JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 74/2002

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A. (Ag.)

BETWEEN	DESNOES AND GEDDES LTD.	DEFENDANT/APPELLANT
A N D	GARRY STEWART	PLAINTIFF/RESPONDENT

Emile George, Q.C. and Laurence Jones instructed by DunnCox for appellant.
P. Alexander Beswick and Mrs. Antonette Haughton-Cardenas instructed by Haughton & Associates for Respondent.

June 7, 8 and November 3, 2005.

FORTE, P:

Having read in draft the judgment of McCalla JA, (Ag). I agree with the reasons and conclusions therein and have nothing further to add.

SMITH, J.A.:

I have read the draft judgment of McCalla JA, (Ag) and I agree.

McCALLA, J.A. (Ag):

On June 8, 2005, after hearing submissions, we dismissed this appeal and affirmed the order of the court below with costs granted to the Respondent to be agreed or taxed. At that time we promised to put our reasons in writing and these reasons are in fulfillment of that promise.

Desnoes and Geddes Ltd. (the appellant) appealed against the judgment of James J. handed down on May 10, 2002 in favour of Garry Stewart (the Respondent), for damages in negligence and breach of statutory duty under the Factories Act. The Respondent, a lithographic printer had sustained injuries in March, 1995 during the course of his employment with the appellant, when his left hand was crushed by a machine which the Respondent alleged was defective.

The appellant prays for an order to set aside the judgment and for judgment to be entered in its favour or alternatively, that there be an apportionment of liability between the parties.

The grounds of appeal are as follows:

"1. The learned trial judge erred in not finding that the Plaintiff was contributorily negligent.

The learned judge so erred having regard to the following evidence:

(i) The evidence of the Plaintiff/Respondent that he placed his hand on the moving roller in an effort to remove a foreign substance.

(ii) The evidence of the Plaintiff/Respondent that he knew that it would be safer to attempt to remove the substance by stopping the machine using a button which was within arm's length.

(iii) The evidence of the Plaintiff/Respondent that during the 9 years of employment with the Defendant/Appellant he had received

safety instructions, reminders or training every six months including instructions not to place hands into or on a moving machine.

2. The amount of $1,225,000.00 awarded by the learned trial judge for general damages for pain and suffering and loss of amenities is excessive having regard to the range of awards in previous cases involving Plaintiffs with similar injuries."

On June 30, 2004, the appellant filed a supplementary ground of appeal to the effect that "the Learned Trial Judge erred in not finding that the Respondent's admitted deliberate act of folly was the sole and effective cause of his injury. In so erring the Learned Trial Judge also erred in finding the Appellant liable". Leave was not sought to argue this ground, but the court heard submissions from counsel.

These are the particulars of negligence which the Respondent alleged:

"(i) Failing to fence or secure the lithographic machine in an adequate manner or at all and in particular failing to ensure that a metal guard was around same.

(i) Failing to take the necessary steps or measures to repair the said machine.

(ii) Causing the Plaintiff to use and operate the said machine when they knew or ought reasonably to have known that same was defective and not functioning properly and in need of repairs.

(iii) The said machine was at the time of the accident unable to detect that an irregular object albeit the Plaintiff's hand had made contact with same and could not and did not stop automatically as it would otherwise have done had the same been in proper working condition.

(iv) Failing to keep or to maintain the said machine in proper and reasonable condition and state of repair.

(v) Failing to use material of sufficient or reasonable quality in its maintenance and repair of its machine.

(vi) Res ipsa loquitur."

The appellant does not deny that on the material date the Plaintiff's hand was injured in one of its machines. However, it denied the particulars of negligence and breach of statutory duty being alleged. It maintains that it abided by the statutory regulations prescribed for the provision of a safe system of work, to ensure the safety, health and welfare of the Respondent at the workplace.

The appellant attributed to the Respondent the following particulars of negligence:

"(1) Failing to follow the established procedure when handling a machine that was in operation - to wit, failing to turn off the said machine before placing his hand thereon.

