REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV 2015-03756**

BETWEEN

JOHN RAY MATHISON

Claimant

AND

KENTZ-OJ'S E&I SERVICES JV LIMITED

Defendant

Before The Hon. Madam Justice C. Gobin

Date of Delivery: May 17, 2019

Appearances:
Ms. Claire Sinanan instructed by Ms. Zaira Mohammed for the Claimant
Mr. Kerwyn Garcia instructed by Mr. Romney Thomas for the Defendant

JUDGMENT

The Claimant's case

1. The Claimant John Ray Mathison filed this claim against his former employers Kentz-OJ's E&I Services JV Ltd for damages for personal injuries and consequential loss arising out of the latter's negligence at common law as well as breach of its statutory duty under S.6 of the Occupational Health and Safety Act. Ch. 88:08 (OSHA).

2. In October 2007, Mr. Mathison took up employment as a driver/hiab operator with the Defendant. He was assigned TCE 2579. In November 2011, as he was attempting to get off the edge of a container he had loaded on to his truck. As he was about to release his grip to jump off to the side of the truck he unexpectedly lost it. He realised then he could not control his grip.

3. He would later be diagnosed as having suffered the effects of a pinched nerve. It came with severe neck/shoulder and hand pain with discomfort. An x-ray performed on 21st November 2011, showed slight lipping and narrowing of the disc space in two areas of his spinal cord. A MRI Scan done on 7th December 2011 revealed spinal canal stenosis with associated oedema of the cervical spinal cord in the areas of narrowing. Mr. Mathison tried to stay on the job, his pain and cramps notwithstanding, but he was unable to work after 16th December 2011. His physical state deteriorated rapidly. He began as well to suffer faecal and urinary incontinence. He continued with extensive pain and numbness of parts of his body. He eventually had surgery at a private institution on 8th May 2011 for which the Defendant paid. The surgery was performed by Dr. Ravindranath Narine, a Consultant Neurosurgeon. Some improvement followed the surgery but he continued to experience incontinence from time to time and even now he is forced to sometimes take the precaution of wearing adult pampers when he is going out. He is unable to stand for long periods, his grasp remains weak and he is unable to walk without a cane. He has been unable to return to work as a driver. He continues to suffer pain, numbness, zapping sensations throughout his body from time to time.

4. Mr. Mathison claimed that his injuries and resulting disability were the result of Defendant's breaches of its obligation to provide a safe system of work. The Defendant had him performing the work of a rigger/lorryman in addition to that of a driver/hiab operator. The stress on his muscles and health generally of the additional work is what he claimed caused the injuries. The Claimant's evidence in the following extracts from his Witness Statement demonstrated graphically, the level of exertion that was involved in doing the work that he was required to do generally 6 days per week. I considered it necessary to include these lengthy passages because they provide a better understanding of what the Claimant actually did and a better appreciation of the Claimant's case on causation when they are read with the medical evidence in mind: -

<u>(Witness Statement of Ray Mathison filed 31/01/18)</u>

> 9. The process I would use to pick up a load is as follows. I would first have to drive and position my truck in a way that best suited the lifting process. I would exit the truck and secure the load using what we call loading straps. These loading straps are also known as lifting straps.

There would be different sizes and lengths of lifting straps. I would select the appropriate lifting strap depending on the size and weight of the load. All loads come with something called an "eyehole" or in some cases multiple eyeholes. The eyehole is a metal mechanism attached to the load and the shackles are attached to that. Sometimes the load would come down with its own shackles already attached to the eyeholes. Other times I would attach the shackles to the eyeholes. Sometimes the eyeholes and shackles would be attached low on the load, other times it could be attached atop the load. Some loads only need one shackle and eyehole others because of the weight may use up to four of each. If the load is large and too high for me to secure the loading straps from ground level and the eyeholes and shackles are atop the load. I would have to use my arms, legs and bodyweight to hoist my body atop the load to secure the shackles to the eyeholes if necessary and then attach the loading straps to the shackles. After loading straps are secure I would go to the hand controls for the crane behind the cab and I would position the crane over the load. When the crane is in position I would then walk back to the load and attach the loading straps to the crane. Sometimes this would mean again hoisting myself atop the load to attach the straps to the crane and also secure a tag line. I would again use my arms to push myself up onto the load and manoeuvre my body and climb on top of the load. I would then go back to the hand controls and using the levers move the load using the crane to place the load onto the bed of the truck. In order to ensure that the load rests properly on to the truck I would raise one hand and use a tag line to guide the load. The tagline is a piece of rope or strap attached to the loading straps or to the load itself to centralize and stabilize the load so that it rests easily onto the truck bed. I would have to raise one hand to manoeuvre the tag line and use the other to operate the crane levers of the Hiab.

