ROYAL COURT (INFERIOR NUMBER)

31st August, 1989.

146.
17 pages.

Before Mr. V. A. Tomes, Deputy Bailiff
Jurat The Hon. J. A. G. Coutanche
Jurat P. G. Baker

Eric John Clarke, Plaintiff,

- v -

Carpet Supplies Limited, Defendant

Advocate R. J. Michel for the Plaintiff
Advocate C. M. B. Thacker for Defendant

The plaintiff was employed by the defendant as manager of its business of carpet suppliers at 58, Don Street, St. Helier. His Order of Justice alleges that on the 6th May, 1983, whilst engaged in the course of his employment, he was requested to assist two other employees of the defendant in moving a roll of carpet; the roll of carpet, weighing approximately 51/2 cwts, was raised at one end by the plaintiff and the defendant's two other employees; the plaintiff was then left holding the raised end, supported against his right thigh; the defendant 's two other employees then went to the other end of the roll of carpet to raise it; the total weight of the carpet was transferred onto the plaintiff's right thigh and, at the same time, the roll of carpet rotated; as a result of a combination of the rotation of the carpet and its complete weight being transferred to the plaintiff's thigh, the plaintiff sustained injury; and that the accident was caused by the negligence of the defendant.

Negligence is denied by the defendant. In the alternative, the defendant alleges contributory negligence on the part of the plaintiff.

Sadly, the plaintiff died shortly after the trial of the action but the action inures for the benefit of his estate.

The plaintiff, who was 63 years of age at the time of the accident, described his duties as running the showroom, selling and assisting as necessary with despatch and receipt of rolls of carpet. The ground-floor of the defendant's premises was a showroom with the first floor used for storage and cutting. Carpets were delivered in rolls by the manufacturers, or carriers on their behalf, and were lifted to the first floor by manual hoist. Rolls would weigh from 31/2 to 5 or more, or even 7, hundredweights. They were normally stacked until such time as they were brought into use. There could be 75 to 100 rolls in stock at any one time. Space was restricted and rolls had to be stacked one on top of the other; if a lower roll was needed, it would have to be located,

then lifted out and over the rolls in front, onto the cutting space; there was a free area for unrolling and cutting. It was not normally part of the plaintiff's duties to help to move rolls of carpets but, with the shortage of personnel, he did assist; he also usually helped with the receipt of rolls of carpet into the premises. If no other senior person was present he would be in charge and supervise the work, but normally Mr. Denis Hartley, the managing director and beneficial owner of the defendant, would do so. The plaintiff accepted that there were quite long absences, (on the part of Mr. Hartley) when he, the plaintiff, was in sole charge. The plaintiff had received no formal training but the moving of rolls of carpet did not call for special training, merely for energy and enough people. When the plaintiff was in charge, the foreman fitter dealt with the cutting and moving of carpets; cutting is a skilled occupation and the plaintiff did not do it.

On Friday, 6th May, 1983, the plaintiff was in the ground-floor office at the rear of the showroom when he received an internal telephone call from the cutting room; Mr. Hartley asked him to go up and help to lift a roll of carpet; he went upstairs; the roll in question was at the back of the pile and needed to be lifted over and brought forward to the cutting area; it was 'Cavaltweed' wool carpet, quite heavy, with a normal weight of 41/2 to 5 hundredweights, depending on length. There were three persons present, i.e. the plaintiff, Mr. Hartley and either a Mr. Pemberton or Mr. Alex Thompson; together they lifted one end and supported it on the rolls in front; the plaintiff was holding it with his body to prevent it falling back again - he was propping it up with his right leg and using his hands to steady it. As the other end was lifted, the whole roll rotated slightly; the roll was covered in a plastic wrapping which could cause movement of that type; the plaintiff felt a pain; the roll of carpet rotated against his leg; he felt more pain in his right thigh, above the knee and dropped the roll of carpet; the other end of the roll came down; they eventually lifted it up and forward; the pain had not gone but it was late morning and the plaintiff wanted to see the work done; he then went downstairs. The plaintiff accepted that it might not have been obvious to others that he had suffered injury; he did not at the time pay much attention to it; he worked the remainder of that day and the following day. Then the Sunday and Monday were rest days, Monday being Liberation day. On Monday the 9th May, the plaintiff found that his leg had "locked" and he found it very difficult to walk; he rested his leg for the remainder of that day, hoping that it might clear; it was still painful on Tuesday, 10th May; he saw Doctor John Thomas Houghton on Wednesday, 11th May; he had taken pain killing drugs; Dr. Houghton advised that the plaintiff should see Mr. John Myles who was very busy; the plaintiff saw him in July; Mr. Myles injected the plaintiff with cortisone and another drug. The plaintiff later saw Mr. P. L. Frank, an orthopaedics surgeon who was seconded to the General Hospital; he subsequently underwent a hip replacement operation in November, 1985.

