Employers liability — safe system of wk.

DAMAGES

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 46/72

BEFORE: The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Robinson, J.A.

BETWEEN PARAMOUNT DRY CLEANERS LTD. DEFENDANT/APPELLANT

AND RITA BENNETT PLAINTIFF/RESPONDENT

R.N.A. Henriques for the appellant.

E.C.L. Parkinson, Q.C., for the respondent.

NOVEMBER 27, 28, 29, 1974

GRAHAM-PERKINS, J.A.:

On May, 12, 1970, the respondent suffered an unfortunate accident resulting in severe injuries to her right hand. As a consequence she sought to recover damages in an action of trial before Melville, J. without a jury.

At the material time the respondent was a presser employed by the appellant. Her job involved the operation of two power steam-pressing machines at the appellant's laundry on Molynes Road, Kingston.

In paragraph 3 of her statement of claim the respondent alleged that the appellant had "impliedly agreed, or it was (its) duty, to provide a safe system of work and effective supervision of the said operation of the power steam-pressing machines," and that it had committed breaches of its agreement, or were negligent in that it had (a) failed to take any proper precaution for her safety; (b) employed an incompetent fellow servant, who had negligently pressed a button on a machine operated by her thus causing the upper part of that machine to descend on her right forearm. She alleged, further, that the appellant was negligent in employing an incompetent and unskilled fellow-servant to "work along with" her.

In its defence the appellant denied that it had failed to provide a safe system of work and effective supervision of the operation of the machines

It denied that it was guilty of negligence as alleged by the respondent, or at all. In particular, it denied that the respondent had suffered her injury in the manner alleged by her. The respondent was the sole author of her misfortune.

In the result Melville, J. was called upon to resolve a relatively narrow issue as to the appellant's liability. Put simply it was: Did the respondent suffer her injury as the result either of the failure in the appellant to provide a safe system of work and effective supervision of the machines, or of the negligence of a fellow-servant?

In support of her claim the respondent gave evidence in which she described the circumstances leading to her injury. There were 4 steam-pressing machines, two small and two large, which were so placed as to describe a semi-circle. She was responsible for the operation of the two small machines. Her co-worker, Ida Griffiths, was concerned with the operation of one of the large machines (hereinafter called "the No. 4 machine"). Another co-worker, one Saunders, operated the other large machine (hereinafter called "the No. 3 machine"). Saunders was absent from work on May 12, 1970. Ordinarily, she (the respondent) pressed the upper part of a shirt, that is, the collar and shoulders, on one or other of the small machines. Griffiths would thereafter press the lower part of that shirt on her larger machine. On May 12, however, there was a large quantity of shirts (or skirts) to be pressed and delivered by 12 midday, and Mr. Chin, the appellant's manager, asked Griffiths and the respondent to speed up their work. He started to use one of the small machines. In those circumstances the respondent decided to use the other of the two large machines, the No. 3 machine, to press the lower part of those shirts which she had pressed on her other small machine. The No. 3 machine could accomodate two shirts at the same time. While using the machine on which she had placed a shirt, Griffiths placed another shirt on the machine. She then sprayed both shirts and said to Griffiths: "Ida, mind my hand. I don't like anyone to use the machine that I am using." Griffiths pressed a button causing the upper part of the machine "to slam down" on her right hand, resulting in severe second degree burns. It was she, and not Griffiths, who should have pressed the button. Her evidence disclosed some measure of uncertainty as to the precise position of her hand when Griffiths pressed the button. In the early part of her evidence she described her hand

as being "right down on the machine on the shirt." In another part, she said: "I was actually holding the spraying gun when the machine came down on it." That then was the case advanced by the respondent.

Before turning to the evidence led by the appellant, it is important to notice here certain allegations by the respondent and certain counter-allegations by the appellant concerning the No. 3 machine. According to the respondent, this machine was defective. Ordinarily, in order to cause the upper part, or head, to come down on to the pad on which an article was to be pressed, two buttons had to be depressed. The result of this was that the head - the heated part - descended gradually until it came into contact with the pad. But both buttons had to be depressed to secure this result. One of the buttons on this machine, however, was defective. It was possible, because of this defect, to cause the head of the machine to descend by depressing one button only. In this circumstance the head came down rapidly and not gradually as it did when the machine functioned properly.

In her evidence the respondent said: "The machine wasn't working properly because when it came down it slammed and it was one button that I had pressed." She said, too, that Mr. Chin had worked on the machine the day before. When he had finished it was not "slamming". Significantly the respondent did not in her evidence describe the machine as defective at any time prior to that moment of time, when as she claimed, Griffiths pressed the button.

Mr. Chin and Griffiths denied that the machine was defective in any way. He denied that he ever had occasion to repair that machine. The head could normally be brought down only by pressing two buttons if both were in order. If, however, one was defective the head could, nevertheless, be brought down, but it would come down gradually. The only way in which the head would "slam down" is if one of the two main springs at the rear of the machine was broken. These springs were not broken.

