Lu Bang Song v Teambuild Construction Pte Ltd and Another and Another Appeal [2009] SGHC 49

Case Number : DA 24/2008, 25/2008

Decision Date : 03 March 2009

Tribunal/Court : High Court

Coram : Chao Hick Tin JA

Counsel Name(s) : Liu Shiu Yi and Belinder Kaur (Hoh Law Corporation) for the appellant in District Court Appeal No 24 of 2008 and the respondent in District Court Appeal No 25 of 2008; Ramesh Appoo (Just Law LLC) for the respondents in District Court Appeal No 24 of 2008 and the appellants in District Court Appeal No 25 of 2008

Parties : Lu Bang Song — Teambuild Construction Pte Ltd; Grandbuild Construction Pte Ltd

Employment Law

Tort

3 March 2009

Chao Hick Tin JA:

Introduction

1 These were two connected appeals brought against the decision of the District Judge ("the DJ") in relation to a claim for damages for personal injuries which arose out of an industrial accident. The DJ found the plaintiff, the injured employee, 20% liable for the accident and the defendants, the employers, 80% liable.

2 Both parties, being dissatisfied, had appealed against that decision to the High Court. To avoid confusion and for the sake of convenience, the plaintiff in the court below will hereinafter be referred to as "Lu", the first defendant as "the First Employer", the second defendant as "the Second Employer" and the two defendants collectively as "the Employers". At the conclusion of the hearing of the oral arguments, I was satisfied that Lu had not proven that the Employers were negligent for the accident. Accordingly, I dismissed Lu's appeal and allowed the Employers' cross-appeal. I now give my reasons.

Summary of facts

3 Lu is a Chinese National who was 36 years old at the time of the incident. At all material times, he was working as a construction worker at the worksite at 12 Jalan Pasir Ria where three units of three-storey terrace houses were being built. The First Employer was the subcontractor for the construction project and the Second Employer was the main contractor and occupier of the worksite. However, nothing in the action, or in these appeals, turned on the different capacities of the Employers. The accident occurred as Lu was discharging pre-mixed concrete from a metal bucket at the worksite.

4 On 17 January 2007, Lu was assigned by his foreman, Sam Tan Lwoi ("the Foreman"), to perform concrete casting work on the roof of the corner terrace unit with a group of seven to eight co-workers.

5 The work involved the pouring of pre-mixed concrete into formworks. The said concrete was delivered to the worksite by trucks and loaded into buckets which were hoisted up by a crane to the formworks. The workmen would pull a lever on the bucket to release the concrete through a funnel at the bottom of the bucket. It was then Lu's task to ensure that the concrete filled the formwork without any air pockets. Lu and his co-workers carried out this task throughout that day.

6 At around 1800 hours, concrete casting work on the roof stopped because the concrete was considered too wet and Lu and his colleagues had to wait for it to harden. They then decided to work on the boundary wall instead. Three of Lu's colleagues came down from the roof to the third storey where the next load of concrete was to be delivered for the boundary wall.

7 As the crane lifting the bucket was apparently not long enough to reach the boundary wall, the signalman, Chen Wen Ming ("Chen"), directed the crane operator to position the bucket over an area near the boundary wall enclosed by scaffolding. The intention was that upon the release of the pre-mixed concrete at that spot, the workmen would then use shovels to scoop the concrete from the floor into the formworks for the boundary wall.

8 Shortly after Lu's three co-workers came down from the roof, Lu also went down to the third storey, leaving Liu Weifa ("PW2"), another co-worker, on the roof. Upon reaching the third storey, however, Lu found that his three colleagues, who had come down earlier, were not there. The Foreman, who had also come down to the third storey to see that the bucket was positioned in the area where it was to be discharged, had by then gone down to the ground floor to sign off the time-card for the driver of the cement truck so that the latter could leave the worksite.

