Supreme Court 5

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. 1974/R077

BETWEEN	Edward Reid	Plaintiff
A N D	Hampden Wharves Limited	1st Defendant
A N D	Dudley Chin	2nd Defendant

Daley, Walker & Lee Hing for plaintiff

Livingston, Alexander & Levy for first defendant

Hines, Hines & Company for second defendant

Heard: 18th January, 1982

Delivered:

Judgment

McKain J:

The plaintiff brought action against both defendants for negligence resulting in injuries he received whilst employed in the service of the first defendant.

His claim was originally against the first defendant to whom he was employed as a storeroom at Hampden Wharf, Trelawny, under the Occupiers Liability Act 1969, the relevant paragraphs of his statement reading as under:

(3) "It was a term of the contract of employment between the plaintiff and the defendant and/or it was the duty of the defendants to take all reasonable precautions for the safety of the plaintiff, not to expose the plaintiff to the risk of damage or injury of which the defendant knew or ought to have known, to provide and maintain adequate and suitable plant and equipment to enable the plaintiff to carry out the said work in safety and to provide a safe and proper system of work. On or about the 1st June, 1971, the defendants by its servants or agents ordered the plaintiff to take up some empty bags inside the defendants' said storeroom and whilst so doing he was hit by sugar bags stored inside the said storeroom."

(4) "The matter complained of were caused by the negligence and/or breach of statutory duty and/or breach of contract of employment and of the terms thereto on the part of the defendant."

The first defendant entered appearance and filed a defence the most relevant paragraph reading:

(5) "The defendant says that the alleged injury sustained by the plaintiff was caused by the negligence of a third party one Dudley Chin, who negligently reversed his motor truck into a sugar heap and hit against the stacked sugar causing several bags of sugar to fall from the heap and hit the plaintiff.

Whereupon, and as a consequence of this paragraph, the plaintiff sought and received an order to add, and added Dudley Chin as a second defendant. Dudley Chin was served an amended Statement of Claim with paragraph 4A added, as under:

"Further or in the alternative the matters complained of were caused by the negligence of the second defendant in his driving managing and controlling of his motor vehicle on the premises of the first named defendant or alternatively by reason of the negligence on the part of both defendants."

The second defendant did not enter appearance and the plaintiff sought and obtained an Interlocutory Judgment against him. Subsequently, this judgment was set aside, defendant entered appearance and filed his defence, paragraph 2 of which stated:

"As to paragraph 4A of the amended Statement of Claim the second defendant denies that he was the owner or driver of any motor vehicle which was on the premises of the first defendant at all material times. The particulars of negligence alleged therein are hereby expressly denied."

Plaintiff's Case

The plaintiff stated he was a delivery man employed to the first defendant on its premises at Hampden Wharf, Falmouth. There was a store-room on these premises in which was kept cement, zinc, etc. in one section.

At another section bags of sugar were stacked floor to ceiling at a height of about 32 bags. Each bag weighed 227 lbs. He was not a stacker of sugar nor a loader. He did not work with the sugar area, but that day it was raining and as he was doing nothing he sat by the door of the storeroom while defendant's Manager, one Mr. Huie, now deceased, sat some distance from him.

The Manager ordered him to go in the storeroom and gather up and stack the empty bags there. He went in, there was an empty truck parked by the stacked sugar, waiting to load bulk sugar. No one was in the truck. The truck was there 15 - 20 minutes before he went up to it and it had passed him and reversed in whilst he was still sitting by the door. He was to pick up the bags to clear the way before the truck could be loaded.

He was bending picking up the bags when he heard a shout and before he knew the reason for it he was knocked unconscious. Bags of sugar had fallen on him, he subsequently discovered. He awoke in hospital. He was hospitalized for nineteen days. As a consequence of the accident he sustained severe injuries:

1. Contusion of the lower anterior chest wall
2. Contusion of the left thigh anteriorly
3. Contusion of the lumbar region of the back
4. 1" scalp contusion
5. Oblique fracture of the upper anterior pole of the body of the second lumbar vertebra.
6. Coughing of blood
7. Loss of consciousness
8. Risk of the development of degenerative arthritis of the spine at the level of the fracture.
9. Impotence as result of the injuries above stated.

He said he did not know the driver of the truck beside which he was picking up bags but he knew the second defendant Chin and he did not see him drive the truck there that day. He did not know the owner of the truck either, neither by observation nor by checking the disc of the truck.

