IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010HCV02176

BETWEEN	**FRANKLIN FRANCIS**	**CLAIMANT**
AND	**FITZGERALD SMITH**	**DEFENDANT**

Sean Kinghorn instructed by Kinghorn & Kinghorn for the Claimant.

Miss Catherine Minto instructed by Nunes Scholefield, DeLeon & Co. for the Defendant.

Heard: 13th, 15th & 17th January 2014 and November 3, 2017

Employer Duty of Care to Employee - Safe System of Work – Breach of Duty of Care - Road Worthiness of Assigned Motor Vehicle to Employee - Cause of Accident - Employee - Driver/Deliveryman/Mechanic - Contributory Negligence - Damages for Personal Injury

DAYE, J.

[1] There is a rural district in North West Clarendon called Lluidasvale in Kellits P.O. area. It appears to be a border district in that area between Clarendon and St. Catherine. The defendant, Fitzgerald Smith, a businessman, own and operate a hardware store there and also other business enterprises such as block making factory.

[2] He employs a number of workers for his business operations. One such employee was the claimant Franklin Francis. He was a driver and deliveryman whose duties were to deliver material and goods from the hardware to the

customers of his employer. In 2006 the defendant assigned to the claimant a 1992 Ford F150 pick up licensed CF 3312 to do his duties.

[3] On the 24th January 2007 the claimant was seriously injured as a result of an accident with this assigned vehicle. He drove this vehicle on the premises of the defendant's hardware at Lluidasvale where he had on orders transported some workers. The vehicle stopped, then shut off. He went and stood in front of the vehicle contemplating, what to do about the problem of the vehicle shutting off frequently. He was standing between the vehicle and a column of the premises. The vehicle he claimed suddenly, started, move towards him and hit and pinned him against the column.

[4] As a consequence of the injuries he sustained from this accident he filed this claim against his employer claiming damages for negligence for personal injuries, loss and interest and costs.

PLEADINGS/CLAIM

The claimant first filed his Claim Form on the 26th April 2009. He then filed an Amended Claim Form on the 29th August 2011.

[5] The amendment to paragraph 4 of his claim form was material and read as follows:

> *"... motor vehicle registeration number CF 3312 suddenly started and pinned the claimant who was standing before the column against the said column."*

The amended Claim Form added particulars of injuries, special damages and interest in paragraph 7.

[6] He alleges and specify the acts of negligence, injuries and damages against his employer hereunder:

PARTICULARS OF NEGLIGENCE

Paragraph 5

i. Failing to inspect motor vehicle registration number CF 3312 to ensure it was fit, roadworthy and suitable for the purposes required by the claimant.

ii. Failing to have or maintain the said vehicle in a proper state of repair for the claimant to use;

iii. Failing to effect any or any proper repairs to a vehicle knowing that same was manifestly unsafe and defective;

iv. Instructing the claimant to use, operate and manage a motor vehicle that was defective and manifestly unsafe and defective;

v. Failing to instruct the claimant in the proper safety procedures and measures when effecting repairs to the said vehicle;

vi. Failing to have and maintain a safe system of work;

vii. Failing to hire a competent staff of men;

viii. Failing and/or refusing to assign the claimant to another vehicle with which to carry out his duties.

Paragraph 6

As a result of the foregoing, the claimant has suffered serious injuries loss and damage and has incurred expenses.

PARTICULARS OF INJURY

(i) Crushed injury to pelvis;

(ii) Lower abdominal and scrotal swelling with pain and tenderness;

(iii) Pelvic Fracture

(iv) Urethral Distraction defect

PARTICULARS OF SPECIAL DAMAGES

I.	Medical Expenses (and continued)	$2,000.00
II.	Medical report registration	$300.00

III.	X-ray	$11,500.00
IV.	Transportation	$5000.00

Paragraph 7

The claimant claims interest on General and Special Damages pursuant to the **Law Reform (Miscellaneous Provisions) Act**.

DEFENCE

[7] The defendant deny responsibility for the injuries caused to the claimant by this motor vehicle used that was assigned to him. The defendant claim it was the claimant's own negligence that caused the injuries and loss he sustained. The material aspects of this defence are paragraph 5-6.

