

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. C.L. H-024 of 2001

BETWEEN	GILBERT HARDIE	CLAIMANT
A N D	GARBAGE DISPOSAL & SANITATION SYSTEMS LIMITED	DEFENDANT

Ursula Khan for Claimant instructed by Khan and Khan

David Batts for Defendant instructed by Livingston, Alexander and Levy

Heard: May 26<sup>th</sup>, 27<sup>th</sup> and 28<sup>th</sup>, 2003, July 18<sup>th</sup>, 2003, April 20<sup>th</sup>, 2011.

Cor: Rattray, J

1. Gilbert Hardie was a man approaching the twilight of his years, but still active enough at age 68 years, whether by choice or force of circumstance, to keep himself employed as a labourer. He occupied himself on weekends by farming his small plot of land in the parish of St. Catherine. On the 10<sup>th</sup> day of January, 2001, he was working as a sideman on a truck driven by a man known to him only as 'Martin' and owned by Garbage Disposal and Sanitation Systems Limited ('the Defendant Company'), assisting in the collection of garbage. While so engaged, the other sideman working on the truck initiated the compacting machinery as a result of which he sustained severe personal injuries to his left foot.
2. Gilbert Hardie initiated legal proceedings against the garbage disposal company claiming damages for its negligence and that of

its servant and/or agent in the management and/or operation of its garbage truck. He also claimed damages for breach of statutory duty under the Occupiers' Liability Act. In the Statement of Claim filed on his behalf, it was alleged that he was employed to the garage disposal company to work on its garbage truck. On the date of the incident, another sideman on the truck acted negligently during the course of his employment thereby causing Gilbert Hardie to suffer severe injuries. It was further alleged that the company:-

- (i) failed to have a proper system of supervision in place to prevent damage and injury to workers.
- (ii) failed to provide a safe system for the collection of container garbage.
- (iii) failed to provide training or instruction for workers in the collection of garbage.
- (iv) failed to provide protective boots and other protective gear to ensure the safety of employees.
- (v) failed to provide adequate safety measures or shields or guards to protect employees during the course of their duties.
- (vi) carried on operations that made no adequate provision for the safety of workers and exhibited a want of care for the dangers inherent in the operation.
- (viii) failed to ensure that the modus operandi of the operations was reasonably safe.

3. Insofar as the other sideman present at the time was concerned, for whom it had been alleged that the Defendant Company was vicariously liable, it was pleaded that he:

- (a) started to operate the grabber on the garbage truck without ensuring that it was safe to do so.

- (b) lacked consideration for another worker on the truck.
- (c) Recklessly started the grabber with no regard for another worker.

Gilbert Hardie also complained of sustaining the following injuries as consequence of the Defendant Company's negligence and/or breach of duty:-

- (i) Crush injury to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> digits of the left foot with necrotic exposed soft tissue including tendon.
- (ii) Traumatic amputation of distal end of 3<sup>rd</sup> digit of left foot.
- (iii) Comminuted fracture of distal phalanx of 1<sup>st</sup> and 2<sup>nd</sup> digits of left foot.

Detailed particulars of an assessment of Mr. Hardie's condition together with Special Damages incurred were also outlined in the claim filed by his Attorneys at law.

4. The Defence filed on behalf of the Defendant Company, while admitting ownership of the garbage truck on which the accident took place, denied that Gilbert Hardie was ever employed to the garbage disposal company. It further expressly denied all allegations of negligence as well as any alleged responsibility for the conduct or actions of persons present on the scene. Those pleadings went on to state that any injuries suffered by Gilbert Hardie were occasioned or contributed to by his own negligence in that he:-

- (i) failed to take any or any proper care for his own safety.
- (ii) placed his foot in a position where it was in proximity to moving parts of the equipment.
- (iii) placed himself in a position which he knew or ought reasonably to have known was dangerous.

(iv) failed to take any or any sufficient care for his own safety.

The Defendant Company further denied being in breach of the alleged or any duty of care under the Occupiers' Liability Act and asserted that at all material times, it took such care as in all the circumstances was reasonable to ensure that Gilbert Hardie was reasonably safe. It further asserted that its truck was reasonably safe for the purpose for which persons were required to be there.

