COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

FAMILY DIVISION

2005/COM/lab/FP00002

BETWEEN

BRADLEY FERGUSON

Plaintiff

AND

GRAND BAHAMA POWER COMPANY LIMITED

Defendant

BEFORE: **The Honourable Mrs Justice Estelle G. Gray Evans**

APPEARANCES: Mr Obie Ferguson and Ms Lakeisha Strachan for the plaintiff
Mrs Vanessa Carlino and Ms Tracy Wells for the defendant

2010: 15, 16, 17 November

2011: 2 February

JUDGMENT

Gray Evans, J.

1. This action commenced by a generally indorsed writ of summons filed 31 January 2005 in which the plaintiff claims damages for personal injuries and consequential loss and damages caused by the negligence and or breach of statutory duty of the defendant, its servants or agents on or about the 19th day of October, 2003, while the plaintiff was working as a Mechanic 1, and interest, thereon, pursuant to Section 3 of the Civil Procedure (Award of Interest) Act, 1992 from the date of the accident (October 19, 2003) until the date of payment.

2. In his statement of claim filed 22 December 2005, the plaintiff alleges, inter alia, that in the course of carrying out repairs on one of the defendant's motor vehicles, he was required to lift two 5-gallon buckets of hydraulic oil and while doing so he experienced pain in his upper left shoulder and neck; that the "matters complained of" were caused by the negligence and/or breach of statutory duty owed to him by the defendant, by reason of which he sustained severe personal injuries and suffered loss and damage. The plaintiff particularized his injuries as: disc bulging at C5-6 and indentation of the spinal cord at C6-7.

3. In its defence filed 27 March 2006, the defendant either denies or does not admit the plaintiff's claim. The defendant specifically denies the plaintiff's allegations of negligence and/or breach of statutory duty on the part of the defendant and makes no admission as to the injuries, loss and damage allegedly sustained by the plaintiff.

4. It was agreed that the trial before me would be on the issue of liability alone and if I found for the plaintiff, then the assessment of damages would be conducted by the Registrar. Consequently, on the issue of liability, the following questions arise for consideration:

    1. Was the plaintiff injured during the course of his employment? If so,

    2. Were the plaintiff's injuries caused by the negligence and/or breach of statutory duty of the defendant?

5. The evidence on behalf of the plaintiff was given by the plaintiff and Dr Kalman D. Blumberg. The evidence on behalf of the defendant was given by Messrs David Parker and Carlton Bosfield and Dr David N. Barnett. Each of the witnesses provided witness statements and each was cross-examined.

6. The plaintiff was employed by the defendant since 23 February 1987. At the time of the incident, the subject of these proceedings, he had been employed for 16 years and had risen through the ranks to Auto Mechanic 1.

7. Sunday, 19 October 2003, was the plaintiff's day off. However, sometime during that morning, he was called out by his immediate supervisor, Mr David Parker, to assess and repair one of the defendant's Boom trucks that had broken down and needed to be repaired.

8. The plaintiff went to the site, assessed the situation and was then taken by Mr David McIntosh, who was at the time the on-site supervisor, to the defendant's "yard" where he collected some tools along with two 5-gallon containers of hydraulic oil, which he thought he would need for the job. The containers were, the plaintiff said, similar to a 5-gallon bucket of paint with a handle for lifting.

9. In describing how he moved the containers from the "yard" to the site of the Boom truck, the plaintiff said he lifted them and put them on the back of the truck – one at a time – by lifting them over the side of the truck; that when he arrived at the site he lifted them in the same manner and removed them – one at a time - from the back of the truck. He said he did not pull down the tailgate of the truck to offload the containers because he could "retrieve them very easily from the side" and lift them over.

10. The plaintiff said he repaired the broken line on the truck, placed a funnel in the truck's tank then lifted one of the 5-gallon containers to pour the oil into the tank. He said he felt a "shooting pain" from his neck to his shoulders and numbness in his fingers, so he stopped. He then told Mr David McIntosh, now deceased, that he felt as if he had pulled a muscle or hurt himself and asked for Mr McIntosh's help. Mr McIntosh refused and suggested that the plaintiff should try to get help from one of the line workers. However his attempts to do so were unfruitful so he completed the job alone, returned the tools and the unused oil to the yard, and went home. He said when he reported to Mr Parker that he had completed the work he also told him that he did not feel well. He admits that he did not tell Mr Parker that he had hurt his neck while lifting the container.

