JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 105/92

COR: THE HON. MR. JUSTICE CAREY P. (AG.)
THE HON. MR. JUSTICE WOLFE J.A.
THE HON. MR. JUSTICE HARRISON J.A. (AG.)

BETWEEN ADALTON FISHER PLAINTIFF/APPELLANT

A N D TEAK & COMPANY LIMITED DEFENDANT/RESPONDENT

Ainsworth Campbell for appellant

Miss Nancy Anderson & Mrs. Kim St. Rose for respondent

May 25 & June 21 1993

HARRISON J.A. (AG.)

This is an appeal from the judgment of Morris J. (Ag.) delivered on the 29th of July 1992, in a claim for damages for negligence in which he entered judgment for the respondent with costs to be agreed or taxed. We dismissed the appeal and promised to put our reasons in writing. We do so now.

Mr. Campbell for the appellant advanced before us as his grounds, that the learned judge, having found that there was an inherent fault in the manner in which a quantity of steel had been packed in the truck, and that the steel belonged to the respondent/employer, failed to assess correctly the issue of causation, namely that, as a consequence, the said respondent/employer was responsible for such faulty packing. He further argued that the judge wrongly emphasized, as material, the ownership of the truck and failed to appreciate that the truck and contents were under the control of the respondent/employer who had held out to the appellant/employee that the steel had been properly packed and could be safely removed and was therefore liable for the appellant's injuries.

At the trial, the appellant and his witness gave evidence. The respondent led no evidence.

The learned judge found that the appellant, a steel fitter, was sent on the 4th July 1988 by his employer, the respondent, a construction company, to assist other workers to unload a quantity of steel bars from a truck. The truck had transported it to the construction site on which they were engaged in New Kingston. There were thirty bundles of steel bars and these were stacked in tiers with each layer separated by wooden planks called polleens. There were about five to six bundles in each tier. The appellant, standing on the roadway and using a crowbar held by a fellow workman and himself, was attempting to prise the last remaining bundle of steel bars from the truck when the wooden plank on which it was resting and which "consisted of two sections joined together," separated. The bundle of steel suddenly slipped "skidded around," fell and injured the appellant on the left ankle. He was hospitalized for 115 days. The appellant and his fellow workmen, using the same method had successfully unloaded from the truck, twenty-nine bundles of steel.

Mr. Campbell argued that the learned judge, having found that the sole cause of the accident was the defective plank and that the steel was owned by the respondent, should have drawn the inference that the respondent was thereby in control of the packing of the steel in the truck and consequently, owed a duty to the appellant, its employee. He based his reasoning on the fact that the respondent's denial of the appellant's averment in the statement of claim of "failing to properly place the steel in the truck," is an admission that the respondent had placed the steel on the truck, albeit, not properly.

We found that the reasoning was entirely illogical, to say the least. The respondent was clearly joining issue with the appellant who was required to prove at least, that the respondent

the accident. Thus, in the case of Cole v. De Trafford [1918-19] All E.R. Rep. 290, where a chauffeur was injured by a fall of a pane of glass above the garage at which he was employed, and the circumstances were such as to show negligence on the part of somebody, but not necessarily personal negligence on the part of his employer, it was held that the chauffeur's action for damages could not succeed. Pickford, L.J. said of the master's obligation at p. 293:

> "... A servant has been held to accept many risks of his employment, but he does not accept them all so as to leave the master without any obligation towards him ... the master's obligation ... is an obligation not by his own personal negligence to expose the servant to danger ... and in the result it will come to the question whether in the circumstances of the case the master ... failed to exercise reasonable care and skill, i.e., had been negligent,..".

Scrutton, L.J., at p. 296 confirmed that:

> "... The master does not absolutely warrant safety." ...

The author in Charlesworth & Perry on Negligence 7th edition, in dealing with the principle of causation, said at paragraph 5 - 20:

> "Before a case can be considered, either direct or circumstantial evidence must be called on behalf of the plaintiff ... it must tend to show how the accident happened and how as a result he sustained his personal injuries ... Such evidence must show that on a balance of probabilities, the most likely cause of the damage was the negligence or breach of duty of the defendant, his servant or agent and not solely the negligence of some other person. If he fails to establish that the defendant caused the harm, of which he complains, or some part of it, then his action will fail..."

and at paragraph 11 - 38:

> "... an employer is not liable to his servant for any damage suffered, arising out of the ordinary risks of the service, when there is no negligence on the part of either himself or his servant."

The test therefore is one of causation.

The learned judge justifiably found:

> "... from the Plaintiff's account of the accident ... the sole cause thereof was the use of a defective plank."

The appellant's pleading of the particulars of negligence of the respondent referred to an aspect of this finding:

> "(a) Failing to properly place the steel in the truck;
>
> (b) Failing to provide a sufficient anchorage for the steel in the truck."

The question therefore arises - Was the respondent or his agent responsible for the placing of the steel in the truck and anchoring it with a defective plank so that as a consequence, the plank "separated" causing the steel to fall on and injure the appellant, thereby making the respondent liable?

The appellant as we have previously indicated, led no evidence before the learned judge to support his assertion that the respondent placed the steel in the truck and did so improperly. Neither was any evidence led to support the further assertion of the faulty anchoring of the steel by the respondent.

Before us, counsel for the appellant failed to appreciate the basic requirement of the proof of causation to launch his claim of liability. His criticism of the learned judge's observation of the lack of evidence of the ownership or control of the truck in the respondent, fails to grasp that therein could lie proof of risk and as a consequence, causation. It is noteworthy that in the endorsement to his writ, the appellant alleged that:

> "... <u>both truck and steel</u> belonging to the defendant ..." [Emphasis added]

but he departed from that pleading in his evidence-in-chief stating:

> "... it fell off <u>a trailer</u> body ... <u>steel belonged</u> to Teak & Co. Ltd."
> [Emphasis added]

The fact of the relationship of employer and employee and the attendant duty of care does not absolve the appellant from proving the cause of the negligence. There was no breach of the respondent's primary duty to the appellant. This was not a hazardous operation to cause the said duty to be seen as having been breached. On the evidence, twenty-nine of the thirty bundles of steel were off-loaded without incident.

In the circumstances, the learned judge was correct in holding that the fault shown was not attributable to the respondent to give rise to a complaint that he caused the accident resulting in injury to the appellant.

CAREY, J.A.

I agree.

WOLFE, J.A.

I agree.