[2011] JMCA Civ 37

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 31/2006

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN	**SONIA WILSON**	**APPELLANT**
AND	**MUFFLER SPECIALIST LIMITED**	**RESPONDENT**

Lord Anthony Gifford QC, Miss Marlene Uter and Miss Tiffany Lofters instructed by Alton E Morgan & Co for the appellant

Garth McBean instructed by Garth McBean & Co for the respondent

23, 24 March; 29 July; and 28 October 2011

HARRIS JA

[1] I have read in draft the reasons for judgment written by my learned brother Hibbert JA (Ag). I agree with his reasoning and conclusion and have nothing to add.

PHILLIPS JA

[2] I too have read the draft reasons for judgment of Hibbert JA (Ag) and agree with his reasoning and conclusion.

HIBBERT JA (Ag)

[3] On 29 July 2011 we gave our decision dismissing the appeal and awarding costs to the respondent. The reasons are now put in writing.

[4] The appellant, Sonia Wilson, was, on 6 October 1993 seriously injured when the bell housing of her 1980 Volkswagen Sirocco motor car exploded while the muffler system was being inspected by employees of the respondent company, at the respondent's premises. As a result, the appellant brought an action against the respondent for damages for negligence and for breach of its statutory duty under the Occupiers' Liability Act.

[5] The particulars of negligence and breach of statutory duty were stated as follows:

> "PARTICULARS OF DEFENDANT'S SERVANT'S/EMPLOYEE'S NEGLIGENCE
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> (a) Running and/or operating the engine of the said vehicle at a rate which was excessive in the circumstances;
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> (b) Running and /or operating the engine of the said vehicle knowing that the Plaintiff was underneath same and;
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> (c) Running and/or operating the said vehicle at a time when it was manifestly unsafe to do so.
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> 7. That the Defendant and/or it's [sic] servants/employee also acted in breach of its duty to the Plaintiff under Section 3 of the Occupier's [sic] Liability Act 1969.

PARTICULARS OF DEFENDANT'S SERVANT'S/EMPLOYEE'S BREACH OF STATUTORY DUTY

(a) Failing to warn the Plaintiff of the dangers of being in close proximity to a running and defective vehicle;

(b) Failing to stop or cease running and/or operating the engine of the said vehicle knowing that the Plaintiff was underneath same;

(c) Inviting the Plaintiff to enter into the repair pit in circumstances where it was manifestly unsafe for her to do so;

(d) Failing to use a safe method of examining and repairing the said vehicle.

8. That as a result of the Defendant's and/or it's [sic] servants' and/or employees' breach of statutory duty and/or negligence, and the consequent explosion of the vehicle's underside or portions thereof the Plaintiff has suffered injuries, loss and damage."

[6] At the trial before Straw J, the appellant gave evidence that a problem had developed with the clutch system of her car and about two weeks prior to 6 October 1993, she sent the car to Thwaites Auto Centre to have the gear box repaired. Work was said to have been done to the clutch and pressure plate. The problem, however, persisted as the "car was still not going into second gear". She reported this to Thwaites Auto Centre and was advised to return after getting the muffler system checked.

[7] About two days before 6 October 1993, she took the car to the respondent where repairs were done to the muffler system. On her way home she heard a sound which she perceived to be caused by a hole or some other defect in the muffler system. She reported this to Mr Gerald Lacey Snr, the respondent's managing director, and as a consequence, returned to the respondent on 6 October 1993.

[8] The car was driven onto a ramp over a pit and the exhaust system was examined. The appellant further testified that Mr Gerald Lacey Jnr, informed her that he had found no fault with the muffler system. She, however, insisted that there was a hole in the system. Mr Lacey Jnr, she said, invited her to where the car was to see for herself that there was no hole in the muffler pipe. She said she entered the repair pit under the car. While she was there with Mr Lacey Jnr, an employee of the respondent remained in the car and was revving the engine. She was pointing out the location from which she heard the sound she complained of, when she heard a violent explosion coming from the underside of the vehicle, then found herself on the ground in pain and unable to move. She realized, then, that she had suffered serious injuries to her legs.

