[2015] JMSC Civ. 124

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2009 HCV00279

BETWEEN	**WAYNE HOWELL**	**CLAIMANT**
AND	**ADOLPH CLARKE** **t/a Clarke's Hardware**	**DEFENDANT**

Mrs. Allia Leith-Palmer instructed by Kinghorn & Kinghorn for the claimant

Mr. Norman Hill Q.C. instructed by Samuels and Samuels for the defendant

Heard: 26th February, 2015 and 19th June 2015.

Negligence – Casual worker injured by falling steel – Employer's liability – Safe system of work – Occupier's liability

CORAM: Dunbar-Green J (Ag)

The Claim

[1] The claimant seeks damages for personal injuries sustained on 15th May 2008. At the time he was employed as the defendant's labourer at Clarke's Hardware store. He sustained injuries when a bundle of steel came loose while being loaded onto a truck.

[2] The claimant has brought this action in negligence and/or breach of contract and/or breach of the **Occupier's Liability Act**.

[3] The particulars of negligence are as follows:

i. causing the said steel to fall and hit the claimant;
ii. failing to warn the claimant of the danger of the said load of steel falling on him;
iii. placing the steel in such a precarious position as to cause the said steel to fall on the claimant;
iv. failing to securely place the steel in such a manner as to prevent the said steel from falling on the claimant; and
v. failing to take such reasonable care in all the circumstances so as to place and secure the said steel that the said load of steel did not fall on the claimant.

[4] The particulars of breach of contract are:

i. failing to take reasonable steps to provide a safe system of work;
ii. failing to provide the requisite warnings, notices and/or special instructions to the claimant and its other employees in the execution of its operations so as to prevent the claimant being injured;
iii failing to provide a competent and sufficient staff of men; and
vi failing to modify, remedy and/or improve a system of work which was manifestly unsafe and likely at all material times to cause serious injury to the claimant.

[5] The particulars of breach of the **Occupier's Liability Act** are:

i. failing to take such care as in all the circumstances of the case was reasonable to see that the claimant would be reasonably safe in using the premises for the purposes for which he was invited or permitted to be on the said premises; and
ii. failing to put up warning signs of the dangerous state of its premises having regard to the precarious way in which the steel was placed.

[6] Particulars of injuries are as set out below:

(a) swollen right lower leg with ulcer to radial leg just above the medial malleolus;

(b) radiographs revealed a comminuted fracture of his right tibia which was fixed with plate and screws; and

(c) fracture to right tibia/fibula with post-operative infection.

[7] The special damages claimed are:

i. medical expenses

Palms Medical Complex		$20,000.00
St. Ann's Bay Hospital		$ 2,100.00
Dr. Derrick McDowell		$22,752.00
Medication	$10,010.00	
	$54,862.00	

ii. household help (7 months@ $1000.00 per week) (and cont.) $28,000.00

iii. loss of earnings $3740.00 per week for 28 weeks and cont $104,720.00

iv. transportation expenses and cont $41,000.00

$228,582.00

Agreed Evidence

[8] The parties agreed exhibits 1-10:

i. Report of Dr. Ian Clarke dated 17th November 2008;

ii. Report of Dr. Dean Wright dated 14th January 2009;

iii. Report of Dr. Denton Barnes dated 11th August 2009;

iv. Report of Dr. Denton Barnes dated 21st June 2010;

v. Receipts from Dr. Barnes dated 11th August 2009 and 22nd June 2010;

vi. Medical report from Palmer's Medical Complex dated 17th November 2008;

vii. Report from Tretzel Medical Centre date 26th June 2009;

viii. Report from Dr. Derrick McDowell dates 30th May 2008;

ix. Receipts from Central Medical Labs dated 13th August 2008 and 26th June 2008;

x. Receipts from R & J Pharmacy numbered A-D; and

xi. Receipt from Pine Grove Pharmacy dated 29th September 2008.

Claimant's Case

[9] The claimant's witness statement filed 2nd October 2013, along with some amplification, was ordered to stand as his evidence in chief.

[10] He was employed for about 10 years (cumulatively) as the defendant's labourer. His duties entailed loading and unloading trucks with block, steel and hardware items at the defendant's hardware store.

[11] In the morning of 15th May 2008 he had used wire to bind a bundle of ½ ton steel. The bundle was 30 feet long. His co-worker, Mr. Haye, used a forklift to lift one end of the bundle of steel into a truck belonging to the defendant.

[12] As Mr. Haye proceeded to lift the other end of the steel with the forklift, the binding wire broke. Mr. Haye requested the claimant to re-bind the steel again, which he did, whilst the bundle was half loaded in the truck.

[13] It was not uncommon for the binding wire to burst when the forklift was being used to load steel, and workers would re-tie the steel when this occurred.

[14] On this occasion, after the claimant had completed re-binding the steel, he began walking away from the forklift when the steel, which apparently became loose, hit him in the back and waist. He fell to the ground and was pinned down by the steel which had fallen on him. He was pinned to the ground for about ½ hour whilst the defendant and co-workers came to his rescue. The forklift was used to lift the steel off him.

[15] The claimant said that on falling to the ground, he had hit his face and head. A bone also stuck through the skin of his right leg and he experienced a lot of pain.