9 Upon seeing that the crane (which was being directed by Chen) had already positioned the bucket over the spot where the concrete was to be discharged, Lu proceeded to enter the enclosed area and pulled the lever behind the bucket to release the concrete. The force of the concrete as it was being discharged from the funnel at the bottom of the bucket caused the bucket to swing towards Lu. The top of the bucket hit Lu in the head while the lever hit him in the chest. As a result, Lu was knocked backwards into the scaffolding behind him.

10 PW2 rushed down from the roof and pushed the bucket away. At almost the same time, the three co-workers who had earlier gone down from the third storey came back. They also assisted Lu.

The pleadings and the decision below

11 The two main bases of claim which Lu had pleaded in the statement of claim against the Employers were as follows:

(a) The Employers' alleged failure to comply with r 220 of the Factories (Building Operations and Works of Engineering Construction) Regulations (Cap 104, R 8, 1999 Rev Ed) ("the Regulations") which stated that "[l]oads which have a tendency to swing or turn freely during hoisting shall be controlled by a tag-line".

(b) The Employers' alleged failure to assign other workers to hold onto the bucket while Lu was opening the funnel at the bottom of the bucket to discharge the pre-mixed concrete.

12 In arriving at his decision as set out in his grounds of decision (see *Lu Bang Song v Teambuild Construction Pte Ltd* [2008] SGDC 236 ("the GD")), the DJ did not rely on Lu's first allegation that the accident had been caused by the Employers' failure to comply with r 220 of the Regulations. Lu did not pursue this line of argument at the trial. Neither did he take up this point on appeal. Accordingly,

Lu's pleaded case was reduced to the sole allegation that the Employers had failed to assign other workers to hold onto the bucket as Lu was discharging the concrete and that was the cause of the accident.

13 It should, however, be noted that the DJ had, in the GD, chosen to base his decision on the following additional grounds (the GD at [34]-[37]):

(a) Lu was the only employee who actually tried to do his job while his co-workers, who were supposed to have been helping him, all failed to do so or took a brief break.

(b) Lu's three co-workers all chose not to help discharge the concrete but instead decided to all go and fetch shovels, a task which did not require all three workmen.

(c) Chen, the signalman, did not offer any assistance to Lu, even though he was on the third storey with Lu.

(d) The lack of reaction from both PW2 and Chen when Lu was attempting to discharge the said concrete on his own was an indication that the danger was not as obvious as the Employers sought to portray.

14 These grounds, however, did not form any part of Lu's pleaded case. As stated, his pleaded case was that insufficient workers were assigned to assist him in discharging the concrete from the bucket. It was *not* that the co-workers assigned by the Employers were in dereliction of their duties and that the Employers were thereby vicariously liable for those workers' failure. Further, and crucially, no questions relating to the aforesaid grounds were put to the Employers' witnesses in cross-examination. Understandably, because these grounds were not part of the pleaded case, the three workers were not asked by the Employers to give affidavits of evidence-in-chief or called as witnesses. Clearly, the Employers were not given an opportunity to respond to these unpleaded grounds which were accepted by the DJ in coming to his decision.

15 Indeed, in oral submissions on appeal, counsel for Lu even attempted to introduce yet another new ground to impose liability on the Employers. Counsel argued that the Foreman had been negligent in the conduct of his duties at the worksite, and that, accordingly, the Employers should shoulder full responsibility for the accident. Counsel put across the following question for the court's consideration: "Could the Foreman have done something?" Again, the Employers did not call upon the Foreman to testify because nothing was alleged against him in the pleadings.

