REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
COURT OFFICE PORT OF SPAIN

C.V. No. 2013-04175

BETWEEN

MOHAN MANGAROO

Claimant

AND

DIPCON ENGINEERING SERVICES LIMITED

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Appearances:

Mr. Shaheed Hosein for the Claimant

Mr. Safraz T. Hussain instructed by Mr. Kyle Prescod for the Defendant

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JUDGMENT

A. Introduction

[1] The instant matter concerns damages claimed by the Claimant for the alleged negligence of the Defendant.

[2] On 22 October 2013, the Claimant filed his Claim Form and Statement of Case against the Defendant claiming relief of the court in the form of damages for personal injuries and loss caused by the alleged negligence of the Defendant. The Claimant further claimed interests on the judgment sum and costs. The Claimant's case was that the event of the Defendant's negligence arose out of an accident which took place on 27 February 2010, during the course of the Claimant's employment with the Defendant.

[3] On 20 November 2013, the defendant filed an appearance to the claim, therein disclosing its intention to defend the entirety of the claim. A Notice was thereafter filed on 5 December 2013, whereby the parties agreed to an extension of time for the Defendant to file its defence. By virtue of that agreement, the Defendant filed its Defence to the claim on 3 February 2014.

[4] The instant claim was first assigned to the Honourable Mr. Justice Hannays (deceased) for the first Case Management Conference to be held on 24 March 2014. However, following the unfortunate passing of the Honourable Mr. Justice Hannays, on 5 August 2014, the instant claim was transferred to this Honourable Court for a Case Management Conference scheduled on 18 September 2014.

[5] Thereafter, on 17 September 2014, the Defendant filed an Amended Defence. In its Amended Defence, the Defendant contended that the Claimant's claim disclosed no cause of action by the Claimant against the Defendant, is frivolous and/or vexatious and should be struck out. The Defendant also complained that the Claimant's pre-action letter dated 12 September 2013, did not conform to the requirements of a pre-action letter as stipulated in **Appendix B of the Practice Directions** appended to the **Civil Proceedings Rules 1998 (CPR), as amended,** thereby negatively impacting upon the Defendant's ability to consider settlement of the matter at an earlier stage.

[6] At the Case Management Conference on 18 September 2014, this Court gave directions to the parties for disclosure. Additionally, the Court granted permission to the Claimant to file an application to put in a reply to the Defendant's Amended Defence, and permission was also given to the Defendant to file any objection it had to same.

[7] Consistent with the permission given by the Court, on 10 October 2014 the Claimant filed its Application to file a reply and on 31 October 2014 the Defendant filed an objection to same. Additionally, on 19 November 2014 and 21 November 2014, the Claimant and the Defendant, respectively, filed their List of Documents.

[8] At the next hearing of the matter on 9 December 2014, this Court, upon consideration of the Claimant's Application to file a reply and the Defendant's objection to same, ordered that permission be granted to the Claimant to file a Reply to the Defendant's Amended Defence. Further directions were also given in respect of the filing of witness statements, evidential objections, and a common statement of issues.

[9] It followed that on 15 December 2014, the Claimant filed a Reply to the Defendant's Amended Defence. Thereafter, on 5 February 2015 the Claimant filed a Supplemental List and Bundle of Documents.

[10] On 3 February 2015 the Claimant filed the Witness Statement of Dr. David R. Santana. Subsequently, on 6 February 2015 the Claimant filed his Witness Statement as well as the Witness Statement of Dr. Neil Persad. On same date, he also filed four Notices for Admission of Hearsay Evidence, namely:

(i) Notice for admission of a Referral Form dated 4 September 2012 and a Medical Report dated 31 October 2012;

(ii) Notice for admission of a Medical Report dated 1 May 2014 of Mr. Raymond Nicholas (Physical Therapist);

(iii) Notice for admission of the undated Referral Form from the Chaguanas Health Facility which the Claimant stated he received around August 2012; and

(iv) Notice for Admission of the referral letter dated 24 April 2011 of Carice Campbell (Physical Therapist)

[11] On the other hand, on 6 February 2015 the Defendant filed the Witness Statement and Supplemental Witness Statement of Wayne Singh (Managing Director of the Defendant), in addition to filing the Witness Statement of Ramdeo Samlal (Stores Supervisor for the Defendant).

[12] On 26 February 2015, the Claimant filed a Notice of Evidential Objections. These objections were dealt with on 9 June 2015 prior to the start of the trial, and were overruled by the Court.

[13] On 10 March 2015 and 20 March 2015, the Claimant and Defendant, respectively, filed their Un-agreed Statement of Issues.

[14] By consent of the parties, an all parties' conference was convened on 14 May 2015 to explore the possibility of a settlement without a trial. Unfortunately, such attempts were unsuccessful and the matter proceeded to trial on 9 June 2015. At the trial, both parties agreed to focus only on the issue of liability; and address the issue of quantum at a later stage, if need arise. Thereafter, by permission of the Court, the Claimant filed its closing submissions on 29 June 2015 and the Defendant filed its submissions on 6 July 2015.

[15] I have considered all the evidence before the Court as well as the submissions made by counsel for the Claimant and the Defendant. Having reviewed and applied the law in respect of negligence, contributory negligence and workmen's compensation, I am of the view that the Claimant has *not* proven that the Defendant was negligent in its duty to provide a safe system of work for the Claimant. Thus, the Defendant cannot be held liable for the damages or losses which might have been accrued by the Claimant as a result of the accident. However, so far as workmen's compensation is concerned, based on the Claimant's eligibility to claim same under the **Workmen's Compensation Act Chap. 88:05**, it is the view of this Court that, if not already done, the Claimant ought to be allowed to make his application for workmen's compensation in relation to the personal injuries which he sustained from the accident, and have same processed by the Defendant against its insurers.

