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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. D. 216 OF 1986

BETWEEN	SAMUEL DURRANT	PLAINTIFF
A N D	UNITED ESTATES LIMITED	DEFENDANT

Ainsworth W. Campbell for Plaintiff.

Garth McBean for Defendant.

APRIL 3, 4 and JUNE 13, 1991.

SMITH, J:

The plaintiff, Samuel Durrant - a 52 year old man, sued his employer, United Escates Limited, for damages in respect of personal injuries suffered in the course of his employment as a sideman on the defendant's truck. He had been so employed since 1970. The defendant owns trucks which are used to transport sugar cane from the field to the factory.

The plaintiff testifies that on the 26th February, 1986, after a grabber had put a load of cane on a truck he chained the cane unto the truck. The chain he said came from Worthy Park "but United Estates Limited is responsible for it". He later under corss-examination amplified this by saying that the chains are hired by the defendant from Worthy Park.

As I understand his evidence the ends of the chain are held together by a catch or clasp known as a "chain dog". This "chain dog" is used to buckle the chain which is placed across the truck from one side to the other. Before the chain is buckled it is drawn tightly by the sideman to ensure that the cane is held firmly. The plaintiff said that on this day in question he was satisfied that the cane was "chained up properly". The truck was on its way to the factory travelling on the New Hall Road when it was brought to his attention that the chain was overhanging and that cane was falling from the truck. The truck stopped. He got out of the cab of the truck where he was riding with the driver. He climbed onto the body of the truck, stood on top of the cane and was drawing the chain to tighten it when the notch flew out of the "chain dog" and he was flung off the truck to the ground. He landed on his hands and knees and suffered injuries.

By Writ filed on the 17th November, 1986, the plaintiff, Mr. Durrant, seeks to recover damages from his employer, the defendant for negligence. The particulars of negligence averred in paragraph 7 of the statement of claim are:

(a) Failure to provide a safe system of work;

(b) Failure to make sure that the chain, the dog and all items (sic) used in securing the cane in the truck were safe for the plaintiff's use;

(c) Failing to have any or sufficient regard for the plaintiff's safety;

(d) Providing worn and inadequately repaired chain and dog for the plaintiff to use to his deteriment;

(e) Res ipsa loquitur.

In its defence the defendant denies that the injuries were caused by its negligence. The defendant pleaded that the injuries must have been caused by the plaintiff's own negligence in -

(a) failing to exercise reasonable care in buttoning the chain dog;

(b) failing to take a proper and secure position on the truck in the course of attempting to re-button the chain dog;

(c) failing to examine the chain dog to ascertain that it was not in any way defective or alternatively, failing to report to the defendant any defect in the chain dog that was discovered.

The issues:

At common law the duty of an employer to his servants is to take reasonable care for their safety. In Davie v. New Merton Board Mills Limited (1959) A.C. 604, the House of Lord held that this duty is not an absolute one and it can be performed by the exercise of due care and skill.

The first real issue therefore is whether or not the defendant, United Estates Limited, had taken reasonable care for the safety of the plaintiff, Mr. Durrant.

Mr. McBean for the defendant submitted that in light of the pleading the defendant has come to meet a case dealing only with the duty of the defendant to provide a safe equipment viz chain and chain dog. Surprisingly

Mr. Campbell for the plaintiff seems to agree he says -

> " The plaintiff's case is about the defective chain and whether there was a need to have a system in place as regards the chain".

However an examination of the pleading and the law applicable will in my view show that such a limitation should not be placed on the pleading. In Wilson v. Tyne-side Window Cleaning Company (1958) 2Q.B. 110, 123-124 Parker L.J. said that the common law duty of the master is a single personal duty. Indeed Lord Oaksley in Paris v. Stepney B.C. (1951) A.C. 367, 384 said:

> " The duty of an employer towards his servant is to take reasonable care for the servant's safety in all the circumstances of the case".

This duty extends to the safety of the place of work, the plant and machinery, the method and conduct of work and others. The particulars of negligence pleaded in the statement of claim state, sufficiently clearly, the nature of the case on which the plaintiff relies - see paragraph 7 of the statement of claim referred to above. Thus the question for the court is: Did the defendant take reasonable care so to carry out his operations as not to subject the plaintiff to unnecessary risk? In the instant case in discharging this duty the master must -

(i) provide and maintain adequate appliances or equipment; and

(ii) provide a safe system of work.

Adequate appliances or equipment

In this regard Lord Herschell in Smith v. Baker 1891 A.C. 325, 362 described this branch of the duty of a master at common law as the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition and so to carry on his operations as not to subject those employed by him to unnecessary risk.

As said before, this duty is not absolute - fault mustbe established. It is also non-delegable.

Has the defendant taken reasonable care to provide a safe chain and chain dog?

Let me state at the outset that I accept Mr. McBean's submission that in this case res ipsa loquitur cannot apply - he cited and relied on Hardy v. Thames and General Lighterage Limited (1967) Volume 1 Lloyds List Law Reports and other authorities which I accept in principle.

Was the chain dog defective?

