IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2010 HCV 00732

BETWEEN	**RALSTON HEADLEY**	**CLAIMANT**
AND	**M & M JAMAICA LIMITED**	**DEFENDANT**

Mr. Sean Kinghorn instructed by Kinghorn & Kinghorn for the claimant

Miss Symone M. Mayhew for the defendant

Heard: October 1, 2012 and May 7, 2014

NEGLIGENCE- PERSONAL INJURY- EMPLOYERS LIABILITY- OCCUPIER'S LIABILITY

SIMMONS, J.

[1] On the 22nd January 2009, the claimant who was engaged by the defendant as a labourer, fell into a water tank situated on the premises of the Chester All Age School (the site) in the parish of Hanover and was injured.

[2] The defendant was at the material time carrying out construction work at the site. The tank was situated on the upper level of the roof and was open. The top of the said tank was level with the roof.

The claim

[3] On the 15th February 2010, the claimant filed a claim in which he alleged that he was injured as a result of the defendant's negligence. The particulars of negligence are quite extensive and include the following:-

i.) Failing to provide a safe place of work;
ii.) Failing to provide a safe system of work;
iii.) Failing to provide the requisite warnings, notices and/or special instructions to the claimant and its other employees in the execution of its operations so as to prevent the claimant being injured;
iv.) Failing to provide proper and effective lighting on the site;
v.) Constructing the floor of the second level in such a way as to leave a hole in the floor of the second level;
vi.) Failing to inform or warn the claimant of the existence of the hole in the floor of the second level of the building;
vii.) Failing to cordon off the hole; and
viii.) Failing to take reasonable care in all the circumstances to carry out its operations in such a manner so as not to expose the claimant to reasonably foreseeable risks.

[4] In addition, the claimant has also made a claim for damages for breach of contract on the basis that it failed to take reasonable care in the execution of its operations so as not to subject the claimant to foreseeable risk of injury.

[5] It also alleged that the defendant breached the ***Occupier's Liability Act*** (***the Act***), by its negligent maintenance or management of the site.

[6] The Particulars of Negligence and/or Breach of ***the Act*** are stated to be:

i.) Keeping or maintaining the site in a dangerous state, by constructing a hole on the second level of the building which was likely to cause injury to an invitee to the premises;

ii.) Inviting or allowing the claimant to work on premises which were manifestly unsafe or dangerous;

iii.) Failing to warn the claimant of the existence of the hole;

iv.) Causing the claimant to fall into the hole;

v.) Failing to use proper lighting in the vicinity of the hole;

vi.) Failing to cordon off the hole;

vii.) Failing to erect warning or caution signs in the vicinity of the hole;

viii.) Failing to take such care as was reasonable in all the circumstances to see that the claimant would be reasonably safe in using the premises for the purpose for which he was invited or permitted to be there.

The Defence

[7] The defendant has denied the particulars of negligence and has stated that the claimant left the area in which he was working, without advising his supervisor or his colleagues.

[8] It has also stated that various safety measures were in place at the site to ensure the safety of all persons including the claimant. Specifically it

has been stated that:-

i.) A step ladder was provided for workers to traverse between the two levels of the roof;

ii.) Movable lights were provided to illuminate the work area and the site in general;

iii.) Caution tape was used to cordon off the open areas on the site including the tank in which the claimant was found;

iv.) It advised the workers including the claimant of the need to exercise caution on the site.

Undisputed facts

[9] There is no dispute that the claimant was legitimately on the premises at the time of the accident. The claimant and the defendant have also given evidence that the accident occurred between the hours of 5:00 and 6:00 p.m. and that it was getting dark.

[10] The evidence is that there were two tanks under construction at the time. One was situated on the lower level of the roof and the other on the upper level. The difference in height between these two levels was said to be approximately five feet.

[11] It is also agreed that the tank in which the claimant fell was open and there were pieces of steel at each corner which were to be used to construct the columns. At the time of the accident the sides of the tank which was situated on the lower section of the roof were being cast.

[12] The evidence in relation to lighting is that there were movable lights on the site but these were concentrated in the area in which the casting work was being done. The parties also agree that there was another light in the roof area. The claimant stated that it was at the other end of the building approximately ten to fifteen feet from the area where the two levels met.

Evidence in dispute

[13] The areas of dispute concern the adequacy of the lighting, whether a wooden ladder or steps were provided for the defendant's employees to traverse between the two levels, whether the claimant knew of the existence of the tank and whether it was cordoned off at the time of the accident.

Claimant's evidence

[14] The claimant's evidence is that he had been working at the site since December 2008. On the day in question whilst working at the site, he left the lower level of the roof where he was working to collect a tool from another worker. He said that the only way for him to get from one level of the roof to the other was to hold on to a steel column on the higher section and then pull himself up to that section. The column that he used was said to be close to the edge of the roof and the open tank. He maintained that there were no wooden steps or step ladder in the area to assist the workers to traverse the roof area.

[15] Mr. Headley stated that the tank was constructed by utilizing a space on the upper level of the roof which had been reserved for a stairway. His evidence is that "we had 'boxed' the shape of the tank" by making a frame

out of plywood and pouring concrete into the frame. The tank was stated to be inside of the building with its top in the area which was left open for the stairway.

