IN THE SUPREME COURT OF THE
TERRITORY OF PAPUA AND NEW GUINEA

WILLIAM RONALD KINGS

Plaintiff.

-v-

HORNIBROOK CONSTRUCTIONS LIMITED

Defendant.

The Plaintiff was injured when a ladder upon which he was working in the course of his employment with the Defendant slipped on the steel floor of a tank causing the Plaintiff to fall a distance of up to twenty feet. His injuries include a severe fracture of the left leg involving a possibility of permanent disability.

In the first place, the claim was brought upon a simple cause of action in negligence consisting of failure to hold the bottom of the ladder while the Plaintiff was climbing to the top. This claim was met by a denial of negligence, a plea that the servant responsible for the holding of the ladder was in common employment with the Plaintiff, and a plea of contributory negligence. This produced amendments in the claim under which the Plaintiff relied upon Section 4 of the Employers Liability Ordinance 1912 and an amendment to the original particulars of negligence by adding an allegation of failure to adopt a safe system of work.

The facts of the case were not much in dispute, the real question being whether under the law in force at the present time in the Territory the Plaintiff has a cause of action for damages. He has, as it is admitted, a limited claim to workers' compensation.

No witness was able to show precisely what caused the ladder upon which the Plaintiff was working to slip, but it was observed that after the accident had happened, the native employee who had been instructed to hold the foot of the ladder was not at his post, and so far as could be ascertained, he had for some reason unknown walked away from this position at some time shortly prior to the slipping of the ladder. The Defendant's own view of the matter was that

this native was guilty of disobedience to his instructions and/was negligent. I think therefore that although the evidence as to the precise facts was very scanty, I should conclude that the negligence of this employee was a cause of the Plaintiff's injuries. This does not, however, help the Plaintiff, for under the law at present in force in the Territory, the Defendant is entitled to rely on the doctrine of common employment, and so far as the negligence of the fellow employee was concerned, I think that this defence meets the Plaintiff's claim.

Plaintiff's Counsel endeavoured to carry the matter one step further by contending that the circumstances amounted to a failure on the part of the Defendant to provide a safe system of working in that a native employee of limited training and experience should not be engaged to carry out such a responsible task without direct European supervision. If this argument could be supported it would avoid the effect of the doctrine of common employment, since that doctrine only arises if it appears that the employer has in fact fully discharged his obligation in relation to the safety of his employees. I cannot accept the argument as soundly based in the present case because the Plaintiff, who was directly in charge of the native in question, was perfectly satisfied to have him holding the ladder, this being clearly a task within his capacity and understanding. The employee was described as a powerful man of considerable experience in the type of work in question, and I think that the provision of such an employee for the express purpose, working directly under the instructions of the Plaintiff himself, sufficiently discharged the Defendant's duty in this respect.

There is more force I think in the Plaintiff's contention that the ladder itself did not constitute a sufficient compliance with the Defendant's duty towards its servants. It may now be said in the light of experience gained from this accident that better facilities ought to be provided for work of this character. The ladder itself was sound enough but was an ordinary rung ladder made of timber and was resting at the lower end upon the smooth steel floor of a large storage tank. It is quite obvious that once the foot of the ladder started to move, it would be beyond the capacity of a man on the steel floor to stop it from slipping further, and a serious question arises as to whether the Defendant should not have provided some positive means of securing the ladder. The Defendant could, for example, have

fitted the ladder with self-aligning feet shod with some material especially designed to give a firm grip on the steel surface. It could have fitted grappling hooks or brackets near the top of the ladder to engage the top rim of the tank and prevent the ladder from slipping back. It could have provided the Plaintiff with a safety belt and hook to help prevent him from falling. Any of these things could have been done and might have saved the Plaintiff from his injuries. The test which I must apply however is not what the employer might have done if it had applied the processes of invention to the unforeseen problem which arose, but rather whether according to the established practice of the industry the risk was one which ought to have been appreciated at the time and guarded against. It has been pointed out in many cases that safety precautions tend to improve from time to time as a result of mishaps of this kind and that after an accident occurs an employer may well be under a greater obligation than he was before. However, I must judge this occurrence by what was understood and practised at the time.

