1981/1

ROYAL COURT (INFERIOR NUMBER)

Before: Sir Frank Ereaut, Bailiff
Jurat R.E. Bailhache, O.B.E.
Jurat J.H. Vint

Between

Edward Charles Thorne, Plaintiff

AND

The States of Jersey Resources Recovery Board, Defendant.

Advocate C.B. Thacker for the plaintiff.
The Solicitor General for the defendant.

On 18th October, 1977, the plaintiff, who was then employed by the defendant, was carrying out maintenance work in an open steel frame lighting tower (hereinafter called "the tower") at the plant of the defendant at Bellozanne Valley, St. Helier. He claims that in the course of carrying out that work he sustained an injury to his right knee. He now actions the defendant for damages on the ground that his injury was the result of the negligence of the defendant. The defendant denies negligence.

By consent, this judgment is limited to the issue of liability.

Because the defendant does not admit that the plaintiff was involved in an accident or sustained any injury at the defendant's plant on 18th October, 1977, it is necessary for us to consider, firstly, whether the plaintiff was injured in the circumstances which he alleges, and this we now proceed to do.

The only evidence as to the facts of the accident was that of the plaintiff himself. His evidence was as follows: At about 2.30 p.m. on the date in question, he was instructed by Mr. Keith Archibald, his immediate superior and the Supervisor

at the Electrical Workshops at the plant, to replace the cast-iron nuts and bolts holding the lighting cable to the tower structure with brass nuts and bolts. That work involved first knocking off the cast iron nuts and bolts with a hammer. Before starting on that work the plaintiff, wearing safety boots issued by the defendant, climbed to the top of the 84 feet tower by means of a vertical ladder fixed inside the tower frame and in a corner of it. Having satisfied himself that the cable at the top of the tower was secure he then climbed down to the bottom and began to work his way up, removing the bolts which were at three feet intervals.

Having reached a height of about 24 feet (the exact height was in dispute but is not relevant to the issue), he assumed that the time was then between 4.30 p.m. and 4.45 p.m. and that therefore he should be making his way back to the electrical workshops to change and wash and so be ready to leave the plant at 5.00 p.m., which was the end of his working day. He therefore began to climb down the ladder, two rungs at a time, holding the sides of the ladder, and with the hammer in his right hand. After a short distance he put his left foot two rungs down and although he made contact with the rung his left foot slipped off it. When his foot slipped he let go of the ladder but managed to cling to the tower frame. At the same time, his right foot, the heel of which was on the rung (which was two rungs above that on which he had expected to place his left foot), slipped forwards off the rung and twisted down sideways into the $8\frac{1}{2}$ inch space between the rung and the inside corner of the tower frame, where it became trapped. That in turn brought the whole weight of his body down on to his right knee and caused it to bang sideways against the tower frame, resulting in injury.

He stayed in that position for some two minutes, suffering from pain and shock, with his right boot trapped between the ladder and the inside corner of the tower frame. He did not shout for help

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because he was frightened, and also he could see no one nearby and the noise of the plant machinery would have drowned his shouts. He then managed to make his way down to the foot of the ladder where he remained for some ten minutes. After resting, he made his way through an unlocked door into the Mechanical Workshops, intending from there to enter the Electrical Workshops to change from his safety boots and working overalls into his own clothing. However, the door was locked and there was no one about and he therefore had no option but to go home in his safety boots and overalls. He went out into the yard where he had parked his car. There he met a work-mate, Mr. G.E. Proper, to whom he offered a lift home. He told Mr. Proper about the injury to his right knee. He had difficulty in driving his manually-operated car, and because of the pain in his right knee he had to use his left foot to operate the clutch, the brake and the accelerator. Having dropped Mr. Proper off in St. Helier, he drove to his home at Longueville, where he at once went to bed.

