15 pages.

ROYAL COURT

12th November, 1990 170.

Before: F.C. Hamon, Esq., Commissioner, and
Jurats Coutanche & Vibert

Between: Terence Matthew Rutter — Plaintiff

And: David Beck — Defendant

Advocate D.F. Le Quesne for the Plaintiff
Advocate P.C. Sinel for the Defendant.

JUDGMENT

COMMISSIONER HAMON: The Plaintiff in this action, Mr. Terence Matthew Rutter, is aged 45. He is one of those itinerant workmen who moves from job to job specialising in roofing and slating. His claim is for personal injuries. They arose in this way.

Mr. David John Beck (the Defendant) is a self employed roofing contractor who customarily works as a sub-contractor with a team of two men. One of his regular team had been taken ill with a heart condition. The Defendant was about to start work on a roof at a property known as Balmoral Cottage, Trinity Hill. The cottage also abuts on to Drury Lane.

The Defendant was telephoned by the Plaintiff. He had met him previously when the Plaintiff had worked for a firm of roofing and flooring contractors but had not employed him before. He decided to take him on. The Plaintiff's main duties were to act as "potman" to

the two roofers, the Defendant and the other regular member of his team, Mr. Thomas Evans.

He had amongst other general duties to heat the bitumen up in its cauldron or "pot" and then carry the bitumen, which is at that stage both volatile and extremely hot, to the mansard roof. It was during this activity that the accident occurred.

We shall need to examine the events of the day of the accident, Tuesday, 28th July, 1987, in much greater detail. Firstly, some preliminary matters.

One of the defences to this action is that the Plaintiff was self-employed. If that were so then of course, an action would be impossible to sustain because the Order of Justice avers that the Plaintiff was at all material times employed by the Defendant. Of that averment the Plaintiff sought further and better particulars. The particulars stated that there was no contract of employment between the Defendant and the Plaintiff. There was a profit sharing contract for services, the terms of which were that the Plaintiff, as a self-employed independent sub sub-contractor, would complete a specified task in his own time and would be remunerated accordingly. The Plaintiff, it was alleged, was to be paid approximately one quarter of the profit generated from the labour element of the Defendant's contract.

It must be stated that the Plaintiff founded his claim on two breaches of statutory duty and alleged that these breaches were indicative of negligence and further claimed that the Defendant was negligent in failing to provide any or adequate safety measures necessary for the Plaintiff's protection.

On the statutory matters the alleged breaches were brought under Regulations 53 and 54 of the Construction (Safety Provisions) (Jersey) Regulations 1970. Regulation 53 deals with a failure to ensure suitable and sufficiently safe means of access and egress from every place at which the Plaintiff worked and Regulation 54 deals with a failure to provide scaffolding for work on the roof where such work

could not be safely undertaken from the ground "or from part of a building or other permanent structure".

We are satisfied that, within the terms of the Regulations, the work being carried out was a building operation. That being so, then Article 3 of the Law provides that it shall be "the duty of every contractor and of every employer of workmen who is undertaking any of the operations or works to which these Regulations apply to comply with such of the requirements of the following Regulations" (and these include Regulations 53 and 54) ".... as affect him or any workmen employed by him". This requirement is subject to a Proviso in these terms:

> "Provided that the requirements of the said Regulations shall be deemed not to affect any workman if and so long as his presence in any place is not in the course of performing any work on behalf of his employer and is not expressly or impliedly authorised or permitted by his employer".

Fortunately the anomalies of the Regulations have been helpfully and comprehensively examined by the learned Deputy Bailiff in Hacon -v- Godel and Brocken and Fitzpatrick Ltd (22nd June, 1988) Jersey Unreported where at page 8 of the Judgment the Court said: "....hence, a contractor is liable not if he merely contracts (in this case for the erection by the scaffold erectors) but only if he is undertaking any of the operations or works to which the Regulations apply i.e. building operations or works of engineering construction (see Regulation 2)".

