[2019] JMCA Civ 3

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 16/2013

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE PUSEY JA (AG)

BETWEEN	**CHANNUS BLOCK AND MARL QUARRY LIMITED**	**APPELLANT**
AND	**CURLON ORLANDO LAWRENCE**	**RESPONDENT**

Mrs Nesta-Claire Hunter instructed by Ernest A Smith & Company for the appellant

Sean Kinghorn instructed by Kinghorn & Kinghorn for the respondent

10 December 2018 and 15 February 2019

MORRISON P

Introduction

[1] In a judgment given on 11 January 2013, Sykes J (as he then was) ('the judge') found for the respondent in a claim against the appellant, his former employer, for negligence and breach of duty to provide a safe system of work.

[2] The claim arose out of an accident at the workplace in which the respondent sustained injuries which the judge, without exaggeration, characterised as catastrophic. As a result, the respondent had to have bilateral above-knee amputations, leading to a

64% whole person disability and a subsequent diagnosis of post-traumatic stress disorder and major depression.

[3] The judge's finding against the respondent was based on his conclusion that (i) its servant or agent, Mr Owen Bailey ('the ancillary defendant'), having negligently done the act which caused injury to the respondent, the appellant was vicariously liable for his conduct; and (ii) the appellant, as the respondent's employer, was in breach of its duty to provide him with a safe system of work.

[4] Having found for the respondent, the judge awarded him substantial damages, made up of general damages of $34,256,000.00, and special damages of $1,782,012.18[1].

[5] The judge also gave judgment for the appellant against the ancillary defendant and ordered that the sum of the contribution to be made by him should be the full sum for which the appellant was liable to the respondent. There is no appeal against this finding or order and nothing further therefore needs be said about it.

[6] In this appeal, the appellant challenges the judge's findings as to both liability and damages. As regards the former, the appellant contends that, bearing in mind the "overall facts" of the case, the judge erred in finding the appellant liable, on the basis of either vicarious liability or breach of duty to provide a system of work ('the liability issue'). As regards the latter, the appellant complains that (i) the judge's award of

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[1] See para. [35] below for the full details of the award

general damages was "wholly erroneous and inordinately high"; and (ii) the award of special damages was wrong in principle, in that it included items which were not pleaded and proved by the respondent ('the damages issue').

The liability issue

The evidence

[7] The judge's terse summary of the facts of the case suffices to establish the basic background:

> "[3] The context of this claim is a horrific accident that took place on September 23, 2006 in which [the respondent] lost both legs above the knee. He was assigned the task of cleaning a machine known as a [concrete] mixer. This mixer was controlled by four switches. Two are known as isolator switches and the other two are called on/off switches. One on/off switch operates paddles in the mixer where [the respondent] was. The other activates the conveyor belt which is connected to the mixer. The isolator switches prevent electricity from reaching the on/off switches. In order to get the machine working, both isolator switches have to be turned on and even then the machine does not work. The on/off switches have to be turned on as well. In this case it is alleged that the isolator switches were turned on and the paddle switch turned on and this led to [the respondent's] injuries."

[8] The evidence which the judge accepted was that the respondent, who was employed to the appellant as a labourer, and the ancillary defendant, were assigned by Mr Donovan Bailey, one of their supervisors, to clean the mixer. This was usually done by using a two pound sledgehammer to remove hardened concrete deposited on the inside of the mixer whenever it was used to make concrete blocks. While the

respondent was, unknown to the ancillary defendant, actually inside the mixer, the latter pressed the on/off switch and thereby activated the paddles, thus injuring the respondent.

[9] In its pleaded defence and evidence at trial, the appellant took the position that, in pressing the on/off switch, the ancillary defendant acted deliberately and with malevolent intent to cause injury to the respondent. Based on remarks allegedly made by the respondent to the appellant's managing director, Mr Anthony Charley, at the hospital after the accident, the appellant's case that the ancillary defendant was motivated to kill the respondent because of, as the judge put it[2], "a dispute over money and a female". However, the ancillary defendant strongly denied this and, in his evidence before the judge, he maintained that he had done so inadvertently, not knowing that the respondent was inside the mixer.

