

WorkplaceNL

Health | Safety | Compensation

Third Party Determination

November 19, 2021

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Dear Denis Fleming and Philip Buckingham:

[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 as to whether an action by [REDACTED] the (Plaintiff) against [REDACTED] (First Defendant), [REDACTED] (Second Defendant), [REDACTED] (Third Defendant), and [REDACTED] (Fourth Defendant) is prohibited by section 44 of the Act.

Background Information

On August 24, 2016, the Plaintiff was injured while working as an operator with [REDACTED] the First Defendant. The Plaintiff reported in the Written Submission of the Plaintiff to WorkplaceNL, that at the time of the injury he had transported a trailer with Bobcat (a brand of compact loader), asphalt roller, and asphalt spreader owned by the Second Defendant.

According to the Statement of Claim, the First Defendant was hired to transport a trailer and equipment to a site on the Trans-Canada Highway near [REDACTED] Newfoundland and Labrador. The Counsel for the First Defendant as well as Counsel for the Second, Third, and Fourth Defendants submitted that the Plaintiff was retained by the Second

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Defendant to haul a trailer holding the Bobcat, asphalt roller, and asphalt spreader which were owned by the Second Defendant. According to the Plaintiff, when the truck carrying the equipment arrived at the jobsite, the Bobcat and asphalt roller were taken off the trailer while the trailer was still hooked to the dump truck. The asphalt spreader was removed after the trailer was unhooked from the dump truck. The site of the accident was an abandoned property adjacent to a driveway which was to be paved by the Second Defendant. The Third Defendant and the Fourth Defendant were at the time of the accident employees of the Second Defendant.

The Plaintiff submitted that the Fourth Defendant proceeded to climb onto the asphalt spreader; however, the trailer would not tip forward in order to permit the spreader to move off the trailer. According to the Plaintiff, the Fourth Defendant was told to wait while the Plaintiff attempted to attach the air hose between the trailer and the dump truck. Suddenly and without warning to the Plaintiff, the Fourth Defendant moved the spreader to the rear of the trailer, causing the front of the trailer to tilt up, trapping the Plaintiff's hand between the trailer and the dump truck. The Third Defendant got into the dump truck and moved it backwards, causing injury to the Plaintiff's hand. The Fourth Defendant then got into the dump truck and moved it forward causing further damage to the hand. The facts of the accident provided by the Plaintiff are disputed by the Defendants. The result of the accident was injury to the Plaintiff's hand.

A statement of claim was issued by the Plaintiff on August 16, 2018, against ██████████, ██████████, ██████████, and ██████████. On February 7, 2019, Denis Fleming requested on behalf of ██████████ and ██████████ that WorkplaceNL determine, pursuant to section 46 of the Act, whether the action brought by the Plaintiff against his clients is prohibited by section 44 of the Act.

On August 13, 2019 Philip Buckingham also requested on behalf of ██████████ the First Defendant, that WorkplaceNL determine, pursuant to section 46 of the Act, whether the action against ██████████ is prohibited by section 44 of the Act. A copy of the Second Defendant's February 7, 2019 submission was provided to the Plaintiff. A submission in reply was provided by the Plaintiff on April 30, 2019. A further submission was provided by the Plaintiff on July 7, 2020. Reply submissions of the Second, Third and Fourth Defendants were provided on July 16, 2020.

In response to my request for clarification regarding the disconnection of the trailer from the dump truck at the time of the accident, a submission was provided by the Second, Third, and Fourth Defendants on October 1, 2020. The Plaintiff provided a response on October 5, 2020.

Legislation and Policy

The Workplace Health Safety and Compensation Act (the Act) states:

Section 2 (1) in this Act

(o) "injury" means

- (i) an injury as a result of a chance event occasioned by a physical or natural cause,
- (ii) an injury as a result of a wilful and intentional act, not being the act of the worker,
- (iii) disablement,
- (iv) industrial disease, or
- (v) death as a result of an injury

arising out of and in the course of employment and includes a recurrence of an injury and an aggravation of a pre-existing condition but does not include stress other than stress that is a reaction to a traumatic event or events;

(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 willful 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 First Defendant

The First Defendant, [REDACTED] is seeking a determination pursuant to section 46 of the Act, that section 44.1(1) of the Act does not apply in the case of the Plaintiff [REDACTED] injury and action. Therefore, the First Defendant maintains that the Plaintiff is barred from maintaining the action against it pursuant to section 44 of the Act.

The First Defendant acknowledges agreement with the submissions of the Co-Defendants that the worker's injury occurred while he was engaged in the course of employment and that each of the defendants named in the action qualify as either an employer or worker under the Act. As a result, unless there is an exception to the statutory bar, the action by [REDACTED] is barred pursuant to the Act.

The position of the First Defendant is that the dump truck was not attached to the trailer when the Plaintiff's hand became stuck between the trailer and the dump truck. Prior to the accident, the Bobcat and asphalt roller had been removed from the trailer without any incident. When the Fourth Defendant, [REDACTED] attempted to remove the

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asphalt spreader from the trailer it moved back over the axle and the front of the trailer tilted upward. It was at this time that the worker's hand initially became jammed between the dump truck and the trailer. Referencing the affidavit of the Fourth Defendant, the Third Defendant climbed into the dump truck to move it forward to free the worker's hand but the Third Defendant did not know how to put the truck in gear. It is maintained by the Fourth Defendant that the dump truck did not move forward or backward while the Third Defendant was in the truck. Then the Fourth Defendant climbed into the dump truck and moved it forward, freeing the Plaintiff's hand.

The First Defendant submits that the injury occurred when the trailer trapped the worker's hand between the trailer and the stationary dump truck. The position is that the injury was caused by the operation of the asphalt spreader by the Fourth Defendant which caused the trailer to tip and pin the Plaintiff's hand. The position of the First Defendant is also that the dump truck owned by ██████████ was a stationary object and not in use at the time of the injury. The argument is that the dump truck did not move backward causing further damage to the worker's hand and was only moved to free the Plaintiff's hand. The exclusion contained in **section 44.1 (1)(b) of the Act** does not apply as the dump truck was not in use, and therefore at the time the accident was not a motor vehicle under the Act.

Therefore, First Defendant's argument is that the exemption found in **section 44.1(1) (b) of the Act** does not apply and the claim against it is subject to the statutory bar. Case law was provided in support of the view that the dump truck was not a motor vehicle at the time of the accident. The First Defendant argues that the case law on multipurpose vehicles shows that equipment/motor vehicles when not being used for conveyance are not necessarily motor vehicles. The dump truck was stationary and not in use as a motor vehicle at the time of the injury.

Position of the Second Defendant, Third Defendant, and Fourth Defendant (herein referred to collectively as the Co-Defendants for the purposes of this determination)

These Defendants are represented by the same counsel and joint submissions were provided. The Co-Defendants submit that the worker's injury occurred while he was engaged in the course of employment and that each of the defendants named in the action qualify as either an employer or worker under the Act. As a result, unless there is an exception to the statutory bar, the action by ██████████ is barred pursuant to the Act.

The Co-Defendants maintain that the only possible exception to the statutory bar in this case is found in **section 44.1 of the Act**. This section applies to accidents that occur while workers are being transported in the course of the worker's employment by mode of transportation in respect of which public liability insurance is required to be carried or suffers injury as a result of an accident involving the use of a motor vehicle. It is asserted that neither of these exceptions apply in this case.

