



[2025] JMSC Civ 132

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV 05175

BETWEEN	LEON MAIS	CLAIMANT
AND	JAMAICA NORTH SOUTH HIGHWAY COMPANY LIMITED	1 ST DEFENDANT
AND	CHINA HARBOUR ENGINEERING COMPANY LIMITED	2 ND DEFENDANT

IN OPEN COURT

Jacqueline Cummings instructed by Archer Cummings and Co for the claimant

Charrie Harris and Romae Quarrie instructed by Caribbean Legal Suite for the defendants.

Negligence - Single Vehicle Accident on the Highway – The Duty of the Highway Maintenance Authority to a Motorist – Whether the Defendants breached their duty of Care to Claimant while carrying out construction on the Highway.

Heard: 1st of July 2025, and the 3rd of October 2025

A Thomas J

INTRODUCTION

[1] This is a claim in negligence arising out of a motor vehicle accident on the 22nd of the December 2015 along the Ocho Rios leg of the North South Highway in which both defendants are sued jointly and severally. The claimant, Mr Leon Mais at the material time, was a heavy goods truck driver. The 1st defendant, Jamaica North South High

Company Limited is, a limited liability company, and was at the relevant time the developer of the Jamaica North South Highway, including the Mount Rosser Bypass which forms part of the Kingston to Ocho Rios leg. The 2nd defendant was at the relevant time the contractor employed by the 1st defendant to construct, develop and operate the Jamaica North South Highway, including the Mount Rosser Bypass of the Kingston to Ocho Rios leg.

[2] In his particulars of claim, the claimant alleges that; prior to the 22nd of December 2015, he frequently traversed the Kingston to Ocho Rios leg of the highway in furtherance of his trade as a heavy goods truck driver. He alleges that on the 18th of December 2015 when he traversed that leg of the highway yellow drums was placed on the roadway indicating that motorist should travel in the right lane. On the 22nd of December 2015 at 2am these drums were places in a different position indicating that motorists should travel using the left lane. He followed these directions; however, the conditions were foggy with no streetlight or illumination or markers to assist him in the new direction in which to drive. He avers “that suddenly a flagman, in the employment of the defendants emerged from out of nearby bushes, indicated to him to make a turn to avoid a blockage. However, the roadway was too narrow and the turn too shape for the trailer to manoeuvre and that it eventually overturned while he was attempting to exit the area as directed’.

[3] He also avers that; the accident was caused by the negligence of the 2nd defendant and/or agents whether acting by itself or under the instructions of the 1st defendant; the 2nd defendant so negligently managed, constructed, operated and altered the North South Highway along the Mount Rosser Bypass from Kingston to Ocho Rios, St. Ann that it caused the claimant’s motor truck to meet in an accident in the parish of Saint Ann and overturned.

[4] The Particulars of Negligence as alleged are as follows

- i. Suddenly and without warning altered the direction and the normal path or direction of the road.

- ii. Failed to give the claimant any warning of alteration or any adequate warning of the alteration.
- iii. Altered the normal path or direction of the road without proper signage of this alteration.
- iv. Altered the normal path or direction of the road such as to permit or allow users into an unsafe area.
- v. Failed to provide any signal or signal men at the point of alteration.
- vi. Failed to provide or failed to provide in time signal men or competent signal men at or close to the point of alteration of the road direction.
- vii. Directed the claimant by use of guiding yellow drums to an area of the road that was unsafe;
- viii. Allowed or permitted the claimant to drive on a portion of the road that was unsafe or was unsafe for a tractor/trailer to drive on;
- ix. Failed to keep the Claimant or other users of the highway from the unsafe portions of the road;
- x. Failed to provide adequate lighting, illumination of markings to show a change of the direction of the roadway.
- xi. Failed in all the circumstance to take reasonable care for the claimant safety in the use of the highway;
- xii. Failed to make provisions for heady duty trailers to utilize the roadway in a safe manner.

[5] He particularized his damage and loss as follows.

[6] Cost to put trailer upright	145,000.00
[7] Cost of assessors' report truck	13,800.00

[8] Cost of assessors' report-trailer	12,900.00
[9] Cost to Repair Trailer	234,090.00
i. Cost of Body Work repair to tractor head	1,230,000.00
[10] Cost of bodywork and spray	78,401.71
[11] Cost of repair Engine	255,000.00
[12] Loss of 900 bags of cement	

The Defence

[13] The Defendants admit being aware of a report by the claimant that on or about the day and time in question he was driving a trailer, laden with cement when it overturned at or in the vicinity of the Mount Rosser Bypass of the North South Highway.