11. In his witness statement the plaintiff gave the following statement regarding the events that happened after the incident on 19 October 2003:

1. The following day I returned to work and turned in my work sheet and spoke to Mr. Parker again and told him about the continuing pain that I was experiencing and that I needed to go and see a doctor. He told me that I could go but I first must write an incident report, so the situation would not end up like the Eddie Stuart case, who was a former employee who had an injury and did not report it at the material time. At that point he just said that (sic) had to tell him what happened.

2. That same day, 20th October 2003, I went to Dr. Michael Darville, my physician, at the Grand Bahama Family Medical Centre, who examined me and recommended that I get an X-ray of my shoulder and neck. I went to Sunrise Medical to have an X-ray performed. The results of the X-ray were taken back to Dr. Darville, who said he could not find anything wrong and stated that he believed that it was muscle spasms. I was given medication for the pain and returned to work and told Mr. Parker that I was given time off.

3. The following day, I was still experiencing severe pain in my shoulder and neck area and I was unable to see Dr. Darville, so I went to see Dr. Roop at the ABC Wholistic World of Health, who gave me an injection for the pain but it only relieved the pain for a few hours and the pain returned.

4. A few days later I went to work and told Mr. Parker that I was still in pain. He wanted me to finish the report which I started on the 20th October. He subsequently told me not to worry about it because he would finish the report. I am not aware of any investigation being conducted into my matter apart from the questions that Mr. Parker asked at the time, such as "Where did I put the oil?" and "What area did I lift the hydraulic oil drum from?"

5. During my conversation with Mr. Parker, in the conference room, in the presence of Mr. Derek King, the Director of Transmissions and Distribution, who after observing my facial expression said that he could see I was in pain and suggested that I go and see a doctor. At that point, I left the conference room and went home.

6. The next day I went to see Dr. Keith Lewis to explain the problem that I was experiencing. He recommended that I get an X-ray performed but I told him that I had one already. I returned to Dr. Lewis with the X-ray from Dr. Darville and after Dr. Lewis examined the X-ray he recommended that I get an MRI done because of the problem that he detected in my upper spine. Dr. Lewis said me that (sic) could not refer me to a particular doctor for the MRI because he was a chiropractor. He suggested I return to Dr. Darville for a referral.

7. I went back to Dr. Darville and he referred me to Doctor's Hospital to get an MRI. I had the MRI performed and took it back to Dr. Lewis who said that I had a protruding disc but he said there was nothing that he could do about it and I should go back to see Dr. Darville.

8. I took the results back to Dr. Darville, who examined the results and recommended that I see Dr. Kalman D. Blumberg, a doctor that specializes in spinal injuries at South Florida Spine Clinic in the State of Florida one of the States in the United States of America. Dr. Darville wrote the referral letter for me to see Dr. Blumbery.

9. I took a flight to Florida on the 4th November, 2003 and saw Dr. Blumberg, who examined my MRI and stated that I had a herniated disc. He informed me that I needed surgery right away because of the injury. On the 6th November, 2003, I had the surgery. I immediately felt relief from the pain that I experience in my neck, shoulder and fingers after the surgery. I stayed in the hospital for a day after the surgery but stayed in a hotel in Florida for a week for observation.

10. When I returned home I told Mr. Parker what was going on and I also spoke to my union representative. I had therapy for a few months at the Rand Memorial Hospital. My therapy sessions ended in March, 2004.

11. The National Insurance Board refused to pay for my required therapy because of the letter which was written by Mr. Carlton Bosfield, Director of Environmental Safety and Security and the National Insurance Form, which was filled out by Mr. Derek King. Both stated a contrary opinion as to how I was injured. The letter and the form made it look as if my injuries were not job related. After receiving this information, I told Mr. Parker the possibility existed that my bills will not be covered by National Insurance. Mr. Parker told me that if that was the case he would try and retrieve the letter from National Insurance. The following day, I spoke to Mr. Derek King concerning this matter only to be told that they would have to do some further investigation to clear up some things pertaining to my injuries. I subsequently got a letter from the National Insurance Board stating that they had denied my claim.

12. I returned to work on a trial basis on light duty April, 2004 until I was terminated on the 7th December, 2006 by the defendant. I am still under doctor's care today seeing Dr. Kevin Cairns, a physician at South Florida Spine Clinic in the State of Florida one of the States in the United States of America and Dr. Darville.

12. Mr David Parker, the defendant's vehicle fleet supervisor, who is in charge of the defendant's fleet vehicles, admits having called the plaintiff out on 19 October 2003 to

repair the hydraulic leak on one of the defendant's vehicles. He says it was a routine repair job which had been regularly undertaken by the plaintiff as well as the defendant's other mechanics.

