AVILA v. DRAGADOS Y CONSTRUCCIONES S.A.

SUPREME COURT (Kneller, C.J.): January 20th, 1993

Tort—fatal accidents—waiver of rights by dependant—acceptance of "death benefit" payable to deceased employee's widow under union agreement in full satisfaction of claims no bar to common law action against employer if done in ignorance of legal implications

Employment—safety—safe system of work—compliance with established working practice weighs in favour of employer—if none, duty on employer to balance magnitude of risk against difficulty and expense of precautions—risk reduced if skilled and experienced worker performing familiar task—duty on employee to take care for own safety

The plaintiff brought an action for damages for negligence and breach of statutory duty against her late husband's employer, in respect of his death.

The deceased had been working on a building site when he fell from a height of 10 ft. on to a concrete floor, fracturing his skull, and died a week later in hospital. At the time of the accident, he had been fitting plastic moulds between metal girders, into which concrete was to be poured. He was using a hammer to knock them into place. A carpenter working with him did not see how he fell, though he told police officers in a subsequent investigation that the deceased had been standing with both feet on one girder immediately beforehand. He had been wearing a hard hat but, like those of his fellow workmen, it was not strapped to his head, and became dislodged during the fall. A wooden ladder leading from the ground floor was later found to be missing a rung and did not comply with safety regulations. The deceased was an experienced builder and had been working on the site for more than a year, performing the same task. He left a widow, the plaintiff, and four children.

Under an agreement between the Gibraltar Master Builders' Association and the TGWU, the deceased's dependants were entitled in the event of his death resulting from an accident at work to a £5,000 "death benefit" payment from the defendant. Shortly after her husband's death, the plaintiff was presented with this sum and signed a receipt which stated that she accepted the money on behalf of herself and her children in full satisfaction of any possible claim against the defendant, and that the money was payable under the agreement with the TGWU. The plaintiff was illiterate, but the document was read to her in Spanish before she signed it.

Some years later the plaintiff brought the present proceedings, alleging that the defendant had not ensured a safe work-place or operated a safe

system of work. She submitted that (a) the deceased must have fallen from the defective ladder in order to land in the position he did; (b) under safety regulations, extensive additional precautions, *e.g.* guard-rails and toe-boards, or safety-nets or harnesses should had been in use, and the defendant should have ensured that safety helmets were worn properly; (c) the positioning of the two men working together was hazardous, since neither could see what the other was doing; (d) accordingly, the defendant had acted negligently and in breach of its statutory duty, and was liable to compensate the deceased's dependants; and (e) since she had not received legal advice as to the meaning of the receipt at the time that she signed it, it could not operate as a discharge of their claims against the defendant.

The defendant submitted that (a) since the workmen on the site did not use the ladder to move between floors but took the staircase instead, the condition of the ladder was irrelevant; (b) it would have been neither practical nor commonly adopted practice to put in place the safety devices suggested by the plaintiff, and responsibility had lain with the deceased to wear his hard hat properly; (c) the position adopted by the deceased for the fitting of the moulds was that recommended in the manufacturer's instructions; (d) therefore, the accident could only have been caused by the deceased's inattention or negligence, probably by leaning across the mould to hammer it into place and slipping; and (e) in any event, the import of the receipt signed by the plaintiff had been explained to her at the time, and she had therefore waived her right to make any further claim against it.

Held, dismissing the plaintiff's claims:

(1) The plaintiff had not, by signing the receipt for £5,000, waived her and her children's rights to claim compensation from the defendant for loss of dependency, since she had not done so in full knowledge of those rights. Evidence of the circumstances surrounding the signing was admissible to construe its contractual effect, since the plaintiff could not read the document and claimed that the contents had not been explained to her. The court was satisfied that the legal implications had not been made clear. In any event, as a document prepared by the defendant, any ambiguity would be construed against Dragados and because it stated that the payment was made in discharge of claims under the TGWU agreement, the other general words of waiver would be interpreted as limited to that claim. Accordingly, there was no accord and satisfaction, and the receipt was at best a waiver of rights under the agreement, though the £5,000 could be deducted from any award made by the court (page 11, line 7 – page, 12, line 27).