16 It is trite law that it is wrong for a judge to decide a matter on grounds which were not part of either party's pleaded case: see *Loy Chin Associates Pte Ltd v Auto Trading Pte Ltd* [1991] SLR 755 at [19]. As Rajendran J,stated in *MFH Marine Pte Ltd v Asmoniah bin Mohamad* [2000] 4 SLR 368 ("*MFH Marine Pte Ltd*") at [14]:

> In taking that approach, the learned DJ was, as he indicated in his judgment, motivated by a desire not to allow poorly drafted pleadings [to] deprive a party of his rights. That motivation is laudable but it has to be balanced against the requirement in our system of justice that issues for determination by the court should be carefully framed and all parties should have the opportunity to address the court on those issues before the court adjudicates thereon. It would be apposite in this context to quote Sir Charles Mathew CJ in *Haji Mohamed Dom v Sakiman* [1956] MLJ 45 where the learned CJ stated:
>
> > I think it is clear that a Judge is bound to decide a case on the issues on the record and if

there are other questions they must be placed on the record …

The same sentiment was echoed by Sharma J, albeit in stronger language, in *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 where he said:

> A statement of claim and the defence (together with the reply, if any) constitute the pleadings in a civil action. It is on the examination of the pleadings that the court notices the differences which exist between the contentions of the parties to the action. In other words the matters on which the parties are at issue are determinable by an examination of the pleadings. An issue arises when a material proposition of law or fact is affirmed by one party and denied by the other. *The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point.* In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the plea on which the parties are at variance.

The learned DJ in this case was quite correct in criticising the pleadings as poorly drafted. But whether the pleadings were poorly drafted or not, the learned DJ was not entitled to decide the case on the basis of an issue that was not canvassed before him.

[emphasis in original]

17 The consideration underlying these principles is that pleadings are meant to define the issues in dispute between the parties so as to prevent surprises arising at trial. Nevertheless, a court may permit an unpleaded point to be raised if no injustice, or irreparable prejudice, will be occasioned thereby to the other party: see *Boustead Trading (1985) v Arab-Malaysian Merchant Bank* [1995] 3 MLJ 331 at 341-342. Indeed, Rajendran J,permitted as much in *MFH Marine Pte Ltd* ([16] *supra*). Evidence given at trial can, where appropriate, overcome defects in the pleadings provided the other party is not taken by surprise: *Siti Aisha binti Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124. However, the present case did not fall within these exceptional circumstances for the reasons alluded to in [14], [15] above and [25] below.

Safe system of work

18 Given Lu's pleaded case, it was clear that these two appeals turned on the question of whether the Employers had provided sufficient supervision and manpower for the work involved, and, more generally, a safe system of work. It should be noted from the outset that a safe *system* of work put in place by employers, is something quite distinct from the way work is *actually* carried out by the employees. A safe system of work must anticipate as many safety pitfalls as possible. However, it does not follow that just because an accident has occurred, there is a lack of a safe system of work. It must be recognised that even the most carefully devised system of work will be unable to prevent mishaps arising from human error, carelessness or foolhardy acts. This is because every system would require individuals, upon whom the various tasks are assigned, to carry out their tasks diligently. If an employee in that system should carry out his task negligently and as a result a third party or a co-employee is injured, the employer would be liable to the injured employee under the principle of vicarious liability.

Duty to provide a safe system of work

19 An employer owes a duty to his employees to maintain a safe and/or proper system of work and provide effective supervision. Our courts have given that duty an expansive reading. In *Parno v SC Marine Pte Ltd* [1999] 4 SLR 579 ("*Parno*"), the Court of Appeal held (at [46] and [48]):

