[2013] JMSC Civ 115

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2008 HCV 02086

BETWEEN	**ADURRAZAQ V. MCKNIGHT**	**CLAIMANT**
AND	**THE KINGSTON WHARVES LTD.**	**DEFENDANT**

Heard: 6th & 7th March 2012 ,19th July 2013 & 15th August 2013

GEORGE J:

Mr. Sean Kinghorn and Miss Danielle Archer instructed by Kinghorn and Kinghorn for the Claimant

Mr. Kuame Gordon instructed by Samuda and Johnson for the Defendant

NEGLIGENCE / EMPLOYER'S LIABILITY/ CONTRIBUTORY NEGLIGENCE/ QUANTUM

[1] In this claim, the Claimant alleges that on the 13th May 2008, whilst in the employ of the Defendant and while performing his duties as a mechanic he sustained serious personal injuries. He alleges that the Defendant was negligent in the manner in which it carried out its operations and thereby exposed him to a risk of injury; thus being negligent towards him and or in breach of its duty as an employer in failing to provide requisite warnings, notices and or special instructions in the execution of its operations so as to prevent the said injuries.

The Accident

[2] The Claimant was a mechanic employed to the Defendant. It is not disputed that the Claimant was called to address a stacker machine which was malfunctioning and that in accordance with his duties as a mechanic he sought to resolve the problem. In doing so, he went on top of the container, which was on the spreader bar on the

stacker. This, the Claimant estimated was at the time about 14ft from the ground. The Claimant alleges that he got on top of the container; asked the operator of the stacker to operate the slewing functions, which would manipulate the container on the spreader bar left or right; instead the container rose higher it plummeted and he fell 20 ft to the ground. It is also not in dispute that as a result of this fall, he sustained serious personal injuries.

The Main Contention

[3] The main issue is that of contributory negligence as liability is not disputed by the Defendant. However, it alleges that the Claimant was also the author of his injuries and consequently it should not be made to compensate him for the full loss claimed but any compensation in damages should be reduced by taking into account the extent of his blameworthiness or his carelessness.

[4] The Defendant through its defence has indicated that it does not dispute that it failed to provide the requisite warnings, notices and special instructions to the Claimant (and its other employees), in the execution of its operations. It is in this regard it accepts some liability for the accident and so ultimately some liability for the Claimant's resultant injuries.

[5] An essential question for the Court therefore, is whether the Claimant contributed to the damage he suffered, due to his own actions. If this is answered in the affirmative, then a second question arises there-from. That is, to what extent did his actions contribute to his damage/injuries? In other words, by how much was he contributory negligent? These are questions to be answered from the facts proven by the evidence. I am of the view that before considering these questions, it is necessary to undergo an analysis of the law and the facts in relation to the Defendant's duties as an employer in the circumstances of this case. In so doing, the questions posed above will be provided with fodder from which they can be answered; along with taking into account the Claimant's conduct in light of his legal responsibility to as far as reasonably foreseeable, guard against personal harm.

Analysis of the Defendant's Duties

[6] The Defendant's duties to the Claimant require consideration against the 'back drop' of his duties as an employee. The Claimant describes his duties and the function of the stacker machine as follows: "My duties as a mechanic in the maintenance department were to maintain container equipment known as stockers. Stockers, manages and lift the containers, moving them from point A to point B. If there is a breakdown with any one of these stocker machines, my job was to find the fault and repair it. The Stocker is a machine used by my employers to stock and move the containers around. The stocker machine has a part called a boom. The Boom is like an arm. It extends and retracts out and in and moves up and down. It is what is used to take up the containers on the wharf. At the end of the Boom is a part called a spreader. This would be like our fingers. These are known as twist locks. When the Boom is manouvered near enough to a container that needs to be moved, the spreader acts with its twist locks and holds the container securely so it can be lifted to where it is desired to go."

[7] I found the Claimant to be a witness of truth and found him to be more credible than the Defendant's witnesses. I am mindful that the standard of proof is on the balance of probabilities. I accept the Claimant's evidence that he had asked the machine operator, Mr. Neville Lewis to lower the container so he could get on top of it to check the problem. This Mr. Lewis did and the Claimant got on top of the container and then unto the spreader bar of the stacker. The container was lowered but not landed. Having checked the electrical box on the spreader and confirming that this was "ok", he came off the spreader and stood up on the container. He started to move towards the "sticking solenoid" when he felt the container rising. He had asked Mr Lewis to operate the slewing function and could see him carrying out some operation in the cab area of the stacker. The claimant is unable to say with any certainty whether this caused the accident. But the evidence indicates that it is not the slewing function which controls the lowering or rising of the container. The Claimant fell, lost consciousness and awoke in the Kingston Public Hospital.

Common Law Duty of Care

[8] It has long been established at common law that an employer owes a duty of care to his employee. The first point of note and endorsed in **Davia v New Merton Board Mills Ltd.** [1959] 1 ALL ER 346, is that **"The common law duty of care owed by an employer to an employee is to take reasonable care for their safety. It includes a duty to provide a competent staff of men, adequate plant and equipment, a safe system of working with effective supervision and a safe place of work".** These four (4) components constitute the broad particulars of the claimant's claim of negligence against the Defendant. I will attempt to deal with each of these separately.

(i) Provision of a competent staff of men

[9] There is no evidence before the Court which seeks to challenge the competence of either the Claimant or the stacker operator Mr. Linford Lewis. In fact the evidence disclosed that they were experienced and competent workmen.

(ii) Provision of Adequate Plant and equipment

[10] Although, the Claimant, in his submissions raised this as an area for consideration for the court, there was no evidence advanced to support the Claimant that the stacker machine in itself, was inadequate; and as the Defendant submitted **"the fact that the stacker malfunctioned does not, without more, render it intrinsically unsafe. There is no evidence before the court to suggest that a properly functioning stacker and prudent, operator could reasonably cause danger".**

(iii)Provision of a safe system of work& Adequate Supervision

Failure to provide adequate supervision & Support

[11] Speed v Thomas Swift and Company Ltd. ((1943) L.B 557 at page 567) provides support for the proposition that part of an employer's duty in providing a safe system of work is to provide supervision. Lord Greene had this to say on the point:

> **"*The duty to supervise workmen includes a duty to take steps to ensure that any necessary item of safety equipment is used by them. In devising a***

system of work, an employer must take into account the fact that workmen are often careless as to their own safety. Thus in addition to supervising the workmen, the employer should organise a system which itself reduces the risk of injury from the workmen's foreseeable carelessness".

[12] The evidence of the Claimant is that his supervisor was assigned to work in another area and did not have the competence/expertise that he had with the stacker machines. The Defendant through its employee, Mr. Robert Bogle, an engineer, gave evidence that each shift is assigned a shift engineer whose role is to address any problems which mechanics are unable to resolve. I preferred the evidence of the Claimant on this point. He struck me as credible when he gave evidence that on the day in question, his supervisor instructed him to attend to stacker No. 15 and have it fixed. Mr. White was the supervisor.

[13] They had been in an office together some four hundred (400) yards away. The Claimant left to attend to the stacker. Mr. White had been assigned to cranes and in fact was less competent than the Claimant in relation to stackers. There was no engineer available to address any problems the claimant as a mechanic was unable to resolve. In any event there is no evidence before the Court that the Claimant had any problem that he was unable to resolve. This is therefore not an issue before me.

[14] However, I find that the Claimant was inadequately supervised that night. Adequate supervision, which would include a competent supervisor on spot, might and should have assisted in providing warnings or instructions or even a 'watchful eye' on the claimant and the stacker operator which would have reduced or prevent the risk of injury that night.

Failure to provide notices & warnings

[15] In providing a safe system of work an employer must take into account the fact that workmen are often careless as to their own safety –**Speed v Thomas Swift & Co. Ltd.** (1943) LB 557. This is one of the reasons why in its provision of a safe system of work an employer is required to give notices and warnings to its employees regarding

the ways in which to work safely, highlighting dangers and conduct that they should refrain from in order to maintain safety.

