JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 12/90

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	COURAGE CONSTRUCTION LIMITED	DEFENDANT/APPELLANT
A N D	ROYAL BANK TRUST COMPANY (JAMAICA) LIMITED AND JENNIFER COLLEEN SILVERA (ADMINISTRATOR OF THE ESTATE OF CLIFFORD ANTHONY SILVERA, DECEASED)	PLAINTIFF/RESPONDENT

Dr. Lloyd Barnett and Mrs. Priya Levers for Appellant

Dennis Goffe for Respondent

February 24, 25 and April 9, 1992

ROWE P.:

The appellant employed Clifford Anthony Silvera as a quantity surveyor and stationed him for duty at a construction site at Nain in St. Elizabeth. On August 9, 1983 Silvera was in charge of the programme of work which involved the construction of an unloading station some 15 feet deep. It was Silvera's duty to check various levels that earth-moving equipment, viz. a bull-dozer and a front-end loader, would cut, following specifications indicated by a series of pegs. It was also his duty to ensure that the machines did not cut deeper than the pegs indicated.

Clifford Silvera and Bentley Northover (a Director of the appellant's company) were standing at the bottom of the unloading station in the late afternoon of August 9, 1983. They were conversing while the bull-dozer and the front-end loader were operating.

Although the time of day was not ascertained, it was sufficiently late in the afternoon for both vehicles to have their headlights burning.

Access and egress from this 15 foot-deep unloading station was via an inclined passage described as "not that steep". The time-keeper employed to the appellant was standing at ground level observing the operations in the hole. He saw the front-end loader commence to reverse from the hole up the inclined passage. On this incline the witness observed that "the engine shut-off - also the light" and the machine ran uncontrolled down the incline. At the shout of the driver of the front-end loader, both Northover and Silvera ran in opposite directions; Northover to safety, but Silvera was run over and fatally injured. The administrators of Silvera's estate who are the respondents in this appeal brought a suit against the appellant alleging negligence and breach of the contract of employment.

Harrison J. gave judgment for the respondent against the appellant and E.L. McFarlane in the sum of $329,000.00 with interest at 3% from May 1, 1985 to January 26, 1990 with costs to be agreed or taxed. Execution was stayed on terms. We were not troubled with any question as to quantum of damages.

Two grounds of appeal filed complained firstly that:

> The trial judge erred in law and on facts in holding that the appellant was liable for actions of the operator or defects in the front-end loader and secondly that there was no evidence on which the trial judge could find negligence on the part of the appellant.

In argument before us, Dr. Barnett submitted that by the issues raised in the pleadings the respondent could only succeed in establishing that the appellant was liable in negligence by proving one of three things:

(a) that the operator of the front-end loader was negligent in the manner in which he managed or operated the front-end loader and that the appellant was vicariously liable for his negligence; or

(b) that the doctrine of res ipsa loquitur applied and that in its application it operated against the appellant; or

(c) that the appellant was itself negligent in respect of its failure to provide a safe system of work.

When Mr. Goffe came to reply he submitted that Dr. Barnett had spread himself too wide in his submissions as the notice and grounds of appeal did not raise any question as to the liability in negligence of the driver of the front-end loader or of the owner of the machine. In addition, he said, the appellant had in its defence pleaded negligence on the part of the owner and driver of the front-end loader and had specifically adopted the particulars of negligence pleaded by the respondent.

The evidence was described by Dr. Barnett as "scanty"; which was a polite way to say that only the barest bones were placed before the judge. The appellant secured a contract to construct a section of a loading site for a bauxite company at Nain in St. Elizabeth. It hired, inter alia, a 950 front-end loader from one E.L. McFarlane, who was the second defendant at trial, and McFarlane supplied the machine with an operator Ralph Hartley (the third defendant in the suit).

There was no evidence that the appellant exercised any control over the activities of the driver of the front-end loader except to give him directions as to where to make his cuttings and to what depth. The appellant disclaimed any knowledge of the technical capabilities of the front-end loader and as to its likely behaviour if for any reason the engine shut off while the vehicle was in motion.

