THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ST. CHRISTOPHER AND NEVIS

NEVIS CIRCUIT

(CIVIL)

A.D. 2015

CLAIM NO. NEVHCV2004/0131

BETWEEN:

CLESTON MAYNARD

Claimant

AND

WAYNE JEFFERS

First Defendant

ANDY LIBURD dba NEVIS MULTILINE SERVICES

Second Defendant

HOTEL EQUITY FUND LLC dba FOUR SEASONS RESORT NEVIS

Third Defendant

Appearances:

Miss Dahlia A. Joseph for the Claimant
Mr. Jeffry E. Nisbett for the First Defendant
Mr. J.O. Webb for the Second Defendant
Third Defendant not appearing or represented

JUDGMENT

2012: October 22, 23, 24 & 29
2015: December 18

Personal injury – Whether claimant's injury caused by negligent operation of forklift truck by first defendant – Volenti non fit injuria and contributory negligence not specifically pleaded but raised in closing argument – Whether properly entertainable by court at that stage - Employment – Whether claimant and first defendant employees of second defendant, or independent contractors – If employees, whether second defendant vicariously liable for first defendant's negligence – Whether, in any event, second defendant liable for failure to provide claimant with safe system of work – Whether third defendant on whose premises accident occurred owed duty of care to claimant.

[1] **DENNIS, J (Ag.):** This is a claim for damages for negligence arising out of a forklift truck accident in which the claimant sustained injury to his right great (big) toe, necessitating its amputation; and injury to his right second toe, resulting in its partial amputation.

The Claim

[2] On the 22nd day of December, 2003, the claimant, Cleston Maynard, a twenty-seven year old labourer of Ramsbury in the island of Nevis was, together with other workers, offloading golf carts from a large shipping container consigned to the Four Seasons Resort in Nevis, on the latter's premises when his right great toe was severed by the moving parts of the forklift truck engaged in the offloading exercise, requiring immediate surgical amputation of that toe. Attempts by his surgeon to save his right second toe which was also severely injured in this unfortunate accident ultimately proved futile and it too had to be partially amputated some eight days later.

[3] The present claim was brought by the claimant against the first defendant, Wayne Jeffers, the operator of the forklift at the material time, on the footing that he had so negligently driven, managed and/or controlled the forklift that he lowered its ramp and trapped the Claimant's right foot between the moving parts of that vehicle, resulting in the injuries already described.

[4] The second defendant, Andy Liburd, doing business as Nevis Multiline Services, is sued on the footing that he was, at the material time, the employer of both the claimant and the first defendant, who were acting in the course of their employment with him; that he was accordingly vicariously liable for the negligence of the first defendant; and that he was also liable to the claimant as a matter of primary liability for having failed to provide a safe system of work, thereby exposing the claimant to the injuries which he in fact sustained.

[5] Finally, the third defendant, Hotel Equity Fund LLC, doing business as Four Seasons Resort Nevis, was also sued in tort for negligence, but on the basis that it permitted the use of its premises, and its equipment (*ergo*, the forklift) in such a manner as to result in the injuries which the claimant sustained.

The Defences

[6] The first defendant denies that he was negligent in his operation of the forklift at the material time and blames the claimant's injuries on the alleged negligence of the claimant himself. The second defendant denies that he was the employer of either the claimant or the first defendant, averring instead that they were, at the material time, either self-employed independent contractors, or employees of the third defendant. He could not, therefore (his defence ran) be either vicariously liable for the first defendant's negligence - if proved - or primarily liable on the footing that he had a duty to provide the claimant with a safe system of work but failed in that duty.

[7] The third defendant, for its part, denies that it failed in any duty owed to the claimant. More specifically, it did not owe the claimant a duty to provide either a competent driver for the forklift or

to ensure that the second defendant who was (on its case) an independent contractor, provided a competent driver. Furthermore, it acted reasonably in entrusting the offloading operation to the second defendant as an independent contractor, and took all reasonable care to ensure that its premises were safe as (on its case) they in fact were, and to satisfy itself (as it in fact was) that the second defendant was competent to carry out the offloading exercise.

[8] I pause here to note that the third defendant was neither present (through its proper officer) nor represented by counsel at the trial; but having been satisfied that it had been properly and adequately notified of the proceedings, I determined that it was appropriate for the court to proceed with the trial – its absence notwithstanding.

The Issues

[9] The following issues arise for determination in the case:

(i) Whether the first defendant was negligent in his operation of the forklift, thereby making him liable for the injuries sustained by the claimant.

(ii) Whether, at the material time, the claimant and the first defendant were employees of the second defendant or merely independent contractors.

(iii) If they were employees, and if the first defendant was negligent, then whether the second defendant is vicariously liable for the first defendant's negligence.

(iv) Quite apart from any issue of vicarious liability, whether the second defendant is liable in negligence to the claimant for failing to provide him with a safe system of work.

(v) Whether, in the circumstances of this case, the third defendant owed a duty of care to the claimant and, if so, whether it failed in that duty and thereby caused the claimant's injuries.

Alleged Negligence of First Defendant

[10] The following particulars are pleaded against the first defendant at paragraph 8 of the statement of claim:

> "8. *On the 22nd day of December, 2003, in offloading the said container, the Claimant climbed into it to maneuver the said golf carts onto the ramp of the forklift whilst the forklift was suspended in the air when the First Defendant so negligently drove, managed and or controlled the forklift that he lowered its ramp and trapped the Claimant's right foot between the parts of the forklift.*

Particulars of Negligence of the First Defendant

(a) *Driving, managing and or operating a forklift without a licence and or qualification;*

(b) *Failing to exercise or maintain any or any sufficient or adequate control of the said forklift;*

(c) *Causing or permitting the said forklift to be lowered on to the Claimant's right foot;*

(d) *Failing to stop, slow down or in any other way manage or control the said forklift.*

(e) The Claimant will rely on the principle of *res ipsa loquitor*."

[11] In support of these particulars the claimant testified through his witness statement that the second defendant had instructed him and his co-workers to offload the third defendant's golf carts from a 40 foot container on that defendant's premises.

[12] The container stood fifty three (53) inches or four and a half (4 ½) feet from the ground. It was one hundred and one (101) inches or eight and a half (8 ½) feet tall. There were too levels of golf carts packed in the container. They were stacked one on top of the other.

[13] The third defendant provided the second defendant with a forklift to assist in offloading the golf carts from the container, and the first defendant was, on the instructions of the second defendant, the operator of the forklift for purposes of the offloading exercise.

[14] He testified, without contradiction, that there was no ramp to transfer the golf carts onto the fork of the forklift. There was also no, or no proper, staircase to get from the ground into the container. However, one of his co-workers, Clayton Liburd (also called "Powers") the brother of the second defendant, nailed two pallets together to create a makeshift ramp to move the golf carts from the container onto the forklift. The first defendant then drove the forklift as close as possible to the entrance of the container. In executing the manoeuvre to get the golf carts from the container to the ground, the first defendant, he said, would have to ensure that the way was clear before he lowered the arm of the forklift.

[15] The makeshift ramp was placed through the forks of the forklift; but the back wheels of the forklift rested on a slope and so it would rock back and forth when the golf carts were placed on it.

[16] He and two of his co-workers climbed into the container from the ground to manoeuvre the golf carts from it onto the forklift whilst it was suspended in the air with the ramp positioned on it as described earlier.

[17] Powers, he said, was standing on top of the back of the forklift to position the golf carts on the makeshift ramp. The men inside the container, including himself, would then push out the golf carts on to the ramp and Powers would press the brake on each of the golf carts to secure it on to

the ramp. He said that every time they placed a golf cart on to the ramp the forklift would rock back and forth on the slope whilst operating at that height.

[18] Ironically, the claimant – all agreed – himself warned Powers about the latter's precarious position atop the forklift as they executed this manoeuvre, and of the need for him to be careful. Powers apparently heeded that warning and they successfully offloaded two golf carts from the containers onto the makeshift ramp without incident. Then, disaster struck.

[19] There was some difficulty in getting the third golf cart onto the ramp: Powers could not reach the brakes to secure it onto the ramp so he held onto the cart whilst the claimant alighted from the container to assist him. That done, the first defendant was given the signal to lower the fork of the forklift but alas, as cruel fate would have it, the claimant turned out to be the harbinger of his own misfortune, for in the process of this dangerous manoeuvre, his right foot became trapped in the mechanism of the moving parts of the forklift. He described the immediate aftermath in extremely graphic terms:

> *"23. ...I yelled out to the first defendant to stop the dissention [sic.] of the fork. The first defendant stopped it immediately. My foot was still caught in between the parts of the forklift. The first defendant then yelled out and asked what happened. I told him to raise the arm of the forklift so I could remove my foot. The first defendant then pressed the wrong lever and went further down on my foot and then went up.*
>
> *24. ...My first [sic.] toe was just hanging by a piece of skin. All the bones in it were severed. My second toe was severely disfigured. My foot looked like crushed mutton to me. I was bleeding profusely. I felt terrible and was in excruciating pain."*

[20] The claimant was rushed to the Alexandria Hospital where he underwent surgery to remove the mangled big toe. Eight days later, the distal phalanx or joint of the right second toe also had to be amputated, having deteriorated so badly that despite his doctors' best efforts, it could not be saved.

[21] In amplification of his witness statement at trial the claimant said there was nowhere for him to have positioned himself to engage the brakes of the golf cart to keep it steady and prevent it from slipping after it was moved out of the container onto the forklift. There was – he said – no other way to secure the brakes at that height. Cross-examined by the first defendant's counsel, he said he was aware of the danger to have stood in the position where he got injured – hardly a surprising answer since, moments before, he had himself warned Powers of that very danger. He admitted that he knew that that was no place to stand and that the vehicle was not designed for persons to stand there; but he reiterated that it was the only way to "get the work done" and in particular (as I understood him) to secure the brakes of the unsteady cart – which was his objective at that point in time.

