IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. R97/85

BETWEEN	ROYAL BANK TRUST COMPANY (JAMAICA) LIMITED and JENNIFER COLEEN SILVERA (Administrators of the Estate of Clifford Anthony Silvera, Deceased)	PLAINTIFFS
A N D	COURAGE CONSTRUCTION LIMITED	FIRST DEFENDANT
A N D	E.L. McFARLANE	SECOND DEFENDANT
A N D	RALPH HARTLEY	THIRD DEFENDANT

D. Goffe & D. Leys for Plaintiffs

Dr. L. Barnett & Mrs. P. Levers for first Defendant

The Second defendant was unrepresented.

16th, 17th, 18th & 19th January, 1990

HARRISON,J.

This is an action by the plaintiffs suing as Administrators of the Estate of Clifford Anthony Silvera, deceased against the first defendant company, Courage Construction Limited and the second defendant, E.M. McFarlane, claiming damages as a result of an accident on the 9th day of August 1983, causing the death of the deceased.

Interlocutory judgment was entered against the Second defendant in default of appearance. He was subsequently served with a notice of assessment. The third defendant was not served with the writ.

The action is brought on behalf of the deceased's estate and his dependants by virtue of the Law Reform (Miscellaneous Provisions) Act and the Fatal Accidents Act, respectively.

The deceased was employed to the first defendant as a quantity surveyor and on the said date he was in a hole in excess of 12 feet deep - excavated by the said first defendant to construct an unloading station. In this hole,

a bulldozer and a front-end loader were then both working, in the late afternoon with the lights of both vehicles burning.

The front end loader then began reversing out of the hole along an inclined passage way when, in the words of the plaintiff's witness, the "engine shut off - also the light. It went into the hole."

The deceased and Bentley Northover, one of the directors of the first defendant, were then in the hole, with their backs to the oncoming front-end loader machine. They were facing the bulldozer and conversing. The operator of the front-end loader, now out of control, shouted. At that time it was approximately 18 yards from the deceased and Northover "approaching them not going slowly." The deceased ran to his right and the front end loader ran over him killing him.

The inclined passage way was described as "not that steep". The plaintiffs' witness Lewin Lewis observed the incident whilst standing at ground level at the top of the hole.

The first defendant company was engaged in a contract with a company, Cable Belt Conveyors, to construct a bauxite unloading station on the Alpart premises at Nain, St. Elizabeth. The first defendant, in order to do excavation work in pursuance of the contract, hired from Mr. E.L. McFarlane, the second defendant, a 950 front-end loader. The second defendant was engaged in the business of hiring out heavy equipment and trucking. The second defendant supplied the said machine along with an operator, the third defendant, in keeping with the contract of hireage.

Mr. Keith NOrthover, the witness for and a director of the first defendant said in evidence that the oral terms of the contract were that the second defendant would supply the equipment and operator, and be responsible for its

maintenance and any defects that arose. He stated further that the first defendant would provide fuel and oil for the machine, pay the operator on a hourly basis and Mr. McFarlane on a monthly basis. He said that the operator would be responsible for the operation of the machine in doing the actual work. He stated further that the deceased was involved with the actual working of the machine, in that he would visit the site and check the pegs which were set up at different levels of the excavation to see that the machine "cut in accordance with the different levels of pegs." This witness admitted further that the said front-end loader was checked by the operator on a daily basis to ensure that the machine was working properly, and continuing said:

> "It is a policy of ours that when guys come to work he check that machine is operating - it is normal that he does that".

The plaintiffs contend that the first defendant being the employer of the deceased owed a duty of care to the deceased which duty was non-delegable and so is liable for any harm caused to the deceased in keeping with that duty. Further that the employment of the second defendant, an independent contractor, in the circumstances does not absolve the first defendant from that liability, due to the fact that the duty is one personal to the employer and also that the was one of an extra-hazardous nature. The plaintiffs rely inter alia, on the maxim res ipsa loquitur. The plaintiffs further based their claim as arising from a breach of the contract of employment between the deceased and the first defendant.