[9] Mr Gerald Lacey Jnr, was the first witness called on behalf of the respondent. He was then a junior manager at the respondent. He stated that on 6 October 1993 the appellant drove her Volkswagen Sirocco motor car to his place of business and complained of hearing a strange sound in the vehicle. The motor car was driven onto a ramp over a pit. He entered the pit and proceeded to examine the exhaust system while Linval Dixon, another employee of the respondent, revved the engine. At some

stage during the examination the appellant entered the pit and pointed to an area where she said the sound came from. He denied inviting her into the pit. While the engine was being revved, he heard an explosion coming from under the vehicle. He immediately felt a blow to his right jaw, caused by a piece of metal. He noticed that he was bleeding from his jaw and that the appellant was also injured. He also noticed a hole in the gearbox bell housing of the motor car, and metal parts, including the flywheel from the gearbox, strewn all over the ground in the vicinity of the car.

[10] Linval Dixon also gave evidence supporting that of Mr Lacey, Jnr, as to the events leading up to the explosion. After the explosion, he also noticed injuries to Mr Lacey Jnr, and the appellant, as well as the hole in the gearbox bell housing, the flywheel and other parts from the gearbox on the ground.

[11] Mr Gerald Lacey Snr, stated that after the incident the motor car was removed to the premises of D.B. Motors Limited where he and a motor vehicle assessor subsequently examined it to confirm the cause of the explosion. During cross-examination, he said that since the respondent company started business in 1979 there were only two reported cases of injuries caused to persons. In one instance, an employee damaged his fingers while using a chisel and in the other, an employee, who refused to wear the safety goggles supplied to him, got particles in his eyes. He admitted that there may be some danger to persons operating in the pit under motor vehicles. This he, however, confined to hot oil leaking from the vehicle or from a hot exhaust system.

[12] Michael Forrest, the then managing director of Trans Jam Loss Adjusters for over 24 years, prepared an expert report for the court based on his examination of the 1980 Volkswagen Sirocco motor car. In this report he concluded as follows:

> "(a) There was damage to the Gearbox Bell Housing, Flywheel assembly and Bolt.
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> (b) Based on the nature of the damage it is my opinion that the Flywheel disintegrated causing damage to the other components.
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> (c) From an invoice shown to me by Mr. Lacey Snr, a copy of which was provided to the Claimant's Attorneys-at-law through the Defendant's Attorneys-at-law Messrs. Garth McBean & Co, it appears that previous repairs were carried out to the Gearbox which in my opinion resulted in this mechanical failure namely the disintegration of the flywheel."

[13] While giving evidence, Mr Forrest stated:

> "For flywheel to disintegrate the bolts will have to give and the flywheel will fly off. If this happens while vehicle is running, in some cases, it can just fly off and rest in the bell housing. This is dependent on the revolution per minute applied. Paragraph 5(b), in this particular case it caused damage to other components… An engine can explode as a result of over-revving. But term 'explode' not happy with it. If engine over-revved would not expect anything to happen with gearbox."

He later stated:

> "In normal course of things would not expect a gearbox to disintegrate."

[14] The learned trial judge, in arriving at her decision, found that on a balance of probabilities the appellant had not proved that the vehicle was being over-revved. In finding that the respondent was not liable, she stated:

> "Even if the court were to find that the defendant invited or allowed the claimant to be in the pit, the claimant has not proved on a balance of probabilities that it was the defendant's negligence or breach of duty that was the immediate cause of the explosion."

Accordingly, judgment was entered for the respondent with costs to be agreed or taxed.

[15] It is from this judgment, which was delivered on 17 March 2006 that the appellant has appealed. Notice and grounds of appeal were filed on 28 April 2006. These were, however, replaced by amended notice and grounds of appeal which were filed on 30 August 2010. The grounds of appeal were stated as follows:

> "(1) The learned judge erred in not holding that on the evidence (both that of the Claimant and that called on behalf of the Defendant) the Defendant had breached its duty of care by inviting and/or permitting the Claimant to enter a dangerous part of its premises, namely the repair pit, at the time that the engine of her car was being revved.
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> (2) The learned judge erred in relying on her finding that the Defendant could not have foreseen that the gearbox of the Claimant's car would explode; and in not holding that if (as the evidence showed) the Defendant ought reasonably to have foreseen the happening of an accident of the type which did occur, as a result of its breach of [sic] duty of care, the Defendant would be liable.
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> (3) The learned judge failed to apply the principle enunciated in **The Wagon Mound (No. 2)** [1966] 2 All ER 709, and to hold that if the Defendant ought to have known that there was a real risk of the car exploding in some way and causing injury to the

Claimant, the Defendant would be liable for the consequences of its breach of duty [sic] of care.

