COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT OF THE BAHAMAS
2009/CLE/gen/FP/00289

BETWEEN
ELEV BOLIVAR GUSTAVE
Plaintiff

AND

GRAND BAHAMA SHIPYARD
1st Defendant

AND

GRAND BAHAMA PORT AUTHORITY
2nd Defendant

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Rawle Maynard and Ms. Carla Scott-Cleare for the Plaintiff

Mrs. Kenra Parris-Whittaker for the 1st Defendant

Mr. Dwayne Fernander for the 2nd Defendant

TRIAL DATES: 27th September and 25th November, 2016

CLOSING SUBMISSIONS: Plaintiff's Submissions filed February 13, 2017;

1st Defendant's Submissions filed February 17, 2017;

2nd Defendant's Submissions filed February 17, 2017

JUDGMENT

Hanna-Adderley, J

Introduction

1. The Plaintiff claims to have been injured while on duty as a security officer at the 1st Defendant's premises.

Pleadings

2. The Plaintiff filed a Generally Indorsed Writ of Summons on October 1, 2009 claiming inter alia damages for personal injuries sustained and loss and damage suffered caused by the negligence and/or breach of statutory duty by the Defendants, their servants or agents at their premises on or about October 10, 2007, interest, further or other relief and costs. By his Statement of Claim filed on February 9, 2010 he alleged that he was employed by the 1st Defendant as a security officer; that on October 10, 2007 at 5:30 am while driving a white 1991 Jeep Wrangler ("**the Jeep**") registered to the 1st Defendant on its premises and in the process of performing his routine duty of inspecting the property collided with a flatbed trailer in the road. He further alleged that the said flatbed trailer had been placed there by the 1st Defendant, its servants or agents and was at all material times under its management and control and maintained that the said collision was caused by the negligence of the Defendants, their servants or agents. He particularized the alleged acts of negligence as (i) causing or permitting the flatbed trailer to be in the middle of the road and to constitute a danger and a trap to the Plaintiff without warning lights in the dark of night; (ii) having created a hazard by parking the trailer in the middle of the road, failing to remove it without delay; (iii) failing to light or mark the said flatbed trailer sufficiently or at all; (iv) failing to give any or any sufficient warning to the Plaintiff of the said flatbed trailer or to take any steps to prevent traffic colliding with it after dark; (v) failing to discharge their common duty of care to the Plaintiff and exposing the Plaintiff to an unnecessary risk of injury; (vi) further or in the alternative the said flatbed trailer was at all material times a nuisance which had been created or permitted by the Defendants and as a consequence the said collision happened.
3. The Plaintiff also particularized his injuries as herniation of the disk at L4-L5 on his right side and suffers partial paralysis at his right great (big) toe. Additionally, he claimed that he lost consciousness briefly following the accident, suffered severe pain in his neck and lower back, had to be transported by ambulance to The Rand Memorial Hospital ("the hospital) and was detained in the hospital for four hours and discharged with medication. He further claimed that following his discharge from the hospital he had to seek medical attention from various doctors including chiropractor Dr. Brian Blower and Dr. James Lee.

As it related to his claim for loss of amenity and other adverse effects the Plaintiff alleged that until the accident he was a security officer working up to 60 hours a week but since the accident he had to cease working as a security officer as it became too stressful for his back and made his pain more severe. Further, he had to revert to cutting hair on a part-time basis to make a living. The Plaintiff under the heading "Particulars of Special Damage" stated "See Statement of Special and General Damages served herewith." The Plaintiff also claimed interest on (i) special damages from the date such loss accrued to be assessed on the ground that the Plaintiff lost earning and incurred expenses he will not recover from the Defendants or otherwise until judgment and on (ii) general damages from the date of service of the Writ until the date of Judgment.

4. The Plaintiff filed an Amended Statement of Claim on February 9, 2010 whereby he amended the particulars of special damages and included doctors' fees and prescription expenses; loss of income (3 years at $10.00 an hour for 50 hours per week) and loss of earning capacity. Further to his Amended Statement of Claim filed on February 9, 2010 the Plaintiff filed an Amended Statement of Claim ("Re-Amended Statement of Claim") on August 4, 2011 whereby he amended portions of the Amended Statement of Claim to include specific allegations against the 2nd Defendant. He alleged inter alia that at all material times the 1st Defendant was a licensee and a franchisee of the 2nd Defendant and in virtue of clause 2, paragraph 15 of the Hawksbill Creek Grand Bahama (Deep Water Harbour Industrial Area), Chapter 261 the control of all roads and bridges in the "Port Area" are vested in the 2nd Defendant. Further, he alleged that the road whereby the collision took place is owned and controlled by the 2nd Defendant which traverses property in possession of the 1st Defendant. The Plaintiff also particularized the said alleged negligent acts of the 2nd Defendant as (i) permitting the said flatbed trailer to be parked in the middle of the road in an unlit area and failing to have it removed or lighted; (ii) failing to give any sufficient warning to the Plaintiff and other users of the road of the presence of the said flatbed trailer or to take any steps to prevent traffic colliding with it in the dark; (iii) in the premises failing its common law duty of care to the Plaintiff by exposing him to unnecessary risk of injury; and (iv) failing to exercise requisite oversight and vigilance over the road.

5. The 1st Defendant filed its Memorandum and Notice of Appearances on December 8, 2009 and its Defence and Counterclaim on June 20, 2012. The 1st Defendant in its Defence either denied; made no admissions or put the Plaintiff to strict proof in response to the paragraphs contained in the Re-Amended Statement of Claim. The 1st Defendant also made the following averments in response to the Plaintiff's allegations (i) that the Plaintiff was employed by Simmons Security and Investigations Limited ("**Simmons Security**") as a security officer at the time; (ii) that the 1st Defendant entered into an agreement with Simmons Security to provide security guards to patrol the 1st Defendants premises on April 11, 2001; (iii) that the 1st Defendant was at all material times a licensee of the 2nd Defendant and made no admission to the matters in paragraph 2; (iv) that the Plaintiff was driving the Jeep owned by the 1st Defendant when he collided with a flatbed trailer on October 26, 2007 at approximately 4:30 in the morning due to his own negligence; (v) that the Plaintiff was assigned to patrol the south and west side of the said premises at the material time, he took a break from his assigned post at the west gate of the said premises and on his return to his post collided with the end of the flatbed trailer located on 'South Beach' at the said premises; (vi) that 'South Beach' is a staging area for Dock 2 at the said premises, is used to store equipment waiting to be loaded on or from ships in the said dock, that it is normal for trailers, boats and containers to be located on 'South Beach' all year round; (vii) that the flatbed trailer the Plaintiff allegedly collided with was located at least 40 feet from the main thoroughfare used by all vehicles on the said premises, the flatbed trailer had been located on South Beach in that location for several days, the Plaintiff worked a minimum of 48 hours where he would have passed the trailer in that position at minimum 6-7 times a shift a combined total of a minimum of 24 to 28 times; (viii) that reflective tape is clearly visible on the said trailer at various positions along the material side of the said trailer; (viiii) that the Plaintiff was stationed at the said premises for 8 months prior to the alleged accident and during that time he was required to drive in the 'South Beach' area at minimum 6-7 times a shift. The 1st Defendant also averred that the Plaintiff's own negligence contributed to the said accident and particularized inter alia that he (i) was driving too fast at the time of the alleged incident; (ii) failed to heed or pay sufficient heed to the reflective tape located on the parked trailer; (iii) failed to steer his vehicle properly or at all to avoid the parked trailer; (iv) failed to drive with due care and attention while

driving the said vehicle; (v) failed to pay any attention at all while driving on the said premises; (vi) failed to drive with headlights on; (vii) failed to wear the required helmet as issued by the 1st Defendant.

6. By its Counterclaim, the 1st Defendant repeated paragraphs 1-14 of its Defence and seeks the cost to replace the said Jeep in the sum of $12,773.09 as a result of the Plaintiff's alleged collision with a flatbed trailer on October 26, 2007 at 4:30 in the morning on the said premises. The 1st Defendant seeks damages, interest, costs and such further or other relief the Court deem just against the Plaintiff in its Counterclaim.
7. The 2nd Defendant filed its Memorandum and Notice of Appearances on December 14, 2009 and its Defence on October 21, 2011. The 2nd Defendant in its Defence either denied; made no admissions or put the Plaintiff to strict proof in response to the paragraphs contained in the Re-Amended Statement of Claim. The 2nd Defendant also made the following averments in response to the Plaintiff's allegations (i) that all roads and bridges constructed in the 'Port Area' are deemed to be private roads and bridges and the Port Authority only has the absolute right to exclude any person or vehicle from the 'Port Area'; (ii) that the 2nd Defendant does not own or control the road and therefore owes no duty of care to the Plaintiff or anyone else lawfully using the road or premises in the course of their duty; (iii) that the 2nd Defendant did not have knowledge or means of knowledge of the existence of a flatbed trailer on the said premises and is therefore not responsible for the placement of the same or the prevention of any risk of damage presented by its placement by a third party.
8. The trial of this matter was heard on September 27 and November 25, 2016. The Plaintiff relied on his Skeleton Arguments received by the Court on December 2, 2014 and his Closing Submissions filed on February 13, 2017. The 1st Defendant relied on its Submissions Before Trial filed on November 25, 2014 and its Submissions After Trial filed February 17, 2017. The 2nd Defendant relied on its Submissions Before Trial received by the Court on December 1, 2014; Skeleton Submissions for use at Trial on 27th September, 2016 undated and Written Closing Submissions of the 2nd Defendant filed February 17, 2017.