"5. The defendant denied that he was negligent as set out at paragraph 5 of the Particulars of Claim, or at all. In further response to the particulars of negligence the defendant will say that:

i. The claimant advised the defendant and therefore led the defendant to believe that he was a trained and competent mechanic and that he was able to properly advise the defendant of the status, fitness and road worthiness of the vehicle.

ii. Further, as a trained Mechanic the claimant is or ought to be fully aware of the proper safety procedures and measures when effecting repairs to the said vehicle. The defendant was relying on the expertise of the claimant.

iii. It was the duty and responsibility of the claimant as a trained mechanic to advise the claimant that the vehicle could not be operated on the road safely.

iv. A day or so before the accident the claimant advised the defendant that the vehicle required a new "key switch", but further advised that this would not affect the roadworthiness of the vehicle and that the vehicle could be operated by him safely. At all material times, the defendant relied on the

expertise and advice of the claimant who held himself out to be a trained and competent mechanic."

"Paragraph 6

The defendant will further say that the claimant's accident and his said injuries was wholly caused or materially contributed by the negligence of the claimant.

PARTICULARS OF NEGLIGENCE OF CLAIMANT

i. Failing to advise the defendant that the vehicle was defective and/or manifestly unsafe as he is now alleging;

ii. Failing to engage the hand and/or mechanical brakes before exiting the vehicle.

iii. Failing to place the vehicle in a parked or neutral position before exiting the vehicle.

iv. Attempting to start the vehicle in a manner which he ought to know (as a driver and/or trained mechanic) was unsafe, in that the claimant:

(a) Stood in front of and attempting to start the vehicle while the hand and mechanical brakes were not engaged.

(b) Stood in front of and attempted to start the vehicle while the vehicle was in gear.

And this was the proximate cause of the accident

v. Advising the defendant that the vehicle was roadworthy and could be driven by him safely in circumstances where he is now asserting otherwise.

vi. Drinking an alcoholic beverage while performing his duties. In the alternative attempting to operate or start the vehicle when he was intoxicated or consuming an alcoholic beverages.

vii. Operating a vehicle which he now says was in a defective and manifestly unsafe condition and which he now says he knew was in such a condition from prior to January 24, 2007.

viii. In all the circumstances, failing to take any precautions or to have any regard whatsoever for his own safety.

ix. In all the circumstances, falling to exercise due care and attention."

ISSUES

(1) FACTS

[8] (a) Was the 1992 Ford 150 pick up defective in 2006 when it was assigned to the claimant to drive?

(b) Did the said vehicle have electrical problem?

(c) Was the now functioned key service an electrical problem?

(d) Did the said vehicle have a transmission problem?

(f) Was the defendant as employer informed by the driver of any problem with the vehicle?

(g) Did the claimant's duty as a driver includes servicing the vehicle if it had a mechanical problem?

(h) Did the 1992 Ford 150 pick up started on its own on the 2nd January 2007 and moved off and hit and pinned the driver?

(I) Was the driver on the 24th January 2007 standing in front of the bonnet of the said vehicle and trying to fix the engine when it shut off?

(j) Was this automatic drive vehicle in gear on in park or neutral on the 24th January 2014 before it moved off and hit and pinned the driver?

(2) **LAW**

(a) Was the said vehicle used during the course of the claimant employment?

(b) Did the defendant have and discharge the duty to service the said vehicle?

(e) Did the defendant have and discharge the duty to supervise the maintenance of the said vehicle.

(d) If the vehicle did have a defect, did the defendant have and discharge the duty to provide a safe system of work to operate this vehicle?

(e) Did the driver fail to exercise due care in standing in front of the said vehicle which he was aware shut off and started irregular at times?

EVIDENCE/FINDINGS OF FACTS

[9] The claimant/employee gave evidence on his own belief. His witness statement dated the 12th September 2012 was accepted as his evidence-in-chief at the trial on January 13, 2014.

The defendant/employer gave evidence and was cross examined on his witness statement dated the 24th July 2012. He called two witnesses to support his case an employee (sales clerk) of the hardware who was present on the day of the accident. There was also a witness who knew the claimant as a mechanic for several years and the person who entered the vehicle and removed it from where it pinned the claimant's body to the column.

The claimant deposed he was employed to the defendant for 20 years. Further to the 24th January 2007 he was so employed. He was employed as a driver and

deliveryman. He states he was driving a F150 Ford pick up assigned to him from 2006. His employer is the defendant.

He insist the vehicle was defective from it was assigned to him and he complained to his employer about the defect. However, the defendant/employer took no steps to have the vehicle repaired or to assign him another vehicle. The defect in the vehicle he listed were:

i) The hand brakes were not working;

ii) The key switch was not working

iii) The vehicle would stop and shut off and it would start after a period when the bonnet is lifted and wires adjusted in the engine.

iv) The vehicle would start on its own and jump in gear and move off if you don't keep your foot on the brakes;

v) It had an electrical problem and a transmission problem.

