Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. S.123 of 2000

BETWEEN	PERCIVAL SWABY	PLAINTIFF
A ND	METROPOLITAN PARKS AND MARKETS	1ST DEFENDANT
AND	ENOCH LAING	2ND DEFENDANT
AND	CARL WAISON	3rd DEFENDANT

Mr. Manley Nicholson for Claimant

Mr. Garth McBean instructed by Knight, Pickersgill and Dowding for 1st and 2nd Defendant.

HEARD: 3rd & 4th February, 4th & 5th March 2004

SINCLAIR-HAYNES, J. (Ag.)

The facts of this case are pathetic. What began as a jollification ended quite lugubriously with Mr. Swaby losing both his legs. Percival Swaby, Clifton Campbell o/c Lenky, Carl Waison and Michael Simpson were crewmembers of an MPM truck. The truck was a flat bed, on which MPM

This was to the right of the truck. Another member sat on a broken plastic chair, which was tied down on a flat surface. This was to the left of the truck. If there was a supervisor in the cab or a striker one crew member stood on the platform and held onto the groove of the water trough. Mr. Swaby disliked standing on the platform because it rocked uncomfortably. There were no rails to prevent the men from falling off.

After leaving the garage that morning the men went down town where they had their breakfast. Upon leaving down town, Mr. Laing instructed Carl Waison to drive while he, Laing, sat in the passenger's seat. Carl Waison drove the entire day.

Sometime in the afternoon the crew stopped at a bar on Water Street where they imbibed alcoholic beverages. Mr. Laing absented himself for about half hour. At the bar, the men were joined by two ladies, the sister and girlfriend of Carl Waison and two small children. Percival Swaby had three drinks of Campari and white rum.

Apparently he became enamored with the sister of Carl Waison. Upon leaving the bar Mr. Laing permitted Carl Waison to convey the two ladies and two children in the cab of the vehicle. He took up position standing on the platform of the truck. Sometime after he alighted the truck.

As they proceeded along Spanish Town Road, Mr. Swaby fell off the truck and the wheels of the truck ran over his legs. Unfortunately both legs were amputated above his knees. He was fifty-two years old at the time.

Mr. Swaby has now sued MPM, Enoch Laing and Carl Waison for negligence. His claim is that Carl Waison negligently drove/operated or controlled the said truck owned by MPM and assigned to Enoch Laing in such a manner that it collided with him causing him personal injury, loss and damage.

The defendants denied this claim and alleged that it was the plaintiff's carelessness and intoxication, which caused or contributed to the accident.

The first issue: whether at the time of the accident the vehicle was being used for MPM's business or whether the men were on a frolic of their own

Mr. Garth McBean submitted that the men were on a frolic of their own. They had gone to the bar where they imbibed alcoholic beverages; they picked up women and children and they intended to take them home. In so doing they had altogether departed from their scope of employment.

Mr. Manley Nicholson, however, submitted that MPM was precluded from relying on the fact that the men went to a bar and consumed alcohol because such behaviour was condoned by the supervisor

Were the men at the time of the accident discharging their duties to MPM or had they altogether strayed from the scope of their employment?

Where an employer's vehicle is entrusted to the employee to be driven by the employee, the employer is liable if the employee is negligent while using the vehicle either wholly or partly on the employer's business or in the employer's interest. However, the employer is not liable if the employee is negligent while using it for any other purpose even though the employee has the employer's permission to use it for those purposes. ***See Charlesworth and Perry on Negligence 8th Edition***

In **Crook v Derbyshire Stone Ltd. (1956) 1 WLR 432** it was held that the employer was not liable when a collision occurred between the employee and a motor cyclist caused by his negligence. The lorry driver had stopped at a way side café and crossed one section of a dual carriage way on foot in order to get refreshment which was an act done while he was employed and with his employer's permission.

This decision refutes Mr. Nicholas' submissions that MPM condoned the drinking of the men on the job. However, in **Harvey v RG Odell Ltd. & Anor.** (1958) 2 QB 79 a motor vehicle was used to collect tools for the job. On the return trip the employee stopped for a meal. It was held that even if the meal was the main purpose of the trip the employee would have

been acting in the course of his employment as stopping for a meal was incidental to his employment.

The instant case is distinguishable. Having a meal must be incidental to ones work. The test is whether Mr. Swaby was at that time doing what he was employed to do or whether what he did was incidental to his employment. In determining whether or not he was so acting, the particular facts of the case must be considered. To go to a bar to drink liquor and carouse with women certainly cannot in any way be regarded as incidental to ones job.

I find that when the crew stopped at the bar, they were not acting within the scope of their employment. Rather they were on their own frolic.