Statement of Facts

The Plaintiff's Case

9. The Plaintiff relied only on his Witness Statement filed on April 17, 2013 and his viva voce evidence during the trial as his evidence-in-chief.
10. The Plaintiff's evidence in his Witness Statement, in part, was that at about 5:40 am on Wednesday, October 10, 2007 he was on duty at the Grand Bahama Shipyard, that at the time he was driving the security jeep #M008 064 on a pathway at the south side of the Shipyard, and that he was headed towards an area known as South Beach. He continued that at that time he felt the vehicle strike something, that he lost consciousness briefly, that when he recovered he came out of the jeep but he was still not completely conscious. Further, that shortly afterwards he was able to see a black flatbed trailer parked almost dangerously on the pathway without any reflectors, that he saw the top and windshield of the jeep was damaged and broken glass was all over his shirt, and that he realized he had collided with the unlit flatbed trailer. He stated that the area where the accident occurred does not have lights and therefore it is difficult to see when driving at night, and that he was able to stop a Great Lakes worker who was walking in the area and asked him to call the security gate to report the accident for him. He further stated that the ambulance came and transported him to the hospital, that he felt very painful in his neck and lower back while in the ambulance, that he was kept in the hospital for about four hours then sent home with medications, and that he was off from work for about ten days before he was able to return to work. Lastly, he stated that he does not feel any pain in his neck but his lower back was still painful, and that it has improved but still not completely healed as yet.
11. His viva voce evidence, in part, was that on October 10, 2007 he was on duty at the Shipyard, and that at about 4:30/4:50 in the morning he was driving in the area known to be South Beach which is the southside of the Shipyard. He stated that it was a routine every morning to drive in that area so that he could open the gate for another company called Great Links [sic] so that the employees could get through; that the routine of patrolling was done to look around to see if there was anything to be reported and open the gate at the same time. He continued that while driving the Jeep he struck, hit something and fell unconscious; that after a while he managed to get out of the jeep and bent down; that he was still not fully conscious at that time, and that after a while he spotted a Great Links worker going through the same gate and asked him to call the security gate to report the accident. That the scene where the accident happened is a dump site where they dump all

debris including metals and beds coming off the ships, that a flatbed trailer was on the cross-way across the road and he hit the flatbed trailer at the centre of the left side, and that the flatbed trailer was parked across the road and not straight on the same direction of the road. He stated that the main reason he collided with the tractor was that it was a little drafty that morning, it was raining slightly, there were no reflectors on that trailer and there was no light pole in that area at the time the incident happened. That since he started working at the premises there was no light in that area, that he was unable to see the trailer that was across the road, that he did not recall any other source of light. After the worker called the security gate he was picked up by the ambulance and taken to the hospital; that he felt a very painful sensation in the back of his neck and lower back; that he was put on the machine and evaluated, that he was sent to Doctor Bethel who referred him to a chiropractor because there were five bones misplaced in his lower back and three in his lower back [sic]. Further, that he stayed in the hospital between four to five hours and was sent home with medication, that he saw the chiropractor about seven times, and that the name of chiropractor was Mr. Blower.

12. Mr. Gustave stated that at that time he was working for Mr. Simmons who was his boss from the Security Department, that he gave Mr. Simmons the report after he came from the hospital and told him that he was given ten days before he could return to work. That he was injured at the facility of the Shipyard, that he returned to work after ten days, that he had since returned to normal functions, that he saw Dr. Bethel, Dr. Blower and Dr. Lee, that they all gave him a report, and that he still has pain in his lower back and his neck once in a while.

13. During cross-examination by Counsel for the 1st Defendant, Mrs. Kenra Parris-Whittaker the Plaintiff was directed to the 1st Defendant's Bundle of Pleadings and Bundle of Documents. It was his evidence that he was employed by Simmons Security which was a contractor of the Shipyard which was contrary to his pleadings. That he was employed with Simmons Security for two years, and that he was stationed at the shipyard for about two years. He continued that the area where the trailer was parked was known as the storage area of the shipyard, that the road is approximately sixty feet or more, that on the side of the road is the storage area, and that the dirt road did not have a side (speed) limit. That every shift he would perform a routine patrol, that he was on the night shift that starts from

12:00am and ends at 8:00am, that before colliding with the trailer he would have driven patrol about five or six times, that he was familiar with that particular road and that he worked five days a week. He stated that the trailer he hit was stationary, that the trailer was parked between the road and the storage area and that he did not have any other accidents in that area prior to this one. That the trailer did not have any reflectors, that when shown photographs in the 1st Defendants Bundle of Documents at Tab 2 that the trailer in the photograph is not the one he hit, that he sees the reflective tape, that in another picture the reflective lights, red white lights can be clearly seen, that the jeep can be seen as well as the trailer running through it in that picture; that in another picture the roadway can be seen, and the jeep is off to the side which is the storage area. That after looking at several photographs he still maintained that the trailer he collided with did not have reflective lights, that the trailer the jeep collided with is far off of the main sixty feet highway; that he denies that the trailer he collided with was lit. He continued that at the time in that area there were no very large tree plants; that when shown the photographs behind Tab 2 that on the particular platform that says ship dock two was not usually lit up and not always illuminated. Further, that during his evidence in chief that was his first time saying that it was slightly raining on the day in question and denied that it was not raining. That he was required to attend safety meetings, that he attended them with his boss, that they were provided with the rules at the Shipyard, the safety procedures and safety gear, that he received a hard hat and safety vest but he did not have googles, that he was wearing the seatbelt. That he did not agree with the accident report on page 3 of the Defendant's Bundle of Documents.

14. Mr. Gustave also stated that he was unable to work after the accident; that he quit Simmons Security not as a result of the injuries but because they did not pay overtime and there was some favoritism. That after being taken through all of the photographs he maintained that there were no reflector lights on the trailer, that he was driving with headlights on.
15. During cross-examination by Counsel for the 2nd Defendant, Mr. Dwayne Fernander the Plaintiff was taken to the 1st Defendant's Bundle of Witness Statements at Tab 7, the document was dated November 5, 2007 with the Plaintiff's name and signature and placed on the company's header, and confirmed that at the time the report was made the events of October 10, 2007 were clear in his mind. The Plaintiff was taken to Tab 4 of the 1st

Defendant's Bundle of Documents and confirmed that the photograph shows a layout of the Shipyard and indicated on the photograph the area known as the South Beach area; that that area is far behind the security gate; that in order for persons to access that area they have to be let in through the security gate; that there is no free access to that area. He continued that his patrol would entail hourly patrols; that he would leave his area and patrol the entire shipyard area including the South Beach area and that he would have to do that every time he reported to work. That on October 10, 2007 the night of the accident he had already done some of the patrol; that the patrols took him the full length of South Beach and around to other areas of the shipyard; that he was familiar with the area; that nothing had changed during the course of his shift and there were no incidents up until the time he had the accident. That he spent the majority of the time working at the Shipyard; that the Shipyard exercised safety protocols for certain people; that there was ample lighting at the Shipyard but not in his area because there was no light. That having traversed that area earlier during his shift he was familiar with what was on that strip and had no issue with the flatbed trailer; that to his knowledge the lights were on when he drove the Jeep; that during the course of his shift that night he passed that area at least four times and that the lights on the Jeep were sufficient for him to see where he had to go. That he was not tired at that time; that he never passed that same flatbed four times because the Shipyard moves things from time to time, that that was a flatbed they just put there. That when he crashed the Jeep into the flatbed and left the Jeep it was left in the same position, that he did not attempt to move it, that when taken to Tab 2 of the Bundle of Documents and shown the picture at the bottom of the page confirmed that the jeep was in the same position he left it; that when shown the picture at the top confirmed that it was the same Jeep but that it was not in the same position he had left it, that he left the Jeep under the flatbed truck; that he could only see the evidence of this one but the bottom part was too dark to see; that in that picture he did not see a flatbed. That when shown the third set of pictures at page 7, he confirmed that from the two pictures he could see the Jeep, the windshield smashed in due to the impact of the flatbed; that the picture at the bottom of the page he confirmed that he could see the Jeep and the flatbed but that position of the Jeep was not where he left it.

16. Mr. Maynard during the Plaintiff's cross-examination objected to the photographs that were put to the witness as he stated they were not part of the agreed bundle and no

photographer had come to Court to give evidence to identify when and how the photographs were taken. The Court ruled that no witness had been called on behalf of the Defendants and if they wish to have the Court consider the photographs they would have to be put into evidence the proper way.

17. Mr. Fernander continued his cross-examination of the Plaintiff whereby he confirmed that from his Witness Statement that he felt his vehicle strike something; that the Jeep's lights were working at the time; that he drove the Jeep on numerous occasions; that he could see clearly in front of him; that at the time of the accident the lights were working; that he could see as he was ducking potholes left and right and maneuvering on the dirt road; that when he hit the trailer he was ducking potholes. That he occasionally had to open the gate to allow persons access to the Shipyard; that that would include Great Lake workers; that no one had free access to the south and north gate; that in order for anyone to have access to that area either himself or his colleagues had to open that gate; that if a member of the public, the police or the Judge wanted access they would have to stop to that gate.
18. Under re-examination by his Counsel, the Plaintiff stated that he was working as a security officer for Mr. Simmons' company as a contractor to the Shipyard; that he saw four doctors at the time of the accident; that he left Simmons Security because he did not pay him, including his injuries and the pain he endured while working. That he was not able to see the trailer parked across the road because he was ducking potholes as this was a routine he knew every morning after each pothole to maneuver to escape from the potholes. That in relation to the Jeep shown in the photographs he was not satisfied of the position of the Jeep compared to that of the trailer.

