IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L. H-104 OF 1994

BETWEEN	DOROTHY HENRY	PLAINTIFF
AND	SUPERIOR PLASTICS LIMITED	DEFENDANT

Mr. Clyde William instructed by Haughton & Associates for plaintiff

Mr. Debayo Adidepe for defendant

May 13, 14, 16 and June 6, 2002

Sykes J (Ag)

November 20, 1991 will live long in the memory of the plaintiff. That was the day on which she was injured at her place of work, Superior Plastics Limited, located in salubrious Mandeville, Manchester. The plaintiff in this matter has lost four fingers on her right hand and the distal phalanx on the thumb of her right hand. According to the medical report of Dr. Ian Titus, dated July 28, 1992, the injuries received by the plaintiff meant that she lost "90% of her hand function [which] represents a (sic) 81% loss of upper limb function and a 49% loss of whole body function." The plaintiff herself says that since her accident she is unable to work. She is unable to comb her

hair, cook her meals or wash her clothes. The plaintiff now has the function of her left hand only.

She now seeks to recover damages for her injuries from her employer by bringing an action under the Factories Regulations made pursuant to the Factories Act and for breach of the employer's common law duty of care to provide a safe system of work for employees. At the commencement of the trial the plaintiff sought, without objection from the defendant, to amend the endorsement on the writ of summons and the statement of claim. The writ and the statement of claim bear the same date, April 28, 1994. The endorsement on the writ did not refer to any breach of statutory duty but only to a claim in negligence whereas the statement of claim particularised the claim in both negligence and breach of statutory duty. Mr. Williams sought to amend the endorsement to include a claim for breach of statutory duty and to amend the statement of claim to add that the defendant was in breach of their common law duty to provide a safe system of work with effective supervision. These amendments were granted.

Shortly after cross-examination of the plaintiff began Mr. Adidepe, for the defendant, applied to amend his defence by deleting "1993" and substituting it with "1991" in paragraphs 1, 3 and 4 of the defence. This was clearly an error since it is agreed that the accident occurred in 1991 and not 1993. The amendments were granted.

THE EVIDENCE

The plaintiff contended that she was a weekly paid employee of the defendant. Her employment with the defendant began on July 25, 1991 and ended on November 20,

1991, the date of her injuries. She says that she was employed to do a number of tasks including operating the machine that she says injured her. According to the plaintiff, she was taught to operate the machine by Mrs. Senior (called Mrs. Beswick by plaintiff) who was a manager of the defendant company. The plaintiff said that the machine that she was taught to operate functioned in this manner: the machine made large pieces of plastic. The machine by some process would make the piece of plastic and when it was ready to be removed a red light would come on. This would alert her to the fact that a piece of plastic was now made and ready for removal. She would open the door with her left hand and remove the plastic from a part of the machine that was described as a "round piece" with her right hand. From the description I formed the view that it was similar to two rolling pins, only much larger. The piece of plastic when it emerged from the machine would be hot to the touch. She would have to grab hold of it, remove it quickly from the machine and deposit it on a nearby table. The door would then be closed and the machine would resume its cycle. The plaintiff said that at times the plastic would be so hot that it would fall from her hands to the floor. She added that the machine itself generated much heat. She says that she was not provided with any gloves to handle either the door or the plastic. She said further that the red light would remain on even after the plastic was removed and would only go off when the door was closed.

On the fateful day she was operating the machine in the manner above when a piece of plastic got stuck. Despite her strenuous efforts she could not remove the plastic from the "round piece". She tugged even harder but it would not

budge. The next thing she knew was that her right hand was caught in the "round piece". When this happened she says that no one else was in the factory. Her cries of anguish brought no response until after a period twenty minutes when another co-worker, one Miss Brown, entered the factory, saw what was happening and raised the alarm. At one point she said that Miss Brown raised the alarm and then fainted immediately. At another point she said that it was Miss Brown who removed her hand from the machine. In cross-examination she said that she could not say who took her hand from the machine because she was "so fainted". Despite being "so fainted" she was able to see Mrs. Senior and Mr. Wright, the supervisor, rushing into the factory after Miss Brown had screamed. She said that it was Mr. Wright who turned off the machine.

The plaintiff said that prior to her employment in the factory she had never worked in a factory before and in relation to the machine she only had received only two weeks training. She said that she told Mrs. Senior that the machine was dangerous and the response was, "Nothing will happen to you."

To bolster her case, she added that the machine did not stop operating when the door was opened. The "round piece" moved from back to front and this motion continued when one was removing the plastic. She said that she was not able to turn off the machine because she was not taught how to do this.

As I listened to the plaintiff I could not help but think that she was describing a factory that had only been catapulted forward in time but remained essentially a nineteenth century operation that existed during the worst days of the industrial revolution.

For good measure the plaintiff added that the factory contained twenty five machines and while the machines were operating a tremendous din was created that had the effect of smothering her screams. In addition she said that in the factory music was playing very high volume. This was no doubt put forward as an explanation for the apparent lack of response to her cries of distress for twenty minutes. No other witness testified for the plaintiff.

The plaintiff, in an attempt to demonstrate that she worked at the machine asserted throughout her evidence, that she does not interfere with anything unless she is given specific instructions to do so. No doubt she was saying that she would not be at the machine unless she was placed there to work. No other witness testified for the plaintiff.

