JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 2/87

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

BETWEEN	THE ADMINISTRATOR GENERAL (Administrator Estate MOSES MARAGH, Deceased)	PLAINTIFF/APPELLANT
AND	ALCOA MINERALS INC. JA.	1ST DEFENDANT/RESPONDENT
AND	P.A.H.K. ENGINEERING LTD	2ND DEFENDANT/RESPONDENT

Carl Rattray, Q.C., and Norman Samuels for the Appellant

W.K. Chin See Q.C., and Dennis Morrison for 1st Respondent

Earl DeLisser for 2nd Respondent

June 23 and 24, 1988 and February 27, 1989

KERR, J.A.:

I have had the opportunity of reading the judgment in draft of Wright, J.A. and agree with his reasoning and conclusion. There is nothing that I can usefully add.

Order: The appeal is dismissed with costs to the respondents to be taxed if not agreed.

WRIGHT, J.A.:

This is an appeal from the judgment of W.D. Marsh J. delivered on December 5, 1986 whereby he dismissed with costs to the Respondents the Plaintiff/Appellant's claim for damages under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act in respect of the death of Moses Maragh while engaged in work at the Halse Hall premises of the 1st Respondent (Alcoa) on the 18th day of August, 1978. Unfortunately, apart from the Order 'Judgment for the Defendants with costs to be agreed or taxed' no judgment appears in the record. However, it is clear from the recorded discussions that the critical issue was whether the Plaintiff/Appellant had established the cause of Moses Maragh's death for which it was sought to hold the respondents liable. The pith of the Plaintiff/Appellant's Amended Statement of Claim wherein the bases of liability are set out is as follows:

> "4. The First Defendants carry on their mining activities as aforesaid in premises which they occupy at Halse Hall in the parish of Clarendon which premises are a Factory within the meaning of the Factories Act, Act of Jamaica and to which the Safety Health and Welfare Regulations (1961) made under the said Factory Act apply.
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> 5. In or around the year 1976 the No.1 Unit of the Digestion System operated by the First Defendants in their mining activities as aforesaid at their said premises was damaged in an explosion. Work in rebuilding this Unit was completed by the First Defendants in the early part of 1978, but prior to putting this Unit into operation, the First Defendants discovered certain defects in the said system which necessitated that certain adjustments be made to the spring suspensions which supported the discharge lines from the pressure relief valves in order that the pressure relief system could function properly. For that work to be done it was necessary that the pressure relief valves be disconnected, adjustments of the spring suspensions done and reconnection of the said pressure relief valves performed.
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> 6. The contract to do the work as aforesaid was awarded by the First Defendants to the Second Defendants who are Electrical and Mechanical Engineers.

"7. The deceased, Moses Maragh was at the material time a Grade 1 Millwright employed to the Second Defendants. He was selected with five (5) other employees of the Second Defendants to attend at the premises of the First Defendants as aforesaid to do the said work. He was an experienced worker who acted as foreman on occasions.

8. On or about the 18th day of August, 1978 the deceased, Moses Maragh while in the course of his employment and within the scope of his employment as aforesaid was doing the work as described in paragraph 5 herein. At the material time he was straddling a pipe in the course of his duties as aforesaid in building 30 of the said premises when he fell some fourteen feet to the floor of the said premises. He received injuries to which he succumbed.

9. The work being done by the Second Defendants at the material time was part of a general project being done by the First Defendants and involving workers directly employed to the First Defendants as well. This project was under the supervision of one Hani El Shoraway a Civil Engineer employed to the First Defendants. This supervision by the said Hani El Shoraway required that the workers of the Second Defendants and in particular the deceased received instructions as to what was required to be done by the First Defendants and the First Defendants reserved the right to instruct the deceased in the manner that they required the work to be done.

10. In the circumstances the deceased was in the position of a temporary servant of the First Defendants. Alternatively the deceased was a quasi employee of the First Defendants to whom they owed the same duty as regards appliances and system of work as if he had been an employee of the First Defendants.

11. The death of the said deceased in the circumstances was due to breach of the Occupiers' Liability Act by the First Defendants, their servants or agents. Further and in the alternative by breaches of the Factories Act and the Regulations made thereunder by the First Defendants, their servants or agents. Further and in the further alternative by the negligence of the First Defendants their servants or agents. Alternatively, to the Negligence of the Second Defendants, their servants or agents. Further and in the further alternative the death of the deceased was due to the combined negligence of the First and Second Defendants.