The position of the Co-Defendants is that neither the spreader nor the trailer qualifies as a motor vehicle for the purposes of **section 44.1** of the Act and therefore the statutory bar does apply. It is contended that both the trailer and the spreader were functioning as industrial equipment and not as motor vehicles at the time of the accident. Neither the trailer or the spreader is required to have mandatory insurance under the *Highway Traffic Act* and therefore will be subject to the statutory bar.

The reply submissions of the Co-Defendants acknowledge that the dump truck was a motor vehicle for the purposes of the *Highway Traffic Act*, however, at the time of the accident it was not being used as a motor vehicle but used as a multipurpose vehicle. It is contended that the statutory bar applies because the dump truck was not being used as a motor vehicle even if there was negligent operation of the dump truck. The position is also that if there is a finding to proceed with a civil action it should only be on the narrow basis of negligent operation of the dump truck causing the Plaintiff's injuries. Any negligence in relation to the trailer or the spreader should be barred.

It is the position of the Co-Defendants that the purpose of **section 44.1** with the exception to the statutory bar, is to remove from the Worker's Compensation system, claims in which there is recoverable automobile insurance. In the Co-Defendants' submission it is contended that legislative documents and WorkplaceNL documents confirm that the purpose of the legislative intention behind the exception contained in **section 44.1** of the Act was to allow workers or WorkplaceNL to gain access to mandatory automobile insurance. The Co-Defendants provided the history of the development, purpose and intention of **section 44.1(1)(b)** to only apply where there is a workplace accident covered by mandatory automobile insurance. As the spreader and trailer were not covered under mandatory automobile insurance coverage for the Second Defendant, [REDACTED], the circumstances of this case are not meant to be captured by **section 44.1(1)(b)**.

The Co-Defendants submit that if **section 44.1(1)(b)** provides an exception to the statutory bar in circumstances where the employer or another worker would not be covered by mandatory motor vehicle liability policy, employers and workers would be exposed to judgments against them by workers. This would compromise the entire worker's compensation system and cause employers to question why they are forced to pay into the system in the first place.

The position is that the spreader and trailer were not motor vehicles at the time of the accident. Case law on multipurpose vehicles shows that equipment/motor vehicles are often transporting something when an accident occurs. It is maintained that this fact does not mean that the equipment is operating as a motor vehicle.

As detailed in the reply submissions of the Co-Defendants, arguments are put forth that both the trailer and the spreader are not motor vehicles under the *Highway Traffic Act* and therefore not motor vehicles at the time of the accident. These Co-Defendants maintain that the trailer was a piece of industrial equipment and used as such at time of

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the accident. The trailer, not being connected to the dump truck at the time of the injury, was operating as intended as a multipurpose vehicle and not required to carry mandatory automobile insurance. It was used for conveyance; but, had done the job for which it was intended and was detached from the truck that brought it. The dump truck carried insurance and the trailer was also insured; however, the insurance on the trailer was not mandatory.

With regard to the spreader, the Co-Defendants point out that it was also not required to carry mandatory automobile insurance and did not carry insurance at the time of the injury. The spreader was a piece of machinery that was not operating as a motor vehicle at the time of the accident.

The Co-Defendants maintain that this section of the Act must be interpreted only to apply where there is a workplace accident covered by automobile insurance. In such a case, it will be the automobile insurer who ultimately pays; either because the worker elects to sue or, if the worker elects to receive benefits from WorkplaceNL, then WorkplaceNL sues in the worker's name. Where there is a workplace accident not covered by automobile insurance, the exception found in section 44.1(1)(b) cannot come into play and no right of action can exist against the employer or another worker.

The Co-Defendants state that whether the dump truck was the direct cause of the loss or an indirect cause of the loss, the involvement of the dump truck cannot provide the worker with the ability to sue (i) ██████████ which had no ownership of the dump truck or (ii) ██████████ in relation to them acting in the course of their duties for ██████████ or in relation to the operation of the ██████████ owned spreader or trailer. The position of the Co-Defendants is that any civil claim by the Plaintiff would be limited to the recoverable damages stemming from ██████████ operation of the dump truck.

Position of the Plaintiff

In the Plaintiff's submission it is argued that ██████████ injuries are not covered by the statutory bar as found in section 44 of the Act which prohibits actions against employers and their workers. The position is put forth that section 44.1 of the Act allows exceptions to the statutory bar and therefore ██████████ commenced an action in the Supreme Court of Newfoundland and Labrador-General Division, against ██████████ ██████████ and ██████████ ██████████ and ██████████ ██████████

Regarding section 44.1, it is put forth by the Plaintiff that this section of the Act applies as ██████████ accident involved the use of a motor vehicle, and that ██████████ injuries were caused directly by the use of the spreader, the trailer and/or the dump truck. The Plaintiff deals with the dump truck, the trailer, and the spreader separately in the argument that each of these are motor vehicles under the Act. The Plaintiff

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maintains that the definition of motor vehicle shall be drawn from the *Workplace Health Safety and Compensation Act* and not the *Highway Traffic Act*.

It is submitted by the Plaintiff that the dump truck was insured and plated in this province and registered under the *Highway Traffic Act* and this meets the definition of motor vehicle under the Act. It is further asserted that the Plaintiff was initially injured when the Third Defendant released the parking brake of the dump truck causing injury to the Plaintiff's hand. The Plaintiff was then further injured when the Fourth Defendant got into the dump truck and moved it forward causing further injury to the Plaintiff's hand. The argument is that both of the actions where the dump truck was moved were acts of negligence involving the use of a motor vehicle.

With regard to the trailer, the position of the Plaintiff is that the Act provides its own definition of motor vehicle and that it is not necessary to look to the *Highway Traffic Act* to determine the definition of motor vehicle. It is contended that the trailer is a motor vehicle. Then, when considering the trailer, it is also submitted by the Plaintiff that the trailer is a motor vehicle as it is registered under the *Highway Traffic Act*. The Plaintiff contends that the Act provides its own definition of motor vehicle and refers to the *Highway Traffic Act* with respect to the definition of highway.

The Plaintiff states that the spreader is used on the highways and should have been insured but was not, and therefore, not being insured was a violation of section 65 of the *Highway Traffic Act*. The argument is that the spreader is a motor vehicle under the *Highway Traffic Act* as it was in use at the time of the accident and should have been registered under the *Highway Traffic Act*.

The position of the Plaintiff is that the accident involved the asphalt spreader, trailer, and the dump truck and these cannot be separated as these three objects were connected. Under this premise the asphalt spreader, trailer, and dump truck would each be subject to the exemption from the statutory bar. One of the intentions of section 44.1(1) is to make private insurers liable for losses covered by liability insurance. It is asserted that the accident which caused [REDACTED] injuries involved two vehicles covered by vehicle liability insurance, and one that ought to have been covered by liability insurance, and thus the exception to the statutory bar applies.

The Plaintiff submits that the action taken against the defendants should not be statute barred.

Reasoning and Analysis

[REDACTED] (First Defendant), [REDACTED] (Second Defendant), [REDACTED] (Third Defendant) and [REDACTED] (Fourth Defendant) are the Applicants in this case. The matter for my determination is to determine whether the action of the Plaintiff against the Defendants is barred by the provisions of the Act. As provided by section 46 of the Act, WorkplaceNL has the

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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 First Defendant, the written submission of the Second, Third and Fourth Defendants, the Submission by the Plaintiff, the Supplemental Submission of the Plaintiff, the Reply Submission of the Second, Third and Fourth Defendants along with the responses to my letter for clarification, and the pleadings in the action.

