MES MANI v. ATTORNEY-GENERAL

SUPREME COURT (Alcantara, A.J.): September 20th, 1993

Employment—safety—safe system of work—employer's duty to give adequate instruction and warning against working hazards—if dangerous working practice condoned by supervisor and experienced colleagues, employee acting in course of employment—employee's intelligence and experience relevant to contributory negligence

The plaintiff brought an action to recover damages for negligence in respect of the death of her husband whilst in the employ of the Public Works Department.

The deceased normally worked in the public gardens, but at the time of the accident had been transferred to cover for an absent member of the P.W.D. refuse collection crew. He had worked with the crew on two or three occasions before. He spoke no English and little Spanish.

As the refuse lorry was travelling from its last collection point to the incineration facility, the deceased was seen standing on a foot-plate at the rear of the lorry. Some cardboard boxes had been placed on top of the lorry instead of inside it, and he appeared to be trying to secure them as the lorry waited at traffic lights. He was not holding on to the hand-rail on the lorry. When the lorry accelerated away, the deceased lost his balance and fell into the road. He died from his injuries.

The foot-plate at the rear of the lorry, which would hold up to four men, had been added by a Government contractor after the purchase of the lorry, for the crew to use when filling the lorry. The crew claimed not to have known that the deceased was standing at the rear during the journey. It was not common practice for a member of the crew to do so when returning to the incinerator but no one had explained to the deceased that he should not. No written safety guidelines had been shown

to any of the crew previously, but rules had been issued since the accident forbidding this practice.

The plaintiff brought the present proceedings under s.6 of the Contract and Tort Ordinance for the benefit of the deceased's dependants. She submitted that the P.W.D. had failed to provide a safe system of work and/or had acted negligently; having specially constructed the foot-plate at the rear of the lorry, it carried the responsibility of warning that it should not be used when the vehicle was moving.

The P.W.D. submitted in reply that the deceased had been guilty of a high degree of contributory negligence, as the danger of travelling on the outside of a moving vehicle without holding on to anything must have been clear to him.

Held, making the following order:

The P.W.D. had failed to provide a safe system of work. It had added the foot-plate to the refuse lorry but had issued no directions as to its use. The deceased was a temporary member of the crew and therefore inexperienced in the role in which he was employed. He was an unsophisticated man. It was probable that he had acted on the instructions, or at least with the knowledge, of the crew in taking his position at the rear of the lorry to secure the boxes, and since this dangerous working practice was condoned he had not acted outside the course of his employment. He was, however, guilty of contributory negligence (25%) in not making use of the hand-rail provided (page 119, lines 17–24; page 119, line 39 – page 120, line 5; page 120, line 38 – page 121, line 10).

Cases cited:

(1) *General Cleaning Contractors Ltd.* v. *Christmas*, [1953] A.C. 180; [1952] 2 All E.R. 1110, applied.

(2) *Hicks* v. *British Transp. Commn.*, [1958] 1 W.L.R 493; [1958] 2 All E.R. 39.

(3) *Jennings* v. *Norman Collison (Contractors) Ltd.*, [1970] 1 All E.R. 1121, distinguished.

(4) *Leach* v. *Standard Tel. & Cables Ltd.*, [1966] 1 W.L.R. 1392; [1966] 2 All E.R. 523.

(5) *Speed* v. *Thomas Swift & Co. Ltd.*, [1943] K.B. 557; [1943] 1 All E.R. 539.

Legislation construed:

Contract and Tort Ordinance (1984 Edition), s.6(1):

> "Where the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person or persons … who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured…"

A.V. Stagnetto, Q.C. and *G.C. Stagnetto* for the plaintiff;
P. Dean, Senior Crown Counsel, for the defendant.

ALCANTARA, A.J.: The statement of claim in this actions reads:

"1. The plaintiff is the widow and sole administratrix of the estate of Layachi El Messaouri (deceased) and she brings this action for the benefit of the dependants under s.6 of the Contract and Tort Ordinance of Gibraltar, which relates to fatal accidents. Letters of administration were granted to the plaintiff by the Supreme Court of Gibraltar on October 31st, 1990.

2. At all material times the deceased was employed by the defendants as a labourer for the Public Works Cleansing Department, working as part of a refuse collection crew.

3. On the morning of September 12th, 1988, in the course of his said employment, the deceased, whilst standing on the foot-plate of the moving refuse lorry, fell off the said lorry.

4. The plaintiff will allege that the defendants, their servants or agents were negligent in that they failed to provide a safe system of work and/or were negligent."

