Dr. McIntyre - \$50.00; cost of medication- \$235.00; costs of domestic assistance for 5 months \$2,750.00. This yields a total of \$7,113.00.
- [60] Learned counsel for the defendant does not dispute the amount of \$4,363.60. The dispute arises from relation to the \$2,750.00 for domestic assistance for a period of 6 months.
- [61] The contention on behalf of the defendant is that even although Marietta Johnson, the claimant's live in partner, had to do all the domestic chores, with which the claimant helped, this was always the case. On this basis a deduction of at least 75% should be made. .
- [62] This submission overlooks the claimant's initial disability as revealed by the evidence of the said Marietta Johnson, De. Armas and Dr. Justin Fadipe as to the claimant's functional status and disability which arose from damage to the bilateral radial head fractures and the removal of the radial heads in June 2007 and the claimant being asked to take part in a physiotherapy program.
- [63] The court accepts Marietta Johnson's evidence that she had to take 3 months no-pay leave to look after the claimant; and further that she was never given a pay slip when paid. Indeed, the case of *Grant v Motilal Moonan and Anor*²⁰ shows that the court can award special damages even in the absence of proof depending on all the circumstances. But Mariette Johnson's absence from work does not qualify.
- [64] The award for special damages is \$4,363.60.

Reductions

- [65] Based on existing rules the award of damages is reduced depending on the circumstances . In this case the evidence is that the claimant was medically examined in December 2012 and it was

¹⁹ See: *Ratcliffe v Evans* (1982) 2 QB 524 and *Perestrello ECompania v United Paint Co. LTD* 1969 3 ALL E.R. 478

²⁰ (1988) 43 W.I.R 372(CA:T&T)

determined that he was not totally disabled . However, no figure or extent was given. In the absence of any further evidence in this regard, the court determines that the awards should be reduced by -10% because of the partial disability.

- [66] In like manner the awards must also be reduced by 10% because of the claimant's contributory negligence. And by the further 10% because of the lump sum payment.

Result

- [67] The award of general damages of \$40,000.0, for pain and suffering and loss of amenities, \$193,536.00, for loss of future earnings, and \$20,000.00 for loss of earning capacity, yielding a total of \$253,536.00, is reduced by 30%. The result is \$253,536.00 minus \$76,060.80 yields **\$177,475.20.**

Issue No. 3

Whether the claimant is entitled to interest?

- [68] The claimant is entitled to pre-judgment interest on certain portions of the damages and post judgment interest as follows:
- (a) Interest of 5% per annum on the award of \$40,000.00 for pain and suffering and loss of amenities; less 10% yields \$36,000.00 from the date of the service of the claim form, being 18th September, 2009 to the date of the trial, being 20th October 2014;
 - (b) Interest of 2½ % per annum on the special damages of \$4,363.60 from the date of the accident, being 3rd February, 2007 to the date of the trial, being 20th October 2014;
 - (c) Interest of 5% on the total award of general damages, except for loss of future earnings, being \$36,000.00, and \$177,475.20 a total of \$213,475.80 from the date of this judgment until payment in full.

Costs

IssueNo. 4

Who is liable in costs?

[69]· The defendant being held liable in negligence is also liable to pay the claimant prescribed costs.

ORDER

IT IS HEREBY ORDERED as follows:

1. The defendant failed to satisfy its legal obligation to provide a safe system and as such is liable in negligence because:
 - (a) the _defendant is in the business of construction and trades in building materials, hardware and house items;
 - (b) its Managing Director, Egbert Charles, was the person in charge of the bat proofing on February 2007 and is a building contractor by trade and has been in that field for 45 years;
 - (c) the established procedure respecting the soaking and drying of the rollers was not followed since the rollers were soaked on the day prior and then used early on the following day;
 - (d) the managing director of the defendant, Egbert Charles and Hilroy Lloyd, an employee said in evidence that the chemical was hazardous, dangerous and strong smelling;
 - (e) the evidence does not reveal that the defendant implemented any precautions to safeguard the claimant against :-
 - (I) the inhalation of the dangerous, strong smelling and hazardous chemical,
 - (II) the wet rollers dripping the chemical on the claimant's hand and then on to the floor of the warehouse,
 - (III) the effect of the oil based chemical on the ladder wiih rubber grips
 - (f) failed to provide appropriate safety equipment such as gloves and respirators which were provided on other occasions.

2. The claimant is contributed to his injuries by virtue of his failure to act with reasonableness and prudence in the circumstances. The contributory negligence is determined to be 10%.
3. Subject to paragraph 4, the defendant is liable for damages flowing from its negligence. The award for general damage are
 - (a) \$40,000.00 for pain and suffering and loss of amenities;
 - (b) \$193,536.00 for loss of future earnings and
 - (c) \$20,000.00 for loss of earning capacity.
4. The awards of \$40,000.00, \$193,536.00 and \$20,000.00 are subject to reductions of 10% for contributory negligence, 10% on account of the lump sum payment and 10% because the claimant is not fully disabled.
5. As a result of the reductions the total award is \$253,536.00 less \$76,060.80 being \$177,475.20 as the total award of general damages.
6. \$4,463.60 is awarded as special damages.
7. The claimant is interest to interest as follows:
 - (a) Interest of 5% per annum on the award of \$28,000.00 for pain and suffering and loss of amenities; from the date of the service of the claim form, being 18th September, 2009 to the date of the trial, being 20th October 2014;
 - (b) Interest of 2 ½ % per annum on the special damages of \$4,363.60 from the date of the accident, being 3rd February, 2007 to the date of the trial, being 20th October 2014;
 - (c) Interest of 5% on the total award of general damages, except for loss of future earnings, being \$36,000.00 and \$177,475.20 a total of \$213,475.20 from the date of this judgment until payment in full.
8. The defendant is liable to pay the claimant prescribed costs.

Appreciation

The court wishes to record its appreciation for the assistance provided by learned counsel on both side by way of excellent submissions.

