NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 25 OF 2004

BEFORE: **THE HON. MR. JUSTICE WALKER, J.A.**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE, J.A.

BETWEEN:	**METROPOLITAN PARKS AND MARKETS LIMITED**	**1st APPELLANT**
	ENOCH LAING	**2nd APPELLANT**
	CARL WAISOME	**3rd APPELLANT**
AND:	**PERCIVAL SWABY**	**RESPONDENT**

Garth McBean, instructed by Knight, Pickersgill and Dowding for the appellants Christopher Samuda and Miss Stacie-Ann Saunders, instructed by Nicholson Phillips for the respondent.

September 27, 28 , 29 and December 20, 2004

PANTON, J.A.

1. On March 5, 2004, Mrs. Justice Sinclair-Haynes (Acting) awarded judgment on a 70-30 basis in favour of the respondent who had filed suit against the appellants for negligence arising from an accident on Saturday, November 7, 1998. The appellants challenged the judgment before us and on September 29, 2004, at the end of a three-day hearing we allowed the appeal in part. The judgment that had been entered against the second and third appellants was set aside and a judgment entered in their favour, with costs in this court as well as the court below to be agreed or taxed. The judgment that had been entered

against the first appellant was affirmed with costs to the respondent to be agreed or taxed.

2. The respondent, a truck sideman, lost both legs following a fall from what is called a flat bed truck on which he worked. The first appellant ("MPM") was the owner of this truck which was being driven by the third appellant (Waisome) who was employed by MPM as a sideman. Waisome's authority to drive the truck had been conferred by no less a person than the second appellant (Laing) who was employed to MPM as a supervisor.

3. Messrs Laing and Waisome as well as the respondent and one Cleveland Campbell, another sideman employed to MPM, worked on the truck that fateful day. During the course of the afternoon, there was an interlude for refreshments. The venue was a bar on Water Lane, Kingston. All, except Campbell, had alcohol drinks over a period of about ninety minutes. They had the company of two ladies and two children. Apparently, this was a bar from which children were not excluded. The respondent admitted to having had either three or four drinks of white rum and campari. One of his drinking companions said that there was another ingredient in that mixture - tia maria. In any event, the medical report said that the respondent was intoxicated as a result. After this interlude, they set out for home. The respondent, Campbell and Laing were on the back of the truck while Waisome, two women and two children were in the cab. Laing was the first to leave the vehicle on this homeward journey. As the

truck continued on Spanish Town Road, the respondent fell from the back of the truck and his legs were unfortunately crushed.

4. Witness statements were provided by all the employees of MPM. At the hearing, the respondent testified on his own behalf, and was extensively cross-examined. Waisome, the sideman who acted as driver, was called as a witness for the appellants, and was also extensively cross-examined. The respondent gave no evidence which indicated that there was any legitimate complaint against, or reason for discomfort with, Waisome's manner of driving. Waisome gave evidence as to how sidemen including himself designed seating for themselves while travelling on the truck. It should be noted that the truck, described as a flat bed, was used for the purpose of collecting derelict cars, metal and make-shift houses from the side of the road. On the back of the truck was a crane which was used for lifting the derelict items. There were no seats, no handrails, and no designated areas for the sidemen to sit or stand with any degree of assurance of safety.

5. In a thoughtful judgment, the learned trial judge, in describing the facts of the case as pathetic, found that when the crew stopped at the bar, they were "on their own frolic". However, "while they were on Spanish Town Road they had resumed the journey of MPM's purpose" as they were taking home the respondent with the intention of also returning the truck to the garage. The learned judge also found that "the fact that he (Waisome) was also doing his own business on the journey by conveying the women and children, perhaps in

breach of MPM's rules, does not per se place him outside the scope of his employment". The respondent, concluded the learned judge, "suffered the accident whilst he was in the course of his employment".

6. The judge went on to examine the evidence relating to the safety of the system of work. She made this observation at pages 127 and 128 of the record:

> "The evidence is that the men worked on a flat bed truck. The cab of the truck was able to safely seat the driver and another. A supervisor or striker rode in the cab. In their absence Mr. Waisome drove in the cab. No stable seating or standing facilities were provided for crew members. Nor were they instructed where to sit or stand. Through their own contrivance they devised their own seating and standing arrangements.
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> Mr. Waisome told the Court he did not want to fall off so he made himself safe. The other crew member stood on the platform and held on to a groove on the water tank. Carl Waisome testified that the groove was a "fingertip hold" or "a beeny raise". The platform was installed to prevent the men from falling through the space between the bed of the truck and the cab. It was installed after the men complained of the danger. A handle was placed at the side of the truck. Mr. Swaby told the court that the handle was placed there after the accident. In light of Mr. Waisome's corroborative evidence of the men's position on the truck, I accept Mr. Swaby's testimony in this regard as true. The truck itself was a flat bed, there were no rails or any support at all. Mr. Waisome told the court that if a handrail was installed it had to be designed so that it could be opened to allow the men access to the truck".