[14] They make no admission that, at the material time, there was a change in the layout of yellow drums indicating the direction road users were to follow and that in any event, the claimant knew or ought to have known that sections of the highway, in the vicinity of the Mount Rosser Bypass, were still under construction and, as such, it was necessary to pay attention to and carefully observe all signage, safety indicators and such others aimed at safely guiding motorists as to the direction in which to drive. They contend that it is possible that the claimant did not see these markers or illumination because of the foggy conditions or because of a lack of due care and attention on the part of the claimant as all material times the highway was fitted with proper signage alerting motorists to be extremely careful when proceeding along such areas.

[15] The defendants aver that at all material times, the claimant knew or ought to have known that the works on the highway were ongoing and that there were no street light, hence, motorists were always warned by a number of safety features and indicators to proceed with extreme caution; the flagman was strategically and carefully positioned along the concerned section of the Highway to direct motorists where to drive; he was never in the bushes.

[16] *The defendants deny that the roadway was too narrow and the turn too sharp for the trailer to manoeuvre. They aver that; from their investigations, the trailer overturned because of the failure of the claimant to proceed with the due care that was required given all the circumstances of the case, including the claimant's knowledge of ongoing road works, the existing foggy conditions and that the claimant was driving at night. in particular, the claimant was driving at a greater speed than it was safe to proceed at and also failed to pay sufficient attention to the safety directions and aids that were present to assist motorists with the safe usage of the material section of the highway".*

[17] The Defendants deny that they failed to make provisions for heavy duty trailers to utilize the roadway in a safe manner. They say that, prior to, at and subsequent to the material time, heavy-duty trailers constantly utilized the material section of the highway without accident or incident. They deny that the claimant suffered any loss and damage as a result of any negligence on their part.

The Evidence

Of the Claimant

[18] Mr, Leon Mais states that he has a license to drive tractors and trailers since 1996 and that he frequently traverses the Kingston to Ocho Rios leg of the Jamaica North South highway now called the Edwards Seaga Highway on a regular basis in furtherance of his trade as a heavy goods truck driver. He testifies that on the 22nd day of December 2015, he left home approximately 1:00 a.m. to carry a load with 900 bags of cement to Montego Bay; he went onto the North South Highway, in particular, the Mount Rosser Bypass and paid the toll of nine hundred & eighty dollars (\$980.00) at the toll booth at Ewarton; as he was driving along the road, he came upon the first big hill and thereafter travelled down the hill; it was dark and there was no streetlight or any other form of light such as illuminator or markers to assist him with the new direction in which to drive; there was also a thick fog on that part of the road, hence he drove slowly.

[19] Mr. Mais also states that a friend of his was driving his truck behind him as they were travelling together. He says that when he got to a section of the highway, he saw that there were some yellow drums and that when he had driven on the same North South Highway the previous Saturday the same drums were there directing him to drive to the right. He says this time he followed the line of drums, and it directed him to drive to the left instead. He says that continued to drive and was looking to see where the line of drums was taking him when he suddenly saw a flagman appeared in front of the truck who then started directing him with his flag to make another turn to avoid a blockage.

[20] However, by the time he turned with the load he was carrying, the roadway was too narrow, and the turn was too sharp for his trailer to make and as a result the trailer overturned. He says he does not know where the flagman turned after he directed him. He also says that his friend who was travelling from Kingston too, almost got lost on the highway. He states that several other vehicles came, and as the position of the highway had changed police had to come on the scene to assist them as to where to turn. He asserts that the sudden change of the roadway by the builders of the highway and for them to change the positioning of the roadway where it turns in the manner it did was negligent as it put himself and other users of the road in danger. He also asserts that the failure to provide lights along the highway when its direction was changed was also careless as it put all the users of the roadway in danger.

[21] He says he only recovered four hundred & seventy (470) of the nine hundred (900) bags of cement that was on his truck as the others were destroyed when the trailer overturned; his truck was his main source of income and after the accident his truck was in disrepair for about six (6) months as such he was not able to earn any money. He states that on a regular basis he would earn fifty-eight thousand Dollars (\$58,000.00) to travel to Negril and fifty-four thousand dollars (\$54,000.00) to travel to Montego Bay and twelve thousand (\$12,000.00) for around town trips within the corporate area. He asserts that he would normally do six (6) Montego Bay trips for the week and two around town trips of six (6) Negril trips for the week. He had to repair the tractor head at a cost of \$1,230,000.00. He had to repair the engine at a cost of \$255,000.00 and do bodywork on the truck for the amount of \$78,401.73.

