Sim Cheng Soon v BT Engineering Pte Ltd and Another
[2006] SGCA 43

Case Number : CA 140/2005

Decision Date : 16 November 2006

Tribunal/Court : Court of Appeal

Coram : Belinda Ang Saw Ean J; Chan Sek Keong CJ; Andrew Phang Boon Leong JA

Counsel Name(s) : N Sreenivasan and Palaniappan S (Straits Law Practice LLC) for the appellant; Edwina Fan (Kelvin Chia Partnership) for the respondents

Parties : Sim Cheng Soon — BT Engineering Pte Ltd; Keppel Shipyard Ltd

Evidence – Admissibility of evidence – Hearsay – Photographs tendered as evidence in relation to fact in issue at trial – Witness giving opinion evidence on photographs as though contents of photographs proof of matters of fact – Witness not witness of fact or expert witness – Whether trial judge erring in admitting photographs as evidence and relying on witness's testimony

Tort – Breach of statutory duty – Duties imposed by statute – Employee claiming damages for personal injury suffered due to employer's and third party's alleged breaches of duty under Factories Act to construct soundly and to properly maintain means of access to work area – Whether employer and third party breaching such statutory duties – Sections 33(2), 33(3) Factories Act (Cap 104, 1998 Rev Ed), regs 4(1), 4(2), 9, 85, 91(1), 91(6), 93(1)(a) Factories (Shipbuilding and Ship-repairing) Regulations (Cap 104, Rg 11, 1999 Rev Ed)

Tort – Negligence – Contributory negligence – Employee claiming damages for personal injury suffered due to employer's alleged breach of duty to provide safe place of work and safe access thereto – Whether employee contributorily negligent by failing to observe ordinary care which ordinary prudent person would take for own safety

16 November 2006 *Judgment reserved.*

Belinda Ang Saw Ean J (delivering the judgment of the court):

1 This is an appeal against the decision of the trial judge ("the judge") dismissing the appellant's claim for damages for personal injuries suffered in an accident at his workplace on 22 June 2002 (see [2006] 1 SLR 697). The respondents are BT Engineering Pte Ltd ("BT Engineering") and Keppel Shipyard Limited ("Keppel"). It was agreed between the parties that only the question of liability would be determined at the trial, with damages to be assessed separately.

The appellant's case in the court below

2 Some two months before the accident, the appellant, Sim Cheng Soon ("SCS"), who was a welder by trade, and other workers from BT Engineering were deployed to carry out welding work on board the *Falcon* ("the vessel"), a tanker which was being converted to a floating production storage and offloading vessel at Keppel's shipyard. Multiheight Scaffolding Pte Ltd ("Multiheight") was engaged by BT Engineering to erect the scaffolding and the working platform required for the conversion works.

3 On 22 June 2002 at about 8.00am, the appellant started work in an area of the vessel known as Module 10. On the day of the accident, he was working at level 3 of the module. At about 11.30am, just before his lunch break, the appellant went about detaching his welding torch and putting away his equipment pail in a temporary storage area located at level 2. Thereafter, he walked along the working platform at level 2 towards the access ladder (identified by the judge as "ladder 3")

to descend to the vessel's deck. The appellant's account of the accident was, in effect, this: He said that before he could reach ladder 3, he fell through an uncovered and unfenced opening at the level 2 working platform where there should have been a platform of planks. At this point, instead of stepping onto a platform, the appellant, as the judge put it, "stepped into empty space" and fell through the opening to the deck below, thereby sustaining serious personal injuries. According to the appellant, he fell from a height of more than 3m. The respondents, however, maintained that the fall was from a height of not more than 3m. The appellant was alone when the accident happened.

4 The appellant challenged the admissibility of the photographs which the respondents adduced in evidence. According to the respondents, the photographs were taken by one of Keppel's safety officers, Ng Sze Kiat ("Ng"), shortly after the accident on the same day. The appellant argued that the photographs could not have been taken on the day of the accident itself because they depicted barricades at the place where he had fallen when there were in fact no such barricades present at the time of the accident. The appellant also claimed that there had originally been planks covering the opening through which he fell, but that the planks must, unknown to him at the material time, have been removed one day before the accident. He complained that there were no signs or notices put up to warn him of the resultant opening in the working platform.