Lewin Lewis the single eye-witness to the tragedy described the scene. As the front-end loader ascended the inclined passageway, Silvera and Northover stood about 10 yards away in the hole itself but not on the incline. There were no lights in the hole except those provided by the two earth-moving machines. Lewis saw the front-end loader as it reversed up the incline, heard when the engine went dead, saw the lights go out, noticed the vehicle rolling down the incline, heard the shouts of the driver to Messrs. Silvera and Northover, and saw the two men scamper away from the on-coming vehicle. Lewis had never seen that front-end loader reverse up that incline before.

The appellant, through its Director Keith Northover, testified that the terrain of the unloading site was flat; agreed that the land tended to slip as the hole got deeper; agreed that the appellant provided protective clothing including hard-hats, gloves, goggles, steel-capped boots for staff but was inconclusive as to the nature of the soil through which the unloading bay had to be dug. He relied upon the hirer to provide a front-end loader in good working order together with a skilled and experienced operator and did not himself make any checks on the competence, reliability or otherwise of man or machinery. Mr. Bentley Northover, a Director of the appellant company, who was present at the scene of the accident and present in Court at the trial did not give evidence.

Harrison J. found that the principle of res ipsa loquitur applied. At page 7 of his judgment he said:

> "When the 950 front-end loader was reversing along the inclined passage-way leading out of the hole, not only did its engine stall but its lights also went out - a complete non-function. This is evidence to which the principle of res ipsa loquitur may be applied. Why did the machine not remain at rest having stalled? Were no brakes on the machine or were those brakes now non-functional? The fact that the machine having come to a halt then proceeded forward, could not be stopped, and ran aided by gravity and its own weight 'not going too slowly' into

> "the hole is further evidence of the negligence of the third defendant, the employee of the second defendant. As a consequence this makes the second defendant vicariously liable. The incline of the passageway was probably too steep; it was therefore in the circumstances, unsafe as an access road to the hole."

It is convenient, notwithstanding the submissions of Mr. Goffe, to deal shortly with the principle of res ipsa loquitur and its application to this case. The classic exposition of this principle is that of Erle C.J. in Scott v. London Dock Co. [1865] 3 H & C 596 at 601:

> "... where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants that the accident arose from want of care."

If there is evidence as to the cause of the accident the doctrine of res ipsa loquitur has no application. This was firmly decided in Barkway v. South Wales Transport Co. Ltd. [1950] 1 A.C. 392. There an omnibus which was being driven at about 25 m.p.h. in a "black-out" veered across the road and rolled over an embankment after its offside front tyre had burst. Upon examination the cause of the bursting of the tyre was discovered. The headnote accurately summarises the judgments of their Lordships that:

> "The application of the doctrine of res ipsa loquitur, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was by itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the respondents to give an adequate explanation, if the facts were sufficiently known the question ceased to be one where the facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be inferred."

In his judgment at page 399, Lord Normand said:

> "The fact that an omnibus leaves the roadway and so causes injury to a passenger or to someone on the pavement is evidence relevant to infer that the injury was caused by the negligence of the owner; so that, if nothing more were proved, it would be a sufficient foundation for a finding of liability against him. ... The maxim ... is no more than a rule of evidence affecting onus. It is based on commonsense, and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant."

Lord Radcliffe commented that much more was known in the Barkway case (supra) than the bare fact that the omnibus mounted the pavement and fell down the bank. I pause to re-state that in the instant case neither the appellant nor the other defendants gave any explanation as to why the front-end loader had a complete shut-down and plunged headlong down the incline.

In Sochacki v. Sas and Another [1947] 1 All E.R. 344, Lord Goddard C.J. declined to apply the doctrine of res ipsa loquitur to an escape of fire from the lodger's fireplace in his bed-sitting-room on the ground that everybody knows that fires occur through accidents which happen without negligence on anybody's part. Where the operation of motor vehicles are concerned the principle of res ipsa loquitur has been frequently applied.

Dr. Barnett submitted that on the evidence there was nothing which established that the operator of the front-end loader made any error or wrong manoeuvre in the manner in which he operated the machine. The evidence, he said, established that the accident was caused because the engine shut off. That in his view was a complete explanation of what occurred, that such failure of the engine was not evidence of any negligence and the subsequent behaviour of the machine was a natural consequence of the engine failure. I find

this argument insubstantial. Some pertinent questions were posed by Harrison J. viz.; why did the engine fail and the lights go off; why did the machine run down the incline rather than remain stationary; why did the operator not apply brakes to stop the stalled vehicle? No answers were forthcoming from the appellant or his co-defendants. In Barkway's case (supra), evidence emerged that the tyre was damaged through trauma and that was the cause of the "blow-out". Could that damage have been detected by the owners on inspection or otherwise? That question was answered on the evidence in the affirmative.

