

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV0410/2010

BETWEEN	GARNETT HANSON	CLAIMANT
AND	CARIBBEAN CEMENT CO. LTD	DEFENDANT

Mr. W. Clark Cousins for the Claimant

Mrs. Janice Brown for the Defendant

Heard: July 28, October 27 and November 24, 2011

Employers Liability – Independent
Contractor – Safe System of Work

Straw J

Oral Judgment

Parties

1. Mr. Garnett Hanson, the claimant, is a trucking contractor who provided haulage services to the defendant at its Rockfort Factory, Kingston.

The defendant is a registered company engaged primarily in the manufacture and production of cement at the above-mentioned location.

On July 15, 2009, the claimant's motor truck licence CG7364, driven by one Winston Hanson, was damaged while Mr. Hanson was engaged in performing haulage services at the defendant's factory.

The claimant has averred that it was the negligence and/or breach of statutory duty of the defendant, its servants and/or agents that caused or contributed to the claimant's loss.

2. The particulars of negligence and/or breach of statutory duty read as follows:

- a. Failing to devise and implement a safe system of work and adequate supervision thereof with respect to the operation of a dangerous machine at the defendant's factory, to wit, the reclaimer machine.
- b. Failing at all material times to have a flagman or an automated signal at the entrance to the Reclaim House which directed trucks such as the claimant's as to when it was safe to enter the Reclaim House to dump at the stockpile.
- c. Permitting the claimant's truck to enter the Reclaim House whilst the reclaimer was in operation or in circumstances which rendered it unsafe for the claimant's truck to enter and dump.
- d. Failing to provide any or proper warning to the reclaimer operator of the presence of trucks in the vicinity of the stockpile and in particular the claimant's truck which was stationary with its headlamps on waiting to dump.
- e. Failing to keep a proper or any lookout for trucks either dumping or waiting to dump and in particular the claimant's said motor truck.
- f. Causing the reclaimer to be so negligently operated as to come into contact with the claimant's said motor truck overturning same.
- g. Exposing the claimant and other visitors to the risk of injury and loss which given the circumstances the defendant knew or ought reasonably to have known might occur.
- h. Failing to ensure that its premises were reasonably safe for persons using same for the purpose(s) for which they were invited.

3. The defendant has denied any responsibility for the damage done to the claimant's truck and has pleaded that the claimant's driver breached the operating

procedures in relation to entry into the reclaimer house, speedily entered the said house and negligently drove into the path of the reclaimer machine which was in operation.

The defendant is also alleging contributory negligence on the part of the claimant's driver.

Agreed Evidence

4. It is agreed that the claimant's driver along with other truck drivers were sub-contracted by one Donnie Chin, a contractor for the defendant's company, to haul lime stone via trucks from a quarry to a reclaimer house on the defendant's premises.

In the reclaimer house, there is a machine with a long adjustable boom operated by a machine operator. This boom lifts the lime stone off loaded by the trucks (into a stockpile) and feeds it into the conveyor belts of the machine and into bins. If the boom is in an elevated position, trucks can pass under it.

5. This machine is dangerous and it is agreed that all parties are aware that it is dangerous to enter the reclaimer house while the machine is in operation.

The reclaimer machine is situated on the east side of the house and it is potentially dangerous to vehicles which travel into the east bay where the lime stone is off loaded. In order to reach this area, trucks would proceed through an improvised entrance and drive a distance into the building.

The trucks are first loaded with the lime stone at the quarry (which is about a 10 minute journey from the reclaimer house). Once loaded, the trucks proceed to a scale where the load is weighed and then proceed towards the reclaimer house where the limestone is unloaded.

6. At the time when Mr. Hanson, the claimant's driver, drove his Mack truck into the reclaimer house, there was no guard at the entrance to prevent trucks from entering. At the time also, there were no signs posted to warn against entry or restrict entry by truck drivers driving into the reclaimer house to offload lime stone.

Evidence of Claimant

7. It is the contention of Mr. Hanson that he drove the truck with a load into the reclaimer house followed by one Glenroy Needham, another truck driver. Ahead of him was one Patrick Francis, who was already inside when Mr. Hanson drove in.

Mr. Hanson stated that he started reversing as he approached the dump site and that he heard a truck driver blow his horn. He stopped the truck with the headlights on to check his position, got back into his vehicle to move forward when the reclaimer machine came into contact with the truck and caused it to turn over.

Issues to be Determined

8. The questions for the court to consider are:

1. Whether the defendant, Caribbean Cement Company Limited breached the duty of care to provide a safe place or system of work for Mr. Hanson.
2. If so, whether Mr. Hanson is guilty of contributory negligence by placing the truck into the position that he did.

