Judgment Book.

IN THE SUPREME COURT OF JUDICAUTRE OF JAMAICA

IN COMMON LAW

SUIT NO. J-340 OF 1993

BETWEEN	BURNETT JAMES	PLAINTIFF
A N D	CARIBBEAN STEEL COMPANY LTD.	FIRST DEFENDANT
A N D	J. LORNA CLARKE	SECOND DEFENDANT

Mrs. Ursula Khan for Plaintiff.

Mr. Patrick Brooks for first Defendant.

Mr. Haynes for Second Defendant.

HEARD: February 17, 18, 19, September 28, 29 and November 30, 1998.

SMITH, J.

The plaintiff was the employee of the first defendant which is a limited liability company with registered office at 115 Brunswick Avenue, Spanish Town and is a processor of steel products among other things.

The second defendant is a businesswoman residing at 3 Miles River, Savanna-la-mar in the parish of Westmoreland, and was on the 19th June, 1991 the owner of truck bearing registration Number 3641 AS.

By a Further Amended Writ of Summons dated the 22nd day of October, 1993 the plaintiff seeks "to recover from the defendants jointly, severally or in the alternative damages for Negligence." On the 14th September, 1994 interlocutory judgment in default of appearance was entered against the second defendant.

On the 7th October, 1994 appearance was entered on behalf of the second defendant.

On the 19th February, 1998 after all the evidence for the first defendant was received, Mr. Haynes on behalf of the second defendant sought and obtained an adjournment pending the hearing of the second defendant's Notice of Motion to set aside default judgment.

On the 28th September, 1998 the court ruled that the matter should proceed after the court was informed that the second defendant had not prosecuted the Notice of Motion toset aside Default Judgment. The court was told by Mrs. Khan that no affidavit was filed and served in respect of the Motion.

The plaintiff in his Statement of Claim gives the following particulars of negligence of the First Defendant, its servants and/or agents:

(1) Failing to provide a safe system of work.

(2) Failing to ensure that bundles of steel contain equal lengths of steel.

(3) Binding steel in bundles of unequal lengths for loading mechanically.

(4) Failing to check and ensure that trucks coming onto its premises for loading were empty of objects that could cause injury to its employees.

(5) Failing to properly lower the bundles of steel onto the truck especially as it contained unequal lengths of steel.

(6) Improperly operating the crane so that steel being unloaded was able to come in contact with the truck in reckless disregard of the safety of employees of the defendant.

(7) Conducting operations at the workplace carelessly and with no regard for the workers at the said workplace.

(8) Carrying on a potentially dangerous operation with no consideration for the plaintiff.

The plaintiff, Mr. Burnett James, now 69 years of age was employed by the first defendant as a loader. He had been in the employ of the first defendant for over 23 years.

On the 19th June, 1991, the plaintiff was instructed to load the truck owned by the second defendnat and driven by Mr. Wilton James, with 10 tons of steel. The truck was parked in the loading area of the first defendant's premises. It was a 'flat body' truck.

The plaintiff testified that the defendant company had a rule that no tyre should be taken in the plant when loading is taking place. This rule the plaintiff said was advertised by a sign near to entrance of premises.

He stated that he saw a tyre (a spare wheel-rim and tyre) in

the middle of the body of the truck. He told the driver Mr. Wilton James, that the tyre should have been left at the gate. He asked him to remove it and saw him remove it. The plaintiff climbed unto the body of the truck and signalled the crane operator (Mr. Winford Wright) to lift, move and place on the truck the first bundle of steel. This was done. The steel was placed onthe skids which were on the floor of the body of the truck. The crane went back to the stockpile to pick up another bundle. The plaintiff was standing on body of truck facing the crane. When the crane returned to the truck, the plaintiff guided the operator as to where on the truck the second bundle should be placed.

When the steel was about 6-10 inches from the bed of the body of the truck one of the chains which held the steel "slipped and grabbed back." The crane operator told the court that the load of steel did not fall as the crane grabbed it back.

