

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Division

[Unreported]

Suit No: CV1220 of 2006

BETWEEN

TYRONE PHILLIPS

PLAINTIFF

AND

BARBADOS PORT INC.

FIRST DEFENDANT

EZRA FORDE

SECOND DEFENDANT

CARGO HANDLERS LTD.

THIRD DEFENDANT

Before The Honourable Madam Justice Maureen Crane-Scott, Judge of the High Court

2011: February 15, 16, 17, 18, 21 and March 23

2013: February 21

Appearances: Mr. Alair Shepherd, Q.C. in association with Ms. Marvalee Franklyn for the Plaintiff; Mr. P.K. Cheltenham, Q.C. in association with Ms. Keren Prescott and Ms. Jewelle A.J. Maynard for the First and Second Defendants; Mr. Elliott D. Mottley, Q.C. in association with Ms. Marilyn Moore and Ms. Andrea Simon for the Third Defendant.

DECISION

- [1] **Crane-Scott J:** On March 4, 2005, while performing duties as a docker on board the *MV. P & O Nedlloyd Trinidad*, Tyrone Philips (“the Plaintiff”) was injured by an empty freight container which was in the process of being loaded onto the deck of the vessel by a Liebherr Mobile Harbor (LHM) crane situated at the Bridgetown Port. The crane was being operated by Ezra Forde (“the Second Defendant”) who was an employee of the Barbados Port Inc (“the First Defendant”).
- [2] The container in question had been lifted by crane from the dock at the Bridgetown Port and was intended to have been lowered onto 4 locking mechanisms or twistlocks (commonly known as “shoes”) situated within the stacking area among a row of other containers which had already been secured on the ship’s deck.
- [3] The incoming container missed the shoes on its first attempt and instead of landing precisely on the 4 shoes as intended, it came down on the ship’s deck and knocked out one or two of the 4 shoes in the process.
- [4] Having both received and acknowledged a hand signal from the Plaintiff that the landing had been unsuccessful, the Second Defendant proceeded to raise the container from the deck in order to make another attempt at correctly landing the container on the shoes.
- [5] As the container was being raised off the deck, the Plaintiff was squeezed in the area of his chest and simultaneously pinned against the side of another stationary container situated to the north of the stacking area in a nearby row of empty containers which had already been loaded on the ship’s deck.

- [6] As a result of the accident, the Plaintiff sustained subconjunctival haemorrhages and other injuries, *inter alia*, to his neck, chest, upper abdomen, diaphragm, forearm and wrist.
- [7] **The Claim**: On July 6, 2006 the Plaintiff instituted an action in negligence against the First, Second and Third Defendants. The Statement of Claim identified the First Defendant as the substantive employer of the Plaintiff, as well as of the Second Defendant.
- [8] Cargo Handlers Ltd (“the Third Defendant”) was joined in the action on the basis that under and by virtue of an Agreement (hereinafter referred to as “the Stevedoring Agreement”) dated the 8th day of August, 2002 and made between the First Defendant and the Shipping Association of Barbados on behalf of the Third Defendant, the Plaintiff had been temporarily subcontracted by the First Defendant to the Third Defendant, as the Stevedoring Contractor, to perform stevedoring services as may be from time to time required.
- [9] In the Statement of Claim, the Plaintiff alleged that the incident on March 4, 2005 had been caused wholly and exclusively by the negligence of all three Defendants.
- [10] At paragraph 7 of his Statement of Claim, the Plaintiff provided particulars of the alleged negligence as follows:
- (i) The Second Defendant (i.e. the Crane Operator) was negligent in that he failed to follow the procedure and take instructions from the deck hand in the lifting of the container;
 - (ii) The other Defendants were negligent for failing to cause the Second Defendant to be sufficiently trained and carefully

instructed as to the dangers arising in connection with the use of the machinery and failure to follow instructions.

- (iii) Failing to ensure that the lifting operation was properly planned and competently supervised and carried out in a safe manner.
- (iv) Negligently or in breach of international regulations or both, failing to ensure that all control systems of the equipment were safe, in particular by:
 - a) failing to provide a suitable interlocking device to effectively prevent the shoe from slipping out whilst the container was being moved;
 - b) negligently failing to ensure that adequate measures were taken to prevent the container from rotating during lifting;
 - c) failing adequately or at all to examine, inspect or check the continued integrity of the shoes and to ensure that they were safe for the purpose.
- (v) Causing, permitting or suffering the continuance of the practice of replacing shoes manually when it was unsafe to do so.
- (vi) In the premises exposing the Plaintiff to an unnecessary risk of injury.
- (vii) In the premises failed to provide or maintain a safe system of work.

[11] During the course of his closing arguments on March 23, 2011, Counsel for the Plaintiff, Mr. Shepherd, QC conceded that no evidence had been adduced in relation to items (iv) and (v) of the Statement of Claim. He

accordingly informed the Court that these two particulars of negligence were to be regarded as having been withdrawn.

- [12] **The Case for the Defendants:** In their Amended Defence filed on February 7, 2011, the First and Second Defendants denied all allegations of negligence as pleaded and particularized in the Plaintiff's Statement of Claim and also denied all allegations of injuries, loss and damage suffered by the Plaintiff.
- [13] The First and Second Defendants contended that there had been no defect or omission in their duty of care because, at the time of the accident, the Second Defendant had been competently discharging his duties as a crane operator.
- [14] They further alleged that the Plaintiff's accident had been caused in whole or in part as a result of his own negligence in that he had:
- a) failed to follow the normal safety procedures whilst in the course of duty;
 - b) ignored his own safety and failed to take any steps to ensure his safety;
 - c) failed to take adequate care of his own property; and
 - d) failed to keep a proper lookout whilst discharging his duties.
- [15] Furthermore, the First and Second Defendants claimed to be entitled to an indemnity or contribution from the Third Defendant under the Stevedoring Agreement and the *Civil Liability (Contribution) Act, Cap 149B* of the Laws of Barbados respectively.
- [16] They further alleged that the accident had been caused by the negligence of the Third Defendant, its servants or agents by:

- a) failing and neglecting and refusing to provide the Second Defendant with adequate or sufficient instructions in operating the crane; and
- b) failing and neglecting and refusing to supervise the deckhand and dockers adequately or at all.