To my mind it is beyond argument that in the absence of an explanation the mere happening of this accident would be fatal to the defence. Mr. Goffe did not succeed at trial to secure an admission from the appellant's witness that a front-end loader is a specie of dangerous machinery but there was evidence from which the inference could be drawn that it was a powerful machine capable of traversing unusual slopes. If such a machine has an engine failure which affects its lights and its braking system and results in its uncontrolled headlong plunge crushing a bystander in its path, in the absence of an explanation as to the cause of the multiple failures, negligence either in maintenance or operation or both must be inferred.

Dr. Barnett argued cogently that the appellant cannot be made vicariously liable for the negligence of the driver of the front-end loader or for the behaviour of the front-end loader as the machine was owned by the second defendant and was operated by the third defendant the servant or agent of the second defendant who was responsible for the management, maintenance and control of the vehicle. I accept as good law the submission of Dr. Barnett that where the owner of the machine hires it to another and supplies its operator, the hirer is not liable for the negligence of the operator, unless in addition to telling the operator where to go and what to do, he also controls and gives directions to the operator as to how

he should manage and operate the machine. See Willard v. Whitely Ltd. [1938] 1 All E.R. 779; Mersey Docks and Harbour Board v. Coggins and Griffiths (Liverpool) Ltd. and McFarlane [1946] 2 All E.R. 345; Salsbury v. Woodland and Others [1969] 3 W.L.R. 29; Karuppan Bhoomidas v. Post of Singapore Authority [1978] 1 W.L.R 189. Mr. Goffe made no effort to say that the driver of the front-end loader became for the time being the servant of the appellant or that the appellant's liability to the respondent arose on that basis.

On a fair reading of the Notice of Appeal the issues raised were as identified by Mr. Goffe viz.:

> (i) Can the appellant be liable for the negligence of the second and third defendants and;
>
> (ii) Was there evidence before the judge to show that the appellant was directly and personally negligent.

So treated, the discussion on res ipsa loquitur and the liability of a site owner for the negligence of an independent contractor were not absolutely necessary for the resolution of this appeal but have been included out of deference to the arguments presented.

The respondent was the employee of the appellant and to him the appellant owed a special duty to see that reasonable care was taken to provide the employee with safe fellow-servants, safe-equipment, safe place of work and access to it, and safe system of work. This duty to see that reasonable care is taken is personal to the employer and therefore "non-delegable". In the 14th Edition of Clerk and Lindsell on Tort, Cap. 13 para. 965 the learned authors say:

> "The most important feature of this duty is its non-delegable nature. It is not enough that the master should take care himself: he has to see that care is taken by whomsoever he engages. What is personal is not the actual performance of the duty, but the responsibility for its bad performance. ... within its scope he remains answerable even though he properly delegates its performance to someone else."

Phillimore J. was required to decide two questions of law as a preliminary issue in Sumner v. William Henderson & Sons Ltd. [1964] Q.B. 450 viz.:

> (i) whether the defendants as employers could be liable for any negligence of the skilled and competent persons who had supervised and carried out specialized work involved in the construction of the building which required skill and knowledge not possessed by the defendants;
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> (ii) whether they could be liable for any negligence of a reputable manufacturer of certain electrical cable.

That case arose in this way. The owners of a departmental store was in the process of extending and modernising its store while continuing its trading activities. An employee and ten other people were killed in a fire which broke out in the shop due to a fault in the electric cable. In an action by the administrators of the estate of the deceased employee the shop owners denied liability for negligence on the basis that they had discharged their duty of care to the employee by ordering the cable from a reputable manufacturer and by employing persons of skill to carry out the specialized work involved in installing the cable and re-constructing the building. Phillimore J. following a long line of authorities held that an employer was under a personal duty to his employees to take reasonable care for their safety in all circumstances and that, even if he delegated that duty to a competent and skilled independent contractor, he remained liable for its due performance. Accordingly, the employers would be liable for any negligence by the persons supervising and carrying out the work. This decision was over-ruled (see [1963] 2 All E.R. 712) on the ground that the procedure by a special case was wrong but no doubt was cast upon the general propositions of law adumbrated by Phillimore J.