" PARTICULARS OF BREACHES OF THE OCCUPIERS' LIABILITY ACT - FIRST DEFENDANTS:

1. By virtue of the contract between the First and Second Defendants the deceased was required to work on the premises of the First Defendants in circumstances which the First Defendants knew or ought to have known imposed on them the obligation of providing safety equipment namely, safety belts, scaffolding or scaffold belts or a firm foot hold, failed in their said obligations and were in breach of their duty to the deceased under the said Act having failed in their duty of care to see that the place was reasonably safe for the purposes for which the deceased was required to be there.

PARTICULARS OF BREACHES OF STATUTORY DUTY - FACTORIES ACT -

1. Contrary to Section 22(1) they failed to provide suitable and sufficient safe means of access to the place where the deceased was required to work.

2. They failed to take any effective measures to prevent the falling to the floor or on to any object over which he was working when they knew or ought to have known that the deceased was required to work at a height of more than six feet six inches from the ground. Contrary to Section 22(2).

3. Contrary to Section 57 of the Regulations they failed to exercise supervision of the works, machinery and plant for the purpose of ensuring safety and in particular to see that all safeguards and other safety appliances were maintained in proper order and position."

Particulars of negligence are supplied with respect to each head of liability.

Alcoa denied liability under any head and pleaded that the Second Respondent (PAHK) had been employed by them to dismantle in specific stages a relief system which PAHK had installed in Building 30 at their plant at Halse Hall in which problems for undetermined reasons had arisen. The agreement was to carry out tests at each stage dismantled in an effort to determine where the defect, if any, existed. In this regard PAHK was to follow strictly Alcoa's instructions concerning the stages and sequence in which the system would be dismantled and in no event to proceed from one stage to another except upon the strict instructions of Alcoa's

Project Engineer, Mani El Sharaway.

It is appropriate to quote paragraphs 6-8 of Alcoa's Defence which read:-

"6. The first Defendant states that save as to the matters raised in Paragraph 4 hereof, the second Defendant, who were at all material times experienced and competent independent contractors, had responsibility for -

a) selection of competent workers to do the job.

b) provision of a safe system of work in respect of the dismantling of the relief system.

c) selection of competent employees to do the job.

d) provision of adequate supervision.

e) determination of safety equipment necessary for the job and provision of them.

f) instruction of the workers in safety procedures.

g) the manner in which the job was done.

7. The first Defendant denies that any of its workers were involved in the execution of the dismantling operations or that its Project Engineer, Mani El Sharaway, gave or had a duty to give instructions to the deceased as to what was required to be done or the manner in which it was to be done or reserved the right to give instructions to the deceased as to the manner in which the work was to be done as alleged in Paragraph 9 of the Statement of Claim.

The first Defendant states that its Project Engineer, Mani El Sharaway, was assigned by them to the project, in particular, for the purposes of determining and instructing the second Defendant as to the stages and sequence in which the dismantling was to be done and of carrying out the appropriate tests during the course thereof. Instructions as to the stage and sequence of the operation were given by Mr. El Sharaway to the Engineers of the second Defendant whose duty it was to give appropriate instructions to their employees, including the deceased.

> "8. In the premises, the first Defendant denies that the deceased was their temporary servant or their quasi-employee or that they owed the deceased any duty as regards appliances and system of work as alleged in Paragraph 10 of the Statement of Claim."

Further, it was admitted that the deceased was found dead on the floor in Building 30 but Alcoa denies any liability therefor. Finally, Paragraph 15 states:-

> "15. The first Defendant states that, if, which is not admitted, the deceased fell while straddling a pipe in Building 30, the fall and his resulting death were due to his negligence and/or the negligence of the second Defendant."

The Defence of PAHK admits that the deceased was their employee as a Millwright Fitter and agrees that the work being done by them was under the supervision of Mani El Sharaway but denies liability under any head for the death of the deceased. Finally, they pleaded in paragraph 11:-

> "If, which is not admitted, the deceased was injured while he was working, the Second Defendants say that matters complained of were caused wholly or in part by the negligence of the deceased, MOSES MARAGH.
>
> PARTICULARS
>
> (a) Failing to perform his work in a workmanlike manner.
>
> (b) Failing to take proper pre-cautions as to his own safety.
>
> (c) Performing work beyond the scope of instructions given to him."