[10] The defendant accept that the claimant was employed to him as a driver and deliveryman on the 24th January 2007, but he did not employ him for the period of 20 years. He did assigned the claimant to the F150 pick up in 2006 to perform duties. But he says the claimant was not acting in his lawful duty on the 24th January 2007 when the accident happened.

[11] He deposed when he assigned the vehicle to the claimant it was not defective. He was only informed a short while before the accident that the key switch was not working. But he relied on the claimant's advice that this did not affect the operation of the vehicle. Again he say he was not informed by the claimant that the vehicle would stop and shut off frequently. He employed the claimant as a driver/deliveryman and as an experienced mechanic to service the vehicle.

[12] He dispute that the vehicle suddenly started on its own, on the 24th January 2007, and move off and hit and pinned the claimant to the columns on the

premises of the hardware. His witness Westbourne Jones depose that the claimant came from the hardware with an alcoholic drink, went before the stationary vehicle used a screw driver in the engine and it started and move off. His other witness Lincoln Harris deponed that he knew the claimant for many years and he saw him doing mechanic work in these years on trucks and cars on the road side in the Kellits area. His next witness Dennon Jones says he was the one who went into the vehicle and put it in reverse and move it off the claimant.

[13] He says the vehicle was in gear. He also say it was the claimant who went into the bonnet of the stationary vehicle and then it started and move and hit him.

FINDINGS OF FACTS

[14] I find proved on a balance of probability;

(a) The 1992 F 150 Ford pick up was assigned to the claimant for the performance of his duty as a driver and deliveryman for the defendant's hardware at Lluidasvale Kellits P.O.

(b) The vehicle was an integral part of the system of work for the defendant.

(c) The vehicle was an equipment necessary for the performance of the duties of the claimant as a driver.

(d) The vehicle's key switch was not functional. The claimant informed the defendant about this from 2006 and not shortly before the accident in 2007.

(e) The claimant took no steps to have the key switch repaired.

(f) The key switch is connected to the electrical system of the vehicle

(g) The defendant was informed by the claimant and was aware that the vehicle would stop and start and shut off and had to be started manually by lifting the bonnet and adjusting the wires in the engine.

(h) The vehicle was an automatic transmission vehicle.

(i) The defendant employed the claimant as an experienced driver and someone who had experience as a mechanic.

(j) The claimant duties included servicing the vehicle. But the nature of the service did not include major mechanic repairs. The defendant accepts this in cross examination.

(k) There was discussion between the claimant and the defendant that he could drive the vehicle even though it had the problem during 2006 to 2007.

(l) The claimant's conduct of driving the vehicle after the problems that he complained of, was not an assurance that the vehicle was at a safe standard to carry out the work of the defendant.

(m) The claimant was standing in front of the vehicle with the bonnet up and attempting to start it by handling the engine. In his evidence-in-chief the claimant deponed this was the normal practice. I accept the defendant's witness that the claimant is an experience mechanic. He went into the engine on the 24th January 2007 and attempted to start it and that is when the vehicle started and move and hit the claimant.

(n) I do not accept the vehicle was in gear it was an automatic transmission vehicle. It could not start and move in gear. A main part of counsel for the defence submission is that the vehicle was left in gear, but I do not find this to be so.

(o) The condition of the vehicle with the stop and shutting off and starting manually was foreseeable danger to the safety of the claimant/employee.

(p) The act of standing in front of the vehicle on the 24th of January 2007 with the bonnet up and trying to start it by adjusting the wires in the engine when the claimant knew before the engine could trip in, and start and move off was a dangerous manoeuvre practice by the claimant and it endangered his safety.

(q) This act contributed to the accident that caused the injuries to the claimant.

SUBMISSIONS

[15] Counsel Miss Catherine Minto submitted that the claimant is not credible on a material aspect of his claim which concerns the cause of the accident. She pointed out the discrepancy between his witness statements and his pleading about the accident. Also she submitted the amendment to his pleadings late in day was conveniently made to improve his claim. In addition, she says he was unconvincing in cross-examination about his experience as a mechanic here in Jamaica from he left Kellits Primary School and when he worked in Guantanamo Bay. She contends he has 5 years experience as a driver and close to those number of years doing mechanic work. She contended on the authority of **Baker v T Clarke (Leeds) Ltd.** [1992] PIQR P262, and **Woods v Durable Suites Ltd.** (1953) 2All ER 391 that as the claimant was an experienced driver and mechanic it was not necessary for the defendant as employer to tell him as regular intervals what he was aware of being the danger of practice of standing in front of car bonnet while fixing it. The defendant had no reason to believe he was not adopting proper precautions and or through familiarity had become contemptuous to them.

