[2020] JMCA Civ 3

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 96/2015

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

BETWEEN	**ADOLPH CLARKE (T/A CLARKE'S HARDWARE)**	**APPELLANT**
AND	**WAYNE HOWELL**	**RESPONDENT**

Raymond Samuels instructed by Samuels Samuels for the appellant

Sean Kinghorn instructed by Kinghorn & Kinghorn for the respondent

26 March 2019 and 24 January 2020

MCDONALD-BISHOP JA

[1] I have read in draft the comprehensive judgment of my learned sister, Foster-Pusey JA. I agree with her reasoning and conclusion and there is nothing I could usefully add.

F WILLIAMS JA

[2] I too have read in draft the judgment of my learned sister, Foster-Pusey JA. I agree with her reasoning and conclusion and have nothing to add.

FOSTER-PUSEY JA

Background

[3] On 26 January 2009, the respondent instituted a claim against the appellant, seeking to recover damages for negligence, breach of the Occupier's Liability Act and breach of contract, arising out of an accident which occurred at Clarke's Hardware, a hardware supplies store owned by the appellant.

[4] The respondent was a labourer employed at Clarke's Hardware. On 15 May 2008, an unfortunate event occurred at the hardware store while a truck owned by the appellant was being loaded in preparation for delivery of goods. The forklift operator, also an employee of the appellant, was in the process of loading a bundle of steel onto the truck, when the binding wire that bound the steel broke, causing the steel to fall and injure the respondent.

Proceedings below

The pleadings

[5] The respondent outlined the following particulars of negligence in the particulars of claim filed 26 January 2009:

> "(i) Causing the said steel to fall and hit [the respondent].
>
> (ii) Failing to warn [the respondent] of the danger of the said load of steel falling on him.
>
> (iii) Placing the steel in such a precarious position as to cause the said steel to fall on [the respondent].
>
> (iv) Failing to securely place the steel in such a manner as to prevent the said steel falling on [the respondent].
>
> (v) Failing to take such reasonable care in all the circumstances to [sic] so as to place and secure the said steel that the said load of steel did not fall on [the respondent]."

Other particulars of negligence were outlined as follows:

> "(i) Failing to take reasonable steps to provide a safe place of work.
>
> (ii) Failing to provide the requisite warnings, notices and/or special instructions to [the respondent] and its other employees in the execution of its operations so as to prevent [the respondent] being injured.
>
> (iii) Failing to provide a competent and sufficient staff of men.
>
> (iv) Failing to modify, remedy and/or improve a system of work which was manifestly unsafe and likely at all material times to cause serious injury to [the respondent]."

[6] In addition, the particulars of breach of the Occupier's Liability Act were:

> "(i) Failing to take such care as in all the circumstances of the case was reasonable to see that [the respondent] would be reasonably safe in using the premises for the purposes for which he was invited or permitted to be on the said premises.
>
> (ii) Failing to put up warning signs of the dangerous state of its premises having regard to the precarious way in which the steel was placed."

[7] Furthermore, in the particulars of claim, the respondent alleged that it was an express or implied term of the contract of service, that the appellant would take all reasonable care to execute his operations in the course of his trade, in such a manner so as not to subject the respondent to reasonably foreseeable risks of injury. However, in breach of the said contract, the appellant had exposed the respondent to reasonably foreseeable risks of injury.

[8] The appellant, in his amended defence filed 4 July 2013, outlined the following:

"(3) Paragraph 3 is denied save that there was an incident on the [appellant's] premises on the 15th day of May 2008.

Particulars of Negligence

a. [The appellant] denies each and every Particular of Negligence as if the same were separately set out and traversed seriatim.

Particulars of Breach of the Occupiers Liability Act

a. [The appellant] denies each and every particular of Breach of the Occupiers Liability Act as if the same were separately set out and traversed seriatim.

Particulars of Injury

a. [The appellant] denies each and every particular of Injury as if the same were separately set out and traversed seriatim.

b. [The appellant] will say that the particulars of injuries are totally inconsistent with the pleading at paragraph 3 of the Particulars of Claim.

(3) The Particulars of Special Damages are not admitted. [The appellant] will say that if [the respondent] incurred loss and damage including medical expense, such expenses were incurred by [the respondent] on a condition which was not in any way connected with [the respondent's] contract of service with [the appellant].

(4) [The appellant] will say that on the 15th day of May 2006 [sic] [the respondent] was working as a "Side man" on a truck owned by [the appellant].

(5) The truck being loaded with half of Steel by a forklift [sic].

(6) [The respondent] upon observing same falling off went to remedy the condition. No steel fell off and injured [the respondent's] back. In the circumstances [the appellant] will say that [the respondent] was a victim of his own folly and is solely to be blamed for all or any injury loss and

damage suffered by him in that exercise…"
(Underlining as in the original)

The appellant's case at trial

[9] On 15 May 2008, the respondent was working as a side man on a truck owned by the appellant. The truck was being loaded with half-ton of steel using a forklift. Before the bundle of steel was moved with the forklift, it was tied on the ground with binding wire, to ensure that it was transferred safely to the truck.

[10] During the transfer of the steel, a mishap occurred, as the bundle of steel shifted and started to fall. Upon observing this, the respondent took it upon himself to try and remedy the situation. The respondent ran past the appellant and went around the back of the truck to stop the steel from falling. However, the steel slid off and hit the respondent on his ankle.

[11] In cross-examination, it was suggested to the respondent that he had been warned by the appellant and the forklift operator not to go into the area of the falling steel, as it was unsafe to do so. The respondent failed to heed the warnings and failed to take into consideration, his own safety, as he went off on his own volition. He was a victim of his own folly and, in these circumstances, he was solely to be blamed for any injuries sustained.

[12] Further, in cross-examination, the appellant agreed that the loading of items into the truck by the forklift is dangerous. In addition, when steel is being loaded onto the truck by the forklift, the binding wire has broken at times and when this occurs the steel has had to be re-bound. This would usually be done by one of the casual labourers. The appellant could not recall whether any of the casual labourers, including

the respondent, on any prior occasions, had run to "catch" the steel when the binding wire broke. He had not posted any warnings "at the front" in relation to the operations of the forklift and the truck.

[13] Sometime after the respondent began to work with him (he was unsure of the date), the appellant had held a safety meeting with the respondent. At a time that he was unable to recall, he trained the respondent on how to do his job. This was long before the accident occurred. Four months before the accident occurred, the appellant had conducted a safety meeting and had conducted one such meeting a year or so prior to that date. The workers who attended the safety meeting were not asked to sign a roster so as to identify who attended the meeting. Safety meetings addressed matters such as how to operate the forklift and the angle at which you operate it so as to prevent whatever is on it from falling off. In addition, it was indicated in the safety meetings that whenever the forklift was operating no one was allowed near to it.

[14] Mr Michael Grandison gave evidence for the appellant. At the time of the accident, he had been employed to the appellant as a driver for two years. He testified that as a driver, he was not required to attend safety meetings. He was at work on two occasions when safety meetings were held, but could not recall the dates when they had been held.

[15] On the day of the accident, Mr Grandison was assigned to deliver material to certain purchasers from the hardware. The truck was being loaded with the material, while he was in the hardware retrieving a piece of wood to fit in between the rolls of

steel on the truck. The rolls of steel weighing approximately one-half ton had been tied together on the ground.

