

IN THE EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF ST CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

IN THE HIGH COURT OF JUSTICE

CLAIM NO. NEVHCV2022/0028

BETWEEN:

JUAN ELIGIO GUZMAN GIL

Claimant

And

MOVE AND GO CONSTRUCTION LTD

Defendant

Appearances:

Ms. Chante Francis for the Claimant

Ms. Kurlyn Merchant and Ms. Aymah George for the Defendant

2024: September 24 & 25
October 31

JUDGMENT

- [1] **THOMPSON JR. J:** Everyone agrees that on June 25, 2018, the Claimant was working on the Defendant's construction project at the Medical University of the Americas at Potworks, Nevis. The parties agree that the Claimant had started work with the Defendant only 4 days before.
- [2] It was common ground that the Claimant was standing on a beam removing the form ply that encased the beam, with the help of a steel bar, when he fell 9 or 10 feet to the ground below. This trial was focused on the narrow issues of how the Claimant fell and who is responsible for the Claimant's fall since it appears that the Claimant sustained serious injuries as a result of the fall.
- [3] Everyone agrees for the Claimant's claim to succeed he must establish that the Defendant owed him a duty of care, that duty was breached, damage was caused to the Claimant as a result of the breach and that it was foreseeable that such damage was likely to be caused. These are trite principles of negligence and not disputed by the parties. Everyone agreed that a duty of care was owed and that

the Claimant sustained personal injuries¹ and that it was foreseeable that damage may be caused. Therefore, the only issues for this court to determine was

- (i) whether that duty was breached and
- (ii) whether the Claimant failed to take sufficient care for himself such that he was partially to blame for the damage he sustained

[4] The Claimant called two witnesses in support of his case, himself and a former co-worker, a Mr. Horacio Nisbett.

[5] I propose to deal first with Mr. Nisbett's evidence since Mr. Nisbett provided the clearest account of what transpired. For the avoidance of doubt this court has also considered the examination in chief and cross examination of all of the witnesses but Mr. Nisbett's evidence sharply brings into focus what transpired on June 25th, 2018.

[6] At paragraph 9 of his witness statement, Mr. Nisbett said:

"At the time of his fall, Juan was standing on top of the cement beam and walking along the beam removing the wood from the beams that were used to hold the cement. He was removing the wood with a steel bar. Juan had to walk across the beams and balance on the beams because there was no scaffolding in place to gain access to the boards that needed to be removed all the way at the top of the second story of the building. Juan had to stand on the edge of the beams to be able to do it"

[7] In cross-examination, Mr. Nisbett said that he witnessed the Claimant's fall. According to him, he saw the Claimant fall because the Claimant almost landed on top of him. According to him, the Claimant had a crowbar in his hand and was applying some power to take the wood off of the beam. That wood was at the side of the beam and that it was when the Claimant was pulling out the wood he fell. It was his evidence that the wood fell over him. Mr. Nisbett could not say how the Claimant got up onto the beam but he knew that he saw him up on the beam, walking on the beam and taking the wood or form ply off the beam.

[8] Mr. Nisbett was a soft spoken and mild mannered witness who came to life when it was suggested to him that he had not seen the Claimant's fall. His entire demeanor changed when he spoke of the fall and this court has little difficulty in accepting his evidence that he saw the Claimant's fall.

[9] Ms. Francis, counsel for the Claimant argued that this court can infer from Mr. Nisbett's evidence that the Claimant lost his balance and fell from the beam when he was applying some 'power' to take off the form ply from the beam. It is important to note that both the Claimant and Mr. Nisbett are native Spanish speakers. The court was thus assisted to understand their evidence with the assistance of an interpreter.

[10] On the other hand, Ms. Merchant argued that how exactly the Claimant fell from the beam was a 'grey area' since it was not precisely explained how the Claimant fell. According to her, it was

¹ This was a trial on liability so that the nature and extent of the Claimant's pain and suffering and loss of amenities were for another day.

not clear how the Claimant even got onto the beam in the first place. Additionally, Ms. Merchant for the Defendant argued that the Defendant's witnesses are clear on the following issues:

- (i) That the Claimant was specifically directed by Mr. Hanley, the Defendant's primary witness not to climb onto the scaffolding or the beam
- (ii) That the Claimant's role on the job site was to collect the form ply when removed by others (Jason Browne and "Davis") and he was thus performing a job that he was not required to undertake.

