[JOSEPHIDES, STAVRINIDES, LOIZOU, JJ.]

MEDCON ENTERPRISES LIMITED,
Appellants-Defendants,

v.

ANASTASIA PIERI PERICLI AND ANOTHER,
Respondents-Plaintiffs.

(*Civil Appeal No.* 4882).

Negligence—Foreseeability—Test—Duty to take reasonable care to avoid foreseeable consequences—Master and Servant—Duty of the master to his servants—Fatal accident—Building works—Workman removing moulds at sixth floor fatally injured by unsupported protruding wooden bar colliding with sling of crane—Employer aware of the risk to workman from hitting of sling—Consequences reasonably foreseeable.

Contributory negligence—Apportionment of liability—Approach of the Court of Appeal—Workman held to have contributed to his injuries by failing to guard against risk—Trial Court apportioning one-fifth of the blame to the deceased workman—Such apportionment not interfered with on appeal as not being either wrong in principle or clearly erroneous.

Apportionment of liability—Made by trial Courts—Approach on appeal to such apportionment—See supra.

Cases referred to :

Overseas Tankship (U.K.) Ltd. v. *Morts Dock and Engineering Co., Ltd.* [1961] 1 All E.R. 404, (P.C.) ;

Tremain v. *Pike* [1969] 3 All E.R. 1303 ;

Barnett v. *Chelsea and Kensington Hospital Management Committee* [1968] 1 All E.R. 1068.

The facts sufficiently appear in the judgment of the Court, dismissing this appeal by the defendants employers.

Appeal.

Appeal by defendants against the judgment of the District Court of Famagusta (Georghiou, P.D.C. and Pikis, D.J.) dated the 25th February, 1970 (Action No. 291/69) whereby the plaintiffs were awarded the sum of £2,760 as damages in respect of the death of the late Pieris Theori Pericli,

the husband of plaintiff No. 1, who died as a result of injuries he received in an accident in the course of his employment by the defendants.

A. Triantafyllides with *A. Argyrides*, for the appellants.

Ch. Mylonas, for the respondents.

The judgment of the Court was delivered by :

JOSEPHIDES, J. : This appeal is in respect of a fatal accident which occurred at a building, which the appellants were erecting at Famagusta, on the 4th November, 1968. The appellants are a construction company and the deceased Pieris Theori Pericli was one of their workmen. The respondents are (*a*) the widow, and (*b*) the legal personal representatives of the deceased workman who died as a result of the injuries he received in the accident.

This accident occurred while the deceased was engaged as a " demoulder " on the sixth floor of a building of ten floors. We shall presently refer to the facts of the case in more detail. Damages were agreed upon and the appellants admitted that death resulted from the injuries suffered in the accident by the workman. The only issue left for determination was that of liability and there was practically no dispute about the facts of the case.

The Full District Court of Famagusta, after hearing evidence, came to the conclusion that the appellants were guilty of negligence, and on the issue of contributory negligence, one-fifth of the blame was apportioned to the deceased workman.

The facts, as briefly as possible, are as follows. On the day in question the deceased, along with another workman, were engaged in the process of removing the temporary support of the moulds known in Greek as " kaloupia ". It is usual when a contractor has to make a concrete slab to put up vertical and horizontal wooden bars, and these form what are known as moulds which are eventually filled in with the concrete mixture.

These two workmen, the deceased and the other workman, were engaged in removing the bars; the removal of the vertical bars is done first, before pulling down the horizontal bars. In accordance with the instructions given by the employers (the appellants) the inner vertical bars had to be removed before the removal of the outer vertical

bars. This method was employed in order to ensure maximum safety. In accordance with the employers' instructions, after the removal of the vertical bars, the workmen had to step aside so as not to expose themselves to the risk under the horizontal bars. The trial Court stated in their judgment that, after the removal of the vertical bars, an interval of about five minutes would inevitably elaspe before it was feasible to demolish the horizontal bars and that, during that interval and whilst " demoulding " the horizontal bars, one of the two workmen would inevitably have to stand virtually under those bars in order to demolish them by means of an iron stick or lever as it has been described. Mr. Triantafyllides, counsel for the appellants, today complained against that finding but we do not find any substance in the complaint, because we are of the view that this finding was open to the trial Court on the evidence before them.

To continue with the sequence of events : The deceased and the other workman, who gave evidence in this case for the deceased, had finished with the removal of the vertical bars and their next task was to bring down the horizontal ones. Before doing so, they had a coca-cola. Such refreshment was on sale at the building at the time. The trial Court found that the practice of selling coca-cola during working hours was not objected to by the appellants, although there was no fixed break as such. The deceased and the other workman drank their coca-cola standing under the horizontal bars exposed as they were without vertical support. The deceased was facing the interior of the building.