13. Mr Parker avers further at paragraphs 4 – 11 of his witness statement filed 28 April 2009 that:

4. Employees when called out to work on the weekend are required to attend the Company building and collect a company truck and the necessary equipment and tools to execute repairs. Given the nature of the repair Mr Ferguson would have been required to collect a 5 gallon container of hydraulic fluid from the storage area at Grand Bahama Power Company. This hydraulic container would have been carried by Mr Ferguson from the storage area and placed on the back of the truck.

5. The 5 gallon container is comparable to a 5 gallon bottle of water found in most homes. It is different in shape, in that it has a handle which allows for easy lifting and movement of the container. In this respect it is in fact easier to lift than a 5 gallon bottle of water. It is normal practice in the industry for hydraulic fluid to be placed in 5 gallon containers.

6. Safety is an important part of our training given the nature of our work. I conduct daily pre-shift meetings and address different areas of safety on each occasion. I refer regularly to the company's Safety Manual and advise all employees of the importance of safety. All employees were and are aware of section 131 Material Handling and Storage which outlines the correct way for employees to lift and if an object is thought to be heavy to obtain assistance. Mr Ferguson was present and attended each training session and pre-shift meeting and in my opinion had the requisite knowledge to lift and handle a five gallon container.

7. On the day that Mr. Ferguson undertook the repairs I was not made aware of any incident, issue or more specifically injury to Mr. Ferguson. In fact following the repair Mr. Ferguson did not communicate with me at all or in fact state that he had been injured. We are in regular communication and if necessary it would have been very easy for Mr. Ferguson to call me by telephone and advise me of any accident or injury which may have taken place.

8. I saw Mr. Ferguson the following day when he reported to work at 8:00 a.m. as normal. At some point during the day Mr. Ferguson mentioned an injury. He said that he had injured himself while moving a 5 gallon container off of the truck he was driving. In our discussion Mr. Ferguson stated that rather than pull the tail gate down to remove the 5 gallon container he lifted the 5 gallon container over the side of the truck. This is entirely contrary to all of Mr. Ferguson's safety training. Section 106 of the Safety Manual clearly outline that 'employees shall always try to place themselves in a safe and secure position.' I asked Mr. Ferguson why he did not report the injury immediately and he said he did not feel any pain at the time and only experienced discomfort that morning. He said that he guessed that his injury was caused when he lifted the 5 gallon container off the truck. I advised Mr. Ferguson to complete an incident report, which we completed together.

9. It is company policy that any and all accidents or injuries are reported immediately. Where possible the Supervisor should be informed immediately

and if the Supervisor is not available another Grand Bahama Power Company Employee of similar position should be notified. Mr. Ferguson informed no one.

10. Mr. Ferguson reported to work intermittently and eventually presented sick notes giving him time off and to my knowledge had surgery sometime after the accident. He returned to work after surgery and was placed on desk duty which required him to answer the phone and conduct filing. I recall that during this period Mr. Ferguson would walk normally without any visible residual effect. Mr. Ferguson upon his return was advised that he could [not] lift any heavy items. I recall that there were times that Mr. Ferguson would attempt to lift tools or other items which would have weighed in excess of 20 pounds. I further recall on one occasion telling Mr. Ferguson to stop as my understanding was that he was unable to lift items bearing that weight. He seemed annoyed and told me he could lift it and proceeded to do so without issue.

11. I have had numerous conversations with Mr. Ferguson over the years and I am aware that he rides motorbikes. To my knowledge he rides in a group on Sundays. I am also aware that Mr. Ferguson races cars. I always got the impression from these conversations that there was speed involved. Mr. Ferguson also conducts his own mechanical business on the side, usually in the evenings or on the weekends. I believe that Mr. Ferguson was injured engaging in one of these activities and not as a result of lifting a 5 gallon bottle of hydraulic fluid as he alleges.

14. Under cross examination, Mr Parker said he did not hear from the plaintiff after he had completed the job on the afternoon of 19 October 2003; that, in fact, because it was a routine repair job, he did not expect to hear from the plaintiff that afternoon, unless there was a problem.

15. Mr Carlton Bosfield, the defendant's Environmental Safety and Security Director, states that in such capacity he "drives the safety department company wide." His evidence is that in 2001 the defendant commenced an active safety program with strong emphasis on ensuring that all employees were involved in, and not only aware of, the defendant's safety requirements but also to execute them.