[16] Further she submitted relying on **Stovin v Norfolk** [1996] AC 923 that the claimant had omitted to apply the hand brake when he stopped at the hardware premises. She adopted the words of Lord Nichollas that "the omission is the element which makes the activity negligent". The court found the hand brake was not working from 2006. The evidential basis of this submission therefore is absent.

On the authority of **Ruoff v Long & Co.** [1916] 1K.B. 148 she contend that the proximate cause of the accident was the claimant's negligence in standing before the motor vehicle, leaving it in gear and attempting to start it by handling the engine.

[17] Also she submitted the claimant was at least to share equal liability for this accident. She contends **Griffiths v Vauxhall Motors Ltd.** supports this submission. There an experience operator failed to hold a gun to secure bolts with care where he knew it was liable to kick back. He suffered injuries to his left hand while working as the production operator for the Vauxhall at its factory. He was an experienced operator for 14 years. The employer's company had failed to carry out any form of risk assessment in light of several complaints of several operators about phenomina. The court found the employer partially liable. The court has already found that the claimant's conduct of trying to start the vehicle while standing in front of it in light of the history of stopping and starting contributed to the accident and his injuries. What remains is the extent of his contributory negligence. Counsel submits liability, if any, should be apportioned 70:30 between the claimant employee of the employer.

[18] Mr. Kinghorn submitted essentially that that the defendant as employer failed to provide a safe system of work for the claimant as an employee as the condition of Ford F150 Ford pick up was not safe. He contended also that the defendant owed the claimant a duty of care at common law that was personal and non delegable.

He submitted the defendant could not rely on the claimant's experience as a driver or a mechanic to absolve him from his duty of care in ensuring the assigned motor vehicle was safe for the claimant to use as a driver. He relied on a number of decided cases which the court will examine. The submission of the counsel for the defendant must be examined against the principles of these decided cases.

Law

[19] At common law an employer has a duty to take reasonable care to provide a safe system of work for his employed. Both counsel accept that **Wilson and Clyde Coal Co. v English** (1938) AC 57establish the duty of care of an employer to an employee.

Lord Wright in the House of Lords said the obligation of the employer is three fold:

1. The provision of a competent staff of men

2. Adequate material.

3. A proper system and effective supervision

He then explained what was the extent of the employer's duty: (p.84):

> *"such a duty is the employers personal duty, whether he performs or can perform it himself or whether he does not perform it or cannot perform it ..... by servants or agents . A failure to perform such a duty is the employer personal negligence."*

He further explained (ibid):

> "... the whole course of authority consistently recognizes a duty which rests on the employer and which is personal to the employer to take reasonable care for the safety of his work men, whether the employer be an individual, firm, or a company and whether or not the employee takes share in the conduct of the operations. The obligation to provide and

maintain proper plant and appliances is a continuing obligation. It is not broken by a mere misuse or failure to use proper plant and appliances due to the negligence of a fellow servant or a merely temporally failure to keep in order or adjust plant and appliances or casual departure from the system of work."

Lord Maugham said an employer cannot divest himself on any of these duty (**Bain v Fife Coal Co.**) (1935). S.C 681

[20] Rowe P in **Courage Construction Ltd. v Royal Bank Trust Co. (Jamaica) Ltd. and Jennifer Colleen Silvera (Administrator of the Estate of Clifford Anthony Silvera) (Deceased) (1992)** 29 JLR 115 CA adopted the modern statement of the duty owed by an employer to an employee made by Lord Brandon Oakbrook in **McDermid v Nash Drudging and Reclamation Co. Ltd. [1987]** 2 All ER 878 at 887:

> *"A statement of the relevant principle can be divided into three parts, first an employer owes to his employee a duty to exercise reasonable care to ensure that the system of work provided for him is a safe one. Second, the provision of a safe system of work has two aspects (a) the devising of a such a system and (b) the operation of it. Third, the duty concerned has been described alternatively as either personal or non delegable. The meaning of these expressions is not self evident and needs explaining the essential characteristics of the duty is that, if it is not performed it is no defence for the employer to show that he delegated its performance to a person, whether its servant or not his servant, whom he reasonably believed to be competent to perform it. Despite such delegation the employer is liable for its non performance."*

[21] The facts briefly is that deceased, a quantity surveyor was employed to the construction company that was constructing a loading station 15 feet deep at the bauxite plant at main in St. Elizabeth. The company managers hired a front end loader with an operator for the week. The deceased who was at the bottom of the hole with a director of the company was fatally crushed by the front end loader. The front end loader was reversing up an inclined passage way that lead out of the hole. The front end loader suddenly stopped the engine went off and also the lights. Then the front end loader ran uncontrollably down the incline and struck

the deceased. The Appeal Court upheld the finding of the trial judge that the construction company did not provide a safe system of work, that is, access for the deceased. It found men and machine should not be in the same place when the front end loader is in operation.