The defendant called three witnesses - Mrs. Senior, Mr. Wright, the supervisor and Mr. John Senior who was also a supervisor as well as the brother in law of Mrs. Senior. Mr. Wright and Mr. Senior were also responsible for the maintenance of the machines. Mrs. Senior and the other witnesses made it abundantly clear there were only four machines in operation at the factory. The technical descriptions came from Mr. Wright and Mr. Senior. The machines were Reed Injection Moulding machines. They varied in size and tonnage but those at the factory were of two types: 150 tons and 300 tons. There were two of each. From the explanation given by the two gentlemen these machines were quite sophisticated. Both types machines could be operated in either full automatic or semi-automatic mode.

Full automation was said to be appropriate for the 150-ton machine because it made small items such as the cover for a 16oz bucket of ice cream.

The 300-ton machine made bigger objects and although it could be completely automated it would not be prudent to operate it in that manner.

Full automatic mode/operation means that the machine can make its products without any human being needed to operate the machine or touch the machine save to add more raw material to the hopper. In other words, once the machines were properly calibrated and enough raw material was in the hopper and the machine switched on, barring some malfunction, it would make the products until the raw material was finished.

Semi-automatic mode means that human intervention was needed to remove the finished product from the taddle.

Both types of machines operated in identical manner save that the 300-ton machine was in fact operated as a semi-automatic machine. What follows is a description of the operation that is common to both machines. Where they differ I will so indicate.

According to Mr. Wright, in the mornings as soon as he arrived at the factory the machines would be switched on. Next he would go to an electrical panel that provided the electrical energy that heats a barrel that is on the machines. This barrel liquefies the polystyrene that is used to make the plastic products. The polystyrene gets to the barrel from a hopper into which the material is placed. After the barrel has been heated for some time a small sample is ejected from the barrel for the purpose of seeing whether it is of the right consistency to be used in the manufacturing process. This sampling is called "purging". The heater was controlled by timers that tripped on and off thereby regulating the temperature of the barrel. This was the method of regulating the temperature in the barrel. The

barrel itself is movable. It can be slid forwards and backwards.

When it was determined that the material was of the appropriate consistency the barrel would be moved forward to another part of the machine known as a taddle. This taddle has two parts: male and female. The male portion of the taddle is mobile and moves back and forth along a slide rail. The female portion is immobile. The barrel is brought to the female part of the taddle. The material inside the barrel is ejected into the taddle that has a mould that shapes the liquefied material that is ejected from the barrel. Around the mould that is in the taddle there is a cooling system that reduces the temperature of the material from the barrel. This cooling system reduces the temperature of the product that has been "moulded". After the product has been cooled the male part of the taddle moves, with the product away, from the female.

On the 150-ton machine the product is removed from the male part of the taddle without human intervention. The product is removed by what is known as an ejector. Once the product is ejected from the male part of the taddle it rolls along a ramp, that is a part of the machine, and deposits itself in a box beneath the machine. This is why this machine is described as fully automated. Thus once the machine is functioning properly and it is operating in full automatic mode there is no need for any human being to handle the machine. From the evidence, human intervention becomes necessary if the taddle is stuck. This I understand only happens if the male and female parts of the taddle are stuck together. This usually occurs because there is some malformation of the product on the mould of the taddle and so the male portion cannot move away from the female. To

remedy this situation, a door that has a transparent glass is opened. Once this door is opened the male portion of the taddle moves back and then the obstruction is removed. According to Mr. Wright and Mr. Senior the taddle is never stuck with the male part away from the female part. The only time when the parts are not together is if the door was opened. From the evidence it is clear that once the 150-ton machine is fully automated no human being has to do anything to the machine other than add more polystyrene to the hopper so that it can make the products. Mr. Senior said that the machine could operate for several days once it has sufficient material in the hopper.

The 300-ton machine worked in the same manner save that the product is removed manually. It is this manual removal of the product why its operation was described as semi-automatic. The door on this machine is similar to that on the 150-ton machine and operates in an identical manner.

Both machines have identical safety features. On opening the door, the male part of the taddle slides away from the female part along a slide rail. As described to me, the male portion of the taddle slides backwards and forwards. A number of electronic switches as well as a mechanical block prevent the male part of the taddle from moving back toward the female part unless and until the door is closed. If the door is opened the male part of the taddle slides back and cannot move forward until the door is closed. This rail has grooves in it. Once the door is opened and the male part of the taddle slides away from the female part metal bars fall into the grooves. This is the mechanical block of which mention has been made. The bars are only lifted if the door is being closed. A device on

the door lifts the bars and thus the male portion is freed to join the female portion.

The 300-ton machine that was at the defendant's factory at the material time was used to make one-gallon ice cream buckets. This machine is the larger of the two kinds of machines.

As the case developed it seemed that the plaintiff was saying that the 300-ton machine crushed her fingers. She says that she was operating the larger of the two types of machines that she saw there.

