Judgment 15/2008 **Stone v Hickman – Court of Appeal (Civil Appeal 390) – 23 April 2008**

Health and Safety at Work (General) (Guernsey) Ordinance, 1987 – personal injury claim by fisherman – action for breach of contract, negligence and breach of statutory duty – plaintiff's appeal from Jurats' finding of 40% contributory negligence - Deputy Bailiff had expressly directed the Jurats that they would only have to consider contributory negligence if they were satisfied that a pot had fallen and had been picked up by the plaintiff – the Jurats had found that a pot did not fall – held that the Jurats had made findings which were mutually contradictory if they had followed the directions of the Deputy Bailiff – no other evidence of contributory negligence upon which the Jurats could have relied – appeal allowed and finding of contributory negligence discharged – no criticism of the Jurats who had been faced with an exceedingly difficult task

IN THE COURT OF APPEAL IN THE ISLAND OF GUERNSEY

Civil 390

The 23rd April, 2008 before Sir Philip Bailhache, presiding, David Arthur John Vaughan CBE, QC and Dame Heather Steel, DBE

PAUL DAVID STONE

(Appellant)

V

MARK ANDREW HICKMAN

(Respondent)

In the matter of the appeal by the above Appellant from that part of the judgment of the Royal Court given on 8 June 2007 relating to liability in the action brought by the Appellant against the Respondent;

Whereas, on 1 April 2008, THE COURT heard Advocates J M Wessels and M G Ferbrache for the respective parties and RESERVED Judgment;

THE COURT this day ISSUED JUDGMENT in the terms attached hereto and

1. ALLOWED the appeal
2. DISCHARGED the finding of contributory negligence; and
3. ORDERED recovery of damages on a one hundred per cent basis.

K H TOUGH
Registrar of the Court of Appeal

Approved Judgment 16.04.08

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

CIVIL DIVISION – APPEAL NO 390

Tuesday 1 April 2008

Before: **Sir Philip Bailhache, President**
David Arthur John Vaughan, CBE QC
Dame Heather Steel, DBE

Between: **PAUL DAVID STONE** **(Appellant)**

v

MARK ANDREW HICKMAN **(Respondent)**

Advocate J M Wessels appeared for the Appellant
Advocate M G Ferbrache appeared for the Respondent

JUDGMENT

BAILHACHE, JA

Introduction

1. This is the judgment of the Court.

2. On 17th May 2000 Paul David Stone ("the appellant") suffered a terrible accident. He was on board the fishing boat the "Janet Elaine" as a member of the crew. He was loading crab pots onto a platform from which they were dragged into the sea attached to a long piece of rope called a "string". Somehow the appellant found his wrist entangled in the rope attaching one of the crab pots to the main string. The rope became taut as the pot was dragged into the sea, and the appellant's right hand was traumatically amputated.

3. The appellant brought an action against the owner and skipper of the fishing boat, Mark Andrew Hickman ("the respondent"). He alleged breach of contract, negligence, and breach of statutory duty. That duty was owed under section 1 of the Health and Safety at Work (General) (Guernsey) Ordinance 1987 to ensure, so far as reasonably practical, the health, safety and welfare at work of employees.

4. Liability was disputed, and after a long delay the trial of that issue was heard before the Royal Court presided over by the Deputy Bailiff between 29th May and 8th June 2007. The Jurats found the respondent liable but also made a finding of contributory negligence and determined that the appellant's damages

should be reduced by forty percent. On 18th June 2007 counsel for the appellant made an application to the Deputy Bailiff seeking to have that latter determination by the Jurats set aside as being inconsistent with their findings and the legal direction they had received. This application was dismissed by the Deputy Bailiff.

5. By Notice of Appeal dated 28th June 2007 the appellant appealed against the finding of contributory negligence and against the decision of the Deputy Bailiff of 18th June 2007. He sought an order that the finding of contributory negligence should be declared a nullity and / or set aside; alternatively he sought an order that the figure of forty percent contributory negligence should be reduced to such percentage as the Court of Appeal should think just.