[16] The claimant explained that the roof of the upper level was closer to the ground at the opposite end of the building as a result of the slope of the land. Whilst he was going from the lower to the upper level of the roof he fell in the tank which was situated in the area where there was a difference in height between the two levels of the roof.

[17] The claimant stated that a light was usually placed in the area of the open tank but it had been moved to the area in which they were working that evening. His evidence is that there were no barricades or warning signs or tape around the tank. He said that he could not see and when he got to the higher level he only took a few steps. Mr. Headley's next memory is that he woke up in the Cornwall Regional Hospital in a lot of pain.

[18] In cross examination he said that he did not work on the tank on the upper level and that he did not know that it was there.

Defendant's evidence

[19] Mr. Fitzroy Jones who was employed to the defendant as a Project Director gave evidence on its behalf. He confirmed that the claimant was employed by the defendant and was engaged in the casting of the sides of the water tank on the lower level on the day of the accident.

[20] He stated that a step ladder had been erected on the roof to allow persons to traverse from one level of the building to the next. He also gave evidence that on occasion, work would continue into the evening and that

movable lights were used to illuminate the work area. He also said that there were other lights at the site.

[21] He admitted in cross examination that both tanks were under construction and were open at the top. His evidence is that caution tape was used to cordon off the open areas on the site including the tanks. However, he could not confirm if there was tape around the tank on the day of the accident as he did not go up on the roof that day.

[22] Mr. Jones gave evidence that concrete was being poured that evening as the trucks had arrived late. He indicated that there were three moveable lights at the site on the day that the accident occurred and that there were additional lights in the area where the tank on the upper level was located. The witness also stated that the lights were needed in the work area and that the casting of the other tank was of paramount consideration. He also indicated that at the time of the accident the movable lights were concentrated in the work area.

[23] Mr. Jones maintained that wooden steps had been constructed for workers to traverse between the two levels on the roof. These steps were said to be about five to six feet away from the area where the tank was situated and were nailed down. He said that there is a difference between a step ladder and wooden steps. In cross examination, he indicated what he had referred to were wooden steps and that he did not recall saying in his witness statement that a step ladder was provided to assist the workers. By way of explanation he said that the item to which he had referred was not a moveable ladder but a wooden step which served the same purpose as a

ladder to the next level. He said that he had referred to wooden steps in his evidence in chief and not a step ladder.

Issues

[24] In order to determine whether the claimant was injured as a result of the defendant's negligence the following issues must be resolved:-

i. Whether there was any and/or adequate lighting in the area where the claimant fell;

ii. Whether the area in which the tank was situated was cordoned off;

iii. Whether there was either a step ladder or wooden steps to assist workers to traverse between the two levels of the roof.

Claimant's submissions

[25] Mr. Kinghorn submitted that an employer owes a duty of care to an employee to take reasonable care for his safety. Reference was made to the case of ***Davies v New Merton Board Mills Ltd.*** [1959] 1 All ER, 346 and ***Schaasa Grant v. Salva Darwood and JUTC*** 2005 HCV 03081 (delivered on the 16th June 2008) in support of that submission. That duty he submitted includes an obligation to provide a safe system of work. Counsel referred to the judgment of Lord Greene M.R. in the case of ***Speed v Thomas Swift & Co. Ltd*.** [1943] KB 557 at 563-564 in which the term "safe system of work" was defined.

[26] Counsel stated that an employer's duty to provide a safe system of work is not static and depends on the circumstances which may apply at any particular stage of the operations of the employer. He also stated that

the system must also be monitored in order to ensure the safety of employees.

[27] Mr. Kinghorn also submitted that when an employer is devising a system of work he ought to take into account the fact that workmen are often careless as to their own safety. Reference was made to ***Bish v. Leathercraft Limited*** (1975) 24 WIR 351, ***General Cleaning Contractors Ltd. v. Christmas*** [1952] 2 All ER 1110 and ***Allan Leith v. Jamaica Citrus Growers Limited*** claim no. 2009 HCV 00664 (delivered on the 23rd July 2010).

[28] In ***General Cleaning Contractors v. Christmas*** (supra) at page 1114, Lord Oaksey described the duty owed by an employer to an employee in the following terms:-

> *"In my opinion, 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, and there is evidence in this case that it was well known to the appellants, 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. Employers are not exempted from this duty by the fact that their men are experienced and might, if they were in the position of*

> *an employer, be able to lay down a reasonably safe system of work themselves. Workmen are not in the position of employers. Their duties are not performed in the calm atmosphere of a board room with the advice of experts. 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."*

[29] Mr. Kinghorn submitted that when the evidence which was presented by the defendant is examined, it clearly demonstrates that the defendant had breached the duty of care which was owed to the claimant. Specific reference was made to Mr. Jones' evidence that yellow caution tape was placed around the corners of the tank where the steel was exposed.

