



[2020] JMSC Civ 217

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014 HCV 05648

BETWEEN	CALVIN MORRIS	CLAIMANT
AND	GEARY HUTCHINSON	1ST DEFENDANT
AND	JAMAICA PUBLIC SERVICE COMPANY LIMITED	2ND DEFENDANT

IN OPEN COURT

Ms Lesley McCalla instructed by Robinson, Phillips & Whitehorne and Ms Kinberley Facey and Ms Courtney-Dawn Johnson instructed by Facey and Partners for the Claimant

Mrs Tana'Ania Small Davis, Ms Keisha Spence and Ms Monique Hunter instructed by Livingston, Alexander & Levy for the Defendants

Heard: November 4, 5, 6, 7, 8 and 28, December 20, 2019, January 17 and November 13, 2020.

Negligence and/or Breach of Statutory Duty – Whether Claimant was an independent contractor – Employer's Liability – Volenti non fit injuria – Contributory negligence

Damages – Assessment – Personal injury – Loss of earning capacity – Loss of earnings – Future medical expenses

LINDO, J

Background

[1] Mr Calvin Morris (Calvin) (the Claimant) a mechanical labourer and fisherman, was among a group of men engaged in bushing and clearing debris from along the Jamaica Public Service Company's distribution lines in Bellefield, Saint Mary

after the passage of Tropical Storm Sandy in November, 2012. His father, Mr Dave Morris, (Dave) as well as his brothers and other men from the community were also involved.

- [2] On November 6, 2012 while the men were in the process of cutting down a guango tree, with the aid of a power saw, a large branch fell, causing serious injury to Calvin.

The Claim

- [3] By his Amended Claim Form and Particulars of Claim filed on September 14, 2018 Calvin is seeking to recover damages for negligence and/or breach of statutory duty against the defendants as a result of personal injuries and loss suffered by him.
- [4] He alleges that he was hired by Mr Hutchinson on behalf of the Jamaica Public Service Company (JPS Co) and that the incident happened while he was carrying out his assigned duties. He attributes his injuries to the negligence of the Defendants in their failure “*to provide...a safe system of work, a competent staff of men, adequate training...plant and equipment...*”, among other things.

The Defence

- [5] In their amended defence filed on November 7, 2018, the Defendants deny any negligence or breach of statutory duty on their part and contend that the injuries sustained by Calvin Morris were caused by his own negligence or the negligence of the independent contractor to whom he was employed/and or engaged. In their particulars of negligence of the claimant they also plead “*volenti non fit injuria*”
- [6] The Defendants aver that Calvin was not “employed and/or hired and/or contracted” by Mr Hutchinson, but it was his father, Dave who was engaged as an independent contractor and that Dave held himself out as having the requisite expertise and a reliable crew to carry out the work. They deny that Mr Hutchinson

gave instructions for the guango tree to be cut down and state, in the alternative, that if such instructions were given by him, it was not in a supervisory capacity but to ensure that the workmen understood the scope of the work to be carried out.

The Trial

- [7] The trial commenced on November 4, 2019 and lasted for five days during which time the court heard evidence from Dr Rory Dixon, the expert witness, and from Calvin Morris, Dave Morris, Tomica Morris and Wesley Gibbs who gave evidence in support of the claim, and from Shelton Thomas and Geary Hutchinson who gave evidence on behalf of the Defendants.
- [8] The Bundle of agreed documents, (including receipts totalling **\$78,455.00** as part of the special damages claimed) filed on October 18, 2019 was received in evidence.

The Expert Evidence

- [9] Dr Rory Dixon, Orthopaedic surgeon, was called as an expert witness and his evidence was by way of video link from Nice, France, where the oath was administered to him by Ms Aurelib Baillie, an attorney at law. His reports dated March 25, 2014, January 14, 2016 and July 19, 2018 were admitted in evidence. He states that in all three reports he assessed Calvin as having 50% impairment guided by the Guides to Assessment of Permanent Impairment (Table 13-12).
- [10] The following documents were also admitted in evidence through this expert witness:
1. Receipt dated March 25, 2014 in the sum of \$25,000.00
 2. Receipt dated January 14, 2016 in the sum of \$45,000.00
 3. Medical report dated December 10, 2013 signed by Dr Thein H. Soe

- [11] When cross examined by Ms Spence, Dr Dixon admitted to being guided by the Medical Association Guidelines to the Evaluation of Impairment, 6th Edition, and agreed that it introduces new approaches to assessing impairments. He said the 4th Edition, termed Diagnosis Related Estimates or Injury Model, allows for assessment of impairment based solely on diagnosis. Dr Dixon stated that it is not totally correct to say that based on the 4th edition, even if a patient had not reached maximum medical improvement (MMI) an impairment rating could still be obtained because it would depend on the medical condition. He disagreed that based on the 6th Edition guidelines, the main focus is on the permanent impairment when MMI has been reached and stated that the main principle of the 6th edition concerns factoring in the functional capacity of the patient when they have achieved MMI. He said he was rating functionality when the patient has achieved MMI and agreed that based on his report dated March 24, 2014, Calvin had not reached MMI when he assessed him as having a 50% impairment rating. He disagreed that his assessment was not in keeping with the 6th Edition guidelines, but agreed that in the reports dated January 14, 2016 and July 19, 2018, there are two instances where he stated that Calvin had reached MMI.
- [12] Dr Dixon said Calvin's cost of living, estimated in his reports as \$2.3m, is based on Economic Impact of Spinal Cord Injury published in the journal "Topics in SCI Rehabilitation, Volume 6, No. 4, 2011, and that the figures are based on data from the United States of America, as currently the Caribbean has no data. He admitted that he did not include data from Jamaica relating to the inflation rate, but that the figure quoted in the journal article was between US\$2.1 to US\$5.4M. He denied that his reports provided very little information as to the medical procedures carried out.
- [13] In re-examination, Dr Dixon said in relation to rating functionality, when he stated that Calvin has reached MMI and improved thereafter, he means:

"Comparing to where he started from, bedridden, Mr Morris was better able to balance himself in terms of sitting up properly and stand with

support. He cannot walk, he cannot run but by definition, he would still remain at 50%.”

The Claimant's Evidence

- [14] The witness statement of Calvin Morris dated January 15, 2019, stood as his evidence. He states that on November 4, 2012 he was hired by Mr Hutchinson and became part of a team of seven men who worked along the roadway from Esher Gully towards Egypt Pen crossing. He says they reported directly to Mr Hutchinson who told them which areas to bush, which trees to cut and that they were to clear the power line twelve feet apart, on each side of the road. He adds that they were not given any orientation, protective gear or equipment and there was no supervision when they were working.
- [15] He also states that they finished working at about 5pm and went home, and at about 7pm, Mr Hutchinson came to his house, indicated that he wanted to restore electricity to the police station that night, and along with the other men, including his father, he went with Mr Hutchinson and they finished working about 8pm.
- [16] Calvin states further that on the following day, before they started working, Mr Hutchinson made a note of their names, and that during the day, he, Mr Hutchinson, hired five more men. He says they cleared debris from the police station to a light post about a mile away and that there was a second set of work men who were 'linesmen' who worked under D.S. Wedderburn Limited and they were responsible for restoring electricity. He adds that towards the end of the day, Mr Hutchinson gave them instructions for the following day's work and inspected the work done on that day and during the inspection, he noted that a guango tree was not cut and specifically instructed the bushing crew to cut it from its root.
- [17] He says Mr Hutchinson told them to report to work early the next day and that they could start working without him and gave them a piece of rope about 20 feet long. He says further, that on November 6, 2012, they went to where they had

stopped working the previous day, he was assisting his brother Levan, to cut the guango tree and noticed that it was going to fall in the road and he tried to run across the road but a limb from the tree fell onto his back and he became unconscious. He states that when he regained consciousness he was in severe pain and he recalls being rushed to the Annotto Bay Hospital.

