BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1812 of 2006

BETWEEN

LEROY DACOSTA ROACH **Plaintiff**

AND

MARY ANNE ALLEYNE **Defendant**

Before: The Hon. Madam Justice Kaye Goodridge, Judge of the High Court.

2009: November 5, 6

2010: April 27

May 25

2011: November 10

Mr. Clement E. Lashley, Q.C. and Ms. Honor Chase, Attorneys-at-law for the Plaintiff.

Mr. Gregory P. Nicholls of George Walton Payne & Co, Attorneys-at-Law for the Defendant.

DECISION

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Nature of Action

[1] The Plaintiff's action is a claim for damages against the Defendant as a result of injuries which he sustained when he fell from a motor lorry operated by the Defendant.

The Pleadings

The Plaintiff's Claim

[2] In his amended Statement of Claim, the Plaintiff alleged that he was employed by the Defendant as a chauffeur to operate motor lorry registration number E1898 in the Plaintiff's business of freighting.

[3] It is alleged that on 18 November 2003, the Defendant provided the Plaintiff with the motor lorry to use in the course of his employment. At the material time the motor lorry carried a defective platform in that screws were missing to hold the platform in a stable position and the metal tray was rusted.

[4] It is alleged further that the platform of the motor lorry was unstable due to an unstable latch. The Plaintiff alleged that, while loading the motor lorry, he involuntarily rested his foot for balance and the siding of the lorry gave way. He fell to the ground, sustaining injuries.

[5] The Plaintiff's complaint is that the accident was caused by the Defendant's negligence in that she failed to:

1. ensure that the platform of the truck was stable;

2. have the truck inspected and serviced so as to ensure its roadworthiness;

3. ensure that the siding of the truck was stable and secure so as to protect the Plaintiff in the course of his employment;

4. warn the Plaintiff of the dangers of exposing himself to the risk of falling from the vehicle in the course of his employment.

The Plaintiff also claimed that the Defendant caused, permitted or required him to work on the motor lorry when she knew or ought to have known of the dangerous condition of the motor lorry.

The Defence

[6] The Defendant denied that the Plaintiff was engaged under a contract of employment and stated that he was an independent contractor who drove the motor lorry under a contract to use and operate the same.

[7] The Defendant alleged that, under the terms of the contract, the Plaintiff was responsible for:

1. paying his own P.A.Y.E, holiday pay and national insurance contributions;

2. inspecting the lorry and ensuring that it was fit for the purpose of its hire;

3. reporting any defects, mechanical failure and other problems to the Defendant or to the Warehouse Manager at A.S. Brydens & Sons Ltd. so that they could be remedied.

[8] The Defendant denied that the platform was defective and alleged that the accident was caused through a breach of duty of care owed by the Plaintiff to himself by resting his foot for balance on the side rail and standing or attempting to stand on the same.

[9] The Defendant also raised the defence of volenti non fit injuria in that the Plaintiff, with full knowledge of the risk of injury or damage to himself, voluntarily consented to accept such risk and to waive any claim in respect of any injury or damage that he may have sustained.

The Evidence

The Plaintiff's Case

[10] The Plaintiff testified that he was informed by a friend, Mr. Anthony Greaves, that the Defendant required a chauffeur to drive her motor lorry which was kept at A.S. Brydens & Sons (Barbados) Limited (Brydens).

[11] He contacted the Defendant by telephone, who told him that the motor lorry was hers and that he should go to Brydens and see Mr. Griffith who would gave him directions. He asked the Defendant about payment of his N.I.S contributions and she said that she would work on it and get back to him. She never did.

[12] The Plaintiff went to Brydens as instructed, spoke to Mr. Griffith and started driving the Defendant's vehicle from June 1999. His work entailed loading the vehicle; taking goods to assigned supermarkets or shops; off loading same and returning to Brydens. He had a second man, Mr. Chesterfield Corbin, who worked with him, loading and off-loading the vehicle.

[13] He was paid on a commission basis and earned $15.00 per trip. He had a book which had been provided by the Defendant in which he recorded the trips. He would submit his slips to Mr. Griffith at the end of the week and then he would receive his payment from the cashier at Brydens. He earned between $250 and $300 a week.