An employee who goes off on a journey of his own as to be outside the course of his employment may return to the course of his employment when he is finished his own journey and may resume the journey of his employer's purpose. See **Creer V Brightside Foundry Engineering Company (1942) 35 BWCC 9**.

The question therefore is whether the men returned to the course of their employment upon leaving the bar and boarding the truck. The evidence is that Mr. Waison intended to take Mr. Swaby home before he took his passengers who were in the cab to Portmore.

I find that at least while they were on Spanish Town Road they had resumed the journey of MPM's purpose. The fact that he was also doing his own business on the journey by conveying the women and children, perhaps in breach of the MPM's rules, does not per se place him outside the scope of his employment. ***See Patten V Rea (1857)2CB(n.s.)606.*** He might have been performing his duty in an unauthorized and unlawful manner, but the truck was being driven primarily for the purposes of MPM's business, i.e. to take the men to their destination and to return the truck to MPM.

Willmer LJ **in Ilkiw v Samuels (1963) 2 ALL ER 879 at pg 885** expressed the following view:

> "... the mere fact that the act complained of was done in disobedience of expressed instructions is of no necessary materiality in deciding whether or not the act was within the course of the employment."

The evidence was that the driver was the supervisor. The usual driver was not Mr. Laing. However, Mr. Laing was properly authorized by Mr. Hardware to act for Mr. Thompson. In his capacity as driver/supervisor he permitted Mr. Waison to convey the women. In any event there is no evidence that what he was doing was against the wishes or instructions of the MPM.

Even if Mr. Waison was in fact going to take his passengers to Portmore before leaving Mr. Swaby near his home, that fact would not necessarily prevent the use from being for MPM's purposes.

The fact that the employee deviates from the employer's orders will not necessarily prevent the use from being for the employer's purposes. It is a question of degree.

In Joel v Morrison (1838) 6 Car Pso 1, Parke B. said:

> "If the Servants, being on their master's business, took a detour to call upon a friend, the master would be responsible ... the master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when doing his master's business, he could make his master liable but if he was going on a frolic of his own without being at all on his master's business the master will not be liable."

A deviating driver is only outside the scope of his employment when he departs altogether from his employer's business. If an employee deviates by taking a longer journey the point where his employment ceases so as to divest the employer of all liability is a question of degree as to how far the deviation could be considered a separate journey. See **Storey v Ashton (1869) LR 4QB 476.**

In any event, the evidence is that Mr. Waison intended to take Mr. Swaby to his destination on Spanish Town Road before taking his passengers home.

The unchallenged evidence is that the men's work ended when they were returned to the depot or when they were left near their homes. Given the peripatetic nature of their job, i.e., to pick up old cars etc along the way and the fact that instructions were often given whilst they were on the road I am satisfied that Mr. Swaby was obliged to travel on the truck at the time the accident occurred. Being on the truck at that time was incidental to his employment. The fact that it was towards the end of the journey is immaterial. See **Smith v Stages et al (1989) 1 ALL ER. 833.**

Having carefully deliberated upon the factual picture in its totality, I find that Mr. Swaby suffered the accident whilst he was in the course of his employment.

The second issue: whether MPM failed to provide the crew with a safe system of work.

Charlesworth and Percy on negligence Ninth Edition defines a safe system of work as follows:-

(i) The organization of the work; (ii) the way in which it is intended the work shall be carried out; (iii) the giving of adequate instructions (especially

to inexperienced workers; (iv) the sequence of events; (v) the taking of precautions for the safety of the workers and at what stages; (vi) the number of such persons required to do the job; (vii) the part to be taken by each of the various persons employed; and (viii) the moment at which they shall perform their respective tasks.

The evidence is that the men worked on a flat bed truck. The cab of the truck was able to safely seat the driver and another. A supervisor or striker rode in the cab. In their absence Mr. Waison drove in the cab. No stable seating or standing facilities was provided for the crewmembers. Nor were they instructed where to sit or stand. Through their own contrivance they devised their own seating and standing arrangements.

Mr. Waison told the Court he did not want to fall off so he made himself safe. The other crewmember stood on the platform and held on to a groove on the water tank. Carl Waison testified that the groove was a "fingertip hold" or "a beeny raise". The platform was installed to prevent the men from falling through the space between the bed of the truck and the cab. It was installed after the men complained of the danger. A handle was placed at the side of the truck. Mr. Swaby told the Court that the handle was placed there after the accident. In light of Mr. Waison's corroborative evidence of the men's position on the truck, I accept Mr. Swaby's testimony

in this regard as true. The truck itself was a flat bed, there were no rails or any support at all. Mr. Waison told the court that if a hand rail was installed it had to be designed so that it could be opened to allow the men access to the truck.