Section 44(1) 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) states that section 44 shall not apply where the worker is injured or killed 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. Section 44 shall also 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 a number of issues which include:

1. Was ██████████ a "worker" or "employer" within the meaning of the Act?

From my review of the facts in this case, ██████████ was employed as an operator with ██████████ when the injury occurred to his hand. ██████████ is a worker within the meaning of section 2 (1)(z) of the Act.

2. Was ██████████ a "worker" or "employer" within the meaning of the Act?

From my review of the facts in this case, ██████████ was employed with ██████████ when he climbed into the dump truck after ██████████ hand was jammed between the trailer and the truck. ██████████ is a worker within the meaning of section 2 (1)(z) of the Act.

3. Was ██████████ a "worker" or "employer" within the meaning of the Act?

From my review of the facts in this case, ██████████ was the owner and employed with ██████████ when he climbed into the dump truck after ██████████ hand was jammed between the trailer and the truck and moved the truck forward to free the hand. ██████████ is a worker within the meaning of section 2 (1)(z) of the Act.

4. Was ██████████ an "employer" within the meaning of the Act?

According to WorkplaceNL records, ██████████ is a registered employer in the province of Newfoundland and Labrador. In accordance with section 2 (1)(j) of the Act ██████████ is considered an employer within the meaning of the Act.

5. Was ██████████ an "employer" within the meaning of the Act?

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According to WorkplaceNL records, ██████████ is a registered employer in the province of Newfoundland and Labrador. In accordance with section 2 (1)(j) of the Act ██████████ is considered an employer within the meaning of the Act.

6. Did ██████████ injuries arise out of and in the course of his employment in accordance with s. 43 of the Act?

The parties agree with the position that the Plaintiff was in the course of his employment when the injury to his hand took place. Work was being completed by the Plaintiff for ██████████ and the injury came about as a result of the employment as the Plaintiff was injured in the completion of his duties. ██████████ elected to not claim compensation. Based on my review of the facts, I conclude that the Plaintiff injury arose out of and occurred in the course of his employment in accordance with section 43 of the Act.

7. Did ██████████ injuries result from an accident involving the "use of a motor vehicle"?

The answer to this question is at the core of the request for determination of the Defendants. In my review I will examine the facts and factors along with the submissions to determine whether action against the Defendants by the Plaintiff is subject to the statutory bar.

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 on by the employer. This provision promotes a fundamental aspect of the Worker's Compensation system known as the "Historic Trade-Off" which is reflected in sections 44-46 of the Act and as is outlined in *Pasiechnyk v. Saskatchewan (Worker's Compensation Board (1997) 2 S.C.R. 890* and *Reference Re: Workers' Compensation Act, 1983 (Nfld.) (Piercey Estate v. General Bakeries Limited)*.

In this particular case, it must be determined if the exception as stated in section 44.1 of the Act applies.

Section 44.1(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. The Plaintiff in this case had already delivered the trailer and equipment to the worksite and the dump truck was parked at the time of the accident. The Plaintiff was outside of the dump truck at the time of the injury and was not being transported in the course of his employment. Section 44.1(1)(a) does not apply in this case.

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Section 44.1(1)(b) spells out the criteria that must now be considered in determining if a right of action exists. It 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.

Section 44.1(2)(a) provides that in subsection (1) "motor vehicle" means (i) a motor vehicle registered under the *Highway Traffic Act*; (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. The meaning of highway is as defined by the *Highway Traffic Act*.

Facts

Arguments have been put forward regarding facts, including the sequence of events and claims of negligence as a result of actions of the parties involved. My review does not involve determinations of negligence or fault. The application which has been made to WorkplaceNL is for a determination of whether the exception in **section 44.1** of the **Act** applies to each of the defendants in question and whether injury to the worker was 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. **Section 46** of the **Act** provides WorkplaceNL with the jurisdiction to adjudicate and determine whether the action taken against a party in respect to an injury is prohibited by the **Act**. In doing so, I must first draw conclusions on the facts as presented by the parties to the Action.

The First Defendant, ██████████ acknowledges that it was retained to haul a trailer containing a Bobcat, asphalt roller, and an asphalt spreader to a job site. The First Defendant also acknowledges that it was the owner of the dump truck which was used for that purpose and which was subsequently involved in the accident. According to the Plaintiff, ██████████ who was the operator of the dump truck, the job site was located at ██████████. In its submission, the First Defendant indicated that the dump truck and trailer were parked on an abandoned property adjacent to the driveway that was to be paved. The trailer was not attached to the dump truck. The Plaintiff indicated he had been instructed to disconnect the trailer from the dump truck.

The statement by ██████████ owner/operator and employee of the Second Defendant, ██████████ provided February 6, 2019, indicates that the company is in the business of residential and commercial asphalt paving. ██████████ is the Fourth Defendant in the action and confirms that the Third Defendant, ██████████ is an employee of ██████████. ██████████ also confirmed that ██████████ had requested that ██████████ transport the trailer and equipment and that the trailer was disconnected from the dump truck.

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In his statement, ██████████ confirmed that the Bobcat and asphalt roller were removed from the trailer without incident. ██████████ reported in the October 11, 2018 statement:

"...With respect to the incident, ██████████ would unhook the truck. I will add that the spreader can be removed from the trailer without being hooked from the truck. For some reason ██████████ tried to hook the air hose the same time I was moving the spreader off the float. When the spreader gets to the wheels on the float, the float will tilt and I would continue off. As I was moving spreader the float started to lift. When this was happening ██████████ reached his hand in to hook up the air supply from the truck to the trailer. ██████████ did not say he was going towards the truck. I got on the spreader and ██████████ was off to the passenger side of the unit. I got on the spreader and started it up and moved it almost halfway up float. When I did I heard someone say ouch. I will add that I would have been facing the back of the unit as I was driving spreader."

The description of the mechanism of injury provided by ██████████ was that ██████████ reached his hand in where the hitch was and when the float raised up or tilted, it caught his hand between the float hitch and the tailgate of the dump truck. ██████████ also indicated that the spreader moved and then the trailer tipped up and jammed ██████████ hand. In his statement dated October 11, 2018, ██████████ stated that when ██████████ started to move the spreader, ██████████ tried to hook up the truck again. ██████████ stated:

"He was trying to reattach the truck and the spreader movement caused the float to come up. When it did it caught his hand between the truck and the trailer. At that point the suspension bags were down and there was only 6-8 inches between the tailgate and the hitch. When the float came down the hitch area came up and hooked his hand. ██████████ should never have unhooked the pindle (Sic) when the spreader was coming off. ██████████ reached in to hook up the truck and float and at that moment the float moved and caught his hand."

Based on ██████████ statement, clarification regarding the state of connection was requested and provided by both the Plaintiff and Mr. Fleming on behalf of the Co-Defendants. The disconnection of the trailer from the dump truck has been clarified in the October 1, 2020 correspondence from Denis Fleming and the October 5, 2020 correspondence from Tristan Carroll on behalf of Plaintiff. The trailer containing the Bobcat, asphalt roller, and asphalt spreader was brought to the site adjacent to the driveway being paved. Before disconnection, the ramps of the trailer were lowered and the Bobcat and asphalt roller were removed from the trailer. The trailer was then disconnected from the dump truck. Disconnection, according to the Plaintiff's statement, means the trailer was unlocked from the pintle, electrical lines unplugged, the air lines were unhooked, and the trailer's safety chains removed from the truck. At that point

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prior to the accident, the Plaintiff was prepared to drive the dump truck away to retrieve asphalt.