[22] Mr. Mais states that the repair of his trailer cost \$234,09; He also had to pay to put on the trailer head in the amount of \$145,000.00; He lost earnings for six months at \$373,600.00 per month amounting to \$2,241,600.00; The 470 bags of cement that were destroyed cost \$875.00 each and hence he lost \$411,250.00 worth of cement. He had to pay for the Assessors Report for the truck and trailer amounting to \$26,700.00. He asserts that his total loss as a result of this accident is \$6,239,729.73.

[23] On cross examination Mr. Mais states that he travelled 4 times on the highway in the previous week to include the Saturday, and that the accident occurred the following Tuesday. He states that he was not aware of construction on the highway but on a building close to the highway. He was aware of the presence of the yellow drums but those were to take away the traffic from the construction of the building in the vicinity of the highway on the right. These yellow drums, he says, were used to create a single lane that allowed the motorist to continue straight ahead.

[24] He does not agree that because he was used to seeing the drums in a particular place, he failed to keep a proper look out. He admits that there was fog on the road at the time. Given those conditions he says he was travelling at a lowered speed as he was going downhill. He says he was travelling at 25 to 30KMPH. He agrees that because he was used to a certain lay out he was traveling with that in mind. He states that when manoeuvring a sharp corner he would slow the truck right down and then make a wide turn; If he realized he was not going to make the turn he would stop, reverse and try again. When asked if on the 22nd of December 2015 if he stopped and reversed he says he did not as they wanted him to turn left but there was no turn there. When referred to his witness statement in which he states that the turn was too sharp he says he could not stop because when he saw the flag man in front of the blockage he had already passed where he wanted him to turn because "they cut off the highway".

[25] He mentions that he could not stop because the weight on the truck was pushing him forward. He explains further that a "truck with weight cannot stop on a dime like a car. The blockage and the flagman came up unexpectedly, so he had to try and negotiate the turn and so the truck flipped over. It would take 2 to 3 seconds for the truck to slow down.

He did not have two to three seconds to slow down He tried to stop but the notice was too short when he came upon the blockage and the flagman”.

[26] Mr. Mais also says that; he usually come along the road way at 2’ Oclock in the morning and that on the Saturday evening the presence of the drums, allowed him to travel straight ahead in the right lane; on the 22nd the blockage was across the high way two to three feet from the slip road; he was directed to turn on the slip road. He says he came upon the drums at the same time as on Saturday but on a different side. He insists that there was no light on the road at all and that he was directed to turn on the slip road that leads to Moneague.

[27] He states that; If he intended to turn on the slip road he would have taken up his position in the lane at a point before he was directed to turn; if he was not directed to turn he would have continued straight ahead; If he was not directed to turn he could have ended up in the barrier; the barrier was not there on the Saturday. He agrees that though the barrier was not there on the Saturday but there on the Tuesday he had a responsibility to take care for his own surety.

The Evidence of Defendants

[28] Mr. Patrick Cohen is the only witness called on behalf of the defendants. He states that from 2014 he has been employed to the Jamaica North South Highway Company Ltd who is responsible for developing and maintaining toll roads in Jamaica; he is maintenance service officer since 2020. He states that at the time of the incident he was the one who responded to the call regarding the accident; he got the information at 3:37 AM and arrived on the scene at 3:47 AM. He says that he observed the trailer overturned at the turn; he sets up the necessary traffic management including cones to restore adequate traffic flow; he saw cement strewn all over; due to the size of the trailer an independent wrecker was used to remove it.

[29] On cross-examination Mr. Cohen states that he arrived on the scene after the truck was overturned. He agrees that there was a barrier beyond where the truck overturned

preventing the truck from going beyond. He agrees that based on his investigations another truck passed the turnoff, hit down the barrier, and went through the barrier. When it was suggested that it was after the accident that signs were put up he says he cannot say when the signs were put up but they were there when he arrived. He says the China Harbour Engineering Company was responsible for the extension of that part of the road. He does not remember if it took Mr. Mais 24 hours to have the truck removed but it took a long time. He admits that the barrier was on the road way because they were doing construction on that leg of the roadway.

The Issues

[30] The following are the issues which arise in this case;

- i. Whether the defendants owed a duty of care to the claimant
- ii. Whether any duty of care owed by the defendants to the claimant was breached

[31] Whether that breach caused the claimant to suffer damages

[32] Whether the Claimant failed to take care of his own safety so as to be guilty of Contributory Negligence

The Law

[33] The case of *Donoghue v Stevenson* [1932] UKHL 100 is the Locus Classicus on the law of negligence. Lord Atkins in the judgment of the court stated that “reasonable care must be taken to avoid an act or omissions which a reasonable man can foresee may cause injury to a neighbour”.

[34] He defines “your neighbour” as “anyone who is directly affected by your actions”.