The plaintiff's witness as to facts one Graham was also a worker employed to the first defendant. He said he was a stacker and bulk sugar loader in the storeroom, he gave evidence of the system employed in connection with stacking and loading, and all three witnesses one for each party in this action agreed as to the system.

The system was that sugar came in bags of 227 lbs. and these were stacked floor to ceiling to a height of about 32 - 35 bags, alongside the walls to await loading on ships for export. Bulk loading of the sugar in trucks for haulage to Reynolds Pier in Ocho Rios was a new thing. Hitherto the sugar was taken by the workers bag by bag in wheel-barrows to lighters at the Wharf Pier. These lighters then took the bags to ships in midstream. But for a couple weeks before the incident the bulk loading was now in operation. Trucks would one after another reverse into the storeroom to be filled with loose sugar. There were two bays one on the left and one on right side of the stacked sugar. Men working in gangs loaded on separate sides. A lower platform of 6 - 7 bags high was made after the stacking to ceiling. The truck would come up to the platform which was generally the height of the back of the truck from the ground. Bags of sugar were cut open and emptied into these vehicles.

Let me say here, all three witnesses as to fact, one for each party in this action agree generally as to the system, save for one difference, the first defendant's witness said the sugar was loaded from the back and the other two said the sugar was loaded over the side of a

truck which would back up beside the platform and not to it. This difference I shall deal with later and the reason for loading over the side will be apparent. To continue the system, of each gang the men worked in pairs to heave the bags of sugar to the particular point on the truck where they would cut the bag and empty it in the truck. Bags were taken from the platform and thereafter working from the side of the stack and building a platform from time to time for easy access to loading. The higher they reached they threw down bags to platform level for cutting open and emptying until a truck was loaded with the specific amount required. The empty bag was thrown on the ground there and the laden truck drive out. The bags were then collected and counted to ensure that the proper amount of sugar had been loaded in the departed truck, before another truck could commence loading.

Witness Graham said he had been working as a labourer on sugar for over ten years. He said it needed care to stack the bags. He was both a stacker and a loader. He said he saw the truck referred to come in. He had earlier loaded another truck which left, leaving the empty bags on the ground. This present truck was there 10 - 15 minutes before the plaintiff came and started picking up bags. He Grahan was waiting to load this truck which had reversed into the right side of the stacked sugar.

They were waiting while the bags were collected and counted before starting loading. The truck had come alongside the sugar heap to be filled over the side. He was standing on the ground on the left side of the truck, same side as the plaintiff and the truck was between them and the sugar stack.

He heard a shout "look out" and he saw the bags coming down and the bags hit the plaintiff. He and his partner removed the bags off the plaintiff. He said he was the partner throwing down bags that day. He did not know what caused the bags to fall but was certain it was not from any

backing of the truck onto the platform heap. He said there were no supervisors appointed to see to the stacking or bulk loading. Witness said he had loaded the truck which left those empty bags which the plaintiff was collecting and he was waiting to load the other empty truck which was standing by. This truck did not back into the heap, it cane along side and about 12" from the sugar heap. He and his gang (about twelve nen in all) were there. Because they were paid for task work the workers would grab the bags easiest pulled out fron the heap. By task work I understood hin to nean they were paid for the nunber of trucks they could load in a day in the shortest tine. He also said sonetines sone of the workers who did stacking were not acquainted with the nethod of proper stacking, as a result bags fell fron tine to tine, without being disturbed.

Sone one fron the gang would break the stack to nake the seven bags height heap. If the truck was not filled by this heap they took fron spares laid alongside the stack. He stated it was possible sonetines to take bags fron the niddle leaving a cave and depending on how well the bags were stacked this act could contribute to the collapse of the stack.

He further said he knew the second defendant and had seen hin drive that truck before; but the second defendant was not the driver that day, and to quote the witness "the driver who drove it that day told ne he was employed by second defendant." Witness admitted he did not know if the second defendant was the owner of the truck. In his evidence of the systen he said after they stacked and nade a platform they peaked until they reached the ceiling and explained that by "peaking" they went up levels until the highest level was to the ceiling.

The plaintiff submitted Medical Certificate and called Dr. Fletcher as a witness particularly with reference to his inpotence. This I shall

refer to under damages.

