IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

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| BETWEEN | IRA BOWEN | PLAINTIFF |
| AND | ST. THOMAS LEATHER WORKS LIMITED | DEFENDANT |

J. Mordecai and P. Brooks instructed by Nunes, Scholefield, DeLeon and Company for the Plaintiff.

Patrick Bailey instructed by Patrick Bailey and Company for the defendant company.

Haring on October 9, 10, 11, 12, and 19, 1990

JUDGMENT

BINGHAM J.

The plaintiff who was up to June 1987 employed as a Machine Operator at the defendant's Leather Factory at Yallahs, Saint Thomas was on Friday, January 21, 1983 somewhere between 8:30 - 9 A.M. injured while allegedly working effecting some minor repairs to a Creasing Machine of which the operator at the material time of the incident was one Delores Henry.

The plaintiff was at the time of the incident assigned the duty of operating a Skiving Machine which was situated to the rear of the machine on which Miss Henry was the operator. He had been up to the time of the incident employed at the defendant's plant as a Machine Operator for about eighteen months during which period he had gained experience in operating three machines including the Creasing Machines of a type similar to the one on which he suffered the injury in question.

It was his evidence that apart from achieving a degree of competence in operating these machines, he was also trained by the supervisor, one Uton Jones to carry out minor repairs on these machines, a task which although based upon the instruction passed on to employees by the management was usually performed by the mechanics from the workshop which was not far removed from the locality in the plant in which the machine in question was situated being within "an arms reach", of the machine on which the plaintiff was injured.

It is the plaintiff's contention that on the morning in question he was at work when he observed work which was being passed on to him for Skiving coming

from Miss Henry with certain faults which was in his opinion caused from the need for the proper adjustment of a piece of wood placed at the base of the Creasing machine on which the materials such as leather wallets, purses etc. had to be placed for the creasing process to be carried out. This operation which required the use of a metal press, situated at a height of some 12 inches from the base of the machine, to descend downwards unto the material, two buttons on this electrically operative machine which were situated on either side of the base had to be pushed down. Having creased the material, the press would then ascend automatically back to its elevated position where it would remain stationary until the creasing process was required to be repeated at which time the same exercise would be carried out.

It is the plaintiff's case that having gone over to the creasing machine on which Miss Henry was engaged at work that morning, she being the only woman then engaged on such a machine at that time, he was in the act of carrying out the repairs and in the act of adjusting the wooden edges on the base of the machine , when Miss Henry who was seated to his right facing the machine and talking with a fellow worker to her right, negligently touched the buttons causing the press to descend downwards crushing the three middle fingers of his left hand injuring them, the digital phalanx of the long finger more seriously than the others.

The defence sought to contend through Miss Henry that the plaintiff far from carrying out minor repairs on the machine had left his machine and was molesting her with idle chatter having nothing to do with the work that they were each employed to do. She ignored him and continued doing her work and chided him in the process for his unwelcomed intrusion. At around this time the Supervisor Uton Jones was seen approaching her machine not far off and the plaintiff who had been leaning on her machine was injured.

Although the defence as pleaded alleged inter alia at paragraph 4 that:

> "the defendant says that the accident was caused solely by the negligence of the plaintiff in that the plaintiff in disobedience of his assignment orders left his assigned place of work

> without permission or authorisation and walked over to another employee, Miss Delores Henry who was the operator of the press machine and the plaintiff spoke to her about matters unconnected with the defendant's business when a supervisor passed by and the plaintiff pushed his hand under the said press machine in the pretence that he was working on same and was injured in so doing." (underlines for emphasis)

There has not been one scintilla of evidence adduced by the defence to support this contention.

As to the circumstances leading up to the plaintiff's injury, the only evidence forthcoming came from his testimony. On that account he was not entirely free from contributing to his injury as even if his account was accepted in its entirety and it could be inferred that he had an implied authority to carry out simple or minor repairs such as that in which he was engaged at the time of the incident, he was under a duty to exercise a degree of competence and the skill and care to be expected of a mechanic or supervisor to whom such tasks were usually allotted. In this regard it was to be expected that he would have as a precautionary measure disengaged the functioning of the machine by unplugging the cord from the socket, or in the alternative, removing the operator Miss Henry from the immediate area of the controls. Both of which measures he failed to do.

The law here is clear as to the duty of care to be expected from an employer in industry. It is threefold namely:-

1. To provide a safe system of work.

2. To provide proper and adequate supervision.

3. To provide competent workers.

There is also a correlative duty placed upon the employee to take such reasonable steps for his own safety and that duty is discharged when he for his own part takes such steps to safeguard himself from such injury.