From the description given by Mr. Wright and Mr. Senior it is clear that the male portion of the taddle is a moving part of the machine. Both men say that in respect of the 300-ton machine one cannot touch the taddle while standing on the floor unless the door is opened. If the door is not opened one would have to stand on a table or be of very great height to touch the taddle on the 300-ton machine. Mr. Senior was more graphic. He said that one would have to be a giant to be able to reach the taddle on the 300-ton machine with the door closed.

Some one standing by the machine and placing their hand slightly upward, forward and downward towards the taddle can reach the taddle on the 150-ton machine. The taddle from this description is on top and down in the body of the 150-ton machine.

None of the witnesses was able to give the precise height of the machine. This is an important aspect of the case. A determination of the height of the machine is critical. This finding will go a far way in determining whether the taddle was dangerous within the meaning of regulation 3(1) of the Factories Regulations. From the demonstrations given in court by Mr. Wright and Mr. Senior

of how one could touch the taddle of the 150-ton machine while standing on the floor it would seem to be between five feet four inches to five feet seven inches in height. Mr. Wright said that if the 150-ton machine became stuck a person could put their hand over into the taddle and try to free it. This must involve some pulling and tugging. This would suggest that a person standing on the floor could get sufficient leverage to remove the obstruction. I use the evidence of Mr. Wright and Mr. Senior to determine the height of the machine.

The plaintiff's description of the machine is unreliable.

The plaintiff says that on November 20, 1991 it was Mrs. Senior who assigned her the task of operating the machine. Mrs. Senior denies this and in this Mr. Wright supports her. Mr. Wright says that the plaintiff was assigned the task of trimming the plastic lids. Both Mrs. Senior and Mr. Wright say that she was never ever employed to and has never been instructed or permitted to operate any of the machines.

Mrs. Senior and Mr. Wright deny that the plaintiff was a weekly employee. They say she was employed from time to time to trim finished products and not to operate any machine. Mr. Wright says that the plaintiff worked at most three days in any one week. Mrs. Senior was less generous. She says that plaintiff worked at most one or two days per week any time she was employed. Mrs. Senior said that the plaintiff worked at most thirteen times at the factory. Mrs. Senior seemed unsure of the number of times the plaintiff worked at the factory but she was quite clear that she was not a weekly employee.

Mr. Wright said that on the morning of November 20, 1991 after the plaintiff was given the task of trimming the plastic lids he turned his attention to one of the 300-ton machines. The plaintiff's work station was approximately ten feet away from the 150-ton machine. Two machines were in operation that day: one 300-ton and one 150-ton. The 150-ton was operating on full automatic mode. He (Wright) was tending to the 300-ton machine. Sometime after, he heard a scream and when he looked he saw the plaintiff's right hand caught between the male and female parts of the taddle. On seeing this he immediately rushed over to her and pulled open the door and removed her hand. At the time of the injury the 150-ton machine was making 16 oz. plastic covers.

The evidence of Mr. Wright was that he was the person who removed the plaintiff's hand from the 150-ton machine. She was not standing on any table when he saw her hand in between the male and female parts of the taddle.

He was cross-examined with a view to establishing that the plaintiff's hand was caught in the 300-ton machine and not the 150-ton machine. This he refuted and added that what counsel was suggesting was impossible. His reason for saying that counsel's suggestion was impossible was that the taddle on the 300-ton machine is too high to be reached from the ground but he did concede that if the door was opened then a person standing on the ground would be able to touch the taddle and indeed this was how the product was removed from the male portion of the taddle. He said that once the door was opened the male portion of the taddle could not move. This was so because of the safety features mentioned already. He said that he was tending to the 300-ton machine. When it was pointed out to him that there were

two 300-ton machines that were in the factory at the time he said that only one was in operation and he was tending to that one and the plaintiff was not at that machine.

On the day in question Mrs. Senior said that the plaintiff came to her asking for work. It was decided that she could do some trimming that day and that was the task that she was in fact given. Of course the plaintiff denies this and says that she came to work as she normally did and was placed to work on a machine that could only be described as dickensian. Mrs. Senior said she never assigned any duties to the plaintiff on November 20, 1991. Mr. Wright did that. She said that after she (the plaintiff) began working she (the plaintiff) came to her and she (Senior) observed a cut on the plaintiff's hand and forehead. She had a conversation with the plaintiff and sent her home. Mr. Wright cannot speak to this conversation but he says that the plaintiff was assigned the trimming task after discussing the matter with Mrs. Senior in the presence of the plaintiff. Mr. Wright says that the plaintiff could not start working unless and until he received the approval of Mrs. Senior.

Mr. John Senior provides circumstantial evidence which if accepted would support Mr. Wright. It is accepted by all parties that Mr. Senior was not at the factory when the injury occurred. He said that he arrived later in the morning and when he entered the factory he saw blood on the taddle of the 150-ton machine.

THE ISSUES

The issues are whether the defendant was in breach of its statutory duty under the regulation 3(1) of the

Factories Regulations and if yes whether that breach caused the injuries to the plaintiff?

The other issue is whether the defendant was in breach of his common law duty of care to provide a safe system of work and to provide effective supervision of the plaintiff and did such breach cause the injuries suffered by the plaintiff.