Mr. McBean submitted that MPM had no obligation to provide the men with a safe system for the following reasons –

(1) Mr. Swaby by his own admission was an experienced side man;

(2) The task performed was not unusual or repetitive or complex requiring close supervision.

Lord Dunedin in **Morton v Dixon (Williams) Ltd.** (1909) SC 807 at p. 809 had this to say:-

> "Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or to show that it was a thing which was obviously wanting that it would be folly in anyone to neglect to provide it"

> "It is a question of fact whether or not there is need for a safe system of work to be prescribed in any given circumstances. In deciding it, regard ought to be had to the nature of the work, that is, whether it properly requires careful organization and supervision in the interest of safety of those persons carrying it out, or it can be left by a prudent employer confidently, to the care of the particular men on spot to do it reasonably safe."

See **Charlesworth & Perry on negligence, ninth edition p.789.**

The positions the men were forced to contrive for themselves were in the circumstances perilous. Nowhere was provided for them to sit or stand stably or safely nor were there any handholds provided. I cannot see that it can be said with any seriousness that men so precariously perched on an open back truck with no rails, were not in an unusual and highly dangerous position.

Lord Goddard C.J. in **Roberts vs. Dorman Long & Co. Ltd** [1953] 1 WLR expressed the following view:

> "It is said that there is a common law duty, and undoubtedly there is, for an employer to provide a safe place of working and to take reasonable steps to guard against consequences of his men being in a perilous situation."

The evidence, which I have accepted, is that subsequent to the accident, the handle was placed on the side of the truck. There was therefore some attempt to provide a safe system. MPM, it can be reasonably inferred, recognized that the manner in which the men were being conveyed was obviously wanting and so upon request provided the platform to prevent the men from falling through the chassis. In the circumstances there was therefore no latent defect which was not brought to the attention of MPM.

An employer is obliged to make a proper layout of the job and to take reasonable steps to guard against those dangers incidental to the work reasonably to be contemplated by the employer.

Wasn't it reasonably foreseeable that if nothing was provided to stabilize and secure the men whilst they were driving around on an open flat bed truck precariously perched as they were, that an accident of some sort was highly probable?

In **Vernon v British Transport Commission (1963) Lloyds rep. 55 CA** the deceased had slipped into a dangerous gap. The locale where the deceased worked was a very dangerous area, although there had been no previous accidents. Sellars LJ approached the matter from the point of view of foreseeability. He was of the opinion that the defendants had a duty to avoid unnecessary risk to men at work. Any reasonable and prudent employer would have foreseen the danger. He felt it was incorrect to find that the deceased in that case had acted voluntarily while communicating with men below, as he had not voluntarily put himself in that position. It was not necessary to show how the deceased fell, because in the ordinary way of life men did stumble.

It has been held that there was a failure to provide a safe system of work, where window cleaners cleaned windows high above the ground on a

very narrow window sill, without any instructions to test the window before cleaning or to use any apparatus to prevent the windows from closing. Employers were also found liable where they failed to provide employees with safety belts to attach the employees to available transoms.

See **Drummond v British Cleaners & Ors. (1954) 1 WLR 1434, Roberts v Dormon Laing & Co. Limited (1953) 2 All ER 428.**

In **Harris v Brights Asphalt Contractor Co. Ltd. (1953) 1QB 617** the employers were found liable where they failed to provide boards for the men to stand on when they were working on a roof from which they were likely to fall.

In Morris v West Hartlepool Steam Navigation Co. (1956) AC 552, the employers were held liable where the upper deck hatches were battened down but the tween deck hatch covers were not replaced leaving the hatch way unfenced. As a result a seaman who was sent down to the tween deck while the ship was at sea fell into the hold and was injured.

In **Donnavan vs Cammel Laird and Co. & Others** 2 ALL ER 82, again the employers were held liable for not taking steps to prevent a workman who was repairing a ship in a dry dock from falling into the hold.

The crew of the MPM truck was open to unnecessary risk. There was no barrier to prevent Mr. Swaby from falling from the truck, there was no

seating or standing arrangement. He was forced to brace himself. Mr. Waison said, "I never wanted to fall so I made myself safe."

The crew was constantly being driven around in dangerous circumstances. The likelihood that a crewmember could fall was reasonably foreseeable. MPM ought to have implemented measures to guard against that happening. The convenience and expense of guarding against the likelihood of the men falling could not have been entirely disproportionate to the risk involved. It was reasonably practicable to diminish the danger. In the circumstances MPM failed to secure the safety of the crew. A clear breach of duty at Common Law has been established.