[22] Cross-examined by counsel for the second defendant, he said he did not see any sign on the forklift truck indicating that he should not stand on it. However, in light of his candid admission to counsel for the first defendant earlier that he was well aware of the danger of so doing, whether or not he actually saw such a sign is hardly of any moment. If he had not stood there, all would have been well, he agreed, but again he maintained that he had to venture there because there was no other way of getting the job done.

[23] He accepted that he was not compelled by anyone to continue working after he saw that the system being employed for unloading the container was not safe. In response to counsel for the second defendant he offered a sobering explanation for continuing to work in the face of obvious danger without complaining or protesting to anyone, including his employer: "I could have refused," he said, "but I would have been terminated."

The First Defendant's Defence

[24] In his defence, the first defendant denies that he was guilty of any negligence as alleged in the statement of claim and says that the matters complained of by the claimant happened as a result of the claimant's own negligence, the particulars of which are pleaded at paragraph 10 of his defence, as follows:

> "*(a) Failing to keep any or any proper look-out or to have any or any sufficient regard for his own safety while off loading the golf carts unto the forklift.*
>
> *(b) Stepping onto the support of the forklift while it was been [sic.] lowered.*
>
> *(c) Stepping into the path of the lowering ramp of the forklift without giving the First Defendant any reasonable opportunity of avoiding the said incident.*
>
> *(d) Failing to pay any or any sufficient heed to the lowering ramp of the forklift.*
>
> *(e) Stepping onto the support when it was unsafe and dangerous so to do.*
>
> *(f) Failing to see the lowering ramp of the forklift in sufficient time to avoid the said collision or at all.*"

[25] To make good of these particulars, the first defendant testified that he was, at the material time, a competent and skillful operator of the forklift. He had, up until that time, been operating a forklift for over twelve years. He did not require a licence to do so, he said, because he was operating it on private property.

[26] On the day in question, a system of work was put in place whereby the claimant and Clayton Liburd (Powers) were on the roof of the forklift. Their duties were to place each golf cart onto the ramp which was on the forklift. This system of work was used numerous times in the past, he said – apparently without incident. His duty was to lower the forklift when the golf cart was in place on the forklift. A golf cart was placed on the ramp which was on the forklift and the claimant stepped

up and applied the foot brakes in the golf cart in order to stabilize the cart. He testified further that, apparently, in stepping down, the claimant placed his right foot on the support bar of the forklift. He was instructed by the claimant and Powers to lower the forklift and he proceeded so to do. He did not see the claimant's foot on the support bar, but in the lowering process, he heard the claimant shout "Yow Yow," realized something was wrong, and "having regard to my expertise and skill I manoeuvred the forklift back up in the air instead of continuing downward." He later realized that the claimant was injured as a result of his foot being trapped in the mechanism of the forklift.

[27] The first defendant testified further that about five to ten minutes prior to the incident, Powers had his foot in the same place and the claimant told him to be careful as it was real dangerous putting one's foot there on the forklift. He said he himself also told the claimant and Powers to be careful.

[28] Cross-examined by counsel for the claimant he said that operating the forklift was his normal job and reiterated that he had been doing so for twelve years and on the third defendant's premises. A licence, he agreed, would certify his skill and competence to operate a forklift but as far as he was concerned one was not necessary for him to do so on private property.

[29] He denied continuing to lower the fork of the forklift after being alerted to the claimant's plight; that only after lowering it further did he then raise it; and that it was his lack of skill in this manoeuvre which caused the claimant to be injured – and so severely.

[30] Cross-examined by counsel for the second defendant, he said that the date of the accident was not the first time that he had been unloading golf carts with a forklift truck, although it was his first time doing so from what he described as a two-decked container, referring (as I understood it) to the fact that the golf carts were stacked on two levels one on top of the other. He had been doing so about once a year without incident. It was not necessary – he said – for the claimant to have stood where he did at the time he was injured. Had he not stood there, the accident would not have happened.

[31] In re-examination he said that after he heard the claimant warn Powers he alighted from the truck and spoke to them both, telling them to be careful. He had to do what they told him to do - he said - and he reminded them that he could not see from where he was in the truck. He then got back into the truck and asked the claimant if it was o.k. to lower the fork, to which the claimant replied "Sure." He started lowering and both the claimant and Powers said "Lower" and it was whilst complying with this instruction that he heard the claimant's plaintive shout and realized that something was wrong. He accordingly stopped the descent of the forklift and raised it back up.

[32] It is against the background of the foregoing factual matrix that the first defendant's conduct at the material time falls to be examined to determine whether he was at fault for the accident, and for the claimant's resulting injury.

The Law

[33] The law of negligence is well settled. Counsel for the claimant relied on the following passage appearing at paragraph 7-04 of **Clerk & Lindsell on Torts** 18th ed. as being a correct statement of the law as to the ingredients of the tort:

> *"There are four requirements for the tort of negligence], namely:*
>
> *(1) the existence in law of a duty of care situation i.e. one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in suit on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable;*
>
> *(2) breach of the duty of care by the defendant, i.e. that it failed to measure up to the standard set by law;*
>
> *(3) a causal connection between the defendant's careless conduct and the damage;*
>
> *(4) that the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.*
>
> *When these four requirements are satisfied the defendant is liable in negligence."*

[34] On breach of duty, the learned authors at paragraph 7-159 (upon which counsel also relies) summarize the position thus:

> *"A defendant will be regarded as in breach of a duty of care if his conduct falls below the standard required by law. The standard normally set is that of a reasonable and prudent man. In the oft cited words of Baron Alderson: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do; or doing something which a prudent and reasonable man would not do." The key notion of "reasonableness" provides the law with a flexible test, capable of being adapted to the circumstances of each case."*

[35] None of this is a matter of controversy and I have no difficulty in accepting the foregoing passages as a correct statement of the law. The first defendant clearly owed a duty of care to the claimant in his operation of the forklift and the question is whether he breached that duty.

Whether the first defendant breached his duty of care to the claimant

[36] In answering this question I have regard to the following which, on the evidence, is clearly established:

(i) In the absence of a proper ramp to transfer the golf carts from the container unto the forklift, the protagonists in this drama were engaged in a highly dangerous exercise, which demanded particular care.

(ii) All concerned – and in particular both the claimant and the first defendant – recognized the danger, at the material time, and in fact articulated it.

(iii) Having regard to the claimant's position atop the forklift truck at the material time, it was impossible for the first defendant to have seen him so as to be able to make a determination as to whether it was safe to lower the forklift.

[37] In these circumstances, it seems to me that it behooved the first defendant to ensure that he lowered the forklift only when it was safe to do so, even if that meant insisting that the claimant and Powers alighted from their precarious perch to the ground, after each manoeuvre, before lowering the lift. This would no doubt have slowed down the progress of the work – perhaps quite considerably – but that would have been a small price to pay for guaranteeing that no one was hurt in the process, especially given the obvious danger which all clearly recognized. In my judgment, it was not good enough for the first defendant to have relied on Powers and the claimant himself to tell him whether it was safe to lower the fork – as, on his evidence, he appears to have done. The onus was on him to ensure that it was in fact safe; and by failing to do so, he breached his duty of care to the claimant.

[38] Much was made of the fact that the first defendant did not have a licence to operate the forklift truck. However, whilst it is true that the possession of such a licence would have provided at least *prima* facie evidence of competence, the fact that the first defendant did not possess one did not, without more, necessarily mean that he was incompetent; and on the uncontroverted evidence before me that he had been operating the forklift for some twelve years without incident, I would have been prepared to hold that he was at least technically competent to do so notwithstanding that he lacked the certification which a licence would otherwise have provided. However, in view of my finding that he had otherwise failed in his duty of care to the claimant, the licence issue recedes into insignificance – at least insofar as the issue of the first defendant's liability is concerned.

[39] The claimant's injury was not only a direct result of the first defendant's failure to take proper care, but it was also an injury of the kind that was reasonably foreseeable in the circumstances of this case. I accordingly hold that the first defendant is liable to the claimant in negligence for the injury which he sustained in the course of unloading the golf carts.

Vicarious Liability

[40] It is common ground that if, at the material time, the first defendant was acting in the course of his employment with the second defendant, then the latter would be vicariously liable for his negligence. However, as previously indicated with reference to the second defendant's pleaded defence, it is a live issue whether the first defendant was indeed an employee of the second defendant, an independent contractor, or an employee of the third defendant.

[41] The same issue arises as between the claimant and the second defendant, given the former's case that the second defendant failed, in his duty as his employer, to provide him with a safe system of work and that it was as a result of this failure that he came to be injured. I must therefore consider the evidence to determine whether the relationship of employer and employee did indeed exist between the second defendant and the claimant and/or as between the second defendant and the first defendant.

Employee or Independent Contractor

[42] It is common ground that at all material times the second defendant was doing business as Nevis Multiline Services, offering customs brokerage services to his customers. According to the claimant, the services which the second defendant provided also included the offloading of goods from containers for such customers and the transportation and delivery of such goods. He was first employed by the second defendant from October 1996 to September 1999 as a clerk in the brokerage department and enjoyed the benefit of health insurance under the second defendant's insurance policy with British American Insurance Company Limited. It is also common ground that he was dismissed by the second defendant in September 1999 (apparently for misconduct involving gambling on the second defendant's premises – although the claimant stoutly denies that he had been gambling); but on the claimant's account was re-hired in or about December 2000 as a stevedore. That he resumed working with the second defendant about that time, or certainly by 2001 is not in dispute. It is the nature of that working relationship which is. His responsibilities, under this new working relationship, he said, included driving the second defendant's delivery trucks and picking up and offloading cargo; and he was in continuous employment with the second defendant from the time of his re-hire until his injury, earning EC$850.00 per week on average. His salary, he said, was dependent on the volume of work the second defendant was contracted to do and the type of cargo that needed transportation within a given period. However, during the busy Christmas season he would earn as much as EC$2,500.00 per week.