The plaintiff said that he had known many cases where three persons had lifted a roll of carpet of similar weight; normally the weight was disclosed on the invoice - an approximate weight within a few pounds. Mr. Hartley was always in charge of the first floor; whenever he was present he was in sole charge of the cutting area; he, the plaintiff was not in a position to give instructions to other employees or subcontractors in the lifting of the carpet, as alleged in the claim for contributory negligence, when the managing director was present; there was no other way of moving the carpet and he could not be at fault for doing what was asked by the managing director; in theory, he could have refused but this would have precipitated a quarrel and, in any case, he had given similar help on many previous occasions. To the best of his recollection there were no other persons on the premises at the time; otherwise, he would not have been asked to help.

In cross-examination it was put to the plaintiff that at the time of the accident he was not completely fit; he asserted that he was fit, that he had worked for the defendant for over seventeen years and had rarely been absent from work. During the last few months he had done largely desk work. He normally worked in the showroom and office in any event; he did not normally go to the first floor to move carpets. He had consulted his doctor quite regularly for check-ups but was physically fit and could still run up stairs; he was able to work six days a week and for his age was reasonably active.

The plaintiff admitted that he did not mention the sharp pain that he suffered at the time; it was intermittent and did not impinge until the following Monday. He could not recall having lifted any more carpets on the Friday or the Saturday. He first went to see Doctor Houghton the following Wednesday morning at the first surgery at 9.00am. He had not made a claim until 1985 because he wanted to see what would happen; he had not complained to Mr. Hartley before he left his employment because he had not seen Mr. Myles and had no firm report; after the accident he had experienced a great deal of difficulty; he had started off with the help of a walking stick but as difficulties increased, he had had to use two; he had finished work on the 6th June, 1983; the accident was part and parcel of the reason, by then he was using two sticks and it was obvious that he could not continue, for some months after he could not walk more than a few steps. The plaintiff conceded that Mr. Hartley had asked him to leave for a different reason altogether, but he insisted that he could not have continued in any event. It was put to the plaintiff that the accident had not occurred at all but he was adamant that it had and that the last thing he would have wanted was a hip replacement. The plaintiff conceded that he suffered an arthritic condition that predated the accident, but contended that it was minor and that something happened on the 6th May which brought matters forward.

The plaintiff did not claim the method of work to be unsatisfactory but said that it needed more people; he denied that normally three people lifted the carpet at one end, left it resting on another roll, and that all three then went to the other end; he insisted that one person steadied it at the lifted end and that circumstances sometimes made it essential for one person to stay there.

In his Order of Justice the plaintiff had pleaded specifically that the roll of carpet weighed approximately 51/2 hundredweights. In evidence he had said 31/2-5. Challenged in cross-examination he sought to explain that rolls differ in weight and that, normally, one knew whether or not a roll was heavy. The roll in question was an oversized one; even a 31/2 hundredweight roll was heavy if it was leaning on one; whilst three people were enough to move a 31/2 hundredweight roll, beyond that weight there should be four persons or more; normally Mr. Hartley did not accept such estimates; in Mr. Hartley's estimation that roll could be lifted by three persons and one normally went along with his opinion and did one's best. The plaintiff helped to move carpets perhaps once or twice a week, unless Mr. Hartley was away when it became a daily occurrence. The number of persons available varied; it would usually be four or five but this was an unusual time of day; somebody had to support the roll when the other end was lifted. Manual lifting was the normal custom; there were accessories that the carpet trade has to assist but there were very few on the Island; the normal method in Jersey was manual, although some larger companies had mechanical aids.

Dr. Houghton told us that the plaintiff had been a patient since the early 1970's. Up to 1980, he had not been a regular attender - merely occasionally for check-ups and minor matters. Between 1980 and 1982 he had attended on four or five occasions. On the 11th May, 1983, he had attended and had complained of a pain in his right hip; the doctor had prescribed anti-inflammatory tablets. Between the 11th May and the 4th June, 1983, the plaintiff had telephoned on three occasions to ask for stronger pain killers because he was suffering more pain. On the 4th June, 1983, the doctor saw the plaintiff again; he was complaining of continuing pain in his right hip which was radiating down his right leg; he was then walking with the aid of a stick; there was pain and swelling in the right knee; the doctor suggested a specialist but the plaintiff was none too keen; the doctor would only very rarely insist. In the interim period, the plaintiff had been x-rayed on the 19th May, 1983; this had disclosed moderately advanced osteo-arthritis in the left hip and minimal osteo-arthritis in the right hip. On the 23rd June, 1983, the plaintiff's knee was x-rayed; there was nothing abnormal. The doctor referred the plaintiff to Mr. John Myles who prescribed injections for injured ligaments; these seemed to cure the symptons at the time but on the 7th July Mr. Myles warned that the plaintiff might need further injections. By September, 1984, the doctor had seen the plaintiff a number of times; he had been issuing social security certificates of unfitness to work; and he advised the plaintiff to see Mr. Frank for a second

opinion.