[16] In the case of Speed v Thomas Swift, Lord Greene MR provided a useful guide as to what constitutes a safe system of work. At page 563-4 he said: "**I do not venture to suggest a definition of what is meant by a safe system, but it includes, in my opinion or may include according to circumstances, such matters as the physical layout of the job, the setting of the scene so to speak; the sequence in which the work is to be carried out, the provision in the proper cases of warning, notices and the issuing of special instructions."**

[17] Accordingly, it is not surprising that in the case of **Schassa Grant v Salva Dalwood & Jamaica Urban Transit Co. Ltd.** 2005 HCV 03081 delivered 16/6/08**,** Campbell J found that **"the 2nd Defendant failed to discharge its duty to institute a system, whether through notices, reminders, training sessions or warnings to ensure the use of the equipment. In the circumstance of this case, this is a duty cast upon the employer."** In this case before me, the Defendant concedes that they had failed to issue warnings or notices to its employees. It accepts that it had this duty. This was a significant breach of duty to the Claimant and one which exposed him to a risk of injury.

Policy of Landing Containers

[18] Mr. Lewis gave evidence that he had offered to go for the forklift. He admitted that the forklift would have just been able to ease the container off the fender and that it could not have lifted it to the ground. An attempt was made to put forward, the position that his intentions were to land the container and another being to assist the Claimant to reach to the top of the container. The claimant denied that Mr. Lewis had indicated that he was going for the forklift for the purpose of 'landing the container'. Mr. Lewis himself was inconsistent and unworthy of belief on the point. The defence filed, put forward the position that Mr. Lewis had indicated he was going to get the forklift to 'land the box on the ground and reached about one-half chain away when he was called back by the Claimant". This is a significant thrust of the Defence of contributory negligence put

forward by the Defendant. (The evidence is that “box” and “container are used interchangeably).

[19] Mr. Lewis’s evidence upon cross-examination, was that the claimant did not follow procedure as “he climbed on the container without using a lifter to lift him to that height”. The Claimant, he said, ought to have waited for a lifter to lift him to the container and that when he told him he was going for the lifter this was to lift him unto the container. So clearly, for Mr Lewis, the Defendant’s only eye witness and its employee, the “procedure” was not to land the container but to use a lifter to get to the top of the container. This was further compounded on re-examination when his attention was brought to paragraph 15 of his witness statement, where he had said that he was “going to get a fork lift to ease the box off the fender- to land the container”. He agreed that this was different from what he had said in cross-examination. In an attempt to rehabilitate himself, he declared that it “can do both things- first, it was to lift container off the fender and then to lift him up to container”. So even in this explanation, there is no indication that a part of his purpose was to ‘land the container’ as indicated in the witness statement and in the defence.

[20] The court in seeking clarity asked him if the forklift could have lifted the container to the ground (landed), to this he replied “the forklift could not have lifted the container to the ground as small forklift – only ease off fender”. This clearly lay to rest any suggestion or assertion that he had intended to ‘land the container”. These inconsistencies in my view, reduces the credibility of the Defence and helps to support the Claimant’s contention that there was no system in place of containers being landed before being worked on. Going on top of the container in these circumstances, was a method he had always employed; one which is also employed by other workers.

[21] He was asked by counsel for the defence whether or not he considered it safe to work on top of a container that is elevated. In response he said “it would depend on the procedure” he was “about to undertake”. On the night in question, he considered it safe to go on top of the container to “work on it”. The clamant agreed that it would have been safer to get on top of the container whilst it was landed rather than when elevated. However, curious as it may seem, in observing his demeanour, I accept without a doubt

that as he said, he was considering this for the first time through, as he said “his conversation now” (being questioned) with Defence Counsel “because it was such a simple procedure it never come into **our** thoughts.” It is significant that he uses the word ‘our’ rather than ‘my’. It is the view of this court that **“Where a practice of ignoring an obvious danger has grown up it is not reasonable to expect an individual workman to take the initiative in devising and using precautions. It is the duty of the employer to consider the situation, to devise a suitable system, to instruct his men what they must do, and to supply any implements that may be required”.** Per Lord Reid, in General Cleaning Contractors ltd v Christmas H.L. 1952

[22] I accept the evidence of the Claimant that there was no policy in place that forbade him from working on a container whilst it was elevated. I do not accept that there was a policy in place which mandated that containers must be landed before a machine could be worked on. The container was about 10 ft in height. The landing of the container would have meant that, the Claimant in repairing areas located on the spreader of the stacker, would have been working at a significantly lower height than if the container was not landed and the degree of risk of injury reduced accordingly. This would have made a lot of difference in the circumstances of this case. In fact, there would have been no issue of the container plummeting to the ground. Further and or alternatively, if there was any such policy it was not implemented and strictly enforced; it was not the standard practice of the employees and would therefore amount to more or less the same as ‘no safe system being in place’ of landing containers before working on them.

[23] The evidence reveals that the Claimant in the operations that day went about his duties in the usual way. In addition, to failing to warn and provide notices to the Claimant, as stated above, I do not accept that there were safety policies in relation to not fixing the stacker whilst on an elevated container. In fact if there were any such safety policies, these were not adhered to as they were not at all implemented, monitored, controlled and insisted upon by the Defendant. These failings would also amount to a breach of the Defendant’s duty to provide a safe system of working and exposed the Claimant to a significant risk of injury. Thus in **Schaasa Grant v Salva**

Dalwood and Jamaica Urban Transit Co. Ltd. **ibid** Campbell J succinctly described the legal duty at common law of the employer in these terms:

> **"The common law places a duty on the employer to provide a safe system of work for his employee, <u>and further to ensure that the system is adhered to". (emphasis supplied).</u>**

Policy to use "lifter or Elevated Surface" to work at heights.

[24] I find that working at elevated heights was permissible and that there is no contention otherwise. I accept that 'lifters and or elevated surfaces were provided. However the main issue of dispute, is whether there was a policy that a container should be landed before being worked on. The issue of whether there was provision and policy for a lifter or elevated surface to assist in getting to work at heights become significant in the context of the Defendant's allegations of contributory negligence. This is worth consideration, as even though the defence filed did not indicate such a policy, the witness, Mr lewis alluded to this in his evidence and therefore it is material before the Court for consideration.

[25] It is clear from the evidence that even the "lifter" or elevated surface or "man bucket" which was available for getting to heights, was often not used by employees and this is why the Claimant asserted in evidence that if it were to happen again he would not do anything differently and that the other employees did the same thing. Having these equipments available is almost worthless, without a strict safety policy making their use mandatory. Additionally, it is also a breach of the Defendant's duty to the Claimant in failing to ensure adherence to any safety policy, should one have existed, and results in him being exposed to a significant risk of injury. However, the Claimant must establish that this breach on the part of the Defendant led to the accident and to his injury. Similarly, the Defendant, must show that the Claimant's failure to use the lifter or elevated surface resulted in him carelessly exposing himself to a risk of injury resulting in the accident and his subsequent injuries. These are considered in the context of contributory negligence below.

Substitute/Replacement Stackers

[26] Clearly there must be a system of using a substitute stacker when a stacker is malfunctioning and to such a system the Claimant readily admitted. However this does not absolve the Defendant nor does it provide material for the charge of contributory negligence, because it is clear from the evidence of the Claimant, and I accept this, that the Container was on the stacker, it was required to be dispatched that night and a substitute stacker would not have assisted as the container could not come off. The claimant therefore set about doing his tasks in the way he had always done it, in order to get the employer's business done and to meet any deadline. In fact Mr. Lewis' s evidence lends support to this as he had intentions of getting the forklift but curiously this was to "ease the stacker off the fender". He too was focused on manipulating this container so it could get to its required destination. This did not involve removing the container to a substitute stacker as this was hindered by the malfunctioning of the number 15 stacker, which he had been using that night. In any event, the repair of the machine was the duty of the claimant. Using a substitute stacker would not have repaired the stacker that was malfunctioning. It is the Defendant's duty towards him whilst he performs his duty as a mechanic in carrying out the repairs which is the issue. There is no evidence that the claimant could not fix the stacker but proceeded to, rather than to get a substitute stacker. He set about fixing the stacker as he was required to. It was shortly after being on top of the container and attempting to fix the stacker that the accident happened.

Training/Safety Managers/Safety Monitors

[27] The Defendant's training of the Claimant was deficient. This training amounted to the reading of a stack of manuals on safety by employees, including the Claimant. There was no formal training which included safety rules and procedure. There was also no training either orally or by way of written material on the dangers of working on elevated surfaces, including an elevated container or on the wisdom of landing containers before working on them.

[28] I do not accept Mr. Bogle's evidence that there was safety managers at the Defendant's premises that would give safety information through safety monitors of a policy that a container must first be landed before any attempt is made by an employee

to go on it for whatever reason. His evidence does not indicate that he was ever given such information; or that he was ever present when any such policy was being announced or disseminated. It is also curious that the defendant did not call any such safety manager or safety monitors to give evidence on its behalf.

