IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014HCV 06060

BETWEEN	**ANDRE MORRISON**	**CLAIMANT**
AND	**MARLANDO VIRTUE**	**1st DEFENDANT**
AND	**INNOVATIVE SIGNS AND AWNINGS LIMITED**	**2nd DEFENDANT**

IN OPEN COURT

Miss Kimberley Facey and Mr. Kevin Page instructed by Page and Haisley for the Claimant.

Mr. C. Townsend and Ms. C. Johnston instructed by Townsend, Whyte & Porter for the Defendants.

Heard: **December 17-18, 2020 and February 5, 2021.**

Whether safe system of work – negligence – whether Claimant contributorily negligent – whether cause of accident inevitable – whether Second Defendant vicariously liable – credibility of witnesses – general damages principles – handicap on the labour market – costs of future medical care.

MORRISON, J

[1] The Claimant at the time of this incident, being the 20th day of August 2013, was a Sign Technician in the employ of the Second Defendant, the owner of motor truck registered CG 8809. The First Defendant, the driver of the said motor truck, was also in the employ of the Second Defendant. The Claimant, the First Defendant and others travelled together in the said motor truck en route to St. James on a work assignment. The motor truck is called a Boom Truck in that there is a

contraption at the open back of the truck that can be extended to permit its user to erect sign boards at particular heights. The Boom Truck also carries a cab to its front which allows for two (2) persons to ride therein. The hapless Claimant, who was seated in the bed at the back of the Boom Truck, sustained severe injuries to his person when the truck overturned as it traversed the Falmouth Main Road in the parish of Trelawny.

[2] The Claimant's suit is framed thus: "The Claimant brings this action against Marlando Virtue and Innovative Signs and Awnings Limited, the First and Second Defendant respectively, to recover damages for negligence and/or breach of statutory duty, for that on or about the 20th day of August 2013, the Claimant whilst in the course of his employment, was lawfully travelling in the bed section of the back of the truck on motor vehicle registered CG 8809 along the Falmouth Main Road, Trelawny when the First Defendant acting as the servant and/or agent of the Second Defendant so negligently drove and/or operated motor vehicle with registration number CG 8809 causing and/or permitting same to violently overturn. As a consequence of the First Defendant's negligence the Claimant has suffered multiple and serious injuries, as a result of which he had to undergo extensive medical treatment".

[3] The pleading continues:" The Defendants by way of their Further Amended Defence has ascribed blame to the driver of a white Liteace minibus whose particulars, name and identity are unknown and who suddenly and without warning or indication pulled infront of the defendant's motor truck, from a parked position along the left hand soft shoulder of the road causing the First Defendant's motor vehicle to flip when he was taking evasive action".

[4] Further, "the Defendants by way of their Further Amended Defence", the pleadings continue, "have ascribed blame to the Claimant, Andre Morrison agreeing that he chose to travel in the rear of the vehicle, in breach of company regulations.

[5] Lastly, that the Defendants have denied being negligent and deny any liability for any damages as a result of this accident.

[6] In this Further Amended Particulars of Claim, the Particulars of Negligence reads that the First defendant was negligent in that he:

a. caused and/or permitted motor vehicle bearing registration number CG 8809 to violently overturn;

b. drove at an excessive and/or improper speed;

c. failed to keep a proper lookout in all the circumstances or at all;

d. drove without any or any sufficient consideration for other users of the road;

e. failed to apply his brakes within sufficient time or at all so as to prevent the accident from occurring;

f. failed to stop, slow down, swerve, turn aside or otherwise operate the said motor vehicle so as to prevent the vehicle from violently overturning; and ,

g. failed to keep any or any proper and effective control of the motor vehicle whilst driving.

[7] The Further Amended Particulars of Claim added to the slew of negligent behaviour by the Second Defendant in that the Second Defendant:-

a. failed to take any or any adequate or effective precaution for the safety of the Claimant while he was engaged upon the work;

b. failed to provide the Claimant with a safe mode of transportation while conducting the company business;

c. exposed the Claimant while he was engaged upon his work to run unnecessary risk of damage or injury which they know or ought to have known;

d. failed in the circumstances to provide and/or maintain a safe and proper system of work;

e. failed to provide the Claimant with adequate assistance and support in the execution of his duties as a servant and/or agent of the Second Defendant.

THE DEFENCE

[8] Here the Defendants allege that the incident was an inevitable accident. In particular the Defendants assert that:-

a. the collision was due wholly or substantially to the negligence of the driver of a white Liteace minibus whose particulars, name and identity are unknown;

b. the said white Liteace minibus suddenly and without any warning or indication pulled out infront of the Defendants motor truck from a parked position along the left hand soft shoulder of the road causing the First Defendant to have to take causive action by swerving, and which ultimately caused the motor vehicle to flip and to land on its side;

c. the accident as incoitably recurring despite the exercise of all reasonable care and skill on the part of the First Defendant.

[9] Further, asserts the Defendants in their Defence, the Claimant is contributorily negligent in that he:-

a. had a reciprocal duty to take all reasonable steps to ensure his personal safety including not to travel in the rear of the Second Defendant’s motor vehicle in breach of company regulations;

b. caused or materially contributed to his own injuries specifically by;

i his own election and not under any strict instructions from the Defendants travelled in the rear of the vehicle despite available seating in the cab;

ii. the Claimant's failure to keep his lower limbs within the confinement of the rear side panels of the motor vehicle and had his leg protruding which materially contributed to the alleged injuries; and;

iii. the Claimant in electing to sit in the rear of the vehicle rather than in the cab, infact acted in breach of the Second Defendant's company regulations which expressly mandates that workers are to travel in the cab of the company motor trucks and not in the rear.

THE AGREED FACTS

[10] It will suffice here to remind for the purpose of facility that a body of facts are not in dispute, namely: that the Claimant was employed to the Second Defendant at the relevant time as a Sign Technician; that the First Defendant, an employee of the Second Defendant was at the relevant time the servant and/or agent of the Second Defendant and who was the driver of the ill-fated motor truck registered CG 8809; that the Second Defendant was at the relevant time the owner of the said motor truck registered CG 8809; and, that at the relevant time the back of the motor truck was loaded with advertising signs, metal to posts, sand, stones and gravel with the Claimant and others accompanying or sharing the said space at the back.

THE DISPUTED FACTS

[11] The key to the resolution of the disputed facts is to be determined, on a balance of probabilities, by asking and answering which of the accounts as given, is more likely to be the case than not. As such the factual issues may be broken down as follows:

a. Whether the First Defendant failed to control and/or operate the motor truck registered CG 8809, owned by the Second Defendant, so as to prevent or avoid the motor truck from overturning;

b. Whether the unidentified white Hiace motor vehicle referred to by the First Defendant, did in fact pull from a parked position off the road, onto the road, infront of the motor truck being driven by the First Defendant and, thereby caused, and/or substantially contributed, to the First Defendant failing to maintain control of the motor truck;

c. Whether the First Defendant was the sole cause of or materially contributed to the accident occurring;

d. Whether the First Defendant is solely or partly liable for the injuries sustained by the Claimant;

e. Whether the accident was an evitable accident;

f. Whether the Second Defendant failed to provide a safe system of work for the Claimant;

g. Whether the Claimant disobeyed company regulations by riding in the back of the Boom truck/motor truck and not in the cab;

h. Whether the Claimant's leg was protruding, from the back of the Boom truck, prior to the accident occurring;

i. Whether the Second Defendant provided and/or communicated company regulations to its employees and particularly the Claimant, that workers are to travel in the cab of the company's motor trucks and not in the rear of the Boom truck;

j. Whether the cab of the Boom truck could seat or accommodate only two persons or five simultaneously at the relevant time;

k. Whether there was an extension of the back of the Boom truck with the railings, at the relevant time;

l. What is the extent and nature of the injuries sustained by the Claimant including his loss and damage;

m. What is the measure of damages that is recoverable by the Claimant.

[12] As I see them, these are the issues to be resolved:

a. Whether, the First Defendant failed to control and/or operate the motor truck lettered and numbered CG 8809 owned by the Second Defendant, so as to prevent the motor truck from overturning;

b. Whether an unidentifiable white Hiace motor vehicle pulled from a parked position in front of the motor truck driven by Marlando Virtue, and thereby solely caused and/or substantially contributed to the First Defendant failing to maintain control of his motor vehicle;

c. Whether the First Defendant, was the sole cause of or materially contributed to the accident occurring;

d. Whether the First Defendant is solely or partly liable for the injuries sustained by the Claimant herein;

e. Whether the accident was an inevitable accident;

f. Whether the Second Defendant failed to provide a safe system of work for the Claimant;

g. Whether the Claimant disobeyed company regulations by riding in the back of the Boom truck and not in the cab;

h. Whether the Second Defendant provided and/or communicated company regulations to its employees and particularly the Claimant,

that workers are travel in the cab of the company's motor trucks and not the rear of Boom truck;

i. Whether the cab of the Boom truck could seat only two persons or five persons at the material time;

j. Whether there was an extension of the back of the boom truck with railings, at the material time;

k. The nature and extent of the injuries sustained by the Claimant including, loss and damage;

l. The quantum of damages recoverable by the Claimant herein.

[13] In summary, what the issues speak to is a discussion on the law relating to negligence, contributory negligence, inevitable accident, a safe system of work, vicarious liability and the law on general damages.

THE SUBMISSIONS

[14] The Claimant's submissions are in the areas of the credibility of the witnesses, the liability of road users, contributory negligence, employer's liability, and inevitable accident.