The plaintiff hoped that his knee would be better next morning, 19th October, but it was worse. He decided that he must report his accident to his superior at the plant, and not having a telephone he drove to Bellozanne Valley, arriving there soon after 8 a.m. He told Mr. Archibald that he had sustained an accident on the tower the previous afternoon, when he had twisted his leg. He then drove home, and he told us that he called his doctor, Dr. Pitter, who came to see him at home at 11 a.m. that day. Dr. Pitter was not, however, called as a witness. The following day, 20th October, he was seen by Dr. Kinross, a partner of Dr. Pitter, who noticed recent bruising on his right knee.

Dr. Kinross was called as a witness. He told us that on 20th October, he saw the plaintiff, who told him that he had slipped and fallen heavily, twisting his right leg and banging the outer side of his right knee against the lattice-work of the tower. The Plaintiff was obviously in pain. The doctor say the

plaintiff again on 27th October, when he noticed that the movement of the right knee was very restricted, there was considerable fluid and there were four to five square inches of bruising on the outer side of the knee.

At the first visit, Dr. Kinross arranged for the knee to be X-rayed on 22nd October. The X-ray showed that the plaintiff suffered from arthritis which probably pre-dated the alleged accident. Two loose bodies (pieces of bone or cartilage) had come adrift, probably due to a sudden accident. The arthritic condition could have caused a locking of the knee and some pain, but the plaintiff said that he had never experienced any trouble before the accident and the doctor did not think that the account which he received from the plaintiff was consistent with that cause. He expressed the view that the bruising which he saw was consistent with the plaintiff having banged his knee against the tower frame, but he agreed that it was also consistent with the knee having been banged against any other flat object, including falling down on a pavement.

The Solicitor General submitted that there must be considerable doubt as to whether the plaintiff had suffered an accident on the tower as alleged, for the following reasons.

Firstly, Mr. Archibald said that at 4.45 p.m. there could be up to a dozen employees in the vicinity of the tower, and some parts of the plant were manned twenty-four hours a day. Counsel argued that it seemed very unlikely, therefore, that the plaintiff would have seen no one in the area at the time of the accident. On the other hand, Mr. Archibald also said that those whose working day ended at 5 p.m. usually came down to the Workshops at about 4.40 p.m.

Secondly, Mr. Archibald was certain that he did not leave the Electrical Workshops until 5.10 or 5.15 p.m. on 18th October. Before leaving, he carried out his usual duties of locking all doors and turning off heaters. He agreed that he occasionally

left earlier, but on this day his immediate superior, Mr. Brennan, was away, and so he was quite certain that he stayed until 5.10 p.m. He did not remember seeing the plaintiff that evening, and the plaintiff certainly made no complaint to him about any accident. The first he knew of any complaint was next morning, soon after 8.00 a.m., when the plaintiff reported that he had had an accident on the tower and said that he had twisted his leg. He did not examine the plaintiff's leg and did not notice anything unusual about his walking, but he agreed that the plaintiff said he was going to the hospital.

Thirdly, we heard the evidence of Mr. Proper. He was not called as a witness by the plaintiff, but in the course of the hearing the parties agreed to call him,-at the Court's suggestion, and he came straight from his place of work to give evidence. He agreed that he had worked with the plaintiff at the plant and had had general conversations with him about his accident, but he could not remember accepting a lift on the afternoon of the accident, nor could he remember any specific occasion when the plaintiff had had difficulty in driving his car. Contrary to the evidence of the plaintiff, he did not have regular lifts from him; if he received a lift from him it was just chance.

Fourthly, the Solicitor General argued that the account given of the accident was inherently impossible. The length of even a small size of the safety boot being worn was 11 inches, and the gap between the rungs of the ladder and the corner of the tower frame was only $8\frac{1}{2}$ inches. Yet the plaintiff claimed that his right foot had slipped forwards and off the rung, twisting sideways. Counsel suggested that such a manoevre was impossible. Moreover, he argued that if a man is climbing down a ladder, two rungs at a time, and his lower foot slips, the effect is to bring the weight of the body down on the higher foot, which is by then level with the waist, and it was unreasonable to envisage that that foot could then slip forward off the rung, which should at least catch

and hold the heel.