[16] He was not outside and did not see when the steel fell on the respondent, as at the time, he had gone into the hardware to retrieve a piece of wood. To his knowledge, the forklift operator should not have put the steel on the truck because "something had broken off the truck" and he, Mr Grandison, had gone inside to fix "a thing on the back that is supposed to protect the steel from sliding two sides".

[17] It is important to note that aspects of the appellant's and Mr Grandison's witness statements were redacted at trial on the ground that they breached the rule against hearsay.

The respondent's case at trial

[18] The respondent stated that, on 15 May 2008, he was carrying out his duties as a labourer employed at the appellant's hardware. The accident occurred whilst the appellant's truck was being loaded by a forklift with half-ton of steel in preparation for delivery.

[19] Before the loading of the steel onto the truck had commenced, he had counted and tied the steel into a bundle to be lifted by a forklift. The forklift operator, who was also an employee of the appellant, used the forklift to lift one end of the bundle of steel onto the truck, and then lifted the other end of the bundle to put the entire bundle into the truck. Whilst this was being done, the binding wire that was used to tie the bundle of steel broke.

[20] The forklift operator, as was the normal practice, called him and asked him to re-tie the steel with the binding wire. He complied. It was after he had re-tied the binding wire and was walking away, that he felt a great impact to his back, waist and right foot. After feeling the impact, he was pinned to the ground by the half-ton of steel for approximately half an hour.

[21] In cross-examination, the respondent however said that the steel had become loose, he was going back to tie it, and the operator of the forklift pushed the steel which then hit him on his back and broke up his foot. He fell on the ground when it hit him in his back, then some steel came and hit him on his foot before he could tie up the steel.

[22] Later, the respondent stated that he had in fact tied up the steel before the accident.

[23] He denied that he had been warned by the appellant and the forklift operator to not attempt to stop the steel from falling off the truck.

[24] The respondent insisted that the appellant did not give the employees any safety instructions, warnings or precautions or safety training. There were no warning signs. In fact, there was no system of safety implemented at the hardware. The employees were left to their own devices. The procedure that he had followed on the 15 May 2008, was what he had been instructed and taught to do by the appellant. When he was tying the steel, both when it was on the ground, as well as when it was on the forklift, he did so in the appellant's presence. This was how they normally operated at the hardware and no one objected to what he was doing.

The decision

[25] The matter was set for trial on 26 February 2015 before Dunbar-Green J (Ag) (as she was then). On 19 June 2015, the learned trial judge found in favour of the respondent and made the following orders:

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

The appeal

[26] In the notice of appeal filed 25 September 2015, the appellant has based his challenge of the decision of the learned trial judge on 15 grounds. On 26 March 2019, this court heard oral and written submissions from both counsel and at the end of the proceedings, we promised that our decision and reasons would follow in due course. We now fulfil that promise.

The grounds of appeal and orders sought

[27] The grounds of appeal are:

> "a. The Learned Trial Judge, generally, failed to evaluate or to properly evaluate the evidence given by the Witnesses-in-chief and elicited in cross-examination and in her recital thereof avers to conflicting and unreasonable conclusions;

b. The Learned Trial Judge failed to assess or to properly assess the totality of the evidence of the Respondent as to liability which disclosed material facts and inconsistencies which should have led to a finding of negligence exclusively or contributory negligence;

c. The Learned Trial Judge failed to recognise those material inconsistencies and conflicts which clearly impaired the Respondent's evidence and case and which ought to have led to a finding that he is not a witness of truth;

d. The Learned Trial Judge failed to evaluate or to properly evaluate the evidence given by the Appellant which demonstrates that the Respondent was solely responsible for or that he materially contributed to the accident;

e. The Learned Trial Judge failed to examine or to properly examine the evidence given on behalf of the Appellant and elicited in cross examination which indicate that the Appellant maintained a level of control and supervision over the work to be performed and that the Respondent breached such control and as such was sufficient to ground a finding of negligence on the part of the Respondent.

f. The Learned Trial Judge failed to assess the Respondent's evidence respecting his alleged injuries and disabilities as well as the medical evidence which in material respects were adverse to the credit of the Respondent and generally his case;

g. The award of damages for pain and suffering and loss of amenities is inordinate and is not supported by the evidence given by the Respondent in examination-in-chief and under cross-examination as well as in light of the evidence of the Appellant's witness;

h. The Judgment of the learned trial judge was unreasonable in the light of the evidence.

i. The Learned Trial judge erred in not considering the issue of contributory negligence.

j. The learned trial judge erred when she found that the negligence (if any) committed by Respondent [sic] caused the [Respondent's] current injuries and medical complaints.

k. The learned trial Judge failed to give proper weight to the obligation imposed by law on the [Respondent] with respect to a special risk ordinarily incident [sic] to his occupation as a labourer.

l. The learned trial Judge failed to give proper weight to the fact that the steel might have fallen on the floor of the [Appellant's] workplace was not a latent but an obvious risk ordinarily incident to his occupation which he was obliged to be on the lookout for and was warned.

m. The learned trial Judge failed to appreciate that the [Respondent] was warned not to go where the steel was falling off and despite the warning went to the area where the steel was falling and the circumstances where, as in the instant case, the relatively short duration of the steel beginning to fall and when the Respondent went to the area where the steel was falling was such that no system for the [sic], however efficient, could prevent an accident where the Respondent failed to heed the warning and failed to comply with procedures instituted by the Appellant.

n. The learned trial Judge erred in finding that the [Respondent] was not warned; alternatively even if there was a warning but same was deficient, this did not relieve the [Respondent] from or reduce his own duty of care.

o. The learned judge erred in not finding the Respondent 100% negligent for his injury, but even if she did not find 100% then she failed to find that there was at least contributory negligence for the accident and the Respondent receiving his injuries."

[28] The orders being sought by the appellant are:

> "1. That there be judgment for the Appellant against the Respondent with costs to be taxed if not agreed.
>
> 2. ALTERNATIVELY, there be Judgment for the Respondent against the Appellant but that the Respondent was contributory [sic] negligent and equally and/or more than likely to be blamed for [sic] accident and injuries received.
>
> 3. ALTERNATIVELY, that there be judgment for the Respondent against the Appellant and that liability be apportioned between the Appellant and the Respondent equally or in favour of the Appellant."

The submissions

Submissions for the appellant

[29] Mr Samuels, on behalf of the appellant, urged this court to conclude that the learned trial judge was wrong to have accepted the evidence of the respondent, as he was not a credible witness. This, he argued, was borne out by a number of material inconsistencies in the respondent's evidence. These included the respondent's:

> i. incredible description of the process by which the half-ton of steel was lifted – it was impossible for the steel to have been lifted one end at a time;
>
> ii. inconsistent evidence as to whether he was hit by the steel after he had re-tied them or whether it was while he was on his way to re-tie them that the steel fell on him;

iii. evidence that all the half-ton of steel had fallen on him but his injuries were not as severe as they would have been had that been true;

iv. testimony that the steel had fallen on his back which was in contrast with his evidence that he had fallen on his back before the steel hit him; and

v. evasiveness when he was questioned as to for how long he had been working for the appellant.

[30] Mr Samuels also criticized the finding of the learned trial judge that the appellant operated a lax system of work, in light of the appellant's evidence that safety meetings were held periodically, and there was a system in place that no employee was to be in the zone when the forklift was operating. It was the respondent's failure to comply with warnings that he should not interfere with the steel that led to his injury.

[31] Counsel further argued that while Mr Grandison, a witness for the appellant, stated that a wedge which ought to have been on the truck to secure the steel was missing when the accident occurred, this state of affairs did not materially contribute to the accident and the learned trial judge ought not to have taken it into consideration in arriving at her conclusions.