[17] In its Amended Defence filed on February 7, 2011, the Third Defendant admitted that an accident had occurred on the date and place as alleged but denied that the accident had been caused by its negligence whether as alleged or at all. It further alleged that the accident had been caused either wholly or in part by the negligence of the Plaintiff who, it alleged, had:

- a) failed to follow safety procedures whilst in the course of his duties;
- b) failed to take any or any adequate care of his own safety; and
- c) failed to keep a proper look out.

[18] Further or in the alternative, the Third Defendant alleged that the accident had been caused either wholly or in part by the negligence of the Second Defendant by:

- a) attempting to lift the container without an adequate signal being given;
- b) failing to take instruction from the deckhand.

[19] The Third Defendant made no admissions in respect of the Plaintiff's alleged injury, loss or damage and stated that if held liable to the Plaintiff it was entitled to claim against the First and Second Defendant such indemnity and/or contribution pursuant to the *Civil Liability (Contribution) Act, Cap 194B* and the Stevedoring Agreement mentioned above.

[20] The Third Defendant also contended that, in the alternative, the accident was caused by the movement of the sea which made the container swing and strike the Plaintiff.

[21] **The Issues:** Having regard to the evidence which was adduced and to the pleadings as modified by Counsel for the Plaintiff at the close of the trial, the Court found that it was called upon to resolve the following broad issues:

- 1) As a preliminary issue of fact, how did the accident aboard the *MV. P & O Nedlloyd Trinidad* on March 4, 2005 by which the Plaintiff was injured occur?
- 2) Was the Plaintiff injured as a result of the negligence of the Second Defendant in failing, as the crane-operator, to follow the established procedure by taking instructions only from the deck hand before lifting of the container?
- 3) Was the Plaintiff injured as a result of the failure of the First Defendant and/or Third Defendant to provide or maintain a safe system of work and thereby exposing him to an unnecessary risk of injury and, more specifically, by:
 - (i) failing to cause the Second Defendant to be sufficiently trained and carefully instructed as to the dangers arising from the failure to follow instructions in connection with the use of the mobile crane?; and/or
 - (ii) failing to ensure that the lifting operation was properly planned and competently supervised and carried out in a safe manner?
- 4) Alternatively, did the Plaintiff sustain his injuries wholly or partly as a result of his own negligence, as the Defendants have all alleged?

- [22] **Discussion:** The Court does not propose to provide, at this stage, a comprehensive review of the evidence and legal submissions in this matter. It will instead set out a brief summary of its findings on the four issues as outlined above. Detailed reasons for its decision, including a full review of the evidence and legal submissions, will be provided in the event of an appeal.
- [23] *Issue 1 – How did the accident occur?:* Although some 9 witnesses gave evidence at the trial, only 3 were actually on aboard the *MV Nedlloyd* at the time of the accident and therefore in any position to assist the Court in determining how the accident occurred. The witnesses who provided direct evidence about the accident were: (i) the Plaintiff-Tyrone Phillips, and (ii) his fellow docker, Anderson Gamble, on the one hand, and (iii) the Second Defendant and crane operator, Ezra Forde, on the other.
- [23] Viewed as a whole, the evidence given by Tyrone Phillips, Anderson Gamble and Ezra Forde about the accident was contradictory in many respects and this initially made it quite difficult for the Court to get a clear idea of precisely how the accident occurred.
- [24] Despite the contradictions however, the evidence given by these 3 witnesses did contain some undisputed facts which have been accepted by the Court.
- [24] Firstly the Court accepted the evidence of all 3 witnesses who testified that the process of loading empty freight containers from the dock onto the deck of a ship is normally conducted by a work gang consisting of 4 dockers, a deckhand, a crane-operator and a foreman, all of whom are supervised by the Stevedoring Contractor.

- [25] The Court also accepted that on the day in question, a full work gang had been on board the *MV Nedlloyd*. These were the 4 dockers, Tyrone Phillips-the Plaintiff, Anderson Gamble, Michael Beckles and a Mr. Todd.
- [26] Additionally, Malcolm Walcott, who went by the nickname of “Chicky”, was acting as deckhand, while the Second Defendant was the crane-operator. Finally, the foreman that day was Carl Mayers, while the Stevedoring Contractor was a man by the name of Leon Gibbs.
- [27] The Court also accepted the evidence of the Second Defendant, Ezra Forde, who told the Court that the ideal practice when a container was coming down on deck is for all 4 dockers to be so positioned as to be able to monitor each of the 4 points in the stacking area where a shoe had been placed.
- [28] His evidence as to the role of the 4 dockers was confirmed by the Chief Executive Officer of the First Defendant, Mr. Everton Walters who explained that having 4 dockers made the loading operation as safe as possible. He also stated that each of the 4 dockers would be looking at the incoming container from 4 different points. Mr. Walters later told the Court that ultimately it was left to the Stevedoring Contractor, as the overall supervisor of the work gang, to determine from a practical standpoint what specific duties were to be performed in any given situation.
- [29] Although 4 dockers had been employed in the loading of the *MV Nedlloyd* on the day in question, the Court found that the evidence indicated that only 2 of those dockers, namely, the Plaintiff and Anderson Gamble, had been around the stacking area when the accident occurred. Neither the Plaintiff nor Mr. Gamble was able to provide a satisfactory explanation as to where the other 2 dockers had been immediately prior to and during the accident. The Plaintiff did, however, tell the Court that sometime after the accident,

Michael Beckles, one of the other dockers, had informed him that he had been elsewhere on the vessel looking for shoes. No evidence was elicited regarding the whereabouts of the foreman, Carl Mayers at the material time.

[30] In the Court's view it was regrettable that neither "Chicky" the deckhand, who the Plaintiff said was on deck in an open area on the landside of the vessel, nor the Stevedoring Contractor, Leon Gibbs, who Anderson Gamble said, had alerted him to move out of the way as the container swung in a southerly direction on being raised from its stationery position on the deck, were called to give evidence for any of the parties in the matter. In the absence of their testimony, the Court felt that it had most likely not obtained the most complete picture of what actually occurred aboard the *MV Nedlloyd* on the afternoon of March 4, 2005.

[31] Nonetheless, it was not in dispute that the accident occurred while an empty 40 foot container was being loaded from the shore onto Bays 5-7 of the deck of the *MV Nedlloyd* by the Second Defendant who was operating the LHM crane.