What the judge found

[10] The judge rejected the appellant's position and accepted the ancillary defendant's evidence on this issue. Expanding on his conclusion on the point, the judge said this[3]:

> "[42] Before leaving the issue of liability something must be said about the company's allegation that [the respondent], in conversation with Mr Charley said that the [ancillary defendant] tried to kill him because of a dispute over money and a female. The theory was that [the ancillary defendant]

[2] Para. [42]
[3] At paras [42]-[44]

> from his vantage point could have seen inside the mixer and he also could have heard when [the respondent] was using the hammer to clean the mixer.
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> [43] The court wishes to say that none of this was established by reliable and cogent evidence. Any serious allegation of this nature must be established by strong evidence. They involve very serious imputations on the character of a person and ought not to be lightly made.
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> [44] It became clear from the evidence that the company did not have good evidence to back up its assertions of malevolence. The case of malice because of a dispute over money turned out to be false. The explanation given by [the respondent] and [the ancillary defendant] was that on the day of the incident [the ancillary defendant] borrowed JA$1,000.00 from [the respondent] who asked for JA$500.00 extra when the money was being repaid. The [ancillary defendant] agreed to this Shylockian interest rate of fifty percent. The court accepts this explanation."

[11] In answer to the respondent's case that the appellant had failed to provide him with a safe system of work, Mr Charley gave evidence of the company's safety protocol for the cleaning of the mixer. Basically, this required that the person cleaning the mixer should padlock the various switches and keep the key in his possession while doing the cleaning. The protocol was designed, as the judge explained it[4], "to prevent anyone from turning on the mixer while it was being cleaned because there was the risk of serious injury if that happened".

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[4] At para. [35]

[12] However, based on the evidence given by Mr Donovan Bailey, the judge found that the appellant had failed to comply with its own safety protocol on the day of the accident. This is how the judge concluded this section of the judgment[5]:

> "[36] The company's safety protocol for cleaning the mixer has been stated. Let us now look at what happened. Mr Donovan Bailey's evidence is that he took off the padlock. He turned off the isolator switch. He went to the office. He was the one who assigned [the respondent] to clean the mixer. He never said, in accordance with the safety protocol outlined by Mr Charley, that he relocked the switches or instructed [the respondent] to do so or saw that it was done … He did not testify that he gave the key to [the respondent] with clear and explicit instructions to lock the switches and keep the key in [his] pocket. In short, Mr Donovan Bailey did not ensure that the company's safety protocol was followed. Mr Donovan Bailey breached the crucial parts of the safety protocol as outlined by Mr Charley. This translates into a lack of supervision and breach of the safety protocol which means that there was a breach of duty to provide a safe system of work.
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> [37] To put it bluntly, Mr Donovan Bailey's evidence really amounts to an admission that no safety protocol was used on the fateful day when the mixer was being cleaned. No measures were put in place after he removed the padlock to ensure that the very thing that the padlock was used to prevent did not happen."

[13] The judge next went on to highlight[6] a further area of weakness in the appellant's system of work, that is, the lack of training of either the respondent or the ancillary defendant:

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[5] At paras [36]-[37]
[6] At paras [38]-[39]

> "[38] There is no evidence that [the respondent] was specifically instructed about the safety protocol relating to cleaning the mixer. There is no evidence that he was told that he should padlock the switches and keep the key in his pocket. It appears that [the respondent's] training for cleaning the mixer was less than rudimentary regarding the safety aspect of the job as distinct from actual mechanics of cleaning the mixer.
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> [39] The court's impression of the lack of adequate training was reinforced by Mr Donovan Bailey's testimony on the point. When cross examined his testimony was that the only precaution he told the respondent to take when cleaning the mixer was that he should not go in while it is running."

[14] In the result, the judge found the appellant liable on the basis of (i) vicarious liability for the negligence of the ancillary defendant in turning on the switch of the mixer; and (ii) breach of its duty to provide a safe system of work to the respondent, by its failure "to execute the safety protocol on the day in question"; and, secondly, "to train adequately [the respondent] and [the ancillary defendant] for the task of cleaning the mixer".

