COURT OF APPEAL

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8th April, 1992.

Before: **Sir David Calcutt, Q.C., (President),**
L.J. Blom-Cooper, Esq., Q.C.,
Lord Carlisle, Q.C.

Between:	**Martin George Hacon**	**Appellant**
And:	**Philip Francis Godel**	**First Respondent**
And:	**Brocken & Fitzpatrick Limited**	**Second Respondent**

Appeal against the Judgment of the Royal Court (Samedi Division) of 22nd June, 1988, whereby the appellant's claim for special damages, general damages, interest thereon and costs was dismissed.

Advocate R.J. Renouf for the Appellant.
Advocate P. de C. Mourant for the First Respondent.
Advocate G.R. Boxall for the Second Respondent.

JUDGMENT

CARLISLE, J.A.: The Judgment which I am about to give is the Judgment of the Court. This is an appeal by Mr. Hacon from a decision of the Royal Court given on 22nd June, 1988. On that day the Royal Court dismissed a claim by Mr. Hacon for damages for personal injuries against both the first and second respondents, (then the first and second defendants) arising out of an accident which had occurred on 1st August, 1985, and which Mr. Hacon, (the plaintiff) claimed was caused by the breach of statutory duty of both the first and second defendants and/or by the negligence of the first defendant or the second defendant.

Mr. Hacon, who was aged 21 at the time of the accident, was a painter and decorator, and at the relevant time was employed by the first defendant and was engaged in repainting a feed-

hopper at Ronez Quarry in St. John for the purpose of which scaffolding had been erected by the second defendant.

At about 4.00 p.m. on the afternoon of 1st August, 1985, Mr. Hacon fell through the perspex rooflight of the corrugated asbestos roof of a precast workshop adjacent to the feed-hopper. He fell some 19 feet onto the concrete floor of the workshop and as a result, sadly, suffered serious injury.

In the Order of Justice the plaintiff alleged that the breach of statutory duty which he said had caused the accident was firstly in failing to ensure that the scaffolding boards at the north-east corner did not overlap their own supports by more than four times the thickness of the said boards; that being a breach that was alleged to be contrary to Regulation 72 of the Construction Safety Provisions (Jersey) Regulations (1970) made in pursuance of the Safeguarding of Workers (Jersey) Law, 1956; and secondly, failure to ensure that toeboards were provided on the north-east corner of the scaffolding contrary to Regulation 75 of those same Regulations.

Alternatively, as I have said, the plaintiff claimed that the accident was caused by the negligence of the first defendant in causing or permitting or allowing the scaffolding boards to overlap the support at the north-east corner of the scaffolding to a dangerous extent; failing to ensure that there were sufficient toeboards at the edge of the north-east corner of the scaffolding; failing to heed or observe the dangerous condition of the scaffolding; and in the result failing to take any or adequate precautions for the safety of the plaintiff and failing to provide and/or maintain a safe method and/or place and/or system of work.

He claimed against the second defendant, negligence in causing, permitting, or allowing the scaffolding boards to overlap the support at the north-east corner; failing to ensure that there were sufficient toeboards at the edge of the north-east corner and failing generally to exercise any adequate skill or care in the erection of the scaffolding; failing to heed or observe the dangerous condition of the scaffolding and failing therefore to take any or adequate precautions for the safety of the plaintiff whilst on that scaffolding.

The defendants, by their respective defences, both denied any breach of statutory duty or that they had been negligent. They did not admit that the accident had occurred as alleged and indeed they put the plaintiff to strict proof, both as to his actions and the circumstances leading to the accident. So far as the first defendant is concerned, he specifically pleaded that the accident had happened when the plaintiff was on a part of the hopper where he was not authorised to work and that his

accident had been caused wholly by his own negligence. That allegation was denied by the plaintiff in his reply.