[29] Mr. Bogle's evidence really amounted to little. He was not present at the time of the accident and so could not speak to it. His evidence in relation to the Defendant having safety managers and safety monitors carries little weight in the backdrop of the Claimant's clear and credible evidence that this was not so. He was not a safety manager or monitor and therefore unable to give sufficiently persuasive evidence that there was in place a policy about employees not going on a container before it was landed; that there was a method through which such a policy was disseminated and that this was in fact done.

[30] In view of the foregoing, it is clear that the Defendant was in breach of several aspects of their duty to provide a safe system of work. In failing to provide a safe system of work the Defendants failed in their common law duty to the Claimant. Speed v Thomas Swift & Co. Ltd. Ibid. This position was reiterated in **McDermid v Nash Dredging and Reclamation Co. Ltd. [1987] AC906. The House of Lords held that the Defendant's company was liable as the evidence showed that the Claimant was injured because no safe system of work was in operation. The employer had a duty to devise and ensure that there was a safe system of work in operation. This duty had not been fulfilled.**

[31] In providing a safe system of work, it is the employer's responsibility to ensure that the actual mode of conducting the work is safe. The Defendant, as employer has a duty to devise, institute and maintain a safe system of work. – This includes such things as how the job is laid out and the sequence in which the work is to be carried out. He is responsible for co-ordinating the Claimant's activities in any given operation, including the fixing of machinery at levels above the ground and in ensuring that containers are landed before any such work is carried out.

(iv) Provision of a Safe Place of Work

[32] I do not find that there was sufficient evidence to establish that the Defendant failed to provide a safe place of work

Contributory Negligence

The Accident

[33] Mr. Lewis's evidence is that the container fell whilst the Claimant was on top of it. There is no clear evidence as to why it fell. The Claimant had asked Mr lewis to lower the container and instead it began to rise higher and higher. It is not clear whether this was a result of any action on the part of Mr Lewis or whether it was as a result of the malfunctioning of the stacker machine. In the circumstances it would have been difficult for the Claimant to provide this evidence. What he alleges is negligence which, in considering the particulars of negligence and the evidence amounts in essence to the Defendant, "employing a manifestly unsafe and dangerous system in the rectifying of its machinery". This renders the cause of the machinery plummeting to the ground almost insignificant. In any event, the evidence of the Defendant on this point was at the highest suggestive in nature. No concrete position was put forward. No engineer was called to explain this. As such the Court is only left with clear evidence that an accident occurred and that the Claimant was injured; that at the time the Claimant was repairing the Stacker whilst some 14-15ft off the ground. This accident could have occurred as a result of a variety of reasons and so 'res ipsa loquitor' is not being relied on nor does the evidence support it.

[34] The evidence suggests that the accident was as a result of the stacker malfunctioning or the actions of Mr. Lewis in the cabin of the stacker or of the Claimant simply falling or as the defendant suggests the claimant interfering with the solenoid motor box on the spreader. In either of these instances there is a clear and irresistible inference of negligence on the part of the Defendant as employer, whose employee was at the time, repairing one of its machines at an elevated height, without instructions or warnings or safety equipment to prevent or reduce the likelihood of a fall; or protective gear to reduce or guard against injury in the event of a fall. As her Ladyship, Harris JA opined in **Wayne Ann Holdings Ltd (T/A Superplus Food Stores) v Sandra Morgan**,

“A legal burden is placed on a claimant to prove negligence and not on a defendant to disprove it. If facts are proved which raise a prima facie inference that an accident resulted from the failure of the Defendant to exercise reasonable care, then the Claimant’s action will succeed unless the Defendant provides an explanation which is sufficient to displace the prima facie inference that he had failed to take reasonable care”. SCCA 73/09.

[35] Of course, the container, if it fell, would have fallen due to some reason. The issue however, is not that it fell, but that it fell while the claimant was on top of it. This begs the big question, whether he should have been on it? That is whether he was exposed to a significant risk of injury when working on the stacker by standing on the container at such an elevated height? He clearly was! Therefore, this is followed by the questions, whether, any risk of injury to which he was exposed was one which was avoidable or could have been reduced or prevented; and if so, whether this was the full responsibility of the Defendant or both the Claimant and the Defendant. The circumstance surrounding their conduct is crucial to having these questions answered.

[36] As Counsel for the Claimant submits, it is a question of fact to be determined by the evidence whether the Defendant having breached its common law duty of care as an employer to the Claimant is solely responsible for the injuries sustained by him. The Claimant would be contributory negligent if he ought reasonable to have foreseen that, if he did not act as a reasonable prudent man, he might come to some harm. As Lord Ellenborough, in Butterfield v Forester (1809_ 1 East at 61 said, “***One person being at fault will not dispense with another using ordinary care for himself.”***

[37] The Defendant has asserted that the Claimant was contributory negligent. It therefore has a duty to provide evidence from which this court can accept on a balance of probabilities that this is so. So not only is the Defendant required to specifically plead contributory negligence, he must also prove:

(1) that the injury of which the Claimant complains resulted from the particular risk to which the Claimant exposed himself by virtue of his own negligence.

The particulars of the Claimant's negligence alleged by the Defendant are as follows:

a) Climbing on top of a malfunctioning container at a time when, at a place where and in a manner which was manifestly dangerous and unsafe so to do.

b) Instructing L. Lewis who was going to get a forklift to land the container safely on the ground, to return to stacker No. 15 to assist him while he was working in the sensor box.

c) Working on the malfunctioning container box in a manner which was dangerous and unsafe so to do.

d) Failing to request assistance and/or instructions.

e) Causing the container to plummet suddenly to the ground.

f) Causing his own fall from the said container.

g) On his own initiative and without instructions from any other person climbing on the container.

h) Failing to appreciate the dangers involved in climbing on the top of the malfunctioning container.

i) Failing to do the requisite checks and inspection before climbing on top of the container.

j) Failing to pause, seek assistance or instructions or otherwise so to conduct himself as to avoid causing his fall from the container.

k) Exposing himself to risk of injury.

[38] It is a question of fact whether any negligence of the Claimant is so entangled or intertwined with the state of affairs which came about as a result of the Defendant's negligence so as to make the negligence of both contributory causes to the accident **Henley v Cameron** [1949} LJR 989. So in order to establish the defence of contributory

negligence, the Defendant is required **“to prove to the satisfaction of the jury [tribunal of fact] that the injured party [the Claimant] did not in his own interest take reasonable care of himself and contributed by this want of care, to his own injury”** – Nance v British Colombia Electric Rly Co. Ltd [1951] AC 601, at 611 per Viscount Simon.

[39] Lord Denning in **Hones v Livox Quarries Ltd**. (1952) 2 QB608 AT 615 described contributory negligence in the following terms:

> ***“A person 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”.***

[40] Did the Claimant fail to take reasonable care for his own safety at the material time and thereby contributed to the accident and his resulting injury, damage and loss? Did he fail to act as a reasonable prudent man? If so, would he have reasonably foreseen that as a consequence, he might hurt himself?

[41] The Defendant submits that it is in direct disobedience of their policy that the Claimant stopped Mr. Lewis from retrieving a forklift to lower the container or elevating him to work on it and instead climbed onto the container. The claimant readily admitted that on the night in question, Mr. Lewis, the driver of the subject stacker had told him that he was going to get another machine to elevate him to the container.

[42] In addition, they contend, although the Claimant was not aware what the problem was with the stackers, rather than using available substitute stacker, he opted instead to climbing the malfunctioning stacker and on to the container – It contends that at this time he was 15ft off the ground, “standing on a suspended container knowing fully well that the stacker which was suspending the container was malfunctioning”. Although the Claimant gave evidence that he could not recall ever coming across a problem with a stacker and not being able to fix it, he clearly indicated that in such a situation, the procedure would have been to withdraw that particular machine from

operation and reissue another one. That Defendant did have a system in place where if a stocker machine was malfunctioning a substitute machine would be used.

[43] However, not only was the claimant not faced with such a problem; a substitute stacker machine would not have solved the problem because “that night the box was needed for trans shipment (and so) it needed to come off”. Due to this, the claimant formed the view that the machine had to be fixed. “the box would not be released as slewing function wasn’t working”. I accept that a substitute stocker in these circumstances would not have resolved the problem.