Court's Findings

[11] This Court accepts the evidence of Mr. Horacio Nisbett without reservation. He was not shaken in cross examination and he provided the clearest account of what the Claimant was doing and how he was doing it when he fell. Mr. Nisbett's explanation that the Claimant applied some 'power' with the metal bar, to take the form ply off of the beam suggests that he lost his balance while pulling at the form ply on the beam. Mr. Nisbett's evidence that the Claimant almost landed on him confirms that he had the best view of the Claimant's fall.

[12] According to the Defendant, there was a 5 foot high metal scaffolding in the vicinity of the beam. In this court's view, if there was a 5 foot high metal scaffolding which allowed the Claimant to climb onto the beam and the Claimant was about 6 feet tall then there would be 2 feet to spare if he had stood on the scaffolding to remove the form ply since everyone agrees that the beam was 9 -10 feet from the ground. If that is correct there would be no need for the Claimant to stand on the beam itself to remove the form ply because he could stand on the scaffolding for this purpose.

[13] In other words, if the Defendant is correct, the Claimant could have stood on the scaffolding in order to remove the form ply from the beam. Mr. Nisbett's evidence in this regard is critical. According to Mr. Nisbett, he did not recall seeing any scaffolding in the area that the Claimant was working. It was Mr. Nisbett's evidence that the only scaffolding that he saw was the makeshift kind made by stacking blocks and a plank on top.

[14] In this regard, Jason Browne, a witness for the Defendant testified that they had metal scaffolding on site that the metal scaffolding would run the length of the area that they were working. To use Mr. Browne's words, they would 'drift' the scaffolding as they worked and they would build their own makeshift scaffolding to cover any areas that the metal scaffolding did not cover.

[15] This court has little difficulty in finding that while there was metal scaffolding on site, there was no metal scaffolding in the vicinity of the beam that the Claimant fell from. There is no reason for Mr. Nisbett to lie about the scaffolding since the scaffolding and its absence or presence was not the focus of his evidence. His evidence confirmed the critical issue of how the Claimant fell and what he was doing when he fell. This court is satisfied that while there was scaffolding on site, there was no metal scaffolding in close proximity to where the Claimant was removing the form ply from the beam.

[16] Considerable time and energy was devoted to determining where exactly in the building the Claimant fell. No photograph of the interior of the building was tendered in evidence and the singular

photograph of the building's exterior was extremely unhelpful in determining where the Claimant fell. No diagram of the room or its dimensions was tendered in evidence although Ms. Francis included a diagram in her post trial submissions. The fact that the diagram appeared in the Claimant's post-trial submissions begged the question of why no diagram had hitherto appeared. Suffice it to say, this court could not attach any weight to the diagrams in Ms. Francis's submissions as they were not agreed with Ms. Merchant.

[17] It was open to both sides, in marshalling their case to agree the dimensions of the room (these could not have been disputed) and provide as many or as few diagrams as they thought would be of assistance to the court. For reasons known only to them no such diagrams were provided in order to assist this court in determining what exactly happened at Potworks, six years ago.

[18] Both the Claimant and his witness, Mr. Nisbett were clear that while there was scaffolding there was none present in close proximity to the beam. Mr. Browne's evidence that the Claimant was told by Mr. Hanley, that he should not be on the scaffolding but was authorized to remove the ply from the beam requires deeper analysis.

[19] Standing on the scaffolding would appear to be the safest way to remove the form ply from the beam. Moving onto the beam which is higher in the air and presumably smaller than the width of the scaffolding would mean that the system of work designed for removing the form ply would be unsafe if you were standing on the self-same beam that you were trying to remove the ply from. If Jason Browne's evidence is to be believed on this issue it would mean that Mr. Hanley had expressly authorized the Claimant to perform his work in an unsafe manner.

[20] If Jason Browne is not speaking the truth on this issue then it is difficult to discern the purpose and value of any lie since Mr. Browne is the Defendant's witness. In other words, if Jason Browne is telling an untruth it would mean that the Claimant disobeyed clear instructions to remain on the scaffolding while removing the ply from the beam. Mr. Hanley's own statement to the social security, in which he detailed the circumstances of the accident was to the effect that the Claimant was on the beam while removing form ply from the beam. If it were true that the Claimant was on the scaffolding while removing the form ply then it stands to reason that Mr. Hanley would have said so when explaining the accident to social security.

