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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 88/94

BEFORE	THE HON. MR. JUSTICE FORTE, P. THE HON. MR. JUSTICE WALKER, J.A. THE HON. MR. JUSTICE LANGRIN, J.A.	
BETWEEN	MANCHESTER BEVERAGES LIMITED	DEFENDANT/ APPELLANT
AND	PATRICK THOMPSON	DEFENDANT/ APPELLANT
AND	CARLTON BROWN	PLAINTIFF/ RESPONDENT

Tana'ania Small and Helga McIntyre instructed by D.O. Kelly & Associates for the Appellants

Rudolph Francis instructed by Frater, Ennis and Gordon for the Respondent

June 15, 16, and October 27, 1999

LANGRIN, J.A

This is an appeal from a judgment of Chester Orr J. on 8th July, 1994 whereby he awarded the claimant the sum of $660,792.00 by way of damages. Interest of 3% was also awarded on this sum.

Having heard the arguments of counsel on both sides, on the 16th June, 1999, we dismissed the appeal and confirmed the judgment of Chester Orr J. As promised we now herein set down the reasons for our decision.

The facts for the plaintiff are briefly stated as follows: On the 31st of August, 1987, the plaintiff while performing his duties as an employee of the

first defendant in his warehouse was hit down by the second defendant who was driving and operating a fork lift owned by the first defendant in the warehouse so negligently that it collided with the plaintiff in consequence of which the plaintiff sustained serious personal injury and was put to loss and expense.

The findings of fact by Orr J. were:

(a) the plaintiff was not permitted to use the warehouse bathroom

(b) the plaintiff was hit from behind

(c) the plaintiff did not steal bottle of beer and did not walk backwards into path of forklift as alleged by defendants

(d) the second defendant was negligent as on is own evidence he was unable to see over pallet of forklift

(e) the first defendant owed the plaintiff, a trespasser a duty of care

(f) the plaintiff was contributorily negligent as he was employee of first defendant for twenty years and did not exercise due care.

The plaintiff's liability was assessed at 20% and the defendants' at 80%.

The defendants now challenge the judgment on the following grounds:

(1) the trial judge erred when he ruled that although the plaintiff was a trespasser, the defendants owed a duty of care to him

(2) the trial judge erred in finding 2nd defendant negligent in being unable to see over pallet as in

normal operation of forklift, driver looks to the side

(3) the trial judge failed to consider the noise from forklift ought to have alerted the plaintiff

(4) the trial judge failed to consider that the plaintiff ought to have known of and should have been looking out for the presence of forklift operating

(5) the trial judge awarded damages for injury to 2 legs although the plaintiff gave evidence only of injury to one leg and the doctor's finding of injury to left leg may have had nothing to do with accident.

The central issue in this appeal raises a point of some general importance in relation to the nature and extent of the duty of care owed by occupiers to trespassers.

On the first ground of appeal counsel for the appellant disagreed with Clerk & Lindsell on Torts (14th ed) page 663 which was adopted by the trial judge in his judgement:

> "After Cooper's case [**Southern Portland Cement v Cooper** 1974 1 All ER 87] there seems to be little if any difference between the kind of duty which an occupier owes towards trespassers and the ordinary duty of care in negligence, even at a purely theoretical level."

Counsel for the appellant sought to rely on **Addie & Sons v Dumbreck** (1929) 1 All ER 1 and argued that **Cooper's** case had not simply restated the law but had widened the occupier's liability to child trespassers only.

Such an argument is untenable. The original principle of an occupier's liability to trespassers, as stated in **Addie & Sons**, was that the occupier owed no duty of care towards a trespasser save where the injury suffered by the trespasser was due to some wilful act of the occupier. That statement of principle has long since been extended. The decision of the House of Lords in **British Railway Board v Herrington** [1972] A.C. 877 extended the original principle of an occupier's liability to trespassers by creating a special new type of duty, the duty of ordinary humanity which, though not as demanding as the duty of care owed to a visitor/licensee, was greater than the previously held duty to merely avoid injury to a trespasser due to some wilful act.

The decision of the House of Lords in **Herrington** (Supra) in establishing a new duty owed by the occupier to the trespasser came about as a result of the fact that the Occupier's Liability Act 1957 (U.K.) like the Occupier's Liability Act (Ja), did not include a duty of an occupier to trespassers. Consequently, when the general notion of a trespasser as a wrongdoer dissipated, especially as a result of increasing cases involving injury to children, the Court felt constrained to devise a suitable principle of the Occupier's Liability Act, but above the previous minimal duty of the occupier to avoid injury to a trespasser due to some wilful act.

