

**Esparon v Bristol
(2001) SLR 152**

Phillippe BOULLE for the Plaintiff
Frank ELIZABETH for the Defendant

Judgment delivered on 22 October 2001 by:

PERERA J: The Plaintiff sues the Defendant, his former employer, for damages arising out of an injury suffered in the course of his employment. In paragraph 2 of the plaint, it is averred that "on 8 February 1996, whilst the Plaintiff was working in the course of his employment at Foret Noire, Mahe, an accident occurred when a defective bread trolley overturned and fell over his left foot."

The medical report of Dr. Alexander, Consultant Orthopedic Surgeon, dated 16th July 1996 is as follows-

"Re-Medical Report Senville Esparon" the above person was brought to Casualty on 8.2.96 with history of heavy object fall on left foot.

The details of sustained injuries:

Left foot: rugged laceration on left foot dorsum part.

X'ray foot fracture distal end 2nd metatarsal

Period of hospitalization 8.2.96 to 4.3.96

Temporary disability about 20% and residual disability is too early to decide.

The Plaintiff avers that the accident occurred due to the fault and negligence of the Defendant, or of his Servants or Agents. Particularizing fault and negligence, he avers that -

1. The Defendant failed to employ a safe system or work for his employees including the Plaintiff.
2. The Defendant was negligent or reckless in all the circumstances of the case.
3. The Defendant failed to provide the Plaintiff with proper, safe and adequate facilities and equipment to work with.
4. The Defendant failed to insure the Plaintiff against such risks and perils.

The Defendant in his answer avers that if the trolley overturned, it was due to the fault and negligence of the Plaintiff. He also avers, in the alternative, that the accident was "faked and caused by a deliberate Act of the Plaintiff to claim damages."

According to the evidence of the Plaintiff, he had been working at the Defendant's Bakery for only 2½ months at the time of the accident. His task as a baker, that day was to remove a trolley of baked bread from the oven. The trolley is about 6 feet in height, and about 4 feet in width. It has four adjustable wheels. The baking oven is 7 feet in height, and 5 feet in width. The trolley is wheeled into the oven and taken back over a ramp. At the locus in quo, the procedure followed in baking was demonstrated. The dough produced by the mixing machine is arranged in moulds and placed in the trolley. Two vertical iron bars are fixed to prevent the moulds from falling. The loaded trolley is first kept in a "prover oven" for a short time till the "bread has risen" and then wheeled into the baking oven. The mechanism in the oven clamps the trolley in position. Once the bread is baked, the door of the oven is opened. Usually, one person using protective cloth or gunny material hold the two vertical bars and pull the trolley forward exerting some force to dislodge the trolley from the locking device. It was while being wheeled down the ramp that the trolley is said to have fallen.

The Plaintiff in his examination in chief stated –

It was coming straight towards me and when I went to the side it was then that it fell on my foot.

As regards the trolley, the Plaintiff testified that one wheel was defective, in that, it did not turn intermittently and that he and two others informed the employer Mr Emile Bristol about it. He further stated that Mr Bristol told him that all previous employees used the trolley in that condition and that he too should use it. He also stated that that trolley was wheeled into the oven without a problem but after it had been heated, the defective right side front wheel seized. He stated thus-

The only way for the trolley to have overturned was because the wheel did not want to turn and if the wheel was in proper working condition, it would have just slid down the slip, but as it did not, it just overturned, because one of the wheel was not turning.

He further stated that a wheel of the trolley did not "roll over" his foot as was stated by his lawyer in the letter of demand dated 12 August 1996 (P3) and also in the original paragraph 2 of the plaint, but that the upper part of the trolley fell on his foot as he was trying to get to a side when the trolley was capsizing as it came down the ramp.

The Plaintiff's testimony as regards the accident was corroborated by Michel Anaou, the other person who helped him to pull the trolley from the oven at the time of the accident. He had been working in the bakery for 1 year and 3 months. He stated that previously he had experienced difficulty in using this trolley due to the jamming of a wheel. He had brought that defect to the attention of Mr Bristol. He further stated that the guard bars were fixed on the trolley that day but they became loose after it fell. He also stated that there was only one other trolley of this size that is used in that oven. The defective trolley was however used throughout the time he was in employment at the bakery, but

it was only that day that it capsized, and caused injury to someone. He further stated that the defective trolley could be distinguished from the other from the noise that came from the defective wheel. The trolley came down the ramp slowly but tilted and fell on reaching the floor as the defective wheel get blocked. There was nothing on the floor to obstruct the moving trolley. This witness also stated that it was the front right side wheel that was defective.