The defence denies negligence or failure to provide a safe system of work. The defence further alleges contributory negligence and puts forward the defence of *volenti non fit injuria*.

Rarely in this type of case does the court get a complete picture of how the accident happened. This is such a rare case. The court has the evidence of two completely independent witnesses who saw how the accident happened. Mr. Mark Millar and Miss Sally Watkins, two paramedics from England on holiday in Gibraltar, witnessed the accident. By a consent order their statements have been read in court. I shall read from the statement of Miss Sally Watkins:

"We then stopped by the traffic lights situated at the junction with Winston Churchill Avenue. Whilst we were stopped, I noted that there was a private vehicle in front of us and directly in front of this car, and the first in line, was a green refuse truck. My attention was drawn to the fact that at the rear of the said lorry there was a man standing on what appeared to be a platform. This person I suspected to be in his early 50s and at the time was alone at the rear of the lorry. I then said to Mark: 'Look at the man on the back of the refuse truck.' I noticed that the man was trying to push himself towards the upper part of the lorry, trying to get higher, as it looked as if he wanted to secure cardboard boxes which were resting on the upper part of the lorry.

At the time the climate was dull and in this particular area the wind was strong. I also noticed that whilst the man was trying to secure the boxes, he was not holding himself to any part of the lorry and was only balanced on the rear platform, but at the time the truck

was stopped and the impression I had gathered was that the man wanted to secure the boxes quickly before the traffic lights changed to green. Although there was a car directly in front of us, I had a clear view of the truck and the man at the rear. I then lost interest in what the man was doing and took my attention away from him.

Seconds later we started to move forward and I noticed that traffic in front of us was moving very slowly. I then saw the man again standing on the platform on the rear of the truck facing towards the vehicle and I noticed that he was still trying to secure the boxes and was not holding himself to anything, although at this stage the vehicle was moving forward at a slow speed. At this stage we were already proceeding along Winston Churchill Avenue and manoeuvring to the left side lane, presumably to overtake both the vehicle in front and the said refuse truck which was travelling on the inside lane. I then noticed that the refuse lorry lurched into acceleration, presumably changing gear, and at the same time I saw the man on the platform being jerked backward and falling away from the platform in between the said lorry and the vehicle travelling behind it, which I thought was going to run him over. As the man fell backwards, I saw him with both his arms in the air apparently trying to balance himself, and as he fell in between both vehicles I lost sight of him."

As the result of the fall, Layachi El Messaouri died on September 13th, 1988. The question which has now to be answered is: How did it come about that the deceased was travelling on the foot-plate at the rear of the refuse lorry?

Mr. Antonio Bonavia was the lorry driver at the time of the accident. He tells us that he has been employed as such for the past 29 years. At the relevant time he was driving a Daihatsu lorry G 54797, which loads refuse from behind and has a compactor. Each time the lorry is full it is driven to the incinerator to empty it. This is what this witness said in chief:

"The compactor lorry G 54797 has at the rear a sort of foot pedestal and a little further up, a hand-rail. The lorry is constructed like this. This is for the use of the labourers who get on this when we go to collect refuse. A total of four dustmen can get on to the foot pedestal. When we go to the incinerator normally no one stands on the rear foot pedestal."

The above was confirmed by both Mr. Hector Pereira, who is the Cleansing Foreman in the Public Works Department, and Mr. Juan Remorino, leading hand and in charge of the dustmen working with G 54797 at the time. What became clear during the course of cross-examination was that this particular compactor lorry did not come equipped with the rear foot-plate from the factory; it was added locally at the Government garages.

All the witnesses for the defendant have testified that persons were not allowed to go on the rear foot-plate when the lorry was going back to the incinerator. This is what several witnesses have said:

Antonio Bonavia: "[We have] never taken persons on [the] platform when going back. I do not know whether Layachi knew this."

Juan Remorino: "When [the] lorry goes to [the] incinerator no one should go at [the] back. I have never seen any set of rules. After [the] accident rules have been issued. [They are] more severe: no standing and no placing boxes. Before [the] accident no one paid attention. I did not explain. They should have known what to do."

Hector Pereira: "[It is] not normal practice to use [the] foot-plate [on the way] to [the] incinerator."

Joseph Evans (leading hand at time of accident): "[We were] not supposed to go on [the] foot-plate to [the] incinerator. I had never seen written instructions before [the] accident."