[32] It was also not in dispute that the container involved in the accident was not the first container to have been loaded onto those particular Bays that day. However, while Anderson Gamble identified the container in question as being the fifth in its row, the Second Defendant insisted the container which was being loaded was the sixth and final container to be loaded in that row.

[33] All 3 witnesses also accepted that immediately to the north of the row into which the container in question was being loaded was another row containing 6 empty freight containers that had already been secured onto the deck of the vessel. The Plaintiff and Mr. Gamble both testified that it was

against one of these containers to the north of the stacking area that the Plaintiff had been squeezed.

[34] It is also undisputed that when the Second Defendant was lowering the container in question into its stacking area, the Plaintiff, Tyrone Phillips, had been standing to the north of the stacking area, while Anderson Gamble had been standing at the opposite end, namely, to the south. Additionally, both dockers had been facing the empty stacking area awaiting the lowering of the container.

[35] The evidence showed that the Plaintiff and the Second Defendant had both testified that the Plaintiff had been standing two containers away from the stacking area when the container was being lowered to the deck. However, although the Second Defendant put the Plaintiff to the north-west of the stacking area, the Plaintiff at one point seemed to place himself to the north-east. The evidence of Mr. Gamble, like that of the Second Defendant, also placed the Plaintiff to the north-west of the stacking area that was being loaded at the material time.

[36] Ultimately after considering the matter, the Court was satisfied, on the balance of probabilities, that at the time when the container was being lowered into the stacking area, the Plaintiff had more likely than not been standing to the northwest, two containers or approximately 16 feet away of the stacking area, since it stood to reason that that would have afforded him the best vantage point from which to observe the north-western shoe which he had been required to monitor.

[37] The Plaintiff and the Second Defendant both described the position in which the Plaintiff had been standing as a position of safety. Mr. Gamble, however, disagreed with this assessment. He testified that the position where

the Plaintiff had been standing was, in his view, not one of safety because the Plaintiff had been standing behind a hatch or a hole on the deck, which was a depth of 3 feet and led to a lower deck. According to Mr. Gamble, that position was, in his view, unsafe because a person could be injured by slipping and falling into the hole, in the event that he had to move suddenly.

[38] After considering this apparent discrepancy, the Court was not completely satisfied that it had been established on the evidence that the location behind the hatch where Mr. Gamble had seen the Plaintiff standing and which he told the Court was not a position of safety, was the exact location on deck where the Plaintiff was standing and which the Plaintiff and the Second Defendant had both agreed was a position of safety as the container was being lowered.

[39] The Court was satisfied that the evidence suggested that at the point in time when the container was being lowered onto the deck into the stacking area, both Mr. Gamble and the Plaintiff had taken up positions of safety on opposite sides of the row of containers in Bays 5-7 which were already secured on the deck.

[40] The Court also found that from his position to the south-west of the stacking area, Mr. Gamble whose job it was to monitor the south-western shoe as the container was being lowered, would have been unable to see the Plaintiff who had taken up his position of safety in the north-west of the stacking area, some 2 containers away from the stacking area.

[41] The Court was unable to say that Mr. Gamble was lying or mistaken in any part of his testimony. Indeed, the evidence which Mr. Gamble gave about the Plaintiff's location behind the hatch was detailed enough, and his demeanour earnest enough to convince the Court that he really did see the

Plaintiff standing in a location near a hatch which, in his view was not a position of safety.

[42] Ultimately, the Court concluded that the apparent discrepancy between the evidence of the Plaintiff and the Second Defendant on the one hand and Mr. Gamble's evidence on the other hand, was not necessarily material since the container had in fact landed on the deck without causing injury to the Plaintiff.

[43] Furthermore, the Court felt that the discrepancy had most probably arisen because the witnesses were speaking about different points in time. In other words, Mr. Gamble was most likely testifying about seeing the Plaintiff near the hatch at a point in time which was later than the time when the container was being lowered. The discrepancy was not cleared up during the trial. Nonetheless, the Court was satisfied that it did not impact negatively on the evidence of any of the 3 eye-witnesses.

[44] The evidence established and the Court accepted, that that the stacking area or the area on the deck of the ship onto which a freight container is to be set contains 4 dovetail twistlocks (more commonly referred to as "shoes") that are placed by the dockers upon dovetail foundations located on the deck of the vessel itself. The bottom of each freight container also has 4 holes, one in each corner, and the goal of the crane operator is to load the container in the stacking area in such a way that the holes on the bottom of the container land onto the shoes that are positioned on the deck.

[45] The Court accepted that the task of landing a container onto the shoes on the deck of a vessel in one attempt is a feat which is described by workers at the Port as a "Tiger Woods" because it is very difficult to achieve. The Court also accepted that due in part to the movement of the sea, a crane operator

rarely achieves a “Tiger Woods” in his first attempt. Additionally, more often than not a container which is being loaded onto the deck may miss the shoes completely and may sometimes also displace one or more of the shoes on the deck.

[46] All 3 witnesses testified that when the Second Defendant was loading the container onto the deck, it not only missed the shoes in its first attempt, but displaced one or more of the shoes in the process. The Plaintiff testified that the container in question displaced the shoe on the north-western end of the stacking area, while Mr. Gamble’s evidence was that a shoe on the south-western end where he was, was also dislodged. In his evidence, the Plaintiff did not appear to be aware of the displacement of any shoe other than that in the north-west which he had been monitoring.

[47] The Plaintiff testified that on his becoming aware of the displaced north-western shoe, he had signaled to the Second Defendant to alert him to the fact that a shoe had been displaced and to direct him to raise the container. In his evidence, the Second Defendant confirmed that the Plaintiff had provided such a signal and that he had acknowledged the Plaintiff’s signal by nodding his head and blowing his horn. The Plaintiff, however, denied that the horn was ever blown and further indicated that he could not recall whether the LHM crane even contained a horn.

[48] While the Court has not accepted the Plaintiff’s suggestion that the LHM crane had no horn, a fact which the Court finds extremely difficult to believe, it was equally not prepared to accept the evidence of the Second Defendant that the horn had been blown in acknowledgement of the Plaintiff’s signal. The Court is satisfied that had the horn been sounded, it is more likely than not that the other docker working on the deck, Anderson

Gamble, would have heard it and the evidence was that Mr. Gamble, like the Plaintiff, heard no horn. The Court therefore accepted that no horn was sounded.

