JAMAICA

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. T004 of 1988

BETWEEN	**SAMUEL THOMAS**	**PLAINTIFF**
AND	**B.R.C. JAMAICA LTD.**	**DEFENDANT**

Clarke Cousins instructed by Rattray, Patterson, Rattray for plaintiff

Dennis Goffe and Paul Dennis instructed by Myers, Fletcher & Gordon, Manton & Hart for defendant

February 1, 2, 15 & 16 and June 21, 1990

GORDON, J.

The plaintiff, aged 42 years, was employed as a casual labourer by the defendants in the defendants' factory at White Marl in St. Catherine. On 18th February, 1987, while so employed, the plaintiff was struck in the face by a "crank handle" which was dislodged from a crank shaft. The blow caused laceration of left cheek, loss of four teeth, 100% loss of vision of the left eye, laceration of the left upper eye lid and in the process rendered the plaintiff unconscious. Plaintiff recovered consciousness in the Kingston Public Hospital the following day after surgery. He received treatment there for one month. On his discharge he returned for treatment for three months. Medical evidence in the form of a report, admitted by consent, indicates a 45% loss of vision.

The plaintiff pleaded:

"4. The said accident was occasioned by reason of the breach of statutory duty on the part of the defendants or its employees.

PARTICULARS OF BREACH OF STATUTORY DUTY

(i) Failing to securely fence or at all the gear stick which when coupled to the end of the crankshaft of the rolling machine constituted a dangerous moving part of the rolling machine as required by S.3 of the Factories Regulations 1961.

(ii) Failing constantly to maintain and keep in position any fencing or guard over the end of the crankshaft to which the said gear stick was coupled while the rolling machine was in use as required by S.3 of the Factories Regulations 1961.

(iii) Failing to fully instruct its employees on the dangers attendant on the operation of the rolling machine and the precautions to be taken as required by S.16 of the Factories Regulations 1961.

5. Further or in the alternative, the said accident was occasioned by reason of negligence on the part of the Defendant and its employees.

PARTICULARS OF NEGLIGENCE

(vi) Failing to install an automatic reverse on the rolling machine (as it has now done) thereby avoiding the use of the detachable gear handle.

(vii) In the premises, failing to provide and maintain safe plant and equipment

" or to provide a safe place of work for the Plaintiff or to provide a safe system of working."

The plaintiff said he commenced employment with the defendants in November 1986 as a common labourer earning $250 net per fortnight. Defendants were fabricators of steel matting (mesh) used in the construction industry. In the factory where he worked there were two machines which were involved in the manufacturing of the mesh, a welding machine and a rolling machine. Steel wires were welded to form a mesh or matting in the welding machine and then pulled to and rolled into rolls by the rolling machine. Both machines worked in unison with the operator of the welding machine being in overall control. When mesh leaves the welding machine being pulled by the rolling machine for rolling into bales it is examined and if defects are found in the welding the operator of the welding machine orders the operator of the rolling machine to stop that machine. If necessary, the rolling machine has to be reversed to allow the mesh to be accessed by the welder who would manually weld the defects. When the defects were rectified the operator of the welding machine would instruct the operator of the rolling machine to re-start that machine and the process of manufacturing would proceed.

The rolling machine was not fitted with an automatic reverse motor so the job of reversing the mesh was done manually. This was achieved by the operator of the rolling machine attaching a crank handle which weighed about 17½ lbs., to the crank shaft of that machine and manually reversing the mesh rolled on. The crank handle was removed when not in use. This handle was not secured to the crank shaft and workers knew it would fly off and could do severe

damage or kill if the machine was activated while the crank handle was on the crank shaft. The evidence is that the person operating the crank handle cannot reach to and operate the controls of the rolling machine. The cranking of the mesh can only be done when the machine has been stopped and the control button placed on manual. This had been done this day before plaintiff began to operate the crank handle.

The plaintiff said that the operator of the welding machine had to shout orders to the operator of the rolling machine to stop, manual, or start the rolling machine. Shouting orders was necessary because the factory was noisy and there was no other way of communicating commands. In this respect plaintiff was supported by the evidence of Mr. Rupert Vassell, an assistant supervisor with the defendants, who once operated the machines in the factory. He was called as a defence witness and he gave evidence of the system employed. He said:

> "There is a lot of noise in the factory when it is operating. Operators have to shout to one another."

The plaintiff said that on the 18th February, 1987 he was operating the rolling machine when, in response to a command from Mr. Blackwood, the operator of the welding machine, he stopped the machine, placed it on manual and began the operation of uncranking the metal mesh for the welder to repair defects. While waiting on the welder to do his job he received a "sudden lick" (blow) in his left eye. He saw one Alton Wilson at the controls of the rolling machine, he spoke to him then lasped into unconsciousness. He recovered consciousness the following day to find he was a patient in the Kingston Public Hospital. The plaintiff was the only witness called to give evidence in this regard.