> 46 For the purpose of this case, the aspect of the duty which was in issue was that of a proper system of work. The employer must devise a suitable system and instruct his men in what they must do: see *Pape v Cumbria County Council* [1992] 3 All ER 211. In devising a safe system, the employer should be aware that workmen are often careless for their own safety, and his system must, as far as possible, reduce the effects of an employee's own carelessness: see *General Cleaning Contractors Ltd v Christmas* [1953] AC 180 at pp 189–190 per Lord Reid. The employer must also take reasonable care to ensure that his system is complied with, *but he is not obliged 'to stand over workmen of age and experience at every moment they are working … to see that they do what they are supposed to do'*: see *Woods v Durable Suites Ltd* [1953] 2 All ER 391 at p 395C; [1953] 1 WLR 857 at p 862 per Singleton LJ.
>
> ...
>
> 48 With respect, we were of the opinion that the respondent's negligence in this case extended to more than just the fact that there was no warning or signal given before activating the starter. An employer's general duty to provide a safe system of work and effective supervision is much broader than was considered by the trial judge. The employer is responsible for the general organisation of the factory or undertaking; in short, he decides the broad scheme under which the premises, plant and men are put to work. This organisation or 'system' includes such matters as coordination of different departments and activities; the lay-out of plant and appliances for special tasks; the method of using particular machines or *carrying out particular processes*; the instruction of apprentices and inexperienced workers; and the general conditions of work: see John Munkman, *Employer's Liability at Common Law* (1985) at pp 131–132.
>
> [emphasis added]

20 In *Zheng Yu Shan v Lian Beng Construction (1988) Pte Ltd* [2009] SGHC 6 (*Zheng Yu Shan*), V K Rajah JA elaborated on the principle stated in *Parno* (at [38]):

> [T]he duty on the part of an employer to provide a safe system of work is twofold. First, the employer must take the employee's carelessness in relation to safety into account when *devising* a safe system of work. Having devised such a system, the employer needs to take *reasonable* care to ensure that the system is complied with. This includes checking to ensure that the system which it has put in place is complied with by its employees (see *Parno* at [46] and [54]). [emphasis in orginal]

21 From the passages above, it would be seen that an employer owes a duty to devise a safe system of work that, as far as possible, reduces the effects of workmen's carelessness. This duty is crystallized into two facets: the *existence* of the system itself, and the *supervision* required in ensuring compliance with the system. On the facts of the present case, there *was* such a system of work in place, and sufficient care *had* been taken to ensure that there was indeed compliance. Paragraph 9 of the appellant's case (in District Court Appeal No 24 of 2008), *ie*, Lu's own case, clearly indicated that there was such a system in place at the worksite:

> In the event that the bucket would sway, it would be [the Foreman's] duty to assign a few workers to steady it. If [the Foreman] was at another location then it should be [Chen's] duty to arrange for the same.

22 As already outlined at [18], it is not a deficiency of the *system* of work if individual elements of that system, *eg*, foremen and signalmen, should fail to discharge their duties with care. However, if that failure of an employee should cause injury, the employer would be vicariously liable to the injured for the negligence of his employee.

Alleged negligence of Lu's co-workers

23 Although not pleaded by Lu, I had borne in mind the additional points considered by the DJ (see [13]-[14] above) in coming to my decision. Accordingly, I will first address the issue of negligence on the part of the Foreman and Lu's co-workers in this section. I will then move on to consider Lu's substantive pleading that the Employers had assigned insufficient workers to carry out the task of concrete casting. Lastly, I will consider the issue of negligence on the part of Lu and the real cause for the accident.

24 As mentioned above, the Foreman had to come down from the third storey to the ground floor in order to sign the time card to enable the cement truck driver to leave the worksite. This was a duty he had to perform. The Foreman only came down for that purpose after noting that the group of workers he had assigned to perform concrete casting were present at the area where the concrete was to be discharged.[note: 1] To his mind, there were sufficient workers to discharge the concrete and to carry on with the concrete casting of the boundary wall. He could not have anticipated that any of the workers would attempt the foolhardy act of discharging the concrete from the bucket onto the floor by himself. There was no neglect of duties on his part. Discharging pre-mixed concrete from the bucket was the sort of work which Lu and the other co-workers were very familiar with. There was no suggestion from Lu, or any of his witnesses, that the Foreman had the practice of permitting a single worker to act alone in discharging pre-mixed concrete from the bucket.