Clerk & Lindsell (14th ed.) at page 662 explains:

> "It is difficult to see how in nature if not in content this new duty of ordinary humanity differs in any meaningful sense from the usual **Donoghue v**

> **Stevenson** duty of care. Unless the occupier is to be judged by some standard other than that of the reasonable man...it is hard to see how an occupier can be liable to a trespasser for negligent behaviour without this placing on him an obligation to take reasonable care for the trespasser's safety, or in other words the ordinary **Donoghue v. Stevenson** duty of care."

Orr's J adoption of the statement of law that "there seems to be little if any difference between the kind of duty which an occupier owes towards trespassers and the ordinary duty of care in negligence" is not incorrect. This is clear especially after reading the decision of the Privy Council in **Southern Portland Cement Co. v. Cooper** (Supra) where the standard of care of the occupier was said to be objective rather than subjective, therefore equating it with the standard to take reasonable care. The standard of reasonable care in respect of a trespasser may be different from the standard of reasonable care in respect of a visitor/licensee, but a definite duty to take reasonable care is owed by an occupier to trespassers.

As explained in **Cooper's** case at page 64 2G:

> "the fundamental difference between the relationship of occupier and trespasser and other relationships which give rise to a duty of care is that the occupier's relationship with a trespasser is forced on him against his will, whereas other relationships are generally undertaken voluntarily."

At page 643B:

> "the **Addie** formulation of the occupier's duty [to trespassers] is so narrow that it will not cover many cases where humane considerations would clearly

> impel an occupier to do something to avoid or lessen danger to trespassers...His duty must be formulated in broader terms [to include considerations of humanity]...but cannot be extended so as to make it exceed his duty to a licensee."

The new rules are now more flexible than were formerly supposed. The Board applied **Donoghue v. Stevenson** [1932] A.C. 562 at 580:

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour?....persons who are so closely and directly affected by my acts that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question: But in applying that passage to trespassers it must be remembered that the neighbourhood principle has been forced on the occupier by the trespasser and it would therefore be unjust to subject him to the full obligations resulting from it in the ordinary way. "

The objective standard required at page 644G is:

> "What would have been the decision of a humane man with the financial and other limitations of the occupier."

It could therefore not be said that the trial judge erred in finding that the defendants owed the plaintiff as trespasser a common duty of care.

A "visitor" under the Occupier's Liability Act is one who would be considered an invitee or licensee at common law. At common law, the plaintiff would not have been an invitee because he was not invited expressly or impliedly and would not have been a licensee, he not having had permission

from the occupier to enter the warehouse. According to Halsbury's Laws (4th ed) paragraph 20, a licence may not be implied merely because the occupier knows of the presence of the trespasser or has failed to take the necessary steps to prevent his entry. There must be evidence either of express permission, or that the occupier has so conducted himself that he cannot be heard to say that he did not give it.

A man can be a trespasser even if, when invited into premises, he goes to a section of those premises where he knows he is not to go. In **R v. Walkington** 1979 1 WLR 1169 the Court held that whether the area within the three-sided counter was part of the store from which the public was excluded so that D entered part of a building as a trespasser within the meaning of the Theft Act 1968 was a question of fact and that there was ample evidence to support the conclusion that the management had impliedly prohibited customers from entering the area and D knew of that prohibition. In **Alcan Jamaica Ltd. and Universal Fencing Ltd.v. Edward Nicholson** (1986) 23 JLR 418 the Court of Appeal found that although the plaintiff had been invited onto the premises under a contract for services between Alcan Jamaica Ltd. and Universal Fencing Ltd. he became a trespasser when he left his work area to venture for cigarette in a part of the premises he knew to be unauthorised and dangerous.

The issues of whether the plaintiff was a visitor or a trespasser and of an occupier's liability to a trespasser were fully addressed by the Court of Appeal

in **Alcan Jamaica Ltd. and Universal Fencing Ltd. v. Edward Nicholson** (Supra). The test as to the plaintiff's status which was applied was: Did the respondent act reasonably in following the path he did? That is, did the respondent reasonably think his licence extended to the warehouse? In the present case the Managing Shareholder and Managing Director of the first defendant, Mr. Albert Lowe testified that non-warehouse workers only had permission to enter the warehouse when he expressly invited them into his office in the warehouse and this was confirmed by the trial judge as a finding of fact. Carey, J.A, in **Alcan Jamaica** was influenced by Lord Atkin's opinion in **Hillen & Pettigrew** v. **I.C.I. (Alkali) Ltd.** [1936] A.C. 65 at 69: The duty of an occupier to an invitee:

> "Only extends so long as and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purposes for which he has been invited...So far as he sets foot on so much of the premises as lie outside the invitation or uses them for purposes which are alien to the invitation he is not an invitee but trespasser."

At page 423 Carey, J.A. said of the respondent:

> "...his presence there could never be said to be incidental to his job No one expected him to be there."