After examining and comparing the facts of several decided cases, the learned judge concluded thus at page 130 of the record:

> "The crew was constantly being driven around in dangerous circumstances. The likelihood that a crew member could fall was reasonably foreseeable. MPM ought to have implemented measures to guard against that happening. The convenience and expense of guarding against the likelihood of the men falling could not have been entirely disproportionate to the risk involved. It was reasonably practicable to diminish the danger. In the circumstances MPM failed to secure the safety of the crew. A clear breach of duty at common law has been established. The fact that Mr. Swaby was very adept at operating the crane, does not, however, absolve MPM from taking precautionary measures to protect the men who were in constant peril. It was pellucid that the condition that existed on the truck was an accident waiting to happen".

7. Sinclair-Haynes, J.(Acting) later addressed the question of whether the respondent was "befuddled by drink" or whether "his intoxication had rendered him incapable of firmly bracing his feet against the wall". She preferred, on a balance of probabilities, the latter view. She went on to conclude that the respondent had imperilled himself further and above the peril that his employer MPM had placed him in. She, quite rightly in our view, concluded that some liability must be attached to the respondent.

8. The learned judge attached blame to Laing for allowing the respondent to drive on the truck in his intoxicated state. She found that a prudent supervisor would have foreseen the likelihood of the respondent falling from the truck. Her conclusion was that Laing had a duty not to allow the intoxicated respondent on such an unsafe vehicle. In so doing, she found that he was negligent, and that MPM was vicariously liable for his negligence. The learned judge also entered

judgment against Waisome although there was nothing in the evidence to suggest that his manner of driving was anything other than appropriate.

9. The appellants have challenged the judgment on grounds that may be summarized thus:

The learned judge erred in finding that -

- The respondent suffered the injury whilst in the course of his employment;
- Laing and Waisome were acting in the course of their employment whilst on Spanish Town Road;
- The truck was being driven by Waisome on the instructions of MPM and primarily for the business of MPM;
- MPM was under a duty to provide a safe system of work and failed to do so;
- Laing was negligent in allowing the respondent to be on the vehicle in an intoxicated state; and
- The respondent was only thirty percent (30%) contributorily negligent.

10. The appellants, on these grounds, sought an order that the appeal be allowed, judgment below set aside, and judgment entered for the appellants; alternatively, an order allowing the appeal in respect of the apportionment of liability and adjusting the judgment accordingly so that the respondent bears a greater share in keeping with the level of his contributory negligence.

11. Mr. Garth McBean, in his thorough presentation before this Court, submitted that the finding of the learned judge that the respondent was injured

in the course of his employment was unnecessary and irrelevant to the issue of whether MPM was vicariously liable for the acts of Laing and Waisome. Mr. McBean is correct in this view given the fact that there was no evidence of negligent driving by Waisome, and no evidence indicating culpability on the part of Laing towards the respondent and the injuries he sustained. However, the finding is clearly relevant as far as MPM's responsibility and liability are concerned on the issue of a safe system of work.

12. It was contended that the finding that the respondent was injured during the course of his employment was not in keeping with the evidence. To support this contention, Mr. McBean pointed to the transportation of the ladies and children to Portmore being part of a private arrangement. MPM, he said, was not a party to this arrangement, and was not aware of it. Furthermore, he said, Laing, the supervisor, had already left the vehicle. Mr. Christopher Samuda countered that the fact that Laing's journey had ended was unimportant in determining whether the truck was being driven in the course of employment seeing that the driver, Waisome, was an employee of MPM. We agreed with Mr. Samuda. So far as the transportation of the ladies and children was concerned, there was no evidence to indicate that there had been a breach of any rule or policy laid down by MPM. In any event, it is agreed that MPM was obliged to return to their homes employees such as the respondent; and there is no doubt that the respondent was on his way home. The inclusion or intrusion of other

persons on the trip did not alter the fact that the respondent was being taken home.