[21] In this court's view, it is more likely than not that Mr. Hanley accurately represented to social security what had transpired. That is to say, that the Claimant was removing form ply from the beam that he was standing on. If everyone agrees that this is what the Claimant was doing then that would appear to be an unsafe system of doing the work of removing the form ply from the beam.

[22] In this court's view, it is inconceivable that there was a 5 foot high scaffolding erected below the beam which the Claimant abandoned in order to climb onto the beam to remove the form ply. I believe the evidence of the Claimant and his witness on the absence of metal scaffolding and find that it was more likely than not that there was a makeshift scaffolding with blocks and wood which the Claimant climbed on to get onto the beam.

[23] The Defendant's witness (Mr. Jason Browne) who indicated that the Claimant was prohibited from being on the scaffolding but was required to remove the wood from the beam only confirms the case for the Claimant. Why would the Claimant be prohibited from being on the scaffolding if he had to remove the wood from the beam? The only logical inference to be drawn from this evidence is that

there was no scaffolding or that the scaffolding was makeshift and thus dangerous. It is inconceivable that the Claimant would forego the opportunity to stand on a 5 foot tall metal scaffolding and opt to climb onto the beam.

[24] In this court's view, it is important to determine the exact nature of the system of the Claimant's work. If the Claimant was required to stand on 5 foot high scaffolding and remove form ply from the beam then a harness would be surplus to requirements. The risk of serious harm from a fall from 5 feet was fairly minimal.

[25] On the other hand, if the system of work required the Claimant to work from 10 feet off the ground while standing on the beam would have meant that the risk of harm was significantly greater. None of the defence witnesses indicated that they stood on the scaffolding to remove the ply from the beam. The effect of their evidence was that they would have stood on the beam and did the exact same thing that the Claimant did. If that is correct, the narrow question for this court is whether the removal of form ply from a beam while standing on the beam without any scaffolding is a safe system of work?

[26] In cross-examination, a hypothetical question was put to Mr. Browne. That question asked Mr. Browne to consider what would have happened to the Claimant if he had been wearing a safety harness while on the beam. Mr. Browne's answer was both telling and insightful. According to him,

"If Mr. Guzman was wearing a proper safety harness and he had fallen from the beam then it depends. Being on the beam, the safety harness would have to be tied short enough to prevent him from going all the way down. The beam would have steel sticking out then he wouldn't have had much room to maneuver to do his work. The harness could only have been attached to the scaffolding or the beam."

[27] Tellingly, Mr. Browne did not say that a harness was unnecessary or that a harness would not have made a difference. According to him, a harness would have reduced the Claimant's maneuverability to do the work but there was no suggestion that a harness would not have mitigated the risk of a fall. Moreover, Mr. Browne recognized that any harness would have to be attached to either the scaffolding or the beam. There was no evidence that it was impossible or unwise for the Defendant to have organized its system for the removal of form ply in this way.

[28] In this court's view, the removal of form ply from a beam 10 feet in the air while standing on that beam without any safety equipment was not a safe system of work. There is no dispute that Lord Greene's definition of safe system of work in Speed v Thomas Swift and Co Ltd [1943] 1 All E.R. 539 as set out below, has been cited with approval in numerous cases:

"In cases where the work to be performed is regular and uniform as in the ordinary factory or mine, provision of a safe system for the type or class of work and provision of a safe system for the individual job will in general be the same, although a particular occurrence or emergency may call for special precautions. But in many kinds of work there is no such regularity or uniformity and what is a safe system can only be determined in the light of the actual situation on the spot at the relevant time. A system of working may consist of a number of elements and what exactly it must include will, it seems to me, depend entirely on the facts of the particular case. For example, one element may be the sequence in which a particular job ought to be carried out, e.g., in a combined job of demolition