It appears that the Plaintiff was employed mainly as a mechanic but also in various associated tasks having relation to the constructional work generally undertaken by the Defendant. He was quite an experienced welder and on the occasion in question was sent to relieve another welder to assist in the construction of a fuel storage tank. The tank was of steel and had been largely prefabricated but in fitting steel truss members to support the roof of the tank the Defendant's rigger found a misalignment necessitating the cutting of fresh holes in the structural members to take the necessary bolts. Minor welding and cutting operations had to be carried out by the Plaintiff at many different points on the outer shell and the overhead truss members of the tank. All of these operations had to be carried on from inside the tank. The Plaintiff had to mount his ladder encumbered by a fair amount of welding and cutting gear and steel components and had to work for periods of about ten minutes near the top of the ladder. Temporary wooden stagings or platforms were being erected to facilitate the work of the steel riggers when they were fitting truss members in position, but the Plaintiff's work was one requiring mobility, and the erection of special stagings at each point was not practicable. In any case he would have had to climb the ladder in the first place to erect cleats to hold the staging. The orthodox ladder appeared in the circumstances to be the most convenient

and most logical thing to use on account of its lightness and portability.

Although more elaborate means of securing the ladder against slipping on the floor might have been employed, these means themselves might have introduced additional considerations for safety. For example, fixed brackets on the top of the ladder would not engage structural members at various heights above the ground without producing variations in the slope of the ladder which might render the ladder or the Plaintiff's working position much more dangerous. Elaborate mechanical contrivances would tend to defeat the whole purpose of using the ladder, and I think that so far as the evidence enables me to understand the experience of the industry as it stood in the Territory at the date of the accident, the most sensible solution would have appeared to be to use a plain ladder with an able-bodied man at the foot of it to hold it firmly and see that no initial movement of the ladder took place. Under these conditions experience would have indicated that the ladder would be safe, and it was only the fact that the employee for some unknown reason chose to walk away and leave the ladder unguarded that caused the accident to occur.

As I have already indicated, the Defendant may in this respect find itself under a duty to take greater precautions in the future in similar circumstances having regard to the experience gained from this accident.

The Defendant having in my opinion satisfied the test by recognising the risk of a slipping ladder and by making available to the Plaintiff, who was an experienced operator, the exclusive services of an able-bodied employee for the express purpose of preventing the ladder from slipping, the defence based on the doctrine of common employment arises and is in my opinion an answer to this part of the Plaintiff's claim.

I think that the defence of contributory negligence raised by the Defendant has no application to the facts of the present case and that the Plaintiff cannot be blamed for anything that he did. From his position on the top of the ladder, encumbered as he was by his equipment, he was in no position to see what the native employee was doing and perforce had to rely on the native employee to carry out the specific instructions given to him by the Plaintiff.

The remaining cause of action upon which the

Plaintiff relies is that referred to in Section 4 of the Employers Liability Ordinance 1912. The relevant provision preserves free from the doctrine of common employment personal injuries caused by reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence or by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform where such injury resulted from his having so conformed. In the case of Van Leeuwen v. Coconut Products Limited (1956) No. W.S. 13 I had to consider the scope of a similar statutory provision in force in New Guinea, and I came to the conclusion that no new cause of action arises by virtue of Section 4 unless the same cause of action would have arisen at common law in the absence of the doctrine of common employment. The only claim which according to my conclusions in this case is not by this defence is the claim arising out of the negligence of the native servant who walked away from his post. It is therefore only if this act of the employee was due to the negligence of somebody in superintendence or of somebody to whose orders or directions the Plaintiff was at the time confirming, that Section 4 will assist the Plaintiff. The Plaintiff was working as an expert in an independent trade, called in to assist the work being carried out by the rigger in charge. The Plaintiff was working under the rigger's directions to the extent that he was making holes and executing welding work in the positions indicated by the rigger. However, the rigger in no way superintended or directed the operations relating to the use of the ladder by the Plaintiff or the manner in which he carried out the work. Indeed, the native employee in question was working at the time under the sole direction of the Plaintiff himself who had the ladder placed wherever he wanted it and gave the instructions to the employee as to the safe holding of the foot of the ladder. I think that the rigger was not in the position of authority or responsibility contemplated by Sub-Section 3 or 4, and I therefore think that the Plaintiff's claim falls outside the scope of the Ordinance.

In case the Plaintiff should desire to test the legal soundness of the conclusion which I have reached, I should say that if the Defendant were responsible for the negligence which caused this accident to occur, I would have assessed the damages to which the Plaintiff would be entitled at the sum of £1,200.