THE LAW

a. Liability Under the Factories Regulations

Regulation 3(1) of The Factories Regulations 1961 reads as follows:

> *Every dangerous part of any machinery shall be securely fenced* ***unless it is in such a position or of such construction as to be as safe to every worker as it should be if securely fenced.*** (My emphasis)

The approach to the interpretation of this kind of provision was indicated by the House of Lords in the case of ***John Summers & Sons, Ltd v Frost*** [1955] 1 All ER 870. The provision of the relevant English legislation that was before the House was section 14(1) of the Factories Act:

> *Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced: Provided that…*

The difference between this provision and the Jamaican equivalent is miniscule. Despite this ***Summers' case*** (supra) has been held in these courts to be the definitive case on interpreting these provisions. I do not see any good reason to depart from ***Summers' case*** (supra)

Viscount Simonds at page 872 D in ***Summers' case*** (supra) said:

> *My Lords, s. 14 of the Factories Act, 1937 and its predecessor s. 10 of the Factory and Workshop Act, 1901, have on many occasions been discussed in the courts, and I think that their true construction is not in doubt. In particular, I think it is clear that the obligation imposed by the section to fence securely every dangerous part of any machinery, except as in the section mentioned and subject its proviso, is an absolute obligation. And by that I mean that it is not to be qualified by such words as "so far as practicable" or*
>
> *"so long as it can be fenced consistently with its being used for the purpose for which it was intended"*
>
> *or similar words.*

Since this case no one has questioned the proposition that there is an absolute duty on the employer to securely fence every dangerous part of any machinery unless it is in such a position or of such construction as to be safe as if it had been securely fenced.

This still leaves the question of the definition of "dangerous part".

Whether a part of a machine can be described as dangerous is decided by asking whether "in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection" (per Wills J in ***Hindle v Birtswistle*** [1897] 1 Q.B 192, 195). The full description of the test of Wills J is:

> *Machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection. No doubt it would be impossible to say that because an accident had happened once therefore the machine was dangerous. On the other hand, it is equally out of the question to say that machinery cannot be dangerous unless it is so in the course of careful working. In considering whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency with which that contingency is likely to arise, are matters that must be taken into consideration. It is entirely a question of degree.*

This was approved by Lord Reid in the House of Lords in the ***Summers' case*** (supra).

A more fulsome and perhaps more understandable way of putting the matter is to be found in ***Mitchell v North British Rubber Co., Ltd*** (1945) S.C. (J) 69, 73 as quoted by Lord Reid in ***Summers' case*** (supra) at page 883 B-E

> *The necessary and sufficient condition for the emergence of the duty to fence imposed by s. 14 of the Factories Act is that some part of some machinery*

> *should be "dangerous". The question is not whether the occupiers of the factory knew that it was dangerous; nor whether a factory inspector had so reported; nor whether previous accidents had occurred; nor whether the victims of these accidents had, or had not, been contributorily negligent.* ***The test is objective and impersonal.*** *Is the part such in its character, and so circumstanced in its position, exposure, method of operation and the like, that in the ordinary course of human affairs danger may reasonably be anticipated from its use unfenced, not only to the prudent, alert and skilled operative intent upon his task, but also to the careless or inattentive worker whose inadvertence or indolent conduct may expose him to risk of injury or death from the unguarded part?* (My emphasis)

The essence of the test as gleaned from the passages cited is this: when determining whether a part of a machine is dangerous one has to take into account its nature, where it is actually located, how it operates and such like. The court has to take account of the scrupulously careful person as well as the careless, the misinformed and the indolent. The court must not assume that all persons will be careful. Bearing these in mind the court then asks itself whether in the ordinary course of human events and activity in the factory where the dangerous part of the machine is located, it can be said that the workman would be in danger. If this question is answered in the affirmative, then the part of the machine is dangerous and there arises an absolute obligation to fence unless its position and construction are such that it is as safe as if

it were securely fenced. This is why it is no answer to say, "If you were careful in the use of the machine you would not have been injured." Equally the fact that a careless person is injured by the machine is not, without more, conclusive and irrefutable proof that the machine is dangerous. It also means that there will be borderline cases when applying this "***objective and impersonal***" test.

If in applying this test the court concludes that the part of the machine is dangerous and its position and construction did not make it as safe as if it were fenced then there is breach of the regulation. It is as simple as that. A finding that the machine is dangerous is not necessarily a poor reflection on the employer. He may think that he has installed the safest machine that money can buy. He may even be the most caring employer in the world. His benevolence and munificence may be legendary. On the other hand the employer may be a penny-pinching curmudgeon presiding over a sweat shop. A factory inspector may think that the machine is dangerous or he may think it is quite safe. None of this matters. The test is objective and impersonal.

In applying the test the court can take into account the history of the machine. It may be that no one has been injured since the machine has been in use. This is not conclusive proof that the machine is not dangerous but it certainly cannot be ignored.

