NWLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. C.L. D. 086/1991

BETWEEN	ROY DOUGLAS	PLAINTIFF
A N D	REID'S DIVERSIFIED LIMITED	1ST DEFENDANT
A N D	ROLLING STOCK LIMITED	2ND DEFENDANT
A N D	MR. H. G. REID	3RD DEFENDANT

Ms. P. Warren for Plaintiff, instructed by Daly, Thwaites & Campbell

Mr. Arthur Williams for Defendants, instructed by Kelly, Williams & McLean.

Heard: 14th, 15th, 16th July 1993 & 6th October 1995

James, W.A. J.

On the morning of July 10, 1985 a flat-bedded truck left business premises on Church Street, May Pen with building materials consisting of blocks, cement, sheet of plyboard. The sheets of plyboard were placed on top building blocks. On top of the plyboard sat the plaintiff, a sideman on the truck. On the journey, the wind (created by the speed of the truck) blew the plyboard with the plaintiff aloft off the truck and onto the ground.

The plaintiff suffered certain injuries as a result of this accident. He now brings this action against the Defendants to recover damages. He alleges that his employer(s) have failed to provide a safe place and system of work. Alternatively, that the said accident was caused by the negligence of his employer, its servants and/or agent.

The plaintiff's evidence is that he started working with an entity described by him as Reid's Hardware in 1981. He is illiterate. Apart from doing duties of a sideman, he stated that when he goes to work he did whatever he is instructed to do. This includes cleaning the yard. He testified that "Reid's Hardware" has four different sections. Three of which he was able to recall. They are Rolling Stock, Sand & Stone and Auto Products.

The plaintiff further testified that the plyboards were placed on top of the blocks but were not on top of the cement; they were loaded in that manner as one Tony Reid told himself and the other sideman that if anything happened to the plyboard they would be held responsible. He said further that he sat on the plyboard as they never gave them nothing to put on or to tie them down.

As a result of the accident the plaintiff suffered injuries which were mainly to his right ankle. The plaintiff was first taken to the May Pen Hospital and later to the Spanish Town Hospital that same day where he spent one week. He was afterwards transferred to the Kingston Public Hospital and he remained there for about 8 weeks.

The injuries sustained by the plaintiff and treatment given to him were described in medical reports which were by consent tendered in evidence.

The injuries were described as follows:-

(i) Compound fracture of the medial molleolus of the right ankle.

(ii) Fracture of the posterior molleolus of the right ankle.

(iii) Spinal fracture of the distal five (5) centimetres of the right fibula.

The treatment of the injuries involved an open reduction and internal fixation at the Kingston Public Hospital after an unsuccessful reduction was done at the Spanish Town Hospital.

Post operatively, the lateral wound became infected and the plaintiff had to be given repeated courses of antibiotics and dressings in the follow-up clinic. The fractures healed, but the plate and the screws over the distal end of the fibula became loose and in May 1988, under general anaesthesia, the plate and screws were removed. On that occasion he remained in hospital for two (2) days. After he was discharged, he returned on several occasions to the Fracture Clinic, K.P.H. and up to October 1988 the wound had not completely healed.

When the plaintiff was last seen at the Fracture Clinic in September 1989, the wound over the right ankle was well-healed and the fractures were

solid with bony deformity over the medial malleolus. Up to the date of hearing the plaintiff testified that even as he spoke the right leg pained him.

He said that he earned $75 per week at the time of the accident and that while he was hospitalized he was paid $50 per week.

In cross-examination the plaintiff said that a gate house or guard house is on the premises. In that house, in addition to certain spares that are kept there for trucks, a rope is also provided and kept there. The rope is used to tie down things such as plyboard and zinc on trucks. He, however, said that on the 10th July, 1985 no rope was available at - the gate house. That day, was not the first time that he had loaded plyboard on top of blocks in a flat-bed truck and sat on top of the ply-board. He denied that Vincent Pinnock, (the driver of the truck) told him to put bags of cement on top of the plyboard. However, in a statement given by him to Lindwall Powell, a supervisor, in the Reid Group of Companies on 18th July, 1985 he said that the driver told him to put some of the cement on the plyboard. The statement was, by consent, admitted in evidence as Exhibit 2.

