BAILII Citation Number: [1963] EWCA Civ 3
Case No.:

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL

Royal Courts of Justice,
29th November 1963.

B e f o r e :

LORD PEARCE,
LORD JUSTICE HARMAN
and LORD JUSTICE DIPLOCK
Between

Between:

DOUGHTY

-v-

TURNER MANUFACTURING COMPANY LIMITED

(Transcript of the Shorthand Notes of the Association of Official Shorthandwriters, Ltd., Room 392, Royal Courts of Justice, and 2, New Square, Lincoln's Inn, W.C.2.)

Mr A.E. JAMES, Q.C. and Mr S. BROWN (instructed by Messrs Park, Nelson & Dennes & Co., Agents for Messrs Harvey, Mabey & Seagroatt, Birmingham) appeared on behalf of the Plaintiff (Respondent).
Mr E. BRIAN GIBBENS, Q.C. and Mr M. UNDERHILL (instructed by Messrs Barlow, Lyde & Gilbert, Agents for Messrs Thompson, Warmington & Cave, Wolverhampton) appeared on behalf of the Defendants (Appellants).

HTML VERSION OF JUDGMENT

LORD PEARCE (read by **Lord Justice Harman**): The Defendants appeal from a Judgment of Mr Justice Stable awarding to the Plaintiff £150 damages for personal injuries suffered in an accident which occurred during the Plaintiff's employment at the Defendants' factory.

The scene of the accident was the heat-treatment department to which the Plaintiff had gone for the purpose of delivering a message to the foreman. In that department there stood two baths or cauldrons 3ft. 10ins. high and 3ft. 4ins. square. They had thick walls intended to resist great heat so that the internal area of each bath was only 18 by 31 inches. Into those baths was placed sodium cyanide powder. Two upright electrodes, lowered by chains into the bath, passed an electric current through the powder which became a molten liquid and attained the very great heat of 800 degrees Centigrade, eight times the heat of boiling water. The process consisted of subjecting metal parts to heat by immersing them in the liquid. In order to conserve the heat in each bath there were two loose covers which rested side by side over it. These covers were made of a compressed compound of asbestos and cement known as Sindanyo which, until this accident occurred, was thought to be a safe and suitable material for such a purpose. It had been so used in England and the United States for over 20 years. The Defendants bought the covers for the particular purpose from the reputable manufacturers of the baths.

Immediately before the accident the electrodes in the bath were being changed by a workman standing on the side of the bath. He, or some other of the four workmen in the vicinity, must have inadvertently knocked the loose asbestos cement cover so that it slid into the bath and disappeared from sight beneath the molten liquid. Nobody regarded this as a dangerous matter or withdrew from the neighbourhood of the bath. Two men actually moved closer to peer into the bath and see what had happened. After an interval, which one witness put at one minute and another at two minutes, the molten liquid erupted from the bath, injuring the bystanders by its great heat and setting fire to objects on which it fell. The Plaintiff was at that moment standing by the side of the foreman not far from the bath.

The reason for the eruption was discovered by experiments which Imperial Chemical Industries Ltd., who had installed similar covers, carried out as a result of this accident. It then appeared that whenever any cover made of compound asbestos cement was immersed in the molten liquid and subjected to a temperature of over 500 degrees it created such an eruption.

At that temperature the compound, which contains hydrogen and oxygen, undergoes a chemical change which either creates or releases water. This water turns to steam and produces an explosion or eruption which throws some of the hot molten liquid out of the bath, Thus the immersion of the cover in the bath was inevitably followed by an eruption of liquid from the bath. The same result would occur if something that contained actual moisture in it (as opposed to what might be called the potential moisture which is thus precipitated by great heat) was immersed; if, for instance, this cover, which is porous and capable of holding water, had been immersed when wet. But it was not suggested that this particular cover contained actual moisture at the time of the accident, since it had been standing in the hot room for some days beforehand.