From what has been said it means that there will be borderline cases. The instant case is one such case.

b. Common law duty

The employer at common law has a duty to provide a safe system of work for his employees. Mr. Williams has asked me to say that this common law duty was breached. However the duty at common law is not absolute and as Lord Tucker reminded us in ***Latimer v A.E.C. Ltd*** [1953] A.C. 643, 658:

> *[T]he courts should be vigilant to see that the common law duty owed by a master to his servant should not be gradually enlarged until it is barely distinguishable from his absolute statutory obligations.*

c. What the plaintiff must establish to succeed under the Factories Regulation

The law on this point has been stated with great clarity by the House of Lords in ***Caswell v Powell Duffryn Associated Collieries Limited*** [1940] A.C. 152, at 164-165 by Lord Atkin:

> *The person who is injured, as in all cases where damage is the gist of the action, must show not only a breach of duty but that his hurt was due to the breach. If his damage is due entirely to his own wilful act no cause of action arises; as, for instance, if out of bravado he puts his hand into moving machinery or attempts to leap over an unguarded cavity. The injury has not been caused by the defendants' omission but by the plaintiff's own act. But the injury may be the result of two causes operating at the same time, a breach of duty by the defendant and the omission on the part of the plaintiff to use the ordinary care for the protection*

> *of himself or his property that is used by the ordinary reasonable man in those circumstances. In that case the plaintiff cannot recover because the injury is partly caused by what is imputed to him as his own default. On the other hand if the plaintiff were negligent but his negligence was not a cause operating to produce the damage there would be no defence.*

This expression of the law is now subject to one correction. These words were uttered before the passage of the ***Law Reform (Contributory Negligence) Act,*** 1945 (UK) which reversed the common law principle that contributory negligence was a complete defence. Therefore in so far as the Law Lord said that if the plaintiff contributed to his own injury then the defendant is not liable that is no longer the law in either the United Kingdom or Jamaica. That apart I believe that the law is crystal clear.

This position was reaffirmed by the House of Lords in ***Bonnington Castings Ltd. v Wardlaw*** [1956] A.C. 613 at page 619-620 per Lord Reid:

> *It would seem obvious in principle that a pursuer or plaintiff must prove not only negligence or breach of duty but also that such fault caused or materially contributed to his injury, and there is ample authority for that proposition both in Scotland and in England. I can find neither reason nor authority for the rule being different where there is breach of a statutory duty.* ***The fact that Parliament imposes a duty for the protection of employees has been held to entitle an employee to sue if he is injured as a result of a breach of that duty, but it would be going a great deal farther to hold that it can be inferred***

> ***from the enactment of a duty that Parliament intended that any employee suffering injury can sue his employer merely because there was a breach of duty and it is shown to be possible that his injury may have been caused by it. In my judgment, the employee must in all cases prove his case by the ordinary standard of proof in civil actions: he must make it appear at least that on a balance of probabilities the breach of duty caused or materially contributed to his injury.*** (My emphasis)

There is therefore no rule that the ordinary rules applicable to actions for damages are truncated because the action is brought under a statute imposing an absolute duty on the employer. The plaintiff must still prove on a balance of probabilities that the breach of duty caused or contributed to his injury.

This principle has been consistently applied as shown by the cases examined below.

A stark if not robust demonstration of this principle is found in ***Rushton v Turner Brothers Asbestos Co. Ltd*** [1959] 3 All ER 517 where Ashworth J found that although the defendants were in breach of the Factories Act they were not liable in damages because the plaintiff, who was properly trained in the use of the machine he was operating and who had been on the job for six months before the incident, had deliberately inserted his hand in the machine without stopping it. The plaintiff in that case was seeking to carry out the laudable task of cleaning the groove of the machine.

In denying the plaintiff his remedy Ashworth J said a page 521 B:

It seems to me that in each case it is a question of degree. It is a question of degree, looking at the whole of the circumstances fairly and broadly to see whether the breach of the Factories Act, 1937, was of itself an operative cause of the accident or is more truly in a sense the circumstances in which the accident happened.

In dealing with the facts of that particular case the learned judge said at 521 D:

It seems to me in this case that, first, the plaintiff was not injured by reason of some accidental omission on his part to take due care, nor was it a case of momentary inadvertence and failing to remember the safety rules…I find that he did it quite deliberately, and that the cause of this accident, in the sense of the operative act and effective cause, is wholly to be attribute to him.

In the matter of ***Cope v Nickel Electro*** [1980] C.L.Y. 1268 Sheldon J found that there was a breach of the Factories Act but that the plaintiff, a senior engineer of 25 years experience, requested that the machine be run while repairing it. He was injured. The court found that he was an expert and undertook the risk of the machine running while it was being repaired and so was one hundred percent contributorily negligent.

Similarly in ***Humphreys v Silent Channel Products*** [1981] C.L.Y. 1209 French J found that a tool setter with twelve years experience was the sole author of his injuries

when he did not take the necessary precautions during maintenance/repairs of the machine.

d. Contributory Negligence

Even in cases of contributory negligence if the conduct of the plaintiff is deliberate and reckless it is not unusual for him to be fixed with a significant degree of responsibility for his injury.

In ***Uddin v Associated Portland Cement Manufacturers Ltd*** [1965] 2 All ER 213 C.A. the Court of Appeal upheld the trial judge's finding that the plaintiff was eighty percent contributorily negligent. The plaintiff found himself in an area in which he ought not to be and while there he tried to catch a pigeon. In his attempt to snare the bird he received injuries. The apportionment of the trial judge may well be an example of judicial benevolence. The conduct of the plaintiff was so outrageous that Lord Pearce was moved to describe it as example "*of extreme folly outside any reasonable anticipation*" (see page 218 C). Russell L.J. (as he then was) said, "*Whether I would have attributed only eighty per cent. of responsibility to the plaintiff I am far from sure*" (see page 221 F). Wilmer L.J. said had "*I been trying this case at first instance it is possible that I might have arrived at an apportionment somewhat more generous to the defendants*" (see page 221 A).