Other witnesses gave evidence of system and the aftermath of this incident.

Evidence was adduced that on the day after this incident (1) warning signs were erected for the first time in the area of the crank shaft where the crank handle was operated;(2) a mesh fencing was placed about the end of the said crank shaft and (3) an automatic reverse machine was installed which mechanised the former manual method of unrolling the mesh for defects to be manually welded.

The defence was a denial of liability and in addition -

> "5. The Defendant says that the Plaintiff's injuries were caused wholly or in part by his own negligence.
>
> PARTICULARS OF NEGLIGENCE
>
> (a) When instructed by his supervisor, Mr. David Blackwood, to stop the machine, failing to follow the correct procedure.
>
> (b) Leaving the machine on automatic, instead of switching it to manual.
>
> (c) (c) Failing to remove the handle.
>
> (d) Instructing his co-worker, Mr. Alton Wilson, to press the button marked 'uncramp', which activated the machine, and since the handle had not been removed, caused the handle to fly off the machine."

The defence called no witnesses in support of these pleadings but suggestions in keeping with the defence filed were put to Mr. Thomas and denied by him. Mr. Rupert Vassell, assistant supervisor, said he worked under supervision about

two weeks before he was allowed to operate the machine on his own; he could not "say if Thomas was shown how to use the machine as I was" but he worked with Thomas on rolling machine before Thomas was allowed to work on his own. He said that if the machine is re-started without the crank handle being taken off it would fly off. He also said that after plaintiff was injured, modifications were done to the machine: "These modifications made the machine much safer". In re-examination, he said "Machine in original state was perfectly safe if operated properly".

Mr. Vincent Sang, who gave evidence for the defence, was of no assistance. He went to that employment in November 1988.

The plaintiff said he had been instructed how to operate the rolling machine. He had received his instructions from Mr. Vassell. Mr. Vassell said he could not say if Mr. Thomas (plaintiff) was shown how to use the machine as he was, but he had worked with plaintiff before plaintiff was allowed to work on his own. Called on to explain the operation of the machine, plaintiff embarked on an exercise which was not convincing. It was clear from the evidence he lacked the expertise of Mr. Vassell and that he was not comparable with Mr. Vassell in intelligence. He lacked competence.

Mr. Dennis submitted that the machinery handle and use were safe provided the procedure was followed. The fact that the plaintiff could not give the theory of operation of machine does not mean he could not operate the machine practically. The machine only constituted a danger when it was not properly operated. The subsequent modifications, by fencing, the erection of signs and the installation of an auto-reverse engine do not imply that the system was unsafe.

He relied on Pipe vs. Chambers Wharf and Cold Storage Ltd. (1952) 1 Lloyd's List Law Reports p. 194 and Gray vs. The Admiralty (1953) 1 Lloyd's List Law Reports p. 14. These cases are concerned with the common law duty of care and in Pipes's (supra) case it was held that the subsequent modification of the system did not necessarily imply that the system originally adopted was unsafe. The Court found that the system in operation at the time of the accident was in fact a safe one and that plaintiff's claim accordingly failed.

Mr. Dennis further submitted that the act complained of, which resulted in the injury plaintiff suffered, was the act of an employee and to make the defendant liable the plaintiff would have to establish that the employee was acting within the scope of his employment.

The plaintiff's case is founded in breach of statutory duty and alternatively in negligence. In breach of statutory duty he claims that defendants were in breach of Regulation 3 of the Factories Regulations 1961. The particular regulation prayed is Regulation 3(f) which provided:

> "3 (1) Every dangerous part of any machinery shall be securely fenced unless it is in such a position or of such construction as to be as safe to every worker as it would be if securely fenced.
>
> In particular and without prejudice to the generality of the foregoing provision, the following sub-paragraphs shall apply to every factory -
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> (f) projecting set-screws bolts or keys on any revolving shaft, spindle, wheel or pinion shall be securely fenced, cut off or counter-sunk."

The general regulative purpose and intent and tenor of the Regulations is to place on the owner of a

factory responsibility for the safety of his employees. He is to ensure a safe system of work. Thus the Act and regulations supersede the common law. This is evident from the provisions of Regulation 16 Part II which is pleaded by the plaintiff, Regulation 57 which falls in Part III and Regulation 78:

> "16. No person shall be allowed to operate any dangerous machine unless -
>
> (a) he is competent to do so or is directly under the supervision of a person competent to operate such machine; and
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> (b) he has been fully instructed as to the dangers attendant upon the operation of such machine and the precautions to be taken."

> "57. In all places to which these Regulations apply a person shall be appointed to exercise supervision of the works, machinery, and plant, for the purpose of ensuring safety. It shall be the duty of the person so appointed to see that all safeguards and other safety appliances are maintained in proper order and position and to investigate accidents. Nothing in this regulation shall relieve the owner, manager or person having control of the factory of his duties under these Regulations."