[44] The problem that the Claimant was faced with, and which in line with his duties he was required to fix, was to get the slewing function working. This was an imperative, because if this problem was not fixed, not only could the container not be slewed to the right; neither could it be released so that it could be put on a replacement stocker in order to meet the trans shipment requirement of that night. In those circumstances the Claimant did what he felt he had to do, in the way he has always done it. i.e. climb unto the container to fix the slewing function, so that the container could be conveyed to wherever it needed to go for trans shipment.

[45] I accept that although on the face of it, it appears that the claimant failed to take account for his own safety when he climbed on to the container, in these circumstances he was merely following the practice in place and carrying out his work in the usual way practiced by his fellow employees and condoned by his employer. – When it was suggested to him that he had failed to take account for his own safety, his poignant response was “I don’t agree because I’m not the only shift mechanic that use the same procedure”. It is my view that this way of working was a common practice among the employees.

[46] I accept the Claimant’s evidence that in fact the container could not come off the stacker as the slewing function was malfunctioning. In these circumstances, the safety of the claimant depended on either the provision of equipment to protect him whilst

working on the stacker in the specific area in which repair was required; or by ensuring that the container was "landed" on the ground before any repair was carried out.

[47] The degree of any negligence, if any, attributed to the Claimant might be affected by whether in fact Mr. Lewis's intention to get the forklift was to lower the container or to elevate him to work on it. If in fact it was to "ease" the forklift off the fender, or to lift him to the top of the container, then perhaps as the Claimant asserted "it would not have made much difference" and therefore his refusal to wait for it inconsequential. For the reasons stated previously, I find that it was Mr Lewis's intention to retrieve the forklift was for the purpose of easing the container off the fender and or to lift the claimant to the top of the container. It was not to lower the container for the Claimant to work on it.

[48] It is also important to note that the claimant did not fall whilst climbing on to the container and therefore being assisted to the appropriate height would not have prevented or reduced the risk of injury, in the circumstances in which he received his injuries. Any carelessness on his part in climbing unto the container and not using a 'lifter or elevated surface' did not result in the accident, nor the injuries sustained

[49] The evidence indicates that using a lifter or elevated surface would only have made a difference if the claimant would have been able to work on the solenoid motor located in the middle of the spreader bar from the elevated surface/lifter. If he was able to do so, then clearly, some liability would be attached to him for not using this and forging ahead with little regard for his safety, in circumstances where he should have foreseen that he might come to some harm by standing on the container rather than the elevated surface, which he accepts was provided for use for employees.

[50] It is clear from the evidence accepted by this court, that there were no special equipment or procedure provided to assist to get to the area in the middle of the spreader for the purpose of repair. The usual way for the mechanics to carry out repairs

in this area of the spreader was to climb unto the container to access the motor solenoid.

[51] In order for the claimant to get to the area, he stepped up on to the front of the stacker, the container was then lowered, and he then jumped on to the container. He admits that to be provided with another equipment to get to the top of the container, was a safe way to get there. However, I note that his evidence (as stated earlier) is that the use of an elevated surface is sometimes used to get to heights but in this instance, he needed to get to the area containing the slewing motor solenoid and that the elevated surface would not have assisted him for this purpose.

[52] In fact it is clear from his evidence that it is not the fact that he had not used another equipment to get to the top of the container which was the cause of the accident. Based on his evidence, even if he had used the elevated surface to reach to the top of the container, he would still need to come off the elevated surface and unto the container to reach the area in the middle of the spreader bar, which contained the slewing motor solenoid that he intended to fix. In these circumstances, the defendant has failed to satisfy me as to paragraphs (a) and (b) of their particulars of the Claimant's negligence.

[53] Of course if it would have been safer for the container to be landed to climb on it, it follows that it would have been safer for it to be landed to work on it. However if there was no such system in place, the claimant as an employee is not expected to devise his own system of working. The employer is required to provide such a system and to ensure it is adhered to. It is my view that the Claimant did not think of it prior to the thought provoking questions being asked of him by counsel for the Defence, because this was not the standard way of working and this is why the Claimant without hesitation and in a very convincing and completely uncontrived manner declared "it never come into our thoughts".

[54] Whilst I accept that the Claimant cannot speak of what or what does not come to the thoughts of others, this statement is accepted as an indication that this is the standard practice and that other employees did the same.

[55] The Claimant agreed in evidence that the stacker is a man made machine and could therefore malfunction. Furthermore he agreed with the suggestion that it would have been safer to land the container than to get on top of it whilst elevated. The Defendant therefore submits that in those circumstances the Claimant fully appreciated the risk but nevertheless opted to run the risk in total disregard for his own safety. Consequently, they assert, that he was therefore contributory negligent in the circumstances. My findings in relation to this are to be found above. The Claimant's appreciation of the risk was clearly blurred by repetition.

[56] This was the way he and the other employees had always performed this task. His cross examination was his 'eye opener' as 'it was a simple procedure' and this is the way the employees 'had always done it'. It was the procedure in place and one which he automatically followed. This finding dispenses with paragraph (c) of the defendant's particulars of negligence. Paragraph (d) has been dispensed with by my findings above as to inadequate supervision. I also find that the task at hand was considered by the Claimant to be simple and routine so there would have been no requirement for assistance and or instructions. If the defendant contends otherwise, it has failed to provide any evidence to support this.

[57] The Claimant stated that at the time he got on top of the container it was fourteen (14) feet above ground – "It was not at twenty (20) feet". I accept that it is whilst he was on the container that it was raised. The claimant asked the operator, Mr. Lewis to operate the slewing function so that he could find the solenoid and release it with a small screwdriver but instead the container was raised and "I found it going higher and higher". The next thing he realised was that he was at the Kingston public Hospital.

There is therefore no evidence to support paragraphs (e) and (f) that the Claimant 'caused the container to plummet suddenly to the ground and that he caused his own fall. Accordingly, the Defendant has failed to satisfy me as to these.

[58] I accept that as outlined in paragraph (g) the Claimant "on his own initiative and without instructions from any other person" climbed on the said container. However, I do not believe that in the circumstances this made him contributory negligent. Firstly, there was inadequate supervision. Secondly, the claimant followed normal procedure for what he considered to be a routine and simple task. He was as the defendants contend an experienced mechanic. It would not be reasonable to expect him to seek instructions in performing simple tasks. This clearly was not the practice. The real issue is that he was not only following his initiative, but was doing so in the context of what he considered to be the 'norm' and this was the standard way of working.

[59] It is the Claimant's evidence that he did not consider it dangerous to go on top of the elevated container even though he was told that the stacker was not working. The claimant was told that the stacker was not slewing and not that it could not lift the container or control the container to the ground. Clearly therefore, the claimant would not have been anticipating that the container would or could plummet to the ground. His clear evidence is that Mr. Lewis had told him the stacker was not slewing to the right. He described slewing as the moving of the container from left to right or vice versa. This is particularly, true as the Claimant explained that after having been told of the malfunctioning based on his experience he knew what the problem was before he went on the stacker.

[60] In addition he had never experienced a stacker dropping a container without the operator engaging the controls to release the container. He was not able to confirm that the stacker had dropped the container. It is not disputed that the stacker has a safety feature which prevented the accidental release of the container. In fact it is particularly significant to note that even given the backdrop of the accident the claimant's evidence when asked if he was to do anything differently, what would he have done differently is that he would not have done anything differently ---- "All the mechanics do it the same".

[61] I accept this evidence as an indication that in fact this was the normal or usual way of carrying out the type of repair that was involved that night. In these circumstances, the claimant could not reasonably be expected to foresee that the risk taken by him in attempting to repair the stacker from on top of the container would result in him being harmed. Furthermore, if this is the normal procedure and the Defendant had failed to implement a safe method of carrying out this task, then the claimant as employee cannot be faulted for carrying out the procedure in the way that has been set and followed by employees. He is not and should not be expected to devise his own method of work.