[30] He stated that the placement of the caution tape in the absence of any evidence as to the adequacy of the lighting was not sufficient to discharge the defendant's duty of care towards the claimant. Mr. Kinghorn also said that there is no evidence that the claimant was warned of the danger presented by the open tank or that any notices were placed in the vicinity.

[31] In addition, it was submitted that the defendant failed to give any consideration to the fact that workmen are often careless where matters of safety are concerned. In this regard he stated that no evidence had been adduced to indicate that there was a system in place designed to reduce the risk of injury from foreseeable carelessness.

[32] Counsel also stated that in the event that the court finds that such a system existed, the defendant has not provided any evidence of any

steps which it took to monitor its employees in an effort to ensure compliance. He also indicated that the defendant's evidence is that there was one supervisor but there is no information as to the number of employees that were under his supervision.

[33] With respect to the claim under ***the Act***, it was submitted that the defendant is properly designated as an occupier. Mr. Kinghorn quoted the following extract from the text ***Commonwealth Caribbean Tort Law, 4th ed*** by Gilbert Kodilinye***:***

> *"The occupier may be defined as a person being in possession or control of the premises. The foundation of occupier's liability is occupational control, that is to say, control associated with and arising from presence in and use of or activity in the premises. The owner of the property, if in possession, will be deemed to be the occupier, but if he is out of possession, for example, where the property is let to a tenant, then the tenant will be the occupier for the purpose of the statutes, not the owner.*
>
> *It is possible for there to be more than one 'occupier' at the same time, as for example, where an occupier engages a contractor to do repairs or building work, in which case the contractor may be a co-occupier as well as a visitor".*[1]

[34] Where the alleged breach of ***the Act*** is concerned, it was submitted that the burden of proof is on the defendant to prove that it has complied

[1] Page 126

with its provisions. The case of ***Marie Anatra v. Ciboney Hotel Limited and Ciboney Ocho Rios Limited*** Suit No. CL 1997/196 (delivered on the 31st January 2001) was cited as being an authority on this point.

[35] Counsel argued that the defendant not only had a duty to take care but to prove that care was taken. In this regard he referred to the cases of ***Wheat v. E. Lacon & Co. Ltd.*** (1996) A.C. 552 and ***Brenda Gordon v. Juici Beef Limited*** Claim No. 2007 HCV 04212. In the former case Lord Denning said:-

> *"…wherever a person has a sufficient degree of control over premises that he ought to realise that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an "occupier" and the person coming lawfully there is his "visitor": and the "occupier" is under a duty to his "visitor" to use reasonable care."* [2]

[36] It was submitted that no evidence has been presented to the court which is capable of satisfying the court that the defendant has discharged its liability under ***the Act.*** He also pointed out that there is no dispute that the claimant was an invitee to the premises as this was admitted in the defence.

[37] Mr. Kinghorn also stated that the evidence of the defendant that a flood light was placed at the opposite end of the building in the absence of any information as to its adequacy does not discharge its burden of proof. He argued, that this was insufficient to establish that the defendant

[2] Page 578

took such care as as was reasonable in all the circumstances, to ensure that the claimant would be reasonably safe in using the premises for the purpose for which he was invited or permitted to be there. He also directed the court's attention to Mr. Jones' evidence that he did not go on the roof that day, even after the accident.

[38] Where the issue of contributory negligence is concerned, counsel submitted that the burden of proof is on the defendant. In the circumstances, it is the defendant who must present evidence which establishes that the claimant ought to have foreseen that if he failed to act as a reasonably prudent man he may have injured himself. Counsel then proceeded to deal with the particulars of contributory negligence pleaded by the defendant.

[39] With respect to the claimant's alleged failure to use the step ladder, it was submitted that the defendant's evidence in cross examination that wooden steps were provided is a material discrepancy. He asked the court to reject the defendant's explanation that wooden steps and a step ladder are one and the same. In addition, it was submitted that there is no evidence as to how the claimant's failure to use the steps or the step ladder may have caused the injury. Counsel also directed the court's attention to the Mr. Jones' evidence that he did not see the claimant fall.

[40] It was also submitted that there is no evidence that the claimant failed to exercise caution whilst traversing the area or that he failed to have regard for the caution tape. Reference was made to the case of ***Flower v. Ebbw Vale Steel, Iron and Coal Co.*** [1936] A.C. 206 at 213 - 214 where Wright, J. in reference to the decision at first instance said:

"The judge, having held that the defence of contributory negligence was open to the respondents, then proceeded: 'The question is then whether the plaintiff by the exercise of that degree of care which an ordinary prudent workman would have shown in the circumstances could have avoided the result of the defendant's breach of duty. I find that he could and that the proximate cause of the accident was his own disobedience of orders in putting his hand and arm under the copper bar in such a way as to make the fence, which had been provided, utterly useless.' Again, at the end of his judgment, he thus sums up his conclusion: 'I think, of course, that in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of work in a factory and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence.'

This reasoning seems to me to agree with that in the earliest case in England on this matter, still, I think, the leading case, Caswell v. Worth … which was decided on demurrer."