[35] The principle of negligence was also discussed in the case of **Blyth v Birmingham Waterworks**, [1856] 11 Ex Ch 781. In that case, the Birmingham Waterworks Company, incorporated by statute to supply water to Birmingham, was required by law to maintain and install fireplugs in streets where main pipes were laid. According to the statute, these fireplugs were to be kept functional and properly maintained, with specific instructions for their placement and upkeep. The fireplug opposite Mr. Blyth's house was installed in accordance with the statutory requirements and was constructed with sound materials. However, during an unusually severe frost, the fireplug failed, leading to a flood that damaged Mr. Blyth's property. Mr. Blyth subsequently sued the Waterworks Company for negligence, arguing that their failure to prevent the frost-related failure of the fireplug constituted a breach of their duty of care.

[36] In that seminal decision the court stated that:

“Negligence is the omission to do something which reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done or did that which a person taking reasonable precautions would not have done”.

[37] Regarding the issue of Contributory Negligence, Section **3(1)** of the **Law Reform (Contributory Negligence) Act** is applicable. The section provides as follows:

“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...”

Submissions

[38] Ms. Cummings counsel for the claimant points out that in their submissions, the defendant’s states “that they owe a duty of care and that the 1st defendant have a duty to ensure that the highway is reasonably safe ensuring that their acts or omissions do not cause injury to any road user”. They note construction, foggy conditions, and drums on the road. They acknowledge no lights were present. Counsel submits that the defendants

were aware of the foggy conditions yet failed to ensure that lights were within the vicinity of the construction so road users could adequately see and heed the road apparatus directing them where to go.

[39] Counsel posits that the claimant's evidence was that the flagman, whose duty was to alert road users of the change in the road appeared unexpectedly and out of nowhere at the blockage. This, she submits *"is supported by the defendants' stating that the flagman was strategically placed near the barrier on the highway. He may have been clouded in fog and not readily visible unless in close proximity. However, no evidence was led by the defendants as to the flagman's position before the accident. This supports the claimant's contention that he was not adequately alerted of the disruption until it was too late to make the turn, especially as he was driving downhill in a truck laden with cement. Despite the defendants' contention that he should have decreased speed further than 25–30 kmph, a heavy vehicle requires adequate time and space to negotiate turns, which was not afforded him, the turn being narrow and warning given at the last minute. Thus, even at a slower speed, the incident would still have occurred"*.

[40] Counsel further submits that the 1st and 2nd Defendants failed to consider that bigger, heavier vehicles required more notice of obstructions, especially given the fog and lack of lighting and that while they sought to shift blame to the claimant, the evidence shows they were aware of the state of the highway but failed to take prudent steps for safety, thereby breaching their duty of care. She asserts that the claimant, an experienced driver since the age of 19, drove at a reasonable speed with due care.

[41] She submits that the defendants' own witness, Mr. Patrick Cohen, stated that another truck collided with the barrier, showing that it was not only the claimant that was affected by the sudden roadway change but also another truck. This supports the claimant's contention that the defendants failed to have due regard for heavy vehicles. There does not need to be a witness statement from the other driver, as Mr. Cohen's evidence while under oath is sufficient for the Court to consider and give appropriate weight. Accordingly, the claimant has discharged his burden of proof, and negligence is established against the Defendants. The Court is asked to find for the claimant against

the defendants jointly or severally, with interest and costs, and to award special damages **of \$4,100,829.23 with** interest as the Court deems just

[42] On behalf of the defendants Mr. Quarrie made the following submissions;

- i. The claimant and the 1st and 2nd defendants each had a duty of care. The claimant had a duty of care to ensure that he conducted his self in such a manner and with such care to prevent any injury to any other person, thing or his self. The defendants had a duty to ensure that the highway was reasonably safe ensuring that their acts or omissions did not cause injury to any road user. The claimant had a duty of care to ensure the safety of other road users, that means driving at a reasonable speed, paying attention to signs and directions on the road way, adjusting speed if there is a change in conditions that may affect visibility, ensuring that fatigue is not present, and if he is then taking a break to rest before continuing the journey. (He relies on the cases of In Blyth v Birmingham Waterworks; Esso Standard Oil SA Ltd & Another v. Ivan Tulloch (1991)
- ii. The claimant was aware of the conditions that existed on the highway at the time of the accident. The claimant knew that the conditions on the highway were not of the usual state due to several factors, being construction on/in the vicinity of a section of the highway; foggy conditions and apparatus on the highway; namely, drums to indicate that road works were underway. Despite knowing this, the claimant manoeuvred his motor truck in such a manner that was not reasonable. When all these factors are taken into consideration, the claimant should have acted in a manner that a reasonable and prudent man would have done.
- iii. The claimant being apprised of certain information about the circumstances that existed on the highway at the time should have, if

nothing more, significantly decreased his speed when approaching the area of the highway in which the construction was taking place. On the basis that there could have been any type of change on the layout of the road as well as any apparatus that could have fallen on to the road, coupled with the fact of there being a natural phenomenon on the highway at the time inhibiting vision. Fog is a common occurrence at varying times of the day on the highway. Fog is not a phenomenon that occurs instantaneously while you are driving so as to inhibit sight. The claimant was aware of the situation of low visibility by virtue of fog being present on the highway, considering that he travelled on the highway often and ought to have known that his driving should be adjusted in expectation of these conditions.