5. In his Reply to the Defence filed, Gilbert Hardie denied that he placed his foot near to any moving part of the equipment. He maintained that while the equipment was turned off and he was loading the garbage, a servant or agent of the Defendant Company negligently started the machinery without any care or consideration for his safety, which led to him being injured. He also averred in the Reply that where he was positioned was not dangerous once the equipment was inoperative. However, he pleaded that when the company's servant or agent started the grabber without warning, there was nothing he could do to safeguard his safety.
6. According to Gilbert Hardie, the unfortunate train of circumstances leading to his being injured had its genesis early in morning of the 10<sup>th</sup> January, 2001. He had started work at about 5 am. His evidence was that he went on to the garbage truck at the Defendant Company's business place at Brentford Road, Kingston 5 and it drove to the Red Hills Road area where garbage was collected and taken to the dump at Riverton City. Later that day between 2pm to 3pm, while emptying a garbage skip from premises on Red Hills Road, a problem was encountered as an obstruction prevented the flow of garbage from the skip into the truck. To clear this obstacle, Gilbert Hardie stated that with one foot on the ground (his right foot) and the other resting on a small platform on the left side of

the truck, he used a stick to try to free the blockage. Before he could complete this task, his co-worker on the right side of the truck started what he described as “the grabber”, which caught his left foot, sliced through his leather shoe and cut off several of the toes of that foot.

7. Mr. Hardie further testified that he started working with the Defendant Company as an employee on the said truck on the 3<sup>rd</sup> January, 2001, one week before the accident. On the 10<sup>th</sup> January, 2001, there were only two of them working on the truck when he got injured. He received neither training nor any instructions for the job, but was only told to go and work on that garbage truck by Mr. Randolph Williams who hired him. He was never given any protective shoes or boots, nor were there any guards, shields or other safety measures on the truck to prevent him from being injured. The driver who was in charge of the truck and who would normally be responsible for supervision in the absence of an assigned supervisor, had left the area and had gone into some apartments prior to the incident occurring. Gilbert Hardie maintained that he was not a trespasser and further that he was not employed by the driver, but by the company which paid him weekly in cash at the office.
8. In answer to further questions put to him by his Counsel Mrs. Khan in amplification of his evidence, Mr. Hardie clarified his reference to being employed by Randolph Williams as meaning that he was employed by the garbage disposal company, as Mr. Williams and the company were the same and he declared that Mr. Williams owned the truck. He further gave evidence outlining his employment history with Grace Kennedy and with the Ministry of Housing and pointed out that he had always worked on garbage

trucks at the Kingston and St. Andrew Corporation. He said that on that morning when he went to the Defendant Company's plant, he was supervised by the soldier, which he explained as meaning that the soldier at the gate indicated to him the truck on which he was to work.

9. Under cross examination by Counsel Mr. Batts, Gilbert Hardie admitted that while he had not worked on that truck before that day, all of them were "the same kind of truck", with the compartment for the garbage located behind the cab where the driver was seated. He further admitted that in that compartment was a compactor which looked like a large shovel which grabbed the garbage and pressed it down into the truck leaving space for further garbage. For the shovel to move, it had two rollers which extended on either side of the truck and when the compactor moved up and down, the rollers moved also. He admitted that the roller moved in a channel and its operation relied on compression. Mr. Hardie described the garbage skip as a large metal container on the side of the road in which rubbish was deposited. Once attached to the truck by a cable, the skip was pulled up and the garbage emptied into the compartment. He agreed that the engine of the truck had to be on for the winch lifting the skip to work, but said that afterwards, the engine was turned off. As some of the garbage was stuck on top of the compactor blade, it would not go down into the truck and Mr. Hardie said he had to 'jook' the garbage with a stick to free it up. He indicated that at the time he was doing this, the engine of the truck was not on and the shovel was not working. He agreed however that the compactor could not work unless the engine of the garbage truck was turned on.