The plaintiff said that the uneven ends of steel "juk" the cab of the truck. This impact caused the truck to "rock." The plaintiff described what took place as follows: "I felt something come down on me and pitched me forward. I screamed and some men jumped on the truck and took tyre off my foot. When I was pitched forward I dropped and the tyre was on my foot. It was so terrible, I can't explain. I think I was going to die."

The crane driver said as the plaintiff was signalling him he saw the driver of the truck Mr. Wilton James with one hand resting on the tyre. The tyre was on top of the first two bundles of steel.

He described what happened after in this way: "Then I heard a sudden cry like something happen to crane; suddenly it looks like the chain slip and grab up back and then I applied the lever in a split second I find the crane hold the tension of the steel. I took a quick look where I heard the noise and flash my eyes to the truck ..... I saw Mr. Burnett James lying on the floor of the flat body of the truck." He also saw some of the workers lift tyre off Mr. Burnett James' foot.

The court is asked to draw the inference that the rocking motion of the body of the truck caused by the impact of the steel on the cab of the truck dislodged the tyre from the grasp of the driver

of the truck. That the wheel rolled and fell on the foot of the plaintiff causing him injuries. The doctor's diagnoses were a torn plantar fascia and severe tarsometatarsal joint strain.

The plaintiff claims that the first defendant is liable because it failed to take reasonable care in all the circumstances as regards the safety of the plaintiff.

The First Defendant's Defence

In its Defence dated 28th January, 1994 the first defendant avers "that the said incident and injury to the plaintiff was solely caused or alternatively contributed to by the negligence of the servant and/or agent of the customer onto whose truck the steel was being loaded and/or the plaintiff himself.

The particulars of negligence of the customer's servant and/or agent alleged are:

(a) moving the tyre and repositioning same at a time when and in a manner in which it was unsafe to do so;

(b) placing the tyre in a precarious position in the back of the said truck;

(c) propping up the said tyre in the back of the truck improperly;

(d) failing to alert the plaintiff or anyone else as to the repositioning of the said tyre;

(e) failing to take any or any sufficient care for the plaintiff's safety;

The particulars of negligence alleged against the plaintiff by the first defendant initially are:

(a) failing to heed or observe the presence of the said tyre in the said truck;

(b) failing to take steps to ensure the safe positioning of the said tyre prior to conducting the loading of steel;

(c) failing to heed or observe the instability or precariousness of the said tyre;

(d) failing to take any proper steps to ensure his own safety or to avoid the said tyre as it fell.

On the 17th February, 1998 before the trial commenced Mr. Brooks

applied to have the Defence amended as regards the particulars of negligence alleged against the plaintiff to add the following after paragraph (d):

"Further or in the alternative

(e) moving the tyre or repositioning same at a time when and in a manner in which it was unsafe to do so;

(f) placing the tyre in a precarious position in back of said truck;

(g) propping of the said tyre in the back of the truck improperly."

Mrs. Khan objected to this applciation on the grounds that it was too late to make those allegations and that it was contradictory to allegations already contained in the Defence and attributed to the customer's agent and/or servant.

The court was of the view that the amendment sought did not affect any cause of action and could be made at this late stage without injustice to the plaintiff. Also, it was the court's view that the amendment might be necessary to enable justice to be done between the parties. Accordingly the application for amendment was granted and the consequential amendment to the Reply made.

Mr. Wilson James the driver of the second defendant's truck is the only witness called by the first defendant. He is the common law husband of the second defendant Miss J. Lorna Clarke. He told the court he drove the truck to the first defendant's plant to collect half inch corrigated steel bars. Thetruck was a MC Astro tractor and trailer. The bed of the trailer was flat and about forty (40) ft. in length. After his truck was weighed he drove it to the loading bay. By the headboard there was an "empty road tyre - it did not have any rim and it was not inflated," "it was not in a running position" he asserted.

He arranged the skids about 8 feet apart in three different locations on the bed of the trailer. The first row of skids was approxiamtely 10 feet from the head board. The crane proceeded to the stock pile and then Mr. Burnett James came on to the truck.

The witness said he was onthe bed of the truck at the front of the trailer near the head board. Mr. Burnett James went to the rear of the trailer.