[14] The Plaintiff stated that if anything was wrong with the lorry he would call the Defendant and inform her. He did this on several occasions. The lorry was maintained by the Defendant. If he needed to use the vehicle for personal reasons, he sought and obtained the Defendant's permission. If the lorry needed diesel he would go to Mr. Griffith for money as instructed by the Defendant.

[15] The Plaintiff testified that he paid no N.I.S. contributions. He took vacation at least once a year, for 3 or 4 weeks and consulted with the

Defendant before going on leave. He had no discussion with the Defendant about the conditions of employment. He did not take sick leave. He knew that the Defendant could have dismissed him.

[16] The Plaintiff stated that he reported for work at 7.30 a.m. and left at 4.30 p.m., the standard times that Brydens operated. The clerks gave him instructions as to deliveries.

[17] The Plaintiff said that he was not given any instructions by anyone to report any faults on the lorry; it was the Defendant's responsibility to ensure that the lorry was repaired at anytime.

[18] He testified that on several occasions during 2002, he reported to the Defendant that the tray of the lorry had started to rust and had a couple of loose screws. The Defendant sent him to a welder in Green Hill, St. Michael who examined the lorry and said that he would get back to the Defendant. After this he was not advised by the Defendant not to drive the truck.

The Accident

[19] On the day in question, Vita malt cases were loaded on to the lorry by a fork-lift. There were 3 pallets and each pallet contained 100 cases. The cases were about 7 feet high.

[20] The lorry is a flatbed truck, with metal sides and a wooden platform with a metal gate at the back of the truck. The right side was down and the back and left sides were fastened/latched.

[21] The Plaintiff was on the left side of the truck and was reaching up to take down the higher cases to pack them around the sides. His right foot was on the platform and his left foot was resting on the siding on the left side of the lorry. As he was taking down the cases, the latches let go, the side came down and he lost his balance. He fell on to a car and then landed on the ground.

[22] In cross-examination the Plaintiff said that he recalled speaking to the Defendant about N.I.S during their first conversation. He did not recall talking about salary or hours of work at the time.

[23] The Plaintiff acknowledged that he received his pay from the cashier at Brydens and that no money was taken out for N.I.S or P.A.Y.E. He also agreed that it was Mr. Griffith who told him about the hours of work at Brydens and the money he would be paid per trip. He maintained that his second man, Chester, received his money from the cashier at Brydens.

[24] In further questioning, the Plaintiff said that he knew that the payment of N.I.S contributions is mandatory, but he made no arrangements for N.I.S on his own account because the Defendant said that she would sort it out and she was his employer. The Plaintiff stated that, prior to working for the Defendant, he paid N.I.S contributions and he now pays N.I.S in his present employment.

[25] The Plaintiff also said that if Brydens had no work he did not receive pay and that he did not consider it to be the Defendant's responsibility to pay him if Brydens did not.

[26] The Plaintiff stated that he did not use the truck to do personal work for which he received payment. He said that on one occasion he used the truck to transport lumber to his home.

[27] When asked about the accident, the Plaintiff said that he fell because the railing on which his foot was resting came down. He agreed that during the time he drove the truck, he had never had the experience of the side rail becoming unlatched and coming down. He accepted that it is not common practice for persons to put their feet on the side railing of a truck. The Plaintiff said that he rested his foot on the railing in order to get the job done.

[28] In re-examination, the Plaintiff said that he did not know why Brydens paid his medical expenses but that the accident happened on their premises. He also stated that he had lifted cases before and had rested his left foot on that area before.

The Defendant's Case

[29] The Defendant gave evidence and called one witness in support of her case. The Defendant testified that she received a phone call from the Plaintiff, who told her that he was not working and offered to drive her daughter's truck and to give her a percentage for so doing. She sent him to Mr. Arleigh Griffith at Brydens, who subsequently contacted her for confirmation of the arrangement.

[30] The Defendant stated that she was not aware of who paid the Plaintiff's P.A.Y.E and N.I.S contributions. She made no arrangements with the Plaintiff because she did not employ him and she believed that he should have made his own arrangements for P.A.Y.E and N.I.S.