[43] On the claimant's case, one of the customers for which the second defendant provided customs brokerage, offloading and delivery services was the third defendant, Hotel Equity Fund LLC, doing business as Four Seasons Resort Nevis. The second defendant, he said, had a contract with the third defendant for such services at the material time, and his activities on the latter's premises at the time of his injury were in the course of his duties as an employee of the second defendant who was, in turn, acting pursuant to his contractual arrangements with the third defendant. In particular,

the second defendant had instructed him, and others, including the first defendant, to off-load the third defendant's golf carts from the container.

[44] The claimant gave evidence further that the third defendant provided the second defendant with the forklift for use in the offloading process and that the first defendant was instructed by the second defendant to operate the forklift as part of his duties.

[45] The second defendant tells an entirely different story. According to his evidence, neither the claimant nor the first defendant were employees of Nevis Multiline Services. Rather, they were self-employed casual workers upon whose services he would call under what he described as a "special arrangement call-out service" when his customers needed casual workers. Under this arrangement, if a Multiline customer needed a worker he would introduce the worker to the customer and both parties would enter into their own contractual arrangements.

[46] As a matter of convenience only and to facilitate his customers, he would pay such casual workers up front, reflect this as a disbursement when he billed the customer for his own services, and got reimbursed when his own bill was settled. However, sometimes the worker would be paid directly by the customer. According to his evidence, this was the arrangement he had with Four Seasons Resort at the material time. Under this arrangement, he would prepare monthly miscellaneous bills showing all the payments he had made on its behalf and Four Seasons would repay him later by cheque.

[47] He denied re-employing the claimant in the year 2000. He also denied sending either the claimant or the first defendant - or any other worker for that matter - to work at the Four Seasons on the day in question. He said under his contract with the hotel he was not responsible for unloading or providing workers for unloading their containers – his contract was confined to customs brokerage services only. As far as he was concerned, the claimant was not a Multiline employee when he sustained his injury. He was either self-employed or an employee of Four Seasons – the third defendant. He was adamant that the claimant was not his employee at the material time since, apart from paying the claimant what Four Seasons and others instructed him to advance for them under the call-out service, his only connection with the claimant was that from January to December 2003 the claimant also worked for Multiline under that same service as a longshoreman or porter at the Nevis Long Point Sea Port on the motor vessel "Addie" of which Multiline was the agent. He said he made the statutorily required social security payments for the claimant for this period only because the rules of the Nevis Air & Seaports Authority required it – not because of any obligation to do so as the claimant's employer; and, in any case, this was occasional work done by the claimant whilst he was still free to work as a self-employed casual labourer elsewhere, as he pleased.

[48] There was evidence also from Miss Mauricia Caines, Multiline's office manager, at the material time, as to the claimant's status. She too testified that the claimant was initially a full time employee enjoying full benefits but was fired after he was caught gambling in the office. Thereafter

– she said – the second defendant secured a job for him with Four Seasons' construction company which was then refurbishing the property after hurricane damage sustained by it. After the refurbishment was completed, Four Seasons' purchasing manager, Mr. Kelvin Archibald, called him out to work at the hotel offloading containers, among other work. She denied that he was rehired by Multiline in the year 2000 driving delivery trucks and picking up and offloading cargo. The second defendant had himself testified that after the claimant's dismissal, Mr. Archibald – he believed – had put him on Four Seasons' work team as an extra "porter on call" when necessary.

[49] If Miss Caines' evidence is to be accepted, not only was the claimant not re-employed to the second defendant subsequent to his dismissal in the year 2000, but also, he was not even a part of the third defendant's call-out programme as a self employed casual worker. However, the latter proposition is completely at odds with the second defendant's own testimony, given in his witness statement, that there were 46 persons listed as part of the call-out programme, including the claimant. Indeed, in his quest to demonstrate that the claimant was not an employee of Multiline but either a self employed casual labourer (or employee of Four Seasons) the second defendant – it has already been seen – testified that quite apart from paying the claimant what Four Seasons and other customers instructed him to pay, the claimant also worked under the call-out programme as a longshoreman or porter at the port on the motor vessel "Addie" for which Multiline was the agent. Therefore, it is clear that as far as the second defendant was concerned, the claimant was indeed a part of the call-out programme. It is quite curious that his office manager's evidence would suggest the contrary, especially in circumstances where the wage book documenting wages paid by the second defendant clearly shows entries of payments made to the claimant for services rendered to Multiline's customers. It would seem to me that if – as they both maintained – the claimant was not an employee, then the appearance of his name in the wage book could clearly only be explicable on the basis that he was indeed a part of the call-out programme. Ms. Caines evidence in this regard therefore remains quite puzzling.

[50] The wage book itself is ambiguous as to the claimant's status. It is common ground that it contains entries showing payments made to the claimant subsequent to his dismissal in the year 2000, for services rendered to Multiline's customers. However, these entries are equally consistent with the claimant's explanation that he was employed to the second defendant to execute these services for his customers, and with the second defendant's explanation that they simply reflected work done by the claimant for those customers as an independent casual worker under Multiline's call-out programme. The inconsistency between the evidence of the second defendant and that of his office manager as to whether the claimant was a part of the call-out programme, does not, however, inspire confidence in the court that the second defendant's explanation is the true and correct explanation of this record. This discrepancy though, is only one of the factors, looking at the evidence in the round, that I have to consider in coming to a decision as to the true nature and character of the relationship between the claimant and the second defendant.

Employee or Independent Contractor – The Law

[51] Counsel for the claimant very helpfully referred the court to the Privy Council decision of **Lee Ting Sang v. Chung Chi-Keung** [1948] Q.B. 90 which applied the English common law standards set out in the well known case of **Market Investigations Ltd. v. Minister of Social Security** [1969] 2 Q.B. 173 in determining whether the worker in question in the former case was an employee or independent contractor. The applicant, a mason, was working for a subcontractor, at a construction site, chiselling concrete as instructed by the subcontractor. The applicant used tools supplied by the subcontractor and his work was not supervised but was inspected periodically by the main contractor's foreman. Depending upon the nature of the work he had to do the applicant was paid either a piece-work rate or a daily rate for working from 8 a.m to 5 p.m. If he finished his work early he assisted the subcontractor to sharpen tools. He sometimes worked for other contractors but he gave priority to urgent work of the subcontractor telling those for whom he was then working to replace him. During the course of his work at the site he was injured. On his application against both the subcontractor and the main contractor for compensation under the Employees' Compensation Ordinance the judge dismissed the claim holding that the applicant was not an employee within section 2(1)1 of the Ordinance but an independent contractor. The Court of Appeal upheld that decision.

[52] On the applicant's appeal to the Judicial Committee, it was held, allowing the appeal, that English common law standards had to be applied in determining whether the applicant was working as an employee of the subcontractor or an independent contractor, the fundamental test being whether or not he was performing services as a person in business on his own account and thus an independent contractor; that since the factual circumstances in which he performed his work had to be investigated and evaluated in determining the applicant's status it was a question of fact for the trial judge, and an appellate court would not interfere with his finding unless it was unsupported by the evidence or was one which he could not reasonably have reached if he had properly directed himself on the law; but that, although the courts below had concurrently found as a fact that the applicant was an independent contractor, they had been misled in assessing the facts by wrongly relying on two dicta from inapposite cases; that the finding was contrary to the established facts and so unreasonable as to constitute an error of law, so that the Board were justified in reversing their decisions; and that, therefore, the applicant was working as an employee under a contract of service with the subcontractor and was entitled under the Employees' Compensation Ordinance to be compensated by the subcontractor and the main contractor for his injury.

[53] As to the standard to be applied, Lord Griffiths had this to say:

> *"What then is the standard to apply? This has proved to be a most elusive question and despite a plethora of authorities the courts have not been able to devise a single test that will conclusively point to the distinction in all cases. Their Lordships agree with the Court of Appeal when they said that the matter had never been better put than by Cooke J. in* ***Market***

Investigations Ltd. v. Minister of Social Security [1969] 2 Q.B. 173, 184-185**:**

> *'The fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question 'yes' then the contract is a contract for services. If the answer is 'no,' then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.'"*

[54] At page 383 of the judgment, Lord Griffiths set out the facts as found at trial, as follows:

> *"With this test in mind it is now necessary to turn to the facts of the present case which are summarised in the following passage from the judgment of the Court of Appeal [1988] 2 H.K.L.R. 476, 477:*
>
> > *'Although there was no finding in express terms, it seems clear, that the trial judge accepted the facts sworn to by the applicant. These facts established (1) that the applicant suffered a head injury in an accident when working as a mason chiselling concrete at the said construction site; (2) that he had been told to work at the site by the first respondent who was a subcontractor of the second respondent; (3) that the applicant was given a plan by the first respondent showing him where to chisel but he was not thereafter supervised in his work; the foreman of the main contractor, the second respondent did, however, from time to time check the work; (4) that the tools used by the applicant were provided by the first respondent; (5) that he had commenced to work at the site some 20 days prior to the accident; (6) that he was normally paid in accordance with the amount of concrete*

chiselled, the measurement being done by the first respondent or his agent, but that on occasions, when the concrete was difficult to chisel or the work involved only a small area, he received a wage of $220 for an 8 a.m. to 5 p.m. day (this appears to have been done because the payment if calculated in accordance with the area chiselled would have amounted to less than a fair day's wage;) (7) that the applicant when he completed his work before 5 p.m. would assist the first respondent to sharpen chisels and would, after so doing, be paid for that work on an hourly basis; (8) that the applicant worked from time to time for other contractors but would, when the work for the first respondent was urgent, give priority to him, telling any other employer for whom he was then working to engage another to finish the work.'"

