JAMAICA

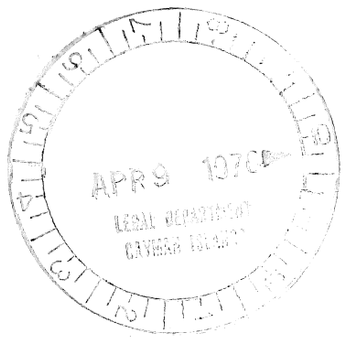
IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CIVIL APPEAL No. 15/75

BEFORE: The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Watkins, J.A.(Ag.).

B E T W E E N NOVELETT BISH

A N D LEATHERCRAFT LTD.



Mr. V.B. Grant, Q.C. for the Plaintiff/Appellant.

Mr. H.G. DeLisser for the Defendants/Respondents.

11th July, 1975 and
24th October, 1975

WATKINS, J.A.(Ag.):

On July 11, 1975 we allowed the appeal in this matter, set aside the judgment entered in the court below in favour of the respondents, and entered judgment in favour of the appellant with a direction that the case be remitted to the court below for assessment of damages. We promised that we would put our reasons in writing and do so now.

The appellant sought to recover damages for negligence against the respondents in the following circumstances. The respondents, a registered company, were button-makers carrying on business at 85 Brunswick Avenue, Spanish Town, St. Catherine. Their business of button-making involved the processes of button-chopping and button-pressing and in their button-pressing department at least two types of button-pressing machines (types X and Y for ease of reference) were in use. They share certain common features, but in one material particular they differ. They each have a mould upon which is placed the material prepared for processing into a button, and above the mould is the piston which, in the words of Mr. Bennett Wolfeld, the plant manager, "comes down (upon the mould) at approximately slow speed, but with 12 tons of pressure" and makes the button. In type X machine, there are two buttons, A and B, the former on the left side, the latter on the right side, of the machine. When button A alone is pressed, the piston rises.

By pressing both A and B simultaneously the piston descends. Both buttons are on the same plane with the sides of the machine on which they are respectively located. They do not project or extend out from the sides of the machine. In type Y machine, however, there is in place of button B, a lever standing some three inches above the right side. By pressing button A alone on this machine the piston rises. By what operation the piston in type Y machine is made to descend was, however, a matter of some controversy on the evidence, the plant-manager contending with some conviction that both button A and the lever had to be simultaneously activated, whilst the appellant, equally firmly, insisted that at the time of her injury she did not have her hand on button A at all. The Service Manual tendered in evidence was silent on the matter. No guard protected this rather prominently projected lever from accidental handling, and it was indeed the testimony in cross-examination of Mr. Wolfeld that "it would be easier for someone to touch the lever by accident than the button". A moulded button carries a shank or hook at the bottom of it. Efficient working of both types of machines requires that buttons should be heated before being pressed. Buttons not pre-heated tended to adhere to the piston and so efficient plant management required the provision of some mechanism to extract buttons which so adhered. It was, accordingly, the practice in the respondents' plant to provide an operator with a 3" nail for the purpose. This was done by inserting the nail into the hook or shank and pulling it away from the piston. Both types of machines are electrically operated.

The appellant Bish joined the respondents' business as a button-chopper in May 1971. In December, 1973, she was trained to use the type X machine and seemed to have worked with that machine for some time. On March 14, 1974 the work-force of the button-pressing department was so afflicted with unpunctuality and illness that Mr. Wolfeld felt obliged to transfer the appellant to the button-pressing department. For a little while she worked there on a type X machine, and then returned to her button-chopping. She was again, however, sent back to the button-pressing department and this time she was set to work on the type Y machine - and this for the very first time. Mr. Wolfeld stood behind her and instructed her on the use of the machine for some time.

He then left her on her own, not however before she drew to his attention the fact that the buttons were not pre-heated. After successfully pressing about two dozen buttons the injury occurred. A button adhered to the piston. No 3" nail was on her machine, nor did the nearest operators to her have any. The three supervisors whom she might have consulted were nowhere to be found, and it was a rule of the plant that save for urgent personal reasons and at lunch-breaks no operator was to leave her machine. In the exigency of the circumstances, the appellant, a very good worker in the judgment of Mr. Wolfeld, decided to use her right index finger to extricate the button. Supervisors had been known to ask when nails were unavailable "You can't take your finger and take it out?" In her first effort the shank separated itself from the button. The appellant persisted and in so doing, the elbow of her right hand apparently came into contact with the unguarded lever whereupon the piston came down and crushed the distal phalanx of the right index finger which she had been using to dislodge the button. The medical certificate tendered in evidence confirmed the removal of the phalanx.

It was in the foregoing circumstances that the appellant brought her action in common-law negligence, particulars of which were that the respondents negligently operated or managed their factory and/or failed to provide a safe and proper system of work in order to secure the safety of the appellant. The defence stated at the trial was a mere denial of negligence. Contributory negligence was not pleaded, nor did the appellant add a claim in breach of statutory duty.