He recruited the following authorities:

(a) Esso Standard Oil SR Limited and Anor v Ivan Tulloch (1991) 28 JLR 557;

(b) Hay or Bourhill v Young [1943] AC 92;

(c) Blyth v Birmingham Waterworks Company [1843 -60] ALL ER 478;

(d) Jowayne Clarke & Anthony Clarke v Daniel Jankine, Suit No. 2001/C211, Judgment delivered on 15/10/2010;

(e) Cecil Brown v Judith Green & Ideal Car Rental, Claim No. 2006 HCV 02566;

(f) Barnett v Chelsea & Kensington Management Committee, 192 [1968] 1ALL ER 1068;

(g) Marlene Graham, Asphalt Specialist Ltd., Devon Henry and The Administrator General, Claim No. 2005 HCV 5341, Judgment delivered on 12/3/2010;

(h) Roy McCalla v Atlas Protection Limited & Range Company Ltd, 2006 HCV 09117;

(i) Caswell v Powell Duffryn Associates Collieries Limited [1940] AC 152;

(j) Lister v Hesley Hall Ltd. [2002] 1 AC 215;

(k) Desmond Walters v Carlene E Mitchell [1992] 29 JLR 173;

(l) The Merchant Prince [1892] p. 179;

(m) Ottey v Defreitas and Defreitas [1968] 13 WLR 498; and

(n) The Road Traffic Act.

[15] As to the Defendants, I am prepared to say that the arguments relied on by the Claimant were challenged and rejected by a reliance on the following authorities:-

i Norman Graham v Jermaine Bailey & Knutsford Express Limited [2016] JMSC Civ. 259;

ii Adolph Allen v Orandy Moving & Storage Company Limited & Kayan Kentish, Orandy Moving & Storage Company Ltd & Omar Lawrence [2017] JMSC Civ. 73;

iii Norman McBean v Rianford Wade & Rupert Campbell [2017] JMSC Civ. 74;

iv Island Builders Contractors & Real Estate Ltd. V Transport Authority, unreported Judgment delivered on 16.11.2001;

v Charlesworth and Percy on Negligence, 14th Edition;

vi Adassa Bolton v Maizie Henry, Dwayne Henry, Rohan Clarke & Christopher Wilson [2012] JMSC Civ. 25;

vii Whittle v Burnett [2006] EWCA Civ. 1538;

viii The Road Traffic Act, Sections 43 B (i) (h) and section 11 (1) (c);

ix Schassa Grant v Salva Dalwood & Jamaica Urban Transit Company Ltd. unreported Judgment delivered on 16.6.2008;

x Froom & Others v Butcher (1995) 3 All ER 520;

xi Antoinette Perrier v McMasters Meat Mart Ltd, [2013] JMSC Civ. 124;

xiI McBean v Rainford Wade & Rupert Campbell, [2019] JMSC Civ. 74.

[16] It has become necessary for me to say that by itemising the authorities on which the parties rely that I intend to refer to all of them in detail. Where it is convenient for me to do so, I will.

Defendant's Submissions

[17] The Defendants submitted on vicarious liability between the First and Second Defendants that, it is trite law that in order to fix vicarious liability on the owner of a car it must be shown that the driver was using it for the owner's purpose, under delegation of a task of duty. That, one has to look at the totality of the evidence, although there is a presumption of agency that arises from the fact of ownership.

[18] They argue that the First Defendant was acting in the course of his duties as assigned by the Second Defendant; that, the First and Second Defendants, did not

act negligently or carelessly and did not breach any applicable duty to the Claimant.

[19] They submit that the evidence, on a balance of probabilities, is consistent with an inevitable accident, not set in motion by any fault of the First Defendant who, on appreciating the circumstances before him, took all reasonable steps to avoid the said accident.

[20] The Defendants submit that the application of the test for whether there has been an evitable accident is set forth in the case of ***Whittle v Bennett***, supra. There, a serious road accident occurred on the A25 Dorking to Reigate Road when a Ford Mondeo motorcar driven by the Appellant, John Whittle, performed a U-turn from the nearside of the carriageway notwithstanding the presence or near approach of two Vauxhall Nova motor cars, the second of which was driven by the Respondent, James Bennett, which had been traveling behind him. The first Nova managed to pass the Mondeo before it had advanced too far into the manoeuvre. Mr. Bennett's Nova, however, struck the car at about the midpoint of its offside. Mr. Whittle was catastrophically injured and, by his next friend, commenced proceedings against Mr. Bennett on the basis that he was driving too fast and too close to the other Nova. The issue of liability before HHJ Previte sitting as a Judge of the High Court, who dismissed the claim on the basis that Mr. Bennett's driving was not the cause of the **accident**, deciding in the alternative that, if he was wrong about that, Mr. Whittle's contributory negligence was 80%. On appeal the Court affirmed the trial court's decision. In considering the trial judge's finding of fact, the Appellate Court took the opportunity to praise the description which the learned judge gave of the accident:

> *"Mr. Pollitt and the Defendant say that the Defendant touched his brakes as he rounded the bend. This must have reduced the Defendant's speed a little. I accept that the distance at which the Defendant followed Mr. Taylor down the straight was about four-five car lengths. It could not have been as close as 1 car length (as estimated by Mr. Pollitt at the time of overtaking) because if the Novas were that close to each other as the Mondeo began the U-turn both cars would have got past the Mondeo.*

[21] The Defendants has asked this Court to apply the aforementioned test from **Whittle v Bennett** to Mr. Vanzie's evidence, including his evidence under cross examination to say that:-

a. He was on his way from Greenfield, Trelawny when at a distance of about 40 feet he observed a parked van on the soft shoulder without its vehicle lights turned on. He confirmed that when he came around the corner, he kept his eyes on the parked vehicle at all times and on approaching the vehicle he blew his horn. When he was about 20 feet away from the said parked van, it pulled out without making any indication.

b. To avoid hitting the back [of the vehicle] I brake up and swerve to the right. There was a car coming in the opposite direction and so I have to come back [over]. The truck lean to the left. There is the boom, [with] weight up there. The front wheel lift up off the ground. That is when it dropped on the side [overturned].

c. After I swerve to the right, the truck landed on the left side…I brake up to avoid hitting [the parked car]. I had to swerve to the right.

d. When he came around the corner and first saw the Hiace bus he reduced his speed by raising his foot off the gas pedal. He confirmed that the truck he was driving has an automatic transmission system with air brakes.

e. The said Toyota Hiace did not stop after the accident and he did not get the opportunity to observe the license plate of the van. He explains that he was able to recognize the make of the vehicle because he had driven a similar vehicle previously. He further confirmed that the 2nd Defendant's boom truck did not make contact with the said Toyota Hiace van.

[22] The Defendants further submit that the First Defendant has through his detailed account demonstrated that the said accident was not initiated by any fault on his part. That, the First Defendant demonstrated that he had engaged his mind and physical capabilities as a driver to prevent the accident from occurring. That, in spite of his best efforts, the accident ensued. That the Claimant, in spite of the presence of two other passengers and the First Defendant, (in the back of the Boom truck) could not offer an account of the said accident. Accordingly, the Defendants suggest that there were no "counter facts" to challenge the First Defendant's account, other than the "barebones suggestions" of negligence that were put to the First Defendant in cross-examination.

[23] Furthermore, the Defendants submit, that the evidence of the First Defendant is to be preferred and has asked this Court to find that the Claimant was advised by the First Defendant not to travel in the rear of the truck. That the Claimant chose to travel in the rear of the truck despite the absence of a seat belt in the cab of the boom truck.

[24] As to the claim for contribution negligence the Defendants rely on

> Section 3 (1) of the Law Reform (Contributory Negligence) Act. It empowers the Court to reduce the amount of damages recoverable by a Claimant who is partly at fault for his damages he has suffered, as the Court thinks fit and having regard to the Claimant's share in the responsibility for the damage. Fault is defined to include, inter alia, negligence or any act or omission giving rise to contributory negligence.

[25] They referred this Court to the case of ***Adolph Allen v Orandy Moving & Storage Company Limited Kayon Kentish; Orandy Moving & Storage Company Limited & Omar Lawrence***, supra, in which it was said that:-

> *"although it has been widely accepted in* jurisprudence *(and the Road Traffic Act defines seatbelt in Section 2 to include any device designed to diminish the risk of injury to the wearer) it is pertinent to look at Mr. Allen's injuries…"*

[26] Also, they refer to the case of ***Froom & Others v Butcher***, supra, which is cited in ***Adolph Allen v. Orandy Moving & Storage Company Limited et al***.

[27] **The Defendants submit on assessing the legal requirement of a safe system of work, including a safe mode of transportation.** They allude to the test set forth in ***Schaasa Grant v Salva Dalwood and Jamaica Urban Transit Company Ltd***, unreported judgment delivered on the 16th of June, 2008. The Second Defendant submits that it has been demonstrated, on a balance of probabilities, that it provided a safe system of work.

[28] The following statement of the law was urged by the Defendants:

> *"The common law places a duty on the employer to provide safe system of work for his employer, and further to show that the system is adhered to. The employer's duty is to take such precaution as a reasonably prudent employer in the similar situation….*
>
> *The procedures should ensure that use be made of equipment provided in a public passenger transport, signs will be effective because members of the travelling public, by their mere presence, will have the effect of causing compliance by the employee with the mandates of the sign of warnings. It is not to be assumed that even a usually reliable employee will heed directives for the employee's own safety."*

[29] The Defendants submit that the First defendant, and the witnesses of the Second Defendant all agree that the boom of the truck had not changed since the accident.

[30] Without conceding liability, the Defendants have relied on the cases of:

(a) ***Simone Moore v Tulsie & Grant,*** Khans Personal Injury Awards, Vol. 4 page 37 (Khans). There, the Claimant underwent a below knee amputation. Judgment was delivered in October of 1996 and updates today to a total of $7,076,709.35;

(b) ***Oswald Espuet v Sons Transport et al,*** Khans, Vol.4, p. 39. There the Claimant underwent an above the knee amputation. Judgment was delivered in June 1997 and updates to $9,767,549.08;

(c) ***Willard Morgan v Valley Fruit,*** Khans, Vol. 6 page 31. There the

Claimant underwent a below knee amputation, Judgment was delivered on the 15th of February, 2006 and updates to $8,601,097.51; and

(d) ***Gregory Hamilton v Courtney Burnett,*** Khans, Vol. 6 page 33. There the Claimant underwent amputation of right leg. Judgment was delivered on December 1, 2003 and updates to $9,643,83,39.