[55] Finally, delivering the judgment of the Board, he concluded:

"Upon these findings of fact their Lordships would have had no hesitation, if sitting as a court of first instance, in concluding that the applicant was working for the first respondent as an employee and not as independent contractor. All the tests, perhaps it is better to call them indicia, mentioned by Cooke J. in Market Investigations Ltd. v. Minister of Social Security [1969] 2 Q.B. 173, 184-185 *, point towards the status of an employee rather than an independent contractor. The applicant did not provide his own equipment, the equipment was provided by his employer. He did not hire his own helpers; this emerged with clarity in his evidence when he explained that he gave priority to the first respondent's work and if asked by the first respondent to do an urgent job he would tell those he was working for that they would have to employ someone else: if he was independent contractor in business on his own account, one would expect that he would attempt to keep both contracts by hiring others to fulfil the contract he had to leave. He had no responsibility for investment in, or management of the work on the construction site, he simply turned up for work and chipped off concrete to the required depth upon the beams indicated to him on a plan by the first respondent. There is no suggestion in the evidence that he priced the job which is normally a feature of the business approach of a subcontractor; he was paid either a piece-work rate or a daily rate according to the nature of the work he was doing. It is true that he was not supervised in his work, but this is not surprising, he was a skilled man and he had been told the beams upon which he was to work and the depth to which they were to be cut and his work was measured to see that he achieved that result. There was no question of*

his being called upon to exercise any skill or judgment as to which beams required chipping or as to the depths that they were to be cut. He was simply told what to do and left to get on with it as, for example, would a skilled turner on a lathe who was required to cut a piece of metal to certain dimensions.

Taking all the foregoing considerations into account the picture emerges of a skilled artisan earning his living by working for more than one employer as an employee and not as a small businessman venturing into business on his own account as an independent contractor with all its attendant risks. " (p.383 to 384)

[56] In the instant case, the evidence discloses that the claimant worked as a stevedore – notably in respect of the motor vessel "Addie" which was one of the second defendant's customers. His tasks performed for the defendant's customers also included the pick-up and delivery and off-loading of goods - tasks which were performed using the second defendant's equipment, namely the truck belonging to the second defendant and ordinarily used in the second defendant's business.

[57] The claimant was also admittedly paid by the second defendant for the work done by him for its customers. The wage book confirms this. According to the second defendant he paid the claimant for such work only as a favour to his customers and for their convenience; and the payments so made were merely advances by him for the benefit of his customers which he would recover by preparing monthly miscellaneous bills showing all such advances. These customers would then repay him by cheque. This, he said, was the system in operation on the 22nd of December, 2003 when the accident occurred. However, no documentary evidence was produced by the second defendant to evidence the existence of such a system. Not a single "miscellaneous bill" was produced showing the invoicing of any customer for such an advance. I find that quite remarkable, for if indeed this was the system it seems to me that it would have been a relatively easy matter to produce even a few invoices to make good his version of the facts. I therefore have great difficulty accepting that the payments made to the claimant as reflected in his wage book were simply advances made for the convenience of his customers.

[58] It is significant in this regard too that on the second defendant's own evidence, he had been making social security payments for the claimant, up to the time of the latter's injury, in respect of work done by him for the motor vessel "Addie". The second defendant sought to explain away these payments made by him on the claimant's behalf on the basis that he only made them because the rules of the Nevis Air & Seaports Authority (NASPA) required it, in that they would not allow the claimant to work as a stevedore unless he was covered by social security. However, it seems to me that that would hardly be a matter of concern to him if the claimant was indeed working independently as a stevedore rather than as his employee, It would be quite odd for a non-employer to take it upon himself to assume the obligation or responsibility of making statutorily mandated social security payments on behalf of an independent contractor.

[59] As far as his wages were concerned, the claimant's evidence was that he earned an average of $850.00 per week, depending on the volume of work and the kind of cargo that needed to be transported within a given week. During the Christmas season when things were particularly busy, he could make as much as $2,500.00 per week. This was not disputed.

[60] He also said the he did not negotiate his own rates of payment – all negotiations were conducted through Multiline. In his words he "met the rates there" and Mr. Liburd (the second defendant) arranged the rates and he never questioned them. In cross examination, the second defendant was taken to entries in the wage book showing work done in respect of delivery of goods, including deliveries made by the claimant, and admitted that his office charged the relevant customers for these deliveries. He also admitted that his office – not the claimant – made the necessary arrangements for the deliveries, and that the claimant would not have negotiated a price for the services to which the entries related. This accords with the claimant's evidence that he did not himself negotiate his own wages and, in particular, never agreed wages with the Four Seasons. Rather, all negotiations were done through Multiline. I therefore have no hesitation in accepting the claimant's testimony in this regard.

[61] That the claimant had not been independently negotiating and agreeing his own wages, but rather was being paid based upon rates agreed between the second defendant and his customers seems to me to accord more with the claimant being an employee of the second defendant than with him being an independent contractor.

[62] It was also the claimant's evidence that he continued to receive wages some weeks after the accident in amounts representing what he would have earned, but for the injury. His evidence to this effect was not seriously challenged, although it was suggested to him in cross examination that those payments were made not by the second defendant but by his co-workers. The second defendant himself had an opportunity to comment upon the claimant's evidence in this regard and did not challenge the claimant's characterization of those post-accident payments as being payments received from the second defendant for wages he would have earned for the relevant period had he not been injured.

[63] Against the background of the foregoing, I find the second defendant's version of events that he merely introduced self-employed casual workers - including the claimant - to his customers and simply "fronted" for them as a favour by advancing payment for the services rendered by such workers, to be far less credible than the claimant's version that he was engaged by the second defendant, worked for the latter's customers as directed by him, and was accordingly paid by the second defendant on the bases determined, and at rates negotiated, by the second defendant.

[64] In the round, the evidence also suggests a level of control by the second defendant over the work done by the claimant which seems inconsistent with the kind of independence that would ordinarily be associated with a worker operating under a contract *for* services as opposed to a contract *of* service: the recipient of the services were Multiline's customers; Multiline deployed the claimant as, where, and to whom necessary, to get the job done; Multiline made the necessary

arrangements and negotiated and agreed the relevant wages; its truck was used for execution of the work; the claimant had no responsibility for investment in, or management of, the work, and he bore no financial risk or any degree of responsibility for investment and/or management.

[65] I pause here to note that although the evidence in this regard was focused predominantly on the claimant, these factors, on that evidence, applied equally to the first defendant.

[66] It is true that, as counsel for the second defendant skillfully elicited in his cross examination of the claimant, the latter received no holiday pay from the second defendant as would have been expected from an employer; he was not specifically aware whether or not he was obliged to give or receive notice of termination of his services; he was not guaranteed a minimum wage and if he did not work he received no pay; he did not consider that he or any of his co-workers who operated in the way he did, was obliged to show up for work; and they could refuse to do so if they wanted to. However, when taken as a whole, inclusive of the factors earlier mentioned, the picture that emerges on the evidence before me is that of an unskilled worker making a living by making his services available to the second defendant for deployment as, when, where, and to whom the latter directed, all in the service of the latter's customers, in exchange for remuneration paid by the second defendant who controlled how his services were employed. This arrangement, it seems to me, bore the hallmarks of a contract *of* service rather than of a contract *for* services, keeping in mind the indicia adumbrated by Cooke, J. in the ***Market Investigations Ltd.*** case.

[67] Taking all of the foregoing into account, I am propelled to the conclusion that the claimant was, at all material times, the employee of the second defendant – not an independent contractor; and that the first defendant who, on the evidence, worked under the same system, was also the employee of the second defendant – not an independent contractor.

[68] I therefore accept the claimant's case that on the day in question the second defendant was indeed providing off-loading services to the third defendant from the third defendant's container on its premises, and in particular the off-loading of the golf carts; that the task of unloading the container was one to which the second defendant assigned both the claimant and the first defendant; that the third defendant provided the second defendant with a forklift to assist in the process; and that the second defendant instructed the first defendant to operate the forklift as part of his duties.

[69] It follows that, to the limited extent that the second defendant pursued the alternative defence that the claimant and first defendant were employees of the third defendant, that alternative defence also fails.

Vicarious Liability – The Law

[70] It is trite law that an employer is vicariously liable for the negligence of his employee committed while acting within the scope of his employment. There is no dispute as to this well settled principle, the *locus classicus* of which is the well known case of ***Ormrod v. Crossville Motors Services Ltd. [1953] 1 W.L.R. 1120***. The issue in the instant case is simply whether the second

defendant was so liable for the negligence of the first defendant in respect of the latter's negligent operation of the forklift. On the facts as I have found them, namely that at the material time the claimant and the first defendant were engaged in a task assigned by the second defendant as their employer; and further that for the purposes of that task the first defendant was required by the second defendant to use and operate the forklift truck provided by the third defendant, there is no room to find otherwise than that the first defendant was indeed acting within the scope of his employment. In those circumstances a finding of vicarious liability on the part of the second defendant, for the first defendant's negligence is inescapable; and I so hold.

Safe System of Work – The Law

[71] As indicated earlier in this judgment, quite apart from any issue of vicarious liability there is also the issue of whether the second defendant was, as a matter of primary liability, also liable to the claimant for failing to provide him with a safe system of work.