In his reasons for judgment the resident magistrate found that the buttons were not pre-heated, that the nail requisite in the circumstances was not provided and that no supervisor was available for consultation. On the other hand, he found that the type Y machine which the appellant had been operating was in perfect working condition, and that the appellant had been pressing button A at the material time. In his view, the immediate and proximate cause of the accident was not the omissions of the respondents, but the positive act of the appellant in pressing button A at the critical moment. "No accident" he said "could have taken place had she taken the precaution of releasing the pressure by the finger of her (free) left hand on button A", and, he

continued "the plaintiff proved, and proved only that she received an injury using a button-pressing machine. She had to go further than that; she had to establish that either the absence of the nail or the failure to pre-heat the buttons before passing them to her for processing resulted in injury to her finger." In the grounds of appeal filed by him as in his arguments before us learned attorney-at-law for the appellant Mr. V.B. Grant, Q.C. urged that the decision of the court below was contrary to the weight of the evidence and he cited a number of cases bearing upon the duty of an employer towards his servant. We do not consider it necessary to refer to these cases. Learned attorney-at-law for the respondents rested his arguments almost entirely on the resident magistrate's reasons for judgment.

We regret that we must differ from the resident magistrate on the conclusions of law to which he arrived on the facts as found by him. Additionally, we would observe that it is apparent that the relevance of the unfenced or unguarded lever as a factor, in the special circumstances of this case, leading to the accident quite escaped his notice inasmuch as his reasons for judgment bear no reference at all to it. In so doing, we feel that he fell into error. The nature and scope of an employer's duty to his workman is well settled at common-law. Speaking in broad terms, it is to take reasonable care for his servant's safety in all the circumstances of the case. (Paris v. Stepney Borough Council (1951) 1 All E.R. 42 at p. 50). To particularise against the background of the instant case, it involves, inter alia, the provision of adequate material, a proper system or method of work and effective supervision (Wilson and Clyde Coal Co. v. English (1937) 3 All E.R. 628 at p. 640). This duty exists whether the employment is inherently dangerous or not (Speed v. Thomas Swift and Co. Ltd. (1943) 1 All E.R. 539). In all these respects the respondents were in default. Buttons were not pre-heated. This circumstance rendered imperative the provision of nails to extricate such un-pre-heated buttons as would adhere to the piston. Absence of the nail obliged an operator to contrive and resort to the use of a finger was the contrivance expected by management. Such a contrivance in its turn by its very nature exposed an operator to the likely risk of accidental handling of an unguarded lever. These omissions on the part of the

respondents were the ones that had set the stage for the accident and precipitated it. In the words of Mr. Wolfeld - "the lever was put on to make it easier to operate". Without a guard, however, it constituted a potential hazard which mushroomed into a real danger in conjunction with the circumstances of failure of duty on the part of the respondents as already indicated. Had there been a guard over this lever the strong probability is that the accident would not have occurred even if the appellant had continued to press button A. In Staply v. Gypsum Mines Ltd. (1953) A.C. 663 at p. 682 Lord Reid observed: "It may often be impossible to say that, if a man had done what he omitted to do, the accident would certainly have been prevented. It is enough in my judgment, if there is a sufficiently high degree of probability". The pressing of button A, perhaps the consequence of the appellant's unconscious preoccupation with the task of extricating the un-pre-heated button with her finger, became a factor, but neither an immediate nor proximate one, leading to the accident because, and only because, of the failure of the respondents to discharge their duty of care to the appellant.

Finally, the resident magistrate expressed himself as confirmed in the conclusions to which he had arrived by reason of a written judgment of this Court in R.M. Civil Appeal No. 49/73 Lilbert Gonzales v. A. G. O'Brien wherein the appeal of the defendant/appellant was allowed and the judgment in favour of the plaintiff/respondent set aside. In Gonzales' case the plaintiff was injured whilst using an electrical saw belonging to the defendant and in the course of the latter's employment. No guard was provided for the saw, but the evidence established no causal connection between the absence of the guard and the injury sustained. Indeed, the evidence on behalf of the plaintiff himself strongly indicated otherwise. The resident magistrate nevertheless found in his favour and this Court had no hesitation in setting aside the judgment observing, in the words of Lord Thankerton in Watt v. Thomas (1947) 1 All E.R. 582 at p. 587 that the learned trial judge had failed to take "proper advantage of his having seen and heard the witnesses". These are not the circumstances in the instant case.

There it was a case of the perception or non-perception of facts. Here it is a case of the proper evaluation of facts and of the proper conclusions of law arising therefrom.

For the foregoing reasons, therefore, we allowed the appeal, set aside the judgment entered in the court below in favour of the respondents and entered judgment in favour of the appellant, and directed that the case be remitted to the court below for assessment of damages. As regards costs, the following order was also made. Costs on appeal to the appellant in the sum of $40 with costs to the appellant in the court below to be taxed or agreed upon.