16. Mr Bosfield testified as to the safety measures put in place by the defendant and states at paragraphs 3 through 8 of his witness statement that:

3. Soon after assuming my position as Director every employee existing and new received an American Power Public Association (APPA) Safety Manual. The APPA Safety Manual was developed using various safety resources and as such is a comprehensive manual. The Safety Manuals were given with a memo from me personally and it was provided to each employee on the understanding that compliance with the contents of the manual was mandatory and a condition of employment with the company. Further the contents of the APPA Safety Manual were written into the Union Contract and therefore employees were aware of what it contained at all levels. The APPA Safety Manual outlines the company's safety standards and each employee is required to comply with its contents. In addition, site specific safety procedures were also developed.

4. Specific to the vehicle maintenance and repair area, we target this as a specific area requiring very detailed safety training. In the safety department we coordinated the training for this area. In fact over the years aside from our own

in-house training we arrange for several companies from the United States to fly to our facility and train employees in vehicle safety and occupational health and safety and Mr. Ferguson was part of each training session.

5. Section 1405 of the Safety Manual requires that Supervisors conduct daily safety job briefing. Mr. Parker, Mr. Ferguson's Supervisor was required to ensure that each employee was aware of the safety requirements. I am personally aware that Mr. Parker takes safety very seriously and in fact has been on the Safety Sub-committee for the past four years. Prior to becoming a member of the safety sub-committee he has always been an advocate of safety. Mr. Parker was required to conduct daily staff meetings advising employees of what tasks they were required to undertake and what hazards were involved and how they should address the hazards. For example there would be discussion of what personal protective systems the employee was required to utilize in executing a particular task. At the time of the accident Mr. Ferguson had available to him a lifting belt, which was available to all employees.

6. I was made aware of the alleged injury to Mr. Ferguson at a Safety Committee meeting. It is the practice during these meetings that the Labour & Management representative raise any concerns. I was advised that Mr. Ferguson was injured lifting a drum. At the time I recall being surprised to hear that Mr. Ferguson injuries were attributed to the lifting of the drum as each drum contains approximately 5 gallons full and is something that each mechanic would lift regularly. I am not aware of any circumstances where any employee was injured while lifting a 5 gallon hydraulic drum.

7. Our safety rules located at section 103 require that if an employee is injured, he report the injury immediately. Mr. Ferguson's Supervisor, Mr. Parker would have been available for him to report the injury to immediately. If for any reason Mr. Parker was not available there would have been several Supervisors for Mr. Ferguson to report the incident to. An employee is obliged to report it to any Grand Bahama Power Supervisor who would have then referred it on to his direct Supervisor. It is my understanding that Mr. Parker did not report the accident to his Supervisor or any other employee at the time he alleges he was injured.

8. As the Director in charge of Safety I am intimately aware of the level of training received by each employee. Mr. Ferguson was a senior mechanic with the company and received over the years, ongoing training in occupational safety and job execution. We have never considered the lifting of a 5 gallon hydraulic container as dangerous and continue to use them in our mechanical division without incident. Each employee is required to use reasonable care in the performance of their duties and act in such a manner as to ensure the maximum safety to themselves. We undertook and provided Mr. Ferguson with all the skills and training necessary to execute his job in a safe manner and as such did not breach any statutory obligation or duty of care to Mr. Ferguson.

17. Under cross examination, Mr Bosfield said lifting belts which were available to all employees were purchased by the defendant and distributed from the defendant's warehouse sometime in 2001. However, he says, although the belts were available at the time of the alleged incident, the defendant discontinued issuing them around 2004 or 2005 because "industry practices" noted that they were not good for the employees.

18. The medical evidence on behalf of the plaintiff was given by Dr Kalman D. Blumberg and on behalf of the defendant by Dr David N. Barnett neither of whom saw the plaintiff immediately after the alleged incident. Dr Blumberg saw him about two weeks later on 4 November 2003 and Dr Barnett about six years later on 13 March 2009.

19. Dr Kalman D. Blumberg, a medical doctor and Board Certified Orthopedic Surgeon, currently licensed to practice medicine in the States of Florida, Virginia and Pennsylvania, United States of America, states in his witness statement that the plaintiff was referred to him by Dr Michael Darville of Freeport, Grand Bahama.