The crane came with the first bundle of steel and placed it on the skid. The crane returned to the stockpile. It made five trips to complete the first layer of steel on the skids.

He and the plaintiff changed positions - that is he went to the rear of trailer and Mr. Burnett James went to the front.

After the crane had made a few more trips, he "looked in the direction of the head board and saw Mr. James holding his calf and saying the tyre fall on him."

He claimed that he had seen Mr. James shifting the tyre during the loading process. Mr. James, he said had put the tyre to lean on the head board in an upright position.

The witness said he went to the front of the trailer where Mr. James was and with the assistance of another employee took Mr. James off the truck. He told the court that Mr. Burnett James asked him to "say something for him so that he could get some compensation." His reply, he said was "I can't say anything because I did not see what happen."

Findings of Facts

I was not impressed by Mr. Wilton James, the second defendant's driver. I prefer the evidence of Mr. Burnett James, the plaintiff, and Mr. Winford Wright, the crane driver to the evidence of Mr. Wilton James.

I find on a balance of probabilities that the accident happened in the manner described by the plaintiff and Mr. Wright. It is inconceivable that the injuries sustained by the plaintiff were inflicted by an "empty tyre" falling on his foot. This is even more improbable in the light of Mr. Wilton James' evidence that the plaintiff and the tyre were on the same level. Indeed the doctor's evidence which is contained in a medical report dated October 14, 1993 states "Apparently, a large spare wheel fell on his right foot ....." The inference here is that the injuries sustained by the plaintiff are consistent with his evidence.

I find that it was a spare wheel - rim and tyre - that fell on

the plaintiff. That Mr. Wilton James placed the wheel on top of the first two bundles of steel, that is to say the first load.

I find that the steel struck the cab of truck and caused the truck to 'rock' and thereby resulting in the tyre falling on the plaintiff's foot.

Mr. Wilton James would have the court believe that the plaintiff was the author of his own misfortune. He places the blame entirely on the plaintiff. As said before he was the only witness called by the first defendant. Thus no attempt was made by the first defendant to place any blame on the customer.

Yet the first defendant in its original pleading dated 28th January, 1994 averred that "the said incident and injury to the plaintiff was solely caused or alternatively contributed to by the negligence of the servant and/or agent of the customer on to whose truck the steel was being loaded and/or the plaintiff himself."

It was only when the trial was about to begin on the 17th February, 1998 that the first defendant's defence was amended to aver that the plaintiff moved and placed the tyre in a precarious position in the back of the truck. I am inclined to agree with Mrs. Khan that if indeed it was the plaintiff who had re-positioned the tyre this would have been in the knowledge of the employer (the first defendant) and would have been pleaded from the outset.

I accept the plaintiff's evidence that the defendant had a rule that no tyre should be taken inside the plant when loading is taking place and that there was a sign at the gate to that effect.

I should state that I find as a fact that the 'tyre' was on the body of truck when truck was driven to the loading area. That the plaintiff instructed the driver of truck (Mr. Wilton James) to remove the tyre and that he complied. That the tyre was replaced on the body of the truck by Mr. Wilton James unknown to the plaintiff.

I find that it was in the process of the second loading that the tyre came down on the plaintiff and not after the fifth load as Mr. Wilton James said.

Liability

Mr. Brooks submitted that the effective cause of the accident is not the failure of the first defendant to provide and operate a

safe system of work but the improper placing of the tyre in an unsafe position.

He contends that if the court finds that the second defendant's driver was the person who placed the tyre in that position the first defendnat would not be liable.

The proximate cause of the accident, if the plaintiff's evidence is believed, would be the negligence of the driver of the second defendant in placing the tyre on the bed of the truck and not the fact that the tyre had entered the loading area. Accordingly, he argues, the plaintiff has failed to establish negligence on the part of the first defendant and its action against the first defendant should fail.

Mrs. Khan, contends, that the plaintiff being the employee of the first defendant was entitled to certain proteciton from the first defendant. That the first defendant had a duty to take reasonable care not to subject the plaintiff to unnecessary risk.

The employer's duty is to supply a safe system of work and to supervise the operation of it.

