[2021] JMSC Civ 108

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015HCV02939

BETWEEN	**MARVIN GAYNOR**	**CLAIMANT**
AND	**BRACO FARMS LTD**	**DEFENDANT**
AND	**NOEL AUSTIN**	**DEFENDANT**

IN CHAMBERS

Representation: Christine Hudson and Dian Grant Wright instructed by K. Churchill Neita and Co for the Claimant.

Nadine Lawson instructed by Mensa Legal Services for the Defendant.

Heard: March 17th, 2021, June 11th, 2021

Negligence – Contributory negligence – duty of care – personal injury – whether the road traffic act covers collisions in a truck park – special damages – general damages – loss of earnings – unauthorised entry

CORAM: HUTCHINSON, J

Introduction

[1] On the 12th of February 2014, the Claimant was a haulage contractor and co-owner of a motor truck which he utilized to haul bauxite on behalf of the 1st Defendant. At about 5 pm that day he was present at a property owned by the Noranda Jamaica Bauxite company and used by the 1st defendant for the parking of its trucks and equipment. He was engaged in the process of using a service truck owned by the

1st defendant to carry out repairs on his trucks parts when he was pinned between the service vehicle and a Mack Truck registered CF8897 which was owned by the 1st Defendant and being driven by the 2nd defendant (Mr Austin). It is not in dispute that at the relevant time the 2nd defendant had been operating as the servant and/or agent of the 1st Defendant.

[2] As a result of this incident, the Claimant suffered injury and loss and filed a Claim in this matter. An Amended Claim Form naming these two defendants was filed on the 17th of August 2016 in which he sought damages for negligence arising out of this incident. The 2nd defendant was never served with the Claim Form but on the 26th of October 2016 an acknowledgment of service was filed on behalf of the 1st Defendant. Their defence was filed on the 22nd of December 2016, the late filing of same having been consented to by the Claimant. While the fact of the collision was acknowledged by the 1st Defendant they denied that the 2nd defendant wholly caused or contributed to the incident and asserted that the Claimant had in fact caused the incident or been contributorily negligent. They also raised questions as to whether the Claimant had been authorized to be present in the area in which the incident had occurred or to use their service vehicle to effect his repairs.

Issues

[3] Arising out of the areas which are in dispute between the parties, I found that the issues to be determined by me are as follows;

1. Was the Claimant authorised to be in the area or to utilise the services of the 1st defendant's service vehicle at the time of the collision?

2. Was the incident caused solely by the negligence of the 2nd defendant or was there contributory negligence on the part of the Claimant?

3. Does Res Ipsa loquitur apply?

4. What quantum of damages is the Claimant entitled to, if any, by way of special and general damages?

Summary of the Claimant's Case

[4] Mr Gaynor provided a witness statement in this matter which stood as his evidence in chief with amplification permitted by the Court. It was his evidence that on the day and time stated above, he had parked his truck in the truck park at Noranda Bauxite Limited in order to effect repairs on same. On realising that he needed to use a vice clamp to assist with these repairs, he sought permission from 'Delroy' the senior mechanic employed to the 1st Defendant to use Braco Farm's service vehicle which had the necessary equipment. Permission having been obtained he entered that area of the truck park and began to effect the necessary repairs. While he was engaged in doing so a motor truck registered CF 5587 which was being driven by the 2nd defendant and owned by the 1st defendant entered the compound and stopped in close proximity to where he was working.

[5] On recognising that the truck was too close to his work area and impeded his ability to complete his task, Mr Gaynor approached the driver's door and requested that he reverse. This was done and the vehicle reversed 10 feet away after which Mr Gaynor resumed his work which he acknowledged was a noisy process. He explained that the next thing that he knew was he felt an impact to his back and left leg and realised that he was pinned between the truck being driven by Mr Austin and the service vehicle. While he was pinned he heard the truck make a sound like the engine had stalled then restarted after which it reversed and he fell to the ground.