Also in ***Aston Fitten v Michael Black Ltd. and Ken Henry*** (1987) 24 J.L.R. 252 Wolfe J (as he then was) found the plaintiff sixty percent responsible for his injuries where he apparently inserted his hand in a machine.

What is quite clear from an examination of the authorities is that the expression "contributory negligence" when dealing with a breach of statutory duty does not carry the same meaning as under the common law. It seems to me that what could be described as carelessness or error of judgment or momentary inattention on the part of a workman is not "contributory negligence" for the purpose of considering whether the workman contributed to his injury when an action for breach of statutory duty is brought (See ***Flower v Ebbw Vale Steel, Iron & Coal Co*** [1936] A.C.206 per Lord Wright 214-216).

The same case (***Flower*** (supra)) establishes that once the plaintiff establishes a breach of statutory duty and that such breach contributed to his injury the onus is on the defendant to raise and prove satisfactorily the contributory negligence relied on if he wants to reduce his liability.

My examination of the law on contributory negligence in this area would be incomplete without reference to the apparently talismanic and bewitching words of Goddard L.J. (as he then was) in ***Hutchinson v London & North Eastern Railway Company*** [1942] 1 K.B. 481,489:

> *It is only too common to find in cases where the plaintiff alleges that the defendant has been guilty of a breach of statutory duty, that a plea of contributory negligence has been set up. In such a case I have always directed myself to be exceedingly chary of finding contributory negligence where the contributory negligence alleged is the very thing which the statutory duty of the employer was designed to prevent.*

This passage is often cited to say that a court should be slow to find contributory negligence in an employee. However that may be this cannot mean that a court should not find contributory negligence where it clearly exists or that a court should not say that the plaintiff is the cause of his injury if that is the case.

In ***Hutchinson's case*** (supra) the statutory duty imposed by rule 9 of the ***Prevention of Accident Rules***, 1902 made under the ***Railway Employment (Prevention of Accidents) Act***, 1900 required the company "in all cases where danger is likely to arise" to provide a good look out or some system to warn the workmen of approaching trains. The company failed to provide the look out or indeed any proper system to warn the workmen of approaching trains with the result that deceased were killed by the north bound train shortly after the south bound train had passed. An action was brought by the wife of one of the deceased. There was no evidence, direct or inferential, that the deceased had done a deliberate act that demonstrated a reckless disregard for his safety. The evidence showed that the injury was caused by the defendant's breach of statutory duty. This is apparent from the judgment of Lord Green M.R.

The words of Goddard L.J. mean nothing more and nothing less than that the defendant cannot succeed if the contributory negligence pleaded amounted to carelessness or momentary inattention on the part of the workman since this was the very kind of conduct from which the workman ought to be protected by the employer performing his statutory duty. The learned Lord Justice has never been understood to be saying that a workman who displays a reckless disregard

for his safety cannot be found to be totally blame worthy for his injury.

That this is so is demonstrated by the fact that ***Caswell's case*** (supra) was referred to in the judgment of the Master of the Rolls and Goddard L.J. None of the members of the Court of Appeal expressed any difficulty with the analysis of the law by the House of Lords.

In examining this issue of contributory negligence, under the Factories Regulations, I have taken into account the case of ***Allen v Aeroplane and Motor Aluminium Castings Ltd.*** [1965] 3 All ER 377. In that case the trial judge rejected the plaintiff's version. He said that there was no evidence indicating how the accident occurred despite finding that there was a breach of the duty to fence and so he gave judgment for the defendants. The Court of Appeal reversed the trial judge on the basis that once he found that there was a breach of the statutory duty to fence and the injury was the result of the breach then judgment had to be given for the plaintiff despite his unsatisfactory evidence because there was no evidence that would enable the judge to say that the injury was not caused by the breach of duty. This is a graphic demonstration of the principle that once the breach is established and injury attributable to the breach is proved then the defendant must adduce evidence (direct or circumstantial) that the plaintiff was either the author of his injuries or contributed greatly to his injuries. Mere carelessness or inadvertence will not establish the case for the defendant. There must be reckless disregard for his safety.

e. Conclusion

Success for the plaintiff under the Factories Regulations requires him to establish that there was a breach of the duty to fence and that that breach caused his injury.

Where a workman embarks upon a deliberate course of reckless conduct which demonstrates a "reckless disregard by [the] workman for his own safety" (per Lord Keith ***Summers' case*** (supra) at page 890) even if the employer is in breach of his statutory duty, he (the workman) is quite likely going to be fixed with a high degree of contributory negligence if he is not found to be the author of his misfortune.

The fact that the plaintiff gives an unsatisfactory account is not necessarily a bar to recovery if a breach of the statutory duty by the defendant is established and the injury flows from that breach.