Lindwall Powell gave evidence on behalf of the defendants. He is a Supervisor employed to the Reid Group of Companies. He said the group is comprised of four companies, namely, **Reid's Hardware Ltd.**
Sand & Stone Ltd.
Auto Products Ltd. and
Rolling Stock Ltd.

He stated that the 1st defendant sued as Reid's Diversified Ltd. is not a part of the Reid's Group of Companies.

He knew the plaintiff since 1983 when he started working with Reid's Group of Companies. He said the plaintiff was employed to the company Sand & Stone Ltd. On the day of the accident the truck on which the plaintiff was travelling and from which he fell was owned by the 2nd Defendant Rolling Stock Ltd.

According to Mr. Powell a number of labourers are employed to the Group of Companies. Some of them work as sideman on trucks. He testified that equipment consisting of rope, chain, a hook and tarpaulin,

is provided and kept in the gatehouse. It appears from Powell's evidence that once persons are employed as labourers within the group they may be assigned duties as are necessary irrespective of the entity that benefits from such duty. He further testified that on the morning of the 10th July 1985 the equipment referred to above was in the gatehouse.
He did not however see the truck being loaded, nor indeed when it passed through the gate.

In this action the plaintiff sues Reid's Diversified Ltd., Rolling stock Ltd. and Mr. H. C. Reid as the 1st, 2nd and 3rd defendants respectively.

At the close of the case for the defendants, Counsel for the defendants submitted that the plaintiff had not given any evidence capable of affixing any liability on either the 1st or 3rd defendants. With this submission Counsel for the plaintiff agreed.

Counsel for the defendants then submitted that although there is evidence that the truck from which the plaintiff fell is owned by the 2nd defendant, plaintiff has failed to prove that he was employed to the 2nd defendant.

It is clear from the evidence before me that particularly that of Lindwall Powell, Supervisor employed to the Reid's Group of Companies that the laboureres/sidemen are employed to the group and assigned duties to the respective companies within the group.

The 2nd defendant, Rolling Stock Ltd. is a member of the group.

Secondly, the truck on which the plaintiff was when the accident occurred was owned by the 2nd defendant, Rolling Stock Ltd.

Having regard to the evidence, I reject the submission of Counsel for the 2nd defendant and hold that the plaintiff was also employed to the 2nd defendant. The relationship of master/servant therefore existed between them at the material time. In **Donovan v Laing Syndicate [1893] 1 Q.B. 629**, Bowen L.J. said

> "We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by employer is meant the person who has a right at the moment to control the doing of the act."

The duty of an employer towards his servant is to take reasonable care.... .. so to carry on his operations as not to subject those employed by him to unnecessary risks. **See Smith v Baker [1891] A.C. 325**

It is common ground that the various items of building materials were loaded on a flat bedded truck. Prominent among these items were sheets of plyboard.

The master is under a duty to take reasonable care to employ competent servants and supervision. He is also under a duty to provide sufficient and safe equipment.

Did the 2nd defendant provide items of equipment at the guard house for securing building materials such as plyboard on a flat bedded truck?

Although Lindwall Powell testified that on the day of the accident rope, chain and other items of equipment were provided and available for use on the truck, I accept the evidence of the plaintiff that none of those items was available that day at the guardhouse.

I therefore find that the 2nd defendant failed in its duty of care towards the plaintiff in failing to provide equipment to fasten the plyboard on the truck. I find that the case of Paris v Stephney y Borough Council [1951] A.C. 367 is instructive. In that case a workman was injured on the job when metal chip hit him in his eye. He successfully claimed damages against his employers in respect of the injury on the ground that they were negligent in failing to provide and require the use of goggles as part of the system of work. It was also submitted by Counsel for the 2nd defendant that the plaintiff was negligent in that he was given specific instructions by the driver of the truck to put bags of cement on the plyboards and that he failed to do so. Had he done so the accident would have been avoided.

The plaintiff is illiterate. From my assessment of him, I find that he appears to be simple minded. He testified that after the truck was loaded one Tony Reid(presumably someone in authority) told him and the other sideman that if anything should happen to the plyboard they would be held responsible. In those circumstances I do not think it was unreasonable for the plaintiff to disregard the instructions of the driver.

Further, the plaintiff had on previous occasions while the truck was loaded, sat on top of plyboards.

