JAMAICA.

IN THE COURT OF APPEAL
CIVIL APPEAL NO. 7 of 1962

July 11, 12, 15, 16, 17 & September 23, 1963

MELBOURNE BAILEY - PLAINTIFF/APPELLANT

V.

GORE BROS. LTD. - DEFENDANTS/RESPONDENTS.

Mr. E.C.L. Parkinson, Q.C. and with him
Mr. D.V. Daley for Plaintiff/Appellant
Mr. V.O. Blake Q.C. and with him
Mr. R.H. Williams for Defendants/Respondents

MR. JUSTICE LEWIS:

The appellant was employed by the respondents in the operation of a stone-crushing machine. The machine was run by a diesel engine which had to be cranked and carried a gear lever by means of which the rollers were started. The appellant's work was to feed stones into the machine by shovelling them into a trough. The stones then vibrated through a funnel down to cast iron rollers which crushed them. The crushed stones fell under the machine and another workman transferred them into a sieving machine.

The machine was defective in that while it was working a belt frequently slipped, causing the rollers to become choked and to stop. It was then the practice for the operator to climb up on to the machine and clear the stones from the rollers and to get someone on the ground to start the rollers again before he came down in order to make sure that they were working freely.

On the 15th of June, 1959, the appellant having cleared a choke in this way was climbing down to the ground while the rollers were working when he slipped and fell. His right hand was caught between the rollers which were not protected by a guard and was severely injured. He lost one finger entirely and parts of three others had to be amputated. He sued the respondents alleging negligence in that they had failed to provide a safe system of work and effective supervision of their stone-crushing operation. The respondents by their defence denied negligence and pleaded that the accident was caused solely by the appellant's own negligence, or alternatively, that he was guilty of contributory negligence. The

contributory negligence alleged was that

(a) in breach of instructions issued for his own safety he had the machine turned on before he had safely returned to the ground and

(b) that in breach of instructions he had climbed down hurriedly from the machine without taking due precautions for his own safety and fell, thereby causing his hand to come into contact with the rollers.

The jury found that the accident was due to the negligence of both parties and apportioned the blame at 90% to the respondents and 10% to the appellant. They assessed special damages at £94. 14. 7. and general damages at £950. The judge accordingly entered judgment for the appellant for £940. 5. 1.

Against this judgment the appellant now appeals on the grounds that the finding of contributory negligence was wrong and that the awards, both of general and special damages, are inordinately low.

The functions of an appeal court in reviewing the verdict of a jury in a civil case and the circumstances in which it will interfere with such a verdict are fully discussed in the judgments of the learned Law Lords and, in particular, in the judgment of Lord Wright in Mechanical and General Inventions and Lewhess v. Austin and the Austin Motor Co. (1935) A.C. 346. The principles are thus summarised in the last paragraph of the headnote to that case:

> "When it is decided that a case is to be tried by a jury, that tribunal is the only judge of the facts, and no appellate tribunal can substitute its finding for that of the jury. The appellate court has a revising function to see, first, whether there is any evidence in support of the issue found by the jury, and, secondly whether the verdict can stand as being one which reasonable men might have come to."

Lord Wright refers to the phrase "miscarriage of juries" used by Glyn, C.J. in reference to this subject in Wood v. Gunston (1655) Style, 466 as "significant", and after citing Lord Halsbury's "most illuminating statement" in Metropolitan Railway Co. v. Wright, 11App. Cas 152 at p. 156, he sums up his remarks as follows, at p.375:

> Lord Halsbury in these valuable observations is, I think, going back to the test applied in Wood v. Gunston, which was whether there was a miscarriage of the jury. Thus the question in truth is not whether the verdict appears to the appellate Court to be right, but whether it is such as to show that the jury have failed to perform their duty. An appellate Court must always be on guard against the tendency to set aside a verdict because the Court feels it would have come to a different conclusion."

In Davies v. Powell Duffryn Associated Collieries, Ltd. (No. 2 (1942) A.C. 601, in considering the circumstances in which the Court of Appeal would, or ought to, interfere with an assessment of damages by a judge sitting alone, Lord Wright said, at p. 616:

> "There is an obvious difference between cases tried with a jury and cases tried by a judge alone. Where the verdict is that of a jury, it will only be set aside if the appellate Court is satisfied that the verdict on damages is such that it is out of all proportion to the circumstances of the case."