First Defendant's Case

One Malcoln was the sole witness for the first defendant . He supported the other witnesses as to the system of stacking and loading of the sugar. He also said the second defendant was not the driver of the truck that was there waiting to be loaded, and which truck was backed into the stack. He says he was on the other side of the sugar stack waiting for his truck and not paying attention to the plaintiff's side. He had seen the plaintiff at the door and heard the order given him by the Manager to collect the empty bags. He first knew of the dropping of the bags when he heard a shout and looked up, at which time he saw the truck tipping up its front. It was the noise that made him look up.

He admitted that from where he was he could not see if the truck's tail could touch the sugar bags and he could not tell the distance of truck's tail from the bags. It is remarkable that although the first time he knew of anything extraordinary happening was when he saw the truck front tipping yet he tells me the truck backed in and hit the sugar heap. At the same time he says he would not have been able to see that contact from where he was sitting.

I accept his story that what he knew of the incident was when he saw the tipping of the truck.

I am of the view that if he knew when the truck came in he was aware it came in 10 minutes or so before the accident as he first said, although he tried to correct himself, on being questioned by his Attorney further as to time by saying he meant 10 seconds.

I do not accept him as a witness of truth on any material point. I find he is quite unable to help as to how the plaintiff got injured, and

where there is conflict in the versions of how the truck reversed in, whether to the side of the stack or tail to the stack, I accept the evidence of the other witnesses who were on the truck's side of the stack and directed it there, and I reject his version.

Second Defendant

The second defendant gave evidence and called one witness. He admitted control of the truck and a contract to haul sugar for the first defendant. He denied driving the truck that day. He denies ownership of the truck. He says the truck is registered in his father's name and belongs to his father. Stanley Nelson his witness gave evidence which assisted the plaintiff's case and, it tallied on several points in the case for each party. He also stated that the truck was there 10 - 15 minutes before the accident. He said he could not see the workers on the left side heap, that is, first defendants' witness, Malcolm's side, but he could hear them. It was not possible for him to see a truck over that side either. The height of stacked sugar prevented this.

While the other two witnesses were not able to tell or did not see the genesis of the accident this witness was of great assistance. He said he was on the very heap near the falling bags. He demonstrated the groaning sound heard. He said he looked up and saw the bags falling. Experienced as he was and having seen it happen before in his three years, he immediately identified the sound and looked in that direction. The bags began to fall from high, he stepped out of harm's way. Bags fell in the truck tilting it and bags spilled over the side hitting the plaintiff who was on the other side of the truck picking up the empty bags.

He had directed the truck in for loading but had to wait as ordered by the Manager until the empty bags were picked up, and it was while he was

on this 10 - 15 minutes wait that the accident occurred. The sudden downfall tipped the truck. He said the truck had come to the side of heap and was waiting there. It was not the movement of truck which caused the fall of the sugar bags. He did not know or see the reason why the bags fell. The bags fell from his side of the stack, that is, right side. He said management knew of the occasions when bags had fallen overnight because of not being firmly packed, and on those occasions they would be packed in the next store-room. No one supervised the stacking.

He is the only witness who could explain in detail or at all how the falling of the sugar and the shout of "look out" came about.

All three witnesses, each one for each party and all of whom were working for first defendants agree:

(i) No supervisor is employed by the first defendants with respect to the stacking of bags of sugar and (b) the method of loading bulk sugar in trucks.

(ii) Sugar was generally stacked to ceiling of room.

(iii) Stacked sugar has been known to fall down without any known physical interference.

(iv) Management was aware of this happening before.

(v) There were two bays one on either side of the stacked sugar and the only method of trucks getting in for loading was for them to back in towards the sugar stacks.

(vi) Sugar is normally stacked to roof height, and since the operation of bulk loading a system has been devised by loaders where stacks are made preparatory to loading so as to facilitate quick and easy loading in view of the fact the workers operate on a task work basis.

(vii) If sugar is not carefully and expertly removed on loading caves could be left in the stack which could cause collapse and fall of pile.

The witness for the plaintiff and the second defendant stated that the truck had parked for 10 - 15 minutes before the accident. Witness Malcolm for first defendants at first concurred but changed later and said ten seconds.

The version of 10 seconds is not impossible but highly improbable particularly as this witness said the truck came, touched the heap, then moved forward again - a little, and again bearing in mind his statement that he could not from where he sat see the tail of the truck in relation to the 6 or 7 bags height of sugar while he himself was sitting the same height on the other side of the stacked sugar. The touching was therefore clearly a reconstruction of a mental picture of the incident.