5 At the trial, the appellant claimed that BT Engineering owed him a duty of care as an employer, and also statutory duties under the Factories Act (Cap 104, 1998 Rev Ed) and the Factories (Shipbuilding and Ship-repairing) Regulations (Cap 104, Rg 11, 1999 Rev Ed) ("the Factories Regulations") made pursuant to ss 68 and 102 of the Factories Act. As against Keppel, the appellant claimed that it was in breach of its statutory duties under the Factories Act and the Factories Regulations as the occupier of the work site in question. The earlier claim against Keppel based on its common law duty as occupier was abandoned on appeal and as such, we need not go into that.

The defence

6 The respondents served a joint defence which not only questioned the appellant's account of how the accident happened, but also went on to explain how the accident probably happened and why the appellant's injuries were so serious. In the court below, the respondents set out to prove that the appellant lost his grip while he was descending ladder 3 and thus fell from the ladder, and not from the working platform at level 2 as the appellant claimed. The respondents called two witnesses to establish that it was not possible for the appellant to have fallen from either the working platform at level 2 or the top of the generator to the right of ladder 3. They were Mohamed Aliffi bin Ismail ("Ismail"), the safety manager of Keppel, and Lim Nyuk Kok ("Lim"), a site manager of Multiheight. Accompanied by Ng, who took the photographs at the scene of the accident and who subsequently prepared the investigation report, Ismail was at the scene of the accident within an hour of the accident. Ismail confirmed that the photographs were of the place of the accident and its surroundings. He testified that the open sides of the working platform at level 2 were barricaded with railings. He also saw the edges of the top of the generator "all ... railed up". The judge admitted the photographs as evidence. Lim was called to interpret the photographs and explain the structures depicted therein. He confirmed that the scaffolding poles shown in photograph 2 and marked "A" to "F" were barricades put up to prevent any worker from falling from the open sides of the working platform. As such, and contrary to the appellant's assertions, there could not have been planks placed outside the area barricaded by the scaffolding poles because no worker was meant to have access to the area to begin with.

7 According to Keppel's investigations (which, incidentally, did not include interviewing the appellant), the appellant was not, at the material time, wearing his safety helmet. The respondents submitted that if the appellant had worn a safety helmet, the extent of the injuries which he

sustained would not have been so serious.

The decision below

8 The judge rejected the appellant's version of how the accident happened and concluded that on the balance of probabilities, the effective cause of the accident was the appellant's fall from ladder 3 during descent, which was entirely due to his negligence. Accordingly, the judge dismissed the action against the respondents.

9 The judge's findings were, *inter alia*, as follows:

(a) The photographs adduced in evidence were taken on the day of and after the accident. Ismail was present when all the photographs were taken except in respect of photographs 9 and 10.

(b) The photographs showed barriers surrounding the opening through which the appellant purportedly fell. On one side of photograph 2 were three barriers marked "A", "B" and "C" and on the opposite side were three barriers marked "D", "E" and "F". All the barriers met and were connected by a vertical pole at three places marked as "G", "H" and "I" on photograph 2. The judge said that the photographs also showed railings surrounding the edges of the top of the generator next to ladder 3. The judge then concluded that the photographs showed the appellant's version of the accident to be "inherently improbable". She further found that there could not have been planks (parallel with the I-beam which was directly opposite the generator and to the left of ladder 3) at the opening which had been removed a day before the accident.

(c) The appellant had not discharged the burden of proof, which was upon him, to explain how he fell or how the accident happened. He said he had stepped into "empty space" instead of onto a platform of planks and had fallen. The judge found the appellant's testimony to be vague and evasive. She was also not satisfied with the appellant's explanation of the discrepancy between his version of the accident as set out in his lawyer's letter to the respondents dated 13 November 2002 and the version which he gave in court.

(d) The appellant was found lying on his back on the deck. That position was consistent with the appellant falling off ladder 3 during descent. A person using a ladder would fall backwards and land on his back.

(e) The appellant was not wearing a safety helmet at the time of the accident. If he had worn a safety helmet, he would not have sustained the serious head injuries that rendered him a quadriplegic.