[15] As regards the applicable law on the issue of vicarious liability, the judge based himself on the law as expounded by the House of Lords in **Lister and Others v Hesley Hall Ltd**[7], in which it was held that the correct approach to determining whether the doctrine applies is to consider whether the employee's torts were so closely

[7] [2002] 1 AC 215

connected with his employment that it would be fair and just to hold his employers vicariously liable. Applying this principle, the judge therefore considered that[8]:

> "The focus is on the nature of the employment, the duties of the employee and the act complained of. If, looking at the matter broadly, the act is closely connected with the employment and duties required then the employer will be held liable."

[16] And further that[9] -

> "… a defendant cannot escape liability by arguing that what was done by the employee was deliberate, intentional or even criminal. He has to show that what was done was not closely connected to the employee's job. On the other hand, the claimant cannot simply say, 'He is your employee. He injured me, so compensate me.' He must show that the tortious act was so closely connected to the job of the employee that it is fair and just to hold the employer liable."

The appeal

[17] The appellant filed seven grounds of appeal. In summary, on the issue of liability, the grounds challenge the judge's finding that (i) the appellant was vicariously liable for the acts of the ancillary defendant; (ii) the appellant failed to provide a safe system of work; and (iii) that the ancillary defendant's action in turning on the switch to the mixer was not the sole cause of the accident. And, on the issue of damages, the appellant contends that the judge's award for general damages was wholly erroneous

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[8] At para. [10]
[9] At para. [13]

and inordinately high; and that the award for special damages included items which were neither pleaded nor proved.[10]

[18] As regards liability, Mrs Hunter submitted that the evidence, "when analysed in the round", did not support the finding that the appellant had failed to provide a safe system of work. Accordingly, the finding of negligence and failure to provide a safe system of work was unreasonable in the light of the evidence. Further, the respondent's misfortune was caused by the intentional and malicious act of the ancillary defendant and, in these circumstances, it was unfair and unjust for the judge to have held the appellant vicariously liable for the ancillary defendant's tortious acts.

[19] For the test of vicarious liability, Mrs Hunter referred us to **Lister**, in which the warden of a school boarding house had sexually abused resident children and the question was whether his employers were vicariously liable. It was held that the correct approach to determining whether the doctrine applied was to consider whether the employee's torts were so closely connected with his employment that it would be fair and just to hold his employers vicariously liable. On the facts of the case, as Lord Steyn concluded[11], "the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties …".

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[10] Appellant's written submissions dated 30 July 2018, para. 4
[11] At page 230

[20] **Lister** was applied by the Privy Council in **Clinton Bernard v The Attorney General of Jamaica**[12] and **Inez Brown (near relation of Paul Andrew Reid, deceased) v David Robinson and Another**[13], both appeals from decisions of this court.

[21] In **Bernard**, Lord Steyn (who had also delivered the leading judgment in **Lister**), stated[14] that:

> "… The correct approach is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether looking at the matter in the round it is just and reasonable to hold the employers vicariously liable. In deciding this question a relevant factor is the risks to others created by an employer who entrusts duties, tasks and functions to an employee."

[22] On this basis, the Privy Council held that the trial judge had been entitled to hold the Attorney General vicariously liable for the unlawful shooting of the plaintiff by a police constable during an altercation over the use of a public telephone. The shooting followed the plaintiff's refusal to accede to the constable's demand that he be allowed to use the telephone before him. It sufficed to establish vicarious liability that the constable had purported to act as a policeman immediately before he shot the plaintiff.

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[12] [2004] UKPC 47
[13] [2004] UKPC 56
[14] At para. 18

[23] In **Brown**, the deceased, a 17 year old boy, was wrongfully shot by a security guard during an altercation arising from the guard's attempts to restore order at a football match at Sabina Park. The Privy Council had no difficulty in holding that, applying **Lister**, the close connection test rendered the guard's employer vicariously liable for his wrongful act.

