

**IN THE SUPREME COURT OF GRENADA AND THE
WEST INDIES ASSOCIATED STATES SUPREME COURT
(CIVIL)**

CIVIL CASE NO. GDAHCV2001/0629

HERMAN FORDE

CLAIMANT

AND

GRENADA STEEL WORKS LTD

DEFENDANT

Appearances:

Mrs Celia Edwards for the claimant;
Mr Alban John for the defendant.

2004: 22 March, 7 April

JUDGMENT

- [1] **BELLE, J:** The claimant in this case claims that he is now disabled as a result of an accident which took place on 31st May 2001 at the premises of the Defendant Grenada Steel Works Limited on Dusty Highway in the parish of Saint George in Grenada. He claims damages against the Defendant for negligence caused by the servant or agent of the defendant. The case raises the issues, (1) liability for negligence, (2) vicarious liability and (3) contributory negligence I will deal with the issues in that order. But first I should set out the facts and subject those facts to some analysis.

Facts

- [2] The Claimant says that on the 31st May 2001 he drove a truck registration number TM606 to the defendant's premises to collect and transport roofing sheets also described as steel and galvanized sheets, manufactured by the defendant company for a homeowner who had hired his services. He said that he was directed by the defendant's servants to drive

the truck into the defendant's warehouse where the roofing material was to be loaded by forklift operated by the defendant's operator. This evidence was corroborated by all of the other witnesses in the case.

- [3] Based on instructions received the claimant parked his truck next to the forklift laden with the galvanized sheets. The forklift was on the right side of the truck. He next mounted the tray of the truck and awaited the loading of the roofing material. What the claimant said he did next is important. The claimant said he mounted the tray of the truck to assist in tying the material after it had been loaded. The defendant's forklift operator then got out of the forklift and tied the galvanized sheets to the rear of the truck, he gave the other end of the rope to the truck's conductor to hold and then returned to the forklift which Leslie Lewis and Winston Alexander agree was about 4 feet away from the truck. Alexander next positioned the forklift to load the material by driving forward and placing the material resting partly on the cab and partly on the forklift's fork. He then reversed the forklift tilting the fork to complete the loading process, and it was at this point that the galvanized slipped breaking the rope he had given to the conductor to hold and trapping the claimant at the back of the tray, hanging from the tray badly injured.

ANALYSIS OF THE FACTS

- [4] The claimant says that the forklift driver gave him no warning that he was about to load the material and instead lowered the boom which controls the operations of the forklift and the roofing material slipped off the forklift blade. The defendant's employees agree that no warning was given. The Claimant says this all happened in a "split second" and as he saw the material slipping he ran to the back of the truck bed to try to get off the truck but he got stuck at the back of the truck by the materials. But the defence witness Danny Smith contradicts this "split second" account of the facts. Mr Smith answered questions from counsel for the claimant and from the court in a forthright manner, and I believe his account of the accident. I should say that it comes very close to the account given by Leslie Lewis. It seems to me that the forklift driver would have had to manoeuvre his forklift to a position where loading was possible and then position the fork itself with the galvanized sheets to rest them in the tray of the truck. This in my view could not have been

done in a "split second". I therefore accept that it was on noticing the galvanized slipping that the claimant tried to get away from the falling sheets and got caught at the back of the tray of the truck. But this did not happen in a "split second."

- [5] The claimant says that he watched the forklift driver Alexander get out of the forklift and tie the rope at the back of the truck he then observed him give the other end of the rope to the conductor to hold and then he got back into the forklift. He never said that he had any difficulty observing the forklift driver's movements. He gave evidence that the forklift's engine had been running from the time he entered the warehouse to collect the galvanized sheets. So where was the surprise that the sheets were loaded at the time they were? I therefore find that the slippage was surprising to the claimant but the actual process of loading was not, even though there was no warning.
- [6] Again the account of the facts which follow the actual slippage of the galvanized sheets is corroborated by the other witnesses in the case. The claimant said after being caught he was hanging upside down off the tray of the truck. A piece of steel, which had been loaded unto the truck earlier, caught him in the leg and ran up into his leg. The roofing material cut through the other side of his leg. He was later removed from that position "bawling in pain," and taken to the General Hospital.
- [7] The Claimant blames the defendant's servant the forklift driver for the accident and the injuries he suffered because he says it was customary that if someone is loading materials, I assume while a person is standing or on the tray of the truck , the person doing the loading would sound a warning first. His testimony was that he has done this himself as a forklift operator for some 13 years with Jonas Browne & Hubbards.
- [8] The defence witnesses Alexander the forklift driver and the warehouse clerk Smith both deny Mr. Forde's claim about a warning and state that it is not normal to have to issue a warning because normally no-one would be on the tray. I believe that they are right. Their testimony was an admission that they were not accustomed to loading material while

anyone was on the tray of the truck. They were caught unprepared for this kind of accident because the circumstances were unusual. But there is more.