When Doctor Houghton had seen the plaintiff on the 4th June, 1983, they did talk about the accident because of the plaintiff's swollen knee; it was not uncommon at the plaintiff's age to have osteo-arthritis in the hips; the condition got slightly worse after 1983 and then progressed until the hip replacement operation; such a condition could be exacerbated suddenly as a result of trauma or increased use of some sort; in March, 1982, the plaintiff had complained of some pain in his right hip and the doctor had prescribed anti-arthritic medication but the pain became much worse after May 1983 whereas usually there is either a steady rise or it remains the same for years.

The plaintiff's story was consistent with an increase in the cause of pain in his right hip; an accident as described would increase osteo-arthritis; this would seem to be a case of a pre-existing condition exacerbated by a trauma. Mr. Frank had diagnosed a primary lesion in the right hip and Dr. Houghton agreed.

Under cross-examination Dr. Houghton repeated that it was unusual to find such an increase in pain in such a short time and the plaintiff's condition was consistent with the plaintiff's story; trauma to the thigh could result in trauma to the hip.

Mr. Hartley, the beneficial owner of the defendant, agreed that the plaintiff was in charge of selling and accounts but also helped him and others if they needed him; the plaintiff was involved in the lifting of carpets only when they needed him; lifting was a matter of common-sense and did not require training; those involved would work as a team.

When he, Mr. Hartley, was away, the plaintiff had to plan the company's work and arrange with the foreman which jobs would be done; the plaintiff would be asked to help if help was needed to lift carpets.

Mr. Hartley claimed that on the 6th May, 1983, there was a "group" of people on the premises; only three jobs were done that day; that no carpet was cut at all that day; that "Cavaltweed" was a light cheap carpet and the roll would weigh four hundredweights at most; that normally, four people would be engaged in lifting, two at either end, and the roll would be lifted cleanly upwards; there had been times when only three persons had been engaged in lifting but these had not included the plaintiff who was not a well man at the time and was kept to office and shop duties; the plaintiff had deteriorated quickly in 1981 and 1982 and he, Mr. Hartley, kept the heavy work for young people; Mr. Hartley denied that after 1982 the plaintiff had been involved in a three man lifting operation and had no recollection of the alleged internal telephone call. The Mr. Pemberton referred to did not work for the defendant

but ran a steam cleaning service and came in on occasions. Mr. Thompson was there regularly but he, Mr. Hartley, could not say whether Mr. Thompson was there on the particular occasion. There was "cavaltweed" carpet on the premises but there would have been occasion to move it only to get to other material and only three jobs had been done that day. Mr. Hartley could not recall an incident of a dropped carpet on that day; carpet rolls did get dropped but none had ever hurt him at all. Asked about the incident described by the plaintiff, Mr. Hartley said that it was possible but he could not recall any such occasion; with a medium sized roll one would lift one end whilst leaving the other end supported but one would not attempt it with a big roll. No complaint had been made by the plaintiff; he had asked for time off in order to see his doctor; this was because of trouble with his hips; he had had to lose a lot of weight , then he had a hip operation; at no time did he give a specific reason; the receipt of the plaintiff's claim was the first that Mr. Hartley knew about it; the plaintiff had continued to work for four weeks after the alleged accident and yet never mentioned it; he had left in early June when he had been instantly dismissed for a reason that had no connection whatever with his health or the accident claim; he would never have been dismissed on account of his physical symptons because he could do the office and paper work and the company would have looked after him and would have "carried" him to the age of sixty-five. Mr. Hartley first heard of the claim when the insurance company representative rang him up quite a long time afterwards, he thought in 1984. When the actual date of the alleged incident was provided, Mr. Hartley had checked his diary; very little work had been carried out and there was no reason to move a heavy roll of carpet on that day. The method alleged would have been the only possible way of moving a roll of carpet with only three persons, but Mr. Hartley could not recall it and could not see why or how the foreman would have come back to the shop for more carpet that day. The staff worked in two teams of two people; therefore if one team had returned, it would have been two persons with Mr. Hartley and the plaintiff. When asked in cross-examination whether the plaintiff was lying, Mr. Hartley replied that he did not say that it could not happen; but on the particular day at the particular time he could not see how it happened; the accident could have happened but he did not recall it; it was unlikely to have happened because the books showed that there was not enough work on that day for the incident to arise; if a roll of carpet was dropped, he would not necessarily remember; he could not remember the plaintiff being injured in the shop; the plaintiff had moved carpets from wagons into store for years; rotation of carpet rolls as described did happen.