[6] It was acknowledged by him that he had resumed working before the engine had shut off but he explained that the diesel vehicles often took a while to throttle down after the engine was shut off. Mr Gaynor estimated that it was about 3 to 4 minutes after he had spoken to the driver and he reversed that he felt the impact. He later conceded that it could a shorter period of 2 or 2/12 minutes. He rebutted the suggestions that the truck had only moved four feet away and that he had resumed

working while it was still in very close proximity to him. He explained that he had resumed carrying out his repairs as he did not expect that having reversed the driver would have moved back in his direction. It was also pointed out by him that there was no horn or other alert to indicate that the driver had been moving forward in his direction. He acknowledged that he had not been wearing his reflective vest but explained that this would ordinarily be worn in the mines. He also maintained that 10 feet was a safe distance away for him to revert to his task and not a hazardous situation.

[7] Mr Gaynor was transported to the St Ann's Bay hospital where he had his left leg stitched and bandaged. He also received an injection to his left hip which was swollen and he was hospitalised for 2 weeks. After a painful period of treatment, he was discharged and placed on outpatient care. He also received physiotherapy to assist with the healing process. He was only able to ambulate using crutches and for an extended period of time he had to be assisted by his partner to carry out the most menial of tasks. He complained of ongoing pain in the leg as well as numbness and had to wear shoes a size larger in order to reduce this discomfort.

[8] He wasn't able to resume driving his truck and explained that as a result of this he experienced a loss of income as he was not able to haul bauxite for the 1st defendant as he did before. He indicated that in the period of January to March 2014 this ranged between $68,746.03 per fortnight and $101,988.28 and that he had worked for the 1st defendant on a regular basis. He claimed loss of earnings for a 2-year period in the sum of $4,439,014.06. The particulars of claim outlines this as $85,000 per month. He was asked to explain this figure in light of the fact that he had sold his truck and indicated that he had been laid up in hospital not working and based this loss on the time that it took him to get back to work which was a year and a ½ later.

[9] A number of documents were agreed and these were the medical report from NERHA St Ann's Bay Hospital dated the 5th March 2015 signed by Dr Ian Titus. The medical reports of Dr. G Dundas dated 19th September 2016 and 7th May

2017. The cost of the medical reports, an examination at Elite diagnostic, travel expenses and extra help were all agreed in the sum of $129,400. There were also 3 pay slips agreed in support of the fortnightly earnings alluded to above. The medical reports revealed that he had a number of significant injuries, these included;

a. A crush injury to the left lower extremity with residual sensory nerve deficit.

b. Sacroiliac contusion

c. Left Hip strain

d. Soft tissue injury around the left hip

e. Peripheral nerve impairment in the left lower extremity.

f. Whole person impairment 5%.

Summary of 1st Defendant's Case

[10] Mr Christopher Parnell, the Director of Braco Farms Ltd provided a statement which stood as his evidence in chief. He outlined the operations of the 1st Defendant, the principal activity of which was the mining and hauling of bauxite under a contract with Noranda Bauxite Ltd using trucks owned by the 1st defendant as well as other trucks owned by sub-contractors. He noted that there was no employment contract in place with these sub-contractors as these trucks would simply show up and be utilised if there was a need. Mr Parnell pointed out that the owners of the truck were wholly responsible for the cost of maintenance and insurance of their trucks as well as payment of their drivers. In respect of the manner in which these truckers would be paid, it was pointed out that this would be based on the number of tons of bauxite transported.

[11] The 1st defendant was allocated a truck park which Mr Parnell stated was only to be used by trucks belonging to the company and for its equipment. Access to the

service equipment owned by the 1st defendant could only be granted by the Mechanic or Mines Supervisor, Messrs Douglas Clarke and Robert Robinson respectively. The independent relationship with the external truckers was maintained by the fact that they were responsible for making their own income tax and statutory deductions payments. The 1st defendant would occasionally make deductions from the gross payment in respect of advances made or to cover the cost of fuel or tyres provided.

[12] Mr Parnell acknowledged that between 2011 and 2014, the Claimant worked with the company and a table setting out the gross and net earnings as well as the deductions made was outlined in his statement. In respect of the events of the 12th of April 2014, he stated that he received a call between 5:30 and 6:30 that evening and was provided with some information. He subsequently received an oral report from the driver Mr Austin. He indicated that the Mack Truck which Mr. Austin had been driving had a high cab and nose shape which made it difficult to see individuals who were bending over. He also noted that the driver would have to be guided in reversing same. In respect of the claim for loss of earnings for a 2-year period by Mr Gaynor, Mr Parnell pointed out that he, the Claimant, had sold actually his truck in July of 2014 for JMD$1.25 million.