Although there was no allegation of contributory negligence pleaded in the defence, this question could arise in the plaintiff's case and based on the evidence given by the plaintiff it is clear that had he taken the steps referred to before engaging in carrying out the repairs to the machine, the

injury suffered by him consequent upon such failure would have been avoided. On his account therefore contributory negligence arises for determination.

Once the question of negligence on the part of a fellow worker Miss Henry was established, then it follows that to the extent that she was at fault, the defendants were held to be vicariously liable for her acts done in the course or scope of her employment.

The Defence's Case

As to the system in place at the defendants plant this evidence was furnished by Mr Farkas the Manager for the entire period of its operation at Yallahs. There is no reason to doubt that given the system in place if the instructions passed on to the workers were carried through to the letter then there was a safe system of work in place. Not much care is, however, to be expected from the ordinary worker engaged in industry. It has to be expected that they are apt to disregard simple instructions hence the need for adequate supervision to be put in place in order to ensure that the safety instructions are adhered to. Although it is not to be expected that the extent of the supervision will go as far as for the employers to be required to keep a constant watch over such workers to ensure that the safety instructions are carried out to the letter, it is to expected that such reasonable precautions will be taken to keep workers such as machine operators "on their toes." In this regard the supervisor Uton Jones from the evidence of both the plaintiff and Mr Farkas by his conduct this left much to be desired. He seemed to have always getting into problems which caused him to be suspended on more than one occasion. Miss Henry from her evidence, however, sought to bolster up the defence by seeking to paint a picture of Uton Jones as being someone who was an exemplary person. According to her, he was never suspended. On the other hand she sought to establish the plaintiff as an intermeddling person and could only recall that he operated the skiving machine which he worked on from he came and saw her at the defendants' plant in June 1981 up to 1987 when they were both made redundant. Despite her evidence in answer to a question posed by the Court she testified that her eyes at all material times focussed on the machine on which she was operating while the plaintiff was leaning on it, she was unable to give any account as to how the

plaintiff's three fingers of his left hand came to be crushed by the press on the machine. As she admitted under cross-examination that Uton Jones and the plaintiff enjoyed a good relationship (it being the plaintiff's account that it was Jones who trained him in the task of repairing the machines), it is therefore, strange and inexplicable as well as highly improbable as to the unsupported allegations set out in the defence in which it was pleaded inter alia that:-

> "when a supervisor passed by and the plaintiff pushed his hand under the said press machine etc."

Had there been any rational foundation upon which to buttress this contention it clearly pales into insignificance by the silence from a failure to seek to establish it.

One also finds the conduct of Miss Henry in failing to draw the attention of the supervisor Uton Jones who, far from "passing by the machine "was placed by her at a distance of less than a half-a-chain approaching towards her machine, to the molestations of the plaintiff. When her account is weighed examined and tested against the testimony coming not only from the plaintiff but from Mr Farkas whose account supports the plaintiff in relation to several material facts, her demeanour as well as her testimony stamps her as an unconvincing and unreliable witness. In so far as her evidence differed from that of the plaintiff and Mr Farkas I accepted their accounts in preference to hers.

When the evidence given on both sides is examined what the case boils itself down to is as to whether I accepted the plaintiff's account as against that of the three witnesses called for the defendant as to how and in what manner the plaintiff incurred his injury.

The defence as pleaded as to the material aspect of the Claim was left totally without any evidence to support it and had to be rejected for this reason.

On the evidence, having seen and heard the witnesses, although there was some weakness in the plaintiff's account as to his denial of the presence of Uton Jones, the supervisor,at work on the date of the incident, a fact which the weight of the evidence coming from Mr Farkas, Miss Montague and which is further supported by the Time Card relating to presence of Uton Jones at the plant during

the week ending January 21, 1983, I did not regard this lacuna in his case as sufficient to destroy it altogether, What the totality of the evidence revealed is a factual situation in which once one came to a determination that the defence as pleaded was unsupported on the evidence coming from the defence, the only evidence left to be considered as to the circumstances in which the plaintiff suffered the injury in question, and in this regard all that stood to be examined was his account.

The burden of proof remained on the plaintiff, however, to establish upon a balance of probability that his injury was caused wholly or partly by the negligence of the defendant company. In the light of my earlier findings I would be minded to hold that both parties for the reasons which I have set out were equally to blame. This finding is further buttressed by the evidence of Mr Farkas that at the date of the incident, although the plaintiff was engaged at the plant for a mere eighteen months, he had not only shown promise but was a keen and efficient worker, all of which made it more probable than not, that, far from wasting his production time in idle chatter as Miss Henry would have me believe, he would have been showing the sort of interest in seeking to correct the flaws that he said was the genesis of his leaving his machine and attempting to carry out the adjustment to the board at the base of the machine which led to him incurring the injury to the left hand.