A careful examination of this case and of the evidence before us leaves us in no doubt that the Plaintiff was employed by the Defendant. On the evidence before us we have no hesitation in saying that we believe the Defendant agreed in the telephone conversation to which we have referred to employ the Plaintiff at approximately £25 per day (which was, it appears, then the going rate) and that it was to be paid weekly. We do not believe that the Plaintiff had yet handed in his Social Security card to the Defendant, nor do we believe that he was on a profit-sharing agreement.

The Plaintiff was employed by the Defendant and it was the Defendant who collected him and drove him to work on the day of the accident.

As we will see there is a conflict of evidence in this case which is both marked and troublesome. At one stage in the trial, while he was in the witness box and under oath, the Plaintiff told us that after the accident he had not worked on a building site at the Hotel Rex. If witnesses were to deny that then they would be lying on oath.

During the course of presenting his case, Advocate Sinel for the Defendant called two witnesses. Mr. Gerald O'Connell knew the Defendant through roofing. He had been at one time a partner in a firm of roofing contractors. He had in the course of his employment worked at the Hotel Rex at the end of February and March, 1988. The Plaintiff had worked as a casual labourer pouring bitumen and sending it up on a hoist for about three weeks. Mr. Stanley Irwin, a roofing contractor, told us that he, too, had worked with the Plaintiff at the Hotel Rex. He had seen scars on his arms and legs when he was changing. The Defendant had worked on a pulley carrying bitumen to a higher level and had helped him to unload trucks. Both these witnesses were closely questioned as to their credibility. At the end of the first day's hearing the Court was disturbed at the stance that the Plaintiff had taken. We said nothing.

On the morning of the second day of the trial we gave permission for the Plaintiff to be recalled. He admitted that he had lied to us on oath. he gave us an explanation. We do not criticise Advocate Le Quesne in any way whatsoever. We must say, however, that despite the Plaintiff's overnight crisis of conscience (if that is what it was) the Plaintiff did himself a great disservice. It little behoves a witness to lie emphatically and roundly to this Court on one matter and then (having made a confession) expect this Court to weigh his other uncorroborated evidence against two other witnesses on a major conflict of evidence other than with some suspicion. We accept his explanation. We do not admit complete confidence where there is a troublesome conflict.

One final preliminary matter concerns the counterclaim. The Defendant has pleaded by way of counterclaim that he had loaned the Plaintiff £700 in order to enable the Plaintiff to pay his rental and other commitments. It was admitted, during the course of the trial, by the Defendant that the £700 had been a gift. Again, we find that behaviour unusual. We do not, fortunately, find it reprehensible. The counterclaim is dismissed with costs.

We can now turn to the events that led up to this unfortunate accident.

We were shown a series of coloured photographs by the owner of the property, Mr. Ian Douglas Campbell. They had not been taken particularly at the time of the accident, but were a personal record to show how the building work had progressed. We found them helpful to a limited extent. Unfortunately, we were not shown a plan nor a report from an Accident Security Officer of the Social Security Department. We have had to do the best we could to visualise the state of the work at the time that the accident occurred.

On Monday, 27th July, the Plaintiff first arrived on site as an employee of the Defendant. The owner of the property had employed a Mr. John Cox of Colon Ltd as his contractor to renew the roofs of his property. The plans had been prepared by an architect. Mr. Cox, in his turn, employed the Defendant. The owner of the property was not consulted on the sub-contractor. He had agreed a price with his contractor. His contractor, in turn, agreed a price with his sub-contractor. The owner of the building plays no further part in the developing saga.

On the first day, the Monday, work of a general nature was carried out on the roofs. By Tuesday the main roof was ready to have a second layer of felt applied to it. There was at this time only one means of access to the main roof. There was no scaffolding in position, although scaffolding was in place in Drury Lane and was in place at the scene of the accident (though not to a sufficient height to gain access to the main roof) apparently on the day following the accident. The means of access was taken in this way.