[16] He was transported to the St. Ann's Bay hospital, admitted, treated and underwent an operation to his leg.

[17] He spent about two weeks in hospital and was also an outpatient.

[18] The only support he received from the defendant was the payment of his full salary for about 6 weeks.

[19] The claimant said he had been given no safety instructions, warnings or precautions and workers were left up to their own devices at the hardware.

[20] He also stated that he had conducted himself as instructed and taught to do by the defendant. He said the defendant was present at the time he was tying the steel and neither he nor anyone else had raised any objection to what he had done because it was normal operations.

[21] In amplification of his witness statement, the claimant testified that no-one had told him not to go near the forklift or the truck.

[22] In proof of special damages, he said that he had taken taxis to and from the hospital and the doctor's office. He also bought lunch on those occasions. After being discharged from hospital, he needed household help and for this he paid $1300 dollars each time, though he was unable to recall on how many occasions he had done so. As

an outpatient, he had to visit the clinic four times per week but could not say for how many weeks he had done so. Each round trip to the clinic cost him $1500.

[23] In cross-examination, he admitted being paid $3,740.00 and not the $3,850.00 claimed. The last payment he received was on 12th December 2008. He denied being paid in full from May to September 2008 but said he had kept no record of the payments. He, however, agreed that he got half pay for October and November and one week in December, 2008.

[24] He denied a suggestion that he was not allowed to stand where the forklift was being operated. He said it was necessary for him to be there so that he could "call the operator and direct him while he [was] doing the putting on of the steel on the truck."

[25] He was emphatic that he and the forklift operator were the only ones outside at the time of the incident. The others, he said, were in the hardware.

[26] He contradicted his witness statement by saying "The steel loose out and I was going to tie it back and the operator of the forklift push the steel and the steel hit me in my back and broke up mi foot. I did not bind it before it hit me. It pull up…some of them come and hit me in the back. The rest of them run off the truck and broke my foot. I fell on the ground when it hit me in the back then some come and hit me on the foot." In the witness statement he said the steel had been re-tied and he was walking away when it hit him.

[27] He agreed with Counsel that he had tied the steel before being hit.

[28] It was suggested to the claimant that he had been injured when he ran to the back of the truck to stop the steel from falling off. This, he denied. He also denied that he was warned by the defendant and forklift operator to stay away from the steel when it was slipping off the truck.

[29] He denied being employed elsewhere after the incident, except for one week in 2015. This contradicted his witness statement that he had been employed in August of 2013.

The Defence

[30] The defendant's witness statement filed 29th October 2009, along with some amplification, was ordered to stand as his evidence in chief. Paragraphs 5 and 7 and the words "remedy the situation…did not heed to the warnings" in paragraph 6 were ordered redacted on the basis that they were not set out in the defence as required by rules 10.5 and 10.7 of the Civil Procedure Code (CPR).

[31] The witness statement of Michael Grandison filed 29th October 2009 was also ordered to stand as his evidence in chief, in support of the defence. Paragraph 9 was ordered redacted for being hearsay.

[32] The defendant's version of the incident was that the claimant had been warned to step away from the area around the forklift. On seeing the steel shifting and falling, the claimant "took it upon himself to try and remedy the situation despite warnings from several persons [including the forklift operator] not to go near the steel." He was injured on the ankle.

[33] The defendant stated that the claimant had failed to take his own safety into consideration and was solely to blame for the accident. He had assisted the claimant with medical expenses and paid his full salary from 16th May 2008 to 26th September 2008. Thereafter, he was paid half salary from 3rd October 2008 to 5th December 2008, the last payment being made on 12th December 2008.

[34] In cross examination, he said that whenever the forklift did not work, the claimant would help to load the steel manually. He denied that there was any need to give directions when the forklift was operational. However, he accepted that whenever he was present he would assist the forklift operator by giving directions on how to load.

[35] He accepted that the binding wire would sometimes break and when this happened one of the casual workers would be required to rebind the steel. He accepted

that on the date of the incident the binding wire had broken but he denied that the claimant had gone to re-bind the steel.

[36] The defendant accepted that when the claimant first joined his staff, no training was done. He said the claimant had been trained "four to six months as also the safety meetings." He also said there were no warnings posted in relation to the forklift or the truck.

[37] He said that at the time of the incident the defendant ran from the lumber yard to catch the steel when the wire broke. However, in re-examination, he said that when he saw the defendant running, he had no binding wire in his hand. It was suggested that he did not try to stop the defendant, to which he disagreed.

[38] The defendant said that a safety meeting had been held four months prior to the incident. The only other was held a year before. He kept no attendance record.

[39] In response to the Court, the defendant said that training consisted of "safety meetings on how to operate the forklift; the angle to which [you] operate it so that whatever [you] have on it don't fall off; and whenever the forklift is being operated no-one is allowed nearby."

[40] Mr. Grandison testified that he was not outdoors when the steel fell on the claimant. At the time, he was in the hardware to secure a wedge. He had been employed by the defendant for four years. During that period he was aware of two safety meetings being held, prior to the incident, although he could not remember the dates. He had not been required to attend those meetings.

[41] He had passed the forklift when it was lifting the steel. The forklift operator, he said, should not have put the steel on the truck because something on the truck which should protect the steel from "sliding two sides" had broken off and he had gone to secure a wedge in the hardware.