I find the following facts:

1. There were no written instructions as to what a worker should do or not do.

2. The foot-plate at the back of the lorry had been custom-built locally.

3. Layachi was not a permanent member of this crew. He had been transferred from the gardens and was on this occasion covering for an absent member and had only worked with this crew two or three times.

4. Layachi knew no English and very little Spanish.

It is unnecessary to relate in detail the rubbish collection on that particular day except to say that the last port of call before the accident was the Holiday Inn. This, together with the Rock Hotel, Toby's Bar and maybe others are good ports of call. The crew goes in to partake of breakfast or a drink (I dare say soft). I assume it is a perk of the trade in return for not leaving any rubbish behind.

The lorry left the Holiday Inn full. The evidence leads one to the conclusion that there were some empty cardboard boxes on top of the lorry (not inside). Remorino admitted to placing one box there himself in the statement he made to the police soon after the accident. The lorry left with Bonavia driving and another crew member sitting next to him in the vehicle's cabin, and with Layachi on the rear foot-plate holding or taking care of the empty cardboard boxes. The lorry was due to return to the Holiday Inn to collect more rubbish.

The witnesses say that none of them saw Layachi or was aware that he was at the rear of the lorry. This I cannot accept. It is obvious that if cardboard boxes had been placed on the top of the lorry then someone had to take care of them so that they did not fall off and create a traffic hazard. I have come to the conclusion after hearing and seeing the witnesses that at the very least Remorino, who was the leading hand, was or should have been aware that Layachi was undertaking this duty. I find

as a fact that Layachi was acting in the course of his employment and was doing what was expected of him.

Mr. Stagnetto has argued that the only issue that the court has to decide is that of contributory negligence, if any. I agree with him. The allegation in the defence of *volenti non fit injuria* was abandoned during the hearing. Counsel submitted that to allege in para. 7 of the defence that travelling on the lorry when in motion was intrinsically dangerous and, at the same time, constructing a foot-plate for that purpose, is the height of negligence. He has referred me on the question of safe system of work to the case of *Speed* v. *Thomas Swift & Co. Ltd*. (5), the headnote to which in *The All England Law Reports* ([1943] 1 All E.R. at 539) reads: "HELD, the employers had failed to provide a safe system of working, and the accident was due to that failure and not to the failure of a servant to carry out a proper system."

Also in *General Cleaning Contractors Ltd.* v *Christmas* (1), Earl Jowitt quoted with approval what Denning, L.J. had said in the Court of Appeal ([1952] 2 All E.R. at 1113):

> "If employers employ men on this dangerous work for their own profit, they must take proper steps to protect them, even if they are expensive. If they cannot afford to provide adequate safeguards, they should not ask them to do the work at all. … You cannot blame the man for not taking every precaution which prudence would suggest. It is only too easy to be wise after the event. He was doing the work in the way which the employers expected him to do it, and, if they had taken proper safeguards, the accident would not have happened."

Mr. Dean accepted that this was not a case of *volenti non fit injuria* and that there was a *prima facie* case of negligence against the defendant, but argued that there was a very high degree of contributory negligence on the part of the plaintiff. Counsel drew my attention to the case of *Jennings* v. *Norman Collison (Contractors) Ltd.* (3), where Salmon, L.J. said ([1970] 1 All E.R. at 1126):

> "That the plaintiff was guilty of contributory negligence there is no doubt. He was, as I have already said, a highly experienced foreman and an intelligent man. He said, in effect (I am paraphrasing his evidence), that the danger had never occurred to him. It should have occurred to him."

In the present case the characteristics of intelligence and experience cannot be attributed to the plaintiff. No evidence has been adduced to that effect. In reality he was a garden worker doubling as a dustman.

The cases of *Hicks* v. *British Transp. Commn.* (2) and *Leach* v. *Standard Tel. & Cables Ltd.* (4) were brought to my attention for the proposition that in some cases the degree of contributory negligence on the part of a plaintiff can be higher than the degree of negligence on the part of the defendant (the employer).

In my considered opinion, such is not the case here. The degree of contributory negligence I find is much smaller. The deceased was guilty of negligence in not making use of the hand-rail on the lorry with at least one hand when trying to secure the cardboard boxes when the lorry was not only stationary but when it was moving. The negligence of the defendant is that it did not provide a safe system of work.

On June 3rd, 1993, the last day of the hearing on the question of liability, I found that the defendant was 75% to blame and the plaintiff 25% to blame for the fatal accident. I accordingly gave judgment for the plaintiff, which I now confirm.

It is unnecessary for me to deal with the question of *quantum* of damages, as this was agreed at a subsequent hearing.

Order accordingly.