The fact that Mr. Swaby was very adept at operating the chain, does not however, absolve MPM from taking precautionary measures to protect the men who were in constant peril. It was pellucid that the condition that existed on the truck was an accident waiting to happen. Birkett LJ in **Roberts v Dorman Long & Co. (1953) 1 WLR 943 at pg 947** said:-

> Even assuming that he was familiar with the kind of work almost daily, nevertheless a moment's reflection would show that a mere slip, a moment of forgetfulness in doing familiar work, or some quite unforeseen happening of any kind might result in a sudden overbalancing with serious and in this case fatal consequences."

Devlin J. in **Donnavan vs Cammel Laird & Co. and others (1948) 2 ALL ER 82 at p. 86** came to the following conclusion:

> "I have come to the conclusion that the plaintiff's behaviour was due to momentary lapse from alertness such as might affect the ordinary, prudent workmen of his grade, and that it is not to be accounted as a falling short of the standard of care to be expected from him in the circumstances" .

Should MPM be exonerated if it is found that Mr. Swaby had shifted from his position?

In **Roy v Coordinated Traffic Service** (1969) 113 SJ 162 where the defendant's system was faulty and the men were left to find a remedy for themselves, without being given proper instructions on how to overcome the difficulty, Denning MR held that the defendants were under a duty to provide a safe system.

In **Legall v Skinner Drilling (Contractors) Ltd.** (1993) High Court Barbados No. 1175 of 1991 the Claimant was given a ten feet drum to stand on in order to carry out his duties as a derrick man. He fell and injured himself. The employees were found to be in breach of their Common law duty to provide a safe system of work.

In **Field v Jeavons & Co** (1965) 1WLR 996 an electrical lamp was switched on accidentally. It was held that an occupier of a factory should

collected derelict cars, metal and houses. Michael Thompson was the authorized driver for the day, the others were sidemen.

Percival Swaby's task was to operate the chain of the crane which was attached to the truck. He fastened the derelict objects to the chain. He was very adept at his task. Indeed he had been employed in that capacity for five years.

Carl Waison operated the crane . The usual driver was Michael Thompson. He was their supervisor on the job. However, on that fateful day Mr. Hardware, the overall supervisor, authorized Enoch Laing to drive. Work ended for the men when they were either returned to the garage or were left near their homes by the driver. Whilst on the road they were sometimes met by supervisors and "strikers" who would direct them to the objects to be removed. Whilst being conveyed on the truck, the crewmembers were not provided with seating or standing area. The men devised their own arrangements.

The driver and the supervisor or striker drove in the cab of the vehicle. The cab could comfortably seat two (2) persons. In the absence of a supervisor or striker Carl Waison rode in the cab with the driver.

Mr. Swaby's usually seat was the gas tank. There was nothing to hold onto, so he used the soles of his feet to brace against the wall of the cab.

watch out and be prepared for some degree of stupidity and forgetfulness on the part of those working in the factory.

In **McArthur v BRB** (1968) 6 KIB 40 the employer was held liable when an engine driver was killed when he was obliged to lean out of the cab to observe a signal placed near a bridge with an unusually narrow clearance.

Assuming there was no unusual jerk and Mr. Swaby himself was not able to maintain this unusual and awkward position (that is he was unable to brace his feet firmly and that was the cause of the fall) such a situation must be regarded as foreseeable in the circumstances. The men's job required that they were constantly being driven during the day in search of derelict heavy material. The act of driving in those circumstances meant they were repeatedly sitting or standing in the aforesaid precarious position since they were not provided with any stable seating or standing support.

I find that in those circumstances the danger of a man falling arose so constantly that it called for an advance system to meet it. It was a danger so obvious that it was unreasonable to ignore. MPM should have anticipated some degree of inadvertence from the crew.

In **Winter v Cardiff Rural District Council (1950) 1 All ER 819** a voltage regulator was carried on a lorry and no instructions were given to the charge hand to secure it in a manner to inhibit movement. It was held that

"there was no need to prescribe a system of work as the job required the exercise of judgment on the spot".

Winter v Cardiff is distinguishable from the instant case. It must be a reasonable requirement of MPM or any employer to ensure that the crew members are not unnecessarily endangered as they are conveyed. It cannot be reasonable to expect that the men ought to be left to provide their own means of securing themselves in so perilous a situation. In any case, that case was decided before the doctrine of Common employment was abolished in Jamaica by the Law Reform (Common Employment) Act. As a result, today the employer would be held liable for the charge hand's negligence in not securing the regulator.

Mr.Garth McBean submitted that the task was not unusual, complex or repetitive and so MPM had no duty to provide a safe system. I do not agree. The authorities make it clear that an employer is under a duty to prescribe a system of work even where the operation is a single one if it is in the interest of safety. See **Vernon v BTC** (1963) 107 SJ 113.

Mr. McBean further submitted that Mr. Swaby's failure to hold on whilst the truck was in motion and his intoxication were either the cause or contributed to the accident.

