IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1986/P119

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| BETWEEN | ASTON PINNOCK | PLAINTIFF |
| AND | CORE BROTHERS LIMITED | DEFENDANT |

F.K. Anderson appearing on behalf of the Plaintiff

W. Wilkins and Miss Karen Robertson instructed by Clinton and Hart and Company for Defendant.

HEARD: 11th, 12th June and 12th July, 1991.

HARRISON J. (Ag.)

In this action the plaintiff is seeking to recover damages for personal injuries.

The plaintiff was employed by the defendant company as a tile grinding operator. On the 26th day of September 1983 he was injured whilst on the job. A forklift driven by Victor Chin, pushed a tile rack causing it to pin the plaintiff's left leg against a tile grinding machine. The plaintiff received injuries and was treated at hospital. He alleges that the collision was caused by the negligence of the defendant, their servant or agent.

The defendant admitted that the plaintiff was injured by the said forklift but sought to escape liability by saying that the driver of the forklift was employed by the defendant as an operator of a tile grinding machine and not otherwise. He was not authorised by the defendant to drive the forklift and was expressly forbidden to do so whether on the defendant's behalf of at all. In the premises, it was contended that the driver's act was not done by him in the course or within the scope of his employment.

The grounds of negligence alleged against the defendant are stated as follows:

1. Failing to keep any or any proper look out or to observe in time or at all the presence of the plaintiff.
2. Failing to take due care and attention.
3. Failing to apply the brakes in time or at all so to steer or control the forklift as to avoid the said collision.

The evidence revealed that the defendant company was engaged in the

business of tile manufacturing. Both plaintiff and Victor Chin worked alongside each other at the tile grinding machine. On the 26th September 1983 they were at work carrying out their respective duties. Roy Campbell, a witness for the plaintiff was also at work in the tile grinding department. Chin was responsible for "feeding" the machine.

The plaintiff and his witness contend that a rack from which tiles were taken by Chin to feed the machine was almost empty. Chin left the machine and was next seen driving a forklift conveying a rack filled with tiles. He was heading towards the grinding machine when the forklift crashed into the rack thereby causing it to pin the plaintiff's left leg against the grinding machine. Mr. Venson, a supervisor, having heard a scream went to investigate and was just in time to see Chin trying to reverse the forklift. The plaintiff was seen holding up his left leg.

Victor Chin was not called to give evidence at the trial. Two supervisors were called as witnesses to give evidence on behalf of the Defence. They said Chin was acting contrary to express prohibition. This prohibition against driving the forklift was not in writing. They contended however that Chin was warned by them verbally on several occasions whenever he was seen driving the forklift. The exact words used for the warning, were not given but one got the impression from the defence witnesses that he was told not to drive. It was disclosed by the defence that Chin was suspended once for having driven a forklift. Both plaintiff and his witness have never heard Chin being warned and neither knew of any disciplinary action taken against him.

When cross-examined the plaintiff said "Any and any body can drive a forklift at Gore Brothers". Mr. Venson said that the company had three persons employed on 26th September 1983 to drive forklifts. Chin was not one of those persons. Campbell when cross-examined was asked if it was a free for all for anyone to drive a forklift in 1983. In response he said "you could call it so". He further contended "if the accident never happened the company would not recognise a proper driver to drive the forklift". The word "recognise" seems to suggest that there are now operators assigned to operate forklifts.

There is also evidence that other employees apart from Chin were in the habit of driving forklifts loaded with tiles and that they too were warned.

Mr. Venson said that Chin was however a special case and they had to open their eyes on him all the time.

It would seem from the evidence that one did not have to possess special skills to operate a forklift. Mr. Marsh, supervisor at factory said "forklift is a very simple thing to operate". Venson admitted that Chin could operate it. He denied however under cross-examination that Chin was allowed to drive the forklift. He repeated that Chin was given "a lot of warning".

It was submitted on behalf of the defendant firstly, that the plaintiff had not adduced sufficient evidence to clearly establish that Chin was negligent. Secondly, Mr. Wilkins submitted that if the court found that Chin was negligent, it should find that he committed a breach of instructions not to drive the forklift and in doing so he was acting outside the scope of his authority. He cited and relied on the authorities of Twine v Bean's Express Limited [1946] 1 All E.R. 202 Iqbal v London Transport Executive Times June, 7, 1973 and General Engineering Services Limited v K.S.A.C. 1988 3 All E.R. 867. In these cases the employer was held not to be liable where the servant was disobeying instructions given by the employer.

Mr. Anderson submitted that negligence on the part of Chin was established on a balance of probabilities. Secondly, he said that there was a presumption that the driver of the forklift at the material time was acting as agent of the owner. It was therefore the defendant's duty to rebut this presumption. Thirdly, it was further submitted that "the defendant company is under a dilemma. If as they aver Chin was from time to time driving the vehicle without authority then his employer took no heed for the safety of their other employees and in retaining him in their employment are therefore liable for his negligence". In support of these submissions he cited and relied on various authorities and concluded that Chin was definitely acting within the scope of his employment and as such the defendant would be vicariously liable for his negligence.

There are instances where the wrongs of the servant even where wilful or in disobedience of express instructions by the employer are seen to be within the course of the servant's employment. A wrongful act has been deemed to be within the scope of the servant's employment if it is a wrongful

and unauthorised mode of doing an act authorised by the Master. It is really a question of fact in each case.