Mr. Alexander Thompson had worked in the carpet trade for upwards of seventeen years and was a carpet fitter by trade. The only training with regard to lifting rolls of carpet was a constant instruction to always make sure to keep one's back straight and to bend the legs; in this way the weight was taken on the legs and straining of the back was avoided. He had been employed by

the defendant for fourteen years, as an employee until 1983 and as a sub-contractor since; he knew "Cavaltweed" carpet, a roll weighed between four and five hundredweights. To lift a roll would require a number of men; one could manage with two at each end; it is a dead weight; one end is lifted up first and two men would hold it; the other end would be lifted afterwards; one would very rarely rest the roll on the body of one person; the custom of the trade, followed by the defendant, was always to try to ensure that there were sufficient people around. When Mr. Hartley was away the plaintiff took charge; the business being small there were not many bodies available and all helped each other; one acquired knowledge by experience. Mr. Thompson told us that he honestly could not remember the plaintiff being involved in the lifting of rolls of carpet; during his last few months with the defendant the plaintiff was employed mainly on desk duties and was not very fit. Mr. Thompson said that he had only heard of the plaintiff's claim very recently and found it difficult to believe that the plaintiff would be claiming for an accident at work because he, Mr. Thompson, could not recall any accident; he could not recall the incident which formed the basis of the claim. He also said that the staff worked in pairs comprising a senior fitter and an apprentice; they stayed together and came and went as two men.

Under cross-examination Mr. Thompson agreed that carpet rolls on arrival were lifted up by hoist; at times there was a quantity in store and rolls had to be moved. It was better to have two men each end but one man could hold the carpet at one end. The rolls were stacked in pyramids - there was always a slope - and rolls could be rolled; one would lift a roll onto the first one and then roll it over the others. If four men were available the roll could be lifted. It there were only three men, two men would lift one end of the roll and balance it on the row of carpets with one man supporting it. When one knew what one was doing it was very rarely that the carpet would overbalance and fall; he did not remember it happening; a roll of carpet could be dropped - he could not pinpoint an occasion, but it happened from time to time. Mr. Thompson could not recall the actual occasion when Mr. Hartley and he were allegedly upstairs and the plaintiff was asked to come upstairs to help; more likely than not the apprentice would have been there as well; it could have happened that he returned for additional material; he did find it necessary to go back sometimes and he would not take his apprentice with him on such occasions; he would go back by himself; it could happen that there would be a need to lift a roll of carpet and that only Mr. Hartley and himself would be in the room; it was quite possible that the plaintiff would have been asked to help, but he could not recall it happening. Finally, it was possible that the roll could be supported by the thigh.

Mr. Martin Paul Le Mottée was a carpet fitter who had worked for the defendant for some two and a half years from September, 1982, to March, 1985, and therefore, was so employed at the relevant time in 1983. He worked as a pair or team with Mr. Mark Le Huquet. On arrival in the morning he would go into the cutting room, cut the carpet required for the day's work, load it into vans, and leave. Sometimes, he returned because a piece of carpet had been forgotten. He was also concerned with the lifting of carpets; there was no training except learning by experience from one's superiors; there was some lifting done every day; he knew the name "Cavaltweed" but was used to dealing with all makes; he was not good at estimating weights; generally, there were either three or four involved with lifting; he could recall the plaintiff, who spent most of his time downstairs, being upstairs and sometimes helping to lift carpets. The plaintiff was not a physically fit man; he always had a limp and Mr. Le Mottée believed he was arthritic. Mr. Le Mottée had no recollection of the particular incident but carpets could fall or slip; personally, he had suffered no injury when they had done so. He could recall the plaintiff leaving his employment, but nothing was said about an injury or accident.

Under cross-examination, Mr. Le Mottée said that the plaintiff always walked with a limp but he could not say when the plaintiff started using a walking stick. The ideal number to effect a lift of a roll of carpet was four but he could remember occasions when three only were involved; if three only were involved, one would roll rather than lift the carpet and one would "take it easy". With three, they could manage to lift, but they should be healthy people; it was easy enough to lift over two rolls high because in effect one would be rolling the carpet with one man in the middle and one either end; if two people went to one end then the other would just hold the roll of carpet; there would be no pressure if one was only holding the roll; the other two would then move to the other end; rotation could happen and this was more likely if the roll of carpet was still wrapped; rotation could happen with two people lifting one end of the roll; rotation could happen at either end or the middle.