- [18] In amplifying his evidence, Calvin said he did not know Wesley Gibbs and that Mr Hutchinson gave instructions for them to start working before the lines men, “to give them a lead”. He said five of them started and Mr Hutchinson sent “two more power saw man” and it was the guango tree Levan was cutting that fell on him.
- [19] In relation to his employment before the incident, he said he did mechanic work two days per week and “*ketch crab and shoot fish*” and that he would earn \$40,000.00 from the mechanic work and sometimes \$20,000.00 or more, from fishing. He said he saw a psychiatrist whose first name is Yvonne, and that he paid her and received a report, but she is now dead.
- [20] When cross examined by Mrs Small-Davis, Calvin stated among other things, that when they went to the Egypt Pen crossing on Sunday, November 4, 2012, he saw a JPSCo van from which Mr Hutchinson came and said he wanted some workers to do bushing. He said he told Mr Hutchinson he had no experience in bushing but he “*could tek on the work*” and that the team of men used their own cutlass to carry out the bushing.
- [21] He denied that Mr Hutchinson held meetings with the work crew each morning but said one meeting was held, on the second day, but he does not recall what was said at the meeting. He said Mr Hutchinson added Leon Freeman and Carlton Harris to the crew as ‘power saw men’ but Levan took control of the power saw as Mr Harris had difficulty using it and that when Levan was cutting the tree, two other men had a rope tied around it and he knew to start running because Levan shouted “*the tree a come*”.

- [22]** He said when he started working on the first day it was Mr Hutchinson who described what was to be done but Mr Hutchinson did not stay with them the entire day and that although he did not ask Mr Hutchinson for any equipment, other workmen did, and were told they were responsible to find their own equipment.
- [23]** Mr Dave Morris' evidence is that he received information from his niece Nikeisha and as a result he along with Calvin, Levan, Junior and Dave Jnr. went to Belfield crossing on November 4, 2012 where he saw a man who introduced himself as Geary Hutchinson and who indicated that he was looking for men to clear the JPSCo power lines. He says he told Mr Hutchinson he wanted the job and they were instructed to start bushing the lines in Esher Gully and to clear the power lines twelve feet apart on each side of the road down to Egypt Pen. He says he started to work at about 8am with four other men and shortly after two other men, Leon Freeman and Carlton Harris, were also hired and they cleared the power lines until about 5pm.
- [24]** Dave Morris states further that at about 7pm Mr Hutchinson came to his house and said he wanted to restore electricity to the police station that night and he transported them to the area. He says Calvin and Levan were instructed to limb the trees, Mr Hutchinson gave him a big flood light and told him to focus on the limbs they were cutting and after they were finished he took them home and told him to report to work early the following morning.
- [25]** He also says that at about 7am the next day, he returned to the Belfield Crossing with the same crew of men and saw Mr Hutchinson standing at a shop at the corner and also saw other men who were unknown to him who appeared to be working on the power lines. He states that before he started working Mr Hutchinson asked for his name and wrote it down and he asked Mr Hutchinson how they were going to be paid and was told not to worry and then told that when they finished that section of the road they would be paid for all the work they completed up to that point. He adds that they cleared the entire road and the

power lines as instructed, and at about midday he went back to the shop in the crossing where Mr Hutchinson told him that a section of the Belfield Works main road was in a bad condition and he wanted five more men to complete the job.

- [26] Mr Morris says he told some men in his community and five more men joined the group, Mr Hutchinson hired them and gave instructions to them and before they finished working Mr Hutchinson inspected the work, told them they should not have left out the large guango tree, and instructed them to cut it down from the root. He says Mr Hutchinson told them to report to work early the next day and that they did not need to wait on him to start working. He adds that Mr Hutchinson gave them a piece of rope "*about 3 inches thick and approximately 20 feet long*".
- [27] He also states that on Tuesday, November 6, 2012, at about 7am, they resumed working and Levan started cutting the tree assisted by Calvin, and Mr Harris and Mr Freeman used the rope given to them to tie the tree. He says he noticed the tree started to 'shift' direction and realized it was going to fall forward into the road and he ran up the road. He adds that Calvin attempted to escape the falling tree but a large limb fell on his back knocking him unconscious and that he lifted the limb that was pinning Calvin to the ground, the group of men removed him, and he was taken to hospital by a passer-by.
- [28] He states further that he returned to the job site where the other men continued to work and sometime after 3pm Mr Hutchinson, Mr Henry and Mr Abdon Campbell from JPS visited the scene. He indicates that they were not paid for the work they completed and he went to the JPSCo office in Port Maria and spoke to Mr Henry and has since then had telephone conversations with other persons from JPSCo, including Mr Thomas and Ms Kelly Tomblin.
- [29] Dave Morris states that Calvin has been paralyzed and has been unable to work and requires his daily assistance. He also states that none of the workmen

reported to him, they all reported to Mr Hutchinson and that he never did any bushing work for JPSCo prior to November 4, 2012.

- [30] In amplifying his evidence he said he did not know Wesley Gibbs and “*every detail of the work is from Mr Hutchinson*”.
- [31] When cross examined, Dave Morris said when he heard that JPSCo needed workers he shared the news with other men from the community because he knows they could do the type of work and they all went up to Belfield District crossing with their machetes, where they met Mr Hutchinson for the first time, and he instructed them to start working from Esher Gully to Egypt Pen crossing that day.
- [32] He denied being the spokesman for the group and stated that all five men spoke to Mr Hutchinson themselves. He stated that he did not ask Mr Hutchinson for tools because “*the type of work we doing our tool could do it*”.
- [33] He stated that on the second day they started working at school corner and Mr Hutchinson indicated where work should start and stop. He agreed that before work started on the Monday there was a discussion about “*safety and things like that*” and he agreed that Mr Hutchinson came and inspected the work.
- [34] When it was suggested to him that Mr Hutchinson did not indicate from the Monday evening that they should start working without him the following morning, he disagreed and said “*he gave us rope from Monday evening*”. He said he could not tell Mr Hutchinson that he did not know about bushing as “*[he] was looking work, Christmas coming and [he] want the work and is [his] hobby*”. He agreed that he was the person talking to Mr Hutchinson about pay.
- [35] Tomica Morris gave evidence that on November 3, 2012, sometime in the afternoon, she saw Mr Hutchinson who offered her cousin Nikiesha, and herself a ride to Egypt Pen, and he told them he was in the area to examine damage done to power distribution lines. She says they showed him around the area and

on the following morning her cousin called her and then came to the house and spoke to her father who, along with her brothers and Junior Robinson, went to meet Mr Hutchinson.