The Trial

6. Three people were on board the "Janet Elaine" when the accident took place, *viz.*, the appellant, the respondent and another employee called Nicholas Nagy. The respondent was in the wheel house controlling the vessel and the winch. He had a view of the potting operation which was slightly obscured. The accident took place while the crew were about halfway through letting out ("shooting" is the technical term) a string of about sixty-five crab pots. The pots were stacked on the deck and Mr Nagy's task was to roll each pot over to the appellant as the main string was being let out. The appellant's job was to lift up each pot and to place it on the shooting table from which it would be carried into the sea. The "Janet Elaine" was travelling at between five and six knots and the forward motion of the vessel dragged out the main string to which each pot was attached by another rope called a "strop". Each pot remained on the shooting table for a few seconds before the strop tautened and the pot was dragged overboard. It was estimated that the time period between each pot being taken overboard was about nine to ten seconds. The whole process of shooting a string lasted between fifteen and twenty minutes. The state of the sea was rough, and the vessel was rolling from side to side.

7. The evidence of the appellant was that Mr Nagy had rolled him a crab pot, that he had placed it on the shooting table but that it had fallen off. He had picked it up and had replaced it on the table. He had noticed a rope around his hand and had felt himself pulled forward. He thought that he was about to be pulled overboard and that he was going to drown. He braced himself with his legs under the shooting table and tried to shake off the rope. He felt that the rope had let go of his arm, and he went to pick up the next pot. He noticed blood dripping from his oilskins, and he saw that his hand had gone. He turned to the wheelhouse to show the respondent who then slowed the boat down and told Mr Nagy to cut the main string He had gone into the wheelhouse and sat down holding his arm upright. The respondent had taken the vessel back to Guernsey where the appellant was immediately transferred to hospital.

8. In cross examination, the appellant agreed that he was an experienced crewman. He also agreed that it was good practice not to pick up a pot which had fallen off the shooting table. Any such pot should be left and either it would be dragged overboard or the strop connecting the pot to the main string would break and the pot could then be moved out of the way. He agreed that he would have regarded the shooting table system as a safe system of work. Counsel for the respondent put to him a statement which he, the appellant, had made to the police on 18th May 2000 when he had made no mention of a crab pot falling off the shooting table. In that statement he had recorded – "After we were about halfway through

the shooting, I loaded a pot onto the table. As I did this I felt like the rope rod had taken a turn around my hand. I leant over the pot and shook my right arm as the rope had weight on it, then I felt it go. I thought it had released, I took my arm away and saw blood at the end of my waterproofs; that was when I saw that my hand was missing". The appellant denied in cross examination that that was an accurate account of what had happened.

9. Mr Nagy gave evidence that the sea state was rough, indeed horrible, but nonetheless workable. As to the crucial period, he stated that he had rolled a pot to the appellant. Then he had seen the appellant leaning over the pot on the shooting table and he had realised that he was in trouble. He made no mention of seeing a pot fall off the shooting table. As to when the respondent first realised that something was wrong, Mr Nagy thought it was when the appellant knocked on the window of the wheelhouse after the accident. He thought that the description of events in the appellant's statement to the police was "pretty near got to be true". When cross examined about the desirability of picking up a pot which had fallen off the shooting table, he agreed that it was a dangerous thing to do, but suggested that it was quite often done.

10. Mr David Stone, the father of the appellant, gave evidence of a conversation he had had with the respondent on the day of the accident at the hospital. Mr Stone senior, who was a retired fisherman, had questioned the respondent about how it had all happened. The respondent had been distressed and had stated that he did not see anything until the appellant came to the wheelhouse and held up his arm. This was unchallenged in cross examination.