[32] Counsel referred to the case of **Norris v W Moss & Sons Ltd** [1954] 1 WLR 346 in which the Court of Appeal of England and Wales found that the plaintiff's injury was solely caused by his own negligence. He relied on the case of **King v Smith (t/a**

Clean Glo) [1995] PIQR P 48, CA in support of the principle that the standard expected of the employer is that of a reasonable employer, not one who is perfect.

[33] Additionally, counsel relied on the case of **Joseph Reid v Mobile Welding and Engineering Works Ltd and Newton Rodney** ((unreported), Supreme Court of Judicature, Jamaica, Suit No Cl 2000 R - 030, judgment delivered 26 January 2007, per Justice Anderson) and submitted that the employer cannot be expected to protect his employee from their most egregious follies.

[34] Counsel argued that the learned trial judge ought to have considered whether, in the circumstances, it was necessary to give the respondent repeated warnings, he having worked with the appellant for over 10 years. Counsel relied on the case of **Qualcast (Wolverhampton) Ltd v Haynes** [1959] AC 743 to bolster his point that an experienced man does not need any warning about the risk with which he is familiar.

[35] Turning to the issue of contributory negligence, Mr Samuels stated that while the learned trial judge concluded that contributory negligence by the respondent had not been proved, she had not provided any reasons in support of that finding. He referred to the cases of **Davies v Swan Motor Co (Swansea)** [1949] 2 KB 291 and **Nance v British Columbia Electric RY Co Ltd** [1951] AC 601 in support of the principle that to establish contributory negligence, it is not necessary to show that the negligence of the plaintiff constituted a breach of duty towards the defendant; it is sufficient to show that a lack of reasonable care for the plaintiff's own safety or property was a cause of the injury.

[36] As it relates to the question of apportionment of liability, counsel made reference to the case of **Joseph Reid**, which adopted the judgment of Lord Pearce in **Uddin v Associated Portland Cement Manufacturers Ltd** [1965] 2 All ER 213. Counsel highlighted that at page 218, Lord Pearce noted that; "the question of proportion is one of fact, opinion and degree. The onus of proving contributory negligence is on the defendants" (see also **Aston Fitten v Michael Black Ltd and Ken Henry** (1987) 24 JLR 252 (SC), per Wolfe J (as he then was)). Counsel contended that although the court in the **Aston Fitten** case found the plaintiff 60% liable, the case at bar is distinguishable because the respondent had the greater responsibility for the accident, as he acted recklessly, despite being warned. Hence, he should be held 90% liable.

[37] The award of damages made by the learned trial judge, counsel argued, was excessively high. He therefore urged the court to reduce the damages awarded, in light of the case of **Roy Douglas v Reid's Diversified Ltd et al**, as reported in the Khan's Recent Personal Injury Awards Volume 4, at page 61 (decided on 6 October 1995) and that of **Yvonne McKenzie v Marcus South** found in the Khan's Recent Personal Injury Awards Volume 6, at page 66 (decided on 30 January 2009). In the **Roy Douglas** case, damages were awarded in the sum of $240,000.00 which, updated using the CPI at the date of trial (223.0), would have amounted to $1,587,188.61. In the **Yvonne McKenzie** case, damages of $1,000,000.00 were awarded which, updated using the CPI at trial (223.0), would have amounted to $1,633,699.00. Counsel submitted that the injuries sustained by the respondent were not as serious as those sustained in the referenced cases. In the circumstances, an award of damages in the amount of $1,300,000.00 would have been adequate.

Special damages

[38] Apart from the award made for medical expenses, the sum in respect of which there was agreement, counsel challenged all other aspects of the award of special damages. The learned trial judge made the following awards: $324,445.00 for loss of earnings, $108,106.00 for medical expenses (as agreed), $20,000.00 for transportation expenses, and $31,200.00 for household help. Counsel submitted that special damages must be specifically pleaded and proved and no receipts were tendered by the respondent in support of the amounts claimed for household help, loss of earnings and transportation costs. There was no basis on which the legal requirement for strict proof of same should be tempered. Consequently, no award should have been made for those aspects of the claim. He referred to the cases of **Lawford Murphy v Luther Mills** (1976) 14 JLR 119 and **Desmond Walters v Carlene Mitchell** (1992) 29 JLR 173.

Submissions for the respondent

[39] Mr Kinghorn, in response, helpfully outlined the principles by which this court is guided in reviewing decisions made by judges at first instance. These include the following:

i. This court will not lightly disturb findings of fact made at first instance, but will do so if the findings are not supported by the evidence, the tribunal did not make use of the benefit of having seen the witnesses, has failed to properly analyse the entire evidence or has misdirected itself in relation to the law or the facts.

ii. The court must be satisfied that the judge at first instance is "plainly wrong".

He referred to the cases of **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7, **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 23 JLR 35, **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21, **Choo Kok Beng v Choo Kok Hoe** [1984] 2 MLJ 165, per Lord Roskill, **Watt (or Thomas) v Watt** [1947] AC 484 and; **Clarence Royes v Carlton Campbell and Another** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 133/2002, judgment delivered 3 November 2005. These cases also indicate that where the credibility of witnesses is important in the determination of a matter, the judge at first instance would have had a distinct advantage in hearing and seeing the witnesses, and this court will not lightly disturb findings of fact made. Where inferences are concerned, however, the court may review the evidence and, if required, make necessary inferences.

[40] Mr Kinghorn urged that none of the findings of fact made by the learned trial judge could be seen as plainly wrong. The learned trial judge accepted the respondent's case as more credible where it conflicted with the appellant's case. She carefully assessed the evidence given by the appellant of his safety measures, procedures and protocol, and on the very basis of what he asserted, she found that there were clear breaches of his common law duty of care. Proof of these breaches was buttressed by the evidence of the respondent, which the court properly accepted. Hence, there was no proper ground on which to disturb the learned trial judge's findings of fact.

[41] In so far as the relevant principles of law are concerned, Mr Kinghorn argued that the learned trial judge correctly identified and applied them to the issues before her. She properly referred to the common law duty of care owed by an employer to an employee, and the various facets encompassed in this duty, including the provision of competent staff, adequate plant and equipment, a safe system of work with effective supervision, the constant monitoring of the system of work, the sequence of work, the propensity of workmen to be careless as to their own safety and the resultant duty on the employer to organize a system of work which itself reduces the risk of injury from the workmen's foreseeable carelessness. He referred to a number of cases in support of these principles: **Davie v New Merton Board Mills Limited** [1959] 1 All ER 346, **Speed v Thomas Swift and Co Limited** [1943] KB 557, **Stokes v GKN (Bolts and Nuts) Ltd** [1968] 1 WLR 1776 at page 1783, per Stanwick J, **Bish v Leathercraft Limited** (1975) 24 WIR 351, **General Cleaning Contractors v Christmas** [1953] AC 180, **Walter Dunn v Glencore Alumina Jamaica Limited (t/a West Indies Alumina Company (Windalco))** (unreported), Supreme Court of Judicature, Jamaica, Claim No 2005 HCV 1810, judgment delivered 9 April 2008), some of which had been included by the learned trial judge in her reasons.

[42] Counsel highlighted paragraphs [73] to [75] of the learned trial judge's judgment, in which he said she not only identified the correct principles of law but also could not be faulted in her application of same to the facts before her.