Issues

[42] This Court will have to determine the following issues:

i. whether the defendant owed a duty of care to the claimant, and if so, whether there was breach of that duty and whether harm was foreseeable;

ii. whether the defendant is liable for breach of his statutory duty under the **Occupier's Liability Act**;

iii. whether the claimant was the author of his own injuries or contributorily negligent;

iv. the nature and extent of the claimant's injuries; and

v. the quantum of damages, if any, to be awarded to the claimant.

Analysis

[43] Harris, JA in ***Glenford Anderson v. George Welch*** [2012] JMSC Civ. 43 at paragraph 26, enunciated the relevant principle in these terms:

> *It is well established by the authorities that in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to a claimant by a defendant, that the defendant acted in breach of that duty and that the damage sustained by the claimant was caused by the breach of that duty. It is also well settled that where a claimant alleges that he or she has suffered damage resulting from an object or thing under the defendant's care or control, a burden of proof is cast on him or her to prove his case on the balance of probabilities.*

[44] Lord Griffiths in ***Ng Chung Pui and Ng Wang King v Lee Chuen and Another*** Privy Council Appeal No. 1/1988 delivered on 24 May 1988, pp. 3,4 dealt with the burden of proof and role of the Court. His lordship said:

> *The burden of proving negligence rests throughout the case on the plaintiff. Where the plaintiff has suffered injuries as a result of an incident which ought not to have happened if the defendant had taken due care, it*

will often be possible for the plaintiff to discharge the burden of proof by inviting the court to draw the inference that on a balance of probabilities the defendant must have failed to exercise due care, even though the plaintiff does not know in what particular respects the failure occurred.

... it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established.

[45] Apart from a general duty of care, at common law, the employer owes a special duty to his employees, not just generally but to each individual employee. This was decided in ***Paris v Stephney Bourough Council*** *(1951) 1 All ER 42 at 445* and applied by Campbell, J. in ***Schaasa Grant v Salva Darwood and Jamaica Urban Transit Company (J)*** 2005 HCV 0308, P.14 (also applying ***Walter Dunn v Glencore Alumina Jamaica Ltd. (t/a West Indies Alumina Company (Windalco)*** 2005 HCV 1810 delivered on 9th April 2008; and ***Speed v Thomas Swift and Co. Ltd*** *(1943) K.B. 557).*

[46] The duty of care requires the employer to provide a safe system for carrying out the type of work which is required of the specific employee. This burden will be discharged where, as practicable and necessary, there are: established safety procedures; the provision of safety equipment, information and training; and adequate safeguards, including effective supervision and warning signs. The employer must not only establish and implement safety measures as are warranted but also take reasonable steps to ensure that the employee follows the safeguards. (***Speed v Thomas Swift and Co. Limited***).

[47] Thus, in ***Walter Dunn***, Brooks, J. found the employer liable because although safety footwear had been provided and there was 'general supervision', the employer was 'casual' in its enforcement and therefore operated with a 'lax standard'.

[48] *In* ***Speed v Thomas Swift*** at page 567, Lord Greene said:

> *The duty to supervise workmen includes a duty to take steps to ensure that any necessary item of safety equipment is used by them. In devising a system of work, an employer must take into account the fact that workmen are often careless as to their own safety. Thus, in addition to supervising the workmen, the employer should organize a system which itself reduces the risk of injury from the workmen foreseeable carelessness."(Paras 13-14).*

[49] In his response to the claimant's evidence that he had received no safety instructions or training, the defendant said that he personally conducted safety training. However, he produced no training records.

[50] Mr. Grandison, the truck driver, could only remember two training sessions being held over a two year period. He did not know when those training sessions were held and had attended none as he was not required to do so.

[51] The fact that Mr. Grandison had not attended nor required to attend any training was remarkable. A truck driver, as a matter of common sense, should undergo safety training. This would include safe loading, securing the load, safe unloading and the ability to assess risks in the process.

[52] Were this Court to accept that training sessions had been held, they would have been irregular and the content too narrow. This could certainly not constitute evidence of a satisfactory provision of a safe system of work.

[53] It is clear from the evidence that the defendant operated a lax system of work. The claimant's conduct was consistent with someone who had been left up to his own devices on the job. It is quite telling that the defendant did not say what was to have been the 'trained' response of the claimant on seeing steel coming loose whilst being loaded by the forklift.

[54] The dangerously lax nature of the operations was also brought out in the evidence of Mr. Grandison, who told the court:

"I pass the forklift operator outside with the steel on the forklift. He [forklift operator] wasn't supposed to put it [steel] on the truck because something had broken off the truck and that is what I went inside to get, the board to fix it. The thing at the back that is supposed to protect the steel. It's a piece of board with a thing on it like a wedge to prevent the steel from sliding from side to side. The steel is to stay in the middle of the truck that wedge would go to the extreme end of the truck, the tailgate."

[55] Mr. Grandison knew that the latching device in the truck back was not in working condition. The load of steel would therefore be unstable in the truck. Although Mr Grandison said he had passed the forklift with the steel on it, he apparently did nothing to warn his co-workers that the steel should not be loaded. He might have done so had he received safety training. The forklift driver was also slinging the load of steel into the truck back, apparently without checking that the necessary restraint device was in place on the truck. Neither worker operated with any awareness of the risks involved.