20. Dr Blumberg's evidence is that he first saw the plaintiff on 4 November 2003, when the plaintiff complained of severe pain in his neck radiating into his left upper extremity; that the plaintiff told him that he had "had an accident on the job" three weeks prior to the said visit. He said that upon examining the plaintiff, he noticed that he had "severe weakness in the left triceps, mild weakness in his left pectoralis and sensory decrease in his left C6 and C7 distribution; his Hoffmann's was negative and he had a decreased cervical range of motion. Dr Blumberg said that he reviewed the plaintiff's MRI scan and it revealed a large left sided C6-7 disc herniation and smaller at C5-6; that based on that review, he diagnosed the plaintiff as having a cervical myeloradiculopathy and recommended anterior cervical discectomy and fusion, which he later performed on the plaintiff.

21. In his witness statement, Dr Blumberg stated that based on his examination of the plaintiff, his history and the MRI, he determined that the plaintiff's injuries and need for surgical intervention were the direct result of his injuries that occurred on 19 October 2003; that the plaintiff's past medical history was not relevant to his injuries, complaints or disabilities; that the plaintiff's condition did not pre-exist his date of injury and all of his cervical issues arose after the injury occurred and thus were not pre-existing; that the plaintiff did not have a pain free or asymptomatic degenerative disc disease and the injury did not exacerbate a pre-existing condition (as opined by Dr Barnett). He concluded that the lifting of the two 5-gallon buckets on 19 October 2003 was a direct cause of his injuries.

22. Dr David N. Barnett, a Fellow of the Royal College of Glasgow and Edinburgh, is a consultant at the Princess Margaret Hospital in New Providence, the medical expert called by the defendant, concluded that the plaintiff had "objective evidence of pre-existent degeneration in his spine (x-rays, MRI scans, findings at surgery) and to say lifting two five-gallon buckets of oil caused his disc disease on 19 October 2003 is incorrect." In his opinion, "what that lifting did was the final straw in making his on-going (pre-existent) disc disease symptomatic."

23. Dr Barnett indicated under cross examination that the plaintiff was assessed by him for the nature of his present status so, although he obtained the plaintiff's medical history from him, all he could comment on was the state the plaintiff was in when he saw him and the x-rays that were presented to him which he used for his assessment.

24. According to Dr Barnett, the plaintiff told him he had injured himself while he was walking with the buckets.

25. It is common ground that in order to prove common law negligence, the plaintiff must establish and prove firstly, that he was owed a duty of care by the defendant; secondly, that the defendant breached that duty; and thirdly, that as a result of the defendant's breach, the plaintiff sustained injury and damage (See Donaghue v

Stevenson [1932] A C 562) and Lord MacMillan in Lochgelly Iron and Coal Co. v McMullan [1934] AC 1 was of the view that it was "quite immaterial whether the duty to take care arises at common law or is imposed by statute."

26. As regards the defendant's statutory duty to the plaintiff as its employee, section 4 of the Health and Safety at Work Act, 2002 provides as follows:

> 4. (1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.
>
> (2) Without prejudice to the generality employer's duty under subsection (1) the matters to which that duty extends include in particular —
>
> (a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;
>
> (b) arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use handling storage and transport of articles and substances;
>
> (c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees;
>
> (d) so far as is reasonably practicable as regards any place of work under the employer's control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to arid egress from it that are safe arid without such risks;
>
> (e) the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.

27. In the case of Wilsons & Clyde Coal Company Ltd v English [1938] AC. 57 Lord Wright at page 84 expressed the view that the duty which rests on the employer is personal to him and his failure to perform such duty is his personal negligence. At page 81 he cited the comments of Lord Cairns in the case of Wilson v Merry & Cunningham L.R. 1 H.L. (Sc) 326, 332 that:

> "What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work."

28. Lord Wright continued:

> "To this must be added a third head – namely, to provide a proper system of working…By this is meant, not a warranty, but a duty to exercise…all reasonable care."

29. Then in Latimer v AEC Ltd [1953] AC 643, the Court of Appeal said "the duty is one of reasonable care only and thus the employer is not obliged to take unreasonable precautions even against foreseeable risks".

30. And, as Hall, J., in the case of Mackey-Bethel and Canadian Imperial Bank of Commerce [1993] BHS J. No. 8, opined: "Employers have no duty to ensure that the workplace is risk free. There are hazards in every workplace as there are in every household, and an employee does have the responsibility to take reasonable care for his own safety."

31. Further, the mere fact that an injury - even a severe injury - is sustained by an employee while at work does not, without more, establish negligence or breach of statutory duty on the part of his employer. As observed by Hall J. in the case of Sturrup v Resorts International (Bahamas) 1984 Ltd [1991] BHS J. No. 103, 1985 No. 83, "an employer would have to be in breach of his common law or statutory duty or there would have to be some unusual dangers (as in Jennings v Cole [1949] 2 All ER 191) to ground liability for injuries so sustained and each person, even while performing his duty as an employee, has to assume a measure of responsibility for his own safety..."