Mr. Mark Anthony Le Geyt, who had worked for the defendant on a sub-contracting basis for upwards of nine years and worked with Mr. Thompson, confirmed that there was no special training for lifting rolls of carpet; it was a question of common-sense and experience. He had no recollection of any accident nor had the plaintiff mentioned one. One was bound to drop a roll of carpet now and again.

However, he said that the plaintiff was called upon to help with lifting from time to time, if they really needed an extra pair of hands. He had noticed the plaintiff's physical condition changing as he got older; he had difficulty in walking around and often moaned about his hip; Mr. Le Geyt could not say how long before May, 1983, the plaintiff had complained but it was years rather than months. Mr. Le Geyt had not known that the plaintiff's employment was

being terminated; one morning he arrived at work and the plaintiff was not there; he had had no knowledge of a claim for compensation until 1986. Under cross-examination, Mr. Le Geyt said that a roll of carpet falling or slipping was not an event; he also said that the plaintiff was not as fit as other people and should not have been lifting carpets.

Mr. Mark Anthony Le Huquet had been employed by the defendant for upwards of seven years. When asked about lifting he said that he had started as a youngster and was shown how not to hurt himself. He agreed that the plaintiff occasionally helped with the lifting of carpets - he "gave us a hand if we needed it". Mr. Le Huquet told us that what the plaintiff did was not difficult because he never did anything very strenuous. The plaintiff walked very slowly and "hobbled" around; he had never said anything about seeing a doctor. Under cross-examination, Mr. Le Huquet claimed that the plaintiff had always had difficulty walking but became worse as the years went by. The plaintiff had helped with the lifting of carpets when he, Mr. Le Huquet, was there; when asked if that was frequently, he replied that if no one else was around, the plaintiff was asked by anyone present including Mr. Hartley who sometimes telephoned for help.

The Law

In Louis -v- E. Troy Limited and others (1970) J.J. 1371, the Court at page 1377, said this:

"The three essentials of actionable negligence are:-

1. A legal duty to take care;
2. Negligent conduct in breach of that duty;
3. Injuries or damage caused by that negligence to the complainant",

and at page 1393 said this:-

"From the authorities cited to us we deduce these principles: that the overall test which we have to apply is the conduct of the reasonable and prudent employer, taking positive thought for the safety of the plaintiff in the light of the risks inherent in the work; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or of special circumstances which he knows or ought to know it is clearly bad, and where he has, or ought to have, knowledge that the risks in regard to the plaintiff are greater than to the average worker, he may be thereby obliged to take more than the average or standard precautions".

Mr. Michel referred to Shales -v- Jersey Granite and Concrete Company Limited (1967) J.J. 755 C.A., only to dismiss it as an action dealing with dangerous employment (removing hard rock in a quarry) and said there were no Jersey cases. In doing so, he ignored Louis -v- E. Troy Limited and others (supra) and other cases to which we shall refer later. At page 763 of Shales -v- Jersey Granite and Concrete Company Limited the Court said this:-

"Their (the employers') general duty is stated in terms agreed at the hearing by the parties which are conveniently set out in Mr. Munkman's book on Employers' Liability, 6th edition, at page 73:

> 'It is the duty of an employer, acting personally or through his servants or agents, to take reasonable care of the safety of his workmen and other employees in the course of their employment. This duty extends in particular to the safety of the place of work, the plant and machinery, and the method and conduct of the work; but it is not restricted to these matters.'"

In Hacquoil -v- George Troy and Sons Limited and anr. (1970) J.J. 1305 the Court was dealing with a claim by an employee who was stone deaf and the duty of the employer to take special precautions. At page 1321, the Court, having cited the above extract from Munkman on Employers' Liability at Common Law (Sixth Edition) at page 73 went on to cite from page 82:-

"The employer's duty of care is owed to each workman or employee as an individual. Therefore, it must take into account any special weakness or peculiarity of a workman which is (or ought to be) known to the employer, such as the fact that he is one-eyed. Also, a lower duty may be owed to a workman who is experienced and familiar with the dangers, and a higher duty to a workman who has not sufficient experience for his task and needs help and supervision."

The Court then said this:-

"From the authorities cited to us we deduce these principles: that the overall test which we have to apply in this action is the conduct of the reasonable and prudent employer, taking positive thought for the safety of the plantiff in the light of the risks inherent in the work; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or of special circumstances which he knows, or ought to know, it is clearly bad; and where he has, or ought to have, knowledge that the risks in regard to the plaintiff are greater than to the average worker, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of

the injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent."