Did the Defendant Breach the Duty of Care?

9. There is no issue that the defendant owed a duty of care to Mr. Hanson as well as all the other truck drivers who were invited onto the premises as sub-contractors to do the work described above.

Section 3(1) and (2) of the Occupier's Liability Act prescribe that the occupier would have a duty to take care that visitors will be reasonable safe in using the premises for the purposes for which they are invited or permitted to be there "as in all the circumstances of the case is reasonable."

10. The circumstances relevant to this case would be the same as the statutory and common law duty of care owed by an employer to his employees.

In **Wilson and Clyde Coal v English** 1938 AC 57, Lord Wright defined the employer's common law duty to his employee as threefold:

"The provision of a competent staff of men, adequate material, a proper system and effective supervision. This is fulfilled by the exercise of due care and skill."

11. A safe system of work has been described by Lord Greene MR in **Speed v Thomas Swift & Co. Ltd.**, 1943 KB, 557 (at pages 563-564) to include the physical lay out of the job, the setting of the stage, the sequence in which the work is to be carried out, the provision of warnings and notices and the issue of special instructions and where necessary, modifications or improvements to circumstances which arise.

Defendant's Evidence in Relation to the System of Work

12. The evidence of the defendants' witnesses in relation to the system of work is as follows:

- An employee of the company stands guard outside the reclaimer house
- Once the truck is loaded at the quarry, a call is made from the quarry to the reclaimer operator and the guard outside.
- In order for the trucks to enter the reclaimer house, the driver of the truck waits outside for a directive from the guard.

- The guard receives the directive first from the reclaimer operator who indicates that it is safe for the truck to enter.
- Trucks are not allowed to enter when the reclaimer machine is in operation.
- Before commencing work, all truck drivers participate in a safety course which is mandatory and the above procedure is known to all drivers.

13. It is important to note that one of the claimant's witnesses, Mr. Patrick Francis, who was also a truck driver employed to the claimant, acknowledged that he did participate in safety procedures after he had been there three to four months. This was before the incident, and the driver of the ill-fated truck, Mr. Winston Hanson was also there. Mr. Francis stated that the purpose was "to make us aware of how to be safe on Caribbean Cement's compound and the loading of trucks with raw material."

Mr. Francis is silent concerning knowledge of the system in relation to a guard being positioned outside the reclaimer house. However, he did say that since he has been there, he has never seen any guard positioned outside to direct trucks into the reclaimer house.

Mr. Glenroy Needham, another truck driver and witness called on behalf of the defendant, also spoke to his attendance at safety courses. He, however, confirmed that the procedure in place would be for the trucks to wait in queue for the direction of the guard posted outside the reclaimer house.

Analysis of Evidence in Relation to Safety Procedure

14. Mr. Cousins, counsel for the claimant, has asked me to reject the evidence of the defence in relation to the said safety procedure. He asked that I examine the statement of case of the defendant as it does not speak to the system as outlined.

Paragraph 7 (ii) avers that the claimant's truck entered the reclaimer house in breach of the defendant's operating procedure which prohibits more than one vehicle to be present in the reclaimer house while the reclaimer machine is operational.

Paragraph 7 (iii) states that the claimant is aware of these operating procedures, as the same was communicated to him at a safety induction on commencement of the claimant's contract for services.

15. I do agree with the submission of Mr. Cousins that the evidence in relation to the safety system lacks cogency for the reason put forward. The statement of case avers that only one truck is allowed into the reclaimer house while the machine is operational. The evidence of the reclaimer operator, Mr. Jolly, is that trucks are not allowed to enter the reclaimer house when the reclaimer is in operation.

16. Of course, the issue would still arise as to how a truck driver outside of the reclaimer house would be made aware whether a truck is inside or not.

I am of the opinion that even if a system existed for a guard to be outside, the defendant did not enforce compliance with this system.

17. It is the evidence of Mr. Jolly that when Mr. Hanson drove inside, there was no other truck present. He stated that work had not yet started i.e., in relation to the off-loading of the lime stone, so no guard had yet been posted.

In any event, he had received no calls from the quarry or the guard in relation to oncoming trucks.

He agreed, however, that once a truck is dispatched at the quarry, someone should be at the entrance.

18. I am constrained to reject his evidence that work had not yet started, as Mr. Needham stated that he had done two previous trips from the quarry to the reclaimer house and it was on his third trip that Mr. Hanson turned up the quarry, loaded and then proceeded ahead of him to the reclaimer house.

19. Mr. Needham also admitted that when he reached the reclaimer house behind Mr. Hanson, there was no guard at the entrance. He further stated that Mr. Hanson proceeded into the reclaimer house and he drove behind him.