- [9] Firstly some of the galvanized sheets were too long for the truck, secondly, because of the height of the sides of the tray the forklift driver had to tilt the fork, thirdly the rope broke. The forklift driver did not anticipate the danger, and neither did the warehouse clerk. These were the two servants of the defendant present at the scene. The forklift driver took charge of the scene as may have been expected in the warehouse where he worked. He took responsibility for the situation, which ensued.
- [10] Neither the defendant's forklift driver nor warehouse clerk perceived any danger in the process of loading the truck. But the claimant said this process was inherently dangerous, whether one is loading cement or sand and indeed loading galvanized sheets is more dangerous than loading cement or sand.
- [11] The claimant was asked what he would have done if he had been warned that the load was being placed on the truck. He said that he would have positioned himself in a safe place. But in circumstances where some of the galvanized sheets were too long for the tray, where on the tray could he find safety? Yet he said he was on the tray for the purpose of tying the galvanized sheets. I therefore find that this was not a situation in which the claimant was expecting a warning. He saw that the galvanized sheets were going to be loaded and remained on the tray even though he apprehended danger.
- [12] The claimant says that after the accident he attended the Accident and Emergency Department of the General Hospital and had to be given 110 stitches in his leg which was very painful. He could hardly walk and could not put any weight on his leg. He had to report to the hospital every day to have the bandages changed and was unable to drive his truck for 6 weeks. He says that even now "I still have some pain sometimes" and he has to sometimes walk with a stick and has a 4-inch scar on the right side of his leg where the steel went into his leg. He says he has not been the same since the accident. He now describes himself as disabled and weak. He says he cannot sit or stand for any length of time and walks with a limp. This was not the case before the accident, when he never walked with a limp and was not in pain.

- [13] Furthermore the Claimant says that he lost income as a result because he could not drive and truck driving was his only source of income. He said he worked for \$70.00 per day for hire and he lost this income for 6 weeks. He also had to pay for medical expenses in the form of pain medicine and attending his private doctor for after care as the pain continued. He used antibiotics and Motrin. The pain he said continued to be severe for about 2 months then lessened. He did not produce any documentary evidence of this loss but the defendant did not refute it either. So I find that based on his assertion and without further evidence he did suffer this loss.

The Law

- [14] Mr. Alexander the forklift driver tried to convince the Court that this accident could not have been foreseen. He said that he did not see any immediate danger. He did not think that the weight of the stack of galvanized was too much for the conductor to hold. He insisted that the conductor did not hold the rope with enough tension. However he also emphasized that other things contributed to the accident, including the length of the galvanized sheets and the configuration of the truck's tray which was described as having sides which were higher than the back and which forced the forklift driver to tilt the fork so to rest the load of galvanized on the tray. But at that time the stack of galvanized was resting partly on the cab and partly on one part of the forklift. This was obviously precarious and although perhaps unusual, this situation called for special care. I find that the danger was foreseeable. In the circumstances some precautionary measures should have been used to avoid possible injury as a result of any accident. It could have been a warning or simply ensuring that the truck's tray was clear, or something else. I think that the defendant's servant the forklift driver failed to exercise the necessary duty of care in the circumstances and was therefore negligent in the way he loaded the galvanized sheets onto the truck.
- [15] The defendant company is vicariously liable for the act of its servant who negligently performed his work on the behalf of the defendant company on the company's premises at the time of the accident. The defendant is therefore liable for the damage caused to the claimant and must pay the claimant damages for the injuries he suffered and consequential loss.

[16] In assessing the damages in this case I intend to follow the approach laid down in the case of **Cornillac v St Louis** 7 WIR 491, by Wooding CJ. The learned Chief Justice of Trinidad & Tobago outlined the several considerations a judge had to bear in mind in making his assessment of the damages in a personal injury case; these were:

1. The nature and extent of the injuries sustained;
2. The nature and gravity of the resulting physical disability;
3. The pain and suffering endured;
4. The loss of amenities suffered;
5. The effects on pecuniary prospects.