The learned Judge held that, as the evidence showed, the Defendants did not appreciate that the immersion of the cover in the liquid would produce an explosion and he held that they were not to blame for not appreciating it. He continued:

> "The result simply is this that if, for example, the bath contained an amount of this substance and it exploded whilst it was being used in the ordinary way, I think the Defendants would have escaped liability".

That is clearly right.

He went on to hold, however, that it must have been common knowledge that there were substances which, if dropped into such immense heat, would produce an explosion, although not all substances would do so; and that, therefore, "every possible precaution should be taken to see that nothing was dropped into the bath which could have that result". He therefore held that the inadvertence of one of the Defendants' workmen in upsetting the cover into the bath was "negligent in the true sense of the word; that is to say, it constituted an actionable wrong".

No authorities were cited to the learned Judge at the trial and at that date, we are told, the Judgment of the Privy Council in the Wagon Mound, reported in 1961 Appeal Cases, 388, had not yet been reported. In the light of that important case which gave such a different complexion to cases where seemingly harmless acts result in unforeseeable calamities, I think that the learned Judge, if it had been called to his attention in the case, might have reached a different conclusion. In the Wagon Mound case the Board held that Re Polemis should no longer be regarded as good law and that the essential factor in determining liability for the consequences of a tortious act of negligence is whether the damage is of such a kind as the reasonable man should have foreseen. "After the event", said Lord Simonds giving the

Judgment of the Board, at page 424, "even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility".

In the present case the evidence showed that nobody supposed that an asbestos cement cover could not safely be immersed in the bath. The learned Judge took the view, which Mr James concedes was correct, that if the Defendants had deliberately immersed this cover in the bath as part of the normal process, they could not have been held liable for the resulting explosion. The fact that they inadvertently knocked it into the bath cannot of itself convert into negligence that which they were entitled to do deliberately. In the then state of their knowledge, for which the learned Judge, rightly on the evidence, held them in no way to blame, the accident was not foreseeable. In spite of Mr James' able argument I am of opinion that they cannot, therefore, be held liable for negligence.

Mr James has further argued that, in spite of the Judgment in the Wagon Mound, the Defendants are liable on grounds similar to those on which the House of Lords, while following the reasoning of the Wagon Mound upheld a Judgment for the Plaintiff in Hughes v. Lord Advocate, reported in 1963 2 Weekly Law Reports, 779. In that case an allurement to children in the roadway constituted by a red lamp, a hole in the ground and a tarpaulin tent caused an unforeseeable explosion and injury by burns. Their Lordships held, however, that although the exact chain of events was unforeseeable, the type of accident and the injuries "though perhaps different in degree, did not differ in kind from injuries which might have resulted from an accident of a foreseeable nature". (See Lord Reid's Speech at page 781).

> "Of course the pursuer has to prove that the defender's fault caused the accident and there could be a case where the intrusion of a new and unexpected factor could be regarded as the cause of the accident rather than the fault of the defender. But that is not this case. The cause of this accident was a known source of danger, the lamp, but it behaved in an unpredictable way".

He concludes with these words:

> "This accident was caused by a known source of danger but caused in a way which could not have been foreseen and in my judgment that affords no defence".

In the present case the potential eruptive qualities of the covers when immersed in great heat were not suspected and they were not a known source of danger, but Mr James argues that the cause of injury was the

escape of the hot liquid from the bath, and that injury through the escape of liquid from the bath by splashing was foreseeable. The evidence showed that splashes caused by sudden immersion, whether of the metal objects for which it was intended or any other extraneous object, were a foreseeable danger which should be carefully avoided. The falling cover might have ejected the liquid by a splash and in the result it did eject the liquid, though in a more dramatic fashion. Therefore, he argues, the actual accident was merely a variant of foreseeable accidents by splashing. It is clear, however, both by inference and by one explicit observation, that the learned Judge regarded splashes as being in quite a different category. Moreover, according to the evidence it seems that the cover never did create a splash: it appears to have slid into the liquid at an angle of some 45 degrees and dived obliquely downwards. Further, it seems somewhat doubtful whether the cover falling only from a height of 4 or 6 inches, which was the difference in level between the liquid and the sides, could have splashed any liquid outside the bath. And when (if ever) the Plaintiff was in the area in which he could be hit by a mere splash (apparently the liquid being heavy, if splashed, would not travel further than a foot from the bath) the cover had already slid into the liquid without splashing. Indeed, it seems from the Plaintiff's evidence that when he first came on to the scene the cover was already half in and half out of the liquid. On broader grounds, however, it would be quite unrealistic to describe this accident as a variant of the perils from splashing. The cause of the accident, to quote Lord Reid's words, was "the intrusion of a new and unexpected factor". There was an eruption due to chemical changes underneath the surface of the liquid as opposed to a splash caused by displacement from bodies falling on to its surface. In my judgment, the reasoning in Hughes v. Lord Advocate cannot be extended far enough to cover this case.

