[2016] **JMSC Civ. 228**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV02429

BETWEEN	**DEVON HARRIS**	**CLAIMANT**
AND	**E & R HARDWARE LTD.**	**DEFENDANT**

IN OPEN COURT

Mr. Lemar Neale instructed by Bignall Law for the Claimant

Mr. Mikhail Williams instructed by Taylor Deacon & James for the Defendant

Heard: 21st, 22nd & 23rd November and 20th December 2016

NEGLIGENCE - OCCUPIER'S LIABILITY - EMPLOYER'S LIABILITY - INDEPENDENT CONTRACTOR - RES IPSA LOQUITOR - INADEQUACY OF PLEADINGS

CORAM: JACKSON-HAISLEY, J. (AG.)

[1] The Claimant Devon Harris filed a Claim Form accompanied by Particulars of Claim on April 19, 2013 against the Defendant E & R Hardware Ltd. seeking to recover Damages for Negligence and/or Damages for a breach of the Occupier's Liability Act. On June 5, 2015 he filed an Amended Particulars of Claim. This Amended Particulars of Claim was further amended on November 22, 2016.

[2] His Claim is based on an incident which occurred on the 16th February, 2012 on premises belonging to the Defendant. The Claimant indicates that he is a Welder and on that date he was on a contract of/for service with the Defendant who at all material times was a limited liability company with its registered office at Lot

16/17 Portmore Town Centre, Saint Catherine and was the operator of premises located at the said address.

[3] According to the Claimant he was invited by the Defendant, its servants and or agents to repair a gate located on the premises owned and operated by the Defendant and whilst in the process of effecting the repairs to the said gate, a bolt from a faulty lock came loose and violently struck him on his right hand, causing him to sustain injury, loss and damage.

[4] The Claimant alleges that there was an implied term of the contract of service that the Defendant should provide and maintain an adequate and suitable system, plant and equipment to enable the Claimant to carry out his work safely and further that the Defendant breached this duty resulting in his injury. Further, that in the alternative the Defendant breached its statutory duty pursuant to section 3 of the Occupier's Liability Act, in that it failed to ensure that the Claimant, a lawful visitor, was reasonably safe in using the premises for the purpose for which he was invited and/or permitted to be there.

[5] He also pleads that the accident was caused by the negligence of an employee, servant and/or agent of the Defendant, in the supervision and management of the premises. Further, or in the alternative, the injuries, loss and damage were occasioned by the Claimant in the course of the work by reason of the negligence of the Defendant and its servant and/or agent.

[6] The Claimant sets out the Particulars of Negligence and breach of the Occupier's Liability Act as follows:

> "1.Failed to take any or any adequate or effective precautions for the safety of the Claimant while he was engaged upon the work in that the Defendant, its servants and/or agents failed to provide the Claimant with special

instructions, warnings, advice and or protective hand and head wear to aid in executing the repairs for the said gate.

2. Exposed the Claimant to an unnecessary risk of damage or injury while he was engaged upon the work which they knew or ought to have known, in that the Defendant, its servants and/or agents failed to advise the Claimant about the faulty lock on the gate.

3. In the circumstances failing to provide and/or maintain a safe and proper system of work.

4. Failed to provide a safe place of work, in that the Defendant, its servants and/or agents failed to ensure that in all the circumstances the place of work which the Claimant was required to work was reasonably safe.

5. The Defendant failed to ensure that in all the circumstances of the case the Claimant herein was reasonably safe whilst using the premises for which he was lawfully invited to be there, in that the Defendant, its servants and/or agents failed to advise the Claimant about a faulty lock on the gate, the said gate of which they had invited the Claimant to repair, and exposed the Claimant to a risk of harm, which they knew or ought to have known.

6. The Claimant will rely on the doctrine of res ipsa loquitor."

[7] The Claimant indicates that he has suffered pain, injury, loss and damage and incurred expense and his Particulars of Injury are said to include a crush injury to the right thumb. He claims Special Damages as follows:

I. Medical Report and visits to Dr. Fabio Pencle in the sum of $2,000.00;

II. Loss of income for nine months at $45,000.00 per month amounting to $405,000.00;

III. Transportation of $25,000.00;

IV. Extra help for 36 weeks and continuing in the sum of $144,000.00.

The total sum claimed for Special Damages amounted to $572,000.00. Further, he claimed General Damages and Interest thereon at such a rate and period as this Honourable Court deems just pursuant to the Law Reform (Miscellaneous Provisions) Act as well as Costs.