For the appellant Ida Griffiths and Kingsley Chin gave evidence.

Griffiths said that on May 12, 1970, she was operating both large machines. The respondent operated the two small ones. She described the method she adopted in the operation of the two large machines thus: She would place a garment on the pad of one of the large machines, and bring down the head so as

to press the garment. Having done so she would move to the other large machine and repeat the exercise. Next she would go back to the first machine and release the head. If the garment here was properly pressed she would remove it and "reload" the machine. Thus she would "go to and fro" between the two large machines "unloading" and "reloading" each with a garment. Griffiths was clear that the respondent did not, at any time on May 12, use any of the large machines, nor did she put a shirt in the No. 3 machine. Sometime before the accident resulting in the respondent's injury, Mr. Chin approached the respondent and spoke to her about certain garments which he said had not been properly pressed. He began to use one of the respondent's small machines. The respondent at that time was standing to the left and rear of Griffiths. Although Griffiths says that she did not then see the respondent she knew where she was "through the argument that was going on" between her and Chin. While this "argument" was in progress Griffiths was "spreading out a shirt" on the pad of No. 3 machine. She then sprayed it. She said: "I looked and locked it by pressing both buttons. When I pressed both buttons the top comes down gradually." At this point she demonstrated the length of the machine estimated at 4' 6" by Melville, J. and 3' 6" by Mr. Parkinson. She continued: "At the time I was standing in front of the machine when I closed it. To close it I have to stand in front of it. I made one step to release the next machine. I glanced behind and saw something stretched out. At first I didn't know it was a hand. I turned around fully and saw (Respondent's) hand in machine. I made a scream and released it."

It is clear from Griffiths' evidence that what she was saying was: (i) that at the moment of time when she pressed the buttons to cause the head of the machine to descend, the respondent was standing to her left and to the rear; and (ii) that at that time the respondent's hand was not on the pad or near it. Griffiths said further that the head did not "slam down"; it came down gradually. Chin had not told her or the respondent to rush any work. There was a quantity of shirts to be done but these were not required "to be got out by midday."

Kingsley Chin said that shortly before the accident he had spoken to

the respondent because she had not done certain garments properly. He had with him some garments that she had pressed and with which he was not satisfied. He showed her how to lay out, spray and press two of them. While he was with the respondent, he saw Griffiths working at the two large machines. After showing the respondent how he wanted the garments pressed, he left her to press them again. He had moved off some 15 to 20' when he heard a scream. There was nothing wrong with the two large machines that were being used by Griffiths.

It will be seen that there was considerable conflict between the evidence given by the respondent on the one hand and that given by Griffiths and Chin on the other. At the end of the day the learned trial judge arrived at certain conclusions which he expressed as follows:-

> "Plaintiff's case grossly exaggerated. Court finds as facts that Chin showing Plaintiff how shirt to be pressed by small number one machine. Plaintiff then by or near number three machine. Reject Plaintiff's evidence of how accident happened. Satisfied Griffiths witness of truth when she says she alone operating number three. Plaintiff's hand came to be under top of machine. Court rejects Plaintiff's evidence that she was operating number three machine and Griffiths had shirts when Griffiths pressed button and brought down machine on hand. Court satisfied that Chin showing Plaintiff how to press skirt on number one machine. Plaintiff then had hand resting on pad of number three. Griffiths then operate number three and carelessly brought machine down on Plaintiff's hand. Not true Plaintiff spraying with spray in hand when machine brought down or then one would expect top of fingers to be burnt and not back of hand as actually happens. Closeness of machines. Proximity of Plaintiff to Defendant. Griffiths ought to take care to see no one hand on machine before pressing buttons to bring down top of machine and she is there negligent. Plaintiff not taking care for her safety by putting hand on pad at time knowing Griffiths using number three. Therefore guilty of contributory negligence. No slamming down of machine as Plaintiff alleges. Accepts Chin's

evidence machine in proper working order. Accept that Chin mistaken when he says he had moved off after speaking to Plaintiff. Court accepts Griffiths evidence on this point that Plaintiff and Chin somewhere behind her."

It cannot be open to dispute that of the foregoing findings the most critical are: (i) When Chin was showing the respondent how to press a shirt on one of the smaller machines, the respondent then had her hand resting on the pad of No. 3 machine; (ii) Griffiths then pressed the buttons of that machine and caused the head to descend.

