THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV 2010/0 777

BETWEEN:

ARNOLD HUGHES

Claimant

AND

CARIBSEAS LIMITED

Defendant

Appearances:

Mr. George Lake for the Claimant
Mr. Craig Christopher for the Defendant

2013: February 19
May 13

JUDGMENT

[1] **Remy J.:** The Claimant, Arnold Hughes, is a truck driver. The Defendant, Caribseas Limited, is a company engaged in the business of providing shipping/agent services and stevedore contracting services. The Claimant's claim against the Defendant is for damages for negligence and breach of implied terms of the contract of employment.

[2] The Claimant's case is that on the 29th of October 2008, while in the employment of the Defendant, he drove the defendant' s truck at the Deep Water Harbour in St. John's , Antigua, moving shipping equipment owned by the Defendant. He climbed up onto the said truck to adjust his load for transport. He slipped and fell, and as a result of the said fall did extensive damage to his ankle. He had to travel on several occasions to have surgery and treatment on his ankle. He

states that he is still disabled as a result of said injury. Further, that since the accident, he has been greatly incapacitated and has limited mobility. He is no longer able to enjoy the amenities of life that he had previously enjoyed prior to the accident. He states that, as an employee, he was owed a duty of care by the Defendant, and that this duty was breached by the Defendant. The Claimant claims General Damages, Special Damages in the sum of $149,818.70, interest and costs.

[3] The Defendant company denies the Claimant's claim. In its Defence, the Defendant pleads, among other things that:- The Claimant is a self-employed individual offering his services as a truck driver for hire; that over the past four to five years the Defendant Company availed itself of the Claimant's services on a sub-contractual basis; that the Claimant was engaged by the Defendant Company as a truck driver wholly and solely and not as a stevedore, longshoreman, cargo stripper, packer, catcher or any other job related to the Defendant Company's business. The Defendant further pleads that, given that the Claimant was engaged by the Defendant as an independent sub-contractor the Defendant Company does not owe the duty of care to the Claimant as being alleged in or at all in the circumstances. It avers that it discharged all and any duties owed to the Claimant in relation to the independent contractual arrangements which existed between the parties during the subsistency of the arrangement. The Defendant pleads that any injuries suffered by the Claimant was as a result of his own negligence and not as a result of any negligence on the part of the Defendant Company whether directly or indirectly, vicariously or by way of contribution on the part of the Defendant Company.

[4] The issues which fall for determination by the Court are as follows:-

i). Whether the Claimant was an employee of the Defendant company or whether he was engaged as an independent contractor.

ii). Whether the Defendant company was negligent.

iii). Whether the Claimant sustained any injuries as a result of the negligence of the Defendant company.

iv). Whether the Defendant company is liable to the Claimant for the injuries sustained.

ISSUE # (i) - WHETHER THE CLAIMANT WAS AN EMPLOYEE OF THE DEFENDANT COMPANY OR WHETHER HE WAS ENGAGED AS AN INDEPENDENT CONTRACTOR.

[5] The Claimant's evidence is that, at the time of the accident, namely, the 29th October 2008, he was employed by the Defendant company; in other words, his status was that of employee of the company. He states that a Mr. Tyrone Simon, the Operations Manager of the Defendant company, employed him to drive the truck belonging to the said company. In his Witness Statement, the Claimant stated that he had worked for the Defendant company from and since 1995. Under cross examination, he testified that Mr. Simon employed him as a truck driver one week before his accident, when Mr. Simon told him to leave his truck outside and drive the Defendant's truck. He further testified that, prior to that time, he was engaged by the Defendant company as an independent contractor.