In L.C.C. v Cattermoles (Garage) Limited [1953] 1 W.L.R. 977 a garage hand was forbidden to drive but to manhandle the vehicles. He disobeyed and drove. It was held that his employers were liable for damage caused by his negligence while driving a vehicle. All that had been prohibited was a particular mode of moving vehicles. Similarly in C.P.R. v Lockhart [1942] A.C. 591 the Privy Council held that a prohibition against driving uninsured cars did not operate so as to relieve the master from liability when a servant caused damage while driving an uninsured car for the purposes of his work.

In East v Beavis Transport Limited [1969] 1 Lloyds Rep. 302 two lorries stood back to back at the docks being loaded with produce. It was required to move one of them owned by Beavis. Beavis' driver gave permission to Sellars a docker employed by Anderson to move it. Sellars reversed into the other lorry, squashing the plaintiff against it and injuring him. Sellar's employers were held vicariously liable for his negligence because although they did not employ him to drive lorries, his act had a close connection with what he was employed to do namely, the loading of lorries.

I was impressed with the manner in which the plaintiff and witness gave evidence. They were frank with their answers. I find that forklifts were driven by several workers including Chin during 1983 for the purpose of conveying tiles in the grinding department. I further accept the plaintiff's evidence were he said "any and anybody could drive a forklift at Gore Brothers". It was a vehicle which required no special skills to drive. I also find that in the absence of the operators for these forklifts, workers including Chin did use them to convey tiles and that this was the case on the 26th September 1983. In my opinion, and I so find that on balance of probabilities the accident was caused by the negligent manner in which Chin operated the forklift.

The question to ask is, despite the verbal warnings given to Chin is his employer to be held vicariously liable? In determining whether this wrongful act was done by Chin in the course of his employment I hold that all the surrounding circumstances must be taken into account and not merely the particular act that leads to the damage.

It is admitted that both trolley and forklift work "hand in hand". According to Mr. Marsh they almost served the same function. The evidence revealed that at the material time there was a need to have a rack of tiles deposited by the grinding machine. The operator for the forklift was not present in the grinding department so Chin it would appear used a forklift to transport the rack of tiles. Mr. Marsh, admitted when cross-examined that it was in the company's interest for the machine to be fed as fast as possible with tiles. Mr. Wilkins submitted that the true test was not whether an employee at the material time was acting in the interest of the employer but rather whether or not the person was authorised or employed to do what he was doing. He argued that a distinction must be drawn between the manual work of Chin with the trolley vis-a-vis the mechanized work involved in operating the forklift.

"Clerk and Lindsell on Torts", 13th Edition at paragraph 220 states as follows:

> "It is not the law that the master is liable whenever the wrongful act was done by the servant in the belief that it would advance his master's business, but on the other hand, the line should be drawn fairly high in favour of the innocent sufferer injured by the act of somebody who was employed by the defendant employer and who was seeking to further that employer's interest".

I find and hold therefore that on the evidence presented, Victor Chin was not acting outside the scope of his employment at the material time. In the circumstances therefore this court finds the defendant vicariously liable. The defendant is therefore liable to pay damages.

I deal firstly with special damages. The plaintiff was unable to work for a period of sixteen (16) weeks. He earned $300 weekly. After deductions he takes home approximately $220.00. I make his loss of earnings for this period amounting to $3520.00. He paid $30 for medical expenses. Taxi fares were not proved. Special damages proved therefore total $3550.00. I turn next to General Damages. Evidence of the injuries was provided by a medical report put in by consent which showed that the plaintiff had multiple lacerations on his left leg and an undisplaced fracture midshaft of the left tibia and fibula. He was considered totally disabled from 26th September 1983 until 29th December 1983 and thereafter partially disabled until 20th February 1984. He was further

considered to be fully healed on 20th February 1984 with no residual disability. The plaintiff gave evidence that he experienced "heavy pains" for about four (4) weeks and "light pain" for about five (5) weeks. General Damages should therefore be limited to pain and suffering.

Mr. Wilkins cited and relied upon an award made in C.L. 1979/R073 Roofe v The Attorney General reported in Khan's digest of Recent Personal Injury Awards Vol. 1 page 60 where the plaintiff suffered somewhat similar injuries. The court awarded $6000.00 in that case for General Damages in 1981.

Mr. Anderson sought to rely upon the authorities C.L. 1982/C100 Cobran v Gooden and Another and C.L. 1982/A077 Anderson v Tilsie. These cases were reported in Khan's digest of Recent Personal Injury Awards Vol. 2 at pages 86 and 101 respectively. Both cases in my view rendered very little assistance. He submitted however that the $6,000.00 awarded in Roofe's case should be multiplied by at least eight times having regard to the rate of inflation. The indications are that he was looking at a figure of $48,000.00.

In the recent case of Suit C.L. 1988/G033 Gayle v Gray and Another reported in Khan's Recent Personal Injury Awards Vol. 3 p.36 the plaintiff suffered the following injuries:

1. 4 c.m. laceration over left eye
2. 6 c.m. laceration on anterior aspect of right forearm
3. 9 c.m. superficial abrasion over right forearm
4. Minor fracture of tip of right fibula

The plaintiff was totally disabled for about three (3) months and for a further three months she had a 20% disability and was left with no significant final disability. On 1st May 1990 the court awarded $24,750.00 in respect of General Damages.

In my judgment an award of Thirty Five Thousand Dollars ($35,000.00) for General Damages in all the circumstances of this case would be adequate.

Accordingly, there will be judgment for the plaintiff in the sum of $35,000.00 General Damages with interest thereon at 3% per annum (from the date of service of writ until today) and $3550.00 Special Damages with interest thereon at 3% from 26th September 1983 until today. There will be costs to the plaintiff to be taxed if not agreed.