(1) Attempting to remove a foreign object from a machine that he had set in motion and when it was manifestly unsafe and dangerous so to do.

(2) Failure to have heed or sufficient heed for his own safety."

A brief summary of the relevant circumstances, extracted from the judgment of James J., is to the following effect:

> "The Plaintiff, now aged 36 was employed by the Defendant Company where at the time when this action arose worked at the 'Coating machine'.
>
> In this department, metal sheets from which bottle stoppers are made, are varnished with lacquer by the coating machine so as to enable the plastic liner to hold on the bottle stopper or crown.
>
> On the 15th March, 1995 the Plaintiff was so engaged in his work when he observed some irregularity in the spread of the lacquer on the metal sheets. He stopped the machine and did some adjustment similar to others he had done on numerous occasions. A junior foreman was present.
>
> After making the adjustments the Plaintiff told his co-worker one Mr. Green to stop –start the line at the printing press. He did. The Plaintiff was about to check the amount of varnish on one of the rollers of the machine when his left hand came in contact with a roller which pulled in his hand crushing it up to his wrist.
>
> The Plaintiff testified that an electrical micro switch was put there as a safety device to prevent anything thicker than metal sheeting from going through to the rollers. However, he

> said this safety switch had been disconnected some time before.
>
> He also testified that no metal guard or sufficient guard was installed on the coating machine to prevent injuries such as he suffered. After his accident the Defendant placed perspect (sic)at the front of the roller to prevent anything thicker than the metal sheet from passing through."

The issues for determination in this appeal are:

(1) whether or not the Respondent's act in placing his hand on the machine was a "deliberate act of folly";

(2) was such act of folly the sole and effective cause of his injury so as to disentitle him to any award of damages; and

(3) whether or not by his own negligence he had contributed to his injuries.

The thrust of the submissions advanced by Mr. Emile George Q.C. was that in circumstances where a switch to shut down the machine was at arm's length and the Respondent deliberately put his hand on a moving machine, it was "an extravagant act of folly" and/or negligence and was the sole and effective cause of his injury or that it substantially contributed to his injury.

He relied on several authorities including the case of ***Rushton v Turner Brothers Asbestos Co. Ltd.*** [1960] 1W.L.R 96 where it was held that

the defendants were in breach of section 14(1) of the Factories Act, 1937, but that since the Plaintiff's deliberate act of folly was the operative and effective cause of his injury the defendants were not liable. In **Boyle v *Kodak Ltd.*** [1969] 1 W.L.R. 661 *where the court* found that neither party was gravely to blame, it was held that equal apportionment was the fairest course.

He also cited the case of **Aston Fitten v *Michael Black Ltd.& Ken Henry*** [1987] 24 J.L.R. 252 where the court found the Plaintiff to have contributed to the accident by his deliberate act of placing his hand in a dangerous machine, in order to remove a foreign matter. He had done so in circumstances where he ought to have contemplated the probability of the machine being switched on. However, on the facts of that case the learned judge found that the Plaintiff had not been operating the machine at the relevant time.

The relevant sections of the Factories Regulations [1961], made under the Factories Act, state as follows:

> "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 securely fenced.
>
> 3(1)(c) Efficient devices or appliances shall be provided and maintained in every room or place where work is carried on by which the power can promptly be cut off from the transmission machinery in that room or place;

> (I) all fencing or other safeguards provided in pursuance of these Regulations shall be of substantial construction, and constantly maintained and kept in position while the parts required to be fenced or safeguarded are in motion or use, except when any such parts are necessarily exposed for examination or for any lubrication or adjustment shown by such examination to be immediately necessary: Provided that any such examination... shall be carried out only by persons specially appointed by the manager..."