On the question of liability, therefore, and given the fact that a supervisor who was engaged in effecting similar repairs to a creasing machine during working hours would given the safety measures in place reasonably have done namely:-

1. Either removed Miss Henry from the immediate vicinity of the machine where the two control buttons were located and/or
2. Unplugged the electrical cord from the socket thereby disabling the machine;

the plaintiff taking such reasonable care for his own safety and having undertaken the task of the said repairs to the machine would have been expected to display no less care. In so far as he failed to do so, he too was negligent.

In conclusion I would hold that the proximate cause of the injury was the fact of Miss Henry pushing the two control buttons for the press when the plaintiff's hands were under it; a fact which she, either knew or ought to have known and a fact which clearly amounted to negligence on her part for which act the defendant company, her employers, were in the circumstances of this case, vicariously liable for.

The plaintiff for his part was not entirely without blame for the injury which he suffered he having failed to take the necessary precautionary measures for his own safety. I would in the circumstances apportion the blame as between the plaintiff and the defendant company equally.

Damages

1. Special Damages

In so far as this head of the claim was concerned there was no sissue as to the head of the Claim for "transportation" for the plaintiff to receive medical attention during the post-injury period the sum of $100 claimed is therefore recoverable.

As to the head of the claim of $960 for "loss of earning", the evidence fell far short of this sum. There was an issue of fact which arose for determination in relation to three weeks of a total period claimed of twelve weeks. In any event,even given the entire period of twelve weeks, the plaintiff's account was that he earned $60 per week and not $80 as claimed in the particulars of the claim.

Even if the plaintiff's evidence was accepted, the highest sum he stood to recover would have been $720. The plaintiff's evidence, however, was that he was absent from work for six weeks. It was the evidence of Mr Farkas that the plaintiff received three weeks pay during his absence from work due to the injury received. No documentary proof was adduced in support of this fact. The plaintiff stated that he received no salary during the period that he was absent from work. I find this somewhat strange, however, as for an employee who had been working at the defendants' plant continuously for over eighteen months (June 1981 to January 1983), the plaintiff would have at that stage of his

employment be entitled to at least two weeks sick leave with pay. In the circumstances I would allow the claim for loss of earnings for the remainder of the four weeks at $60 per week based upon the plaintiff's evidence of the total period that he was absent from work. This would amount to a sum of $240.

The total sum recoverable for Special Damages would when quantified amount to $340.

2. General Damages

This falls to be assessed on the basis of Pain and Suffering and Loss of Amenities. Two Medical Reports were tendered in evidence as Exhibit 1 and 2, respectively.

Exhibit 1 relates to an examination carried out on the plaintiff on March, 14, 1983 at either the Isaac Barrant Hospital, Golden Grove or the Princess Margaret Hospital, Morant Bay by Dr. C. Batchelor, the Medical Officer in charge of both institutions. This report supports the evidence of the plaintiff, (a fact not in issue) that he was first treated at the Princess Margaret Hospital following his injury on January 27, 1983. This is so even though there is a slight discrepancy between the date given by the plaintiff and that stated in the medical report. Given the unchallenged evidence of Miss Montague, the Office Manager who kept the records at the defendants plant the correct date was in fact January 21, 1983.

The Medical report which is dated March 14, 1983 (Exhibit 1) reads in part:-

"Re Ira Bowen"

This is to certify that this man was treated at this hospital on January 21, 1983 after he was involved in an accident at his work place, during which his left hand was caught in moving machinery. Examination at that time revealed lacerations transversely through the nail beds of the 2nd and 4th fingers and thorugh the distal interphalangeal joint of the 3rd finger which was also moderately contused.

He was appropriately treated and his injuries have healed. Recent examination reveals stiffness in the distal interphalangeal joint of the left

3rd finger with discolouration of the nail. All three nail beds exhibit new nail growth with extrusion of the old damaged nails. He has not worked since the accident due to the temporary disability but should be able to resume by March 14, 1983. No permanent functional disability or defect is expected.

.....
C. Batchelor MBBS
Medical Officer i/c "

Further to this date and before the writ was filed in this action, the plaintiff's Attorneys no doubt seeing the need for an up to date report as to the plaintiff's present condition caused him to have an examination conducted on him on March 5, 1987 by a Dr. D. Osbourne at the Department of Orthopaedics, Kingston Public Hospital. This report (Exhibit 2) read in part:-

"Re Ira Bowen"

"The patient's left middle finger was allegedly caught in an industrial machine on the 27th January 1983. He was seen in our Orthopaedic Out-patient Department on the 15th January 1987 and was found to have flexor deformity of the left long finger at the distal interphalangeal joint.

X-rays revealed osteophytic changes at the joint. This patient has permanently lost movement of his left long finger at this joint.

This is a final report.