[72] On the issue of an employer's duty to provide a safe system of work, counsel for the claimant relied on the following passage from ***Clerk & Lindsell on Torts (18th ed.):***

> *"A [sic.] employer does not warrant that the equipment or process is unattended by danger but he is under a duty to see that a safe system of work and adequate supervision are provided. A system of work is a term usually applied to work of a regular and more or less uniform kind. In this connection it means the organization of the work, the procedure to be followed in carrying it out, the sequence of the work, the taking of safety precautions and the stage at which they are to be taken, the number of men to be employed and the parts to be taken by them, and the provision of any necessary supervision…It is a question of fact whether a system should be prescribed, and in deciding this question regard must be had to the nature of the operation, whether it is one which requires proper organization and supervision in the interests of safety, or whether it is one which a reasonably prudent employer would properly think could be safely be left to the man on the spot."*

[73] On what constitutes a system of work, reliance was placed on the following dicta in the English Court of Appeal case of ***Speed v.Thomas & Company Limited*** *[1943] K.B. 557:*

> *"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 in 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 jobwhich it is the master's duty to decide, and, in doing so, he must pay proper regard to the conditions affecting the safety of his men..." (per Lord Greene at 563)

[74] Further reliance was placed on the following dicta of Lord Wilson in ***Wilson & Clyde Coal Company Limited*** *[1938] A.C. 67 at 78:*

> *"In Rudd's case the Court of Appeal, applying their general views which I have just stated, held that the employers could escape liability by showing that they had appointed competent servants to see that the duty was fulfilled. This House held that, on the contrary, the statutory duty was personal to the employer, in the sense that he was bound to perform it by himself or by his servants. The same principle, in my opinion, applies to those fundamental obligations of a contract of employment which lie outside the doctrine of common employment, and for the performance of which employers are absolutely responsible. When I use the word absolutely, I do not mean that employers warrant the adequacy of plant, or the competence of fellow-employees, or the propriety of the system of work. The obligation is fulfilled by the exercise of due case and skill. But it is not fulfilled by entrusting its fulfilment to employees, even though selected with due care and skill. The obligation is threefold – "the provision of a competent staff of men, adequate material, and a proper system and effective supervision."*

[75] Applying these authorities, counsel submitted that the second defendant in the instant case failed to satisfy his duty to provide a safe system of work by failing to provide a competent staff of men, in that he failed to provide a licensed forklift driver; and failed to provide a proper system and effective supervision. As evidence of an unsafe system, counsel relied on the claimant's evidence that there was no other way that the job could be done than for him to stand atop the forklift and engage the brakes on the golf carts. Counsel submitted that it was the duty of the second defendant as the employer to take whatever measures were necessary, including providing adequate supervision, to ensure a safe system of work for his employees and he failed to do so.

The Second Defendant's Defence

[76] As has already been observed, the second defendant's principal defence was that he was not the claimant's employer, and that he accordingly owed the claimant no duty to provide him with a safe system of work. However, in view of my finding as to the relationship between the two, this defence must clearly fail; and the second defendant, as the claimant's employer, owed him a duty of care to provide a safe system of work.

[77] As an alternative to his principal defence, the second defendant pleads at paragraph 5 of his defence that if he was the first defendant's employer, then, having delegated his duty to the exceedingly and highly competent third defendant, the third defendant as his agent or delegate owed him a duty of care in all the respects pleaded by the claimant, entitling him to either a contribution or indemnity against the third defendant should he be adjudged liable to the claimant.

[78] I hasten to observe that no ancillary claim for a contribution or indemnity was filed by the second defendant against the third defendant, nor (as counsel for the second defendant candidly acknowledged during closing submissions) was any evidence adduced by the second defendant in support of this aspect of his defence.

[79] In any event, as the dicta in the authorities referred to above clearly indicate, the duty of an employer to provide a safe system of work for his employee is non-delegable, and he cannot excuse himself by saying that he had good grounds for relying on the competence of the person to whom he delegated the duty. Lord Greene says it best in the ***Speed*** case cited by counsel for the claimant and referred to above:

> *"What exactly is meant by 'a safe system of working' has never, so far as I know, been precisely defined. The provision of such a system falls within the master's province of duty. If he delegates it, he remains responsible for any inadequacy in the system just as much as if he had personally provided it, and he cannot excuse himself by saying that he had good grounds for relying on the competence of the person to whom he delegated the duty: Wilsons and Clyde Coal v. English ." (p. 562)*

[80] In my judgment, the second defendant clearly failed in that duty: unloading containers was, on the evidence which I accept, a service which he provided to his customers; yet, on the occasion in question, no ramp was provided to transfer the golf carts from the container unto the forklift as was clearly necessary if the carts were to be unloaded safely; a makeshift ramp had to be created for this purpose and was obviously woefully inadequate; the execution of the manoeuvre under such condition, and in circumstances where the first defendant operating the forklift could not see the claimant or his colleague as they worked atop the truck, was fraught with danger, and betrayed a dangerous lack of adequate or proper supervision. There was evidence from Carl Manners, the tractor driver who had hauled the container containing the golf carts to the locus of the accident, that the unloading could have been done without anyone standing atop the forklift as the claimant and Powers did. However, in my view, the failure of the second defendant to take the basic step of providing an adequate mechanism for the transfer of the golf carts to the forklift by way of a proper ramp played a significant role in the accident. Had a ramp been provided, it is highly improbable that the eventuality of climbing atop the forklift truck to execute the transfer of the golf carts from the container would even have arisen. This dereliction of duty was also, in my view, compounded by the lack of adequate supervision of the exercise by the second defendant, and exposed his employees – including the claimant – to the danger which in fact caused his injury.

[81] I have no difficulty in holding in these circumstances that the second defendant failed miserably in his duty to provide a safe system of work for the claimant and is therefore liable to him in negligence for the injuries which he sustained as a result.

The Case Against the Third Defendant

[82] As encapsulated earlier, the claimant's case against the third defendant is that it so permitted the use of its premises and its equipment as to cause injury, loss and damage to the claimant. He pleads the following particulars of negligence against that defendant at paragraph 10 of the statement of claim:

> "(a) Failing to take any or any adequate precautions for the safety of the Claimant while he was on its premises;
> (b) Failing to provide a competent driver for the forklift;
> (c) Causing and or permitting the forklift to be driven, operated and or managed by an incompetent and unlicensed person;
> (d) Failing to ensure that care is take [sic.] in the course of employment of workers on its premises;
> (e) Failing to ensure that there was a safe system of work for the Claimant on its premises."

[83] In its amended defence, the third defendant avers that at all material times the second defendant did not own a forklift and it was part of the contract between it and the second defendant that in off-loading the third defendant's goods on the latter's premises, the second defendant would use its forklift. However, it denies any responsibility for providing a driver for the forklift, and avers that it did not therefore owe the claimant any duty to provide either a competent driver or to ensure that the second defendant – who was an independent contractor – provided one. The third defendant avers further that it acted reasonably in entrusting the off-loading of the golf carts to the second defendant and that it took all reasonable steps to satisfy itself, and was in fact satisfied, that the second defendant was competent to do so.

[84] Finally, the third defendant pleads that at all material times it took all reasonable care to ensure that its premises were safe and they were in fact safe. The forklift was in excellent condition and it was safe and ideally suited to off-load the golf carts. There was no unusual danger in the use of the forklift by the second defendant for that purpose of which the third defendant knew or ought to have known.

[85] The third defendant therefore denied that it failed in any duty owed to the claimant.

[86] As noted earlier in this judgment, the third defendant did not appear at the trial either by its proper officer or by counsel, and so no evidence was adduced on its behalf in support of its defence. I

must therefore resolve the issue of its liability on the facts as I have found them, based on the evidence otherwise adduced in the case.

[87] Counsel for the claimant submitted that the court ought to find the third defendant liable in negligence on the evidence presented in the case for the following reasons:

(i) The third defendant failed to take any or any adequate precautions for the safety of the claimant while the claimant was on its premises;

(ii) The third defendant failed to provide or to ensure that a competent driver was provided to operate its forklift;

(iii) The third defendant permitted its forklift to be driven, operated and managed by an incompetent and unlicensed driver which caused the injuries suffered by the claimant;

(iv) The third defendant failed to ensure that the claimant was using a safe system of work while on the third defendant's premises.

[88] However, the basis of the alleged duty underpinning each of these alleged breaches - which on the claimant's case would render the third defendant liable to him in negligence - was never articulated by counsel, and remains unclear.

[89] In any event, it seems to me that, having regard to the view of the evidence which I have taken regarding the relationship between the claimant and the second defendant, the duty rested with the second defendant and not the third to provide a competent driver for the forklift and generally to provide a safe system of work for the claimant. As regards the alleged failure of the third defendant to take any or any adequate precuations for the safety of the claimant while the latter was on its premises, it was never explained – nor do I see – how such a duty (presumably based on occupiers' liability) could properly be said to have arisen on the facts of this case.

[90] In the circumstances, I am constrained to dismiss the claim against the third defendant on the basis that it owed the claimant none of the duties of care alleged in its statement of claim.

[91] In summary I hold:

(i) That the first defendant was negligent in his operation of the forklift, thereby rendering him liable to the claimant for the injuries which the latter sustained;

(ii) That both the claimant and the first defendant were employees of the second defendant at the material time; and that since the first defendant was acting within the scope of his employment whilst operating the forklift, the second defendant is vicariously liable to the claimant for his negligence;

(iii) That the second defendant is also liable to the claimant as a matter of primary liability, for failing to provide the claimant with a safe system of work.

(iv) That in the circumstances of this case, the third defendant owed no duty of care to the claimant, and is therefore not liable to him in negligence for the injuries which he sustained.

[92] The claimant's claim against the third defendant is therefore dismissed.

Volenti non fit injuria

[93] It had been submitted by counsel for the first defendant in closing submissions that, having regard to the claimant's admission in evidence that he knew that it was risky to stand on the forklift while it was in operation, his awareness of the risk without being warned, and the fact that he nonetheless chose to stand on the mechanism of the forklift and as a result sustained injury, the claimant must be held to have agreed with the first defendant to take the risk of harm upon himself, and should therefore not recover damages against the first defendant.

[94] Counsel for the second defendant argued more generally that, on the evidence, the claimant was fully aware of the risk of proceeding to work under an unsafe system, and could be said to have voluntarily consented to the risk of being injured rather than "down tools and protest that he was in the circumstances forced to work in an unsafe system."

