NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 63 OF 2006

BEFORE: **THE HON. MR. JUSTICE HARRISON, P.**
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.

BETWEEN	**K'S ROOFING CO. LTD.**	**1ST APPELLANT**
AND	**ABE KAWASS**	**2ND APPELLANT**
AND	**ROSELAND RICHARDS**	**RESPONDENT**

Mr. Jalil Dabdoub instructed by Dabdoub, Dabdoub & Co. for the Appellants.

Mr. Ainsworth Campbell for the Respondent.

February 12, 13, 16, 2007

HARRISON, P.

I have read the judgment of Cooke, J.A. and I agree with his reasoning and conclusion.

COOKE, J.A. (Oral Judgment)

1. The respondent Roseland Richards, was on the 1st October, 2002, injured in an accident in a zinc factory owned and operated by the first appellant (K's Roofing & Co. Ltd.). The 2nd appellant (Abe Kawass) was the manager of

this factory. The respondent brought an action in negligence to recover damages consequent upon his injuries, which resulted in the partial amputation of his right 2nd, 3rd and 4th fingers. On the 12th May, 2006 the court below found in favour of the respondent and made the following award:

> "1. **GENERAL DAMAGES** in the sum of $1,179,000.00 being
>
> a) Pain and Suffering Loss of Amenities — $750,000.00
>
> b) Loss of future earnings — $429,000.00
>
> with interest on $750,000.00 at 6% per annum from the 24/6/03 to 12/5/06.
>
> 2. **SPECIAL DAMAGES** in the sum of $487,452.00 with interest thereon at 6% per annum from the 1/10/02 to the 12/5/06."

There is no appeal in respect of the quantum of the award of damages.

2. The particulars of negligence pleaded were:

> "a) Mandating the Claimant then a youth to work on an electrically driven machine without training and or giving him instructions to operate the machine and or the necessary precaution to be taken in the operating of the said machine.
>
> b) Failing to instruct the Claimant of the dangers involved in using the machine.
>
> c) Failing to warn the Claimant of the danger in using the machine and or working around the vicinity where the machine was located."

3. The appellants contended that the respondent's injuries "were caused or contributed to by his own negligence", the particulars of which were averred to be:

> "i) Entering the factory area of the defendants [sic] premises where he was not required or authorized to be having regard to his duties as a junior welder.
>
> ii) Placing himself in close proximity to the said machine when he was not assigned any duties or given any instructions by the 2nd Defendant or any servant and or agent of the 1st defendant that required his presence by the said machine.
>
> iii) Expressly disobeying and disregarding specific instructions of a servant and or agent of the 1st Defendant George Kawass to refrain from going into the factory area where the machine was located.
>
> iv) Failing to have any or any adequate regard for his own safety.
>
> v) Putting his hands in the gears of the machine while it was in operation."

4. At this juncture it is convenient to reproduce the account by the respondent as to his involvement at the zinc factory on the 1st October, 2002. His witness statement reveals the following:

> "1. ...
>
> 2. On the 1st October 2002 at about 1:00p.m. Mr. Abe Kawass said to me that he needed ten pieces ten foot zinc. I was in a welding shop where I had made nine rafter brackets. It was

Kawass that sent me to make the brackets. He took the brackets, there were no more brackets to be made. Mr. Kawass said, "Mr. Richards I want you to make ten 10 foot sheets of zinc. After that you are to bore 50 fillets. I had to go down to the zinc factory to make the zinc sheets. I closed the shop door [sic] Mr. Abe Kawass and I went to the factory where the manufacture of zinc sheets is done.

3. When I went to the factory I saw Brian Fuller. Mr. Abe Kawass told me to work with Brian. The 1st October, 2002 was the third time Mr. Kawass had sent me to work in the zinc factory. I was taken on as a welder. That's what I told Mr. Kawass who with one Mr. George took me on as a welder.

4. On the first occasion of three that I was to work in the zinc factory I was on my way to the welding shop. Mr. Abe Kawass met me on the way and said to me that it was not every day I would have welding, you are going to work down there with the other", pointing to the factory. Mr. Kawass always told me on each day when I am to go to the zinc shop to work. On the 1st October 2002 he sent me to the zinc factory. Mr. Kawass is one of the bosses at K's Roofing Company Limited.

5. On the 1st October 2002 Mr. Abe Kawass went with me to the zinc factory and I worked with Brian Fuller pushing zinc through a machine. I had pushed through the last sheet of zinc and was to collect fillets to carry them to the welding shop and was passing the zinc machine when my hand got caught in the gears of the machine and my hand was mashed up by the gears of the machine. The gears are on the outside of the machine and run on rollers. These gears and rollers are not covered. Parts of my fingers were chopped off and fell to the ground. They bled profusely and pained greatly."

This account does not provide an evidential basis which could in anyway substantiate the averments of negligence proffered by the respondent (see par. 2 supra). In respect of those averments the only one which was borne out by the evidence of the respondent was that he was mandated to work on an electrically driven machine. In respect of this Brian Fuller who gave evidence in support of the respondent's cause said he heard the 2nd appellant instruct Richards

> "... to go and help me push zinc through the machine".

5. The appellants through the 2nd appellant (Abe Kawass) denied giving the respondent any instructions to work in the zinc factory. The learned trial judge stated in her judgment:

> "K's Roofing has a duty to keep the machine in such a manner that it does not cause injury to persons. They breached that duty. It is agreed that the gears and rollers of the machine were not fenced. Exposed gears and rollers have the potential to be dangerous to workers."

It was not possible to successfully challenge this finding by the learned trial judge. Accordingly the appellants have directed their energies to attacking the award, in that on the evidence, the respondent should have been affixed with contributory negligence.