The duty of an employer relied upon in Shales -v- Jersey Granite and Concrete Company Limited (supra) extracted from Munkman's Employers' Liability at Common Law 6th edition, page 73 was the only authority cited in Farcy -v- E. Flaherty and Company Limited (1972) J.J. 2095; it had become the 7th edition at page 77 but was in identical words; and the Court held that it was the defendant's duty at management level to ensure that all necessary precautions were taken, notwithstanding that the deceased (it was a fatal accident case brought by the widow as guardian ad litem of the children) had been a ganger who had had as many as fourteen men working under him and was well able to make decisions on what precautions should be taken.

The duty of an employer to his employee was again considered in Stopher -v- Commodore Shipping Services (1982) Limited and another (1985 - 1986) JLR 219, a case involving a claim for damages by a lorry driver who in the course of his employment was required to deliver a cable drum and as part of his duties was required to assist in the unloading of goods which he had delivered if called upon to do so by a customer; it was the usual practice of the plaintiff to help in the unloading of cable drums delivered to the second defendant. On arrival at the second defendant's premises the cable drum was to be unloaded from the lorry using a forklift truck owned by the second defendant and driven by one of its employees. The blades of the forklift truck were too short for the unloading to be carried out in a straightfoward manner and, although the second defendant's employees were authorised to hire a more suitable truck, they had not done so on this occasion. The cable drum could, therefore, only be unloaded after a somewhat complicated manoevre. The plaintiff endeavoured to assist in the unloading but he positioned himself so that at one point he believed that the cable drum was about to fall on him, stepped backwards, fell off the lorry and injured himself. Had the unloading been carried out using a larger forklift truck, the drum would never have tilted so as to give the appearance of falling. The Court held, giving judgment for the plaintiff against the first defendant, that as his employer, the first defendant owed the plaintiff a duty to take reasonable care for his safety during the course of his employment. That included the duty to devise and establish a safe system of work. It was in breach in failing to ensure there was an adequate procedure for obtaining a forklift truck which was suitable for unloading the cable drums in question.

Mr. Michel cited Winfield and Jalowicz on Tort (12th Edition 1984, pages 181-187; Wilsons and Clyde Coal Co. Ltd. -v- English (1937) 3 All E.R. 628; Harris -v- Bright's Asphalt Contractors Ltd. (1953) 1 All E.R. 395; and Withers -v- Perry Chain & Co. Ltd. (1961) 3 All E.R. 676. Because we have cited a number of Jersey cases which were not cited to us, it is not necessary for us further to review the English authorities. Indeed two extracts from Withers -v- Perry Chain & Co. Ltd. were cited, with approval, by the Court in Hacquoil -v- George Troy and Sons Limited and another, and in Stopher -v- Commodore Shipping Services (1982) Limited the Court cited Wilsons & Clyde Coal Co. Ltd. -v- English.

Decision

The burden of proof is upon the plaintiff; the standard of proof is the balance of probabilities.

The Court has to ask itself 1) did the accident occur at all? 2) if so, did it occur in the manner described by the plaintiff? 3) if so, did it cause injury to the plaintiff; and if so, was the defendant guilty of negligent conduct in breach of its duty to take care of its employee?

The primary contention of the defence was that the plaintiff had not discharged the burden of proof, to show that the injury had occurred in the manner alleged. Counsel for the defendant argued that all that the plaintiff said had happened could possibly have happened but that there was strong reason to doubt whether it could have happened as described. Counsel went on to describe three particular areas where he considered that the plaintiff had been less than frank.

It is true that the success or failure of the plaintiff's claim depends upon whether or not the Court believes the plaintiff's story, supported to some extent by Doctor Houghton.

The Court has come to the conclusion, despite some areas of difficulty, that the plaintiff was a credible witness and that the accident did occur, substantially in the manner described by the plaintiff, and that it did cause injury to the plaintiff.