[95] Counsel relied upon the maxim *volenti non fit injuria* which is explained by ***Charlesworth & Percy on Negligence*** (12th Ed.) paragraph 4-73 as follows:

> *"A person who makes an agreement, whether expressly or by implication, to run the risk of harm negligently inflicted by another, cannot recover in respect of damage suffered in consequence. The rule has traditionally been expressed by the maxim volenti non fit injuria. The defence, which must be pleaded specifically, raises issues whether (a) the claimant agreed to the breach of a duty of care, owed him by the defendant; and (b) the claimant consented to waive his right of action against the defendant in respect of that breach. If the answer to each is in the affirmative then the wrongfulness of the defendant's conduct is excused and the claimant is precluded from recovering damages."*

[96] In response, counsel for the claimant submitted that, as the passage above clearly states, *volenti non fit injuria* is a defence which must be specifically pleaded and since it was not, it could not properly be advanced as part of the defendant's defence. Counsel for the first defendant had earlier submitted that *volenti non fit injuria* need not have been pleaded specifically – it was the substance that mattered; and having regard to the overall pleading of the first defendant and the language of negligence to be found at paragraph 10 of his defence, there was sufficient pleading of that defence to allow the court to consider it. Counsel for the claimant maintained, however, that

that was not sufficient. In the circumstances – counsel submitted – the court ought not to accept the argument that the defence could be gleaned from the pleadings.

[97] I have to agree. The defence of *volenti non fit injuria*, where successful, excuses the defendant's conduct and precludes recovery of damages from him by the claimant. In those circumstances, it would, in my judgment, be fundamentally unfair to allow the defence to be raised, for the first time, at the end of the case without it having been specifically pleaded.

[98] Even if counsel for the first defendant is right that what matters is the substance of the pleading, there is nothing at paragraph 10 of the first defendant's defence or in the particulars pleaded therein, which even remotely suggests that the first defendant would be relying on this defence. It is instructive to consider the relevant paragraphs of the first defendant's defence in full:

> *"...(8) In relation to paragraph 8 of the Claimant's Statement of Claim the 1st Defendant says that the claimant was off loading golf carts from a container onto the ramp of the said forklift. All other aspects of the paragraph is denied.*
>
> *(9) The Defendant denies that he was guilty of any negligence as alleged in the Statement of Claim.*
>
> *(10) The Defendant says that the matters complained of was as a result of the negligence of the Claimant.*

[99] The particulars of negligence earlier set out at paragraph 24 of this judgment then follow.

[100] It is immediately apparent from these pleadings, that the substance of the first defendant's defence was simply that the accident and the claimant's resulting injury were caused by the claimant's own negligence. It does not even come close to averring facts suggesting that the claimant had agreed to the second defendant's breach of his duty of care owed to the claimant or that the claimant consented to waive his right of action against the first defendant in respect of that breach.

[101] In the circumstances, I have no difficulty in rejecting the first defendant's last-minute attempt to rely on *volenti non fit injuria* as a defence to the claimant's claim.

[102] The second defendant's defence too, was bereft of any specific pleading of *volenti non fit injuria*, and in substance simply blamed the claimant as being the author of his own misfortune. So far as is material, he pleaded at paragraph 8 of his defence:

> *"...(2) the injury to the Claimant was caused either by the Claimant doing what he ought not to have done or being in a place where he ought not to have been*
>
> *(3) prior to the injury the Claimant knew or ought to have known that what he was doing or proposing to do was dangerous and likely to result in injury*

> (4) *the Claimant had foreseen or ought to have foreseen the likelihood of injury to any person so acting yet he nevertheless did what he had done regardless of the consequences, and had thereby caused the said avoidable injury to himself."*

[103] Again, the substance of these pleadings does not in my judgment amount to a sufficient pleading of volenti *non fit injuria* to justify allowing the second defendant to rely, in closing, on that that defence. I accordingly also reject the second defendant's attempt to do so.

Contributory Negligence

[104] It was also submitted in closing argument on behalf of the first defendant that on the evidence the claimant was guilty of contributory negligence, since he did not in his own interest, take reasonable care of himself, and as a result contributed to his own injury. However, the first defendant further argued (as actually pleaded) that the claimant was entirely responsible for the accident. However the evidence is looked at – counsel argued – it is clear that the claimant did not take sufficient care for his own safety. He was entirely responsible for his own injury and the first defendant should not be responsible at all. If, however, the court found that the claimant was not totally responsible and the first defendant bore some responsibility, the overwhelming contribution should be on the part of the claimant.

[105] Asked by the court whether the first defendant's pleadings were sufficient to support a finding contributory negligence on the part of the claimant, counsel submitted that they were because the greater (i.e., the averment that the claimant was to blame for the accident) included the latter (i.e., that he was partially to blame). However, no authority was cited in support of this position.

[106] For his part, counsel for the second defendant pointed to paragraph 8 of the second defendant's defence, referred to above, and adopted the argument of counsel for the first defendant that the greater included the lesser, submitting on that basis that having regard to the evidence, the court may, and ought properly to, find the claimant to have been contributorily negligent.

[107] I must therefore decide whether, having regard to the pleadings, I can properly consider as a live issue, the question of whether or not the claimant was contributorily negligent.

[108] Counsel for the claimant submitted that, like *volenti non fit injuria*, contributory negligence must be specifically pleaded and since it was not pleaded by either the first or second defendant they ought not to be permitted to rely upon it. Counsel pointed to r.8.6 and 8.7 of CPR 2000. The former speaks to what must be included in the claim form. The latter requires that a claimant include in the claim form or statement of claim, all the facts on which the claimant relies. These are very general provisions which unfortunately do not provide much assistance for resolving the specific issue which I have identified for determination.

[109] However, there is strong authority on the point that contributory negligence must be specifically pleaded by the defendant, and that, in the absence of such a pleading, the court should not, of its own volition, make such a finding[1]. This raises the question of what amounts to a plea of contributory negligence. More specifically, the question in this case is whether a general averment (common to both the first and second defendant) that the claimant's injury was caused by his own negligence can reasonably be taken to include a plea of contributory negligence.

[110] The decision in the Scottish case of ***Lawrie v Glasgow Corporation*** (1952) SC 361[2] is directly relevant to this point. In that case, the defendants had pleaded that the motor vehicle accident in question was caused solely by the claimant's own fault. No reference was made to contributory negligence in their pleadings, nor in defence counsel's opening statement. However, in closing submissions, the defence sought to argue that the issue of contributory negligence should be put to the jury on the basis that the greater includes the lesser, such that, a general reference to sole negligence should not require a specific reference to contributory negligence. The trial judge rejected this argument and declined to direct the jury that a finding of contributory negligence was open to them. The defendants then enrolled a motion for a new trial in the Scottish Court of Session (Second Division) on account of misdirection by the judge. This application was dismissed and the Court ruled that the trial judge acted correctly in the circumstances.

[111] The ruling of Lord-Justice Clerk in this case is of direct relevance in the instant case given that the court squarely rejected defence counsel's submission that the greater includes the lesser in the case of a pleading of whole negligence. Addressing that submission, Clerk, L.J. observed:

> *"He said, first, that, so long as he imputed sole fault to the pursuer in the pleadings, the absence of any reference in these pleadings to contributory negligence did not prevent the pursuer's being held partly to blame. His view was that the greater includes the less and that the absence of a case of contributory negligence had no effect on the conduct of the trial or on the jury's duty to apportion damages if they thought both were to blame…(p.364)*
>
> *"The fact of the matter is that the defenders' argument does not depend on Shillinglaw, but on the general proposition that their averment of sole fault includes an averment of joint fault, which involves, as a corollary, that a pursuer faced by a plea of sole fault must anticipate and be prepared to meet a plea of joint fault. I do not think that a pursuer is bound so to anticipate. He is entitled to conduct his case on the footing that the closed record discloses his adversary's case. The conduct of a case by a pursuer—even to the extent of the amount of evidence led—may well be different, if the issue is sole fault, from what it would be if joint fault were in*

[1] *Fookes v Slaytor* [1978] 1 WLR 1293 (EWCA); *Christie v Bridgestone Australia* (1984) 33 SASR 377 (Sup Ct SAus).

[2] (Court of Session (Inner House, Second Division))

issue. It seems to me to be inconsonant with our rules of pleading to permit a defender to state one case and then to rely on another case which raises different considerations and leads to different results. There is no hardship in insisting that a defender must state his case explicitly on record. There is risk of hardship to a pursuer if this is not done." (p.365)

[112] The court in that case also placed great emphasis on the fact that the defence had not included the issue of contributory negligence in its opening speech and sought to later raise it only in its closing submissions. Much therefore turns on the overall conduct of a defendant's case and on whether contributory negligence was a live issue, reasonably foreseen by the claimant in a manner which enabled him to adequately respond to it:

"These considerations are exemplified in what happened in the present case. The defenders did not even adumbrate joint fault in their opening speech. In my view this should have been done and the defenders' failure to do so was itself enough to prevent their being allowed to raise the matter later— cf . Robertson v. Federation of Iceland Co-operative Societies. Even if on the pleadings the pursuer was bound to anticipate that joint fault was in issue, he was entitled to assume from the silence of the opening speech that the point had been given up. I can see no justification in these circumstances for the defenders' senior counsel raising for the first time the issue of joint fault in his closing speech." (p.365)

[113] ***Lawrie v Glasgow Corporation*** has been mentioned in a number of tangentially related Scottish cases but it has not been definitively affirmed (or rejected) by any higher courts. However, there is another authority which supports the approach taken by the Court in that case – the 2006 England and Wales Court of Appeal decision in ***CTO GFC v Dziennik*** [2006] EWCA Civ 1456..

[114] In ***Dziennik***, the claimant appealed a finding of contributory negligence on the basis that the specific ground on which he was found to have been contributorily negligent differed from the particular bases identified in the defendant's pleadings. In this case, the pleading in question referred specifically to contributory negligence but the particulars of that negligence were not the actual bases on which the claimant was found to be at fault. It was held that, given that the pleadings in question, as well as the conduct of the defendant's case, relied specifically on certain averments of negligence on the claimant's part, the judge should not have made a finding of contributory negligence which lay outside the ambit of the defendant's allegations.