In answer to counsel for 2nd defendant, the plaintiff said that he thought his weight could have kept down the plyboard. It was suggested in cross-examination of the plaintiff that he got up to go to the front of the truck when the breeze blew the plyboard off truck. To this he responded in the negative. There was no evidence led on behalf of the 2nd defendant that the plaintiff had attempted any such action.

Was the plaintiff negligent?

If the fact of seating himself on top of the plyboard can be considered a risk, then what must be decided is whether the risk was reasonable. In **Clayards v Dethick (1848) 12 Q.B. 439** it was held that taking a reasonale risk is not contributory negligence. Although the decision was criticised it was later followed in **Billings & Sons Ltd. v Riden (19580 A.C. 240.**

In all the circumstances, I do not think it can be said that the plaintiff took an unreasonable risk. I therefore hold that he did not by his action contribute to his downfall.

Counsel for the plaintiff did not find much comfort in the state of the evidence in so far as it relates to the liability of the plaintiff's employer to provide safe place and system of work. She preferred to rely on the basis of liability as pleaded in paragraph 5 of the statement of claim - which reads -

> "Alternatively and further, the accident aforesaid was caused by the negligence of the Plaintiff's employer its servant or agent."

She buttressed her submissions on the following:

(a) the truck was owned by the 2nd defendant.

(b) that the plaintiff was on the truck.

(c) that there is a prima facie presumption that where plaintiff proves that damage has been caused by the defendants motor vehicle, the fact of ownership of the motor vehicle is prima facie evidence that the motor vehicle was at the material time being driven by

the owners, his servant or his agent.

In support of this presumption she relied on **Barnard v Sully (1931) - 47T1R 557 & Rambarran v Gurrucharran [1970] 1 All ER 749.** These cases are in the main illustrative of the doctrine of vicarious liability. I do not think Counsel's submissions in support of this head of liability is well founded. She sought to place great emphasis on a portion of the plaintiff's evidence that the truck was being driven at a speed of about 50 m.p.h. at the material time.

The plaintiff's evidence on the speed of truck cannot be accepted as there was no basis on which he came to that belief. I hold on a balance of probabilities that having regard to the physical condition of the road leading to the intersection, it is not likely that the truck could have attained the speed of 50 m.p.h. The driver of the truck as the servant ora gent of the 2nd defendant was not shown to be negligent. There is therefore no basis on which an employer would be held vicariously liable.

I would give judgment for the plaintiff against the 2nd defendant. Judgment against the plaintiff in favour of the 1st defendant and 3rd defendants with no costs to the 1st defendants. The costs of the 3rd defendant to be borne by the 2nd defendant.

THE DAMAGES

SPECIAL DAMAGES

The general rule is that Special Damages which represents some specific item of loss must be specially pleaded and proved by the plaintiff. I find that the items of Special Damages which were pleaded including those granted on the application to amend pleadings at the trial have been proved. They total $7,645.00.

ON GENERAL DAMAGES

The plaintiffs injuries have already been referred to. The plaintiff underwent three surgical procedures between the date of the accident and May 1988. It is clear from the medical reports that the wound over the right ankle joint was not healed until sometime in 1989, almost four

years after the accident.

The expert medical opinion has assessed the plaintiff as having a permanent partial disability of 10-15 percent of the functions of the right leg.

Counsel on either side referred the Court to several cases reported in Khan's Personal Injury Awards. As there are no two personal injuries cases alike, one has to use past awards only as a guide in arriving at an award for General damages which appears just in all the circumstances. In addition to the plaintiff's regular employment he also did gardening from which he earned $50 - $60 per day. Since the accident he has been prevented from pursuing his gardening activities as his ankle swells and pains whenever he attempts to do so. He also said that he used to play football and cricket but cannot do so since the accident.

In making an award for general damages I have also taken into account the fact that the plaintiff was about 27 years old at the time of the accident, was a labourer and illiterate. Such is his situation which does not leave him with much options by way of other employment.

I would award the plaintiff the sum of $240,000 for Pain and Suffering and Loss of Amenities. The plaintiff will have judgment as follows:

Special Damages	-	$7,645.00 with interest at 3% per annum with effect from 10/7/85 to 6/10/95.
General Damages	-	$240,000 with interest at the rate of 3% per annum with effect from 3/1/92 to 6/10/95.

with cost to be taxed if not agreed.