- iv. The claimant did not act as a prudent and reasonable man would in the circumstances. The claimant also knew there were no lights on the road. The claimant operated his motor truck guided by the assumption that the illuminated drums that were present on one side of the road previously would have been present on the same side of the road on his subsequent journey. As a result of this presumption the claimant drove his motor truck without due care. Had the claimant not developed a presumption that the layout of the highway was the same as before then perhaps the claimant would have been more careful thus preventing the accident from occurring. The claimant would have decreased his speed even further than 25 or 30 km/h and would have ensured that he paid significant attention to the roadway during his journey. Had the claimant operated his motor truck in a reasonably safe manner he would have noticed the change in the road way before reaching a point where it was difficult for him to manoeuvre thus causing him to attempt to make a sharp turn and then overturning as a result.

- v. The claimant also is the proximate cause of the damage to his motor truck. By failing to act reasonably in the circumstances and proceed cautiously the claimant caused the damage of his load and his motor truck. The 1st and 2nd defendants maintained their duty of care to the claimant. There was a flag man present on the highway as well as illuminated drums to direct the road users on the side of the road that should be used. The flagman was strategically placed near to the barrier on the highway. The flagman was present on the highway to direct drivers to make the turn, to ensure that the drivers did not drive through the barrier placed on the highway. Had the Claimant operated his motor truck in a reasonable manner then he would have been able to see the flagman with sufficient time to make a decision. The flagman would have been clouded in fog and therefore may not have been readily visible with the naked eye unless in close proximity to him.

- vi. The claimant's action was the cause of the accident as the claimant was not travelling at a reasonable speed given the circumstances on the road at the time of the accident. Had the claimant been travelling at a reasonable speed he would have been able to stop, swerve, change direction upon realizing that there was a change in the roadway. Travelling at a speed of 25 or 30 km/h at the time of the accident was not reasonable at that time. The claimant should have reduced his speed on the section of the highway where the accident occurred. Travelling with 38 tonnes of cement, he should have reduced his speed to at least 10 km/h. The claimant ought to have contemplated that if there was any impediment on the road either due to a natural phenomenon or man-made that he would need ample time to stop, swerve or change direction. Therefore, it may not be reasonable to drive at a speed that would prevent these actions from being done in order to prevent damage to himself and others.

- vii. Further, the Claimant knew that he was driving a vehicle that could not stop immediately if needed to due to any circumstances that may present themselves on the highway. The claimant should have decreased his speed with this factor, this, would have given the claimant ample time to brake once he realized that the flagman was in the road directing him to turn and before coming into sight of the barriers. The defendant's witness, Mr. Patrick Cohen indicated that there were already signs on the highway when he got there.
- viii. The claimant asserted that there was another truck that collided with a barrier that was placed on the highway. The defendants ask that this statement not be considered in determining the reasonable driver on the highway. There was only a cursory statement made by the claimant in relation to the 2nd driver. There was no witness statement from this 2nd driver and as such this driver would not have been assessed on the veracity of his claim. Further, the 2nd driver was not put before the court to be cross-examined on his actions and whether his actions were reasonable in the circumstances.

ANALYSIS

[43] I bear in mind in this case that the Claimant has the burden of proof to prove his case on a balance of probabilities.

Whether the Defendants owed a duty of care to the Claimant

[44] It is an established fact that the defendants were carrying out construction work on the highway traversed by motorist. In accordance with the principles laid down in the cases of ***Donoghue v Stevenson*** and ***Blyth v Birmingham Waterworks*** the defendants should have had these, motorists in their contemplation as persons who would have been

affected by their acts of omission or commission. Therefore, the claimant being one of those motorists, is someone to whom the defendants owed a duty of care. As appropriately put by counsel for the defendants *“That duty of care was to ensure that the highway was reasonably safe, ensuring that their acts or omissions did not cause injury to any road user.”*

Whether the Defendants Breached Their Duty of Care

[45] In order for the court to determine whether the defendants failed in their duty of care to the claimant this court must first determine the issue of causation. The contention of the claimant is that it was the sudden change of conditions on the highway by the defendants, rendering the roadway too narrow, and the creation of a turn that was too sharp for his trailer to make that caused his trailer to overturn. He also points to the failure of the defendants to provide light on the highway as a contributing factor. The defendants have ascribed the blame for the accident to the claimant. In their defence they deny that the roadway was too narrow and the turn too sharp for the trailer to manoeuvre. Counsel for the defendants submits that the claimant would have been aware of the presence of the drums on the road and the foggy conditions, so the accident could only have occurred by the claimant failing to cut his speed and his failure to pay due care and attention.