[6] The Defendant denies that the Claimant was its employee. It is the Defendant's contention that it engaged the Claimant as a sub-contractor to provide trucking/haulage services. Learned Counsel for the Defendant, Mr. Craig Christopher, has submitted that the relationship between the Defendant company and the Claimant is not an employment relationship as is being claimed but rather that of a sub-contractor arrangement as is confirmed by all the evidence before the Court. Learned Counsel contends that the Claimant "failed to adduce any evidence in support of his assertion that at the material time, i.e. at the time of the accident, that he was an employee of the Defendant company." He further contends that the Defendant Company would pay the Claimant at a rate of $550.00 per vessel operation (hauling full/empty containers at the Port) in respect of which none of the statutory deductions in relation to employee wages were applied as would be required by law in an employer/employee contract of employment. The Claimant received no letters of employment from the Defendant; no statutory employee deductions were ever taken out of his pay package; that the Defendant's payroll records show clearly that he was never an employee and was not covered by the risk insurance taken out by the Defendant company in respect of its employees. Mr. Christopher also contends that the Claimant was "classified by the Defendant company in its records as miscellaneous sundry payments and which category is comprised of payments to sub-contractors and incidental workers." Further, that the Claimant did not participate in the company Thrift Fund established for all the employees.

[7] According to the learned writers of Law of Tort (page 1077, paragraph 20.46)[1], "how the parties themselves understood and described the relationship is a relevant but not decisive consideration, as 'it is for the court to examine the realities of the relationship between the parties and .....whilst the label put on the relationship by the parties is a factor of importance to be considered, it cannot override the reality of the situation..." - per J W Kay, Q.C. in Johnson v Coventry Churchill [1992] 3 ALL ER 14 at 19. In that case, Kay found that the Claimant before him was an employee even though his contract with the defendant referred to him as a 'sub-contractor' and to his remuneration as a 'fee'.

[8] Halsbury's Laws of England – (5th Edition, Volume 39, page 21, paragraph 4)[2] states: - "There is no single test for determining whether a person is an employee. "The approach to the determination of whether a person is an employee (engaged under a contract of service) or an independent contractor (engaged under a contract for services) is to take into account "a wide range of factors," and to apply a "wide range of tests." In the case of Rudder v Dallaway (Divisional Court of Barbados), Sir William Douglas CJ, in delivering the judgment of the court, had this to say:-

> ".....A court should look at all the factors for and against finding a contract of employment, e.g. the power to select and dismiss, the direct payment of some form of remuneration, deduction of income tax on a 'pay-as-you-earn' basis and national insurance contributions, the organization of the work place, the supply of tools and materials and the economic realities of the business."

[9] At paragraph 15, page 37, the learned writers of Halsbury state:-

> "In general, a contract of employment need not be in any particular form. A contract of employment may thus be inferred from conduct which shows that such a contract was intended although never expressed, as where there has in fact been service of the kind usually performed by employees. Accordingly, an employment tribunal should first examine all the relevant evidence, including what was said and done between the parties, to determine whether a contract of service may be implied, that is deduced, as a necessary inference from the conduct of the parties and the work done, before concluding that no contract of employment exists. The inference of a contract of employment may be rebutted by evidence that some other relationship was intended....."

[1] Ken Oliphant Ed. *Law of Tort* (Butterworths, Lexis Nexis 2007)
[2] Halsbury's Laws of England (5th ed. Lexis Nexis 2009) Vol 39)

[10] The Court accepts the evidence of the Claimant that, sometime in or around October 2008, he was told by Mr. Tyrone Simon to drive the Defendant's truck and leave his own truck outside. Was this directive sufficient to change the status of the Claimant from that of independent contractor to that of employee? As stated above, the label given to the relationship is not important; it is the reality of the relationship between the parties. In Calder v H. Kitson Vickers & Son (Engineers) Ltd [1988], 1CR 232, the plaintiff was viewed as self-employed even though the employer paid him "wages" for ten weeks following the accident. Each case turns on its own particular facts. The Claimant's evidence is that he has been working for the Defendant company as a truck driver from 1995; he describes the service that he offers in these words" I drive the truck hauling containers from point A to point B." He works in and around the port compound. He further gave evidence that, while working for the Defendant from 1995 to 2005, he used the truck belonging to Ewart Isaac. Under cross examination, he conceded that it was really Ewart Isaac who was providing the service for the Defendant company and not him. The Claimant states that he stopped working for Ewart Isaac in 2005 and began providing truck services for the Defendant company from 2005. He first began by using his uncle's truck and then bought his own truck. The Claimant agreed that between 2005 and 2008, he was not employed by the Defendant company; he was simply providing a service. According to the Claimant, his status changed in 2008 when Mr. Simon told him to leave his truck outside and drive the Defendant's truck. That directive, according to the Claimant, transformed his status from independent contractor, or that of providing a service for the Defendant, to that of employee.