[115] The Court's ruling in ***Dziennik*** again emphasizes the point that the claimant must be given full opportunity to respond to any claims of joint fault, by making those claims extremely clear. It is also important to note that the initial defence in ***Dziennik*** did not include a specific pleading of contributory negligence. A general reference was made to the sole negligence of the claimant. This

pleading was then amended after the issue was raised by the trial judge who had clearly taken the view that simply averring that the accident was caused "entirely" by the claimant's own negligence did not constitute a pleading of contributory negligence. This supports the approach taken by the court in ***Lawrie***, that the greater does not include the lesser, and that a plea of sole negligence could not properly be taken to automatically include an averment of contributory negligence.

[116] I am persuaded by the approach taken on the issue in these two case and must reject the argument advanced on behalf of both the first and second defendants that the greater includes the lesser. I do not believe that the applicability or force of the principle underlying these cases is diminished by the fact that the pleadings before me, in averring that the accident was caused by the claimant's own default, do not use the language "solely" or "completely" or "entirely". When read as a whole, and taken together with the defendants' denial of any negligence on their own part in each of their respective defences, there can be no doubt that their case was that the claimant was solely responsible for the accident. Indeed, this was the basis on which the trial was conducted from start to finish – until contributory negligence was mentioned for the very first time in closing arguments.

[117] As in ***Lawrie***, the defence in the instant case was an "all or nothing" defence. No reference was made to contributory negligence or joint fault before closing submissions. It was simply not raised or treated as a live issue in the course of the trial, and the claimant conducted his defence on that footing, as he was entitled to do in the circumstances,. It must be borne in mind that the principle underlying the requirement of specific pleading is that the claimant must be able to reasonably anticipate and respond to any such allegations. In the case before me, the claimant may well have conducted his case differently were the issue of joint fault or contributory negligence put squarely in issue. It was not. There is therefore a serious risk of injustice to the claimant were I to accede to the argument that a pleading that lays responsibility for the accident squarely at his feet implies joint fault or contributory negligence, so that the claimant should have been prepared to meet such a case. Like the learned trial judge in ***Lawrie***, I can see no justification for the defendants' counsel raising for the first time the issue of joint fault or contributory negligence at the stage of closing submissions and in the circumstances I must decline to consider it as a live issue for determination in the case.

Damages

[118] The claimant, who on the evidence before me was twenty seven years old at the time of the accident, lost his right great toe and half of his right second toe to the accident in circumstances which, as disclosed in my earlier review of this aspect of the evidence, were quite traumatic. The physical pain he endured in the immediate aftermath was excruciating and he continued to experience severe pain during the two week period of his hospitalization, despite a regimen of antibiotics and painkillers. He was, in his own words, "devastated to say the least" when it became apparent that his right great toe and could not be saved after all. He feared he might have to

amputate the entire foot. He was emotionally distraught and experienced waves of depression during the period of his hospitalization.

[119] Dr. Rawlins testified that post-operatively the site of the great toe amputation healed well; but the second toe deteriorated post-operation resulting in its partial amputation. The claimant was placed on antibiotics and pain killers and his wounds improved well enough for him to be discharged from hospital on December 5, 2004 – just over two weeks after the accident. He had outpatient follow-up treatment twice over the course of the next ten days. He last saw Dr. Rawlins as a patient on October 7, 2011 when he complained of gait abnormality because of the loss of the great and second toe, right foot pain which was at its worst at the bone of the right first metatarsal, inability to walk for long periods, and difficulty and pain if running.

[120] The claimant, on Dr. Rawlins' testimony, is never free of pain, and his lower limb function is diminished. The doctor explained in his medical report that the toes are important in force and pressure transfer in the late stance phase of gait. They take thirty to forty percent of peak force and seventy percent of peak pressure. The big toe is the most important and the other toes have progressively less importance. The pressure that is exerted on the bones of the right foot with the missing toes is uneven as he walks. Additionally, the loss of toe function may increase stress elsewhere leading to other future problems – particularly arthritis, bone inflammation (osteomyelitis) and inflammation of the joint lining (synovitis) due to the extra dependence for balance on the remaining toes. That, the doctor said, could also increase the chance of further amputation "down the road." The claimant is required to wear special footwear to assist in restoring the balance that his right big toe and second toe formerly provided. He is an unskilled labourer and experiences tension on job sites where he is required to lift heavy goods and is unable to do so. The doctor concluded that the claimant had suffered a fifteen percent permanent partial disability.

[121] The claimant himself gave evidence that he is never pain free. He is embarrassed to show his feet in public. He feels like an invalid and still gets depressed from time to time. His lifestyle he says, has changed dramatically. Prior to the accident, he was an active basketball player. He played every day after work and played cricket and football occasionally. He can no longer do so because of his injuries. According to Dr. Rawlins' evidence under cross-examination, he should still be able to play sports and in particular basketball, but with impeded or diminished capacity. Jumping, running or walking for long periods, would be difficult for him.

[122] The claimant also gave evidence that prior to the accident, he used to climb trees and engage in many outdoor activities with his son who was three years old at the time of the accident. He was not able to do that after the accident. He gave evidence further that prior to the accident he worked five – sometimes six – days a week; but post-accident, was out of work up to the day he filed his claim – October 11, 2004. Thereafter, he worked one day a week at MS Trading as a truck driver. Driving was painful but he did it to support his family, starting in December 2004 at EC$300.00 per day, and ending in April 2005. Since then he has worked only part-time, occasionally operating a

backhoe at $25.00 per hour; but this is not consistent work. Dr. Rawlins in one of his medical reports adverted to the fact that he was unable to drive for long periods because of his injuries.

[123] Having regard to the foregoing, the claimant falls to be compensated, by way of general damages under the following heads:

(i) Pain and suffering and loss of amenities
(ii) Loss of future earnings

[124] The claimant is also entitled to be compensated by way of special damages for expenses incurred as a result of the accident and for any loss of earnings from the date of the accident to the date of filing of his claim. I will deal first with special damages.

Special Damages

[125] As special damages, the claimant claimed expenses incurred by way of hospital fees of EC$960.00, amputation fees of $700.00 and anesthesia care of $450.00. The relevant invoices for these expenses formed part of the agreed bundle of documents and I am satisfied that the claimant's claim for these items has not only been strictly pleaded as required, but has also been strictly proved.

[126] As regards his claim for loss of earnings, the claimant's evidence that he earned $850.00 per week on average was not disputed and indeed, finds support in the second defendant's wage book. As previously indicated, and for the reasons then given, I also accept the claimant's evidence that during the period of his hospitalization and beyond (a total of five weeks) he continued to receive wages from the second defendant, representing what he would have earned if he was still on the job. That evidence disclosed that over the course of that five week period, he was paid the total sum of $4,485.00, which comes out at an average of $897.00 per week. Further, the claimant's evidence that because of the effects of his injuries he was out of work from the day of the accident to the date he filed his claim (a total of 41 weeks) was not disputed, and I have no difficulty accepting it, having regard to the medical evidence to which I adverted earlier.

[127] I therefore find that the loss of earnings claimed has also been strictly proved. On the face of it therefore, the claimant is entitled to an award of EC$39,960.00 by way of special damages, as pleaded. However, it was submitted by counsel for the first defendant (and counsel for the claimant conceded) that the award for loss of earnings to the date of filing of the claim should be reduced by the amount of social security benefit payments received by the claimant in the aftermath of the accident. Counsel for the first defendant cited the English cases of ***Hodgson v. Trapp*** [1938] 3 AK E.R. 870, and ***Palfrey v Greater London Council*** [1985] I CR 437; but this

approach is entirely consistent with how such benefits have been treated in the various jurisdictions of the Eastern Caribbean Supreme Court.[3]

[128] The claimant's evidence was that he received a total of $40,472.53 by way of installment payments from the Social Security Department. When this sum is taken into account, it completely extinguishes his claim of $34,850.00 for loss of income from the date of the accident to the date of his claim. Accordingly, there can be no recovery for this item. Special damages will, accordingly, be awarded only on the basis of the remaining items, yielding a net total of EC$2,110.00.

General Damages

[129] In assessing general damages, I take into account the following considerations in keeping with the approach established in ***Cornilliac v. St. Louis*** [1965] 7 W.I.R. 491 and repeatedly followed and applied within the jurisdiction of the Eastern Caribbean Supreme Court: the nature and extent of the injuries; the nature and gravity of the resulting physical disability; the pain and suffering which the claimant endured; loss of amenities; and the extent, if any, to which the claimant's pecuniary prospects have been affected. In this context, I bear firmly in mind the evidence of the claimant and that of Dr. Rawlins earlier summarized above, which speak to all of these factors.

Pain and suffering and loss of amenities

[130] In ***CCAA Ltd. v. Julius Jeffrey,*** St. Vincent Civil Appeal No. 10 of 2003, Gordon J. (Ag.) articulated the modern approach to assessment of this head of general damages expressed by Lord Hope of Craighead in the case of ***Wells v. Wells***[4]:

> *"The amount of the award to be made for pain, suffering and the loss of amenity cannot be precisely calculated. All that can be done is to award such sum within the broad criterion of what is reasonable* ***and in line with similar awards in comparable cases*** *as represents the Court's best estimate of the plaintiff's general damages."*[5] *(emphasis added)*

[131] Gordon J. went on to observe that a trial judge must exercise his discretion based on the evidence before him, but that that discretion must be curtailed by attempting to achieve consistency in awards within the jurisdiction of this court.

[132] Having regard to the relevant evidence which I have set out fully above, counsel for the claimant submitted that an award in the range of EC$150,000.00 to $200,000.00 would be appropriate in this case for pain and suffering and loss of amenities. Counsel relied on the following cases:

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[3] See for example, Tortola Yacht Services Limited v. Denroy Baptiste – BVI Civil Appeal No. 2008/016, June 22, 2009.

[4] [1998] 3 All E.R. R.481

[5] Page 5

(i) ***Avaline Ogarro et al v. Neil Ross et al*** SVGHCV 2004/329 – February 2012, in which an award of EC$140,000.00 was made for pain and suffering to a 30 year old claimant who sustained fracture of the acetabulum with dislocated right hip and restrictions of all range of motion to that hip, which was very painful. I do not find this case to be helpful, given the obvious dissimilarity between it and the claimant's case.

