

# WorkplaceNL

Health | Safety | Compensation

## Internal Review Decision

April 5, 2019

Ms. Bridget S. Daley  
Goodland Buckingham  
16 Forest Road Suite 200  
St. John's, NL A1C 2B9

Dear Ms. Daley:

Re: [REDACTED]

I have reviewed in accordance with section 46 of the Workplace Health, Safety and Compensation Act (herein referred to as the "Act"); the submissions of all interested parties in an action by [REDACTED] (Plaintiff) against [REDACTED] (Defendant) as to whether an action is prohibited by section 44 of the Act.

### Background Information

On or around July 31, 2015, the Plaintiff, an employee of [REDACTED] was working as a Labourer at the [REDACTED] installing fence posts with a co-worker, [REDACTED]. The two men arrived at the worksite in the Defendant's motor vehicle, a 2008 Dodge Ram. The motor vehicle was used as a mode of transportation to and from the worksite and to store material required for the project. The Plaintiff described that [REDACTED] used a backhoe to dig a hole and the Plaintiff was assisting with stabilizing the fence post in the hole. Given the amount of dirt and debris surrounding the ditched area where the hole was dug, the Plaintiff described climbing into the back of the motor vehicle to move the post into the hole. The Plaintiff noted that once the post was upright in the hole, he attempted to come down from the tailgate to level and sturdy the post, when he slipped on hydraulic fluid, fell out of the motor vehicle into the hole, causing personal injury.

On July 5, 2016, a statement of claim was filed by Mr. James Goodman of the law firm, Rogers Rogers Moyle, on behalf of the Plaintiff against the Defendant for damages for injuries sustained, specifically, but not limited to, a protruding disc. Mr. Goodman cited the Plaintiff's injuries, pain and discomfort were caused by the negligence of the Defendant due to the following:

- Driving and/or use of the motor vehicle without due care and caution,
- Driving and/or use with reckless disregard for the lives and safety of others,
- Driving and/or using a vehicle in a manner that is dangerous to the public and other users of public roadways,
- Failing to comply with the statutory rules imposed by the Highway Traffic Act, R.S.N.L. 1990, c. H-3,
- Failing to exercise care and skill in the operation and control of said motor vehicle,
- Failing to take any precautions to avoid the alleged accident.

On April 24, 2018, you requested on behalf of the Defendant that WorkplaceNL determine, pursuant to section 46 of the *Act*, whether the action brought by the Plaintiff against your client is prohibited by section 44.1 of the *Act*. You indicated that the Defendant denies that the alleged incident occurred but for the purpose of this section 46 determination, you provided information regarding the alleged facts to be considered by WorkplaceNL. The Plaintiff testified that he was standing on the tailgate of the subject motor vehicle for the purposes of stabilizing a fence post. The Plaintiff alleged that while he was standing on the tailgate of the motor vehicle, he slipped on hydraulic fluid and fell out of the motor vehicle into a hole.

You submit that the alleged injuries of the Plaintiff arose out of and in the course of employment and did not arise as a result of an accident involving the use of a motor vehicle by a worker or another person, in the course of the worker's employment within the meaning of section 44.1 of the *Act*. You request a finding that the exception to the statutory bar as found in section 44.1 (1) (b) of the *Act* does not apply in this matter and the Plaintiff is thereby statute barred.

On May 30, 2018, a section 46 Response was filed by Mr. Rogers, on behalf of the Plaintiff. Mr. Rogers submitted that the circumstances in the Plaintiff's case are such that the Plaintiff should be entitled to continue to proceed before a court. The Plaintiff submitted that the injury sustained by the Plaintiff resulted from the use of a motor vehicle and the exception to the statutory bar in section 44.1 (1) (b) of the act is operative.

On June 26, 2018, you provided a Rebuttal Submission on behalf of the Defendant. You submitted that the alleged injuries do not fall under the statutory exception in section 44.1 (1) (b) of the *Act* and the action is statute barred.