11. The respondent gave evidence that he was an experienced skipper. He considered that the equipment on board was in reasonable condition. He described where he was standing on the vessel as being jammed in a position between the seat and the wall of the wheelhouse. This gave stability and enabled him to see the whole of the deck. He would be watching the shooting process and checking the general direction in which the boat was going. The crew were only just in front of him and through the window of the wheelhouse he claimed to have a clear view. He had not been talking on the telephone at the material time and had not been distracted. He said that a pot had been rolled over to the appellant and he had seen him place it on the shooting table. He had seen the appellant leaning over the pot which appeared to him to be strange. He had then pulled back the throttle and knocked the boat astern. The appellant had turned around, the respondent had seen blood coming from the appellant's sleeve, and he realised that the appellant had lost his hand. The respondent was quite sure that no pot had fallen off the shooting table and been replaced. He stated that in such an eventuality he would shout at a crew member to leave the pot where it was, and that in no circumstances should it be picked up.

12. The respondent gave evidence that two weeks after the accident he had installed a shooting ramp on the vessel. He had decided upon this change six or seven weeks before. The decision was based not on safety grounds, but in order to avoid backache caused by lifting the pots onto the shooting table. The effect of the shooting ramp system was that the job being done by the appellant on the day of the accident no longer existed. The crab pot would be drawn up the ramp and then overboard by the motion of the vessel and without any human intervention. The respondent agreed however that the shooting ramp was a safer system. In cross examination he denied that he had not been paying attention.

13. Two experts were called to give evidence. The appellant called Captain Eric Knott, and the respondent called Captain Bernard Charles Goldsmith. Both had considerable seafaring experience. Captain Knott had worked as the skipper of crab fishing vessels before specialising in safety at sea. Captain Goldsmith obtained his Masters certificate and served approximately eighteen years at sea before qualifying as a surveyor and undertaking work for insurers. The experts produced a joint document setting out many areas upon which they were agreed. They agreed that the number of crew was sufficient for the operation. They agreed that fishing was an inherently dangerous business, and that there were many foreseeable risks which should be considered by the skipper and crew. An accident such as befell the appellant should have been reasonably foreseeable by any experienced fisherman, including both crewmen and the skipper of the vessel. Reviewing all the evidence, the experts were unwilling to apportion percentage blame.

14. Both experts gave evidence at the trial. Captain Knott opined, having listened to the evidence, that the most likely part of the equipment in which the appellant became entwined was the strop connecting one of the pots to the main string. The appellant's explanation of the accident was consistent with his opinion. As to the question of fault, Captain Knott stated

> *"I don't think the fault is gonna lie in any one place. I think this is the sort of accident where it would be silly to try and say 'it's nothing to do with me' because quite clearly everybody involved in this incident is involved in the incident. Uhm, I think overall the skipper of the boat, particularly controlling an operation such as this from such close proximity, has to bear some responsibility particularly as the information I have available to me is that there was no reaction until after the incident. The crewman involved himself has to bear some responsibility because he's the guy that's handling the ropes. So, my opinion is that both Skipper Hickman and Paul Stone must bear some responsibility for this accident".*

15. Unfortunately that evidence was not explored in cross examination. Counsel for the appellant told the Court that he was content to leave matters there, but it is surprising that Counsel for the respondent did not press Captain Knott for an explanation as to the evidence upon which he relied in forming this opinion. It may be that he too took a strategic decision not to explore the matter further. Whatever the reason, the Jurats were left with the position that, in the view of Captain Knott, the appellant bore some responsibility because he was "the guy that's handling the ropes". But as to why the appellant was at fault, the matter was left in the air. We will return to this below.

16. Captain Goldsmith conceded that he had no direct experience of this kind of fishing operation. He was not questioned as to why he had agreed with Captain Knott that blame should be apportioned between the appellant and the respondent.