[46] However, having assessed the evidence it is observed that there is no dispute that the defendants had altered the normal flow of traffic while working on the highway. There is no dispute on the evidence that the initial alteration was effected by using yellow drums to create a single lane on the right that allowed, motorist travelling towards Ocho Rios to continue straight ahead. There is no dispute that this was the prevailing condition on the Tuesday prior to the 22nd of December 2015 when the claimant travelled that route. There is also no dispute that on the 22nd of December 2015 when the claimant travelled the same route there was another alteration to the flow of traffic. Whereas, previously a single right lane was created for traffic going towards Ocho Rios, the single lane was no longer on the right but a single lane had been created on the left for the flow of traffic going towards Ocho Rios. Additionally, whereas previously, traffic could have continued

straight on towards Ocho Rios, a blockage had by then been placed at a point on the highway blocking the flow of traffic from continuing straight towards Ocho Rios.

[47] Counsel for the defendants submits that the speed of 25 or 30 km/h at which the claimant was travelling at the time of the accident was not reasonable and that the claimant should have reduced his speed on the section of the highway where the accident occurred to at least 10 kmph. He also submits that at a reasonable speed the claimant would have been able to stop, swerve and change direction upon realizing that there was a change in the roadway.

[48] However, I find that there is no evidence to support the contention that if the claimant was travelling at a speed of 10kmph per hour the accident could have been avoided or that travelling at a speed of 25 to 30 kmph, the claimant was travelling at an excess speed. The claimant has not denied that he saw the yellow drums on the left. The evidence of the claimant is that he was following the drums to see where they led, when the flagman suddenly appeared in front the truck who then started directing him with his flag to make a turn to avoid a blockage.

[49] His evidence also, is that he had already passed the point where the flagman was indicating for him to turn. This evidence has not been refuted. In essence this evidence points to the absence of a clear indication that the motorist had to turn left and not continue straight ahead. This is in light of the fact that there was a clear path for the truck to continue beyond this turn prior to encountering the flagman, or sight of the blockage. Essentially, the evidence indicates that the direction as to the path that the motorist should have taken was not sufficiently clear. There is no evidence as to what material was used to create the blockage. However, the fact that the defendants saw the need to have a flagman in place at the point of the blockage is an indication that the blockage in itself was not sufficiently illuminated to warn approaching motorists. The uncontradicted evidence of the claimant is that if he intended to, or had prior knowledge that he had to make that left turn he would have positioned himself to make the turn earlier.

[50] The evidence of the claimant that the blockage and the flagman came up unexpectedly was not discredited on cross examination. He remained consistent in his

response. In their defence the defendants say that, “at all material times, the flagman was strategically and carefully positioned along the section of the highway to direct motorists where to drive and the flagman was not in the bushes”. Nonetheless there is no evidence from the flagman or anyone else to contradict the version given by the claimant that the flagman was not in position at all material times but that he came out suddenly indicating to the claimant to turn right at a point where it was difficult to make that turn. The defendants in their defence also deny that the roadway at the turn was too narrow and the turn too sharp for the trailer to manoeuvre. They contend that, “prior to, at and subsequent to the material time, heavy-duty trailers constantly utilized the material section of the highway without accident or incident” but have provided no evidence to support these contentions. The defendants have produced no evidence to contradict the version given by the claimant despite the many assertions in defence counsel’s submission that the accident was due to the claimant speeding during foggy conditions with the knowledge that there was ongoing construction on the highway.

[51] Consequently, I accept the version of the claimant as to how the accident occurred. I accept his evidence that the conditions were foggy as such he drove slowly. I accept his evidence that he became aware of the presence of yellow drums being on a different side of the road from which they were on the previous Tuesday when he travelled the same route. I accept his evidence that he was driving and watching the drums to see where they led. I accept his evidence that while doing so he came upon an unexpected barrier and a flagman suddenly appearing in the road directing him to turn at a point that his truck had already passed. I accept his evidence that in attempting to make the turn he found that the turn was too sharp and the roadway too narrow. I accept his evidence that this caused his truck to overturn.