[43] Turning to the issue of contributory negligence, Mr Kinghorn submitted that a person can be found to have been contributorily negligent if he ought reasonably to

have foreseen that, if he did not act as a reasonable prudent man, he might be hurt himself, and in his reckonings, he must take into account the possibilities of others being careless.

[44] Counsel further submitted that it is trite law that the appellant must prove contributory negligence (see **Flower v Ebbw Vale Steel, Iron and Coal Co Ltd** [1936] AC 206 and **Uddin v Associated Portland Cement Manufacturers Ltd** [1965] 2 All ER 213, per Lord Pearce).

[45] He drew the attention of the court to the fact that the appellant had not pleaded any particulars of negligence in support of his allegation that the respondent was partially responsible for the accident. Counsel argued that, in any event, the court was correct to have found that, as a matter of fact, there was no contributory negligence on the part of the respondent. As such, counsel argued that this aspect of the appellant's appeal should also be refused.

[46] In responding to the challenge to the award of general damages, counsel referred to the principles by which an appellate court is guided in its review of damages awarded by a lower court. As outlined by Phillips JA in the case of **Richard Sinclair v Vivolyn Taylor** [2012] JMCA Civ 30 at paragraph [27], in quoting an excerpt from the case of **Flint v Lovell**:

> "…To justify reversing the trial judge on the question of the amount of damages it will be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate

> of the damages to which the plaintiff is entitled."

[47] He also relied on the cases of **Stephen Clarke v Olga James-Reid** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 119/2007, judgment delivered 16 May 2008 and **The Attorney General v Derrick Pinnock** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 93/2004, judgment delivered 10 November 2006 in support of the principle.

[48] In his oral submissions, Mr Kinghorn shortly addressed the appellant's challenge to aspects of the award of special damages. In so far as the award for loss of earnings was concerned, he referred to paragraph [119] of the judgment where the learned trial judge referred to the evidence of the respondent's income at the time of the injury ($3,740.00 per week), and payments amounting to $64,515.00 made by the appellant to the respondent after the accident. Where transportation expenses were concerned, while the respondent had given evidence of having paid $1,500.00 for round trip travel to his doctors, the clinic and the hospital, counsel highlighted that the learned trial judge awarded only $600.00 per trip. He submitted there was no basis to disturb the awards for transportation or for household help.

[49] In conclusion, he submitted that the award of damages made by the learned trial judge was reasonable in all the circumstances and could not be described as an award that no court could ever make.

Discussion and analysis

Contributory negligence - grounds b, d, i and o

[50] A number of the grounds of appeal criticize the decision of the learned trial judge on the basis that she ought to have found that the respondent was either wholly responsible for the accident or was contributorily negligent. However, in light of the nature of the pleadings, was it open to the learned trial judge to find that the respondent was contributorily negligent?

[51] Mr Kinghorn raised this issue, but did not appear to rely on it too strongly. In my view it is a very important issue, as the pleadings in the defence would have posed some challenge to the making of a finding of contributory negligence by the learned trial judge. In the amended defence filed 4 July 2013, I noted that the appellant wholly attributed blame for the accident on the respondent. It was stated at paragraph 6:

> "The claimant upon observing same falling off went to remedy the condition. No steel fell off and injured the claimant's back. In the circumstances the defendant will say that the claimant was a victim of his own folly and is solely to be blamed for all or any injury loss and damage suffered by him in that exercise." (Underlining as in the original)

[52] The appellant did not plead contributory negligence and, very importantly, there are no particulars of negligence alleged against the respondent, as would be required in order for that allegation to be properly raised by the appellant and thereafter considered by the court.

[53] In light of the foregoing, the learned trial judge could not properly have found that the respondent was contributorily negligent. In the case of **Fookes v Slaytor** [1978] 1 WLR 1293, the Court of Appeal of England and Wales held that contributory

negligence had to be specifically pleaded by way of defence to a plaintiff's claim of negligence. Therefore, since there had been no such plea, the judge had erred in law in finding that the plaintiff's negligence had contributed to the accident.

[54] This issue was fully ventilated in the persuasive Belizean Court of Appeal decision of **Madrid Cruz v Jose Alvarenga and Wendy Hernandez** (Civil Appeal No 15 of 2011, delivered 28 June 2013). The case concerned a claim for negligence, arising out of a motor vehicle collision where the appellant sought damages from the respondent. On appeal, the issue as to whether the court could have made a finding of contributory negligence, in the absence of it having been specifically pleaded, arose.

[55] In that matter, in the defence filed 7 January 2010, the defendant averred that; "it was the claimant who negligently drove his motor cycle into his vehicle, as evidenced by the Police Report into the accident…" Counsel for the respondents submitted, in reliance on **Fookes v Slaytor**, that contributory negligence not having been specifically pleaded, there ought to have been no reduction of the award of damages on this basis. Reference was also made to the cases of **Dann v Hamilton** [1939] 1 All ER 59 and **Dziennik v CTO Gesellshcaft Fur Containertransport MBH and another** [2006] EWCA Civ 1456.

[56] Counsel for the appellant in the matter, however, submitted that it was open to the learned trial judge, on the pleadings as well as the evidence, to find on a balance of probabilities that Mr Alvarenga's negligence was a contributory factor. In advancing this submission, counsel sought to distinguish **Fookes v Slaytor**, in which it was held that contributory negligence had to be pleaded by way of defence, on the ground that there had been an allegation of negligence against Mr Alvarenga in the defence.

[57] Morrison JA examined the cases of **Fookes v Slaytor** and **Dziennik** at paragraphs 75 to 79 of the judgment. He concluded at paragraph 80:

> "**These cases demonstrate, it seems to me, that the requirement that contributory negligence be specifically pleaded is more than a technical rule of pleading. It is in fact an essential part of the process of ensuring fairness to all parties in civil proceedings.** In the instant case, in which it is common ground that Mr Cruz did not, in terms, plead contributory negligence in his defence, his position is not improved, in my view, by the bald statement in the defence that Mr Alvarenga was negligent. A proper pleading of contributory negligence would require that, in a case such as this, particulars be given sufficient to enable Mr Alvarenga to deal with the specific contributory factor being alleged against him, whether it be that he was riding at an excessive speed, that he was unlicensed or that he was riding in the middle, instead of close the outer edge, of the right hand lane of Constitution Drive." (Emphasis added)

[58] In the case at bar, it is noted that the learned trial judge had found, on the facts before her, that the respondent had not been contributorily negligent. Applying the above legal principles to the case at bar, in the absence of a specific pleading of contributory negligence accompanied by the necessary particulars, it would not, however, have been appropriate for the learned trial judge to have found the respondent contributorily negligent in respect of the accident. The statement made in the amended defence that the respondent went to "remedy the condition" created by the falling steel, "was a victim of his own folly" and "is solely to be blamed" is not a pleading of contributory negligence and does not constitute particulars of negligence as would have been required for a consideration of the question of contributory negligence.

[59] Consequently, it is also not open to this court to grant the orders sought in the alternative by the appellant, in so far as he seeks findings of contributory negligence on the part of the respondent. Grounds b, d, i and o therefore fail.

The challenge to findings of fact - grounds a, c, e, h, j, m and n

[60] Upon a review of the remaining issues raised by the appellant, it is clear that the gravamen of the appeal is that, by virtue of the material inconsistencies in the respondent's evidence, the learned trial judge ought to have rejected his evidence wherever it was inconsistent with that of the appellant and his witness and, as a consequence, should have given judgment in favour of the appellant.