It is clear from a reading of the evidence given at the trial that at the time that Mr. Hacon's accident occurred on 1st August, 1985, there were certain toeboards missing from the scaffolding at the north-east corner of the hopper, and that the scaffold boards did protrude beyond the end supports by some 3 feet 2 inches which was more than the maximum referred to in Regulation 72. But it was strongly disputed that the accident had happened in the way alleged by the plaintiff, or had been in any way caused by any breach of statutory duty that may have been committed by either of the defendants.

In those circumstances it seems to this Court that it is central to the success or otherwise of this appeal to look and see what was being said on behalf of the appellant as to the way in which the accident happened and then to look at the findings of fact as made by the Royal Court.

The plaintiff's case as pleaded is set out in paragraphs 4 to 8 of the Order of Justice and I will, if I may, read them:

"4. That at approximately 4.00 p.m. on the said 1st August, 1985, the plaintiff was painting the east elevation of the said hopper, working on the north-east corner thereof. That during the course of such work the plaintiff noticed a foreign substance on the side of the said hopper and that it was necessary to remove the said substance prior to painting that area.

5. That the plaintiff commenced to scrape off the said substance with a small paint scraper, that whilst so doing the plaintiff inadvertently dropped the scraper which fell onto or in the alternative, bounced along to the end of the scaffold platform. That the end of the scaffolding platform projected over the end supports by approximately 3 feet 2 inches.

6. That the plaintiff bent down to pick up the said scraper from the end of the scaffolding platform and that as he straightened up thereafter, his head and/or shoulder hit the guardrail of the scaffolding which said guardrail was directly above the end supports hereinbefore referred to causing him to lose his balance.

7. That in an attempt to prevent himself falling to the ground some 20 feet below, the plaintiff pushed himself towards the roof of the adjacent precast workshop building.

8. That the roof of the said building consisted of corrugated asbestos roof sheets with a row of perspex

rooflights along the full length of the roof. That upon making contact with the said roof the plaintiff fell through one of the said perspex rooflights and fell onto the concrete floor of the workshop below".

That, as I say, is the way in which the plaintiff's case is set out in the Order of Justice.

That in general accords with the evidence given at the trial by the plaintiff, other than to add, as he did, that as he lost his balance he had in desperation just jumped onto the roof to try and save himself and that that was the action by which he came to be on the part of the roof through which he fell.

It is that explanation given in the Order of Justice and in the evidence of the plaintiff which as I say, was challenged by the defendants and, sadly, from the plaintiff's point of view it was an explanation which the Court found itself unable to accept.

The findings of fact of the Royal Court are to be found at letter E at p.573 of the Judgment (1987-88) JLR 547. Having carefully reviewed the evidence that they had heard as to the actions of the plaintiff and the way in which the accident had happened and the inferences to be drawn from the evidence they had heard, they stated at letter E as follows:

"We make the following findings of fact: the plaintiff was not painting the east elevation of the feed hopper, working on the north-east corner thereof as alleged in his Order of Justice. He was painting the south elevation of the feed hopper. He had no reason connected with his work to go to the north or east side of the scaffold. If, as is alleged, the plaintiff noticed a foreign substance on the side of the hopper, which is not established, it could only have been either on the south or on the west side. If the plaintiff inadvertently dropped his paint scraper, which is not established, it could only be on the south or on the west side, probably on the latter where his paint kettle and brush were found. It was impossible therefore for the paint scraper to fall or bounce along to the north-east corner of the scaffold. There is no evidence to support the allegation in the Order of Justice as to the manner in which the plaintiff's accident came about.

On the balance of probabilities he walked from the south side of the feed hopper where he was working to the west side where he left his paint kettle and brush, thence along the north side to the north-east corner and thence on to the roof of the adjacent precast workshop whilst on a frolic of his own.

The plaintiff did not jump on to the roof, he fell through the roof vertically and feet first and the accident was his own fault".

On those findings of fact the Royal Court then asked itself the question as to who was responsible for the accident. And having asked themselves that question they said at p.574 at line 37 of their judgment:

"We find that in substance and in reality the accident was due solely to the fault of the plaintiff".