██████████ in his statement stated that he told ██████████ that he was going to reconnect the air hose after ██████████ indicated the trailer would not tip to allow the spreader to be driven to the ground. ██████████ indicated that he advised ██████████ not to move the spreader so he could attempt to reconnect the air hose from the dump truck to the trailer. ██████████ moved the spreader and the trailer tipped, trapping ██████████ hand.

██████████ provided evidence in his statement that he climbed onto the spreader and was facing towards the back of the trailer with the dump truck at his back. When he got into the spreader, he started the engine and ██████████ was clear of the trailer and dump truck. ██████████ stated that the trailer is designed so that the trailer will tilt to the ground when the spreader was moved over the axle. As the spreader moved over the axle the trailer tilted up in the air and this is when ██████████ hand was trapped. ██████████ statement indicates that ██████████ had moved between the trailer and dump truck for no known reason and that the trailer had operated as it should when he moved over the axles.

In ██████████ statement it is indicated that when ██████████ entered the dump truck, ██████████ released the park brake causing the dump truck to roll backwards crushing ██████████ hand. ██████████ got out of the dump truck and ██████████ proceeded to get into the dump truck and moved the dump truck forward causing further injury in ██████████ hand.

██████████ statement indicates that ██████████ got in the dump truck but was unable to get it out of gear and the vehicle never moved forward nor backwards. ██████████ indicates that he then got in the dump truck and moved it forward to free ██████████ hand.

Based on the evidence, it appears that there are three separate actions which could have potentially caused three separate injuries to ██████████ hand. The First Defendant submits that there are two distinct elements of the circumstances of the accident that require analysis. Firstly, it is contended that an injury occurred when the trailer trapped the Plaintiff's hand between the trailer and the stationary dump truck. That injury was thus caused by the operation of the asphalt spreader which caused the trailer to tip and trap the Plaintiff's hand. Secondly, the First Defendant also contends that the dump truck did not move backward causing further damage to the worker's hand and was only moved to free the hand.

The position of the First Defendant is that the dump truck owned by ██████████ was a stationary object and not in use at the time of the injury. The injury occurred when the trailer tipped and crushed the Plaintiff's hand. It is therefore contended that the exclusion contained in section 44.1(1)(b) of the Act does not apply as the dump truck was stationary and the accident did not involve the use of a motor vehicle.

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The First Defendant's position is that the case law on multipurpose vehicles shows that equipment/motor vehicles when not being used for conveyance is not necessarily a motor vehicle. The fact that the dump truck was involved does not automatically mean that the equipment was operating as a motor vehicle.

The Co-Defendants' submission is that legislative documents and WorkplaceNL documents confirm that the purpose of the legislative intention behind the exception contained in **section 44.1 of the Act** was to allow workers or WorkplaceNL to gain access to mandatory automobile insurance. The Co-Defendants maintain that this is not an accident that occurred while the worker was being transported in the course of his employment by a mode of transportation where public liability insurance was required.

The position is that the trailer and the spreader were functioning as industrial equipment at the time of the accident. Neither the spreader nor the trailer qualifies as a motor vehicle for the purposes of **section 44.1 of the Act** and therefore the statutory bar applies. Also, as neither the trailer or the spreader is required to have mandatory insurance under the *Highway Traffic Act*, the action is subject to the statutory bar.

The Co-Defendants acknowledge that the dump truck was a motor vehicle for the purposes of the *Highway Traffic Act*; however, at the time of the accident it was being used as a multipurpose vehicle. It is contended that the statutory bar applies because the dump truck was not being used as a motor vehicle even if there was negligent operation of the dump truck.

The Co-Defendants maintain that whether the dump truck was the direct cause of the loss or an indirect cause of the loss, the involvement of the dump truck cannot provide the worker with the ability to sue (i) [REDACTED] which had no ownership of the dump truck or (ii) [REDACTED] or [REDACTED] in relation to them acting in the course of their duties for [REDACTED] or in relation to the operation of the [REDACTED] owned asphalt spreader or trailer.

The Plaintiff's position is that **section 44.1 of the Act** applies as his accident involved the use of a motor vehicle, and that his hand injuries were caused directly by the use of the spreader, the trailer and/or the dump truck. The Plaintiff deals with the dump truck, the trailer, and the spreader separately maintaining that each of these are motor vehicles under the Act and each should be subject to the exemption from the statutory bar.

It is submitted by the Plaintiff that the dump truck was insured and plated in this province and registered under the *Highway Traffic Act* and this meets the definition of motor vehicle under the Act. The accident involved the asphalt spreader, the trailer, and the dump truck and these cannot be separated as these three objects were connected. Legislative intention of **section 44.1(1)** was argued with the purpose to make private insurers liable for losses covered by liability insurance. It is argued that the accident which caused the Plaintiff's injuries involved two vehicles (dump truck and

trailer) covered by vehicle liability insurance, and one (spreader) that ought to have been covered by liability insurance, and thus the exception to the statutory bar applies.

Case Law and Submissions

Section 19(4) of the Act states the decisions of WorkplaceNL shall be upon the real merits and justice of the case and 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.

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

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 the worker was 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 2010 the matter was referred back to WorkplaceNL for a new decision involving the interpretation of **section 44.1 of the Act**. 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.

In this recent case, the Court of Appeal reviewed the matter 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 Internal Review Specialist had concluded that the narrower meaning of the term "use" does not include repair. The Court of Appeal overturned the Application Judge's decision and determined that the Internal Review Specialist's approach and interpretation were reasonable, including the narrower interpretation of the definition of "use" based on the dictionary definition and the reliance of the language used in other statutes.

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.

*In The Matter s.13 of Part I of the Judicature Act, 1986, c.42, S.N. 1986
And Reference re: Workers' Compensation Act, 1983 (NFLD.) (Piercey Estate v.
General Bakeries Ltd.)*

This decision confirmed the cornerstone of the Workers' Compensation System as the "Historic Trade-off". This means employers contribute to a no-fault insurance scheme based on their annual payroll, then workers forfeited their right to sue an employer or another worker covered under **the Act**, unless an exception to the statutory bar applies. Aside from any stated exceptions, employers are protected by the statutory bar and workers receive benefits under **the Act**.

Analysis

In these cases, the Courts note that the "Historic Trade-off" is a fundamental basis of the Workers' Compensation System, and that it would be unfair for employers to be subject to private legal actions while at the same time being forced to contribute to a no-fault insurance scheme. I find these cases relevant as they provide confirmation regarding the purpose of **the Act**, which is the worker, forfeits the right to an action, aside from any stated exceptions.

Archean Resources Ltd. v. Newfoundland (Minister of Finance)

This case involved a dispute concerning smelting royalties between Archean Resources Ltd. and the Government of Newfoundland. The Court of Appeal provided guidance when determining the objective of legislature in accordance with its true meaning.

The Court noted that every provision of an Act is to be considered "remedial" and to interpret it so that it "best" ensures the attainment of its "objects" according to its "true" meaning. The Court noted that when arriving at the "true" meaning of the surrounding text, interrelation of other related statutes, the social and legislative context in which the provision was enacted, other extrinsic aids must be consulted during the process of determining the "true" meaning of a particular statute.