- [36] She says after 6pm that day, Mr Hutchinson came to the home and she heard him tell her father that he wanted to clear a section of the road because he wanted to restore electricity to the police station that night, and Mr Hutchinson picked up her father, brothers, herself, and three other men from the community, and took them to a place along the Belfield main road. She states that she remained in the vehicle and saw Levan and Calvin climb a calabash tree and chop limbs from it and she saw Mr Hutchinson give her father a large flood light. She says the men worked until after 8pm and Mr Hutchinson took them home.
- [37] She states further that she generally helps Calvin by washing his clothes and preparing his meals and that since the incident he is completely dependent on the family, and in particular, his father, to assist him with his daily needs.
- [38] When cross examined, she said before the incident Calvin, was a mechanic and fisherman and her father "*plant him field and go bush*" and that since Calvin has been injured she has worked two times per week and sometimes she does not work as she stays around to help him.
- [39] Wesley Gibbs' witness statement filed on July 30, 2019 was admitted as his evidence in chief. He states that he was an Electrician and Crew Leader and on November 3, 2012 he was called by D S Wedderburn to go to Belfield to do electrical work and restore electricity. He says he carried twelve men from Kingston, got there on Saturday evening, and on Sunday he met with Geary Hutchinson, who he knew to be a Supervisor at JPSCo.
- [40] He says there were two linesmen crew, and Mr Hutchinson told them he had men to do the bushing and clear the way, and they were to follow behind and string up the power line. He adds that a "tail gate meeting" took place early in the morning, Mr Hutchinson took their names and gave instructions to install the

'short and grounds' and they worked, following behind the bushing crew, and started from Esher Gully crossing and worked until about 2am, the Monday, after they put up light at the Belfield Police Station.

- [41] Mr Gibbs also says he asked Mr Hutchinson who was the contractor for the bushing crew, but got no response. He says further that at about 7am Monday, November 5, 2012, he reported to work with his crew and the restoration work continued after a tail gate meeting was held with Mr Hutchinson. He says the bushing crew was there and he recalls seeing Calvin Morris and Dave Morris, there was no trained JPSCo crew leader for the bushing crew and they did not have proper safety gears. He states further that at no time did any of the men on his team engage in any bushing activities, "*linesman just focus on linesman work...*".
- [42] Mr Gibbs states further that he was informed of the incident by telephone and he went to his work location after which Mr Hutchinson arrived and a tail gate meeting was held. He also states that he enquired of Mr Hutchinson who was the contractor in charge of the bushing, Mr Hutchinson made a telephone call, gave him the telephone and he recognised that it was Mr Abdon Campbell on the telephone. He says he asked Mr Campbell who was the contractor for the bushing crew and Mr Campbell "*tried to tell [him] that Mr D S Wedderburn was in charge of the bushing*". Mr Gibbs says he knew that was not the case so "*[he] just dismissed his statement*".
- [43] When cross examined by Mrs Small Davis, Mr Gibbs said he located the twelve men and took them to Belfield. He said it is correct that sometimes when contractors are hired by JPSCo they receive a scope of work but "*this work was emergency work ... to restore current*". He explained how the work was to be done and said after completion, the JPSCo supervisor would be called to inspect the work and that sometimes the supervisor is present telling them what to do but most times he had other crew of men supervising. He agreed that the main

purpose of the supervisor was to inspect the work done and if satisfied he would call control to say “*switch on*”.

- [44] He said when he started working at Egypt Pen, the area was clear, and it was not he who had sent men ahead to clear the road but he “*think it’s Mr Hutchinson*”. He agreed that there was a meeting in the morning with Mr Hutchinson, his workmen and himself, and that the bushing crew was in front. He said the bushing was ground bushing and it was casual labour work which is different from a situation when JPSCo is doing line maintenance and are doing distribution bushing. He also said that at any time when doing distribution bushing it requires a higher degree of skill.
- [45] Mr Gibbs admitted to knowing Calvin and to seeing him “and others” on Monday at the tailboard conference and said the work they were doing was ground bushing, clearing debris and cutting trees. He indicated that persons present at the tailboard conference are required to sign. He said he finished work “at around 8pm” on the Monday.
- [46] He stated that a ‘Permit to Work’ is the ‘official thing’ which says you can start working and that JPSCo create a safe place for him to work and it is when they have tailboard conference that the supervisor calls control and ‘log out’. He denied that he was working at the time he was informed that a member of the bushing crew had been injured and indicated that he had not yet reached the work site and that when he did, he waited for Mr Hutchinson to come and discuss what to do and “*to install the short and ground*”.
- [47] He said the location of the incident was on the other side of the road, “*about a mile or less*” from where he was, and that when he started, at that point, it was already clear. He agreed that it is usual to hire men from the area to work, in particular, to do bushing and said he had authority to do so, if necessary.
- [48] He agreed that there are different types of bushing, transmission or distribution lines bushing and ground bushing and said distribution line bushing was taking

place on November 4, 5 and 6, 2012, even when the lines were down and that on those days the lines were down, some poles were leaning and some were broken. He indicated that the instruction to clear twelve feet on either side of the line path is called 'full width' bushing.

- [49] He said he had no conversation with Mr Hutchinson about pay, denied telling him he needed men to do bushing, and then admitted that he told him, on the first day, that he needed men to do bushing because of the amount of work and that Mr Hutchinson told him he had men to take care of the bushing.

The Defendants' Case

- [50] The witness statement of Shelton Thomas filed on July 16, 2019 and that of Geary Hutchinson filed on June 28, 2019, were admitted as their evidence in chief.

- [51] Shelton Thomas states that he is familiar with JPSCo's policies and procedures and he sets out the general policies and procedures relating to hurricane restoration activities and indicates that he was assigned to the parish of Manchester. He states that when the damage is extensive JPSCo engages the services of a contractor team to carry out the work and it is the contractor's responsibility to engage competent and trained workers and provide them with tools and safety equipment. He adds that D S Wedderburn has been one of the company's approved hurricane restoration contractors.

- [52] Mr Thomas further states that before emergency restoration activity is commenced, inclusive of bushing, a tailboard conference is held and a Permit to Work issued for that line section and should restoration activity be required at another section, a tailboard conference is held and the Permit to Work issued for that specific line section before any restoration activity is begun.

- [53] His evidence also is that JPSCo conducts a tailboard conference every morning before restoration activities commence for that day and the conferences involve

identifying hazards, mitigation of hazards and stating the procedures to conduct the work safely. He also states that after the tailboard conference is held, the tailboard conference sheet is signed and a Permit to Work is issued.

- [54]** When cross examined by Ms Courtney-Dawn Johnson, Mr Thomas indicated that contractors are hired through the Purchasing Department of the company and that he was privy to a copy of the list of approved contractors. When asked if Dave Morris or Calvin Morris appeared on that list, he said he did not know those persons. He admitted that he was not present in the Belfield district during the period November 4 to 6, 2012.
- [55]** Geary Hutchinson, Specialist Engineer employed to JPSCo gave evidence that in November 2012 he was a Technician Engineer and Supervisor assigned to the parish of Saint Mary to oversee the restoration work in Bellfield District. He says his role was to ensure the line was safe to be energised and that he is always present while a contractor works and in his absence a team leader is responsible for supervising his team. He says the scope of the work included bushing, pole line work, restringing and tensioning of power lines and that he prepared a document in relation to this.
- [56]** He says two crews, led by Owen Spaulding and Wesley Gibbs were assigned to him by Abdon Campbell, the Parish Manager for St Mary, and that Wesley Gibbs said he wanted to hire men from the community and he cautioned him about doing so. He adds that when persons are hired from the community they are hired by the contractor and not by JPSCo.
- [57]** Mr Hutchinson states further that when he called to check on the progress of the work, Wesley Gibbs told him he had engaged men from the community to do bushing and he “understood that Dave Morris and his sons were part of the bushing crew hired by Wesley Gibbs”. He says the bushing did not require a trained JPSCo team leader as it was ground bushing, which he defines as cutting of fallen trees to clear the path to allow for splicing and re-tensioning of

conductors. He denies carrying workmen to look at a guango tree or instructing them to start working early on November 6, 2012 without him.