[61] The appellant is contending that the learned trial judge failed to properly evaluate and assess the totality of the evidence that was presented before her. The challenge is, therefore, principally to the findings of fact made by the learned trial judge, as well as her assessment of the credibility of the respondent.

[62] In the case of **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 23 JLR 35, the Privy Council ruled that it is only in cases where the findings of the tribunal are not supported by the evidence, or it is clear that the tribunal did not make use of the benefit of having seen and heard the witnesses, that the appellate court would disturb those findings. Similarly, in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21, it was stated, in part, at paragraph 12:

> "... It has often been said that the appeal court must be satisfied that the judge at first instance has gone '**plainly wrong**'. See, for example, Lord Macmillan in **Thomas v Thomas** [[1947] AC 484] at p 491 and Lord Hope of Craighead in **Thomson v Kvaerner Govan Ltd** 2004 SC (HL) 1, paras 16-19. This phrase does not address the

> degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: **Piggott Brothers & Co Ltd v Jackson** [1992] ICR 85, Lord Donaldson at p 92. **Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole.** That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. **Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence**: **Choo KokBeng v Choo Kok Hoe** [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169." (Emphasis added)

[63] As has been argued by the appellant, the determination of this matter also hinged on the credibility and reliability of the parties. There were inconsistencies in the respondent's evidence; both oral and written. The resolution and treatment of such inconsistencies would be impacted by the respondent's credibility. Of significant note, credibility is a matter for the learned trial judge, based on her assessment of the parties during the course of the trial.

[64] The case of **Algie Moore v Mervis L Davis Rahman** (1993) 30 JLR 410 provides a detailed examination of this principle of law. Patterson JA (Ag) noted at page 413:

> "Where there is an appeal from the trial judge's verdict based on his assessment of the credibility of witnesses that he has seen and heard, an appellate court **'in order to reverse must not merely entertain doubts whether the decision below is right, but be convinced that it is wrong'** (per Lord Kingsdown in *Bland v. Ross, The Julia* (1980) 14 Moo P.C.C. 210 at p. 235). Lord Wright, in his opinion in *Powell v. Streatham Manor Nursing Home* (supra) at page 67, quoted Lord Sumner's views as to 'the proper questions which the

Appellate Court should propound to itself in considering the conclusions of fact of the trial judge.

(i) Does it appear from the President's judgement that he made full judicial use of the opportunity given him by hearing the viva voce evidence?

(ii) Was there any evidence before him, affecting the relative credibility of the witnesses, which would make the exercise of his critical faculties in judging the demeanour of the witnesses a useful and necessary operation?

(iii) Is there any glaring improbability about the story accepted, sufficient in itself to constitute 'a governing fact which in relation to others has created a wrong impression' or any specific misunderstanding or disregard of a material fact or any 'extreme or overwhelming pressure,' that has had the same effect?"' (Emphasis added)

(See also **Attorney General and another v Paul Facey** (unreported) Court of Appeal, Jamaica, Resident Magistrates Civil Appeal No 25/2006 judgment delivered 31 July 2007 and **Davy v Davy** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 19/2004 judgment delivered 30 March 2007.)

[65] Having examined the reasoning of the learned trial judge and having reviewed the evidence in this case, I find that it was clearly permissible for the learned trial judge to make the findings of fact at which she arrived, in the face of the evidence before her. Consequently, the judgment is reasonable in light of the evidence. The learned trial judge took into account various inconsistencies in the evidence of the respondent. The appellant has highlighted five main inconsistencies in the respondent's evidence, namely that:

i. the bundle of steel was lifted at each end and that it was lifted in the middle by the forklift operator;

ii. it was the entire half-ton of steel which hit him, however, his injuries are not consistent with this account;

iii. the respondent fell on his back after the impact, but had said that the bundle of steel hit him in his back; and

iv. the respondent was employed by the appellant for 10 years but answered five years then 10 years.

[66] At the following paragraphs, the learned trial judge addressed her mind to various inconsistencies in the case. She stated:

> "[63] I recognise that the inconsistency in the [respondent's] evidence as to how he came to be injured, is significant. He said in the witness statement that he had re-tied the steel before he was struck. In cross-examination he said the steel had become loose and he was going to re-tie them but the forklift pushed the steel and they fell and hit him to the back and broke his foot. He then said that he had not rebound the steel and some of them hit him. When counsel suggested to him that his explanations were inconsistent, he said he had tied them.
>
> [64] The version that the [respondent] advanced in the witness statement suggests that the 62 rods of steel (1/2 ton), while bound, would have hit him to the back and also to the ankle. The injuries established in the medical reports are not supportive of this version. I would have expected the injuries to be greater if the incident had occurred in that way.
>
> [65] It is more believable that the rods had not been bound together when the accident occurred. This would have been consistent with the [respondent's] first version in cross-examination and also the [appellant's] case.

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

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

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

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

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

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

[67] In **D and LH Services Ltd et al v The Attorney General and Anor** [2015] JMCA Civ 65, one of the grounds of appeal canvassed by the appellant, was that the learned trial judge failed to have regard to the inconsistencies, discrepancies or questionable features in the evidence of the respondents' witnesses. Our learned sister, McDonald-Bishop JA (Ag) (as she was then), in dealing with this issue, succinctly outlined at paragraph [81]:

> "It is accepted that contradictions (inconsistencies and discrepancies) in the evidence of witnesses may be a sign that the truth is not being spoken and so are matters that go to the issue of credibility that falls to be treated with by a tribunal of fact. It is also accepted that contradictions in the evidence of witnesses may be slight or serious, material or immaterial. It is for the tribunal of fact to decide whether there are, in the first place, any such contradictions and to determine whether they are slight or serious, material or immaterial by reference to the central issue in the case that has to be determined. **It is accepted that where a judge sits alone, he or she is required to demonstrate how contradictions in the evidence (if any) have been treated with and resolved within the context of the issues raised for resolution, particularly, if those contradictions are serious and material.** It is against this background that the instant ground of appeal has been considered." (Emphasis added)

[68] The learned trial judge addressed relevant inconsistencies, although not all those highlighted by the appellant. For example, the learned trial judge did not express any view or take any position as to whether the respondent's outline as to how the steel is usually lifted is credible or incredible. She examined, in particular, the inconsistency in relation to how the respondent got injured. It is prudent for trial judges to consider and address all material inconsistencies in a case, however, if all inconsistencies have not been addressed by a trial judge, that in and of itself, does not render his/her decision defective. Inconsistencies which are material or relevant

to the issues to be resolved by the trial judge must be adequately addressed otherwise his or her decision could be successfully challenged. I agree with the learned trial judge that the inconsistency in the respondent's evidence as to how the accident occurred did not go to the issue of liability. In fact, none of the inconsistencies highlighted by the appellant went directly to the issue of liability. The majority of them were singled out by the appellant's counsel in support of his argument that the respondent was generally unreliable and untruthful.

[69] The learned trial judge, at paragraph [66] of her judgment, gave her assessment of the respondent. She found that he was not always coherent and was a simple man. Further, she was not of the impression that he had set out to put an incredible story to the court. The issue of credibility of witnesses is one in respect of which, as the authorities indicate, a trial judge is best placed to determine, having seen and heard the witnesses. Nothing has thus far demonstrated that the learned trial judge erred in her assessment of the respondent.

[70] The learned trial judge, at paragraphs [43] to [46] of the judgment, examined the law relating to the duty of care owed by an employer to ensure that there is a safe system of work at the workplace.