[41] Mr. Kinghorn submitted that having examined the evidence there is nothing which supports the defendant's allegation that the claimant was contributorily negligent. He said that based on the case of ***Ramon***

Burton and another v. McAdam and others Suit No. C.L. 1996/B110 (delivered on the 13th March 2008) the defendant's assertion of negligence on the part of the claimant must therefore fail. In that case Lawrence-Beswick, J said:

> *"There is no evidence to support the pleading that Ramon or Wilburn Barton was negligent.*
> *It boggles the mind as to the reason why Counsel, Mr. Samuda filed these pleadings alleging negligence and has presented not even a scintilla of evidence of negligence either by Ramon or his father.*
> *Nonetheless, despite this, Mr. Samuda submits that there should be Judgement for Mr. Dennis and Wright's or alternatively for Wrights against Bartons.*
> *I reject this submission and enter Judgement for the Claimants against the Defendants."*

[42] In conclusion, counsel asked the court to find that the claimant was injured solely as a result of the defendant's negligence.

Defendant's submissions

[43] Miss Mayhew submitted that an employer has a duty to provide a safe system and place of work. She also stated that there should be effective supervision of its employees and the employer should as far as possible ensure that the system is adhered to.

[44] She adopted Lord Greene M.R's definition of the term "system of work" in ***Speed v. Thomas Swift and company Ltd.*** [1943] K.B. 557 and stated that in devising such a system an employer must be mindful of

the fact that workmen are often careless as to their own safety.

[45] Counsel also submitted that an employee was also under a duty to take reasonable care for his own safety. It was argued that if as is alleged in the instant case, the accident occurred as a result of the claimant's own carelessness, then he would be either solely or partially liable for its consequences. Miss Mayhew pointed out that in this matter it is being alleged that the defendant failed to heed the warnings or instructions of the defendant or to take care for his own safety. It was also argued that in the instant case where the claimant's evidence is that the light which was usually in the area where the tank is situated was moved to another area, the defendant will not necessarily be liable, as the claimant would have known of the presence of the uncovered tank in that area.

[46] It was also submitted that whilst Mr. Jones had not gone on the roof that day he would have been in a position to know if one or three of the moveable lights were being used at the time. She reminded the court of his evidence that there were also fixed lights on the premises and the claimant's own evidence that one of these was about twenty feet away from the tank. In those circumstances she asked the court to find that the lighting was adequate.

[47] Counsel also addressed the issue of whether there was caution tape around the opening of the tank. She referred to the claimant's evidence at paragraph 13 of his Witness Statement where he said:

> *"There is no covering for that tank. As far as I know there was never any covering for the tank or any barricades around the tank either. There were no warning signs or*

any tape or anything around the tank to prevent persons from falling into the tank."

This was contrasted with the evidence of Mr. Jones that *"crime scene yellow tape"* was wrapped around the steel that was exposed at the corners. She conceded that the witness having not gone onto the roof on the day in question could not speak definitively to this issue.

[48] It was however submitted that the claimant is not a witness of truth and that his evidence that he did not know about the tank and that the day of the accident was the first time that he was working on the roof ought to be rejected. This evidence she said, was in conflict with paragraphs 9, 12 and 13 of his Witness Statement which state:

"9. We had worked on one tank. This tank was in the other building and the top of this tank was on the roof of the higher section of the building.

12. Normally on the roof there is a light over by the tank. The Supervisor normally had a light over by the tank to show where the tank is. This light was moved from that area to the other area where we were working on the other tank.

13. ..there was no covering for that tank..."

[49] It was submitted that based on the above statements the claimant is not a credible witness. It was also argued that even if there was no caution tape around the tank at the relevant time, the claimant knew of its existence and ought to have exercised caution in the area.

[50] With respect to the issue of whether there were wooden steps as against a step ladder in place to assist employees of the defendant to go from one section of the roof to the other, counsel asked the court to find that this discrepancy is a minor one. She asked the court to reject the claimant's evidence that the only means of going from one level to the next, was by the use of the steel column.

[51] In conclusion, it was submitted that the claimant by his use of the steel to pull himself up to the higher level of the roof failed to use the systems that were put in place by the defendant for his safety and was the author of his own misfortune. Counsel also said that if in the event that the court accepts his evidence that the lighting was inadequate he assumed an even greater risk by not using the steps which the defendant said were provided.

[52] Miss Mayhew also submitted that the defendant should not bear any liability for the injuries suffered by the claimant as Mr. Headley knew of the presence of the tank and being an adult, had a corresponding duty to take care for his own safety. It was further submitted that in the event that the court finds that the measures employed by the defendant were not adequate, liability should be apportioned equally between the parties.

Employers' Liability

[53] An employer owes a duty to an employee to take reasonable care for his safety. In ***Wilsons and Clyde Coal Co. v. English*** [1938] A.C. 57 at 78 the nature of the duty owed by an employer to an employee was defined by Lord Wright as threefold: *"the provision of a competent staff of men, adequate material, and a proper system and effective supervision."* This

duty is not absolute as it is discharged by the exercise of due skill and care.