[62] He agrees that he was aware that the solenoid could malfunction and readily admits that he knew that it was malfunctioning before he went on top of the container. In fact this is why he went up there. It is his evidence that he is able to predict the slewing action of the stacker even when the solenoid is malfunctioning. This he says is "because all hydraulic functions of the machine are switched on and off by the electrical solenoid". He does agree that if the electrical solenoid malfunctions it could affect the hydraulic function. The claimant went on to say that this was something he was aware of before he went unto the container – But he says "All hydraulic functions are switched on and off by the solenoid. The operator controls the switch for the solenoid". The inference being that he would not in all the circumstances expect the container to plummet to the ground of its own accord

[63] He states that not only has he not experienced a container falling of its own accord, but also denies that if the solenoid which controls the hydraulics for the twist locks malfunction, this could result in the stacker releasing the container. This evidence is supported by the Defendant's witnesses. It is clear from the evidence that there was a safety feature, which required an operator to release the container for it to be released. Nevertheless the possibility of a fall from an elevated container was a reasonable foreseeable danger which the defendant ought to have safe guard against by at least the provision of safety measures and policies such as the landing of the

containers before working on them. It is not disputed that the container plummeted some twenty (20) feet to the ground. Even if there was a possibility that the container could be released by a malfunctioning solenoid, there is no evidence that this is in fact what happened or possibly happened.

[64] If in fact the container plummeted of its own accord, in these circumstances, it is my view that the Claimant's appreciation of any such danger hinges on a safe procedure being in place and on the issuing of warnings and notices. Otherwise, the claimant has only adopted the way of working that existed in the employer's organization and he cannot be faulted for it. I therefore find that the Defendant has not established the particulars of negligence listed at paragraphs (i) – (k).

[65] The container being landed to prevent it from plummeting or falling would have made a material difference to the circumstances of this case or alternatively, some sort of safety harness which would allow for the claimant to work at that height with access to the motor solenoid area of the spreader bar, whilst on the container but properly secured. The defence's position is that there was a policy for the container to be landed and that this was breached by the Claimant. I find that this was not so.

[66] ***In Pitters v Haughton*** *(1978) 16 JLR 100, Carey, J, in considering the issue of contributory negligence considered that the facts of the particular case showed that* ***"the plaintiff did deliberately place her hand where it became caught. It was a risky thing. It was a risk which the Defendant was required, however, to guard against. A measure of criticism can forcibly be suggested against the plaintiff's conduct. I have nevertheless come to the conclusion that any deficiencies on Miss Pitters part fall short of the negligent conduct required in the case of a workman where breach of statutory duty is concerned. She should be absolved from any responsibility. I so hold. It was the failure to fence securely which was the failure to fence securely which was the cause of the accident and not the plaintiffs' misguided, albeit risky act of placing her right hand in the position she did".***

[67] Although this case involved an employer's breach of statutory duty, it is nevertheless applicable as there is a duty on the Defendant to 'guard against risk', to protect his employees as far as reasonably practicable against reasonably foreseeable harm. If he fails to do this then he is in breach of his duty to that employee. The Defendant failed to guard against the risk of the claimant falling whilst on top of the container. A reasonable practicable precaution would have been to have a safety policy about landing containers before working on them or on the stacker. The risk of falling or an accident at that height would have been reasonably foreseeable. The risk of serious injury as a result, would also have been reasonably foreseeable. The claimant's voluntary exposure to that risk was as a result of doing his job the way it has always been done due to the lack of an adequate and safe system of work being in place.

[68] **Speed v Thomas Swift and Company Limited Ibid** - Succinctly stated the principle that "***an employer's duty to provide a safe system of working must be considered in relation to the circumstances of each particular job...".*** *This I fully* endorse.

[69] It is my view that the Claimant's injuries are as a result of the Defendant's failure to provide and maintain a proper system of working as distinct from a casual departure from a proper system owing to the negligence of the Claimant.

[70] This was a special circumstance, which easily lent itself to a foreseeable risk of injury. The Defendants ought to have foreseen this and taken steps to alleviate or reduce the risk accordingly. This would at least have required an established and strict policy of the landing of the container before work being done on the spreader bar and provision of notices and warnings; supported by safety managers and monitors and the insistence of adherence thereto. The defendant failed in all these areas and this failure is a breach of its duty which resulted in the injury to the Claimant. The claimant's actions were in keeping with the usual method used in carrying out repairs in these circumstances.

[71] In General Cleaning Contractor Ltd v Christmas – ibid, t Lord Reid expressed the view that **"where a practice of ignoring an obvious danger has grown up it is not**

reasonable to expect an individual workman to take the initiative in devising and using precautions. It is the duty of the employer to consider the situation to devise a suitable system, to instruct' his men what they must do, and to supply any implements that may be required." I would only add, 'and ensure that it is adhered to'.

[72] I further commend the view of Lord Dennis in the said case in the Court of Appeal (1952) ALL ER that **"if an employer employs men on this dangerous work for their own profit, they must take proper steps to protect them, ….. If they cannot afford to provide adequate safe guards, they should not ask them to do the work at all…you cannot blame the man for not taking every precaution which prudence would suggest. It is only too easy to be wise after the event. He was doing the work in the way which the employers expected him to do it, and, if they had taken proper safeguards, the accident would not have happened".**

[73] In my view, it does not amount to negligence on the part of an employee to follow a system of work accepted by the employer even it involves obvious risks. So if the risk of injury arises from a failure on the part of the Defendant to provide or maintain a safety policy against working on an elevated container; or allows for the working whilst on an elevated container, to carry out repairs, which is precarious in itself, but for which no arrangement is made, with no safeguards in place, there is, without more, no contributory negligence on the part of the claimant as employee. I say this because the employee would have been following the employer's system/procedure or standard way of working, which is in place. He is not expected to (and probably could not) deviate from the Defendant's standard way of working and devise another system of working that he may have considered safer, for himself.

[74] In either leaving the claimant to take precautions, against obvious risk of injury when not implementing any, and or not maintaining a safe system for doing the work, the Defendant failed to discharge its common law duty of providing a reasonably safe system of work. See **General Cleaning Contractors v Christmas (1955) 180** and to adopt the words of Lord Oaksey in that case **"Workmen are not in the position of employers. Their duties are not performed in the calm atmosphere of a board**

room with the advice of experts. They have to make their decisions on narrow window sills and other places of danger and in circumstances in which the dangers are obscured by repetition".

[75] In view of the foregoing, I conclude that the proximate cause of the accident was the omissions of the Defendant. **The test is "the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to have known."** Stantwick J in Stokes v GKN (Bolts and Nuts) Ltd (1968) !WLR 1776 at p1783. The Defendant knew or ought to have known that implementing and maintaining a system of landing containers before carrying out work on top of them would have been safer for his employees. In failing to have such a system in place, the Defendant did not act as a prudent and reasonable employer. The Defendant should have taken precautions as a reasonable and prudent employer would take in light of the risk of an accident occurring and the likely gravity of any injury there-from.

[76] The likely serious gravity of any foreseeable injury from a fall from the top of the container whilst suspended in the air or as a result of it plummeting to the ground is an obvious one. The steps required to reduce or remove the risk was in all the circumstances easy, practicable and relatively inexpensive. These were inter alia, to have a system of landing containers before being worked on; to provide warnings and notices insisting on strict adherence to any such policy; the provision of immediate and competent supervision; the provision of training and refresher courses; the provision of safety managers and safety monitors to ensure compliance and to address any necessity for modification or improvement to any system laid down. These the Defendant failed to do.

[77] Although the Claimant is required to act reasonably to avoid any foreseeable risk of injury to himself, in the circumstances of this case and the evidence presented to this court, I find that there is insufficient evidence on which I can find the claimant contributory negligent. This is mainly because although contributory negligence was alleged in the defence, there is a lack of evidence to support it and on the Claimants

case, the evidence establishes clear, cumulative and egregious breaches on the part of the Defendant.

Damages

[78] Following the fall the Claimant lost consciousness and awoke in the Kingston Public Hospital. He was admitted to intensive care and later to the surgical ward. He remained in hospital for 10 weeks.

[79] The Claimant suffered extreme pain all over his body, but more so in his head. Following his discharge from the hospital, he became an outpatient from January to March of 2009. Whilst in hospital and as an outpatient, he had to undergo physiotherapy. He had significant difficulty with his neck, shoulder and left foot. He could not lift his right shoulder and up to at least at the time of his witness statement, 28th April 2011, could not flex the ankle region of his left foot.

[80] He suffered great discomfort at the hospital; ranging from head colds, draining of mucus to the throat making it difficult for him to breathe, resulting in heavy painful coughing in an attempt to relieve the symptoms. Upon leaving Kingston Hospital he has attended upon approximately six (6) doctors for various reasons, but all related to the said fall.