[16] I have hereinafter detailed the reasons for the Court's decision on liability in the instant matter.

B. Factual Background

[17] At the time of the events relevant to this claim, the claimant was fifty-five (55) years of age (his date of birth being 6 October 1954). He was employed as a Truck Driver/Loader with the Defendant and earned an average of **one thousand three hundred and one dollars and forty cents ($1,301.40)** per week (the equivalent of **twenty-three dollars ($23.00)** per hour).

(i) The Claimant's Case

[18] The Claimant's case was that on 27 February 2010, in the course of his employment as a Truck Driver/Loader for the Defendant, he was assigned the duty to deliver materials at a Plant in Wallerfield. He arrived at the Plant in Wallerfield and ascended a ladder attached to the side of the truck. The Claimant described that ladder as being made out of steel, smooth with no grip and with bars approximately half inch in diameter. The Claimant stated that upon ascending the ladder, he proceeded to untie the canvas which was covering the load that he had to deliver. After untying the canvas he was in the process of descending the ladder, when he slipped off the truck and fell to the ground. The Claimant claimed that he immediately experienced severe pain in his lower back, left thigh, left buttocks, calf and sole of his left foot.

[19] According to the Claimant, the accident occurred around 3:15pm near to the end of the work day. He stated that he immediately left the Wallerfield site, and returned to the Defendant's truck yard in Chaguanas. He explained that when he arrived at the yard, he informed Mr. Samlal (the Defendant's Stores Supervisor) that he slipped off the ladder and fell off the truck while removing the canvas, and that he had injured his back.

[20] The Claimant stated that when he arrived home on the evening of 27 February 2010, he continued to experience pain in his lower back and leg and visited the Chaguanas Health Facility, where he was treated for his injury. He stated that he continued to experience such

pain in his lower back and left leg, thus causing him to visit a private doctor, Dr. Indarjit Birjah on 1 March 2010, and on various occasions thereafter for treatment. Dr. Birjah, he stated, treated him with pain medication and recommended physiotherapy and sufficient bed rest.

[21] The Claimant further stated that he was then referred by the National Insurance Board to Dr. Neil C Persad on 2 September 2010. After Dr. Persad examined him, he informed him that he was suffering from lumbar disc herniation, referred him to physical therapy and advised that he seek further medical care at one of the public hospitals. In support of this the Claimant exhibited a referral letter from Dr. Neil Persad dated 2 September 2010.

[22] The Claimant deposed that he continued to experience worsening pain and thus attended therapy sessions at Mount Hope General Hospital for approximately eight months, after which he was informed by Carice Campbell, Physical Therapist, that he should undergo lumbar traction. On 24 April 2011, he was again referred to Dr. Persad for consultation. He again visited Dr. Persad on 28 June 2012.

[23] More than three years after the accident the Claimant caused his attorney to issue a pre-action letter dated 12 September 2013, in which he claimed (i) compensation for the injuries sustained at work during the course of his employment; (ii) payment under the provision of the Workmen's Compensation Act; (iii) compensation for his injuries which resulted from the Defendant's alleged breach of statutory duty, negligence, and/or unsafe equipment and/or working conditions.

[24] The Claimant asserted that the accident occurred as a result of the Defendant's negligence as the employer of the Claimant, or alternatively, that the Defendant was vicariously liable for its workers' negligence. In his claim filed 22 October 2014, the Claimant particularised the alleged negligence of the Defendant, to be that the Defendant:

(a) failed to provide a safe system of work;

(b) failed to provide adequate safety equipment and/or help for loading/off loading the truck;

(c) failed to train and/or instruct employees in safe working practices;

(d) failed to provide safe working conditions;

(e) failed to provide employees with sufficient assistance and/or equipment for loading/off-loading equipment from and off the truck; and

(f) failed to maintain and/or secure and/or repair the ladder on the truck

[25] The Claimant also specified that the injuries which he suffered as a result of the accident included sharp pain in the coccygeal area; pain in the left thigh; numbness in the left buttock, thigh, calf and sole of his left foot; loss of lumber lordosis consistent with paravertebral muscle spasm; and lumbar disc herniation with LLE radicular symptoms. He added that he suffered permanent partial disability assessed at 15%. In support of the injuries alleged the Claimant exhibited three medical reports dated 24 April 2011, 31 October 2012, and 8 August 2013, respectively.

[26] The Claimant emphasized that as a result of his injuries, he was unable to resume his occupation as a loader/driver or be engaged in any similar activities. Hence, he did not return to work after the 27 February 2010.

[27] In light of the injuries specified and the Claimant's alleged inability to work, the Claimant particularized his special damages as follows:

(a)	Cost of transport for medical treatment	$7,100.00;
(b)	Cost of medical report	$ 850.00;
(c)	Cost of physiotherapy	$ 910.00;
(d)	Costs of Dr. Indarjit Birjah's visit	$5,820.00;
(e)	Loss of Earnings (from 28 February 2010 to 31 October 2013)	$244,663.20
	Total	$259,343.20

[28] In support of the sums claimed the Claimant exhibited thirty-five receipts each in the value of **two hundred dollars ($200.00)** save one for **three hundred dollars ($300.00)** that he received from payments made mainly to Rennie Jagassar for the use of taxi-services

in the years 2010 to 2013, such taxi-services being from Longdenville (where the Claimant resided) to either Mount Hope, Port of Spain or to St. Joseph Medical Associates.