[31] The Defendants have asked this Court to decline to consider any award under the headings of Handicap in the Labour Market and loss of Future Earnings. The Second Defendant submits that in light of his evidence given by him in December of 2018, the Claimant, since December 4, 2014, is treated as being on paid leave, and is free to return to work where he will be paid his wages as before. As such, it is not appropriate to make an award to the Claimant under the heading of handicap on the labour market and for loss of future earnings, respectively. In short, the Claimant has had the privilege of his job at the Second Defendant remaining open for four years and counting, they argue.

[32] Further, the Defendants submit that, it is important to note that a series of letters exchanged between the Claimant and the Second Defendant under the signature of Lennox Palmer speak to an employer that is fully willing and able to provide suitable employment for the Claimant.

[33] As to the Law on Awards for Handicap in the Labour Market, the Defendants submit that, the Claimant in his Further Amended Particulars of Claim filed January 31, 2018, based his claim for Loss of Earning Capacity/Handicap on the Labour Market on the pleading that he is no longer able to compete with able bodied men in his industry and he is currently unemployed. His loss of employment and inability to compete due to his disability are as a result of the accident of August 20, 2013

[34] According to the Defendants, the Claimant has provided no medical evidence that he was unfit to return to his employment as a sign technician at the offices of the Second Defendant, or to work in any other position in the market. Further, that

there was no evidence that the Claimant had sought any other employment with or without success. That, it was the Defendants Counsel in cross examination, who confronted the Claimant with the fact that he had painted a bar for paid compensation at SoSo Seafood. They submit that the lack of evidence on the part of the Claimant is fatal to an award of damages under this heading, bearing in mind the applicable law.

[35] A further submission of theirs is, that in a claim for handicap in the labour market, the Claimant needs to provide evidence, however tenuous it may be, for the court to make an award, as the court is being asked to assess his reduced eligibility for employment or the risk of financial loss.

[36] As to Loss of Future Earnings, the Claimant in his Further Amended Particulars of Claim filed January 31, 2018 based his claim for Loss of Future earnings on the case of ***Robert Minott v. South East Regional Health Authority, the Attorney General of Jamaica***, supra.

[37] Further, that compensation for loss of future earnings is awarded for real assessable loss proved by evidence.

[38] The Defendants submit that the Claimant has conceded the generosity of the Second Defendant. That the Claimant has agreed that the Defendant company even raised his salary while he was on sick leave; that the Claimant has also conceded that he made no attempt to find out about the desk job that the management of the Second Defendant, Mr. Andrew Fogarthy, had personally discussed with him after he had been fitted with his prosthetic leg; and that he has agreed that Mr. Fogarthy told him that he was going to give [him, the Claimant] a better position.

[39] Furthermore, the Defendants submit that the evidence of his own witness, Ms. Terri Sparber Bukacheski, who fitted the Claimant with his prosthesis, is that the Claimant should be able to return to work and reduce how much he has to walk.

There should be no limitation for a desk related job and that eventually he should be able to return to work close to his previous level of activity.

[40] Accordingly, they advance that the Claimant has placed no evidence before the Court, that he could not cope with any other kind of work. The Claimant has simply removed himself from the offices of the Second Defendant and failed to show any attempts at any other work, save and except for the painting of the bar at So-So Seafood, which in any event, demonstrates that he is able to work if so motivated.

[41] The Defendants have also submitted on the weight to be placed on the reasonableness of the Claimant's action with respect to medical treatment.

[42] As to making awards under the heading, "Cost of Future Medical Care", the Defendants submit that the Claimant in his Further Amended Particulars of Claim filed January 31, 2018, based his claim for the cost on future surgery and future care.

[43] Further, that in the Claimant's evidence-in-chief he set out at paragraph 9 of his Witness Statement that:

> *"I am now desperately in need of a replacement of the prosthetic leg and the cost for this is about Seventeen Thousand United States Dollars ($U.S. $17,000.00). I am unable to change the prosthetic leg because I do not have the money to do so…..these changes have to be made for the rest of my life every three years. I will need at least Seventeen Thousand United States Dollars ($U.S. $17,000.00) every three years to change my prosthetic leg."*

[44] As to transportation costs, the Defendants submit that the Claimants claim for transportation in the sum of $1,000,000.00 be disallowed as his evidence was incredible in this respect. He they argue has alleged in examination-in-chief that he was chartering private vehicles in order to move around. The evidence elicited under cross examination is that he has access to and drives private cars and that he has not reconciled this portion of the evidence with his claim.

[45] The Defendants submit that, as for household help, no evidence was led in proof thereof.

[46] With respect to the claim for pre-trial loss of income in the sum of $1,520,000.00, the Defendants submit that, this claim suffers the same fate as his claim for handicap on the labour market and loss of future earnings. They submit that this is so due to the fact that the Claimant has not returned to his job which is being kept open by the Second Defendant.

[47] Finally, the Defendants submit that, they have provided cogent evidence, on a balance of probabilities, that the accident that occurred on the 20th of August, 2013, was an inevitable accident, not set in motion by any fault of the First Defendant.

[48] Alternatively, that should the Court assign any fault to the First Defendant, that it finds that the Claimant was contributorily negligent and apportion damages in keeping with the principles set forth in the case of ***Whittle v. Bennett,*** supra.

The Evidence

[49] The Claimant's evidence comes primarily from his witness statement that was received in evidence as his evidence-in-chief. The circumstances leading up to and during the accident that gave rise to the instant claim is contained in paragraphs 4, 5 and 6 of his Witness Statement which state as follows:

> *"On the 20th day of August 2013 I was assigned along with some other co-workers to go to Montego Bay in the parish of St. James to do a job on behalf of Innovative Signs and Awnings Limited. I along with four other workers boarded motor vehicle registered CG 8809. It was a motor truck which we called the boom truck. The truck had a boom that could be extended and that allowed us to put up signed at great heights. The driver of the motor vehicle was a co-worker and his name is Marlando Vanzie, the first defendant in this matter. The motor vehicle registered CG 8809 was a truck with a cab at the front that could only hold 2 persons. I was instructed to go to the back of the truck along with 2 other co-workers by the name of Phillip Davis and another whose first name is Maxwell. We had to sit at the back of the truck as there was nowhere else on the truck to travel on.*
>
> *I sat in the bed section at the back of the truck. There were also materials, tools, signs cement and gravel in the back of the truck. I travelled in the*

> *back section of the truck to ensure safety of the tools and because there was no space to fit in the front of the cab. I did not sit on the side of the truck and I kept my legs within the confinement of the rear side of the truck. While I was sitting at the back of the truck, no part of my body protruded from the truck.*
>
> *On our way to Montego Bay along the Falmouth Main Road, in the parish of Trelawny, I started to fall asleep and then suddenly I felt the truck starting to flip and then I was struck in my forehead and I became unconscious. It was the boom that swing and hit me in my head causing me to become unconscious. The truck overturned and I was flung from the truck and a part of the truck landed on my left leg. I was taken to the Falmouth Hospital. I was in severe pain. My left foot was badly injured and I suffered a deep 7 cm laceration to my right knee, a 4 cm laceration to the left side of my forehead and laceration to my right ankle. My left leg was completely crushed with exposure of the joint. I could see my bones and some flesh exposed. As a result of the severity of the injury to my left leg I had to undergo an emergency surgery due to excessive bleeding. I underwent a below the knee amputation at the Falmouth Hospital on the same night of the accident. The accident took place in the night on the 20th of August 2013.*

[50] In his examination-in-chief the Claimant was asked to examine the paragraph contained in the Defendant's Notice of Intention to Tender Evidence filed on November 26, 2018. The Claimant stated that the photograph of the truck was not an accurate photograph of the truck involved in the accident on the 20th day of August 2013. The Claimant stated that at the time of the accident that the back of the truck was shorter, the back of the boom truck did not have the extension as depicted and also, there were no railings. The Claimant also stated that the warning sign in another photograph which read "warning *death or serious injury could result*" also was not present on the boom truck at the material time of the accident. Further, in examination in chief, the Claimant's evidence is that there was no policy stipulating that workers should not travel in the back of the boom truck.

[51] In cross-examination the Claimant maintained his position as to how the accident occurred. The Claimant stated that he was laying flat in the back of the truck and that two other employees were in the back of the truck with him. His evidence is that the single cab of the truck only had two seatbelts and that they were two employees including the First Defendant who were in the front of the truck. The Claimant maintained that he was not told to come and sit in the cab of the truck.

When asked whether he was aware that the cab could hold five persons, the Claimant responded that the front of the truck could not accommodate that many persons in the single cab. He said it was the usual practice, was for employees to travel in the back of the truck.

[52] During cross-examination the Claimant stated that the truck was modified after the accident and that at the time of the accident there were no railings and that the back of the truck was shorter. The Claimant again stated that there was no warning sign affixed to the boom or to the back of the truck. The Claimant said that he was not given any document outlining the company's procedure and safety regulations.

[53] In respect of the treatment that he received after he was fitted with the prosthetic leg, he stated that he had replaced the socket and linings.

[54] The Claimant stated during cross-examination that his employment status with the second Defendant was uncertain. He said that he received no salary in November 2014 and indeed all assistance from the company ceased in that month. The Claimant said he called the Second Defendant several times to ascertain his employment status and whether he would be provided with new duties given his disability but he was unsuccessful in getting a response. The Claimant denied the assertion by Counsel for the Defendants that he was offered a desk job.

[55] The Claimant also disagreed with the suggestions that he knowingly placed himself in danger and that he was told to sit in the front by the First Defendant. During cross-examination the Claimant stated that, on the day of preparing for the task, Mr. Fogarthy admonished his workers that "if we don't load the vehicle and leave I will lose my job." The only way to do this, the Claimant asserts, is to load the vehicle and go on the back of the truck. The Claimant had no alternative but to travel in the back of the truck as is the usual practice. He was merely carrying out his duties. The Claimant did not cause or contribute to the injuries he sustained as a result of the accident.

[56] In respect of his salary, the Claimant stated that the Second Defendant cut his salary by 50% for August 2014 and that he received no salary after November 2014. The Claimant confirmed that he earned approximately $40,000 per fortnight. The Claimant addressed the statement raised by Lennox Palmer in paragraph 9 of his witness statement as to whether he received and/or saw an email correspondence from Terri Buckacheski that recommended his return to work in July 2014 to a desk related job. He stated that he never received the email referred to despite his requesting a copy of the email.