Rizzo and Rizzo Shoes Ltd. (Re)

In this case Rizzo and Rizzo Shoes Limited had declared bankruptcy and when a receiving order was made with respect to the firm's property, the firm's employees lost their jobs. Proof of outstanding termination or severance pay owing to former employees under Employment Standards Act (ESA) was provided to the Trustee by Ontario's Ministry of Labour. The trustee in this case disallowed the claims of the employees on the grounds that the bankruptcy of the employer does not constitute dismissal from employment and accordingly created no entitlement to severance, termination or vacation pay under the ESA.

The appeals court found that termination as a result of an employer's bankruptcy gives rise to an unsecured claim provable in bankruptcy pursuant to section 121 of the *Bankruptcy Act* for termination and severance pay in accordance with the subsection 40 and 40a of the ESA. The court stated that the use of legislative history as a tool for determining the intent of legislature is appropriate.

Analysis of the (Archean Resources and Rizzo and Rizzo Shoes) cases

The *Archean Resources and the Rizzo and Rizzo Shoes* cases provide guidance in statutory interpretation. The cases confirm that when reviewing a particular provision of an Act, such as **section 44.1(1)(b)** the entirety of the surrounding text, objectives, interrelation of provisions, social and legislative intent of the Act must be considered when determining the “true” meaning of **section 44.1**.

Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)

In this case, an employee requested information from the Department of Justice. The Department of Justice refused the request claiming that the records were subject to solicitor-client privilege. The employee made a request to the Privacy Commission where the Privacy Commissioner’s Office requested that the Department of Justice produce records for the purpose of verification of the claim that the records were subject to solicitor-client privilege. The Department of Justice denied the request indicating that section 52(3) of the *Access to Information and Protection of Privacy Act (ATIPPA)* did not circumvent this privilege. The Court found that production of the records to the Privacy Commissioner was not required. Upon appeal of this finding, the Newfoundland Labrador Court of Appeal, found that section 52 was unambiguous and explicitly permitted the privacy Commissioner to abrogate a claim to solicitor-client privilege in order to verify the legitimacy of such a claim in the discharge of his statutory mandate.

Analysis

In this case the Court of appeal, to assist in the process of interpreting ATIPPA, used statements from the Newfoundland Labrador House of Assembly and a report prepared by a review committee, determining that such sources of legislative history “may be relied upon by a court in determining the proper interpretation of the statute.”

Diamond Estate v Robbins

In this case there had been an accident between two motor vehicles in February 1998. One of the drivers (David Diamond) was killed in the accident. The estate of Mr. Diamond commenced an action in which Diamond and others sought relief in respect of injury caused by the alleged negligence of Robbins, the other driver involved in the accident. Robbins denied the allegations of negligence and stated that the accident was caused by the negligence of the late David Diamond. After retaining additional counsel in 2003, application was made requesting leave to file a counterclaim in the within action. Mr. Robbins was granted leave to file a counterclaim.

Analysis

In this case, to assist in interpreting the Limitation Act, the Court referred to the Newfoundland Law Reform Commission reports as evidence of context, legislative purpose and textual meaning.

L. Blackburn Excavating Limited v. Salmon Arm Machine Shop Limited, (1977) Carswell BC 559 (B.C.S.C.)

The dump truck in this case was damaged when the hoist with which the dump truck was fitted collapsed while a load of dirt was being dumped from the truck. At the time, the dump truck was stationary and the engine was running. The court found that the damage to the dump truck caused by the collapse of the hoist was unrelated to the operation of the dump truck as a motor vehicle.

Analysis

In this case, the Court considered when the dump truck was in operation as a dump truck when it was being used to dump material and noted the damages did not come as a result of its operation as a motor vehicle. This is a case where the Court distinguished between when the dump truck was being used as a motor vehicle versus when it was being used as equipment. Although the dump truck was stationary, damage caused to the dump truck was as a result of the use of the hoist which was the use of auxiliary equipment attached to the vehicle for a purpose unrelated to the operation of the dump truck as a motor vehicle. This case is relevant to the accident being considered in this matter as the dump truck was stationary at a point during the accident. However, in the case under review, the dump truck was also in motion at the time when [REDACTED] hand was injured for the second time. The evidence indicates that the dump truck was moved by one or both of [REDACTED] and [REDACTED].

Briton Amos v. Insurance Corporation of British Columbia

A motorist was attacked by a gang while he was driving. One of the gang members shot and seriously injured the motorist while he was escaping in his vehicle. The motorist applied for benefits under his Automobile Insurance policy. The claim of the motorist was denied; therefore, the motorist subsequently appealed to the Supreme Court of Canada. The Court determined the motorist was driving his van down the street which was an ordinary and well-known use of an automobile. In making this determination, the Court applied a two-part test: (1) did the accident result from the ordinary and well-known use of an automobile, and (2) is there a causal relationship between the motorist's injuries and the ownership, use or operation of the vehicle. The Court determined that driving a van down the street was an ordinary and well-known activity to which automobiles are put and the injuries were causally connected with the ownership, use and operation of the vehicle. Therefore, the motorist was entitled to insurance benefits.

Analysis

In the Amos case, the injuries or damages were determined to be as a result of the use of a motor vehicle. The motor vehicle in question was an automobile (motor car) designed to carry people. Amos deals with entitlement to motor vehicle insurance benefits under the *Insurance (Motor Vehicle) Act* of British Columbia. In this case, it was determined that the motorist's driving, was an ordinary and well-known activity, to which automobiles are put. The motorist's injuries were considered to be causally connected with the ownership, use and operation of the vehicle.

The Amos case does not involve an interpretation of the *Workplace Health, Safety and Compensation Act*, or similar legislation from another workers' compensation jurisdiction and does not involve a multi-use vehicle. In this case automobile insurance was carried on the vehicle which was being driven as a motor vehicle at the time of the injury. It is relevant in that in the case under review, the dump truck did carry automobile insurance and was driven at a point during the accident in which the Plaintiff experienced a hand injury.

Multiform Manufacturing Company Limited et al. C. R. et al.

This appeals case is one where the appellant was investigated for violations of the Bankruptcy Act where documents from the appellant's home had been seized under search warrant under the Criminal Code of Canada. The appellant's application to have the warrant quashed. The appeal was dismissed. The Court held that on plain reading, s.443 of the Criminal Code applied to any federal statute, whether or not it contained search and seizure provisions. Section 443 also indicated that when Parliament wanted to restrict its application, it expressly used words "subject to any other Act of Parliament".

Analysis

When words used in a statute are clear and unambiguous, no further step is needed to identify intention of Parliament. This is relevant to the case under review; however, it is necessary to understand the legislative intent for the changes made to section 44.1. Also, section 44.1 references the *Highway Traffic Act* which is necessary to be examined in order to understand what a motor vehicle is in order to distinguish "use of a motor vehicle".

Keddy v. Workplace Health, Safety and Compensation Commission (New Brunswick)

In this case Ms. Keddy was at work when she cut off part of her finger with a saw. The surgeon amputated the tip of her finger. She attended the hospital for pain treatment. She alleged that the nurse had administered an injection near the sciatic nerve, causing more pain. Ms. Keddy brought an action against the nurse and hospital. The nurse applied for a determination as to whether Ms. Keddy's action was barred under s. 11 (1) of the *Worker's Compensation Act*. The Tribunal held that the injection resulted from

Ms. Keddy's work-related injury in that the injury and treatment were connected because without the injury, Ms. Keddy would not have needed treatment. Ms. Keddy appealed and the appeal was dismissed. It was determined that workers injured while receiving treatment for work related injuries are acting within the course of their employment at the time of suffering the subsequent injury.

