

18th December
1985

IN THE ROYAL COURT OF THE ISLAND OF JERSEY
Samedi Division

85/13

Before: P.L. Crill, C.B.E., - Deputy Bailiff
Jurat M.G. Lucas
Jurat D.E. Le Boutillier

Between	JACK CHARLES STOPHER	Plaintiff
And	COMMODORE SHIPPING SERVICES (1982) LIMITED	First Defendant
And	STATES OF JERSEY TELECOMMUNICATIONS BOARD	Second Defendant

Advocate C.M.B. Thacker for the Plaintiff
Advocate Miss C. Dorey for the First Defendant
Advocate Miss S. Nicolle for the Second Defendant

The Plaintiff in this action is a driver for the First Defendant for which company he has worked for several years. The Second Defendant is a customer of the First Defendant. On the 12th April, 1984, the Plaintiff, during the course of his employment, collected a heavy-duty cable drum from the Quay at St. Helier. The drum was 5 ft. 9 ins. in diameter and about 3 ft. in width. It weighed about 1180 kilograms. He placed it in the middle of what is called a Lancashire flat, (the flat) that is to say, a trailer with two high ends of fixed material. The flat was 8 ft. wide and about 4 ft. from the ground. The drum was placed in the centre line and was therefore parallel to the sides of the flat. On arrival at the Second Defendant's yard, the Plaintiff told the foreman that he had a drum for him and Mr. P.J. Vasse, an employee of the Second Defendant for some 12 years, drove a fork-lift truck to the flat in order to remove it. Because the blades of the fork-lift were not long enough to insert them under the drum to any appreciable extent in the position it was in the centre of the flat, Mr. Vasse manoeuvred to insert the ends of the blades under the righthand, (or in terms of the flat's cab, the offside) edge of the drum in order to tilt it and slide it towards the side, when he would be able to place the blades of the fork-lift completely under it and take it off. The manoeuvre had been done many times, and in doing so the drum would tilt away from the fork-lift as the blades were inserted.

The Plaintiff went round to the back of the drum, that is to say the near-side of the flat, and attempted to ease the drum onto the forks. The tilt, however, alarmed him, and fearing that he might be crushed, he stepped back, fell off the flat and was injured. The Court was asked to decide the question of liability only and, accordingly, we have done so. The Plaintiff now brings this action against both Defendants, claiming insofar as the First Defendant is concerned that it "failed adequately to supervise, direct and instruct the Plaintiff

as to a safe method of working while at the Second Defendant's site, and failed to organise a safe system of work". And, insofar as the Second Defendant is concerned that it was negligent in that it:- "(a) Provided mechanical equipment, that is a forklift truck, unsuitable and/or unsafe for unloading the specific cables although it had, at the time, access to a bigger forklift truck more suited to and safer for the said task. (b) Failed to provide suitable and adequate equipment for the said unloading. (c) Failed either directly or through its servants to warn or instruct or supervise the Plaintiff when he assisted in carrying out the said unloading. (d) Failed to provide or organise a safe system of work".

This is a case where both the Defendants' employees were engaged in a common task of unloading the drum. They had co-operated in this way, that is to say the driver delivering the drum at the Second Defendant's premises, and the Second Defendant's employees using a forklift to unload the cargo, in this case a drum, for a number of years. So far as concerns the First Defendant, it expected its drivers to assist in unloading its goods, if asked to do so by the customer, in this case the Second Defendant. It left the method to its employees. At any rate it was aware of the method actually used to unload the drums, although according to Mr. Payne, its Operations Manager since 1983, it gave no specific instructions to its drivers, apart from telling them that if they encountered difficulties either in the method of work or with the instructions given to them by the customer, they should telephone to the Company's office for their own instructions. So far as concerns the Second Defendant, according to Mr. Doublet, the Safety Officer on the day of the accident, it regarded the drivers as being in a position to tell its own men how to do the unloading and what was required. What, then, is the position in Law of the two Defendants?