32. Finally, the learned authors of Halsburys Laws of England Volume 20, 1911 edition at paragraph 234 state:

> "It is an implied term of the contract of service at common law that a servant takes upon himself the risks incidental to his employment..."
>
> ...
>
> "Apart from special contract or statute therefore, he cannot call upon his master, merely upon the ground of their relationship of master and servant, to compensate him for any injury which he may sustain in the course of performing his duties.
>
> ...
>
> "The master does not warrant the safety of the servant's employment; he undertakes only that he will take all reasonable precautions to protect him against accidents..."

33. It is clear from the above authorities that an employer owes a duty to take all reasonable precautions to protect his employee from injury and he does this by providing a safe system of work, training and tools and equipment to perform the work. However, he is not obliged to warrant his employee's safety and the employee also has a measure of responsibility for his own safety.

34. In this case, the plaintiff alleges at paragraphs 4 and 5 of his statement of claim that "upon lifting the said 5-gallon buckets of hydraulic oil, he experienced pain in his left shoulder and neck; that the "matters complained of" were caused by the "negligence and/or breach of the statutory duty of care owed by the defendant to the plaintiff under section 4 of the Health and Safety at Work Act, 2002, by reason of which negligence and/or breach of statutory duty of care, the plaintiff has sustained severe personal injuries and has suffered loss and damage"

35. No where in his statement of claim does the plaintiff provide any particulars of negligence or particulars of breach of statutory duty, and no such particulars were requested by the defendant.

36. In that regard, counsel's attention is drawn to the notes to Order 18 rule 12 in the 1997 English Supreme Court Practice where the learned authors state:

> Negligence – Particulars must always be given in the pleading, showing in what respects the defendant was negligent. The statement of claim "ought to state the facts, upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged." (per Willes, J. in Gautret v Egerton (1867) L.R. 2 C.P. 371, cited with approval by Lord Alverstone C.J. in West Rand Central Gold Mining Co. v R. [1905] 2 K.B. 391, p. 400. Then should follow an allegation of the precise breach of that duty, of which the plaintiff complains, and lastly, particulars of the injury and damage sustained."

37. Notwithstanding his failure to provide particulars of negligence, in his supplemental witness statement filed on 12 November 2010, the plaintiff states that the defendant is negligent and has breached its statutory duty of care by failing to provide him with a lifting belt and for failing to advise him that a lifting belt ought to be worn at all times during the course of his assignments and in particular when he was required to do heavy lifting.

38. Those allegations were echoed by counsel for the plaintiff at paragraphs 8.1 – 8.3 of his opening statement, where he says:

> "The defendant breached its duty of care by failing to advise the plaintiff that a lifting belt ought to be worn by him at all times during the course of his assignment, and in particular when he is required to do heavy lifting, e.g. putting the two 5-gallon drums containing hydraulic fuel on the truck and lifting and pouring hydraulic fuel into the funnel and subsequently into the tank.
>
> During the daily safety job briefing the plaintiff was never given nor told that he was required to wear a lifting belt during his daily assignments.
>
> There was no daily safety job briefing on the 19th October 2007 [sic] which was a Sunday and was the plaintiff's day off."

39. Then at paragraphs 22 and 23 of his closing submissions, counsel for the plaintiff said:

> "The evidence shows, and it is admitted by Mr Parker, that there were no briefings on how to pour fuel into the funnel from the back of a truck.
>
> The defendant's witness, Mr Parker, said there was no procedure for handling or lifting of the 5 gallon hydraulic oil into the tank of the boom truck, and as was said earlier, there was no procedure for how this process ought to be handled."

40. In response to the Court's inquiry at the end of the closing submissions, as to how, in a nutshell, was the plaintiff saying that the defendant was negligent in causing his injury? Counsel for the plaintiff responded: "No procedure was in place for lifting and pouring."

41. From the foregoing, it appears that the plaintiff alleges that the defendant was negligent or breached its statutory duty by:

1. Failing to provide the plaintiff with a lifting belt and failing to advise him that he ought to wear a lifting belt while carrying out his daily assignments, including the day he sustained the alleged injury; and/or

2. Failing to provide a procedure for handling or lifting the 5 gallon hydraulic oil and pouring it into the tank of the boom truck; and/or

3. Failing, on the morning of the alleged incident, to give a briefing on how to pour fuel into the funnel from the back of a truck; and/or

4. Failing to put in place a procedure for lifting and pouring.

42. Both Messrs Parker and Bosfield say that at the time of the incident a lifting belt was available for the plaintiff's use. The plaintiff denies this. However, to my mind, whether or not the defendant provided the plaintiff with a lifting belt specifically or one was available for his use, is immaterial since the plaintiff under cross examination admitted that "logically" a lifting belt would not have prevented him from injuring his neck in the manner alleged. Further, his expert witness, Dr Blumberg, under cross examination, agreed that wearing a lifting belt would not have prevented the injury which the plaintiff is alleged to have sustained.