[29] The Claimant also exhibited a receipt dated 29 July 2012 for the value of **eight hundred and fifty dollars ($850.00)** in relation to payment of an Orthopaedic Surgeon at St. Joseph Medical Associates for professional services rendered.

[30] Additionally, he exhibited eight receipts for months in the years 2010 and 2011, of varying amounts, received for payment for physiotherapy at Physiotherapy Services Ltd in Port of Spain and physiotherapy sessions in Mount Hope General Hospital. The value of these receipts altogether totaled **nine hundred and ten dollars ($910.00)**.

[31] Finally, the Claimant also attached eight receipts for months in the years 2010 and 2011, received for payments made to Dr. Indarjit Birjah (District Medical Officer) for what appears to be the Claimant's medical visits to Dr. Birjah. The value of these receipts altogether totaled **five thousand six hundred and twenty dollars ($5,620.00).**

(ii) The Defendant's Case

[32] The Defendant, however, had a different view of the events relevant to the instant matter. According to the Defendant, on 22 February 2010 the Claimant was employed by the Defendant as a Truck Driver on a temporary basis. The Defendant exhibited the Claimant's Employment Form dated 22 February 2010, wherein it was stated that the Claimant was employed on a temporary basis and subjected to a probationary period for six (6) months or a further period as the company may deem fit. The Defendant further explained that following the Claimant's temporary employment, the Claimant was assigned by the Defendant to work on three (3) contracts awarded to the Defendant for the upgrading of public roads. Each of those contracts were for a period of three months and ran concurrently.

[33] The Defendant explained that the Claimant in fact only worked for the company for a period of six (6) days extending from 22 February 2010 to 27 February 2010. His rate of pay was stated to be **twenty-three dollars ($23.00) per hour**. The Defendant specified,

that the Claimant's aggregate pay for the six (6) day period which he worked was therefore as follows:

February 22, 2010 for 10 ¾ hours
February 23, 2010 for 10 ½ hours
February 24, 2010 for 11 hours
February 25, 2010 for 10 ¾ hours
February 26, 2010 for 9 ¼ hours
February 27, 2010 for 10 hours

Total hours worked 62 ¼ hours at $23.00 per hour =	$1,431.75
Less PAYE	$ 69.00
Less Health Surcharge	$ 8.25
Less NIS	$ 53.10
TOTAL NET PAY	**$1, 301.40**

[34] According to the Defendant, when the Claimant signed and began working for the Defendant on 22 February 2010, the Claimant was informed of the Defendant's safety procedures and requirements in relation to attire, footwear and equipment. The Defendant explained that as a Truck Driver, the Claimant was required to deliver materials to and from work sites where the Defendant was hired to supply its construction/engineering services. That task would also require the Claimant to tie and untie the canvasses that covered the loads upon the truck.

[35] In those premises, the Defendant stated that on 27 February 2010, the Claimant was required to deliver materials to a site at La Plata Road, Wallerfield. On that date, the Claimant reported for duty at around 6:00am. The Defendant asserted that the Claimant took the truck from the Defendant's Chaguanas garage to Tapana Road, Valencia, where the truck was loaded with material that was to be delivered at the Wallerfield site (which was some 45 minutes' drive from the Tapana site).

[36] The Defendant stated that around 5:30pm on the same date, the Claimant returned with the truck to the Defendant's yard at Endeavour Link Road, Chaguanas. Upon returning the truck to the yard, the Claimant informed his supervisor, Mr. Ramdeo Samlal, that he had injured his back. The Defendant maintained that notwithstanding several phone calls made to the Claimant, after 27 February 2010, by Mr. Samlal and other representatives of the Defendant, the Claimant never provided the Defendant with further details of the

alleged incident (contrary to the Defendant's procedure) nor did the Claimant ever report for duty after the 27 February 2010.

[37] The Defendant further stated that the Claimant never presented any sick leave certificates, medical reports or any documentation to justify why he failed to report for duty after 27 February 2010. This, the Defendant averred, constituted abandonment by the Claimant of his employment with the Defendant, thereby diminishing any issue in respect of loss of earnings by the Claimant after 27 February 2010.

[38] The Defendant explained that it is the usual practice that if a worker is legitimately injured on the job and needs to make a claim for workmen's compensation the workman must inform the supervisor at the site where the incident occurred immediately. The site supervisor would then orally inform Mr. Samlal of the incident. Mr. Samlal would then report the incident to the office. The worker would then be required to give a full report to the office. Once the worker has sought medical attention he would then submit his medical report, bills and any sick leave notifications from his doctor. The office would then prepare the application for the workmen's compensation on the worker's behalf, attaching all of the documentation received from the worker and submit same to the Defendant's insurance broker for processing of the claim.

[39] According to Mr. Wayne Singh (Managing Director), from a review of the Claimant's file, he stated that the Claimant never reported an incident to the site supervisor where the alleged incident occurred nor did he ever submit sick leave forms, applications or notifications to the Defendant.

[40] That notwithstanding, the Defendant stated that on 12 March 2010, the Claimant was paid the sum of **one thousand four hundred and thirty-one dollars and seventy-five cents ($1,431.75) (prior to tax and NIS deductions)** representing payment for the work done between 22 February 2010 to 27 February 2010, with the latter date representing the final day the Claimant worked for the Defendant.