Strangely, enough, despite PAHK's admission that the deceased was their employee at the material time and Alcoa's denial that he was their employee, the Plaintiff/Appellant's reply to Alcoa's Defence insisted that the deceased was Alcoa's employee thus apparently placing the deceased in the joint employment of Alcoa and PAHK. Accordingly, it was crucial to the Plaintiff/Appellant's case against Alcoa to prove that the deceased at the material time was Alcoa's employee and that Alcoa was liable for his death under one or more of the heads of liability pleaded. PAHK having admitted that the deceased was their employee, it

only remained for the Plaintiff/Appellant to prove liability as pleaded.

The case for the Plaintiff/Appellant did not begin too auspiciously in that the first witness, a civil servant, called to produce a document prepared in the office of the Plaintiff/Appellant left the witness box without doing so when objection was taken to her competence, it being admitted that the document was not a public document nor was she the maker thereof. The only witness who spoke concerning the day Moses Maragh died was Delroy Charvis, an ex-employee of Alcoa who had subsequent to the incident, been made redundant and thereafter left Jamaica. He had seen Maragh at work on the third floor of Building 30. He last saw him at about 12.30 p.m. using a wrench to adjust the hangers (the supports) on a pipe. Work was being supervised by Mr. El Sharaway This witness underscored Alcoa's attitude to safety. The extract of his evidence in cross-examination in this regard reads:-

> "Alcoa has certain safety precautions. There is a booklet. Each employee has access to the booklet. Alcoa also has to employ certain outside people (like PAHK) to do certain jobs. Before working they get a briefing re safety. One of the instructions is that if you are working from a height you must use belts or scaffolding. They preach that to the employees. When I work on jobs with outsiders (like PAHK) Alcoa also preaches this to their workers."

But despite this preaching, he said when he had last seen the deceased Maragh adjusting the hangers on the pipe, Maragh was sitting on the pipe without belt or scaffolding - wearing

1. Safety hat
2. Safety glasses
3. Safety boots
4. Gloves

In contrast with Maragh, other members of the PAHK crew were wearing safety belts as well. Maragh he said had come on the job just the day before although work had been in progress for six weeks. What is more the witness said he would not sit on that pipe without a safety belt and that Maragh, who he said was an experienced worker, was the first person he had ever seen sitting on such a pipe without a safety belt. The conduct of Maragh is relevant to the consideration of at least, contributory negligence.

When the witness passed where he had left Maragh working at 1.45 p.m. he did not see him. But he saw the hanger for the pipe on which he was sitting loose and on the floor where Maragh was working he saw blood. He explained further that with respect to the job on which they were engaged they would use safety belts with scaffolding where there was no platform but that there was a platform where Maragh worked. Except as occasioned by the adjustment of the hangers there would be no vibration in the pipes on which they worked, because the digester which would produce such vibration was not operating while the job was being done.

On the third day of the hearing counsel for the Plaintiff/Appellant sought an amendment which would add a cause of action, viz. 'under the Mining Act and the Safety and Health Regulations made thereunder'. Coming more than eight years after the incident giving rise to the suit the application to amend quite predictably was met with very strong objection to which it succumbed.

The final witness called on behalf of the Plaintiff/Appellant was one Stanford Moore, an inspector of Mines who testified that he visited the factory on the day following the incident and was shown certain areas. It is apparent, however, that the real purpose of calling him was to have him testify that an enquiry was held pursuant to the provisions of the Mines Act and a report filed. Effort was then made to have this report admitted into evidence. The learned trial judge ruled the evidence inadmissible. Ground 3 of the Ground of Appeal challenges this ruling. The Ground reads:-

> "The finding of the Commissioner of Mines as to the cause of death of the deceased, Moses Maragh, was a Public Document and was relevant to the trial and there was no basis in law for the Learned Trial Judge to have refused to admit it in evidence."

Two considerations are fundamental to Mr. Rattray's submissions before us:-

1. Was there any evidence of negligence or Breach of Statutory duty on the part of the Defendants which was the

cause of the death of the deceased?

2. If there was no such evidence on record was the learned trial judge's ruling excluding the report of the Commissioner of Mines wrong in law thus preventing the introduction of further evidence?

Mr. Rattray's argument is pregnant with a fallacy viz., if the excluded report could prove what was essential to the case then it was wrong not to admit it. But by comparison hearsay evidence which does not enjoy any of the recognised exceptions suffers similarly in that it has the potential to supply much needed information but is excluded by its inherent deficiency. And, indeed, contents of the report may well be founded upon hearsay evidence. Without a doubt the burden of Mr. Rattray's submission is to secure the admission into evidence of this report by which it is hoped to prove what the appellant was unable or failed to prove by viva voce evidence. He based his claim on the contention that the incident under query arose out of a mining operation and that in keeping with Section 65 of the Mining Act an enquiry was held.