[49] Overall, the Court was unimpressed with the Plaintiff's evidence regarding how the accident occurred and in particular as to exactly how he came to be squeezed or pinned by the container against a nearby container in an adjoining row. In the view of the Court, the Plaintiff was not particularly forthcoming as a witness and his evidence as to what he had been doing just before he was struck by the container was implausible and frankly incredible.

[50] The Court recalled that the Plaintiff had insisted that he was at all times in a position of safety. This would have placed him 2 containers or approximately 16 feet away from the stacking area into which the incoming container was being loaded. He told the Court that because the container had not moved after he had given the crane operator [the Second Defendant] the signal to heave, he had moved from his position of safety to a further position of safety in order to speak to Malcolm "Chicky" Walcott, the Deckhand. He claimed to have spoken to "Chicky" for only 2-3 seconds before he returned to his position of safety from where he continued to watch the container.

[51] Incredibly, although the Plaintiff's evidence is that he watched the container from his position of safety, he told the Court that he never saw the container move until it came at him suddenly and struck him. As unlikely as that seemed, he continued to maintain that all he could say was that the container had swung and came at him suddenly.

[52] The Court finds it hard to believe that the Plaintiff would not have seen the container move before it struck him had he been watching the container while standing away in a position of safety 2 containers or approximately 16 feet away from the stacking area, as he has claimed. Indeed, the Court is unable to accept the Plaintiff's evidence that he had been in a position of safety at all times, as he has alleged, because, were that so, he would never have been struck by the container.

[53] Although constrained somewhat by his lofty perch inside the LHM crane, several feet above the ship's deck which would have prevented him from seeing everything that was happening on deck, the Second Defendant did provide the Court with evidence as to the location on deck of the Plaintiff at various times and offer the Court some useful insight into how the accident may have occurred.

[54] The Court accepted that the Second Defendant had seen where the Plaintiff had been standing in his position of safety at the start of the loading process when the container was being lowered onto the deck. This location, as the Court has already found, coincided exactly with the location where the Plaintiff said he had been standing in his position of safety to the northwest of the stacking area, two containers or approximately 16 feet away and is accepted by the Court.

[55] The Court also accepted that the Second Defendant next saw the Plaintiff at a point in time when the container was being raised off the deck at the Plaintiff's request. According to the Second Defendant, when he saw the Plaintiff the second time, the container had been raised to a height of about 8 feet off the deck and the Plaintiff had been standing much closer to the stacking area and directly in line with it, while clutching his chest in pain.

- [56] The Court was satisfied that that the location on deck where the Second Defendant placed the Plaintiff at the time of the accident was not where the Plaintiff would have been expected to have been, had the accident occurred in the manner the Plaintiff had outlined in his evidence-in-chief.[*See paragraphs [48] to [51] above*]
- [57] The Court found that while the evidence of the Second Defendant as to where the Plaintiff had been standing on deck when he was struck by the container did not accord with that of the Plaintiff, it was more closely in line with the evidence of Anderson Gamble on this point.
- [58] The Court found it most significant that in the course of his testimony, Mr. Gamble (who had been called to give evidence for the Plaintiff) repeatedly insisted that he had seen the Plaintiff replacing the shoe at the north-western end of the stacking area.
- [59] He also testified that “Chicky” the deckhand was at work and that he could see the deckhand from where he stood. He completely contradicted the Plaintiff’s evidence that the Plaintiff left his position of safety to speak to “Chicky” the deckhand. In short, Mr. Gamble told the Court that he never saw the Plaintiff move from his position to the north of the stacking area to speak to the deckhand.
- [60] The Court accepted this aspect of the evidence of Anderson Gamble as more probable than that given by the Plaintiff. Mr. Gamble was called as a witness for the Plaintiff and while the manner in which he gave his evidence was at times disjointed and even confused in some aspects of his testimony, he appeared to the Court to be a credible witness and there was no reason for the Court to doubt what he had to say.

- [61] Furthermore, Mr. Gamble was present at the scene of the accident. He saw the Plaintiff putting in the north-western shoe immediately after the container had been raised and before the container swung northwards and squeezing the Plaintiff against one of the containers in the adjoining row northwards of the stacking area. What is more, Mr. Gamble was not a party to the proceedings, had no known interest in its outcome and therefore had no motive or reason to lie.
- [62] The Court accordingly, had absolutely no reason to doubt the veracity of his testimony. His direct evidence about not seeing the Plaintiff move from his position to the north of the stacking area to speak to the deckhand, but instead, seeing the Plaintiff putting in the north-western shoe immediately after the container had been raised and immediately prior to the Plaintiff being squeezed against one of the containers in the adjoining row northwards of the stacking area, convinced the Court that the Plaintiff had more than likely lied to hide the fact that he had not followed the best practice at the Port and had failed to take care for his own safety and contributed to his injuries.
- [63] The Court was also satisfied that having cut through the established channels of communication and given a hand signal to the crane operator directly and received an acknowledgement that his signal had been understood, there was absolutely no reason for the Plaintiff to have left his position of safety to speak to the deckhand.
- [64] In summary, the Court has found that this accident occurred at a point in time when the container in question was being raised from the deck where it had landed having (according to the Plaintiff and Anderson Gamble) displaced the 2 shoes on the southwestern and northwestern sides

respectively. After being informed of this by the Plaintiff through a signal whose receipt he had acknowledged, the Court further accepted that the Second Defendant proceeded to slowly raise the container from the deck.

[65] When the container was raised to a height of about 4 feet, the Plaintiff, like his fellow docker, Anderson Gamble, crouched under the container and went in to quickly replace the displaced northwestern shoe.

[66] Based on the evidence before it, the Court was satisfied that as the Plaintiff was proceeding to stand up after he had bent down to replace the shoe, the container swung in a northerly direction, striking him in the chest and simultaneously pinning him onto a stationary container situated to the north of the stacking area in a row of empty containers which had already been secured on deck, injuring the Plaintiff in the process.

[67] Issue 2 – Did the Second Defendant negligently fail to follow procedure when lifting the container from the deck?: Having found the relevant facts and determined how the accident occurred, the Court proceeded to examine the question whether the Second Defendant was liable to the Plaintiff in negligence for the accident.