[71] The legal principles pertaining to the duty of care of an employer, to provide a safe system of work are well established. The case of **Speed v Thomas Swift and Co Ltd** [1943] 1 All ER 539 is instructive. Lord Greene, MR at page 542 said:

> "I do not venture to suggest a definition of what is meant by system. But it includes, in my opinion, or may include according to circumstances, such matters as the physical lay-out of the job - the setting of the stage, so to speak -

> the sequence in which the work is to be carried out, the provision in proper cases of warnings and notices and the issue of special instructions. A system may be adequate for the whole course of the job or it may have to be modified or improved to meet circumstances which arise: such modifications or improvements appear to me equally to fall under the head of system.
>
> The examples which I have given are not intended in any way to be an exhaustive list. I give them merely to bring out the point that the safety of a system must be considered in relation to the particular circumstances of each particular job. **If the master is unable to give such close attention to every job which he undertakes as will enable him to provide a safe system for all of them and is thus compelled to leave its provision to others, he cannot escape responsibility.** The way to test the correctness of my view is to consider the case where the master is present himself. **In such a case, if he lays out the job in a way which is not reasonably safe and sets his men to work in dangerous conditions which could be eliminated by the exercise of due skill and care, it appears to me impossible for him to say that he had not failed in a duty which lies upon him and upon no one else**." (Emphasis added)

[72] I find that the learned trial judge correctly encapsulated the principles enunciated in **Speed v Thomas Swift**. In her judgment, in particular at paragraph [46], she stated:

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

[73] Counsel for the appellant has urged that the learned trial judge ought to have found that the appellant maintained a level of control and supervision over the work performed, but that the respondent breached these procedures. A review of the main aspects of the evidence, and the approach taken by the learned trial judge, is therefore required.

[74] The respondent stated that he was not given any safety instructions, warnings or precautions, training, and no warning safety signs were posted. He also testified that there was no system of safety at the appellant's hardware and the employees were left to their own devices. This evidence was outlined at paragraph [19] of the learned trial judge's judgment.

[75] On the other hand, the appellant in cross-examination, pointed out that:

> "when the forklift is putting on the steel no one is necessary outside giving it directions – the operator. If I am there I will assist the forklift operator. I mean give directions as to how to load. If I am not there no one is necessarily assigned to give directions… When Mr. Howell came to the hardware to work I had no safety meeting with him at that time. I had safety meeting with him after he first came there to work. I had no warnings posted at the front – in relation to forklift and truck… The safety meetings I conducted were done approximately four months before accident, the last of the meeting held...[sic]"

Aspects of this evidence were outlined at paragraphs [36] to [38] of the learned trial judge's judgment. The learned trial judge noted that the appellant accepted that when the respondent first joined his staff, no training was done. In fact, when the appellant was questioned as to when the respondent had been trained to do his job as a labourer he responded "four to six months as also the safety meetings". The

learned trial judge took note of the appellant's evidence that there were no warnings posted in relation to the forklift or the truck. The appellant also testified that the workers were not asked to sign a roster when they attended these safety meetings. On the state of the evidence, it was therefore not possible to conclude whether the respondent attended the safety meetings to which the appellant referred.

[76] Mr Grandison, a truck driver employed to the appellant, also testified that when he was working for the appellant as a driver he was not required to attend safety meetings. He recalled that he was aware of those meetings having been conducted around two times since he had been working for two years at the appellant's hardware. He was unable to state when the last meeting had been held.

[77] At paragraph [52] of her judgment, the learned trial judge concluded that even if the court were to accept that training sessions had been held, they would have been irregular and the content too narrow. She went on to state; "[t]his could certainly not constitute evidence of a satisfactory provision of a safe system of work". This was a finding open to the judge on the evidence. I note that the learned trial judge found it telling that the driver, Mr Grandison, had not been required to attend any safety meetings although his role would have impacted the loading process.

[78] In continuing a review as to the system of work at Clarke's Hardware, other evidence given by Mr Grandison is highly relevant. He was in the hardware at the time the accident occurred. At pages 21 to 22 of the court's transcript, his evidence is outlined as follows:

> "I passed the forklift operator outside with the steel on the forklift. He wasn't supposed to put it on the truck because

> something had broken off the truck and that's what I went inside to get the board to - fix a thing on the back that is supposed to protect the steel from sliding two sides. A piece of board with thing on it like a wedge prevents the steel from sliding two sides – from side to side. The steel is to stay in the middle of the truck. The wedge would go to the extreme end of the truck/the tailgate [sic] ."

[79] In paragraph [54] of the judgment, the learned trial judge noted "the dangerously lax nature of the operations" and referenced the evidence of the appellant's witness, Mr Grandison. As reflected above, Mr Grandison had stated that the forklift operator was not supposed to put the steel on the truck because "something had broken off the truck and that's what I went inside to get the board to fix a thing on the back that is supposed to protect the steel from sliding two sides…". It was clearly open to the learned trial judge, in light of the evidence from the appellant's own witness, to have found that the nature of the operations was "dangerously lax".

[80] This was additional evidence on the basis of which the learned trial judge could have concluded that there was no safe system of work put in place by the appellant and she did not err in so finding.

[81] The appellant has also criticised the approach taken by the learned trial judge in addressing the issue as to whether the respondent was warned not to interfere with the falling steel, and whether the respondent ignored such warning. At paragraph [32] of the judgment, the learned trial judge outlined the appellant's version of the incident. The appellant contended that the respondent had been warned to step away from the area around the forklift and upon seeing the steel shifting and falling, the respondent

"took it upon himself to try and remedy the situation despite warnings from several persons [including the forklift operator] not to go near the steel" .

[82] The learned trial judge concluded at paragraph [56]:

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

[83] It is quite clear from this paragraph that the learned trial judge did consider the warning given to the respondent. However, she found that there was no disregard of any relevant or established procedure. I am of the view that her finding is consistent with the relevant principles of law that indicate that the employer should implement a reasonably safe system of work, which will take into account the fact that employees are often careless about the risks which their work may involve.

[84] Further, in the House of Lords decision of **General Cleaning Contractor Ltd v Christmas** [1952] 2 All ER 1110, Lord Reid at page 1117 expressed the view that:

> "where a practice of ignoring an obvious danger has grown up it is not reasonable to expect an individual workman to take the initiative in devising and using precautions. It is the duty of the employer to consider the situation to devise a suitable system, to instruct his men what they must do, and to supply any implements that may be required."

[85] An oral warning in the course of the incident would not suffice to discharge this duty, especially in light of the fact that the respondent's evidence was that it was his regular duty to re-tie steel whenever the binding wire broke during loading.

[86] Having heard evidence and submissions on the matter of a safe system of work, the learned trial judge reasoned at the following paragraphs of her judgment:

> "[71] The [respondent] had no control over the work process and his obligation to take due care for his own safety at the workplace would, for the most part, mean that he should not ignore clearly established training and safety instructions. This is what I understand from the following passage in Oaksey L.J.'s judgment in **General Cleaning Contractors v Christmas** [1952] 2 All ER 1110, 189-190 where he said, inter alia:
>
> > '…it is the duty of an employer to give such general safety instructions as a reasonably careful employer who has considered the problem presented by the work would give to his workmen. It is, I think, well known to employers…that their workpeople are very frequently, if not habitually, careless about the risks which their work may involve. It is, in my opinion, for that very reason that the common law demands that employers should take reasonable care to lay down a reasonably safe system of work…Workmen are not in the position of employers… They have to make their decisions on narrow window sills and other places of danger and in circumstances in which the dangers are obscured by repetition'.
>
> [72] Similarly, in **Garth Burton v The Jamaica Biscuit Company Limited** 2008 HCV 04637, Straw, J. said, inter-alia:
>
> > 'In considering whether the Defendant established a safe system of work the Court bears in mind that the employer must take into account the fact that workmen are oft times heedless of their own safety… In devising a safe system of work, the employer must take steps to ensure that the system of work is complied with and that the necessary safety procedures are observed. The system established by the employer should so far as 17is? possible minimise the danger of a workman's own foreseeable carelessness. (Paras. 27-29)'.