At right angles to what we shall call the main house and running 'au pourportant' Drury Lane is a smaller building. That, too, was being roofed. At the foot of that building were some stone steps. The stone steps ran up along the side of the building. These stone steps gave access to the first roof which at the time of the accident was covered in felt. That roof was a sloping roof. There was a one foot step to get from the top of the steps to the first roof. The slope was away from Drury Lane and again at right angles to the second or main roof. It was, as we have said, on the main roof that the accident occurred. Despite assurances that it was an "easy walk" one glance at photograph 11 leaves us in no doubt that after an initial walk along this gently sloping roof there was a hollow of several feet again down a short slope before the level section is reached adjacent to the main roof. We are satisfied that from that level section of roof there is a four foot section of the wall of the main building sloping away from the person standing on the level section of roof to the foot of the slope of the main roof.

That, let it be repeated, was the only access provided for the carrying of bitumen from the "pot" to the main roof. The pot was situated in a position close to the foot of the steps. We shall consider that access in the context of what we have to decide in a moment.

Let us now examine the other means of access that was used by the Plaintiff and which led to the accident. The Plaintiff (and again we shall consider this access in the context of what we have to decide in a moment) had placed an aluminium ladder on a flat roof. This flat roof was again at right angles to the main building but at the other side of it. The aluminium ladder was laid against the wall of the main building (which at that time was still only framed with wooden beams). The top of the ladder projected by about three rungs over the top of the roof. The slope of the main roof was not considerable and one could easily and safely have stood upon it. We estimate that the slope of the unclad walls of the main building were some nine feet to the top and a vertical height from the base of the flat roof to the foot of the main roof would have been eight feet. That ladder was not secured in

any way. The ladder was resting on boards on the flat roof. The Plaintiff climbed the ladder with a bucket of hot bitumen. He put the bucket of hot bitumen to rest on the roof when he reached the top of the ladder. He held on to the bucket. He continued to climb but as he transferred his weight the ladder slipped. He threw the bucket away from him but his leg caught in the ladder and he was badly and seriously burned by the bitumen receiving eighteen per cent burns to both arms, the lower trunk and the left leg. His injuries might well have been more severe had not the Defendant and Mr. Evans doused him with cold water.

This case will turn to a large extent (and despite the very helpful submissions of law presented to us by both counsel) on how we interpret the evidence.

The Plaintiff told us that he had been using the ladder for most of the day - the accident occurred at about 3 o'clock in the afternoon. He said this several times. He told us with some emphasis that if other witnesses told us that he had only just started to use the ladder when the accident occurred then they were lying. It was he who had found the aluminium ladder. He agreed that if he had tied the ladder top and bottom it would have helped but he was adamant that he had been using the ladder from 10 in the morning until the accident occurred. He had never been told that there was an alternative and safer route along the roof-tops, as we have previously described. He usually tied a ladder at the top. If there had been scaffolding then, in his opinion, the accident would not have happened. It was not feasible to have pulled the bitumen up by pulley. At no time was it explained to us how the Plaintiff got from the yard to the flat roof to start the climb up the ladder. He said that he did not let go of the bucket until it was placed on the stand which is obviously made of two pieces of wood and rests on the sloping roof to make a flat and steady surface.

It is perhaps unfortunate that minutes after telling Advocate Sinel that if witnesses said he had worked at the Hotel Rex they were lying the Plaintiff was telling Advocate Sinel that if witnesses said

that he was using the ladder for the first time when the accident occurred they were also lying.

Everyone agreed that roofers avoided the use of aluminium ladders. They were dangerous to use because of their rigidity.