The responsibility of the First Defendant as the employer is a well-known one, and that is to take reasonable care for the safety of its workmen throughout the course of their employment. That duty continues even though the workman is upon the premises of a third party. The standard of that duty was described by Parker L.J. in *Wilson v. Tyneside Window Cleaning Co.* (1958) 2 All E.R. at p.272 as follows:

"This case is a very good example of the difficulties that one gets into in treating the duty owed at common law by a master to his servant as a number of separate duties. Thus, it is often said (as it is said in this case) that the master owes a duty to make the place of employment as safe as reasonable skill and care will permit. Again, it is said that it is the master's duty to make the plant and tools as safe as reasonable skill and care will permit; and again it is said that it is the master's duty to devise and lay down a safe system of working. Approached in that way, questions at once arise whether, and if so to what extent, any of those duties extend (in the case of premises) to premises not occupied or controlled by the master, or (in the case of plant and tools) to plant and tools bought from responsible and reputable suppliers or manufacturers bearing in mind, as has been laid down so often, that in each case the duty is a duty personal to the employer, in the sense used in *Wilson & Clyde Coal Co. Ltd. v. English* (1) (1937) 3 All E.R. 628). It is no doubt convenient, when one is dealing with any particular case, to divide that duty into a number of categories; but I prefer to consider the master's duty as one applicable in all circumstances, namely, to take reasonable care for the safety of his men, or, as Lord Herschell said in the well-known passage in *Smith v. Baker & Sons* (6) (1891) A.C. 325 at p.362, to take reasonable care so to carry out his operations as not to subject those employed by him to unnecessary risk.

That general duty applies in the circumstances of every case; but the governing words "reasonable care" limit the extent of the duty in the circumstances of each case. Accordingly the duty is there, whether the premises on which the workman employed are in the occupation of the master or of a third party, or whether the tool has been made to the order of the master or his manager, servant or agent, or is a standard tool supplied and manufactured by reputable third parties; but what reasonable care demands in each case will no doubt vary".

Again, whether there is a system of work or not is a question of degree. Two cases in this respect are relevant. The first is a Scottish case called in *English's case*, (1936) S.C. 883, at p.904:

"What is system and what falls short of system may be difficult to define ... but, broadly stated, the distinction is between the general and the particular, between the practice and method adopted in carrying on the master's business of which the master is presumed to be aware and the insufficiency of which he can guard against, and isolated or day to day acts of the servant of which the master is not presumed to be aware and which he cannot guard against; in short, it is the distinction between what is permanent or continuous on the one hand and what is merely casual and emerges in the day's work on the other hand".

The second case is that of *Speed v. Swift (Thomas) & Co. Ltd.*, (1943) K.B. 557, at p.563, where Lord Greene, M.R., cited the passage we have just mentioned and continued:

"I do not venture to suggest a definition of what is meant by system. But it ... may include ... the physical lay-out of the job - the setting of the stage, so to speak - the sequence in which the work is to be carried out, the provision in proper cases of warnings and notices and the issue of special instructions. A system may be adequate for the whole course of the job or it may have to be modified or improved to meet circumstances which arise; such modifications or improvements appear to me equally to fall under the head of system".

In the *Wilson* case, Holroyd Pearce L.J. added to the remarks of Parker, L.J.:

"Now it is true that in *Wilson & Clyde Coal Co. Ltd. v. English* (1), Lord Wright divided up the duty of a master into three main headings for convenience of definition or argument; but all three are ultimately only manifestations of the same duty of the master to take reasonable care so to carry out his operations as not to subject those employed by him to unnecessary risk. Whether the servant is working on the premises of the master or on those of a stranger, that duty is still the same; but as a matter of common sense its performance and discharge will probably be vastly different in the two cases. The master's own premises are under his control: if they are dangerously in need of repair he can and must rectify the fault at once if he is to escape the censure of negligence. If, however, a master sends his plumber to mend a leak in a respec-

table private house, no one could hold him negligent for not visiting the house itself to see if the carpet in the hall creates a trap. Between those extremes are countless possible examples in which the court may have to decide the question of fact: did the master take reasonable care so to carry out his operations as not to subject those employed by him to unnecessary risk? Precautions dictated by reasonable care when the servant works on the master's premises may be wholly prevented or greatly circumscribed when the place of work is under the control of a stranger. Additional safeguards intended to reinforce the man's own knowledge and skill in surmounting difficulties or dangers may be reasonable in the former case but impracticable and unreasonable in the latter. So viewed, the question whether the master was in control of the premises ceases to be a matter of technicality and becomes merely one of the ingredients, albeit a very important one, in a consideration of the question of fact whether, in all the circumstances, the master took reasonable steps". At p.729 of Charlesworth on Negligence 7th Edition is the following passage:

"Servant gaining access to or working on another's premises or plant. Despite initial doubts it has been firmly established by the House of Lords now that the general duty of an employer to his servant, namely to take reasonable care for his safety, does not come to an end merely because the servant has been sent to work at premises, which are occupied by a third party and not by the employer. The duty remains throughout the whole of the course of his employment. What will vary in each case is the degree of care to be taken by the employer".