[8] The Defendant filed an Amended Defence on the 7th August 2015. The Director of the Defendant Mr. Errol McCarthy signed this Defence. He denies that at the material time the Claimant was on a contract of service or for service with the Defendant. He avers that the Claimant sustained the injury whilst he was assessing a task on his instructions in respect of which he intended to enter into a contract for services with the Claimant but had not then done so. Further, that he received no estimate of the cost from the Claimant, but instead received a telephone call by which means he was advised that the Claimant had suffered injury while carrying out repairs, although not authorised to do so.

[9] The Defendant alleges that consequent upon there being no contract of or for service with the Claimant at any material time, there arose no material or implied term to provide and maintain an adequate and suitable system of work and/or to take reasonable care to provide and maintain an adequate and suitable plant and equipment. Further, there was no duty on the Defendant not to expose the Claimant to any risk or injury whether same was known to the Defendant and which it ought to have known existed.

[10] Further, that if the Claimant is found to have contracted with the Defendant, then at all material times he was an independent contractor and so was solely responsible for ensuring that his system of work was safe. The accident, it is pleaded was not caused by the Negligence of the Defendant nor is the Defendant in breach section 3(7) of the Occupier's Liability Act. Further, that the injury, loss and damage was caused solely by the Negligence of the Claimant.

The Particulars of Negligence are all denied and the Defendant adds that at no time did it fail to take adequate or effective precautions to ensure the Claimant's safety, nor did the Defendant expose the Claimant to unnecessary risk of damage or injury.

[11] Further, that the injury sustained was not reasonably foreseeable and that the injuries, loss and damage suffered were as a result of the Claimant's own Negligence. Further, that the very reason the Defendant asked the Claimant to assess the gate was in anticipation of engaging him to repair the faulty lock. Additionally, the Defendant says there is no basis on which the Claimant can rely on res ipsa loquitur as the Negligence of the Claimant speaks for itself in that he failed to ensure that the bolt was safely undone when he attempted to adjust the door and failed to ensure that his hand was on a section of the door with which the bolt would not impact when he adjusted the door. The Defendant neither admits nor denies the Particulars of Injury or Special Damages but puts the Claimant to strict proof of both.

[12] At the trial of the matter the Claimant's witness statement was allowed to stand as his evidence-in-chief and he gave further evidence by way of amplification and cross-examination. His evidence was to the effect that on the day mentioned earlier he was working at a location on Port Henderson Road when at about 6pm, Mr. Errol McCarthy came to the location and advised him that the "bottom hinge" of the warehouse door at the Hardware Store, which is the business place of the Defendant, broke off and asked if he would deal with it. He indicates that he told Mr. McCarthy that since night was coming it should "stay" until in the morning and Mr. McCarthy replied that it needed to be fixed that night because there were millions of dollars worth of material in the warehouse. Further, that Mr. McCarthy assured him that he, Mr. McCarthy, would be responsible for everything and so he agreed to fix it and proceeded to the Hardware Store at Lot 16 and 17 Portmore Town Centre.

[13] He indicates that on arrival he was directed to the door of the warehouse and that he observed that there were in fact two very large doors, spanning 15 feet in height and 8 feet in width and that they were supported by two hinges each, one close to the top and the other close to the bottom. According to him, the door with the broken hinge was the right door and it was connected to the wall with the top hinge, but was unconnected to the wall at the bottom and the other door was closed with both hinges in place. He said he proceeded to repair the bottom hinge, following which attempts were made to close the door but that the door appeared to be stuck and so required pushing and pulling. The Claimant indicates that he then went on the inside and started to pull while his two assistants were on the outside and that it was whilst pulling this right door that it came into contact with the left door and the latch at the top of the left door became detached and fell onto his right thumb causing the injury to his thumb. He observed blood gushing out of his hand. He gave further evidence that the latch was made of steel and was about ¾ inch thick and about 6-8 feet in length.

[14] He asserts that Mr. McCarthy never told him that the left door had any issues, or issued any warning about the dangers of this door, nor was he given any safety equipment. Further, that as a result of the injury he was transported to the Spanish Town Hospital and there he was treated and diagnosed with having a laceration to the distal right thumb and a crush injury to the right thumb. He indicates that he was treated with antibiotics and the wounds were sutured and dressed and that he was referred to and in fact attended ten sessions at the Orthopaedic Department of the Hospital. He says he was discharged from the outpatient clinic in October of 2012 and asserts that due to his right thumb being crushed he was unable to do much with that hand and that the pain was consistent for about seven months.