The Defendant told us that having dropped the Plaintiff off on the site he spent the morning keeping outside appointments. He returned to the site at about half past one. Mr. Evans and the Plaintiff had just finished lunch. He had told the Plaintiff to walk with the hot bitumen along the first roof until he came to the Mansard, or second, roof. At that point he would have handed the hot bitumen in the bucket to Mr. Evans. We must say that we find as a matter of law and fact that we do not see the "roof route" as a suitable and sufficiently safe access to and egress from the "pot" to the second roof. It is clear from our reading of the cases where similar accidents have occurred (see for example, Miller -v- Miller (20th May, 1982) Jersey Unreported) that hot bitumen is a highly dangerous substance. It cannot in our view be considered as anything other than hazardous for, even an experienced pot man as the Plaintiff undoubtedly was, to stand on a sloping surface and hand up over a height of several feet from a lower level to a higher level a bucket to someone who is crouching, stooping or kneeling to receive it on a roof sloping in a different direction and where the face of the wall slopes away from the person standing below it.

But let us consider the troublesome matter of the evidence concerning the ladder. The Defendant told us that there was no ladder in sight at half past one when the bitumen pot caught fire. He told us he was on the main roof with Mr. Evans. He leaned over and suggested a method of cooling down the pot. He was adamant that there was no ladder to be seen. He did not own an aluminium ladder. As we have said he considered such ladders to be inherently dangerous because of their rigidity. Mr. Evans told us that the bitumen pot was fired just before the lunch break. The first time that he realised a ladder was being used was when he heard the screaming of the Plaintiff. He felt that to rest a bucket of hot bitumen on a sloping roof was extremely hazardous. The Plaintiff knew of the alternative route and had used it previously on other work. The Defendant had told us that to climb the

ladder was quicker than to use the alternative route but as he put it to us in an example of some clarity it may be quicker to walk across a motorway than to use a footbridge but a prudent man would not take that route. With that we entirely agree.

On these facts we find with no hesitation that we prefer the evidence of the Defendant. We find that the Plaintiff, for reasons best known to himself, used an aluminium ladder which he had found on site and which was not provided by his employer. On his first journey up that ladder the accident occurred.

The consequences that follow from our decisions of fact are somewhat complex. We shall need to consider the law in some detail.

In Kealey -v- Hurd (1982) All ER 974, Mann J cited with approval at p.976 a passage from an earlier judgment of Marney -v- Scott (1899) 1QB 986 which states:

> "I think that a man who intends that others shall come upon property of which he is the occupier for purposes of work or business in which he is interested, owes a duty to those who do so come to use reasonable care to see that the property and appliances upon which it is intended shall be used in the work are fit for the purpose to which they are to be put, and he does not discharge this duty by merely contracting with competent people to do the work for him".

But in the context of that case the force of the statement becomes clear. There planks improperly placed on scaffolding by an unknown workman collapsed when the Plaintiff walked on them; here we have a quite different situation. We have found that the Plaintiff found the ladder of his own volition and was using it unbeknown to the Defendant or Mr. Evans. What business then did the Plaintiff have to use the ladder? As the learned Deputy Bailiff said in Hacon -v- Godel and Brocken and Fitzpatrick Ltd (see supra) at p.19:

> "In our judgment, the present case is to be distinguished on its facts from Moir-Young -v- Dorman Long. In the latter case the

Plaintiff was attempting to lead his men to the scale pit, however misguided the way that he chose. Thus his presence in the place where he suffered his accident was in the course of performing his work. But in the present case, the Plaintiff had no business at all to be at or near the North-East corner of the scaffold, or, indeed, anywhere on the North or East sides; thus his presence there could not be in the course of performing his work". And again at p.23:

"As was said, per curiam, in Ginty -v- Belmont Building Supplies Limited and another (1959) 1 All ER 414 at p.423 albeit about delegation of statutory authority: ".... the important and fundamental question in a case like this is ..... simply the usual question: "whose fault was it"?"

Now at that point, and facing the facts as we have found them to be, it would appear that the answer to the question whose fault was it? is that the accident was solely due to the fault of the Plaintiff, so that he was effectively the cause of the accident, and he would not be entitled to recover. But the matter is not that simple. We do not know what motivated the Plaintiff to find and put up an aluminium ladder which he knew to be inherently dangerous. We cannot conjecture; we have evidence that neither the Defendant nor Mr. Evans either knew that the ladder was there, or indeed, knew that the Plaintiff was using the ladder until his screams drew their attention to the situation.