and excavation it may be dangerous to begin to excavate before a neighbouring structure is demolished. The decision as to which task is to be performed first appears to me to lie within the master's province and to be a matter of system. It is part of the lay-out of the job. It is the master's duty to decide what the lay-out of the job shall be and in doing so he must pay proper regard to the conditions affecting the safety of his men. The layout of the job is logically prior in time to the commencement of the work although, of course, it may have to be modified as the work proceeds, e.g., if in the course of the work a neighbouring bank threatens to collapse upon the workmen, the taking of proper steps to shore it up is, it appears to me, a matter of system—it is logically prior in time to the continuance of the work and is concerned not with the work itself, but with the safety of the conditions in which it is performed. I do not venture to suggest a definition of what is meant by system. But it includes, in my opinion, or may include according to circumstances, such matters as the physical lay-out of the job—the setting of the stage, so to speak—the sequence in which the work is to be carried out, the provision in proper cases of warnings and notices and the issue of special instructions. A system may be adequate for the whole course of the job or it may have to be modified or improved to meet circumstances which arise: such modifications or improvements appear to me equally to fall under the head of system.”

[29] The late Lord Greene’s foregoing example of workmen engaged in the demolition and excavation of a structure is instructive. In Lord Greene’s example, if there was a risk that a neighbouring structure might collapse on the workmen, it fell to the employer, as a matter ‘logically prior in time to the continuance of the work’ to ensure the safety of the conditions of the work to ‘shore up’ the neighbouring structure. That analysis is as true today as it was in April 1943. That analysis is best captured by the aphorism, safety first.

[30] Clearly the risk of harm would not be the same for the removal of all form ply from all beams but beams that were 10 feet higher or more which carried the potential risk of harm to an employee required some degree of precaution from the employer in carrying out the work. In this court’s view, the risk of an employee overbalancing while using a steel bar to separate the ply from the nails that connected the ply to the concrete was manifest. The higher the beam the more dangerous the work since the risk of harm from falling was exponentially greater the higher in the air you were. The only way to mitigate that risk was by safety equipment and it is clear that the Defendant gave no instructions to their employees to wear safety equipment or use rope or other material to create a makeshift harness to mitigate this risk.

[31] The Defendant’s assertions that there was rope available on site could not reasonably meet the Defendant’s legal obligation to ‘modify or improve’ the circumstances as they arise. In this court’s view, it is telling that the Defendant led no evidence from their witnesses to address the issue of the risks inherent in removing form ply from a beam while standing on the beam. There was no onus on the Claimant to ask the Defendant’s witnesses about this issue. In this court’s view, it fell to the Defendant to justify the safety and adequacy of their system of work. After all, it was their system of work that was being challenged by the Claimant. This court makes it clear that it does not cast any burden on the Defendant to prove anything but notes that the Defendant’s case does not expressly address the safety of removing form ply from a beam while standing on that beam.

[32] The Defendant’s case that there was rope on site, though no instruction to use rope for the purpose of securing oneself is telling. The Defendant could not discharge their duty to create a safe system of work by simply making rope available on site to its employees. Rope, unlike a hard hat is

not safety equipment. A rope can be used to create a safety harness and can thus become safety equipment but rope in and of itself is not safety equipment. A harness is analogous to a hard hat since it is a specific bit of equipment designed to mitigate the risk of harm inherent in conducting work while 10 feet or more from the ground. In this court's view, the position would be different if rope were provided and clear instructions given for its use as safety equipment. Here no such instructions accompanied the evidence that there was rope on site and as such I am satisfied that the Claimant has discharged the burden of proving on a balance of probabilities its particulars of negligence more fully described at paragraph 12 of the Claimant's Statement of Claim.

Contributory Negligence

[33] As a starting point, Ms. Francis should be commended for her frank concession that her client was at least partially at fault (to the extent of 33%) for the injuries he sustained. If the Claimant accepts that he was at least partially at fault for the injuries he sustained means that this court's task in determining the extent of any contributory negligence is immeasurably easier. This is not to say that this court is bound to accept counsel's submissions but a concession of some degree of contributory negligence means this court is thus focused on an apportionment exercise.

[34] Section 2(2) of the Law Reform (Miscellaneous Provisions) Act provides that:

"Where any person suffers damage as the result partly of his or her own fault and partly of the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable, having regard to the claimant's share in the responsibility for the damage."

[35] This court's task is to determine the extent to which the damages recoverable by the Claimant are reduced having regard to the Claimant's share in the responsibility for the damage. So that for example in Reeves v Metropolitan Police Commissioner [2000] 1 A.C. 360 while the authorities have a duty to protect a prisoner from taking his own life (he is after all in their exclusive care and control), if a prisoner commits suicide any damages should be reduced by 50% since the prisoner has a concomitant obligation to look out for himself.