- [58] He outlines that the procedure to commence work involves himself and a team leader identifying where the work should start and stop for that day and that a tailboard conference is held where the scope of the work is outlined and hazards identified. He says that no restoration work or bushing could have commenced before the 'Permit to Work' was signed and he denies having the authority to hire anyone in Belfield in November 2012, as the supervisor for JPSCo. He identified a copy of the 'Scope of Work' outline document said to be prepared by him and it was admitted in evidence as Exhibit 8.
- [59] In cross examination, Mr Hutchinson said he assessed the Belfield Area by himself and denied engaging the assistance of persons in showing him around the area and also denied knowing Tomica Morris before coming to court. He said when he stated in his defence that *"the defendants did properly employ Dave Morris as an independent contractor..."* he meant Dave Morris was employed by the contractor. He said that Dave Morris was an independent contractor at the material time and that he first met him on the evening of November 4, 2012, at Esher Gully but said he could not recall if that was the same time he met Calvin.
- [60] He denied that electricity was restored to the police station on the Sunday evening, November 4, 2012 and said it was approximately 2am on the Monday, and he also denied that bushing was completed up to that point on the Sunday evening.
- [61] Mr Hutchinson admitted that Omar Spaulding and his team carried out restoration work in Belfield on November 3, 2012 before he assessed the area, and said that he did not know the members of the bushing crew. He denied telling Dave Morris to bush twelve feet apart on each side when clearing the power lines. He then said that Wesley Gibbs and Omar Spaulding were responsible for bushing and for assembling the team for bushing and denied

instructing the bushing crew to cut the guango tree, indicating that he was not able to say whether any guango trees were cut during the restoration work.

[62] He agreed that he did not state, in the amended defence, that D S Wedderburn Limited was the independent contractor at the material time and he denied hiring a team of men, including Calvin, on November 4, 2012 and also denied knowing Mr Harris and Mr Freeman. He also said that Calvin Morris was part of Wesley Gibbs' team and was under Wesley Gibbs' direct control and supervision.

The issues

[63] The court has to determine the Claimant's employment status at the material time including whether Dave Morris was hired by the 1st Defendant on behalf of the 2nd Defendant as an independent contractor, and whether Dave Morris hired Calvin Morris; whether the accident was caused by the negligence of the 1st and 2nd Defendants and consider the nature and extent of the injuries sustained by the Claimant and the quantum of damages, if any, to which he is entitled.

The Submissions

[64] Counsel for the parties provided written submissions in which they examined the nature of the proceedings and addressed the law relating to negligence, and in particular, whether or not the accident was caused by the negligence of the 1st or 2nd Defendant within the context of the status of the Claimant's employment or whether it was caused by the negligence of the Claimant.

[65] It was submitted on behalf of the Defendants that in the event the court finds that they were negligent, the court should also find that the Claimant contributed to his injury as he was reckless in accepting the job to carry out bushing and tree cutting operations knowing that he had no training or experience and it was negligent to stand in a location during the course of the tree cutting exercise.

[66] I will not restate the submissions but will make reference to them during the course of the discussion to show and explain the reasons for my decision.

The Law and Discussion

- [67] Where the employer prescribes the work to be done but the manner in which it is to be carried out is left to the workman, a relationship of employer and independent contractor is established but where an employer not only determines the work to be done but also has control over how it is to be done, the relationship established would be that of employer and employee. (See **Collins v Hertfordshire County Council** [1947] KB 598 at 615.)
- [68] The authorities show that the determination of the status of employment of a person who is engaged to carry out work depends on an examination of all the circumstances in which the employment exists and in the case at bar a resolution of this issue rests heavily on the credibility of the parties and the plausibility of the accounts given by them.
- [69] I reject the evidence of Mr Hutchinson who on the one hand says the Defendants engaged the services of Dave Morris as an independent contractor who hired Calvin, and on the other hand says Calvin and his father were hired through D S Wedderburn Limited, one of JPSCo's approved contractors.
- [70] Calvin Morris and Dave Morris were both candid and forthright witnesses. Their evidence, which I accept as true, is that they were employed by Mr Hutchinson to carry out the specific task of bushing. The bushing required to be done was said to be 'ground bushing' which did not require any special training and expertise, and I find that Mr Hutchinson told the men what was to be done and how to go about doing it. There is no evidence to show that Mr Hutchinson dealt with Dave Morris only, when giving instructions on what was to be done and the manner in which it was to be done.
- [71] I note that, with frankness, Dave Morris, when cross examined, stated that when he heard that men were needed to do bushing, he called his sons and another

person, they took their machetes and went to the crossing where he saw and approached Mr Hutchinson and told him “*we come to do the bushing*” and that he would not tell Mr Hutchinson he did not know about bushing as he is “*a machete man, Christmas coming and [he] want the work...*”

[72] While there is no evidence of Calvin negotiating or agreeing to any amount that he would be paid for the job, I find as a fact, that Dave Morris questioned Mr Hutchinson about payment. This in my view points to a finding that Dave Morris was not an independent contractor.

[73] Mr Hutchinson however, tells an entirely different story and I find his evidence to be quite inconsistent. According to his evidence, Calvin Morris was employed by his father Dave Morris, who was employed as an independent contractor and neither Calvin nor Dave were employed by him on behalf of JPSCo. Mr Hutchinson was very guarded in his responses and his demeanour during the course of cross examination leads me to a finding that he was not being truthful. In particular, I find that he was not being truthful about being shown around the Belfield area by Nikiesha Morris and Tomica Morris, as to when he first met Dave Morris and whether he met Calvin at the same time and that he transported the men to carry out further work so that electricity could be restored to the Belfield Police station.

[74] Although Calvin provided his own tool, in the form of machete to carry out the job of bushing, I find that it was Mr Hutchinson who hired additional men with the power saw, and that he also provided the rope for the men to use in the cutting of the guango tree and gave instructions as to how it was to be cut.

[75] I therefore find on the evidence that there was some measure of control by Mr Hutchinson over the men doing the bushing, as I believe it to be true that they were told which areas to bush, where to start and where to stop, and that they were to clear the power line 12 feet on each side of the road and to ensure they were ahead of the linesmen.