[31] The Defendant testified that she had nothing to do with the Plaintiff's work schedule as that was strictly between the Plaintiff and Mr. Griffith.

[32] The Defendant continued that the Plaintiff was responsible for reporting defects to her. If he did not contact her she would assume that the vehicle had no defects. The Defendant said that from time to time she would go to Brydens to view the vehicle. The vehicle was always inspected and passed inspection by the Ministry of Transport and Works.

[33] The Defendant said that the lorry did not have a defective platform nor was it in a dangerous condition. After the Plaintiff was injured, the vehicle continued to be used and nothing was done to it for some time.

[34] In cross-examination, the Defendant said that she did not know about the Plaintiff's accident until about a week after it had occurred. She said that she contacted the Plaintiff, asked him what happened and he said he fell from the truck. The Defendant also said that the Plaintiff did not tell her that the platform had given way, nor did he say how he fell from the vehicle.

[35] The Defendant denied that the Plaintiff told her about a defect at the side of the truck and also denied advising him to take the truck to a welder in Green Hill, St. Michael. The Defendant maintained that no defects were fixed after the accident. She agreed that she provided the diesel on a daily basis and stated that the money which she received was for maintenance and diesel.

[36] In further questioning, the Defendant said that the Plaintiff was never employed by her, and that he never spoke to her about paying his N.I.S contributions and she never agreed to do so. She denied that he inquired of her on several occasions about N.I.S.

[37] The Defendant stated that she could not determine how much vacation the Plaintiff was entitled to as a self-employed person. She testified that the Plaintiff would call her and indicate that he was going on vacation.

[38] The Defendant maintained that there were no screws missing, nor was there an unstable latch. She did not bring her mechanic to see the lorry after the accident because there was no defect to the platform.

[39] The Defence witness, Mr. Arleigh Griffith, testified that he is the Warehouse Manager at Brydens Distribution, formerly A.S. Brydens & Sons Ltd and that the Plaintiff was not employed by Brydens.

[40] He explained that when freight trucks worked for Brydens, they work according to trips. The trips are totalled and sent to the cash desk, where the monies for the trips are worked out and given to the owner or anyone who has permission to receive them on the owner's behalf.

[41] Mr. Griffith testified that when the Plaintiff came to see him he explained to him how Brydens operated and paid for freighting. To the best of his knowledge the Plaintiff did not have any private truck which was used for freighting at Brydens. The Plaintiff collected money from the cash desk for the trips which he made. All money went to the Plaintiff because the cash desk clerk did not separate the money for the owner and the driver. The Plaintiff would give him a sum of money for the Defendant and keep the rest.

[42] Mr. Griffith said that there were occasions when the Plaintiff would return to Brydens late. In those instances he would collect the money and the Plaintiff would tell him the amount and he would subdivide it and put it in envelopes.

[43] In cross-examination, Mr. Griffith said that the charge for a delivery went to the owner, the driver and a second man, if there was one. He recalled that at the time the payment was $60.00 per trip of which the Defendant would receive $33.00 and the Plaintiff would receive $27.00. If there was a second man, the Plaintiff received $15.00 and the second man $12.00 a trip. He did not know whether the Plaintiff paid N.I.S out of his money or whether the Defendant paid.

[44] When questioned about hours of work, Mr. Griffith said that there were no specific hours of work for the drivers, who came as they chose. Mr. Griffith stated that the Defendant supplied the diesel for the truck and as far as he knew, the Plaintiff was entitled to use the truck for private purposes. He was not aware that there was a defect to the platform of the truck which the Plaintiff drove. He was not present when the Plaintiff was injured but saw him sometime afterwards.

[45] In re-examination, Mr. Griffith said that the truck was at Brydens a few days after the accident and it was driven without any alterations or repairs being done.

The Issues

[46] The issue which the court must determine are as follows:

1. Whether the Plaintiff was an employee of the Defendant or an independent contractor.

2. Whether the Defendant owed the Plaintiff a duty of care and whether there was a breach of that duty.

3. If there was a breach of that duty, to what damages is the Plaintiff entitled?

Issue No. 1 – whether the Plaintiff was an employee of the Defendant or employed as an independent contractor.