[11] As stated earlier, in considering whether someone is an employee or an independent contractor, the Court must consider several factors. The Court must also consider the categorization of the person in question objectively. In the instant case, it is undisputed that the Claimant was not given any letter of employment; he was not given any written contract. In the absence of any such document signifying a proof of employment, the Court has to consider whether a contract of employment can be inferred from what was said between Mr. Simon and the Claimant. According to the Claimant, Mr. Simon told him to "leave his truck outside and drive the Defendant's truck." Under cross examination, the Claimant testified that Mr. Simon never told him that he was employed by the Defendant company. In fact, Mr. Simon never told him anything other

than to leave his truck outside and drive the Defendant's truck. Yet it is the Claimant's assertion that he was an employee of the Defendant company. Can it reasonably be inferred that a contract was intended, even though it was never expressed? The Defendant could easily have brought Mr. Simon to give evidence to rebut the Claimant's assertion that he was an employee. It did not do so. Notwithstanding that fact, the Court is of the view that it must also consider other factors. In particular, it must evaluate the factual circumstances in which the work was performed. - Sagicor Insurance Co. v Carter – [2007], 71 WIR 74, as well as the nature of the work involved.

[12] The nature of the work is an important and relevant factor to the considered. The Defendant was engaged in the business of providing shipping agent services and stevedore contracting services. The Claimant was engaged in driving a truck within the port compound, in his words, "hauling containers from point A to point B." The Court must therefore take into account the custom and practice of the industry, namely the operations at the Port Authority (the Port).It is customary that independent contractors come to the Port when a vessel is in and offer their services; truck drivers, custom brokers, men who will help to load vehicles. The truck drivers have their own trucks and are paid according to the trip and load. People or companies who clear goods or containers regularly use the same service providers every week. Many companies clear goods once a week or once a month. It is more cost effective to use independent contractors to perform the port services; clearing and driving. These independent contractors, whether custom brokers or drivers, know the system and work on an "as needed basis." A truck driver with port experience has a valuable service to offer. The undisputed evidence before the Court is that the Defendant company was not engaged in the business of providing a trucking service.

[13] When a vessel was in Port, drivers would be required to haul full/empty containers belonging to the Defendant company within the Port authority compound. In his examination in chief, Mr. Clarvis Joseph, Managing Director of the Defendant company, stated as follows: - "From time to time when the Port is unable for various reasons to provide trucks to remove the containers from shipside to the storage areas or reverse, we would go out and hire additional trucks, so that our work can be completed in a timely manner. Mr. Hughes would have been one of these additional truckers." From the evidence before the Court, when a vessel was in port, the Defendant had engaged the service of the Claimant to haul full/empty containers belonging to the company for a

number of years. During all that time, the Claimant was not employed by the Defendant company while he provided that service. This is not disputed by the Claimant. He was available, and the Defendant engaged his services. He had a long working relationship with the Defendant company. He provided his services as an independent contractor throughout all of this period. He was paid $550.00 per vessel, and he provided his services, on average, once a week. The Claimant adduced no evidence that there were any changes made or to be made with respect to his work when he was told by Mr. Simon to leave his truck outside and drive the Defendant's truck. He adduced no evidence that his salary would change; there were no stipulations as to his hours of work; he was not told that he would he obligated to work only for the Defendant, or that he would be expected to report to Mr. Simon or to anyone at the Defendant company; he would not be expected to do anything differently with respect to his work. He was given no contract; he was given nothing to sign.