The duty of the Second Defendant is less onerous because it did not stand in the same relationship to the Plaintiff as that of the First Defendant. But because it had a common interest in the work, the duty falls not far below that of the First Defendant. In the case of *Membury v. Great Western Rail Co.* (1889) 14 App. Cas. 179, Lord Herschell suggested that the duty of the occupier, where work is done on premises for the benefit of the occupier, falls under three heads:

"(i) "Machinery, appliances or tackle" which they have provided for the workman's use. (ii) The condition of their premises. (iii) Dangerous activities carried out in the course of their business".

Advocate Thacker conceded that head number 2 did not apply, but submitted that the other two heads did, in the particular circumstances of the present case. Advocate Nicolle on the other hand for the Second Defendant, submitted that the Plaintiff was an invitee and that accordingly because the Second Defendant had no control over how the driver carried out his duties, a limited duty was owed by it to him. She cited the case of *Macrae v. Jersey Golf Hotels Limited* (1973) Jersey Judgments, p.2313, in support of her submission that the Plaintiff was an invitee on the Second Defendant's premises. She also cited *O'Reilly v. Imperial Chemical Industries Ltd.* (1955) 3 All E.R. p. 382. In the present case, clearly the contractual relationship of master and servant was between the Plaintiff and the First Defendant. In the *O'Reilly* case the Court found that there was a heavy onus of proving that there was a relationship of employer and employee between the customer, that is to say ICI and the employee of British Road Services, whose workman was delivering lorry drums to the Defendant's premises. The Plaintiff had failed to show that the Defendant had the right to direct how the unloading was to be carried out. That case was referred to in the Royal Court in the case of *Louis v. E. Troy Limited and Others* (1970) Jersey Judgments p.1371. The Court said at p.1390 when summarising the English Authorities:

"The effect of the above cases is summarised in *Munkman's Employer's Liability at Common Law*, at page 79 -

"It is only in rare and exceptional cases that the right of control over an employee is transferred to a temporary master, and the burden of proving such a transfer is a heavy one. In particular, it is not usually discharged where a man is lent together with valuable equipment such as a crane; nor even when a driver is on permanent loan with his lorry, the arrangement being that the hirers can tell him what to do but not how to do it; but transfer of control may be inferred more readily when a man is lent on his own, without equipment, especially an unskilled man". "

In this case the evidence showed from all the witnesses that the system of work had been in force for a long time. Further, there had been no problems before the accident and no complaints by any of the employees either of the Second or First Defendants. Nevertheless, the Plaintiff was relying on the skilled use of the equipment of the Second Defendant, under the control of Mr. Vasse. We find that because of the common interest in the operations the Second Defendant did owe a duty of care to the Plaintiff, who was using the Second Defendant's equipment under the contract between the Second Defendant and the First Defendant. The question, therefore, is whether both Defendants have discharged their respective duties of care and if not, then whether the Court should apportion the damages under Article 5 of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960 between them. These two Defendants pleaded contributory negligence on the part of the Plaintiff. In his particulars the Plaintiff alleged that the First Defendant should have used a form of transport called a low loader. With one exception none of the evidence called by him supported that allegation and accordingly it could not stand.

Apart from the Plaintiff we heard three other witnesses on his behalf. The first was Mr. Kenny, who was on the Works Committee of the First Defendant and who disclosed that working conditions were discussed with the company. He had been a heavy goods vehicle driver for some 6 years. He was prepared to assist in any unloading but if that took more than an hour, then the time would be recorded in a book for the purposes of the First Defendant's accounts. He agreed that the operation could be dangerous. And whilst it was natural to step on to the flat, the driver could not be expected to push it. He, himself, would have steadied it and if a driver had stood behind it, that, he felt, would be a risky manoeuvre.