10. When further questioned, Gilbert Hardie admitted that when in operation, the compactor moved slowly and always made a noise. The part of the machine that projected at the side of the truck which caused injury to his foot also moved very slowly. He was of the view that had it been moving faster, he would have lost his whole foot and not just his toes. He could not see the compactor as it was covered with garbage. He did not see the compactor moving nor did he hear the engine being started and he only realised the engine was on when he sustained the injury to the toes of his left foot. He claimed to have no knowledge of the practice of drivers leaving the truck with the engine throttling and insisted that at the time he got injured, the truck was not in motion neither did he hear the truck engine.
11. When asked by Counsel Mr. Batts as to what caused the injury to his foot, Gilbert Hardie answered that it was the roller which squeezed his foot. He denied however that he had placed his foot in the roller channel or that he failed to remove it before the roller came down, as he maintained that the machine was not in operation. When Counsel pressed further and suggested that he had put his left foot in the roller channel, Mr. Hardie replied that at the time his foot was there, the machine was not operating and that every truck he worked on had a cover on the roller channel, but this one was not covered. He asserted that he looked where he was placing his foot, but he eventually conceded that he did not know if his foot was in the roller channel as it could have been anywhere, as no-one told him that that was the roller channel. Despite this uncertainty he held fast to his view that the truck engine was not on when he was engaged in clearing the blockage.

12. He gave evidence that he started working on the 3<sup>rd</sup> January, 2001, the week before the accident. When asked who at the company employed him, he said he did not know the name of the soldier, but that he was the one who directed him to the truck on which he was to work. Gilbert Hardie went on to tell the Court that when he went to the plant early that morning and spoke to the soldier at the gate, he told the soldier his name and was assigned to go on that truck by the soldier. When questioned by Mr. Batts as to whether it was Randolph Williams or the soldier who directed him to work on the truck, he replied that it was the soldier who pointed out the truck he was to work on. When that same question was again put to him, he stated that the soldier told him that Mr. Williams said he was to work on that truck. He admitted that he had never been given any instructions by Mr. Williams and although “he knew his face”, he “had never associated with him”.
13. On the issue of his pay, Mr. Hardie stated that the company paid him weekly in cash and that he received no payslip nor did he sign to receive his pay. Under cross examination, he declared that the arrangement was that he was to be paid every two (2) weeks, but that he never got any pay from the time he started working with the company, save for the sum of \$1,000.00 which he received after the accident, while he was in the hospital. He did not sign for this money as they never brought any book for him to sign in when this sum was paid to him at the hospital. When further questioned, Gilbert Hardie was adamant that if anyone said he would be paid weekly, it would not be true.
14. He went on to tell the Court that he had worked for a week before the accident and had received cash at the office. He said that that was the week of the 3<sup>rd</sup> January, 2001, but then said that he had



worked for one day and he received \$700.00. Although initially admitting that he got this payment in cash at the office, he then went on to state that he was given this money in the parking lot of the company, by a man whose name he did not know for work done during that day. As a result of re-examination by his Counsel Mrs. Khan, Gilbert Hardie revealed that it was the soldier who pointed out what his duties would be, how much and how often he would be paid and the truck on which he was to work. In the course of re-examination, Mr. Hardie also revealed that from the time he received the injury to his leg, he also started having a problem with his hearing, which he did not have prior to the accident.

15. Randolph Williams, who was the General Manager of the Defendant Company in January, 2001, gave evidence on its behalf. He testified that Gilbert Hardie was not an employee of and had never been employed to that company. The garbage disposal trucks owned by the company were driven by independent contractors. Their responsibility included recruiting, training, supervising and paying their own sidemen. The company's Works Manager examined the sideman once they were employed and trained by the contractor, to ensure that they were familiar with the operating procedures. The company also sold to the contractor equipment including boots, gloves, overalls and raincoats for use by the contractor and his sidemen.
16. He maintained however that Gilbert Hardie was at no time employed to or by the Defendant Company. At all material times, the driver of the truck on which Gilbert Hardie was injured was an independent contractor named George Martin. Mr. Williams stated that despite efforts to locate George Martin, he no longer resided at

his previous address and all attempts to find him proved futile. Mr. Martin was paid weekly, with such pay as was due to him calculated on the amount of garbage skips emptied on any given day. A percentage of the fee charged to the client was paid to the driver/contractor. If no skips were emptied, he would receive no pay. As regards the maintenance of the truck on which Mr. Hardie was injured, Randolph Williams testified that it had been serviced the night before the incident, with all systems checked and found to be in good working order.