The Plaintiff's Submissions

[47] In his written submissions, Mr. Lashley, Q.C. counsel for the Plaintiff, relied on a number of cases to highlight the distinction between a contract of service and a contract for services, in particular the case of ***Sagicor Insurance Co. v. Livingstone Carter et al 71 W.I.R. 74. (Sagicor).***

[48] Counsel analysed the various elements which characterised the relationship between the Plaintiff and the Defendant. He submitted that although the Defendant neither exercised daily control of the Plaintiff, nor did she pay him directly, these were not factors from which the Plaintiff's self-employment could be inferred. Counsel also submitted that the arrangement of the motor lorry being kept on the premises of Brydens where the freighting originated was simply to provide a facility for the operation of the work.

[49] Counsel submitted further that as the Plaintiff was not the owner of the motor lorry and earned $250 to $300 per week, he could hardly be considered an independent contractor, given the facts of the case. Mr. Lashley submitted that on the facts the Plaintiff was at all material times an employee of the Defendant.

The Defendant's Submissions

[50] Mr. Nicholls, attorney-at-law for the Defendant, submitted that the evidence before the court points to a contract for services. He submitted that the Plaintiff did not enter into any contractual negotiations (wages, vacation, work-times) with the Defendant nor with any agent thereof when he assumed the job of chauffeur of the motor lorry. The conditions under which the Plaintiff would operate the lorry and the specifics of payment were discussed with the Warehouse Manager at Brydens.

[51] Counsel contended that the Plaintiff's work as chauffeur and the manner in which that work was done was not controlled by the Defendant. The work and the manner in which it was done was a matter between the Warehouse Manager and the Plaintiff.

[52] Counsel submitted that when the control, organization and economic reality tests were applied to the facts in this case, it is clear that the Plaintiff was not an employee of the Defendant but was an independent contractor.

Discussion

[53] In the ***Sagicor*** case, ***Sir David Simmons,*** former Chief Justice of Barbados, had to determine whether insurance representatives were employees or independent contractors. The facts were that the representatives were paid on a commission basis. They were responsible for determining their hours of work. They were entitled to take holidays according to their own convenience but did not receive holiday pay. It was the representatives' responsibility to meet with prospective clients when it was suitable for the clients. The company made provision for them to meet clients at its offices. It also provided office space, secretarial assistance, stationery and supplied some of them with receipt books of the company.

[54] ***Simmons CJ*** reviewed the legal principles and the tests which the law has developed to determine whether a worker is engaged under a contract of service or a contract for services. In the court's view, the ultimate question to be determined is whether the worker is carrying on business on his/her own account or not and that question can only be settled by "examining the whole of the various elements which constitute the relationship between the parties" - **per** ***Lord Wright*** in the case of ***Montreal v Locomotive Works Ltd [1947], 1 DLR 161*** at p. 169***.***

[55] After a detailed analysis of the various factors and features of the relationship between the parties, ***Simmons CJ*** held that the representatives were employed as part of Sagicor's business, their work was an integral part of its business and not merely accessory to it. They were not in business on their own account but were engaged by Sagicor under contracts of service.

[56] In this case, the court must examine and evaluate the various aspects of the relationship between the Plaintiff and the Defendant in order to determine the nature of the contract which existed between them.

[57] The enterprise upon which the Plaintiff was engaged was that of freighting commodities from the warehouse at Brydens to various supermarkets and other businesses throughout the Island. According to the Defendant's evidence, she was the guarantor of the motor lorry which belonged to her daughter. On her daughter's migration to the U.S.A., they had planned to sell the vehicle and it was at Brydens so that persons could see it and make offers. It was the Defendant who decided that the vehicle should be used so that "it could pay back for itself". On these facts it seems to me that the Defendant was engaged in the business of transporting commodities from the warehouse at Brydens.