[15] In cross-examination when asked if he went to fix the door he said it was only the hinge he was asked to fix. He was questioned about the nature of his injuries and

asked if he could use his left hand during the period of his recovery and he said he could use it to some extent but not to bathe.

[16] The Claimant relies on the evidence of one witness in support of his case, Dean McLeod. Mr. McLeod indicates that on that date he was working alongside Mr. Devon Harris and at around 6pm Mr. McCarthy told them that the bottom hinge of the warehouse door at the hardware "bruk off" and asked them to deal with it. He states that shortly after this they were transported to the Hardware where they were directed to the door with the faulty hinge. He describes the door as being very large spanning 15 feet in height and 8 feet in width. He indicates that they proceeded to repair the hinge of the right door, following which they were trying to close it, with Mr. Harris pulling from the inside and he and another man pushing from the outside and that it was whilst pulling and pushing that he heard a loud cry from Mr. Harris and observed that Mr. Harris' right thumb was severely damaged and there was a lot of blood coming from it.

[17] In cross-examination he pointed out that they were told to fix a specific door so that is what they did and that it was specified that it was the hinges that were not functioning. When asked whether in hindsight there were any steps they could have taken to avoid the injury to the Claimant he responded that he did not see what they could have done to prevent it.

[18] Errol McCarthy gave evidence on behalf of the Defendant. Mr. McCarthy indicated that he is the Managing Director of the Defendant. He admits knowing the Claimant and that he spoke to him on the 16th February, 2012 and asked him to look at a door which was malfunctioning and advise him of the cost to repair it. He says the Claimant agreed and he heard nothing further from him until later the said day he was advised that the Claimant had been injured while repairing the warehouse door. He expressed that despite not believing that he was at fault he paid for the Claimant's medical expenses and paid him the cost to fix the door.

[19] Mr. McCarthy asserts that he had no agreement with the Claimant to conduct work on the door and that they were simply at the negotiation stage. The Claimant, he points out, was not an employee of the Defendant and was a self-employed skilled workman and did not act in a way that took into consideration the need for his own safety. Moreover, the Claimant ignored his specific instructions and did what he pleased. He also indicated that the warehouse door is very heavy and made of corrugated steel.

[20] He points out that the Claimant was the author of his own misfortune and that his injuries were a result of his own actions and/or inactions. Further, that the Claimant failed to properly assess the situation and take the necessary steps to ensure that as he carried out the repairs his hand was in a safe place or that the bolt was in such a position that would prevent it from falling.

[21] In cross-examination, Mr. McCarthy was asked when it was that he first became aware that the door was malfunctioning and he said it was the same day at 5pm. He was also asked if he had told the Claimant to go and fix the door and he at first responded yes but then said that he had asked him to go and see if he can fix it and to provide him with a cost before doing so. He however agreed that the Claimant was lawfully on the Defendant's premises. When it was suggested to him that the Claimant was never warned of any danger, he replied that there was no danger as that door was there for twenty odd years or so and nobody has ever been injured before and that they would oil the bolt now and then, maybe every six months. In fact he said the only servicing that can be done is to throw a little oil on it. When asked if the bolt was "cotching" on anything he responded that the door locked onto a "U clamp" and that the hinge goes over and one would have to put the lock over it. Further, that as a consequence of the door being so high and the bolt being so long, sometimes the bolt would be drawn down to do things. Although not present when the accident occurred he insisted that it was the same door that he sent the Claimant to fix that caused the injury.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[22] At the beginning of the submissions Counsel for the Claimant indicated that the Claimant was no longer pursuing the claim in Employers Liability and so confined his submissions to Negligence and Occupier's Liability. In respect of Negligence, he submitted that the Claimant was a lawful visitor to the premises and that as such the Defendant owed him a duty of care pursuant to section 3(1)(a) of the Occupier's Liability Act. Further, that the Defendant failed to take such care necessary to ensure that the Claimant was reasonably safe and that the Claimant was never warned or made aware that there was a fault with the latch.

[23] He submitted further that the principle of res ipsa loquitur is applicable and on that point relied on the authority of **Scott v London and St. Katherine Docks Company** (1865) 3 H&C 596, 601, a case where it was held that where a thing is shown to be under the management of the Defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the Defendant, that the accident arose from want of care. Further, that the fact that the door has been there for over twenty years and only serviced once every six months, negligence can be presumed.