I have great sympathy with the Plaintiff who suffered injury through no fault of his own. But, in my judgment, the Defendants cannot, on the evidence, be held guilty of negligence, and I would accordingly allow the appeal and enter Judgment for the Defendants.

LORD JUSTICE HARMAN: The learned Judge appears to have decided this case in favour of the Plaintiff upon the footing that having regarded to the peril engendered by the presence in the cauldron of this mass of molten material and to the knowledge which the Defendants had that certain substances might produce dangerous results it was negligent in them or, in other words, a breach of their duty towards the Plaintiff to allow anything whatsoever to fall or slip by accident into the molten material. In fact the hardening process operated in this room consisted of dipping objects into this very material and nobody suggested that there was any danger in that, so that the learned Judge must have considered that no negligence was

involved in purposely putting objects not known to be dangerous into the cauldron.

In effect the learned Judge's finding comes to this, that the Defendants were insurers of the Plaintiff's safety. Now, it may very well be that it is desirable that it should be the law that the employer is such an insurer and that an injury which, without the employee's fault, happens to him in the course of his employment is the responsibility of his employer. I believe this to be the law in some parts of the United States of America and it is the principle lying behind the workmen's compensation code now abandoned, but, in my judgment, it is not justifiable to import the doctrine of Rylands v. Fletcher into this branch of the English law. We ought, in my opinion, to start with the premise that the criterion in English law is foreseeability. I take it that whether the Wagon Mound case is or is not binding on this Court we ought to treat it as the law. Our enquiry must, therefore, be whether the result of this hard-board cover slipping into the cauldron, which we know now to be inevitably an explosion, was a thing reasonably foreseeable at the time when it happened. It is acknowledged by the Respondent that no-one in the employer's service knew of the likelihood of such an event, and it is clear that no-one in the room at the time thought of any dangerous result. There was a striking piece of evidence of the two men who went and looked over the edge of the cauldron to see where the piece of board had gone. Neither they, nor anyone else, thought they were doing anything risky.

The Respondent's argument most persuasively urged by Mr James rested, as I understood it, on admissions made that, if this lid had been dropped into the cauldron with sufficient force to cause the molten material to splash over the edge, that would not have been an act of negligence or carelessness for which the employers might be vicariously responsible. Reliance was put upon the case of Hughes v. Lord Advocate, where the exact consequences of the lamp overturning were not foreseen, but it was foreseeable that if the manhole were left unguarded boys would enter and tamper with the lamp and it was not unlikely that serious burns might ensue for the boy. Their Lordships' House distinguished the Wagon Mound case on the ground that the damage which ensued though differing in degree was the same in kind as that which was foreseeable. So it is said here that a splash causing burns was foreseeable and that this explosion was really only a magnified splash which also caused burns and that, therefore, we ought to follow Hughes v. Lord Advocate and hold the Appellants liable. I cannot accept this. In my opinion, the damage here was of an entirely different kind from the foreseeable splash. Indeed, the evidence showed that any disturbance of the material resulting from the immersion of the hard-board was over an appreciable time before the explosion happened. This latter was caused by the disintegration of the hard-board under the great heat to which it was subjected and the consequent release of the moisture enclosed within it. This

had nothing to do with the agitation caused by the dropping of the board into the cyanide. I am of opinion that it would be wrong on these facts to make another inroad on the doctrine of foreseeability which seems to me to be a satisfactory solvent of this type of difficulty.