(2) On the evidence, the deceased's accident had not been caused by any negligence or breach of statutory duty by the defendant. Although the defendant had undoubtedly been under a duty to eliminate all unnecessary safety risks, the existence of an established working practice gave weight to the defendant's case. In the absence of such a practice, the defendant would be obliged to balance the magnitude of any foreseeable

risk and its likely consequences against the difficulty, expense and any other disadvantages of precautions. It was not the practice for safety-nets or other such equipment to be provided for the type of work undertaken here, and in any event the risk of an accident involving an experienced, skilled and physically fit workman such as the deceased had been properly assessed as minimal. The deceased had probably fallen from a girder due to his own carelessness and inattention. He ought to have been standing with one foot on each girder for balance. Since the defective ladder had had nothing to do with the accident, any breach of statutory duty in relation to it was irrelevant. The plaintiff's claim would be dismissed (page 13, line 8 – page 14, line 6).

Cases cited:

(1) *Arrale* v. *Costain Civil Engr. Ltd.*, [1976] 1 Lloyd's Rep. 98; (1975), 119 Sol. Jo. 527, considered.
(2) *Avila* v. *Dragados y Construcciones S.A.* (1990), 17 C.L.B. 84.
(3) *D. & C. Builders Ltd.* v. *Rees*, [1966] 2 Q.B. 617; [1965] 3 All E.R. 837, followed.
(4) *Gallagher* v. *Balfour, Beatty & Co. Ltd.*, 1951 S.C. 712.
(5) *Morris* v. *West Hartlepool Steam Nav. Co. Ltd.*, [1956] A.C. 552; [1956] 1 All E.R. 385.
(6) *Morton* v. *William Dixon Ltd.*, 1909 S.C. 807; 1909 S.L.T. 346.
(7) *Paris* v. *Stepney Borough Council*, [1951] A.C. 367; [1951] 1 All E.R. 42.
(8) *Payler* v. *Homersham* (1815), 4 M. & S. 423; 105 E.R. 890, followed.
(9) *Perkins, In re, Poyser* v. *Beyfus*, [1898] 2 Ch. 182; (1898), 67 L.J. Ch. 454, followed.
(10) *Prenn* v. *Simmonds*, [1971] 1 W.L.R. 1381; [1971] 3 All E.R. 237.
(11) *Saunders* v. *Ford Motor Co. Ltd.*, [1970] 1 Lloyd's Rep. 379, followed.
(12) *Unsworth* v. *Elder Dempster Lines Ltd.*, [1940] 1 K.B. 658; [1940] 1 All E.R. 362, applied.

A.E. Dudley and *M.P.J. McDonnell* for the plaintiff;
R. Wandurgala and *L.E.C. Baglietto* for the defendant.

KNELLER, C.J.: At 5 p.m. on November 4th, 1986, Salvador Perez Duran, a shutter carpenter employed by Dragados y Construcciones S.A., was working for it on the first floor of one of the structures of the west wing of some new buildings called "The Water Gardens Complex" in Gibraltar. He was placing moulds between iron girders and he fell 10 ft. to the ground floor, split open his head and died of his injuries on November 11th.

Dolores Enriquez Avila, his widow and the legal personal representative of his estate, issued a writ of summons on September 22nd, 1989,

claiming damages and interest from Dragados for her own benefit and that of Maria, Louis, Luisa and Elizabeth, their children, who were aged 16, 14, 10 and 2 respectively at the time of the accident, and all dependent on him.

I turn to the pleadings. His widow alleges that he fell either from one of the girders on which he was standing, or a ladder, from the first floor to the ground floor. Dragados denies that he fell from either of them. She avers he fell because Dragados, its servants or agents were in breach of their statutory duty and/or negligent in their duty to care for his safety. Dragados denies that they were, and claims that his fall, injuries and death were caused by or contributed to by his own negligence.