20. I have come to the conclusion therefore that even if there was such a system in place, the defendant failed to enforce compliance and therefore would have breached the duty of care by failing to provide a safe system of work (**Walter Dunn v Glencore Aluminium Jamaica Ltd** SCCA 2005 HCV/1816 per Brooks J at pg 7).

Contributory Negligence

21. I must now consider the issue of contributory negligence as all the witnesses including Mr. Hanson agreed that it was dangerous to enter the reclaimer house while the machine is in operation.

Both Mr. Francis and Mr. Hanson stated that one cannot see whether the reclaimer machine is in operation from outside. Mr. Francis further stated that a person standing outside could hear it clearly but it would not be as easy to hear if he is in his truck and the engine is running. This is the position Mr. Hanson was in. He was inside his truck with the engine running so he did not hear it in operation while he was outside.

Although Mr. Needham stated that he could see into the reclaimer house and saw it was in operation, he is not a credible witness on the point, as he made inconsistent statements as to where he was at the time he realized the machine was in operation.

It is also clear, based on Mr. Jolly's description of the position of the machine in the east bay that one would have to drive into the building to observe the machine. The photographs of the reclaimer house agreed by both parties are also illuminating to some extent.

I bear in mind also that, although Mr. Hanson had been working on the premises for six (6) months prior to the incident, he stated that he had never seen the machine in operation before that time.

22. However, he did state that he observed that the machine was working when he entered. He stated as follows:

"I realized that the reclaimer machine was working when I reached the destination where I was going to dump ----. Francis was already dumped. I positioned myself to dump. Francis blew his horn. Got out truck. At that time realized reclaimer machine was operating. The reclaimer machine was 35 to 40 feet away, the boom of the machine ---. Never knew it would reach that far. The boom was moving side to side slowly but away from truck and back to truck. I believed I had enough time to dump my load and get out of the way. The machine would not stop that sudden but stop after a period of time."

23. These words of Mr. Hanson are instructive. It is important to note also that all the parties who stated they were present in the reclaimer house blew their horns to warn Mr. Hanson of danger.

Although the defence witnesses Mr. Jolly and Mr. Needham deny that Mr. Francis was there, I accept that he was. He stated that he blew his horn to warn Mr. Hanson that he had reversed his truck into uneven ground. Both Mr. Jolly and Mr. Needham blew

horns because of the impending danger of the machine coming into contact with Mr. Hanson's truck.

24. Mr. Francis stated that at the time Mr. Hanson was backing-up, the machine was operating. Mr. Needham who was behind Mr. Hanson, also observed that the machine was in operation. Mr. Francis stated that the system he employed would be to drive into the reclaimer house to see if the machine was in operation. If it was, he would stop "as it is not a machine that one can look at, for e.g., a front end loader." He further stated:

"The machine could be working and you could easily drive your truck pass it, go to the stock pile and do not know it is working. You can drive underneath it as it is over your head."

25. Based on the evidence, it is clear Mr. Hanson knew the machine was operating, knew it was dangerous and yet continued to position his truck to dump the lime stone. The danger was apparent to everyone else around him.

I do not find Mr. Francis was as truthful as he could have been when he stated his reason for blowing his horn. I am of the opinion that like Mr. Jolly and Mr. Needham, he was aware of the impending danger.

26. Whether Mr. Hanson continued to reverse after he got back in the truck or not is of no moment as he had already positioned the vehicle at a potentially dangerous spot. There is no evidence that Mr. Jolly was operating the machine in a dangerous manner. He shut it down as soon as he realized what was about to happen.

The danger would have been reasonable foreseeable to Mr. Hanson. Once he entered the reclaimer house, he ought to have stopped at a safe location when he realized the machine was in operation. He was aware that it was dangerous. He asked no questions but began to reverse.

The claimant and his witnesses have given evidence that the reclaimer house was poorly lit. Based on the agreed photographs, flood lights are present. In any event there is no evidence that the quality of lighting was a contributing factor to the unfortunate incident.

Mr. Hanson has to share the burden of liability as he ought to have taken some precautionary measures before positioning the truck as he did.

I apportion the liability of the defendant at 70 percent.

Judgment granted to the claimant.

Damages

In relation to the damages as pleaded both parties have agreed to the following:

Loss occasioned by total loss of truck	-	\$700,000.00
Loss Adjuster's report	-	12,600.00
Loss of profits	-	<u>1,346,400.00</u>
Total	-	\$2,059,000.00 with interest at 6% from July 15, 2009 to November 24, 2011.

Costs of 70% to the claimant to be agreed or taxed.