We have seen them both in the witness box. On this and on other conflicting evidence we prefer their sworn evidence to that of the Plaintiff and not only because of our strictures on the false evidence that the Plaintiff gave over his employment at the Hotel Rex.

We have examined the test of the distinction between servants and independent contractors set out in Charlesworth & Percy on Negligence (8th Ed'n 1990) at p.p. 128-130 and p.164. There is no need to repeat them here. They are well known and have been well expounded before us. We have no doubt that, for the purpose of establishing a duty to take care that the Plaintiff was employed as a servant of the Defendant.

If the alternative route (of which the Plaintiff must have been aware) was dangerous to some degree, was the Plaintiff taking a reasonable risk by using an unsecured aluminium ladder? As Charlesworth & Percy states at p.180 paragraph 3-06): "The fact that the Plaintiff has to take a risk does not amount to contributory negligence on his part, if the risk be one created by the negligence or breach of statutory duty of the Defendant, and it is one which a reasonably prudent man in the Plaintiff's position would take".

We must not forget Regulations 53 and 54. We have found that there was not a "suitable and safe access" to the main roof because the alternative route in our judgment, was not safe for its intended purpose. It might well have been considered safe for carrying hods of bricks or a bucket of nails; it was not safe for the carrying of boiling hot bitumen. If that is so then the provisions of Regulation 54 applied. Advocate Le Quesne asked us to consider the practicalities of a humble pot man employed by an established roofing contractor where he requested the provision of scaffolding to enable him to gain access to the roof. That may then be a counsel of perfection but there was an alternative. We do not know what would have happened had the Plaintiff, on finding the aluminium ladder, asked his employer to secure it top and bottom before he climbed it. We can see no reason to believe that the Defendant who was well aware of the dangers of using an unsecured ladder would not immediately have agreed.

Whether the taking of hot bitumen up a ladder (however secure) is prudent is another matter. We cannot help but recall the concluding words of the learned Deputy Bailiff in Miller -v- Miller (20th May, 1982) Jersey Unreported: "In all the circumstances we have come to the conclusion that it was not totally reasonable for him to use the ladder wholly unsecured for the purpose of carrying hot bitumen particularly as the ladder was resting on a damp surface".

By using the case of Woods -v- Durable Suites Ltd (1953) 2 All ER 391 counsel at one point tried to argue that the four foot rise on the alternative route was not inherently dangerous and invited us to take a robust view of work which by its very nature must involve risk. On that general principle we agree what we cannot accept is that the

alternative route was safe and satisfactory. Nor do we accept, even if the aluminium ladder had not been found, that the defendant did not have wooden ladders of his own that could have been made perfectly secure. We do not feel that the question of the scaffolding is too much in point although Mr. Evans told us that scaffolding was erected on the day following the accident (a photograph shows the ladder with the bitumen staining it) tied to scaffolding erected to a lower height than the main roof. It does seem to us that some liaison between the Defendant and the main contractors could have resolved the matter easily. All parties agreed that scaffolding would have made the work as safe as practicable.

It must be remembered that the Plaintiff was not inexperienced in the task that he set out to do.

As is stated in Halsbury Laws of England (4th Edition) Negligence paragraph 10: "....the legal standard is not that of the defendant himself but that of a person of ordinary prudence or a person using ordinary care and skill".

Advocate Le Quesne argued that the putting up of the ladder by the Plaintiff was reasonable because the alternative route provided was unsafe. If the ladder slipped then the fault was the Defendants because the Plaintiff should never have been put in a position where he had to devise his own method of access. We then have to decide whether or not there was an agreement to run the risk - that is the defence of "volenti non fit injuria". This defence was specifically pleaded as was the question of contributory negligence.