EVALUATION OF THE EVIDENCE

I. Was the part of the machine dangerous?

I now have to decide whether this 150-ton machine was dangerous within the meaning of the regulation. This machine was capable of total automation as well as semi-automation. It did not need an operator if fully automated. It was located in the production area of the factory. Mr. Wright says that in his two and one half years at the factory no one was injured by the 150-ton machine. On the day in question the machine was in full automatic mode. No one was needed to tend to the machine and in fact no one

was tending the machine. The plaintiff was not required to operate the machine or to do anything to it. The machine was approximately between five feet four inches to five feet seven inches in height.

I formed this view of the height from the demonstrations given by Mr. Wright and Mr. John Senior. It appears that the taddle is down in the body of the machine. The evidence is that if any one is standing on the ground and wants to touch the taddle such a person would have to be very close to the machine, raise their hand, put it over the machine and then move it downwards towards the taddle. It is only if this is done that one comes in contact with the taddle.

Reasonable foreseeability does not mean that one must foresee all possibilities that can be conjured by human ingenuity. If that were so then it would be very difficult if not impossible to avoid the conclusion that an employer would hardly ever be able to establish that a part is not dangerous. What is foreseeable must be reasonable.

I do not believe that this machine would injure a prudent and careful worker. However the test mandates me to take account of the careless, the inattentive and the indolent. I do not see how a careless, inattentive or indolent person could come in contact with the taddle by behaving in a careless in the vicinity of this machine. The machine is at most five feet seven inches tall. Without deliberate and reckless conduct it is difficult to see how anyone could come in contact with the taddle.

This means that I do not accept that the machine was dangerous within the meaning of regulation 3(1) of the Factories Regulations. This means that there was no obligation to fence the taddle.

II. ***How was the plaintiff injured?***

If I am wrong that there was no breach of statutory duty by the defendant I now consider the matter on the assumption that there was in fact a breach of statutory duty.

Counsel for the plaintiff has invited me to say that some portions of Mrs. Senior's testimony ought not to be accepted. In particular he says that Mrs. Senior is not to be believed when she says that after the plaintiff was set to work and before the accident she (Senior) has sent the plaintiff home because the plaintiff had cut herself with the knife used to do the trimming. This was an attempt, according to Mr. Williams, by Mrs. Senior to remove liability from the company by suggesting that the plaintiff had deliberately interfered with the machine. Counsel questions how is it that Mrs. Senior can recall with such clarity the conversation she had with the plaintiff before the accident but she cannot recall or even assist with an approximation of what the wage rate for the plaintiff was, and she cannot recall when the plaintiff began working at the factory. Counsel took the submissions further by suggesting that even the testimony of Mrs. Senior about how the plaintiff was assigned work the day in question the court should reject. I agree with counsel for the plaintiff. It does seem odd that the plaintiff received an injury that, from the evidence, no one regarded as very serious or even serious. Why not send her to the doctor or hospital or even administer some first aid? Why send her home? It did seem to me that Mrs. Senior was not being frank with the court on this issue. I accept Mr. Wright's

evidence when he says that Mrs. Senior approved the trimming task that was to be done by the plaintiff. This means that I do not accept or put another way there is no evidential basis for me to say that Mrs. Senior sent the plaintiff home.

I accept the evidence of Mr. Wright and Mrs. Senior when they say that the plaintiff never operated any of the machines. I accept their evidence when they say that she was not instructed or permitted to operate any of the machines. Even counsel for the plaintiff invited the court to accept the testimony of Mr. Wright. At one point I felt that counsel was saying that where there was any conflict between Mr. Wright and Mrs. Senior that I should accept Mr. Wright. Mr. Wright appeared to me to be forthright, honest, truthful and reliable.

I do not believe the plaintiff when she says that she was trained to use the machine by Mrs. Senior. Mr. Wright said that it was he who would train any person who was employed as a machine operator if that person needed training. He described Mrs. Senior as being afraid of the machines and the further she was from them the better she felt.

I find therefore that the plaintiff was not employed to operate any machine at the factory. I find that on November 20, 1991 she was set the task of trimming the finished products. She was not placed at any machine to work.

Counsel for the plaintiff attacked the testimony of Mr. Senior, the brother in law of Mrs. Senior. He says that the time when he says that he arrived at the factory the accident had not yet occurred. Mr. Senior said that he arrived there between 9:00am-10:00am. The plaintiff said

that the accident occurred between 10:00am-10:30am. These are approximations. Counsel suggested that Mr. Senior's testimony that he saw blood on the taddle of the 150-ton machine was an attempt to establish that the plaintiff was a busy body who was the author of her own misfortune. I do not agree with counsel. It must be remembered that the witnesses are trying to recall events that took place over a decade ago. I see no reason why I should not accept Mr. John Senior's evidence. I believe that he saw what he said he saw.

Even if counsel is correct in this submission, the testimony of Mr. Wright in my view puts it beyond question that the machine that injured the plaintiff was the 150-ton machine. Mr. Wright said that of the two 300 ton machines that were at the factory only one was in operation and that was the one that he was dealing with at the time of the accident.

I find that the plaintiff was injured by one of the 150-ton machines. The accident did not happen in the way the plaintiff said. From the testimony of Mr. Wright it is clear that the plaintiff was doing the trimming approximately ten feet away from the 150-ton machine.

