IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

CLAIM NO.: 163 OF 2003

CIVIL DIVISION

BETWEEN:

ABDUL WOODLEY

Claimant

v

EAST CARIBBEAN METALS/ PLASTICS INDUSTRIES LTD

Defendant

Appearances:
Ms. Zhinga Horne – Edwards for the Claimant
Mr. Douglas Williams for the Defendant.

2004: September 27
2006: February 14
2006: February 16
2007: February 26

JUDGMENT

[1] **BRUCE-LYLE, J**:- The claimant claims general damages for negligence arising out of injuries sustained to his left hand while he was in the employ of the defendant company working in the capacity as the operator for a machine known in the industry as a 10/3 machine which produces corrugated galvanize metal sheets. As a result of the injuries sustained, all four fingers on the left hand of the

claimant had to be amputated. The claimant also claimed special damages, interest and costs.

THE FACTS

[2] The accident happened on the 11th of July 2001. The claimant who was an employee of the defendant company was operating the 10/3 machine at the defendants factory premises. To really comprehend how the accident might have happened, it is necessary to give a brief description of the workings of the said 10/3 machine. This machine is a corrugating machine used to corrugate metal sheeting. The roll of metal sheeting is loaded on to a stand and the end is guided into the in-feed area by the operator. Located on the side (each side) of the in-feed area is a piece of wood measuring approximately 2 inches by 2 inches and 3 feet in length.

[3] The purpose of the wood is to keep the metal sheeting in place. The wood is secured with clamps, two on each side: one at each end of each piece of wood. There are also two additional clamps at the outer – right hand side of the in-feed area, which control the width of the in-feed area. There is also a control panel on the machine it is at this control panel that the operator sets the number of sheets and the specific lengths to be cut. The emergency switch is also located on the control panel.

[4] The machine is started. This has the result of pulling the metal sheeting into the machine. The sheeting is specifically drawn between two sets of rollers located about 12 inches from the end of the wood. The sheeting emerges at the opposite end of the machine with a corrugated pattern. As the sheet emerges, it activates a switch by pushing against it. This deactivates the motor of the machine and triggers the action of the guillotine which cuts the sheet at the required length. If the cut sheet is then removed, it releases the switch and the motor is re-activated. Three employees work on this 10/3 machine. That is one operator, and two other

workers who remove the cut sheets. The claimant was the operator of the 10/3 machine and Hermus Cozier and Everal Lavia were the two other workers on the day of the accident.

[5] It is necessary to expound on the claimants duties that day as the operator of the 10/3 machine. His job involved preparing the machine for production, setting the machine to produce the required number and lengths of galvanized sheeting and ensuring that the sheets produced were of good quality. From time to time, adjustments had to be made to the machine by the operator. This would occur mainly when the metal sheeting was crimping or folding at the edges. This would required sometimes for the moving of the wood mentioned earlier which meant that the operator would have to put his hand in close proximity to the rollers

[6] At other times the adjustments would be done only by the operator being required to use the clamps at the outer right-hand side of the in-feed area. It must be remembered that adjustments could only be made while the machine was stopped. The machine could be stopped in two ways: (1) by the action of the newly corrugated sheet pushing against the switch and not being removed at the instruction of the operator thereby temporarily deactivating the motor and (2) by the operator using the emergency switch which cuts of the power to the machine.

[7] Between 9:00am and 9:30am on the day of the accident, July 11th 2001, the claimant was making some adjustments which required him to shift the pieces of wood described earlier. Incidentally this was Everal Lavia's first working day with the 10/3 machine. The machine at this stage was deactivated as the sheeting had shut off the motor by activating the switch. Whilst the claimant was in the process of making the adjustments to the machine, he used his left hand to press down on the sheeting while tightening the clamps on the wood with his right hand. At this point the machine began running pulling the metal sheeting into the 10/3 machine and the claimants left hand was caught in the rollers of the machine. The claimant suffered a crush injury, as a result of which four of his fingers had to

be amputated. It is crucial to note that when the accident occurred Everal Lavia ran out of the factory.

[8] In his witness statements, the claimant stated that he had been working with the defendant for about one year before the accident giving rise to the claim and that he had worked on the 10/3 machine for most of that time; the last two or three months of which he was the operator. He had been recommended for that position by the factory supervisor Mr Derrick David who had trained him how to operate the machine.

[9] The defendants case is simply that based on the evidence the accident did not happen in the manner alleged by the claimant; and that at the time when the accident occurred the machine was still in activation following the period when it was stopped according to the claimant , for about 15 minutes, and the adjustments made. The defendant further stated their case to the effect that the desired length of sheeting had not yet been reached so as to come into contact with the switch to activate the guillotine to cut the sheet and thereby to deactivate the machine. They further contended that this accounts for the fact that only 14 feet of the sheet was corrugated.