[14] Under cross examination, the Claimant testified that he could not show any documents showing that he had social security and other contributions deducted from his salary, as he has never been paid, "not up to this day." The issue of the Claimant's remuneration is, in the view of the Court, relevant in its assessment of the relationship between the Claimant and the Defendant at the date of the accident. As stated previously, the Claimant acknowledges and concedes that prior to October 2008, he provided services to the Defendant company as an independent contractor. In his Statement of Claim, the Claimant pleaded that he was paid $550.00 per week. Under cross examination, he clarified that, in effect, he was paid $550.00 per vessel, and that the vessel usually came in once a week. In his Witness Statement, the Claimant states that, after he was told by Mr. Simon to drive the Defendant's truck, he "agreed to work for the Defendant company for $550.00 per week." It would therefore appear that, based on that evidence, the Claimant's remuneration did not change.

[15] The Claimant's evidence at paragraph 10 of his Witness Statement is as follows:-

> "I began working driving the Defendant's truck on the Thursday before the accident. I worked the Thursday, Friday and Wednesday before the accident. I was never paid for driving their truck. At no time did the Defendant Company deduct any monies from my salary as I was never paid. It was a policy of the Defendant Company that when a ship came on Thursday or Friday you would not be paid until the following Friday."

[16] It would appear, based on the above evidence, that the "policy" to which the Claimant was alluding was that which obtained with respect to the way in which he was paid previously; namely when he provided services to the Defendant as an independent contractor. There is no evidence that he expected to be paid differently, or that he was told that a different "policy" would apply with respect to his remuneration. Of further significance to the Court is the fact that, at paragraph 3 of his Reply, the Claimant pleads that: - "The Claimant was injured before his first pay period ended and as such was never paid for the time he worked. So no deductions would have been made for any statutory deductions." There is no evidence from the Claimant how this "first pay period" was to be calculated. In fact, this reference to the end of "first pay period' is consistent with the Claimant's evidence that he would be paid on the Friday following the Thursday prior to the accident. In other words, he expected to be paid the same wages and in the same manner as he had been accustomed to prior to the 29th October 2008.

[17] The Claimant testified that "when a company has their own truck, they no longer need a truck, they need a driver; so instead of hiring any truck in particular, they hire a driver." The Court is of the view that while it is true that sometime in or about October 2008 the company obtained its own truck, which the Claimant was asked to drive, that fact is not decisive in establishing the relationship between the Claimant and the Defendant as an employee. The Claimant had in the past driven other trucks, including that of Mr. Isaac, that of his uncle and his own truck in providing his services to the Defendant. There is no indication that because Mr. Simon told the Claimant to drive the Defendant's truck and leave his truck outside, that this was to be a permanent state of affairs. Based on the fact of the long standing relationship between the Claimant and the Defendant company, it would seem to make perfect sense that Mr. Simon asked the Claimant to drive the Defendant's truck to do the work. There is no evidence however, that Mr. Simon was not free to engage the services of anyone other than, or in addition to the Claimant to drive its truck if it chose to. Further, there is no evidence that the Claimant was not free to withdraw his services from the Defendant company and work for another shipping company. Accordingly, there was no "mutuality of obligation" in the relationship between the Claimant and the Defendant, which would be one of the factors leading to a finding that the Claimant was an employee.

[18] Learned Counsel for the Claimant, Mr. George Lake, grounds his submission that the Claimant was not an independent contractor but an employee on the following: - the fact that the Claimant was operating the Defendant's equipment/truck and that he was being directed as to what racks to move and where to by the Defendant's clerk, as evidenced in the testimony of Clarvis Joseph. It is the contention of Mr. Lake that "these are the activities of an employee not an independent contractor."

[19] I am afraid that I have to disagree with the submission of Learned Counsel. In the first place, the fact that the Claimant was driving the Defendant's truck, while relevant with respect to the issue of vicarious liability, is not decisive of the status of an employee. Further, the fact that the Claimant was being directed as to what racks to move and where to by the Defendant's clerk is not an indicia of control by the Defendant. Moreover, given the nature of the work, the practical reality is that the Claimant would have to be told what racks to move and where to by the Defendant's shipping clerk, rather than taking it upon himself to move racks without being told which ones were to be moved. Being directed as to what racks to move and where to by the Defendant's clerk cannot therefore be said to be "an activity of an employee not an independent contractor", as submitted by Learned Counsel for the Claimant.