[24] In arriving at this conclusion, the Board distinguished **Attorney General of British Virgin Islands v Craig Hartwell**[15], to which Mrs Hunter also referred us. In that case, a police officer ('Laurent') left his post on one island ('Jost Van Dyke') and went to a bar on another island ('Virgin Gorda'). There, he saw his partner or former partner and mother of his children in the company of another man. In what the Board described[16] as a "deliberate, reckless act … consumed by anger and jealousy", Laurent fired five shots from his service gun in the bar, one of which caught the respondent (who was a visitor to the island).

[25] While the Board considered that the state was itself negligent in allowing Laurent access to the gun in the circumstances, it declined to assign liability on the basis of vicarious liability. This is how Lord Nicholls of Birkenhead explained the distinction[17]:

> "16. … The connecting factors relied upon as satisfying [the Lister] test are that Laurent was a police constable on duty at the time of the shooting (working his three day shift on Jost Van Dyke), that his jurisdiction extended to Virgin

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[15] [2004] UKPC 12
[16] At para. 14
[17] At paras 16-17

> Gorda, and that before leaving Jost Van Dyke he had improperly helped himself to the police revolver kept in the substation on that island.
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> 17. These factors fall short of satisfying the applicable test. From first to last, from deciding to leave the island of Jost Van Dyke to his use of the firearm in the bar of the Bath & Turtle, Laurent's activities had nothing whatever to do with any police duties, either actually or ostensibly. Laurent deliberately and consciously abandoned his post and his duties. He had no duties beyond the island of Jost Van Dyke. He put aside his role as a police constable and, armed with the police revolver he had improperly taken, he embarked elsewhere on a personal vendetta of his own. That conduct falls wholly within the classical phrase of 'a frolic of his own'."

[26] Mrs Hunter therefore relied on **Attorney General of British Virgin Islands v Hartwell**, to make the point that, in this case, the ancillary defendant had left his assigned duties of cleaning the premises and gone on a personal vendetta or frolic of his own to turn on the mixer, fully well knowing that the respondent was on the inside of it cleaning it.

[27] In his skeletal submissions, Mr Kinghorn contended that the judge was right for the reasons he gave and that his findings on liability were unassailable. In the first place, Mr Kinghorn submitted, the appellant faces the formidable hurdle that the judge's conclusions were substantially based on his findings of fact. Accordingly, the appellant must overcome the long-established principle that this court will not lightly disturb a trial judge's findings of fact, and will only do so where those findings were not supported by the evidence, or are otherwise sufficiently flawed, as to warrant this court's interference. In this regard, Mr Kinghorn referred us to the recent judgment of

Brooks JA in **Rayon Sinclair v Edwin Bromfield**[18], in which the following statement from the judgment of Lord Hodge in **Beacon Insurance Company Limited v Maharaj Bookstore Limited**[19] was cited with approval:

> "… It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong' ... This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts … Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence …"

[28] In this case, the judge's main findings of fact were identified by Mr Kinghorn as follows[20]:

(i) Two persons would normally clean the mixer.

(ii) The ancillary defendant suggested that he assist the respondent with the cleaning of the mixer and Mr Donovan Bailey, their supervisor, agreed and authorised them to proceed accordingly.

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[18] [2016] JMCA Civ 7
[19] [2014] UKPC 21, para. 12
[20] At para. 9 of the skeletal submissions

(iii) Both men were therefore assigned to clean the mixer.

(iv) Neither the ancillary defendant nor the respondent received proper training for the task of cleaning the mixer.

(v) The appellant's own safety protocol was not followed on the day of the accident.

(vi) The malice theory, that is, that the ancillary defendant was trying to murder the respondent was rejected.

(vii) The ancillary defendant's deliberate act of turning on the mixer was so closely connected with what he was assigned to do (that is, to assist the respondent to clean the mixer) that the wrongful nature of his conduct did not exonerate the appellant from liability.