It is for the plaintiff to satisfy us on a balance of probability that he did suffer an accident on the tower on the late afternoon of 18th October, 1977. In considering this question we have looked at the overall picture.

As is so often the case, there are inconsistencies which are not altogether easy to resolve, although there is in each case a possible explanation. We are surprised that the plaintiff saw no one in the vicinity of the tower. He did not have a watch. It may be, therefore, that the time was later than he estimated, and that all employees who were due to finish work at 5.00 p.m. had already left the area for the Workshops. Similarly, it is possible that he arrived at the Workshops after everyone, including Mr. Archibald, had left. Although Mr. Proper's memory may be at fault, we do not think that it is, because we feel sure that he would have remembered the plaintiff telling him that the accident had just happened, and would also have remembered the plaintiff manipulating all the car controls with his left foot. There were subsequent conversations about the accident and it may be that the memory of the plaintiff is genuinely confused, or even possibly that he has tried to "embroider" his case. We have considered the claim that the way in which the accident is alleged to have taken place is inherently impossible, and while we accept that there are one or two unusual features about it we cannot conclude that it is so impossible as to be incapable of belief.

As against these matters which were very properly put before us, we have the following considerations. We are satisfied that the plaintiff did suffer an accident at some place between 4.30 p.m. on 18th October and 8.30 a.m. on 19th October. Up to 4.30 p.m. he was fit to carry out quite arduous duties on the tower; the next day he was not. He reported the accident on

19th October, and on 20th October Dr. Kinross saw bruising which was consistent with his account of banging his right knee on the tower frame.

The real issue, therefore, is whether the accident occurred on the tower. It is true that the only evidence that it did came from the plaintiff himself. On the other hand, on 19th October, he gave a brief account of the accident and injury to Mr. Archibald who, on 21st October, completed an accident report form describing the accident as: "Twisted leg on lighting tower. Right knee swollen". Mr. Archibald signed this as "verified", although he told us that this merely meant that he had inserted on the form what the plaintiff told him. Furthermore, the next day, 20th October, the plaintiff gave a similar account to Dr. Kinross, in which he included the information that he had banged the outer side of his right knee against the tower frame. There is a consistency between those two accounts of the accident and that which he gave to us in evidence. Furthermore, we find it difficult to believe that, if he did suffer the injury away from the plant, he would then have made a false complaint to Mr. Archibald the next morning.

As we have said, there are inconsistencies in the plaintiff's conduct and we can well understand why the defendant submitted that it had not been proved that the accident occurred on the tower. However, looking at the overall picture we are satisfied, on a balance of probability, that the accident giving rise to the injury did take place there.

It follows that we now have to consider whether the injury sustained by the plaintiff on the tower was the result of the negligence of the defendant.

In his Order of Justice the plaintiff alleged three main particulars of negligence, but during the hearing two of these were withdrawn, leaving only the allegation of -

"Failing to keep a safe place of work in that the said ladder was not encircled with hoops."

In its Answer the defendant denied negligence and alleged that the accident was caused solely by the plaintiff's own negligence. In the Answer and in a subsequent letter, the defendant alleged, by way of particulars of negligence, that the plaintiff -

(a) failed to disclose to the defendant that he had for an unknown period before the accident suffered from arthritis of the knee-joints and from impaired vision of the right eye;

(b) remained on the ladder for a prolonged period despite suffering from the above-described conditions;

(c) failed to ensure that his footing on the rung of the ladder was secure before attempting to place his weight on it;

(d) failed to keep any or any adequate look-out as to his footing;

(e) attempted to descend the ladder too quickly; and

(f) generally failed to have any or any adequate regard for his own safety.