### **Legislation and Policy**

The Workplace Health Safety and Compensation *Act* states:

#### **Section 2 (1) in this *Act***

(j) "employer" means an employer to whom this *Act* applies and who is engaged in, about or in connection with an industry in the province and includes:

- (i) a person having in his or her service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in a work in or about an industry within the scope of this *Act*,
- (ii) the principal, contractor and subcontractor referred to in section 120,
- (iii) in respect of an industry referred to in subparagraph (i) a receiver, liquidator, executor, administrator and a person appointed by a court or a judge who has authority to carry on an industry,
- (iv) a municipality,
- (v) the Crown in right of Canada where it may in its capacity of employer submit to the operation of this *Act*,
- (vi) the Crown and a permanent board or commission of the Crown where the province may in its capacity of employer submit itself or a board or commission to the operation of this *Act*, and
- (vii) in respect to the industry of fishing, whaling or sealing, the managing owner or person operating a boat, vessel or ship employed or intended to be employed in the industry;

(z) "worker" means a worker to whom this Act applies and who is a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes:

- (i) in respect of the industry of fishing, whaling or sealing, a person who becomes a member of the crew of a boat, vessel or ship under an agreement to prosecute a fishing, whaling or sealing voyage in the capacity of a person receiving a share of the voyage or is described in the Shipping Articles as a person receiving a share of the voyage or agrees to accept in payment for his or her services a share or portion of the proceeds or profits of the venture, with or without other remuneration, or is employed on a boat, vessel or ship provided by the employer,
- (ii) a person who is a learner, although not under a contract of service or apprenticeship, who becomes subject to the hazards of an industry for the purpose of undergoing training or probationary work specified or stipulated by the employer as a preliminary to employment,
- (iii) a part-time or casual worker, and
- (iv) an executive officer, manager or director of an employer.

**Section 19.** (1) The commission has exclusive jurisdiction to examine, hear and determine matters and questions arising under this Act and a matter or thing in respect of which a power, authority or distinction is conferred upon the commission, and the commission has exclusive jurisdiction to determine

- (a) whether an injury has arisen out of and in the course of an employment within the scope of this Act;
- (b) the existence and degree of impairment because of an injury;
- (c) the permanence of impairment because of an injury;
- (d) the degree of diminution of earning capacity because of an injury;

(4) The decisions of the commission shall be upon the real merits and justice of the case and it is *not* bound to follow strict legal precedent.

**Section 43** (1) Compensation under this Act is payable

- (a) to a worker who suffers personal injury arising out of and in the course of employment, unless the injury is attributable solely to the serious and wilful misconduct of the worker; and
- (b) to the dependents of a worker who dies as a result of such an injury.

**Section 44** (1) The right to compensation provided by this Act is instead of rights and rights of action, statutory or otherwise, to which a worker or his or her dependents are entitled against an employer or a worker because of an injury in respect of which compensation is payable or which arises in the course of the worker's employment.

(2) A worker, his or her personal representative, his or her dependents or the employer of the worker has no right of action in respect of an injury against an employer or against a worker of that employer unless the injury occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer.

## No Compensation

**Section 44.1(1)** Section 44 shall not apply where the worker is injured or killed

- (a) while being transported in the course of the worker's employment by a mode of transportation in respect of which public liability insurance is required to be carried; or
- (b) as a result of an accident involving the use of a motor vehicle by the worker or another person, in the course of the worker's employment.

(2) In subsection (1) "motor vehicle" means

(a) a motor vehicle

(i) registered under the Highway Traffic Act, or

(ii) authorized under section 12 or 17 of the Highway Traffic Act to be operated on a highway in the province without being registered under that Act,

whether or not it is being operated on a highway; or

(b) another motor vehicle while being operated on a highway in the province and

for the purpose of this definition "highway" means a highway as defined in the Highway Traffic Act.

**Section 46** Where an action in respect of an injury is brought against an employer or a worker by a worker or his or her dependent, the commission has jurisdiction upon the application of a party to the action to adjudicate and determine whether the action is prohibited by this Act.

### Position of the Defendant

The Defendant denies that the alleged incident occurred and is seeking a determination pursuant to section 46 of the Act, that section 44.1 (1) (b) of the Act does not apply in the case of the Plaintiff's alleged injury and action. Therefore, the Defendant contends that the Plaintiff is barred from maintaining the action pursuant to section 44 of the Act.

The Defendant puts forth that the alleged injury occurred while the Plaintiff was engaged in the course of employment as a worker and the Defendant was an employer under the Act. As a result, unless there is an exception to the statutory bar, the action by the Plaintiff is barred pursuant to the Act.