The first defendant argues that it is not liable for the negligence of the second defendant, the independent contractor, except where the employer has a primary duty i.e.

to provide a safe system of work and there is a breach of that duty. However, the first defendant contends that there is no basis on which, even if there is negligence found on the part of the second defendant or his servant, that this can constitute, a breach of duty on the part of the first defendant and make it liable. The first defendant was not responsible for any probable defect in the machine. In addition, there was no evidence of a breach of the standard of care as an employer of the deceased to give rise to a breach of the implied term in the contract of employment.

At common law an employer owes to his employee a duty of care which though not an absolate one, is a high duty to ensure the safety of his employee. This duty is non-delegable. Accordingly the employer is not absolved from this responsibility by the employment of an independent contractor. This duty is described as four fold, namely, to provide competent staff, a safe place of work, proper plant and appliances and a safe system of work. Flemming, in the Law of Torts, 7th Edition, at page 485 said:

> "There is an element of risk in the performance of even the most simple industrial operations, but an employer is not expected to ensure that his system of work is in fact accident-proof. He need only guard against unreasonable or ... unnecessary risks, having regard alike to the likelihood of danger, gravity of injury and means for avoiding it..."

In Wilson's & Clyde Coal Company v. English [1939] A.C. 57, Lord Wright recognized the general duty of an employer, "which is personal to the employer to take reasonable care for the safety of his workmen..."

The author in Charlesworth & Percy on Negligence, 7th Edition at page 719, speaking of the employer's duty, observed,

> "... It is a sincere personal duty, which is non-delegable, and the importance of this feature is that the employer must see that care is taken by all those persons engaged by him. ... the master's duty is stricter than the duty to take reasonable care for oneself, and it exists whether or not the employment is inherently dangerous".

In Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool) Limited, [1947] (A.C. 1 (H.L.) the general employers were held to be liable for the negligent acts of its employee, driver, who had been hired out along with a crane but still controlled by the general employer. The special employer to whom the driver and crane were hired was not liable. This principle was affirmed in Karruppon Bhoomidas vs. Port of Singapore Authority [1977] 1 WLR 189.

However, a hiring employer is liable for the negligence of his independent contractor, if it amounts to a breach of the primary duty owned by the hiring employer to his own employees or if the nature of the work is an extra hazardous one. See Summer vs. Henderson & Sons Limited [1964] 1 Q.B. 450 and Davie v. New Merton Board Mills Limited [1959] 1 ALL ER 346.

Negligence may be inferred from the facts proven, in some circumstances, based on the principle of res ipsa loquitur.

> "The mere happening of the accident 'speaks for itself' since it may be more consistent with negligence on the part of the defendant than with any other course. If that is so, the court may find negligence on the part of the defendant, unless he gives a reasonable explanation to show how the accident may have occured without neglence on his part."

Charlesworth & Percy on Negligence 7th Edition, page 349.

The statutory provisions of the Factories Act, by virtue of Section 24 and the regulations made thereunder, would extend to the instant building operations. However, there is no relevant breach of its provisions by the

defendant in the instant case.

In the instant case, the deceased was owed a duty of care by the first defendant company his employer. The deceased's duties included the supervision of the pegs in the hole where the front-end loader machine was cutting "to see that it did not go deepe than it should go".

Was it therefore necessary for the deceased to be in the hole for the purpose of checking the pegs while this earth moving machine was working in the hole? The answer is yes - it was in the execution of his duty. Both the deceased and Bentley Northover were in the excavation at this time. This Court finds that being required to be afoot in the hole, working in close proximity to an operating front-end loader, was a nazardous operation in the circumstances. The evidence of the first defendant's witness that "Hard hats, gloves ang goggles given to deceased ... piece of open land nothing dangerous there - even with heavy equipment digging ... no risk of persons working near to where heavy equipment excavating" is less than convincing. Such equipment is desirable, but the instant operation required more than mere safe protective gear. It required a strict separation of the functions in the hole, of the front-end loader while operating, and the deceased employee while doing his inspections - as to time and place. Both ought not to have been in the excavation at the same time.

The said witness, in order demonstrate, the first defendant's care to see that the machine did not develop defects said,

> "... machine being checked on a daily basis by operator to ensure that everything in place, machine working properly. It is a policy of ours that when guys come to work he check that machine operating - it is normal that he does that."