In Osborne -v- London & North Western Railway (1888) 21 QBD 220 at p.223 Wills J said:

> "If the defendants desire to succeed on the ground that the maxim 'volenti non fit injuria' is applicable they must obtain a finding of fact that the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran, impliedly agreed to run the risk".

In regard to master and servant cases, however, the defence is only to be applied very cautiously. The reason is given by Hallet J in Nerrington -v- Ironridge Metal Works Ltd (1952) 2 All ER 1101 at p.1103 where he said:

> "....a real assent to the assumption of the risk without compensation must be shown by the circumstances .... If, however, a man acts under the compulsion of a duty, such consent should rarely, if ever, be inferred, because a man cannot be said to be willing unless he is in a position to choose freely".

Examples to illustrate these statements are given in Charlesworth & Percy on Negligence in paragraph 3-82:

It is important to distinguish between "volenti" and contributory negligence. We do not think that "volenti" applies in this case at all. There is no question of the Plaintiff deliberately proceeding to take a risk against the orders of his employer. What we think is the more natural consequences of this action is the defence of contributory negligence. Of course on this question it is not necessary for us to find that there was a duty owed by the Plaintiff to the Defendant. All that the Defendant has to prove is that the Plaintiff failed to take reasonable care of himself. The breach of statutory duty then is a finding which may explain why the Plaintiff chose to put up a ladder of his own volition. His reasons are certainly not clear to us. It may be that he thought it would be quicker and easier for himself and relied on his many years experience.

Certainly the Plaintiff did not give the Defendant a chance either to make the aluminium ladder secure or even to discuss any possibility of making either route to the main roof secure. The Defendant did not, in our judgment, know that the ladder was there. We think that the Plaintiff acted unreasonably. We do not think that the law intended him to be a paragon of circumspection. He was experienced. He knew the dangers of using aluminium ladders. He admitted that he should have tied the ladder. He also knew the extreme consequences of bitumen spilling from the bucket. We do not have to weigh up one route with

another. He should have foreseen the harm that he was likely to incur to himself.

We give judgment for the Plaintiff but order that whatever damages to be awarded or agreed in due course shall be reduced by 60 per cent. And we think it right that the costs should follow in the same proportion.

Authorities referred to:

Safeguarding of Workers (Jersey) Law 1956.
Construction (Safety Provisions) (Jersey) Regulations 1970.
Harris -v- Brights Asphalt Contractors [1953] All ER 395.
Keeley -v- Heard [1982] All ER 974.
Hacon -v- Godel & Fitzpatrick (22nd June, 1988) Jersey Unreported.
Charlesworth on Negligence (8th Ed'n) p.p. 127-130; 164-178; 213-240.
4 Halsbury 34 p.p. 1-14.
4 Halsbury 16 p.p. 313-316.
Employers Liability at Common Law (7th Ed'n) Munkman p.p. 27-100; 125-142.
4 Halsbury 9 p.p. 81-83, 91.
A.G. -v- Cosgrove (18th January, 1989) Jersey Unreported.
Woods -v- Durable Stores Ltd [1953] 2 All ER 391.
Muller -v- Muller (20th May, 1982) Jersey Unreported.
NCB -v- England [1954] 1 All ER 546.
Ginty -v- Belmont Bulding Supplies Ltd [1959] 1 All ER 414.
Qualcast (Wolverhampton) Ltd -v- Haynes [1959] 2 All ER 38.
Allen -v- Parish of St. Helier (1987-88) JLR N2.
Morris -v- West Hartlepool Steam Co Ltd [1956] AC 552.
Hodkinson -v- Harry Wallwork Co Ltd [1955] 3 All ER 236.
Farquhar -v- Chance Brothers Limited [1951] 2 TLR 666.
4 Halsbury 34 p.p. 57-64.
Stapley -v- Gypsum Mines Ltd [1953] 2 All ER 478.
Louis -v- Bellee and BCISC (Jersey) Ltd (1972) JJ 2049.