Mr. Durrant testified that he buckled the chain dog. He tightened the chain, the notch flew out of the dog and he was flung to the ground.

Under cross-examination, he said that the chain has to be stretched before any defect can be discovered. The defect is usually in the buckle - the dog. If the chain is not buckled properly that may cause it to fly. Before the truck left the field he stretched the chain and buckled it. He was satisfied that the cane was chained up properly before truck left the field.

Whilst the truck was on its way to the factory he noticed that the chain was loose. He could not say why the notch flew because he did not see the chain after the accident. Mr. Bowie, a witness for the defendant said the notch will fly if it is not properly buckled or if it is worn.

There is no evidence before me that the chain was not properly buckled. I accept Mr. Durrant's evidence that he buckled the chain dog. I find therefore on the balance of probabilities that the notch flew because it was worn.

Was the defendant in breach of his common law duty?

The evidence that I accept indicates -

(i) The chain and chain dog are hired from Worthy Park;

(ii) Worthy Park does not manufacture chain or chain dog;

(iii) Two or three days before the reaping of cane begins some chains are sent for and kept in the storeroom of the defendant;

(iv) The chains are not examined by the defendant;

(v) The practice is for the sidemen to run the chain through the "chain dog" so as to ensure that the dog is in proper working condition;

(vi) Apart from what the sidemen do there is no system of checking the safety of the chain or "chain dog" by the defendant;

(vii) The defendant does not know if there is any system of checking the safety of chains and chain dog at Worthy Park;

(viii) The defendant does not know "anything about the maintenance of chain at Worthy Park".

(ix) Defendant is aware that "chain dog" do go bad from time to time;

(x) Worthy Park repairs defective "chain dog".

(xi) Defendant is aware that "if chain is defective it can be dangerous".

Apart from Mr. Bowie, the defendant's Assistant Cultivation Manager, saying under cross-examination that "it is accepted that chains and dogs are safe" - a rather vague and unhelpful statement - there is no evidence that the chain dog provided was safe. There is no evidence of a proper and reasonable system of inspection of the chains and/or chain dogs being in place. The only evidence in this regard is that the sidemen were to do their own examination for patent defects. Mr. McBean submitted that this was a reasonable system. He pointed to Mr. Durrant's evidence that it is possible on examination to see defects in the notch. It was the plaintiff's duty he, urged, to ensure that the chain dog was working properly. The defendant was entitled to rely on the plaintiff's skill and experience in this regard, he submitted. For this he relied on Richardson v. Stephenson Clarke Limited (1969) 1 W.L.R. 1695. But this case may be distinguished from the present one in that in the former the employers made available to the servant, safe and adequate equipment and the servant who was competent and experienced selected equipment which were not adequate for the work. It was held that the employer could not be negligent in those circumstances in leaving the selection of the equipment to the plaintiff. It was reasonable and prudent in the circumstances to leave to the workman the task of selcting the equipment. In this case the question is whether it was reasonable for the employer to leave it to the sideman to do his own examination of the chain and chain dogs for defects.

The defendant cannot in my view rely wholly on the plaintiff's "skill" as an experienced sideman to detect defects in the chain and chain dog.

It might well be said, as in Jenner v. Allen West and Company Limited (1959) 1 W.L.R. 554, that the defendant was guilty of negligence in relying solely on the experience of the sideman. There is no evidence that only

experienced employees are used as sidemen. Indeed the evidence is that the plaintiff from the start of his employment with the defendant had been "chaining" cane. How then, can the defendant claim that the 'system' by which the sidemen were trusted to do their own examination is a reasonable one?

In each case it is a question of fact whether the employer has failed in his duty by doing no more than to trust the experience of his servant - see Jenner v. Allen West supra.

Mr. McBean also submitted that even if there was a defect in the chain dog such defect must have been latent bearing in mind Mr. Durrant's evidence that he ran the chain through the "chain dog" and it was running freely. In such a case, he argued, the employer is not liable for a latent defect which could not have been detected on reasonable examination. But can an examination done by the plaintiff be said to be reasonable? All the circumstances of the case must be considered.

Mr. Durrant testified that he is 52 years of age. He has been working with the defendant from 1970. Up to time of accident he had been working as a sideman "chaining up canes with same type of chain".

Apart from this evidence there is nothing to indicate that he is competent in testing the safety of chains and chain dogs. Mr. Bowie said it takes close examination to discover a defect in the chain dog. If the chain is defective it can be dangerous, he conceded.

It cannot in my view, be reasonable and prudent to leave such an examination to be done by a sideman. The employers liability is only discharged by the exercise of due care and skill. I am not satisfied on the evidence that such defect, even if it was latent, could not have been detected on reasonable examination.

It was strongly contended by Mr. McBean that the defendant has fulfilled its duty by relying on the skill and judgment of Worthy Park who to the knowledge has a system of examination.