10. When the load is resting properly on the bed of the truck I would climb onto the bed of the truck using my arms and legs. I would do so by holding onto the edge of the truck bed with my hands and push up swinging my legs over onto the bed. My truck did not have any ladder to get onto the bed for the duration of my employment with the Defendant and so I would have to use my arms, legs and bodyweight to hoist myself onto the bed of the truck. If the load is a large one that is

taller than me or one where I cannot stretch and reach to unhook the crane I would use my arms and body weight to hoist myself again onto the top of the load and manually unhook the crane from the loading straps. I would then either jump or climb down from the load. Depending on the size I would jump off or I would use my arms and holding on to the edge of the load drop down onto the truck bed. I would then pick up a different set of straps called the ratchet straps to secure the load to the truck bed. How I used the ratchet straps to secure the load to the truck bed depended on the size of the load. Sometimes I would stand on one side of the truck bed and using my arms and hands I would toss the straps to the other side of the truck and secure the ratchet to the bed on the side. I would use my arms, hands, shoulders and muscles to apply force to the ratchet in order to tighten the binding straps over the load. This required me to push the ratchet handle in an upward movement and pull it downwards with great force in order to tighten the ratchet. When the load is too high or too cumbersome just to throw the ratchet straps I would have to again ascend the truck bed climb onto the load, physically pass the ratchet straps over the load, descend the truck and firmly secure the ratchet to the bed. I would then fold in the crane of the Hiab and proceed to the delivery point.

11. The process I used upon arrival at the delivery sites as follows. I would position the truck where it has to be offloaded. I would climb down from the cab of the truck and walk to the sides to loosen the ratchets from the truck bed. I would then position the crane over the load using the hand controls. I would then physically ascend the truck by using my arms and legs to hoist myself onto the truck bed because as I said, my truck did not come equipped with a ladder to get into the truck bed whilst I was employed with the Defendant. When I got onto the bed I would then hook the loading straps to the crane. If the load is too high for me to reach the crane from the truck bed I would climb onto the load to attach the crane. This was sometimes very difficult especially when the load takes up most of the bed of the truck and there is little or no leg room to manoeuvre. In stances where the load takes up the entire truck bed and there is no room for me to climb onto the truck bed I would climb onto the crash bar that is located between the cab of the truck and the bed of the truck. When I climb onto this crash bar I

would then climb onto the load and secure the loading straps onto the crane. The tag line would still be attached from before. I would then descend the truck by jumping off to the ground and operate the hand controls for the Hiab and the tag line to lift and manoeuvre the load to place it where it has to be stored.

5. At the trial, expert medical evidence was produced to support the Claimant's case on causation. Dr. Narine examined Mr. Mathison and took instructions as to what his work involved. The doctor learnt of the regular, repetitive motions involved in the Claimant's driving/rigging/lorryman jobs including jumping on and off the truck, hoisting himself by his arms on to various loads, operating the ratchet binder utilizing overhead force, the detail of which is contained in the extracts from the Witness Statement. Dr. Narine concluded that it was likely that such physical activities may have contributed materially to the Claimant injuries.