(4) The learned judge erred in stating the issue to be whether the actions of the Defendant's employees were the cause of the explosion; whereas the issue for her to determine was whether the Defendant's breach of duty (in inviting or permitting the Claimant to enter the pit area) had been an effective or operative cause of the Claimant's injuries.

(5) The learned judge failed to consider the legal principles applicable in cases where there are two or more causes of a Claimant's injury; and erred in not holding that the Defendant's breach of duty was an effective or operative cause of the Claimant's injury in the circumstances of this case.

(6) The learned judge erred in holding that the defect in the gearbox of the car was a *nova causa interveniens*; since (a) such defect was neither a new nor an intervening cause; (b) the Defendant's breach of duty was also an effective or operative cause of the Claimant's injury."

[16] Before this court, Lord Gifford QC submitted that, before the court below, there was sufficient evidence that the respondent breached its duty of care to the appellant by either inviting her into the pit or allowing her to remain there while the engine of the car was being revved. Consequently, he submitted, the learned trial judge ought to have made such a finding.

[17] Lord Gifford further submitted that it was not necessary to prove that the respondent, through its servants, foresaw or ought to have foreseen the exact circumstances which arose. Thus, he argued, the learned trial judge's finding that the respondent could not have foreseen that the gearbox would cause an explosion was not

determinative of the respondent's liability. The proper question to be asked, he urged, was what caused the injury and not what caused the explosion. The respondent, he said, ought reasonably to have foreseen the happening of an accident of the type which did occur. In support of these submissions, Lord Gifford relied on excerpts from the judgments in **Hughes v Lord Advocate** [1963] 2 WLR 779 and **Jolley v Sutton London Borough Council** [2000] 1 WLR 1082. (These I will address later.)

[18] Lord Gifford also submitted that, had the learned trial judge applied the reasoning to be extracted from the decision of the Privy Council in **Overseas Tankship (U.K.) Ltd v The Miller Steamship Co Pty Ltd and Another (Wagon Mound No 2)** [1966] 2 All ER 709, she would have appreciated that it did not matter that the possibility of the car exploding (for whatever cause) was unlikely to happen.

[19] Lord Gifford also submitted that the injuries to the appellant were caused by a combination of factors, one of which was the fact that she was invited into or permitted to remain in the pit. So, even if the explosion was not caused by the negligence of the respondent, the respondent's breach of duty was a cause of the injury. But for the presence of the appellant in the pit, she would not have been injured. To support these submissions, Lord Gifford prayed in aid the decisions in **Stapley v Gypsum Mines** [1953] 2 All ER 478 and **Bailey v Ministry of Defence** [2009] 1 WLR 1052 and sought to distinguish the decision in **Barnett v Chelsea and Kensington Hospital Management Committee** [1968] 1 All ER 1068, which was referred to by the learned trial judge.

[20] Mr McBean, in response, drew the court's attention to the particulars of negligence and breach of statutory duty as pleaded and submitted that this was the issue before the learned trial judge. He also emphasized that when the motor car was brought to the respondent's place of business, the complaint of the appellant was with regards to the muffler system and no other part of the car.

[21] He submitted that the learned trial judge did not err in not making a finding that the respondent breached its duty of care to the appellant by inviting her into, or allowing her to remain in the pit. This is so, he urged, as the cause of the injuries to the appellant could not be attributed to the respondent.

[22] Mr McBean sought to distinguish the cases of **Hughes v Lord Advocate** and **Jolley v Sutton London Borough Council** from the case before us by submitting that in each case the damage caused was a variant of that which was foreseen and further that in each case there was a causal link between the defendant's breach of duty and the damage sustained. In the instant case, he submitted, the injury caused to the appellant was not a variant of that which might have been foreseen, neither was there a causal link between the respondent's alleged breach of duty and the injury suffered by the appellant.

[23] The submission by Lord Gifford that the learned trial judge ought to have applied and failed to apply the principle enunciated in **Wagon Mound No 2** was also challenged by Mr McBean. He submitted that based on the finding by the learned trial judge that it was not proved that the engine of the car was being over-revved, the

respondent's servants could not have known that there was a real risk of the car exploding in some way.

[24] Mr McBean also submitted that there can be no real distinction drawn between the cause of the explosion and the cause of the injury to the appellant as they are inextricably bound up. He further submitted that the alleged breach of duty by the respondent did no more than provide the occasion for the faulty repair to the gearbox to cause the injury to the appellant. Consequently, he submitted, the respondent could not be held liable.