Having indicated that if they had felt that any breach of statutory duty by either defendant had contributed in some measure towards the accident, they would, subject to the question of contributory negligence, have found in favour of the plaintiff. They went on at p.575 of their judgment at line 31 to say as follows:

"In our opinion on the balance of probability the plaintiff must have climbed down or let himself down on to the roof of the precast workshop and walked upon it. It was a negligent act; it was an unauthorised act in an unauthorised place for his own purposes. He could not but foresee the danger of going on to an asbestos and perspex roof. We are quite unable to find that the projecting boards or planks or the absence of toeboards were breaches of statutory duty without which the accident would not have occurred. The accident occurred because the plaintiff was on a roof that could not support his weight and was the plaintiff's own fault".

Those are the findings of fact made by the Royal Court and it is those findings of fact which the appellant has to upset if he is to succeed in this appeal.

We have looked carefully at the evidence that was given in this trial. We have considered with great care the various criticisms made by Mr. Renouf of the evidence which led the Royal Court to the findings of fact to which I have referred and we have considered the various aspects of the evidence which he claims contradict those findings. But having done so, we find ourselves unable to come to any other conclusion than that which was reached by the Royal Court.

The evidence of Mr. Hacon's fellow workmate, Mr. Pallot, and his employer, Mr. Godel, was to the effect that Mr. Hacon never was painting either the east or the north elevation of the hopper as alleged in the Order of Justice. It is clear from their evidence that Mr. Hacon that afternoon was in fact engaged in painting the south elevation, sitting alongside Mr. Pallot. It is clear that no painting had in fact taken place at the east

side of the hopper. The facts were that they had been instructed - that is Mr. Pallot and Mr. Hacon - to paint the south side and had been told that once they had finished they could go home. Neither Mr. Pallot nor Mr. Godel could think of any reason why Mr. Hacon should have needed or wanted to go to the north or the east side of the hopper.

So the case as pleaded was in effect demolished by the evidence. Further, Mr. Hacon's paintpot was found not on the north or the east side of the scaffolding where it had been said he was painting, but halfway along the west elevation.

The case as pleaded, having as I say, been demolished by that evidence, we then have to ask ourselves how was it that this accident happened. Was it, as was claimed, that Mr. Hacon was forced to jump onto the roof? Or was he walking across the roof at the time that he fell?

There is, in our view, every unlikeliness that the accident could have occurred in the manner claimed on Mr. Hacon's behalf.

Mr. Renouf, in his submissions to us, laid great emphasis on the fact that the evidence of both Mr. Copp and Mr. Myers, the Accident Prevention Officers, was to the effect that there were no footprints found on the roof to suggest that Mr. Hacon could have walked across the roof in the way that the Court on a balance of probabilities found must have happened. But it is significant if one looks at p.140 at letter D of the transcript that in fact in the contemporaneous note made by Mr. Copp he states: *"During the afternoon, apparently climbed"* (referring to Mr. Hacon) *"on to the asbestos roof of the precast building"* and when asked about it by the Deputy Bailiff said that at the time *"that was the conclusion that we had assumed"*.

Certain facts stand out. The hole in the roof through which Mr. Hacon fell was some 2 feet 6 inches long and 2 feet 6 inches in width. The distance from the edge of the building to the front edge of the hole was some 8 feet 4 inches. That means that if this accident was to happen by means of a jump, in the way in which Mr. Hacon claimed, he must have jumped a distance of at least 8 feet 4 inches. We find that difficult to accept. Further, if he had done so then both commonsense and the evidence that was given at the trial lead us to the conclusion that he would inevitably have fallen spreadeagled on the roof yet the size of the hole would appear to make it much more likely that he fell vertically through it.

Then there is the evidence of Mr. Power. His evidence was described, and in our view rightly described, as being of some importance (in line 10 of p.571 of the judgment). Mr. Power was an employee of Ronez who was actually working in the workshop at the time when the accident occurred. His evidence was to the

effect that he saw Mr. Hacon fall through the roof and that he came down feet first and caught his head on the side of the machinery on the way down. That evidence of Mr. Power of what he says he saw also confirms the evidence of Dr. Kennedy, the Consultant Neurologist who said that the compression fracture of the eleventh thoracic vertebrae of the spine which Mr. Hacon sadly suffered, made him believe that it had been caused by a vertical force, and I quote *"such as if he had landed on his heels, or possibly on his head"*.