[54] An employer's duty can also be summarized as one which requires him is to take reasonable care to conduct his operations in a manner which does not expose his employees to unnecessary risk. In ***Harris v. Brights Asphalt Contractors*** [1953] 1 Q.B. 617 at 626 Slade, J. defined unnecessary in the following terms:-

> "*In case there is any doubt about the meaning of "unnecessary," I would also take the duty as being a duty not to subject the employee to any risk which the employer can reasonably foresee, or, to put it slightly lower, not to subject the employee to any risk that the employer can reasonably foresee and which he can guard against by any measures, the convenience and expense of which are not entirely disproportionate to the risk involved."*

[55] In ***Paris v. Stepney Borough Council*** [1951] A.C. 367 at 384 Lord Oaksey said:

> *"The duty of an employer towards his servant is to take reasonable care for the servant's safety in all the circumstances of the case. The fact that the servant has only one eye if that fact is known to the employer, and that if he loses it he will be blind, is one of the circumstances which must be considered by the employer in determining what precautions if any shall be taken for the servant's safety. The standard of care which the law*

demands is the care which an ordinarily prudent employer would take in all the circumstances. As the circumstances may vary infinitely it is often impossible to adduce evidence of what care an ordinarily prudent employer would take. In some cases, of course, it is possible to prove that it is the ordinary practice for employers to take or not to take a certain precaution, but in such a case as the present, where a one-eyed man has been injured, it is unlikely that such evidence can be adduced. The court has, therefore, to form its own opinion of what precautions the notional ordinarily prudent employer would take".

[56] This duty includes the provision of:-

i. a safe place of work;

ii. a safe system of work;

iii. an adequate plant and machinery

The burden of proof is on the claimant to establish that he was injured as a result of the defendant's negligence.

Safe place of work

[57] This duty according to the learned authors of ***Charlesworth & Percy on Negligence 10th Edition*** at page 694 is *"… fulfilled by providing a place as safe as care and skill can make it, having regard to the nature of the place of work".* The place of work must therefore have such protective devices as experience has shown to be desirable in other places of the same or similar kind.

[58] The defendant would therefore have had a duty to warn its employees

of the existence of the tank and to take measures to minimize the risk associated with its state. It is not enough for the defendant to show that the claimant knew of the danger. In ***Umek v. London Transport Executive*** (1984) 134 N.L.J. 522, the claimant who was employed to the defendant was killed whilst crossing the railway lines. The subway had been flooded and a notice was placed at its entrance stating that persons should use the footbridge and not cross the railway lines. This was ignored by some of the staff and the defendant was aware of the situation. The court held that the defendant was negligent by its failure to warn the train drivers that members of staff were walking across the tracks. The damages awarded to the claimant were reduced by 25% on the basis that she was contributorily negligent.

[59] It must however be borne in mind that the accident in the instant case occurred on a construction site which by its very nature, is dangerous. The onus is therefore on the defendant to show that he acted as a reasonably prudent employer would in the circumstances.

Safe system of work

[60] An employer is also liable for injuries sustained by an employee where that injury is a result of its failure to institute a safe system of work.

[61] In considering whether an employer has fulfilled this duty, the court is required to consider such factors as the organization of the work, the implementation of safety precautions, the nature of the work, the level of expertise that is required, the need for supervision and the number of persons required to execute the assigned tasks.

[62] In ***Speed v. Thomas Swift and Company Ltd.*** (supra) at pages 563

-564 Lord Greene M.R. said:

> *"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…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."*

[63] The issue of whether the defendant has discharged its duty is a question of fact. It must however be borne in mind that this duty is not an absolute one and does not require perfection on the part of the employer. An employer is therefore not required to take unreasonable precautions even where the risk is foreseeable. The determination as to what is reasonable in the circumstances depends on the facts of each case.

[64] In ***General Cleaning Contractors Ltd. v. Christmas*** (supra) at 1117, Lord Tucker said that it is a duty *"… to take reasonable steps to provide a system which will be reasonably safe, having regard to the dangers necessarily inherent in the operation. In deciding what is*

reasonable, long established practice in the trade, although not necessarily conclusive, is generally regarded as strong evidence in support of reasonableness".

[65] In ***Speed v. Thomas Swift and company Ltd.*** (supra) at pages 562 -563 Lord Greene M.R. said:

> *"On the other hand, it was said that the duty of providing a safe system must be considered, not generally, but in relation to the particular circumstances of each job …In my opinion the latter view is the correct one. 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 Co. v. English ... The nearest approach to the definition of "system" of which I am aware is that contained in the judgment of the Lord Justice Clerk in the Court of Session in the case just mentioned …: "What is system and what falls short of system may be difficult to define, and it may be often far from easy to say on which side of the line a particular case falls, but, broadly stated, the distinction is between the general and the particular, between the practice and method adopted in carrying on*

> *the master's business of which the master is presumed to be aware and the insufficiency of which he can guard against, and isolated or day to day acts of the servant of which the master is not presumed to be aware and which he cannot guard against; in short, it is the distinction between what is permanent or continuous on the one hand and what is merely casual and emerges in the day's work on the other hand…. 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.*

[66] It has been recognized that workmen oftentimes exhibit some amount of disregard their own safety: ***General Cleaning Contractors v. Christmas*** (supra). Therefore whilst the system of work should be designed so as to minimize the risk of foreseeable carelessness or danger, an employer must also take reasonable steps to ensure that it is followed. This may be accomplished by a system of supervision.