[10] Defendants further stated that had the full length of 15 feet been reached to deactivate the cutting switch when Derrick David put the switch into reverse to release the claimants hand from the rollers, the same 15 feet sheet would still have been there and not 14 feet as was in fact the case. The defendant further contended that the claimant was singularly grossly negligent in the operation of the machine which resulted in his injuries and therefore the defendant cannot be held liable in damages for any negligence, contributory or otherwise.

[11] The defendant's case is reliant primarily on the evidence of one Hermus Cozier. Cozier's back was turned away from the operator the claimant, and facing Lavia at the other end of the machine bed when suddenly he heard a loud noise and a

pounding on the machine with the claimant shouting "stop the machine". Cozier did not say in his evidence that the machine was stopped and then suddenly began turning. The claimant however stated that the machine was stopped for about 15 minutes to make adjustments. In cross-examination Cozier stated that there are two ways of stopping the machine and that the claimant himself was in the position to switch off the machine. This evidence is supported by that of Michael Persaud, the manager of the defendant company, who stated under cross-examination that there is a remote control switch by which if the operator needs to control the machine he can do so. This switch is held by the operator and can be moved around with. This evidence was also corroborated by the Factory Supervisor Derrick David.

[12] The court visited the factory (locus inquo) on the 16th February 2006. The Court, together with counsel and the parties were shown the said 10/3 machine and given a demonstration as to how it works. The two switches referred to in the evidence of cross-examination of Mr Michael Persaud and Hermus Cozier were also demonstrated. It was evident from that demonstration that the hand held switch can at all times be held by the operator or within easy reach and had it been so held or within easy reach of the claimant at the time, he himself could have stopped the machine. It is clear therefore that the claimant was at all times the person in exclusive control of the operation of the machine, in that he had access to the two switches to control the power of the machine. Was the claimant there – fore negligent in the circumstances?

[13] There was something of supreme importance that the Court noted on its visit to the factory. This confirmed what both Gideon Lewis, witness for the claimant in his witness statement at paragraph 11, and the claimant at Paragraph 12 of his witness statement stated. The Court noted that there was no fencing or guard shielding the rollers on the machine though it observed what appeared to be hinges on the machine in the area near to the infeed rollers which suggested that there might have been some form of safety fence or guard prior to these witnesses

being employed by the defendant. Mr Persaud in his evidence given under cross-examination said surprisingly that the machine was purchased in its present configuration and had been in operation since 1981 without any form of fencing or guard and without any incident. Should this be accepted as an excuse by the Court to absolve the defendant from liability? I would say no.

THE LAW

[14] There are various pieces of legislation relevant to this case. These were referred to by Claimants Counsel Ms Zhinga Horne-Edwards. I agree with all those pieces of legislation, and their relevance to this case. The Factories Act Cap 335 states at Section 9(1)(a) and 9 (1)(g) as follows -:

> Section 9 (1) (a)-: "All machinery and every part thereof shall be made safe to all persons employed or working in the factory"

Section 9 (1)(g) of the act states that every part of the machinery or plant used in the factory –

> "Shall be in such condition or so constructed or so placed that it can be used without risk of bodily injury"

[15] The factory and machine Regulations, Cap 335, at Regulation 19 states-

> "It shall be the duty of the owner, manager or other person having control of any factory to comply with part II"

Part II of the regulations includes regulations 21, 33 and 70 which have been referred to by Learned Counsel for the claimant.

Regulation 21 states-

> "Every dangerous part of any machinery shall be securely fenced unless it is in such a position or of such construction as to be as safe to every worker as it would be if securely fenced".

[16] In considering these pieces of legislation referred to above in this judgment, the Court should have regard to the test to be applied in assessing whether machinery is dangerous. Whether machinery is dangerous is a question of fact and degree.

But in the case of Close v Steel Company of Wales Ltd [1962] A.C. 367 the House of Lords laid down the test and had this to say –

> "Machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may reasonably be anticipated from the use of them without protection".

It is trite law that an employer has a duty to securely fence dangerous machinery where a danger of injury by contact is reasonably anticipated. As per Charlesworth and Percy on Negligence, 10th Edition at paragraphs 11-174; And in the case of John Summers and Sons Ltd v Frost [1955] 1 ALL E.R.870 it was held that regard must be had not just to the careful worker but to the careless and inattentive worker. This supposes that the duty to fence dangerous machinery imposed by regulation 21 is an absolutely duty – Halsbury's Laws of England, 4th Edition Vol 20, para. 562.