The Defendant's position is that the only possible exception to the statutory bar in this case is found in section 44.1 (1) (b) of the Act. This section applies to accidents that are a result of an accident involving the use of a motor vehicle. The Defendant maintains that this exception does not apply in this case as the Plaintiff was standing on the tailgate of the motor vehicle, using said motor vehicle as a tool or a piece of equipment, its purpose to act as a platform, in order to stabilize the post. Therefore, the alleged injury did not occur through the "use" of the subject motor vehicle as contemplated by the Act. The Defendant submitted that once the motor vehicle

transported the workers and the necessary materials to the worksite, the purpose of the motor vehicle was fulfilled.

There was a Response Submission provided by the Plaintiff who argued that while parked, the purpose of the motor vehicle was still operative, as it was used to store materials and could be driven without difficulty. In response, the Defendant submits the motor vehicle was not engaged in normal "operation" or "use" at the time of the alleged incident. The Defendant submits that the use of the motor vehicle as an elevation platform is not the purpose for which the motor vehicle was designed to be used. The Defendant submits that the motor vehicle was not being used as conveyance but rather as a tool or piece of equipment, i.e. a platform.

The Defendant notes that the Court of Appeal upheld the decision of WorkplaceNL in finding that "use of a motor vehicle" and its function does not include such words as operation, repair, or maintenance of a motor vehicle. The Defendant highlighted that a parked vehicle used as a platform to assist with a task does not fall within the meaning of "use" as contemplated by the *Act*.

It is the Defendant's position that the Plaintiff's alleged injuries arose out of and in the course of his employment and did not involve the "use of a motor vehicle by the worker or another person in the course of his employment" within the scope of section 44.1 (1) (b) of the *Act* and the claim is statute barred.

#### **Position of the Plaintiff**

In the Plaintiff's submission, it is outlined that section 44.1 (1) (a) of the *Act* is not applicable in this case as the injury did not occur while being transported in a vehicle which requires public liability insurance. However, it is the Plaintiff's position that section 44.1 (1) (b) permits an action as the Plaintiff's injuries arose as a "result of an accident involving the use of a motor vehicle by the worker or another person, in the course of the worker's employment."

It is the Plaintiff's position that the motor vehicle was engaged in its normal operation and use. The Plaintiff puts forth that the motor vehicle was parked, readily available to maneuver from one section of fencing to the next, and stored all necessary materials required to complete the fencing project. The Plaintiff outlined that it was common usage for the motor vehicle, a pick-up truck, to be used to load and offload material. It is the Plaintiff's position that the motor vehicle was in use at the time of the accident, as it was being operated as per its purpose and the use of the motor vehicle as an elevation platform was secondary.

The Plaintiff submits that the motor vehicle while parked, continued to carry out its purpose and was still operative, as it was storing material, and could be driven without difficulty. The Plaintiff submits the motor vehicle was used for its intended purpose, unloading materials stored in the bed of the truck and that due to the nature of the fencing section, it was safer to stabilize the post before disembarking the motor vehicle which resulted in the Plaintiff sustaining an injury from the use of the motor vehicle.

The Plaintiff submits that the exemption as found in section 44.1 (1) (b) of the *Act* be applied and the action taken against the employer should not be statute barred.

## Reasoning and Analysis

██████████ is the applicant in this case. The matter before me as a result of the application by the Defendant is to determine whether the action of the Plaintiff against the Defendant is barred by the provisions of the *Act*. As provided by section 46 of the *Act*, WorkplaceNL has the authority upon the application of a party to the action to adjudicate and determine whether the action is prohibited by the *Act*. I have reviewed and considered the written submission of the Defendant, the Rebuttal Submission by the Plaintiff, and the Reply Submission of the Defendant.

Section 44 of the *Act* provides the statutory bar to actions of the worker against an employer for an injury which arises out of and in the course of the worker's employment. There is an exception to this provision of the *Act*. Section 44.1 (1) (b) states that section 44 shall not apply where the worker is injured as a result of an accident involving the use of a motor vehicle by the worker or another person, in the course of the worker's employment.

In making the determination, I have considered the following information:

1. Was the Plaintiff a "worker" within the meaning of the *Act*?

From my review of the facts in this case, the Plaintiff was employed as a Labourer with the Defendant when the alleged incident occurred. The Plaintiff is a worker within the meaning of section 2 (1) (z) of the *Act*.