[22] The court found also that the company did not delegate its duty of care to the independent contractor and was personally liable in negligence to the deceased. Miss Catherine Mintto submission that the claimant/driver was experienced and he failed to take reasonable care for his safety in driving a known defective vehicle, must take into account that closing passage of the principle above that the employer duty is personal and non delegable. Even if someone else is given the responsibility for the duty, if the duty is not done with care the employer remains liable. Mr. Kinghorn submitted this aspect of the principle is applicable to the claimant/driver even if it is accepted that he was an experienced mechanic. Counsel submission is valid and is in line with the authorities. The defendant fail to inspect the Ford F150 pick during 2006 to 2007. Neither did he get any mechanic to assess its road worthiness or cause any repairs to be done to the vehicle, He postponed and delayed its repairs. He ought to foresee that his employee was at risk to his safety by using the vehicle with the continuous problem it had.

[23] The claimant knew ought to have known of the dangers associated with the frequent problem of the vehicle. He had a duty to take reasonable care in operating the vehicle. To this extent counsel Miss Minto's submission find favour.

[24] In the circumstances I find the Particular of Claim (vi) of the claimant:

> "Failing to have and maintain a safe system of work" it is proved.

It is not necessary to determine the other particulars. Only to say particular (i) to (v) are examples and instances of the defendant's failure to provide a safe system of work on the evidence.

[25] Particulars of (iv) (a) (b) (vii) of the Defence was proved and therefore the claimant's conduct was contributory to the accident. The defendant on principle must take the main responsibility for this accident. He is liable for the accident. I do not hold that liability is 50:50 with the claimant but 60:40.

DAMAGES

[26] The nature of the injury sustained by the claimant are set out at paragraph 6 of his Amended Particulars of Injuries.

He was admitted to hospital for 3 weeks. He depone he felt pain at the time of the accident; during his stay at the hospital and up to the time of trial.

He says he "can't run" or "carry any load" and he "can't walk up hill". He went back to work after 3-4 months as a driver. There is no evidence of the measurement of his permanent partial disability (PPD) as submitted by counsel for the defendant. Nor did he give evidence how this injury has handicapped him on the labour market.

[27] Mr. Kinghorn propose that the court award the claimant $7,500,000.00 for general damages for pain and suffering. He relies on the authority of **Vincent Schoburg v Michael Fletcher,** delivered 23rd September 2004**.** I agree with counsel Miss Minto that the injuries in this judgment were more grave than the claimant's. The PPD was 6%.

[28] Mr. Kinghorn submitted further even though no PPD was assessed the treatment of the claimant's injuries indicate how serious it was viz:

1. Laparotomy and urethral realignment (urology),
2. Application of external fixator (orthopaedics)
3. Biopsy of incidental bowel lesion (general surgery)

[29] Miss Minto submitted the claimant should only be awarded $850,000.00 for general damages for pain and suffering for his injuries. Further she contend he has proved $300.00 for special damages and not $20,300.00 for medical expense.

[30] Counsel compare the claimant's injuries to **Collette Brown v Dorothy Henry** Vol. 6 Khan page 51 where the claimant was awarded general damages for pain and suffering of $1,917,431.00 as updated at the time of trial. The injuries were:

- Tenderness over pubic bone
- Minor bruises and laceration to leg
- Fracture right superior and inferior pubic rami
- Fracture left superior and inferior pubic rami
- Pain in leg and right side – walk with limp
- Weakness in quadriceps muscles
- Lower back pain
- Pain with intercourse
- Haematuria (blood in urine)
- PPD 5%

[31] The injuries are certainly more serious than the present claimants, see the injuries in **Melvin Roberts v Evans Safety Ltd.** 6Khan 43 where the PPD was 15% of the lower extremity and 6% of the whole person. The updated award was $1,700,569.56.

[32] These cases are not entirely comparable. They show that the award of general damages were low for some serious injuries.

[33] In my view an award of $2,700,500.00 is a reasonable sum to meet the pain and suffering and hospitalization and treatment (surgery) for the injuries of the claimant. Only $300.00 was proved in special damages.

[34] Accordingly the judgment of the court is judgment for the claimant. Liability is apportioned 60:40 to the defendant.

General damages $2,700,500.00.

Interest at 3% per annum. Damages interest from date of service of claim 7th October 2010 to date of judgment.

Special damages $300.00.

Interest on special damages at 3% per annum from 24th January 2009 to date of judgment.

Costs of 60% apportioned to the claimant to be agreed or taxed.