[36] The question of contributory negligence requires an answer to the narrow question of whose act caused the harm? As long ago as December 1921, Viscount Birkenhead in delivering the opinion of the House of Lords in The Volute [1922] A.C. 129 that

"...I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it."

[37] That statement of the law predated the 1945 Law Reform (Contributory Negligence) Act but there is no reason to doubt its efficacy today. Contributory negligence requires a common sense assessment of what was the cause of the harm suffered by the claimant.

[38] Mr. Justice Pearson (as he then was) in Ginty v Belmont Building Supplies Ltd [1959] 1 All E.R. 414, at page 424 neatly summarized the relevant principles on contributory negligence in an employer/employee relationship in the following helpful terms:

"In my view, the important and fundamental question in a case like this is not whether there was a delegation, but simply the usual question: Whose fault was it? I shall refer to some of the decided cases to demonstrate what I have said. If the answer to that question is that in substance and reality the accident was solely due to the fault of the plaintiff, so that he was the sole author of his own wrong, he is disentitled to recover. But that has to be applied to the particular case and it is not necessarily conclusive for the employer to show that it was a wrongful act of the employee plaintiff which caused the accident. It might also appear from the evidence that something was done or omitted by the employer which caused or contributed to the accident; there may have been a lack of proper supervision or lack of proper instructions; the employer may have employed for this purpose some insufficiently experienced men, or he may in the past have acquiesced in some wrong behaviour on the part of the men. Therefore, if one finds that the immediate and direct cause of the accident was some wrongful act of the man, that is not decisive. One has to inquire whether the fault of the employer under the statutory regulations consists of, and is co-extensive with, the wrongful act of the employee. If there is some fault on the part of the employer which goes beyond or is independent of the wrongful act of the employee, and was a cause of the accident, the employer has some liability."

[39] The facts of Ginty are instructive. Mr. Ginty was, an experienced asbestos sheeter. He, was employed by the first defendant which carried on business as roofing contractors. Mr. Ginty had been instructed and understood that he was not to work on asbestos roofs without using boards.

[40] On Thursday, 29 July 1954, Mr. Ginty and another coworker went to the second defendant's factory to strip the existing asbestos roof replace it with new asbestos sheeting. The old asbestos sheeting was defective and Mr. Ginty had been told of its unsafe condition by his employer. On arrival at the 2nd defendant's factory, Mr. Ginty and his co-worker were taken to the builder's yard where they were supplied with a ladder and were shown the different kinds of boards and were told to help themselves to what they wanted.

[41] On Friday, 30 July employees of the second defendant noticed that Mr. Ginty was working on the roof without using boards, and they then took two duckboards from the builder's yard and placed them by the wall on the side where Mr. Ginty was working and where they could be seen by him. They did not tell Mr. Ginty or his co-worker that they had done this. On Tuesday, 3 August Mr. Ginty went on to the roof without using boards, fell through the roof and was seriously injured.

[42] Mr. Justice Pearson held that Mr. Ginty was wholly at fault and his claim for damages against the Defendants must fail. In his view, Mr. Ginty had decided to take the risk of not using the boards that had been provided and was thus wholly responsible for the harm that he had sustained.

[43] In the present case, while the Defendant had rope on site that rope was not provided for the purpose of safety or taking precautions to ensure that the Claimant or his co-workers would not sustain harm if they fell. Simply making rope available on site could not suffice to discharge the Defendant's responsibility to the Claimant. So that even if the Claimant had decided to run the risk of falling from the beam, the Defendant's failure to expressly provide safety equipment meant that the Defendant's failures were co-extensive with the risks that the Claimant opted to run.

[44] Ultimately, *“Contributory negligence is a man's carelessness in looking after his own safety. He is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man, he might be hurt himself: see Jones v. Livox Quarries Ltd. [1952] 2 Q.B. 608.”*

[45] At paragraph 5 of his witness statement the Claimant confirmed that in order to get the job of bricklayer at a company in Cuba in 1987 he had to do an evaluation which tested his knowledge of bricklaying and that type of work. At paragraph 7 of his witness statement, the Claimant indicated that in 1988 he had trained in a trade school in his native Cuba where he had obtained evaluation certificates in bricklaying, plumbing and painting.