Discussion/Analysis

Was the Claimant authorised to be in the area utilising the services of the 1st defendant's service vehicle at the time of the collision?

[13] It is the Defence's position that on the day and time of the incident, the Claimant was not supposed to have been in the truck park as this area was reserved for the company's equipment and personnel. It was also highlighted that truckers are to use their own equipment and were not allowed to use the equipment belonging to Braco Farms Ltd. It was also noted that permission to use or deploy the equipment in this area could only be given by the mechanic or mines supervisors.

[14] The Claimant on the other hand outlined that it was the usual practice to park his truck within the area and he had been using the service truck with permission. It

was pointed out by his attorney that it is his unchallenged account that he had obtained permission from Delroy the mechanic supervisor. It is evident that by raising questions as to whether or not the Claimant should have been present in this area, the defence was seeking to imply that his entry was unlawful and had placed him at risk of injury. In order to persuade the Court to adopt this position as accurate, it was incumbent on the defendant to provide evidence in support of same.

[15] On a review of the evidence, it is clear that although the policy may have existed that truckers were to use their own equipment, the use of the equipment owned by the 1st defendant was under the supervision of the mechanic and/or mines supervisor who had the requisite authority to grant access to or deploy same. It was also apparent from the evidence of Mr Gaynor, that the practice had developed for permission to be granted to the truckers to use the service vehicle to carry out their repairs. The concession that permission could be granted by these supervisors, was consistent with the evidence of the Claimant that he had obtained permission from Delroy before going across to the area. While I note that the name Delroy was different from Douglas which Mr Parnell had given as the first name of the mechanic supervisor, it was never suggested to the Claimant that this was a different individual, neither was it suggested that he never obtained permission from him. In these circumstances, in the absence of any evidence to contradict the account of the Claimant, I am satisfied on a balance of probabilities that this was in fact an authorised visitor to that location and was permitted to use the service vehicle.

Was the incident caused solely by the negligence of the 2nd defendant or was there contributory negligence on the part of the Claimant?

[16] The principles in relation to the law of negligence were laid down in the locus classicus of ***Donoghue v Stevenson [1932] UKHL 100*** where Lord Atkins stated as follows:

> *"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be- persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question".*

[17] The legal principles enunciated in that decision were applied by our Court of Appeal in ***Glenford Anderson v. George Welch [2012] JMCA Civ.43*** where Harris JA stated as follows;

> "*It is well established by authorities that in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to the Claimant by the Defendant, that the Defendant acted in breach of that duty and that the damage sustained by the Claimant was caused by the breach of that duty*".

[18] Having made this pronouncement, the Learned Judge went on to state;

> *It is also well settled that where a Claimant alleges that he or she has suffered damages resulting from an object or thing under the Defendant's care or control, a burden of proof is cast on him or her to prove his case on the balance of probabilities*

[19] Applying these principles of law to the instant matter, it is clear that the burden is on Mr Gaynor to satisfy the Court that Mr Austin owed a duty of care to him, had breached this duty and he suffered injury and loss as a result of this breach. Although the facts of the instant case disclose that this incident did not occur on the public roadway as the driver of a motor vehicle in an area which was used by other vehicles and pedestrians, Mr Austin would have been under a common law duty of care to keep a proper lookout and have adequate regard for other users of the road. This duty was recognised in the decision of ***Boss v. Litton [1832] 5 C & P 407*** where the Court stated:

> *"All persons, paralytic as well as others, have a right to walk on the road and are entitled to the exercise of reasonable care on the part of the persons driving carriages upon it"*

[20] In submissions made on behalf of the Claimant, the question as to whether the provisions of Section 51 (2), which governs the duty of the driver of a motor vehicle to avoid a collision would apply to the actions of the driver herein. In ***Glenroy Gilmore v Horace Christie etal [2013] JMSC Civ 191***, Simmons J, as she then was, in the course of considering the issue of negligence in a motor vehicle accident which occurred in a carpark stated as follows;