As I have said that I do not accept the plaintiff's account. Mr. Wright did not see how the accident happened. I have read the evidence of Mr. Wright on this point very carefully. What I have him saying is that the plaintiff was assigned the task of trimming finished products. She was about ten feet from the machine. He was tending to one of the 300-ton machines. He heard a scream, he looked over and he saw her hand stuck in the 150-ton machine.

The plaintiff said that plastic was stuck in the machine and she tried to remove it and it was during that

attempt to remove the plastic that her hand was crushed. Mr. Wright says that her hand was caught between the two parts of the taddle. He says that he opened the door to remove her hand. No one seems to have investigated what caused the taddle to be stuck with the plaintiff's hand between the two parts. The evidence is that when the machine is operating in full automatic mode as it was on the day the usual explanation for the sticking of the taddle would be that some of the product had "glued" the two pieces together.

Counsel for the plaintiff has invited this court to say that the plaintiff must have seen something in the machine and tried to remedy it and so suffered her injuries. Regrettably I cannot do this. I find that the machine described by the plaintiff does not exist. I accept Mr. Wright's description and operation of the machines that were at the factory at the material time.

From the evidence the following is clear. The plaintiff was employed on the day in question to trim finished products. She was placed approximately ten feet from the machine. The machine was working properly. There is no evidence that it was malfunctioning. She was not asked or instructed or placed to tend the machine. The direct evidence of Mr. Wright establishes this part of my findings. Mr. Senior's testimony established that the machine was serviced the Saturday before the accident.

How the accident occurred is largely a matter of inference. I now say what my inferences are.

In coming to this conclusion I bear in the mind the wise words of Lord Wright in the case of ***Caswell v Powell Duffryn Associated Colleries Ltd*** [1940] A.C. 152, 169-170.

Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive facts from which the inference can be made, the method of inference fails and what is left is mere speculation and conjecture.

The objective facts are:

a) the plaintiff was employed on the morning in question to trim finished products;
b) she was places approximately ten feet away from the 150-ton machine;
c) the machine was operating in full automatic mode;
d) no person was nor was any person operating the machine.

The inferences I draw are:

a) she must have left her trimming and moved towards the machine;
b) she must have raise her hand, put it over the machine and then down into the taddle while the machine was operating;
c) her hand was caught by the taddle;

What could be more reckless than this? How different is this from Lord Atkin's formulation is ***Caswell's case*** (supra)?

As noted this machine does not require human intervention once it is functioning properly. There is no need to handle the machine once it is functioning properly. It seems to me that she did a deliberate act in putting her hand in the machine. That to me was the real effective cause of the injury. It is not that she was operating the machine and during her handling of the machine she was injured during a moment of carelessness or inattention. This is the real point of distinction between this case and the case of ***Amy Pitters v T Haughton*** (1978) 16 J.L.R. 100 cited by Mr. Williams. In that case the accident occurred during the course of her actual work on the machine. What happened could be attribute to momentary carelessness. That is not the position here.

In the instant case I find that the plaintiff was totally to be blamed for her accident. She had no reason to be going to the machine to say nothing of lifting up her hand and putting it in the taddle. At no time was she ever required to tend to the machine. The machine as it was operating on the day in question did not need human intervention. Her conduct was deliberate and fell within the type of conduct identified by the cases referred to above. She showed a reckless disregard for her safety. This was not case of mere careless or momentary inattention but one of an extraordinary degree of recklessness. One does not raise one's hand and put it in machine that does not require human input during its operation in a moment of inattention or carelessness. She is totally at fault.

Therefore even if the there was a breach of statutory duty that was not the cause of the plaintiff's injury. Her act of deliberate reckless was.

III. ***Was there a breach of the employer's common law duty of care?***

To accede to counsel's submission that I am to find that there was an unsafe system of work in this case would be to breach Lord Tucker's salutary warning. Consequently I do not find that there was a breach of the employer's duty at common law. Here the plaintiff was put a point sufficiently far from the machine that she would be safe once she did not interfere with the machine. Mr. Wright said that the workers who were employed to deal with the machines were given instructions about the machines. Those who were not so employed were not given any instructions about the machines. The plaintiff fell within the second category. Mr. Williams wishes me to say that this amounted to a breach of the common law duty to provide a safe system of work. I do not believe that this is sufficient. What she was employed to do and where she was placed was perfectly safe. There was nothing inherently dangerous in what she was doing and neither was the machine operating in an unsafe manner. It was she who went to the machine and placed her hand in it.

I find that the plaintiff was not a weekly employee but worked at most three days. Whatever doubts I may have about Mrs. Senior's evidence on this point I have none when I consider the evidence of Mr. Wright. He say that he does not recall when the plaintiff was employed but what he is quite clear about is that she never worked more than three days in any one week. I understood Mr. Wright to be saying that the plaintiff was not at the factory every week but if she was there for more than one day in any one week her

employment never exceeded three days for that particular week. I accept this evidence of Mr. Wright and reject the plaintiff's assertion that she was a weekly paid employee.

Despite my sympathy for the plaintiff who has suffered very serious injury I have to say, regrettably, that she has failed to establish her claim under the regulations and at common law.

I therefore give judgment for the defendant with costs in accordance with Schedule A of the Rules Supreme Court (Attorney at Law's Costs) Rules 2000.