[68] The Court is satisfied that as the crane operator responsible for loading freight containers aboard the *MV Nedlloyd*, the Second Defendant owed a duty of care to all persons present on the deck of the ship where the crane was being used. It was also reasonably foreseeable that a breach of that duty of care could result in injury to the Plaintiff or any of the other workers working on deck or indeed anyone on the ship.

[69] The existence of this duty on the part of the Second Defendant is uncontested. The only question before the Court is whether the Second

Defendant breached this duty of care by failing, as the Plaintiff alleges, to follow procedure and to take instructions from the deckhand in the lifting of the container and, if so, whether his failure to do so caused the injuries sustained by the Plaintiff.

[70] Evidence about the procedures in place during the loading of containers on vessels was provided in the testimony of Mr. Everton Walters, the CEO of the Port, who was called on behalf of the First and Second Defendants, and Mr. Donald Grant, a certified trainer in dock work who gave evidence for the Plaintiff. Both these witnesses were formally trained in port management and dock work respectively and had also obtained extensive practical experience in port work and management.

[71] They testified that as a result of their experience and training, they were familiar with the loading process and how it should be conducted. According to their evidence, the ideal practice during the loading of a vessel was for the deckhand to communicate with the crane operator using the portable radio transceiver (or “walkie talkie”). While seemingly acknowledging the practice of dockers communicating with the crane operator directly using hand signals, they both maintained that the better practice was for the crane operator to be informed about a displaced shoe through radio communications from the deckhand rather than by hand signals from the dockers.

[72] Apart from Everton Walters and Donald Grant, Mr. Owen Smith, a former crane operator and docker at the Port told the Court that in practice when a shoe was knocked out during the loading of a vessel, the crane operator would be informed about the displaced shoe sometimes through the

deckhand who would radio this information to him, but also sometimes through a docker, if the docker was in the view of the crane operator.

[73] Asked to existence at the Bridgetown Port of both methods of communication between those on deck and the crane operator, the Port's CEO, Mr. Walters explained to the Court that the better or ideal practice of communicating between the deck and the crane using "walkie talkies" was not always practical.

[74] The Court found that the evidence of both the Plaintiff and the Second Defendant effectively confirmed the existence and use of an accepted practice at the Port which permitted dockers to communicate with the crane operator using hand signals. Both of them clearly told the Court that on March 4, 2005, the Second Defendant had been informed about the displaced shoe and directed by the Plaintiff to heave the freight container from the deck using a hand signal given by the Plaintiff to the Second Defendant.

[75] The Plaintiff and Second Defendant also testified that the Second Defendant received the Plaintiff's signal and acknowledged his receipt and understanding by nodding his head. The Second Defendant claimed in addition that he also confirmed receipt of the Plaintiff's signal by blowing the crane's horn. However, for reasons which the Court has earlier stated, the Court has been unable to find that the Second Defendant acknowledged his understanding of the Plaintiff's hand signals by the sounding of the horn.

[76] Apart from the Third Defendant about whom not much is known, the Court is satisfied that the evidence clearly establishes that Plaintiff and the First and Second Defendants were each aware of the existence of the ideal procedure governing communications from the deck of the vessel to the

crane operator during the loading of a vessel. The Court is, however, satisfied that both the Plaintiff and the Second Defendant failed to follow the recommended ideal procedure and that their failure was commonplace at the Port.

[77] It is also obvious to the Court that the procedure identified as ideal was followed as much by its breach as by its compliance. Furthermore, the alternative practice which allowed dockers to communicate directly with the crane operator using hand signals was not only prevalent, but accepted.

[78] As to whether the failure of the Second Defendant to follow the ideal procedure and to take instructions from the deckhand in relation to the lifting of the container was negligent on the facts of this case, the Court is satisfied on the evidence that more than one method of communication between the deck and the crane was in use at the Port, both of which were equally permissible.

[79] In their pleadings, the Plaintiff and the Third Defendant both claimed that the Second Defendant was negligent (according to the Plaintiff) in that “*he failed to follow the procedure and take instructions from the deckhand in the lifting of the container*” or (according to the Third Defendant) “*in failing to follow the normal safety procedures while in the course of his duty*” as the crane operator.

[80] The Court is satisfied that given the distance between the deck of the ship and the cab of the crane operator and the fact that the dockers are not always in the direct line of vision of the crane operator, the ideal practice which Mr. Walters described which required the crane operator to be informed of a displaced shoe through radio communications from the deckhand, was

undoubtedly much safer than by hand signals from the dockers due to the obvious risk of mis-understandings and mis-communications.

[81] However, as the evidence disclosed that more than one method of communication between the deck and the crane was in use at the Port, both of which were equally permissible, the Court was unable to find that the Second Defendant “*failed to follow the procedure and take instructions from the deckhand in the lifting of the container*” or that he “*failed to follow the normal safety procedures while in the course of his duty.*”

[82] Furthermore, even if the Second Defendant could be said to have failed to follow the normal safety procedure of taking instructions from the deckhand, on the facts of this case, the signal he received from the Plaintiff was clearly understood by him and acknowledged and there was no evidence of any failure in communication between himself and the Plaintiff.

[83] In short, although the Second Defendant did not follow what was known as the ideal practice or procedure, the Court is unable to conclude that this failure was the primary cause of the accident. What is more, if the Court were to find that breach of the established procedure by the Second Defendant had caused the accident, the Court would be unable to find the Second Defendant personally liable in negligence for engaging in practices which were established and permitted by his employers, even if not ideal. ***Herton v Blaw Knox Ltd (1968) 6 KIR 35, per Willis, J.***

[84] Far from establishing negligence on the part of the Second Defendant, the fact that it was apparently permissible for the dockers on the ship’s deck to communicate directly with the crane operator despite there having also been, what Port CEO of the Port, Mr. Walters and other witnesses have accepted was another ideal and safer means of communicating with the crane operator

through the deckhand, suggested to the Court the possibility of a flaw in the system of work in place at the Port and/or a breakdown in its effective supervision. This provides support of the Plaintiff's allegation that the loading process was not conducted in a safe manner and it is to this pleading that the Court now turns.

[85] Issue 3: The Court is now required to decide whether either the First Defendant as the permanent employer of the Plaintiff or the Third Defendant as his temporary employer, or both, owed a common law duty to the Plaintiff to maintain a safe working environment and whether, on a balance of probabilities, the Plaintiff had been injured as a result of the failure of one or both of the employers to fulfill this duty.