The Evidence of the Defendants

[57] The First Defendant, Marlando Virtue, was the driver of the truck that was involved in the accident. Under cross examination the First Defendant admitted that he left the Second Defendant's compound in Kingston with employees in the back of the truck including the Claimant. He stated that this was not the first time they were doing so.

[58] The First Defendant claims that the company policy was that no one should travel in the back of the truck. The First Defendant was not able to identify any handbook or rule book which sets out the policy that employees were not allowed to ride in the back of the truck. He was only able to point to a form that he said he filled out when applying for the position of driver at the Second Defendant's company which he says sets out company policy.

[59] Despite this alleged policy the First Defendant travelled from Kingston to Trelawny with three co-workers in the back of the truck.

[60] The First Defendant asserts that the truck could comfortable accommodate five passengers in the single cab of the truck; that the width of the truck is about 5 feet. Further, the truck did not have five seatbelts. In point of fact, the First Defendant said that the truck had only three seatbelts.

[61] Mr. Fogarthy, the Defendant's witness, said during cross examination that the truck was a single cab truck and that it only had three seatbelts. Despite this he claimed in his witness statement that the truck could comfortably accommodate up to five persons and, that he was aware that five persons were needed to carry out the job in Trelawny and St. James. However, when shown a picture of the truck, he admitted that subsequent to the accident the truck was modified by railings placed along the sides. He stated that the width of the truck was 7-8 feet.

[62] As to the road on which the accident occurred, the First Defendant's evidence is, that the accident occurred after he drove around a corner and that the width of the soft shoulder was 6 feet. His evidence is that there were no vehicles travelling in front of him or behind him but that there was a vehicle that was parked on the soft shoulder. That the said motor vehicle pulled out in front of him and caused him to swerve to the right causing the left wheel to come off the ground resulting in the truck flipping and landing on its side. The accident took place in the night and the First Defendant said that when he first saw the vehicle parked on the soft shoulder that it was 40 feet away and that when he was "feet away" from this vehicle, he had to swing away from it as it had suddenly pulled out. On the evidence of the First Defendant, the truck was loaded with signs, metal post, sand, stone and gravel at this time. The First Defendant was not able to give the motor vehicle registration number of the vehicle.

[63] The First Defendant said he saw the Claimant in the back of the truck but admitted that "just before the impact" he was unable to say whether the Claimant's legs were raised.

Evidence of Lennox Palmer

[64] Called as a witness on behalf of the Defendant, Mr. Palmer admitted that he was not employed to the company at the time of the accident. His evidence is that since his employment to the Second Defendant and, after the accident, is that during training company regulations are shown to employees.

[65] Mr. Palmer stated that he had communicated with Mr. Morrison regarding his job in July 2014 but admitted, under cross-examination, that Mr. Morrison had replied to his letter and despite this, the Claimant was not made aware of his employment status. Further, that the Claimant submitted relevant sick leave but was not paid from November 2014. The Claimant had provided the Second Defendant with sick leave up to January 31, 2015 and this document was disclosed in the Claimant's Supplemental List of Documents.

[66] Mr. Palmer confirmed that he signed the first Defence filed in the Claimant's claim and that at the time of signing the Defence he signed based on the information given by the driver. He stated under cross examination that he was first made aware of the "white Toyota Hiace minibus" at the time of giving instructions in April 2015. It is of note that a Defence mentioning the Hiace motor vehicle was not filed until December 2017.

Evaluation of the Evidence

[67] Here, I wish to remind myself, that the facts in issue are those which the Claimant must prove in order to succeed in his claim together with these which the defendant must prove in order to succeed in his defence. The facts in issue are determined by reference to the substantive law and what the parties allege, admit, do not admit and deny or, in other words, the pleadings.

[68] One must also pay regard to the credibility of the witnesses. In all of this I remind myself that the Claimant bears the burden of proof. As to the standard of proof or the degree of cogency required to discharge the burden of proof is that it must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the trier of facts can say: "we think it more probable than us", the burden is discharged, but if the probabilities are equal it is not: per Lord Denning in Miller v Minister of Pensions [1997] 2 All ER 372.

[69] The credibility of a witness is based upon the ability of the trier of facts to trust and believe what a witness says. It also relates to the accuracy of the witnesse's

testimony, its logic, truthfulness and sincerity. However, it must be noted that human testimony can seldom acquire certainty of demonstration. A witness, not unfrequently, is mistaken or may wish to deceive. The credibility of a witness or, the worthiness of belief of such a witness, attaches to his/her testimony and arises from the double presumption that the witness has good sense and intelligence and is not mistaken nor deceived. Also, such a witness is presumed to have probity and that the witness does not wish to deceive. To gain such credibility, a trier of facts must be assured, first, that the witness is not mistaken nor is deceived. Thus it is proper to consider the nature and quality of the proved facts as well as the testimony of other witnesses on the subject-matter and with human facts.

[70] Second, a trier of facts must be satisfied that the witness does not wish to deceive and that there are strong assurances of this. A good statement of the law on the credibility of a witness can be distilled to this: The validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted, or the circumstance that the Judge may have remarked favourably or unfavourably on the evidence or the demeanour of a witness; these things are elements in testing the evidence but they are subject to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time: Farlyna Charny [1952] 2 DLR 345, paragraphs 8 to 11.

[71] Accordingly, it has been said, if the findings of a trier of facts on credibility depend solely on which person he/she thinks made the better appearance of sincerity in the witness box, then one is left with a purely arbitrary finding and justice would then depend upon the best actor or actors in the witness box. It is virtually axiomatic that the appearance of telling the truth is only one element that enters into the credibility of the evidence of a witness. There are other elements: opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what the witness has seen or heard.

[72] Other factors or elements combine to produce a witness credibility. Accordingly, the credibility of interested witnesses cannot be gauged solely by the test of

whether the personal demeanour of the particular witness carried the conviction of the truth. The test must subject the witnesses' story to an examination of its consistency with the probabilities that surround the currently existing conditions, that is, the witnesses perception, recollection, narration and sincerity.

[73] In deciding the case I am, of course reminded that, I must first decide where the truth lies. Secondly, decide any points of law and then give judgment. In this I am to be guided by any inherent probabilities, contemporaneous documentation or records, and circumstantial evidence tending to support one account or the other, and impressions made as to the character and indications of the witnesses: See Baroness Hale of Richard in Re B (Children) (Core Proceedings: Standard of Proof) [2008] UKHL 35, [2009] 1 AC II.

[74] In deciding between witnesses, cases are decided by the quality of the evidence adduced at the trial and not by the weight of numbers of witnesses on one side compared to the other side: See Gurnley Consulting Engineers v Gleeds Health and Safety Ltd. [2006] EWHC 43 (TCC).

[75] In evaluating evidence given at a trial, I find it useful to adopt the advice of Peter Smith J in EPI Environmental Technologies Inc v. Symphony Plastic Technologies pic [2004] EWHC 2945 (CL), [2005] 1 WLR 3456. The guidance given is that first, it is essential to evaluate a witness's performance in the light of the entirety of his or her evidence.

[76] Witnesses can make mistakes, but those mistakes do not necessarily affect other parts of their evidence. Second, witnesses can regularly lie. However, lies themselves do not mean necessarily that the entirety of that witness' evidence is rejected. A witness may lie in a stupid attempt to support or strengthen a case, but the actual case nevertheless remains good irrespective of the lie. Alternatively, a witness may lie because the case is a lie.

[77] Third, it is essential that a witness is challenged with the other side's case. This involves putting the case positively. It is then for the tr+ier of facts to assess the

witness's oral response and demeanour, and the likely veracity of the response in the overall context of the litigation.

[78] Guided by the foregoing principles, I am to say that I prefer the evidence of the Claimant to that of the defendants and their witnesses. In particular, the First Defendant gave his evidence with the demeanour of injured guilt. His evidence as to how the accident happened lacks the kind of cogency needed to make it more probable than not. It lacked the type of coherence necessary to make it logical and complete because even if one would grant the presence of the imaginary truck on the side of the road, this type of accident, in the ordinary course of driving within the rules of the road, do not occur and, having regard to state that the Second Defendant's truck was in which he was driving. I do not say here, nor do I assert, that the First Defendant and the Second Defendant have assumed any burden of proof, except for the proofs of inevitable and contributory accident. The probability of the version of the First Defendant's account happening, is less than equal to that given by the Claimant's account. It was implausible.

[79] On the other hand, the Claimant was forthright and forthcoming. He gave his evidence with unequalled simplicity and directness of veracity. Accordingly, I find that where their respective evidence are in conflict, the evidence of the Claimant is to be preferred. I find that the Claimant was ordered to sit at the back of the truck; that the cab of the truck could accommodate two persons; that there were no warning signs, at the time, to warn riders of the dangers of riding in the back of the truck. The Second Defendant had failed to discharge its duty to institute a system, whether through notices, reminders, training sessions, warnings, to ensure their workers' safety in riding on the back of the boom truck. No challenge was mounted by the Defendants that the Claimant was ordered to ride on the back of the boom truck as per his witness statement. This was, apparently, the Claimant's and others work and custom of so doing. This was unrefuted.

THE LAW

[80] Section 51 (1) of the Road Traffic Act (the Act) sets out the duties of the driver. As a shorthand it is referred to as the Rules of the road. It reads that the driver of a vehicle shall observe the following rules in respect of the vehicle –

(a) meeting or being overtaken by other traffic shall be kept to the near side of the road. When overtaking other traffic the vehicle shall be kept on the right or off-side of such other traffic;

(b) being overtaken by other traffic shall be driven so as to allow such other traffic to pass;

(c) ……..

(d) shall not be driven so as to cross or commence to cross or be turned in a road if by so doing it obstructs any traffic;

(e) ……

(f) ……..

(g) shall not be driven so as to overtake other traffic unless the driver has a clear and unobstructed view of the road ahead;

(h) shall not be permitted to travel backwards further than may be necessary for turning or other reasonable purpose.