[41] The Defendant maintained that no correspondence came from the Claimant following the alleged accident until nearly two years after the accident, when the Claimant, by handwritten letter dated 6 December 2011, stated that he would be making a claim for workmen's compensation. That letter refers to a medical report that was attached for the Defendant's attention (though said medical report was not exhibited with the letter annexed to the claim). In any event, the Defendant averred that it was not until late 2012 that the Defendant received any medical document regarding any of the Claimant's alleged injuries and relating to the Claimant's alleged incident which allegedly occurred on 27 February 2010.

[42] The Defendant was adamant that no accident occurred and the Claimant did not suffer any injuries during the course of his employment with the Defendant on 27 February 2010. The Defendant further maintained that in the event, however, that an accident occurred and the Claimant did suffer injuries on 27 February 2010, same was not due to any negligence of the Defendant but that any accident/injury was wholly caused by and/or contributed to by the negligence of the Claimant who failed to take due care and attention while descending the ladder of the truck.

[43] To that end, the Defendant particularised the Claimant's negligence as follows:

(a) the Claimant failed on 27 February 2010 to follow the safety procedure which was known to him, more specifically, he failed to take reasonable care before and after tying and untying the tarpaulin covering the load carried in the tray of the truck;

(b) the Claimant failed to take adequate care while descending the ladder notwithstanding being informed of proper safety techniques when he began his employment with the Defendant;

(c) the Claimant failed to use the handrails/frame of the ladder as he descended same; and

(d) the Claimant failed to take care of his safety as he descended the ladder and or at any time on 27 February 2010.

[44] The Defendant maintained that both the truck and the ladder on the truck were in good state and condition and neither posed any danger. According to Mr. Wayne Singh (on behalf of the Defendant), the ladders on all the Defendant's trucks were extended to allow for easier access and climbing by truck drivers. These extensions were necessitated by the fact that the ladders with which the trucks were purchased were too high to allow for easy access by drivers.

[45] Additionally, Mr. Samlal (also on behalf of the Defendant) stated that it was standard practice for truck drivers to inspect their vehicles each day to ensure that they are in good and proper working order and without defects. Both Mr. Samlal and Mr. Singh did not recall receiving any report of any damage or defect with the ladder attached to the truck driven by the Claimant. In fact, Mr. Samlal added that during his time working at the Defendant, there had never been any report of any truck driver falling off any of the Defendant's trucks.

[46] Moreover, the Defendant was adamant that no special training or warning was required to be given by the Defendant to the Claimant, save for the training and safety procedures indicated by the Defendant's representatives to the Claimant when the Claimant was employed. The Defendant averred that the Claimant was made aware of proper safety procedure and the necessity of wearing proper equipment while on the job. A copy of the company's list of procedures to follow when employing drivers, which was provided to the Claimant was exhibited to the defence. Additionally, the Defendant asserted that the Claimant was familiar with the task of tying and untying the load and ascending and descending the ladder having regard to his previous work experience with the Defendant and his previous employers. Thus the Claimant should have taken reasonable care for his own safety, particularly since he was advised of the Defendant's safety recommendations.

[47] In the circumstances, the Defendant denied that it exposed the Claimant to the risk of damage and injury from the use of the truck and/or the truck's ladder and the delivery of the material. The Defendant consequently, also denied the particulars of injuries alleged by the Claimant, and in particular denied that the Claimant is entitled to the damages, losses

and expenses as particularised in the Claimant's Statement of Case. The Defendant also stated that it was a stranger to the three medical reports which the Claimant annexed to his Statement of Case and put the Claimant to strict proof of same.

(iii) <u>The Claimant's Case in Reply</u>

[48] In reply to the Defendant's version of events, the Claimant denied that he abandoned his job with the Defendant as alleged or at all. The Claimant averred that as a result of the injury he sustained, he was unfit for work and therefore unable to attend. To this end, he stated that he informed Mr. Ramdeo Samlal (his supervisor) of the accident and the injury he sustained.

[49] The Claimant went on to state that on Monday 1 March 2014, he reported for work at or around 6:00am, he informed Mr. Samlal that he was still experiencing pain from the fall and was unable to carry out his duties due to his injury and sought medical treatment.

[50] The Claimant further averred that at no time did the Defendant inform the Claimant of any safety requirements, in relation to attire, footwear and equipment. He commented that the document which the Defendant exhibited as safety procedures for truck drivers was not concerned with the safety of the truck driver but rather it was guidelines for truck drivers in operating the trucks to avoid damage to the Defendant's trucks.

[51] Nonetheless, the Claimant stated that he has previous experience as a truck driver and ensured that at all times he was properly attired with regard to footwear and equipment while performing his duties. He also stated that he has previous experience as a truck driver and was familiar with the task of tying and untying the load and the task of ascending and descending the ladder.

[52] The Claimant further denied that Mr. Samlal or any of the Defendant's representatives made attempts to contact him after the 27 February 2010.

[53] He also denied that he in any way contributed to, was negligent and/or wholly caused his injuries. He repeated that he had previous experience as a truck driver, and at

all material times exercised due care and attention in carrying out his duties as a truck driver. He emphasised that the injuries which he suffered as a result of the Defendant's alleged negligence are ongoing, causing him to visit several medical practitioners since the accident in 2010 and in the years that followed.

C. Issues before the Court in the Instant Claim

[54] Having reviewed the Un-agreed Statement of Issues filed by the Claimant and Defendant, respectively, I am of the view that there are **four main issues** which arose for determination in the instant matter. They are:

(i) Whether the Defendant was negligent and failed to provide a safe system work for the Claimant thereby resulting in the alleged accident;

(ii) Whether the Claimant was negligent, thereby contributing to the occurrence of the alleged accident and his damages;

(iii) Depending on the Court's finding in respect of the first issue, what is the extent of the injuries and losses which that Claimant suffered, and for which the Defendant ought to be held responsible?