> [73] In my view, the operator of a hardware store which involved the regular use of a forklift to lift steel and other material onto a truck, should provide, at a minimum, a marked safety zone beyond which no worker should be located whilst the forklift is loading or unloading material. This would be a reminder to workers that there was risk of danger should a load fall. The dangerous nature of the activities also required that all participant workers be trained to carry out their tasks safely.
>
> [74] In the absence of any evidence that even a simple and inexpensive safety measure such as a safety zone existed and any credible evidence of adequate safety training, if at all, I do not believe that the [appellant] made any satisfactory attempt to provide a safe system of work.
>
> [75] I therefore find that the [appellant] failed to discharge his duty at common law and as an employer to provide training, proper equipment, safety warnings and instructions, and effective supervision of the [respondent], particularly in relation to the manner in which steel was to be uploaded and how it should be rebound were it to fall apart."

[87] It was clearly open to the learned trial judge to arrive at these conclusions on the evidence before her. In fact, I agree with the submissions of Mr Kinghorn that the appellant's own evidence supported these findings by the learned trial judge. I am therefore neither convinced that the learned trial judge failed to properly evaluate and assess the evidence, nor that she erred in her assessment of the credibility of the respondent. The learned trial judge addressed the material inconsistencies in the respondent's evidence. A number of the inconsistencies highlighted by counsel for the appellant were not material as they did not go to the root of the matter. The decision of the learned trial judge cannot be found to be plainly wrong, warranting interference from this court. Grounds a, c, e, h, j, m and n therefore fail.

Special risk - grounds k and l

[88] Counsel for the appellant argued that the respondent was an experienced labourer and therefore there was no onus on the employer to warn the respondent, although he was in fact warned. Reference was made to the case of **Qualcast** to bolster this point. In that case the plaintiff was not ordered or advised by the defendants to wear protective clothing because he was an experienced moulder, and as such he knew and appreciated the risks of the metal splashing.

[89] The line of authorities to include **Roles v Nathan** [1963] 1 WLR 1117, **Neame v Johnson and another** (unreported) Official Transcripts (1990-1997), Court of Appeal, judgment delivered 24 November 1992 and **Williams v Department of the Environment**, (unreported) Official Transcripts (1980-1989), QBD, judgment delivered 30 November 1981, have established the principle that in determining whether the common law duty of care has been breached, the occupier does not have to warn persons having special skills as a result of their calling, of risks associated with the exercise of those skills, because such a person will appreciate and guard against any special risks ordinarily incident to that calling. What constitutes a special risk associated with a particular calling is a question of fact to be decided in each case.

[90] In dealing with this issue, the learned trial judge stated at the following paragraphs:

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

> [77] The duty arises from '…any invitation or permission' which the occupier 'gives (or is to be treated as giving) to another to enter or use the premises' (s. 2(2). It therefore extends to an employee who lawfully enters his employer's premises under a contract of employment. (See for example, **Brenda Gordon v Juici Beef Limited** HCV 2007/04212 delivered by Lawrence-Beswick J's on April 14, 2010).
>
> [78] **Section 3(2) (b) of the Act provides that: '…an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so**.'" **On the facts of this case, it is apparent that the circumstances contemplated by section 3(2)(b) do not arise. This is not a case involving a skilled worker who would be expected to have control over his own actions in the approach to the job.**
>
> [79] Based on the foregoing, I find, on a balance of probabilities, that the [appellant] is liable for the injury suffered by the [respondent]." (Emphasis added)

[91] In the case at bar, the respondent was not a skilled worker, he was a casual labourer who needed constant supervision and control. His years of service did not transform him into a skilled worker who would independently determine the manner in which he would carry out his job and appreciate and guard against special risks ordinarily incident to his job. The case of **Qualcast** is therefore clearly distinguishable from the instant case. The learned trial judge was therefore correct in her decision on this issue. Grounds k and l therefore fail.

Assessment of damages - grounds f and g

General damages

[92] The appellant had contended that in awarding damages in respect of the respondent's alleged injuries, the learned trial judge failed to properly consider the

evidence, in particular the medical evidence. Further, that the award in respect of pain and suffering and loss of amenities was inordinate and not supported by evidence.

[93] The medical reports of the respondent revealed the following:

A. Dr Ian Clarke dated 17 November 2008 –

Examination

1. "Swollen right lower leg with ulcer to redial leg just above the medical malleolus
2. Radiographs revealed a comminuted fracture of his right tibia which was fixed with plate and screws. There was no radiological evidence of osteomyelitis."

Assessment

1. Fracture to right tibia/fibula with post operative infection

B. Dr Dean Wright dated 14 January 2009 –

Investigations

"Radiographs done on the 12th October 2008 post-op showed both bone plate and screw fixation of the distal ¼ of the right tibia and fibula with a comminuted extracticular tibia/fibula fracture."

Diagnosis

Infected distal right Tib-fib fracture.

C. Dr Denton Barnes dated 11 August 2009 –

Examination

"… Radiograph of his right leg revealed a comminuted fracture of the distal third of the right tibia and fibula, with no extension into

the joint. Radiographs of his pelvic and chest were normal with no fractures."

Treatment

"He was assessed as hiving [sic] a grade one (1) open fracture of the right distal tibia and multiple soft tissue injuries…"

D. Dr Denton Barnes dated 21 June 2010 –

Impairment

"Based on the fact that Mr. Howell has a 15 degree flexion contractor and is unable to bet [sic] his ankle to neutral position he has 6% impairment of the whole person. He also has a 1% impairment of the whole person due to the atrophy of the right calf. In total he has 7% impairment of the whole person."

[94] In arriving at an appropriate award, the learned trial judge reviewed the expert evidence before her. She reviewed the medical reports of Dr Ian Clarke dated 17 November 2008, of Dr Dean Wright dated 14 January 2009 and that of Dr Denton Barnes dated 11 August 2009. The details of these reports were highlighted in paragraphs [82] to [89] of her judgment:

"**Assessment of Damages**

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

i. swollen right lower leg with ulcer redial leg just above the medial malleolus; and

ii. comminuted fracture to right tibia/fibula with post-operative infection (no evidence of osteomyelitis).

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

i. mild tenderness to scapula area (there was no obvious bruising);

ii. grossly swollen right ankle (with good range of movement);

iii. medial incision (oozing serous material) of approximately 10cm in length with 2 to 3 areas 1x1.5cm wide which were raw and not fully healed;

iv. signs of chronic infection;

v. lateral ankle wound appeared healed;

vi. skin condition around wound was generally poor, with some amount of hyperraemia, and skin somewhat thickened;

vii. radiographs done on 12th October 2008 post-op showed bone plate and fixation of the distal ¼ of the right tibia and fibula with a comminuted extracticular tibia/fibula fracture; and

viii. diagnosis of infected distal Tib-fib fracture.