[56] It is probably true that the defendant, the forklift operator and other staff had warned the claimant against approaching the forklift when he saw the steel falling off. It is not clear why he would have chosen to ignore their admonition. What is clear, however, is that there is no evidence that the claimant was disregarding any procedure that had been established to control his behaviour in relation to the loading of steel.

[57] By contrast, there is evidence from the defendant, under cross-examination, that it was not uncommon for the binding wire to burst and that the casual workers, including the claimant, were expected to re-bind the steel whenever this occurred. He also said that when the forklift was not functioning the casual workers would load the steel. He would also give directions to the forklift operator but in his absence no-one was charged with that responsibility. He said that he was present at the time of the incident but there is no evidence from him about whether the truck was in a safe state to be loaded or that any instructions were given to the forklift operator to ensure the safe loading of the steel, in circumstances where the truck driver said that the forklift operator should not have been loading the truck without the safety device being in place. It is telling that the defendant would have been present when this took place.

[58] On the evidence, including that of the defendant's, he should have been aware of the hazards involved in the job. Breakage and re-tying of steel seemed a routine event. He must have known that the workers were not equipped with wire that was strong and secure enough for the binding of steel or the weight steel that was bound at the material time. He had an obligation to ensure the safety of all persons involved in the steel-loading operation. That obligation encompassed the entire system of work: binding, moving, re-tying and loading steel onto the truck and safe access to the steel throughout the process.

[59] I adopt, as a correct statement of the law, the following passage from the judgment of Mason J in the Australian case of ***Wyong Shire Council v Shirt*** [1980] HCA 12; (1980) 146 CLR 40 at 47-48:

> *…In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.*
>
> *The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors.*

[60] The claimant's job involved tying steel together which would then be lifted by a forklift onto the defendant's truck. The nature of the activities, in the normal course, would involve the steel becoming loose in the process of being lifted by the forklift, for whatever reason. When this happened, the steel would have to be re-tied so they could be moved in a bundle and not singly. The fact that it actually happened, in this case, highlights the dangers of the steel loading process. This was a potentially dangerous operation from start to finish. The component parts were not remote from each other such that the danger posed by the lifting of steel with the forklift would not be a risk also to the worker whose job it was to see to the binding of the steel rods so they could be moved as a bundle.

[61] It was foreseeable that the claimant was exposed to the risk of injury in all aspects of the operations. He did not only bind the steel rods together but was sideman on the truck. So he was involved in all aspects of the operation: binding, loading, transporting and unloading steel from transport vehicles. The risk of danger was certainly not "far-fetched" or "fanciful".

[62] It is therefore entirely misplaced, to suggest that the claimant had failed to act to protect himself from being injured. On the facts, he had seen a bundle of steel come loose and had gone to re-tie them, or was attempting to do something in relation to them, or had actually re-tied them and was moving away. In whichever of these circumstances, the claimant acted, it would have been consistent with the usual practice of casual workers re-tying steel that had come loose.

[63] I recognise that the inconsistency in the claimant's evidence as to how he came to be injured, is significant. He said in the witness statement that he had re-tied the steel before he was struck. In cross-examination he said the steel had become loose and he was going to re-tie them but the forklift pushed the steel and they fell and hit him to the back and broke his foot. He then said that he had not rebound the steel and some of them hit him. When counsel suggested to him that his explanations were inconsistent, he said he had tied them.

[64] The version that the claimant advanced in the witness statement suggests that the 62 rods of steel (1/2 ton), while bound, would have hit him to the back and also to the ankle. The injuries established in the medical reports are not supportive of this version. I would have expected the injuries to be greater if the incident had occurred in that way.

[65] It is more believable that the rods had not been bound together when the accident occurred. This would have been consistent with the claimant's first version in cross-examination and also the defendant's case.

[66] However, I do not believe the claimant was setting out to put an incredible story to the Court. He was a simple man and the evidence he gave was not always coherent.

[67] I am also of the view that whether the claimant had been going to tie the steel or had done so and was moving away, his behaviour was prompted by the rods becoming loose and falling from the truck, in circumstances where, according to the truck driver, the safety device on the truck was not in place and the forklift driver should not have been attempting to load the steel.

[68] On the facts of this case, as I have found them to be, the inconsistency in the claimant's evidence as to how the accident occurred, although significant, is not determinative of liability. There is no question in my mind that he had gone to do something about the steel, and it had to do with his job. He had acted on the expectation that he should "remedy the situation" as the defendant said in cross-examination.

[69] I find that the load of steel was not secured and it is quite plausible that some of the rods fell out of the truck, and hit the claimant to the ankle and he fell. This is consistent with the defendant's version. However, I do not believe that the half ton of steel fell on the claimant and pinned him to the ground. From the evidence, it seemed that the accident happened suddenly and in such circumstances it was not far-fetched that he could have sensed that the incident was greater than in actuality.

[70] I also find that even if, as the defendant said, at the time he saw the claimant running towards the steel there was no wire in his hand, this does not negate what the claimant said was his intention at the time.