The policy of the first defendant seems to be an assumption of responsibility for the checking of the actual functioning of the machine. This Court holds that the first defendant was probably not restricted merely to "... supply equipment with fuel and oil", as Ex.1, the agreement seeks to portray. Exhibit 1, in its opening line reads "August 2 1983 but was signed on "12/8/83" as dated by the first defendant's witness. Its wording is recorded in the future tense, although the said witness stated that it was also inclusive of work already done. He agrees, curiously, that the said hireage agreement was signed after the accident, although the front-end loader was already in use doing the excavation for a period of three weeks before.

This Court rejects Ex.1 as being referable to the contract of hireage in existence at the time of the death of the deceased. The front-end loader hired by the first defendant on the evidence of its witness and in use on 9/8/83 was, a 950 front-end. The front end loader referred to in Ex.1 on 12/8/83 that "Courage Construction Limited will hire was, "one 944 front-end loader," probably a different machine.

When the 950 front-end loader was reversing along the inclined passageway leading out of the hole, not only did its engine stall but its lights also went out - a complete non-function. This is evidence to which the principle of res ipsa loquitur may be applied. Why did the machine not remain at rest having stalled? Were no brakes on the machine or were those brakes now non-functional? The fact that the machine having come to a halt then proceeded forward, could not be stopped, and ran aided by gravity and its own weight "not going too slowly" into the hole is further evidence of the negligence of the third defendant, the employee of the second defendant. As a consequence this makes the second defendant vicariously liable. The incline of the passageway was probably too steep; it was therefore in the circumstances, unsafe as an access

road to the hole. The first defendant was therefore liable to the deceased in the circumstances.

Though the first defendant in its defence alleges that "the accident was due to a latent defect". it led no evidence in support of this.

This Court finds that the first defendant failed to provide a safe system of work for its employee, the deceased, both in respect of its primary duty at common law and the implied condition under the contract.

The witness Jennifer Colleen Silvera, the widow of the deceased was born on the 29th day of November 1955. The deceased was born on the 31st day of October 1954. They were married on the 26th day of November, 1977 and had one child Jothan who was born on the 5th day of February, 1980. At the time of his death, the deceased was employed to the first defendant as a quantity surveyor and earning a net salary of $2,700 per month. The deceased was described as "a good provider, a homely person - hardworking and ambitious". There is no evidence of any rate of increase in earnings. He would "keep money for lunch and personal expenses" and give his wife money "to work from a budget and allocate for expenses."

The total monthly expenses for the house-hold, on the evidence was approximately $3,000.00. The widow earned a net salary of $1200.00 per month.

It seems therefore that the deceased's net salary was supplemented by his wife's to provide for the total monthly expenses of the household.

This Court holds that the deceased would probably have withheld for his "lunch and personal expenses" approximately $300 per month. Despite his death some of the household expenses would remain unchanged. Of the amount of $3,300 monthly - this court allocates the amount of $700

per month towards the support of the deceased himself.

Taking into consideration what deceased would have spent on himself the net dependency at death was probably approximately $1700. Deceased met his death at the age of 28 years. Assuming that the deceased, would have enjoyed a working life up to age 65 years, the number of years purchase to be used as an appropriate multiplier is 16, realising a sum of $20,460 per annum.

The widow would enjoy a dependency of 37 years and the child Jothan - 15 years.

Under the Fatal Accidents Acts the sum available for the near relations of the deceased is $20,460 multiplied by 16, realizing a total sum of $326,400.

There was no claim for funeral expenses.

Under the Law Reform (M scellaneous Provisions) Act, both the widow and the child would be entitled to inherit the estate. The deceased's future earnings during ;the lost years, using the same multiplier, 16 and an annual earning of $20,460, I assess at $326,400. The amount for loss of expectation of life is assessed at $3,000.

On the principle that where the beneficiaries are the same under both Acts the damages recoverable under the Law Reform (Miscellaneous Provisions) Act should be taken into account in assessing the damages under the Fatal Accidents Act - no award is made under the Fatal Accidentw Act, see Gammel v. Wilson [1981] 1 ALL ER 578.

There shall be judgment for the plaintiffs under the Law Reform (Miscellaneous Provision) Act against the first defendant and damages assessed against the first and second defendants for the sum of $329,400 plus interest @ 3% from 1/5/85 the date of service of writ to date, and costs to be agreed or taxed.