[52] Essentially, as it relates to the issue of causation, I find that the claimant has satisfied the causation test established in the case of **Barnett v Chelsea Hospital** [1969] 1 QB 428. That is, the accident would not have occurred had it not been for the failure of the defendants to provide sufficient illumination, sufficient notice, and clear direction, having changed the route for the traffic flow in circumstances where they were aware

that there were no streetlight and that area is subject to fogging. (See also the case of **Glenford Anderson v. George Welch** [2012] JMCA Civ 43);

[53] As to the issue of foreseeability, in my view, the defendants had created an obvious danger for motorist traversing the highway. That is, having changed the normal route for the flow of traffic, I find that there was a foreseeable risk of danger or harm, to a motorist travelling at night with no streetlight, compounded by the foggy conditions, insufficient notice, and no clear direction of the new flow/route. The fact that the defendants saw the need to have a flagman on the route is an indication that they were aware, and ought to have been aware that the presence of the barrier with no clear indication that vehicles had to make the left turn created a dangerous hazard for motorist.

[54] In view of the evidence, it is apparent that without the presence of the flag man, there was no notice that a motorist should not proceed straight until they came upon the barrier. His presence was clearly necessary not only to point out the blockage ahead but to indicate the left turn. I accept the evidence of the claimant that at the point that he saw him; the flag man was coming from the bushes. However, there is no evidence from the defendants whether any relief was provided for this single flagman in the event that he had an emergency such as a nature call that would prevent him from being in position at all material times.

[55] Additionally, counsel for the defendants is asking the court to reject evidence that another truck went through the barrier on the same occasion, on the basis that there is no statement from that truck driver. However, while the claimant cannot speak to the state of mind of that driver, he can speak to his observation of facts. Moreover, while evidence from the other truck driver could possibly reinforce the evidence of the claimant as to what he saw, the absence of such evidence does not amount to a contradiction to existing evidence where there is no evidence pointing to the contrary. Nonetheless, I accept the evidence of the claimant that his friend, a truck driver, was travelling behind him at the time of the incident. The claimant's evidence is that his friend got lost. It is in fact the defendants' own witness, Mr Cohen, that has provided more context to this assertion. He

admits on cross examination that the incident of another truck being driven through the barrier did come to his attention.

[56] In the case of ***Bird v Pearce*** [1979] RTR 369. the Court of Appeal held that, by painting white lines at a series of junctions along the road and then omitting to repaint the lines that had been obliterated at one junction, the council had themselves created a potential source of danger that had not existed before the lines were painted. In effect they had trapped motorists into relying on the white line markings as indicating that they were driving along a major road and that they had priority over traffic in the side roads.

[57] In the instant case I find that the accident was caused by the failure on the part of the defendants to ensure that the measures they put in place, while carrying out construction on the highway functioned effectively. The claimant has produced evidence of loss and damage to include loss of cement, loss of earnings, cost of repairs and assessors' fees. These which have been substantiated by supporting documents have not been discredited by the defence. Consequently, I find that the claimant has proven on a balance of probabilities that the defendants breached their duty of care towards him. That he suffered damages and as such he is entitled to award in damages

Whether the Claimant is Guilty of Contributory Negligence

[58] Counsel, Ms Cummings submits that:

- (i) The 1st and 2nd Defendants sought to allege negligence on the part of the claimant owing to the fact that the claimant gave evidence that he travelled on the highway several times during the week prior to the accident, and that he was aware of the conditions which existed on the highway. However, this cannot be a reason to base negligence on the part of the claimant. The claimant in his oral evidence indicates that the state of affairs on the highway as it relates to the construction at the time of the accident, was not the same state of affairs when he travelled on the highway previously. It was always

the claimant's position that there was a change to the direction of the roadway from what it originally was versus at the time of the accident. The claimant's oral evidence during cross examination is that at the time of the accident, he was driving slowly, travelling at around 25-30 kmph. This is a speed at which any ordinary, reasonable truck driver would travel on the Jamaica North South Highway.

- (ii) At trial, counsel for the 1st and 2nd Defendants during cross examination questioned that if the claimant failed to keep a proper lookout because he was used to the drums being in a certain position to which the claimant answered in the negative. The 1st and 2nd Defendants have not established negligence on the part of the claimant. The claimant at all materials proceeded along the highway slowly and acted as a prudent and reasonable truck driver, with the knowledge of highway construction, and did not presume the layout of the highway was the same as prior times he travelled. The Claimant though could not anticipate sudden drastic changes without proper notice. At the trial there was no evidence adduced which supports the 1st and 2nd defendant's contention that the claimant was negligent. 1st and 2nd defendants have not established negligence on the claimant's part. The evidence led indicates that the claimant upheld his duty of care and acted as a reasonable and prudent man. The accident was a direct result of the defendants' acts and omissions, not the claimant's fault, and he should not be found contributorily negligent.