There is one further matter. The paint scraper that Mr. Hacon in the course of his evidence identified as being his paint scraper was found on the floor of the workshop, which means it must have been in his hand as he fell through the roof. According to Dr. Kennedy, as line F of p.73 of the transcript of his evidence, he would expect that if anybody had leaped to the roof in this way that his hand would automatically have opened and that anything he would be carrying would therefore have fallen from his grasp before he hit the roof and it would not have been possible to retain a scraper so that it would go through the hole.

All of these pieces of evidence taken together, appear to us to be wholly inconsistent with someone jumping for the roof in the way that the plaintiff was suggesting and are far more consistent with someone walking across the roof and falling vertically through it. The very impression, according to his evidence, gained by Mr. Power.

Now, much criticism was made by Mr. Renouf that Mr. Power's impression should not be accepted since it related to the speed at which he said Mr. Hacon fell through the roof. But we think it is clear that Mr. Power's impression was not only formed by his view as to the speed at which he said Mr. Hacon fell, but also as to the way in which he said he saw Mr. Hacon falling vertically, feet first, through the hole.

Finally, can I add that as a result of the accident Mr. Hacon suffered very serious injuries which led to a very prolonged period of post-traumatic amnesia. That, in the opinion of Dr. Kennedy, meant that he did not consider he would be able to remember the event he was describing and that his evidence must be approached with great caution.

We heard argument relating to what is the right test that the Court of Appeal should apply before over-ruling any finding of fact by the Royal Court and we were in particular referred to two separate decisions of this Court, namely the cases of Hyams -v- English (1981) JJ 89; and Taylor -v- Fitzpatrick (1979) JJ 1; one of which cases dealt with the question when the issue of the credibility of the witnesses was involved, the other where the Court was really concerned with the inference to be drawn

from agreed facts. But as I have said in this particular case all of the evidence leads us to agree with the findings of the Royal Court that on the balance of probabilities the plaintiff must for some reason have either climbed down to, or let himself onto, the corrugated roof and walked upon it prior to his fall. From that finding of fact as to the way in which the accident happened it follows that any breach of statutory duty that there may have been by the defendants either in relationship to the absence of any toeboards, or of any overlapping on the scaffolding planks; or indeed, if it be a fact, the failure of either party to examine the scaffolding as required by Regulation 55 of the Construction (Safety Provisions) (Amendment No. 2) (Jersey) Regulations, 1979, could not, in our opinion, in any way be said to have caused or contributed to this unfortunate accident.

We find that on the facts of this case there is no nexus between any breach of statutory duty that may have existed and the cause of this unfortunate accident and this appeal therefore fails and must be dismissed.

Authorities

Construction Safety Provisions (Jersey) Regulations, 1970.

Construction Safety Provisions (Amendment No. 2) (Jersey) Regulations, 1979.

Westwood -v- Post Office (1973) 3 All ER 184.

Uddin -v- Associated Portland Cement Manufacturers Ltd. (1965) 2 All 213.

Allen -v- Aeroplane & Motor Aluminium Castings Ltd. (1965) 3 All ER 377.

Kelly -v- Pierhead Ltd. (1967) 1 All ER 657.

Benmax -v- Austin Motor Co. Ltd. (1955) 1 All ER 326.

Whitehouse -v- Jordan & anor. (1981) 1 All ER 267.

McGhee -v- National Coal Board (1972) 3 All ER 1008.

Wilsher -v- Essex Area Health Authority (1986) 3 All ER 801.

Hyams -v- English (1981) JJ 89.

John Munkman: Employer's Liability (10th Ed.) pp. 197-201.

Taylor -v- Fitzpatrick (1979) JJ 1.