25 As for Chen, the signalman, Lu had not produced any evidence to show that Chen *did* in fact have sight of Lu at the time immediately prior to the accident. Lu also failed to produce any evidence to show that Chen *knew* that Lu was about to discharge the concrete from the bucket by himself. The DJ had erred in concluding that Chen "would have watched [Lu] enter the enclosed area and pull on the lever" (see the GD at [16]). This was pure speculation. There was no evidence from anyone that Chen saw Lu enter the enclosed area and pulled the lever of the bucket. It was important to bear in mind that Chen's duties comprised "giving directions to the crane operator" (*id* at [15]). It was entirely conceivable that at the relevant time his attention was not focused on Lu. It was true that the Employers did not call Chen to testify., but this was because Chen had indicated to the Employers that he did not witness what happened. Here, I would observe that there are no proprietary rights in a witness: see *Sarah Ellen Mulholland v Roger Philip Edmonds* [1995] SGHC 38 and *PP v Abdul Nasir bin Abdul Rahim* [1997] SGHC 49 at [47]. There was nothing to prevent Lu from calling Chen as a witness if he had thought that Chen would be able to give relevant evidence that might assist him. From the affidavits of evidence-in-chief filed by the Employers, Lu would have known that the Employers were not calling Chen as a witness. Yet he chose not to call Chen as well. It would be recalled that Lu called PW2, a co-worker, to testify. He could not justifiably complain that the Employers did not call Chen to give evidence.

26 In *Zheng Yu Shan* ([20] *supra*), the plaintiff had injured his back while removing metal formworks from a wall at a worksite. This was unusual work in that the removal of formworks was normally carried out by a crane. The worksite in that case was located near a school and the boom of the crane could not be swung in the direction of the school without posing some danger to the school compound or its students and staff.

27 The present case can easily be distinguished from *Zheng Yu Shan*, where the court found that

a safe system of work had *not* been put into place by the employers. There, the work was described as "back-breaking" and yet no instructions were given by the employers as to how the work could be carried out safely, bearing in mind, as stated above, that that nature of work was ordinarily carried out by a crane. Accordingly, it was not difficult to understand why the court there made that finding. Here, the work involved was routine; the release of concrete from a bucket was part and parcel of ordinary concrete casting work. Each of the workers was instructed as to how the work was to be carried out and they were also reminded to do so safely. There was no suggestion that it was the practice, or that the Foreman had tacitly permitted or condoned a single worker to discharge concrete from the bucket alone. I would reiterate that Lu was an experienced construction worker even before he came to work in Singapore. He had attended the safety orientation course conducted by the Ministry of Manpower. He had also been instructed as to how the work was to be carried out.

Sufficiency of workers assigned

28 It was common ground that on the day of the accident, seven to eight workers had been assigned to perform the routine task of concrete casting. In contrast, only two workers had been assigned in *Zheng Yu Shan* to perform the unusual and back-breaking work which was ordinarily carried out by a crane. Indeed, much of the decision in *Zheng Yu Shan* hinged on this last point (at [47]):

> By assigning only two workers to carry out the physically demanding task of removing the metal formworks from the Wall manually and, further, by omitting to give the workers any instructions, the Respondent appeared to have placed cost considerations above safety concerns (even though the latter ought to have been paramount), and, in my view, breached its duty to provide the Appellant with a safe system of work.

29 The facts in *Zheng Yu Shan* were materially different from those at hand. Here, instructions were given on the concrete casting procedure and sufficient workers were assigned to carry out the task. In the GD, the DJ contended that it should not take three workers to fetch shovels (*id* at [34]). Even assuming that to be the case, the act of the three workers did not cause the accident. This fact was thus irrelevant. The important point to note was that it was never the work practice, nor was there any evidence that Lu (or for that matter any other worker) was ever instructed to discharge the concrete from the bucket all by himself. Lu claimed that even though he was alone he was nevertheless "required" to undertake the task all on his own. For the reasons below, there was no merit in this claim (see [31], [33] to [35] and [43] below where this point is examined).