10 In coming to the above findings of fact and conclusions, the judge would have been persuaded by the overall impressions and considerations of the respondents' evidence. Some of these may not have been expressly specified by the judge in coming to her decision, but they were nonetheless implicit from her narration of the evidence and her reasoning. In rejecting the appellant's version of the accident as "inherently improbable", the judge would have to first accept, which she did, that the open sides of the working platform at level 2 were fenced or barricaded by the scaffolding poles marked "A" to "F" in photograph 2, and that these poles could adequately function as guard rails. Having found that the scaffolding poles marked "A" to "F" acted as guard rails, the judge accepted Lim's evidence that, contrary to the appellant's testimony, there could not have been any planks placed parallel to the I-beam on the opposite side of the generator and then removed just a day before the accident. Lim's reasoning was that a scaffolding contractor would not ordinarily

erect a working platform or place any planks outside a fenced or barricaded opening. By ruling in the respondents' favour, the judge accepted the respondents' case that (a) access to ladder 3 was from the working platform behind ladder 3 at the area near the scaffolding poles marked as "A", "B" and "C" in photograph 2, and (b) the appellant was already on ladder 3 when he fell. In contrast, the appellant's testimony was that he fell from the level 2 working platform even before he reached ladder 3. At the material time, he was approaching ladder 3 from the front rather than from the working platform behind ladder 3. According to the appellant, the scaffolding poles "A", "B" and "C" impeded safe access to ladder 3 from the working platform behind ladder 3.

11 The judge held, *obiter*, that even if she was wrong in her finding that the appellant fell off ladder 3 instead of in the manner which he had described, the respondents were still not liable to the appellant as there was no breach of ss 33(2) and 33(3) of the Factories Act. The respondents had provided the appellant with a safe means of access to the work site (*ie*, the vessel) and a safe place of work there. There was a safe system of work due to the stringent safety checks that were put in place by Keppel. In any case, the opening in question was visible and large. The judge was of the view that had the appellant kept a proper lookout, he would have seen the opening. Finally, the judge had no doubt that there was no breach of duty by Keppel as the occupier of the work site as there was no concealed or unusual danger on the vessel that Keppel was aware of.

The appeal

12 The appellant's main grounds of appeal were as follows:

(a) The judge erred in admitting the photographs. Ng was not called as a witness to prove the photographs and there was no evidence that the photographs were taken soon after the accident on the same day.

(b) The judge erred in finding that the photographs showed that the appellant's version of how the accident happened was inherently improbable.

(c) The judge erred in finding that the appellant was not wearing his safety helmet, and that he would not have been rendered a quadriplegic had he done so.

(d) The judge erred in finding that the respondents did not breach s 33 of the Factories Act.

(e) Alternatively, as between the appellant and the respondents, the former's contributory negligence should be apportioned at a lower percentage.

13 In addition, in the event that his main grounds of appeal should be rejected, the appellant adopted a fall-back position, which was for relief under s 33 of the Workmen's Compensation Act (Cap 354, 1998 Rev Ed) ("WCA").

Photographic evidence

14 Turning to the first two main grounds of appeal, these relate to the photographic evidence (see [12] above). The question here is the admissibility of the photographic evidence and whether such evidence, if received, supported the view that scaffolding poles "D", "E" and "F" functioned as guard rails fencing the open side of the level 2 working platform from where the appellant purportedly fell.

15 We should point out that central to the circumstances of the accident, and hence to this

appeal, was the finding that the open sides of the level 2 working platform were barricaded with scaffolding poles "A" to "F" which functioned as guard rails. It was not necessary in this appeal for this court to make a specific finding as to whether there had originally been planks covering the spot from which the appellant fell (see [4] above). In the court below, the appellant did not call any witness to corroborate his claim that the missing plank(s) (or "platform" as the judge called it) was on the level 2 working platform the day before the accident. This was surprising, as other workers working on Module 10 would also have made use of ladder 3. However, fortunately for the appellant, he needed only to prove that he fell from an unfenced or insufficiently fenced opening at the edge of the working platform at level 2. Furthermore, even though the judge found the appellant evasive in his evidence, this would have no bearing on whether there was in fact an unfenced or an insufficiently fenced opening at the edge of the working platform at level 2.