> [*31] This issue was dealt with in Griffin v. Squires [1958] 3 All ER 468 where the effect of a similar provision to that in the Jamaican Act was considered. In that case an unlicensed and uninsured driver was prosecuted under the Road Traffic Act 1930 (UK) after she drove a vehicle in a car park. That car park had two entrances, one of which led to a private footpath which led to a bowling club and council buildings. The car park was owned by the local authority and was could be used by members of the public without payment. The matter for the court's determination was whether the car park as part of the footpath was a road as defined by the Act. It was held that the car park did not fall within the definition of a road.*

[21] Having made this pronouncement, her Ladyship then went on to review the discussion on this issue by Lord Parker CJ in the ***Griffin v Squires*** case before declaring as follows;

> *[33] In any event, whilst it is acknowledged that the car park is a place to which the public had access, no evidence has been led as to the terms of such access. There is also no evidence that it was used as a route to access any other place. It is therefore my opinion that the car park is not a road as defined by the Act.*

[22] After arriving at this conclusion the Learned Judge then went on to find that only the principles governing the common law duty of care as stated in ***Donoghue v Stevenson*** would be of relevance to that claim and I adopt her conclusion in the instant case. In considering whether the Claimant has satisfied these requirements, I note that while he acknowledged that he had not wearing a reflective vest while in the work area, Mr Gaynor gave unchallenged evidence that he would have been visible to the driver from shortly after he drove into the truck park. This would have started from the point when he approached his vehicle to inform him that he was too close to his work area and requested that he reverse some distance away. He also gave evidence that even while he was pinned between the two vehicles, he was able to see the driver who should have been

able to see him. I find that in those circumstances the driver would have been put on notice of his presence in that area and the need to manoeuvre the truck in such a way to prevent any risk of harm.

[23] It was the unchallenged evidence of the Claimant that the vehicle had reversed 10 feet away before he resumed his task. He also indicated that the vehicle having moved away from him, he had no reason for thinking that it would have returned in his direction. I found that the driver having seen him and been alerted to his work area, it would have been readily apparent to him that any movement back in that direction could potentially place Mr Gaynor at risk. If it became necessary to move forward or otherwise manoeuvre in another direction, it would have been incumbent on him to blow his horn or otherwise seek to alert the Claimant. Alternately it would have been open to him to seek to steer or otherwise control the vehicle in such a way that a collision could have been avoided. In this situation it is evident that none of these things were done.

[24] In her cross-examination of the Claimant as well as submissions in this matter, Ms Lawson raised the issue of contributory negligence on the part of the Claimant. The Law on contributory negligence is found at Section 3(1) of the Law Reform (Contributory Negligence) Act (Jamaica.), which reads:

> *"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damages".*

[25] In ***Froom v Butcher [1975] 3 All ER 520***, Lord Denning provided useful guidance on this issue where he said:

> *"Negligence depends on a breach of duty whereas contributory negligence does not. Negligence is a man's carelessness in breach of duty to others. Contributory negligence is a man's carelessness in looking after his own safety. He is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a*

> *reasonable prudent man he might hurt himself. See Jones v Livex Quarries Ltd. "*

[26] The Defendant also relied on a number of authorities one of which was ***Norris vs. William Floss & Son Ltd. (1954) I ALL E 324***. In that matter, the plaintiff had sustained injury in seeking to correct a fault in scaffolding by a method which the court in dismissing a claim for personal injuries, based on common law negligence and breach of a Building (Safety, etc.) Regulation found to be "fantastically wrong" it was held on appeal that "although at the time of the accident there was a breach by the defendants of the Regulation the real cause of the accident was the plaintiffs negligence in employing an unsuitable method of trying to correct the fault; neither the breach of statutory duty nor the failure of the defendants foreman to warn the plaintiff of the fault contributed to the accident; and therefore the defendants were not liable).