Insofar as it is relevant that Section states:-

> 65(1) Whenever an accident occurs in connection with prospecting or mining operations causing or resulting in loss of life or serious injury to any person, the person in charge of the operations shall report in writing with the least possible delay the facts of the matter so far as they are known to him to the Commissioner.
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> (2) In the event of such accident the Commissioner shall hold an enquiry into the cause thereof and shall record a finding
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> (3) .....
>
> (4) .....
>
> (5) .....
>
> (emphasis supplied)

It is worthy of note that this Section is included in that portion of the Mining Act (Sections 62-65) dealing with safety. Section 62 provides for the inspection of premises coming under the Act by the Commissioner or other specified officers who are enabled under Section 63 to issue notice to the responsible party to remedy any danger or defect detected upon inspection and failure to comply is punishable

under Section 64 as a criminal offence with a fine not excluding $2,000.00 and in default imprisonment with hard labour for a term not exceeding one year. Then comes the Section 65 requirement for the enquiry. Mr. Rattray submitted, further, that once the Commissioner acted in pursuance of this Section his report is a public document to which the public has access and that, without more, it is admissible into evidence.

On behalf of Alcoa, Mr. Chin See submitted that the report of the Commissioner was not admissible in evidence and had been properly excluded. In this regard he submitted that it has not been shown that the operation with which the deceased Maragh was concerned was a mining operation. Further, no breach of the Mining Act had been pleaded and accordingly the Mining Regulations which are to give effect to the Act are irrelevant.

The belated efforts to invoke the provisions of the Mining Act and the relevant regulations having failed it is plain that the provisions of that act cannot now be prayed in aid. Furthermore, is it a correct proposition that even if the Commissioner's report was a Public Document it would be available to solve the Plaintiff/Appellants dilemma?

In Sturla v. Freccia (1880) 5 A.C.623, 643 Lord Blackburn defined a public document from the point of view of the law of evidence as 'a document made by a public officer for the purpose of the public making use of it and being able to refer to it'. Has it been shown that this was the purpose of this report? Certainly not. What is beyond doubt is that the appellant intended by tendering this report to obviate the necessity to produce any witness on disputed issues and by so doing would have presented the respondents with a fait accompli. But without evidence from such witnesses the Plaintiff/Appellant's claim stood no chance of success. The manoeuvre to escape the necessity to call such witnesses was obviously not on firm ground. The express intent of Section 65 of the Mining Act is to provide for the circumstances described therein which certainly do not include the situation which arises in this case. Accordingly, it is my opinion that the report was properly excluded.

In this conclusion I am supported by authority.

In Bird v. Keep (1918) 2 KB 692 reliance was sought to be placed on the Coroner's Inquisition and a certified copy of the entry in the register of deaths to establish the cause of death. Both were rejected by the County Court Judge and his decision was upheld by the Court of Appeal per Bankes LJ who said at page 703:-

> "So far as my own experience is concerned both in civil and Criminal Courts, the practice has certainly been to refuse to admit the Coroner's inquisition as evidence where the cause of death is the issue which has to be determined by the Court or jury. To hold otherwise would lead to extra-ordinary results."

Such an extra-ordinary result would, in this case, be the determination of the issue of liability, because this must be the purpose to be served by the report, without any opportunity on the part of the respondents to contest the issue. Again in White v. Taylor (1967) 3 All ER 349 the copy draft of a deed valuer under the Tithe Act 1836 was sought to be adduced as a public document but was rejected on the ground that the valuer had no first hand knowledge of the facts and had only recorded the information received on enquiry. I daresay the Commissioner's report in the instant case suffers from the same limitation.

But Grounds 1 and 2 of the Grounds of Appeal assume that a prima facie case was made out which ought to have been answered. These grounds read as follows:-

> 1. "The Learned Trial Judge erred in giving Judgment for the Defendants when they failed neglected and/or refused to rebut the prima facie case made out by the Plaintiff.
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> 2. The Learned Trial Judge ought to have found that in the absence of any rebuttal evidence from the Defendants the prima facie proof in favour of the Plaintiff had become conclusive proof and the Plaintiff had discharged the burden of proof to obtain Judgment in his favour."