Negligence of Lu

30 Much was made of the questions whether Lu was aware, prior to the accident, that his three co-workers had left the third storey *specifically* to collect shovels for scooping the concrete into formworks, and whether all three of them were needed to go down to collect shovels. The decision to go down to get the shovels was that of the three workers. It was difficult to see how these considerations were relevant. Mr Lim Boon Khoon ("PW3"), Lu's own expert witness, conceded during cross-examination that Lu should have waited for his colleagues to return before attempting to discharge the concrete from the bucket.[note: 2] Mr Lim Jit Heng ("DW1"), the First Employer's manager, also stated during cross-examination that the proper system of work was that while one person pulled the lever on the bucket, another one or two workers would hold the bucket while the concrete was being discharged.[note: 3] Given this, the reason why Lu's co-workers went down from the third storey was hardly relevant (see also [29] above). Lu, who knew the work procedure, should have waited for his co-workers to come up so that they could carry out the task together. It should not matter whether his co-workers went down to collect shovels or for other reasons. Lu should not

have attempted to carry out a potentially hazardous task all by himself. He knew that shovels were needed to scoop the concrete from the floor onto the boundary wall formwork.

31 Indeed, the DJ had found as much (the GD at [22]-[23]):

> 22 I do, however, agree with [the Employers'] counsel's submission that [Lu] was unable to furnish any real reason for why he chose to discharge the concrete on his own without waiting for his co-workers.
>
> 23 It was apparent to me that [Lu] had no real reason as to why he chose to release the concrete on his own save for the fact that he happened to be present at the scene when the bucket was ready to be discharged. When pressed to explain himself, he was clearly at a loss to do so and sought, unconvincingly, to find some logical justification for his actions.

Further, in the DJ's oral grounds dated 2 July 2008, he stated that he accepted the fact that Lu ought to have known not to try to discharge the concrete on his own as it was a job for more than one person.[note: 4]

32 Lu's expert witness, PW3, also conceded during cross-examination that in attempting to discharge the concrete alone, Lu himself was partially responsible for the accident.[note: 5]

33 Lu's own account as to why he chose to discharge the concrete by himself was also suspect. At para 19 of his affidavit of evidence-in-chief, Lu simply stated that when the bucket was lifted over the area for discharge, he was "required to open the discharge funnel… located at the bottom of the [b]ucket by means of a lever".[note: 6] When asked in cross-examination *who* required him to release the concrete, Lu initially testified that it was the signalman, Chen. When it was pointed out to Lu during cross-examination that he had not stated this important fact in his affidavit of evidence-in-chief, he changed tack and stated, very broadly, that his Foreman had told him that he was not to remain idle at the worksite.[note: 7]

34 Indeed, PW2 had conceded during cross-examination that he had not heard anyone instructing Lu to discharge the concrete even when the other workers were not there to assist Lu.[note: 8]

35 Most telling, however, is the fact that Lu had chosen to discharge the concrete from the bucket *even though he claimed that he was unaware that his co-workers had gone to collect shovels*. If he did not know that his co-workers had gone down to collect shovels, why did he choose to discharge the concrete to begin with? He could not have intended the concrete to harden before it was applied to the formworks. He also could not have planned to scoop the concrete onto the formworks with his bare hands! Timely scooping of the concrete into the formworks of the boundary wall was critical.

36 In the circumstances, it was difficult to find any credible rationale behind Lu's decision to release the concrete on his own. The actions of the three co-workers' decision to go down from the third storey to collect shovels (or for other reasons) did not in any way indicate a failure of the *system* of work at the worksite. On construction sites, many ad-hoc decisions are made on a day-to-day, minute-to-minute basis by foremen, workers and supervisors alike. It would be onerous to impose on employers a duty to put in place a system of work that ensured that all employees were supervised at every second, right down to the most tedious of minutiae. The industry would be placed in an impossible position. The law does not require that an employer must supervise a workman's every move, much less an experienced workman.