These principles have more recently been applied by the Court of Appeal in England in Bobcock v. Enfield Rolling Mills Ltd. (1954) 3 All. E.R. 94 (where the complaint was that the jury's award of damages was too low) and in Scott v. Musial (1959) 3 All. E.R.193 (where the award was said to be too high) and are, in my judgment, the principles by which this Court should be guided in its consideration of the questions raised in this appeal.

Applying these principles I shall deal, first, with the question of contributory negligence. Where contributory negligence is set up as a defence, it is only necessary to establish to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care to his own injury for where contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that where a man is part author of his own injury he cannot call on the other party to compensate him in full: per Lord Simon in Nance v. British Columbia Electric Railway Co. (1951) 2 All E.R. 448 at p.450. I accept completely the proposition that in cases of injuries to

workmen due to the employer's breach of a statutory regulation, one ought not to hold as contributory negligence against a workman operating under the conditions of noise and bustle, concentration and repetition associated with a factory, every risky thing he may do through familiarity with the dangers incidental to his work, or every act of omission due to inadvertence or lack of concentration. I recognize that it may be proper, as Mr. Parkinson contended, to apply the same principle, to a limited extent, to cases arising from a breach of the common law duty to provide a safe system of work. These propositions find support in the cases of Flower v. Ebb Vale Steel, Iron & Coal Co. Ltd. (1936) A.C. 206, and Caswell v. Powell Duffryn Associated Collieries Ltd. (1940) A.C. 152 as considered in Stavely Iron & Chemical Co. Ltd. v. Jones (1956) 1 All E.R. 403 and Hicks v. British Transport Commission (1958) 2 All E.R. 39.

It must nevertheless be borne in mind that the question of contributory negligence was essentially one for the jury who had before them all the evidence, in a very short case, relating to the conditions in which the plaintiff worked and the circumstances on which he sustained his injuries. That it was the established practice for the workmen to have the rollers started so as to ensure that the choke had been cleared before they came down was clearly proved, and the fact that on this occasion the appellant followed that practice is not, on the authorities, evidence of contributory negligence. Having successfully cleared the choke it was undoubtedly most imprudent of the appellant to climb down while the rollers were working, but this, too, it seems, was established practice. The respondents, equally with the appellant, were aware of the danger involved in this procedure but never warned the appellant that he ought not to do it. Having regard especially to his youth and inexperience, I am of opinion that this act ought not to be attributed to him as contributory negligence. Considering the small percentage of blame which the jury apportioned to him, I am inclined to to the view that they could not have held this against him.

The appellant stated in evidence that the cause of his fall

was his slipping on ground stones and grease which were on the machine. He had to climb up and down the machine several times daily and knew that the machine "has always ground stones and grease from time to time", the grease being used in connection with its operation. He knew that it was necessary to exercise care in going up and down the machine. In going up, he said he did not look to see if there were stones and grease. In coming down he did not see the grease and stones before he slipped. He came down"backways and at a normal rate" as he usually comes down.

It may be remarked in passing that in the particulars supplied by the appellant's solicitors of a safe and proper system of work and the various respects in which the respondents failed to take proper precautions for the safety of the appellant no mention is made of the condition of the surface of the machine. However, in his evidence John Rodgers, the respondents' personnel officer stated that he agreed that the machine had grease and oil which would make it very slippery and could contribute to an accident to persons climbing up and down.

Mr. Parkinson submitted that on the foregoing evidence no jury could reasonably come to the conclusion that the appellant had failed to take reasonable precautions for his own safety. It was improper, he said, to draw from the appellant's statement that he did not see the stones and grease the inference that he did not look to see where he was going. In climbing down "backways" he could not be expected to see the stones and grease. Further, he contended, even if his slipping and falling can be atrributed to his negligence, it was not this negligence that was the proximate cause of the injury to his hand: the fall may have caused other injuries but it was the absence of a guard around the rollers which alone caused this type of injury.

The test which the jury had to apply was this - ought the appellant reasonably to have foreseen the likelihood of injury to himself if he fell while the rollers were working, and if yes, did he take reasonable care to avoid falling?