Lord Brandon of Oakbrook has provided a clear modern statement of the duty owed by an employer to his employee when in McDermid v. Nash Dredging and Reclamation Co. Ltd. [1987] 2 All E.R. 878, he said at p. 887:

> "A statement of the relevant principle of law can be divided into three parts. First, an employer owes to his employee a duty to exercise reasonable care to ensure that the system of work provided for him is a safe one. Second, the provision of a safe system of work has two aspects: (a) the devising of such a system and (b) the operation of it. Third, the duty concerned has been described alternatively as either personal or non-delegable. The meaning of these expressions is not self-evident and needs explaining. The essential characteristic of the duty is that, if it is not performed, it is no defence for the employer to show that he delegated its performance to a person, whether his servant or not his servant, whom he reasonably believed to be competent to perform it. Despite such delegation the employer is liable for the non-performance of the duty."

The appellant's case was buttressed by a series of decided cases in which the issue of law was which of two employers (the general employer or the temporary employer on hire) was vicariously liable for the negligence of the servant. There was in that presentation no general acceptance of the duty of the appellant to provide and maintain a safe system of work for the deceased and no attempt was made to show that the delegated duty had in fact been performed. Of course the onus of proof to show that a safe system of work had not been provided rested on the respondent but this is more easily discharged when there is no evidence to the contrary. Harrison J. found that it was necessary for the deceased in the execution of his duty to have been at the bottom of the excavation while the bull-dozer and the front-end loader were working and could infer that both he and Bentley Northover were on duty at the time.

There was evidence of what the deceased was required to do in his supervisory character and bearing in mind that he was a quantity surveyor he had to be in close proximity to the physical operations. No one has challenged the necessity for the presence of the deceased at the point where he stood when he was alerted by shouts to the imminence of danger in circumstances where a witness was available for the appellant were it minded to mount such a challenge.

In the absence of evidence as to the details of the system of work employed on this site and of evidence of the minimum safety measures required of that type of work, the learned trial judge was entitled to infer that what was required was a strict separation of the functions in the hole, that is to say that persons should not be in the hole on foot in the vicinity of the machines, while the machines were working and that failure to provide otherwise was negligence on the part of the appellant. It is not correct, as Dr. Barnett argued, that in so holding the trial judge assumed the system of work. Of a certainty, if the machines did some cutting and then the supervisors descended into the hole to check while the machines were at rest, the accident as occurred in this case, would not have happened.

The second and third defendants (the owners and operator of the front-end loader) were clearly negligent. This appellant did not approach the case as if it could possibly have any responsibility for providing a safe system of work for its employees and concentrated on the legal relationship between itself and the second and third defendants as independent contractors simpliciter. In my opinion the appellant failed to provide a safe system of work for its employee, the deceased, in that the access and egress incline was in all probability too steep as found by the trial judge, that man and machine should not have been in the excavated site in close proximity at the same time while the machine was working and in any event there was no evidence from the appellant to show how and why

the operator lost control of the front-end loader. I endorse the submission of Mr. Goffe that Harrison J. correctly applied the law to the facts in the instant case and accordingly I concurred in the decision handed down on February 25, 1992 that the appeal be dismissed with costs to the respondent to be agreed or taxed.

DOWNER, J.A.

Courage Construction Company Limited, the appellant in this case was the employer of the deceased, Clifford Anthony Clifford Anthony Silvera and they have appealed against the judgment of Harrison, J., in the Supreme Court. That judgment ordered the appellant and another to pay the sum of $329,000 with interest to the respondent. As Silvera's beneficiaries under the Law Reform (Miscellaneous Provisions Act) were also his dependants under the Fatal Accidents Act, the learned judge made no order under the latter Act. See **Gammell v. Wilson** [1981] 1 All E.R. 578.

It is pertinent to note at the outset, that the scope of the proceedings on appeal were defined in the notice and grounds of appeal. They are pleaded thus:

> "AND FURTHER TAKE NOTICE that the grounds of this Appeal are:-
>
> (1) The learned trial Judge erred in Law and on facts in holding that the Appellant was liable for the actions of the operator or defects in the front end loader; and
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> (2) There was no evidence on which the learned Judge could find negligence on the part of the Appellant."