[58] It is not disputed that the Plaintiff was not under the daily supervision or direction of the Defendant when he carried out his work as chauffeur. It was Mr. Griffith who assigned the work. The Plaintiff did not report to the Defendant at anytime while driving the motor lorry and he decided his hours of work. Having regard to the nature of the work undertaken, the fact that the Defendant did not exercise control over how the work was done is not to my mind a critical factor in determining whether the Plaintiff was an employee or an independent contractor.

[59] The Plaintiff's earnings from the trips made by the motor lorry were based directly on when the Plaintiff worked and how often he worked. The Defendant played no part in determining the Plaintiff's working hours. But an important feature of the arrangement was that it was the Defendant who provided the motor lorry and had the responsibility for maintaining it, providing diesel and ensuring that it passed inspection by the relevant authority. This was not a case where the Plaintiff provided his own equipment or tools for the performance of the contract. Nor was it a case where the Plaintiff took any financial risks.

[60] There is also the matter of the non payment of N.I.S and the fact that P.A.Y.E was not deducted. The Plaintiff contended that he raised the issue of N.I.S with the Defendant who promised to deal with it, while the Defendant's assertion is to the contrary. In the court's view, this is not a critical factor in determining the nature of the contractual relationship between the parties, for as the authors of ***Chitty on Contracts (30th Edition, Vol 2 (2008)*** state at para ***39-024:***

> "The deduction by the employer of income tax and employed earner's social security contributions under the PAYE system are indications that the parties themselves view their relationship as one of employment. But neither this nor the failure to make these payments or deductions is conclusive as to the nature of the relationship in the eyes of the law".

[61] After a careful evaluation of the facts surrounding the relationship between the Plaintiff and the Defendant, it is the opinion of this court

that the work done by the Plaintiff was not on his own account under a contract for services driving the motor lorry operated by the Defendant. It is the court's finding that the Plaintiff was an employee of the Defendant.

Issue No. 2 – Whether the Defendant owed the Plaintiff a duty of care and was there a breach of that duty?

[62] Having determined that the Plaintiff was an employee of the Defendant, the next issue is whether the Defendant owed a duty of care to the Plaintiff, and if so, whether there was a breach of that duty.

The Plaintiff's Submissions

[63] Counsel for the Plaintiff submitted that the Defendant, as employer, owed a duty of care to the Plaintiff to provide him with a safe system of work. In support of his submission, counsel cited the dictum of **Lord Oakley** in ***General Cleaning Contractors Ltd. v. Christmas (1953) AC 180 at p. 189***. Once it was established that the Defendant provided equipment which was dangerous, the onus shifted to the Defendant to satisfy the court that it had in fact exercised reasonable care for the Plaintiff's safety.

[64] Counsel submitted the Plaintiff has shown that a safe system had not been provided, the Plaintiff having warned the defendant about the defects and consequently having suffered the injury, the onus had not been discharged by the Defendant. Mr. Lashley submitted further that to expose the Plaintiff to the defective platform area of the vehicle when she knew or ought reasonably to have known that the Plaintiff had to use the platform from time to time to load and unload commodities was a breach of her duty of care to provide a safe system of work for her employee. In these circumstances, the Defendant is liable to the Plaintiff.

The Defendant's Submissions

[65] Counsel for the Defendant submitted that the Plaintiff had failed to prove negligence against the Defendant. He submitted that the manner of the Plaintiff's injury was caused by the recklessness of the Plaintiff in attempting to stand with one foot on the side rail of the truck in order to off load the cases to put them around the sides of the platform.

[66] Counsel submitted that the unstable platform, the alleged cause of the accident, had no role to play in causing the Plaintiff to fall off of the side rail to the ground. In his view, there was no evidence that any rust spots, loose or missing screws caused the latch or the side rail to come down.

[67] It was the further submission of counsel that the Plaintiff's evidence as to the mechanism of the accident was materially different from the case as was pleaded and as such his claim ought not to succeed.

Discussion

[68] It has long been established that an employer has a duty at common law to take reasonable care for the safety of his employees. This obligation is to provide (i) competent staff (ii) adequate plant and equipment (iii) a safe system of working and (iv), a safe place of work – ***Wilsons and Clyde Coal Co. Ltd. v. English [1938] AC 57*.**

[69] The Plaintiff has alleged in his Claim that the Defendant, by the provision of a truck with a defective platform and unstable siding failed to provide a safe system of work.