His widow relies on the doctrine of *res ipsa loquitur*. She also alleges that Dragados—

(a) failed to take any adequate precaution for his safety at work;

(b) exposed him to a risk of damage or injury of which it knew or ought to have known;

(c) failed to provide and maintain a safe system of working on the premises;

(d) made or let him walk over a floor surface which was in a dangerous and defective condition;

(e) failed to provide and maintain a safe place for him to work;

(f) failed to provide safe equipment;

(g) failed to provide any or adequate supervision;

(h) caused or permitted him to stand on a girder while putting a mould in place from which he was liable to fall approximately 10 feet;

(i) failed to comply with 20 requirements of the Factories (Building) Regulations;

(j) failed to provide a ladder which was fit for the purpose for which it was being used; and

(k) caused or permitted him to use that ladder.

The ladder, she explains, had a missing rung, did not extend 3 ft. 6 in. above the place where he was working, had no adequate handholds and was not fixed at its top or bottom. Its rungs depended only on nails for their fixity, were not morticed or notched to the uprights, and had no reinforcing ties.

Dragados, in reply, maintains that the doctrine of *res ipsa loquitur* does not apply, and that it was not in breach of the Factories (Building) Regulations, which, in any event, did not apply to the premises or the work he was doing. Moreover, Duran did not have to use and did not use the ladder for the work he was doing. Dragados claims Duran was negligent because he—

(a) failed to ensure he would not slip, become dislodged or fall from the place where the mould was being fitted;

(b) failed to look where he placed his feet, hands, limbs and body and to take care how he moved the same while fitting the mould;

(c) failed to wear a safety helmet or have it properly strapped or tied on; and

(d) failed to take any or any reasonable care for his safety.

Anyway, Dragados continues, on November 20th, 1986, it paid Duran's widow £5,000 and she signed and executed a document which acknowledged a full and final settlement of all her claims and those of her husband's heirs and dependants as a result of his death. But she pleads that she was induced to sign it by the undue influence of Dragados's employees because she put her faith, trust and confidence in them and they told her she was signing a receipt for the £5,000. Furthermore, she was not offered any independent advice before she signed it. Dragados, however, declares its men did not coerce or induce her to sign the document and they told her what it was that she was signing.

So, on the pleadings, the main issues were:

1. Is Dragados liable?

2. If so, did Duran contribute to the cause of his death?

3. If yes, in what proportion?

The parties are content to leave the issue of damages to be answered, if not settled, on another day.

The evidence revealed that at the time of the accident Duran was a Spanish national aged 39 years who had been employed by builders in Spain for at least 15 years before this, and that Dragados was a reputable Spanish building company, said to be well known for its tender care for its workers. It was the largest builder in Gibraltar in 1986 but is, I think, now the smallest.

Duran had been working in Gibraltar on this Water Gardens Complex for $1\frac{1}{2}$ years, on weekdays from 8 a.m. to 1 p.m. and then 2 p.m. to 5 p.m. He had recently been promoted and his salary was increased as a consequence. He wore spectacles with prescription lenses for his work. He was short-sighted and had worn spectacles since he was a boy. He weighed 11 st. 8lb. but I have not discovered what his height was, so it is unclear whether or not he was overweight.

When he was in the Intensive Care Unit at the regional hospital in Malaga tests revealed, among other things, that he had incipient diabetes, but this is not sugar diabetes. Before the accident he was in good health. He had not been known to suffer from dizzy spells, according to his workmate, Jose Cortes Perez, or high blood pressure, according to Mr. Avellano, the Gibraltar Government Safety Officer who checked on Duran's health after this incident.

The weather that day was cool and dry and had been so for some time past. There was little wind, according to Mr. Avellano, and the temperature was 14–16°C, which is not too warm for November here in Gibraltar.

Just before the sad event, Duran was fitting very hard plastic tubs or moulds between the inside ledges of two metal guiding girders lying in

the longitudinal direction from Gibraltar in the South towards Spain in the North. The plastic tubs are called Caissen-type "waffle slab" moulds and under the girders are stanchions. Duran was banging the tubs with his hammer to make them fit. The ledges of these girders supported the tubs and kept them in position. Together they formed part of the framework for the first floor and the lines of moulds looked at from the top resemble the pattern on waffles, or so I think. Duran was an experienced worker in "waffle slab" construction.

Ribbed reinforced concrete was to be poured over the moulds and girders and allowed to set for two days, and then the moulds would be prised away and used with other girders for the next floor above. The top of each floor looked like concrete waffles and underneath each raised portion would be hollow. All this is called "form-work" or "shuttering," which is usually a temporary structure to contain concrete that has been poured over it, to mould it to the required dimensions and to support it until it is able to support itself. This was the usual way of building the floors for this complex and Duran had done this work many times before and for all of that day. He had just two or three moulds to bang into position to complete this line.