On this basis, the appellant has posed four issues for determination. Firstly, was there evidence that there was a failure to provide a safe system of work? Secondly, did the learned trial judge err in his findings of fact when he found that it was the negligent operations of the driver of the front end loader which caused the death of Silvera? Thirdly, was the trial judge's finding in law that the appellant as the employer of Silvera make the employer responsible for failing to provide a safe system of work correct? Fourthly, on the evidence adduced could there have been any finding by the trial judge regarding defects in the front end loader?

Was a safe system of work provided by the appellant?

The evidence discloses that Silvera a quantity surveyor on 9th August, 1983 was performing his duties for his employer at Main in St. Elizabeth. The account of the accident was given by Lewin Lewis a time-keeper for the appellant. Lewis was at ground level and Silvera along with Northover a director of the company was in an excavation where an unloading station was being constructed. He observed that in the excavation was a bulldozer and front end loader. He further stated that, he saw that the front end loader had commenced to reverse on an inclined plane when its engine shut off and its lights went out and it stopped. In continuing his narrative, Lewis said that at that point, the front end loader went down the excavation, which was, he estimated, about twelve feet deep. Lewis also stated that when the front end loader was going down the excavation, he overheard the operator shouting out to Silvera and Northover. Silvera, he said, went to his right and thereafter he saw the front end loader running over Silvera.

There was no rival account of the accident and Harrison, J., rightly accepted the above account. The learned judge considered the pleadings and one of the particulars of negligence was that the appellant failed to provide a safe system of work. Another pleading averred that Silvera was required to be in the excavation at the time of the accident. In the light of these pleadings and the evidence, the learned judge found:

> " In the instant case, the deceased was owed a duty of care by the first defendant company his employer. The deceased's duties included the supervision of the pegs in the hole where the front end loader machine was cutting 'to see that it did not go deeper than it should go.' ".

As regards the learned judge's specific finding on the issue of the failure to provide a safe system of work, the judge stated his

reasons thus:

> "... It required a strict separation of the functions in the hole, of the front end loader while operating, and the deceased employee while doing his inspections -- as to time and place. Both ought not to have been in the excavation at the same time."

The conclusion therefore was that, the appellant had exposed his employee to an unnecessary hazard.

In drawing inferences as to the cause of the accident, the learned judge observed:

> "... The fact that the machine having come to a halt then proceeded forward, could not be stopped, and ran aided by gravity and its own weight 'not going too slowly' into the hole is further evidence of the negligence of the third defendant, the employee of the second defendant."

A further inference concerned the slope of the incline which was stated as follows:

> "... The incline of the passage-way was probably too steep; it was therefore in the circumstances, unsafe as an access road to the hole. The first defendant was therefore liable to the deceased in the circumstances."

These findings of fact and the reasonable inferences drawn from them were sound and ought not to be disturbed. So insofar as the grounds of appeal sought to contend that there was no evidence that the appellant was negligent, this would not be correct since there was ample evidence that a safe system of work was not provided. This evidence also established on balance that the operator was negligent in that, he failed to direct or failed to provide someone to direct the front end loader at the material time. It is in the light of these conclusions that it is pertinent to refer to the law concerning employer's liability in circumstances such as this.

Was the appellant liable in law to the beneficiaries of the estate of Silvera?

As regards this aspect of the matter, there is an apt statement of the law in Clerk and Lindsel On Tort 14th edition of paragraph 965:

> " The most important feature of this duty is its non-delegable nature. It is not enough that the master should take care himself; he has to see that care is taken by whomsoever he engages. What is personal is not the actual performance of the duty, but the responsibility for its bad performance."