2. Was the Defendant, ██████████ an "employer" within the meaning of the *Act*?

According to WorkplaceNL records, ██████████ was a registered employer in the province of Newfoundland and Labrador in 2015. In accordance with section 2 (1) (j) of the *Act* ██████████ was considered an employer within the meaning of the *Act* at the time of the alleged incident.

3. Did the Plaintiff's alleged injury "arise out of and in the course of employment" with the Defendant?

Based on the facts that have been presented for the purpose of this section 46 determination, the Plaintiff was in the course of his employment as a Labourer when the posts were being installed for a new chain-linked fence at the ██████████ site. Work was being completed by the Plaintiff for the employer and the alleged injury came about while completing his duties as a result of his employment.

4. Did the Plaintiff's alleged injuries result from an accident involving the "use of a motor vehicle"?

This is the main focus of my decision and the issue that is in dispute between the parties. Section 44 (1) of the *Act* provides the statutory bar to actions of the worker against an employer or another worker for an injury which arises out of and in the course of the worker's employment. Section 44 (2) of the *Act* states that a worker has no right of action against an employer or against a worker for an injury that occurs while carrying out operations usual in or incidental to the industry carried out by the employer.

In this particular case, what must be determined is whether or not the exception as stated in section 44.1 of the *Act* applies. Section 44.1 (1) (a) applies to accidents that occur while the worker is being transported in the course of the worker's employment by a mode of transportation in respect of which public liability insurance is required to be carried. This section does not apply in this case.

Section 44.1 (1) (b) states that section 44 shall not apply where a worker is injured as a result of an accident involving the use of a motor vehicle by the worker or another person, in the course of the worker's employment.

### Facts

On July 5, 2016, the Plaintiff submitted a Statement of Claim and outlined that on or around the end of July 2015, he was helping stabilize fence posts by standing in the bed of the Defendant's motor vehicle as part of his work duties. The Plaintiff reported while standing in the bed of the Defendant's motor vehicle, after placing a fence pole, without warning, he slipped on spilled hydraulic fluid, fell out of the motor vehicle and into a hole that had been dug as part of his work.

On February 23, 2017, the Defendant filed a Statement of Defense denying that the Plaintiff suffered any injuries and denied that the incident/injury occurred. The Defendant outlined that the alleged injuries, which are not admitted, were not caused as a result of the incident referred to in the Statement of Claim but rather caused or contributed to by pre-existing or subsequent health conditions of the Plaintiff.

The Defendant was the registered owner of a 2008, Dodge Ram which was insured by the Dominion of Canada General Insurance Company as confirmed by the Automobile Loss Notice dated September 23, 2016. The 2008 Dodge Ram was registered under the Highway Traffic Act; therefore, it meets the definition of a motor vehicle under section 44.1 (2) of the *Act*.

On April 25, 2017, the Plaintiff participated in an Examination for Discovery. I reviewed the information provided in the Discovery, in relation to this case. The Plaintiff provided his work history which was seasonal in nature and outlined a history of muscle spasm and lower back pain requiring him to seek medical attention. The Plaintiff indicated that he commenced work as a Labourer with the Defendant on February 27, 2015. An Employee Orientation Form was completed at the time of hire and the Plaintiff was aware that the Defendant had coverage with WorkplaceNL. The Plaintiff stated that he knew that if he had an injury, he would get first aid and report the injury to the person in charge.

The Plaintiff advised that in June 2015, the Defendant was awarded a contract with [REDACTED] for site work which included repairing a chain-linked fence, laying topsoil and sods, and paving and repairing concrete. In July 2015, the Plaintiff stated the [REDACTED] project commenced and during this time, the Plaintiff participated in a safety orientation, safety videos which highlighted what to do in the case of an injury, a safety booklet was provided, toolbox meetings were held, and a notebook was provided to record any observations or incidences while on the project site.

The Plaintiff described the process of putting the posts in the ground for the chain-linked fence which he stated was a two-person job. The Plaintiff described that after a hole was dug by an

excavator, he would place a post in the hole; stand on the ground next to the post, hold a level on the post, and stabilize the post while the hole was filled in with gravel by the excavator.

Throughout the Discovery, the Plaintiff described the use of the motor vehicle, a 2008 Dodge Ram pick-up truck, in relation to the [REDACTED] project.