[25] The issue in this case is whether or not the respondent can be held liable for the injury caused to the appellant, either through the negligence of the respondent's servants or by a breach of a statutory duty. Section 3 of the Occupiers' Liability Act provides:

> "3 - (1) An occupier of premises owes the same duty (in this Act referred to as the "common duty of care") to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.
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> (2) The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there."

[26] The question of liability for civil wrongs has been the concern of several courts and legal writers worldwide and many judicial decisions seem to be in conflict. In **Re**

Polemis and Furness, Withy & Co. Ltd [1921] All ER 40, a ship was destroyed by a fire which arose when, through the negligence of the charterers' servants while discharging, a board fell from some staging into the hold and there came into contact with some substance, with the result that a spark was caused which ignited petrol vapour in the hold. The Court of Appeal in England held:

> "(ii) when once … negligence had been established it was immaterial that a reasonable person would not have anticipated the damage which occurred, and the question whether damages for the loss of the ship were recoverable from the charterers depended only on the answer to the question whether that loss was the direct consequence of the negligent act."

[27] Several subsequent decisions showed an unwillingness by the English court to espouse this rigid position taken in **Re Polemis**. In **Overseas Tankship (U.K.) Ltd v Morts Dock and Engineering Co Ltd (Wagon Mound No 1)** [1961] 1 All ER 404, Viscount Simonds who delivered the judgment in the Privy Council, having examined several decisions since **Re Polemis**, stated at page 413, paragraph D:

> "Enough has been said to show that the authority of *Polemis* has been severely shaken, though lip-service has from time to time been paid to it. In their Lordships' opinion, it should no longer be regarded as good law."

He later stated at paragraph E:

> "It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilized order requires the observance of a minimum standard of behaviour."

[28] The question of liability for negligence on the basis of foreseeability also arose in **Hughes v Lord Advocate**. The head note reads:

> "A manhole in an Edinburgh street was opened under statutory powers for the purpose of maintaining underground telephone equipment. It was covered with a tent and, in the evening, left by the workmen unguarded but surrounded by warning paraffin lamps. An eight-year-old boy entered the tent and knocked or lowered one of the lamps into the hole. An explosion occurred causing him to be severely burned:-
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> *Held*, that the workmen were in breach of a duty of care to safeguard the boy against this type of occurrence which, arising from a known source of danger, the lamp, was reasonably foreseeable, although that source of danger acted in an unpredictable way."

[29] In **Jolley v Sutton London Borough Council**, a boat was left abandoned for at least two years beside a block of flats on land owned by the defendant council. The council was aware of the boat's presence and made plans to remove it, but they were not implemented. Two boys, the plaintiff and a friend, started to repair the boat, using a car jack and some wood to prop it up. While the boys were working on the boat, it fell off the prop crushing the plaintiff who suffered serious spinal injuries resulting in paraplegia. He brought an action against the council for damages in negligence and breach of statutory duty under the Occupiers' Liability Act 1957 [UK]. The judge gave judgment for the plaintiff and found that the presence of the boat would attract children and that the type of accident and the injury that occurred were reasonably foreseeable.

[30] The Court of Appeal allowed the council's appeal on the ground that, although it was reasonably foreseeable that children would play on the boat and be injured, it was not foreseeable that they would prop up the boat and be injured by its falling off the prop, and therefore the plaintiff's accident was of a different kind from anything the council could reasonably have foreseen. On the plaintiff's appeal to the House of Lords, the court held that since the council had conceded that it should have removed the boat because of the risk that children might suffer minor injuries if the rotten planking gave way beneath them, the wider risk of more serious injury being caused by the condition of the boat, which could have been eliminated without the council incurring additional expense, also fell within the scope of the council's duty of care and accordingly, the council was liable for the plaintiff's injuries.

[31] In **The Wagon Mound (No 2)**, on 30 October 1951, two of the respondents' vessels were undergoing repairs at Sheerlegs Wharf in Sydney Harbour. On the same day, the vessel Wagon Mound, on charter to the appellant, was taking in bunkering oil from Caltex Wharf when due to the carelessness of the appellant's engineers a large quantity of furnace oil overflowed on to the surface of the water and drifted to Sheerlegs Wharf where it subsequently caught fire, causing extensive damage to the respondents' vessels.