17. Mr. Williams denied having in the company's employment any soldiers at the front gate of its plant, but admitted that that gate was manned by a security guard. The duties of the security guard primarily involved access control to the company's plant. He categorically denied that the security guard had any responsibility or authority to hire sidemen or to assign them to trucks belonging to the company. He further denied that he gave any message to any security guard to deliver to Gilbert Hardie, as he had no knowledge of him before the incident. With respect to the alleged cash payment to Mr. Hardie, Randolph Williams repeated that a sideman was employed by the driver and paid by that driver. The company paid its employees by cheque accompanied by a payslip indicating the amount paid and the requisite deductions made. In or about January, 2001, the average amount paid to truck drivers ranged between \$1,500.00 and \$1,800.00 per day.
18. Under cross examination by Counsel for Gilbert Hardie, Mrs. Khan, Randolph Williams advised that before any driver was employed to the Defendant Company as an independent contractor, he would be taken through the entire mechanism of the truck for which he would be in charge, instructed as to all its relevant

features and trained as to how the truck functioned. When the driver hired sideman to work with him on the truck, the driver was obliged to train them as to what they were required to do. This was a term of the written contract between the driver and the company. However in moving office in 2001, a number of those documents were lost. The sidemen employed by the driver would then be checked by the company's Works Manager to ensure that they were properly trained.

19. Mr. Williams admitted that although he had an idea as to how long a driver worked as a contractor with the company, he was unable to say how long sidemen stayed in the job, as they were employed by the drivers. He further admitted that he had no record or listing of all sidemen who were trained and that he did not know whether Gilbert Hardie had been trained by George Martin. He was therefore baffled as to how it was possible for a sideman to go out on one of the company's trucks without being trained, given the system the company had in place. He declared however that it was the responsibility of the driver to notify the company when new sidemen were being employed by the driver. If they were not regular sidemen, a temporary pass would be issued at the security gate to enable them access to the compound. Mr. Williams was however unaware as to whether Gilbert Hardie had a temporary pass.
20. Randolph Williams went on to testify that as a driver and an independent contractor George Martin had to operate within the guidelines set out by the company. He was able to make certain decisions on his own, such as the route he would take to do the job of collecting garbage and he was free to choose the method of

doing the job. However he had no authority to vary any of the company's safety guidelines.

21. The General Manger gave evidence that on the particular garbage truck in question, there were two (2) levers on the right side of the truck to the rear, as you stand facing the back of the truck. The procedure to be followed was that the two (2) sidemen would be positioned, one on each side of the truck. The one standing on the right would operate the levers while the other sideman, in this case Gilbert Hardie, would monitor the flow of garbage. Once the skip was attached to a winch, one of the levers was used to lift the skip to the required height and the garbage would run out into the back of the truck by force of gravity. The second lever operated the compaction blade which was a rotating blade which pulled the garbage into the body of the truck and reduced it into smaller quantities by use of pressure.
22. Randolph Williams described two (2) types of blockage that could occur on the garbage truck – firstly, where the garbage did not flow freely from the skip into the collection area at the back of the truck, which was called the 'hopper'. In that case, the lever operating the lifting of the skip would be turned off, and the monitoring sideman could use a piece of wood about 4 to 5 feet in length to dislodge the blockage. The second type of blockage occurred when the waste from the skip emptied so swiftly that the top of compaction blade would be covered with garbage and the hopper filled. In such a case, the waste on top of the blade would have to be pushed down by the monitoring sideman using a stick. For this procedure to take place both levers are stopped, but the engine of the truck could be left on. During the clearing process the compaction blade is not operational. Regardless of the type of blockage encountered,

Randolph Williams maintained that the sideman clearing the obstruction could either stand on the road or stand on the side plate of the truck, to extend his height and reach in order to clear the obstruction.