The Defendant testified that his bakery was in operation for 27 years, and that for the past 11 years he had installed modern equipment. As regards the unlocking procedure involved after the bread had baked, he stated that the trolley had to be "pushed slightly inside and shaken a little", then pulled out. It is then that the trolley gets unlocked from the base of the oven. The trolley is then rolled down the ramp to the floor which is fitted with metal sheeting. All these were observed by Court at the locus in quo when the whole procedure involved was demonstrated.

The Defendant Mr Bristol, however denied that a trolley had a defective wheel. However in his cross examination he stated that if there was a complaint it would have been made to Mrs Maria the Assistant Manager or to his son Peter. He further stated that the safe system adopted was for one person to pull the trolley out using both hands on the vertical bars, but that on the day of the accident the Plaintiff had got the Assistance of another. He stated that the Plaintiff may not have fixed the guard bars that day. He also stated that on several occasions he had instructed the Plaintiff to fix these bars, but that he was very stubborn. After the accident, he did not find any bars near the fallen trolley.

Questioned by Court, he stated that if the trolley is pulled out of the oven by two persons of different strengths, it could go in a different direction. It is for that reason that it is recommended that only one person handles the trolley.

Peter Bristol, the son of the Defendant testified that although he was not present at the time of the accident, when he came there the trolley was in an upright position. He stated that at times he too had pulled the trolleys from the oven. He denied that the Plaintiff ever complained to him about a defective wheel. He too testified that it was not appropriate for two persons to pull out the trolley from the oven. However another person may help if requested.

In his cross-examination he stated that at the time of the accident the two vertical bars had been fixed on the trolley. He stated that otherwise when shaking the trolley to unlock, the hot trays would fall out. He further stated that a bolt in one of the wheels of a trolley had come out and that he told his father about it, and that he heard from someone that it was fixed. He had no personal knowledge whether it was fixed prior to the accident. He also stated that although the bolt was loose, the trolley moved freely as the wheels were fixed with good bearings.

Ms Barbara Maria, the Assistant Manager of the Bakery testified that when she came to the scene on hearing a noise, she saw the trolley fallen with the moulds and bread scattered around. The Plaintiff was also on the floor, but others were helping him to get

up. She stated that the moulds and bread would have come out as the two metal bars had not been fixed.

Liability

Article 1384(1) of the Civil Code Procedure that –

A person is liable not only for the damage that he has caused by his own Act but also for the damages caused by the Act of persons for whom he is responsible or by things in his custody.

This sub-Article has been interpreted to mean that the damage must be caused by the "thing" per se, independently of any direct intervention of man.

In the instant case, of the four grounds averred against the Defendant in paragraph 3 of the plaint, evidence was adduced to establish ground 3, namely that "the Defendant failed to provide the Plaintiff with proper, safe and adequate facilities and equipment to work with". It was the case for the Plaintiff that the trolley capsized as a result of the blocking of a wheel. But that fact was not specifically pleaded in the plaint. The Plaintiff, and his witness Anaou testified that this defect was observed for some time before the accident. Even Peter Bristol, the son of the Defendant confirmed that this defect was brought to the notice of the Management. However his evidence as to whether it was repaired or not remained inconclusive. In any event, the Plaintiff in paragraph 2 of the plaint attributes this alleged defect to be the sole cause of the accident. It is significant to note that in the Plaintiffs Attorney's letter (P3) and in paragraph 2 of the plaint it was averred that a wheel of the trolley "ran over." But subsequently in the course of the hearing paragraph 2 of the plaint was amended to read as "fell over". Hence for the Plaintiff to succeed in the action, he must establish that this defect was the direct cause of the accident, independently of any intervention of man.