James J. held that the machine was dangerous within the meaning of Section 3 (1) (supra) "if the risk of injury is reasonably foreseeable from the use of it without protection but not if there is a remote possibility of its causing injury". The learned judge must have had in mind the test laid down in the case of ***Close v. Steel Company of Wales Ltd.*** [1960] 2 ALL E.R. 657, when he found, correctly in my opinion, that the machine was dangerous. In so finding he also had regard to the evidence that the appellant had fenced the relevant part of the machine after the accident. At page 5 of his judgment James J. continued:

> "The Defendants would therefore have failed in their statutory obligation to the Plaintiff. Notwithstanding the fact from the evidence that the Plaintiff had been given safety instructions, he stated in evidence that the procedure he adopted was what he had done on several occasions (i.e to remove foreign object/substance from the roller) and this was supported by Mr. Green."

Having regard to the circumstances outlined above, the provisions of the Factories Regulations and the finding of the learned judge that the appellants had failed in their statutory obligations to the Plaintiff, the finding of the court with regard to liability was inevitable.

On the question of contributory negligence, Mr. George submitted that in this case liability should be apportioned as the Respondent had done a "risky thing" and had disobeyed safety instructions.

In ***Amy Pitters v. T Haughton*** (1978) 16 J.L.R. 100, the Plaintiff was feeding a tablecloth into a machine when a portion of it folded over. She tried to correct it by extending her right hand over and above the trop guard of the machine and her hand was nipped between the hot roller and the feed ribbon, thereby holding her hand firmly fixed in a position where it got burnt, leading to amputation of four fingers of her right hand.

In ***Pitters*** (supra) the court considered the case of ***Smith v Chesterfield & District Co-operative Society Limited*** [1953] 1 ALL E.R. 447, where the court held the Plaintiff 40 percent to blame because she had done a deliberate act against which she had been warned. If the "risky thing" is in disobedience of orders, the court will apportion the degree of responsibility. The court also made reference to a statement of Lord Wright in the case of ***Flower v. EBBW Vale Steel, Iron and Coal Company Ltd.*** [1936] A.C. 206 where he said that contributory negligence in

connection with breach of statutory duty meant misconduct, namely, disobedience of orders.

In ***Hutchinson v London and North East Railway Company*** [1942] 1K.B. 481 at 488 Goddard L.J. made the following statement:

> "...I always directed myself to be exceedingly chary of finding contributory negligence where the contributory negligence alleged the very thing which the statutory duty of the employer was designed to prevent."

In the instant case the Respondent admittedly placed his hand on the machine while it was in motion. He knew it was unsafe to do so. However, the evidence supported the finding of James J. that although safety training had been given, there was an established practice to clear foreign objects without stopping the machine. Also, the micro chip, which is a safety device, was not functional. It would have shut the machine down if the rollers came in contact with something thicker than the material being used. It had, according to the Respondent, been rendered dysfunctional after an accident of the same nature had occurred on a previous occasion. The unchallenged evidence was that perspex, which would have prevented anything thicker than the sheeting from going through, was not in place, but was installed after the accident.

In ***Pitters*** (supra) the court held that where a statute required a factory owner or employer of labour to provide security or fencing for the machinery and, in default by the employer or factory owner, an

employee sustains injury in the course of carrying out his duty on the same, the employer will be liable for breach of statutory duty.

The court also held that in cases involving breaches of statutory duty by an employer which resulted in injury to the employee, for the employee to be found liable for contributory negligence, such contributory negligence must have been of a high degree. At page 105 of his judgment Carey J. (as he then was) said:

> "One starts with the basic assumption that the Plaintiff had done a "risky thing", and then goes on to enquire the nature and quality of the riskiness for if it amounts to extravagant folly, or if the safeguards are circumvented by perverted or deliberate ingenuity, then contributory negligence may be found".

In ***Pitters*** *(supra)* the learned judge said that deliberately placing her hand on the machine in the manner she had done, was a risky thing but "it is a risk which the defendant was required, however, to guard against". It was the failure to fence securely which was the cause of the accident and not the Plaintiff's misguided, albeit risky, act of placing her right hand in the position she did.