[86] In determining this issue, the Court is required to consider (i) the nature and extent of the common law duty of care owed by an employer to his employees; and (ii) on whom the duty rests in a situation where there is a general and a temporary employer and a written agreement governing their relationship.

[87] Nature and Extent of the Duty: The Court has carefully examined the submissions of all the parties on this point together with the several authorities helpfully submitted by Counsel and is satisfied that the law in this area is well-settled. Indeed, while none of the parties disagree as to the relevant legal principles, their dispute surrounds their applicability to the facts in this particular case.

[88] As indicated by *Charlesworth & Percy on Negligence (Eleventh Edition, 2006) at para 10-01 on p 777*, it is firmly established that where an employee is injured during the course of his employment, an employer may be liable at common law either (i) vicariously as a result of the negligence of

another employee; or (ii) personally in default of some non-delegable duty of care.

- [89] The non-delegable duty of care referred to in the paragraph above has been aptly described by Lord Wright in *Wilson & Clyde Coal Co. Ltd v English* [1938] AC 57 at p 84 as “a duty which rests on the employer and which is personal to the employer to take reasonable care for the safety of his workmen.”
- [90] Lord Wright described the obligation of the employer as being threefold, encompassing the “provision of a competent staff of men, adequate material and a proper system and effective supervision”: *Ibid* at p 78.
- [91] The provision of a proper or safe system of working, which is one aspect of the duty that the Plaintiff has alleged has been breached, requires the employer to take reasonable steps to provide a system of work that is reasonably safe, having regard to the dangers inherent in the operation in question: *General Cleaning Contractors Ltd v Christmas* [1953] AC 180 at 195, per Lord Tucker.
- [92] The term “system of work” includes the organization of the operation, the sequence in which it is performed and the precautions taken for the safety of the workers engaged in it: *Speed v Thomas Swift and Co. Ltd* [1943] KB 557 at pp 563-4, per Lord Greene, MR.
- [93] The employer’s duty to take reasonable care for the safety of his employees does not only extend to providing a safe system of work but also includes ensuring the compliance of his employees with any system that is ultimately adopted: *Charlesworth & Percy on Negligence (Eleventh Edition, 2006)* at para 11-76 on p 845.

- [94] Counsel for the First and Second Defendants have stressed in their written submissions, quite correctly, that the duty imposed upon the employer is not absolute and is discharged by the exercise of what may be considered reasonable care in all the circumstances of the case: *Wilson & Clyde Coal Co. Ltd v English* [1983] AC 57 at p 640, per Lord Wright.
- [95] Counsel has also rightly pointed out that the duty of the employer is owed to each employee personally and the scope of the duty therefore varied depending upon the knowledge and experience of the employee in question: *Qualcast (Wolverhampton) Ltd v Haynes* [1950] 2 All ER 38 at p 42, per Keith LJ.
- [96] The Court is aware, however, that while the scope of the duty to each employee may vary, the duty to take reasonable care for their safety remains, regardless of the employee's knowledge and experience: *General Cleaning Contractors LD v Christmas* [1953] AC 180.
- [97] The Court is also aware that the employer is under the same duty of care whether operating on land or at sea: *Saul v St. Andrews Steam Fishing Co* (1965) 109 SJ 392. It has no doubt that the duty remains the same (as in this case) where the employer is operating partly on land and partly on sea.
- [98] Finally, the Court considers it important to emphasize that the greater the danger in the employment, the higher the degree of care expected from the employer: *Charlesworth & Percy on Negligence (Eleventh Edition, 2006) p 826-7 para 10-101*. Having so noted, it is also obliged to point out that the duty of the employer does not require it to ensure that a place or system of employment is completely free of risk; its responsibility is simply to take reasonable care for the safety of its employees and what is reasonable will, of course, depend upon the circumstances in question: *Ibid*.

[99] *By whom is the duty owed*: Having examined the nature and extent of the employer's common law duty, the Court must now consider which employer, on the facts of this case, owed the duty to the Plaintiff and the nature of that duty, given that these two employers assumed under the Stevedoring Agreement between them, specified roles and responsibilities in so far as it concerned the loading and unloading of a vessel at the Bridgetown Port.

[100] The Court has received no legal authority from Counsel on the specific question as to how the responsibility for maintaining a safe system of work, and liability for the failure to do so, is to be apportioned as between a temporary employer and a permanent employer.

[101] However, Counsel for the First and Second Defendants, citing *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd [1947] AC*, *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Limited [2006] 2 WLR 428* and *Société Maritime Française v Shanghai Dock and Engineering Co [1921] 37 TLR* made submissions about the apportionment of liability between the Second Defendant and Third Defendant in so far as it concerned vicarious liability.

[102] While the cases cited by Counsel are useful in determining the existence of an employment relationship with the Plaintiff, their usefulness is somewhat limited in the determination of this particular point. It is clear that different considerations apply where the Plaintiff has alleged a breach of the common law or statutory duty of care as it does not necessarily follow that a person who is regarded as an employer for the purpose of vicarious liability will necessarily be considered as such in so far as it relates to the breach of the

common law duty to maintain a safe system of work *Charlesworth and Percy on Negligence (Twelfth Edition, 2012) para 11-110*.

[103] According to *Charlesworth and Percy on Negligence (Ibid)* where an injury is caused to an employee by an unsafe system of work while that employee is placed with a temporary employer by his permanent or general employer, the employer who “*prescribed and operated the system*” is the employer that will be liable.

[104] Although not specifically directed to these cases by counsel, the Court has had regard to the cases cited in *Charlesworth and Percy (ibid)* on this particular subject and has found them to be instructive in its determination of the issue. From these cases, it is clear that the question whether the permanent employer or the temporary is liable for breach of the common law duty will rest upon the particular circumstances of the case: See for e.g. *McGarvey v Eve NCI Ltd [2002] EWCA Civ 374*.

[105] In the case currently before the Court, the responsibilities of the two employers had been governed by the Stevedoring Agreement made between them. Under this Agreement, the First Defendant agreed to provide the Third Defendant with such dockers as shall from time to time be required by the Third Defendant. As indicated by its interpretation clause, the Stevedoring Agreement used the term “docker” to refer to all workers directly employed by the Port.