[24] He referred to the case **Woollins v British Celanese Ltd.** 1 KIR 438, where Lord Denning found a Defendant not liable where the risk to the plaintiff was a special risk ordinarily incident to his work. He contended that as the Claimant was only sent to repair the hinge, he would not know of the fault in the door and so it would not be incidental to his work as a Welder.

[25] Reliance was also placed on the case of **Salmon v Seafarer Restaurant Ltd.** [1983] 3 All ER 729 where a fireman was injured while fighting a fire at a restaurant. He had been thrown to the ground whilst footing a ladder on a flat roof. The Defendant sought to escape liability by invoking section 2 (3) (b) of the

Occupier's Liability Act 1957 arguing that the fire fighter could be expected to guard against special risks inherent in fighting fires. It was held that the Defendant was liable as where it can be foreseen that the fire which is negligently started is of the type which could require firemen to attend to extinguish that fire, and where, because of the very nature of the fire, when they attend they will be at risk even if they exercise all the skill of their calling, there is no reason why a fireman should be at any disadvantage in claiming compensation. The duty owed to a fireman was not limited to the exceptional risks associated with fighting fire but extended to ordinary risk. In concluding, counsel for the Claimant submitted that the Court should find that the Defendant owed the Claimant a duty of care which was breached and that the Defendant should be held liable in Negligence and/or Occupier's Liability.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[26] Counsel for the Defendant submitted that the Claimant has both a legal and an evidential burden to prove the elements required for Negligence and that the Court must first direct itself to the pleadings in order to evaluate the evidence relating to the facts in issue. In particular, he submitted that the Court should view the withdrawal of the claim for Employer's Liability with trepidation and deliver a ruling in favour of the Defendant. The Defendant submitted that there is a real concern in relation to the conduct of the Claimant's case which puts the Defendant and the Defence at a disadvantage. He relied on Rules 8.9(i) and 8.9(A) of the Civil Procedure Rules and emphasized that he who alleges must prove and pointed out that the consequences of failing to set out one's case is that the Defendant would not be aware of the case that it is to meet and so would not be able to properly respond to the case. He referred to the case **Anthony Martin v Eric Bucknor & JPS Co. Ltd.** [2012] JMSC Civ. 186 in which the Court pointed out that a Claimant cannot rely on any allegation which was not set out in

his Particulars of Claim, but which could have been set out, unless the Court gives permission.

[27] In respect of the facts Counsel submitted that there are discrepancies, in particular that the Claimant pleaded that there was a faulty bolt but in his evidence speaks of a faulty latch and that the result of this is that the Claimant has pleaded a particular fact but has provided no evidence to substantiate that fact. Further, that there is a greater burden on the Claimant to ensure his own safety because of his expertise as an independent contractor. He also submitted that the Claimant in not pursuing Employer's Liability is acknowledging the fact that he was responsible for his own safety at the material time.

[28] Counsel highlighted the distinguishing features between the authorities relied on by the Claimant and the instant case and argued that they should not be relied on as they are all distinguishable. He also referred to the case of **Jeffrey Johnson v Ryan Reid** [2012] JMSC Civ. 7 in which the Court highlighted the criteria for relying on res ipsa loquitur and indicated that in the instant case res ipsa loquitur is not applicable. He further submitted that the Claimant has not established Negligence or a breach of the Occupier's Liability Act.

ISSUES

[29] Whether or not the Defendant is liable in Negligence and/or for a breach of the Occupier's Liability Act

FINDINGS OF FACT

[30] I have assessed the three witnesses called in this case. The Claimant's case is supported by his witness Mr. McLeod. On the other hand Mr. McCarthy, the witness for the Defendant was not present when the accident occurred and so cannot speak to what transpired. The only evidence led in this case as to what happened at the warehouse comes from the Claimant and his witness. The

Defendant is only able to speak to the instructions he gave to the Claimant. He says that he did not advise him to fix the hinge but rather to provide him with an estimate. I have considered the evidence of the three witness and the circumstances surrounding what transpired. It is not being denied that it was of utmost importance to the Defendant to be able to secure the premises. This is reflected in the evidence that Mr. McCarthy had indicated that there were millions of dollars worth of items contained therein. With that in mind, I am of the view that the defect with the door required urgent attention and find as a fact that the Mr. McCarthy did in fact give to the Claimant and Mr. McLeod specific instructions to fix the door.