Meantime, other workmen of the appellants were operating a crane for the purpose of conveying bricks to the sixth floor. A sling which was a heavy object, was operated by the crane in front of the building. A basket containing bricks had been deposited on the fifth floor and the sling, without the basket, was being pulled upwards. The sling was swinging in the air, due to the wind, and it caught a protruding wooden bar which was part of the moulding for the sixth floor. The bar fell and hit the deceased who was standing just below it. He was mortally wounded. The workman who gave evidence in this case, an experienced moulder, expressed the view that had it not been for this impact the horizontal bar would not have collapsed. He added that in his twelve years' experience in the trade he had not witnessed the collapse of a horizontal bar because of the removal of the vertical bars, and on this evidence

the trial Court found that this was a very remote possibility. The Court also found as a fact that at the time the wind was blowing with great force and that this caused the sling, when not carrying the basket, to swing in the air.

Counsel for the appellants today argued his case very ably on two main grounds : (*a*) That the accident was not foreseeable and, consequently, the appellants were not negligent ; and (*b*) that the trial Court was wrong in apportioning only one-fifth of the blame to the deceased workman.

Mr. Triantafyllides's first argument, that the accident was not reasonably foreseeable, was based on well-settled principles of law. In his argument he referred to *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co., Ltd.* [1961] 1 All E.R. 404, where the Privy Council laid down the test as to foreseeability ; *Tremain* v. *Pike* [1969] 3 All E.R. 1303 ; and to *Barnett* v. *Chelsea & Kensington Hospital Management Committee* [1968] 1 All E.R. 1068.

As we understood his argument, he supported the view that the damage occurring in the present case was a remote probability because (*a*) the accident would not have happened had the sling not hit the bar in that particular way ; (*b*) the accident would not have happened if the horizontal bar at the time was supported by the vertical bar, and in this case the horizontal bar was left unsupported for a short period of time, and (*c*) the deceased workman disobeyed the instructions of his employers (the appellants) by failing to take the necessary precautions, that is, he was standing under the horizontal bars which were unsupported at the time. Had he followed the instructions of his employers, counsel submitted, this accident would not have happened.

Although Mr. Triantafyllides's argument was, we must say, very forceful, we have not been persuaded that the trial Court was wrong in finding that the appellants failed to take reasonable care to avoid reasonably foreseeable consequences. We think that the answer is to be found in the evidence of the appellants' foreman, Criton Cleovoulou. The following are the relevant extracts from his evidence :—

"*Q.* In your experience did the sling collide on many occasions with protruding horizontal bars?"

"*A.* Yes on many occasions, but as there were supporting vertical bars, no accident happened."

And he went on :

> " The sling is a heavy object, but I cannot tell its exact weight. A horizontal bar might break, if it comes into contact with this sling. A broken piece of wood might or might not hit somebody. It depends on where he is."

Then we have the following questions and answers :

> " *Q.* Had the sling first been taken out by 30–40 ft. and to its maximum margin, and then upwards, was it feasible at all for it to come into contact with any wooden bar? "
>
> " *A.* No, it was not."
>
> " *Q.* Assuming you knew that a horizontal bar was left without support by the vertical ones, what would you expect to happen if the sling collided with such a bar? "
>
> " *A.* I would expect it to fall."

From the whole evidence before the trial Court, it is apparent that the appellants, who were under a duty to the deceased to exercise reasonable care, knew that the sling occasionally hit on the building, that on that day the wind was blowing with force which was causing the sling to swing, that the appellants (through their foreman) were aware of the risk to the deceased workman from the hitting of the sling against the unsupported horizontal bars, and that they could take reasonable care to avoid the accident by giving the sling the maximum outward direction.

In these circumstances, we are of the view that the appellants failed to take reasonable care to avoid foreseeable consequences and that, therefore, the trial Court rightly came to the conclusion that they were liable in negligence for the damage.

With regard to the question of contributory negligence, the trial Court made the following finding :—

> " In this case, the deceased stood under the horizontal bars and had his coca-cola oblivious to any possible danger from a fall of the horizontal bars. From the evidence before us we find that the possibility of the horizontal bars collapsing in the absence of a collision with the sling was extremely remote, so remote that

a workman should not be burdened with the duty of guarding against such risk. However, there is evidence that the sling, at times, had hit on the horizontal bars and, therefore, we find that the failure of the deceased to take precautions against this risk was a contributory cause to his injuries."

On these findings, as already stated, the trial Court apportioned one-fifth of the blame to the deceased workman. Mr. Triantafyllides argued that if the possibility of an accident occurring was extremely remote for the deceased the same reasoning should apply to the appellants.

Having considered the finding of the trial Court on this point, we do not think that one can fairly say that that is the reasoning of the trial Court for their conclusions. The reasoning with regard to the remoteness of the risk, refers to the " possibility of the horizontal bars collapsing in the absence of a collision with the sling ", but then the Court goes on to say that the deceased workman had a duty to take precautions against the risk of such collapse due to the sling colliding with a bar, by standing in a place where a horizontal bar would not fall upon him.

In these circumstances, we do not think that the apportionment of liability is either wrong in principle or clearly erroneous, and for these reasons we would not be prepared to interfere with such apportionment.

Before concluding we might, perhaps, add that we were also well impressed with the presentation of the case on behalf of the respondents by Mr. Mylonas.

In the result the appeal is dismissed with costs.

Appeal dismissed with costs.