- [76] I also believe it to be true that when the men completed working on November 4, 2012, they were contacted by Mr Hutchinson to carry out additional work so that electricity could be restored to the Belfield Police Station and that Calvin, as well as the other men, were transported to the specific area by Mr Hutchinson and were also given specific instructions by him and he provided a big flood light so that they could carry out the work.
- [77] I therefore find no merit in the argument that Mr Hutchinson “...*could not and did not stipulate how work was to be done...*” or that he did not exercise the degree of control over Calvin necessary to constitute a relationship of master and servant. I find on the evidence that there was a sufficient level of control by Mr Hutchinson over the work done by Calvin and the other men. The bushing crew received all their instructions from him and although he held one tailboard meeting with the bushing crew, he determined where bushing was to commence and end for each day. It was Mr Hutchinson who deployed Calvin and the other men to where he needed the job of bushing to be done. Additionally, it has not been contradicted that Mr Hutchinson gave them the rope which was used in the tree cutting process and that he provided a flood light when the men were taken back to do additional work so that electricity could be restored to the police station. This level of control is not consistent with the independence which would ordinarily be associated with a person who is working as an independent contractor.
- [78] I bear in mind however, that based on the evidence which I accept as true, Mr Hutchinson did not supervise the bushing crew while they worked, but I do not find that to be a factor which shows he did not have the level of control over Calvin or his father, to be considered their employer. I will address this further when dealing with the issue of liability.
- [79] I believe the evidence of Wesley Gibbs that he was sent by D S Wedderburn to be a part of the restoration programme in Belfield, “...*to do electrical work...*” and that he had his crew of men who only focused on linesmen work and as such I

find that he was not a team leader or supervisor for the Claimant or his father as Mr Hutchinson is also suggesting. I therefore find that Mr Hutchinson's version of the events and that the men were not employed by him to be far less credible than the evidence of Calvin and his witnesses.

[80] On the totality of the evidence presented, I find on a balance of probabilities that all the members of the bushing crew were carrying out the instructions of Mr Hutchinson and none of them exercised any degree of autonomy sufficient to be deemed an independent contractor and neither were they working under the authority of Dave Morris or even Wesley Gibbs. I hasten to note that I find the action of Dave Morris in rounding up other men in the community to carry out bushing as being no more than a neighbour ensuring that others benefitted from an employment opportunity.

[81] When all the circumstances surrounding how Calvin came to be hired to carry out the work of bushing at the material time, the fact that Mr Hutchinson controlled what was to be done, how it was to be done and also inspected and observed the progress of the work, I am propelled to the conclusion that Calvin was at the material time employed by Mr Hutchinson on behalf of the 2nd Defendant and was not an independent contractor and neither was Dave Morris an independent contractor.

[82] Having established the employment status of the Claimant, it fails to be determined whether the Defendants can be held liable in negligence. The issue whether the Defendants are, or may be liable for the independent contractor's breach of his duty of care therefore does not arise for consideration.

Negligence and/or Breach of Statutory Duty

[83] The Claimant in his Amended Claim Form is seeking damages for "negligence and/or breach of statutory duty". While he has particularized the alleged negligence of the Defendants, he has failed to set out his case as it relates

specifically to any breach of statutory duty and neither has he stated any statutory provisions on which he is seeking to rely.

[84] In relation to his claim in negligence, it is well settled that in order to establish liability in negligence on the part of a Defendant, the Claimant has the burden of proving on a balance of probabilities that a duty of care was owed to him, there was a breach of that duty and as a consequence of that breach he suffered damage and the damage was reasonably foreseeable.

[85] In **Jamaica Public Service Company Limited v Winsome Ramsay**, SCCA No. 17/03, unreported, delivered December 18, 2006, Harris JA said, *inter alia*:

“The question as to whether negligence on the part of the appellant has been established is one of fact. A claimant’s success in an action for negligence is dependent on whether there is cogent evidence to establish that the defendant’s negligence caused his injury. In discharging the burden of proving the defendant’s negligence, the claimant must show the existence of sufficient relationship of ‘proximity’ or ‘neighbourhood’ between the defendant and himself, the foreseeability of damage by reason of the defendant’s negligent performance of an operation resulting in injury... “

[86] As I have found, Calvin was employed to JPS Co, through Mr Hutchinson, and it is not denied that Mr Hutchinson was acting on behalf of JPSCo. I have also concluded that Calvin was under the direct control and supervision of Mr Hutchinson who instructed him on what to do and how to carry out the work of bushing. As such, there was a sufficient relationship of ‘proximity’ so that there is no difficulty in finding that the Defendants owed a duty of care to Calvin, as their employee.

[87] It is well established that an employer has a duty to take reasonable care for the safety of his employees. (See **Davie v New Merton Board Mills Ltd.** [1959] 1 All ER 340) This duty includes provision of competent staff, adequate plant and equipment, provision of a safe place and a safe system of work and adequate supervision. Failure to fulfil this duty may amount to negligence on the part of the employer.

- [88] A safe system of work includes the way in which it is intended that the work is to be carried out, the giving of adequate instructions and the taking of precautions for the safety of workers. It also includes the physical layout of the job, the setting of the stage, the provision in proper cases of warnings and notices and the issue of special instructions. Where there is a duty to provide a safe system of work, this duty is not discharged by merely providing it. The employer must take reasonable steps to ensure that it is carried out and this involves providing instructions in the system as well as some measure of supervision. The case of **Speed v Thomas Swift & Co.** [1943] KB 557 provides support for the proposition that part of an employer's duty in providing a safe system of work is to provide supervision
- [89] A defendant will be said to have breached his duty of care if his conduct falls below the standard required by law and this normal standard is said to be that of a reasonable prudent man. (See **Blythe v Birmingham Waterworks Ltd.** (1856) 11 Ex. Ch. 151). The essence of the duty owed by an employer is that the operations are not carried out in a way which would subject the employee to unnecessary risks.
- [90] In the case at bar, I find that Mr Hutchinson did not exercise the supervision required over the bushing crew, and I bear in mind that part of the defence is that, if he provided instructions, they were not in a supervisory capacity but to ensure the workmen understood the scope of work to be carried out. The level of supervision provided to Calvin was therefore not sufficient to indicate that the Defendants maintained their duty of care to him.
- [91] On the issue of whether it was foreseeable that harm could come to Calvin, I find that the Defendants were aware of the hazardous nature of the restoration programme. The Defendants had a duty to take reasonable steps to ensure a safe place of work although not necessarily to the extent of eliminating every foreseeable risk, if so doing would be unreasonably onerous.(See **Latimer v AEC Ltd.** [1953] AC 643).

- [92]** It is Mr Hutchinson's evidence that he ensured to highlight the various hazards at the tailboard meetings held every morning. I do not find on the evidence that tailboard meetings were held every morning before the men who were doing bushing, started to work. I find that there was a meeting which involved Wesley Gibbs' linesmen crew on the Sunday morning after the bushing crew were already at work and that there was another meeting on the Monday morning, involving both linesmen and bushing crew at which time Mr Hutchinson wrote down the name of Dave Morris and spoke about the hazardous nature of the job. This one, tailboard conference/meeting in my view is not sufficient to show that the Defendants discharged their duty of care owed to the Claimant. Additionally, it is clear on the evidence also that it was after the incident on November 6, 2012, that a tailboard meeting was held.
- [93]** I did not find Mr Hutchinson to be a sincere witness. Although he said there were several persons assigned to supervise the restoration work and he agreed that it is safe to say the work was divided among the supervisors, he said he was unable to recall the names of the other supervisors.
- [94]** I prefer and accept the evidence of Wesley Gibbs where it conflicts with that of Mr Hutchinson. Mr Gibbs remained consistent and I note that Mr Hutchinson at least agrees with him that electricity was restored to the police station at approximately 2am. I find it odd however, that Omar Spaulding would have carried out restoration work before he, Mr Hutchinson assessed the area, as Mr Hutchinson said. I therefore reject the evidence of Mr Hutchinson in this regard.
- [95]** With regard to the JPS Co. scope of work document admitted in evidence as Ex 8, this court is unable to accept it as an authentic document. Although Mr Hutchinson gave evidence that he prepared and printed it, there is no evidence as to exactly when it was prepared and in view of the insincerity of the evidence of Mr Hutchinson, as I have found it, I have not attached any weight to that document.