43. As for the complaint that there was no procedure for lifting and pouring, Mr Parker admits that the defendant had no specific procedure on how to pick up a 5-gallon container of hydraulic oil and to pour from it. However, he says that the defendant has in place a procedure which gives guidelines to employees on how to lift without injuring their backs; that such procedure also requires an employee who is expected to lift an item to assess whether he is able to lift the item without assistance; that if the employee is of the view that the weight is too heavy for him to lift without assistance, he is expected to get assistance from a co-worker or to use a machine. Therefore, Mr Parker says, when lifting a 5-gallon container of hydraulic fluid the employee was expected to use his discretion.

44. According to the plaintiff as well as the defendant's witnesses, the 5-gallon container of hydraulic oil is industry standard and none of them knew of any instance in which any of the defendant's employee's had injured themselves while lifting or pouring from such containers.

45. Further, the defendant's evidence, which was admitted by the plaintiff, is that the defendant conducted pre-shift meetings as well as regular training sessions on safety measures, including safe lifting, and that the plaintiff participated in those sessions. Additionally, the plaintiff admitted having been provided with a copy of the defendant's safety and health policy guidelines for internal reporting of accidents/injuries and incidents as well as the American Public Power Association safety manual issued by the defendant and that he was aware of and familiar with their provisions, some of which are set out hereunder:

Conditions Not Covered

Although each employee is primarily responsible for their own safety, in all instances where conditions are not covered by this Manual or the job is not completely understood, the employee shall obtain specific instructions from a supervisor before proceeding with the work.

Responsibility of Employees
Employees share with the employer the responsibility for safety. Each employee is responsible for their own safety, the safety of their fellow employees, and the safety of the general public. Employees shall become familiar with and use all the protective devices which are provided for their protection.

Employees shall report all unsafe equipment, unsafe tools and hazardous conditions that come to their attention.

102. Employee's Responsibility for Safety
(a) Before beginning a job, employees shall satisfy themselves that they can perform the task without injury. If they are in doubt as to their ability to perform the work, they shall call this to the attention of their Supervisor.

(b) Before starting a job, employees shall thoroughly understand the work to be done, their part in the work, and the safety rules that apply.

Section 131 Material Handling and Storage
(a) An employee shall obtain assistance in lifting heavy objects or use power equipment.

(b) When two or more persons carry a heavy object that is to be lowered or dropped, there shall be a pre-arranged signal for releasing the load.

(c) When two or more persons are carrying an object, each employee, if possible, should face the direction in which the object is being carried. Employees shall not attempt to lift beyond their capacity. Caution shall be taken when lifting or pulling in an awkward position.

The right way of lift is easiest and safest. Crouch or squat with the feet close to the object to be lifted; secure good footing; take a firm grip; bend the knees; keep the back vertical; and lift by bending at the knees and using the leg and thigh muscles.

(d) Employees should avoid twisting or excessive bending when lifting or setting down loads.

(e) When moving a load horizontally, employees should push the load rather than pull it.

(f) When performing a task that requires repetitive lifting, the load should be positioned to limit bending and twisting. The use of lift tables, pallets, and mechanical devices should be considered.

46. The plaintiff admits that there was nothing dangerous in lifting the container and pouring the oil. He agreed with counsel for the defendant that lifting the two 5-gallon containers of hydraulic oil over the side of the truck, rather than pulling down the tailgate

and pushing the containers towards the back of the truck before removing them, was not the safest method of moving them from the truck. He admits that the 5-gallon container was not considered so heavy that it required another form of lifting and he confirmed that he had lifted such containers on a number of other occasions without assistance and without incident.

47. Further, Mr Parker says, and this was not disputed by the plaintiff, nor raised by his counsel on cross examination, that the job of pouring oil from the container into the tank of the boom truck was a routine job for the plaintiff which he and other mechanics had done many times over the years and the plaintiff was at liberty to seek assistance if he felt he needed it.