Reviewing a few cases where this principle was applied; in the case of *Hardy v Valabhji* (1964) SLR 98, the Plaintiff injured his wrist and fingers while operating a coconut crushing machine. The Court took into consideration that the machine itself was not dangerous, but the danger lay in the way it was interfered with while in operation. On the basis of the evidence, the Court held that the employer had instructed the Plaintiff to scoop poonac while the machine was rotating, and hence the accident was due to the Plaintiff following such dangerous instructions.

In the case of *Servina v W&C French & Co* (1968) SLR 127, the Plaintiff's right thumb was severed while threading iron rods. Souyave J entering judgment for the Plaintiff stated –

I do not think that the Plaintiff has the burden of going to the extent of proving what exactly caused the accident. I believe that he has only to prove that the work he was asked to do was dangerous and whilst doing so and following instructions given him, he was injured.

However, in *Loveday Hoareau v UCPS* (1979) SLR 155, the Plaintiff was engaged in a dangerous occupation as a rock blaster. Evidence revealed that the employer had not provided the Plaintiff with the necessary device for testing. However the direct cause of the explosion which injured him was that he used a torch battery and bulb, which generated too strong a current which set off the detonator. Further he was standing on the rock over the hole. The Court held that-

I do not think that the Defendant had any duty in the circumstances to provide a safe system of work for the Plaintiff to follow. The Plaintiff was the expert at the site in charge of blasting operations. It was for himself to apply or follow common safety rules which he must have been thought whilst training to become a certified blaster.

Here, the Court took the view that although the explosives were in the custody of the Defendant there was direct intervention of man. The Plaintiff's action was therefore dismissed.

In the case of *Adolphe v Donkin* (1983) SLR 125, the Court held that boiling tar and carrying it on a ladder to a roof top was a dangerous procedure and that the employer was bound to provide a safe system of work and to give correct and safe instructions.

The ratio of these cases is that, where an employee is engaged in a potentially dangerous occupation, especially using machinery belonging to the employer, it is the duty of the employer to provide a safe system for the employee to use that machinery and also provide correct and safe instructions as to how such machinery is to be used. If he fails to do so, he would be liable for the "things in his custody" under Article 1384(1). However, where a safe system had been provided and proper instructions given, an accident occurs due to the direct intervention of the worker, as in *Hoareau* (supra), then the Defendant employer is released from liability.

In the present case, retrieving a hot bread trolley from the oven cannot be considered as potentially dangerous. No expertise or special instructions are needed for a person with average intelligence to work safely. The trolley is fixed with vertical bars to prevent the bread moulds from falling out, and also to be used as handles when pushing and pulling the trolley in and out of the oven. To permit a smooth movement from the oven to the floor, there is a ramp. The floor itself is paneled with metal sheets to permit the free movement of the loaded trolley without hitting against any object or falling into any crack or hole. Hence the employer had provided a safe system of work.

At the visit of the locus in quo, it was also observed that the unlocking of the trolley from the oven required jerking and pulling it down the ramp. Both the Plaintiff and Michel Anaou testified that the trolley fell forward as it came down the ramp. The Plaintiff stated that it was coming straight towards him and that he tried to move away but it fell on his left foot. Anaou stated that "if the wheel was in a proper working condition, it would have just slid down the slip". Further, on being cross-examined he said -

Q. You have testified that the wheel of the trolley seized or tightened. At that point of time what was being done to the trolley?

A. While we were not able to take it out from the oven, we were trying to pull it out, to make it get out of the oven.

Both the Plaintiff and Anaou testified that although there was some defect in a wheel, it was used daily for a long time. It was observed that even if there was no defect in a wheel, the trolley would come down the ramp in a slightly tilted position due the slope. The evidence of Anaou, disclosed that there was some difficulty in pulling the trolley out of the oven at the time of the accident. The Plaintiff stated that the trolley came straight at him as it came down the ramp. Hence if there was any difficulty in taking out of the trolley, which he knew to be defective the Plaintiff should have acted more diligently. On a balance of probabilities therefore, I hold that the trolley fell forward due to the momentum created by the two men who were pulling it out from the oven over the slope of the ramp. The defect of the wheel, if any, has been used as a subterfuge. The accident was therefore not caused by the "thing" per se independently of the direct intervention of man. In these circumstances, the Defendant cannot be held liable in damages.

The Plaintiff's action is accordingly dismissed with costs.

Record: Civil Side No 311 of 1998