Mr. Abraham had 30 years experience as a heavy goods vehicle driver, 16 years of which had been with the First Defendant. The practice had not changed over those years, and ⁱⁿ his opinion the blades of the fork-lift were not long enough, although no one had complained of it. He felt he had a duty to help on the trailer, but one had to be a bit careful. He could not recall any problems in this form of unloading before. He would not stand behind it, that would not be safe, but it would

not be unsafe merely to steady it. He would not expect the First Defendant to phone to the Second Defendant constantly to ask what equipment they had. The third witness for the Plaintiff was Mr. White, also the holder of a heavy goods vehicle licence and a driver for the First Defendant. He had on occasions helped to drag a cable to the side. He agreed that a driver who was on the flat was at some risk. As far as he was concerned he would have used a piece of wood to steady the drum and to stop it rolling along the flat. He was the only witness who felt that a low loader might be safer. But as we have said, the evidence as a whole did not support this allegation of the Plaintiff. He felt that most of the time the operation was quite safe and in any case the job's description was to assist in any unloading. There had been no earlier complaints. He agreed that the driver could phone back to the First Defendant's offices if there were any problems.

For the First Defendant, Mr. Payne, who as we have said, had been the Operations Manager since 1983, said that a low-flat could be used depending on the weight; so far as a low-loader was concerned that was normally kept for the use of transporting glass. There had been no problems at Telecoms before and the practice had been carried out for a number of years. Moreover, no change had been instituted following the accident. There had been no specific instructions issued to drivers, it was part of their job to help. There had been no complaints by his employees in respect of the shortness of the blades on the fork-lift.

Mr. Doublet had been an employee of the Second Defendant for some 26 years and had been the Safety Officer on that day. The Second Defendant had only one fork-lift for all its uses. It was still in use and there had been no complaints. However, there was a procedure where, if a fork-lift with longer blades was needed, the company could hire one from Huelins. The employees of Telecoms did not, he said, give instructions to the drivers. On the contrary, they relied on the drivers to tell them what to do, and he said, as we have already pointed out, that he was their servant. They were guided by the driver. He agreed, however, that on reflection the unloading of the drum on the day in question, having regard to its size, and the shortness of the fork-lift's blades, was a matter for obtaining a fork-lift with longer blades from Huelins. The weight of the drum was within the lifting capacity of the fork-lift. Mr. Vasse had more practical working knowledge about

the method used and the equipment needed. The evidence therefore of Mr. Vasse is important. He had worked for the Second Defendant for some 12 years and had a full training in the use of the fork-lift. The maximum weight the fork-lift could deal with was 2,900 kilos and therefore the cable drum was well within this capacity. He described the manoeuvre in the same way as the Plaintiff's witnesses had done. That is to say, he eased the drum towards the edge of the flat, so that he could insert the blades of the fork-lift fully under it. He agreed, however, that he would lose touch with the driver, if he was behind the drum, as he inserted the blades for the first time. He admitted that at the time he could not say that he knew that he was assisting the unloading. He could not see him and he could not remember him saying that he would help by steadying or otherwise holding the drum, although it was quite likely that he may have said it. The next time he saw him was whilst he, Mr. Vasse, was sitting on the fork-lift which was quite high up and he noticed the legs of the Plaintiff underneath the flat. He stopped what he was doing, got down, went to his aid, told him to stay where he was and then went to the office and phoned for the ambulance. The operation, he said, was nothing out of the ordinary. The fork-lift would raise the drum by about 6 ins. to 8 ins. but it could give the impression to the Plaintiff that it was a big tilt and that he might feel that it was going to topple over, if he lifted it too high, then the drum edge would slip. He agreed that since the accident, he had been more cautious in carrying out the manoeuvre. However, if the fork-lift had longer blades, this might, depending on the capacity of the engine, reduce its lifting capacity. There had been discussions between the employees about getting a better fork-lift than the one they had, but that had not been made known to the management. He had had no accidents in 14 years. It was up to him or the head storekeeper to go to Huelins to hire a fork-lift with longer blades, if they thought it necessary. There was, however, no system and it was left to the driver and the storekeeper as to how the load should be handled. He would be more inclined now to phone to Huelins for longer blades in similar cases.