[31] Counsel for the Defendant has asked me to find that there was an inconsistency with the use of the word bolt in the Statement of Case and then the use of the word latch in the evidence. I accept that this may very well be so but I do not find that this inconsistency goes to the root of the Claimant's case nor do I find that it affects the credibility of the Claimant. I accept the Claimant's account as to what transpired after the hinge was fixed. I accept also that the door was stuck and all three men had to attempt to close it. I therefore accept that it was whilst in the process of trying to close the door that the latch fell and hit the Claimant causing his thumb to be crushed. I also find as a fact that the Claimant and Mr. McLeod had finished fixing the door that they were tasked with fixing when the accident occurred.

ANALYSIS

[32] Counsel for the Defendant has made much of the inadequacy of the Claimant's pleadings and so I have to give due consideration to that issue. I bear in mind that an application to amend the Claimant's Particulars of Claim was granted. No adjournment was requested, although the Court indicated to the Defendant that this was his right and offered the Defendant adjournment. I am of the view that

the Defendant was allowed to fully ventilate its case. Having assessed the pleadings, I do not find favour with the Defendant's submissions that the pleadings are inadequate. Any inconsistency with the evidence will impact the weight that I place on it. I also do not find that prejudice has been caused to the Defendant.

EMPLOYER'S LIABILITY

[33] Every employer has a duty at common law to provide a competent staff of men, adequate plant and equipment, a safe system of working with effective supervision and a safe place of work. The duty also applies to his employee and he may be vicariously liable for the breach of duty by an employee to another employee. Although Counsel for the Claimant had indicated that he would not advance any submissions in respect of this Claim, the Claimant has not expressly abandoned it and so I will consider it briefly.

[34] The test for liability is dependent on whether the victim of the alleged tort is classified as a servant and/or agent or an independent contractor. The learned author of Commonwealth Caribbean Tort Law, Kodilinye at page 380 indicated that a servant is one who is employed under a contract of service whereas an independent contractor is one employed under a contract for service. It is clear in this case that the engagement of the Claimant by the Defendant's agent was a one off occurrence and in fact it appears from the evidence that this was the first time that the Claimant was doing work for the Defendant. In fact, the evidence is that the Defendant already had a Welder but that he was unavailable at that time.

[35] Based on those circumstances it is clear that the Claimant was an independent contractor and so liability of the Defendant as an employer does not arise.

NEGLIGENCE AND/OR OCCUPIER'S LIABILITY

[36] It is settled law that in order to establish Negligence there are four requirements namely, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused (see Clerk & Lindsell on Torts, 19th edn., para. 8-04).

[37] The law on Negligence was explored by Morrison J.A. (as he then was) in the Court of Appeal decision of **Adele Shtern v Villa Mora Cottages Ltd. and Monica Cummings** [2012] JMCA Civ. 20. Commencing at paragraph 49 he analyses the requirements for proof of Negligence as follows:

> *"The test of whether a duty of care exists in a particular case is, as it is formulated by Lord Bridge of Harwich, after a full review of the authorities, in the leading modern case of* ***Caparo Industries plc v Dickman*** *[1990] 1 All ER 568, 573-574: "What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other." As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof, on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case (see Clerk & Lindsell, op. cit., para. 8-149);*

[38] In respect of the "doctrine" of res ipsa loquitur Morrison J.A. examines the seminal case of **Scott v The London and St Katherine Docks Co**. (1865) 3 H & C 596, 601, in which bags of sugar being lowered by a crane from a warehouse by the defendants' servants fell and struck the plaintiff, in which Erle CJ said this:

> *"But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants that the accident arose from want of care."*

[39] At paragraph 51 Morrison J.A. pointed out that a court may also infer carelessness in cases covered by the so-called "doctrine" of res ipsa loquitur then went on to say this at paragraph 52:

> *"...In **Ng Chun Pui v Lee Chuen Tat**, Lord Griffiths considered (at page 300) that the phrase res ipsa loquitur was "no more than the use of a latin maxim to describe a state of the evidence from which it is proper to draw an inference of negligence". While the operation of the rule does not displace or lessen the claimant's burden of proving negligence in any way, its effect is that – "…in an appropriate case the plaintiff establishes a prima facie case by relying upon the fact of the accident. If the defendant adduces no evidence there is nothing to rebut the inference of negligence and the plaintiff will have proved his case. But if the defendant does adduce evidence, that evidence must be evaluated to see if it is still reasonable to draw the inference of negligence from the mere fact of the accident."*