In addition to his spectacles, Duran wore a hard protective "Yelmo" hat made in Spain and had a claw hammer and a bag for tools tied around his waist. All these were photographed by Det. Sgt. Comley of the Royal Gibraltar Police Force soon after the accident. The spectacles were lying some way off from Duran's other possessions, which were at the foot of a ladder reaching up from the ground to the first floor and the gap between the two girders where he had been working. Duran lay on his back near a pool of blood from his split skull. There was no dent or mark on his helmet. It is probable that his spectacles, helmet, hammer, tool bag and waistline belt fell away from him as he fell or hit the floor. There is no evidence that anyone removed them and placed them where they were found later.

Perez, a carpenter form-worker, was with Duran. He had put wooden templates between the girders and he was making them move along by tapping each one ahead and so making the gap between the girders widen until Duran could fit each mould on their ledges. Perez stood with one foot on each girder with his back to Gibraltar moving the templates towards the end of the line facing Spain. Duran was behind him, at right angles to him, and therefore facing east into the Rock. Jose Garrido Galvez, a carpenter, was on the ground floor checking the stanchions. He was facing a column supporting the floor above where Duran and Perez were at work. Miguel Benitez Martinez, the charge-hand with them, was about 15 ft. away from Duran and Perez and had his back to them.

According to their statements to the police, Martinez declares Duran had one foot on each girder, but Perez declares Duran had both feet on one girder. Martinez did not see what happened when Duran fell. Perez did. Duran called out to him, "Give it a bit more," meaning him to wedge

his wooden templates to widen the gap between the ledges of the girder, and Perez said, "OK!" but before he could tap the template he saw Duran fall at an angle and not vertically through the gap. Perez, in his evidence five years later, maintained he did not see where Duran was standing. None of Duran's fellow employees with him then knew what had made him fall. They could not tell which went first—Duran, the mould, the hammer, the helmet, the pouch or his spectacles—and Duran did not, it seems, tell anyone at the accident site or at the hospitals in Gibraltar or Malaga the answers to those questions.

When the accident happened a worker rushed into the Waterport Police Station and asked for help. He told W.P.C. Smith that a man had fallen from the first floor of the construction building site opposite and had split open his head. Constable Lia hurried to the scene and helped to put the unconscious Duran into an ambulance. Someone shouted out that Duran had fallen from the first floor and landed on his head. Detective Sgt. Comley explained what his photographs of the scene reveal and indicated the gap between the girders through which Duran fell, but that is hearsay.

Doctor Farrell, an assistant specialist at St. Bernard's Hospital, interpreted the medical reports on Duran compiled by someone in the Malaga clinic. Duran's broken right wrist and head injuries were consistent, according to Dr. Farrell, with his trying to break his fall and falling not on his back but on his head, face and front. His injuries were inconsistent with his having fallen off the ladder which led up from the ground floor to the gap where Duran was working.

Perez was adamant that that ladder was not used for access by Duran but for putting wooden slats around the tops of the columns. Duran had used the concrete staircase for access, just as all the other workers had done. Perez denied that he should have faced Duran as he tapped the templates along between the girders. He insisted that that would have been unsafe because he would have hit Duran with his hammer when they were close to one another or Duran would have hit him.

The plaintiff's expert witness, Mr. Wynn P. James, is a chartered engineer and a director of Swinvey, Stubbs & Partners, a Croydon and Gibraltar firm of construction engineers with much experience of building sites and their safety requirements, which are the same for England and Gibraltar. Mr. Comley's photographs indicated to Mr. Wynn James that the form-work and supports had been put up in a workman-like manner, the mould had not broken and none of the reinforcing bars was broken, bent or damaged. Duran, as an experienced form-worker, would in a reflex action have saved himself by clutching one of the reinforcing bars projecting from the nearby column or lying in the form-work to prevent himself from falling.