The 1st Defendant's Case

19. The 1st Defendant relied on the evidence of Mr. Tyrone Farquharson and Mr. Morris Simmons whose evidence was contained in Witness Statements filed on November 26 and November 25, 2014 respectively and viva voce evidence during the trial.
20. Mr. Tyrone Farquharson's evidence in his Witness Statement in part is that he is employed as a safety officer at the 1st Defendant and has been employed at the 1st Defendant for 12 years. He states that he is familiar with the operations of the security officers stationed at the premises, that the night shift for security officers are between 12:00am and 8:00am and

there are usually two guards stationed at the main gate of the premises. He continues that the security officers are required to patrol the premises every hour or so, that each patrol takes roughly twenty-five minutes and is usually done by vehicle, that it is a requirement that the vehicle not be driven over seven miles per hour at the premises and that security officers wear safety gear when conducting patrols of the premises. The safety gear includes googles, hard hat and a vest, that all persons operating the vehicle are required to wear a seatbelt at all times. It is his evidence that there is a route that the security officers would take every shift that takes them on South Beach Road, that on October 26, 2007 the Plaintiff worked the night shift and would have driven on South Beach road a minimum of three times on his shift prior to the accident, that during this shift each officer is allotted a thirty minute break. He states that upon his arrival to work the morning of the incident he was asked to conduct an investigation of the accident site, that upon his arrival to the accident site he noticed that the vehicle was far off of the main road of South Beach and was in fact located in the storage area of South Beach. Further, that the road of South Beach is approximately 60 feet wide, is a road used by most employees daily, is also well lit as Dock No. 2 is located on this road, that a vessel was being repaired at the time of the incident and the vessel would have been fully illuminated at that time, that the road also has two large street lamps that illuminate the area. He continues that the flatbed trailer the Plaintiff hit was marked with reflectors, that the vehicle would have hit the trailer at the exact spot where a reflector was located**.** Additionally, that since working at the 1st Defendant South Beach road has always been the storage area as it is close to Dock No. 2, that the Plaintiff would have travelled that road numerous times during his eight month post at the 1st Defendant as it was on the route the security officers took every time they patrolled. Lastly, that while on the scene he inspected the vehicle and made note that the keys were in the ignition, that the horns, light and seatbelt on the vehicle were still operational and that since being employed at the 1st Defendant he was not aware of any other accidents that took place on the South Beach road.

21. His viva voce evidence was that his role as safety officer is to provide a safe work environment for the employees, contractors and crew members that may be visiting the Shipyard if their vessel is under repair and that he met the Plaintiff working at the Shipyard. Further, that the Plaintiff is required to monitor and secure the property, log persons in and

out and conduct moving patrols of the site during his shift; that moving patrols consist of a designated route the security officer will take from the base station driving North Beach and back all the way around to the first end of the site to the South end of the site encompassing the entire site; that it is usually done by vehicle and takes about half an hour to encompass the whole site.

22. His evidence is that all employees must comply with the Company's safety policy; that they are in compliance with full Personal Protective Equipment (PPE) in the work site; that this equipment consists of a hard hat, safety glasses, steel toe shoes, in other cases for those directly involved with working operations, coveralls, hearing protections, respirating protection if required for the specific task they are conducting. That when operating the vehicle there is a speed limit of 5 to 7 miles per hour which is on sign posts, pedestrian crossings and stop signs which must be observed by the operator.
23. His evidence is that on October 26, 2007 he came into work at 6:00 am, was told about the accident and proceeded directly to the scene; that on his arrival he saw that the Jeep had collided with a flatbed trailer, that it was off the thoroughfare leading to South Beach which was more or less a staging area, that South Beach was an unpaved road at the time that was being used as a staging area for containers and equipment to be utilized for vessels or waiting to be lifted onto vessels while they were on dry dock.
24. His evidence is that, when shown Tab 2 of the Bundle of Documents, page 3 which included an Accident and Safety Report(s) and photographs, he recognized them as he took those photographs on the morning of the accident. These 8 photographs were entered into evidence as exhibits TF – 1-4. That when shown the first photograph at Tab 2 described it as showing a flatbed and the Jeep where the Jeep collided with the flatbed trailer; that when shown the third photograph at Tab 2 described it as showing where the Jeep collided with the flatbed and a portion of the flatbed is in the cab of the Jeep.
25. That when shown Tab 3 of the Bundle of Documents at page 4 a photograph he described it as showing the signs posted around the yard that advises drivers of the speed limit within the facility and confirmed that those signs were in place in 2007. That when shown the photograph at Tab 4, page 2 of the Bundle of Documents confirmed that the photograph accurately represents the area described as South Beach and that it accurately reflects what it would have looked like in 2007 in terms of the size of the thoroughfare. That when shown

Tab 3, photographs 17 and 18 pointed to the Court where the thoroughfare was alongside the south side of the pier. These two photographs were entered into evidence as exhibits TF – 5-6. That the South Beach area is typically lit by the dock itself, that its constant lighting and they add additional mobile or power lighting in area; that the dock is always illuminated; that additional illumination would be required while work is going on at South Beach. That there was work going on at South Beach on the date of the accident; that they had a ship on the dry dock doing repairs to it;

26. That when shown the photograph at Tab 4, page 3 (also indicated as page 15 at Tab 3 in Court's Bundle) of the Bundle of Documents he stated that he was looking at dry dock No. 2 and that you can see the lights that illuminate the dock, the lights on the top of the dock are shining outward to illuminate the north and south side of the wing wall, that on the date of the accident that was the position of the said vessel on dry dock No. 2. This photo was entered into evidence as exhibit TF-7.
27. That in reference to the photographs shown and the trailer, his evidence is that the trailer was parked off the thoroughfare; it did not have any material on it at the time, that it clearly had reflective strips, red in color to identify that particular trailer. That he showed the reflective strips he spoke of to the Court and seen in the photographs at Tab 2 of the said Bundle; that once the light hits the reflective strips they illuminate to alert anyone of the presence of a flatbed;
28. That the Jeep was at moved about 9:00 that morning after he did his initial assessment to check to see if the engine would start, the steering gear was operational, the horn and brakes were working. That from there he requested the mechanical department to take it to their workshop to do a follow-up to check the braking and steering system of the vehicle; that the report he received from the mechanical department was that there was nothing wrong with the vehicle, the brakes, steering and everything was still fully operational.
29. Following questions from the Court relating to the photograph at page 15 Mr. Farquharson stated that it is a representation of the lighting on the dock, that in the picture that is actually in front of the dry dock and in front of the dry dock looking downwards you would see the lighting; that the picture is just a representation of the lighting and that is the type of illumination you would see of the dry dock.

30. During cross-examination by Counsel for the Plaintiff, Mr. Rawle Maynard he stated that his profession is not a photographer but that he was chosen to take the photos because he is the safety officer; that he investigates all incidents and accidents at the Shipyard; that he investigates all accidents to get a clear understanding so they could have either corrective actions or put preventative measures in place to prevent accidents from occurring. Further, that his interest in the matter is to make sure that the workplace is safe for all parties regardless of employees, sub-contractors or visitors to the site; that he is one of the mechanisms at the Shipyard to ensure that safety is observed. When asked about the photographs that were admitted into evidence he stated that he did not take some of the photos**;** that he had a good idea when some of the photos were taken; that he could not tell the exact date when the photo labeled No. 17 was taken.
31. Mr. Maynard, during cross-examination began to suggest to the witness that he could not give evidence as to some of the photographs taken and Mr. Fernander objected and stated that those photographs that were put in had been agreed as an "illustrative" of the locus in quo (i.e. the aerial photographs). The Court in response advised the parties that it understood that the witness did not take them and that they were not taken on the day of the incident and had indicated before if he had any objections to the last three photographs being marked as exhibits. Mr. Maynard, in response stated in part that there was no agreement that these photographs be put into evidence; that he strictly objected to any photographs that the witness did not take be put into evidence; that they should be struck and that the witness can only give evidence of photographs he took. Mrs. Parris-Whittaker drew the Court's attention to the Directions Order filed December 3, 2012 at item 11 which stated "the plan of the locus in quo other than a sketch plan be receivable into evidence at trial" and item 12 which stated "photographs and plan of the locus in quo be agreed, if possible." She stated that the 1st Defendant provided these photographs but the Plaintiff has failed to do so and in the event the photographs are not admitted into evidence the Plaintiff has no case. Mr. Fernander also submitted that for the record while the Plaintiff was under cross-examination, the Plaintiff was referred and asked to look at the photographs for illustrative purposes and state whether or not the photograph represented the locus in quo and the Plaintiff stated "yes". Further, that the Plaintiff gave evidence based on the photographs, illustrating where the road was, where South Beach and North Beach were;

that at this stage of the trial it is pointless for Plaintiff Counsel to object that he has difficulty with that photograph when the photograph is for the Court's benefit to assist in understanding the layout of the Shipyard.

32. The Court made a determination on the Plaintiff's objection and allowed the photographs and advised that at the end of the day it will determine the weight to be attached to them.
33. Mr. Farquharson stated that the lights he described earlier are on when he arrives to work at 6:00 am; that when shown Tab 2, photo no. 8 in the Bundle of Documents confirmed that at the top is darkness; that the photo below that was taken at the same time; that he did not use a flashlight when he took the pictures; that it was the position he was in at the time and moved around the vehicle while he was taking the pictures; that the sun was coming up at that time; that it was taken at the same location but you cannot take pictures at the same time. Further, that he took a picture and moved; that you will see dawn in the first one and then later on you can see a clear view.
34. That photo no. 6 is also dark; that he did not use a flashlight; that you can clearly see the reflective strips on the trailer when it is dark; that the strips can be clearly seen at night in the pictures; that the strips reflect sunlight at multiple levels, low lying sunlight and it absorbs any ambient lighting and reflect them off. Further, that you would see the strip because it is a big reflective strip, that unless you are in zero visibility you would not see the strip, that the strip would be accentuated once lighting is on it, it illuminates so you know danger is directly in front of you. He continues that the importance of the two pictures (one being the side view and the second a profile view from in front of the trailer alongside in the staging area) was to prove that the Plaintiff was not driving on the thoroughfare and at that point in time something happened that made him divert off the thoroughfare into the flatbed trailer.
35. That, he said, the photos at 5 are much brighter, the difference in the time between was that it was just about dawn; that he had a good picture of the scene of the accident; that he did not leave the scene until 9:00 that morning; that the photo on the top he took behind the vehicle looking west, slightly off the thoroughfare in the staging area where the vehicle was and had collided with a flatbed trailer. That the top photo shows a flatbed; that the one below he walked closer up to get a detailed picture of the damages that occurred to the vehicle; that the difference between the photographs that reflect darkness and light was

because of the difference of ten minutes. That one of the photos he did not take is a representation of the signage they have in the yard, it is all over the place, at the main security gate, various points along with the stop signs.