Counsel for the plaintiff submits that the first defendant has failed to adduce evidence with regard to the system of work in place. Indeed the only witness for the first defendant said he did not see any sign at the gate to the effect that tyres etc. should be left at the gate and that he did not know that it was the rule of the company that nothing should be on truck when it enters the loading area.

She contends that whoever put the tyre where it was would not have been permitted to put it there if proper supervision was in place. She asks court to find that the first defendant was in breach of its common law duty owed to the plaintiff in that the first defendant was negligent in failing to provide a safe system of work and the operation of it.

She asks the court to reject the evidence of Mr. Wilton James.

If the evidence of Mr. Wilton James is rejected, she contends that there would be no room for contributory negligence on the part of the plaintiff.

Plaintiff's attorney asks court to find that both defendants

she is vicariously liable for the acts of Mr. Wilton James her servant and/or agent. It is the plaintiff's case that Mr. Wilton James repositioned the tyre on the truck thereby creating a dangerous situation in reckless disregard for the safety of the plaintiff.

Repositioning the wheel on the truck was a deliberate act which was in defiance of the clear instruction of the plaintiff. The plaintiff had, pursuant to the rule established by the first defendant, ordered the second defendant's servant and/or agent to remove the tyre. This was done, however Mr. Wilton James, the driver of the second defendant's truck, was subsequently seen with tyre on the truck. It is not clear how he got the tyre back on the truck.

To my mind the deliberate conduct of Mr. Wilton James must bear the major responsibility.

I am of the view that it would be reasonable to apportion 75% of the liability to the second defendant and 25% to the first defendant.

Damages

Special Damages

Medical report	$ 1,000.00
Transport - the plaintiff in his evidence said he paid $70.00 for taxi fares	70.00

Loss of Earnings

Plaintiff used to take home $600.00 per week. The defendant company paid three quarters of his pay from the date of the accident to 1st December, 1992 when he was made redundant. He would therefore have lost $150.00 each week for 74 weeks	11,100.00
The plaintiff would normally have retired at age 65. He was born 28/9/29. He did not receive any salary from December 1992. He therefore would have lost his earnings from December 1992 to 28/9/94 when he attained retirement age. That is 88 weeks at $600.00 = $52,800.00.	
However the plaintiff received $47,630.53 as redundancy payment. He is therefore only entitled to the shortfall of	5,169.47
Total Special Damages	$17,339.47

General Damages

The plaintiff suffered a torn plantar fascia and a severe tarsometatarsal joint strain. He was initially placed on crutches. Later, a below knee plaster of paris cast was applied. This was removed after three weeks.

He complained of pain in foot and from ankle to the hip. He still uses crutch to climb stairs and has to use stick to move around the house. He has difficulty riding bicycle. He cannot help his wife to do the housework as was his wont. Said he used to play with his grand children but can do that no mre. He used to earn extra money by doing the odd job as a mason, this he can no longer do. He is handicapped on labour market and in his daily life.

He is left with a permanent disability assessed as 25% impairment of the foot which is 18% impairment of the lower extremity or 7% of the whole person.

Pain and Suffering and Loss of Amenities

Mrs. Khan referred to recent awards. I will consider two that I think are helpful. The first is **Errol Finn v. Herkerbert Nagimesi and Percival Powell** Suit no. C.L. F.117 of 1991 Khan's Volume 4 p.66. The Mr. Finn who was involved in a motor vehicle accident sustained a compound fracture of the 5th metatorsal of left foot and a wound at fracture site requiring stitches.

He had no significant final disability.

In May of 1994 he was awarded $64,365.00 as general damages. This would now be about $130,000.

The other case I wish to mention is **Jerome Farrell v. Gordon Townsend et al** Suit No. C.L. F.089 of 1982 Khan's Volume 3 p.46. Farrell a professional tennis player was involved in a motor vehicle accident. The right foot was severely crushed, two bones in one of the right toes were broken.

He underwent surgery twice. The resulting disabilities include - deformed right foot, no rotation of second toe, restriction of plantar flexian of 2nd and 3rd toes, and syndactylism (webbed toes). Disability assessed at 18%-20% with strong possibilty of increasing.