In explaining the decision of the Court Vaisey J at pp. 327-320 said -

> *"It is sometimes difficult to decide whether an antecedent act or event is the cause, or one of the causes of a subsequent event, or whether, on the other hand: it is merely one of the surrounding circumstances in which as part of the background in front of which, the subsequent event has taken place. Here it seems to me that the accident to the plaintiff was due entirely to his own negligence in doing a piece of work well within his competence, in a manner which the learned judge described as "fantastically wrong". True it is that it was on the leaning standard that the work in question had to be carried out, but the fact that the standard was in that condition, cannot in my judgment be treated as being in any reasonable sense a cause of the accident. It is not, I think, admissible to construct chains of causation in a case such as this where a single cause - simple obvious and amply sufficient to account for what happened - is to be found in the inexcusably careless behaviour of the workman himself."*

[27] The particulars of negligence alleged on the part of the Claimant were outlined as follows;

a) He failed to keep out of the immediate area in which the motor truck was operating.

b) He had his back turned to the motor truck while it was operating perilously close to him.

c) He failed to use common sense.

d) He failed to have regard for his own safety in the circumstances

[28] The 1st Defendant argued that If Mr. Gaynor had waited until Mr Austin had completed manoeuvring the truck, turned off the engine and exited the truck before he continued working at the service truck, he would not have suffered injury. Counsel pointed out that by his own admission, Mr Gaynor not only remained in the immediate vicinity but also turned his back to the unit before it had completed its manoeuvre. In turning his back, Mr Gaynor was stated to have been negligent as he failed to keep the truck under observation thereby showing reckless disregard for his own safety.

[29] I have already concluded that at the time of the collision, the Claimant had been authorized to enter and carry out his repairs in the area in which the collision occurred. As such, his presence there was not unlawful and cannot in these circumstances be viewed as an action by which he placed himself at risk. It still remained the responsibility of the 1st defendant's driver to ensure that on entering the truck park, where there was likely to be pedestrian as well as vehicular traffic, every effort was made to avoid a collision.

[30] On the question of whether by turning his back to the truck and resuming his work the Claimant was contributorily negligent, from the evidence of Mr Parnell, this was an area in which service equipment belonging to the 1st defendant was kept. As such, it was no doubt a place in which work of a similar nature was the norm. From the Claimant's account, Mr Austin was aware that he was working in this area. Additionally, he had waited until Mr Austin had reversed a distance of 10 feet away from him before resuming his repairs.

[31] It is clear that when the vehicle had initially stopped Mr Gaynor immediately apprehended that it was too close to his work area and sought to avert any threat

to his safety by alerting Mr Austin that he needed to move. He did not just assume that this request would be complied with, but ensured that it was done as he witnessed this process after which he returned to his task. These are all steps that a reasonable and prudent man would have taken in protection of his safety. The situation would have been markedly different if Mr Gaynor having observed the truck in close proximity to him had simply turned around and continued carrying out his repairs. Based on his actions, I am unable to agree that he turned his back in circumstances where he would have known that there was a risk of harm.

Does Res Ipsa loquitur apply?

[32] The issue of Res Ipsa Loquitur has been raised on the part of the Claimant on the basis that he was struck from behind by the truck which was being driven by the 1st defendant's driver at the relevant time. While he was unable to speak to the manner of the Defendants driving, apart from asserting that he failed to keep a proper lookout, it is his position as pleaded that the truck would not have collided with him if Mr Austin wasn't negligent in the operation of the vehicle. Although the cross examination of the Claimant and the submissions filed in this matter raised the scenario of the truck having stalled and jumped forward pinning Mr Gaynor, there was no actual evidence as to what actually occurred in the moments leading up to the collision.

[33] The application of this legal principle was examined by our Court of Appeal in the decision of ***Coke v Rhooms etal*** *[2014] JMCA Civ 54 in which* Brooks JA declared as follows;

> *In Shtern v Villa Mora Cottages Ltd and Another [2012] JMCA Civ 20, Morrison JA, in his characteristically thorough style, assessed the application of the doctrine of res ipsa loquitur. In his judgment, with which the other members of the court agreed, he cited the leading cases on the doctrine and, at paragraph [57], summarised the relevant principles: "(i**) the occurrence is such that it would not normally have happened without negligence (the editors of Clerk & Lindsell, [19th Ed], para. 8-152 provide an illustrative short-list from the decided cases: 'bales of sugar do not usually fall from hoists, barrels do not fall from warehouse windows, cranes do not collapse, trains do not collide and stones are not found in buns'); (ii) the thing that inflicted the***