Mr. Wynn James noted that the opening where Duran was working was only 6–7 sq. m. in size and some of it was taken up by part of the concrete column. The pool of Duran's blood was 2m. from beneath the opening,

but if Duran had fallen through that small opening he would have lain beneath it and so would his blood. So his opinion was that Duran fell off the ladder, which was a very dangerous one and precariously sited. It had one rung missing just where Duran would move his hands from the steel bars, and the absence of an expected foothold would have caused his loss of balance and a fall. The angle of the ladder caused Duran to fall away from it on to his head, side and back in that order.

That ladder failed to satisfy regs. 25(2), (4), (7)(a) and (b) and 25(8) of the Factories (Building) Regulations. It was not, however, continued Mr. Wynn James, the main cause of the accident. Building sites are dangerous places and this one was not safe for even an experienced worker. The edge of the place where Duran was at work was more than $6\frac{1}{2}$ ft. from the ground and did not have 8 in. or higher toe-boards or 3 ft. guard-rails to prevent him falling off the edge or debris falling on to others working below, which were required by regs. 21 and 26. If those were impractical, safety-nets or sheets or other protective measures such as safety belts were necessary: see reg. 77. Moreover, the system of work had not been organized or supervised adequately. Diagonal bars between the beams underneath the forms stabilized them and the photographs show that 50% of them were not in position at the time of the accident. The steel rods were across the girders before the moulds were in place.

He asserted that Perez should not have been working with his back to Duran, because he could not see the result of his tapping the templates into position. He was doing delicate work and could not rely on Duran calling out: "Stop! Start! A little bit more!" to do it properly. He might have hit the mould that Duran was trying to fit into position. The girders or beams were not parallel and the reinforcements were in position and that made his work even more difficult.

Duran, he opined, with all his experience, would never have put all his weight on to the mould which he was easing into the space before him. Nor would he hit it with his hammer towards himself because that would be self-defeating, just as it would be for a tree surgeon to sit on a branch facing the trunk and saw it at a point between the trunk and himself. Duran could cope with an irregularity if he saw it and recognized it, so it was unlikely that Duran would have been hitting the mould on its side.

But when he was cross-examined, Mr. Wynn James accepted that Duran fell through a gap to the left of the wooden templates and not through the one in which they lay. He thought Duran fell vertically and it was possible that the mould that he was hammering tilted forward and down and then disappeared through the gap. The concrete staircase, he accepted, was a safe means of access. The manufacturer of the work system had issued printed instructions and photographs in a pamphlet on how to do this form-work or shuttering and there it could be seen that the position adopted by Duran was the one recommended for a worker putting the mould in position.

Dragados's expert, Mr. Peter Pallett, a consultant scaffold structure engineer and the author of the *British Code for Form Work*, found the English Building Regulations to be more sophisticated than the Gibraltar ones, but he roundly declared that the method and system of work at the scene were acceptable and did not contribute to the accident. He blamed Duran for it. In his experience, shuttering carpenters know how to do their work, it was true, but he believed Duran found the mould did not fit and, whilst standing on a reinforcement rod at right angles to Perez, put his left hand and weight on the mould. He then leant over and across it to its opposite side to hammer it towards himself and fit it into position. The mould slipped.

He could not be certain why. He set out 10 likely causes and rejected 8 because Det. Sgt. Comley's photographs did not support them. That left two: either Duran dislodged the mould with a fatal nudge from his body or part of his body, his knees or one of his feet, or he lost his footing on the reinforcing rod as he reached forward to thump the mould towards himself. At the time he was standing on two reinforcing bars and when one or both rolled or slipped Duran reacted by pushing forward on the mould and then it fell off its only support which was the brim of the girder under Duran's feet. His head was bent forward so his helmet was probably knocked off as it hit the brim of the opposite girder or "diagonal" underneath if it had been fitted by then.

He did not know why Duran stood on one end of the reinforcement bars, put his weight on the mould and hammered it towards himself. Duran should have faced the same way as Perez did, with one foot on each girder, and hammered the mould from right to left.

The photographs, he continued, revealed that there were sufficient "diagonals" in place and, in any event, for this system of work they were irrelevant. The workmen, according to the evidence, used the staircase from the ground floor up to the first floor and not the ladder, so it was not the cause of the accident. It was certainly safe for the workers to walk across the form-work. The position taken by Perez was, in Mr. Pallett's judgment, an eminently sensible position and certainly not the cause of this accident. Also, it was not Perez who dislodged the mould.