He also pointed out these principles:

> *"Res ipsa loquitur therefore applies where (i) the occurrence is such that it would not normally have happened without negligence (the editors of Clerk & Lindsell, op. cit., para. 8-152 provide an illustrative short-list from the decided cases: "bales of sugar do not usually fall from hoists, barrels do not fall from warehouse windows, cranes do not collapse, trains do not collide and stones are not found in buns"); (ii) the thing that inflicted the damage was under the sole management and control of the defendant; and (iii) there must be no evidence as to why or how the accident took place. As regards this last criterion, the editors of Clerk & Lindsell (op. cit. para. 8-154) make the important point, based on Henderson v Jenkins & Sons, that "Where the defendant does give evidence relating to the possible cause of the damage and level of precaution taken, the court may still conclude that the evidence provides an insufficient explanation to displace the doctrine".*

[40] Occupier's Liability, on the other hand is governed by section 3 of the Occupier's Liability Act which sets out the extent of an occupier's ordinary duty and provides as follows:

1. An occupier of premises owes the same duty (in this Act referred to as the "common duty of care") to all his visitors, except in so far as he is free to and

does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.

2. The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

3. The circumstances relevant for the present purpose include the degree of care and of want of care, which would ordinarily be looked for in such a visitor and so, in proper cases, and without prejudice to the generality of the foregoing- (a) an occupier must be prepared for children to be less careful than adults; (b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

4. In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances.

5. Where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe.

[41] The Occupier's Liability Act imposes on an occupier of premises a duty of care to all his lawful visitors, which is to take such care to see that a visitor is reasonably safe in using the premises for the purpose for which he was invited. From an assessment of the case law it does appear that the duty owed in respect of both torts is essentially the same and so I will apply the same considerations in assessing this case. What is also evident is the fact that ultimately it is a question of fact for a judge to determine based on an overview of the relevant evidence. It is a mixed question of fact and law and it is for the Court to consider whether the injury caused was reasonably foreseeable and whether it is in the view of this Court fair and reasonable to impose a duty of care.

[42] In terms of the burden of proof I bear in mind that the Claimant also has the legal burden of proof as distinct from the evidential burden. I have accepted that the Claimant was at the Hardware because he was given instructions by the

Defendant to fix the door and so he was a lawful visitor to the premises. As such, the Defendant owed him a lawful duty of care as an occupier. He was tasked with fixing one door, but I bear in mind that ensuring that the door could be closed was a necessary part of fixing the door and in fact that was the main concern of the Defendant. In the normal course of things, bolts do not fall from doors as they usually have some stopping mechanism and so I accept that there was something about the locking mechanism of the door that was defective and that is what caused the bolt to fall and hurt the Claimant. In the normal course of things, pushing a door does not cause the bolt to fall, one would expect that there should be some mechanism in place to prevent this. In the circumstances, there is sufficient material on which I can rely to infer that there was something wrong with the door that caused this to happen.

[43] Based on the evidence given I find as a fact that insufficient care was taken to ensure that this door of 15 feet times 8 feet was adequately maintained. In fact the evidence of McCarthy is that the door has been there for over twenty years and that the only form of maintenance done to it was to oil the door every six months or so. There was also no evidence as to the last time the door was oiled nor was there any evidence that any checks were made to ensure that this bolt which was over 6 feet in height was in good working condition.

[44] I am guided by the principle set out in **Scott v London and St. Katherine Docks Company** (supra) where it was held that where a thing is shown to be under the management of the Defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the Defendant, that the accident arose from want of care. I find that principle applicable to the instant case especially in light of what the Defendant's managing director indicated that because the door is so high and the bolt so long sometimes you draw down the bolt to do things. I accept that if adequate care

had been taken, the bolt would not have fallen as it did and caused injury. In fact, I am of the view that in light of the knowledge on the part of Mr. McCarthy that sometimes the bolt is drawn down to do things, that he had a duty to warn the Claimant of this fact and that he failed in that duty. I find that in light of McCarthy's awareness of the peculiarities of this door he should have foreseen that the bolt falling was likely to happen and therefore had a duty to forewarn the Claimant.