The Summing Up

17. The Deputy Bailiff summed up to the Jurats on 7th June 2007. Prior to summing up, there had been extensive exchanges with both Counsel on 6th June in open Court both as to the factual questions to be put to the Jurats and as to the legal directions. It seems clear to us that both Counsel were content as to the way in which the Deputy Bailiff proposed to approach the matter in relation to

contributory negligence, which is the only issue arising on this appeal. In exchanges with Advocate Wessels the Deputy Bailiff had accepted -

(i) that contributory negligence operated differently in relation to negligence at common law and in relation to breach of statutory duty; and

(ii) that it was necessary to look at the nature of the statutory duty in determining whether the conduct of the plaintiff could amount to contributory negligence. Advocate Ferbrache did not dissent from these views.

18. The Deputy Bailiff's summing up on this issue was in the following terms–

> *"I come now to how you are to deal with the allegation of contributory negligence pleaded by the Defendant.*
>
> *In paragraph 7 of the Defences on page 18 the Defendant pleaded that:*
>
> 'The plaintiff's accident was caused or contributed to by his own negligence in causing or permitting his right wrist to come into contact with a live rope.'
>
> *The act performed by the Plaintiff to which this allegation relates is that he picked up a pot which had fallen off the shooting table when he should have left it alone. So you will only have to consider contributory negligence if you are satisfied that a pot fell and was picked up by Mr Stone.*
>
> *And I remind you that the primary case of Mr Hickman, the Defendant is that the pot did not fall. However, if Mr Stone has persuaded you that it did fall, then you have to consider whether there is contributory negligence on his part. And you need to do that both in relation to the breach of common law duty and in relation to the breach of statutory duty, if you're satisfied such breaches have been proved, because the legal considerations are different in each case.*
>
> *Contributory negligence has a statutory basis in a Guernsey law of 1979 which provides*
>
> 'Where any person suffers damage as a result of partly his own fault and partly the fault of another person a claim in respect of that damage shall be reduced to such an extent as the Court thinks just and equitable, having regard to the Claimant's share in the responsibility' *and I emphasize that word* 'for the damage.'
>
> *I've omitted certain wording which isn't material to this Case.*
>
> *The burden of proving contributory negligence is on the Defendant and as I've said what he has to do is different in relation to the common law duty than the statutory duty.*
>
> *Dealing with the common law duty, the Defendant must prove that the Plaintiff failed to take ordinary care of himself, or in other words such care as a reasonable man would take for his own safety and secondly that his failure to take care was a contributory cause of the accident.*
>
> *I would add, but it's a matter for you, that it seems to me that on the facts of this Case that second limb, causation, is not an issue. In other words if you are satisfied that he did fail to take reasonable care picking up the pot*

then you may be satisfied that that was a contributory cause. But as I say that's a matter for you.

What you have to decide is whether Mr Hickman has persuaded you that Mr Stone failed to take care of himself as a reasonable man would take for his own safety. And if causation is established, then in relation to the common law duties, you must apportion responsibility for the injury between Mr Hickman and Mr Stone.

In doing that you must look not solely at the degree to which they each caused the accident, but also at their respective blameworthiness. So you must look at the matter generally and decide in what proportions responsibility is to be shared between the two of them. And that's normally done either by way of a fraction or a percentage: such a fraction to one party, such a fraction to another party.

Now in relation to statutory duty, as you've heard, the Health and Safety Ordinance of 1987 imposes a duty on an employee to take care of his own safety.

Section 6 of the Ordinance provides:

"it shall be the duty of every Employee while at work to take reasonable care for the health and safety of himself."

As above, the burden of proving a breach of that duty is on the defendant, it's not for the Plaintiff to establish he was not in breach. And in deciding that issue the Courts have said you must give due regard to the actual conditions under which men work in a factory or mine, or in this case on a fishing vessel, to the long hours and the fatigue, to the slackening of attention which naturally comes from the constant repetition of the same operation, to the noise and confusion in which the man works, to his preoccupation in what he is actually doing at the cost perhaps of some inattention to his own safety.