[70] The Defendant was under a duty to provide for the use of the Plaintiff a motor lorry which was free from defects. Further, it was also her responsibility to ensure that there was a safe system of work. The Defendant sought to convince the court that it was a term of the contract that the Plaintiff report any defects to her and he failed to do so. However, the Plaintiff had been operating the motor lorry for some time on a regular basis. It is reasonable to assume that in so doing he would become aware of any defects and would have reported any defects. His evidence is that he did report the defects to the Defendant, who instructed him to go to a welder but nothing was done. This was denied by the Defendant. While the Defendant made a broad statement that she would go to Brydens and inspect the truck sometimes, and that it had no defects, she gave no evidence as to the frequency of such inspections, or the date of her last inspection. On this point the evidence of the Plaintiff is preferred to that of the Defendant.

[71] I find no merit in the Defendant's submission that the defence of volenti non fit injuria applies in this case. There was no safe system of work prescribed by the Defendant. The Plaintiff was attempting to pack the Vita Malt cases which were stacked 7 ft. high around the sides of the motor lorry and had placed his foot on the side rail when the latch gave way and he fell. I do not think that from the facts it can reasonably be inferred that the Plaintiff consented to run the risk.

[72] After a careful assessment of the evidence it is the finding of the court that the motor lorry was defective and that by placing the Plaintiff in a position where he had to use the motor lorry with defects was a breach of the Defendant's duty to provide a safe system of work.

Issue No. 3 – If there was a breach of that duty, to what damages is the Plaintiff entitled?

[73] As a consequence of the Defendant's breach of the duty of care, the Plaintiff suffered injuries. The Defendant is therefore liable in damages for those injuries. I turn now to the assessment of damages.

The Assessment of Damages

General Damages

[74] The following medical reports were admitted into evidence:

(1) Medical reports of Dr. Jerry Thorne, FRCS dated 11 December 2003 and 12 August 2004.

(2) Report of Ms. Solita Reece, Physiotherapist dated 31 October 2005.

(3) Medical report of Mr. Winston Seale FRCS dated 12 December 2006.

The Injury and the Medical Treatment

[75] The Plaintiff was taken to the Diagnostic Clinic where he was seen by Dr. Sean Russell and underwent X-Rays. He was referred to Dr. Jerry Thorne, FRCS, Orthopaedic Surgeon who saw him the same day. The Plaintiff sustained a fracture of the distal left radius. Surgery was carried out on the Plaintiff's left wrist at Bayview Hospital by Dr. Thorne where the fracture was fixed with a plate. The Plaintiff was kept in hospital overnight. After discharge the Plaintiff returned to Dr. Thorne twice a week for follow-up. A below elbow cast which was fitted was removed approximately six weeks after surgery.

[76] Dr. Thorne also referred the Plaintiff to Ms. Solita Reece, Physiotherapist for therapy in January 2004. The Plaintiff attended therapy regularly from 15 January to 1 April 2004.

[77] In January 2005 the Plaintiff was seen in the Orthopaedic Clinic at the Queen Elizabeth Hospital by Mr. Winston Seale, FRCS, Orthopaedic Surgeon. At that time he complained of (i) persistent swelling over the dorsum of the left wrist; (ii) pain in the distal forearm, worst with flexion of his wrist; (iii) numbness in his right 4^{th} and 5^{th} fingers; and (iv) inability to form a full wrist. On examination, Mr. Seale found that there was chronic swelling of the left wrist making the radius appear thicker than normal but the distal radio-carpal joints were in good alignment; x-rays of the left wrist showed good alignment and healing of the fractured radius. There was mild joint space narrowing consistent with early degenerative arthritis.

[78] Mr. Seale recommended removal of all metal ware from the Plaintiff's wrist. That procedure was done on 17 February 2005 and his wrist was splintered in a half-cast and he was discharged. The Plaintiff received physical therapy at the Hospital and was reviewed in the Orthopaedic Out-Patient Clinic.