At page 425G he continued:

> "The respondent when he entered the precipitation area, in disobedience of the order to keep to his work site, and fully alive as a reasonable man to the risk he ran, must be

> regarded as a trespasser. In searching for cigarettes in the area he ventured he cannot be considered as making an ordinary and reasonable use of the premises for the purpose for which he was invited..."

In the present case, the respondent knew that he ought not to enter the warehouse to use the warehouse bathroom or for any other reason unless specifically invited by his supervisor Mr. Lowe. At the time of the incident he was not invited and he therefore entered the warehouse for an improper and unauthorised purpose and, as such, he was a trespasser.

What then is the duty owed to a trespasser by an occupier of land? Carey, J.A. in **Alcan Jamaica** coherently summed it up at page 426A:

> "Where an occupier knows that there were trespassers on his land or knew of circumstances that made it likely that trespassers would come onto his land, and also knew of physical facts in relation to the state of his land and some activity carried out on the land which constitutes a serious danger to persons on the land who were unaware of these facts, the occupier was under a duty to take reasonable steps to enable the trespasser to avoid the dangers."

All the circumstances of the case must be considered. A balance must be struck between a sensitivity for human suffering and a reluctance to place too heavy a burden on the occupier. In this regard the means and resources of the occupier as well as the motive of the trespasser in coming onto the land must be looked at. Lord Denning in **Pannett v. P. McGuinness & Co, Ltd.** [1972] 3 All ER 137 at 141 said:

> "You must take into account the gravity and likelihood of the probable injury. You must take into account the character of the intrusion by the trespasser. You must have regard to the nature of the place where the trespass occurs. You must also take into account the knowledge which the Defendant has, or ought to have, of the likelihood of trespassers being present."

Using the guidelines set by Lord Denning above to consider the circumstances of the instant case upon the evidence, it becomes clear that the character of the intrusion by the respondent trespasser was not malicious such as a thief or poacher in that he went to have a shower as he had had in the warehouse bathroom before (and not to steal a bottle of Heineken beer as deponed by witnesses for the defendants) there being only two showers on the property. This must be considered along with the fact that the nature of the place where the trespass occurred was dangerous for all persons because of the way in which the incident occurred, on the appellant's own evidence and skeleton arguments, being to the effect that the forklift driver looks to the side when steering the forklift and there cannot see in front of the forklift which he is operating. The incident could therefore have happened to any worker and was not resultant from the plaintiff's trespass per se.

The appellant argues in Ground 2 of this Appeal that the trial judge erred in finding that the second defendant/appellant was negligent because the second defendant was unable to see over the pallet on the forklift. This argument is also untenable on more than one basis. The second defendant as

driver of the forklift was charged with the responsibility to safely operate the forklift regardless of what side he looks to in the normal operation, and regardless of the fact that the pallets were stacked too high rendering him unable to see over them. The trial judge found that the plaintiff was hit from behind thus making the defendants liable (1) in employment law, and (2) in negligence to trespassers. Firstly, the first defendant was under a common law duty to provide a safe system of work and the system could not have been safe if the forklift drivers could not see in front of the forklift they were operating. In **Wilsons and Clyde Coal Co.v English** (1938) AC. 57 the plaintiff succeeded on the basis of the defendant employer's liability for (1) failure to provide proper and suitable plant; (2) failure to select fit and competent servants; and (3) failure to provide proper and safe system of work. Secondly, the second defendant was negligent because he was under a duty to take reasonable care for the safety of the plaintiff, a trespasser, and, as he admitted, he was unable to see over the pallet on the forklift and looked to the side and not to the front when steering.

The appellants argued that the second defendant's inability to safely operate the forklift was part of a system of operation in which the second defendant had a specified function within a restricted area and that the trial judge erred in not considering this when he found the defendants negligent That argument cannot absolve the appellants of liability for breach of their duty

of care and cannot absolve the first defendant of liability for breach of the common law principle to provide a safe system of work.

The appellants argued in Ground 4 & 5 of the Skeleton Arguments (no Ground 3 having been itemized) that because the forklift made a sound from its engine the respondent ought to have been alerted to the presence of the forklift and to have taken proper care for his own safety. The trial judge assessed the plaintiff's negligence at 20%. The appellants think that is too low. We do not.

The appellants argued in Ground 6 that the trial judge erred in awarding damages to the plaintiff for injuries to two legs instead of one as the evidence only shows one leg referred to as injured. Again, this ground of appeal is untenable. Although no reference is made in the plaintiff's evidence to injury to his left leg but only to injury to his right leg, the doctor who examined the plaintiff on the day of the incident noted in his report a deep laceration to the plaintiff's left leg and that he sutured it as it was an open wound. There is thus an irresistible inference to be drawn that the deep, open laceration was caused by the recent incident of the same day and that that injury could have been overlooked as not major compared to the main injuries to the right leg.

For these reasons, we dismissed the appeal affirmed the order of Chester Orr J. and ordered costs to the respondent to be taxed if not agreed.