The appellant's case therefore rests on the evidence adduced, which so far as breaches of statutory duty are concerned must, if the appellant is to succeed, establish one or both of the alleged breaches and in addition must prove that such breach(es) caused or materially contributed to the death of the deceased Maragh. There being no evidence of the cause of death any consideration of the issue of breach of statutory duty will not avail the appellant. And as regards the plea of negligence similar considerations apply.

In a situation such as the present case where the cause of death could be due to breach of statutory duty and/or negligence on the part of the respondents as well as negligence on the part of the deceased it is not enough for a plaintiff to endeavour to identify as against the defendant a likely cause of the death of the deceased. It is incumbent on such a plaintiff to establish, on a balance of probabilities, that the cause of death was due to the act or default of the defendant. The principle was clearly settled by the House of Lords in Bonnington Castings Ltd. v. Wardlaw (1956) 1 All ER 615, (1956) AC 613 and quite recently applied in Wilsher v. Essex Area Health Authority (1988) 1 All ER 871 in which the decision was unanimous. Lord Bridge of Harwich who delivered the principal speech in the Wilsher case, with which the other four Law Lords concurred, referred to the Bonnington Castings Case at page 877 thus:-

> "The starting point for any consideration of the relevant law of causation is the decision of this House in Bonnington Castings Ltd. v. Wardlaw (1956) 1 All ER 615, (1956) AC 613. This was the case of a pursuer who, in the course of his employment by the defenders, contracted pneumoconiosis over a period of years by the inhalation of invisible particles of silica dust from two sources. One of these (pneumatic hammers) was an 'innocent' source, in the sense that the pursuer could not complain that his exposure to it involved any breach of duty on the part of his employers. The other source (swing grinders), however, arose from a breach of statutory duty by the employer. Delivering the leading speech in the House Lord Reid said (1956) 1 All ER 615 at 617-618; (1956) AC 613 at 619-620):

"'The Lord Ordinary and the majority of the First Division have dealt with this case on the footing that there was an onus on the defenders, the appellants, to prove that the dust from the swing grinders did not cause the respondent's disease. This view was based on a passage in the judgment of the Court of Appeal in Vyner v. Waldenberg Bros., Ltd. (1945) 2 All ER 547 at 549, (1946) KB 50 at 55) per Scott, L.J.: 'If there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of proof shifts on to the employer to show that the breach was not the cause. We think that that principle lies at the very basis of statutory rules of absolute duty.'"

Lord Bridge then continued:-

"Of course the onus was on the defendants to prove delegation (if that was an answer) and to prove contributory negligence, and it may be that that is what the Court of Appeal has in mind. But the passage which I have cited appears to go beyond that and, in so far as it does so, I am of opinion that it is erroneous. It would seem obvious in principle that a pursuer or plaintiff must prove not only negligence or breach of duty but also that such fault caused, or materially contributed to, his injury, and there is ample authority for that proposition both in Scotland and in England. I can find neither reason nor authority for the rule being different where there is breach of a statutory duty. The fact that Parliament imposes a duty for the protection of employees has been held to entitle an employee to sue if he is injured as a result of a breach of that duty, but it would be going a great deal further to hold that it can be inferred from the enactment of a duty that Parliament intended that any employee suffering injury can sue his employer merely because there was a breach of duty and it is shown to be possible that his injury may have been caused by it. In my judgment, the employee must, in all cases, prove his case by the ordinary standard of proof in civil actions; he must make it appear at least that, on a balance of probabilities, the breach of duty caused, or materially contributed to, his injury."

The facts in the Wilsher case as set out in the Headnote were as follows:-

"The infant plaintiff was born prematurely suffering from various illnesses including oxygen deficiency. While in a special baby unit at the hospital where he was born a catheter was twice inserted into a vein of