[17] Regulation 33 (Regulations) states -:

> "No worker shall be allowed to work at any dangerous machine unless such worker has been fully instructed as to the dangers arising in connection with the machine and the precautions to be observed".

and Regulation 70 states -:

> "In all places to which these regulations apply a person shall be appointed to exercise supervision of the works, machinery and plant for the purpose of ensuring safety. It shall be the duty of the person so appointed to see that all safeguards and other safety appliances are maintained in proper order and position and to investigate accidents, nothing in this requirement shall relieve the owner, manager, or person having control of the factory of his duties under these regulations".

It is pellucidly clear that these duties as regards the law and statute are absolute.

[18] At common law an employer has a personal duty to have reasonable care for the safety of its employees. That common law duty includes the duty to provide competent workers, adequate plant and equipment, a safe system of working with effective supervision and a safe place of work. The failure to fulfill this duty may

amount to negligence on the part of the employer. Again if an employer employs a workman who has had insufficient training and experience to perform a particular task and as a result of the employee's incompetence another employee is injured, the employer is in breach of his common law duty. By the same token, where an employee has a reputation for shirking his responsibilities or not taking his job seriously and an employer continues to employ him, the employer is liable if another employee is harmed as a result of that employers actions.

[19] An employers duty at common law extends to organize a safe system of work and to supervise his workmen adequately. In doing so, he must bear in mind the fact that workmen are often careless as to their own safety. The system of work must therefore be such that it reduces the risk of injury to employees from the foreseeable carelessness of other employees. A safe system of work also includes the way in which it is intended that the work shall be carried out; the giving of adequate instructions and the taking of precautious for the safety of workers. There are a plethora of authorities that support the above propositions.

[20] From the above, there is no doubt what duty the defendant owed to the claimant. There is ample evidence that the defendant has not really exercised that duty to the satisfaction of the law and to the claimant, and is in breach. The defendant has however pleaded contributory negligence on the part of the claimant. A claimant maybe held to be contributorily negligent if he failed to take reasonable care for his own safety. However that standard of care a workman is expected to take for his own safety may be lower than that for the ordinary man on the street. This is also supported by case law. All the circumstances of work in a factory have to be taken into account, including the noise, the monotony of the particular operation and fatigue and the effect of these factors on the workman's senses and his performance of his job – Commonwealth Caribbean Tort Law 3rd edition pages 359 – 360; Walker V Clarke (1959) 1W1R143. To go further the Courts have been even more reluctant to hold a workman partly responsible for injury the risk

of which the employer had a statutory duty to guard against – Walker v Clarke case.

[21] Juxtaposing the law as against the facts of this case it is clear that the defendant has no leg to stand on. The 10/3 machine being a heavy, large machine with corrugating wheels or rollers, could reasonably be said to have been a machine capable of danger, and foreseeable that danger might arise from the use of the machine without protection. To compound this fact both the claimant and his witness Gideon Lewis, a former employee, stated that there was no fence before the rollers, although there were signs that there may have been a fence there at one time. This is supported by defendants witness Hermus Cozier and Derrick David. If the fence had been properly affixed to the 10/3 machine it would have acted as a barrier to prevent contact with the potentially dangerous rollers. I conclude therefore that the said machine was not in such a position or of such construction as to be as safe to every worker as it would be if securely fenced.

[22] It is also clear from the evidence that this was Mr Lavia's first day on the 10/3 machine. All the instructions and training afforded him to operate this potentially dangerous machine was a "briefing" from Mr David on the operation of the machine and the procedure to be followed in the event of an emergency. This all took place on the morning of the accident, 11th July 2001. The defendant was therefore clearly in breach of regulation 33 mentioned earlier in this judgment. That regulation imposed an absolute duty on the defendant to fully instruct Lavia, and not a cursory or hasty instruction as seems to be the case. It is therefore not surprising to me that because of the cursory or hasty briefing or training given to Lavia, he chose to ran out of the factory when the accident occurred, instead of putting into effect emergency procedures that was to have stopped the machine.

[23] Counsel for the claimant also suggested a breach of Regulation 70 – failing to appoint a person to exercise supervision of the works, machinery and plant for the purpose of ensuring safety. The evidence of Derrick David supports this

contention by Learned Counsel for the claimant. It is clear from the evidence, especially Derrick David's that being the floor supervisor at the defendants premises he at the time of the accident, was in the forklift area of the factory where the coils of metal are stored as opposed to monitoring Everal Lavia who was at the 10/3 machine for the first time and secondly being aware that there had been a fence on the 10/3 machine, and that it was no longer on the said machine for some time before the accident, he yet failed to ensure that it was repaired and maintained on the said machine. There is further evidence from Hermus Cozier that a supervisor was not on the floor of the factory "too often". The defendant therefore failed to comply with its statutory obligations under the Act and the Regulations mentioned earlier in this judgment. There can be no justification on the part of the defendant for its failure to comply with these duties, given the absolute nature of the duties. It is even further held that the defendant breached both his statutory duties and duties imposed under common law.