[106] The Agreement provided in Clause 2.3 that:

“The Authority shall supply dockers competent to perform the work required and specified by the Stevedore Contractors and shall ensure that no docker shall be assigned to work with the

Stevedore Contractors unless he has been adequately instructed and trained to that work.”

[107] By Clause 2.4, the Authority further agreed to ensure that dockers execute their work to a satisfactory standard and be of good conduct and behavior and that they “*respond undertake and perform to all reasonable and proper orders given by the Stevedore Contractors*”.

[108] The Clause also stipulates that so long as the dockers are employed in the business operations of the Third Defendant on board any vessel in the Harbour and on the quay prior to the unhooking of the cargo being off-loaded from any such vessel, the Third Defendant “*shall be solely responsible for the supervision and control of the work of the dockers.*”

[109] The Agreement also contains an indemnity provision in Clause 6, which protects the First Defendant and provides that the First Defendant would not be liable for any damage or compensation payable to any servant or agent of the Third Defendant in respect of any injury, loss or damage sustained by such servant or agent (including the dockers engaged in performing stevedoring services) as a result of the operations of the Third Defendant.

[110] The Court is satisfied that the First and Third Defendants both owed the Plaintiff a duty of care to maintain a safe system of work. Furthermore, by agreement between them, the First Defendant undertook responsibility for training while the Third Defendant assumed responsibility for supervision.

[111] The Court is satisfied that to effectively undertake the responsibilities which they each assumed under the Stevedoring Agreement, the two employers would of necessity have to collaborate in determining the appropriate standards and procedures for the loading of a vessel. Furthermore, it is

obvious that supervision of any system cannot take place without knowledge of the system and training would necessarily have to be conducted according to the established procedures.

[112] *Breach of the duty*: It is apparent from a close examination of the authorities presented by counsel for the parties in this matter that an employer is only absolved of all liability under the common law for breach of his duty where it is clear that there was nothing that the employer could have reasonably done to protect against the risk in question: *General Cleaning Contractors Ltd v Christmas [1953] AC 180 at 195, per Lord Tucker*.

[113] The Plaintiff has alleged that in this case the common law duty of care of the employer was breached firstly, by the failure to sufficiently train and carefully instruct the Second Defendant as to the dangers arising from the use of the machinery and from the failure to follow instructions; and secondly, by failing to ensure that the lifting operation was properly planned and competently supervised and carried out in a safe manner.

[114] With respect to the training of the Second Defendant, the Court is satisfied that the Second Defendant was sufficiently trained in the operation of the LHM crane and the dangers arising from its use. The Court accepts the unchallenged evidence of the Second Defendant that he was intensively trained in all aspects of operating a crane before he was permitted to independently operate the crane. Accordingly, the Court holds that the Plaintiff has not established any breach of the common law duty by either of the employers in so far as it regards the training of the Second Defendant.

[115] The Court's conclusion, however, is not the same with respect to the second ground of this plea. Despite the Defendants' submission to the contrary, the Court is unable to conclude that the employers of the Plaintiff in this case,

both temporary and permanent, had done all that they could have reasonably done to protect their employees from danger while these employees were engaged in the process of loading freight containers onto a ship. In particular, I am not convinced that either employer has established, implemented and maintained a safe system of work under which the loading could be conducted.

[116] All of the witnesses appearing before the Court who were at the time of trial employed by or had previously been employed at the Port, whether they came as witnesses for the Plaintiff or as witnesses of the Defendant, pointed out or agreed without hesitation that the Port was a very dangerous place in which to work. The risks involved in the work carried out at the Port, particularly in the loading and offloading of a vessel, were apparent and reasonably foreseeable to all parties involved.

[117] The Court is satisfied that the First Defendant, in particular, has demonstrated awareness of these dangers. According to the evidence of Donald Grant, the First Defendant did, with the sanction of the trade union, establish a Safety and Health Committee to address issues concerning the safety of its employees. In fact, it was the evidence of Mr. Grant, who was one of the members of this Committee, that the Committee had at one point in time worked on compiling a safety manual but this manual had never actually been produced. Instead, measures pertaining to safety were left to be transmitted on a somewhat *ad hoc* basis from employee to employee.

[118] It is also clear that the training of dockers was also conducted quite informally. Despite the Port having a post for a Manager of Training and Special Projects, Mr. Walters, the CEO of the First Defendant, explained that training was primarily obtained by hands-on experience obtained under

the supervision of more experienced dockers. All of the dockers or former dockers have testified that they received no formal training before and little after they commenced working but were instead to be trained by being paired with a more experienced worker.

[119] While the importance of the practical on-the-job training cannot be overestimated, it appears to the Court that the First Defendant assumed that the dockers (or stevedores as they were then known) who had remained at the Port after the rationalization or re-organization of the Port knew what they were doing and followed and transmitted the appropriate procedure. There was no evidence that any effort was undertaken by the First Defendant to determine whether this was actually so or whether there was any need to adapt or modify the practices that had been followed and which were in use.

[120] In this respect, the evidence of Mr. Grant, the Port's certified trainer, is particularly damning. Mr. Grant, who was certified as a trainer after 2005, asserted that there were a number of bad practices existing among dockers at the Port. He pointed out that these bad practices were sometimes inherited from the more experienced dockers with which a person might work. One of the dangerous practices, which he maintained was carried out regularly, was the practice of rushing in to fix shoes before a container has been properly raised or removed from that stacking area. Indeed, it was the evidence of Mr. Gamble that this is precisely what he had done on March 4, 2005 in connection with the shoe at southwestern end and exactly what the Plaintiff had been doing with the shoe which had been dislodged at the north-western end.

[121] Mr. Walters also agreed that where a shoe had been knocked out, the safest procedure was for the container to be lifted away from the stacking area

before the dockers proceeded to replace the shoe but admitted that he was aware that this practice was not always followed. No evidence was given or elicited of any attempts to ensure compliance with what were known to be appropriate safety procedures.

[122] Although Mr. Walters admitted that certain basic regulations could be formulated in connection with the loading process and agreed that formulating such regulations would be useful in ensuring the safety of workers, he opined that doing so was the responsibility of the Third Defendant and not the First Defendant. Neither the First nor the Third Defendants compiled any such guidelines, despite the high-risk nature of the work being carried out by their employees.