23. The other sideman on the truck that day, Owen Walker gave evidence on the company's behalf. He testified that on the 10<sup>th</sup> January, 2010, George Martin who operated a garbage truck for the Defendant Company asked him to work on the truck, as his regular sideman was not available. When Mr. Martin came to collect him at about 12 noon, another man, who he subsequently learned was Gilbert Hardie was already working on the truck. Owen Walker seemed to have had some previous association with this driver, as he stated that whenever he worked on the truck, he was paid by the driver and he acted on the driver's instructions. He further stated that he was then being paid \$400.00 per day, but declared that he was not employed to or paid by the Defendant Company. Mr. Walker also indicated that in that year, 2001, he had worked as a sideman for another contractor.
24. In his Witness Statement and in the evidence given before the Court, Owen Walker described the scene prior to the accident taking place. He stated that while emptying the skip, some garbage fell on top of the crushing blade. As the lever operator, he stopped the machine, came around and showed Gilbert Hardie where to stand on the platform at the side of the truck, so that he could easily remove the cardboard box which was preventing the garbage from flowing out of the skip. He further stated that that platform or running board, on which it was safe to stand while clearing the blockage, was located below the roller channel. According to Mr. Walker, the blockage could not be cleared without the machine

being in motion, as the hopper was full of garbage which had to be compressed before the rest of the garbage could be released from the skip.

25. Having shown Gilbert Hardie where to stand safely while removing the obstruction, Owen Walker returned to his position by the levers on the opposite side of the truck. Shortly after turning on the machinery, the driver ran up and put the machine in reverse shouting that “the man foot crush up”. Mr. Walker said he rushed to the other side of the truck where he saw Mr. Hardie holding his foot which was bleeding. When he asked him what had happened, Mr. Hardie replied that he had removed his foot from the stand and placed it in the roller channel to make it easier, but kept it there too long and the roller came down on it.
26. The cross examination of Owen Walker by Mrs. Khan exposed him as a man of simple means, lacking the benefits of educational advantage, as he never went to school and although he said could write, he was unable to read. He did not know his age but stated that he had worked on garbage disposal trucks for ten (10) years as a sideman. He admitted not knowing Gilbert Hardie before that day. He gave evidence that Mr. Hardie said a box was stuck in the skip, but he couldn’t see it from where he was standing on the other side of the truck. He came around and showed Mr. Hardie where it was safe to stand on a platform below the roller channel, in order to remove the box. He then returned to his position by the levers at the rear of the opposite side of the truck. He testified that Mr. Hardie went up on the truck and held on with one hand and used his other hand to “draw out the box”. When questioned as to whether he saw Mr. Hardie use a piece of stick to remove the cardboard box, he replied that Mr. Hardie did not use a stick. He

further stated that there would have been no need for him to climb up on the platform at the side of the truck to remove the box, if he was using a stick. Both under cross examination and in answer to the Court however, Owen Walker admitted that he did not see Gilbert Hardie use his hand to remove the box, as once he was using the lever on the side of the truck, he could not see the other sideman. He was nevertheless unyielding in his position that he had shown Mr. Hardie a safe place on which to stand before going back to operate the lever.

27. A crucial determining factor in this case, as in most if not all cases of this nature, is the credibility of the witnesses who have given evidence. The obligation rests on the Claimant to satisfy the Court on the balance of probabilities of that which he has alleged in his claim. He has the burden of proving that he was employed to the Defendant Company, that as a result of its negligence or that of its servant or agent he sustained personal injuries, that as a consequence of the Defendant Company's actions or the actions of those for whom it was responsible, he suffered loss and incurred expense. An alternative claim has also been pleaded by Gilbert Hardie alleging that the Defendant Company was in breach of statutory duty under the Occupiers' Liability Act. That aspect of the complaint rested on his contention that the Defendant Company owed him a common duty of care and that it failed to ensure that the operations of the garbage disposal truck on which he was required to work were reasonably safe for the purposes for which he was employed. Additionally, it was alleged that the company failed to take the necessary steps to see to it that its employees were suitably trained and instructed to provide reasonable safety to other employees during the course of their duties. Again, this is a

hurdle for the litigant who has initiated proceedings to clear, to the extent required by law, if he is to succeed on his claim.