While cross-examining Mr. Swaby he suggested to him that he got up because he was trying to get the attention of the lady with whom he had become enamored. On another occasion he suggested that he had been trying to get the attention of the driver.

An examination of the evidence is essential to determine whether his intoxication caused or contributed to the accident.

Carl Waison's evidence is that the last time he saw Mr. Swaby before the accident, he, Mr. Swaby, was sitting. He testified that he heard a knock on the left side of the truck where Mr. Campbell sat and he saw someone falling from the truck. The person, he told the Court, fell to the left of the truck.

Mr. Garth McBean submitted that if the claimant fell to the left of the truck when the position in which he sat was to the right of the truck, the natural and reasonable inference is that he had got up from his seat and walked to the left. Mr. Garth McBean further submitted that was quite probable in light of the claimant's intoxication.

The claimant, however, denied this and insisted that he fell from the right of the vehicle. Was the claimant so befuddled by drink as to cause him to wander over to the left of the vehicle ?

Did his intoxication render him incapable of firmly bracing his feet against the wall? On a balance of probabilities I find it was the latter. The critical question is whether his inability to maintain his awkward position should render him contributorily negligent and if so to what degree?

If Mr. Swaby were not intoxicated no liability could be attached to him. In **Roy v Coordinated Traffic Services (1969) 113 SJ 162** Denning MR was of the view that where employees were faced with a problem and overcame it, the best way they could without instructions it would not be right in the circumstances to find the plaintiff contributory negligent. Had he put himself in that position voluntarily he would have caused his own accident.

This case is somewhat analogous to that. The crew members of MPM were left to find their own method of securing themselves on the truck. The method they employed was in itself inadequate and unsafe. In such circumstances without more, no liability could be attached to Mr. Swaby.

However, the evidence of the doctor, which was uncontroverted was that he was intoxicated. He therefore imperiled himself further. Notwithstanding, the employer must make allowance for some amount of stupidity, it cannot extend to ridiculous behaviour. In the circumstances some liability must be attached to him.

Third issue: Whether at the time of the accident Mr. Waison was acting within the scope of his employment thus rendering MPM responsible for his acts or whether he was acting outside the scope of his employment.

"A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment" Salmon on Torts 11th edition (1965).

Danckwerts LJ further illuminated the principle in **East v Beavis Transport Limited and Ors. (1969) 1 Lloyds Law Reports 303 at pg. 304** He said:-

> "A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment, it is deemed to be so done if it is either (1) a wrongful act authorized by the master or (2) a wrongful and unauthorized mode of doing some act authorized by the master. It is clear that the master is responsible for acts actually authorized by him."

Mr. Laing, the supervisor/driver permitted Mr. Waison to drive the entire day. On numerous other occasions Mr. Waison was permitted to drive. At the time of the accident Mr. Waison was completing the task for the day. He was to leave Mr. Swaby and Mr. Campbell near their homes and return the vehicle to MPM.

A driver or other employee in charge of his employer's vehicle has no authority to delegate his control of the vehicle to another, except with the

express authority of the employer. The fact that the employee disobeyed the orders of his employer does not necessarily mean that he was acting outside the scope of his employment. The facts must be looked at in their totality to determine whether it was done within the course of his employment.

Without stealth, Mr. Waison moved the truck from the compound and parked it on the road. From the road the authorized driver would take it on its journey. Even though Mr. Waison was junior to Mr. Swaby, in the absence of the supervisor, he sat in the cab with the driver. He was clearly acknowledged as the driver. Mr. Waison testified that only once he returned the truck to the depot. It was an occasion where the other crewmembers were attacked and stabbed and the police took the injured men to the hospital. However, he contradicted himself when he testified as follows:-

> "I could sign for the truck. No one spoke to me about signing his name. I never saw it as a problem. I would take it back in the evenings, park it, lock it up, and hang up the keys".

He recanted soon after and told the court he never drove the truck back to MPM. He was just assuming that it could be done. He insisted that the evening the crew was stabbed was the only time he drove the truck back to the compound. On that occasion he would have been an agent of necessity. The claimant however testified that Mr. Waison never drove the

truck from the garage because he never wanted anyone to see him. He further testified that he never saw Mr. Waison drive in the presence of "any supervisor like Mr. Hardware". Mr. Hardware was the overall supervisor. He remained on the compound. Mr. Swaby told the court that he never reported Mr. Waison because he never wanted him to lose his job.