And it's long been recognised that a purpose behind the imposition of a statutory duty on employees is to protect the workmen against those very acts of inattention which are sometimes relied on as constituting contributory negligence. So too strict a standard would defeat the object of the statute. Accordingly, a degree of carelessness on the employee's part may be overlooked by the Court.

In every case it's a question of fact, whether or not a breach of statutory duty by an employer through the fault of an employee gives rise to any claim by that employee. The employer can defeat such a claim if he can say 'I am in breach of the regulations because of... and only because of your default. I myself have not failed in any respect and my breach is coterminous with yours.'

But if you are satisfied that both the Plaintiff and the Defendant are in breach of their respective statutory duties, then you must share between them the responsibility for the whole of the damage.

You must apportion responsibility, again taking account of both causation and blameworthiness.

So you will have to look at contributory negligence separately in relation to the common law duties and the statutory duties if you are satisfied that the employer has breached both, and you may conclude that the Plaintiff was contributorily negligent as respects of common law duty but not of

statutory duty. Or, if you are satisfied that he was contributorily negligent in relation to both, then you might decide the apportionment of responsibility is different in respect of each duty.

So I'm afraid it's not, it's not straightforward but that's why I've given you a copy of this to take with you and I suggest you have that to hand when you're, when you're looking at the questions.

The Findings of the Jurats

19. The material findings of fact of the Jurats so far as this appeal is concerned were as follows.

(i) They found that immediately prior to the accident a pot did not fall off the shooting table. They rejected the appellant's evidence in that respect.

(ii) They found that the installation of a shooting ramp system would have eliminated or materially reduced the reduced the risk of the occurrence of the appellant's accident.

(iii) They found that the respondent had failed to give any formal training to the appellant about the risks associated with his employment including the risk of coming into contact with "live" rope.

(iv) They found that the respondent had failed to carry out an assessment of the risks to the appellant's health and safety.

(v) They found that the appellant was aware of the risks of handling the ropes.

20. As to liability at common law, the Jurats found that the appellant was exposed to a risk to his health and safety while carrying out his employment. They found that the respondent had failed to identify the nature and extent of that risk and to take reasonable precautions to see that the appellant's place of work at the shooting table was safe. They found that the respondent has failed to devise a safe system of work for the appellant, and that it was not safe, ie such as to prevent the occurrence of the accident that actually took place, so far as was reasonably practicable. The Jurats went on to find the respondent liable to the appellant at common law. The next question asked the Jurats –

"In the event that you find the [respondent] liable to the [appellant] for this accident at common law then please go on to consider whether the [appellant] should bear any responsibility for the accident. ***Following my directions****, [our emphasis] you are requested to consider your assessment of the respective responsibility of the [appellant] and the [respondent] for the accident on a percentage basis."*

The Jurats responded by attributing forty percent liability to the appellant and sixty percent to the respondent.

21. As to liability for breach of statutory duty, the Jurats found that there was a breach of duty by the respondent which was a cause of the appellant's accident. In relation to contributory negligence, or a breach of the appellant's duty under the statute, a majority of the Jurats again attributed forty percent liability to the appellant and sixty percent to the respondent.

Grounds of Appeal

22. Counsel for the appellant did not criticize the Deputy Bailiff's summing up. Indeed, as he had expressly approved it, it would have been difficult for him to do so. Instead he contended first of all that the findings of the Jurats were mutually inconsistent having regard to the directions of the Deputy Bailiff. The Deputy Bailiff had directed them, in relation to contributory negligence, that *"[t]he act performed by the [appellant] to which this allegation relates, is that he picked up a pot which had fallen off the shooting table when he should have left it alone.* ***So, you will only have to consider contributory negligence if you are satisfied that a pot fell and was picked up by the [appellant]."*** [Our emphasis]. The Jurats had found that a pot had not fallen off the shooting table but, contrary to this clear direction, had gone on to find contributory negligence. Secondly, if we may paraphrase, counsel contended that, having established a breach of statutory duty by the respondent, there was no evidence upon which the Jurats could properly find that the appellant has not taken reasonable care for his own health and safety.