[20] The learned writers of Clerk and Lindsell on Torts (page 361, paragraph 6-11)[3] state that in order to assess the provisions inconsistent with the nature of a contract of service, "it is useful to bear in mind Cook J's rule of thumb suggestion in Market Investigations Ltd v Minister of Social Security [1969] 2QB 173, namely "is the worker in business on his own account?" If he is, he will not be an employee."

[21] Having heard the witnesses, evaluated the facts and having weighed the relevant factors governing the relationship between the Claimant and the Defendant including but not limited to the nature of the work, the lack of mutuality of obligation, the absence of stipulation as to the hours of work, as well as the history of the work relationship between the parties, the Court finds that, as at the date of the accident, the Claimant was engaged as an independent contractor providing or supplying a service to the Defendant company. He was "in business on his own account." He was not an

[3] Michael Jones Ed., *Clerk and Lindsell on Tort* (Sweet and Maxwell, 2010)

employee. There is no evidence from which it can be inferred that there was an intention on the part of the Defendant to deal with the Claimant as an employee. The Claimant, on the date of the accident, continued to provide a service to the Defendant as an independent contractor. Previously he provided a truck and driver service. On the date of the accident, he was providing the service of a truck driver. The provision of that service while driving the Defendant's truck is not inconsistent with the service as an independent contractor, although it would be relevant to the issue of vicarious liability with respect to a third party. This latter issue is, however, not before the Court.

[22] I now turn to issue # (ii) namely, - **WAS THE DEFENDANT COMPANY NEGLIGENT?**

[23] The Claimant has pleaded that the injuries which he suffered as a result of the accident which occurred on the 28th October 2008, were caused by the negligence of the Defendant. The Particulars of Negligence alleged by the Claimant are set out in the Particulars at paragraph 5 of his Statement of Claim:-

PARTICULARS OF NEGLIGENCE

a) Failure to take all reasonable precautions for the safety of its employee, namely, the Claimant while he was engaged upon this work.
b) Failure to provide adequate resources for the work.
c) Failure to provide a proper system of working
d) Failure to properly supervise the works
e) Exposing the Claimant to a risk of damage or injury of which they knew or ought to have known
f) Failing to ensure that the flat beds could be unloaded without risk of injury to the Claimant.

[24] According to Alderson B in Blyth v Birmingham Waterworks Co. (1856) 11 Exch 781 at 784:-

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

[25] In order to succeed in his action for negligence, the Claimant in the instant case must establish the existence of a duty of care owed to him by the Defendant, breach of that duty, and that the said breach of duty caused him to suffer damage which was not too remote. The onus of proof is on the Claimant to prove, on a balance of probabilities, that he has suffered injury as the foreseeable result of the Defendant's breach of duty.

DID THE DEFENDANT OWE THE CLAIMANT A DUTY OF CARE?

[26] It was pleaded by the Claimant and submitted by Counsel for the Claimant that the Defendant owed a duty of care to the Claimant as an employee. Learned Counsel submitted that the common law prescribes a special standard of an employer's duty of care towards his employees namely to see that reasonable care is taken to provide safe fellow servants, safe equipment, safe place of work and access to it, and a safe system of work. This duty is non delegable and is stricter than just taking reasonable care. He cited the case of Wilson and Clyde Coal v English (1938) AC 57, 81-85, as well as the case of Davies V New Merton Board Mills Ltd. (1959) 1 ALL ER 346.

[27] On the other hand, Learned Counsel for the Defendant submits that the Defendant company does not owe a duty of care to the Claimant as is being claimed, given that the Claimant is an independent contractor responsible for his own risks and the system of work is not the responsibility of the Defendant company. Learned Counsel further submits that, in the circumstances, the Defendant Company does not owe a duty to the Claimant to provide him with a safe and proper working system, reasonable precautions for safety or non-exposure to risk of damage or injury in relation to the Claimant being engaged in the stripping of shipping containers off of the chassis and the packing up of flat racks.

[28] Having made a finding that the Claimant is an independent contractor and not an employee, the submissions of Learned Counsel for the Claimant with respect to the duty owed by the Defendant as an employer, in particular, his submission that the failure of the Defendant to act as a

reasonable employer in providing a safe system of work and the necessary equipment for the circumstances is a breach of this duty to the employee, are unsustainable.