[71] The claimant had no control over the work process and his obligation to take due care for his own safety at the workplace would, for the most part, mean that he should not ignore clearly established training and safety instructions. This is what I understand from the following passage in Oaksey L.J.'s judgment in ***General Cleaning Contractors v Christmas*** [1952] 2 All ER 1110, 189-190 where he said, inter alia:

> *…it is the duty of an employer to give such general safety instructions as a reasonably careful employer who has considered the problem presented by the work would give to his workmen. It is, I think, well known to employers…that their workpeople are very frequently, if not habitually, careless about the risks which their work may involve. It is, in my opinion, for that very reason that the common law demands that employers should take reasonable care to lay down a reasonably safe system of work…Workmen are not in the position of employers… They have to make their decisions on narrow window sills and other places of danger and in circumstances in which the dangers are obscured by repetition.*

[72] Similarly, in ***Garth Burton v The Jamaica Biscuit Company Limited*** 2008 HCV 04637, Straw, J. said, inter-alia:

> *In considering whether the Defendant established a safe system of work the Court bears in mind that the employer must take into account the fact that workmen are oft times heedless of their own safety. . .In devising a safe system of work, the employer must take steps to ensure that the system of work is complied with and that the necessary safety procedures are observed. The system established by the employer should so far as*

> *possible minimise the danger of a workman's own foreseeable carelessness. (Paras. 27-29).*

[73] In my view, the operator of a hardware store which involved the regular use of a forklift to lift steel and other material onto a truck, should provide, at a minimum, a marked safety zone beyond which no worker should be located whilst the forklift is loading or unloading material. This would be a reminder to workers that there was risk of danger should a load fall. The dangerous nature of the activities also required that all participant workers be trained to carry out their tasks safely.

[74] In the absence of any evidence that even a simple and inexpensive safety measure such as a safety zone existed and any credible evidence of adequate safety training, if at all, I do not believe that the defendant made any satisfactory attempt to provide a safe system of work.

[75] I therefore find that the defendant failed to discharge his duty at common law and as an employer to provide training, proper equipment, safety warnings and instructions, and effective supervision of the claimant, particularly in relation to the manner in which steel was to be uploaded and how it should be rebound were it to fall apart.

[76] It is also my view that the defendant failed to discharge a further duty under the **Occupier's Liability Act**. Section 3(2) obligates him to "…take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

[77] The duty arises from "…any invitation or permission" which the occupier "gives (or is to be treated as giving) to another to enter or use the premises" (s. 2(2). It therefore extends to an employee who lawfully enters his employer's premises under a contract of employment. (See for example, ***Brenda Gordon v Juici Beef Limited*** HCV 2007/04212 delivered by Lawrence-Beswick J's on April 14, 2010).

[78] Section 3(2) (b) of the Act provides that: "…an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so." On the facts of this case, it is apparent that the circumstances contemplated by section 3(2)(b) do not arise. This is not a case involving a skilled worker who would be expected to have control over his own actions in the approach to the job.

[79] Based on the foregoing, I find, on a balance of probabilities, that the defendant is liable for the injury suffered by the claimant.

Contributory Negligence

[80] The principle of contributory negligence is that the damages awarded to the claimant should be reduced to the extent that his fault contributed to the injury or damage. The test is whether the claimant had taken proper care for his own safety (***Jones v Livox Quarries Limited*** [1952] 2 QB 608).

[81] For the reasons I have outline at paragraphs 53 to 73, I find that contributory negligence has not been proved. I will now assess the damages to which the claimant is entitled.

Assessment of Damages

[82] The medical report of Dr. Ian Clarke dated 17th November 2008, established the following:

i. swollen right lower leg with ulcer redial leg just above the medial malleolus; and
ii. comminuted fracture to right tibia/fibula with post-operative infection (no evidence of osteomyelitis).

[83] The claimant was examined by Dr. Dean Wright, Orthopaedic surgeon on 14th January 2009. The examination revealed:

i. mild tenderness to scapula area (there was no obvious bruising);
ii. grossly swollen right ankle(with good range of movement);
iii. medial incision (oozing serous material) of approximately 10cm in length with 2 to 3 areas 1x1.5cm wide which were raw and not fully healed;
iv. signs of chronic infection;
v. lateral ankle wound appeared healed;
vi. skin condition around wound was generally poor, with some amount of hyperraemia, and skin somewhat thickened;
vii. radiographs done on 12th October 2008 post-op showed bone plate and fixation of the distal ¼ of the right tibia and fibula with a comminuted extracticular tibia/fibula fracture;and
viii. diagnosis of infected distal Tib-fib fracture.

[84] The medical report of Dr. Denton Barnes dated 11th August 2009, provided a comprehensive record of the claimant's treatment at St. Ann's Bay hospital. He had been admitted on 15th may 2008 and presented with:

i. right renal angle tenderness;
ii. abrasions to upper back on right side;
iii. tenderness to upper back on right side;
iv. swollen right leg;
v. tenderness to right leg;
vi. deformity of right leg to the distal third;
vii. 2cm puncture wound on the right leg with bleeding;
viii. obvious deformity of the right leg; and
ix. no distal neurovascular deficit.

[85] A radiograph revealed a grade 1 open fracture of the right distal tibia and multiple soft tissue injuries.