In so far as Mr. Swaby's evidence conflicts with Mr. Waison's on the issue of driving the vehicle to and from or in and out of MPM's compound I accept Mr. Waison's as more credible and reliable. Mr. Waison was the driver. I find that Mr. Waison would regularly return the truck to MPM. I am fortified in my conclusion by the fact that he was to return the truck to MPM that afternoon. Even if Mr. Waison did not drive in the presence of Mr. Hardware I find, that it was likely that he drove in the presence of other supervisors. Mr. Waison's evidence is that he cannot recall if any of the supervisors whom the crew met on the road ever saw him driving. I believe on a balance of probability that they did. It is possible that a "supervisor like Mr. Hardware" might not have seen him. In any event the driver of the truck was also a supervisor, albeit at a lower level. Assuming that Mr. Hardware was unaware that Mr. Waison was driving, would that fact exonerate MPM in light of the fact that other supervisors were aware and he was permitted to drive by a supervisor/driver. In **Bell v Greater Council** (1969) 119 New LJ

153 it was held that the employers could not avoid liability where a dangerous method of work was used. It had become common practice amongst his fellow workmen. This fact was known to the chief shift engineers but not to the works manager.

Having accepted Mr. Waison's evidence of the ease with which he could return the lorry and the keys I find in that regard MPM was negligent in that they exhibited a disregard as to who could have access to the vehicle. In any case the uncontroverted evidence is that they were aware or ought to have been aware that Mr. Waison was driving the vehicle from the compound unto the road. (Mr. Hardware was located at the compound). This coupled with the fact that he was at liberty to return the vehicle could suggest some acquiescence on the part of MPM.

In **East v Beavis Transport Limited and Sellars (1969) Lloyds Law Reports 301** a lorry driver was injured by the defendant's lorry when it was reversed by a dock worker who had been given permission to move the lorry by its authorized driver. There was evidence that dock workers were prohibited from driving vehicles in the docks but that prohibition was not observed. It was held that the dock worker was acting in the course of his employment and therefore the employers were responsible for his negligence.

Danckworts LJ expressed the following view at page 305:-

> "... was evident that on not infrequent occasions dockers did in fact move lorries and other vehicles about the dock and therefore it seems to me that it was in the course of his employment as a docker that Sellars did what he did in moving the vehicles. In my view therefore W.E Anderson and Co. Limited are responsible for Sellars negligence."

Karminski LJ in the said case had this to say at page 306:-

> "Sellars was not acting generally outside the scope of his employment. He thought no doubt that he was supporting his employer's interest in manoeuvring this lorry. It is true that there was some evidence that the dock porters had been forbidden to drive lorries. It is also true that in this case Sellars was not a lorry driver ... but in my view the authorities to which my Lord has referred make it clear that Anderson's (Sellars employers) were liable for what he did. This emphatically is not the kind of case in which it could possibly be said that Sellars, when he drove the vehicle was on some frolic of his own. He was doing nothing of the kind. He was engaged on a serious job ..."

See also **Kay v ITW Limited (1968 1QB 140)**

In the instant case Mr.Waison was taking Messrs.Swaby and Campbell to their destinations. He also was responsible for returning the vehicle to MPM.

In **London County Council v Catterwoles (Garages) Limited** (1953) 1WLR 997 a garage hand who had been forbidden to drive since he had no driving licence disobeyed the orders of the garage proprietor and

negligently drove the van into the highway in order to clear the access petrol pumps. The employer was found liable on the ground that the garage hand had been acting within the scope of his employment although he was doing it in an unauthorized way. However, Danckwerts LJ in the **Beavis** case expressed the view as follows:-

> "...but a master is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes - although improper modes – of doing them. In other words a master is responsible not merely for what he authorizes his servants to do, but also for the way in which he does it. If a servant negligently does that which he was authorized to do carefully or if he does mistakenly that which he was correctly, his master will answer for that negligence fraud or mistake".

In the case of **Engelhart v Farrant and Company 1896 QB 246**, the driver of a cart left his duty to a lad who could not drive. The employer of the driver was held responsible when the lad caused an accident. Lord Esher MR at pg 243 had this to say:

"When Mears left the cart the lad did not drive away for his own amusement; he did that which he had no business to do, but he did it certainly with the intent to further the business as he drove on and turned the cart so that when Mears came out time might be saved. Now for what is the defendant liable? He is liable for the negligence of Mears if that negligence was the effective cause of the subsequent damage to the Plaintiff"

Mr. Waison's employment continued up to the point of returning the vehicle to MPM. He was therefore acting within the scope of his employment. In fact when the accident occurred, he was on Spanish Town Road enroute to Mr. Swaby's destination at Two Miles, Spanish Town Road.

In the case of **Clifton Brown v Lloyd Brown & Cargill Brown 12 JLR 883,** the Jamaican Court of Appeal held that the owner was only liable if the authorized driver retained control of the vehicle.