- [96] The witness Shelton Thomas gave evidence as to general procedures followed by JPSCo when carrying out restoration work. He failed to give any specific details as to what obtained on the day of the incident. What is clear on the evidence is that the Defendants having employed the Claimant, gave instructions of what was to be done and how it was to be done but failed to ensure that Calvin was properly attired or equipped for the job he was to do and failed to provide any or any sufficient supervision necessary for him to carry out the job.
- [97] The general procedures and practices referred to by Shelton Thomas which should have been in place were completely ignored. Calvin and the other workers were on their own without any proper supervision. Based on the nature of the work to be carried out, there was the risk of injury if the proper tools and equipment and safety measures as well as effective supervision were not provided. The circumstances of the case demonstrate that the Defendants as employer of the Claimant failed in their duty as employer. The standard of care fell below that which is expected of a reasonable and prudent employer. The failings by the Defendants in my view amount to a breach of its duty of care to the employee, which exposed Calvin to the risk of injury and as a result he suffered serious injuries.

Contributory Negligence and *Volenti non fit injuria*

- [98] The Defendants have asserted, by way of their closing submissions, that if they are found to be negligent, it should also be considered that Calvin contributed to his injury as he was reckless to his own safety in accepting the job to carry out bushing and tree cutting operations, knowing that he had no training or experience, and that it was negligent to stand in a location during the course of the tree cutting exercise which was manifestly unsafe. In their particulars of negligence of the claimant they specifically pleaded the doctrine *volenti non fit injuria*.

[99] I note that there was no reference to contributory negligence prior to the closing submissions and that in their amended defence, the Defendants set out particulars of negligence of Calvin and of Dave and also pleaded, *inter alia*, that “*if the claimant was injured...as alleged, these occurred as a **result of the Claimant’s own negligence** or the negligence of the independent contractor to whom he was employed...*”. (**My emphasis**).

[100] Contributory negligence must be specifically pleaded. To establish this defence, it must be shown that the Claimant did not in his own interest take reasonable care and contributed, by his want of care to his injury. (See **Nance v British Columbia Railway Co. Ltd.** [1951] AC 601).

[101] Counsel for the Defendants has submitted that contributory negligence can also be inferred by the failure on the part of the Claimant and the team to stop and obtain further instructions and guidance when they encountered the problem with the tree. Counsel expressed the view that any damages awarded to Calvin ought reasonably to be reduced by 50% to account for his contributory negligence.

[102] The Defendants did not provide any evidence to substantiate their belated assertion that Calvin was contributorily negligent and the issue was not treated as a live one during the proceedings. No facts have been presented to oppose Calvin’s assertions that there was no supervision while he was carrying out the work of bushing, and that apart from being told to bush 12 feet apart on either side and being given specific order to cut the guango tree from the root, they were not provided with any training or orientation in carrying out the job.

[103] I find that the Defendants employed the Claimant and other men to carry out bushing and the clearing of debris from along their transmission lines and they failed to give adequate or any special instructions or to provide any measure of supervision or sufficient warning in relation to the type of work to be done.

[104] Additionally, the Defendants did not provide any witness as to fact to counter the Claimant’s case as to what took place on the day of the incident and neither have

they put forward any evidence in support of their defence from which I can find on a balance of probabilities that Calvin's own negligence led to his injuries. Mr Hutchinson during cross examination, said he could not recall when he met Calvin and that he did not observe him at all between November 4 and 6, 2012 and admitted that he, Mr Hutchinson, was not at work at the time of the incident.

[105] I agree with the submissions of Counsel for the Claimant that the Defendants would be running afoul of the **Civil Procedure Rules, Part 10**, in seeking to rely on an allegation of factual argument which was not set out in their defence. There was no indication that reliance was being placed on contributory negligence so that the Claimant could be given an opportunity to respond. I therefore reject the argument advanced in the closing submissions as the statement of case of the Defendants speak specifically to negligence on the part of the Claimant and a complete denial on their part.

[106] In order for the defence of *volenti non fit injuria* to apply, it is not enough that the danger is apparent. A person who comes into the proximity of danger of his own free will, must have full knowledge of the nature and extent of the risk. (See **Smith v Baker** [1989] A.C. 325).

[107] A plea of *volenti non fit injuria* in my view involves an admission that there is some amount of risk involved in whatever was undertaken. The Defendants did not provide any evidence to show that Calvin had agreed that if injury resulted they would be absolved from liability and neither was there any evidence to show that Calvin had full knowledge of the nature and extent of any risk involved. It therefore cannot be said that Calvin assumed the risk of injury.

[108] To the limited extent therefore, that the Defendants sought to pursue the alternative defences, these defences fail.

Conclusion

[109] Calvin Morris has established on a balance of probabilities that he was employed to the 2nd Defendant by their supervisor, the 1st Defendant, and that he was not an independent contractor and neither was his father. He has also shown that during the course of his employment he suffered injuries.

[110] There shall therefore be judgment for the Claimant against the Defendants and I will proceed to assess the damages to which he is entitled.

Damages – Assessment

Special damages.

[111] In any action in which a claimant seeks to recover special damages, he has a duty to prove his loss strictly. (See **Lawford Murphy v Luther Mills** (1976) 14 JLR 119). The authorities however show that the court has some discretion in relaxing the rule in the interest of fairness and justice, based on the circumstances. (See **Julius Roy v Audrey Jolly** [2012] JMCA Civ. 63).

[112] The claimant has pleaded the sum of \$235,955.00 as special damages, inclusive of medical expenses and reports, as well as transportation expenses. Of this amount, he has provided evidence to show that he expended the sum of \$78,455.00 in respect of his medical expenses and \$70,000.00 for the medical reports.

[113] In relation to the claim for transportation expenses, the Claimant pleaded the sum of \$48,000.00. His evidence is that he paid \$8,000.00 per trip from his house in St Mary to Kingston and that he made “not less than ten (10) trips”. Although he has not provided any documentary evidence to substantiate this claim the court finds him to be a witness of truth and finds that in the circumstances the sum pleaded is reasonable and will make the award.

[114] The total sum awarded for special damages will therefore be **\$196,455.00**.

Loss of earnings

[115] This head of damages is intended to compensate the Claimant for money he would have earned, but which he is now unable to earn because of the injury.

[116] Calvin has claimed to recover loss of income “at a rate of \$60,000.00 per month... and continuing”, but has not provided any evidence to substantiate that he was in fact earning the amount claimed at the time of the accident.

[117] It was submitted on his behalf that a total of 7 years have elapsed since the date of the accident and as such he would be entitled to \$5,040,000.00, as pre-trial loss of earnings. Reliance was placed on the case of **Carlton Greer v Alstons Engineering Sales and Services Ltd.**, Privy Council Appeal No. 61 of 2001, which Counsel submitted states that if the fact of the loss is shown but the necessary evidence to prove the loss is not given, the court in its discretion can award such sums as it deems reasonable in order to recognise the loss.

[118] I find the Claimant to be a credible witness and I have no reason to doubt that he was employed prior to the accident. He has however not substantiated his claim that he earned the amount stated, which he gave as an approximate figure and it is not clear from the evidence whether the sum of \$60,000.00 per month is gross or net income. His evidence, and that of his father and sister, that he worked as a mechanic and fisherman, was not challenged and neither was any suggestion put to him that he was not being truthful about his employment.