- Prior to receiving the digging permit dated July 13, 2015, the Plaintiff and co-workers collected material needed for the job and loaded it in the back of the motor vehicle.
- The Plaintiff stated he and his co-workers would meet at the Defendant's house at 7:00 am and they would drive together in the motor vehicle to the project site to be there for 8:00 am.
- The Plaintiff described that they used the motor vehicle to put the posts in to bring to the site. The Plaintiff noted that while at the work site, if they were too far away to travel with the excavator, they would put the posts in the back of the motor vehicle and throw them out where they needed to go.
- The Plaintiff stated that on the day of the incident, his co-worker, [REDACTED] had dug a hole with a backhoe in a ditched area as the rented excavator was gone. The Plaintiff testified that he backed up the motor vehicle to the hole, stood on the tailgate of the motor vehicle, slipped the post into the hole, and he held the pole up. The Plaintiff indicated that this was not the normal procedure for placing posts but stated that as there was a ditch and debris around the hole, he thought standing on the tailgate of the motor vehicle was any easier way to get the job done. The Plaintiff also indicated he received no instruction by his employer to position a post using the tailgate of the motor vehicle. The Plaintiff stated that while standing on the tailgate of the motor vehicle, he slipped on hydraulic fluid, which he knew was present, and fell into the hole.

The Plaintiff indicated that he did not complete a Workers' Compensation form.

The Plaintiff indicated that following the incident, he continued working until the end of the [REDACTED] project completing limited manual labour.

On July 18, 2017, an Examination for Discovery Hearing took place with a former co-worker of the Plaintiff, [REDACTED]. [REDACTED] confirmed that during the chain-linked fence portion of the [REDACTED] project, the Plaintiff was responsible for placing, levelling and stabilizing the posts while the holes were filled. [REDACTED] indicated that during the orientation at the [REDACTED] site, they were provided with an overview of safety rules, instant reporting, hazard assessments, and they were given a manual. [REDACTED] stated that the workers would meet in the mornings at the Defendant's home and commute to the worksite together in the motor vehicle. [REDACTED] stated that standing in the bed of a pick-up truck in order to stabilize the fence posts was not a standard procedure but indicated that it was a common practice for the Defendant.

It is clear from the evidence the motor vehicle was used as a mode of transportation to commute [REDACTED] workers to and from the worksite. The motor vehicle was also used to store the necessary material needed to complete the [REDACTED] project. The motor vehicle was also used to transport materials needed around the job site. At the time of the alleged incident, the motor vehicle was backed up by a dug hole, parked and used as an elevation platform in order to slide the fence post in the hole, and to hold and stabilize the post into the dug hole.



## Case Law and Submission

Section 19 (4) of the Act states the decisions of WorkplaceNL shall be decided upon the real merits and justice of the case and WorkplaceNL is not bound to follow strict legal precedent. While WorkplaceNL is not bound to follow strict legal precedents, I have reviewed the cases submitted to determine relevance and applicability to the case at hand.

### Warford v. Weir's Construction Limited (2016) Carswell Nfld 322

The worker, a Mechanic, was assigned to fix an out of service truck which arrived at his place of employment via a flatbed truck. The truck was lifted off the flatbed and placed on blocks by the use of a front-end loader. While working on the out of service truck during the course of his employment, the truck unexpectedly rolled off the blocks and on top of him. In 2014, following Weir's seeking a third determination from WorkplaceNL, a WorkplaceNL Internal Review Specialist found that the action was prohibited as the accident was not one involving the use of a motor vehicle by the worker or another person, in the course of the worker's employment mirroring the language in section 44.1 (1) (b) of the Act. Judicial review was sought of the Internal Review Specialist's decision.

The Court's ultimate conclusion was that the Internal Review Specialist had been unreasonable as the definition of "use" was not supported by its analysis citing that the case law overwhelmingly pointed to including repair and maintenance in the definition and determined that the worker's accident did involve the "use" of a motor vehicle. The Internal Review Specialist's decision was set aside and the Applicant was entitled to pursue the action against the employer by virtue of the exemption to the statutory ban in section 44.1 of the Act. The employer appealed this decision.

### Analysis

In this case, the Applications Judge determined that the term "use" included repair and maintenance in its broader definition. As this decision was overturned in 2018, which will be discussed next, this case is not relevant.