[24] I now return to the issue as to whether the claimant was contributorily negligent as posited by the defendant. The defendants case is that the claimant contributed to his own injuries by his conduct. The defendants defense is that the claimant-:

> (1) "Willfully and without reasonable cause endangered himself by placing his hand in an activated machine which was potentially dangerous when so activated;
> (2) failed to heed the potential danger which he knew that placing his hand in the activated machine presented;
> (3) failed in the premises to take any or any adequate precautions for his own safety".

In the case of Flower v Ebbw Vale Steel /Iron+coal Co Ltd at P.140 Lawrence, J Stated-

> "I think of course, that in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of work in the factory and that it is not for every risky thing which a workman in a factory may

do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence".

[25] These words of Lawrence, J have been approved by the House of Lords on several occasions – John Summers and Sons Ltd V Frost, Per Lord Reid at p8871 to P888A. Looking at the evidence of the claimant as Juxtaposed against the evidence given by the defendants witnesses, I am inclined to accept the claimants version of events, having regard to all the circumstances of the case and the dictum of Lawrence, J in the Flower V Ebbw Vale case mentioned above.

[26] The claimants accident is precisely the type of accident that the statutory duty to fence dangerous machinery was imposed to prevent – John Summers & Sons Ltd V Frost at p890 E Per Lord Keith of Avonholm. Had the defendant complied with it the claimants accident would not have occurred. I hold that the claimant in the circumstances was entitled to firstly, assume that the defendant would have adequately trained all of his fellow workers, and secondly, to continue using the practice to which he had become accustomed and thirdly, to rely on the coorporation of Mr Lavia who was placed by the defendant at the 10/3 machine and with whom he had to work. I hold that the defendant cannot shift responsibility for its shortcomings on the claimant. The claimants failure to use the emergency switch to stop the machine at best amounted to an error of judgment which fell short of negligent conduct – see Walker V Clarke at P148

> "It is recognized that people in factories are not always careful, but on the contrary, they are often thoughtless and sometimes do things deliberately which they ought not to do and which involve themselves in injury. Fencing is intented to protect the careless and ignorant as well as the careful and well-instructed".

[27] As I said earlier in this judgment, the Court visited the locus inquo where the entire scene and the workings of the 10/3 machine was observed. What struck me

glaringly was the attempt by defendants witnesses Mr David and Mr Cozier to fine tune their evidence under cross examination given at the trial and their evidence at the locus. Under cross-examination both these witnesses said that there exists a practice of stopping the machine by telling the workers not to remove the cut sheet. Mr David, the supervisor, being obviously aware of the practice never discouraged it. Workers including the claimant adopted the method as this was what they had observed in their on-the-job training and fact that they were never told not to use that method, the claimant had used that method for sometime prior to the accident, without incident. But at the locus, both these witnesses them went further to tell the Court that additionally the emergency switch is always (emphasis mine) used to cut the power when adjustments are being made.

[28] There is also the clear contradiction of the evidence of Mr David as juxtaposed to Mr Persaud, whose evidence was not really helpful as he was not present when the accident took place. The difference in the evidence of these two witnesses was to the effect that Persaud denied that there was ever a fence shielding the rollers on the 10/3 machine and that such a fence would obstruct the operation of the machine, whilst David in clear contradiction admitted that there was a fence at one time and went further to describe the fence in his cross-examination as being made of plastic and as preventing anything apart from the galvanized sheeting from going into the machine. The Court clearly observed the presence of hinges and a broken piece of plastic on the 10/3 machine. On being questioned what those items were Mr David reluctantly confirmed that those items showed that a fence was there before. Which version is the Court to believe?

[29] Looking at the totality of the evidence in this case, and having examined the law, both statute and common, it is clear that the Defendant has breached its statutory duties as pleaded in the amended claim form, as well as its duties at common law. The defendant has failed to prove that the claimant was negligent with respect to the issue of contributory negligence as explained earlier in this judgment – that

the Courts must be hesitant in finding a claimant to have been contributorily negligent where the employer is in breach of a statutory duty and the workmen conduct is exactly the type of conduct the employers statutory duty was designed to protect.

[30] I therefore hold, on a balance of probabilities, and having regard to all the circumstances of this case that the proximate cause of the accident was the defendants failure to fence the rollers on the 10/3 machine. Had this statutory duty been complied with, to fence this dangerous machinery the claimant would not have sustained this injury in the manner in which it happened. The defendant is therefore liable in damages to the claimant. Damages and costs to be assessed by the Master on a date to be fixed by the Registrar.

.....

Frederick Bruce-Lyle
HIGH COURT JUDGE