The court held that a sufficient causal connection between the initial and subsequent injury exists in that the latter is a necessary incident of the former. They stated that this conclusion is consistent with the objective of the no-fault compensation scheme.

Analysis

The court commented on section 11(1.1) which deals with the exception to the statutory bar in the New Brunswick legislation. The New Brunswick Court of Appeal stated:

"As is well known, s. 11(1.1) provides for an exception for injuries arising from accidents involving the use of a motor vehicle where private insurance coverage is required."

This is relevant to the case under review in that the dump truck is a motor vehicle and carried public liability insurance.

Citadel General Insurance Co. v. Vyllingham

The injured motorists were seeking insurance coverage under their own automobile insurance policy. The Plaintiffs in this case were seriously injured when boulders were dropped overhead on their car as they passed through the underpass. The tortfeasors had transported boulders to the overpass with their car. In order to recover under the Policy, the injuries had to arise "*directly or indirectly from the use or operation*" of the tortfeasor's automobile.

The Supreme Court applied the two-part purpose and chain of causation test. The Court found that the purpose test was satisfied since transportation is what motor vehicles are used for. However, the Court held that the chain of causation had been broken by an intervening act of negligence. The Court found that the rock throwing was an activity entirely severable from the use or operation of the tortfeasor's car. The Court held that there was no coverage under the policy.

Herbison v. Lumbermens Mutual Casualty Co.

In this case, a hunter accidentally shot a member of his hunting party while driving his truck to his designated hunting spot. It was just before sunrise and the hunter, believing he saw a deer in his headlights, got out of his truck and shot the other hunter.

The issue before the Supreme Court was whether the injury sustained by the other hunter arose "*directly or indirectly from the use or operation*" of an automobile. The

Court applied a two-part test that had been traditionally applied by the Court. The Court concluded that although the purpose test was satisfied, since the truck was being driven at the time of the shooting, the chain of causation test had not been satisfied and ruled that the Policy did not apply. The Court concluded that there had been an intervening act of negligence that had been the cause of the accident – that being the shooting itself. The Court held that this act was independent of the use and operation of his truck.

The Court distinguished this case from the facts in the *Amos* case on the basis that this case was not a no-fault benefit case involving the interpretation of a statute.

Analysis (Citadal and Herbison) cases

In both these cases, it was determined that there was an intervening act of negligence responsible for the “*accident*” and the Court concluded that the act was independent of the use and operation of the motor vehicle. This is not the negligent use of a motor vehicle. I find both scenarios, that being the dropping of boulders onto a highway and the shooting, are not similar to the case at hand. These cases did not involve multi-use vehicles and are not similar.

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 a 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.

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.

Lanteigne v. Nova Scotia (Workers' Compensation Appeals 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 a motor 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.

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 the (Harvey, Argue, Lanteigne, and Dixon) cases

The cases provide guidance on how the Courts have viewed multi-use vehicles. In the above cases the injuries and damages were determined not to be as a result of the use of a motor vehicle. In these cases, the Courts distinguish between when the vehicle was being used as a motor vehicle versus when it was being used as equipment. In the above cases the injuries or damages were determined not to be as a result of the use of a motor vehicle.

Walsh v. Marwood Ltd.

In this case, a Forklift Operator was unloading lumber from a trailer and an employee was injured when a load of lumber fell off the forklift and fell on the employee. The injured worker elected to receive benefits from the Workers' Compensation Board. The worker subrogated his rights, and the Board brought an action against the employer. There was a potential exception to the statutory bar if the injury involved a motor vehicle; however, the Supreme Court determined that the forklift was not operating as a motor vehicle at the time of the accident but was being used as a piece of industrial machinery. Any movement underway along the ground was incidental to the job of removing wood from the trailer. Even if the forklift was a motor vehicle, it was not being "driven" and as such the accident did not result from driving a motor vehicle registered or required to be registered, therefore, exception to the statutory bar did not apply. The court stated that the relevant question is how the forklift was being used at the time of the accident.

Analysis

While the forklift was not stationary, it was being used to lift lumber as opposed to being used as a means of transportation. The court noted that any movement was incidental to removing the wood. In this case, while the phrase "driving a motor vehicle" was the legislation at issue, and it is more restrictive than the Act's "use of motor vehicle", I find that this case does have applicability to the case under review.

Submissions

Memorandum and Ministerial Recommendation from February 28, 1992 to Executive Council from Roger Grimes, Minister, Department of Employment and Labor Relations.

Minister Grimes notes provides the legislative intent and background regarding the enactment of **section 44.1** of the *Workplace Health, Safety and Compensation Act*, RSN 1990. According to the recommendations, the Statutory Review Committee recommended changes to **the Act** to include a section allowing injured workers to claim compensation or bring an action against an employer or another worker if certain circumstances applied. Previous legislation allows workers to claim compensation and commence legal action which created administrative and collection issues. The following was the Ministerial Recommendation of the then **section 33** of the **Act**:

Section 33 of the Workers' Compensation Act be amended to stipulate the choice of a worker to claim compensation or take legal action.

The Miscellaneous Legislative Changes Public Liability Insurance Claims began with a background regarding the purpose of the Workers' Compensation Act, 1983 which was to provide compensation "...in lieu of all rights of action to which a worker or his dependents may be entitled to against an employer or a worker." which I reference as the statutory bar. According to the Ministerial Notes the same statutory bar also extended to persons operating motor vehicles or traveling by other modes of transportation even though public liability insurance is required to be carried by the employer or worker in relation to the vehicle. This resulted in the workers' compensation system subsidizing the public liability coverage of private insurers.

At the time, some members of the legal profession in Newfoundland cited this "...as an unacceptable bar to legal action." According to the analysis, other jurisdictions resolved this dilemma "...by exempting the statutory bar to recover costs for accidents in the transportation sector for which there is public liability insurance either for motor vehicle mishaps only or transportation accidents generally." By implementing an exemption to the statutory bar when a motor vehicle is involved, which carries public liability insurance, claims costs are redistributed through higher private insurance premiums. The following Ministerial Recommendation was made:

The *Workers' Compensation Act* be amended by providing that the statutory bar in Section 33 does not apply where the worker was injured or killed while being transported in the course of the worker's employment by any mode of transportation in respect of which public liability insurance is required to be carried, or as a result of an accident involving the use of a motor vehicle by the worker or any other person.

On November 22, 1993, former Minister Roger Grimes proposed "Housekeeping Changes" that would define "motor vehicle" for the purposes of **section 44.1** of the **Act**. **Section 44.1** creates an exception to the statutory bar which prevents workers from an

action against employers or other workers. According to former Minister Grimes notes "This amendment would ensure that the exception would only operate with respect to accidents involving motor vehicles which must be covered by public liability insurance."

According to the Explanatory Notes for Bill 48, An Act to Amend the Workers' Compensation Act, "Clause 8 of the Bill would amend the Act by stating that section 44 shall not apply where the claimant is injured or killed as a result of a motor vehicle accident while working in being transported by a mode of transportation with respect of which public liability insurance is required to be carried."