23. Both counsel placed a number of authorities before us. Mr Ferbrache for the respondent reminded the Court of the heavy burden upon the appellant if he sought to overturn the findings of the Jurats. In Smith v Slawther [1998] GLJ 79, a decision of this Court, Collins JA stated –

> *"It is, by now, well established that this Court will only interfere with a decision as to fact of the Jurats if this Court is satisfied that there was no evidence before the Jurats on which they could reasonably have arrived at the findings under challenge in the appeal or that for some other reason their findings were perverse."*

24. Mr Wessels accepted that this was the right approach for us to adopt. Counsel underlined, however, the exceptional circumstances in which the English courts would make a finding of contributory negligence against an employee where the Court had determined that the employer had failed to provide a safe system of work. He also drew attention to the necessity of proving causation in contributory negligence. In Clark and Linsell on Torts (19th edition 2006), the authors state that the following principles have been established –

> "*(1) In determining whether the claimant's fault contributed to his injury the same rules should apply as when deciding whether the defendant caused those injuries. The basic rules of factual causation should not differ.*
>
> *(2) It is irrelevant whether the operative fault of the claimant is prior, or subsequent, to the wrongdoing of the defendant.*
>
> *(3) Broad common sense should be used to judge cause and effect on the facts of each particular case.*
>
> *(4) Foreseeability of the precise manner of injury is not relevant."*

25. Some of the cases which followed the enactment of the Law Reform (Contributory Negligence) Act 1945 are usefully illustrative of those principles. We observe in passing that the provisions of section 1 (1) of the Law Reform (Tort) Guernsey Law 1979 are for all practical purposes identical to those contained in the 1945 Act. In Davies v Swan Motor Company (Swansea) Limited [1949] 2 KB 291 an employee of the defendant corporation had

disobeyed the express instructions of the corporation not to ride on the steps of the dust lorry whilst it was in motion, and had been killed following a collision with an omnibus. The English Court of Appeal held that the question was whether the injuries suffered by the employee was the result partly of his own fault. On the facts, the Court held that he was partly at fault and reduced the damages payable to his widow by twenty percent.

26. Counsel also referred to Stapley v Gypsum Mines Limited [1953] AC 663. In that case two miners, S and D, had noticed that the roof under which they were working was dangerous and might fall. They reported the fact to the foreman who instructed them to bring the roof down. It was agreed that a corollary of that instruction was that they should not work under it until it had been made safe. S and D tried unsuccessfully to bring the roof down and eventually abandoned the task, S returning to work underneath it. The roof fell, and he was killed. The trial judge found for the plaintiff widow but reduced the damages by fifty percent on the ground of S's contributory negligence. The Court of Appeal reversed that judgment, holding that S was wholly to blame. On appeal to the House of Lords it was held that D's fault in not reporting the difficulties in bringing down the roof to the foreman, for which act his employer was liable, was a contributory cause of the accident which resulted in the death of S. Pursuant to the relevant statutory provision, the damages were reduced by eighty percent on account of S's contributory negligence. Lord Reid stated in relation to that reduction –

"Finally, it is necessary to apply the Law Reform (Contributory Negligence) Act 1945. Sellers J reduced the damages by one half, holding both parties equally to blame. Normally one would not disturb such an award, but Sellers J does not appear to have taken into account the fact that Stapley deliberately and culpably entered the stope. By doing so it appears to me that he contributed to the accident much more directly than Dale".

27. Counsel further referred to Jones v Livox Quarries Limited [1952] 2 QB 608. That was a case where the plaintiff, on his way to the canteen in a quarry during the lunch hour, had jumped onto the tow bar at the back of a slow moving tracked vehicle in order to gain a lift. He had been instructed by his employer not to ride on quarry vehicles and was accordingly acting in defiance of those orders. A dumper truck driven negligently by another employee crashed into the back of the tracked vehicle and the plaintiff was injured. It was held that the plaintiff had suffered "damage as the result partly of his own fault" within the meaning of the Law Reform (Contributory Negligence) Act 1945, and his damages were reduced by twenty percent.