48. The plaintiff admits that he never asked for assistance until after he felt the "sharp pain" and when he was not able to get any assistance, rather than stopping the work and immediately reporting the situation to his supervisor, he completed the job and returned home. Further, although he says he reported to Mr Parker upon completion of the assignment, he admits that he did not tell him that he had injured himself while doing so, contrary to the defendant's policy regarding the reporting of work-related injuries.

49. Moreover, although the plaintiff's evidence is that he was injured when pouring the oil, in his statement of claim he alleges at paragraph 3:

> "That in the course of carrying out the said repairs the plaintiff was required to lift two (2) 5 gallon buckets of hydraulic oil. Upon lifting the said 5 gallon buckets of hydraulic oil, the plaintiff experienced pain in his upper left shoulder and neck."

50. Further, there is conflicting evidence as to how the plaintiff's alleged injury occurred. The plaintiff is the only witness to the incident. All of the reports would have been based on information obtained from him.

51. Mr Parker's evidence is that the plaintiff told him that he had injured himself while moving a 5-gallon container off of the truck he was driving; that rather than pulling the tail gate down to remove the container he lifted it over the side of the truck, contrary to all of his safety training.

52. According to Dr Blumberg's report, he first say the plaintiff on 4 November 2003 at which time the plaintiff stated that three weeks earlier he had had an accident on the job and that based on his examination of the plaintiff, his history and the MRI, he determined that the plaintiff's injuries were a direct result of the injury that occurred on the job on 19 October 2003. He concluded that "the lifting of the two, five gallon buckets on 19 October 2003 is the direct cause of his injuries."

53. Dr Barnett's evidence is that the plaintiff told him that he was lifting two containers of hydraulic oil when he suddenly felt pain and numbness in his upper limb and subsequently on both sides, with the left being worse than the right and that he "immediately" spoke to his supervisor. Under cross examination, Dr Barnett said that the first time he heard about "lifting and pouring into the funnel" was at the trial and in his view, if the injury had occurred during the lifting and pouring process the force would more likely be on the lower spine than the neck.

54. Although Dr Barnett disagrees with Dr Blumberg's finding that the plaintiff's injuries were caused by lifting the two 5-gallon containers of hydraulic fluid, he "admits" at paragraph 35 of his report that "the lifting on 19 October 2003 was the final factor in bringing the plaintiff's disorder to fruition."

55. So, although I agree with counsel for the defendant that the divergent opinions of the medical experts as to the cause of the plaintiff's injuries makes arriving at a conclusive cause of the plaintiff's injuries difficult, it seems to me that as the problems of which the plaintiff complained appear to have begun after the lifting of the containers on 19 October 2003, it is, in my view, more probable than not that the lifting of the containers and the pouring of the hydraulic oil either caused, or contributed to, the plaintiff's injury to his neck and shoulders or aggravated an existing injury.

56. However, just because an employee is injured "on the job", does not necessarily mean that the employer has been negligent or has breach its statutory duty to the employee and it seems to me that that is the real basis of the plaintiff's claim – because his injury occurred while he was "working", the defendant is liable.

57. It is, in my view, impractical to expect an employer to provide for every eventuality or create a procedure for every possible task that an employee has to perform. Further, the evidence is that the plaintiff was a 16-year employee and a senior mechanic who had been handling, lifting and pouring hydraulic fluid from 5-gallon containers for many years; that he, nor any other employee, had been injured while doing so. He admits that there was nothing dangerous about the job of lifting the container and pouring the oil therefrom; that, in fact, the 5-gallon containers were industry standard and as opined by Professor John Flemings in the 4th edition of Law of Torts at page 420, "...there is a sphere in which it is legitimate to leave a skilled workman the decision whether any difficulty he may encounter calls for managerial assistance for it would be a mistake to treat the relationship between him and his employer as equivalent to that of imbecile child and nurse."

58. I am satisfied on the evidence that the defendant did all that it could reasonably do to ensure that the plaintiff was provided with a safe system of work and the necessary equipment and training on safety measures to minimize the risk of injury to its employees, including the plaintiff.

59. In the circumstances, as unfortunate as it may be for the plaintiff, I am unable to find that the defendant was negligent or that it breached any statutory duty it owed to the plaintiff and consequently, I find that the injuries which the plaintiff suffered on 19 October 2003 were not due to the negligence or breach of statutory duty on the part of the defendant.

60. Accordingly, the plaintiff's claim is dismissed. Judgment is to be entered for the defendant with costs, to be taxed if not agreed.

Dated this 25th day of February A.D. 2011

Estelle G. Gray Evans
Justice