28. On the issue of whether at the time of this unfortunate incident Gilbert Hardie was employed to the Defendant Company, I find Mr. Hardie's evidence inconsistent and unconvincing. Further, I find that it contradicted not only the evidence of the General Manager of the Defendant Company, but also at times his own evidence. In his Witness Statement, Gilbert Hardie made the following assertions – "I was just told to go and work on the truck by Mr. Williams who hired me" and "... I was employed by Mr. Randall Williams...". In attempting to explain those assertions, Mr. Hardie went on to state that Mr. Williams owned the garbage truck and that he and the company were the same and therefore when he said he was employed by Mr. Williams he meant he was employed by the Company. As a form of clarification, this explanation generated more confusion, particularly in light of Mr. Hardie's further testimony.
29. When asked by Counsel Mr. Batts, who at the company employed him, and to whom did he speak when he went to the company, Mr. Hardie replied that he did not know the name of the soldier with whom he spoke, but that he received all his instructions from that soldier. These included what his duties were, how much he would be paid and how often, as well as identifying the truck on which he was to work. At no time in his evidence did Gilbert Hardie explain when and where he met Randolph Williams and what discussions they had leading to his employment with the company. Mr. Hardie's evidence in fact spoke to the contrary as under cross examination, he admitted that he had never "associated with Mr. Williams" although he knew his face.



30. The changeable nature of his evidence did not however end there. In his testimony before the Court, Gilbert Hardie was adamant that it would not be true if anyone said that he was to have been paid weekly for work done as a sideman. And yet it was his own evidence in his Witness Statement that stated the company paid him weekly in cash at the office. He had also testified that he was to be paid every two (2) weeks. Even the circumstances of the alleged payment were, to say the least, unusual. Contrary to the evidence in his Witness Statement, he testified that he was not paid at the office but in the front parking lot of the compound. Payment was made by a man, whose name he did not know, who came outside with the money. No pay slip was provided, nor was he requested to sign for the cash received. The amount received of Seven Hundred Dollars (\$700.00) was for one (1) day's pay, although his evidence was that he had worked for one week before the accident, that is, the week of the 3<sup>rd</sup> January, 2001.
31. That explanation took another turn when Gilbert Hardie was re-examined by his Counsel. In further answer to Mrs. Khan, he stated that he started working on the 3<sup>rd</sup> January, 2011 and worked only for one (1) day on another truck, not driven by George Martin. It must have been apparent to Gilbert Hardie that his numerous contradictions would have affected his case and so he explained to the Court that since the accident he had a problem with his hearing, as a consequence of his injuries. He did not have this problem before the accident. This was the first time this alleged injury was raised by Mr. Hardie in his evidence. No claim for loss of hearing as a result of the accident was ever pleaded and the medical reports tendered in evidence by consent made no mention of any such injury.

32. It is not in dispute that the garbage disposal machinery cannot operate unless the engine of the vehicle was turned on. Nor is there any dispute that the truck driver George Martin was not on the scene when Mr. Hardie sustained injury to his left foot and in fact only returned to the truck after Mr. Hardie cried out that he was hurt. Against that background, Mr. Hardie maintained that while he was removing the blockage caused by the cardboard box, the engine of the truck was off, but no evidence was led as to who would have started the truck to enable the compaction machinery to be initiated. I do not accept his evidence in this regard. I am satisfied that the engine of the truck was on when he carried out the manoeuvre to clear the blockage. I accept as truthful the evidence of Owen Walker that he pointed out to Gilbert Hardie where he should stand on the side of the truck when clearing the obstruction caused by the box. I am satisfied and I so find that the injuries sustained were caused by Mr. Hardie placing his foot in the wrong location on the truck, despite instructions given by Mr. Walker. I am fortified in my finding by the evidence of Mr. Hardie as to where his foot was positioned prior to his sustaining the injury. When pressed by searching and penetrating questions from Mr. Batts, although initially maintaining that his left foot was not in the roller channel, he went on to state that the roller channel was not covered and that he did not know whether his foot was actually in that opening.
33. In addition, it was admitted by Mr. Hardie that the part of the machinery that crushed his foot moved slowly and that it also made a noise. In those circumstances, Gilbert Hardie ought to have heard when the compacting machinery was engaged. He nevertheless insisted that the engine of the truck was turned off