Although the question whether the defendant had provided a safe place of work is material, this action is based on negligence, a generally accepted definition of which was given by Alderson B. in Blyth -v- Birmingham Waterworks Co. (1856) 11 Exch. 781, at p.784, in the following terms -

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

It is the duty of an employer to provide a safe place of work for his employees. However, that duty is not an absolute duty; it is a duty to take reasonable care to provide a reasonably safe place

of work, and what is a reasonably safe place of work must be considered in relation to the nature of the employment and its inherent risks, and if a workman sustains injury through an inherent risk of the employment, the employer is not liable in the absence of negligence. In General Cleaning Contractors Ltd. -v- Christmas [1952] 2 All E.R. 1110, Lord Tucker, referring to the duty of an employer to provide a system of work, said at p. 1117 -

> "Their (the employers') only duty is to take reasonable steps to provide a system which will be reasonably safe, having regard to the dangers necessarily inherent in the operation. In deciding what is reasonable, long-established practice in the trade, although not necessarily conclusive, is generally regarded as strong evidence in support of reasonableness it is not sufficient that the system adopted was in fact unsafe, he (the plaintiff) must show something which could reasonably have been done or omitted which would have made the system reasonably safe and that this failure was the cause of his accident."

Those principles equally apply to the duty of an employer to provide a safe system of work.

It therefore follows that the plaintiff in this case must satisfy us of two matters.

1. that in the exercise of its duty to provide a reasonably safe place of work the defendant should have provided a ladder which was encircled with hoops; and
2. that the provision of such hoops would have prevented, or at least mitigated, the injury to the right knee which was the consequence of the accident.

Unless he is able to satisfy us on both these matters there is a break in the chain of causation and a breach of duty giving rise to an award of damages in this case has therefore not been proved.

We have already described the plaintiff's own account of how the accident occurred. It is clear from that account that the sequence of events which led to the plaintiff sustaining the injury to his right knee began when his left foot slipped as he was climbing down the ladder. We are satisfied that the defendant was in no way to blame for the slipping and we consider that it probably occurred because the plaintiff failed to exercise adequate care for his own safety. Our reasons are as follows.

As we have already indicated, an employer is not liable for the consequences of an inherent risk in the employment, in the absence of gligence. It was accepted on behalf of the plaintiff that the provision of hoops would not have prevented his left foot slipping. It as not suggested that there was anything unsafe about the rungs or the sides of the ladder. The slipping of the left foot was not, therefore, due to any negligence on the part of the defendant. Climbing ladders was a necessary part of the plaintiff's employment, and he told us that he fully accepted this. Employment which involves climbing up and down ladders is not as safe as that which involves simply sitting at a desk, but an employee who takes the former type of employment annot complain that it is not as safe as that which involves only sitting at a desk.

We are satisfied that the plaintiff did suffer from arthritis of the knee-joints and from defective vision of the right eye, unknown to the defendant.. Whether those conditions played any part in his slipping, we do not know. The plaintiff said that they did not, and indeed told us that he was not even aware that he suffered from those conditions. Even if they did play a part in the slipping, the defendant is not to blame, for it had no reason to think that the plaintiff was not perfectly fit to carry out the employment for which he was engaged, particularly bearing in mind that the plaintiff himself considered that he was perfectly fit to carry out such employment, including the climbing of ladders.

We consider it likely that the main reason why he slipped is that he climbed down two rungs at a time. He could not satisfactorily explain to us why he did this. It was suggested to him that perhaps he was in a hurry to descend, but he denied that suggestion and said that he always adopted that method of descending. We have witnessed a demonstration of such a practice and we have no doubt that it is less safe (as was agreed by the plaintiff's own expert witness, Mr. L. Wood) than descending one rung at a time, especially in the case of a person who is not tall (and the plaintiff is not), because it entails stretching the leg down fully and thereby making it more difficult for the foot which is being lowered to find the rung on which it is to rest and then to rest securely on that rung.