[119] Based on the totality of the evidence, I believe it is reasonable for the court to regard him as a casual worker, as there is no clear evidence that he was in steady full time employment. The court also has to bear in mind that based on the types of work he did, he would not necessarily be in a position to provide documentation to prove his earnings. The court therefore has to use its own experience in a matter of this nature to arrive at what is proved on the evidence. (See **Central Soya Jamaica v Junior Freeman** (1985) 22 JLR 152) I therefore believe that in the circumstances it is reasonable that he be treated as a

minimum wage earner. What is clear however, is that his injuries have left him unable to work and he has therefore lost earnings.

[120] In order to recognise that he has in fact lost earnings, the court in its discretion will make an award using the minimum wage. The court notes however that there have been changes in the minimum wage at least three times since November 2012. The rate was \$5,000.00 per week effective, September 2012, \$5,600.00 effective January 2014, \$6,200.00 effective March 2016 and \$7,000.00 effective August 2018.

[121] The trial commenced on November 4, 2019, which means a total of seven years elapsed since the incident and the trial. It is therefore my view that it is reasonable to make an award of \$2,163,400.00 to the Claimant as loss of earnings from the date of the accident to the date of trial.

Loss of future earnings

[122] The authorities indicate that the basis of loss of future earnings is the amount the Claimant would have earned in the future and has been prevented from so earning because of the injury. This should also be strictly proved.

[123] In **Mayne and McGregor on Damages**, 12th Ed. at page 167, the learned authors state as follows:

“ ... the amount is calculated by taking the figure of the Claimant’s annual earnings at the time of the injury, less the amount, if any, which he can now earn annually, and multiplying this by the number of years during which the loss of earning power will last, which, if the injury is for the claimant’s life, will require a calculation of his expectation of working life. The resulting amount must then be scaled down by reason of two considerations, first that a lump sum is being given ... and second that contingencies may have arisen to cut off earnings before the period of disability would otherwise come to its end ...”

[124] Counsel for the Claimant submitted that a lump sum of \$6,000,000.00 be awarded for loss of future earnings while it was submitted by Counsel for the

Defendants that the multiplier/multiplicand approach is to be employed when future losses are being calculated.

- [125] I find favour with the submission of Counsel for the Defendants especially in view of the fact that in this case there is also a claim for loss of earning capacity. There is also authority for the use of the multiplier/multiplicand approach. (See **Knaeur (Widower and Administrator of the Estate of Sally Ann Knaeur) v Ministry of Justice** [2016] UKSC 9.)
- [126] In considering the sufficiency of an award for loss of future earnings, the court is cognizant of the fact that no precise mathematical calculation is possible due to the level of uncertainty presented by such matters. The uncertainties include the type of work, if any, he will be able to secure, to what extent his condition will improve or deteriorate, whether he would have secured a better paying job and whether he would work to retirement age or leave the job early due to illness or otherwise. The court therefore tries its best by using the multiplier/multiplicand approach and by following guidelines set out in decided cases.
- [127] In the instant case, it is not possible to ascertain what the earning capacity of the claimant is, or will be in the future and the court has assumed that he would be able to earn an amount equivalent to the national minimum wage (See **Douglas v KSAC & Ors.**(1981) 18 JLR 338).
- [128] Calvin is now 26 years old. Guided by the authorities of **Jamaica Public Service Co v Elsada Morgan**, (1986) 44 WIR 310 where the claimant was 25 years old, and **Kenroy Biggs v Courts Jamaica Limited** [2012] JMCA Civ. 50 in which case the claimant was 26 years old and a multiplier of 14 was used, I believe it would be reasonable to use a multiplier of 14. When the current minimum wage of \$7,000.00 per week is used with a multiplier of 14, the sum for loss of future earnings would be **\$5,096,000.00**.

Future care and future medical expenses

[129] In his particulars of claim, the Claimant has specifically pleaded a sum of US\$2,300,000.00 as the cost for future medical care. He places reliance on information contained in the attachment to the medical report of Dr Dixon, dated July 19, 2018.

[130] It is to be noted that the costs of future care and medical expenses will be assessed on the basis of the costs indicated by Dr Dixon, whose expert reports make it clear that he will need follow up care. Additionally, Dr Dixon has given his opinion that the life expectancy of the Claimant is estimated to be between 60 and 70 years.

[131] Calvin is now wheelchair bound and has claimed for replacement of motorized and un-motorized wheelchairs. Dr Dixon indicated that he will need continuous replacement of his wheelchair every five years and his Counsel has submitted that he would need a replacement wheelchair approximately 9 times in his lifetime.

[132] Although the Defendant agrees that Dr Dixon's report indicates that the Claimant will need periodic replacements of his wheelchair, it was pointed out that Dr Dixon quoted the prices for both motorized and un-motorized "which at the very least is an indication that an un-motorized wheelchair would satisfy the Claimant's needs. In view of the evidence in relation to the terrain in which the Claimant resides, I agree that it may be impractical for him to use a motorized wheelchair as submitted by Counsel for the Defendants. I also find it unreasonable for a claim to be made for both.

[133] Adopting the approach of Sykes J, (as he then was) in the case of **Kenroy Biggs v Courts Jamaica Ltd & Peter Thompson**, *supra*, where he indicated that the multiplier for cost of future care is to be significantly higher than that for calculations for future earning, I find that a multiplier of 22 is appropriate. When this is divided by the number of years which the wheelchair would have to be

replaced it gives 4.4. I would not, as suggested by Counsel for the Defendant, round this figure to the nearest whole number as it is future care that is being addressed. I therefore find that the Claimant would need a replacement of his wheelchair approximately five times.

[134] The replacement of an un-motorized wheelchair is said to be at \$63,200.00 each. I will therefore make an award of \$316,000.00 in respect of the replacements of the wheelchair.

[135] Calvin has also claimed that there will be the need for renal investigations to be done by a Urologist twice per year and Dr Dixon has indicated that the cost is US\$100.00 per visit to the Urologist and \$100 for the investigation. The evidence which I accept is that the Claimant is still at risk for kidney failure although he has so far not had the need to visit a urologist. I find however, that based on the expert's evidence he ought to be compensated so that the review and investigations can be done. I therefore believe the sum USD\$9,200.00, as claimed, is a reasonable sum to be awarded in this regard.

[136] He is also seeking to recover the cost of a bath chair valued at approximately US\$100, a transfer bath bench, a Knurled Grab Bar and the cost of a home gym. The expert's evidence is that certain home modifications are required including the redesigning of bathroom to facilitate a wheelchair and a bath chair and that a home gym be constructed for the Claimant who no longer requires therapy as he is able to do his own exercises. He estimated the cost of the gym to be US\$5,000.00 - \$10,000.00.

[137] Based on the evidence which I accept as true, that some modifications have already been made to the home by his father to facilitate him, I am of the view that he need not be compensated for a home gym.

[138] Dr Dixon has made specific reference to the need for a bath chair but there is no evidence presented to show that the transfer bath bench or the knurled grab bar

are items which are necessary. I will therefore make an award for the cost of the bath chair which is USD\$100.00

General damages

[139] There is authority that in the assessment of general damages, as far as is possible, comparable injuries must be compensated by comparable awards. (See: **Beverly Dryden v Winston Layne**, SCCA No 44/87, unreported, delivered June 12, 1989)

[140] In arriving at the sum to be awarded, the court is guided by the updated Consumer Price Index (CPI) as published by the Statistical Institute of Jamaica (STATIN) in July 2020. The court observed that there has been a recalibration and revaluation by STATIN and although there has been a reduction in the CPI figures in comparison to the trend in the earlier published figures, the formula remains the same. The CPI stated in relation to the cases cited for comparison have therefore been re-valued.