when he was standing on the side of the truck in order to clear the garbage, that he did not hear the noise of the compactor nor was he aware that it was moving. He realised that the engine of the truck was on only when the toes of his left foot were crushed by the roller.

34. After carefully considering the totality of the evidence before the Court, I find that Gilbert Hardie failed to prove on balance of probabilities that he was employed to or by the Defendant Company. Due to the several shifts and changes in his testimony, it would appear that Mr. Hardie seemed to suffer from an allergic reaction to the truth. His evidence was riddled with inconsistencies, discrepancies and contradictions and I find his testimony unreliable and incapable of belief. When that testimony conflicted with that given by Randolph Williams, I accept evidence of Randolph Williams, which I find he gave in a frank and forthright manner. I accept his evidence that the sidemen working on the company's trucks were not employed by the company, but by the driver with whom the company had a separate contractual arrangement. The evidence of the other sideman, Owen Walker as to his employment to and the payment for his services by the driver George Martin went unchallenged and corroborated the testimony of Randolph Williams, that the driver of the company's trucks was responsible for the hiring of sidemen and the payment of their remuneration.
35. On the issue of whether George Martin was an employee of or an independent contractor with the Defendant Company, the following passages from the learned authors of **Clerk and Lindsell on Torts**, 15<sup>th</sup> edition, provide some assistance. At paragraph 3–02, page 156 they state:

“The two most important classes of person for whose torts another person may be liable are servants and independent contractors...Both classes consist of persons employed to do work, but, traditionally, the distinction between them is taken to lie in the different amounts of control exercisable by the employer. In the case of a servant the employer... reserves to himself by the terms of the employment, express or understood, a power of controlling his servant in the execution of his work and of dismissing him for disobedience to orders. The employer of an independent contractor, on the other hand, cannot control the way in which the work is carried out. He can only give directions as to what work is to be done.”

They further stated at page 159, paragraph 3–04,

“One of the most frequently cited statements is that of Lord Thankerton in **Short v. J. & W. Henderson Ltd.** when he said that there were four indicia of a contract of service, namely, (a) the master’s power of selection of his servant, (b) the payment of wages or other remuneration, (c) the master’s right to control the method of doing the work and (d) the master’s right of suspension or dismissal. Of these, however, (a) and (d) are chiefly relevant in determining whether there is a contract between the parties at all, and the same is true of (b) unless a distinction is taken between methods of remuneration, payment by results tending to prove independence and payment by time, the relation of master and servant.”

The unchallenged evidence of Randolph Williams disclosed that the driver George Martin was paid depending on the amount of work he had done, that is, to say by the number of skips emptied. If he was absent and made no collection of garbage, he was not paid. The extent of his remuneration was therefore performance based.

36. The learned authors continued at page 185, paragraph 3–36:

“A person who procures work to be done for him by an independent contractor is in general ... not liable for the negligence or other torts committed by the contractor in the course of the execution of the work. And in this respect the servants of the contractor, whilst acting as such, stand in the same position as their master, so that the employer of the contractor is not liable for the torts committed by the contractor’s servants.”

I am satisfied on the evidence and I so find that at all material times, the driver of the truck, George Martin, was an independent contractor of the Defendant Company. The sidemen who worked on the truck were employed by him and not by the company. Mr. Martin was free to choose the routes on which to travel to collect garbage and the method, manner and times of collection were determined by him. However he was not permitted to change the company’s safety guidelines. He was paid by the company based on performance related work and was responsible for the payment of remuneration of those who worked with him. The responsibility for negligence on the part of his workers, if such negligence existed would fall squarely on his shoulders and would not be the obligation of his employer.