36. That what he saw was the condition of the vehicle a portion of the cab was decapitated by the flatbed trailer, the keys were still in the vehicle, the vehicle was off, that he went in, turned the ignition and the vehicle started, that he tried the horn, did the lights, pressed on the brakes and everything seemed to be working. Further, that he got to the vehicle about ten minutes after arriving to work at 6:00 am, it was halfway across the site so he had to walk to that location; that by the time he got to the vehicle the area was still lit by the portable lighting they had out by the dry dock; that it is the lights that appear on the ship; that the picture is showing an illustration that at the very head of the dry dock, if you are on South Beach you will see the wing wall and all these lighting, they shine down on to South Beach; that in addition they would put mobile lighting towers in position to increase the illumination of the location. That those lights are on from dusk to dawn, they are a twenty-four operation, the lights have to be on; that he did not take any aerial photos, they were taken during the day.
37. That when shown the photo at page 17 an aerial view indicated where the Jeep would be over in the South Beach area, the thoroughfare running from where they call Container Port to Port Lucaya, that the accident occurred midway down the thoroughfare; that that area would have had light early in the morning before sunrise coming from ships and other sources. That the lighting he is talking about is exclusive to the shipyard, the wing wall and the mobile towers and the portable lighting they provide for the work going on for employees.
38. That when looking at the illustration, on the dry dock providing light you can see up top and on the wing wall itself; the dry dock is just a box square that runs 300 feet, at the length of the three hundred feet there are light towers across the top of the dry dock shining down on to South Beach; that inside the dry dock there is a strip just below those columns and also on the bottom, you can see they light the walkway path on the dry dock provide lighting; that there are no towers shown on the picture.
39. During re-examination by Counsel for the 1st Defendant he confirmed that the top photo at Tab 2, page 6 [page 8] is the area described as the thoroughfare and as being 50 to 60 feet

wide; that the area where the Jeep was in the photo was described as the staging area; that the Jeep was well off the thoroughfare; that in the photo below confirmed that where the Jeep was and off to the side was described as dock No. 2 and was where the illumination would have come from and on to the thoroughfare of South Beach. Further, confirmed that the accident happened midway of the thoroughfare; that the thoroughfare has been in operation and use since the inception of the Shipyard.

40. Following questions from the Court in reference to the photograph at Tab 2, page 6 of the Bundle of Documents, the bottom picture, stated that the reflectors seen are not on the truck but are on another container behind or over from it.
41. During further re-examination he confirmed that the said picture at Tab 2, page 6 of the Bundle of Documents, the bottom picture was taken face on and you would not be able to see the reflectors that are in the first set of photographs.
42. Mr. Morris Simmons' evidence in his Witness Statement in part is that he is the owner of Simmons Security and Investigations Limited, that his company and the 1st Defendant entered into a contract for the provision of security services at the 1st Defendant's premises on or around April 2006, that on or around February 2007 the Plaintiff was employed by the company as a security officer and was stationed at the 1st Defendant's premises. Further, that pursuant to the contract of employment between the Plaintiff and the company the Plaintiff worked a twelve hour shift daily, that he was required to work the night shift at the 1st Defendant's premises, that the 1st Defendant required the security officers to wear protective gear supplied by it and that the Plaintiff was aware of that. He continues that to work as a contract security officers, they are required to provide a valid Bahamian passport to the Ministry of National Security, the Plaintiff provided him with a copy of a few pages of the same at the time he was hired and the same was used to submit his application to the Board. He states that the Plaintiff was required to patrol the 1st Defendant's premises along with two other security officers, that the Plaintiff was stationed at the 1st Defendant's premises for eight months prior to the incident on October 26, 2007 and performed a routine patrol during those months which consisted of patrolling the said premises by vehicle every shift. It is his evidence that after the incident in October 2007 the Plaintiff remained in his employ and continued to work at the 1st Defendant property, that the Plaintiff took a few days off following the incident then returned to work, that upon his return to work the

Plaintiff did not appear to be injured and did not complain about any injuries. He continues that the Plaintiff continued to work with the company for a few months after the incident however, he terminated the Plaintiff from his employ as the Plaintiff was unable to provide him with his original passport for review by the Ministry of National Security on or around the end of 2007 and early 2008, that as result he was unable to obtain a national security license for the Plaintiff from the Ministry of National Security.

43. His viva voce evidence is that the services provided to the Shipyard by his security officers consisted of patrol services, patrol around the perimeter and within the interior of the property; manning the entrance gates and ensuring only authorized persons enter the property and ensuring only authorized materials left the property. That the Plaintiff was stationed at the Shipyard sometime in 2007; that on October 26, 2007 the Plaintiff was involved in a traffic accident while patrolling the premises of the shipyard; that after the accident he stayed off for about a few days then returned to work. Further, that he had to terminate the Plaintiff because they were unable to acquire a security license for him, at the time the Plaintiff was unable to provide a current Bahamian passport which was required and the Plaintiff remained with them a few weeks or up to two months after the accident before he was terminated.
44. During cross-examination by Mr. Maynard he stated that he was contracted to provide security services to the Shipyard; that he was at liberty to choose the security officers personnel to carry out that function; that the Plaintiff received his salary from his company; that he collected for his services from the Shipyard. He stated that he did not terminate the Plaintiff's employment because of the accident nor because of any dissatisfaction of the work he was doing; he stated that he was a very good employee.

The 2nd Defendant's Case

45. The 2nd Defendant relied on one witness, Miss Karla McIntosh whose evidence was contained in her Witness Statement filed on November 17, 2014, an Affidavit filed December 4, 2014 and her viva voce evidence during the trial.
46. Miss McIntosh's evidence in part is that save that she is now employed as General Counsel, at the time of preparing her Witness Statement her evidence is that she is employed in the position of Senior Legal Counsel by the 2nd Defendant and has been employed with the 2nd

Defendant since 2010, that the Plaintiff was allegedly involved in a collision with a flatbed trailer that was located on a staging area for Dock 2 at the 1st Defendant's premises.

47. Miss McIntosh states that 2nd Defendant does not have any interest in the premises demised by the 1st Defendant nor does it own or have any shares in the Freeport Harbour Limited and sets out the Conveyance made between the 2nd Defendant and Freeport Commercial Industrial Limited dated March 15, 1973 and recorded in Volume 2701 at pages 210 to 218 inclusive, a Conveyance dated March 15, 1973 and recorded in Volume 2071 at pages 234 to 254 inclusive the 1st Defendant's premises being approximately eighteen acres situated in the Freeport Harbour together with other properties were granted and conveyed to Freeport Commercial and Industrial Limited; a Conveyance dated April 7, 1995 made between Freeport Commercial and Industrial Limited and the Freeport Harbour Company Limited and recorded in Volume 6524 at pages 425 to 438 inclusive the 1st Defendant's premises being approximately eighteen acres situated in the Freeport Harbour together with other properties were granted and conveyed to Freeport Harbour Company Limited ("the Landlord"); an Indenture of Lease dated March 24, 1999 made between the Landlord and Lloyd Werft ("the Tenant"), the Landlord demised unto the Tenant all that demised property for the term created by the said Lease; by a Certificate of Change of Name and Incorporation dated April 24, 2001 the name of the company Lloyd Werft Grand Bahama Limited was changed to the Grand Bahama Shipyard Limited, the 1st Defendant herein. The said documents were admitted and entered into evidence as exhibits KM 1-3.
48. Miss McIntosh states that the 2nd Defendant had no knowledge or means of knowledge of the existence of a flatbed trailer on the premises of the 1st Defendant as the 2nd Defendant is neither the Landlord nor the beneficial owner of the premises and therefore is not responsible for any damages sustained by the Plaintiff, that the 2nd Defendant was not a party nor privy to any Agreement between the 1st Defendant and a third party for the patrol of the 1st Defendant's premises, that the 2nd Defendant does not own or control the road and does not owe a duty of care to anyone else lawfully utilizing the road or the premises of the 1st Defendant.
49. The evidence as found in her Affidavit is that the 2nd Defendant does not have any interest in the demised premises nor does it have or own any shares in the Freeport Harbour Company Limited. She also exhibits the said conveyances between the 2nd Defendant and

Freeport Commercial Industrial Limited dated March 15, 1973 and recorded in Volume 2071 at pages 210 to 218 and dated March 15, 1973 and recorded in Volume 2071 at pages 324 to 254 inclusive of the 1st Defendant's premises being approximately eighteen (18) acres situated in the Freeport Harbour together with other properties that were granted and conveyed to Freeport Commercial and Industrial Limited.

50. During cross-examination by Counsel for the Plaintiff she stated that she put several conveyances into evidence from the Port Authority to Freeport Commercial and her purpose for doing so is to show that the 2nd Defendant does not own the land in question to where the accident occurred; nor is the 2nd Defendant the beneficial owner of the premises, nor does it have any shares in the company that owns those premises. Further that the said land is part of the Port Area.

51. In response to the reference to Section 2, subsection 15 of the Hawksbill Creek, Grand Bahama Deep Water Harbour and Industrial Act, Miss McIntosh states that her interpretation of that provision, using the reference rule here, is that the "main thoroughfare" that cars reverse on is open to the public and is not what she would call a pass or some sideway that an individual constructs on its private premises. She continues that according to the Plaintiff's evidence he stated that the Port Authority, the police and everyone would be excluded from those premises and entrances, so the 2nd Defendant cannot own it.

Submissions

The Plaintiff

52. Mr. Maynard submits in part that the Plaintiff on October 10, 2009 [2007] early in the morning was performing the duties of a security officer for the shipyard and that said duties involved driving their vehicle on roads within the boundaries of property occupied by and under the control of both the 1st Defendant and 2nd Defendant. He further submits that the Shipyard is licensed to carry on the business of ship repairs on the said property by the 2nd Defendant and that by an agreement made between the Government of The Bahamas and the 2nd Defendant, the 2nd Defendant is given control of all roads and bridges located within the Port Area. Additionally, that the 2nd Defendant has the power to close and open roads and bridges for the purpose of maintenance and to ensure their safety whether or not they are located on land owned by the 2nd Defendant. Further, that the Plaintiff was working

during the darkness of the night as a security officer, that he was driving a vehicle provided by the 1st Defendant for the purpose of patrolling the said premises when the vehicle collided with a trailer parked partly protruding into the road and not bearing an illuminated danger sign and in an area not sufficiently illuminated to make the trailer visible to the Plaintiff.