Letter dated March 3, 1993 from Kathryn J. Crosby (General Counsel for the Commission) to Deborah E. Fry Deputy Minister, Department of employment Labor Relations

This letter advised the deputy minister of the need to amend the act that a definition of the term motor vehicle for the purpose of limiting the application of section 44.1 of the Act. The purpose would be to limit the application of paragraph B of section 44.1 to actions involving motor vehicles which carry mandatory insurance.

The October 19, 1993 memorandum to the Commission's Board of Directors from Katherine J. Crosby (General Counsel/Corporate Secretary for the Commission)

This memorandum advised the Commission's Board of Directors of the proposed amendment to legislation adding a statutory definition of the term motor vehicle with the exception to the statutory bar in the cases of motor vehicle accidents to narrow its application to vehicles which are covered are required to be covered by public liability insurance.

Sullivan on the Construction of Statutes, Fifth Edition, by Ruth Sullivan

An Act must be read in the harmoniously and ordinary text taking into consideration its objectives and intent as well as the objective and intent of the legislature. No one provision of the Act can be viewed in isolation. The entirety of the Act must be considered along with the intention, purpose, and objectives of both the Act and the Parliament.

Section 2 of the *Highway Traffic Act*

(zzz) "trailer" means a vehicle which has no motive power of its own and which is attached to a truck, or truck tractor or other motor vehicle but does not include

- (i) an implement of husbandry temporarily attached to another vehicle,
- (ii) a side car attached to a motor cycle, or
- (iii) a tow dolly designed to be used to tow another motor vehicle where one or more axles of the towed vehicle rest on the tow dolly;

(aaaa) [Rep. by 2009 c9 s1]

(bbbb) [Rep. by 2009 c9 s1]

(cccc) "truck" means a motor vehicle that is constructed for or primarily used for the transportation of property;

(dddd) "truck tractor" means a motor vehicle designed and used primarily for drawing another vehicle and not so constructed as to carry a load other than a part of the mass of the vehicle load so drawn;

(eeee) "urban district" means a municipality, village or built-up district;

(ffff) "vehicle" means a device in, upon or by which a person or thing may be transported or drawn upon a highway, but does not include devices used exclusively upon fixed rails; and

(oo) "motor vehicle" means a vehicle propelled, driven or controlled otherwise than by muscular power, other than a trailer or a vehicle running upon fixed rails;

(pp) "motor vehicle liability insurance card" means a motor vehicle liability insurance card issued under the *Automobile Insurance Act*,

(qq) "municipality" means

(i) the City of St. John's ,

(ii) the City of Corner Brook ,

(iii) the City of Mount Pearl , and

(iv) a town, community or region established or continued under the *Municipalities Act*

Section 10 of the *Highway Traffic Act*

Registration of vehicle required

10. (1) A person shall not operate or, being the owner, allow another person to operate, a motor vehicle on a highway unless

(a) the motor vehicle is registered;

(b) a trailer drawn by the motor vehicle is registered;

(c) there is in effect a vehicle licence, appropriate to the class of vehicle, issued under this Act in respect of the motor vehicle and of a trailer drawn by the motor vehicle; and

(d) there is affixed to the motor vehicle and a trailer drawn by the motor vehicle, in the manner prescribed in this Act or the regulations, valid identification plates or markers issued under this Act or the regulations in respect of the motor vehicle and trailer.

(2) On an application for a vehicle licence the applicant shall make a declaration in a form prescribed by the registrar as to whether or not the motor vehicle is insured by a policy and the registrar may require evidence of that policy.

(3) Notwithstanding subsection (1), the registrar may, in order to permit a vehicle which is not licensed or registered to be operated on a highway

(a) for the purpose of being registered;

(b) to be moved from one place to another for repairs or to be inspected before registration;

(c) to be moved from a point of entry into the province to a dealer's premises; or

(d) for another purpose approved by the registrar,

upon receipt of the fee that may be prescribed by the minister, issue a permit for the operation of the vehicle for the journey specified in the permit subject to those conditions that the registrar may prescribe in the permit respecting the affixing of a temporary marker to the vehicle and the manner of displaying it while the vehicle is on a highway.

Analysis and Conclusion

A review of the facts of this case confirms that on August 24, 2016, [REDACTED] was injured while working as an operator. [REDACTED] was employed by [REDACTED] and had delivered a trailer containing a Bobcat, asphalt roller, and an asphalt spreader owned by [REDACTED] by dump truck to a site in [REDACTED] Newfoundland and Labrador. In my determination of this matter, I have considered the pleadings, submissions and materials submitted by the Parties as well as the case law and the requirements of the applicable statutory provisions.

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 on it. WorkplaceNL also has the exclusive jurisdiction to determine whether an injury has arisen out of and in the

course of an employment within the scope of the 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. [REDACTED] was injured in the course of his employment.

There were submissions regarding the historic trade off giving rise to the Worker Compensation scheme. Extrinsic evidence has been provided regarding the intention of the legislature. The Newfoundland Court of Appeal has addressed the statutory bar in reference re: Workers' Compensation Act, 1983 (NFLD), ss. 32, 34 1987 67 NFLD & PEIR16 (NL CA). The court acknowledges the historic trade off and states:

"The workers and their dependents to whom the Act applies are deprived of the benefits which might otherwise be available to them but have all the benefits available to them under the Act. The legislature has ordained that some will receive more, some will receive less, than they otherwise might. This is the manner that has been chosen to structure the social regime of Worker's Compensation."

.....

"The workers compensation scheme provides a stable system of compensation free of the uncertainties that would otherwise prevail. While there may be those who receive less under the Act than otherwise, when the structure is viewed in total, this is but a negative feature of an otherwise positive plan and does not warrant the condemnation of the legislation that makes it possible. Judicial deference to the legislative will is required here."

As noted there is a historical trade off at the root of the Worker's Compensation system which provides benefits to workers in exchange for employers being protected from suit. The Plaintiff has access to the Worker's Compensation system.

The Plaintiff commenced an action against [REDACTED] (First Defendant), [REDACTED] (Second Defendant), [REDACTED] (Third Defendant), and [REDACTED] (Fourth Defendant). The Plaintiff has argued that the asphalt spreader was being operated in a negligent manner, and that the spreader, trailer, and dump truck were involved in the accident where the Plaintiff sustained hand injuries. The Plaintiff is also alleging negligent use of the dump truck by [REDACTED] employees.

The Plaintiff has argued that the accident which caused the Plaintiff's injuries involved two vehicles (dump truck and trailer) covered by vehicle liability insurance, and one (spreader) that ought to have been covered by liability insurance, and thus the exception to the statutory bar applies. The Applicants have requested review to determine whether action against the Defendants is statute barred.

The Plaintiff is alleging negligent use of the dump truck by the Third and Fourth Defendants. According to the Statement of Defense of the First Defendant, the First Defendant denies negligence as a result of the actions of the Third and Fourth Defendants who responded to the situation. It is maintained by the First Defendant that the actions of the Plaintiff contributed to his injuries and the Third and Fourth Defendants acted as rescuers in response to the emergency. In the Statement of Defense of the Third and Fourth Defendants, the Third and Fourth Defendants deny the allegations of negligence maintaining that any operation of the dump truck was done in a lawful and prudent manner.

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) 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.

The definition of motor vehicle is drawn from section 44.1 (2) of the Act. Section 44.1(2)(a) provides that in subsection (1) "motor vehicle" means (i) a motor vehicle registered under the *Highway Traffic Act*; (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.