5. Dr. Victor Coombs, Consultant in Occupational and Environmental Health saw the Claimant on four occasions, the first of which was in 2013 almost two years after the Claimant had left the job. He too took Mr. Mathison's work history. He was told that prior to being hired at Kentz-OJ's as a driver/hiab operator, the Claimant worked at IOCL in a similar capacity and prior to that at Lennox Petroleum as a lorryman/driver. Dr. Coombs received detailed instructions as to what the Claimant's day to day activities as a driver/lorryman/rigger involved including repeated and various stretching, climbing and reaching motions, the repeated use of overhead force. He concluded too that Mr. Mathison's condition was brought about as a direct result of his work and it should be deemed work related.

6. I should indicate here that Counsel for the Defendant raised some concern as to Dr. Coomb's evidence, not as to his expertise but as to his independence given the contents of his report. This was not entirely unjustified. The tone of the report and more particularly the list of OSHA questions were unfortunate, but this was not sufficient to cause me to reject Dr. Coomb's evidence. In any case an order was made allowing the use of Dr. Coomb's report on 5th February 2018 and no objection was noted.

The Defendant's case

7. The Defendant maintained that it provided a safe system of work with adequate manpower. The Claimant was required to transport large and heavy material using a crane mounted on the truck. He was certified and trained in the operation of the crane on the truck. Mr. Mathison was not required to do anything but drive and manually operate the crane. He was not even allowed to go on the bed of the truck. The Defendant asserted that the Claimant was provided with proper equipment and training to do his job. Ratchet straps were used to secure the load on the truck. It was specifically pleaded in the Defence (somewhat inconsistently) that the Claimant and in addition to him a lorryman/banksman were required to use the ratchet straps to secure the load on the truck. The task of securing the load using the ratchet strap was that of the banksman/lorryman.

8. The Defendant specifically denied that the Claimant was required to do the work of a lorryman and rigger. It claimed that a certified rigger/banksman was assigned to the Claimant's truck as shown in copies of Job Safety Analysis records, some of which were in fact signed by the Claimant. The Defendant went so far as to indicate that the Claimant was involved in designing that form. The Defendant said that it had a Manual Handling Policy to enhance safety in its system of work and organisation of manpower. That policy document was produced in evidence.

9. In further answer to the central claim that Mr. Mathison was required to do the work of a driver and or a rigger/banksman Defendant said that a certified rigger/banksman – later identified as Deodath Dharamnath (known as Doray) was at all times assigned to the truck driven by Mr. Mathison. Deodath's job was to assist with loading and unloading. Only the certified rigger (Deodath) was allowed to attach slings to containers for lifting. This was to bolster the claim that Mr. Mathison did not do most of the activities described in his evidence.

10. In relation to the Claimant's safety, Defendant claimed it provided training in formal defensive driving, it held short toolbox meetings, it provided protective gear such as a hard hat, fireproof clothing, gloves, industrial boots/goggles etc. The Claimant was required to operate controls to place the load on the truck. A specific supervisor was not assigned to the truck as operations took place at various

location both on and off site but the Defendant did not concede that there was no supervisor to oversee the transport operations. The JSEA forms made references to the supervisor's tasks and his role in the lifting exercises. Specifically the Defendant claimed it operated a safe system of work and provided sufficient personnel. The Defendant further claimed that nothing in the Claimant's work duties required him to be on the truck, to jump on to or off the bed. Records did not indicate the absence of a ladder but there was a metal one located on the side of the truck near the hand control for the crane.

11. The Defendant pleaded that in accordance with its Manual Handling Policy – sufficient risk assessments were conducted and risks were identified and employees were required to follow the policy. It claimed further that Mr. Mathison wholly caused or contributed to his injury by failing to seek assistance when he required it, failing to follow the manual and essentially failing to take care for his own safety.

The Issues: Legal/Factual

12. The central legal question to be determined in this case was whether the Defendant provided a proper and safe system of work with effective supervision, competent staff, adequate material in accordance with its legal obligations. According to **Charlesworth on Negligence (p.841)** "A system of work is the term used to describe:

    (i) the organisation of the work;
    (ii) the way in which it is intended the work shall be carried out;
    (iii) the giving of adequate instructions (especially to inexperienced workers);
    (vi) the number of such persons required to do the job;
    (vii) the part to be taken by each of the various persons employed.