We can find no sufficient reason to disbelieve the plaintiff. The first area of difficulty was the reason for the termination of the plaintiff's employment with the defendant. We are satisfied that the defendant, through Mr. Hartley, its managing director, did have reasons other than the plaintiff's injuries, for dismissing the plaintiff from his employment. The Court is not concerned with whether or not these other reasons were justified. However, the Court is in no doubt that in the mind of the plaintiff, the injuries that he had

suffered and his worsening condition made it impossible for him to continue in employment. The second area of difficulty is the extent, if any, to which the plaintiff was disabled prior to the accident. It may well be that the plaintiff exaggerated somewhat his degree of fitness prior to the accident; if he did so it was because, we think, he was a proud and determined gentleman and not because he was guilty of deliberate untruths. In any case the evidence to the contrary was inconsistent. Mr. Hartley claimed that the plaintiff had deteriorated quickly in 1981 and 1982. Mr. Thompson said that the plaintiff limped quite badly at times and had used a walking stick for one or two years but under cross examination agreed he could be wrong about 1982; he could recall one and then two sticks but this could have been towards the end of the plaintiff's employment, i.e. after the accident. Mr. Le Mottée said that the plaintiff was not a physically fit man and always had a limp; however, he could not say when the plaintiff started using a walking stick. Mr. Le Geyt said that he noticed the plaintiff's physical condition changing as he got older and that he had difficulty in walking around and had complained for years rather than months; we think that here Mr. Le Geyt, although trying to be an honest witness, was himself guilty of exaggeration because he went on to say that the plaintiff used a walking stick "or an umbrella" and could not recollect for how long. Mr. Le Huguet said that the plaintiff walked very slowly and "hobbled" around; again we think that there was a degree of exaggeration here, except in respect of the post-accident period. However, on this aspect of the matter, the medical evidence is persuasive. The plaintiff was x-rayed on the 19th May, 1983; there was moderately advanced osteo-arthritis in the left hip and minimal osteo-arthritis in the right hip; in other words, the damage to the right hip and knee did not arise from pre-existing serious osteo-arthritis in the right hip, but resulted from the sudden trauma consistent with the plaintiff's story; the pre-accident problems were, on the balance of probability, caused by the moderately advanced condition of the left hip. In any event, the greater the pre-accident problems were, so the duty of care of the defendant increased, (v. Hacquoil -v- George Troy and Sons Limited and anr. supra). The third area of difficulty was the extent of the plaintiff's experience and competence in the physical manhandling of heavy rolls of carpet. Counsel for the defendant claimed that there was a lack of frankness on the part of the plaintiff because helping-out in the handling of rolls of carpet was part and parcel of his job and he knew as much as anyone else about the lifting of carpets. We do not agree that there was any lack of frankness on the part of the plaintiff in relation to the lifting of rolls of carpet. Indeed his version of the work was supported in a variety of ways by the evidence of witnesses called by the defendant.

For example, although Mr. Hartley denied that the plaintiff had ever been involved in a three man lifting operation after 1982, Mr. Thompson said that it could have happened that he returned alone for additional material and that there was need to lift a roll of carpet and if only Mr. Hartley and himself were in the room, that the plaintiff would have been asked to help. And Mr.

Le Huquet said that if no-one else was around, the plaintiff was asked by anyone present including Mr. Hartley, who sometimes telephoned for help. Not one of the defendant's witnesses was prepared to say that the plaintiff was lying or that the accident could not have happened as described by the plaintiff and their evidence in several respects gave credence to that of the plaintiff.

Having found that the accident did occur substantially in the manner described by the plaintiff, causing him injury, the Court has to go on to ask itself whether the defendant was guilty of negligent conduct in breach of its duty to take care of its employee. Again, the Court answers that question in the affirmative. A reasonable and prudent employer, taking positive thought for the safety of the plaintiff, at the age of sixty-three years, and arthritic to some extent, would not have permitted him to form part of a three-man lifting operation. It seems that there was a recognized and general practice for the lifting of rolls of carpet which had been followed for a substantial period in similar circumstances without mishap and that the defendant felt entitled to follow it, but in the light of commonsense, the defendant should have known that the lifting of heavy carpets by a three man team was clearly bad. Here, if lifting by a three man team was to be acceptable in certain circumstances, the defendant had, or ought to have had, knowledge that the risks in relation to the plaintiff were greater than to the average worker and should have taken more than the average or standard precautions by actively preventing him from forming part of a three man team. In our judgment, the defendant fell below the standard to be properly expected of a reasonable and prudent employer in these respects, and, therefore, was negligent. Mr. Hartley admitted that the plaintiff should not have formed part of a three man team engaged in lifting; as a matter of fact we have found that he did. Mr. Hartley claimed that he kept the heavy work for young people; this he failed to do on this occasion at least. The staff worked in two teams of two people but sometimes one of a team returned alone and then only that one man, with Mr. Hartley and the plaintiff were available to form a three man lifting team - in allowing this the defendant was failing in its duty to devise and establish and maintain a safe system of work.

For the above reasons, we find that the defendant was negligent in that it failed in its duty to take all reasonable care for the safety of the plaintiff in the special circumstances of the case.