The plaintiff stated that he knew that he ought to take

care in climbing up and down the machine. In my judgment, there can be no doubt that he ought to have foreseen the likelihood of danger to himself from the working rollers if he fell. He may not have foreseen the extent of the damage he in fact suffered, but this in my view is immaterial, for it does not differ in kind from that which he ought to have foreseen. (See Hughes v. Lord Advocate (1963) 1 All E.R. 705) If the jury found, as they must have done, that the plaintiff fell because he failed to look where he was going in conditions which admittedly called for the exercise of care, that this amounted to culpable failure to take care for his own safety, and that by this lack of care he contributed to his own injury, I cannot say that this is a verdict which is unreasonable and"such as to show that the jury have failed to perform their duty."

I turn now to the question of damages. Mr. Parkinson submitted that the award of £950 for general damages was out of all proportion to the circumstances of the case and that a reasonable jury would have awarded general damages of an order of £5,000 to £7,000. The jury, he said, must have disregarded matters which they ought to have taken into account. He referred to certain English cases in which in comparable cases judges sitting alone had awarded between £1,000 and £2,500 and urged that on the basis of these cases £5,000 would be an appropriate award.

I am of opinion that £950 is rather low but I do not think that it is out of all proportion to the circumstances of the case having regard especially to the evidence which the jury had before them. The factors which the jury had to consider were

(i) pain and suffering

(ii) disfigurement

(iii) deprivation of the amenities of life

(iv) loss of prospective future earnings.

The medical evidence was that the appellant must have suffered considerable pain at the time and shortly after his injury. In addition, pain would result for some weeks from the skin graft done at the time of his injury and from another done on

15th October, to release a contraction which had occurred between the thumb and the index finger. The jury saw the appellant's hand which is considerably disfigured, as this Court was able to confirm from its own inspection. As to deprivation of the amenities, he has lost his entire index finger and parts of the other fingers except the little finger. The thumb is virtually useless. He has a limited use of the hand and a very crude grasp, and will have to depend almost entirely upon his left hand. There was a paucity of evidence as to loss of prospective earnings. The plaintiff is an untrained labourer and no evidence was led to his opportunities for future advancement. He was described as a good worker. It was suggested in argument that he might have risen to be a foreman but there was no evidence of the wages which a foreman might earn. At the time of the trial he was employed by the respondents as a watchman and it seems likely that this is the type of employment he is likely to obtain in future, though again no evidence was given on this point. His wages were then about £6 per week; in his former employment he could have earned £7 to £8 per week.

This was the evidence which the jury had to consider and they had the opportunity to discuss it amongst themselves and assess a sum which seemed to them to be an adequate solatium. I respectfully adopt the words of Morris, L.J., in Scott v. Musial (supra) at page 195:

> "The jury do not have to give reasons, and it may be impossible to deduce how the jury have regarded the particular individual features of a claim, e.g., in a personal injuries case, pain and suffering, deprivation of the amenities of life, and future possible loss of earnings. To warrant any interference with the award of a jury it is not enough to say that the award is more, or even much more, or less, or even much less, than what the judges of the Court of Appeal would consider to be the appropriate amount. The Court of Appeal will not interfere if the figure is one which a jury, acting properly, might award. Interference will be justified if it if it is made to appear that the jury must have acted improperly and so have brought about a palpably wrong result."

As I have already stated, I do not consider the jury's award is out of all proportion to the circumstances of the case.

71

Bearing in mind the difficulties of assessing damages in cases such as this, and that in any event assessment must be a matter of personal judgment, while I would myself have made a larger award I do not think the jury's award so low or inadequate as to indicate that they failed to do their duty.

On the subject of special damages, after listening to Mr. Parkinson's careful argument, I have come to the conclusion that the jury did the best they could with the rather vague and unsatisfactory evidence which they had at their disposal.

Learned Counsel for the appellant found himself constrained to base his computations upon assumptions not clearly warranted by the evidence, and even so to substantially alter from time to time during the course of his argument, the amount to which he claimed his client was entitled. In these circumstances I do not think that the Court should interfere with the jury's verdict.

I would dismiss this appeal with costs.

/S/ A.M. Lewis
Judge of Appeal.

23rd. September, 1963.