### Weir's Construction Limited v. Warford (Estate) (2018) NLCA 5

As noted in the above summary, the worker, a Mechanic was working on an out of service truck which was placed on blocks by a front-end loader. The truck while on the blocks, being worked on by the worker, unexpectedly rolled off on top of the worker.

The Court of Appeal reviewed the case and highlighted that the central issue was in the interpretation of the phrase "an accident involving the use of a motor vehicle". The Internal Review Specialist's decision determined that the involvement of the flatbed truck and the front end loader were in the transferring of the out of service truck onto the blocks, and once this activity was completed, their function had been fulfilled. The Intake Adjudicator concluded that the narrower meaning of the term "use" does not include repair. The Court of Appeal overturned the Application Judges' decision and determined that the Internal Review Specialist's narrow interpretation of the definition of "use" based on the dictionary definition and the language used in other statutes was reasonable.

## Analysis

In this case, the Court of Appeal was clear that in determining whether the exception found in section 44.1 (1) (b) of the *Act* applies to a given fact situation, WorkplaceNL should examine the purpose of the *Act* in general and section 44.1 (1) (b) in particular.

### Lanteigne v. Nova Scotia (Workers' Compensation Appeal Tribunal)

The worker was injured when a boom truck toppled onto its side. The injured worker was in the steel bucket at the end of the boom. The Appeal Tribunal held that while the accident involved another vehicle, the vehicle was not being used as a motor vehicle at the time of the accident. The Nova Scotia Court of Appeal upheld the decision.

## Analysis

The case provides guidance on how the Court has viewed multi-use vehicles. In this case, the injuries were determined not to be as a result of the use of a motor vehicle. The Court distinguished between when the vehicle was being used as a motor vehicle versus when it was being used as equipment.

### Clarke et al v. Marine Support Services Ltd. et al, 2006 NLTD

In review of this case, a worker was welding on a barge while freight was being loaded aboard. An Operator of a boom truck in a fixed position was lifting a loaded steel container and struck the worker welding on the barge which resulted in the worker's death. A WorkplaceNL Internal Review Specialist made a determination that the actions brought about by the Plaintiff against the Defendants were statute barred citing that the injury occurred when the vehicle was being used as a crane and not as a motor vehicle as the truck was in a fixed position and not able to be driven. The Applicant's appealed the decision.

The Court following review of the Internal Review Specialist's decision determined that the Internal Review Specialist incorrectly posed the question "use" or "operation" of the motor vehicle. It was concluded that the word "operation" is not found in section 44.1 (1) (b) of the *Act* and for these reasons, the decision was quashed by the Court.

## Analysis

This case provides guidance in ensuring that decision makers pose questions that are clear and reflective of the information as it is written in the *Act*.

In addition to the above cases, I have considered the following case law in relation to the use of a motor vehicle.

### F.W. Argue Ltd. v. Howe

A delivery person overfilled an oil tank from a tank truck. The oil ignited, causing extensive damage to the customer's premises. It was determined that the damage was caused by the use or operation of the fuel pump mounted on the motor vehicle when the motor vehicle itself was

stationary. The Court determined that the vehicle was being used as something other than a motor vehicle at the time of the accident.

**Harvey v. Shade Brothers Distributors Ltd.**

An individual filled the tank of the domestic oil heating plant, and continued to pump oil into the premises, thereby causing damage. The oil was conveyed from the delivery tank truck (a motor vehicle) by means of a hose and pump, the power for the operation of which was supplied by the truck's engine. The truck was stationary at the time. It was concluded that the motor vehicle was being used as a tank and pump and the accident was not one in which a motor vehicle was involved. The Court said that the test to be applied when considering the character of the multipurpose article at any given time is the purpose for which at that time, it was being used.

**A Dixon Cable Laying Co. Ltd. v. Osborne Contracting Ltd.**

A backhoe was being used to fill a trench in which cable had been laid for the British Columbia Telephone Company. In the process, the backhoe went out of control and damaged the cable. The backhoe was considered a motor vehicle under the Motor Vehicle Act. The question was whether the limitation period under the Motor Vehicle Act applied. In order to apply, the damages had to be occasioned by a motor vehicle. The Court held that the backhoe was being used as a shovel and was not being used as a motor vehicle. The Court further stated that it did not matter that the vehicle was stationary or operational in determining use of the vehicle.