[29] I agree with Mr Kinghorn's submission that all of these critical findings of fact were based on clear and largely uncontradicted evidence and that no basis has been shown for this court to interfere with any of them.

[30] Even if it were possible to say, as Mrs Hunter invited us to do, that the judge was wrong to reject the appellant's contention that the ancillary defendant acted deliberately and with malevolent intent to cause injury to the respondent, it is clear from the modern authorities on vicarious liability that this would not avail the appellant.

[31] Thus in **Lister**, for instance, it simply was not possible to say that the warden's acts of sexual assault on the boys in the employer's care were anything other than criminal. Similarly, in **Dubai Aluminium Company Limited v Salaam and Others,** for instance[21], in which the issue was whether a solicitors' firm was vicariously liable for the fraudulent acts of one of its partners, the House of Lords found the firm liable for his actions. As Lord Nicholls of Birkenhead explained[22] -

> "[21] … Whether an act or omission was done in the ordinary course of a firm's business cannot be decided simply by considering whether the partner was authorised by his co-partners to do the very act he did. The reason for this lies in the legal policy underlying vicarious liability. The underlying legal policy is based on the recognition that carrying on a business enterprise necessarily involves risks to others. It involves the risk that others will be harmed by wrongful acts committed by the agents through whom the business is carried on. When those risks ripen into loss, it is just that the business should be responsible for compensating the person who has been wronged.
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> [22] This policy reason dictates that liability for agents should not be strictly confined to acts done with the employer's authority. Negligence can be expected to occur from time to time. Everyone makes mistakes at times. Additionally, it is a fact of life, and therefore to be expected by those who carry on businesses, that sometimes their agents may exceed the bounds of their authority or even defy express instructions. It is fair to allocate risk of losses thus arising to the businesses rather than leave those wronged with the sole remedy, of doubtful value, against the individual employee who committed the wrong. To this end, the law has given the concept of 'ordinary course of employment' an extended scope.

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[21] [2003] 1 All ER 97
[22] At paras [21]-[23]

> [23] If, then, authority is not the touchstone, what is? … Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct may fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm's business or the employee's employment."

[32] So, as is clear from both **Lister** and **Dubai**, it is no answer to a claim against an employer based on vicarious liability to say that the employee's wrongful acts were either intentional or indeed criminal. This is the approach that the judge took in this case and, in my view, he was entirely correct to do so.

[33] As for the judge's finding that the appellant was guilty of a failure to provide a safe system of work, this too was plainly justified by a comparison of Mr Charley's evidence of what the appellant's safety protocol required and Mr Donovan Bailey's evidence of what actually happened on that fateful day. It is also clear from the evidence that, as the judge found, neither the ancillary defendant nor the respondent had received any specific training on the safety considerations relating to the cleaning of the mixer. On this aspect of the matter, therefore, the judge was not even required to choose between competing versions. In these circumstances, it seems to me that his conclusion that the appellant had failed to provide a safe system of work is unassailable.

Conclusion on the liability issue

[34] I would therefore dismiss the appeal on this issue.

The damages issue

[35] The respondent sustained injuries of the utmost severity. In a follow-up medical report dated 29 August 2011, Dr Ijah Thompson, who had first seen the respondent within days of the accident five years before, assessed his status as follows:

> "PROGNOSIS
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> The patient's injuries are serious, with permanent impairment as noted below. He will need continued rehabilitation in preparation for and after prosthesis fitting. Chronic pains are by their nature unpredictable and dependent on the patient effect and routine activity to get the best results and prevent their occurrence. Mr Lawrence is 100% permanently disabled from working (from his prior line of work).
>
> He will need the continuous assistance for his routine chores and hygiene and ambulation until he his [sic] full [sic] rehabilitated to prosthesis.
>
> He has the option for prosthetic placement. This can be had at a base cost of US$38,000.00 for each limb for a good modern prosthesis. He will also need active physiotherapy to restore his balance and gait (this may take years to achieve good independent competence).
>
> **Future medical care**
>
> Mr. Lawrence will need further rehabilitation sessions ($3,000.00 each), associated with his acclimatization to his prosthetic limbs when they are acquired. It is estimated that a minimum of at least 30 sessions will be required. Analgesic support is patient dependent, related to his subjective perception of his chronic pains.
>
> **Disability**
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> Using the American Medical Association Guides for evaluating Permanent Impairment (page 545 and 604), his