(2) Notwithstanding anything contained in this section, it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident, and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any motor vehicle from the duty imposed on him by this section.

(3) Notwithstanding anything contained in this section, a person shall drive or operate a vehicle with due regard to other vehicles and pedestrian and with due regard to the safety of any person or property;

(4) ……..

(5) ……...

[81] Further, it is also consequential to pay regard to Section 95 of the Act which permits the issue by the Island Traffic Authority of guidance to road users. It reads:

(1) the Island Traffic Authority shall prepare a code (in this Act referred to as the "Road Code") comprising such directions as appear to the Authority to be proper for the guidance of persons using roads, and may from time to time revise the Road Code by revoking, varying, amending or adding to the provisions thereof in such manner as the Authority may think fit;

(2) the Island Traffic Authority shall cause the Road Code and every revised edition thereof to be printed and issued to the public at a price not exceeding the prescribed price.

(3) the failure on the part of any person to observe any provisions of the Road Code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings.

Negligence

[82] It is the duty of the driver of a vehicle to keep a proper lookout. He must look out for other traffic which is or may be expected to be on the road, whether in front of

him, behind him or alongside of him, especially at crosswords, junctions and bends and for traffic light signals and traffic signs including lines marked on the highway.

[83] Failure to keep a proper look out is evidence of negligence: See Springett v Harris (1855) 4 FLF 472.

[84] The duty of a person who drives a vehicle on the highway is to use reasonable care to avoid causing damage to persons, vehicles or property of any kind on or joining the highway.

[85] It is the law that in order to succeed in a claim for negligence the claimant must prove the existence of a duty of care owed by the defendant to such a claimant. Second, that the defendant breached that duty. Third, that in consequence of the breach, the claimant suffered damage.

[86] Further, such a driver has a duty to observe with ordinary care and/or skill that duty to other road users, including passengers within that unit which he controls, when he could reasonably forsee as being likely to be affected by his/her actions or the lack of such actions. The test for the breach of this duty is whether or not a reasonable person, placed in the Defendant's position, would have acted as the defendant did.

[87] Such a driver must exercise reasonable care to avoid causing injury to persons or, indeed, damage to property. There the test for reasonable care is one that hypothetically an ordinary skilful driver would have exercised under all the circumstances that obtains.

[88] The duty, it is to be observed, is one recognised at common law as well as one that is statutorily imposed and it applies to a motorist to exercise reasonable care while operating his/her unit on a road and to take all necessary steps to avoid an accident. See Section 51 (2) of the Road Traffic Act (RTA). Further Section 95 (3) of the RTA, The Road Code, provides that the failure to observe any of these

provisions may be relied on in civil and criminal proceedings by any party to the proceedings as tending to establish or to negative any liability which is in question.

[89] As for causation, the test is that, but for the defendant's negligent act, the claimant would not have suffered damage: See Barnett v. Chelsea and Kensington Hospital Management Committee [1968] 1 All ER 1068.

[90] In the decision of **Cecil Brown v. Judith Green and Ideal Car Rental Claim No. 2006 HCV02566 delivered October 11, 2011**, McDonald-Bishop J (as she then was) referred to the provisions of the Road Traffic Act and the common law in stating that:

> *"It is clear that there is indeed a common law duty as well as a statutory duty for motorist to exercise reasonable care while operating their motor vehicle on a road and to take all* necessary *steps to avoid an accident".*

[91] This is then the distillation on the law of negligence through Judicial pronouncement. In every claim for negligence in order to succeed, the Claimant must prove on a balance of probabilities, the existence of a duty of care, owed to the Claimant by the Defendant, a breach of that duty, and damage resulting from that breach.

[92] **In Jowayne Clarke and Anthony Clarke v. Daniel Jankine Claim No. 2001/C211 delivered 15/10/2010** Sarah Thompson-James, J stated:-

> *"A driver of a vehicle on the road owes a duty to take proper care and not to cause damage to other road users – whom he reasonably forsees is likely to be affected by his driving. In order to satisfy this duty, he should keep a proper look out, avoid excessive speed and observe traffic rules and regulations. It is a question of fact in each case whether or not the driver had observed the above stated standard of care required of him."*

[93] In applying the law to the found facts, I am to say that the First Defendant owed a duty of care to the Claimant; that the duty of care was breached; and, that damage was occasioned to the person of the Claimant thereby.

Contributory Negligence

[94] The concept of contributory negligence means that there has been some act or omission on the Claimant's part which has materially contributed to the damage caused. As noted by Lord Smith in Nance v British Columbia Electric Railway, supra, "when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove…that the injured party did not in his own interest take reasonable care for himself and contributed, by this want of care, to his own injury."

[95] Thus, where a man is part of with or of his own injury, he cannot call on the other party to compensate him in full.

[96] Here, the burden of proof is on the defendant. It is not for the Claimant to disprove it. If, as has been said, the defendant's negligence or breach of duty is established as causing the [damage], the onus is on the defendants to establish that the Claimant's contributory negligence was a substantial or rational co-operating cause: Lord Wright in Caswell v Powell Duffryn Associated Collieries Ltd (1940) AC 152, 172.

[97] In considering what is the cause of an accident, that is, causation in fact, the expression means what a man would take to be the cause of the accident without the kind of microscopic analysis brought to bear on it but by taking a broad view. It is always going to be a question of fact what was the cause of an accident: See Imperial Chemical Industries Ltd. V Shatwell (1965) AC 696.

[98] In the case at bar, the First Defendant's attribution of the boom truck turning over, is to blame the driver of the white Liteace minibus, whose particulars he could not identify, that had suddenly driven out from the soft shoulder around a corner to the front of him and caused him to swerve causing the left wheel to come off the ground resulting in the truck flipping and landing on its side. I find that the First Defendant's explanation, for his courage of advancing is sheer, distorts and attempts to

degrade the actuality of events by downplaying his role in preventing a preventable accident by adherence to the Rules of the Road. Accordingly, I find that the accident of the boom truck turning over was not caused by any imaginary truck but by the First Defendant's imprudent driving.

Inevitable Accident

[99] In an action, based on negligence, it is open to a defendant to establish that there was no negligence on his part. Where the facts proved by the claimant raise a prima facie case of negligence against the defendant, the burden of proof is then thrown upon the defendant to establish facts, negotioning his liability. He does so by proving inevitable accident.

[100] That the burden of proof rests on the defendant to show inevitable accident is borne out as per Lord Fry, LJ in this statement: "To sustain [inevitable accident] the defendants must do one or other of two things. They must either show what was the cause of the accident, and show that the result of that case was inevitable; or they must show all the possible causes, one or the other of which produced the effect, and must further show with regard to everyone of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to be that they have known inevitable accident": The Merchant Ship [1892] p. 179, 189.

[101] Again and further Lord Greene in Browne v De Luxe Car Services [1941] KB 549, 522 said "I do not feel myself assisted by considering the meaning of the phrase 'inevitable accident'. I prefer to put the problem in a more simple way, namely, has it been established that the driver of the car was guilty of negligence?"

[102] Accordingly, the loss must lie where it falls, unless it can be demonstrated that it was caused by a breach on the part of some other person of a duty to take care.

[103] On this, when the found facts confronts the law, the Defendants must fail, in the case at bar. The Defendants have failed to come up to proof to the standard required.

Vicarious Liability

[104] In summary of the law in relation to Vicarious Liability is that employers, though they may not be the ones who directly commit the tort and/or wrongdoing are liable for the wrongdoings and/or negligence of their employees in conducting their duties. In order for the doctrine of vicarious liability to be applicable, a two-fold test must be satisfied. The first being that a relationship of servant and master must exist between the employer and the tortfeasor and, secondly that the person must, in committing the wrong, be acting in the scope of their employment.

[105] In **Lister v Hesley and Hall [2002] 1 A.C. 215** at paragraph 15 had this to say;

"*Vicarious liability is the legal responsibility imposed on an employer, although he is himself free of blame, for a tort committed by his employee in the course of his employment. Fleming observed that this formula represented a compromise between two conflicting policies: on one end, the social interest in furnishing an innocent tort victim with a recourse against financially responsible defendant; on the other hand, a hesitation to foist any undue burden on business enterprises."*

[106] In the case of "The Merchant Prince" [1892] P 179 by Lord Esher, emphatically laid it out that to ground the defence of inevitable accident…"the only way for a man to get rid of that which circumstances prove against him as negligence is to show that it occurred by an accident which was inevitable to him- that is an accident the cause of which was such that he could not by any act of his avoided its result. He can only get rid of that proof by showing inevitable accident, that is, showing that the cause of the collision was a cause not produced by him, but a cause the result of which he could not avoid." Further, where the facts proved by a claimant raises a prima facie case of negligence against the defendant, the burden of proof is then thrown upon the defendant to establish facts, negating his liability.

[107] In applying the law to the found facts of the case at bar, the Second Defendant is not vicariously liable for the negligence of the First Defendant.

A Safe System of Work

[108] A safe system of work is the term used to describe the organization of the work, the way in which it is intended the work shall be carried out, the giving of adequate instructions, the sequence of events, the taking of precautions for the safety of the workers, the number of persons required to do the job, the provision of warnings and notices and the issue of special instructions.

[109] As common law, the duty of an employer to his servants is to take reasonable care for their safety. This duty is non-delegable in that the employer must see that care is taken by all those persons engaged by him. It has been recognized that the duty of taking reasonable care to carry on his operation so as not to subject those employed by him to unnecessary risk: Street v British Electricity Authority [1952] LQB 399.

[110] In Paris v Stephney Borough Council [1951], All ER 42 at 44, Lord Simmonds said, "I will say at once that I do not dissent from the view that an employer owes a particular duty to each of his employees. His liability in tort arises from his failure to take reasonable care in regard to the particular employee and it is clear that, if so, all the circumstances relevant to that employee must be taken into consideration. Further, in Speed v Thomas Swift & Co. Ltd (1943) 1 KB 557, Lord Green said that, "In divising a system of work, an employer must take into account the fact that workmen are often careless as to their own safety. Thus, in addition to supervising the workmen, the employer should organize a system which itself reduces the risk of injury from the workmen foreseeable carelessness.