It is necessary to look to the *Highway Traffic Act* in determining what constitutes a motor vehicle in determining what is registered under the *Highway Traffic Act* as referenced in section 44.1. Section 2. (oo) of *The Highway Traffic Act* states, "motor vehicle" means a vehicle propelled, driven or controlled otherwise than by muscular power, other than a trailer or a vehicle running upon fixed rails. The *Highway Traffic Act*, in section 2 (ffff), "vehicle" means a device in, upon or by which a person or thing may be transported or drawn upon a highway, but does not include devices used exclusively upon fixed rails. [REDACTED] injuries occurred in the course of his employment.

Did [REDACTED] injuries result from an accident involving the "use of a motor vehicle"? To answer this question, determinations are required as to whether the dump truck, asphalt spreader or trailer are motor vehicles. Depending on those determinations, did the accident involve the use of a motor vehicle as applied to these items? For the purposes of my determination, I have concluded that there are two parts to the accident which caused [REDACTED] injury requiring consideration of whether an action is permitted under the Act. The first is the movement of the asphalt spreader on the trailer which is stated to have caused the Plaintiff's hand to be caught between the trailer and the dump truck. The second part in the accident is the movement of the dump truck by one or both of the Third and Fourth Defendants.

It is the position of the Co-Defendants that neither the asphalt spreader nor the trailer qualifies as motor vehicles for the purpose of **section 44.1** of the Act and therefore the statutory bar to action applies.

The worksite in this case was adjacent to an abandoned lot where the trailer and items upon it were parked. The initial phase of the job for which the dump truck had been retained was completed where the dump truck had picked up and dropped off the trailer with the items that were carried on it. The truck was disconnected in preparation to go to another site. The Bobcat and asphalt roller were unloaded onto the abandoned lot without incident while the trailer was connected to the dump truck. The asphalt spreader which had been floated to the site on the trailer remained on the trailer. The flat-bed trailer was then fully disconnected from the truck.

The asphalt spreader was not registered under the *Highway Traffic Act* at the time of the accident nor was it required to be registered according to that Act. The asphalt spreader had steel tracks instead of wheels and had been floated to the worksite; not driven on the highway by its own power. The asphalt spreader is not insured under an automobile insurance policy. This machine was still in the unloading stage from the trailer to the ground when the initial part of the accident occurred. The asphalt spreader moved over the axles as intended causing the trailer to tip.

The trailer was completely disconnected from the truck at all points during the time of the accident. The trailer is excluded from the *Highway Traffic Act* definition of a motor vehicle. The *Highway Traffic Act* in section 2(oo) defines a motor vehicle specifically noting "other than a trailer" in that definition. The *Highway Traffic Act* goes on then to define what a trailer is in section 2(zzz) as "a vehicle with no motive power of its own and which is attached to a truck, or tractor or other motor vehicle...". Also, the trailer was not required to carry automobile insurance at the time the accident occurred.

As determined, it is necessary to look to the *Highway Traffic Act* in determining what constitutes a motor vehicle in determining what is registered under the *Highway Traffic Act* as referenced in **section 44.1**. Neither the asphalt spreader nor the trailer meets the definition of a motor vehicle under the *Highway Traffic Act*. Therefore, neither the asphalt spreader nor the trailer meets the definition of motor vehicle contained in **section 44.1(2)** of the Act in order for the exemption contained in **section 44.1(1)** to apply. In this matter, I conclude that the use of a motor vehicle in **section 44.1(1)(b)** does not include the movement of the asphalt spreader or the trailer. Given that neither the trailer or the asphalt spreader is a motor vehicle under the *Highway Traffic Act*, the accident involving them cannot be as a result of the use of a motor vehicle.

The action by the Plaintiff against [REDACTED] the owner of the asphalt spreader and trailer is therefore statute barred.

The dump truck is registered as a vehicle under the *Highway Traffic Act*. The dump truck was used for transport to the site as a "motor vehicle". The dump truck carried

public liability insurance. I find the dump truck meets the definition of "motor vehicle" under section 44.1 of the Act.

At no time during the accident did the dump truck have an alternate purpose other than that of a motor vehicle. The dump truck had delivered the trailer containing the equipment and was disconnected and parked at the time when the trailer tipped and pinned the Plaintiff's hand between the trailer and dump truck. The dump truck was not in use at the time when the asphalt spreader moved and the trailer tipped. According to the Canadian Oxford dictionary the definition of the word "use" is:

"to employ (something) for a particular purpose... Exploit (a person or thing) for one's own end... the act of using or the state of being used... Employ, apply... Would be in a position to benefit from.... "

In the 2018 decision of the Newfoundland and Labrador Court of Appeal in *Weir's Construction Limited vs Warford*, the Court found that the Internal Review Specialist's decision was reasonable with respect to his interpretation of the word "use" in section 44.1(1)(b) of the Act. The Internal Review Specialist had considered the meaning of the word "use", finding that the interpretation of the word in the Canadian Oxford Dictionary and provincial legislation was appropriate. In its consideration of the Internal Review Specialist's reasoning, the Court of Appeal approved this narrower approach than what had been found in insurance law cases regarding the meaning of "use". Similarly in this case, the question is raised as to whether the accident involved the use of a motor vehicle and the meaning of the word "use" requires interpretation. While the facts of the *Weir's* case and this matter are not the same, the reasoning of the Court of Appeal as to the word "use" in the context of the use of a motor vehicle, is applicable here. The dump truck was stationary and was parked, having completed the transport of the trailer. It was also detached from the trailer. I find that while the dump truck meets the definition of motor vehicle, it was not in "use" at the time of the first part of the accident. The exception in section 44.1(1)(b) does not apply to the dump truck at the time the Plaintiff's hand was pinned against it as it did not involve the use of a motor vehicle.

Although in the initial stage of the accident and injury the dump truck was stationary, in the timeline of [REDACTED] injury and as stated in the Statement of Claim, the dump truck was moved by one or both the Third and Fourth Defendants. At the time of the second part of the accident, I find the dump truck meets the definition of "motor vehicle" under section 44.1 of the Act. This part of the accident involved the use of a motor vehicle as the dump truck was moved. Therefore, the action against the First Defendant, the owner of the dump truck, is not statute barred.

The Parties disagree as to the facts of the case and dispute who moved the truck during the second part of the accident. It is not within the scope of my review to determine matters of negligence or fault, which fall outside my jurisdiction. This determination is limited to whether the action is permitted under the Act. I have determined that the dump truck is a motor vehicle and the second part of the accident involved the use of a

[REDACTED]
November 19, 2021

motor vehicle. As the truck was moved, and as both [REDACTED] and [REDACTED] were identified in the action as operators of the dump truck, the Plaintiff's action against [REDACTED] and [REDACTED] is not statute barred.

Determination

The action by [REDACTED] against [REDACTED] is statute barred.

The action by [REDACTED] against [REDACTED] as a result of injuries arising from the movement of the dump truck is not statute barred.

The action by [REDACTED] against [REDACTED] and [REDACTED] is not statute barred.

Enclosed is a certificate which may be filed with the court.

Sincerely,



Brian Woolfrey
Internal Review Specialist

BW:kao
Enclosure: Certificate

c: Paula Fudge, Internal Review Clerk
Tristan Carroll, MacGillivray Law Office Inc.