[141] Counsel for the Claimant reviewed the medical evidence presented, identified factors to be taken into account in determining reasonable compensation as enumerated in **Corneliac v St Louis** (1965) 7 WIR 491 and submitted that an award of \$45m would provide reasonable compensation to the Claimant. She referred to the following cases as guides in determining the appropriate award for pain and suffering and loss of amenities:

1. **Kenroy Biggs v Courts Jamaica Limited** [2012] JMCA Civ. 50 (unreported), Supreme Court decision delivered January 22, 2010. In this case, the 26 year old claimant suffered amputation, severe urological problems and back pains. His combined WPI was 55%. He was awarded \$18,000,000.00 (CPI 58.4) which updates to \$32,702,054.79 applying the current CPI (106.1) for September 2020.
2. **Maurice Francis v Dist. Cons. Owen Thomas & The Attorney General**, Khan Vol. 4. pg. 126 in which the Claimant, then 17 years, suffered a gunshot wound to his back. He had traumatic paraplegia with injury to spinal cord at thoracic vertebra (T4-T5)

level and was assessed as having 60% whole person impairment. In December 1994, (CPI 11) he was awarded general damages of \$3,500,000.00 which updates to \$33,759,090.91.

3. **Joan Morgan and Cecil Lawrence v The Attorney General**, Khan Vol. 6, pg. 220, in which the 1st Claimant suffered PTSD after being misinformed that she was HIV positive. She was awarded \$3,500,000.00 in December 2007 (CPI 44.7) which updates to \$8,307,606.26; and
4. **Neinah Williams v Islandwide Concrete Company Limited & Henry Bowen** [2017] JMSC Civ. 37 in which the claimant was involved in a motor vehicle accident and suffered cervical spinal cord injury, had urinary and faecal incontinence, was assessed as having 55% whole person impairment and in March 2017 (CPI 91.4) was awarded \$35,000,000.00 which updates to \$40,629,102.84.

[142] The case of **Maurice Francis**, referred to by the Claimant's Counsel, as well as the following cases, were submitted by Counsel for the Defendants as providing useful guides as to what is reasonable in light of the injuries sustained by the Claimant in the case at bar:

- a. **Lloyd Clarke v Cpl. E. F. Quest, Cons R. Barrett, Dist Cons M. Bernard and the Attorney General**, Khan Volume 6, page 170. Clarke, then 17/18 years old, sustained gunshot injuries which caused complete paralysis from the navel down. He was confined to a wheelchair, had incontinence at faeces and urine therefore had to wear diapers; had an indwelling catheter which would remain for life and had to be changed every six weeks. In December 2008, (CPI 52.3), he was awarded \$26,000,000.00 which updates to \$52,745,697.90.
- b. **David Cameron v Ferron Williams, Dave Birch** [2017] JMSC Civ 82. The Claimant, 54 years at the time of trial, was rendered a paraplegic from the waist down as a result of a motor vehicle accident in 2007 and was confined to a wheelchair, had to wear diapers and was dependent on others. In May 2017 (CPI 91.8) he was awarded \$24,744,298.54 which updates to \$28,598,802.56.

[143] The Defendants' Counsel compared and contrasted the cases cited and submitted that an award in the range \$23m to \$26m would be reasonable.

Counsel also pointed out that in relation to the claim for ‘psychological adjustments...’ the claimant cannot rely on the report from Dr Bailey-Davidson and in the absence of evidence from an expert he is unable to establish his case as to his alleged psychological injuries.

[144] The medical reports show that Calvin sustained paraplegia secondary to thoracic spinal cord injuries at the level of T3 to T8 fractures, resulting in no power to his lower limbs; complete spinal cord injury and mild head injury. He was assessed as having 50% whole person impairment. The injury sustained by him is very serious and has a long term physical impact. He is now wheelchair bound and is unable to stand freely. I agree with both Counsel that the case at bar bears some similarities with the case of **Maurice Francis**, *supra*, although Calvin’s whole person impairment is assessed at 10% less.

[145] Although Calvin gave evidence that he has been depressed since the incident and that he visited Dr Bailey-Davidson, there was no evidence presented to substantiate the claim in relation to “psychological adjustment issues” and as such the court will make no award in respect of that particular claim.

[146] I have had regard to the injuries and pain suffered by the Claimant as stated in the medical reports and the evidence presented. I bear in mind also that he is no longer able to take part in physical activities he enjoyed prior to the incident. Using the case of **Maurice Francis** as the preferred guide, and adjusting to account for the lower PPD rating in the case at bar, as well as the fact that Calvin no longer depends on the use of a catheter, has increased body strength and has regained some power in his lower limbs, I am of the view that an award of **\$30,000,000.00** would be adequate compensation.

Loss of earning capacity/handicap on the labour market

[147] An award of damages under this head is to compensate for the Claimant’s reduced eligibility for employment or the risk of future financial loss. This in my view involves some amount of speculation.

- [148] It was submitted on behalf of the Claimant that based on the injuries sustained by the Claimant he is unable to compete with able bodied men. Counsel suggested that the multiplier/multiplicand method ought to be used and that 20 is a reasonable multiplier based on the net income of the Claimant, the length of the remainder of his working life, the level of risk that he will be on the labour market and for how long and the effect of his disability. She stated that *“the sum of \$14,400,000.00 is claimed for loss of earning capacity/handicap on the labour market”*
- [149] Counsel for the Defendants submitted that there must be evidence advanced *“to solidify his claim that his earning capacity has been diminished”*. Counsel added that it is sufficient if the severity of the claimant’s injuries makes it immediately obvious that he must necessarily have suffered an impaired capacity on the labour market.
- [150] In the instant case, it is clear that the Claimant will no longer be able to earn the sum he earned prior to the accident and there is no doubt based on the evidence, that the severity of his injuries indicates that he is handicapped on the labour market as I find that he is unable to compete effectively with able-bodied men of his age and skill.
- [151] I have considered the case of **Kenroy Biggs**, *supra*, in which the court having found that “the prospect of work” for him was “not too good”, used the lump sum approach to compute the award for handicap on the labour market and accepted that the multiplier/multiplicand approach be used to calculate loss of future earnings which was also claimed. I find the case of Biggs to be a reasonable guide in determining the approach in determining an award for loss of earning capacity and I am of the view that the circumstances of this case would dictate that the lump sum approach be used. I will therefore make an award of **\$600,000.00** which I find would be reasonable compensation under this head of damages.

Disposition:

[152] Special damages awarded in the sum of **\$196,455.00** with interest at 3% p.a. from November 6, 2012, the date of the incident, to the date of judgment

Loss of earnings in the sum of **\$2,163,400.00** (no interest)

General damages for pain and suffering and loss of amenities awarded in the sum of **\$30,000,000.00** with interest at 3% from the date of service of the Claim form to the date of judgment

Loss of future earnings awarded in the sum of **\$5,096,000.00** (no interest)

Cost to future care **USD\$9,300.00 and JD\$316,000.00** (no interest)

Loss of earning capacity awarded in the sum of **\$600,000.00** (no interest)

Costs to the Claimant to be taxed if not agreed.