13. Due to the lack of evidence indicating any culpability on the part of either Laing or Waisome, there was nothing for MPM to be vicariously liable for. In order for the respondent to have been successful, therefore, it had to be shown that MPM had a duty to provide a safe system of work, and had breached that duty. Mr. McBean submitted that the learned judge erred in finding that MPM was under a duty to provide such a system. He based his submission on the fact that the respondent was experienced in the work that he was required to perform, and that the task was not repetitive, unusual or complex. The nature of the work was such, he said, that the type of vehicle involved did not attract proper seating. In our view, Mr. Samuda effectively answered that submission by pointing to the fact that the learned trial judge had considered the matter and had used the case of **Roberts v. Dorman Long and Co.** [1953] 1 WLR 943 to support her decision that MPM had a duty to provide a safe system of work. In **Roberts**, at page 947 Birkett, LJ said:

> "Even assuming that he was familiar with the kind of work almost daily, nevertheless a moment's reflection would show that a mere slip, a moment of forgetfulness in doing familiar work, or some quite unforeseen happening of any kind might result in a sudden over- balancing with serious and in this case fatal consequences".

It is appropriate to add that the fact that a task is repetitive cannot, by itself, dispense with the need for the provision of a safe system of work.

14. The major point in the case was whether MPM had provided a safe system of work. Mr. McBean submitted that even if there was a duty to provide a safe system, and MPM had failed in that duty, the failure was not the effective cause of the accident. It was the respondent's intoxication, he said, that was the effective cause of the accident. While intoxicated, the respondent, according to Mr. McBean, had placed himself in a precarious position, and that was the cause of the accident. Further, Mr. McBean argued, the employees had, without the permission of MPM, given the ladies and children, the seats that had been provided for them in the cab of the truck. A safe system of work had been provided. It was merely a situation in which the system had been ignored by the employees, including the respondent. Mr. McBean conceded, however, that there was no specific seating on the back of the truck and that the workmen thereon would hold on to the ledge as that type of vehicle did not attract seating.

15. Mr. Samuda, on the other hand, submitted that the flat bed truck lacked adequate facilities for seating or standing. In the absence of such, and the likelihood of such leading to an accident, MPM, he said, should have recognized that it was necessary to implement a safe system of work; that is, the provision of the facilities as well as instructions as to how they (the employees) could have made themselves safe on the back of the truck. He discounted the fact that the employees had given up their seats to the ladies and children, pointing out that even if these strangers had not been in the cab, there would not have been space therein for all the crew. A safe system of work, he said, was not confined

to the physical structures. It included supervision. Hence, he argued, Laing who had a duty to supervise should have instructed Swaby not to go on the back of the truck given his intoxicated state. When it was pointed out to Mr. Samuda that there was no pleading that had suggested liability on the part of Laing in this respect, he said that once there had been no objection to the admission of the evidence at the trial, there could be no exclusion of its consideration at the appellate stage notwithstanding the lack of a pleading. He relied on the case of **Domsalla and Another v. Barr** [1969] 3 All ER 487 in support of this position. There was no need to determine whether there was any substance to this point due to the simple fact that Laing had no responsibility to provide a safe system of work. That responsibility was MPM's.

16. There is no doubt that the circumstances of each case have to be considered in determining what is a safe system of work, as the requirements depend entirely on what exists at the workplace and on the level of danger that a situation poses. We are of the view that the learned judge displayed a proper grasp of the concept of a safe system of work, as well as of the evidence that was put before her. We found no fault with her treatment of the evidence, nor with her finding that MPM had not provided a safe system.

17. The final matter for consideration was the judge's finding that the respondent was thirty percent (30%) to be blamed for the injuries that he sustained. Mr. McBean contended that the judge should have found that the respondent was the sole or effective cause of his injury; alternatively, that he

was the substantial cause. The medical report revealed that the respondent was intoxicated. That fact together with the respondent's location on the vehicle caused the accident, he said. The respondent had not secured himself properly. Further, the judge had found that had the respondent not been intoxicated, he would have been able to brace himself thereby avoiding the fall. Indeed, the judge described the respondent's behaviour as ridiculous and stupid.

In supporting the apportionment that was made, Mr. Samuda said that MPM had to shoulder the greater share given that primary responsibility for the system of work rested with them. He further said that there was no evidence to demonstrate that the apportionment was misconceived, and that the decided cases pellucidly supported the apportionment that was made.

We are of the view that in the circumstances the apportionment was appropriate. The evidence indicated a serious lapse on the part of MPM. The fact that the respondent was intoxicated was incidental, bearing in mind the learned judge's apt description of the situation as one in which an "accident (was) waiting to happen".

18. In the light of the foregoing reasons, we made the order referred to in paragraph (1) above.