[111] Again, in applying the law to the found facts, I am to say that the Second Defendant failed in its duties to provide a safe system of work for the Claimant when riding on the boom truck.

PARTICULARS OF GENERAL DAMAGES

[112] The Claimant claim for general damages, is supported by the medical report from Dr. Richard Aitken dated January 22, 2014, Falmouth Public General Hospital dated November 17, 2014 and the medical report from Alkatec Medical prepared by Dr. Wayne Palmer sated December 19, 2014. The Claimant was diagnosed as having sustained the following injuries:

(i) 4cm skin laceration to the left side of the forehead;

(ii) 7cm laceration to the right knee and ankle with a small laceration;

(iii) Left foot with crush injury with loss of muscles, bones and tendons;

(iv) Below knee amputation in left leg;

(v) Wound infection in amputated wound;

(vi) Tenderness in the region of the lateral condyle and patella;

(vii) 8 cm scar to the medial parapatella area;

(viii) Soft tissue injury to the right leg with exposure of the joint;

(ix) Bony bruising;

(x) 28% WPI.

[113] In broad terms, in any action for tort, these are four issues to resolve:

i. First, whether the defendant has committed the tort;

ii. Second, whether the tort inflated an injury to the claimant's person;

iii. Third, the extent of the claimant's pecuniary and non-pecuniary losses as a result of his injury and whether such losses are recoverable at law;

iv. Fourth and last, the amount of money to be paid as compensation for these losses.

[114] The first issue having been determined in favour of the Claimant here, the second issue is resolved by stating it in the affirmative. The report of Dr. Richard Aitken, Consultant Surgeon of Andrews Memorial Hospital is dated January 22, 2014. It begins by stating that he saw the Claimant on September 20, 2013 for continuation of medical management for injuries he had received in a motor vehicle accident. He noted that he was seen and treated for the emergency at the Falmouth Hospital and had a left below-knee amputation. He was treated by Dr. Aitken with removal of sutures and oral antibiotics. He subsequently healed with superficial scarring. Despite his treatment Mr. Morrison complained of worsening pain in his right knee joint and was referred to Dr. Wayne Palmer, Consultant Orthopaedic Surgeon.

[115] The Claimant submits that, concerning the loss of amenities, he was an active man, and when not on duty he engaged in sporting activities such as football and basketball as a form of recreational activity. He has not been able to enjoy and engage in his usual form of recreational activities as he is in constant need of care and he has difficulty dressing himself. Overall, he is generally handicapped in his daily activities as a result of the injuries sustained; accordingly he ought to receive reasonably compensated for his loss.

[116] The Claimant submits that he is of the view that the following authorities provide a useful guide as to quantum of damages that ought to be awarded to Mr. Morrison.

[117] He relied on Luna Pitter v Linford Clarke and Marlon Hamilton, cited at page 28 of Khan's Volume 6. The Claimant was 59 year old housewife injured in a motor vehicle accident. The injuries sustained included compound fracture of the left leg and dislocated right sternoclavicular. She was referred to the Plastic Surgery team at the National Chest Hospital and she had surgery and skin grafts placed over open wounds. Despite treatment, a below knee amputation was done. She had 28% impairment of the whole person. An award of $5,500,000.00 was made in

May 2008 with CPI 127.8. This updates to approximately $10,961,267.61 using the CPI for

[118] In Bartley Nugent v Linton Berry and Tony Ellis cited at pg. 15 of Khan's Volume 3. The Claimant was aged 28 and was injured when a motor vehicle in which he was a passenger collided with a utility pole, he sustained the following injuries: severe damage to the tissues in the right foot, below knee amputation of the right leg, multiple fractures of right acetabulum, dislocation of right hip. The Claimant in this case, after he underwent surgery to amputate his right leg, underwent further surgery for closure of amputation stump. No assessment was given of any permanent disability as his stump had not fully healed. Nonetheless, an award of $65,860.00 was given for general damages in May 1980 (CPI- 1.449), which updates to $11,576,633.54 using the CPI for

[119] In Joseph Frazer v Tyrell Morgan & Trevor Coroll [Suit No. C.L. 1999 F-031 (Cor: Beswick J.) Assessment concluded June 2, 2000 *which is reported at page 19 Recent Personal Injury Awards made in the Supreme Court of Judicature of Jamaica, Volume 5, Ursula Khan*. The Claimant suffered severe crush injury to left lower extremity from middle third of left dorsum of foot, which became contaminated. The X-ray showed a grossly comminuted displaced fracture of the left tibia and fibula in the mid-shaft and a result he had a below the knee amputation. The whole person impairment was 32%. The claimant was awarded the amount of 42,000,000.00 for pain and suffering and loss of amenities, CPI being 54.5. When this award is updated using the CPI for July 2020, which is 254.7, the result is $9,346,788.99. The injuries sustained by the Claimant in the instant claim were worse as the Claimant not only suffered a below knee amputation in the left leg but also severe injury to his right leg resulting in exposure of the joint.

[120] According to Trevor Clarke v. National Water Commission, Kenneth Hewitt and Vernon Smith Suit No. C.L. 371/1993 (Before Gloria Smith J. which is reported at page 297 of Harrisons Assessment of Damages [Cases on Personal Injury and

Fatal Accident Claims] 2nd edition (Award made on October 25, 2001), the Claimant suffered amputation of right leg. That Claimant was awarded the sum of Three Million Dollars ($3,000,000.00) for pain and suffering and loss of amenities. CPI being 60.4; and he was also awarded handicap on the labour market in the amount of One Million Four Hundred Fifty Six Thousand Dollars ($1,456,000.00). the value of the aforesaid award as it relates to pain and suffering and loss of amenities using the latest CPI which equates approximately to $12,65,662.30.

[121] The Claimant submits that he expended significant sums in mitigating the effect of his injuries. He states that despite treatment he still experiences pain today. In light of the authorities above the Claimant submits that he is entitled to general damages in the sum of Fifteen Million Dollars ($15,000,000.00) as reasonable compensation for the injuries that he sustained.

[122] On the basis of Trevor Clarke case I award the sum of thirteen million dollars ($13,000,000.00).

Concerning cost of Future Surgery and Future Care

[123] In the most recent medical report dated November 23, 2018, the Claimant submits that, the Jamaica Orthotics Pedorthics & Prosthetics pointed to the need for further medical care.

[124] Initially, the Claimant argues, he walked with the aid of a prosthetic leg which was fitted onto the site of his amputation on his left leg by Ortho Pro Associates Inc in Miami, Florida, United States of America in June, 2014. Currently, he uses sponge to make a foot and get the shape of the foot. He now requires prosthesis, skin graft, follow up care and replacement surgery. The Claimant will have to change his prosthesis once every three years at a cost of USD$16,986.75 each time. With an estimated life expectancy of 36 years, the total estimated cost is USD$203,841.00. He also requires a replacement socket as the need arises at a cost of USD$8,995.86 per fitting which gives a conservative sum of USD$323,850.96 if there were to be one change per year for 36 years. Further,

the Claimant will need socks/liners every 6 months at USD$2,097.12 each time which gives a total cost of USD$150,992.64 having regard to his life expectancy. The total being claimed under this head of damage, to date is USD$678,684.60.

Claim for loss of Future Earnings

[125] The Claimant submits that he has not received a salary from the Second Defendant since November 1, 2014. The Claimant contends that he was paid approximately $20,000.00 per fortnight. Since that time he has been experiencing great difficulty in caring for himself and his family. He claims he will be unable to return to his work or any form of labour requiring prolonged standing or sitting walking or running and so claims under this head of damage.

[126] This head of damage is distinct from the loss of earning capacity and an award for loss of earning capacity, which does not prevent a Claimant from being compensated for loss of future earnings. The Claimant argues that he is in constant pain, which has been confirmed through medical evidence, that he will be unable to return to his work or to any form of labour which requires prolonged standing or sitting.

[127] Sykes J. (as he then was) in the Philip Cranston judgment said that the loss of future earnings should be calculated on the basis of the income received at the time of loss. Based on this principle, the Claimant argues that at the time of the accident he was paid approximately $20,000.00 per fortnight. This totals $480,000.00 per annum as income. Using the multiplicand/multiplier method the calculation is $480,000.00 per annum x 8. This gives a total of $3,840,000.00 for loss of future earnings. We consider eight (8) to be a reasonable multiplier figure based on the following four factors (1) net annual income (2) the length of the remainder of the working life, he was 30 when he was injured (3) the level of the risk that the Claimant will be on the labour market and for how long (4) the effect of the Claimant's disability/handicap on his work capacity.

[128] Concerning Loss of Earning Capacity/Handicap on the Labour Market the Claimant submits that the severity of his injuries made it very difficult for him to continue working in his chosen occupation of a sign technician. He argues that he is an amputee and he is being such at a disadvantage on the labour market as opposed to able-bodied men. He is currently unemployed.

[129] Based on the unreported judgment of Sykes J. (as he then was) in Claim No. 2004 HCV 2172 Andrew Ebanks v Jephther McClymont, judgment given on March 8, 2007, the Claimant submits that "if…if the Claimant is not working at the time of trial and the unemployment is the result of the loss of earning capacity, then the multiplier/multiplicand method ought to be used if the evidence shows that the Claimant is very unlikely to find any kind of employment or if employment is found, the job is very likely to be less well paying than the pre-accident job….": per Sykes, J at paragraph 53.

[130] It was a further submission of the Claimant that Dr. Wayne Palmer noted in his medical report dated December 19, 2014, that because of the injuries sustained by the Claimant, Andre Morrison can be considered to have an impairment rating of 28% of the whole person.

[131] In that regard the words of Sykes, J, they note has some resonance: "…in the absence of specific medical evidence about the likely effect of the injury on the job prospects of the Claimant, the lump sum method should be the default method." As such, they submit that the sum of $5,000,000.00 for this head of damage should be awarded.