> "78. It shall be the duty and responsibility of the owner, manager or other person having the management or control of any factory to comply with the provisions contained in Parts II and III of these Regulations with the exception of regulation 77."

The question that falls to be resolved is whether the machinery was dangerous. The test for this was suggested

by Wills J. in Hindle v. Birtwistle (1897) 1 Q.B. p. 192, 196:

> "Machinery or parts of machinery is or are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection. No doubt it would be impossible to say that because an accident had happened once therefore the machinery was dangerous. On the other hand, it is equally out of the question to say that machinery cannot be dangerous unless it is so in the course of careful working. In considering whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency with which that contingency is likely to arise, are matters that must be taken into consideration."

This test was approved by the House of Lords in Close v. Steel Company of Wales Ltd. (1962) A.C. 367.

Mr. Cousins relied on a statement at paragraph 1135 of Charlesworth on Negligence 6th Edition. I adopt this statement as a correct exposition of the law -

> "The question is not whether the occupiers of the factory knew that it was dangerous, nor whether a factory inspector had so reported; nor whether previous accidents had occurred; nor whether the victims of these accidents had, or had not, been contributorily negligent. The test is objective and impersonal. Is the part such in its character, and so circumstanced in its position, exposure, method or operation and the like, that in the ordinary course of human affairs danger may reasonably be anticipated from its use unfenced, not only to the prudent, alert and skilled operative intent upon his task, but also to the careless or inattentive worker whose inadvertent or indolent conduct may expose him to risk of injury or death from the unguarded part? A machine is dangerous if danger should reasonably be anticipated from its use without protection."

Cases relied on by Mr. Cousins as supportive of his case are Kinder vs. The Mayor, Aldermen and Councillors of the Metropolitan Borough of Camberwell (1944) 2 All E.R. 315; Allen vs. Aeroplane and Motor Aluminium Castings Ltd. (1965) 3 All E.R. 377 and Millard vs. Serck Tubes Ltd. (1969) 1 All E.R. 598. These cases are concerned with breaches of statutory duty under section 14 of the Factories Act 1961 (U.K.) which is similar to our Regulation 3(1). In this latter case a workman suffered severe injuries when his hand was dragged into a drilling machine. Danckwerts L.J. at page 599 said:

> "It has been impressed on us by counsel for the defendants that this was a very unexpected extraordinary kind of accident, but it seems to me that there was a breach of the Act and the fact that the accident occurred in a particular way does not affect the liability which falls on the defendants. It was not readily foreseeable that an accident due to being caught by swarf in this way would be likely to occur; but in my view there was a breach of the statute; the accident occurred in a way that was caused by the defendant's failure to have the machine effectively fenced, because if the fence had been effective the accident would not have happened."

Plaintiff received a severe blow which rendered him unconscious for several hours and left him blind in his right eye. He said immediately after receiving this blow and before he passed out he saw and spoke to someone. I have some difficulty having regard to the severity of his injury, in accepting that he saw and spoke to someone. What I do accept is that while he was operating the crank handle the machine was set in motion and this resulted in his injury. I find too that the plaintiff, from his position at the crank shaft cranking the machine he could not manipulate the controls of the machine.

Mr. Vassell, the supervisor, knew that the crank handle could fly off if the machine was started with the handle in place. Whether this knowledge was based on past experience or certain information he did not say. He also said that usually three persons work on the rolling machine. There is no evidence how many persons were working on it at the time plaintiff was injured. For plaintiff to leave the controls and operate the crank handle meant that the controls were left unmanned and a potential source of danger to the manipulator of the crank handle or anyone else who may be afected by the handle if it flew off.

I find that there was a high level of noise in the factory which necessitated that commands re the operation of the rolling machine had to be given by shouting above the noise. This was highly unsatisfactory.

I further find that there was no system in place to ensure that when the handle was being operated the controls of the rolling machine were safe from unauthorised interference. Lack of this system indicates a lack of proper supervision - a failure on the part of the defendants of their duty to take care and ensure a safe system of work. This duty exists at common law and is imposed by the Factory Act and Regulations.

The erection of warning signs and fencing of the crank shaft immediately after plaintiff sustained his injury and the installation of an automatic reverse motor were attempts on the defendants' part to render a safe system of work. The rolling machine was, at the time plaintiff sustained his injury, a dangerous machine and the defendants are wholly responsible.

For these reasons there will be judgment for the plaintiff.

No evidence was given of loss of earning or of loss of future earnings. No evidence was given of the effect of the loss of vision on plaintiff's earning capacity. In the absence of evidence I cannot speculate. In addition, these heads of damages were not pleaded. There is no nexus between plaintiff's current unemployment and his injury.

I award for general damages, pain and suffering and loss amenities $80,000 with interest @ 3% from 15th February, 1988 to date. For special damages I award $380 with interest @ 3% from 15th February, 1987 to date. The plaintiff shall have his costs to be taxed if not agreed.