I would allow the appeal.

LORD JUSTICE DIPLOCK: About two years before the accident the Defendants, who are the Plaintiff's employers, purchased for the purpose of their business from a reputable manufacturer of asbestos cement an asbestos cement cover for a cyanide bath heat treatment furnace, in which a cyanide salt was raised to a temperature of 800 degrees Centigrade, at which temperature it became a somewhat viscous liquid. They did so on the recommendation of the reputable manufacturers of the furnace itself. The cover was of a type designed for use with the furnace and had been widely so used in the trade for upwards of 20 years. The use of a cover made of this material presents, it is now known, two risks of injury to persons in the vicinity of the furnace. The first risk, which it shares with any other solid object of similar weight and size, is that if it is allowed to drop on to the hot liquid in the bath with sufficient momentum it may cause the liquid to splash on to persons within about one foot from the bath and injure them by burning. The second risk is that if it becomes immersed in a liquid, the temperature of which exceeds 500 degrees Centigrade, it will disintegrate and cause an under-surface explosion which will eject the liquid from the bath over a wide area and may cause injury by burning to persons within that area.

The former risk was well-known (that was foreseeable) at the time of the accident; but it did not happen. It was the second risk which happened and caused the Plaintiff damage by burning. The crucial finding by the learned Judge, in a characteristically laconic Judgment, was that this was not a risk of which the Defendants at the time of the accident knew, or ought to have known. This finding, which was justified by the evidence and has not been assailed in this appeal, would appear to lead logically to the conclusion that in causing, or failing to prevent, the immersion of the cover in the liquid, the Defendants, by their servants, were in breach of no duty of care owed to the Plaintiff, for this was not an act or omission which they could reasonably foresee was likely to cause him damage.

The learned Judge, nevertheless, found the Defendants liable. His ratio decidendi, which was somewhat elliptically expressed can, I think, be fairly expanded into the following findings of fact and propositions of law: (1) It was common knowledge that some substances (viz. those which were chemically unstable at 800 degrees and upon disintegration at that temperature formed, among other things, a gas) would cause an explosion

upon immersion in the liquid cyanide. (2) It was common knowledge that other substances (viz. those which were chemically inert at 800 degrees) would not cause an explosion upon immersion in the liquid cyanide. (3) Therefore, the Defendants were under a duty to all persons whom they ought reasonably to foresee might be within the area within which they would be likely to sustain damage if an explosion occurred to take every possible precaution to see that nothing was immersed in the liquid cyanide which in fact, whether or not they knew or ought to have known it, could cause an explosion.

(4) The Plaintiff was a person whom the Defendants ought reasonably to have foreseen might be within the area which he would be likely to sustain damage if an explosion occurred.

(5) The Defendants did not take every possible precaution to ensure that the cover was not immersed in the liquid cyanide. They used it in a place where it might inadvertently be caused to fall into the liquid cyanide and become immersed therein. (6) One of the Defendants' servants in fact inadvertently caused the cover to fall into the liquid cyanide and become immersed therein, thereby causing an explosion whereby the Plaintiff sustained damage. (7) Therefore, the damage was the result of the Defendants' breach of the duty which they owed to the Plaintiff.

With great respect the fallacy in this reasoning appears to me to lie in the proposition of law in paragraph (3). It means, in effect, that the Defendants could only use the furnace at their peril, for the whole purpose of its use was to immerse in it substances which were chemically inert at 800 degrees. If the learned Judge's proposition is correct the mere fact of an explosion consequent upon the immersion of some substance in the liquid would render the Defendants liable, however meticulous the care they had taken to see that the substance was chemically inert at 800 degrees, for the fact of the explosion would show that the substance "could" cause one.