[132] In conclusion the Claimant has asked this Court to award the sum of fifteen million dollars (15,000,000.00) for pain and suffering the loss of amenities of the sum of five million dollars ($5,000,000.00) for loss of earning capacity; three million eight hundred and forty thousand dollars ($3,840,000.00); and ninety million two hundred and sixty five and fifty one dollars ($90,265,051.00) for loss of future care.

[133] Without conceding liability, the Defendants have offered the following cases as being responsive to the subject of general damages. They are of the view that an award for pain and suffering and loss of amenities in the sum of $7,000,000.00, using the following authorities and applying the December 2018 CPI of 254.7, is acceptable:

1. Simone Moore v. Tulsie & Grant, Khan 4, 37 Cliamant underwent a below knew amputation. Judgment delivered in October of 1996, and updates today to a total of $7,076,709.35

2. Oswald Espuet v Sons Transport et al, Khan 4 page 39 Claimant underwent an above the knee amputation Judgment delivered in June 1997 and updates to $9,767,549.08

3. Willard Morgan v Valley Fruit, Khans 6 page 31Claimant underwent a below knee amputation. Judgment delivered on the 15th of February, 2006 and updates to $8,601,097.51

4. Gregory Hamilton v Courtney Burnett, Khans 6 page 33. Claimant underwent amputation of right light. Judgment delivered on December 1, 2003 and updates to $9,643,83,39.

[134] The Defendants have asked the Court to decline to consider any award under the headings of Handicap in the Labour Market and Loss of Future Earnings. The Second Defendant submits that in light of his evidence given by him in December of 2018, the Claimant, since December 4, 2014, is treated as being on paid leave, and is free to return to work where he will be paid his wages as before. As such, it is not appropriate to make an award to the Claimant under the heading of handicap on the labour market, and for loss of future earnings, respectively. In short, the Claimant has had the privilege of his job at the Second Defendant remaining open for four years and counting, he argues.

[135] He submits that it is important to note that the series of letters exchanged between the Claimant and the Second Defendant under the signature of Lennox Palmer speak to an employer that is fully willing and able to provide suitable employment for the Claimant.

[136] The letter of July 3, 2014 from the 2nd Defendant to the Claimant:

> "*We write to advise you that you are to report to work on Monday, July*
>
> 2014 at 8:30 a.m.
>
> *Consequent on the successful fitting of your prosthesis, the Company was advised that you will be able to perform your assigned duties.*
>
> *We confirm that you will continue to work in the production department and on Monday July 7, 2014 you will be provided with the details of the assigned duties."*

The letter of July 24, 2014 from the 2nd Defendant to the Claimant:

"*We refer to our letter dated July 3, 2014 requesting that you return to work.*

We advise that a report has been provided by Orthopro Associates, the facility where you had the prosthesis fitted. The report confirms that you are able to resume work duties.

As indicated previously, you will work in the production area carrying out duties in the workshop. We appreciate that you will have to readjust. During the first few weeks we will review the duties assigned to you from time to time and make adjustments where necessary…"

The letter of July 29, 2014 from the 2nd Defendant to the Claimant:

"We acknowledge receipt of your letter dated July 24, 2014.

As indicated the recommendation of the Specialist was that you resume employment and this was also to assist your adjustment. We advised that the sick leave allocation to you have been exhausted and as such you will

be placed on reduced salary of 50% of your current salary effective August 1, 2014 to August 21, 2014.

We expect that you will return to work on September 1, 2014. In the event that you do not return to work on September 1, 2014, you will be placed on unpaid leave."

The letter of December 5, 2014 from the 2nd Defendant to the Claimant:

"*We acknowledge receipt of your letter dated November 21, 2014 attachments.*

We advise that you have fully utilized your sick leave entitlement with pay regardless of the presentation of sick leave certificate. We confirm that no retroactive payment will be made. In relation to the sick leave certificate presented from Falmouth Hospital we place on record that we find same to be less than credible having been back dated and also issued by an institution which you have not been under its care in the relevant period. We have noted that Dr. Wayne Palmer who issued the medical certificate in September 2014 has not provided an updated certificate.

We take this opportunity to remind you that the information provided to the Company upon completion of the fitting of your prosthesis was that you were now able to work and that you should resume your normal activities. You have refused to act accordingly notwithstanding the Company's numerous requests for you to return to work having had the benefit of treatment from overseas…….

Once you return to work, you will be entitled to receive your salary commencing from the return date. Our position is that you have elected to take unpaid leave.

[137] As to the Law on Awards for Handicap in the Labour Market the Defendants submit that the Claimant in his Further Amended Particulars of Claim filed January 31, 2018, based his claim for Loss of Earning Capacity/Handicap on the Labour Market on the following narrative:

The Claimant is no longer able to compete with able-bodied men in his industry and he is currently unemployed. His loss of employment and inability to compete due to his disability are as a result of the accident of August 20, 2013 and so claims under this head of damage.

[138] That trial however, the Claimant provided no medical evidence that he was unfit to return to his employment as a sign technician at the offices of the Second Defendant, or to work in any other position in the market. There was no evidence that the Claimant had sought any other employment with or without success. Indeed, it was the Defendants Counsel in cross examination, who confronted the Claimant with the fact that he had painted a bar for paid compensation at SoSo Seafood. The Defendants submit that the lack of evidence on the part of the Claimant is fatal to an award of damages under this heading, bearing in mind the applicable law.

[139] The Defendants submit that in a claim for handicap in the labour market, the Claimant needs to provide evidence, however tenuous it may be, for the court to make an award, as the court is being asked to assess his reduced eligibility for employment or the risk of financial loss. For this submission they have put forward the one authority of Norman McBean v. Rainford Wade and Rupert Campbell, [2017] JMSC Civ. 74.

[140] In that case, the trial judge noted that the Claimant relied on his own say so as evidence that '*there is a risk that he will lose his employment…and may then, a result of his injury, be at a disadvantage in getting another job or an equally paid job…..," and that he "can no longer assist the guests on several paths of the falls."*

[141] The court found that evidence to be wholly insufficient to make an award under this heading, stating:

"This evidence is not sufficient for me to make a finding that he is handicapped on the labour market and the medical evidence has not shown that he is at risk of losing his job as a result of the injury he sustained and therefore does not support an award for handicap in the labour market. I will therefore make no award under this head of damages."

[142] As to the Claim for loss of Future Earnings, the Defendants submit that the Claimant in his Further Amended Particulars of Claim filed January 31, 2018, based his claim for Loss of Future earnings on the following narrative:

"*The Claimant has not received a salary from the Second Defendant since November 1, 2014. The Claimant contends that he was paid approximately $20,000.00 per fortnight. Since that time he has been experiencing great difficulty in caring for himself and his family. He claims he will be unable to return to his work or any form of labour requiring prolonged standing or sitting, walking or running and so claims under this head of damages."*

[143] Further, they submit that in the case of *Robert Minott v. South East Regional Health Authority, the Attorney General of Jamaica, [2017]* JMSC Civ. 2018, the court, cited *Monex Limited v. Mitchell and Grimes, SCCA 83/96* (judgment delivered December 15, 1998) for the following principle:

"*Loss of future earnings represents a distinctive set of circumstances where the victim who, earning a settled wage has suffered a diminution in his earnings on resuming his employment or assuming new employment due to his disability. The net annual monetary loss in terms of the reduction in earnings is easily recognizable and quantifiable in such circumstance.'"*
In this they submit that, the court espoused two principles, to wit:

"Compensation for loss of future earnings is awarded for real assessable loss proved by evidence." Second, that

> *"The anticipated loss, which is that which is that which to my mind can properly be categorized income losses of the Claimant between the time, post-trial and his expected date of retirement, based on evidence as to his date of birth or at the very least, his age at the time was trial was underway. That anticipated loss is typically calculated using the sum multiplier/multiplicand method and no interest is payable on any damages sum awarded in respect of such anticipates loss.*

[144] In the instant matter they submit, that the Claimant has conceded the generosity of the Second Defendant company after the accident. He agreed that the Defendant company even raised his salary while he was on sick leave. The Claimant has also conceded that he made no attempt to find out about the desk job that the management of the Second Defendant, Mr. Andrew Fogarthy, had personally discussed with him after he had been fitted with his prosthetic leg. He agreed that Mr. Fogarthy told him that "*he was going to give [him, the Claimant] a better position."* This offer was not taken up by the Claimant.

[145] Furthermore, they argue, the evidence of his own witness Ms. Terri Sparber Bukacheski, a licensed prosthetist who fitted the Claimant with his prosthesis, is that *the Claimant "should be able to return to work and just reduce how much he has to walk or carry if he is uncomfortable. There should be no limitation for a desk related job. Eventually he should be able to return pretty close to his previous level of activity."*

[146] Accordingly, they conclude, that the Claimant has placed no evidence before the Court, whether by medical evidence or corroborating witnesses that he could not cope with any kind of work whatsoever. The Claimant has simply removed himself from the offices of the Second Defendant and has failed to show any attempts at any other work, save and except for the painting of the bar at So-So Seafood, which demonstrates that he is able to work if so motivated.

[147] The Defendants have also submitted on the weight to be place on the reasonableness of the Claimant's action with respect to medical treatment.

[148] In the case of *Janet Edwards v. Jamaica Beverages Limited*, [2017] JMSC Civ. 76, the court, citing the case of *Lee James Samuel v. Michael Benning* [2002] EWCA Civ. 858, noted the following:

> "*The onus of proving that a Claimant failed to mitigate his damage lies on the negligent defendant to show that the Claimant ought, on the facts, reasonably to have pursued some course of action which he did not. In Smith v. Graham, supra, our own Langrin J, (as he then was) stated that a person who has been injured by the act of another party must take reasonable steps to mitigate his loss and cannot recover for losses which he could have avoided but has failed through unreasonable action or action to avoid."*

[149] It is submitted by the Defendant that the Claimant has consistently displayed an unreasonable reluctance to seek or to obtain medical treatment locally, even when resources of Ten Million Jamaican Dollars were made available to him after the accident on the basis that he needed medical treatment. The Claimant has provided absolutely no account of what was done with this money.