13. The common law duty of the Employer is codified in S.6 (1) and (2) of the OSHA Act 88:08

    6. (1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the safety, health and welfare at work of all his employees.

(2) Without prejudice to the generality of an employer's duty under subsection (1), the matters to which that duty extends include in particular: -

(a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health.

The Evidence /Findings

14. The determination of this core legal issue hinged on the resolution of the factual issue as to whether Mr. Mathison was required to do the job of driver/lorryman/rigger or whether indeed he was required only to drive the truck and operate the crane and all other load handling was done by a certified rigger, Mr. Deodath Dharamnath. This called for an assessment of the credibility of the claims and the parties' witnesses.

15. I preferred the evidence of the Claimant and his witnesses Linton Telesford and Sajad Tariq Moahmmed. Both of these men were former employees of the Defendant during part of the period of the Claimant's employment and familiar with it's system of work. I found the evidence of Mr. Telesford's and Mr. Mohammed's to be cogent and consistent with the Mr. Mathison and each other's. I have no reason to treat their evidence as other than independent. There was no suggestion that as former workers of the Defendant, they had any particular interest to serve or indeed any grouse or ill will toward it. Both were familiar with TCE 2579 and the condition of it. Both were clear that there was no assigned rigger/lorryman to the Claimant's truck. They both indicated quite honestly, in my view, that there were indeed times when assistance was provided upon request, but this was not a part of the established system of work of the Defendant. In the case of Mr. Telesford, he was a labourer part of a team that was running cables at PETROTRIN. His job had nothing to do with transport of equipment, but he was sent from time to time to assist Mr. Mathison with loading. His evidence as to what this involved was consistent with Mr. Mathison's. Mr. Telesford was not himself a certified rigger or lorryman. He was coopted when it was necessary. His evidence supported the broader claim that the Defendant did not employ sufficient personnel to do loading and offloading of the truck.

16. Mr. Mohammed was himself a driver who was subjected to the same conditions as the Claimant only his were not as bad, because he worked a smaller truck and had less heavy loads. When he did ask for assistance, Mr. Mathison was held up as an example of a colleague who was getting the job done on his own. I accept the evidence of the Claimant and Mr. Mohammed that one of the rungs of the metal ladder leading to the cab of his truck was rusted and unusable for a significant part of his employment. I find too that the metal ladder leading to the bed was installed only after Mr. Mathison left.

17. The Defendant has not strenuously denied that no ladder was provided for climbing to the top of the highest loads. I find there was none. Mr. Mohammed filed a supplemental witness statement to respond to the evidence of the Defendant's manager, Mr. Jagoo on the value of the JSEA forms. Essentially, like the Claimant in his own, he said these were just produced and signed as a formality to comply with PETROTRIN safety requirements and in order for the Defendant to obtain "safety to work" certification. He described it as just paperwork. Mr. Mohammed was not strenuously challenged on his evidence in this regard.

18. On the critical aspects I rejected the evidence of Mr. Jagoo and Ms. Biswas who testified on behalf of the Defendant. First, they can hardly be described as independent. Ms. Biswas largely adopted the witness statement of Mr. Jagoo which in itself is not impressive. Ms. Biswas was shown to be inconsistent in her evidence as to how Mr. Mathison left the Defendant's employ and whether she was aware of his complaints before he departed. Her cross-examination established that she must have been aware of his medical condition because she collected monies for him and visited him around Christmas time with her husband. She also had to sign his application for submission for NIS benefits. Her failure to be open on a relatively innocuous matter such as awareness of his illness and complaints, has not assisted her on credibility.