> ***damage was under the sole management and control of the defendant; and (iii) there must be no evidence as to why or how the accident took place. As regards this last criterion, the editors of Clerk & Lindsell (op. cit. para. 8-154) make the important point, based on Henderson v Jenkins & Sons [[1970] RTR 70, 81 – 82], that 'Where the defendant does give evidence relating to the possible cause of the damage and level of precaution taken, the court may still conclude that the evidence provides an insufficient explanation to displace the doctrine'.*** *" (Emphasis supplied)*

[34] Additional guidance on this doctrine was provided in ***Bennett v Chemical Construction (G.B.) Ltd.*** *[1971] 1 W.L.R. 1571* where the Court stated :

> "In order to rely on the doctrine of res ipsa loquitur, the Claimant must establish two things:-
>
> i. That the thing causing the damage was under the management and control of the Defendant or his servants; and
>
> ii. ii. That the accident was of such a kind as would not, in the ordinary course of things, have happened without negligence on the Defendant

[35] Applying these legal principles to the instant case, it is clear that there is no factual account before the Court to explain how the truck ended up moving forward and collided with Mr Gaynor and the theories advanced cannot take the place of evidence. What is apparent however is that the truck was under the management/control of Mr Austin and this accident could not have happened without some negligence on his part.

What quantum of damages is the Claimant entitled to, if any, by way of special and general damages?

Special damages

[36] The issue of special damages did not appear to be especially controversial as the parties were able to agree a number of documents and receipts in respect of expenses incurred for medical reports, transportation and extra help which amounted to the sum of $129,400 and on a review of the documentation in respect of same, I am satisfied that this amount has been proved.

[37] In addition to the cost associated with these areas, the Claimant has also asked for an award to be made for loss of earnings. In his witness statement he indicated that he was seeking same for a 2-year period but in explaining why he was seeking such an award in circumstances where he had sold his truck, he stated that it was a year and ½ before he was able to drive as a result of the extent of his injuries. In support of an award under this heading, he presented 3 pay slips the average of which showed earnings of $85,367 per fortnight, this figure when multiplied by 2 years amounts to the sum claimed above.

[38] While agreeing the pay slips, the 1st defendant also presented figures which they indicate reflect monies actually paid to Mr Gaynor. For the year 2014, gross income of $924,091.87 was noted. The net paid was $237,353.86 as deductibles were said to amount to $686,738.01. Using these figures, the average of the gross salary for 8 fortnight payments would be $115,511.48 and the average of the net would be $29,669.23. The deductibles were said to include sums advanced, fuel and tyres. In light of the range indicated and the absence of any explanation in respect of how the deductions were allocated, I am prepared to accept the sum of $85,327 as not unreasonable.

[39] Apart from presenting these other figures, the 1st defendant highlighted the fact that the truck had been sold from the 21st of April 2014 and raised questions as to what effort if any had been made by Mr Gaynor to mitigate his loss. It is an accepted fact that in order for an award to be made under this heading of damages there must be evidence in proof of same. Additionally, the Claimant is under a duty to mitigate his loss unless there are circumstances which show that his injury was such that he suffered a handicap on the labour market and was unable to work or

obtain comparable employment. In this situation the Claimant has presented evidence to show what his likely earnings were and I am satisfied that this amount would be due to him for the period immediately preceding the sale of the truck.

[40] In respect of the period after the sale, there has been no evidence presented to show any loss of earnings for this time whether in his alternate field as an electrician or otherwise. It was the evidence of Mr Gaynor that apart from being a truck driver, he was also an electrician and this is a trade in which he was still engaged up to the time of this trial. Although he stated that it was not until October of 2014 that he was able to walk for short distances without using a crutch, it was open to him to seek other employment to mitigate his loss. From his evidence, no such effort was made and there has been no explanation provided in respect of same. In these circumstances, I am prepared to make an award for loss of earnings in the sum of $554,625.50.