[46] Even without the precise details of the Claimant's curricula in bricklaying in Cuba, it would not be unreasonable to presume that safety would have formed a part of the Claimant's course of study since bricks are stacked on top of each other to create structures. It is inconceivable that any evaluation of bricklaying would have not considered the safest methods of doing so. As a matter of law, the Claimant's knowledge of an existing danger is an important element in determining whether the Claimant has been guilty of contributory negligence. The question is not whether the Claimant realized the danger but whether the facts which he knew would have caused a reasonable person in his position to realize the danger. See A.C. Billings & Sons Ltd v Riden [1958] A.C. 240.

[47] In determining whether a reasonable person in the Claimant's shoes would have realized the risk of danger, the law requires a court to assess whether it was foreseeable that harm would be caused to the Claimant if he did not act as a reasonably prudent person. There can be no real argument that it was reasonably foreseeable that the Claimant could have sustained serious harm if he fell from the beam while removing the form ply. The dangers inherent in that work would have been obvious to the reasonably prudent man, much less the trained bricklayer, plumber and painter.

[48] It is accepted that the Claimant could not have been required to judge to a nicety the force required to remove the form ply from the concrete but he did have a number of options open to him. He could for instance have placed the crowbar between the wood and the concrete and then hammered the crowbar into the space created. This would have been more time consuming but serves as one clear example of the Claimant's failure to look out for himself.

[49] The Claimant does not dispute that there were other workers on the job site who also performed this work. It was thus open to him to decline to embark on what obviously dangerous work. This Court accepts that it is easy to say with the benefit of hindsight what could or should have happened but there was no suggestion that the Claimant was compelled to do this work or any evidence that he was concerned that his job was at risk. He had after all been working with the Defendant company for 4 days and according to him, it was the Defendant who had sought him out and offered him employment. In those circumstances, it was open to the Claimant to decline to perform this dangerous work.

[50] At one stage of the Claimant's cross examination, Mr. Kelsick KC invited this court to break the Claimant's cross examination so that he (Mr. Kelsick KC) could speak with the Claimant to instruct him to answer the questions being asked of him by Ms. Merchant. This court did not accede to Mr. Kelsick's request but the fact that the request was even made speaks volumes on the Claimant's disposition.

[51] In short, the Claimant seemed to this court to be a forthright and opinionated man possessed of strong views and a domineering tone. The Claimant did not strike this court as the sort of man who could be compelled to do work that he did not wish to do.

[52] The argument by Ms. Francis that the Claimant in 2024 is not the same person as he was in 2018 could not hold water. He may have been physically diminished but his strident tone did not appear to be a recent invention in response to his injuries. At the time of the accident, the Claimant was aged 49 having been born on December 29th, 1968. He was extremely animated and forceful in his exchanges with Ms. Merchant and even when communicating with the translator. The suggestion that his forthright manner was a recent disposition defied belief.

[53] On the other hand, it is accepted there was some inequality of bargaining power between the Claimant and the Defendant. I do not believe the Claimant when he said that the Defendant sought him out or agreed to pay him more than he as paying workmen such as Mr. Nisbett who had been working for him for considerably longer than the Claimant. I am satisfied that the Claimant wanted to work for the Defendant in order to earn more money to take care of his relatives in Cuba.

[54] It is important to note that the Claimant's combative tone when giving evidence is not automatically synonymous with mendaciousness. It is clear that the Claimant had strong views about the Defendant's decision to defend these proceedings and those views informed the manner in which he gave his evidence.

[55] In this court's view, the Claimant made a conscious decision to climb onto a beam that was 10 feet in the air while bereft of safety equipment and attempt to remove form ply that was nailed into concrete. Even if the beam were located on the ground, there was a risk that removing the form ply from the concrete would require significant effort. The risk of harm to the Claimant if he were 10 feet in the air should have been immediately obvious and apparent to the Claimant.

[56] As a matter of law, the Claimant must take care of himself. At paragraph 31 of his witness statement he stated that he "was being as careful as he could possibly have been." There was no evidence led by the Claimant on exactly what this care involved.

[57] Aside from that bald assertion, there was no evidence that he did take such care. He did not say that he was careful or even mindful of the potential danger in embarking on this work. The language barrier could not excuse the Claimant's failure to say so. It may well be thought that if the question were asked of him, he would have answered that of course he was being careful but this court cannot presume that he was when he did not say so.