19. I preferred the explanation of the Claimant and Mr. Mohammed on the JSEA forms and the use and significance of them. I attach no weight to the contents insofar as they purport to reflect safety systems regarding the Claimant's work. I reject the evidence that Mr. Mathison was involved in the design of the form. If his name was included it could well be that he was considered the person most obviously

connected and involved with the Defendant's transport and loading operations at PETROTRIN, and not just as a driver. Mr. Jagoo relied on the JSEA forms, which I have rejected, the handling manual, toolbox meeting records and reports from Incorrect Limited. The last mentioned of these which were irrelevant to this claim entirely and the attachment of them did not assist on the defence credibility.

20. The aspect of the Defendant's evidence which most undermined the credibility of its case was of the alleged assignment of Deodath Dharamnath to the Claimant's truck. Mr. Jagoo was adamant that Deodath who is a certified rigger was assigned to the truck at all times to do the rigging. Mr. Dharamnath remains employed with the Defendant but he was not called as a witness in this matter. This failure on its own was sufficient to cause me to reject the Defendant's case on the provision of a safe system of work. The failure to call a witness who is available to the Defendant and who could easily have established the main plank of the Defence caused me to draw adverse inferences as its credibility generally. No attempt was made even to provide a certificate to indicate that this rigger was actually certified. The Defendant called no evidence of any supervisor/banksman was actually involved in loading and offloading operations on the ground. Mr. Jagoo's and Ms. Biswas's evidence of a safe system of work was based on documentary evidence was not sufficient to establish the Defendant's case. I believe the documents were only conveniently produced for STOW certification. But more fundamentally those particular documents and his evidence in large measure were irrelevant to the peculiar flaw in the system of work that I find caused the Claimant's injury.

21. The cause was not failure of Defensive driving techniques, failure to provide gear (except for a ladder and to repair a rung of the truck bed ladder). It was a flaw in a system of work that exposed the Claimant to the risks associated with manual handling to which he was already exposed as a driver and then further, endangered by the additional responsibilities and physical exertion required to discharge his functions as a lorryman/rigger. On the evidence I find that the Defendant did not have an assigned rigger/lorryman to work with Mr. Mathison and that the Claimant was required to do much more than he was hired to do. On occasion when it was impossible to manage on his own, he got assistance on site. There were other times when he asked for assistance and if someone, including Deodath was

available, he got it, but even then, not for the entire day. Deodath was not assigned to TCE 2579 as a lorryman/rigger.

22. The evidence established that Mr. Mathison was an extremely industrious employee. He worked when required seven days a week, often six days and well beyond the standard eight hours per day. He did what was necessary to ensure that he delivered on schedule as many loads as he was assigned. The Defendant had contracts to supply, install and maintain large scale industrial equipment with Atlantic LNG, PETROTRIN, POWERGEN and PHOENIX. It is not hard to accept on a balance of probabilities that the Claimant was required to make several trips per day.

Causation/Manual Handling

23. Mr. Mathison's claim brings into sharp focus the hazards of poor manual handling in the workplace. While it seldom kills or disfigures anyone, the injuries that occur are often disabling, long term and costly. The damage to the human musculo skeletal frame is insidious and can often go undetected or unattended unless there is some acute incident. The serious health risks and hazards associated with work that might not appear involve the exertion of serious physical force, are not obvious to the uninformed. I myself am only now aware of the advances in occupation health and safety protection in the workplace which require sensitivity to the risk and a manual handling policy where it is necessary. The evidence of the Claimant and all of his witnesses including the doctors established that was required of Mr. Mathison as a driver/hiab operator and rigger/lorryman every day, and the manner in which he was forced to and left to do it on his own, did involve manual handling in the extreme. For a man of his age and his slight frame, he did his work with an admirable level of gymnastic skills.

24. I consider it an extremely relevant factor in determining liability, that at all times the Defendant in this case was aware of the hazards. It had in place a manual handling policy. The policy was not specifically designed for its operations. It was prepared by one Gillian Gonzales of the HS & E Department Bechtel International for PETROTRIN and adopted by the Defendant. At all times the defence relied on adherence.