General Damages

[41] In respect of the appropriate award to be made for pain and suffering and loss of amenities, the case of ***Winston McKenzie and Calvin Watson CL 2002/M100*** was commended to the Court by Counsel for the Claimant. In that matter, the Claimant suffered multiple abrasions to the right forearm and right lower limb, soft tissue continues to right thigh. He was hospitalized for two days. He made follow up visit to hospital on occasion the Claimant's evidence he was incapacitated for 2 months' soft tissue injuries to the lower extremities and right hand. The Claimant was hospitalized for 2 days and was reviewed on two occasions at hospital, he healed with no residual effect. An award of $550,000.00 made for general damages in March 2006 CPI 36.3 updates to $1,639,000 using CPI 108. 3 for March, 2021.

[42] It was submitted that in terms of gravity and severity, Mr Gaynor’s injuries are far more grievous as the extensive laceration to his leg required two (2) weeks hospitalization and complications from an infection spanned a 9-month period. It

was also argued that this Claimant has been left with some deformity, being depressed contour of the proximal area of the thigh and a 13cm x 13 cm oblique scar to the middle 3rd of left thigh, features which were not present in the cited case. It was further submitted that taking into account the treatment, the period of incapacity, the resulting scar and 5% whole person impairment the updated award should be significantly increased.

[43] The other authority cited by Counsel was ***Sheila Richardson v Vincent Kinglack Harrison page 363***. That Claimant suffered soft tissue injury to the lower limb and was admitted to the hospital for one month. She was left with permanent scarring to the muscles with associated difficulty climbing hills and stairs. The award of $60,000.00 was made in February 1991 CPI 2.7 updates to $2,406,600 using the CPI 108.3 for March, 2021.

[44] Counsel conceded that Sheila Richardson injuries were to some extent more extensive in that same involved ankles, foot and multiple abrasions and contusions to the forearm. It was also conceded that her period of hospitalization was 1 month as opposed to 2 weeks. It was highlighted that there was no information as to what treatment if any was experienced post discharge whereas in this matter based on the findings of Dr. Dundas up to September 15, 2014 the Claimant had not reached maximum medical improvement and when the Claimant was last seen on September 15, 2014, 5 months' post injury, the wound was still healing. It was also submitted that although the Claimant in the cited cases suffered multiple soft tissue injuries affecting the upper and lower extremity, all seem to have healed without a trace of residue and only the right leg healed with some residue which was not quantified.

[45] It was also noted that while Richardson had difficulty climbing hills and steps due to diffuse fibrosis and there was permanent scarring of the muscles. Mr Gaynor was assessed with a 5% impairment based on the soft tissue injuries and the peripheral nerve injury, which Dr. Dundas opined was likely to be static. On Mr

Gaynor's account, the impairment resulted in numbness, recurrent pain in the hip and swelling of the foot which affects his choice of foot wear. His tolerance for driving heavy equipment and standing for long hours was also compromised. Counsel submitted that the effects of the residue of his injuries are more extensive and have more far reaching consequences than Sheila Richardson's and any award made ought to be significantly uplifted. Taking these factors into account a recommendation was made for an award within the region of $4 -$4.5 million.

[46] On a careful review of the medical evidence presented by this Claimant, I agree that Mr Gaynor's injuries were more severe that those sustained by Mr McKenzie and Ms. Richardson. Additionally, while Ms Richardson had been left with some disability that impacted her ability to move around, Mr Gaynor was also negatively impacted in terms of his ability to stand for long periods, run or even drive for extensive periods which it is accepted he once did for a living. He has also been left with a total whole person impairment of 5%. In light of these factors, I am of the view that any award would naturally take account of these differences. In respect of the figure which has been recommended however, I find that this figure is too large as while Mr Gaynor still has some issues he has been able to return to a level of normalcy as while he can no longer drive a truck as a haulage contractor, he is able to work as an electrician and drive motor vehicles with an automatic transmission. Accordingly, I am of the view that an award of $3 million would be adequate in the circumstances.

[47] As such, my ruling in this matter is as follows,

a. Judgment is entered in favour of the Claimant.

b. General Damages are awarded to the Claimant in the sum of $3 million. Interest is to apply at a rate of 3% from the 18th of June 2015 to today's date.

c. Special Damages are awarded in the sum of $684,025.50 with interest at the rate of 3% from the 12th of April 2014 to today's date.

d. Costs are awarded to the Claimant to be taxed if not agreed.

e. Claimant's Attorney to prepare, file and serve order herein