[81] He has been unable to return to work since the accident as he still gets dizzy spells, pain to his shoulder, neck and back; walks with an unsteady gait as his left foot drops whilst walking and he is now unable to see properly. The accident has affected his lifestyle “tremendously”, in that he can no longer play cricket, football or volley ball; he has difficulty controlling his urine and runs the risk of “wetting himself” if there is no bathroom nearby. For this frequency in urination, he was referred to a urologist.

[82] He states that in desperation he did attempt to do some wood work, but this attempt to mitigate his loss left him in pain all over his body and so his efforts were frustrated and he has ceased this activity. He is unable to do any strenuous work and no longer able to work or function as a mechanic for the Defendant. This he said, is because this work would require him to be on containers and with his unsteady gait, he

is confident that he will fall off; as well as the pain in his neck, back and head which makes this type of work utterly unsuitable as a mechanic's duties include a lot of heavy lifting and constant bending.

Medical Report s

[83] The reports from the various doctors were by consent admitted into evidence without them being called.

[84] Dr. Randolph Cheeks report is dated 12th March 2009. He had the benefit of assessing the Claimant, taking into account x-rays and CT scans taken whilst he was admitted to hospital.

[85] He notes that "The contemporaneous medical records indicate that **in hospital** he was noted to be suffering from multiple injuries including a head injury with a 5-inch scalp laceration on the left side of his head, an injury to his neck, abrasions to his trunk and extremities, **and a dropped foot on the left side**". He further noted that X-ray of the skull showed an extensive linear un-displaced fracture of the cranial vault; x-rays of the cervical spine showed an un-displaced linear fracture of the posterior arch of the atlas vertebra, fractures of the body and pedicle of the axis vertebra, and a linear fracture of the pedicle of the C3 vertebra; x-rays of the thoracic and lumbar spines and the right knee and foot revealed normal anatomy; x-rays of the pelvis and right shoulder were normal; chest x-ray revealed evidence of contusion (bruising) of the left lung.

[86] In addition, CAT scans of the head and neck were carried out on the day of admission and the films were examined. The CAT scan of his head revealed evidence of extensive contusion and swelling of the left temporalis muscle. There was no evidence of acute structural brain injury or intracranial hemorrhage. The CAT scan of the cervical spine confirmed the presence of fractures of the upper 3 cervical vertebra as described above.

[87] Upon seeing the Claimant eight (8) months after the accident, Dr. Cheeks noted that the Claimant's complainants were difficulty with recent memory function to the extent that he can no longer trust his memory to retain details of recent matters as he

used to in the past. A sensation of dizziness and a persistent humming noise in his right ear; difficulty walking because of weakness of his left foot; problems with his right upper extremity because of painful restriction of the range of motion of his right shoulder; a frequent sensation of itching in his throat.".

[88] Dr. Cheeks concluded that "The head injury sustained by this individual was a concussion of moderate severity. It resulted from an impact to his head which was of sufficient severity not only to cause an extensive scalp laceration but also to produce a fracture of the cranial vault on the left side. This was a diffuse axonal injury, and impairment of recent memory function is a recognized sequel of this type of head injury (diffuse axonal injury). In this case the impairment of memory function is mild to moderate. It interferes slightly with his activities of daily living and is rated as a PPD of 5% of the whole person.

[89] The functional impairment of his left foot which has a complete foot drop secondary to injury to the left common peroneal nerve is such that there is no motor power in the dorsiflexors of the left ankle resulting in a complete foot drop and necessitating the use of a foot drop caliper. The PPD resulting from this is equivalent of 15% of whole person.

[90] He further concluded that "combining disabilities above according to the AMA guidelines to the evaluation of permanent impairment the PPD resulting to this individual from the neurological injuries sustained in the accident of May 13, 2008 amounts to 30% of the whole person". His updated report of 26/6/2011 gave the Claimant a marking of 33% partial disability of the whole person.

[91] The Claimant was examined by Dr. Melton Douglas- Orthopedic surgeon and he gave a report dated 27th April 2011, some three (3) years after the accident and two (2) years after the report from Doctor Cheeks. He indicated that "A dropped foot on the left side was also noted. The files of the KPH were not recovered in order to determine the cause of the condition".

[92] The Claimant's complaints at this time were "Inability to flex the neck fully forward. Any attempt to read a book, or look on the floor would result in neck pain;

constant ringing sound in left ear; dry cough from irritation in the throat; memory loss. He had to write things down due to his inability to recall; pain and weakness in the right shoulder and inability to carry his bag; lower back pain aggravated by standing and sitting for long period; foot drop on the left side and complete dependence on the foot drop splint to improve his gait; loss of sensation over the top of the left foot".

[93] The stiffness and pain affects him when he has to flex his neck and read a book, as well as to look to the floor in front of him and so impacts on his basic normal activities of daily living. The symptoms are for the long term and may worsen. Treatments such as analgesics and physiotherapy can reduce the intensity of the pain but will unlikely eliminate it…the left peroneal nerve palsy has affected his gait and limb strength… his injuries is 9%... the peroneal nerve palsy with severe motor deficit and sensory deficit causing the foot drop carries an impairment rating of 42% of the lower extremity and 17% of the whole person". Dr. Douglas was unable to say with any certainty that the foot drop was related to the accident as the Kingston Public Hospital notes were not available.

[94] Doctor Dundas medical report of the 16th September 2009 – indicates a variance between the CT Scan and the MRI Scan report of the Claimant; some of Dr. Cheeks findings on the CT Scan were not evident on the MRI Scan. However Dr. Dundas admits that the CT Scan was probably the best imaging technique to evaluate the state of the Claimant's bones. Dr. Dundas, not having the benefit of both the MRI and the CT Scan for comparison had a difficulty in commenting on the radiographic appearances of the Claimant's spine.

[95] However based on MRI findings his assessment in an impairment of 19% of the whole person. The left foot drop amounts to 66% of the affected left lower extremity or 26% of the whole person. Dr. Dundas describes the foot drop as iatrogenic and therefore he says that it cannot be fairly attributed to the accident. However, this is a different question from whether it can be fairly attributable to the defendant. The defendant contends that it should not be. This is considered below.

[96] **A Report from Doctor Leachim Semaj dated 3rd May** 2011indicated that Mr Mckight would be unable to carry out a job such as a mechanic and would need to consider alternative type of employment and even then he considered that "While Mr. McKnight could consider a desk job that would require less physical strains, he would need to do courses to acquire the requisite knowledge, skills and certification in order to be considered for such employment".

[97] **Report by Doctor Wendel Abel dated 29th April 2011** summarises his clinical findings in relation to the Claimant as being consistent with "Post Trumatic Stress Disorder and Major Depression" and that the symptoms associated with these disorders begin following the accident and was solely attributable to this. He is also of the view that "given the level of physical and psychological impairment it is unlikely that Mr. McKnight will be able to function in a similar job at this time".

[98] **A report from Dr. Merton Smith dated 30th April 2011** stated among other things, that the Claimant's examination revealed "Indirect laryngoscopy revealed mild redness to the posterior aspect of the larynx. Both vocal cords were mobile, diffusely thickened with reduced luster." He also had mild subglottic erythema and on examination of his neck revealed "an obvious scar in his antero-inferior neck with minimal intervening tissue between the skin and the trachea findings which are in keeping with a previous tracheostomy.

[99] The trachea at this site was somewhat softer than the rest of the trachea but he had no stridor or other features of airway obstruction even on external pressure. He had no cervical lymph nodes. The overall findings were consistent with a patient who had a tracheaostmy but who had no obvious sequelae of this procedure". **A report from Dr. Rajesh Balachandar, Dental Surgeon, BDS, MDS** indicates that the Claimant had and Absent left central incisor and Partial tooth loss.

[100] It is clear that the Claimant has sustained extremely serious and debilitating injuries. Of particular significance is Dr. Randolph Cheeks assessment of the Claimant. He gave his opinion in the following terms:

> "From the neurological standpoint this individual sustained a significant craniocervical injury in the incident of May 13, 2008. The fact that he has both retrograde and post traumatic amnesia indicates that the cranial component of his injuries was a concussion of at least moderate severity the effects of which were compounded by the contusion of his lungs which led to respiratory failure necessitating his admission to the intensive care unit. Respiratory failure is an event which is known to worsen the effects of head injury because of the low oxygen levels in the body (hypoxia) which it causes……The injury to his neck was a very serious life – threatening injury in which he sustained a potentially unstable fracture complex involving the upper 3 cervical vertebrae. It is noteworthy that he was documented at the KPH as having sustained injury to the bulbar (upper) region of the spinal cord which, via the 9th cranial nerve, regulates swallowing (among other things). He was unable to swallow for a prolonged period and was fed directly into the stomach through a surgically created opening in the abdominal wall (gastrostomy)." He indicates that the 'foot drop and facial scarring' are permanent.