(iv) Based on the Courts determination of the first three issues, what is the measure of damages or compensation (if any) to which the Claimant is entitled?

Claimant's Submissions

[55] The Claimant submitted that the Defendant as employer of the Claimant owed to the Claimant a duty of care, to ensure that the Claimant while working and performing his duties is safe and that all equipment provided is safe to use. The Claimant was of the view, that the Defendant breached that duty of care when it failed to provide adequate or safe working conditions; failed to ensure that the ladder was in a safe state and condition; failed to regularly inspect or maintain the ladder on the truck; failed to ensure that the ladder was safe and the rungs not smooth or worn; and failed to establish any system in place for ensuring safety of the ladder on its truck.

[56] Thus, the Claimant concluded that as a result of the Defendant's breach of duty, the Claimant slipped and fell off the ladder and thereby suffered personal injuries and losses. The Claimant further submitted that following the accident that he was unable to work due to the nature and extent of his injuries and therefore he did not return to work. However, the Claimant maintained that he did not abandon his job with the Defendant.

Defendant's Submissions

[57] The Defendant contended that at all material times it provided a safe system of work and had safety procedures in place whereby the Claimant was mandated to make daily checks so as to ensure that truck equipment such as the ladder was in proper working condition. Further, the Defendant's Supervisor, Mr. Samlal, was at all material times on hand and the known person to who all faults and problems with the truck and/or equipment ought to or must have been reported. That upon such reports of faults or problems with the truck or equipment Mr. Samlal would make arrangements for same to be rectified.

[58] In those premises the Defendant contended that the Claimant by his own admission under cross-examination admitted that he was at all material times aware of the Defendant's safety procedures and followed same, and that the Claimant further admitted that he found no faults or defects with both the truck and ladder. Therefore, it was the Defendant's respectful contention that at all times it maintained a safe system of work. The Defendant further maintained that having regard to all the evidence it is clear that the Claimant abandoned his employment with the Defendant after the date of the alleged accident.

D. The Law and its application to the issues

(i) The law

[59] The law of negligence is by now well-established. To prove negligence, a claimant must satisfy the Court that (i) the defendant owed a duty of care to the claimant; (ii) the

defendant has breached that duty of care; and (iii) the defendant's breach of his/her duty of care has caused or resulted in damage or loss to the claimant.

[60] Regarding the duty of care, it is also well-established that an employer owes each of his employees a duty to take reasonable care for his safety. As explained in the very recent decision in **Daron Andrew Williams v. R.B.P Lifts Limited and anor CV2014-01088 at para. 73**:

> ***"At common law an employer owes to each of his employees a duty to take reasonable care for his safety in all the circumstances of the case. The duty is often expressed as a duty to provide safe plant and premises, a safe system of work, safe and suitable equipment, and safe fellow-employees; but the duty is nonetheless one overall duty. The duty is a personal duty and is non-delegable****. All the circumstances relevant to the particular employee must be taken into consideration, including any particular susceptibilities he may have. Subject to the requirement of reasonableness**, **the duty extends to employees working away from the employer's premises.** Which may include employees working abroad: Halsbury's Laws of England, Volume 52 (2014), paragraph 376."* [Emphasis added]

[61] In respect of any damage claimed by a claimant, it has also been emphasised in the case law that to sustain an action for negligence it must be shown that *the negligence is the proximate cause of the damage*: **Rickards v John Inglis Lothian (1913) A.C. 263**.

[62] With respect to legal concept of contributory negligence, the **Privy Council** in **Nance v British Columbia Electric Railway Co Ltd - [1951] 2 All ER 448 at 450,** explained that-

> *".....**when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such a defence is to prove to the satisfaction of the jury [in our jurisdiction 'the court'] that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury.** For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, **where a man is part author of his own injury, he cannot call on the other party to compensate him in full**. This view of the matter has recently been expounded, after full analysis of the legal concepts involved and*

> *careful examination of the authorities, by the English Court of Appeal in* Davies v Swan Motor Co (Swansea) Ltd *to which the Chief Justice referred. This, however, is not to say that in all cases the plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully. Indeed, it would appear to their Lordships that in cases relating to running-down accidents like the present such a duty exists"* [Emphasis added]

[63] Yet, aside from the issue of negligence, there are circumstances in which an employee, who falls under the definition of a "*workman*" at **section 2 of the Workmen's Compensation Act**, may be compensated for injuries suffered in the course of his employment, even if the employee's injuries were not caused by his employer's negligence.