53. Mr. Maynard submits that the issue before the Court is whether the Defendants owed a duty of care to the Plaintiff while he was driving their vehicle on roads or otherwise travelling over land used by and under control of the 1st Defendant and whether that duty was breached. He submits that a person will only be liable in negligence if he is under a legal duty to take care and refers the Court to **Donoghue v Stevenson [1932]** A.C. 562, 619. Further, that the Plaintiff is required to prove that the Defendants owed a duty of care to the Plaintiff; that there is a breach of that duty of care and that the Plaintiff suffered damage. Negligence, he submits is defined as a breach of a legal duty to take care which results in damage, undesired by the Defendants to the Plaintiff. Additionally, that it is necessary for the Plaintiff to prove damage and that the damage which he suffered was reasonably foreseeable by the Defendants and the cause of action accrues immediately once the damage arises. Mr. Maynard continues that the standard of care which a Defendant is required to show in a particular situation is that of a reasonable man and refers the Court to page 76 of Element of the Bahamian Law by Sir Leonard Knowles, Chief Justice.

54. Mr. Maynard submits that the pleadings allege that the 1st Defendant was negligent as they did not exercise, provide and implement the duty of care imposed upon them by law; that having regard to the familiarity the managers have with the work of security officers they would have contemplated the probability of damage and danger affecting such officers, therefore, the reasonable persons would have assumed a duty of care. He also submits that the 1st Defendant being bound by a duty of care should have taken measures to ensure the safety of the Plaintiff and the minimum requirement in the circumstances would have been bright lights to have made the trailer in its entirety visible from the roadway at a safe distance; a large sign on the side of the road warning danger ahead and red reflectors on the trailer; and that they should have been informed prior to the start of the patrol the situation of the trailer and the potential danger thereof. It is his submission that there is no evidence that any action of this kind was taken and the failure of the same is res ipsa

loquitur. He also submits that the 1st Defendant is also in breach of the duty of care imposed by statute under the Health and Safety at Work Act, Section 4.

The 1st Defendant

55. Counsel for the 1st Defendant, Mrs. Parris-Whittaker has provided very fulsome submissions however, I set out the relevant portions as relate to the facts in dispute.
56. Mrs. Whittaker submits that the Court in determining the issue of liability must consider whether the Plaintiff's collision was caused (a) because the flatbed trailer was in the "middle of the road"; or (b) because the flatbed trailer was not "lit or marked sufficiently or at all"; or (c) because the Plaintiff was not "given any or any sufficient warning of the presence of the flatbed trailer."
57. She submits on the first issue that the Plaintiff's pleadings and his evidence was that the flatbed trailer was either in the middle of the road or parked across the road (Pages 9, 12-13 of Transcript dated September 27, 2016); that he readily admitted that he would have passed the flatbed trailer in the same position five or six times during his shift that evening; that he was familiar with the road in question and was familiar with what was on the South Beach strip because he had traversed that area during his shift. Further, during the Plaintiff's evidence he was shown photographs (marked TF 1-4) of an overview of the size of the South Beach thoroughfare and staging area and agreed that the same was approximately sixty feet wide (Page 13, Transcript dated September 27, 2016).
58. She continues that the evidence of Mr. Tyrone Farquharson was that the thoroughfare is approximately fifty to sixty feet wide (Page 10, Transcript dated November 25, 2016); that after being shown Tab 4, page 2 of the 1st Defendant's Bundle of Documents ("Bundle of Documents) confirmed that the photograph accurately reflected the thoroughfare in 2007 (Page 12, lines 13-16, Transcript dated November 25, 2016); that the trailer was parked off the thoroughfare. Further, that the Court was shown the pictures at Tab 3 and 4 of the Bundle of Documents which show that the trailer was parked far away from the thoroughfare which is fifty to sixty feet wide and was more than sufficient for the Jeep driven by the Plaintiff to pass without veering into the staging area. It is her submission that the Plaintiff has failed to provide sufficient evidence to support his contention that the trailer was located in the thoroughfare in the South Beach and that it was positioned

dangerously. Moreover, the evidence provided to the Court demonstrates that the trailer was positioned well off the thoroughfare and did not in any way impede the sixty foot wide driving space.

59. Mrs. Whittaker submits on the second issue as to whether the trailer had reflective tape, the Plaintiff's evidence was that the trailer was not lit and did not have reflective tape (Page 16, Transcript dated September 27, 2016); that the Jeep was in good working condition and that all of the vehicle lights were operable during the material time (Page 30, Transcript dated September 27, 2016); that when he drove the Jeep in the South Beach area earlier in his shift the Jeep's lights were sufficient to see where he had to go and that he could see clear (Pages 31 and 38, Transcript dated September 27, 2016). Further, that the evidence of Mr. Farquharson while being shown pictures of the flatbed trailers two hours after the incident was that the trailer was marked with more than sufficient red reflective tape (Tab 2 of Bundle of Documents, page 15, line 27 onwards, Transcript dated November 25, 2016); that the reflective strips would be accentuated once lighting is on it, it illuminates so the person knows danger is directly in front of them, unless there is zero visibility the strip would not be seen (Page 28, line 32 to page 29, line 4, Transcript dated November 25, 2016); that the condition of the vehicle was such that a portion of the cab was decapitated by the flatbed trailer, the keys were still in the vehicle, the vehicle was off, that he went inside and turned the ignition and the vehicle started, tried the horn and lights and pressed the breaks and that everything seemed to be working (Page 32, lines 14-18, Transcript dated November 25, 2016). Lastly, the evidence from the Plaintiff and Mr. Farquharson was that there were no other accidents on October 10, 2007.

60. Mrs. Whittaker submits on the third issue that the Plaintiff asserted that there were no lights in the South Beach area in his evidence and pleadings however the evidence of Mr. Farquharson when asked to describe the area where the accident took place in 2007 was that the area is always illuminated. Further that the South Beach area is typically lit by the dock itself, that its constant lighting, that a person can see in the dark and that additional mobile lighting is placed in areas (Page 14, lines 12-21, Transcript dated November 25, 2016). Mr. Farquharson was shown a photo at Tab 3, page 15 of the Bundle of Documents which showed dry dock No. 2 in the said area where the accident occurred and stated that there are lights that illuminate the dock, they are on top of the dock and are shining outward

to illuminate the north and south side wing walls (Page 15, lines 8-15, Transcript dated November 25, 2016). Additionally, Mr. Farquharson when shown Tab 4 of the Bundle of documents confirmed that the lights on the wing wall are on from dusk to dawn as a result of the 1st Defendant being a twenty-four hour operation (Page 33, lines 13-29, Transcript dated November 25, 2016).

Findings of Fact

As against the 1st Defendant

61. Having heard from all of the witnesses on behalf of the Plaintiff and the 1st Defendant, I find that the Plaintiff's evidence adduced by way of his Witness Statement and his viva voce testimony from the witness box contained a number of inconsistencies and moreover, differed from his pleaded case. On the other hand, I find the 1st Defendant's witnesses, in particular Mr. Tyrone Farquharson, to be more credible as the evidence found in his Witness Statement and viva voce testimony from the witness box was corroborated by the photographs (Exhibits TF - 1-4) taken by him within 30-45 minutes of the accident happening. It is for these reasons that I attach considerable weight to the photographs found at Exhibits TF-1-4 as opposed to other photographs entered in the action and described as illustrative of the accident site. In the circumstances, I preferred the evidence adduced on behalf of the 1st Defendant in this matter. Therefore, after reviewing the evidence before the Court on behalf of the parties these are my findings of fact.
62. I accept that the evidence of the Plaintiff and of the 1st Defendant is consistent in one respect, that the Plaintiff was employed by Simmons Security & Investigations Limited as a Security Guard and that Simmons Security & Investigations Limited and the 1st Defendant entered into an agreement whereby Simmons Security & Investigations Limited was to provide security personnel to the 1st Defendant. Further, I accept the evidence of the 1st Defendant that in or around February, 2007 the Plaintiff was stationed at the 1st Defendant's premises as a security officer and that his duties as security officer included monitoring and securing the property, logging persons in and out of the premises, conducting moving patrols of the site during his shift; that a moving patrol consisted of traveling a designated route throughout the premises starting from the base station driving from North Beach and back all the way around to the first end of the site to the south end

encompassing the entire site and that this is usually done by using a vehicle and takes about half an hour to complete. Further, as argued by the 1st Defendant, I accept that the Plaintiff was not an employee of the 1st Defendant but was an employee of a subcontractor of the 1st Defendant and was therefore an invitee on the said premises as a security officer.

63. The evidence of the Plaintiff and the 1st Defendant differs as to the date on which the accident occurred as the Plaintiff has stated it occurred on October 10, 2007 and the 1st Defendant has stated it occurred on October 26, 2007. The Plaintiff did not provide any corroborating evidence in support of the date on which the accident occurred and the evidence provided on behalf of the 1st Defendant which includes a "Health, Safety & Environment Accident – Security Patrol Jeep" report found at Tab 2 of the 1st Defendant's Bundle of Documents indicates the date of the accident as October 26, 2007.

64. I accept that the photographs of the accident site found at pages 5 to 8, Tab 2 of the 1st Defendant's Bundle of Documents and entered as exhibits TF 1-4, were taken shortly after the accident by Mr. Farquharson although no identifying features such as a time stamp to verify the date on which they were taken appear on the photographs. However, I am of the view that not much turns on making a finding as to the exact date of the accident and find that in or around October, 2007 between the hours of 4:30am and 5:40 am the Plaintiff was driving a Jeep Wrangler, owned by the 1st Defendant, when he collided with a flatbed trailer in or near the area known as South Beach while conducting his moving patrol around the said premises of the 1st Defendant in his capacity as security officer.