[67] It was however stated in ***Qualcast (Wolverhampton) Ltd. v. Haynes*** [1959] A.C. 743, that an experienced workman does not need to be warned about risks with which he is familiar. In that case the claimant who was

described as an experienced moulder, was injured whilst handling a ladle of molten metal in a foundry. He was not wearing protective spats that had been provided and the metal splashed on his foot. It was held that the claimant was so experienced that he needed no warning that there was a risk of injury if he did not wear the spats. At page 760, Lord Denning said:

> *"What is a 'proper system of work' is a matter for evidence, not for law books. It changes as the conditions of work change. The standard goes up as men become wiser."*

His Lordship went on to state at page 762 that

> *"…there was no negligence on the part of the employers in regard to this particular workman. He knew all there was to know, without being told; he voluntarily decided to wear his own boots…"*

[68] This principle was reiterated by Edwards, J. in the case of ***Allan Leith v. Jamaica Citrus Growers Limited*** (supra) in the following words:

> *"Although the duty of care is enumerated in the authorities by categories, I would be so bold as to borrow from the words of Parker L J in* ***Wilson v Tyneside Cleaning Co.*** (1958) 2 QB 110 at 124, where he said:
>
> > *'It is no doubt convenient, when one is dealing with any particular case, to divide that duty into a number of categories; but for myself I prefer to consider the master's duty as one applicable in all circumstances, namely, to take reasonable care for the safety of his men.'*

> *Duty is a relative concept and it is owed to the foreseeable victim, that is, to the individual workman within the scope of the risk created. The employer will not be held responsible for unforeseeable consequences. The question of whether there was a breach of duty relates to the precaution the ordinary reasonable and prudent man would take in light of the risk of an accident occurring..*
>
> *The duty to ensure the safety of his employees extends to taking care to ensure that the premises where employees are required to work are reasonably safe. It is a duty which obliges the employer to carry out his operations in such a way as not to subject those employed by him to unnecessary risk. See* ***Wilsons & Clyde Coal Co. v English*** (1938) A.C. 57 at 78.
>
> *There is a duty to instruct, warn and supervise…"*

[69] In this matter, the claimant has alleged that the defendant failed to provide a safe place as well as a safe system of work. In order to determine whether the defendant has discharged his responsibility to provide a safe place of work, the claimant's evidence as to his knowledge of the existence of the tank and its location must be examined.

[70] With respect to whether the defendant failed to provide a safe place of work, the evidence in relation to the lighting and the alleged use of yellow tape to cordon off the area is relevant. In order for the claimant to succeed it must be proved on a balance of probabilities, that the lighting was inadequate. It must also be proved that there was no cordon around

the area in which the tank was situated or if there was, that it was insufficient in the circumstances to minimize the risk of injury to the claimant.

[71] With respect to the alleged failure of the defendant to provide a safe system of work, the evidence in relation to lighting as well as the means of traversing from one level of the roof must be assessed. In the event that the claimant's evidence that the lighting was poor and that he had no choice but to use the steel column situated right next to the tank to collect the tool from his co-worker, is accepted, he would have proved his case.

Occupier's Liability

[72] At common law, an occupier of premises owes a duty of care to ensure that all visitors are reasonably safe whilst on his premises. **Section 3** of the ***Occupier's Liability Act*** states:-

> *"3.-(1) An occupier of premises owes the same duty (in this Act referred to as the "common duty of care") to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.*
>
> *(2) The common duty of care is the duty 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.*
>
> *(3) The circumstances relevant for the present purpose include the degree of care and of want of care, which*

would ordinarily be looked for in such a visitor and so, in proper cases, and without prejudice to the generality of the foregoing-

(a) an occupier must be prepared for children to be less careful than adults;

(b) 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.

(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances.

(5) Where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe."

[73] In ***Marie Anatra v. Ciboney Hotel Limited and Ciboney Ocho Rios Limited,*** Suit no. C.L. 1997/A 196 (delivered on the 31st January, 2001) Reckord, J. stated:-

"The plaintiff has based her claim under the Occupiers Liability Act and in negligence.

Under the Act, the common duty of care imposed by section 3(2), 'is the duty 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 to be there'

This section has placed a burden of proof on the defendant.

Long before the statutory provisions came into effect McBride J in ***MacLean v. Segar*** *(1917) 2 K.B. 325 said at page 329:*

'The occupier of premises to which he has invited the guest is bound, as a matter of common law duty, to take reasonable care to prevent damage to the guest for unusual danger which the occupier knows or ought to know of.'

Once the duty of care is imposed, the question whether the defendants failed in that duty becomes a question of fact in all the circumstances."

[74] In this matter no issue has been raised as to whether the defendant is an occupier of the site. There is also no dispute that he authorized to be in the roof area on that day. The defendant has to prove that he took reasonable care to ensure the claimant's safety. The evidence relating to the lighting and the placement of caution tape is therefore critical to the resolution of this matter. The issue of whether wooden steps or a step ladder were provided as a means of access to the roof area may also be relevant.