[58] Moreover, the Claimant's own witness indicated that the Claimant fell when he applied 'some power' to take the form ply off of the beam. That suggestion of power is at odds with the suggestion that the Claimant was acting carefully. At the very least, he applied too much power, at most he miscalculated the amount of power required and thus failed to take sufficient care for himself. The degree of care that the Claimant was exercising was not expounded upon by the Claimant or his witness.

[59] For example, there was no indication from the Claimant on how much of the removal of the form ply he had completed before he fell or how difficult or easy he found the task to be or whether he came close to falling at any stage before he fell. There was no evidence for example that the form ply was substandard and thus fell apart in the Claimant's hands. These matters were not explored in his examination in chief. In this court's view, too much energy was expended on utterly irrelevant and meaningless skirmishes that did not assist the Claimant's case.

[60] In Boyle v Kodak Ltd [1969] 2 All E.R. 439, Lord Reid opined that where neither party was gravely to blame equal apportionment was the fairest course. In Cork v Kirby Maclean Ltd [1952] 2 All E.R. 402, Lord Singleton was of the view that it was not possible to say that responsibility for the damage is more on one side than the other and thus reduced the damages awarded to the plaintiff in that case by 50%. In Cakebread v Hopping Brothers Ltd [1947] K.B. 641, one of the first cases in which the UK Contributory Negligence was judicially interpreted, Lord Tucker was of the view that a 50% apportionment was warranted.

[61] It is accepted that every decision on apportionment in cases of contributory negligence is a decision with regard to the facts of each individual case. Nevertheless, it is possible to discern from each of the foregoing cases a golden thread that underpins the 50/50 apportionment.

[62] So that for example in Cork v McLean Ltd, the epileptic employee who failed to disclose his epilepsy and fell to his death from a platform that was too small and had no guard rails or toe boards was as much to blame as his employers who provided the inadequate equipment. In Cakebread v Hopping Ltd the safety guard on the machine was incapable of being adjusted to comply with the relevant regulation but the employee was aware that the guard was inadequate and opted to work with the unsafe machine meant that both sides were equally at fault when the plaintiff was injured by the machine. These cases both demonstrate that there were co-extensive responsibilities on both plaintiff and defendant. The employer had an obligation to ensure that its system of work was safe, the employee had an obligation to ensure that he took care for himself.

[63] In this court's view, while the Claimant was at fault in failing to take care of himself, the Defendant's system of work for removing form ply from concrete was unsafe. To put it bluntly, the Claimant's decision to climb onto the beam and perform the work compounded the bad situation that had been first created by his employer. The former and latter were inextricably linked but the Defendant's primary breach of its duty to the Claimant then created the Claimant's failure to take care of himself. The Defendant's argument that the Claimant was 80% to blame for his injuries does not fairly accept the Defendant's duty to its employees to create a safe system of work.

[64] Ultimately, a 50% finding of contributory negligence would excuse the employer's fundamental duty to ensure that its system of carrying out the work was safe. In those circumstances a 40% finding of contributory negligence on the part of the Claimant is just and equitable having regard to the Claimant's share in the responsibility for the damage he sustained.

[65] For the avoidance of doubt, this court has fully considered the oral and written arguments deployed before it in this matter. This court is not required to rule on every contested issue of fact before it so that for example the inferences to be drawn from the inconsistency between Mr. Hanley's witness statement and his pleaded

[66] case ultimately paled into insignificance since his credibility was not central to the issues which this court had to decide. Mr. Hanley did not see the Claimant's fall and it is entirely possible that he can be both applauded and pilloried for his decision to regularize the Claimant's social security status and insurance coverage at NAGICO

[67] The following comments are ancillary to this court's decision but hard experience has shown that the human condition is rarely lived in absolute colors of black and white. Persons act from mixed motives, that is to say, it was entirely possible that the Defendant wanted to avoid liability to the Claimant while at the same time allowing the Claimant to have the benefit of the social security sums which he has been receiving for the past 6 years.

[68] Therefore, the Claimant is entitled to damages for the injuries that he sustained but such damages are to be reduced by 40% for his failure to take sufficient care for himself.

Costs

[69] Notwithstanding the 40% reduction in the damages payable to the Claimant, he is entitled his prescribed costs of these proceedings.

Patrick Thompson Jr.

Resident High Court Judge

By the Court

Registrar