The helmet had a plastic or elastic band, like all these "hard hats," which could be worn at the back of the head or under the chin. There was no regulation that Duran must have his hat strapped on and, in practice, building workers only strap them on at the top of tall buildings in a high wind. Mr. Pallett had worn one strapped on to his own head only three times in his life.

He disagreed with Mr. Wynn James about the need for handrails or toeholds at the scene, because where Duran was working was not a working platform, roof or floor but, instead, a temporary structure. Safety belts and harnesses he considered would have led to accidents because the men would trip over them. He accepted that a mobile platform under

where Duran worked would have been "a safety measure" but he went on to declare that it was not "the practice" anywhere.

In conclusion, Mr. Pallett's view was that the structure on which Duran was at work was particularly stable. The work was a simple, common operation. His colleagues were not at fault, the system of work was not the cause of the accident and nor was the equipment which Duran used that afternoon. He probably fell with his head down and his hands flung out behind him, Mr. Pallett claimed, because if he had fallen from a position astride the beams he would have instinctively flung up his hands to clutch the girders. He had fallen because he was negligent and that was due to his being over-confident.

That is the summary of the evidence on which the issue of liability has to be decided. It will be recalled, however, that Dragados also denied liability on the ground that all liability had been discharged by the receipt that Dolores Enriquez Avila signed on November 20th, 1986. Here is a faithful reproduction of a translation of it:

> "I, DOLORES ENRIQUEZ AVILA, have received from DRAGADOS Y CONSTRUCCIONES S.A. with address in Old Queen's Stores, Waterport, Gibraltar, the sum of £5,000 Sterling, in my own name and as the widow of Salvador Perez Duran and/or his personal attorneys or executors and testamentaries and/or assignees and/or heirs and/or dependants, as complete and final settlement of all and any claim, whatever it may be, in any jurisdiction, against Dragados y Construcciones S.A. in concept of the death of Mr. Salvador Perez Duran on November 11th, 1986, due to the accident at the construction of 'Water Gardens' situated at Old Queen's Stores, Waterport, Gibraltar, on November 4th, 1986, and the stated sum to the value of £5,000 Sterling is hereby paid by Dragados y Construcciones S.A. in accordance with cl. 15(i) of the agreement with TGWU dated 29/06/86, and without any concession of responsability [*sic*].
>
> Gibraltar, the twentieth of November 1986.
>
> .....
>
> (Signed) *Dolores Enriquez Avila*
>
> National Identity Card Number 32.006.931"

This was presented to her in a cafe in La Linea de la Concepcion nine days after the death of her husband. She admits it was read to her in Spanish. Dragados's representative goes further and maintains that it was all explained to her, including the fact that that £5,000 was in full and final satisfaction of any possible claim she and any other dependant of Duran might have against Dragados for the accidental death of Duran, but she vehemently denies that this was so. She did not have a lawyer with her at the time. She accepted the cash and signed for it in the cafe in La Linea, and not in Gibraltar as the receipt has it but Dragados explains that it had chosen La Linea to spare her the misery of returning to or passing

the place where her husband fell to his death. It should also be noted that she cannot read or write in any language.

Two considerations arise now: (i) Does that receipt, on its true construction, discharge Dragados from all claims against it not only under the agreement but also claims at common law? (ii) If it does, as Dragados would have it, was there any consideration sufficient to support it?

The receipt states that the £5,000 payment by Dragados to her is made pursuant to para. 15(i) of a memorandum of agreement between the Gibraltar Master Builders' Association and the TGWU, dated June 29th, 1986. Paragraph 15(i) is headed "Death Benefit" and reads as follows:

> "…[A]ll operatives shall be entitled to cover, to be provided by the employer, that in the event of any death resulting from an accident at the place of work, a lump sum Death Benefit of £5,000 shall be payable to the dependants of the deceased operative…"

So under that agreement the dependants of Duran, including his widow, are entitled as of right to payment of the £5,000, and there is nothing else they can legitimately claim under the agreement.