[16] The nature and extent of the injuries were described by the claimant and a medical doctor who attended to his injuries. The claimant said he was caught by the galvanized and he was hanging upside down off the tray of the truck. A piece of steel which had been loaded unto the truck earlier or which was part of the truck's structure, caught him in the leg and ran up into his leg. The roofing material cut through the other side of his leg. He was later removed from that position "bawling in pain, " and taken to the General Hospital.

[17] The other details relating to the injuries were outlined earlier . We do not have a prognosis on the injuries and the likelihood of a full recovery. But I am prepared to accept that there is some residual pain and discomfort. The medical report of the attending doctor described the injuries as a deep laceration of the right leg 17cm in length. He suffered a 10cm x 4cm scar with a "circumscribed", loss of tissue. There were also multiple abrasions to the right leg.

[18] I have been referred to a number of cases which could be used to assist in quantifying the damages in this matter. A number of these cases were extracted from "The Lawyer" and

are Judgments of the Courts of Trinidad and Tobago. Of these cases I find that **Ali v West Indies Drive-Inns Ltd 2724/77, Williams v Sieunarine 1574/84 and Diamond v Timothy 2241/71** are probably the most useful for the purposes of guidance on quantification of damages. Based on these cases and taking into account the exchange rate and the inflation since the year 2000 I find that the appropriate sum in general damages for pain and suffering and loss of amenities should be EC \$40,000.00.

[19] I find that as a truck driver the disability suffered must have shortened the claimant's working earning potential to some extent. I assess the multiplier as 3 based on the claimant's age and the kind of the work he does, and considering the expected reduction of years of service as a truck driver and the fact that he will be getting a lump sum. That multiplier is to be applied to the multiplicand calculated on the basis of \$70.00 per day for a six day work week for 52 weeks or the sum of \$21,840 multiplied by 3, which is \$65,520.00.

[20] For special damages proved I assess that prior to trial the claimant lost his daily earnings of \$70.00 for a period of six weeks, working a six day work week or the sum of \$2,520.00 . His medical expenses were pleaded at \$500.00 but there were no receipts to substantiate these expenses. Thus that sum is not included in the special damages. The total liquidated sum due to the claimant is therefore calculated at \$108,040.00

Contributory Negligence

[21] However the evidence of the claimant raised an interesting issue of contributory negligence. This was not pleaded by the defendant. The rule is that he should have. But I am satisfied that the justice of this case requires that I find that the defendant made a contribution to his own injury by his own act of staying on the tray of the truck during what he accepted was the dangerous exercise of loading galvanized which was oversized for the truck's tray and had to be put through an awkward manoeuvre to be loaded. The danger was clear but the claimant chose to put himself in harm's way and rely totally on the skill of the forklift driver. He cannot be permitted to gain from his own error of judgment and the Court will deduct 30% from the sum awarded in general damages for the claimant's contribution.

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[22] Counsel at the end of the addresses had a short exchange on the subject of contributory negligence. Mr. John said that the court could apply the principle and relevant law even though it was not pleaded. Mrs. Edwards said that contributory negligence must be pleaded. I agree with Mr. John in the circumstances of this case. The reason for my agreement can be found in the case of **East Coast Berbice Village v Shambool Hussain (1982) 31 WIR, 250**. This was a decision of the Court of Appeal of Guyana and it must be to some extent persuasive upon this court. In that case the learned justices of Appeal, Crane C, Fung-A-Fatt and Gonsalves-Sabola JJA, held that where contributory negligence was admitted in evidence it was appropriate as a matter of justice that a finding should be made as to degrees of fault.

[23] Crane C and Gonsalves-Sabola JA, reasoned that once a plaintiff claims that a defendant is negligent and the plaintiff appears on record to admit his own negligence either in chief or in cross-examination, then (ex lege) a clear issue arises notwithstanding the absence of a plea of contributory negligence on the part of the defendant. The learned justices of Appeal examined the facts of relevant cases including **Fookes v Slaytor [1979] 1 All ER 137**, which is cited in practitioners' texts as the authority for the proposition that there is an invariable rule that contributory negligence must be pleaded if it is to be considered by the court in the assessment of damages. I adopt the strongly worded pronouncement of Crane C at page 265 that, "if that case is intended to lay down an invariable rule to the contrary, then I must respectfully disagree with it, for the reason that it would posit a rule tending to do injustice; although, as I have said, I do not think that it was the intention to do so."