65. I accept the Plaintiff's evidence that his shift as security officer usually began at 12:00 am and ended at 8:00 am and that prior to the collision he had driven patrol about five or six times without incident that shift; that he was familiar with that particular road as he worked five days a week at the 1st Defendant's premises and that prior to the collision he was not involved in any other incidents in that area on the morning in question. This evidence was consistent with the evidence given by his employer Mr. Morris Simmons. I also accept the evidence of the Plaintiff that following the collision he did not move the said Jeep.

66. I accept that the top or first photograph on page 8 and entered as exhibit TF-4 shows that after the collision, the flatbed and said Jeep were located on the side of the thoroughfare. This is also Mr. Farquharson's evidence. I therefore reject the Plaintiff's evidence that the flatbed was across or in the middle of the main thoroughfare or of any road. The Plaintiff

has adduced no evidence to prove this assertion. Nor has he adduced any evidence that the 1st Defendant moved the flatbed into the middle of the road at some point during his shift. Both the Plaintiff and Mr. Farquharson agree, and I accept, that the throughfare is 50 to 60 feet in width. I also accept the evidence of the 1st Defendant found in the bottom photograph on page 8 and entered as exhibit TF-4 that shows the aftermath of the collision with the flatbed and the said Jeep and that the flatbed trailer has a reflector on its side that is red and white and that the same reflector on the flatbed trailer can be seen in the bottom photograph on page 7 and entered as exhibit TF-3. I also accept the evidence of the 1st Defendant and the evidence of Mr. Farquharson that the pictures exhibited as TF-1-4 were taken by him shortly after his arrival to work at 6:00 am. I also accept the evidence of the 1st Defendant in the photographs at page 6 and exhibited as TF-2 that the Jeep's headlights were not on upon the arrival of Mr. Farquharson. I accept Mr. Farquharson's evidence as to the extent of the damages to the Jeep, that is, a portion of the flatbed was in the cab of the jeep as depicted in the photograph entered as Exhibit TF-3.

67. I accept the Plaintiff's evidence that he had patrolled the area where the accident happened at least 4 times that night without incident. I reject the Plaintiff's evidence under cross-examination by Mr. Fernander that he collided with the flatbed because he swerved to avoid potholes on the main thoroughfare. This is not the Plaintiff's pleaded case. It is not in his witness statement and he did not give this evidence while giving his evidence-in-chief and he has failed to prove that this is how the accident happened.
68. I can make no finding as to the injuries claimed as having been sustained by the Plaintiff as he adduced no medical proof of his alleged injuries.
69. I accept from the Plaintiff's own evidence and from the evidence of Mr. Simmons that the Plaintiff's termination from his employment was not connected to the accident or to any alleged injuries sustained in the accident.
70. I accept from the evidence of the Plaintiff and Mr. Farquharson that the Jeep sustained significant damage to the front end and cab of the Jeep, which is corroborated by a photograph taken of the Jeep on the scene of the accident by Mr. Farquharson.

Issues

The 1st Defendant

71. Having considered and decided above that the Plaintiff was not employed by the 1st Defendant but was an invitee to the said premises, I find that this case falls within the ambit of occupier's liability. As such the following issues to be determined in this action are:

    a. Whether the 1st Defendant took reasonable care to prevent damage to the Plaintiff from an unusual danger;

    b. Whether the unusual danger was known or ought to have been known by the 1st Defendant and whether the Plaintiff did not know or could not have been aware of the unusual danger;

    c. Whether or not the Plaintiff wholly caused or contributed to the negligence and;

    d. Whether the Plaintiff entitled to damages.

Submissions

Occupier's Liability

72. The Court set out the Plaintiff's submissions on the relevant law on negligence in paragraphs 25 to 27 above.

73. Mrs. Parris-Whittaker submits in part that it is settled law that there is a duty of care owed by an occupier of property to lawful visitors of that property; that the duty is that of reasonable care to prevent damage from an 'unusual danger' of which the Defendant knew or ought to have known and of which the Plaintiff did not know or of which he could not have been aware. Further, she submits that in circumstances where a danger is obvious and the visitor is able to appreciate it there is simply no need for a warning (**Staples v West Dorset District Council 93**, LGS, 536); that the duty owed by the Defendant is not absolute; that the Plaintiff has a duty to use reasonable care for his own safety (**Staples v West Dorset District Council (supra)**) and that he cannot recover damages against the Defendant if he did not exercise care for his own safety. She refers the Court to paragraph 12 of **Rhonda Gaul v Ottershaw Investments Limited d/b/s Sandals Royal Bahamian Resorts & Spa [2009]** 2 BHS J No. 33 and submits that it is established law that it is the

Plaintiff who must show on a balance of probabilities that the accident was caused by the 1st Defendant's negligence. She also refers the Court to **Brown v Rolls Royce Ltd [1960]** 1 WLR 210 in support.

74. It is her submission that the Court must apply the three-fold test laid down in **Capro Industries Plc v Dickman [1990]** UKHL 2 in determining whether a duty exists or not and that the test is firstly that the harm must be reasonably forseeable as a result of the defendant's conduct; the parties must be in a relationship of proximity; and it must be fair, just and reasonable to impose liability. She refers the Court to the cases of **Indemaur v Dames (1866)** L.R. 1 C.P. 274 and **Cox v Chan [1991]** BHS J 110 (**paragraph 21, Sawyer, J**) in support of her submissions and also refers the Court to **Dock Co. Ltd. v Horton [1951]** 2 All ER 1 as being instructive on the concept of 'unusual danger'.
75. Therefore, Mrs. Parris-Whittaker submits that the Court must decide whether the position of the flatbed trailer presented an unusual danger; if so did the 1st Defendant use reasonable care to prevent damage to the Plaintiff and whether the Plaintiff used reasonable care for his own safety. It is her submission that the 1st Defendant has proven by its evidence that the position of the flatbed trailer did not present a danger to a driver who exercised due care and attention and acted reasonably; that reasonable steps were taken to ensure that the trailer was parked safely away from the thoroughfare; that the trailer was clearly marked with red reflective tape; that the area was more than sufficiently illuminated and there had been no previous incidents in that area before October 10, 2007. Further, that the 1st Defendant also employed safety measures on property to ensure that all persons on property wore safety helmets, goggles, drove with a seatbelt and restricted the speed limit on property to 5-7mph; and that the evidence also showed that before the accident the vehicle was operating properly. She submits that the Plaintiff has not met the burden of proving that the 1st Defendant breached its duty of care (if one is owed).
76. Mrs. Parris-Whittaker also submits that the Plaintiff's reliance of the Health and Safety at Work Act, 2002 is not applicable as the Plaintiff's evidence contrary to his Re-Amended Statement of Claim was that he was employed by Simmons Security on October 10, 2007 and not by the 1st Defendant. However, she submits in the alternative even if he was an employee Section 7 of that Act provides for the employee while at work to take reasonable care for the health and safety of himself and others who may be affected by his acts or

omissions at work and that the Plaintiff did not do so when he veered off the main thoroughfare into the staging area. She refers the Court to **Bethel v Canadian Imperial [1993]** BHS No. 222 of 1991 in support.

Discussion/Analysis

The Law

77. The common duty of care in cases whereby the liability of an occupier has arisen is the duty to exercise reasonable care to prevent damage to the invitee from an unusual danger known to the occupier or of which the occupier ought to have known. **See Commonwealth Caribbean Tort Law, 2nd Edition, pg 149**.
78. Mrs. Parris-Whittaker helpfully referred the Court to the case of **Indemaur v Dames (supra)** and the dicta of Sawyer, J at paragraph 21 of **Cox v Chan (supra)** as to the duty of care owed by an occupier to an invitee. Sawyer, J in **Cox v Chan (supra)** stated that the occupier's duty is "not an absolute duty to prevent any damage to the plaintiff but is a lesser one of using reasonable care to prevent damage to the plaintiff **from an unusual danger of which the defendant knew or ought to have known** and, I may add, of which the plaintiff did not know or of which he could not have been aware." (**emphasis mine**)
79. Mrs. Parris-Whittaker helpfully referred the Court to the case of **Indemaur v Dames (supra)** and the dicta of Sawyer, J at paragraph 21 of **Cox v Chan (supra)** as to the duty of care owed by an occupier to an invitee. Sawyer, J in **Cox v Chan (supra)** stated that the occupier's duty is "not an absolute duty to prevent damage to the plaintiff from an **unusual danger of which the defendant knew or ought to have known, and of which the plaintiff did not know or which he could not have been aware.**" (**emphasis mine**)
80. Lord Porter in **London Graving Dock Co. Ltd. v Horton (supra)** stated:

> *"I am not conscious that it has been stated in plain terms, but it is noticeable that what is declared to be the duty is, not to prevent unusual danger, but to prevent damage from unusual danger. It is in this consideration, as I think, that notice or knowledge becomes important. Either may prevent damage, though the unusual danger admittedly exists. As I take this view, I find the question what is unusual danger of less importance than it might otherwise be considered. To my mind, danger may be unusual though fully recognized, and I am not prepared to accept*

the view that the word "unusual" is to be construed subjectively as meaning "unexpected" by the particular invitee concerned. Moreover, I get little assistance from the alternative word "unexpected," suggested by Phillimore L.J. ([1915] 1 K.B. 596) in Norman v Great Western Ry. Co. (4). I think "unusual" is used in an objective sense and means such danger as is not usually found in carrying out the task or fulfilling the function which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises."