The Dispute

[101] Although there is no dispute that the Claimant suffered very serious injuries, there is however some dispute as to the specific injuries said to be sustained by the Claimant and attributable to the Defendant. This is so in relation to the "left foot" injury. Doctor Dundas (consultant orthopedic surgeon) in his report of 29th September 2009, diagnosed the Claimant's "foot drop" condition as being iatrogenic (caused by manner or treatment of physician). The Claimant in his evidence indicated that "he was given an injection of intramuscular diclofenac and when he awoke he could not move his left ankle or foot. In a further report 16th October 2009, Doctor Dundas indicated that the left foot drop could not be fairly attributable to the accident. Doctor Melton Douglas another consultant orthopedic surgeon in his medical report of 27th April 2011, indicated that there was uncertainty as to the relationship of the foot drop due to the unavailability of the Kingston Public Hospital file.

[102] A question for the Court is whether considering the level of uncertainty it can properly in assessing damages, consider the “drop foot” injury as (i) attributed to this accident and or (ii) an appropriate injury to form part of the damages in this claim. The defence contends “that the drop foot injury cannot be considered in assessing the Claimant’s damages as “it cannot be reasonably attributed to the accident and appears to be a new intervening act”.

Pain and Suffering or Loss of Amenities

[103] In the case before me, the “but for test” is not only applicable but appropriate in the Claimant’s quest for redress in a situation where the Dependant’s negligence led to his fall and the extensive injuries. As stated earlier, there is some dispute as to whether the “drop of one leg” (limp) was as a result of the accident. Although two (2) of the doctors seen by the Claimant indicated that the Kingston Public Hospital notes were not available to them (appeared to have been mislaid by the Hospital) and so they were not able to comment on whether or not it was iatrogenic in nature; It is clear from the evidence, and appeared to be accepted by the Defendant in that it has not been Challenged, that this left foot drop was not there prior to the accident.

[104] The issue of dispute surrounds whether it was iatrogenic and if so, the Defendant submits that it cannot be fairly attributed to his accident. In fact one of the Doctors, Doctor G. Dundas noted that “this cannot acceptably be deemed a normal complication or sequel to his trauma”. I do not believe that this is the test for the court. It might not be a normal sqeuel but it is clearly a sequel to his trauma. It is of course for the Claimant to prove on a balance of probabilities that this leg drop injury, was substantially caused by the accident. How does he do this?

[105] The Claimant’s evidence either inferentially or expressly indicates that the “drop leg” was following the accident. He was brought to the hospital immediately following the fall; he was in a state of unconsciousness; during his period in hospital the “drop leg” was noted not only by him, but also the hospital records. This resulted in him being supplied at the hospital with a left foot arthosis. At the time of seeing Doctor Dundas in

September 2009, his walking tolerance was about 500 metres. The defendant has not challenged this.

The Factual Test of Causation

[106] There is no allegation of negligence on the part of the doctor(s). The evidence prima facie, indicates that the claimant's response to his treatment resulted in a 'left foot drop'. The defendant has provided no evidence to the contrary. It is well established that a tortfeasor must take his victim as he finds him. Therefore the Defendant will be responsible for this injury, even if it came about as a result of a reaction to the treatment due to a particular weakness or predisposition such as an allergic reaction. See Smith v Leech Brain.

[107] This is further re-inforced by the 'but for test'. The basic test for establishing causation is the **"but-for" test** in which the defendant will be liable only if the claimant's damage would not have occurred "but for" his negligence. In *Robinson v Post Office (1974) 1 WLR 1176* – the claimant had an accident at work which resulted in her being given an anti-tetanus injection. Nine days later there was an adverse reaction to this, which resulted in brain damage. It was held that the doctors' reasonable decision to provide the standard treatment was not the relevant cause of the brain damage because the claimant would not have been infected "but for" the defendant's negligence.

[108] The defendant will be liable only if the claimant's damage would not have occurred "but for" his negligence. Alternatively, the defendant will not be liable if the damage would, or could on the balance of probability, have occurred anyway, regardless of his negligence.

[109] The claimant is required to prove on a balance of probabilities that the injury is attributable to the Defendant's negligence. The *Oropesa 1943 1 ALLER 211*, is a classic case in support of this principle. A collision occurred in the seas between the Oropesa and the Manchester Regiment. The Manchester Regiment was seriously damaged as a consequence of which the Captain sent fifty of the crew to the Oropesa and later sent a further sixteen. The lifeboat containing this sixteen capsized and nine of the men

drowned. The Manchester Regiment later sank. When sued, the question for the Court was whether the action of the Captain – in sending the men from the Manchester Regiment broke the chain of causation i.e. because of the intervening cause. It was held that the Captain's action was the natural consequence of the emergency in which he was placed by the negligence of the Oropesa and, therefore, the deaths of the seamen were a direct consequence of the negligent act of the Oropesa.

[110] In my view the claimant must establish that the injury that he has suffered was caused by the defendant and so the question for the Court is "but for" the defendant's actions, would the claimant have suffered the particular injury? If yes, the defendant is not liable – If no, the defendant is liable.

[111] The notion of "Novus Actus Interviens", which the defendant contends is applicable here, is tested by whether the new act or the act of a third party was foreseeable. If the act of the third party was foreseeable, the defendant remains liable and the chain of causation unbroken. If the act of the third party is not foreseeable this will break the chain of causation and the defendant is not liable for the actions of the third party. In the case before me, the defendant was negligent towards the Claimant; this resulted in him sustaining serious injuries; he was taken to hospital where he was treated; following this treatment he developed a 'foot drop'. Going to the hospital for treatment was the natural consequence of the accident which followed from the Defendant's negligence. The act of the doctors in administering medication was an act of a third party which was foreseeable. It all followed in the chain of causation.

[112] Therefore in these circumstances, the question is whether there was a new cause of action. To break the chain of causation there must be something unwarrantable and a new cause which disturbs the sequence of events. It is my view that the chain of causation was not broken and the Claimant would not have received the "foot drop" injury if it were not for the negligence of the Defendant which resulted in him being brought to the hospital for treatment. This is underpinned in the principle enunciated in the Robinson v Post Office Case (Ibid).

[113] The Court was directed to several cases by both the Defendant and the Claimant's attorney-at-law, to assist with its deliberation's as to quantum in the assessment of damages. The Claimant's submissions cited 5 cases in relation to the award of general damages and in support of the quantum he hopes to receive under this head. These were all considered by the court. As stated earlier, there is some conflict in relation to the report from Drs. Cheeks and Dundas. Dr. Dundas readily accepts that he did not have some of the information that Dr. Cheeks had prior to for his assessment. He also readily admits that for the purpose of the bone scan, the CT Scan taken soon after the accident and seen and assessed by Doctor Cheeks was more likely to be accurate than the MRI Scan that he had used. In these circumstances, I prefer the report of Doctor Cheeks and accept that in the circumstances his assessment is likely to be more accurate than that of Doctor Dundas.

[114] Accordingly, I accept that the Claimant has a 33% disability of the whole person. The cited case of **Orville Lovelace v the Attorney General of Jamaica** (unreported), is at the higher end of the spectrum for these types of injuries. In this case, the Claimant had a partial amputation of the right foot in that all his toes were amputed. He was left with a permanent partial disability of 36% of the whole person. His award in May 2011 was $20, 000, 000.00. The extent of the injuries in this case was by far more serious than the one before the court in that the Claimant did not have amputation which would have left him to walk only on one leg and the permanent disability of the whole person was higher.

[115] In **Deborah Douglas v Attorney General** Khan vol. 6 page 130, the Claimant was shot in the head and was left with a disability of 45% and therefore significantly higher than that of the Claimant in the case before me. The Claimant received an award which updates to $11,799,000.00

[116] The case of **Ramon Boulton v Jelu McAdan** Khan vol 6 page 132 was cited by both the Claimant and the Defendant, the Claimant suffered severe head injuries, but his disability was 39%; again higher than that of the Claimant in the case before me. After indexation, the current value of the award is $14,700,000.00.

