JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CIVIL APPEAL No. 49/1973

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

BETWEEN LILBERT GONZALES

AND A. G. O'BRIEN

Mr. H. Edwards, Q.C., for Plaintiff/Respondent.

Mr. V. B. Grant, Q.C., for Defendant/Appellant.

March 7, 8, 1974
July 24, 1974

GRAHAM-PERKINS, J.A.:

The plaintiff sought to recover damges for negligence against the defendant in the circumstances following. In December, 1970 the defendant was engaged in the construction of a school building on St. John's Road, Spanish Town. The plaintiff attended at the school site and saw the defendant. He told the defendant that he was a carpenter in search of a job whereupon the defendant ... asked him what evidence he could provide as to his competence. To this query the plaintiff replied that he was willing to make his work speak for him. The defendant said: "You have your tools with you bring them and prepare to start work." The plaintiff started work at the site the following day. One morning, some two months later, he was cutting shores for decking some part of the building. His own saw could not, in his opinion, "cut fast enough for the time." The foreman lent him an electric saw and said he should continue to cut the shores. He noticed that there was "no guard over it like others". He asked the foreman why he had taken off the guard and the foreman replied that the saw "could not cut the wood as it was." We pause here to observe that it is by no means clear

whether the word "it" in the clause last quoted was intended to refer to the wood the plaintiff had been cutting or to the condition of the saw without its guard. It is probable that a reference to the state of the wood was intended since the plaintiff, who was not unfamiliar with the saw and its use, nevertheless used it without its guard. Equally, it is far from clear precisely what it was that the guard was designed to protect. Nothing is known as to its nature or purpose. Was it, for example, an adjustable guard designed to regulate the depth of the cut? There is some evidence that "gauges and guard around the lade was removed by the foreman". It may be assumed, however, that whatever the nature and purpose of the guard that had been attached to the saw, that part of the blade that came in contact with the material to be cut would be, at all material times, exposed. It is reasonable, we think, to assume further that notwithstanding the presence of a guard the saw was so designed that its blade would cut any material it was intended to cut quite independently of the angle or position in which the saw was held.

To proceed with the narrative, the plaintiff said that while using the saw an "apprentice hold the shores but he never hold it properly and it get out of control (the saw and the wood); I never remember the guard was not on it and it just cut me."

The foregoing was, in substance, the case advanced by the plaintiff against the defendant. In cross-examination he admitted that it was "not the first I see saw like this". It was not true, he said, that he "never know how to use that saw". He denied that the wood he was cutting was resting on his leg. He called a witness who said: "Plaintiff was using the saw on a board on his foot and it just slip through and slice him." One of the medical certificates admitted in evidence disclosed that the plaintiff had received a "longitudinal wound extending from the mid third of the right thigh to the right knee joint".

In his reasons for judgment in favour of the plaintiff the

resident magistrate said that he accepted "the plaintiff's testimony" that "he was given an electric saw to use by ... the foreman ..., and while he was using the saw it slipped off the object which he was ... cutting, and there being no guard on the saw the naked blade came into contact with his right thigh ..."

With the greatest respect to the magistrate who tried this case, it is, in our view, perfectly clear that he failed, in the words of Lord Thankerton in Watt v. Thomas (1947) 1 All E. R. 582, at p. 587, to take "proper advantage of his having seen and heard the witnesses". The plaintiff did not say that "while he was using the saw it slipped off" anything. Nor did he say that the naked blade came into contact with his thigh because there was no guard on the saw. As observed earlier, it was the plaintiff's witness who spoke of the saw slipping and this while the plaintiff "was using the saw on a board on his foot". It should be noted that this evidence of the plaintiff's witness is quite obviously consistent with the nature and position of the wound described in the medical certificate. It should also be carefully noted that the plaintiff did not attempt, even vaguely to explain how the blade of the saw came in contact with his thigh. What he said was that the saw got out of control, " never remember the guard was not on it, and it just cut me." With the best will in the world we find it quite impossible to read into the plaintiff's evidence an assertion that he received his injury because of the absence of a guard on the saw. Fom his evidence as to the "fault" of the apprentice the almost inevitable conclusion appears to be that he would have received that injury even if there had been a guard on the saw. In any event, even if the magistrate is to be taken to have found that it was the failure of the apprentice to hold the shores properly it cannot be said, without more, that such failure constituted a negligent act or omission. Nor can it be said, again without more, and even assuming such negligent act or omission, that the defendant was vicariously responsible therefor. At the commencement of the hearing we asked Mr. Edwards to define the negligent act in the defendant of which the plaintiff complained. Certainly it did not appear in the particulars of claim, nor did it

appear in the plaintiff's evidence. The plaintiff proved, and proved only, that he received an injury while using a saw that had no guard. In our opinion he was obliged, in order to succeed, to go much further. Assuming, without deciding, that there was some duty owed by the defendant to the plaintiff in the particular circumstances of this case with regard to the loan of the saw, and assuming that duty to be to provide on loan a saw with a guard, as distinct from a duty to warn the plaintiff as to the absence of a guard, the plaintiff was required to establish, as a matter of causation, that his injury resulted from the absence of that guard. This he clearly failed to do. In the result we would allow the appeal and set aside the judgment in favour of the plaintiff.

This case, in our view, has nothing to do with any theory of volenti non fit injuria as the magistrate appears to have thought. Nor was there any issue as to the plaintiff incurring the risk of losing his job by his failure to carry out the instructions of the foreman, again as the magistrate appears to have thought. There was not a shred of evidence that the foreman had "ordered" the plaintiff to use the electric saw. There was no evidence that the foreman had made any complaint as to the time being spent by the plaintiff on the cutting of shores. By concerning himself with non-existent issues, perhaps because of the way in which the case was conducted, the magistrate failed to address his mind to the one real issue that arose, namely, had the plaintiff established negligence in the defendant? For these reasons we would order a new trial before another resident magistrate.

We would order that the costs of the first trial abide the result of the new trial. The appellant will have the costs of this appeal fixed at $50.00