(ii) ***Violine Joseph v. Terese Morris and Sonnel Samuel*** ANUHCV 2006/0133 - June 22, 2009, concerned a 48 year old claimant who sustained a crushing injury of her right leg, resulting in its amputation. She was awarded EC$135,000.00 for pain and suffering and loss of amenities. Again, I do not find this very dissimilar case helpful.

(iii) ***Lincoln Carty v. Lionel Patrick et al*** SKBHCV 1998/005 – 2009, which involved fractures to the claimant's right femur, pelvis and ribs; lacerations and contusion of the sciatic nerve in the right leg and permanent dislocation of the joint in the sternum, among other injuries. An award of EC$175,000.00 was made to the claimant for pain and suffering and loss of amenities; but again, it will be immediately apparent that this case bears very little, if any, relationship to the one before me.

(iv) Finally, counsel directed the court's attention to the case of ***Marcel Fevrier v Bruno Canchan et al*** SLUHCV1989/313, delivered March 2002, in which the 25 year old female claimant sustained abrasions, superficial lacerations and fracture of the right femur and was awarded EC$150,000.00 under this head of general damages. This is not a very helpful case either.

[133] Counsel for the first defendant relied upon the English cases of ***Heddow v. Braltex***, a 1990 decision of the Queen's Bench Division reported on Lawtel; and ***Evans v. Lufthansa German Airlines,*** also a decision of the Queen's Bench Division reported on Lawtel, but given in 1981. In *Heddow*, a 55 year old warehouse worker suffered a crushed big toe from a falling pallet which resulted in amputation; and a fractured proximal phalanx. His injury also caused osteomyelitis of the first ray of his left foot and risk of further infection through diabetes and bad circulation. He had to walk with a stick and his gait was affected, which caused hip trouble. He received an award in 1990 of £12,000.00 for pain and suffering and loss of amenities. ***Evans*** concerned a crush injury of the left foot of a forklift truck operator who was injured in the course of his employment when his truck crashed into a wall. I do not propose to consider this case since in my view, quite apart from the dissimilarity of the injury involved there, it is bound to be unreliable given its vintage and the difficulty I would face in even attempting to update an award made in 1981 to today's value.

[134] ***Heddow*** is far more helpful, given the similarity of the injuries in that case to those of the claimant. Updated to today's value in order to account for inflation, that 1990 award of £12,000.00 would yield an award today of £21,482.51. An award at that level for that kind of injury is also consistent with the U.K. Judicial College Guidelines on personal injury and fatal accident awards (which have

been cited with approval in the Eastern Caribbean Supreme Court) the current edition of which suggests an award in the vicinity of £23,000.00 for amputation of the great toe.

[135] No cases from the Eastern Caribbean or the wider Caribbean region involving injuries similar to the claimant's were cited to me; and so I have looked to English decisions. The case of ***Watts v. W.H. Smith*** reported in the December 2004 update of Kemp & Kemp is the one I find most helpful. In that case, the 29 year old plaintiff sustained a fracture of his left great toe which failed to heal satisfactorily, and after several unsuccessful medical procedures over the course of an approximate three year period to save it, the decision was taken to amputate it. Unlike the claimant in the case before me, the plaintiff there was not handicapped in any real way in the labour market as a result, and he was not expected to suffer long term consequences of the amputation; but in addition to the physical symptoms, he suffered a significant depressive reaction characterized by low mood outbursts and anger and his marriage was affected. He was awarded £20,000.00 for pain and suffering and loss of amenities in November 2002. Updated to today's value in order to account for inflation, that would yield an award today of £26,800.00.

[136] It seems to me that if I were to apply the Judicial College Guidelines in conjunction with the English cases referred to above, which are the cases found to bear the greatest similarity to the claimant's, I would have to say that an award in the EC$ equivalent of £21,000.00 at the lower end to £27,000.00 at the upper end, would be appropriate. At the current exchange rate of approximately EC$4.00 to £1.00 that would yield a range of approximately EC$85,400.00 to EC$110,000.00.

[137] I bear in mind, however, that it would not be appropriate to slavishly follow awards found to be appropriate for a jurisdiction whose socio-economic conditions and standard and cost of living are vastly different from the jurisdiction in which the claimant's case arises. But having said that, I am still mindful of the fact that the claimant's injury and the resulting disability and loss of amenities are much greater than those of the plaintiffs in the two English cases to which I have referred. In particular, the claimant suffered not one, but two amputations – a total amputation of his big toe and a partial amputation of his second toe. In addition, he suffers gait abnormality and must wear special footwear to assist in restoring balance. He faces the risk of future problems – particularly arthritis, bone inflammation, and inflammation of the joint lining, which together can also increase the chances of further amputation in the future. He is an unskilled labourer and his pecuniary prospects are undoubtedly impaired. All told, Dr. Rawlins concluded that he has suffered a fifteen percent permanent partial disability.

[138] When I consider these aggravating factors, it seems to me that, even taking the different socio-economic conditions between the UK and the Eastern Caribbean (and in particular Nevis) into account, an award in the range of EC$85,400.00 to EC$110,000.00 would not be excessive for the claimant under this head.

[139] Taking all of the foregoing into account, I would therefore award the sum of EC$95,000.00 for pain and suffering and loss of amenities.

Loss of Future Earnings

[140] This head of damages is meant to compensate a claimant for money he would have earned during his normal working life had he not been injured, but which he is unable to because of the injury.

[141] As earlier indicated, at the time of the accident, the claimant was an unskilled labourer earning an average of $850.00 per week. It is not clear from the evidence whether this was gross or net of statutory deductions, but the fact that it is an average suggests that it varied upwards or downwards from time to time; and given that at this level of earnings such deductions would probably be relatively low, I would not consider this uncertainty to be of any great moment. Prior to the accident, he worked five or six days a week but after the accident was out of work up to the date of filing of his claim. Thereafter he worked one day a week only, as a truck driver, up until April, 2005, earning $300.00 per day. However, driving was painful then, and still is. He is never pain free and is unable to drive for long periods. Since April, 2005 he has worked only part time, occasionally operating a backhoe at $25.00 per hour but this is not consistent work, although according to his evidence at trial, it is the only thing he is capable of doing right now.

[142] I accept that the injury has left the claimant impaired in his ability to perform certain activities, particularly those which would exert pressure on the bones of the right foot. Driving is obviously one such activity; and unfortunately for him, as an unskilled labourer, his choice of occupation is likely to be restricted to the very kind of work which would result in such exertion, eg., loading and offloading goods. It is unclear from the evidence though, just how much of a diminution there has really been of his ability to engage in activities that would ordinarily be associated with an unskilled labourer.

[143] Counsel for the claimant submitted that his employment (by which I understood her to mean his ability or capacity to work) has been diminished by at least fifty percent, thereby reducing his average weekly income from $850.00 to $425.00; but I am not at all convinced on the evidence before me that the claimant is so incapacitated by his injury that he can do no better than occasional employment operating a backhoe at $25.00 per hour. I bear in mind, however, that he has suffered a fifteen percent permanent partial disability, which Dr. Rawlins explained meant a fifteen percent disability of the whole person; and as an unskilled labourer who can only perform with difficulty and pain tasks that would ordinarily be associated with that category of worker, he will in all probability continue to experience more than minor difficulty finding suitable work.

[144] It seems to me, based on all of the foregoing, that a fair assessment on the evidence before me would put the level of impairment of the claimant's future earning capacity at no less than thirty three and one third percent – and probably even more. Forty percent would appear to me to strike a fair balance in all the circumstances. On that basis I am prepared to hold that the average monthly income of $3,400.00 which he might otherwise have been expected to earn has probably been reduced by $1.360.00 per month.

[145] At the time of trial the claimant was thirty six years old, and with a probable retirement age of 65 years, his active working life could probably have been expected to extend for another twenty nine years. However, given the many vicissitudes and imponderables of life, an unpredictable future, and the fact that the claimant is to receive a lump sum payment and not periodic payments by way of any award under this head, I would apply a multiplier of ten. At a loss of $1,360.00 per month or $16,320.00 per year, this would yield a figure of EC$163,200.00 for loss of future earnings.

[146] I would accordingly summarize the damages payable to the claimant as follows:

(i) Special damages	$2,110.00
(ii) General damages:	
(a) Pain and suffering and loss of amenities	$95,000.00
(b) Loss of future earnings	$163,200.00
Total	**$260,310.00**

Interest

[147] The guidelines to be followed for the award of interest in personal injury cases are those set out in ***Alphonso v Ramnauth***, BVI Civil Appeal No.1 of 1996. No interest is to be awarded on loss of future earnings. On general damages for pain and suffering and loss of amenities, interest should be awarded for the period from the date of service of the claim to the date of trial at the rate payable on money in court placed on short term investment, and in the absence of evidence of what that rate is, at the applicable statutory rate of interest. Special damages will attract interest to be awarded for the period from the date of the accident to the date of the trial, at half the rate payable on money in court placed on short term investment.

[148] There is no evidence before me as to the rate payable on money in court placed on short term investment in the Federation of St. Christopher and Nevis. However, the statutory rate of interest under the Judgments Act to be applied to judgment debts from the entry up of judgment until payment, is five percent. Accordingly, I would award interest in this case as follows:

(i) On the special damages of $2,110.00 – interest at the rate of two and one half (2½) percent from the 22nd of December, 2003 to the 22nd of October, 2012.

(ii) On the general damages of $95,000.00 for pain and suffering and loss of amenities – interest at the statutory rate of five percent from the 11th of October, 2004 to the 22nd of October 2012.

[149] Interest will, of course, also be payable on the entirety of the judgment debt arising from this judgment, at the statutory rate of five percent as prescribed by section 7 of the Judgments Act.

Costs

[150] The claimant is to have his prescribed costs, pursuant to CPR 65.5. However, no award of costs will be made in favour of the third defendant since it did not appear at the trial.

Paul B. Dennis
High Court Judge (Ag.)
18th December, 2015