37 In this case, the crane was unable to reach the boundary wall, so a spontaneous solution was arrived at: the concrete would be deposited nearby, and workers would then have to use shovels to scoop the concrete onto the relevant formworks. Every one of those workers knew that. As such, shovels would have to be collected by the workers before any scooping could begin. It would be ludicrous to require a safe system of work that provided for the specificity of such contingencies. Imagine the following provision: "No more than two workers are required to collect shovels." Of course in our case here the Foreman did not see the three workers going down as he had gone down earlier to sign off the cement truck driver. In any case, a worker could have gone down to collect shovel or just to answer the call of nature. The fact of the matter was that there was nothing inherently difficult or dangerous about the work. A system of work was in place. Lu failed to comply with it. He was the creator of his own misfortune. As pointed out in *Chua Ah Beng v C & P Holdings Pte Ltd* [2001] 3 SLR 106 (at [32]), it was not the law that an employer must give instructions on every aspect of his work. Recognition must be given to the worker's ability to be able to carry out some work himself relying on his own experience and judgment. An employer is not required to warn an employee to keep his fingers out of the way before he strikes a nail with a hammer. Here, Lu has over 20 years' experience in the construction industry. He had also been briefed specifically during his safety orientation course that before he did any particular task, he should ask himself whether it was safe to perform that task. He had also admitted in proceedings that he had been told that if he came across any unsafe conditions at work, he should stop work and notify his superiors.[note: 9]

38 It would be germane at this juncture to note the following guidance from *Parno* ([19] *supra*) in assessing the negligence of an employee (at [64]):

> A few general principles can nevertheless be drawn from the authorities in this area. Courts have generally been reluctant to hold an employee to be at fault if his actions were taken in the heat of the moment following an emergency created by the employer's carelessness. Courts would also be slow to scrutinise to the minute detail the conduct of a conscientious employee as the primary responsibility for ensuring safety rests with the employer. Additionally, the fact that the plaintiff had to take a risk does not amount to contributory negligence on his part if the risk were created by the negligence of the defendant and was one which a reasonably prudent man in the plaintiff's position would take. Broadly, it would seem that employees have more often than not been judged by less exacting standards than employers… Finally, it is also clear that mere errors of judgment do not ordinarily count against a plaintiff, for a person's conduct in the face of sudden emergency cannot be judged from the standpoint of what would have been reasonable in the light of hindsight. To this end, courts often draw a distinction between mere heedlessness or errors of judgment on the one hand, and culpable neglect on the other.

3 9 *Parno* lays down a clear, principled approach to help courts decide whether employees were negligent in cases of industrial accidents. However, the perimeters set out therein were clear. Where the employee's actions have been taken in the heat of the moment following an *emergency* (or *risk*) engendered by the "employer's carelessness" (or negligence) only then would the aforesaid guidance enunciated in *Parno* be applicable. In the present case, there was no emergency that required Lu to discharge concrete from the bucket alone. Nor was there any risk involved that Lu was required to surmount; if only he had waited for his colleagues to return to undertake the task together, the accident would have been averted. This was agreed to by both PW2 and Lu himself during their cross-examination.[note: 10] In the circumstances, *Parno* did not appear to be on point and should be distinguished.

40 In PW2's affidavit of evidence-in-chief he stated (at para 19) that "in the usual course of our work and in the circumstances, [Lu] was required to discharge the pre-mix concrete from the [b]ucket even though he was alone".[note: 11] He appeared to hint at a casual execution of a

system of work that would undermine the safety concerns of such a system. This was an assertion without any basis. PW2 agreed that he had not heard the Foreman telling Lu to discharge concrete from the bucket even though there were no other workers around. PW2 was only speaking generally about the fact that the Foreman would scold if workers were idling around and not doing work.

Request for further arguments

41 In their request for further arguments dated 15 January 2009, counsel for Lu contended that the Employers had canvassed certain arguments in court that had not been pleaded in their defence. Specifically, counsel for Lu stated that it was never pleaded by the Employers that "[Lu] should have waited for his co-workers to arrive". Counsel also stated that it was not pleaded that "nobody told [Lu] expressly to discharge the cement".