The duty owed by a Third Party to an employee of a company which it invites on to its premises for a common purpose, if it can be substantiated, is a contractual one. Nevertheless, O'Reilly's case where the Third Party only was sued makes it clear that that duty cannot be transferred pro hac vice. On p.388 of O'Reilly's case, Jenkins L.J. says this:

"I agree. It is not in dispute that if the relationship between the plaintiff and the defendants in this case were merely that of invitor and invitee, the plaintiff's case must fail owing to his knowledge of the danger, as is shown by Horton's case. It has, however, been argued for the plaintiff that in all the circumstances of this case the defendants owed to him a duty amounting to the duty owed by an employer to an employee; that is to say, the duty on the employer to provide the employee with adequate plant, to devise a safe system of work for the employee and not to do anything to expose the employee to unnecessary risk. Had it been established that the defendants were under such a duty in this case, it is clear from the learned judge's findings and from the evidence that the plaintiff would be entitled to succeed, for the tiering truck was not an adequate apparatus for unloading a lorry having on it three tiers of three hundred pound drums. The duty owed by an employer to his employee, however, is a contractual duty and prima facie, therefore, it can only exist in a case in which the contractual relationship of employer and employee exists between the parties. For instance, as was shown by Horton's case, the fact that A enters the premises of B for the purpose of rendering services to B pursuant to a contract between the employer of A and B, the occupier of the premises, does not give A any higher right than that of an invitee, because there is no contract of service between him and B, and it matters not what arrangement may have been made between his employer and B, that being an arrangement to which he is not a party.

There is, however, a rare exception to that rule which has been referred to sometimes as the case of employment pro hac vice. That is the kind of case in which an employer hires out to some other person the services of his employee and the transfer of the control and direction of the actions of the employee is so complete and puts his temporary employer in such close control of the situation that for the purposes of liability either to a third party, or equally I think to the employee himself, the temporary employer is to be regarded in law as his master. As Parker, L.J. has said, the onus

on those who seek to establish a relationship of employer and employee pro hac vice is a heavy one, and in my view the range of cases in which that relationship should be held to have been set up ought not to be extended".

We accept Miss Nicolle's submission that so far as the Second Defendant is concerned the Plaintiff was an invitee, although assisting the Second Defendant in the use of its equipment. One witness alone thought that Mr. Stopher was in control of the lifting arrangements. We think that the true position was that the Plaintiff merely assisted the Second Defendant's employee, Mr. Vasse, at his (the Plaintiff's) discretion. At no time could he be said to be under the control of the Second Defendant and accordingly the relationship of master and servant could not be maintained. Indeed, in reply to Advocate Nicolle the Plaintiff said that the driver did not ask him to assist. That being so is the case of *Membury v. the Great Western Rail Co.* (1889) 14 App. Cas. 179, an authority for producing a kind of link between the Second Defendant and the Plaintiff so as to vest responsibility for the defective vehicle, that is to say the fork-lift and its operation upon the Second Defendant jointly with the First Defendant? All the later cases show that considered from a contractual standpoint, the Plaintiff should fail, as he has not discharged the onus on him vis a vis the Second Defendant. The negligence claimed by the Plaintiff against the Second Defendant is that first, there was defective plant, that is to say a fork-lift with too short blades and secondly, the operation of that defective plant was negligent by Mr. Vasse. There is a relevant passage in the Seventh Edition of Charlesworth on Negligence, at p.576/7. Looking at that passage and considering the other authorities we find that the Plaintiff only had a general duty to help to unload. The control such as it was over him was extremely loose and could not have been in our opinion the sort of control to give rise to the relationship of master and servant within the authorities to which we have referred. We therefore find for the Second Defendant on the issue of liability and it is dismissed from the action with costs.

Looking at the evidence we have come to the conclusion that the First Defendant failed in the duty of care which it owed to the Plaintiff, and accordingly on the issue of liability we find for the Plaintiff as against the First Defendant only. But we are satisfied that the Plaintiff himself did not take reasonable care for his own protection. The evidence indicated that it would have been wiser not to have stood behind the drum in the way he did on a very narrow ledge. And although he was exposed to this danger by the failure of his employer to institute a safe system of work, nevertheless we think that it would be right to reduce his damages which he may eventually recover from the First Defendant by 25 per cent. The costs will be paid to the Plaintiff by the First Defendant.