Contributory Negligence

[75] At common law where a claimant was partially responsible for his

injuries no damages were recoverable. This application of this rule produced harsh consequences and was changed by statute. Section 3 (1) of the ***Law Reform (Contributory Negligence) Act*** states:-

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

[76] Whilst no duty of care is owed by the defendant to the claimant, he may be found to be contributorily negligent if he failed to take reasonable care for his own safety. In ***Jones v. Livox Quarries Ltd.*** [1952] 2 Q.B. 608 at 615, Lord Denning stated that:-

> *"Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless."*

[77] In ***Bailey v Gore Brothers Ltd.*** *(1963) 6 WIR 23,* Lewis JA said:

> "*Where contributory negligence is set up as a defence, it is only necessary to establish to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by his own want of care, to his own injury; for where contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that where a man is part author of his own injury he cannot call on the other party to compensate him in full.."*

[78] In ***Uddin v. Associated Portland Cement Manufacturers Ltd*** [1965] 2 All E.R. 213 at 218, Lord Pearce stated that the onus of proving contributory negligence is on the defendant.

[79] Where workmen are concerned, it is not in all cases that they will be held liable for negligent acts. The test is whether the workman ought reasonably to have foreseen that his actions may have resulted in injury to him and took steps to avoid such injury. This was acknowledged by the court in ***Flower v. Ebbw Vale Steel, Iron and Coal Co. Ltd.*** (supra) and ***Allan Leith v. Jamaica Citrus Growers Limited*** (supra). The principle was subsequently applied in the case of ***Caswell v. Powell Duffryn Collieries Ltd.*** [1940] A.C. 152 at 166 where Lord Atkin said:

> *"I am of opinion that the care to be expected of the plaintiff in the circumstances will vary with the circumstances; and that a different degree of care may well be expected from a workman in a factory or a mine from that which might be taken by an ordinary man not*

exposed continually to the noise, strain, and manifold risks of factory or mine. I agree with the statement of Lawrence J. in Flower v. Ebbw Vale Steel, Iron and Coal Co., Ld. …, cited by my noble and learned friend Lord Wright …: 'I think of course that in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of work in a factory, and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence.' This seems to me a sensible practical saying, and one which will afford all the protection which is necessary to the workman."

[80] A similar view was expressed by Lord Wright at page 179 of the above case who said:

"What is all-important is to adapt the standard of what is negligence to the facts, and to give due regard to the actual conditions under which men work in a factory or mine, to the long hours and the fatigue, to the slackening of attention which naturally comes from constant repetition of the same operation, to the noise and confusion in which the man works, to his pre-occupation in what he is actually doing at the cost perhaps of some inattention to his own safety."

[81] Where contributory negligence has been established section 3 (1) of the ***Law Reform (Contributory Negligence) Act*** states that the damages awarded to the claimant are to be reduced *"…to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."* This is a question of fact and according to Seller, L.J. in ***Quintas v. National Smelting Co.*** [1961] 1 All. E.R. 630 at 636:-

> *"…the respective responsibilities of the parties and what is just and equitable having regard thereto can only properly be assessed when it has been found what the plaintiff in fact did and what the defendants failed in their duty to do. The nature and extent of the defendants' duty is, in my view, highly important in assessing the effect of the breach or failure of duty on the happening of the accident giving rise to the plaintiff's claim and on the conduct of the plaintiff. There is an interaction of factors, acts and omissions to be considered."*

[82] In this matter, the accident occurred on a construction site. There is no dispute that the very nature of the work that was being undertaken by the defendant may expose its employees to danger. Whilst it is acknowledged that the defendant owed a duty of care to the claimant, Lord Herschell in ***Smith v. Baker*** [1891] A.C. 325 at 360 reminds us that not all loss which is sustained as a result of exposure to certain dangers merit an award of damages. He said:-

> *"Where a person undertakes to do work which is intrinsically dangerous, notwithstanding that reasonable*

care has been taken to render it as little dangerous as possible, he no doubt voluntarily subjects himself to the risks inevitably accompanying it, and cannot, if he suffers, be permitted to complain that a wrong has been done him, even though the cause from which he suffers might give to others a right of action."

[83] The question which needs to be answered is whether the claimant failed to take reasonable care for his own safety. In this matter where it has been alleged that the lighting in the area of the tank was inadequate, the claimant may be found to be guilty of contributory negligence by virtue of his going onto that section of the roof.

[84] In ***Ghannan v. Glasgow Corporation*** 1950 S.C. 23 a tenant fell on the stairs of the building in which he lived and was injured. At the time the area which was normally lit by electric lamps was dark. It was held that although the defendant had breached its statutory duty the claimant was: "…*guilty of contributory negligence by deliberately exposing himself to an obvious risk and failing to exercise sufficient care..."*

[85] There are three questions which need to be answered in order to determine whether Mr. Headley should bear any responsibility at all for the accident. The first is whether he knew of the existence of the tank. The second is whether the area was adequately lit? In the event that it was not, the third is whether the path which he took on that evening was the only means by which he could retrieve the tool from his co-worker?