> fixed permanent whole person disability associated with bilateral above knee amputation is 40% for each side, when combines [sic] give a total of 64% whole person impairment.
>
> **Important clinical correlations**
>
> These injuries sustained are severe and it is almost miraculous that Mr. Lawrence is alive, in light of the tremendous blood and tissue loss. Statistics show that 50% of amputees commit suicide while a larger number sustain long-term psychiatric impairment."

[34] In addition to Dr Thompson's evidence, the judge referred to and relied on the evidence of Dr Wendel Abel, who spoke to the "great mental and emotional distress" which the respondent suffered as a result of his injuries[23]; and Dr Rory Dixon, who gave evidence of the respondent's prosthesis needs[24].

[35] The judge's award was as follows[25]:

General damages

a. pain, suffering and loss of amenities - $19,000,000.00 (with interest at 3% per annum from the date of service of the claim to 11 January 2013)

b. handicap on the labour market - $2,548,000.00 (with no interest)

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[23] See medical report dated 7 October 2011
[24] See medical report dated 28 November 2008
[25] In Jamaican dollars

c. loss of future earnings - $2,548,000.00 (with no interest)

d. cost of future domestic care - $8,008,000.00 (with no interest)

e. cost of prosthetic device - $2,152,000.00 (with no interest)

Special damages

f. pre-trial loss of earnings - $1,145,000.00

g. medical expenses - $632,012.18

h. cost of transportation - $5,000.00

[36] Mrs Hunter took no issue with the judge's awards of general damages for pain and suffering and the cost of future medical care. However, she raised questions in relation to the awards for handicap on the labour market/loss of future earnings, and the cost of future domestic care.

[37] As regards the former, she submitted that, having fully compensated the respondent for loss of future earnings in the sum of $2,548,000.00, it was "just and fair for the [identical] sum awarded for handicap on the labour market to be discounted". In her submission, a sum of $750,000.00 would have been a "more reasonable" figure for handicap on the labour market.

[38] And, as regards the latter, she submitted that, over time, as the respondent grew accustomed to using the prosthetic device for which provision had been made, his

need for future domestic care would diminish. She also submitted that the figure of $7,000.00 per week which the judge chose as a multiplicand for future domestic care was unreasonable and suggested a figure of $3,500.00 per week as "a more reasonable calculation". Accordingly, applying the same multiplier of 14 which the judge had used in relation to loss of future earnings/handicap in the labour market to the multiplicand of $3,500.00 per week, Mrs Hunter submitted that the sum of $2,548,000.00 would have been more reasonable for future domestic care. Alternatively, Mrs Hunter suggested $3,500.00 per week for 22 years (a total of $4,004,000.00).

[39] Mr Kinghorn's response to these submissions was direct. First, he observed that there is no principle of law requiring that the award for handicap in the labour market should be discounted where future loss of earnings are being awarded: the two awards are separate and made on different principles. Second, there was no basis on the evidence to reduce the multiplier or the multiplicand of $7,000.00 per week: that sum was supported by evidence which was not challenged by the appellant. And third, the judge's award was reasonable in all the circumstances and it cannot be said that it was one which no court could ever make.

[40] The law as to this court's approach to an appeal against a trial judge's assessment of damages is well settled[26]. The court will not normally interfere with the trial judge's assessment merely because the judges hearing the appeal take the view

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[26] See, for example, **Flint v Lovell** [1935] 1 KB 354 at 355; **Desmond Walters v Carlene Mitchell** (1992) 29 JLR 173, per Wolfe JA (Ag), as he then was, at page 178; and **JAMALCO (Clarendon Alumina Works) v Lunette Dennie** [2014] JMCA Civ 29, per Phillips JA at para. [52]

that, had they had it to do, they would have awarded a lesser sum. This court will usually defer to the trial judge's findings and will only disturb them when it is persuaded that the trial judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the court, an entirely erroneous estimate of the damages to which the claimant was entitled.