[59] However, counsel for the defendants relying on **Section 3(1) of the Law Reform (Contributory Negligence) Act** (Jamaica), submit that the claimant knowing that the conditions on the highway were not in its usual state due to: construction on a section of the highway, foggy conditions, drums to indicate that road works were underway. manoeuvred his motor truck in such a manner that was not reasonable.

[60] Counsel further submits that:

"The claimant breached his duty of care and should have acted in a manner that a reasonable and prudent man would have done. The claimant being apprised of certain information about the circumstances that existed on the highway at the time should have, if nothing more, significantly decreased his speed when approaching the area of the highway in which the

construction was taking place”.. The Claimant had a duty to ensure that he operated his motor truck with reasonable care to ensure that there was no harm to any other road user as well as his self. If the court finds, on a balance of probabilities, that the defendants were in fact negligent, there ought to be findings that the claimant was also negligent in his actions. The damages that resulted from the claimant’s motor truck overturning were directly as a result of his failure to keep proper lookout, to adjust his speed in consideration of fog being present and construction being done in the vicinity of the highway. In light of the foregoing, the claimant should be adjudged as liable partly for his actions and liability apportioned to that extent.

Analysis

[61] The established legal principle as it relates to this issue is that a defendant is allowed to rely on the defence of contributory negligence in seeking a reduction in the award of damages to the claimant. Where this defence is raised, the burden of proof rests on the defendants to prove on a balance of probabilities that that the claimant did not act as a reasonable and prudent man in circumstances where he ought reasonable to have foreseen that if he did not act as a reasonable and prudent man, he might hurt himself, taking into account the possibility of others being careless. (See the judgment Denning, L.J. in the case of **Jones v Livox Quarries Ltd.** - [1992] 2 Q.B. 608, at 615), and the case of **Caswell v Powell Duffryn Associated Collieries Ltd.** [1940] A.C. 1).

[62] Having assessed the evidence, I agree with the submissions of counsel for the claimant that the defendants have failed to adduce any evidence to establish contributory negligence on the part of claimant. As, was pointed out earlier the claimant states that he was travelling slowly, at 25 to 30 kmph because of the presence of the drums, the fogs and lack of lighting. There is no evidence refuting these assertions of the claimant. The defendants in asserting contributory negligence on the part of the claimant point to his evidence that he did not stop or reverse. They also assert that he did not swerve. In essence they have taken the position that if these actions were taken by the claimant he could have avoided the accident and the consequential damage. However, the evidence of the claimant is that he tried to stop but because of the blockage and the flagman coming out suddenly he could not stop immediately because the weight on the truck was pushing

it forward. He also went on to explain that on breaking, the truck would take two to three seconds to stop. I accept this explanation in view of the fact that there is no evidence to refute these allegations. Additionally, in order to reverse the claimant would first have to stop. Therefore, his explanation regarding his failure to stop sufficiently explains his inability to reverse at the particular juncture

[63] In my view, it is reasonably expected that if a hazard or obstruction appears unexpectedly on the roadway, that would prevent a motorist from having sufficient breaking time. In these circumstances the cause for any mishap cannot be placed at the feet of the motorist. Additionally, having accepted the evidence of the claimant that the turn lane was narrow, I cannot envisage how swerving would have assisted in avoiding the accident as there would have been insufficient space to swerve on either side. I have taken into consideration the evidence of the claimant that, while attempting to stop he was being pushed forward by the weight on the truck and could have ended up in the blockage. This is the same blockage that the witness for the defendant admits that another truck was not able to avoid. As such I find that the only other choice that was available to the claimant was to attempt to make the turn. In those circumstances I find he cannot be faulted for making this choice. Therefore, I find that the defendants have failed to establish contributory negligence on the part of the claimant. Consequently, I find that the defendants are liable in damages for the total loss incurred by the claimant arising from the accident.

Damages

[64] The claimant has produced receipts and evidence of loss totalling \$4,100,829.23

[65] I accept this evidence of the claimant that this is the total loss he suffered arising from the accident. As such I find that the defendants are liable to the claimant in damages in the sum of \$4,100,829.23 plus interest. Consequently, I make the following orders.

Orders

- 1) Judgment for the claimant in the sum of \$4,100,829.23
- 2) Interest is awarded at a rate of 3% from the 22nd of December 2015 to the date hereof
- 3) Cost to the claimant to be agreed or taxed.

.....
Andrea Thomas
Puisne Judge