28. Where there is a breach of a statutory duty by the employer, other considerations have also to be borne in mind. As Lord Tucker expressed it in Staveley Iron and Chemical Co. Limited v Jones [1956] AC 672 –

"In Factory Act cases the purpose of imposing the absolute obligation is to protect the workman against those very acts of inattention which are sometimes relied upon as constituting contributory negligence so that too strict a standard would defeat the object of the statute."

29. That passage was cited by the Court of Appeal in Toole v Bolton Metropolitan Borough Council [2002] EWCA Civ. 588. The appellant was appealing against a finding of seventy-five percent contributory negligence by the Manchester County Court. The circumstances of that case were that the defendant council, conscious of the dangers posed to their staff and to the public by used syringes

being left in toilet areas, issued a guidance note, headed "Supervisors Note of Action". The note instructed employees to adopt a procedure involving, *inter alia* obtaining a pair of heavy duty protective gloves from the office. There was an express instruction not to touch any syringe without adopting this procedure. The appellant was notified that a needle had been seen in a toilet brush container. He went to inspect the scene. He was not wearing heavy duty protective gloves, but he put on rubber surgical gloves. He put his hand into the container in order to retrieve what he thought was a single needle, and sustained a finger injury from another needle which he had not seen. At trial the case turned on the provision or otherwise of suitable equipment. The judge made a finding that the protective gloves which were available to the appellant would not in fact have provided adequate protection to him from the injury which he had suffered. The gloves would have allowed the passage of a needle through the fabric. There was therefore a breach of statutory duty. The Court of Appeal allowed the appeal and quashed the finding of contributory negligence. Buxton L J referred to the passage from Staveley Iron and Chemical Co. Limited v Jones cited above and continued –

"And I would also venture to mention the comment on that passage of Lord Hoffman in Reeves v Commissioner of Metropolitan Police [2000] 1 AC 360 at page 371, where his Lordship pointed out that the Contributory Negligence Act requires the court to apportion not degrees of carelessness but the relative responsibility of the two parties, and that an assessment of responsibility must take into account the policy of the rule, such as that of the Factories Act, by which the liability is imposed.

...

I fear that I do not start to see how an employee can be said to be contributory [sic] negligent when he fails to take a precaution asserted by the employer, but that precaution itself consists of and contains the breach that the Recorder has already found. Simply as a matter of logic, I do not think that the finding that the Recorder made was open to him in the facts that he found.

Quite apart from that, it is impossible to establish that Mr Toole's act or omission was causally related to the injury that he suffered because, as the Recorder found, if he had been wearing the inadequate gloves that his employer provided for him, it is by no means certain that they would have kept him harmless. I quite accept that they would probably have been more effective than the gloves that he in fact wore. But that is not the point. In order to establish that his omission was, in the context of contributory negligence, sufficient to deprive him of his judgment, it has to be shown that his omission caused the event that occurred. That simply cannot be established, in view of the nature of these gloves that he is criticised for not wearing.

For those reasons, therefore, I am not able to agree with the Recorder's view that this was a case of contributory negligence at all. For that reason, I would allow the appeal, discharge the findings of contributory negligence and order recovery on a 100 per cent basis."

Conclusion

30. As to the first ground of appeal, we entirely accept that it is not for us to question the findings of fact by the Jurats, other than in the special circumstances explained by Collins JA in Smith v Slawther. Having said that, it is clear that in

this case the Jurats did make findings which, if they had followed the directions of the Deputy Bailiff, were mutually contradictory. The Deputy Bailiff had expressly directed them that "you will only have to consider contributory negligence if you are satisfied that a pot fell and was picked up by [the appellant]". The Jurats found that a pot did not fall. They should not have gone on to consider contributory negligence at all. The finding of contributory negligence cannot stand, and the appeal must therefore succeed on this ground alone.