[123] It is also apparent from the evidence that supervision of the loading process was sporadic and ineffectual. The unsafe practices described by the witnesses were conducted despite the presence of a foreman and the Stevedoring Contractor aboard each vessel. The Court finds it peculiar that no evidence has emerged as to the location of the foreman in this particular loading exercise and although the Stevedoring Contractor, Leon Gibbs was placed at the scene, Mr. Gamble's evidence suggested that he obviously condoned the practice and only warned him of the emerging container and did not stop him from rushing in to fix the shoe on the south-western end of the stacking area.

[124] Despite widespread knowledge of the risks attendant with work at the Port, the evidence clearly revealed that a number of unsafe practices were not only practiced by those persons engaged in loading the vessel, but that these practices were done in full view of and with the knowledge of their employers, both the First and the Third Defendant. I am unable to find that

those unsafe practices, such as that found to have been undertaken by the Plaintiff in this case, were atypical.

[125] Not only were no written or oral guidelines of any established procedure provided, but supervision of the employees and of any informal rules that may have existed appeared to be entirely inadequate during the loading process. To require the employer to adequately supervise its employees is not too strict an interpretation of the duty which an employer owes to its employees, particularly given the inherent risks involved in work being done.

[126] Having regard to the totality of the evidence adduced in this case and the duty of the employer to his employees under common law, I find that the Plaintiff has proved on a balance of probabilities that both the First Defendant and the Third Defendant were in breach of their respective common law obligations to provide a safe system of work for the Plaintiff and his fellow employees.

[127] I find too that it was the failure of the employers to establish and maintain a safe system of work that led to the accident on March 4, 2005 and thus the injuries of the Plaintiff.

[128] The Court noted earlier in its judgment that the Stevedoring Agreement between the First and Third Defendants contains an indemnity clause. The apportionment of damages as between the First and Third Defendants may therefore be dealt with on that basis of their contractual arrangement.

[129] *Issue 4*: Having already found negligence on the part of the First and Third Defendants, I now have to consider whether the Plaintiff in any way contributed to the injuries he obtained as a result of the accident aboard the

Nedlloyd Trinidad on March 4, 2005 and, if he did so contribute, the extent of his contribution and its affect on any award of damages that the Court may choose to make.

[130] The basis for the apportionment of liability in a claim in tort arises not from the common law but from legislation passed by the Parliament of Barbados. **Section 3** of the ***Contributory Negligence Act, Cap 195 of the Laws of Barbados*** provides for the apportionment of liability and damages in a case where a person suffers injury partly as a result of his own fault and partly because of the fault of one or more other parties.

[131] It is clear that every adult is legally required to take reasonable care for his or her own safety and cannot expect any other person to do so for them. This duty is not extinguished during the course of an employment relationship simply because a person becomes the employee of another.

[132] A plaintiff may be guilty of contributory negligence whenever he ought reasonably to have foreseen that, if he did not act prudently, he might sustain injury, and in determining how to act he must take into account the possibility of other persons being careless: ***Jones v. Livox Quarries Ltd [1952] 2 Q.B. 608 at 615, per Lord Denning, L.J.*** A person's duty to take reasonable care for his safety is therefore increased where he is aware of the risks involved in pursuing a course of action: ***Charlesworth & Percy on Negligence (Eleventh Edition, 2006) at para 4-12 on p 231.***

[133] It is important to note, however, that the mere taking of a risk by a plaintiff does not amount to contributory negligence unless the taking of the risk was not reasonable in the circumstances of the case: ***Ibid at para 4-06 on p 229.***

[134] As Counsel for the First and Second Defendant stressed in his oral submissions, the Plaintiff was not an inexperienced worker. He had been working at the Port for a very long time and, like all the other employees or former employees of the First Defendant who gave evidence in this matter, he had to have been cognizant of the fact that the Port was, in general, a dangerous place in which to work, while loading freight containers onto a ship was even more dangerous.

[135] The Court is satisfied that the Plaintiff was aware of the risks generally inherent to his job and to his specific task of loading empty freight containers onto the *MV P & O Nedlloyd Trinidad*.

[136] The Plaintiff admitted to being aware that it was dangerous to reposition a shoe in a stacking area when the container remained hanging over it. He revealed in cross-examination that the normal safety procedure was for a docker to wait until the container was lifted and taken away from the stacking area before moving in to reposition the shoe. The Court finds that despite this knowledge the Plaintiff still proceeded to move beneath a hovering container to replace a shoe that had been knocked out from the northwestern side of the stacking area.

[137] While the Court has found that the First and Third Defendants had failed to provide a safe system of work, it also finds that the Plaintiff failed to have due regard to his own safety and his carelessness is in part responsible for the accident that occurred on March 4, 2005 and his ensuing injuries.

[138] However, the Court is also conscious of the fact that the carelessness that appears to have been exhibited by the Plaintiff was not in any way limited to him alone, but the evidence showed that it was widespread across all the employees involved. Such behavior by the employees was aimed at

completing the assigned tasks as swiftly as possible and there was no effective system in place by any of the employers to curtail it. It is clear also that the danger of the practice in which the Plaintiff engaged had been obscured by its constant repetition by the dockers without any substantial consequence.

[139] Accordingly, in these circumstances, the Court holds it just and equitable that liability in this claim should be apportioned 10 percent for the Plaintiff and 90 percent jointly and severally for the First and Third Defendants.

[140] Damages: The Court has not received sufficiently substantive submissions on damages from Counsel for the Defendants. It is therefore unable to make, at this stage, any finding as to the quantum of damages to which the Plaintiff is entitled and instead invites further submissions and argument in relation to damages.

[141] Disposal: For the reasons which the Court has outlined above, the Court holds:

- (i) That there be judgment for the Plaintiff, Tyrone Phillips in negligence for 90 percent of his claim for damages against the First Defendant, the Barbados Port Inc, and the Third Defendant, Cargo Handlers Ltd, due to their failure as his employers to provide a safe system of work;
- (ii) Damages are to be agreed between the parties or failing agreement to be assessed by the Court on a date to be fixed;
- (iii) That the Plaintiff is awarded 90 percent of his costs of this action as well as any costs reasonably incurred on the hearing of the assessment of damages, certified fit for 2 attorneys-at-law.

**Maureen Crane-Scott
Judge of the High Court**