He said bags were stacked on a platform and the truck touched the platform and just ran off a little forward and that the truck was stationary when the bags fell.

The bags fell from the ceiling height. If such a gentle touch occurred as first defendants would have us believe then, even accepting that, there would certainly be something wrong in the stacking to the ceiling to cause such a light touch to a heap so far away as 6 - 7 rows to result in the 30 high ceiling bags falling. The defendants' witness says bags fell from high so it cannot be that the 7 height bags fell over the other side of truck and onto plaintiff an event he could not see from his side of the sugar stack.

The question of how the bags fell can be answered with the nearest clarity only by one witness Nelson, whereas the other two witnesses were only alerted when they heard the shout "look out." Nelson could state that the hnn--- sound caused him to look in that direction of the sound and from there he saw the bags actually coming down. Of the propositions put forward I reject the case of the bags falling by virtue of the truck's backing into it. As I have already said the only person who so states is the one person least likely to see that. He was not paying any attention to that side of the stack. From where he was he would not be able to see that side. He confessed it was the falling of the bags which attracted his attention to the tipping

of the truck. He says it was customary for someone to be present directing a truck as it backs to the sugar but he did not say whose was the responsibility to provide that person. If he intended to inply that someone was provided by the first defendant again I reject his insinuation and rather accept the statement of the other two witnesses.

Having accepted and found that the truck did not back onto the sugar stack, and it having been common ground that the second defendant was not the driver on the day of the accident I do not think it necessary to deal with the duty of care on his part, owed to the public in general and the workers particularly the plaintiff in the storeroom, with respect to the operation of the truck in its manoeuvring to the sugar stack. I do not find him negligent.

This leaves me to consider the situation between the plaintiff and first defendant.

The plaintiff was employed as a worker by the defendants and this has been so admitted. Part of his duty was to carry out the instructions of the first defendant's agents or servants. The Manager gave him order to pick up and count empty bags in the storeroom. He was obeying that order at time of accident. He was performing his duty.

In the nature of the operation of this enterprise what was the obligation owed the plaintiff by the first defendant ?

The plaintiff says it is the negligence of the first defendants that caused him to be injured.

The first defendant has denied liability and alleged that the negligence was the act of a third party the second defendant. There was no allegation that the injury to the plaintiff was through his own fault or contributed to by him in any way. Further there is no denial that the plaintiff suffered injury whilst in the first defendant's employ and on the defendant's premises.

The question therefore left to be resolved is what part if any did the first defendants play in the injury to the plaintiff?

Occupiers Liability

Under the Act 1969 it is the duty of a defendant to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonable safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there.

Safety of Plaintiff

The plaintiff asserted and this was supported by the first defendant's own witness, that from time to time bags of sugar were known to fall after being stacked.

It is accepted that there was no one employed to supervise the stacking or unloading of the sugar, that the plaintiff was a stacker and loader himself and he and his partner who worked gang with him used their best knowledge when packing.

He said one Gordon had his foot broken by falling sugar. The defendant did not deny this nor did he deny that no supervisor was appointed to see the bags properly stacked or removed.

The evidence revealed that both stacking and removing of the stacked bags required a certain amount of knowledge and skill.

It was suggested, and not challenged that, if the bags were not properly stacked or were stacked by inexperienced persons, the result was the likelihood of their falling even without interference. Added to this was the fact that loaders in an effort to do as much work as possible to earn as much as possible the job being task work, would grab an available bag wherever stacked, and this could result in leaving a cave in the stack which would contribute or lead to the collapse of a pile of sugar.

It cannot therefore be said that first defendant did not know of the danger existing, and the risk of injury from falling bags of sugar to any person, employee or not who was lawfully present in that storeroom.

I do not know if "Gordon" referred to was compensated for his broken leg or how it got broken from the bags but I am satisfied that the first defendant was more than sufficiently warned of the likelihood of injury to persons in the storeroom from fallen bags. The first defendant did nothing about it, and the usual practice of men working on their own without supervision doing a job requiring constant monitering, continued.

There is evidence that the workers had earlier that very day worked on that very same sugar pile. It is not, in my view unreasonable to hold and it is highly probable this earlier working on the sugar pile had somehow disturbed the packed pile, whether or not the pile had been properly stacked originally, and I find that the stack had been recently disturbed.

In any event whether the bags fell from being badly stacked or being badly removed, it would not affect the responsibility of the defendant to the workers on that project to see that the system was a safe one.