The learned trial judge in the instant case stated that he took all the evidence and case law into consideration. He found that the Respondent was not guilty of contributory negligence. Clearly, in so finding, he must have found that failure to fence was the actual proximate cause of the

accident. I am of the view that there is no basis on which to disturb the finding of the learned judge. In ***Breen v Amalgamated Engineering Union (now Amalgamated Engineering and Foundry Workers Union) and Others*** [1971] All E.R. 1148 the court held that it was unable to disturb the judge's finding of fact because it was dependent on the credibility of witnesses seen and heard by the trial judge, and it had not been affirmatively demonstrated that the judge had gone astray in making the finding even though the court had difficulty in understanding how he had arrived at that finding.

In the present case, it has not been shown that there is any basis on which this court could interfere with the learned trial judge's conclusion on the question of liability.

On the question of damages Mr. George, Q.C. submitted that the amount of one million two hundred and twenty-five hundred thousand dollars ($1,225,000.00) awarded for pain and suffering and loss of amenities is excessive. In ***Stanford Garwood v Michael Scot, W.Williams and Neville Brown*** Suit No. G-271 of 1987 (unreported), judgment was delivered on March 10, 1995. In that case the Plaintiff had sustained injuries which included a crush injury to the palm and dorsal aspect of the left hand, fracture of the bones of the left hand and dislocation of the left elbow. The court in that case awarded damages of six hundred thousand dollars ($600,000.00) for pain and suffering and loss of amenities. Mr.

Beswick contended that the award made in the case of ***Garwood*** is comparable, as also the award granted in the unreported case of ***Everton Campbell v Minott Services Ltd. & Linton Stewart*** Suit No C.L.C. 144 of 1998, where in December 1998, for injuries of a similar nature, the court awarded the sum of one million dollars ($1,000,000.00) for pain and suffering and loss of amenities. The award made in each case, when adjusted by inflation index converts to one million two hundred and forty thousand dollars ($1,240,000.00). He said that taking the circumstances of the present case into account there is no basis for reducing the award granted by the learned judge.

With regard to the amount awarded for loss of earning capacity, Mr. George Q.C. argued that the evidence does not support the award of two hundred thousand dollars ($200,000.00). James J. considered the case of ***Taylor v Bristol Omnibus Company Limited*** [1975] 2 All E.R. 1107 and referred to the statement of Lord Denning at page 1111 where he said:

> " It must be remembered that, when assessing compensation for loss of future earnings, the court is not seeking to replace week by week the sums which the Plaintiff would have earned. It is only giving compensation for loss of future earning capacity."

In making the award, James J. took into account the age of the Respondent at the time of the accident, the amount of his earnings at

that time as well as the fact that since the accident he had been self-employed on a "small scale", though he had given no evidence of the income which he derived from that activity. The learned judge made the award for loss of earning capacity on the basis that "a hand which is less than 50% functional at its best must restrict the ability of the Plaintiff to realize his full earning capacity."

He found that:

> "The Plaintiff suffered a crushing degloving injury of the left hand. All the shin(sic) was removed by the machine, exposing bones, tendons and nerves. All fingers were damaged. The index finger was just hanging o and had to be amputated. There was compound dislocation of the middle and ring fingers and the little finger was left at first but was later removed. The Plaintiff was operated on twelve (12) times in all."

It seems to me, having considered the authorities cited, that the trial judge's award of $1,225,000.00 for pain and suffering and loss of amenities is not excessive.

In ***Monex Limited and Derrick Mitchell v Camille Grimes*** S.C.C.A No. 83/ 96 (unreported), Harrison J.A. considered several cases with regard to the proper approach to be taken and at page 9 of the judgment he states:

> "An award for pain and suffering and loss of amenities is given in an attempt to compensate the victim, in money's worth, for the pain and mental suffering and the deprivation of the

> enjoyable things of life that she has undergone because of the action of the wrongdoer. It may fall short of achieving that objective, because courts may differ in their approach in doing the best they can. However, an appellate court will look at the global figure, and will not disturb the award unless it is out of harmony with comparable cases as being inordinately too high or too low."

(See also ***Housecroft v. Burnett*** [1986] 1 ALL E.R. 332). There is therefore no basis on which this court could reduce the award made by the learned judge. It was for these reasons that I concurred with the orders made, as stated at the outset.