[150] As to making awards under the heading "Cost of future medical care", the Defendants submit that the Claimant in his Further Amended Particulars of Claim filed January 31, 2018, based his claim for the cost of Future Surgery and Future Care on the following narrative:

> "*Our client will require prosthesis, skin graft, follow up care and replacement surgery. The Claimant will have to change his prosthesis once every three years at a cost of United States $17,116.30 each time. With an estimated life expectancy of 36 years, the total estimated cost is US$205,395.60.*
>
> *The Claimant will require follow-up care, including physiotheraphy, orthopaedic and further assessment. As treatment is continuing the claim will be amended in the future to include the further medical reports and expenses incurred."*

[151] The Defendants submit that in the Claimant's evidence-in-chief he set out at paragraph 9 of his Witness Statement that:

> "*I am now desperately in need of a replacement of the prosthetic leg and the cost for this is about Seventeen Thousand United States Dollars ($U.S. $17,000.00). I am unable to change the prosthetic leg because I do not have the money to do so…….these changes have to be made for the rest of my life every three years. I will need at least Seventeen Thousand United States Dollars ($U.S. $17,000.00) every three years to change my prosthetic leg."*

[152] In throwing their reliance on the case *of Kenroy Biggs v. Courts Jamaica Limited* and Peter Thomson, Unreported Judgment delivered on the 22nd of January, 2010, they say that, this Honourable Court noted that, when dealing with the future costs of medical care, there are two issues to be considered:

> "*The first is when will these costs arise and second what will be the duration. From these two issues a third issue arises and that is, the method of calculation. Should it be adding up the anticipated costs and award that figure or should it be a multiplier multiplicand approach?"*

[153] Again, the Defendants argue that this Honourable Court in *Kenroy Biggs v. Courts Jamaica Limited and Peter Thomson,* decided that the cost of future surgery claimed by the Claimant would be assessed on the basis of the stated costs by health professionals. The court advised itself that:

> "*The purpose of an award of damages for future expenditure is to place the pursuer as near as may be in the same financial position as he would have been in if the accident had not occurred. What is required in the present case therefore is such a sum of money as may reasonably be expected to pay for the nondomestic element of caring for the incapax at Quarrier's Village for the rest of his life. Since the whole damage must be recovered in one action, the award which the court must make once and for all for the*

future has to take the form of a capital sum…the mechanism by which the capital sum if arrived at is the selection of a multiplicand, as representing the estimated annual cost of the care as at the date of the proof, and a multiplier which, when applied to the multiplicand, will provide the amount which can be expected to achieve the desired result."

[154] They note, from the Life Care plan for the Claimant from Ortho Pro Associates dated the 3rd of November 2017, adduced by the Claimant, it is stated that he will require full prosthetic replacement every 2-4 years costing $16,986.75 United States Dollars. Additionally, it is stated that the Claimant will require 12-15 new prostheses. When multiplied by 15, the total is $254,801.25 United States Dollars.

[155] Miss Julal's medical report, prepared after a review of the Claimant in 2018, is accompanied by a 2 page Estimate Quotation from Jamaica Orthotics Pedorthics & Prosthetics dated the 26th of November 2018 stating that $1,321,025.87 JMD is the total cost for fitting Mr. Andre Morrison with a full prosthetic leg on each occasion that a replacement will be required.

[156] Miss Julal noted, inter alia, at page 5 of her report, that

"*the existing prosthetic device needs to be replaced, a replacement with the type of prosthesis with which Mr. Morrison was fitted previously will be quite suitable for him as this limb is stable and functions well when it is maintained and the components are changed in a timely manner."*

[157] That, when calculated by 15, the Defendants submit that the approximate cost for 15 such fittings when performed by Jamaica Orthotics Pedorthics & Prosthetics would be Jamaican $19,815,388.00 in total.

[158] It is submitted by the Defendants that there is no medical requirement for the Claimant to be treated overseas or that subsequent prosthetic fittings must be done at the same facility – OrthoPro Associates, where the initial fitting and socket repair was conducted. In fact, they submit that the Claimant's own witness, Terri

Buckacheski, confirmed under cross examination that "the costing in her report dated November 3, 2017 applies to a standard below the knee prosthetic limb and "*we [OrthPro are not the only company to make a standard prosthesis or replacement socket…."].* Accordingly, they ask that the sum of $1,321,025.81 be awarded.

[159] As to transportation costs as a aspect of Special damages, the Defendants submit that the Claimant's claim for Transportation in the sum of $1,000,000.00 be disallowed as his evidence was incredible in this respect: he alleged in examination-in-chief that he was chartering private vehicles in order to move around, the evidence elicited under examination is that he has access to and drives a BMW and a Suzuki Swift nor has he reconciled this portion of the evidence with his contention that he used privately chartered vehicles being driven by someone else as his means of transportation after the accident.

[160] As for household help the Defendants submit, there was no evidence led in proof thereof.

[161] With respect to the claim for pre-trial loss of income in the sum of $1,520,000.00, the Defendants submitted that this claim should suffer the same fate as his claim for handicap in the labour market and loss of future earnings. This, they submit is due to the fact that the Claimant has not returned to his job which is being kept open by the Second Defendant, who has elected to treat the Claimant's absence as his being on unpaid leave, instead of an abandonment of his post.

The Law on General Damages

[162] Generally, I prefer the authorities and submissions of the Claimant over that of the Defendant here. The principles of law which govern the various heads of claim can be compendiously stated.

[163] The principles of law which govern the various heads of claim here can be compendiously stated as follows:

[164] For general damages a sum of money is awarded under this head for loss or reduction of a claimant's mortal or physical capacity to do the things he used to do or has suffered as a result of personal injuries. Thus, in actions for personal injuries the claimant may recover damages for his financial losses and an award for pain and suffering. Accordingly, the loss to the ability to play games, and such the like, even if these were the claimant's hobbies, will be taken into account in fixing damages. The assessment is based on the objective view of the value of the loss of these amenities to the Claimant.

[165] Here, I prefer the authority of the Trevor Clarke, supra in awarding the sum of thirteen million dollars ($13,000,000.00) for pain and suffering and loss of amenities.

Loss of Future Earnings

[166] A claim under this head usually arises when the claimant is in employment at the time when the claim falls to be evaluated. The claim is to cover the risk that, at some future date during the claimant's working life, he will lose his employment and will then suffer financial loss because of his disadvantage in the labour market. The court has to estimate the present value of that future risk: See **Moeliker v A. Reyrolle & Co. Ltd** [1977] 1WLR 132, 140 where Browne LJ dealt with this matter. Evidence is required in order to prove the extent, if any, of the risk that the claimant will at some future time during his working life should he lose his employment.

[167] In **Moeliker v A. Reyrolle & Co, Ltd**., supra, Browne, LJ said:

> *"In awarding damages for personal injuries in a case where the plaintiff is still in employment at the date of the trial, the court should only make an award for loss of earning capacity if there is a substantial or real, and not merely fearful, risk that the plaintiff will lose his present employment at some time before the estimated end of his working life. If there is such a risk, the court must, in considering the appropriate award, assess and quantify the present value of the risk of the financial damage the plaintiff will suffer if the risk materialises, having regard to the degree of the risk, the term when it may materialise, and the factors, both favourable and the factors, both favourable and unfavourable, which, in a particular case, will*

or may affect the plaintiff's chances of getting a job at all or an equally well paid job if the risk should materialise."

[168] In **Cook v Consolidated Fisheries Ltd.** [1977] I.C.R. 635 at 640 Browne, LJ corrected himself by stating that an award of damages for loss of earning capacity did not arise only when the injured person was employed at the date of trial. He said, "In my view, it does not make any difference in the circumstances of this case that the plaintiff was not actually in work at the time of the report in [1976] I.C.R. I said 'This head of damage only arise where a plaintiff is at the time of the trial in employment. On second thoughts, I realize that is wrong…and, when I am to correct the proof in the report, in the All England Reports, I altered the word 'only' to 'generally'…

[169] In United Dairy Farmers Ltd. & Anor v Goulbourne (bnf Williams), SCCA 6518, Carberry JA said "Awards must be based on evidence. A plaintiff seeking to secure an award for any of the recognised heads of damage must offer some evidence directed to that head, however tenuous it may be".

[170] In this regard what this court is being asked to do is to assess the Claimant's reduced eligibility for employment or the risk of future financial loss. Evidence must be adduced in order to prove the loss even though it may involve speculation Browne LJ in Moeliker's case, supra, opined that there are two stages for consideration by the Court. First, the question to be answered is there a substantial or real risk that a plaintiff will lose his present job at some time before the estimated end of his working life. Second, if there is, the Court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materialises, having regard to the degree of the risk, the time when it materialises, and the factors, both favourable and unfavourable, which in a particular case will or may, affect the plaintiff's chances of getting a job at all, or an equally well paid job.

[171] Here. I need only allow the Claimant's evidence at paragraphs 2, 3 and 8 of his witness statement to guide this particular deliberation. Taken in tandem with the

relevant submissions of the Defendants, I am not able to find any evidence to support the first question as posed above. As such, the second proposition does not arise. See also The Attorney General of Jamaica v Ann Davis, SCCA 114/2004; Dawnett Walker v. Hensley Pink, SCCA 158/01.

Cost of Future Care

[172] The head of damages is an assessment is awarded on the basis of a comprehensive detailed report which identifies reasonable costs related to the Claimant's injuries. These costs consists of services and products needed to allow an individual together, as near possible, to pre-injury level of forthcoming and quality of life.

[173] Generally, I find the Defendants proposition in law with respect to quantum, loss of future earnings, handicap on the labour market and cost of future medical care to be consonant with the law. I do not find, however, that the Claimant was contributorily negligent. I have not allowed myself to be influenced by the unfortunate revelation that interim payments have been made to the Claimant by the Second Defendant.

[174] I make the following award:

a) for general damages the sum of $13,000,000.00; is awarded from the date service of the writ to today's date at the rate of 3% thereon;

b) for cost of future medical care the sum of $19,815,388.00;

c) for handicap on the labour market and loss of future earnings zero sum;

d) for special damages on the sum of $91,000.00 is awarded from the date of the accident to today's date at the rate of 3% thereon;

[175] Costs are awarded to the Claimant and are to be taxed if not agreed.