The onus is on the defendant to so satisfy me. The allegation against the defendant is that he had breached the statutory duty he owed the plaintiff. He admitted the duty owed plaintiff. He had not satisfied me that the operating of the system was a safe one, sufficient to protect the workers. He knew or ought to have known of the danger ever present in the system as it was operated.

A prudent employer with an operation of such a magnitude would, after previous warnings, at least have tried to ascertain the reason for the spontaneous falling of stacked bags from time to time and taken some steps to

correct it.

The suggestion was made that the first defendant did not install rails or a barrier between any truck that may have come in to be loaded and the stacked sugar but the very plaintiff himself stated this could not work and would hamper the system of loading.

If, as it appears the bulk sugar loading system was new then the first defendant ought all the more to have employed someone to see that the operation was carried out without any or a minimal risk of danger to anyone on the premises. This he failed to do.

Independent Contractor

The first defendant's defence was that the accident was caused by the negligence of a third party, that is, the second defendant.

He evidently regards the second defendant as a stranger in the cause. He did not join him as a third party. He did not use the defence of independent contractor, though I must assume that is what is implied.

His witness says, no one directed the truck driver in, no one was employed to do so. The worker would direct the truck to the position he wanted it. So says the plaintiff's witness also. He says unless someone guided it there is danger of a truck backing in the sugar stack.

The defendant did not state what were the terms of the contract with the second defendant and what, apart from the general duty of care owed by any driver to other persons with whom he might come in contact this second defendant owed the workers.

The defendant has never said and up to now did not show whether or not the second defendant was an independent contractor.

His witness's final comment on the question of who was liable was

"I can't determine what cause the sugar to topple. Can't say whether truck ran into it or whether it toppled." (The underlines are mine).

It is quite apparent the standard of care provided by the first defendant was woefully lacking in its requirement. I find and I so hold that first defendant was solely liable for the plaintiff's injuries.

In view of my finding above and bearing in mind the system of stacking and loading and what took place that day, there is no necessity to consider the doctrine of respisa loquitor, as it does not apply here.

I find the following facts:

(a) The plaintiff was at the material time employed to the first defendant and came under the category of persons described under the Occupiers Liability Act 1969.

(b) The plaintiff was injured as a result of bags of sugar in the storeroom falling upon him.

(c) The sugar was either improperly stacked in the first instance or if properly stacked was disturbed by the action of loaders when pulling out bags to load a truck which had left previously.

(d) The truck in the warehouse at the time was parked there 10 - 15 minutes before the accident.

(e) The truck had never reversed into the stacked sugar.

(f) It was not the first time sugar bags had fallen when as a result of being improperly stacked and/or removed.

(g) The first defendant was aware of this and made no attempt to have the system supervised.

(h) The first defendant was negligent in its responsibility under the Occupiers Liability Act.

Damages - Special

No out of pocket expenses were established. The plaintiff was gainfully employed and his position financially improved after his recovery.

Medical Expenses	$ 258	allowed
Loss Income	$1,310	- do -
Transport	201	- do -
	$1,769	

General

The plaintiff says he still does not feel well. But this chief complaint appears to be loss of a special amenity, the ability to enjoy a full sexual life. He says he has been impotent from the accident. The doctor who gave evidence, Dr. Fletcher, said he specialized in Urology and was of the view that the evidence of diabetes that he saw in the plaintiff on examination could equally cause the impotence as could the accident which had fractured a vertebrae of the spine. He said he could not say one more than the other of these two ills was responsible. He stated that it could also be psychosomatic to some extent.

There was no evidence that the plaintiff had not been performing alright in that area before the accident or that the diabetes only appeared after the accident. It is safe to conclude that whatever may have been the physical condition before the accident, the plaintiff was virile enough up to a year previously as he then had a child one year old.

Granted the fact of lessing of his sex drive because of age the presence of diabetes, the psychosomatic reaction, there would certainly seem to be some contribution by the bad back. The bad back was caused by the accident. The psychosomatic reaction is in itself a medical and real mental reaction. It alone could make him impotent in fact.

Several cases were referred to me as to quantum of damages. The defendant's Attorneys themselves suggested $15,000. It is a figure near enough to what I would have assessed without assistance. I would assess general damages at $15,000.

Judgment for the plaintiff against the first defendant for $16,769 (being special damages $1,769 and general $15,000).

Costs to be taxed or agreed. Judgment for the second defendant, his costs to be borne by the first defendant.

A. McKain
Judge