81. In my findings of fact above, and the evidence adduced by the parties, the Plaintiff was not employed by the 1st Defendant but was employed by Simmons Security & Investigations Limited as a security officer to provide security services to the 1st Defendant. As a part of his duties, he was required to conduct moving patrols around the premises which involved him driving the said Jeep from one end of the premises to the other which would take him about half an hour to complete. Therefore, as an invitee to the 1st Defendant's premises the task or function he was required to fulfill was to the extent of his duties described herein and in the evidence of the parties adduced before the Court. Further, it was the Plaintiff's evidence during cross-examination that his shift as security officer usually began at 12:00 am and ended at 8:00am and that prior to the collision he had driven patrol about five or six times; that he was familiar with that particular road as he worked five days a week at the 1st Defendant's premises and that prior to the collision he was not involved in any other incidents in that area. The Plaintiff has alleged in his Re-Amended Statement of Claim that the 1st Defendant caused or permitted the flatbed trailer to be in the middle of the road and constituted a danger and a trap; failed to have the trailer removed forthwith; failed to light or mark the trailer sufficiently or at all and failed to give sufficient warning to the Plaintiff as to the presence of the trailer. In his submissions, the Plaintiff continues that the 1st Defendant failed to illuminate the area sufficiently so that the trailer was visible; failed to place a large sign on the side of the road warning danger and that the Plaintiff should have been informed before the beginning of the patrol of the situation of the trailer.
82. As I understand the dicta of Lord Porter in **London Graving Dock v Horton (supra)** it is not the duty to prevent unusual danger but the duty is to prevent damage from unusual danger and it is at that juncture where knowledge or notice becomes important. Parties are

bound by their pleadings. In the circumstances of this case, the allegations contained in the Plaintiff's Re-Amended Statement of Claim, submissions and viva voce evidence were not proven and further were refuted by the 1st Defendant. In the findings of fact made above, I found that the trailer was not midway on the thoroughfare but was on the side of the staging area; that the trailer had reflective strips that illuminate and indicate its presence when light is shone on it and the photographs exhibited into evidence also showed that other trailers had the same reflective strips attached to them.

83. The evidence provided by the 1st Defendant as to the illumination of the area was that there was a ship on dry dock No. 2 and the lighting from that ship would have extended towards the South Beach area. The 1st Defendant also adduced as evidence exhibit TF-7 a photograph showing how the lighting from a ship that is on dry dock would illuminate the surrounding area, however, no evidence was led as to the state of the said lighting on the morning in question. However, the Court's determination in civil matters is on a balance of probabilities and in the circumstances, I am of the opinion that it is more probable than not that the lights from the ship that was on dry dock no. 2 would have provided some illumination that extended to the South Beach area.

84. The Plaintiff also gave evidence that he had driven that route several times prior to the accident and was familiar with the area. However, the Plaintiff in his viva voce evidence during cross-examination by Counsel for the 2nd Defendant stated that the trailer had to have been put there between the time he conducted his last patrol and the accident; that it was raining lightly and that he had been ducking and dodging potholes. This evidence was not stated in his Witness Statement and he could not explain why he had not previously included it. I am not of the view that the 1st Defendant was required to inform the Plaintiff prior to his patrol of the flatbed trailer as his evidence was that he was familiar with the area and had conducted his patrols prior to the said accident without any incident and there is no evidence that the flatbed trailer was in a position to cause damage to the Plaintiff or to anyone else.

85. Therefore, I accept that the 1st Defendant, by placing reflective stickers on the flatbed trailers, by maintaining the flatbed trailers to the side of the thoroughfare and on to the staging area, by providing sufficient illumination of the area by virtue of the ship on dry dock No. 2, discharged its duty to prevent damage from unusual danger. Further, that the

1st Defendant's actions and precautions in and around its premises were reasonably safe to those who were deemed invitees.

86. However, if I am incorrect in my finding above and the 1st Defendant owed the Plaintiff such duty and breached the same, I find that the Plaintiff has not proved that he sustained any damage resulting from the said breach. In an action for negligence, the Plaintiff must establish all three elements i.e. (i) **he was owed a duty of care by the defendant; (ii) the defendant breached that duty; (iii) as a result of which the plaintiff sustained reasonably foreseeable injury and damage**. (**See Donaghue v Stevenson [1932] A C 562**) (**emphasis mine**).The burden is on the Plaintiff to prove each of those elements.

87. The Plaintiff in his Re-Amended Statement of Claim alleged that he suffered herniation of the disk at L4-L5 on his right side and suffered partial paralysis at his great right toe. He also asserted in his pleadings that he briefly lost consciousness following the accident and suffered severe pain in his neck and lower back. The Plaintiff's evidence in his Witness Statement was that he briefly lost consciousness following the accident, that he was very painful in his neck and lower back and at the time of writing the statement he did not feel any pain in his neck but his lower back was still painful, that there was some improvement but still not completely healed. His viva voce evidence was that he sustained injuries as a result of the collision, that he was transported to the hospital and received treatment and later discharged. His evidence was that following the accident he was transported to the hospital; that while being transported he felt pain in his neck and lower back; that he was kept in the hospital for about four hours and discharged with medication; that he was sent to Doctor Bethel who referred him to a chiropractor because there were five bones misplaced in his lower back and three in his lower back and that he saw the chiropractor about seven times. It was also his evidence that he received reports from all of the doctors he was seen by.

88. The Plaintiff also claimed in his Re-Amended Statement of Claim that he ceased working as a security officer as it was too much stress for his back and made his pain even more severe; he claims special damages for doctors' fees and prescription expenses, loss of income (3 years @ $10.00 an hour for 50 hours per week) and loss of earning capacity. His evidence was that he returned to work after ten days, that he had returned to normal functions and that he still had pain in his lower back and neck once in a while.

89. The 1st Defendant submits that the Plaintiff has not produced any evidence that he was injured as a result of the accident. Further that he has not produced any documents that would support his claim for loss of income. It is their submission that the 1st Defendant provided evidence that demonstrated that the Plaintiff returned to work a few days after the incident and continued his employment for some time after the accident and that his quitting of the job was not the result of his injuries but by not receiving overtime pay and his boss using him as a spare tire. The Court also notes that the evidence of the 1st Defendant by Mr. Simmons was that the Plaintiff was terminated as a result of not obtaining the Plaintiff's passport to submit for his license renewal.

90. During the trial of this action however the Plaintiff did not produce to this Court any medical reports, receipts for doctor visits and medication to corroborate the injuries alleged to have been sustained as a result of the collision and the extent of those injuries. A medical report from his treating physician on the day of the accident would have corroborated his evidence as to the date of the accident or even the extent of what he alleged as his physical injuries. In the instant case while the Plaintiff to some extent has pleaded his injuries and alluded to some injuries during his evidence, the Plaintiff led no medical evidence to substantiate or corroborate any of the of injuries he alleges he sustained as a result of the said collision. He who avers must prove and the Plaintiff in this case has failed to prove that he suffered any injury as a result of the said collision.

91. Therefore, I find in the circumstances that the Plaintiff has failed to establish this crucial element and prove his claim in negligence and the same is dismissed.

The Claim as Against the 2nd Defendant

The Plaintiff

92. As it relates to the 2nd Defendant, Mr. Maynard submits that the 2nd Defendant in accordance with the terms of the Hawksbill Creek Agreement is the operator of the harbor and the 1st Defendant is a licensee of the 2nd Defendant. Therefore, he submits that the implication is clear that the 2nd Defendant has a proprietary interest in the 1st Defendant for which they are paid a service charge (rent) and by virtue of paragraph fifteen of the Hawksbill Creek Agreement has general oversight and care of the roads and bridges in Freeport including the maintenance and safety of the road in issue. Further, that the 2nd

Defendant owed a duty of care to the Plaintiff as they are aware of the operational activities of the 1st Defendant and is in breach by failing to enforce their oversight obligation to attend to the safety of the roads including the installation of adequate lighting and warnings of danger.

The 2nd Defendant

93. The 2nd Defendant relies on its Submissions Before Trial dated November 29, 2014, its Skeleton Submissions undated and its Written Closing Submissions filed on February 17, 2017. Counsel on behalf of the 2nd Defendant, Mr. Fernander submits that the Plaintiff's allegation that the 2nd Defendant is the owner of the road way on which the accident occurred is misguided; that the Plaintiff's own evidence was that the location of South Beach was far behind the security gate (Page 27, lines 1-15, Transcript dated September 27, 2016); that there was a gate at the 1st Defendant that barred entry from unauthorized persons and that except for employees of the 1st Defendant no other person had access to the premises (Page 38, lines 26-32; page 39, lines 1-20, Transcript dated September 27, 2016). It is his submission that it is abundantly clear that any alleged road was not owned or controlled by the 2nd Defendant, its agents or employees.
94. Mr. Fernander also submits that the evidence adduced by Ms. Karla McIntosh on behalf of the 2nd Defendant in her Witness Statement and Affidavit (i.e. the Conveyances between the 2nd Defendant and Freeport Commercial Industrial Limited; between Freeport Commercial Industrial Limited to Freeport Harbour Company Limited; an Indenture of Lease between Freeport Harbour Company Limited and Lloyd Weft Grand Bahama Limited (and now known as the Grand Bahama Shipyard)) shows that there is no ownership of land held by the 2nd Defendant upon which the 1st Defendant operates its business from. Further, that the lease itself is incontrovertible evidence that the 2nd Defendant is not seised of any right of ownership in the property upon which the 1st Defendant conducts its business. Lastly, he submits that the Plaintiff has not adduced any evidence before the Court to show that the property or any alleged road therein is in fact owned or controlled by the 2nd Defendant.

Findings of Fact

As against the 2nd Defendant

95. After reviewing the evidence before the Court on behalf of the parties these are my findings of fact.

96. I accept the evidence of the 2nd Defendant that the 1st Defendant is a licensee of the 2nd Defendant. This finding is based on the documentary evidence adduced by the 2nd Defendant hereinbefore and hereinafter-mentioned.