[24] In support of this line of reasoning Gonsalves-Sabola JA opined that the reference to Denning LJ's statement referred to in **Slater v Clay Cross Co Ltd [1956] 2 All ER 625**,

in **Fookes v Slaytor** had been taken out of context because Denning LJ's statement could not be fairly understood to be dealing with a point of pleading since contributory negligence was in fact pleaded in the defence in **Slater**. The learned Justice of Appeal noted that in **Slater v Clay Cross Co Ltd**, at the trial the issue of contributory negligence did not avail the defendant. Furthermore the trial judge's encouragement of counsel to raise the issue was rebuffed. Gonsalves-Sabola JA then concludes that the decision in **Fookes v Slaytor** purports to derive its ratio from the cases discussed above but in his opinion, those cases do not authorize a broad and absolute principle that a court can only make a finding of contributory negligence if that plea is specifically raised in the defence. He then quoted the following words from the decision of Sir David Cairns in the **Fookes** case explaining the *raison d'être* of a specific plea of contributory negligence as follows at page 140:

[25] *" It appears to me that, with all respect to Judge McDonnell, it was not right in this case to treat the matter as if there were a plea of contributory negligence before the court. That seems to me to be the rule in relation to procedure. The opposite view would mean that a plaintiff in a case where contributory negligence might possibly arise, even though it was not pleaded, would have to come to court armed with evidence that might be available to him to rebut any allegation of contributory negligence raised at trial."*

[26] I agree with Gonsalves-Sabola JA , that a plaintiff needs to be fore-warned so that he could be fore-armed. It follows that, where a finding of contributory negligence necessarily arises out of the evidence called on behalf of the claimant/plaintiff himself, the reason for giving him notice of the plea is not applicable; *cessante ratione legis, cessat ipsa lex*.

[27] I also agree that as the Court of Appeal in Guyana reasoned in a case such as the instant one where the facts demonstrating the contributory negligence arise from the evidence of the plaintiff/claimant himself the court can hold that he is contributed by his own negligence to the damage caused to him. The Justices of Appeal of Guyana reasoned further that section 9(1) of the Law Reform (Miscellaneous Provisions) Act of Guyana made it clear that contributory negligence was substantive law and held that to attribute to a rule of adjective law the capacity to transcend a rule of substantive law in defiance of common sense and the patent requirements of justice is to defeat the ends of justice themselves.

[28] In Grenada there is similar legislation namely section 3(2) of the Law Reform (Miscellaneous Torts) Act Cap. 167 of the revised laws of Grenada 1990, which states:

"Where a person suffers damage as the result partly of his own fault and partly of the fault of some 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:"

[29] In the case of **Ramnath v Alphonso Civil Appeal No. 9 of 1996 , 1997 56 WIR 183** Sing JA delivering the judgment of the Eastern Caribbean Supreme Court, Court of Appeal stated at paragraph J on page 187 ,

"it is accepted that the guiding principle in proving contributory negligence, is whether the respondent by his acts or omissions contributed to his injuries, in the sense that he failed to take reasonable care for his own safety taking into account, as he must that other users of the road are likely to be negligent."

Later in the judgment he adds, *"contributory negligence does not depend on a breach of duty to the defendant but on a lack of care by the plaintiff for his own safety. Although contributory negligence does not depend on duty of care it does depend on foreseeability. Just as actionable negligence requires foreseeability of harm to others so contributory negligence requires foreseeability to oneself."*

[30] Mr. Forde the claimant admitted that the procedure of loading a truck is dangerous and yet he went ahead and got on the tray of a truck which was being loaded with galvanized that was longer than the tray itself. I would say that this behaviour in his own words shows his failure to take reasonable care for his own safety, even when he saw the forklift driver return to the forklift to execute the final steps of loading the galvanized on the truck.

[31] I therefore have no hesitation in following the guidance of the case-law in **East Coast Berbice Village v Shambool Hussain (1982) 31 WIR ,250** and I find that the contributory

negligence is proved based on the Claimant's own evidence. I assess the contribution at 30% in the circumstances.

[32] Based on the cases found in The Lawyer where incidents of injuries of a similar nature were considered I am guided to award the claimant \$108,040.00 in total for general and special damages from which the sum of \$32,412.00 will be deducted for his contributory negligence; leaving a total of \$75,628.00. The sum of \$2,520 should be paid with interest calculated in the following way : (1) at 3% from the date of the accident to the date of trial and (2) at 6% from the date of filing of the claim until payment; and (3) on the sum of \$73,108.00 calculated at the rate of 6% from the date of trial until payment.

[33] Costs are awarded to the claimant in the sum of \$15,000.00 bearing interest at the rate of 6% from the date of trial.



Francis H V Belle
High Court Judge