[79] At his last review in clinic on 5 September 2006, Mr. Seale found that the Plaintiff's wrist had fully healed and he was discharged from further attendance.

The Effects of the Accident

[80] The Plaintiff testified that after undergoing surgery, he was unable to look after himself at home. He had to rely on assistance from his mother which continued for about 5 months, until he could move his fingers.

[81] The Plaintiff also testified that he played cricket, football and volleyball for recreation before the accident. He no longer plays football or volleyball. He tries to play cricket but has found that holding a bat is now uncomfortable.

[82] The Plaintiff stated that his main occupation is as a driver but he also does upholstery and auto electronics. He was out of work from November 2003 until April 2008. He presently drives a manual truck and his work is less physical. On occasion, he experiences stiffness using the gear shift.

Discussion

[83] The Plaintiff sustained a fracture of the left wrist which caused him pain. He suffered from persistent swelling, reduced range of movement and numbness in his 4^{th} and 5^{th} fingers for some period after the accident.

[84] Mr. Lashley submitted that an award of $56,400 should be made under this head. He cited the case of ***Ford v. Large, Kemp and Kemp H4-015/1 (Ford)*** and noted that the award in this case was £10,250.

[85] Mr. Nicholls referred to the Judicial Board Guidelines 2005 where awards for an uncomplicated colles' fracture are estimated to be in the region of £4,000. He submitted that an award of $14,000 would be appropriate.

[86] In ***Ford*** the plaintiff injured her left (dominant) wrist, neck and head in a road accident. The wrist was fractured and was in plaster for five weeks. Two and a half years after the accident, the wrist clicked on occasions and ached periodically. Examination revealed a 20 degree loss of flexion and slightly diminished grip. Physiotherapy resulted in improvement in grip and function to near normal, but significant crepitus remained, causing difficulties at work and periodic pain. There was a possibility that the Plaintiff would develop degenerative changes in the wrist in the future. At three years from the date of injury the Plaintiff also developed mild symptoms of cervical spondylosis in her neck, causing discomfort on turning her head to the right. These symptoms were likely to wax and wane but unlikely to be a major problem. She was awarded £6,500 for the wrist injury, £750 for the neck injury and £3,000 for the anxiety whilst driving.

[87] In the present case, the Plaintiff's injury, and resulting problems, were not as severe as those of the plaintiff in **Ford**. Having regard to the injury suffered by the Plaintiff and taking into account the authorities cited, it is considered that an award of $20,000 would be an appropriate award for the pain and suffering endured by the Plaintiff.

Loss of Earning Capacity

[88] Mr. Lashley submitted that the Plaintiff will be at a disadvantage on the labour market and that he should receive a ***Smith v. Manchester*** award in the amount of $28,600. He relied on the cases of ***Gunter v. John Nicholas and Sons (Port Talbot) Ltd (1993) P.I.Q.R 67*** and ***Smith v. Vine Kemp and Kemp para 6-718. C***ounsel referred to the final paragraph of Ms. Reece's report which indicated that "the range of motion of the left wrist was not quite full range". Ms. Reece expressed the opinion that "at this stage it would probably be better that Mr. Roach look for a job that would not require a lot of manual dexterity". It must be noted that Ms. Reece was commenting on the Plaintiff's condition in 2004.

[89] It is Mr. Nicholls' submission that there is no evidence to support the Plaintiff's claim for any handicap or devalued position on the labour market, particularly when the opinion of Dr. Thorne is taken into account.

[90] In his report of 12 August 2004, Dr. Thorne stated:

> "Mr. Roach is a manual labourer, that is his training and it seems likely that he will be so engaged for the remainder of his working life. He has suffered an injury to his left wrist. He is right hand dominant. He complains of some discomfort about the left wrist which can be attributable to the presence of the insitu hardware. This discomfort contributes to his current disability through I am concerned that the current evidence supports the view that were it not the fact that he is engaged in a contentious legal action with his previous employer, were he not convinced that his previous post had been taken by a person who is permanently employed, he in his current state would have returned to work leading to the view that certainly with regards to his current employment this gentleman has suffered no permanent disability at least not sufficiently significant to prevent continued employment".