[86] On 19th May 2008 the claimant was discharged on oral antibiotics and analgesics. He was re-admitted on 8th June 2008 and underwent operation on 9th June 2008 (open reduction and internal fixation of the right distal tibia and fibula fixation). He was again discharged on 12th June 2008, on crutches with a protective plaster and to be continued on oral antibiotics.

[87] He was reviewed on 19th June 2008 and complained of pain and bleeding from the operative site. The wound was healing and there was evidence of infection. On 26th June 2008 a further review found a superficial wound infection.

[88] At a further review on 10th July 2008 there was no significant complaint. This was followed by several reviews during which he continued on antibiotics and compression dressing. On 10th December 2008 it was determined that he had a healed fracture and he was advised to start full weight bearing. On 3rd June 2009 he was ambulant full weight bearing. He was also seen on 16th July 2009 and 29th July 2009 at which time his wound had healed well. Dressing was maintained and he continued on antibiotics.

[89] Dr. Denton Barnes furnished a second report on 21st June 2010. He found a 7% impairment of the whole person. The claimant had a hypo-pigmentation of the medial aspect of the right leg and an ulcer which took a significant time to heal. This ulcer could recur and if it did, there would need to be a removal of all implants present.

General Damages

[90] Mrs. Allia Leith-Palmer, counsel for the claimant, relied on the cases of ***Marcella Clarke v Claude Dawkins and Leslie Palmer Claim No. C. L. 2002 C 047*** reported at Khan 6, 54; and ***Douglas Fairweather v Joyce Eloise Campbell Claim No. C. L. 1982 F 059*** reported at Khan 5, 74.

[91] In ***Marcella Clarke,*** the claimant suffered a fractured left humerus and fractured shaft of the pelvis. The pelvis was also shifted from its normal position. She suffered 8% whole person disability. She was hospitalized for almost one (1) month and underwent surgery. On discharge, she had to be lifted and taken home where she remained for six (6) months. She started to use a stick to ambulate seven (7) months

after the accident and did so for almost one (1) month. She returned to hospital for physiotherapy and dressing. She complained about a left hand that was “hook up” and severe pain when she walked. She also could not stand continuously for long periods. Radiographical evidence supported the genuineness of her pain and showed ½ cm shortening of the left lower limb. She was unable to play netball or to wear high heels and endured cryptic remarks over the cause of her appearance. The award for pain, suffering and loss of amenities/general damages was $1,400,000.00. At June 2004, the date of the award, the Consumer Price Index (CPI) was 76.81. Using a CPI of 223 (at January 2015) the award is now $4,064,574.93.

[92] In ***Douglas Fairweather,*** the claimant sustained a fracture of the tibula fibula amongst other injuries; and was assessed as having a permanent functional impairment of between 7-10%. He was awarded $1,300,000.00. At March 1998, the date of the award, the Consumer Price Index (CPI) was 46.43. Using a CPI of 223 (at January 2015) the award is now $6,243,807.88.

[93] Mr. Norman Hill Q.C., counsel for the defendant, cited the cases of ***Roy Douglas v Reid’s Diversified Ltd. et.al*** decided 6th October 1995, reported at Khan 4, 61; and ***Yvonne McKenzie v Marcus South*** decided 30th January 2009, reported at Khan 6, 66.

[94] In ***Roy Douglas***, the claimant sustained compound fracture of medial malleolus of right ankle, fracture of posterior malleolus of right ankle and spinal fracture of distal 5cm of right fibula. The award was $240,000.00. Using a CPI of 223 (at January 2015) the award is now $1,587,188.61.

[95] In ***Yvonne McKenzie***, the claimant sustained a deformed tender left ankle, displaced bimalleolar fracture of the left ankle, and 4% impairment. The award was $1,000,000.00 which updates to $1,633,699.00 using a CPI of 223 (at January 2015).

[96] Of the cases cited by both parties, I find ***Marcella Clarke*** to be most helpful. I do not agree with counsel’s submission that the injuries sustained are less severe than Mr. Howell’s. Marcella Clarke sustained fractures to the left humerus and shaft of the pelvis, as also a shifting of the pelvis. The whole person disability was also higher. She also

experienced severe pain when she walked and could not stand continuously for long periods. Although it appeared that her situation resolved quicker, she was left with a greater impairment and the extent of her injuries was also greater than the claimant's. However, I have also considered that in the instant case, there is medical evidence that the claimant was treated for infection and he was on anti-biotics and analgesics for a considerable period. He was not able to ambulate until about seven (7) months after the incident.

[97] Bearing these factors in mind and making the necessary adjustments, having considered the nature and extent of the claimant's injuries and the period over which he suffered pain and had to be treated for an infection, I am of the view that an award of $3,000,000.000 is appropriate.

Loss of Future Earnings/Handicap on the Labour Market

[98] I am reminded of the decision of the Court of Appeal in ***Icilda Osbourne v George Barned and Others*** **Claim No. 2005 HCV 294** delivered February 17, 2006 that, in an appropriate case, a claimant can receive separate awards for loss of future earnings and loss of earning capacity.

[99] To succeed in a claim under the head of Handicap on the Labour Market, there must be evidence of the claimant's earnings at the time of the trial, evidence of loss of these earnings, evidence of difficulty finding alternative employment and evidence that any subsequent employment would result in diminution of earnings (***Dovan Pommells v George Edwards et al Khans Vol 3,*** pp.138-144).