[29] The Court will now examine whether or not a duty of care was owed to the Claimant as an independent contractor. Learned Counsel for the Claimant has submitted that even if the Claimant is deemed not to be an employee, he is owed a duty of care by the Defendant for "his involvement in what is a dangerous aspect of the Defendant's daily or weekly works." Learned Counsel contends that "this is a situation of inherent danger" and the Defendant still owed the Claimant a duty of care. He cites the case of AC Buildings & Sons Ltd. V Riden (1958) AC 240. In that case, it was held that the duty of care is owed to all those whom the contractor may reasonably expect to be affected by his works whatever the capacity in which they come, whether as invitees, licensees or other contractors. He also cites the case of Wheeler V Copas (1981) 3 ALL ER 405., a case involving equipment provided to a contractor, where it was held that there is a duty to provide suitable equipment for the work undertaken.

[30] The law is settled that, in general, a duty of care will be owed whenever in the circumstances it is foreseeable that, if the defendant does not exercise due care, the plaintiff will be harmed. – Kondilinye; Commonwealth Caribbean Tort Law, page 63[4].

According to Halsbury's Laws of England (Volume 78, 5th edition, page 6, paragraph 4):-[5]

> "When considering whether a notional duty of care applies in a particular situation, the courts will consider three questions:- (1) whether the damage is foreseeable; (2) whether there is a relationship of proximity between the parties and (3) whether the imposition of a duty would be fair, just and reasonable ."

[31] With respect to the first question namely, whether the damage is foreseeable, "reasonable forseeability focuses on the knowledge that someone in the defendant's position would be expected to possess." (Halsbury – supra, page 6, paragraph 4). Based on the facts of the instant case, the Defendant's Operations Manager, Tyrone Simon, worked at the port when a vessel was in. The Defendant's Port Operations Clerk Machel Browne also worked there. The knowledge of

[4] Gilbert Kodilinye, *Commonwealth Caribbean Law* (Cavendish, 2003)
[5] Halsbury's Laws of England (5th Ed. Lexis Nexis, 2010) Vol 78

the working conditions at the port can therefore be imputed to the Defendant company. Machel Browne, who was a witness for the Defendant, gave evidence that the drivers regularly climbed on top of the flat racks to secure their load. The Court is therefore of the view that the damage was reasonably foreseeable. With respect to the second question, namely whether there is a relationship of proximity between the parties, the Court is of the view that the fact that the Claimant was engaged in providing services for the Defendant, albeit as an independent contractor, means that there exists a relationship of proximity between the parties. With respect to the question of whether the imposition of a duty would be fair, just and reasonable, the Court is guided by the authority of Halsbury (supra) page 6, paragraph 4, where the learned writers state:-

> "In addition to public policy considerations, it is a requirement of ordinary reason and common sense that the court must be satisfied that in the circumstances it is fair and reasonable for a duty of care to be owed to the persons concerned."

[32] Taking the above criteria into consideration, the Court is satisfied that a duty of care applies in the instant case.

DID THE DEFENDANT BREACH THE DUTY OF CARE?

[33] The Claimant alleges that the Defendant breached its duty of care, and as a result he has suffered loss. He has pleaded that the Defendant was negligent in, among other things, exposing him to a risk of damage or injury of which they knew or ought to have known.

[34] As stated in Clerk & Lindsell on Torts, page 864, paragraph 13-19:- (supra)

> "In deciding whether the Defendant was in breach of its duty of care, the Court will consider whether or not a reasonable man, placed in the defendant's position, would have acted as the defendant did."

In the same vein the learned writers of Butterworth's Law of Torts (supra) state thus:-

> "Negligence consists of the unreasonable creation of a risk of an injury, or the unreasonable failure to take some precaution to reduce or eliminate an existing risk of injury." Law of Tort (supra)

[35] The duty of care which will give rise to liability on the part of a defendant is therefore, a duty to take reasonable care. This duty is not to take care to avoid every conceivable danger, but rather to avoid the dangers that are probable. In the case of Bolton v Stone, AC 850, [1951] 1 ALL ER 1078), it was held that, ".....nor is the remote possibility of injury occurring enough; there must be sufficient probability to lead a reasonable man to anticipate it....." Further, as in every civil case, the burden of proving that the Defendant breached its duty of care lies on the Claimant.