The common law of Gibraltar is the same as the common law of England and if there is true accord and satisfaction, in that the plaintiff, with full knowledge of her rights, freely and voluntarily agreed to accept that one sum of £5,000 in discharge of all her claims and those of her children, she will not be permitted to pursue her claims at common law: see *D. & C. Builders* v. *Rees* (3). Alcantara, A.J. has held that "it cannot be said that the signing of the receipt by the plaintiff excluded any claims which the children, as dependants, might have against the defendant": see *Avila* v. *Dragados y Construcciones S.A.* (2) (17 C.L.B. at 85).

If the plaintiff and other defendants recover common law damages they will have to give credit for any sums received under the agreement: see *Unsworth* v. *Elder Dempster Lines Ltd.* (12) ([1940] 1 K.B. at 674).

The general rule is that when a contract has been reduced into writing, evidence of negotiation is not admissible to construe it: see *Prenn* v. *Simmonds* (10). It may be admitted, however, if there is an allegation that the plaintiff's signature has been obtained by misrepresenting the contents of the document (namely, that the money was a payment on account to cover medical expenses) or the contents were not explained: see *Saunders* v. *Ford Motor Co. Ltd.* (11). Evidence would also be admissible if the plaintiff claimed that she did not understand the effect of what she was signing.

There is a rule of construction that where a document states that a payment is made in discharge of a particular claim which is followed by general words purporting to release and discharge all claims, then those general words are to be referred to the particular claim and to be limited to it: see *Payler* v. *Homersham* (8) and *In re Perkins* (9). There is also another rule of construction which applies, namely that if there is doubt, the document prepared and put forward by Dragados should be construed

against it. It cannot be gainsaid, to my mind, in this case that the origin and aim of the receipt was to record that the plaintiff was paid and accepted the sum to which she and all the other dependants of her husband were entitled for all claims including those under the agreement and therefore it should be so limited: see *Prenn* v. *Simmonds* (10).

But if this receipt is to be construed as meaning the plaintiff accepted the £5,000 as a discharge of her claim and that of her children under the agreement and also for damages at common law, was there a true accord and satisfaction? Did the plaintiff with full knowledge of her and their rights really and readily agree to accept the £5,000 in discharge of all those claims? If the answer is "Yes," she and they will not succeed in their claims at common law: see generally *Arrale* v. *Costain Civil Engr. Ltd.* (1).

I hold that Dragados's liability to the plaintiff and Duran's other dependants has not been discharged by its payment of £5,000 to her and her receipt for it, despite the fact that the receipt states that the payment is received "as complete and final settlement of all or any claim, whatever it may be, in any jurisdiction against Dragados y Construcciones, S.A." in respect of Duran's death. I believe the testimony of Dolores Enriquez Avila when she says she did not have a lawyer with her to explain what that meant, that she could not make it out for herself and it was not spelt out to her by the representatives of Dragados before she signed it. I doubt that anyone but the draftsman knew that she and her children had any common law rights and the draftsman was not present in the cafe in La Linea when the plaintiff signed that receipt. So she did not have full knowledge of those rights and there was no true accord and satisfaction here.

At the end of the trial it was conceded by Mr. McDonnell for the widow that the ladder was not the cause of the accident because Duran did not fall off it. He underlined its defects however, and submitted that it was part of the widow's case that Duran's death was due to breaches of statutory duty by Dragados. The ladder should not have been on the site because it was in breach of every statutory regulation about ladders. Dragados did not have a safe system of work there. One example was that the diagonal links between the stanchions were not in position at the time of the accident. Dragados did not have an effective system of supervision for the safety of its workers. Burgas visited this workforce every two months and left it to Mr. Avellano, the Government's Safety Officer, to check that the necessary safety measures were being taken. Had Duran been made to wear his helmet's strap under his chin, he would probably not have died from his fall.

Mr. Pallett and Mr. Avellano were adamant that there were no breaches of statutory duty. A trolley, safety-net or shield under Duran and Perez could have saved Duran's life, but it was not "the practice" to have one or more of them, since the height they would fall was only 10 ft. and it

would make the work of anyone working underneath them more difficult or impossible. The structure erected by Dragados was rigid and in no danger of collapse. There were sufficient links in place between the stanchions to ensure this. Duran was not on scaffolding or a working platform, roof or floor, so handrails, toeholds, hooked belts or straps were not obligatory at the gap and certainly not the practice because they would be impractical. They would have been irrelevant at the sides.