What is the evidence here? It is agreed that Worthy Park supplies the chains. It is not known who the manufacturers are. There is no evidence that the chains and chain dogs were of a standard pattern bought from

reputable manufacturers. There is no evidence of any system for the maintenance and examination of chains by Worthy Park. What we have is the evidence of Mr. Bowie who said that he is not familiar with the process of examination of the chains at Worthy Park. He said the chains are not made at Worthy Park. He does not know anything about the maintenance of chains at Worthy Park. Worthy Park repairs the chains when they go bad. There is nothing about the skill and competence of Worthy Park in the examination and maintenance of chains. I find that the proposition that the defendant has fulfilled its duty by relying on the skill and judgment of Worthy Park is untenable. In the end I am satisfied that the defendant has failed to take reasonable care to provide a safe chain dog.

Safe system of work:

The employer has a duty to take reasonable steps to provide a system which will be reasonably safe having regard to the risks to which his employee is exposed.

The evidence of the plaintiff is that his duty requires him to climb to the top of the truck loaded with cane in order to buckle the chain dog. To carry out this exercise of buckling the chain dog, he has to stand on loose cane, and pull hard on the chain to tighten it. According to Mr. Bowie the cane is usually packed 2 ft. above height of the truck. The body of the cane truck, he said, is about 8 ft. high.

Mr.Lewis testified that sidemen are provided with safety caps, safety glasses and workmen's gloves.

It is interesting to note Mr. Durrant's evidence that since the accident, tractors are used to tighten the chain around the cane on the truck. "The system now has changed" he stated approvingly. "In 1986 when we buckle the chain we have to draw it tight on the cane. Now we just buckle it and the tractor draw it and tighten it".

Mr. Bowie states that tractor sometimes pull the chain but that "it is not a system and when there is no tractor sidemen have to pull the chain". Mr. Bowie, as stated before, admits that if chain dog is defective the operation described above can be dangerous. It seems to me that even if the chain dog is not defective, standing on loose cane packed at least 2 ft. above

the height of the body of the truck and, pulling the chain to tighten it is an inherently dangerous operation.

In my view the defendant's duty of care extends to instructing the sidemen not to load cane beyond the height of the body of the truck whenever the 'chaining' of the cane is to be done manually. This certainly would be a reasonable exercise of care to guard against the risk of a sideman falling off the truck in the execution of his duties. Failure by the defendant to prescribe a system whereby the sidemen are so instructed and warned is, in my view, in breach of the defendant's common law duty to take reasonable care to prescribe a safe system of work.

Damages:

I must now consider damages.

Special Damages:

The accident happened on 26th February, 1986. Mr. Durrant, said he went back to work in January, 1987. He could not work before then because of pain in his wrists. Incidentally he resumed his job with the defendant and as I understand it, he still works with the defendant.

The crop season ran from January to June, and still does, during which time he earned $250 per week. Ordinarily he would not work with the defendant between July and December each year. However he testified that he did his own farming during the off-crop season and would earn around $310 per week. Because of recurring pain, the plaintiff said he has to stay away from work each year for about 6 weeks, during which time he does not receive any pay.

Having regard to his evidence and the pleadings he is entitled to the following awards:

For 1986 - March to June i.e. 15 weeks at $250 per week	- $ 4,000.00
July to Dec. i.e. 24 weeks at $250 per week	- 6,000.00
	$10,000.00
For years 1987-90 at 6 weeks each year i.e. a total of 24 weeks at $250	- 6,000.00
Thus the total award for loss of earnings is	- $16,000.00

The following claims are supported by the evidence and amended pleadings -

(i)	Transportation to and from doctors	200.00
(ii)	Medication and doctor's fees	150.00
(iii)	Xrays fees	200.00
	TOTAL AWARDED AS SPECIAL DAMAGES	$16,550.00

General Damages:

The plaintiff is 52 years of age. His evidence, which was not contradicted, is that he fell on his knees and hands. He was unconscious for about one hour. When he came to, he was at the hospital. His wrists were swollen and painful. He was feeling pain in his chest and knees. He was treated at the hospital and sent home. His wrists were placed in plaster of Paris which was removed after three months.

He still suffers from intermittent pain in the wrists and sometimes has to be off the job for up to six weeks each year. When he uses cutlass his wrist pains. This has forced him to reduce his farming activities. He told the court that he is unable to make a fist. (When witness demonstrated, this inability was not pronounced).

The doctor who treated the plaintiff at the hospital was not available to give evidence. The plaintiff was seen by another doctor on the 2nd July, 1990, some four years after the accident. This doctor testified that when she saw the plaintiff the fractures were healed. She spoke of the plaintiff's inability to make a fist, tenderness at the joints, painful movement of the wrists, a loss of 20% of movement of the wrists and the arthritic condition of the wrists.

A medical report dated 2nd July, 1990, and signed by this doctor was, by the consent of the parties, received in evidence as Exhibit 1 during cross-examination. This report makes no mention of arthritis or the plaintiff's inability to make a fist.

The doctor under cross-examination admitted that she could not say whether the arthritic condition which caused the inability to make a fist existed before the date of the accident. For obvious reasons the doctor was not in a position to be of much help to the court.

However from the plaintiff's evidence that his wrists were placed in plaster of Paris the court may, and I so do, draw the inference that the plaintiff's wrists were fractured.

I will now deal with general damages under the different heads referred to by Mr. Campbell for the plaintiff.