In establishing the relationship between the bad performance of the operator and the personal responsibility of the employer, the learned judge said:

> " Mr. Keith Northover, the witness for and a director of the first defendant said in evidence that the oral terms of the contract were that the second defendant would supply the equipment and operator, and be responsible for its maintenance and any defects that arose. He stated further that the first defendant would provide fuel and oil for the machine, pay the operator on a hourly basis and Mr. McFarlane on a monthly basis. He said that the operator would be responsible for the operation of the machine in doing the actual work. He stated further that the deceased was involved with the actual working of the machine in that he would visit the site and check the pegs which were set up at different levels of the excavation to see that the machine 'cut in accordance with the different levels of pegs.' "

Mr. Goffe cited **Sumner v. Williams Henderson & Sons Ltd.** [1964] 1 Q.B. 450 a case which was overruled, (see [1963] 1 W.L.R. 823 Sellers, Donovan, Russell, L.JJ.) on the ground that since there was no agreement on the facts, the hearing should not have proceeded as a special case. The excellent analysis of the leading authorities on this branch of the law, is convenient and

valuable. At page 464 Phillimore, J., said:

> " Decided cases abound with statements to the effect that an employer has a duty to provide a safe system of working, safe appliances, safe premises, and a safe means of access for his employees. For myself, I prefer to follow Parker L.J. in Wilson v. Tyneside Window Cleaning Co. [1958] 2 Q.B. 110, 124; [1958] 2 W.L.R. 900; [1958] 2 All E.R. 265 C.A., in relying on the words of Lord Herschell in Smith v. Baker & Sons [1891] A.C. 325, 362; 7 T.L.R. 679 H.L.(E). Parker L.J. said:
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> > 'It is no doubt convenient, when one is dealing with any particular case, to divide that duty into a number of categories; but for myself I prefer to consider the master's duty as one applicable in all circumstances, namely, to take reasonable care for the safety of his men, or, as Lord Herschell said in the well-known passage in Smith v. Baker & Sons [1891] A.C. 325, to take reasonable care so to carry out his operation as not to subject those employed by him to unnecessary risk.'
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> Lord Herschell's statement of the employer's duty has been cited with approval again and again in the House of Lords and in the Court of Appeal. In a passage of authority in Dalton v. Henry Angus & Co. [1881] 6 App. Cas. 740, H.L. (E.) Lord Blackburn said Ibid 829:
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> > 'a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it.' "

In applying the principle enunciated in these cases to the particular instance of providing a safe system of work, Phillimore, J., turned to the important case of **Wilsons & Clyde Coal Co. Ltd. v. English** [1938] A.C. 57 and at page 466 he quotes Lord Wright thus:

> "...Lord Wright, in his opinion, put the matter in this way:
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> > 'There is perhaps a risk of confusion if we speak of the duty as one which can, or cannot, be delegated. The true question is, What is the extent of the duty attaching to the employer? Such a duty is the employer's personal duty, whether he performs or can perform it himself, or whether he does not perform it or cannot perform it save by servants or agents. A failure to perform such a duty is the employer's personal negligence.' "

Another useful case in this regard is **McDermid v. Nash Dredging & Reclamation Co. Ltd.** [1987] 2 All E.R. 878. Accordingly therefore, when Harrison, J., stated that:

> " At common law an employer owes to his employee a duty of care which though not an absolute one, is a high duty to ensure the safety of his employee. This duty is non-delegable. Accordingly the employer is not absolved from his responsibility by the employment of an independent contractor,"

it was the correct statement of the law and there was no error in that regard, as the ground of appeal alleged.

Did the learned judge find the appellant responsible for a latent defect in the front end loader as the ground of appeal averred?

It was the appellant who averred that the accident was caused by a latent defect in the front end loader. Paragraph 6 of the appellant's defence reads as follows:

> "6. The 1st named Defendant denies that he failed to provide safe and sound surroundings and safe system for the deceased to carry out work and states that the accident was due to a latent defect of which it had no knowledge and which could not have discovered by the exercise of reasonable diligence by the 1st named Defendant its servants and/or agents."

The learned judge recognised that despite this allegation, the appellant "led no evidence in support of this": see **Davies v. New Merton Board Mills Ltd.** [1959] A.C. 604. Consequently, there could be no proper finding in this regard and insofar as the ground of appeal makes a complaint, it can be ignored.

Conclusion

The appellant has failed on both grounds of appeal. Consequently, the appeal was dismissed at the end of the hearing. The order below was affirmed and the agreed or taxed costs of this appeal went to the respondent.

GORDON, J.A.

I have read the draft judgment of Rowe, P. and Downer, J.A. and find that there is nothing useful I can add. Harrison, J., was correct in his application of the law and findings of fact. I agree with the decision and concur with the reasons.