We therefore conclude that the plaintiff slipped either because of an inherent risk in the type of employment, or, which we think much more likely, because, by descending two rungs at a time, he failed to exercise adequate care for his own safety. In either case, the defendant is not to blame because it has not been shown to us that the slipping was due to any negligence on its part.

That conclusion does not, however, end the matter, because if the subsequent injury was due to the negligence of the defendant, that is to say, a breach of its duty to provide a reasonably safe place of work, then the defendant is liable, and the case for the plaintiff is that the provision of encircling hoops would have prevented, or at least mitigated the extent of, the injury.

We were referred to the British Standards publication 4211 entitled "Steel ladders for permanent access". That publication recommends that all ladders exceeding 7 feet 6 inches in height should be fitted with safety hoops, the spacing of which should be uniform and at intervals not exceeding 3 feet. Three vertical straps should be fitted internally to brace the hoops, one of these being at the centre back of the hoop,

and the other two being spaced evenly between the centre back of the hoop and the sides of the ladder. The hoops may be either circular or rectangular. If circular, the width across the hoop from the centre line of the stringers to the inside of the back of the hoop should be 2 feet 6 inches to 2 feet 9 inches. If rectangular, that same width should be 2 feet 3 inches to 2 feet 6 inches.

The inside measurement of the tower frame is 3 feet square. The area of the square "cage" thus formed is therefore marginally greater than would have been the recommended area of the "cage" formed by either circular or rectangular hoops if such had been fitted. Moreover, the sides of the tower consist of diagonal angle irons, and not vertical bars, and are therefore more open than with hoops.

Mr. Wood, a consultant engineer in safety methods for twenty-six years, gave evidence for the plaintiff. His evidence may be divided into two parts.

First, speaking generally, he expressed the view that the ladder in the tower should have been provided with encircling hoops and vertical straps for safety reasons, both psychological and physical. With the provision of such hoops and straps, a man could lean back against the hoop and strap behind him, thus freeing both hands for his work. If he felt tired when climbing up or down the ladder he could more easily rest. If he fell, it was very likely that the hoops and straps would prevent him falling far and also give him a better opportunity to grab something to stop his falling further. Although the tower frame did provide a "cage" of a sort, the area of that "cage" was marginally larger than the recommended area of encirclement which hoops and straps would have provided, and anything larger than that recommended area must be less safe in the event of an accident. Moreover, the angle irons of the tower frame did not give the same protection against the consequences of a fall as would hoops and straps.

Secondly, on the question as to whether the provision of hoops and straps would have prevented injury in the circumstances of this case,

Mr. Wood could not say that they would have done so, but they might have. It depended on the position of the plaintiff's body weight and whether the injury was caused by the weight of the body being suddenly shifted on to his right leg. If his right foot had slipped through the rung his body would have tended to lean backwards because when a man loses control his body weight tends to go backwards. If that happened in this case, then the hoops and straps might have taken some of the weight of his body, with the result that the weight on his right leg when it slipped through the rung would have been reduced, and thus injury to his right knee might have been avoided or mitigated.

Mr. Robert Coppell, who is the Senior Accident Prevention Officer employed by the Social Security Committee of the States of Jersey, gave expert evidence on behalf of the defendant. His evidence also may be divided into two parts.

Firstly, speaking generally, he agreed that British Standards were a standard to work to, and that the provision of hoops with vertical straps would make the ladder and the tower marginally safer and would make it easier for a man working on the ladder to rest, although he did not agree with all the points made by Mr. Wood. The hoops would also have a psychological effect. However, following the accident he had, in his official capacity, examined the tower and considered whether he should advise the defendant to provide hoops. He felt it to be his duty to apply the test of reasonable practicability, and to balance the extra safety which would be achieved against the cost and work of providing it. Because the tower frame already constituted a "cage" he regarded the ladder as a safe place of work. The marginal nature of the extra safety which hoops would provide did not, in his view, justify the cost of such provision (although he had not enquired what that cost would be), especially as the ladder was not much used.