This is to impose on the Defendants a "strict liability" analogous to the duty to prevent a dangerous thing escaping from his hand which, under the rule laid down in Rylands v. Fletcher, 1868 Law Reports, 3 House of Lords, page 330, is owed by an occupier of land to persons who are likely to be injured by its escape. An attempt to import into the general law of negligence a similar strict liability upon persons carrying on an ultra-hazardous activity was made in Read v. J. Lyons & Co. Ltd., 1947 Appeal Cases, page 156, and was negatived by the House of Lords.

There is no room to-day for mystique in the law of negligence. It is the application of common morality and common sense to the activities of the common man. He must take reasonable care to avoid acts or omissions

which he can reasonably foresee would be likely to injure his neighbour; but he need do no more than this. If the act which he does is not one which he could, if he thought about it, reasonably foresee would injure his neighbour it matters not whether he does it intentionally or inadvertently. The learned Judge's finding, uncontested on appeal, that in the state of knowledge as it was at the time of the accident the Defendants could not reasonably have foreseen that the immersion of the asbestos cement cover in the liquid would be likely to injure anyone must lead to the conclusion that they would have been under no liability to the Plaintiff if they had intentionally immersed the cover in the liquid. The fact that it was done inadvertently cannot create any liability, for the immersion of the cover was not an act which they were under any duty to take any care to avoid.

It was, however, argued by Mr James for the Appellant that, even though the risk of explosion upon immersion of the cover was not one which the Defendants could reasonably foresee, the Plaintiff can, nevertheless, recover because one of the Defendants' servants inadvertently either knocked the cover into the liquid or allowed it to slip in, thus giving rise to a foreseeable risk of splashing the hot liquid on to the Plaintiff and injuring him by burning. The actual damage sustained by the Plaintiff was damage of the same kind, that is by burning, as could be foreseen as likely to result from knocking the cover into the liquid or allowing it to slip in, and Mr James contended that this was sufficient to impose a duty on the Defendants owed to the Plaintiff to take reasonable care to avoid knocking the cover into the liquid, or allowing it to slip in, and that the Plaintiff's damage flowed from their breach of this duty. Such a proposition might, before The Wagon Mound, have been supported by In re Polemis, 1921 3 King's Bench, page 560. But the decision of the Court of Appeal is no longer law; and Mr James relied principally on Hughes v. Lord Advocate, a case in which the House of Lords treated The Wagon Mound as correctly stating the law, but distinguished it on the facts. I do not think that this authority assists him. In Hughes v. Lord Advocate the breach of duty by the defendant which was relied upon was his omission to guard a dangerous allurement to children which was liable to cause them injury (inter alia) by burning. The infant plaintiff, to whom the duty was owed, was allured and was injured by burning, although the particular concatenation of circumstances which resulted in his burns being more serious than they would have been expected to be could not reasonably have been foreseen. But they were the direct consequence of the defendant's breach of duty and of the same kind as could reasonably have been foreseen, although of unforeseen gravity. But in the present case the Defendants' duty owed to the Plaintiff in relation to the only foreseeable risk, that is of splashing, was to take reasonable care to avoid knocking the cover into the liquid or allowing it to slip in in such a way as to cause a splash which would injure the Plaintiff. Failure to avoid knocking it into the liquid, or allowing it to slip in, was of itself no breach of duty to the

Plaintiff. It is not clear on the evidence whether the dropping of the cover on to the liquid caused any splash at all. The Judge made no finding on this. The reasoning in his Judgment is not sufficiently explicit to make it clear whether the point argued by Mr James, with which I am now dealing, formed part of his ratio decidendi, though some of his observations in the course of the hearing suggest that it was not. However that may be, it is incontrovertible that, even if there was some slight splash when the cover fell on to the liquid, the Plaintiff was untouched by it and it caused him no injury. There was thus, in the circumstances of this case, no breach of duty to the Plaintiff involved in inadvertently knocking the cover into the liquid or inadvertently allowing it to slip in.

For these reasons I would accordingly allow this appeal.

MR GIBBENS: My Lord, I ask that the appeal be allowed,

Judgment entered for the Defendants, and that the costs of this appeal should follow.

LORD JUSTICE HARMAN: Is the Plaintiff legally aided?