[36] It is apposite to examine the work of the Claimant in light of the operations at the Port. The evidence before the Court is that the Claimant provided hauling services; in his words, from Point A to Point B within the Port. According to the evidence of Mr. Joseph, a vessel operation involves offloading full containers and re-loading empty containers. Containers with two sides, rather than four sides, are referred to as flat racks. That simply means that there are two sides to a flat rack and not four; that is what makes it a "rack". With respect to stacking the racks, some flat racks come with pins or twist locks and some come without; in the latter case, the ship provides twist locks. The Operations Clerk would be given a set of twist locks to take up to the pen to facilitate the stacking of flat racks in cases where the flat rack did not have its own pin or twist lock. The twist lock remains in the custody of the Operations Clerk.

[37] The Claimant's witness Tremaine Thomas gave evidence that he has been employed with the Port Authority for five years as a tow truck operator. His job is to take full or empty containers to and from the vessels. Prior to being so employed, he was employed with a truck company as a rig operator; so that he has eight years' experience in the business of providing services at the port. He stated that the flat racks are loaded by a stacker. When asked "what folds down the sides of the flat racks?" Mr. Thomas replied, "We use our hands to push over the flaps if we can, or we use a forklift." He stated that the stacker and the forklift are both owned by the Port Authority. He added that the compound and the pen where the flat racks are kept are owned by the Port. He agreed that it is the Port Authority that provides the system for stacking and packing the racks. Under re-examination, Mr. Thomas testified that the worker uses his hands to push over the flaps on the flat racks, this cannot be done from the ground; the worker does so by standing up on the goose neck and pushing the flaps over. He explained that the goose neck is the upper part of the chassis; it is the area of the chassis that is connected to the truck.

[38] In his Witness Statement (at paragraph 11) the Claimant states that on the 29th October 2008 – the date of the accident, he was at his job at the Deep Water Harbour driving the Defendant's truck and offloading one of their ships. He states:- "I, along with other employees of the Defendant company were engaged with stripping shipping containers off of the chassis and packing up the flat racks." He started work at 7 a.m. He started by packing flat racks; there were no containers that day; the shipping clerk told him exactly what to do. He had already made two trips, from the pen where the flat racks are, to the vessel. Tremaine, that is the longshore driver, was there; the Caribseas (the Defendant) vessel clerk was there, along with the stacker operator. He stacked the flat racks on the chassis; the chassis is about four and a half feet high. He stated that he proceeded to climb up onto the truck to inspect the flat rack in order to place the next flat rack on top of it, and ensure that it was ready for transportation. While he was climbing up the side of the flat rack to get on to the top to see if there was any lumber or other debris on the second flat rack, his foot slipped and he fell over backwards. He fell 8 to 9 feet to the ground. There were two racks up when he fell. The ground where he fell was ordinary ground – dirt- it was not a paved yard; it was dirt. There were holes around, but he did not fall into any of these holes.

[39] The evidence of Mr. Clarvis Joseph was that the Claimant had no business climbing up onto the truck to put in pins and secure the load as that was the job of his shipping clerk. The Claimant as well as the other witnesses testified to the contrary. They stated that it was the practice that the driver of the vehicle would check his load and ensure another flat rack could go on top of the first or second flat rack. They state that it is the driver of the vehicle who climbs up on the truck on top of the flat racks and flattens the racks and puts in the pins. It is how it is always done. In his Witness Statement, the Claimant stated: - "It is a part of all drivers responsibility, whether inside the port or otherwise, to ensure that their load is secured properly prior to commencing transporting. Serious injury or death can occur to persons in the vicinity if one of these loads is not properly secured and falls off the truck during transportation. In order to ensure that the flat racks are properly loaded for transportation the sides must be folded down completely flat. If any scrap lumber is caught between them they will not fold down completely. To check to see if there are any scraps of lumber left on the flat rack the driver had to climb up onto the flat rack to inspect the same." Mr. Joseph

gave evidence that his clerk is always there; he is the person that would put in the pins. The clerk denies that this is so.