The defendant pleaded that if any negligence were to be found on its part the plaintiff contributed to the accident by his actions. The particulars of the alleged contributory negligence was (a) a failure on the part of the plaintiff to give clear instructions to other employees or subcontractors in the working gang in the lifting of the carpet so as to keep himself safe from harm, and (b) a failure to have any or any sufficient regard for his own safety on account of his

general medical state (i) in deciding to participate in the lifting of the carpet roll and (ii) in allowing himself to be left holding one end of the roll as pleaded by him.

Neither Counsel referred the Court to any authority on the question of contributory negligence and the Court was left with the impression that Mr. Thacker had no great enthusiasm for the argument he advanced.

In Hacquoil -v- George Troy and Sons Limited and anr. (supra) the Court, at page 1333, said this:-

"The test to be applied on a plea of contributory negligence is stated in Halsbury's Laws of England (Third Edition), Vo. 28, paragraph 93 - 'Where the defendant is negligent and the plaintiff is alleged to have been guilty of contributory negligence, the test to be applied is whether the defendant's negligence was nevertheless a direct and effective cause of the misfortune. The existence of contributory negligence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish a plea of contributory negligence is to prove that the injured party did not in his own interest take reasonable care of himself and contributed by this want of care to his own injury. The principle involved is that where a man is part author of his own wrong, he cannot call on the other party to compensate him in full. The standard of care depends upon foreseeability. Just as actionable negligence requires the forseeability of harm to others, so contributory negligence requires the forseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably prudent man, he might hurt himself. The plaintiff is not usually bound to foresee that another person may be negligent unless experience shows a particular form of negligence to be common in the circumstances. If negligence on the part of the defendant is proved and contributory negligence by the plaintiff is at best a matter of doubt, the defendant alone is liable'.

"An examination of the cases cited in Chapter 20 of Munkman shows that pleas of contributory negligence have often been accepted in cases where there was a disobedience of orders, a disregard of, or failure to look out for, obvious dangers, or a failure to use equipment provided for safety. On the other hand, it has frequently been held that it is not negligent for a workman to follow the method of work accepted by the employer, even if it involves some obvious risk, nor to disregard personal danger because absorbed in work. Moreover, inadvertence has been excused in many cases, and in John Summers & Sons Ltd. -v- Frost (1955) 1 All ER 870, where a skilled man held a piece of metal too near to a grinding wheel, Lord Keith indicated that "momentary inadvertence" is not enough and that something like 'disobedience to orders' or 'reckless disregard by a workman of his own safety' must be proved before he can be held negligent.

"In all cases where contributory negligence is alleged, the question to be answered is - Whose negligence caused the accident? Was it that of the defendant alone, or of the plaintiff alone, or of both together?"

When questioned on the issue of contributory negligence, the plaintiff's attitude was that he had not telephoned downstairs for help and that Mr. Hartley, as managing director, was always in charge of the first floor and cutting area; that there was no other way of doing the work with a three man team; that he could not be at fault for doing what he was asked to do by the managing director; that whilst he could have refused to help it would have precipitated a pointless quarrel, and that, in any case, he had helped on many previous occasions. By the events as they occurred, the injury to his leg had been caused by the roll of carpet rotating when the other end was lifted and as he did not lift the other end but merely supported the first end he could hardly have been at fault.

In our judgment no evidence was adduced by the defendant to support a claim in contributory negligence. It was not negligence for the plaintiff to follow the method of work accepted by the managing director of the defendant. There was no disobedience to orders - to the contrary there was compliance with a request which, emanating from the managing director, was tantamount to an order. The claim in contributory negligence must fail.

Accordingly, we dismiss the plea of contributory negligence and we give judgment in favour of the plaintiff against the defendant on the issue of liability. The defendant will pay the plaintiff's costs on a Taxation basis.

Authorities referred to :-

Louis -v- E.Troy Limited et al (1970) JJ 1371 at pp 1377, 1393

Shales -v- Jersey Granite and Concrete Company Limited (1967) JJ 755 CA at p763

Hacquoil -v- George Troy and Sons Limited et al (1970) JJ 1305 at pp 1321, 1333

Farcy -v- E. Flaherty and Company Limited (1972) JJ 2095

Stopher -v- Commodore Shipping Services (1982) Limited et al (1985-86) JLR 219

Winfield and Jalowicz on Tort (12th edition, 1984) at pp 181-187

Wilsons and Clyde Coal Co.Limited -v- English (1937) 3 All ER 628

Harris -v- Bright's Asphalt Contractors Limited (1953) 1 All ER 395

Withers -v- Perry Chain & Co. Limited (1961) 3 All ER 676