Analysis of the evidence

[86] There is no dispute that the claimant's was injured in the course of his employment. The parties are however at variance as to the circumstances which led to the claimant sustaining those injuries. Was this due to the defendant's failure to provide a safe system and/or place of work? Was the claimant injured as a result of his own negligence and if so, to what extent?

[87] The determination of liability in this matter is a question of fact and rests on the court's assessment of the credibility of the evidence of the witnesses. The main facts in dispute are: (i) whether the area in which the claimant was injured was adequately lit; (ii) whether sufficient measures were put in place to ensure the safety of the claimant; (iii) whether there was either a step ladder or wooden steps between the two levels of the roof; (iv) and if so, how that may have impacted on the exercise of the defendant's duty of care to the claimant.

[88] He who avers must prove. When the evidence given by the claimant is assessed the first area in which there is a discrepancy between his evidence in chief and that given in cross examination is concerned with his knowledge of the existence of the tank. In one breath he said that he had worked on the tank: *"There was a hole there for a staircase in case the building owners decided that they wanted to go up to a third floor. However, the owners decided to convert that space into a tank to store water. The tank would be a concrete tank and we had 'boxed' the shape of the tank already. This process involved us making a frame out of ply wood and then we would pour the concrete into the ply frame. This would mean that the tank is basically inside of the building and the top of the tank would be the*

hole that should have been for the stairway access to the third floor…We had worked on one tank. This tank was in the other building and the top of this tank was on the roof of the higher section of the building."

[89] However in cross examination, he denies having any knowledge of it. It is also to be noted that despite this lack of knowledge he was able to say that one of the moveable lights was usually situated in that area. I find that this discrepancy is a material one which impacts negatively on the claimant's credibility. I therefore reject his evidence that he did not know of the existence of the tank.

[90] Where the evidence in relation to whether any mechanism was in place for employees to access the higher section of the roof is concerned, the claimant has said that he had to use the steel column which was close to the edge of the roof and the tank to do so. I have also noted his evidence that he was going to collect a tool from a fellow workman who was on the ground. The plan was for that workman to pass the tool to the claimant at the other end of the building which was closer to the ground.

[91] Mr. Jones has given evidence that wooden steps or a step ladder were provided for the use of the defendant's employees. I have noted that in his evidence in chief he referred to a step ladder and that whilst giving *viva voce* evidence he spoke of wooden steps. The witness by way of explanation stated that those two things are one and the same. He said that the steps or ladder was *"…nailed down…It is not a moveable ladder. It is a wooden step but serves the purpose of a ladder to the next level".* I accept his explanation. I also accept his evidence that the steps or ladder was situated approximately five to six feet away from the tank. The

claimant's evidence that there was no other means of accessing the higher section of the roof except by the use of the steel column which was near to the tank is rejected.

[92] Whilst there is no dispute that there was lighting on the premises, the question of its adequacy needs to be resolved. It is apparent even from the evidence of the defendant that the moveable lights were concentrated in the area where the tank on the lower level was being worked on. The evidence is that there was a fixed light at the other end of the building and was about ten to fifteen feet away. No evidence was presented as to the brightness of that light. The claimant has stated that it was dark. I accept his evidence and find that the lighting was not adequate.

[93] Having accepted the claimant's evidence that the area in which the tank was situated was dark, I question his decision to use that area to go to his co-worker to collect the tool. No consideration appears to have been given to any alternate means of achieving the same result. For example, why didn't the claimant get off the roof and collect the tool instead of venturing into an area that was not well lit. Mr. Headley knew about the tank and ought to have taken care for his own safety.

[94] With respect to whether yellow tape was placed around the tank, the claimant has clearly stated that that was not done. Mr. Jones has stated that it was done and employees were constantly reminded of the need to exercise caution on the site. I have however noted that Mr. Jones did not go up on the roof that day. In those circumstances, he cannot speak definitively to the presence of this yellow tape. I therefore accept the evidence of the claimant on this issue. In any event, given the state of the

lighting, even if it was in place, the defendant would not have fulfilled his duty of care to the claimant.

Findings

[95] Having assessed the evidence and observed the witnesses my findings are as follows:

i. The claimant was aware of the existence of the tank and its location;
ii. Wooden steps or a step ladder was provided for employees to traverse from one level of the roof to the next;
iii. That the said wooden steps or step ladder was situated approximately five to six feet away from the tank;
iv. The lighting in the area where the tank was situated was inadequate;
v. There was no yellow tape around the tank at the time of the accident.

[96] I find that the claimant breached the duty of care owed to the defendant by its failure to cordon off the area around the tank and to provide adequate light on the evening in question. However, having found that the defendant knew of the existence of the open the tank and that he went onto that section of the roof which was poorly lit, I am of the view that he failed to take proper precautions for his own safety.

[97] In the circumstances, I accept the submissions of Miss Mayhew and find that both parties are equally responsible for the accident.

[98] Judgment is therefore awarded to the claimant with damages to be assessed on the basis of equal liability.