[100] The definition of loss of future earnings as distinct from loss of future earning capacity, is found in the following oft cited passage from Scarman L.J's dictum in ***Smith v Manchester Corp*** (1974) 17 KIR 1:

> *Loss of future earnings or future earning capacity is usually compounded of two elements. The first is when a victim of an accident finds that he or she can, as a result of the accident, no longer earn his or her pre-accident*

rate of earnings. In such a case there is an existing reduction in earning capacity which can be calculated as an annual sum. It is then perfectly possible to form a view as to the working life of the plaintiff and, taking the usual contingencies into account, to apply to that annual sum of loss of earnings a figure which is considered to be the appropriate number of years' purchase in order to reach a capital figure.

The second element in this type of loss is the weakening of the plaintiff's competitive position in the open labour market: that is to say, should the plaintiff lose her current employment, what are her chances of obtaining comparable employment in the open labour market? The evidence here is plain – that, in the event (which one hopes will never materialise) of her losing her employment with Manchester Corporation she, with a stiff shoulder and a disabled right arm, is going to have to compete in the domestic labour market with women who are physically fully able. This represents a serious weakening of her competitive position in the one market into which she can go to obtain employment. It is for that reason that it is quite wrong to describe this weakness as a 'possible' loss of earning capacity: it is an existing loss: she is already weakened to that extent, though fortunately she is protected for the time being against suffering any financial damage because she does not, at present, have to go into the labour market.

[101] Further clarity on the matter is found in the dictum of Browne LJ in ***Moeliker v A Reyrolle & Co Ltd*** [1977] 1 WLR 132, 140, a case about earning capacity. His Lordship said:

… ***Smith v Manchester Corp*** *is merely an example of an award of damage under a head which has long been recognized – a plaintiff's loss of earning capacity where, as a result of his injury, his chances in the future of getting in the labour market work (or work as well paid as before*

> *the accident) have been diminished by his injury... This head of damage generally arises where a plaintiff is, at the time of trial, in employment, but there is a risk that he may lose this employment at sometime in the future and may then, as a result of his injury, be at a disadvantage in getting another job or equally well paid job. It is a different head of damages from an actual loss of future earnings which can already be proved at the time of trial.*

[102] The requirement for Loss of Future Earnings was also expressed in these terms by Rowe, P in ***Allen and Anor v Watt***, SCCA 74/88:

> *…a plaintiff is not entitled to ask the Court for damages for loss of future earnings without bringing some evidence on which that assessment, however speculative, can be made… to encourage trial judges to make awards based on some principle rather than upon plucking figures out of the air supported only by submission of counsel.*

[103] In Dr. Barnes' medical report of 21st June 2010, he opined, inter-alia:

> …Mr. Howell has hypo-pigment area over the *medial aspect of the right leg can be attributed to a phenomenon called post-phlebiyic syndrome. Reports have highlighted the importance of post-phlebitic syndrome in the fractures of the tibia…Aiken et al…particularly stressed that it may take 5-10 years before significant clinical features chronic venous insufficiency develop. They described other reports that revealed an increasing incidence of post-phlebitic limbs with the passage of time; 13%, 35% and 39% at 3, 9 and 14 years respectively in the tibia shaft fractures. The authors have advised patients and their representative to be cautious of the early settlement of personal injury claims following tibial shaft fractures for it may be that an early final settlement would leave the patient with no redress if post-phlebitic syndrome should develop…Aiken et al 1987 noted limb with femoral and tibia fractures 18% had clinically disabling post-*

phlebitic syndrome including venous ulceration. Mr. Howell has hypo-pigmentation of the medial aspect of the leg; he also has an ulcer which took a significant time to heal. This could possibly be attributed to the presence of post-phlebitic syndrome which he has developed over the background of venous insufficiency of the right lower limb. The early development of venous insufficiency explains the persistent ulcer and the difficulty with healing of the wound.

[104] Counsel also relied on Dr. Dean Wright's prognosis that "*Mr. Howell will have long term complications from his injuries and will require several further surgeries. He is at risk with significant stiffness in his ankle as well as pain in the ankle in the future and degeneration of the ankle secondary to his infection.*"

[105] I must observe that this trial occurred approximately six (6) years since those matters were reported on. The Court might have been better aided, had the doctors been called to update those statements. The assessments are speculative and lacking in specificity, respectively. Dr.Wright, in particular, did not say what the complications from the injuries were likely to be and how they might have impacted the claimant specifically in his ability to work. Neither did he say when, the nature of, likely effects and justification for the "further several surgeries" that the claimant would require. Dr. Wright also said in his prognosis that the claimant "is at risk *with significant stiffness in his ankle as well as pain in the ankle in the future and degeneration of the ankle secondary to his infection.*" He has not aided the Court as to whether any of the surgeries referred to would have been to remedy those medical effects, should they occur.

[106] While I find the doctors' assessments useful in determining the extent of the claimant's injuries, I find them lacking in relation to the future, except for the 7% disability of the whole person as Dr. Barnes found. The ankle, in particular, he gave 6% impairment and for atrophy of the right calf, he gave 1%. However, this does not provide a basis on which I can find that the claimant would be unable to work and earn as he did in the past.