**Analysis of (Argue, Harvey and Dixon)**

These cases provide guidance on how the Courts view use of a vehicle. In these cases, the Court distinguished between when the vehicle was being used as a motor vehicle versus when it was being used as a piece of equipment. In these cases, the injuries or damages were determined not to be as a result of the use of a motor vehicle. In Harvey, the Court confirmed that the test to be applied when considering the character of the multipurpose article at any given time is the purpose for which at that time, it was being used.

**Analysis and Conclusion**

A review of the facts of this case confirms that on or around the end of July 2015, the Plaintiff was a worker for the Defendant, an employer who was covered by WorkplaceNL. The Defendant had been awarded a job at the [REDACTED] site to complete a three phased project which included repairing a chain-linked fence, laying topsoil and sods, and paving and repairing concrete. The Defendant's motor vehicle, a 2008 Dodge Ram was used to commute the workers to and from the [REDACTED] worksite, transport material around the work site and to store material necessary to complete the project work. The Plaintiff submits that while working on the chain-linked fence portion of the project, he backed up the motor vehicle to a hole that had been dug by a backhoe in a ditched area. The Plaintiff testified that he got into the back of the pick-up truck, slid a post in the hole, stood on the tailgate of the motor vehicle, to level and stabilize the post, slipped on hydraulic fluid, and fell landing in the hole sustaining injury.

Section 44 (2) of the Act states that a worker has no right of action against an employer or against a worker for an injury that occurs while carrying out operations usual in or incidental to

the industry carried on by the employer. In order for action to be able to proceed, an exception as stated in section 44.1 of the *Act* would need to apply.

Section 44.1 (1) (b) of the *Act* states that section 44 shall not apply where a worker is injured as a result of an accident involving the use of a motor vehicle by the worker or another person, in the course of the worker's employment.

Case law supports that when an accident involves a motor vehicle, WorkplaceNL must determine the purpose for which the motor vehicle was being used at the time of the accident.

The Plaintiff argues that the motor vehicle was engaged in its normal operations and use at the time of the accident as it was readily available to maneuver from one area of the project to another, stored all of the necessary materials, and was used to load and offload material which was a common usage of the motor vehicle. The Plaintiff puts forth that the motor vehicle was in use at the time of the accident, as it was being used for its purpose and the use of the motor vehicle as an elevation platform was secondary.

The Defendant argues that the use of the motor vehicle as an elevation platform falls beyond the scope of its intended use or purpose and submits that the motor vehicle was not engaged in normal use at the time of the alleged accident.

In this case, the motor vehicle was a 2008 Dodge Ram pick-up truck which was owned by the Defendant. The pick-up truck is registered under the Highway Traffic Act and meets the definition of "motor vehicle" under section 44.1 of the *Act*. At the time of the alleged accident, the motor vehicle was backed in next to a dug hole, parked and holding materials needed for the project. At the time of the alleged accident, the motor vehicle was not in motion, and was not being used for conveyance. The purpose for which it was being used was to hold materials needed for the project and the Plaintiff used the tailgate as an elevation platform to stabilize a fence post. The motor vehicle was not being used as a "motor vehicle" at the time of the alleged accident; it was being used as equipment.

Since the pick-up truck was being used as equipment at the time of the accident, the accident did not involve the use of a motor vehicle. Therefore the exemption found in section 44.1 of the *Act* does not apply in this case.

Section 19 (1) provides WorkplaceNL with exclusive jurisdiction to examine, hear and determine matters and questions arising under this *Act* and a matter or thing in respect of which a power, authority or distinction is conferred upon it, and WorkplaceNL has the exclusive jurisdiction to determine whether an injury has arisen out of and in the course of employment within the scope of this *Act*. Section 43 of the *Act* provides that compensation under this *Act* is payable to a worker who suffers personal injury arising out of and in the course of employment. I find that the Plaintiff's alleged injuries arose out of and in the course of employment and did not involve the use of a motor vehicle by the worker or another person in the course of his employment.

### **Determination**

The action by the Plaintiff brought against the Defendant is statute barred. Attached is a certificate which may be filed with the court.



April 5, 2019

Sincerely,

*Lynette Evans*

**Lynette Evans**  
Internal Review Specialist

c: Paula Fudge, Administrative Officer – Internal Review Division  
Mark Rogers, Rogers Rogers Moyse