In December 1988, he was awarded $30,000 as general damages,

now the equivalent of about $425,000.00.

Mrs. Khan after referring to other cases suggested $750,000 as a reasonable award.

Mr. Brooks cited the case of **Charmaine Powell v. Milton O'Meally et al** P.081 of 1996, Khans Volume 4 p.56. The complaints were pain in right knee, abdomen and chest, severed ligamentum patella and shock. Permanent partial liability was assessed at 7% of the whole person. The blow to the front of knee damaged the articular cartilege consequently Miss Powell had a 10-15% chance of developing osteo-arthritis. She received $450,000 for general damages in June of 1997. The equivalent damage today would be about $525,000.00.

Mr. Brooks suggested $400,000 as a reasonable award.

Having considered all the cases referred to and the evidence adduced I am of the view that the sum of $425,000 would be a reasonable award for pain and suffering and loss of amenities.

Handicap on the labour market

Mr. Brooks submitted that the plaintiff is not entitled to receive any payment under this head because at age 65 he is presumed not to be re-entering the labour market. He contended that no multiplier is used for persons 65 years and over unless in extreme situation.

Mrs. Khan onthe other hand submitted that it is a fallacy to say that 'working life' is over at 65.

It is common knowledge that in Jamaica today many pesons work beyond the age of 65. As Mrs. Khan said, people work whilst they are able.

The plaintiff said that after he was made redundant he tried to get a job but was not successful because he had to walk with the aid of a stick. But for the accident it is probable that the plaintiff would be successful in his attempt to get a job.

The plaintiff is now 69 years. The present minimum wage is $800 weekly. From age 65 to 69 he would have been able to earn at least $166,000. I am of the view that in the circumstnaces of this case it would be reasonable to award the plaintiff the sum of $200,000 under this heading.

Conclusion

Judgment for the plaintiff against the first defendant. Liability is apportioned between the first and second defendants. As I have said before in my view a fair and just apportionment is 25% to the first defendant and 75% to the second defendant.

Damages assessed against both defendants as follows:

Special Damages assessed at $17,339.47 with interest at 3% from the 19th June, 1991 to date of judgment.

General Damages assessed as follows:

Pain and Suffering and Loss Amenities	$425,000.00
with interest at 3% from the 6th August, 1994 to date of judgment	
Handicap on the Labour Market	$200,000.00
Total	$625,000.00

Costs to the plaintiff against both defendants to be taxed if not agreed in accordance with liability.

are jointly and severally liable.

It is not in dispute that the plaintiff was acting in the course of his employment when he was injured.

There is no evidence of any system in operation to ensure safety of the employees during the loading process. The plaintiff, did not know that the tyre was respositioned on the truck. However the crane operator, Mr. Winford Wright, told the court that he saw Mr. wilton James on the truck with his hand on the tyre.

The tyre, he said was "standing." It was on top of the steel. It was at this time the crane operator said he was in the process of depositing the second load of steel and then the chain slipped

As was stated before, this caused the steel to hit the cab of truck, the truck rocked, the tyre rolled and fell on the plaintiff's foot.

Mr. Wright did not say what caused the chain to 'slip.'

It seems to me that in these circumstances the employer (the first defendant) was in breach of his basic duty to take reasonable care so to conduct the loading of steel operation as not to subject those employed to him to unnecessary risk. The injuries suffered by the plaintiff were foreseeable as a result of such breach. The first defendant is therefore liable. However, this breach in my view was not the major cause of the accident. The major cause was, in my view, the conduct of the second defendant's driver in placing the tyre on the steel which was on the bed of the truck. Moreover this was done after he had taken the tyre off the truck on the instruction of the plaintiff.

Apportionment of Liability

I find that both defendants are liable but not to the same degree.

The first defendant is liable in that it failed to provide for the safety of the plaintiff. It failed to guard against foreseeable events. The first defendant took some measure as regards the safety of its employees by establishing the rule that no tyre etc. should be on track during the loading process. But that alone was not reasonable in all the circumstances.

The plaintiff's case against the second defendant is that