It is undoubtedly of some importance to notice that the learned trial judge accepted Griffiths' evidence that Chin and the respondent "were somewhere behind her" at some point of tine. The only evidence that Griffiths gave as to the respondent being behind her, was with particular reference to the point of time at which she pressed the buttons on her machine. There is, therefore, a conflict between this finding based on an acceptance of Griffiths' evidence and the finding at (i) and (ii) above, that Griffiths pressed the buttons of No. 3 machine when the respondent's hand was resting on the pad. There is also apparent inconsistency between the finding that "Chin showing the respondent how shirt to be pressed ... (Respondent) then by or near No. 3 machine", and the later finding "Chin showing (the respondent) how to press skirt ... Respondent then had hand resting on pad of No. 3."

But there is a more fundamental objection to the finding that Griffiths pressed the buttons of her machine when the respondent's hand was resting on the pad of that machine and that Griffiths was negligent in so doing. The objection to that finding is that there was not a scintilla of evidence on which it could be based nor from which it could be inferred. When once the learned trial judge reached the conclusion that the respondent was not, at the material time, operating the No. 3 machine, and that the account advanced by her as to the circumstances in which she received her injury was to be rejected in toto, there ceased to be any evidential basis on which to found a conclusion that she had her hand resting on the pad of the No. 3 machine when Griffiths pressed the buttons of that machine.

Indeed this theory as to the cause of the accident was not, at any

time, adumbrated by anyone during the trial. It certainly was not suggested in the pleadings. It was readily conceded by Mr. Parkinson, that the theory advanced by the trial judge was untenable. He made no attempt to defend it.

In the result I would hold that the conclusion that Griffiths was negligent was not supported by the evidence and must, therefore, be set aside.

What Mr. Parkinson asked us to do, however, was to find that the defendant was guilty of a breach of its duty to provide a safe system of work in relation to its employees, and more particularly to the respondent. For this purpose he suggested that we should hold that the trial judge was wrong in rejecting the respondent's evidence. He was also wrong in accepting the evidence of Griffiths and Chin wherever that evidence was in conflict with that given by the respondent. Having done so we should then call in aid the doctrine of res ipsa loquitur. Let it suffice to say that no valid reason has been advanced why it should be held that Melville, J. was in error in rejecting the respondent's evidence, or in accepting the evidence of Griffiths.

In our view once the respondent's evidence is rejected, and once the conclusion is reached that it was not open to the learned trial judge to assign a theory of his own as to the cause of the respondent's injury, there can be no justification in the circumstances of this case, for any debate as to the failure in the appellant to provide a safe system of work. In our opinion Mr. Parkinson is in error in thinking that it is open to this Court, in the state of the evidence led at the trial, to examine any such question.

In COLFAR V. COGGINS AND GRIFFITH LTD., 1945) 1ALL.E.R. 326 Viscount Simon, L.C., dealing with a similar problem, said, at p. 328:

> "Such being the state of the law, the advisers of the appellant realised that his claim (independently of the Workmen's Compensation Act) was bound to fail unless it could be established that the accident was due to the respondent's failure to provide and maintain a proper system of work. To raise this issue, the statement of claim ought to set out, so far as relevant, what the proper system of work was, and in what relevant respects it is alleged that it was not observed."

It is true that in GENERAL CLEANING CONTRACTORS, LTD. V. CHRISTMAS (1952) 2ALL.E.R. 1110 Lord Oaksey, in commenting on the foregoing dictum said, at p. 1115:

> " In the course of the argument questions were raised as to the adequacy of the pleadings and attention was called to the dictum of Viscount Simon, L.C., in COLFAR V. COGGINS AND GRIFFITH LTD., that a plaintiff in such a case as the present must prove that the system adopted is not reasonably safe and also prove what system is safe, but, in my respectful opinion, what the noble and learned viscount was dealing with was the evidence which would go to show that the system adopted was unsafe, that is to say, by proving a possible safe system. It cannot, in my opinion, be that as a matter of law a plaintiff cannot succeed in such a case unless he proves a particular system in which the work can be performed."

Be it observed, however, that the point made by Lord Oaksey was that although a plaintiff was not required to prove a particular system, he was at least required to raise a live issue by leading evidence to show that the particular system adopted was unsafe. By so doing a plaintiff would almost always be able to show, inferentially, a possible safe system of work. Whether, therefore, the problem be looked at from the point of view of pleadings and evidence, or from the point of view of evidence alone, the result is necessarily the same, although it is not a little difficult to appreciate why a plaintiff who relies on the breach of an employer's common law duty to provide a safe system of work should not so plead.

In this case the respondent did plead a failure in the appellant to provide a safe system of work. She also particularized the two factors which, she alleged, constituted that failure. In the end, however, whatever evidence she gave as to the cause of her injury was totally rejected by the trial judge. There was no issue remaining as to the alleged failure in the respondent. There was, therefore, no basis on which the trial judge could have found that the respondent's injury was the result of a failure in the appellant to provide a safe system of work. Nor can it, I think, be open

to this Court to so find.

We would allow the appeal and set aside the judgement in favour of the respondent. We would enter judgement in favour of the appellant with costs in the Court below, and of this appeal, to be agreed or taxed.