[41] In **Fairley v John Thompson (Design and Contracting Division) Ltd**[27], Lord Denning MR explained the difference between loss of future earnings and loss of earning capacity (as handicap in the labour market is sometimes described[28]) in this way:

> "It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages."

[42] While the older leading cases on the subject, such as **Moeliker v A Reyrolle & Co Ltd**[29], proceeded on the basis that damages based on the multiplier/multiplicand method would not normally be awarded under both heads, it must be borne in mind that the plaintiffs in those cases remained in employment at the time when the award

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[27] [1973] 2 Lloyd's Law Rep 40, at page 42

[28] See **Monex Limited and Another v Camille Grimes**, (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 83/1997, judgment delivered 15 December 1998, per Rattray P, at page 12

[29] [1977] 1 All ER 9

of damages was being assessed. To make this point, the judge referred[30] to the statement of Browne LJ in **Moeliker** that, where the risk of the plaintiff losing his job is not imminent, then the multiplier/multiplicand method should not be used.

[43] In **Campbell and Others v Whylie**[31], which the judge also applied in his own previous decision in **Marcella Clarke v Claude Dawkins and Leslie Palmer**[32], this court held that, in an appropriate case, the multiplier/multiplicand approach would be appropriate in assessing damages for handicap in the labour market. In this case, in which, as the judge put it, the risk of the respondent losing his job as a result of the injuries suffered in the accident had "become reality", the judge therefore held that the multiplier/multiplicand method provided an appropriate approach to the assessment of the respondent's handicap in the labour market.

[44] I entirely agree with the judge's erudite analysis. By the time of trial, the respondent was no longer in employment. The medical evidence amply demonstrated that he would, virtually for the rest of his life, suffer a severe – and perhaps insurmountable - handicap in the labour market. In these circumstances, as it seems to me, the judge was fully entitled to award him damages under both heads of damage, that is, loss of future earnings and handicap in the labour market, using the multiplier/multiplicand method. These are, in my view, two distinct heads of damage and I can see no basis on the facts of this case to discount the latter on account of the

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[30] At para. [79]
[31] (1999) 59 WIR 326
[32] (unreported), Supreme Court, Jamaica, Suit No CL 2002/C-047, judgment delivered 16 June 2004

former. So far as authority is concerned, it is in my respectful view, unnecessary, to search any further than the judge's own previous statement in **Icilda Osbourne v George Barned et al**[33]:

> "It is well established that loss of future earnings is an item of general damages and is separate from loss of earning capacity (see Carey J.A. in ***Gravesandy and Moore***). There is no principle of law that says that both cannot be recovered in an appropriate case. It is instructive to note that the Court of Appeal of England upheld an award of loss of earning capacity, loss of future earnings, and loss of pre trial earnings in ***Zielinski v West*** [1977] C.L.Y. 798."

[45] Finally, with regard to the appeal against the judge's award for future domestic care, I also agree with Mr Kinghorn's submission that it was fully supported by the evidence and that no basis has been shown to disturb it.

Disposal of the appeal

[46] I would therefore dismiss the appeal. Unless an application is made within 14 days of the order on the appeal for a different order as to costs, I would also award the respondent his costs of the appeal, such costs to be taxed if not agreed.

SINCLAIR-HAYNES JA

[47] I have read in draft the judgment prepared by the learned President. I agree with it and there is nothing that I can usefully add to it.

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[33] (unreported), Supreme Court, Jamaica, Claim No. 2005 HCV 294, judgment delivered 17 February 2006, para 23

PUSEY JA (AG)

[48] I too have read the learned President's judgment in draft. I agree with it and have nothing to add.

MORRISON P

ORDER

Appeal dismissed. Unless an application is made within 14 days of this date for a different order as to costs, costs of the appeal are awarded to the respondent, to be taxed if not agreed.