Discussion

[91] Mr. Seale reported that when he saw the Plaintiff in June 2006 he complained of stiffness in his left wrist. There was reduced movement at the joint, most likely due to post traumatic degenerative arthritis. At his last review on 5 September 2006, Mr. Seale found that the Plaintiff's wrist had fully healed.

[92] Loss of future earning capacity was discussed in the case of ***Moeliker v. A. Reyrolle & Co Ltd [1977] 1 W.L.R 132.*** At p. 141 B ***Lord Justice Browne*** said:

> "Where a plaintiff is in work at the date of the trial, the first question on this head of damage is: what is the risk that he will at some time before the end of his working life lose that job and be thrown on the labour market? I think the question is whether this is a "substantial" risk or is it a "speculative" or "fanciful" risk: ***Davies v. Taylor [1974] A.C. 201, Lord Reid*** at p. 212 and ***Lord Simon*** of ***Glarsdale*** at p. 220….In deciding this question all sorts of factors will have to be taken into account, varying almost infinitely with the facts of particular cases. For example, the nature and prospects of the employer's business; the plaintiff's age and qualifications; his length of service; his remaining length of working life; the nature of his disabilities, and any undertaking or statement of intention by his employers as to his future employment. If the court comes to the conclusion that there is no "substantial" or "real" risk of the plaintiff losing his present job during the rest of his working life, no damages will be recoverable under this head".

[93] The Plaintiff is now 45 years old and is currently employed as a driver. Since the accident he has not driven the Defendant's motor lorry. However the evidence before the court is not of the quality and kind which would enable the court to assess the factors identified in ***Moeliker*** and make a determination as to whether there is a substantial or real risk**.**

[94] Having considered the available evidence, the court is of the opinion that no award should be made under this head.

Loss of Earnings

[95] In his claim the Plaintiff stated that his loss of income was for the period 18 November 2003 to 30 September 2006 at the rate of $400 per week being $59,141.00. However, the Plaintiff testified that he earned between $250 and $300 per week. In his written submissions counsel argued that he should receive the sum of $40,659.44 using the rate of $275 per week. The Plaintiff stated that in May 2007 he had been employed at Hinds Garage, St. James but he experienced difficulty doing the job because of his inability to grip the tools. He gave up this job and was next employed in April 2008.

[96] The medical evidence suggests that the Plaintiff had sufficiently recovered by August 2004 - see Dr. Thorne's remarks at para [90] above. In that report, Dr. Thorne inquired whether or not the Plaintiff had returned to work and the Plaintiff replied "I did not return to work because there is someone in the job and I have information that they are not temporary". Dr. Thorne also reported that "his current employability is completely unimpaired by this injury".

[97] However, allowance must be made for the fact that the plaintiff at the time of his visit to Mr. Seale in January 2005 was still suffering from

pain and Mr. Seale found chronic swelling of the left wrist. The removal of all in situ hardware and subsequent treatment led to Mr. Seale's finding that the wrist had fully healed on 5 September 2006.

[98] In view of the foregoing, I consider that loss of earnings should be recovered for the period from the date of the accident i.e. 18 November 2003 until 5 September 2006. The sum recoverable by the Plaintiff is $275 x 143 = $39,325.

Special Damages

[99] The Plaintiff claimed the sum of $7,480 for special damages. The Defendant did not object to the amount claimed. This sum will therefore be allowed under this head.

Disposal

[100] In summary, I find on the facts that the Plaintiff was employed by the Defendant under a contract of service and was owed a duty of care by the Defendant. There was a breach of that duty of care which resulted in injury to the Plaintiff. Judgment is given for the Plaintiff against the Defendant in the following terms:-

General damages	-	$20,000
Past loss of earnings	-	$39,325
Special damages	-	$ 7,480

Interest on the general damages will be at the rate of 6% from today until payment and on the special damages at the rate of 6% from the date of filing of the writ until payment.

[101] The Plaintiff will have his costs certified for two attorneys-at-law, to be agreed or taxed.

Kaye Goodridge,

Judge of the High Court.