[40] Whether the Defendant has breached its duty of care will depend on the circumstances of each particular case. As stated in Bolton v Stone, (supra), "The existence of some risk is an ordinary incident of life, even when all due care has been, as must be, taken." In the instant case, the Court will consider whether the Claimant's work involved a risk that was inherent and obvious. In other words, was the risk of falling from the flat racks plainly obvious? Evidence that the Claimant had fallen in the past, or that other drivers had fallen in the past while performing such work would be an indicator that this activity was one of inherent risk and danger. The undisputed evidence of Mr. Joseph was that hoists were used for purposes of climbing the containers which are more than eight feet. The Defendant obviously considered climbing such a container a conceivable danger. However, from the evidence of the Claimant and Mr. Joseph, the chassis is four and a half feet high, and the flat racks vary from 8 inches to 18 inches high depending on the length of the flat rack. Therefore the maximum height that the Claimant could have fallen from was seven and a half feet.

[41] Under cross examination, the Claimant testified that he has been a truck driver for "roughly about 21 to 22 years", and that he has been doing this type of work in or around the port from 1995, as an independent contractor. He testified that he would have done this exercise – that of climbing the flat racks – numerous times before. There is no evidence that during all these years, that the Claimant had ever fallen while climbing the flat racks. There is no evidence that anyone else had fallen while climbing the flat racks. Neither was any evidence adduced from Mr. Thomas, who was an employee of the Port Authority, that he had ever fallen while climbing the flat racks, or that anyone else that he knew of, had done so. In all the circumstances of the case, the Court finds that the Claimant has not produced any cogent evidence, on a balance of probabilities, that the activity in which the Claimant was engaged was one of inherent risk and danger.

[42] The Claimant agreed that as a truck driver, he would be well aware of all the risks associated with his work. He testified that he did not take insurance coverage to guard against the risks of his work; he did not take insurance specifically to guard against those risks associated with providing

service at the port. In the view of the Court, the Court is entitled to infer from the Claimant's failure to do so, the fact that he did not consider the likelihood of danger to himself to be great or significant. This is so especially in light of the fact that the Claimant had been engaged in doing this work for a period of at least thirteen (13) years, and therefore was not a newcomer to the job. In any event, as an independent contractor, the Claimant was responsible for taking all precautions for his safety and welfare, including taking adequate insurance coverage.

[43] The Claimant testified that there was nothing different about this flat rack on the morning of the accident; there was nothing peculiar about the conditions of work that day; it was not raining or muddy; there was nothing wrong with the flat rack that he climbed on to; there was nothing wrong with the chassis on which the flat racks were being stacked; there was nothing wrong with the truck owned by the Defendant that he was driving. He added that he was wearing work boots that day; he does not know how he fell. He did not think that there was oil on his shoe or on the flat rack. In response to the question of Mr. Christopher namely, "In your best estimation, what caused you to slip?" the Claimant stated: - "up to now I don't know; I can't come to any conclusion how I fell like that". In response to Learned Counsel's further question "Could it be that you just put your foot wrong on the flat rack?" he responded "I don't know up to now; possibly yes, possibly no." The Claimant also denied the suggestion of Mr. Christopher that he fell into a hole in the ground that was about three feet deep, but admitted that there were holes around on the ground where he fell.

[44] Taking all the above factors into account, the Court finds that the Defendant did not breach its duty of care to the Claimant.

[45] Based on the foregoing the finding of the Court is that (a) on the date of the accident, the Claimant was an independent contractor and not an employee; (b) the Claimant has failed to prove, on a balance of probabilities that the Defendant was negligent. In light of these findings, it is not necessary to discuss issues (iii) and (iv) in paragraph 4 above.

[46] Accordingly, the Claimant's claim against the Defendant is hereby dismissed.

My Order is as follows:-

1. The Claimant's claim against the Defendant is dismissed.
2. The Claimant to pay to the Defendant prescribed costs in accordance with the Civil Procedure Rules (CPR) 2000.

Jennifer A. Remy
High Court Judge