37. The picture painted by Gilbert Hardie’s own evidence of his actions on that fateful afternoon was that of a man oblivious to his surroundings. Despite his stated experience of previously working on garbage trucks, and the instructions which I find were given by Owen Walker for him to stand on the platform on the side of the truck, he acted in a manner of complete disregard for his own safety. I find that Mr. Hardie failed to take precautions for his own protection, by placing his foot in or near the roller channel at a

time when it was dangerous so to do, thereby causing injury to himself. I am satisfied on the evidence of Randolph Williams that a safe system of work was in place on the truck at the time of the accident. I accept his unchallenged evidence that that vehicle had been serviced the night before the unfortunate incident and passed fit for use on the road. Gilbert Hardie worked on that truck for hours that day without mishap. I find on the evidence that had he stood and remained on the platform as instructed while removing the blockage, he would not have been injured and that it was his placing of his foot in the roller channel just above the platform that caused his injuries.

38. As regards the claim by Gilbert Hardie that the accident in which he sustained injuries was due to breach of the Occupiers' Liability Act ("the Act") by the Defendant Company, his Counsel relied on the Act to show that her client was clearly within the category of persons to whom the Defendant Company owed a common duty of care. The extent of that duty is outlined in Section 3 of the Act and so far as is relevant reads:

S.3(1) "An occupier of premises owes the same duty (in this Act referred to as the 'common duty of care') to all his visitors,...

S.3(2) The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

Counsel submitted that whether her client was a trespasser (which was not admitted), an employee, workman or licensee, he was

owed a duty of care at common law and by statute, which was breached by the Defendant Company.

39. Counsel Mr. Batts in response submitted that no liability could arise under the Act in relation to his client. He relied on the case of **Wheat v. E. Lacon & Co., Ltd.** (1966) 1 ALL E.R. 582 at 600 and 601 where Lord Pearson stated:-

“...it is necessary to say something about the nature of the occupation which is requisite for occupiers’ liability.

The foundation of occupiers’ liability is occupational control, i.e., control associated with and arising from presence in and use of or activity in the premises.”

By virtue of Section 2(3) of the Occupiers’ Liability Act, the term ‘premises’ is widely defined to include not only lands and the buildings thereon, but also any fixed or movable structure including any vessel, vehicle or aircraft. As such, Mr. Batts submitted that in the circumstances of this case, the Defendant Company would not fall within the ambit of the definition of an ‘occupier’, as the truck was under the control of an independent contractor, George Martin.

40. Mr. Batts further placed reliance on Sections 3(4) and (5) of the Act which read:-

S.3(4) “In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances.

(5) Where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the

circumstances it was enough to enable the visitor to be reasonably safe.”

Counsel contended that the evidence before the Court established that Gilbert Hardie had been shown where to safely place his feet on the truck by Owen Walker, when carrying out the manoeuvre to remove the blockage. In any event, on Mr. Hardie’s own evidence, he had previous experience working on garbage trucks prior to this incident. Counsel urged the Court to find that the circumstances of this case were such that Mr. Hardie was warned and was aware of the dangers, had been shown where he was to stand on the truck to keep himself safe, had previous experience in that line of work and as such, there was nothing more that could have been done to ensure that he was reasonably safe.

41. I agree with Counsel Mr. Batts in his submissions with respect to the Occupiers’ Liability Act and I accept that on the evidence before the Court, the Defendant Company is not liable under that Act. I find that neither the Defendant Company nor any of its servants or agents was in occupational control of the garbage truck at the material time. I further find that it was George Martin, an independent contractor who had control of the vehicle, and that the sidemen working on that truck were not employed to, by or were agents of the Defendant company.
42. In light of my findings in this matter, it is the order of the Court that there be Judgment in favour of the Defendant with costs to be taxed if not agreed.