42 It is difficult to see how this point is relevant. The burden of proof lay on Lu to show that his case as set out in his own pleadings – that the Foreman was negligent in supervision and insufficient workers were assigned by the Employers to assist Lu in the discharge of the concrete from the bucket – had been made out. In this case, on the evidence, I did not find that these allegations of negligence had been made out against the Employers.

4 3 Paragraph 15 of the amended statement of claim listed out the various particulars of the Employers' alleged breaches of duty that led to the accident. These particulars included allegations by Lu that the Employers, *inter alia*, had failed to assign sufficient workers to hold onto the bucket. These allegations were subsequently addressed by the Employers (*viz,* the argument that there were sufficient workers and that Lu should have waited for assistance before discharging the concrete) throughout the course of the trial and in submissions. In doing so, the Employers were merely meeting the case that had been brought against them. Lu was specifically examined as to why he proceeded to discharge the concrete from the bucket even though the other co-workers had gone down. His expert witness, PW3, also agreed that Lu should not have attempted to discharge the concrete alone (see [32] above). The DJ, in his oral grounds, also made the same comment (see [31] above). I do not think it would be right or fair for Lu to now contend that the Employers had argued outside of their pleadings.

44 In any case, the Employers had in their amended defence dated 1 October 2007 (in response to Lu's amended statement of claim dated 12 September 2007), besides denying the allegations of negligence made against them and their employees, servants or agents, also averred, *inter alia*, the following particulars of negligence on the part of Lu:

> 10.1 Failing to take any or any adequate precautions for his own personal safety while carrying out the works assigned to him at the Worksite.
>
> 10.2 Failing to be vigilant in the course of carrying out the works assigned to him and thereby endangering his own health and safety.
>
> 10.3 Failing to take any or any proper safety measures while carrying out the works assigned to him.
>
> 10.4 Failing to carry out the works assigned to him in a safe and proper manner in the circumstances so as to avoid the accident.
>
> …

10.6 Failing to pull the lever down in a safe and proper manner such that the concrete would be discharged or released in a gradual manner without causing the bucket to swing.

…

10.14 Failing to stop carrying out the works if he knew it was unsafe and dangerous to do so in the circumstances.

Quite clearly, the contention that Lu should not have discharged the concrete alone and should have waited for the co-workers to return fell within the ambit of 10.1 above. It could also have come within some of the other listed particulars.

45 It was true that the main allegation which the Employers made against Lu was that in discharging the concrete he pulled the lever of the bucket too strongly. He should have done it gently so that the release of the concrete would be slow and the bucket would not swing. The DJ did not appear to have addressed this point. On this, Lu was well aware that he could control the discharge flow of the concrete from the bucket by pulling the lever slowly. He also knew that if the release of the concrete was gradual the bucket would not swing back. Lu was also negligent on this count.

Conclusion

46 In the result, I held that the allegations of negligence against the Employers had not been proven. Neither were the allegations against the Foreman or Lu's co-workers established. As stated above, Lu was the creator of his own misfortune.

47 Accordingly, I dismissed Lu's appeal and allowed the Employers' cross appeal. The Employers were awarded costs of the action below and these appeals, with the usual consequential orders. In view of the Employers' prior offer to settle, the Employers would be entitled to costs on the standard basis up to 7 March 2008 and on the indemnity basis thereafter.

[note: 1]Joint Record of Appeal ("JRA") at p 73.

[note: 2]JRA at p 63.

[note: 3]JRA at p 70.

[note: 4]JRA at p 75.

[note: 5]JRA at p 63.

[note: 6]JRA at p 88.

[note: 7]JRA at pp 30, 32 and 39.

[note: 8]JRA at p 52.

[note: 9]JRA at pp 18-19.

[note: 10]JRA at pp 51 and 32 respectively.

[note: 11]JRA at p 136.