6. Firstly, the appellants submitted that the evidence of Abe Kawass that "I did not assign any duties (to) Roseland Richards on that day and neither did I instruct him to go into the factory area" was not challenged. It was not challenged in that when this witness was cross-examined it was never suggested to him that he (Abe Kawass) did give the instructions as stated by the respondent and supported in this regard by Brian Fuller. The appellant relied on a passage from Phipson on Evidence Eleventh Edition paragraph 1544 which stated:

> "As a rule a party should put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness, or in which he had a share, e.g., if the witness has deposed to a conversation, the opposing counsel should indicate how much he accepts of such version, or suggest to the witness a different one. If he asks no questions he will in England, though not perhaps in Ireland, generally be taken to accept the witness's account."

However, in this paragraph, 5 lines later it is further stated:

> "... Failure to cross-examine, however, will not always amount to an acceptance of the witness's testimony, e.g., if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy, as where young children are called as witnesses for their parents in divorce cases, or when counsel indicates that he is merely abstaining for convenience, e.g., to save time." (Emphasis mine)

In the regime introduced by the Civil Procedure rules 2002, each party is required to file and serve on the other party witness statements. Thus, before a trial begins each party is aware of the evidential material on which each

respective case is grounded. Therefore, in this case the witness Abe Kawass would have had 'notice to the contrary beforehand' i.e., that the respondent's stance was that he had been instructed by the said Kawass to work in the zinc factory. Accordingly, the failure to cross-examine Abe Kawass on the issue of the disputed instructions does not in this case amount to the acceptance of his testimony. Further the pleadings made it clear as to how the battle lines were deployed. There was no retreat therefrom. The learned trial judge was entitled, having seen and heard the witness's to find as she said:

> "I accept as true the evidence that Mr. Richards was instructed by Mr. Kawass to work at the particular machine in the factory on that occasion and was therefore authorized to be in the vicinity of the machine in the K's Roofing factory."

7. Attention is now turned to how the accident occurred. The only witness who gave evidence as to this was the respondent. As to this he made the bald statement that he:

> "... was passing the zinc machine when my hand got caught in the gears of the machine and my hand was mashed up by the gears of the machine."

There has been no elaboration as to how his hand "got caught in the gears". There was no direct evidence from which it can be visualized how it was that the respondent's hand "got caught in the gears". This was in circumstances where it is an incontrovertible fact that the offending gears were some five feet above the ground level on which the respondent would have been walking at the time he

was "passing the zinc machine". It is more than curious as to how and why the respondent's hand was so elevated as to subject it to contact with gears which were five feet above ground level. There has been no explanation as to this phenomenon. The learned trial judge did not address this significant lacuna in the case presented by the respondent. She merely said without more.

> "I accept on a balance of probabilities that Mr. Richards' hand in his glove was caught in the gears of the machine as he passed it."

Nowhere in the judgment did the learned trial judge mention that the gears were five feet above ground level. The significance of this aspect of the evidence seems to have escaped her. She did recount the evidence of George Kawass a manager of the appellants' company as follows:

> "According to Mr. Kawass, the machine can be quite dangerous if it is not fenced and is running. The guard was off the machine on the day of the accident because an adjustment had been made to the machine that day. However, he said that the machine cannot pull in a glove unless the glove is intentionally put in. In order for something that a person has on to catch the machine, the person would have to have his hand held at shoulder height and outstretched. It would be impossible for that to happen at three feet above the ground."

Apart from recounting this aspect of the evidence the learned trial judge did not evaluate it. It is likely that had she done so, her conclusion that there was no contributory negligence on the part of the respondent would likely have been different. The inescapable inference as submitted by the appellants is that the respondent must have done something with his hand which brought that hand in

contact with the gears of the machine. In not giving due consideration to the totality of the evidence the learned trial judge was in error in not finding that the respondent was contributorily negligent. Rule 1.16.(4) of the Court of the Appeal Rules 2002 states that:

> "The Court may draw any inference of fact which it consider is justified on the evidence'

In this case the inference of fact drawn is that the respondent was in some degree responsible for his injury.

8 The question now arises as to the apportionment having decided that there is contributory negligence. Section 3 (I) of the Law Reform (Contributory Negligence) Miscellaneous Provisions Act states:

> "3—(I) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage..." (Emphasis mine)

The authorities indicate that in determining apportionment there are two factors to be considered. The first is the "causative potency" of a particular factor. The second is an assessment of blameworthiness. See **Davis v. Swan Motor Co. [1949]** 1 All E.R. 620**; Brown v. Thompson [1968]** 2 All ER. 708; **The Miraflores and the Abadesa [1967]** 1 A.C. 826. These considerations should not be subject to any mathematical treatment. Rather after due consideration

the court should endeavor to come to a conclusion that is fair and reasonable. In this case as regards "causative potency" there is the factor of the gears being without guards. As to blameworthiness, the respondent would not have had his hand crushed by gears which were 5 feet above ground level unless he did in fact embark on such activity with his right hand in the vicinity of the gears which activity is indicative that he was negligent as to his own safety. There were other employees working in the area of the exposed and dangerous gears who suffered no like injury. After an examination of these two factors it is "just and equitable having regard to the claimant's share in the responsibility for the damage" that the respondent was contributorily negligent to the extent of One-Third. The damages are therefore apportioned accordingly.

9. The appeal is allowed in part. The appellant shall pay to the respondent Two-Third costs both here and in the court below.

McCALLA, J.A.

I agree.

ORDER

HARRISON, P.

Appeal allowed in part. Respondent is contributorily negligent to the extent One-Third. Two-Third costs of this appeal and in the Court below to be paid by the appellants to the respondent.