[64] To this end, **section 2 of the Workmen's Compensation Act** defines "*workman*" to mean -

> *"**any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour or otherwise**, whether the contract was made before or after the commencement of this Act (that is, 15th November 1960), **and whether such contract is expressed or implied, oral or in writing, whether the remuneration is calculated by time or by work done, and whether by the day, week, month or with reference to any other period whatever**; ...*
>
> *Provided that the following persons shall not be regarded as workmen for the purposes of this Act:*
>
> *(a) persons employed otherwise than by way of manual labour whose earnings exceed five thousand dollars a year or such other sum as may be prescribed;*
>
> *(b) persons whose employment is of a casual nature and who are employed otherwise than for the purposes of the employer's trade or business, not being persons employed for the purposes of any game or recreation and engaged or paid through a club;*
>
> *(c) outworkers;*
>
> *(d) members of the employer's family dwelling in his house;*
>
> *(e) members of the Defence Force of Trinidad and Tobago and any auxiliary force attached thereto; or*
>
> *(f) members of the Police Service and members—*
>
> *(i) of any Police organisation having the general powers of members of the Police Service constituted by law and in respect of whom provision exists in any law for the*

payment of a gratuity or pension in case of injury or death; or

(ii) of any Fire Service." [Emphasis added]

[65] **Section 4 of the Workmen's Compensation Act** then specifies the circumstances under which an employee who falls within the category of a *"workman"* my then be entitled to workman's compensation. **Section 4** provides that-

> *"4. (1)* ***If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall,*** *subject as mentioned below,* ***be liable to pay compensation in accordance with the following provisions****: Provided that—*
>
> *(a) the employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least three days from working for full earnings at the work at which he was employed;*
>
> *(b) if it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed."* [Emphasis added]

[66] Thus, it is clear that a workman's entitlement to workmen's compensation is not subject to whether any negligent act or omission is proven in respect of the workman's employer. Rather, the elements of entitlement to workmen's compensation are that-

(i) the personal injury must arise out of and in the course of the workman's employment;

(ii) the injury must disable the workman for a period of at least three days from working for full earnings at the work at which the workman was employed;

(iii) no such compensation is to be granted if the injury to workman is attributable to the workman's serious and wilful misconduct unless the injury results in death or serious permanent disability.

[67] For the purpose of workmen's compensation, an employer of workmen is required to have compulsory insurance consistent with **section 24 of the Workmen's**

Compensation Act and **section 5** of same Act sets out the amount of compensation that is to be awarded in specified circumstances.

[68] Apart from the law relevant to negligence, contributory negligence and workmen's compensation, in light of the Claimant's claim for loss of future earnings as a result of the alleged negligence of the Defendant, an issue arose as to whether the Claimant abandoned his duties. To this end, this Court has also taken note of the principle of law in relation to abandonment of contract. As submitted by counsel for the Defendant, who quoted from ***Chitty on Contracts (26 Edn) 1594***:

> *"**It is open to a court to infer that the parties have mutually agreed to abandon their contract where the contract has been followed by a long period of delay or inactivity on both sides. The party seeking to establish abandonment of a contract must show that the other party so conducted himself to entitle him to assume, and that he did assume, that the contract was agreed to be abandoned sub silentio**."* [Emphasis added]

(ii) Application of the law to the issues

Issue 1: Whether the Defendant was negligent and failed to provide a safe system work for the Claimant thereby resulting in the alleged accident

[69] In the instant matter the Defendant denied that any accident as alleged by the Claimant occurred on 27 February 2010 and contemporaneously denied that even if any accident occurred that it was not due to the Defendant's negligence but rather the Claimant's own negligence. Thus, the Claimant was put to strict proof of the entirety of his case.

[70] Similar to the approach taken by this Court earlier this year in the matter of **Shaban Muhammad v The Attorney General CV2010-04804 at para 43**

> *"The test as in all civil cases is ultimately whether the claimant has proven his case on a balance of probabilities. Where there is disparity between the versions of events on both sides the court is left to make a determination on the facts. To this end, the claimant's counsel submitted and this court accepts that, as stated by Lord*

> *Bingham in the Text* ***"<u>The Business of Judging</u>" Selected Essays and Speeches (2005)*** *at page 6:*
>
> ***The main tests*** *needed to determine whether a witness is lying or not are, I think, the following, although their relative importance will vary widely from case to case:*
>
> *(1)* ***The consistency of the witness' evidence with what is agreed, or clearly shown by other evidence, to have occurred;***
> *(2)* ***The internal consistency of the witness' evidence****;*
> *(3)* ***Consistency with what the witness has said or deposed on other occasions****;*
> *(4)* ***The credit of the witness in relation to matters not germane to the litigation;***
> *(5)* ***The demeanor of the witness.****"*

[71] Keeping in mind these principles, I found the Claimant to be quite a credible and reliable witness under cross-examination. He appeared certain and confident of the facts that had occurred during his six (6) days employed with the Defendant and more particularly the facts as they related to the accident which he alleged occurred on 27 February 2010. He was quick in answering the questions asked of him and appeared sincere in his responses, sometimes even giving responses that were adverse to his own case.

[72] On the other hand, under cross-examination Mr. Singh and Mr. Samlal, the witnesses for the Defendant, seemed more uncertain of the events that transpired in this matter. I have considered that this could have been perhaps as a result of the passing of time since this incident occurred in February 2010 or due to the lack of recorded information in relation to the incident. However, I found it difficult to rely on the evidence of both Mr. Singh and Mr. Samlal, as their evidence under cross-examination was on more than one occasion, particularly in the case of Mr. Samlal, inconsistent with evidence in chief in their respective witness statements.

[73] In those premises, I am convinced by the evidence before this Court that the Claimant's version of events, as they relate to the accident on 27 February 2010, are more likely to be true on a balance of probabilities. However, in as much as I believe that an

accident did occur on 27 February 2010 from which the Claimant suffered personal injuries, I however, cannot find in the evidence any basis for concluding that the accident was as a result of the negligence of the Defendant. The Claimant's own testimony in cross-examination is clear on this point.

[74] Perhaps the most telling parts of the Claimant's cross-examination are at ***page 19 lines 1 to 35 of the Notes of Evidence; page 20 lines 6 to 47 of the Notes of Evidence*, and *page 21 line 1 to 37 of the Notes of Evidence***, which make it clear that the Defendant was not in breach of its duty to provide a safe system of work and working equipment.