31. In deference to the arguments of counsel we think that we should, however, also deal with the second ground of appeal. Counsel for the respondent did not expressly criticise the Deputy Bailiff's summing up, but he nonetheless felt able to submit that there was other evidence of contributory negligence upon which the Jurats were able to rely. In particular he relied upon the evidence of Captain Knott. It is surprising that this was not drawn to the attention of the Deputy Bailiff when counsel were asked to make submissions as to the adequacy of the draft summing up. Be that as it may, Captain Knott did state that "the crewman involved himself [ie the appellant] had to bear some responsibility because he's the guy that's handling the ropes". The Deputy Bailiff clearly did not regard this as evidence of contributory negligence which was sufficient to go to the Jurats. Was he right?

32. Section 1 (1) of the Health and Safety at Work (General) Guernsey Ordinance, 1987 provides that –

"It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety, and welfare at work of all his employees".

Section 1 (2) makes it clear that that duty extends to providing systems of work which are, so far as reasonably practicable, safe and without risk to health. The duty also extends to providing such information, instruction, training and supervision as is necessary to ensure so far as it reasonably practicable, the health and safety at work of employees. The Jurats found that the respondent had failed in that duty.

33. Section 6 of the same Ordinance provides that is shall be the duty of every employee while at work "to take reasonable care for the health and safety of himself…". It was accepted by both counsel that, once a breach of the employer's statutory duty has been established, the burden is on the employer to show that the employee did not take reasonable care for his safety.

34. It is clear that the appellant was working in a dangerous environment and that he knew that to be the case. It is not clear from the evidence, however, exactly how the appellant's arm became ensnared in a rope, or other piece of equipment. It is possible that he lost his balance as the boat rolled in the turbulent sea, and that he put his hand in the wrong place as he steadied himself for support on the shooting table. It is highly unlikely that he deliberately ensnared himself, and indeed that was not suggested by the respondent. At worst, from the perspective of the appellant, he was guilty of some momentary lack of care in picking up a crab pot so that his arm became entwined in the strop. It may perhaps be inferred that Captain Knott thought that such a momentary lack of care was sufficient to confer some responsibility upon the appellant. If so, he was wrong. In our judgement this was one of those classical situations referred to by Lord Tucker where "the purpose of imposing the absolute obligation is to protect [the fisherman] against those very acts of inattention which are sometimes relied upon

as constituting contributory negligence…". The appellant had been placed in a highly dangerous situation. It was a situation which was known to be dangerous. Others, including Mr Nagy, had suffered injury from live ropes in the past.

35. The appellant had not consciously done anything untoward. He had not disobeyed instructions or wilfully submitted himself to any greater risk than he was required to do pursuant to his employment. It does not seem to us that he was in any way at fault. In our judgement the Deputy Bailiff was entirely correct to reach the conclusion that there was no evidence either of contributory negligence or of a breach of the statutory duty to take reasonable care of himself on the part of the appellant other than that which was expressly left to the Jurats. The appellant also succeeds on this second ground of appeal.

36. The appeal is therefore allowed and the finding of contributory negligence discharged. We order recovery of damages on a one hundred percent basis.

Postscript

37. In setting aside the finding of the Jurats that there was contributory negligence we intend no criticism of them. They were faced with an exceedingly difficult and complicated task which they had to undertake without the continuing assistance of the Deputy Bailiff. Having regard to the large number of questions which they were obliged to answer, and the lengthy legal directions against which they had to consider them, it is not at all surprising that they fell into error. We were glad to be assured by counsel that legislation is pending which will allow the presiding judge to retire with the Jurats while judgment is being considered.

Vaughan, JA

I agree and have nothing to add.

Steel, JA

I agree and have nothing to add.