[107] The claimant, in his witness statement, three (3) to four (4) years after the medical reports, said: “even today I feel pains. I have these pains especially in the nights when I am ready to go to bed. In the mornings I wake up with my leg stiff and I have to work it out before the pain ease off. When I walk for long my heel hurts me and when I stand in one place for too long, my foot starts to swell. My ankle is always swollen. I cannot put too much pressure on my foot. My foot is deformed and I now walk with a limp”.

[108] I take note that at the trial, nearly two (2) years later, there was no medical or other evidence in relation to these complaints and whether they had persisted and if they did, the .impact they would have had on his ability to work. Any findings by me in this regard would be speculative. Furthermore, proximate to the time of making these statements, he had been working [August 2013], according to the witness statement.

[109] I have also considered counsel’s submission, in reliance on paragraphs 17 and 18 of the claimant’s witness statement, that the claimant had established that he was unable to work effectively as a manual labourer.

[110] I find that the claimant would have been unable to work as a labourer up to seven (7) months after the accident because he had been given medical advice not to weight bear on the leg but since then there has been no credible evidence that he has been unable to work as a labourer or any similar vocation on account of his injury.

[111] In his witness statement, the claimant said: “I only started working again August of this year [2013]. It is really a part-time job. I do not know if I will be able to manage this job for too long because I cannot stay home and do nothing. After leaving work I am normally in pain but I try to tough it out. Working as a handyman was hard before my accident and now that I have an injured leg and I feel pains often work is much harder.”

[112] There was no evidence as to the nature of the part-time job, the payment he received, when exactly he stopped working and why. In the absence of information as to why the employment did not continue, and the absence of evidence in relation to the

current effects of his injury, I see no basis for finding that he is incapable of working or finding suitable employment should the need or opportunity arise.

[113] In cross-examination, counsel asked whether the claimant had worked since the accident. His answer was: "one week this year [2015]…a man ah deck a house, mi pass an mi get a week work." Counsel then asked whether he could not find anyone to hire him and he said, "No".

[114] This evidence does not establish any inability to work as a labourer on account of the injury nor does it assist the Court in determining what efforts were made by the claimant to find stable employment or his prospects. It, however, establishes an inconsistency in his evidence in relation to when he worked, since in the witness statement he said he had started to work in August 2013 but told counsel that since the accident he had only worked for one week in 2015.

[115] The aim of an award of damages is to restore the claimant's pre-accident status by providing a sum which, as far as possible, equates to the income which he would have earned during the period he is unable to earn as a consequence of the injuries that have been caused by the defendant's negligence. Based on the requirements outlined in the authorities and having considered that there is no credible evidence that the claimant's injury will affect his ability to earn a living in his usual socio-economic environment, I make no award under the heading of handicap on the labour market and loss of future income.

Special Damages

[116] It is a general principle that special damages must be specifically pleaded and strictly proven. However, failure to do so is not necessarily fatal to a claim. The Court is expected to look at all the evidence offered to substantiate the claim, however tenuous each aspect may be (***Dalton Wilson v Raymond Reid SC Civ. App*. no 14/2005** per Smith J.A. at p.12).

I. Loss of Earnings

[117] Dr. Barne's report states that the claimant was advised to start full weight bearing at seven (7) months after the accident and that a year after he was ambulant full weight bearing. Subsequent to that, in July 2009, he had two screws removed. The doctor observed that the wound was healing well and claimant had been advised to continue full weight bearing to get back to full activity. This suggests that there was some continued incapacitation. There was no evidence as to how long he was incapacitated but when he was reviewed last, in June 2010, the doctor said that he had delayed union but a united fracture of the right distal tibia.

[118] I find that there is a basis for an award under the head of Loss of Earnings. I also find that it is reasonable to make the award for up to the time of the last medical report which was approximately two years after the accident.

[119] It was proved that at the time of injury, the claimant's income was $3,740 per week. There is evidence that he had been paid four months full salary plus two months half salary and for another month he received $935.00.

[120] Accordingly, he will be awarded $388,960.00 less $64,515.00. The final award under this head is therefore $324,445.00

II. Medical Expenses

[121] I award $108,106.00 for medical expenses, as proved by the agreed evidence.

III. Transportation

[122] It is not in issue that the claimant made several visits to the doctor. He said that $600 was paid to a taxi for each round trip. He did not support the evidence but it is not expected that he would have received receipts for taxi fare. I have considered that he was not ambulatory for a long period and will make an award for thirty-three (33) trips which amounts to $20,000.00 (33 x $600.00).

I. Household Help

[123] He gave evidence that the cost of household help was $1300 but was unable to say how often he received such help. I have considered that he was advised to begin weight bearing about six months after the accident. Accordingly I will make an award for household help, once per week for 24 weeks. The award is $31, 200.

Orders

[124] Accordingly, I make the following orders:

1. General Damages for pain and suffering and loss of amenities in the sum of $3,000,000 with interest at a rate of 3% per annum from the date of service of the claim to the date of judgment.
2. Loss of Earnings in the sum of $324,445.00.
3. Other Special Damages (medical expenses, transportation and household help) in the sum of $159,306.00 with interest at a rate of 3% per annum from the date of accident to the date of judgment.
4. Costs to the claimant against the defendant to be taxed if not agreed.