[45] I find that the Defendant did not comply with the requirements under the Occupier's Liability Act and therefore failed to discharge his duty of care to the Claimant. I am satisfied on a balance of probabilities that the Defendant owed to the Claimant a duty of care, he being a lawful visitor to his premises and I find that the falling of the bolt in the circumstances outlined suggest a failure to take reasonable care and I find therefore that the Defendant failed in his common law duty of care and also under the Occupier's Liability Act in that he failed to ensure that in all the circumstances of the case the Claimant was reasonably safe whilst using the premises for which he was lawfully invited to be there. I accept also the applicability of the doctrine of res ipsa loquitur.

[46] I do not find that the Claimant was contributory negligent as he wasn't aware of any peculiarities with respect to this door and he was merely engaging in closing the door which is what a door is supposed to do. I find as a fact that the Claimant in no way contributed to this accident.

[47] The Defendant is therefore liable to the Claimant in Negligence and under the Occupier's Liability Act. Judgment is hereby entered for the Claimant. This brings me now to the question of Damages.

ASSESSMENT OF DAMAGES

[48] The Claimant relies on the medical report of Dr. Fabio Pencle in support of his claim for General Damages.

[49] He submitted that the Court could find guidance in the following cases:

Leslie Gunnis v Clarendon Sugar Company115 CL. 1985 G 139, Khans Vol. 5 pg 115 where the Claimant suffered amputation of the 5th digit of the right hand, fracture of proximal phalanx of ring and middle finger and deformity of the index, middle and ring fingers and was awarded $369,913.00 which updates to $2,006,315.14 for pain and suffering.

Leroy Mills v Roland Lawson & Keith Skyers CL. 1987 M497, Khans Vol. 3 pg. 124 where the Claimant's injuries resulted in deformity of the distal phalanx of the right index finger, reduced power in right hand and a PPD of 20% of the right upper limb. He was awarded $50.000.00 which updates to $2,535.637.14.

Stanley Campbell v Innswood Estate Ltd. & Linton Roger, CL 1980 C240, Khan's Vol. 3 pg126 where the sum of $40,000.00 was awarded to the claimant who sustained a crush injury to his right hand and fingers of the distal phalanx of the 3rd, 4th and 5th fingers of the right hand. This sum updates to $1,720,146.52.

It was further submitted that having regard to the lack of impairment on the part of this Claimant that an appropriate award would be $1,300,000.00.

[50] Counsel for the Defendant sought to distinguish the authorities relied on from the instant case and contended that the injuries in those cases are far greater than those of this Claimant and suggested that only a nominal figure should be awarded.

[51] The injuries sustained by the Claimant herein are described by Dr. Fabio Pencle as being a laceration to the distal right thumb. His diagnosis is that of a crush

injury to the right thumb which required treatment in the form of antibiotics, suture and follow up at the Orthopaedic Department.

[52] On an examination of the cases cited I found the **Gunnis** case to be the most useful. However, Mr. Gunnis' finger was amputated, unlike that of the Claimant herein so I form the view that his injuries are at least twice as severe and so in order to arrive at an appropriate award I am of the view that the sums awarded to Mr. Gunnis should be discounted by sixty percent. In the circumstances, an award of $800,000.00 for General Damages is appropriate.

[53] I find the sum of $2000.00 claimed in respect of the Medical Report to be proved. In light of the nature of the injuries sustained by the Claimant, the nature of his job and the fact that he had an assistant Mr. McLeod, I find that a period of four months at $40,000.00 per month is appropriate for loss of income which amounts to $160,000.00. In respect of having to engage a household assistant, I take into account that for the first month his girlfriend was assisted in his care, so he would not have had to seek extra help for that period so an appropriate award would be for twelve weeks at $4000.00 weekly which amounts to $48,000.00. I find that the sum of $25,000.00 claimed for transportation, although not strictly proved, is reasonable and I am prepared to make an award reflecting that. All of those items taken together amount to $235,000.00.

Damages are awarded as follows:

I. Special Damages awarded at $235,000.00 plus interest thereon at a rate of 3% from the date of the incident, the 16th day of February, 2012 to today, December 20, 2016;

II. General Damages awarded at $800,000.00 plus interest at a rate of 3% from the date of service of the Claim Form, April 27, 2013 to today, December 20, 2016;

III. Cost to be cost in the Claim except for the cost of the Application to Amend the Particulars of Claim and the preparation of the joint bundle.