Secondly, on the question as to whether the provision of hoops and straps would have prevented the injury, he said that he could not see how they would have prevented the plaintiff from banging his right knee

against the tower frame: if the plaintiff's foot slipped right through and off the rung he would have expected a forward motion of the body. He agreed that there might also have been a backward motion of the body at some stage, but if there were, he did not think that it would have been substantial. He found it difficult to accept that the injury could have been prevented by hoops, since if they had been fitted the hoop and strap behind the plaintiff would have been only 6 inches nearer to his back than the tower frame behind him.

In order to succeed on liability, the plaintiff must satisfy us on a balance of probability of two matters. Firstly, that the defendant should have fitted hoops to the ladder in pursuance of its duty to provide a safe place of work, and secondly, that had it done so the injury would have been avoided or mitigated. We find it convenient to consider first whether he has satisfied us on the second question.

Counsel for the plaintiff submitted that both expert witnesses had agreed that the fitting of hoops would have provided a sense of security to a man on the ladder. When the plaintiff slipped he sensibly grabbed part of the tower frame to prevent himself falling; but, in doing so, the full weight of his body must have descended on his right knee. However, if hoops had been fitted his instinctive reaction would have been to grab a hoop to the side of, or behind, him instead, especially as his body would have been leaning backwards to some extent. Had he grabbed a hoop instead of the tower frame it was likely that his body weight would not have descended on his leg.

We have considered this second question most carefully. It appears to us that we are being asked to find that the provision of hoops and straps would have prevented, or mitigated, injury to the right knee, on the following chain of causation:

1. The plaintiff's right knee banged against the tower frame because the whole weight of his body came down on it;

2. the whole weight of his body came down on his right knee because there was no hoop or strap to the side of, or behind, him to take the

3. if there had been a hoop or strap behind him then, because there would have been a backward movement of his body when he first slipped, the hoop and strap might have taken the whole or part of his weight;
4. alternatively, had he known that there was a hoop and strap behind or to the side of him, he would have instinctively grabbed those instead of the tower frame and so have avoided or reduced the weight of his body on his right leg.

It seems to us that these arguments must be pure conjecture. We cannot be certain that the injury was caused by the plaintiff's body weight coming down on his right knee and thus causing it to bang sideways against the tower frame. Mr. Wood could not express a view on this. But even if we assume that, we are then asked to assume further that his body would have leant backwards. Mr. Wood said that it would have done but Mr. Coppell would only say that it might have done. The plaintiff himself did not testify that his body went backwards, although admittedly a man in a moment of emergency may not be able to recall every movement of his body. However, even if we then assume that the body did lean backwards, we have to ask how far it might have travelled, because if hoops and straps had been provided to the recommended standard the support which they would have provided behind the plaintiff would have been only 6 inches nearer to his back that the tower frame behind him. Mr. Wood could not say how far back the body would have gone, but he thought that a hoop and strap might have taken some of the weight. Mr. Coppell did not think that the backward movement (if any) would have been substantial.

It is easy to speculate on all these matters, but speculation does not afford a basis for a finding of fact such as we are being asked to make. Equally speculative is the suggestion that if a hoop had been fitted the plaintiff would have grabbed this rather than the tower frame, and thus avoided injury. He might have done, but it is impossible to say; and even if he had done, it is quite impossible to say further that his right knee would not then have banged against the tower frame.

hoops and the ladder without hoops is, for the purposes of this case, marginal, and we cannot say that that small margin would on the facts of this case have made any difference.

We have therefore concluded that the plaintiff has failed to satisfy us, on a balance of probability, that the fitting to the recommended standard of encircling hoops (with vertical straps) to the ladder would have prevented or mitigated the injury to the plaintiff in this particular case. That being so, the chain of causation is broken and the defendant is not liable to compensate the plaintiff for his injury. It is, therefore, not necessary for us to decide the first question, namely, whether the defendant should have fitted hoops to the ladder, and we do not do so.

We give judgment in favour of the defendant.