"the plaintiff rather than an artery and on both occasions the plaintiff was given excess oxygen. The plaintiff was later discovered to be suffering from an incurable condition of the retina resulting in near blindness. The plaintiff's retinal condition could have been caused by excess oxygen but it also occurred in premature babies who were not given oxygen but who suffered from five other conditions common in premature babies and all of which had afflicted the plaintiff. The plaintiff brought an action against the health authority claiming damages for negligence and alleging that the excess oxygen in his bloodstream had caused his retinal condition. At the trial the medical evidence was inconclusive whether the excess oxygen had caused or materially contributed to the plaintiff's retinal condition. The trial judge held that, since the hospital had failed to take proper precautions to prevent excess oxygen being administered to the plaintiff and since the plaintiff had suffered the injury against which the precautions were designed to be a protection, the burden lay on the health authority to show that there was no breach of duty as well as showing that the damage did not result from the breach. The judge held that the health authority had failed to discharge that burden and awarded the plaintiff £116,119 damages. On appeal, the Court of Appeal affirmed the judge's decision on the ground that the hospital's breach of duty and the plaintiff's injury were such that the hospital was to be taken as having caused the injury notwithstanding that the existence and extent of the contribution made by the hospital's breach of duty could not be ascertained. The health authority appealed to the House of Lords, contending that the plaintiff had failed to establish that the hospital's negligence had caused the plaintiff's retinal condition, since that negligence was only one of six possible causes of his condition. It was held that where a plaintiff's injury was attributable to a number of possible causes, one of which was the defendant's negligence, the combination of the defendant's breach of duty and the plaintiff's injury did not give rise to a presumption that the defendant had caused the injury. Instead the burden remained on the plaintiff to prove the causative link between the defendant's negligence and his injury, although that link could legitimately be inferred from the evidence. Since the plaintiff's retinal condition could have been caused by any one of a number of different agents and it had not been proved that it was caused by the failure to prevent excess oxygen being given to him the plaintiff had not discharged the burden of proof as to causation. The authority's appeal would therefore be allowed and a re-trial ordered."

Viewing the appellant's case in the light of the principle enunciated and applied reveals how far this appellant is from proving a case against Alcoa based either on breach of statutory duty or negligence.

The factual situation, therefore, was that the case was bereft of any evidence, whether by proof or by admission, showing how Moses Maragh came to his death. No witness saw him fall nor did anyone hear any cry from him for help. If, indeed he did die from a fall which is essential to the Plaintiff/Appellant's case, what was he doing at the time? Was he negligent, in any way? The only witness, Delroy Charvis, who testified about Maragh's equipment did not see him with a safety belt. When he was found on the floor was he wearing one? Did he use the platform which Charvis said was provided and, assuming that death was due to a fall, would he have fallen had he used the platform? These are but some of the questions which the Plaintiff/Appellant cannot avoid if he is to succeed. All these questions are set against the background that Maragh was an experienced worker who had worked fitting pipes in 1975 and as such would know the tension of the pipes and, what is even more, he was the foreman of the PAHK crew who were all properly equipped for the job.

PAHK admitted in paragraph 6 of their Defence that the deceased Moses Maragh was in their employment as a Millwright Fitter on the 18th day of August, 1978. As such they were required to provide him with a safe system of work failing which they would be liable in negligence if such failure resulted in injury to him. Wilson v. Tyneside Window Cleaning Co. Ltd. (1958) 2 QB 110: (1958) 2 W.L.R. 900 (1958) 2 All ER 665. The duty is to take reasonable care for the employee's safety. Further, they would be liable in damages for any breach of statutory duty resulting in injury to the employee. But it is not enough for a plaintiff to allege negligence and/or breach of statutory duty. He must, where he is not relieved by admissions on the part of the defendant, prove the negligence and/or the breach of statutory duty resulting in injury to him.

In paragraph 7 of PAHK's Defence there is an admission that 'the deceased Moses Maragh sustained injuries on the premises of the First Defendant' on the date in question. But it was not admitted that such injuries were sustained while he was working and it is alleged that if the injuries were sustained while the deceased was working then his negligence was wholly or in part to blame. It is clear that PAHK did not relieve the appellant in anyway of the onus to prove his case. If anything PAHK increased the appellant's burden by raising the issue of contributory negligence.

It is obvious that at the end of the day the allegations in the Amended Statement of Claim remained no more than mere allegations. The necessary evidence did not materialize.

Mr. Rattray had queried the correctness of the judgment in favour of the respondents inherent in which he contended that there was a finding of fact that the respondents had discharged their obligations to the deceased. But that contention ignores the fact that where issue is joined the plaintiff must adduce evidence to establish his allegations otherwise there will be nothing for the defendant to answer. Accordingly, where the plaintiff fails in this regard a judgment for the defendant is not a finding of fact that the defendant did anything. Rather it is a judgment that the plaintiff has failed to do what he ought to have done.

During the course of argument several other cases were cited but in the absence of the evidence to which the relevant principles could be applied, I do not consider it necessary to refer to them, counsel's industry notwithstanding.

In conclusion therefore, I would dismiss the appeal with costs to the respondents.

DOWNER, J.A.:

I agree.