97. I accept the evidence of the 2nd Defendant that the 2nd Defendant does not have any interest in the premises demised by the 1st Defendant nor does it own or have any shares in the Freeport Harbour Limited. I also accept the documents entered as exhibits KM 1-3 during the trial which are the conveyance made between the 2nd Defendant and Freeport Commercial Industrial Limited dated March 15, 1973 and recorded in Volume 2701 at pages 210 to 218 inclusive, a Conveyance dated March 15, 1973 and recorded in Volume 2071 at pages 234 to 254 inclusive the 1st Defendant's premises being approximately eighteen acres situated in the Freeport Harbour together with other properties were granted and conveyed to Freeport Commercial and Industrial Limited; a Conveyance dated April 7, 1995 made between Freeport Commercial and Industrial Limited and the Freeport Harbour Company Limited and recorded in Volume 6524 at pages 425 to 438 inclusive the 1st Defendant's premises being approximately eighteen acres situated in the Freeport Harbour together with other properties were granted and conveyed to Freeport Harbour Company Limited ("the Landlord"); an Indenture of Lease dated March 24, 1999 made between the Landlord and Lloyd Werft ("the Tenant"), the Landlord demised unto the Tenant all that demised property for the term created by the said Lease; by a Certificate of Change of Name and Incorporation dated April 24, 2001 the name of the company Lloyd Werft Grand Bahama Limited was changed to the Grand Bahama Shipyard Limited, the 1st Defendant herein.

98. I also accept that the Plaintiff by his own evidence confirmed that the area known as South Beach was far behind the security gate and that in order for persons to access that area they would have to be let in through the security gate. Further, I accept the Plaintiff's evidence where he stated that in order for him to have access to that area or anyone else his

colleagues would have to open the gate and that if a member of the public, the police or the Judge wanted access to the premises they would have to stop to that gate.

Submissions

99. Mr. Maynard as summarized in the paragraphs above submits that in accordance with the terms of the Hawksbill Creek Agreement the 2nd Defendant is the operator of the Harbour, and as the 1st Defendant is a licensee of the 2nd Defendant, the 2nd Defendant has a proprietary interest in the 1st Defendant. He submits that the 1st Defendant pays the 2nd Defendant a service charge which he places in parenthesis as rent which created the proprietary interest and paragraph 15 of the Hawksbill Creek Agreement has general oversight and care of the roads and bridges in Freeport including the maintenance and safety of the road in issue.

100. He submits that the 2nd Defendant owed a duty of care to the Plaintiff being aware of the operational activities of the 1st Defendant and is in breach by failing to enforce their oversight obligation to attend to the safety of the roads including the installation of adequate lighting and warnings of danger.

101. Counsel for the 2nd Defendant, Mr. Dwayne Fernander submits that the Plaintiff's own evidence and evidence given during cross-examination was that the alleged road way in which he asserts the 2nd Defendant's ownership and control over is misguided and that any alleged road was not owned by or controlled by the 2nd Defendant, its agents or employees. Further, that the 2nd Defendant's own evidence from its witness Karla McIntosh contained in her witness statement and Affidavit herein showed that there is no ownership of land held by the 2nd Defendant upon which the 1st Defendant operates its business from and that the lease itself is controvertible evidence that the 2nd Defendant is not seised of any right of ownership in the property upon which the 1st Defendant conducts its business. It is his submission that the Plaintiff has no adduced any evidence before the Court to show that the property or any alleged road therein is owned or controlled by the 2nd Defendant.

102. Mr. Fernander also submits in part that the Plaintiff has not discharged his burden of proof against the 2nd Defendant (See Section 82 of Evidence Act; **Sands and others v Marsh Harbour Boat Yard Limited – [2013]** 3 BHS J. No. 72) and it is settled law that the standard is on a balance of probability. He refers the Court to section 15 of the

Hawksbill Creek Agreement and submits that at the time the said Agreement as amended came into effect all roads and bridges constructed by the 2nd Defendant and any licensee within the Port Area were deemed private roads and bridges and the 2nd Defendant had the absolute right to exclude any person or vehicle (other than an officer or employee or vehicle of the Government from using the same without giving a reason). He submits that that right was only over 'private roads' in the context of roads constructed for public access and not roads or pathways created by a fee simple owner on its property. Further that the property the 1st Defendant operates its business is subject to a Leasehold to the exclusion of even the landlord Freeport Harbour Company Limited and refers the Court to clauses 5.1 (which excludes the Landlord or any person) and 5.6.2. (which required the 1st Defendant to install a chain link fence around the perimeter of the property on or before May 31, 2000) of the said lease. He submits that the 2nd Defendant does not have an absolute right or any right at all to exclude the 1st Defendant or any other person or vehicle from using the alleged road or path upon which the Plaintiff's accident occurred. Therefore, it is his submission the Plaintiff's evidence that there is a security gate to the entrance to the Shipyard, no free access through that gate, that if a member of the public, the police, even the Judge wanted access they would have to stop at the gate, even the Plaintiff himself concludes that it was the 1st Defendant by virtue of the Lease Agreement with Freeport Harbour Company Limited who exercised control and the right to exclude any person or vehicle from accessing any alleged roads and pathways in the Shipyard and not the 2nd Defendant.

103. Mr. Fernander also submits that it is trite law that a defendant should only be held liable for that part of a plaintiff's ultimate damage in which he could prove that there is a causal link. **See Williams v Bermuda Hospitals Board [2016]** UKPC 4. Additionally, that the 1st Defendant admitted in its Defence that the accident occurred on its premises thus the 2nd Defendant has no duty to the Plaintiff in negligence or at all.

Discussion/Analysis

104. Having made my findings of fact above and as stated in the paragraphs above, in an action for negligence against another party the Plaintiff must establish all three elements i.e. (i) he was owed a duty of care by the defendant; (ii) the defendant breached that duty; (iii) as a result of which the plaintiff sustained reasonably foreseeable injury and damage.

(**See Donaghue v Stevenson [1932] A C 562**). The burden is on the Plaintiff to prove each of those elements.

105. The Plaintiff in his Re-Amended Statement of Claim alleged that the road on which the collision occurred is owned and controlled by the 2nd Defendant. However, the evidence before the Court from the 2nd Defendant by way of the exhibited conveyances and lease agreement showed and I accept as I have made findings of fact on the same that the 2nd Defendant does not own nor control the road which traverses the 1st Defendant's premises. Therefore, I accept the submissions of Mr. Fernander that the 2nd Defendant is not seised of any ownership rights over the said road. Further, the Plaintiff did not adduce any evidence to rebut the 2nd Defendant's documentary evidence that it no longer owns and controls the said road in the 1st Defendant's premises and I accept Mr. Fernander's submission.

106. The Plaintiff in his Re-Amended Statement of Claim also particularized the acts of negligence alleged were committed by the 2nd Defendant. These include permitting the flatbed trailer to be parked in the middle of the road in an unlit area and failing to have it removed or lighted; failing to give sufficient warning to the Plaintiff and other users of the road of the presence of the flatbed or take any steps to prevent traffic from colliding with it in the dark; failing its common law duty of care by exposing him to unnecessary risk of injury and failing to exercise oversight and vigilance over the road. As I have made my finding of facts above that the 2nd Defendant has no ownership rights or proprietary interest in the said premises, I find that the Plaintiff has failed to adduce any evidence in support of these allegations. However, the evidence that has been adduced by the Plaintiff was that he was employed by Simmons Security and that his job required him to work at the 1st Defendant's premises. The Plaintiff has not proven that the 2nd Defendant was the occupier of the 1st Defendant's premises nor that he was an invitee at the request of the 2nd Defendant to the 1st Defendant's premises. Moreover, the Plaintiff has not adduced any evidence that the 2nd Defendant would have had notice of the said flatbed trailer allegedly parked in the middle of the road (which was dismissed by my finding of fact that it was parked off to the side of the thoroughfare) and failed to remove it; that the 2nd Defendant had an obligation to warn the Plaintiff and other users of the said flatbed trailer or take steps to prevent traffic colliding with it in the dark, exercise requisite oversight and vigilance over the road as such

obligation to warn or take steps would require the 2nd Defendant's involvement in the 1st Defendant's operations which by virtue of the lease agreement excludes the landlord and any other persons from interfering with.

107. Additionally, as submitted by Mr. Fernander, I accept the Plaintiff has not discharged his burden of proof nor has he established that the 2nd Defendant owed him some duty that was subsequently breached. Moreover, as stated above in my finding for the 1st Defendant, the Plaintiff has not adduced any evidence in support of the injuries he sustained as a result of the collision nor has he established what damage if any he has sustained as a result of the said collision.

108. Therefore, in the circumstances, I also dismiss the Plaintiff's claim against the 2nd Defendant.

1st Defendant's Counterclaim

109. The 1st Defendant, by its Defence also sought by way of its Counterclaim the cost to replace the said Jeep in the sum of $12,773.09.

110. A review of the Court file shows that a Judgment in Default of Defence to the 1st Defendant's Counterclaim was filed by the 1st Defendant on November 26, 2012. The said Judgment in Default states inter alia that the Plaintiff is to pay the 1st Defendant the sum of $12,773.09, interest and costs to be taxed if not agreed. By an Affidavit of Service filed January 3, 2013 the said Judgment in Default of Defence was served on Counsel for the Plaintiff on January 2, 2013. To date no application has been made before this Court by the Plaintiff to set aside the Judgment in Default of Defence and so the same remains in force.

Disposition

111. I make the following Orders:

(1) The Plaintiff's claim against the 1st Defendant is dismissed.

(2) The Plaintiff's claim against the 2nd Defendant is dismissed.

Costs

112. That Costs shall follow the event and are awarded in favour of the 1st and 2nd Defendants, to be taxed if not agreed.

Delay

113. Further, I apologize profusely for the delay in the delivery of this Judgment which was due to late receipt of the transcript, the disruptions caused by Hurricane Matthew, the renovations to the Garnet Levarity Justice Centre and the displacement of the Court caused thereby, the disruptions caused by Hurricane Dorian, and the Covid 19 Pandemic, and the ever present burden of work. Albeit inordinate, I am of the view that the said delay has not resulted in errors or a failure to produce a properly reasoned Ruling. Alternatively, any errors or failure to produce a properly reasoned Judgment is not due to the delay and has in no way prejudiced the Plaintiff or cast doubt upon this Judgment or any part of the Judgment. Additionally, I had the benefit of the transcripts and written Submissions in the preparation of this Judgment.

Dated this 23rd day of January, A.D. 2023

Petra M. Hanna-Adderley
Justice