MR GIBBENS: No, my Lord; it is a Union case.

LORD JUSTICE HARMAN: Mr Colston, what do you say about costs?

MR C. COLSTON (for Mr James): My Lord, this case was started in the County Court by the Plaintiff, as your Lordship will know. It was then transferred to the High Court at the instigation of the Defendant Appellants in this case. I would only say this, that your Lordship may consider that it would be proper that the costs in the Court below should be on the County Court scale.

LORD JUSTICE HARMAN: On the County Court scale up to the date of transfer. Do you object to the transfer of the case to the High Court?

MR COLSTON: Yes, my Lord. It was transferred at the instigation of the Appellants, because this case is in the nature of a test case for them. I understand that other people were injured in this same accident, my Lord. The result of those claims depends upon the Judgment in this case.

LORD JUSTICE DIPLOCK: This is a test case for both sides.

MR COLSTON: Yes, my Lord.

LORD JUSTICE HARMAN: You say that the Defendants wanted the matter pursued in the High Court.

MR COLSTON: Yes, my Lord.

LORD JUSTICE HARMAN: What do you say about that, Mr Gibbens? What Order did the learned Judge make?

MR GIBBENS: My Lord, he made an Order for costs in favour of the Plaintiff on the High Court scale after the date of transfer. Of course, we could not object to that. They asked for it. My Lord, the tables are being turned on me now. The sole question at issue is whether it was reasonable for this case to be transferred to the High Court as the County Court Act provides.

LORD JUSTICE HARMAN: Does the County Court Act give any circumstances which should make it proper to transfer?

MR GIBBENS: My Lord, under the County Court Act the Judge may transfer the case to the High Court if it involves questions of law or fact of sufficient importance. It was under that section that we applied to the County Court Judge and had it transferred.

LORD JUSTICE HARMAN: The actual amount involved here is very small.

MR GIBBENS: Yes, that is why this case was brought in the County Court. I only would observe that the other cases were made to mark time, so that this case could be decided first, by those acting for the various Plaintiffs. My Lord, we were not satisfied that it should be dealt with on that basis. We wanted a High Court decision for that, because there is one fatal accident case. It was, therefore, reasonable, and I would submit the Judgments of your Lordships have made it apparent, to regard this case as of such importance as to justify High Court trial.

LORD JUSTICE HARMAN: It was not a matter altogether easy, because we reserved Judgment.

MR GIBBENS: My Lord, the issue of fact was out of all

proportion to the monetary issue in this particular instance. As Lord Justice Diplock said it is a test case for both sides. We were not prepared to have it decided in the County Court.

LORD JUSTICE DIPLOCK: The cases are all Union cases, are they?

MR GIBBENS: Yes, my Lord.

LORD JUSTICE HARMAN: Are they High Court or County Court cases?

MR GIBBENS: My Lord, they are High Court cases. I understand that they are being conducted by other Solicitors, but by the same Union.

LORD JUSTICE HARMAN: We do not see why we should not apply the same rules as were applied by the Judge below. Any costs should be High Court costs when the matter was in the High Court.

MR COLSTON: If your Lordship pleases.

MR GIBBENS: There is one small matter I ask leave to mention.

On the transfer of the case to the High Court the Registrar made an Order as required of him that the Defendants should give security for costs in the sum of £450 as paid in by the Defendants under that Order. The learned Judge did mention, after giving Judgment, that that sum should be paid out to the Defendants, but by some oversight it was not included in the Judgment as drawn up. So it would be the most simple course if I were to ask your Lordships now for an Order that that sum be paid out.

LORD JUSTICE HARMAN: Unless it appears on the Judgment Schedule. They must have one, yes. There is no suggestion that you are not entitled to have it?

MR GIBBENS: No, my Lord. My learned friend Mr Stephen Brown for the Plaintiff before the learned Judge agreed that I should have it out, even though there was a stay of execution.

LORD JUSTICE HARMAN: Very well. There will be an Order for payment out of the money in Court.

MR GIBBENS: I am much obliged, my Lord.