[117] Again in the case of **Attorney General of Jamaica v Evelyn Simpson**, Khan vol 6 page 136, the Claimant suffered a severe head injury but had a significantly greater disability assessed at 60%. His award updates to $21,059,113.30

[118] The cases cited by the Defendant, with the exception of the Ramon Barton (Ibid) do not take account of the Claimant's claim for the "left foot" drop and so are at the bottom of the scale. The case of **Ramain Barton v John McAdam** provides the best comparison to this case. In that case, the Claimant suffered severe head injury, a fractured skull, forgetfulness, mild memory loss and walked with a hemi paretic gait. He suffered 30% disability of the whole person. His award was $14,700.000.00. In taking into account the lesser disability in the case before me, and the additional suffering of post traumatic stress disorder and depression as outlined in Doctor Wendel Abel's assessment outlined above, I make an award of $11,500,000.00 for pain and suffering.

Loss of future Earnings

[119] The Claimant's evidence is that he has not been able to return to work since the accident as he is unable to take on certain physical tasks and has a memory problem. Doctor Wendel Abel and Doctor Cheeks somewhat supports this evidence. Doctor Cheeks report of 25th June, 2011, indicates that his "Assessment of visual and verbal memory function as well as his speed of information processing reveals that these neuro cognitive functions are impaired when assessed". Doctor Wendel Abel is opinion was that the injuries were such that "given the level of physical and psychological impairment, it is unlikely that Mr. McKnight will be able to function in a similar job at this time". There can be no dispute that the Claimant will suffer some loss of income in the future. The question is to what extent is this so and how does this quantify in damages?

[120] The Claimant saw Doctor Leachim Semaj an industrial psychologist and he by his report of 3/5/2011, indicated that the claimant might have to gain employment of a clerical nature, a "desk job" and that this is likely to be less well paid than his previous job as an Auto Mechanic. In this job he earned approximately $50,040.00 per fortnight.

[121] The Claimant in seeking to prove loss of future earnings has to establish that his future financial earnings will be negatively affected by the injury. This he has done from his evidence as well as the medical reports admitted into evidence on his behalf. The Claimant and Defendant are poles apart under this head. Whilst the Claimant submits that $7,200,000.00 would be an appropriate award, the Defendant contends that a figure of approximately $1,500,000.00 would be appropriate. They both employ the multiplier multiplicand method of calculation. However whilst the claimant supports his position by using a multiplier of 6 and the Claimant's annual salary before the accident as the multiplicand; the Defendant uses a multiplier of 7 and the minimum wage of $4,500 per week. From this figure statutory deductions are then applied.

[122] The Claimant's injuries are clearly serious and long term. In considering the sufficiency of an award under this head, the court is cognizant of the fact that no precise mathematical calculation is possible due to the level of uncertainty presented by such matters. Such as what work, if any, will the Claimant be able to secure? To what extent will his condition improve or deteriorate? Would he have secured promotion if it were not for the accident? Would he have worked to pensionable age or left the job market early due to ill health or otherwise? However, the court tries to do its best by using the multiplier, multiplicand method of calculation and by following guidelines set by previous cases.

[123] The multiplicand for these purposes, represents the Claimant's net future loss taking into account earnings at the time of the accident and the likelihood of promotion. The Claimant's earning potential before the accident was a approximately $1.2 million per annum. In taking this as a minimum (as it would be expected that this would be increased over time) and in taking into account his age, which at the time of trial would have been about forty (44) years old; the retirement age being sixty (60), he would have another sixteen (16) years of working life. However, due to the uncertainties referred to above, I believe that the multiplier of six (6) to the multiplicand of $1,200,000.00 as submitted by counsel for the Claimant is not unreasonable in the circumstances. This sum amounts to an award of $7, 200,000.00.

[124] As the Claimant might still be able to work, this effectively takes into account his residual earning capacity. The multiplier is reduced accordingly as it is likely that he might work in the future, albeit at a much reduced pay. In fact the report of Dr Samachj, indicates that he would need to learn new skills and gain qualifications in order to move into a 'desk job'. This in itself might be impacted if Dr Abel is correct in his assessment of the claimant's memory functions and cognitive skills following the accident. The multiplier is also reduced to take account of the fact that there is a chance that the Claimant would not have worked until retirement age even without the accident. The Claimant may have left employment for a variety of reasons, including illness.

[125] I do not accept the Defendant's proposal of a multiplier 7 and a multiplicand of four thousand five hundred dollars ($4,500.00) per week, representing the minimum wage (now $5,000.00) is reasonable in the circumstances. In my view the loss of future earning must as far as possible reflect the Claimant's true potential loss. He was a skilled worker, working far above the minimum wage, therefore, in my view his loss cannot be considered in relation to the minimum wage, although it is true and is reflected in my assessment, that the court must take account life's contingences or the vicissitudes of life. This it has done by reducing the multiplier from a potential of 16 to 6. The award of $7, 200, 000.00, takes into account that this is a lump sum award representing a capital sum which the Claimant, if prudent, will invest in interest bearing securities.

Disadvantage or Handicap in the labour market

[126] This is a head of damages, claimed by the Claimant. This head of damages I believe is more suitable for a Claimant with a long term injury who is gainfully employed at the date of trail, but if he or she loses their employment in the future; might as a result of their impairment find it difficult to get a new job of a similar type and for similar pay.

[127] Hence although it is usual to make a modest addition to damages, as in **Smith v Manchester Corporation** (1974) I K I R (CA) to reflect the Claimant's future "disadvantage in the job market", it is my view in the circumstances of the case before me, where the Claimant is not working; where it is established from the evidence that he

will be not able to work again in his capacity as a mechanic but will need to take on a desk job, which is likely to be less paid; his “handicap on the job market” is reflected in the award for loss of future earnings and would be a duplication, if given again under a separate head. Accordingly, I make no separate award for “handicap” in the labour or job market.

Future Medical Expenses

[128] The Medical reports of Dr. Wendel Abel and Dr. Rayesh Balachander indicate that the Claimant will require future medical care.

[129] Doctor Abel’s clinical findings in relation to the Claimant’s were consistent with Post Traumatic Stress Disorder and Major Depression and his preliminary estimate for future mental health care, including neurological assessment and Psychotherapy is $740,000.00

[130] Doctor Rayesh Balachander, a dentist, examined the Claimant in respect to his upper left central incisor tooth which was partially lost as a result of the accident and which was subsequently extracted. He gives options for its replacement, in the alternative as (i) a bridge at a cost of $100,000.00; (ii) an implant at a cost of $200,000.00 or (iii) a denture at the cost of $8000.00

[131] The Claimant’s preferred choice is not clear from the evidence, but an award is reasonable in the circumstances. The Court therefore, makes an award of 200,000.00. I agree with counsel for the Defence that there is no medical report indicating that the Claimant requires braces any at all and if so whether this is as a result of the accident. I therefore make no award for this.

Special Damages

(i) **Medical expenses** were agreed between the parties at $248,961.91

(ii) **Loss of Earnings -** The Claimant also claims for loss of earnings.

[132] His evidence is that he has had difficulty working since the date of the accident. He gave evidence that he attempted to do wood work but that he was unable to

continue as he had severe pains to his body. Unfortunately, there is no indication from the evidence, as to how long this was for and how much was earned. Nevertheless, as it appears to have been very, very brief, the court will make an award to take account of the full period between the date of the accident to the date of the trial, particularly as the Defence left that part of the evidence undisturbed although loss and continuing loss of earnings at $55, 040.00 per fortnight was specifically pleaded and claimed in evidence. The accident occurred on 13th May 2008 from this date to the day of trial is approximately four (4) years i.e. forty eight (48) months. This would equate to 4x 52 weeks x 25000, which amounts to $5,200,000.00.

Damages are awarded as follows:

Special Damages

Loss of Earnings	$5,200,000.00
Medical Expenses	$ 248,922.01
Total	**$5,448,922.01**

General Damages

(i)	Pain and Suffering and loss of Amenities & Post Traumatic Stress Disorder	$11,500,000.00
(ii)	Loss of future earning	$ 7,200,000.00
(iii)	Future Medical Expenses	$ 940,000.00
	Total	**$19,640,000.00**

[133] The Court awards interest on special damages at the rate of 3% from the 12th May 2008 to the date of trial and on general Damages at the rate of 3% from the 27th April 2009 to the date of trial.

Costs to the Claimant to be Agreed or taxed.