25. The manual is extremely informative in defining and explaining manual handling, the activities which qualify as such, the risks and steps to identifying them, and it included advice on measures to minimize or avoid risk. It is clearly a document for the use and guidance of managers and persons running a business as opposed to employees themselves. There could no reason for Mr. Jagoo to provide Mr. Mathison with the document. It contains no instructions for employees, so it could not have been the subject of training for them. I do not believe Mr. Mathison or any other worker was familiar with the policy or that he was even aware there was one. I would not be surprised if Mr. Mathison had never heard of or understood the expression manual handling before his case. Here again was one for the Defendant's books it seems.

26. The Defendant on the other hand would have been aware of the following points which I have taken from the text of the Manual Handling Document itself: -

(i) That manual handling covers more than heavy lifting, it includes sustained muscle exertion required to restrain or support a load that injuries often occur due to wear and tear accumulated from frequent periods of manual handling activity such as repetitive work of heavy lifting. That the effects of these injuries often become more disabling as workers become older. The first high risk group identified was heavy truck drivers. The Claimant therefore started off as a high risk candidate.

(ii) That tasks which are likely to stress the body needed to be identified. That employees involved in manual handling should be trained for each task including training on safe manual handling.

(iii) That the process of identifying tasks required noting if a worker needs to bend, stretch, over reach (particularly where there are objects, blocking the way), work above shoulder height, twist the body, carry out tasks for long periods of time, handle heavy objects that apart from lifting lowering or carrying – many tasks require force to hold or restrain objects. **[Emphasis added]**

(iv) That for older workers as age increases, wear and tear injuries are common. Other factors which influence risk are general state of

health and fitness physical dimensions such as height, reach hand grip size.

(v) The need to provide training on hazards associated with musculo skeletal injury on how the hazards can be recognised and the ways being used to manage risk training all worker in manual hardly.

(vi) Work organisation – The risk of injury may influence the way in which work is organised and includes: -

(a) The number of staff available to do the work;
(b) Deadlines and production targets;
(c) The pace of work;
(d) The opportunity to do tasks requiring different physical demands;
(e) The opportunity to take rest breaks.

27. On the part of the Defendant, the hazards of the several jobs and the risk to the Claimant's physical health was therefore entirely foreseeable. On the other hand the Claimant, completely ignorant of the serious risk to which he was exposing himself did only what a worker with an exemplary approach to his job would do, he put his shoulder to the wheel and got the deliveries done. In the circumstances of his ignorance of the policy document and of the risk of his exposure and of my finding that he was required to do the work of a rigger/lorryman as well as a heavy truck driver, the claim of contributory negligence fails.

28. The evidence in this case established that what the Defendant did by failing to provide a rigger/lorryman and requiring the Claimant (a driver already known to under the policy to be at high risk) in his late forties to do in addition the gruelling work of a rigger/lorryman, exposed this slightly built gentleman to greater risk. The stress on his frame which was brought about by these demands is what caused Mr. Mathison's injury. No risk assessments were actually carried out. There was no training on the risks of musculo/skeletal injury. There was no evidence that risks were assessed and measures to guard against them implemented in accordance with the policy.

29. The document specifically address issues arising from "the organisation of the work" as an accepted feature of a safe system of work. There is no evidence from the Defendant that in accordance with it, it considered deadlines and delivery targets, the pace of Mr. Mathison's work, or even advised him on a simple matter of taking breaks. This guidance was ignored it seems. In the circumstance, the Defendant failed to provide a safe system of work.

Apportionment

30. At the date of the filing of the Defence on 18th April 2016, the Defendant would already have had sight of the medical certificate of Dr. Victor Coombs dated 6th November 2015 which was attached to the Claimant's Statement of Case filed on 6th November 2015 in which he set out the Claimant's occupational history. The Defendant raised no issue of pre-existing condition of any other cause of the Claimant's injury and consequently no issue of apportionment. I am inclined to agree with the submissions of the Claimant's attorney that on the pure pleading point, the Defendant should not have been allowed to raise it at the stage of the trial. CPR jurisprudence on this point is clear. I have to accept though that at the close of the evidence, I myself encouraged the parties to have discussions on the very issue. When they could not agree I returned to consider the submissions more carefully. Out of deference to Counsel's industry and my recognition of the fact that I encouraged submissions on the point I shall indicate my opinion.