Dragados, as Duran's employer, was under a duty to eliminate unnecessary risks so far as it reasonably and practicably could. If the court finds a clearly established practice "in like circumstances," the practice weighs heavily on the scale on the side of the defendant and the burden of establishing negligence which the plaintiff has to discharge is a heavy one. If Dragados could not rely on "an existing practice" it was under a duty, in considering whether some precaution should be taken against a foreseeable risk, to weigh, on the one hand, the magnitude of the risk, the likelihood of the accident happening and the possible seriousness of the consequences if an accident happened, and on the other hand, the difficulty and expense and any other disadvantage of taking the precaution. The degree of care and foresight from an employer necessarily varies with the circumstances of each case. It is a matter upon which there is scope for much difference of judicial opinion: see *Morton* v. *William Dixon Ltd.* (6) (1909 S.C. at 809, *per* Lord Dunedin); *Paris* v. *Stepney Borough Council* (7) ([1951] A.C. at 382, *per* Lord Normand); *Gallagher* v. *Balfour Beatty & Co. Ltd.* (4); and *Morris* v. *West Hartlepool Steam Navig. Co. Ltd.* (5) ([1956] A.C. at 574, 576 and 579).

It is right to say that Mr. Wynn James had the edge over Mr. Pallett in his knowledge of building sites in Gibraltar, but Mr. Pallett was, in my view, the expert with the greater knowledge and experience of the theory and practice of the work Duran was doing. Mr. Wynn James was incorrect when he said Duran's death was due to his falling off this unsafe ladder and breaches by Dragados of its statutory duties towards its employees on the site. I found Mr. Pallett's reconstruction of the accident plausible, possible and probable.

Duran was trying to fix in position a mould which did not fit properly. He stood with both feet on the beam on which Perez had his left foot. He leant on the mould and hammered it towards his feet. He should have stood with a foot on each beam, as Perez did. The mould slipped and Duran fell to his death.

Dragados rebutted the plaintiff's reliance on the doctrine of *res ipsa loquitur* with an explanation for the accident that I found reasonable. Duran had a duty to his employer to take care for his own safety. He did not do so. He was qualified. He was an expert in this work. It was not a dangerous task for such a man. He could not have fallen through the gap without being inattentive, foolhardy or negligent. The gap was an obvious danger but the risk was minimal for a young, active, skilled, experienced,

careful form-worker. It was proved that "in like circumstances" it was not the practice to provide a safety-net or trolley under the form-workers. The plaintiff did not show on the balance of probabilities that Duran's death was due to breach of statutory duty and/or negligence by Dragados.

So I answer the first issue thus: Dragados is not liable. And then the other two issues do not call for an answer.

If I am wrong in finding Dragados not liable, I must assume Duran could fall through the gap without inattention, foolhardiness and negligence and that it was the practice to have a safety-net or trolley underneath the gap or it was time to alter the practice of not having one or both. Dragados was not entitled to assume there was no risk at all or only a small risk of an accident with fatal or calamitous results. I would also have to find that the gap was an obvious danger and the provision of a safety-net or trolley to be not difficult or expensive. A reasonable, prudent man weighing these matters would say the precaution clearly ought to have been taken because it was a simple available one, which would not impose too high a standard of care on Dragados.

If I had found Dragados liable and that Duran did not contribute to the cause of his death, I would not have dealt with any issue of proportion. Supposing I had found Dragados liable and that Duran did contribute to the cause of his death? Standing back from the findings and weighing one thing with another, I would have fixed Duran's contribution at 40%. The Dragados safety-net or trolley under the gap would probably have saved Duran from his negligence and Dragados would have had in place a safety device which hitherto was not the practice for a builder to provide for form-workers over a 10 ft. drop.

Contribution was pleaded but no evidence led, no submissions made and no authorities cited on it, so it was probably forgotten. I have done the best I can to assess it on the meagre material before me. The upshot is, however, that the plaintiff's action fails and her suit must be dismissed with costs.

Order accordingly.