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

i. right renal angle tenderness;

ii. abrasions to upper back on right side;

iii. tenderness to upper back on right side;

iv. swollen right leg;

v. tenderness to right leg;

vi. deformity of right leg to the distal third;

vii. 2cm puncture wound on the right leg with bleeding;

viii. obvious deformity of the right leg; and

ix. no distal neurovascular deficit.

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

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

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

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

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

[95] The learned trial judge, in reviewing the facts of the case, clearly took into account the expert evidence reflected in the medical reports. It is therefore not correct, as asserted in ground of appeal f, that she failed to "assess the respondent's evidence respecting his alleged injuries … as well as the medical evidence". At paragraph [64] of the judgment, the learned trial judge stated:

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

[96] This court will not interfere with the learned trial judge's decision unless the award can be seen as either inordinately high or low. Can it be said that the damages awarded have varied too widely from the maximum or minimum figures awarded in similar cases by the courts? I do not believe so.

[97] Counsel for the appellant in his submissions, in dealing with the issue of the award of damages, examined the cases of **Roy Douglas** and **Yvonne McKenzie**. In **Roy Douglas**, the plaintiff had suffered a compound fracture of the medial malleolus of the right ankle, fracture of posterior malleolus of the right ankle and spinal fracture of distal 5cm of the right fibula. Permanent partial disability was assessed at 10-15%. The court made an award of $240,000.00 which at the date of trial amounted to $1,587,188.61.

[98] In **Yvonne McKenzie**, the plaintiff had a deformed tender left ankle and displaced bimalleolar fracture of the left ankle. Her impairment was assessed as 10% of the lower extremity, which is equal to 4% permanent impairment of the whole

person. The court awarded damages at $1,000,000.00, which at the date of trial updated to $1,633,699.00.

[99] Counsel for the appellant had argued that the injuries suffered by those plaintiffs were more serious than those suffered by the respondent. As such, an appropriate award would be $1,300,000.00.

[100] I am not persuaded by these submissions made by counsel for the appellant in criticising the decision made by the learned trial judge. Having reviewed the cases that were proffered by counsel for both parties, and having looked at the whole person disability, and the other factors of this case, it was clearly open to the learned trial judge to rule that the most appropriate case on which to rely was that of **Marcella Clarke v Claude Dawkins and Leslie Palmer** reported at Khan's Recent Personal Injury Awards Volume 6 at page 54. At paragraph [91] of the judgment the learned trial judge reviewed the **Marcella Clarke** case. She stated:

> "In **Marcella Clarke**, the claimant suffered a fractured left humerus and fractured shaft of the pelvis. The pelvis was also shifted from its normal position. She suffered 8% whole person disability. She was hospitalized for almost one (1) month and underwent surgery. On discharge, she had to be lifted and taken home where she remained for six (6) months. She started to use a stick to ambulate seven (7) months 21 after the accident and did so for almost one (1) month. She returned to hospital for physiotherapy and dressing. She complained about a left hand that was 'hook up' and severe pain when she walked. She also could not stand continuously for long periods. Radiographical evidence supported the genuineness of her pain and showed ½ cm shortening of the left lower limb. She was unable to play netball or to wear high heels and endured cryptic remarks over the cause of her appearance. The award for pain, suffering and loss of amenities/general damages was $1,400,000.00. At June 2004, the date of the award, the Consumer Price Index (CPI) was 76.81.

> Using a CPI of 223 (at January 2015) the award is now $4,064,574.93."

[101] At paragraphs [96] and [97] of the learned trial judge's judgment she then gave her reasons for the quantum of award under this head of damage. She said:

> "[96] Of the cases cited by both parties, I find **Marcella Clarke** to be most helpful. I do not agree with counsel's submission that the injuries sustained are less severe than Mr. Howell's. Marcella Clarke sustained fractures to the left humerus and shaft of the pelvis, as also a shifting of the pelvis. The whole person disability was also higher. She also experienced severe pain when she walked and could not stand continuously for long periods. Although it appeared that her situation resolved quicker, she was left with a greater impairment and the extent of her injuries was also greater than the [respondent's]. However, I have also considered that in the instant case, there is medical evidence that the [respondent] was treated for infection and he was on antibiotics and analgesics for a considerable period. He was not able to ambulate until about seven (7) months after the incident.
>
> [97] **Bearing these factors in mind and making the necessary adjustments, having considered the nature and extent of the [respondent's] injuries and the period over which he suffered pain and had to be treated for an infection, I am of the view that an award of $3,000,000.000 is appropriate**." (Emphasis added)

The learned trial judge, in arriving at the award of damages, took into account the appropriate and relevant factors which impacted the quantum of the award. The amount discounted from the damages awarded in the **Marcella Clarke** case was $1,064,574.93 from the updated sum of $4,064,574.93. The award of $3,000,000.00, in light of the circumstances of the case, cannot be said to be inordinately high so as to be an erroneous estimate of the damages to which the respondent was entitled.

Special damages

[102] While the appellant's counsel made written submissions and short oral submissions challenging aspects of the award of special damages, it is noteworthy there was no ground of appeal addressing that matter. It is possible that this is what accounted for the fact that the respondent's attorney-at-law made no reference to that issue in his written submissions. Counsel for the respondent, however, made oral submissions in respect of the issue and it appeared that he had had sufficient opportunity to consider the matter and contest it. I concluded that it was therefore appropriate for the court to consider the issue.

[103] The learned trial judge addressed the award of special damages at paragraphs [116] to [123] of the judgment. She highlighted the fact that failure to specifically plead and strictly prove special damages is not necessarily fatal to a claim and the court is expected to look at all the evidence offered to substantiate the claim, however tenuous each aspect may be (see **Dalton Wilson v Raymond Reid** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 14/2005, judgment delivered 20 December 2007). This is a correct approach, as the courts have found that there are areas of expenditure in relation to which it is understandable that receipts may not have been requested or received. Depending on the circumstances, this may include transportation expenses and payments made for household help. In light of the facts of this case, the learned trial judge was not unreasonable in deciding to make an award for these areas of the claim in the absence of receipts.

[104] In so far as the award for loss of earnings was concerned, the learned trial judge utilized the weekly sum of $3,740.00, which was reflected in the appellant's

outline of payments which he had made to the respondent after the accident (see pages 59 to 60 of the record of appeal). I agree with Mr Kinghorn that this approach cannot be faulted. The appellant's complaint in respect of the award made by the learned trial judge for transportation expenses, household help and loss of earnings is therefore without merit.

Summary and conclusion

[105] The outcome of this matter depended to a large extent on the assessment of the credibility of the witnesses by the learned trial judge. The learned trial judge demonstrated that she made use of the benefit of having seen and heard the witnesses. She also adequately addressed any issues of credibility and reliability of the witnesses as well as the critical inconsistencies which arose in the evidence. In light of the evidence as a whole, including aspects of the appellant's evidence, it was clearly open to the learned trial judge to make the findings of fact at which she arrived.

[106] After a careful assessment of the case, I am unable to agree with the contention of the appellant, that the learned trial judge was plainly wrong in arriving at her decision or that the damages awarded were inordinately high.

Disposal of the appeal

[107] Accordingly, I would dismiss the appeal and affirm the decision of the learned trial judge with costs to the respondent to be taxed, if not agreed.

MCDONALD-BISHOP JA

ORDER

1. Appeal dismissed.

2. The judgment of Dunbar-Green J (Ag) dated 19 June 2015 is affirmed.

3. Costs of the appeal to the respondent to be taxed, if not agreed.