Mr. McBean submitted that on the authority of Clifton Brown, MPM cannot be vicariously liable for the acts of Mr. Waison since Mr. Laing had left the vehicle at the time of the accident. Mr. Laing, he submitted had delegated his responsibility to Mr. Waison and was no longer in control of the vehicle. The facts of Clifton Brown are however distinguishable from the facts of the present case.

In the instant case Carl Waison was an employee of MPM. He operated the crane of the truck and he was carrying out the business of MPM. On the other hand in Clifton Brown, the unauthorized driver had no connection to and was not acting in any way in furtherance of the owner's business. He was a plumber and a mere passenger in the defendant's vehicle. In order to attach liability to the employer the employee in that case

had to retain control of the vehicle by being present whilst it was being driven by the unauthorized driver.

The fourth issue: whether Mr. Waison's driving was the effective cause of the injury sustained by Mr. Swaby.

Liability attaches only to negligence which is either the sole effective cause of an injury or is connected with it as to be a cause materially contributing thereto.

See Halsbury's Laws of England Third Edition p.27.

Is there any evidence that Mr. Waison drove negligently or that his driving was the effective cause of Mr. Swaby's injuries?

The evidence is that Mr. Waison was an unlicenced driver. Mr. Swaby told the Court that they all drank the Campari and white rum from the same bottle. However, Mr. Waison insisted he drank only four bottles of Heineken when they stopped at the bar.

Mr. Swaby's evidence is that when the vehicle got to Spanish Town in the vicinity of Collie Smith Drive he felt "a sudden jolt to the left, it felt like a swing or a move from some vehicular traffic or obstruction in the road like a pot hole". This sudden movement caused him to lose his balance and he slipped and fell to the ground. It is Mr. Swaby's evidence that the other

driver would go slowly over pot holes. If indeed something in the nature of a pot hole caused Mr. Waison to swerve, could Mr. Waison without more be said to be negligent. Mr. Waison told the Court that he heard a knock to the left and saw something falling. He was unable to say whether his driving caused Mr. Swaby to fall. He also testified that he could see through his rear view mirror to where the left wheel touched the road. Under cross-examination he told the Court that he swerved to the right when he saw the person falling. However, in his witness statement (evidence in chief) and early in his cross examination there was no mention of swerving. He told the Court that he slammed his brakes and stopped suddenly because he saw someone falling. It was a quick reaction, he said. It was only under cross-examination when it was being suggested that he was negligent in failing to avoid contact with Mr. Swaby told the Court he swerved. I do not believe he swerved. I believe he slammed his brakes and stopped suddenly. The assertion that he swerved was an afterthought.

It was submitted by Mr. Nicholson that had Mr. Waison not stopped suddenly when he saw the person falling Mr. Swaby's legs would not be crushed. However, Mr. Waison no doubt took a decision on the spur of moment. A motorist is expected to be reasonably prudent but not expected to be a perfectionist by hindsight. **Brooking v Stuart Buttle**. See Bingham

and Berrymans Motor Claims Cases First Supplement to the Tenth Edition at p.3. There was some overcrowding in the cab caused by the women and children, however there is no evidence that that in any way affected Mr. Waison's driving. There is therefore no nexus between the overcrowding and the accident.

The liability of Mr. Laing

Mr. Laing was still the supervisor at the time Mr. Swaby boarded the lorry in his intoxicated state. It is true that where a person makes himself drunk there is no special duty of care to him. However, given the lay out of the lorry a prudent supervisor would have foreseen the likelihood of Mr. Swaby falling from the truck . In those circumstances Mr. Waison ought not to have allowed Mr. Swaby to drive on the truck since he knew his faculties were impaired by alcohol.

The following is the dictum of Lord Sumner in Glasgow **Corpn v Taylor 1922 AC 44 at pg 67:**

> "A measure of care appropriate to the inability or disability of those who are immature are feeble in mind or body is due to others who knew or ought to anticipate the presence of such person within the scope of the hazard of their own operations."

The principle enunciated suggests that Mr. Laing had a duty not to allow Mr. Swaby in his intoxicated state on such an unsafe vehicle. In so doing he was negligent. MPM is vicariously liable for his negligence

Quantum of Damages

MPM had a primary responsibility of providing the crew with a safe place to work. Mr. Swaby, however, contributed to the accident by his intoxication.

I find that he is 30% to blame for his injuries. Consequently, I will reduce his damages by 30%.

Mr. Swaby was at the time of the accident a crane operator. Both his legs were amputated above his knees.

He was assessed a total permanent disability of 90% impairment of each lower extremity which is equivalent to 72% of the whole person.

Counsel were unable to find a Jamaican case in which the claimant suffered the loss of both of his legs.

Trevor Clarke v National Water Commission & Others Suit No. C.L. 1993/C371 is a helpful guide for a claimant who has had one leg amputated above the knee.