Dr. D. Osbourne
Department of Orthopaedics
Kingston Public Hospital"
DO/sj

Dr. Osbourne, being attached to the Orthopaedic Department at this hospital would in my opinion be more competent to examine and assess the plaintiff's condition on March 5, 1987 when this report was prepared.

Having read both reports and seen the plaintiff in Court it appears that, and this is bourne out in the last sentence in Exhibit 2, he has now reached his maximum state of recovery. The only visible problem that he is now experiencing is that the left long finger (his right hand being his control limb)

is now slightly bent at the distal interphalangeal joint. The doctor's opinion in this regard is that the plaintiff has lost the movement of the finger at this joint. There is also the danger of osteopytic changes taking place at this joint. The plaintiff is, however, able to function fully at his present job as a Machine Operator performing a similar task on a machine of the same type as that which he was operating when he suffered the injury in question. He also complains that apart from experiencing pain occassionally in the joint of the affected finger he is able to function quite normally. He is, however, unable to use a fork to till the soil on a plot of land on which he is presently engaged as a part-time farmer. He now has to hire someone to perform this task.

It is of some significance that there is no particulars set out in the Statement of Claim to cover this aspect of the plaintiff's testimony. Had such instructions been given to his Attorneys this would have been covered under the heading of "Extra Help" or such other similar nomenclature. The plaintiff must be taken, therefore, to have just pulled this claim "out of the air" and as there is no basis for this evidence, I hold it to be of a speculative nature. Such award as will be considered for an assessment of general damages will, therefore, take into account the nature and extent of the plaintiff's injuries the degree of pain and suffering experienced and the extent of his disability.

Mr Brooks for the plaintiff, has submitted that a reasonable award under this head ought to be in the region of $25,000. He cited in support Joseph McLean vs. Kenty's Block Supplies and another pg. 124 of Volume 2 of Mrs Ursula Khan's book on Personal Injuries Awards. This sum would be arrived at, he contended, if the injuries in that case were adjusted downwards and the steep rate of inflation now prevailing and its effect on the purchasing power of the Jamaican dollar was taken into consideration.

Not to be outdone, Mr Bailey for the defendants suggested that a reasonable award ought to be in the range of $6,000. He relied in support of his contention on C.L. 1984/0969 Harold Colquhon vs. Franklyn Dunkley pg. 1.6 of the same Volume of Mrs Khan's work (referred to supra).

Although I must express my indebtedness to both Counsel for having brought these two cases to my attention, I find that on an examination of them that they are no assistance as in both matters, unlike the facts in the present case, the plaintiffs suffered permanent disability of a marked degree which were assessed in the medical evidence at 25% and 10% respectively of the right limb which in both instances was the control limb.

I would be minded to rely upon C.L. 1979/C 169 Lena Clarke vs. West Indies Metal Products Ltd. pg. 81 of Volume 1 of Mrs. Khan's work of a similar nature to that referred to supra; being an assessment of Patterson J (ag as he then was) delivered on 20/2/81.

In that case the report read in part:-

"PERSONAL INJURIES

(1) Laceration through proximal part of right index finger

(2) Fracture of mid shaft of the proximal phalanx of right index finger

TREATMENT

She was treated at University Hospital where her wound was sutured and she was sent home. Subsequently the finger was operated on because of bone damage - the finger was pinned - pin was subsequently removed. She was under medical care for approximately 6 months.

PARTICULARS OF DISABILITY

(1) Finger cannot bend

(2) Cannot hold pen to write properly

(3) Cannot crochet or hold curler to do hairdressing.

By consent liability was apportioned 50/50

and Judgment entered for Plaintiff in the sum of $6,000.00 inclusive of costs."

Although in that case it was a finger of the control limb that was injured it is of note that the extent of the injury despite being slightly more serious is, however, within the range of the factors falling within the instant case. Such an award in February 1981 would when allowances are made for the falling value of the Jamaican dollar now attract an award somewhere in the range of $35,000 - $40,000.

I would in the circumstances making the necessary adjustment downwards, consider a reasonable award under this head for general damages as being falling within the range of $15,000 and having regard to the degree of apportionment judgment is, therefore, entered for the plaintiff in the sum of $7,670 with costs to be agreed or taxed being:

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| 1. | Special damages | $ 340 |
| 2. | General Damages | $15,000 |
| | | $15,340 |
| | less 50% | $ 7,670 |
| | | $ 7,670 |

Mr Brooks asks for an award of interest fixed at the usual rate of 3% on the awards for both General and Special Damages.

Court awards interest on award for Special damages at 3% from 21/1/83 to 19/10/90 and 3% from date of service of writ, 6/4/87 to 19/10/90.

Mr Bailey asking for a Stay of Execution for 4 weeks.

Court grants stay of execution for 4 weeks.