31. Counsel for the Defendant cross-examined both doctors as to the effect on the Claimant's health of the similar work for a significant period of some thirteen years prior to his employment with it. Dr. Narine who did not have instructions when he issued his report accepted there may have been some impact and Dr. Coombs had to agree but he was firm that did not think it would have been significant. Had apportionment been raised on the pleadings the Claimant would have had the opportunity to respond and to provide full evidence of what the former employment involved. In re-examination, Counsel for the Claimant at the first opportunity elicited evidence that at Lennox Petroleum, the Claimant was a lorryman for two years and a driver for eight years. He worked exclusively as one or the other for those periods. When he worked at Lennox Petroleum the job involved the use of a winch not a crane. This was less physically stressful. There was no climbing or jumping as was required in his job with the Defendant. I accepted this and moreso because there was no rebuttal.

32. But further to this, the mere fact that the Defendant was previously employed as a lorryman/driver for thirteen years prior to his 2007 employment with the Defendant was not sufficient to establish any causal link to Mr. Mathison's injury in 2011. He said he had had no health complaints prior to 2007 and his attendance history and reputation for reliability seemed to support this claim. If he suffered any condition, he was asymptomatic until the exacerbation during his period of work with the Defendant. I think I am allowed to take judicial notice of the fact that the result was not inevitable simply because he had been working for so many years. Not every driver or rigger of the Claimant's age or occupational history experiences the kind of episode, injury and resulting incapacity that he did.

33. While I do not consider that the issue of apportionment is a live one, I consider applicable the guidance of the **PC** in **Board of Williams v. The Bermuda Hospital Board 2016 UKPC 4 PC App. No. 110 of 2011** in which the Board affirmed the general principle that "an employee will establish liability if he can prove that the employer's breach made a material contribution to his disability," and I have found this and more.

34. The Board went on reiterated the well-known principle that a tortfeasor takes his victim as he finds him. If Mr. Mathison's condition after thirteen years in similar occupations heightened his vulnerability to injury from manual handing, then the Defendant had to take him as it found him. The principle applies a fortiori in the circumstances of the Defendant having hired Mr. Mathison because of his interactions with it through his former employment as a driver/hiab operator. Moreover the Defendant, if it had carried out a risk assessment in accordance with its policy would have informed itself of any weakness or increased risk of the Claimant. If, indeed it had come to an apportionment, on the evidence I would have discounted no more than 15%.

Damages

35. Given Mr. Mathison's state of health, his age and my awareness of the state of the job market even for sedentary work, I do not believe it is likely that Mr. Mathison will find employment. The Defendant

has not strenuously disputed the evidence in support of the claim for damages. Its submissions focused on discounts for claims for contributory negligence and apportionment both of which have not succeeded.

36. On 9th May 2019 when I announced Judgment for the Claimant, I asked the parties for further assistance on the effect of the order of 5th May 2017 on the claim for past pecuniary loss. I accept there was no impact. Having considered the further submissions and those on the appropriate rate of interest and the guidance of the **Court of Appeal, CA Civ 251 of 2012 The Attorney General v. Fitzroy Brown** and ors. Damages are assess as follows: -

(i) For Past Pecuniary Loss - 75% of $12,000.00
= $9,000.00 x 74 months
= $666,000.00 with interest thereon at a rate of 1.25% from 31/1/12 to 9/5/19;

(ii) Special Damages - $10,000.00 with interest thereon at a rate of 1.25%;

(iii) General Damages - $200,000.00 with interest thereon at a rate of 2.5% from date of filing (6/11/15) to date of judgement (9/5/19);

(iv) Future Loss of Earnings-$9,000.00 x 48 months = $432,000.00;

37. The Defendant will pay the Claimant's costs of the action on the prescribed scale.

38. The Defendant will further pay the Claimant's Medical Experts' fees in the sum of $23,000.00.

Carol Gobin
Judge