[75] *Page 19 lines 1 to 35 of the Notes of Evidence* state as follows:

"MR. SAFRAZ HOSEIN:	*And when you were doing the checks every morning if you found something wrong you would report it to your supervisor, Mr. Samlal?*
MR. MANGAROO:	*Well Mr. Samlal use to be present when we doing the checks*
……	
MR. SAFRAZ HOSEIN:	*Okay and if you found a problem you would tell him and then he would fix it or he would arrange for it to be fixed?*
MR. MANGARRO:	*Yes*
……	
MR. SAFRAZ HOSEIN:	***February 27th, the day that the accident occurred you did the mandatory checks in the morning of the trucks?***
MR. MANGARRO:	***Yes sir.***
MR. SAFRAZ HOSEIN:	***And you found, there was nothing that you needed to report to Mr. Samlal, there was nothing wrong with it when you checked it in the morning?***
MR. MANGAROO:	***Well as far as I woulda check nothing was wrong****.*
MR. SAFRAZ HOSEIN:	***Nothing was wrong. But I remember that you have 38 to 40 years driving, working and a lot of that is driving trucks whether it's hauling cane, delivering, offloading and such, so having all of this experience it made you very cautious while doing this type of work?***
MR. MANGAROO:	***Yes sir***
MR. SAFRAZ HOSEIN:	***So you would know what to look out for?***

MR. MANGAROO: ***Yes sir.***

[And then at page 20 from lines 6 to 47]

MR. SAFRAZ HOSEIN: ***….And the truck that you drove on February 27th was it same truck you drove all week while you worked with them?***

MR. MANGARRO: ***Yes sir****.*

MR. SAFRAZ HOSEIN: ***And the same truck you inspected every day?***

MR. MANGAROO: ***Yes sir.***

MR. SAFRAZ HOSEIN: ***So you alone used that truck for the week****?*

MR. MANGAROO: ***Yes sir as far as I understand, I don't know when I park it up if anybody does use it.***

MR. SAFRAZ HOSEIN: *Alright so you took it out the morning, you brought it back in the evening after work, you take it up in the morning again?*

MR. MANGARRO: *Yes sir.*

MR. SAFRAZ HOSEIN: *And February 27th was a Saturday that the incident occurred?*

MR. MANGAROO: *Yes sir.*

MR. SAFRAZ HOSEIN: *Right. So you started work on Monday before that?*

MR. MANGAROO: *Yes the Monday before the 27th*

MR. SAFRAZ HOSEIN: ***And you would make trips ups and down, loading, offloading all day?***

MR. MANGAROO: ***Yes sir.***

MR. SAFRAZ HOSEIN: ***So you made several trips a day?***

MR. MANGARRO: ***Yes sir.***

MR. SAFRAZ HOSEIN: ***You did that Monday, Tuesday, Wednesday, Thursday, Friday and Saturday?***

MR. MANGAROO: ***Yes Sir.***

MR. SAFRAZ HOSEIN: ***With the same truck?***

MR. MANGAROO: ***Yes sir***

MR. SAFRAZ HOSEIN: ***And on February 27th you said the accident occurred around 3:00 o'clock in the afternoon?***

MR. MANGAROO: ***Yes around that time.***

MR. SAFRAZ HOSEIN: ***So you made trips all day from the morning?***

MR. MANGAROO: ***Yes***

MR. SAFRAZ HOSEIN: *Am several trips?*

[And page 21 lines 1 to 37]

MR. MANGAROO: *Yes but I can't say exact how much.*

MR. SAFRAZ HOSEIN:	***But more than one?***
MR. MANGAROO:	***Yes more than one***
MR. SAFRAZ HOSEIN:	***And you would have climbed the ladder, offload, climb back down the ladder. Every trip you made you had to climb up the ladder, untie the tarpaulin offload, but climb back down offload, so you did that for all the trips that you made on February 27th?***
MR. MANGAROO:	***Yes sir.***
MR. SAFRAZ HOSEIN:	***That process that I just asked you about, climbing the ladder coming back down, offload that is the process you did every day while at work?***
MR. MANGARRO:	***Well every time you have to go to untie the tarpaulin, or tie it that is what you have to do.***
MR. SAFRAZ HOSEIN:	*Alright. I just want to ask this to ask this to clear up, when you climb up and untie the tarpaulin, then you have to climb back down and then you offload the truck?*
MR. MANGAROO:	*Yes sir.*
MR. SAFRAZ HOSEIN:	***So all Monday, Tuesday, Wednesday, Thursday, Friday, Saturday there was nothing wrong, you didn't see anything wrong with the ladder, it was working fine?***
MR. MANGAROO:	***Yes.***
MR. SAFRAZ HOSEIN:	***And if anytime during the week while you was working there was anything wrong with the ladder, let's say the ladder was shaky a little bit you will report that to Mr. Samlal?***
MR. MANGAROO:	***Yes sir.***
MR. SAFRAZ HOSEIN:	*For him to fix?*
MR. MANGARRO:	*Yes sir.*
MR. SAFRAZ HOSEIN:	***And during that whole week, including Saturday, February 27th 2010 there was nothing you didn't find a reason to report the ladder to Mr. Samlal?***
MR. MANGAROO:	***No.***

[76] To add to that evidence, the Claimant also admitted under cross-examination that in February 2010 when he was employed by the Defendant, he was told about their rules, regulations and procedures to operate the truck and to conduct the job that he was hired for ***(page 18 lines 10 to 14 of the Notes of Evidence)***. The Claimant went on to admit that it

was his responsibility to check the truck every morning to make sure everything was in working order before he left the Defendant's yard ***(page 25 lines 27 to 31 of the Notes of Evidence)***, and further admitted that if he discovered anything wrong with the ladder or the truck at any time that it was ***his*** responsibility to report it to Mr. Samlal ***(page 25 lines 41 to 45 of the Notes of Evidence)***. Moreover, the Claimant admitted that for the six days that he worked with the Defendant and used the same truck for the six days that the ladder was in *perfect working condition* for each of those six days ***(page 25 lines 32 to 37 of the Notes of Evidence)***.