[32] In an action by the respondents for damages, based on nuisance and on negligence, the trial judge found that the officers of the Wagon Mound would regard furnace oil as being very difficult to ignite on water, but their experience would have

been that this had very rarely happened and that they would have regarded it as a possibility, but one which would become an actuality only in very exceptional circumstances. He therefore found that the damage to the respondents' vessels was not reasonably foreseeable by those for whose acts the appellant was responsible. He gave judgment in regard to the issue of negligence against the respondents but, regarding the issue of nuisance, found that liability did not depend on foreseeability and gave judgment for the respondents on that issue.

[33] On appeal and cross-appeal to the Privy Council, the court held:

> "On the evidence in the present case (which was different from that in the *Wagon Mound (No 1)* there would have been present to the mind of a reasonable man in the position of the engineer of the appellant that there was a real risk of fire, through a continuing discharge of furnace oil on the water, and his knowledge that oil so spread was difficult to ignite and that that would occur only very exceptionally would not, in the circumstances of this discharge, make such a reasonable man think it justifiable to neglect to take steps to eliminate the risk; accordingly negligence, for which the appellant was vicariously responsible, was established, the damages were not too remote and the respondents were entitled to recover on the issue of negligence."

[34] The decisions in these cases clearly show that for a claimant to succeed he must show that: (1) there was a known source of danger for which the defendant was responsible, (2) it was reasonably foreseeable that this known source of danger could cause injury or damage of a particular nature and (3) injury or damage of the same genus as that which was reasonably foreseeable occurred.

[35] In order to determine whether or not these criteria have been met, an appellate court must look at the findings of fact made by the trial judge and determine whether such findings were reasonable in light of how the trial was conducted and the evidence presented to the court. The importance of this was clearly demonstrated by the decisions reached by the Privy Council in the **Wagon Mound (No 1)** and the **Wagon Mound (No 2)**. The respondent's wharf in **Wagon Mound (No 1)** and the respondents' vessels in **Wagon Mound (No 2)** were damaged by the same fire at the same location. At the trial in **Wagon Mound (No 1)**, the assertion by the charterers of the Wagon Mound that it was not reasonably foreseeable that the oil on the water could ignite was not challenged. Additionally, the evidence led on behalf of the operators of the wharf to establish liability was different from that which was led by the owners of the vessels in **Wagon Mound (No 2)**. Consequently, it was held that the failure of the operators of the wharf to obtain an award of damages was not inconsistent with the decision to award damages in **Wagon Mound (No 2)**.

[36] Before Straw J the appellant presented, as the source of danger, the over-revving of the engine of the motor car and argued that it was reasonably foreseeable that this could cause the engine to explode, and did cause the explosion which caused her injuries. Based on the evidence and the conduct of the case, the learned judge made the following findings:

> "(1) The defendant specializes in muffler repairs and had nothing to do with the repairs to the gearbox of the car.

(2) The engine of the car was not being over-revved.

(3) Something may have gone amiss with the flywheel and that it may have been due to some previous repair done by a third party.

(4) The defendant could not have foreseen that there might have been something amiss with the gearbox bell housing and flywheel and that the revving of the engine would have caused an explosion in that area."

[37] Applying the principles extracted from **Hughes v Lord Advocate**, **Jolley v Sutton London Borough Council** and the **Wagon Mound (No 2)**, the appellant can only succeed if she can show that Straw J's findings and conclusions were wrong. Lord Gifford has failed to so persuade me.

[38] Did Straw J therefore err in making no findings of fact as to whether or not the appellant was invited into the pit or allowed to be there? I think not. As was shown, in **Jolley v Sutton London Borough Council**, "the common duty of care" under section 2(2) of the Occupiers' Liability Act 1957, which is identical to section 3(2) of the Jamaican Act, is based on foreseeablity. Having found therefore that the respondent's servants could not have reasonably foreseen the type of injury sustained by the appellant, it was unnecessary to make a finding as to whether or not the appellant was invited into or allowed to be in the pit. Based on the evidence of Mr Gerald Lacey, Snr, which no doubt the learned judge accepted, the only danger which could be reasonably foreseen by someone in the pit while the engine of a motor car was in motion was burns from dripping oil or contact with the exhaust system. I do not believe that it

could be said that the injury caused to the appellant was a variant of what was reasonably foreseeable.

[39] In my view, the appellant failed to show that there was a known source of danger for which the respondent was responsible, or that the respondent breached its duty of care under the Occupiers' Liability Act or was negligent. For these reasons, I believed that the appeal ought to have been dismissed with costs to the respondent to be taxed if not agreed.