In that case the claimant was a fisherman and a farmer. He was 63 years old at the time of the award and 54 years old at the time he sustained

the injury. He was assessed a total permanent disability of 90% impairment of the lower extremity which is equivalent to 36% of the whole person impairment. He was awarded general damages in the sum of Three Million Dollars.

Using the consumer price index for the month December 2003 which was 1786.5 the figure arrived at is 3,684,883.20.

Mr. Manley Nichloson submitted that the figure ought to be doubled where the person has lost both legs.

Mr. Garth McBean, however, submitted that it ought not to be doubled.

In the absence of any local authority, Kemp & Kemp, The Quantum of Damages in Personal Injuries and Fatal Accident claims Volume 3 provides guidance. The sum awarded for an above the knee amputation of one leg was Thirty Eight Thousand Six Hundred and Ten Pounds at the lower bracket and Fifty One Thousand Four Hundred and Eighty Pounds at the upper bracket. The sum awarded for the above the knee amputation of both legs was Ninety Seven Thousand Eight Hundred and Twenty Pounds at the lower bracket and One Hundred Eight Thousand One Hundred and Twenty Dollars at the upper bracket. Those figures were as at April 1995. The British courts have more than doubled the award given for one leg. Mr.

Swaby's legs were both amputated close to his hip. The evidence of Dr. Warren Blake is that Mr. Swaby's right stump measures 28 centimeters from the greater trochanter and left stump measures 32 centimeters.

In such circumstances, in making an award a judge ought to take into consideration whether the claimant will be in any way adversely affected by the use of a prosthesis. For example whether he will suffer pain and if so the severity of the pain.

No evidence was elicited from Mr. Swaby in this regard. In fact he now moves about in a wheel chair. His injuries were however, very severe. He developed complications which caused him to remain in Intensive Care for about one week. At the time of the accident Mr. Swaby was conscious. The truck remained on his legs until a doctor who was a motorist in the vicinity instructed Mr. Waison to reverse the truck off his legs. He suffered grade iii 'e' compound fracture as a result. There can be no question that his pain must have been severe. Again there is a dearth of evidence pertaining to his loss of amenities. The test with regards to loss of amenities is an objective one.

Lord Reid in **West & Sons Limited & Anor. v Shepherd** (1963) 2 ALL ER 625 at p.628 said:

> "It is true that in practice we tend to look at the matter objectively. ... but I think that is because the consequences of such a loss are very much the same for all normal people."

It is manifestly obvious that he has suffered loss of amenities. Both his legs were amputated above his knees. There are obviously a multitude of things he will be deprived of doing. Life for him will patently be fraught with frustrations.

I will give Seven Million Three Hundred Thousand Dollars ($7,300.000) for pain and suffering and loss of amenities. Having found the claimant 30% liable he is entitled to the sum of Five Million Three Hundred and Thirty Thousand Dollars ($5,330,000) with interest at 6% per annum from the 11th July, 2002.

Handicap on the Labour Market

The unchallenged evidence is that Mr. Swaby was a dexterous crane operator at the time of his accident. There was no evidence of his earnings prior to the accident and no evidence of his prospects.

Mr. Garth McBean submitted that in the absence of such evidence the court ought not to make an award under that head.

I disagree. There is some evidential support which would allow me to make such an award. Mr. Swaby was a crane operator. He therefore, relied on his agility and ability to stand and move to earn his living.

Obviously the loss of both his legs must result in diminished earnings in the future.

In arriving at a figure I am mindful of the type of job he did and the vagaries and vicissitudes of life in general.

I am of the view that his expected work life is approximately eight years. In **Carlton Brown v Manchester Beverage Limited et al** at Suit No. C.L. 1990/B027 a forty-five years old bottle sorter was found to have a work life expectancy of eight years.

Courtney Orr, J in **Mark Scott v Jamaica Prepak Ltd.** Suit No. C.L. 1992/S279 made an order for handicap on the labour market although there was a paucity of evidence concerning the claimant's earnings and prospects.

In those circumstances he found that the multiplier/multiplicand approach inappropriate.

In the circumstances of the instant case the multiplier/multiplicand approach is similarly inappropriate . I, however, find that his injuries will affect his earning capacity on the labour market.

In the circumstances I award the sum of $300,000.00 for Handicap on the labour market. However, the claimant is only entitled to 70% being $203,000.00.

Loss of future earnings: Mr. Manley Nicholson submitted that I ought to make an award for loss of future earnings. However no evidence was led as to Mr. Swaby's earnings and so in the absence of any evidence as to his income before the accident or his prospective earnings, I am unable to make such an award.

Special Damages:

Similarly I am unable to make any award in respect of special damages because no evidence was led in this regard.