[77] In light of this evidence coming from the Claimant himself, and having regard to the aforementioned principles of law in respect of negligence, this Court cannot find anything in the Claimant's evidence, nor was anything found in the Defendant's evidence, that would suggest that the Defendant was in breach of its duty of care to the Claimant. The Claimant's claim of negligence against the Defendant must, therefore, fail.

Issue 2*:* Whether the Claimant was negligent, thereby contributing to the occurrence of the alleged accident and his damages

[78] Regarding the Defendant's accusation against the Claimant of contributory negligence, given that this Court has determined that there is no proof of negligence on the part of the Defendant, the question becomes whether the Claimant's accident and consequent injuries were as a result of the Claimant's own negligence.

[79] As stated by the Privy Council in **Nance (supra),** this Court must ask itself whether the Claimant "*did not in his own interest take reasonable care of himself and contributed, by this want of care to his own injury*". The Claimant has, of course, denied that he was negligent in his duties. On the other hand, the Defendant, though alleging that the Claimant was negligent, did not provide any evidence to substantiate that accusation, except for suggesting that since the Defendant was not negligent and an accident occurred, then it must have been that the Claimant was negligent.

[80] That may not necessarily be the case. By the literal meaning of the word "*accident*", an accident is an "*unplanned event causing damage or injury*" or may be referred to something that happens by "*chance*" (Oxford Dictionary Thesaurus 2002). Thus, I am of the view that it is not impossible for an accident to occur even where parties involved appeared to take reasonable care to avoid same; other elements may come into play thus resulting in the accident. That said, given the lack of evidence by the Defendant disproving that the Claimant did in his own interest take reasonable care of himself in descending the ladder, I am unable to make any finding to the contrary.

Issue 3*:* Depending on the Court's finding in respect of the first issue, what is the extent of the injuries and losses which that Claimant suffered, and for which the Defendant ought to be held responsible?; and Issue 4: Based on the Court's determination of the first three issues, what is the measure of damages or compensation (if any) to which the Claimant is entitled?

[81] With respect to the extent of the injuries and losses which the Claimant suffered, this Court accepts that the Claimant has provided a great deal of supporting documented evidence relevant to the costs of transport required for medical treatment; the costs of medical reports and physiotherapy; and the costs of visits to Dr. Indarjit Birjah.

[82] The Court has also noted that the Claimant made a claim in a substantial amount for loss of earnings from 28 February 2010 to 31 October 2013.

[83] As pertains to the Claimant's claim for loss of earnings, not only has this Court found that the Defendant was not negligent and therefore cannot be held liable for any loss of earnings by the Claimant, but additionally, I agree with the submissions of Counsel for the Defendant, that it indeed appears that the Claimant had abandoned his contract of employment with the Defendant after the accident on 27 February 2010.

[84] Following the accident, there is no evidence that the Claimant either sought sick leave, or alternatively, that he at least notified the Defendant that he was sick and would have to be away from work for a specified time. In fact, the first documented evidence from

the Claimant which would have suggested to the Defendant that the Claimant may have been ill and thus unable to work, was the handwritten letter from the Claimant dated 6 December 2011 *(more than a year and eight months after the Claimant's last appearance at work on 27 February 2010).* Even that letter focused more on the issue of workmen's compensation as opposed to providing the Defendant with information in respect of whether or not the Claimant was interested, or able, to return to work to fulfil his contract. Thus, the Claimant's abandonment of his contract of employment prevents him from now claiming any loss of earnings after 27 February 2010.

[85] Regarding, the Claimant's claim for costs of transport required for medical treatment; the cost of medical reports and physiotherapy; and the costs of visits to Dr. Indarjit Birjah, although the Defendant, by virtue of the law of negligence, cannot be held liable for these costs, such costs, particularly the medical expenses may be claimed by the Claimant under the Workmen's Compensation Act. The injury was sustained by the Claimant in the course of his work-duties for the Defendant on 27 February 2010. The Claimant at the material time fell under the category of persons defined as a "workman" at **section 2 of the Workmen's Compensation Act**. Thus, consistent with **sections 2, 4 and 5 of the Workmen's Compensation Act**, the Claimant is entitled to apply for workmen's compensation, and the Defendant has a duty to process the Claimant's application and collaborate with its insurers in ensuring that the Claimant receives compensation for same.

E. Disposition

[86] In light of this Court's findings, this Court hereby orders as follows:

ORDER:

I. The Claimant's claim be and is hereby dismissed.

II. That the Claimant nonetheless be allowed to make an application for workmen's compensation for his medical expenses and that such application be processed by the Defendant consistent with the

Workmen's Compensation Act Chap. 88:05, provided that same has not already been done.

III. **Both parties shall address the Court on the question of costs in relation to entitlement and quantification.**

Dated this 17th day of January, 2017

_____
Robin N. Mohammed
Judge