16 Counsel for the appellant, Mr N Sreenivasan, argued that the appellant's account of the accident should have prevailed before the judge. It was submitted that the photographs were wrongly admitted as the photographer, Ng, was not called to prove that they were taken by him on the day of the accident. Effectively, the only evidence available before the court as to the cause of the accident was the appellant's testimony. The accident, it was argued, was due to the respondents' breaches of duty: the appellant fell from the level 2 working platform as there was no or inadequate fencing along the open side of the working platform.

17 Counsel for the respondents, Ms Edwina Fan, accepted that the photographs were critical as they showed barriers surrounding the alleged open side of the working platform from which the appellant had purportedly fallen. She contended that the photographs were properly admitted in evidence. The judge was right to have accepted Ismail's evidence that he was present and saw Ng take the photographs. Lim's interpretation of the photographs was crucial in explaining why the appellant's version of how the accident happened was improbable. Ms Fan argued that the judge was right to have accepted Lim's testimony that the photographs showed that there were barriers erected at the side of the working platform from which the appellant allegedly fell, such that it was "inherently improbable" for the appellant to have fallen from the working platform in the way which he claimed. If anything, the accident was due to the appellant's fault. He was careless and did not keep a proper lookout for his own safety.

18 On the question of the photographic evidence, we agree with the judge's ruling that the photographs were admissible in evidence through the testimony of Ismail, who was with Ng at the time the latter took the photographs. Ismail had testified that the photographs depicted what he saw at the site of the accident and the surrounding scaffolding. Ismail also saw the photographs after they were developed in the course of Ng's preparation of the investigation report and during his discussion with Ng. The investigation report was later approved and confirmed by Ismail. Since the photographs could be proved through Ismail, Ng's attendance in court was unnecessary. Therefore, contrary to the appellant's submissions, there was nothing adverse to infer from the respondents' failure to call Ng as a witness. The respondents had earlier explained that Ng had left Keppel's employment and was presently working in China.

19 The onus of proof was always on the appellant to explain how he fell from the working platform and also to explain why this fall was due to the negligence of the respondents or a breach of statutory duty on the part of Keppel. Contrary to the respondents' submissions, from the transcripts of the evidence, the appellant steadfastly maintained throughout that scaffolding poles "D" and "E" were not guard rails as they were too low to prevent any person from falling from the working platform. From our analysis of the photographs, we agree. Notably, the focal point of the important photographs was ladder 3. Photograph 2 shows an I-beam to the left of the photograph. To its immediate right is ladder 3, next to which is the generator at the other end of scaffolding poles "A",

"B" and "C". Scaffolding poles "A", "B" and "C", which were erected horizontally, are parallel to each other at varying heights. Scaffolding pole "D" is attached perpendicular to "B" above the top of the generator at that end of "B" which is away from the I-beam. The spot from which the appellant allegedly fell is at the edge of the two wooden planks shown in the foreground of photograph 2. Scaffolding pole "F" runs under one of the two wooden planks and also ends there. These two wooden planks are not in photograph 3 as it was taken from a different angle. Photograph 3 shows ladder 3 and a small section of scaffolding poles "D", "E" and "F". It is impossible to see from photographs 2 and 3 whether scaffolding poles "D" and "E" were of heights which correspond with scaffolding poles "A", "B" or "C". Significantly, there were no photographs showing the full length of poles "D" and "E". There were also no photographs showing the railings surrounding the edges of the top of the generator. We found it surprising that Ismail did not ask that photographs be taken of the area immediately above the top of the generator as proof that the edges were, as he put it, "all ... railed up" (see [6] above) since, if he was to be believed, the investigations which would typically be done in a case like this, where a workman had a bad fall, ought to identify or rule out any unsafe open sides. The judge did not draw the necessary inference from these matters when considering the photographic evidence. The judge did, however, observe that the railings which Ismail saw in relation to the small gap of about 180mm wide on the working platform at level 2 immediately behind ladder 3 were scaffolding poles "A", "B" and "C" in photograph 2, and that they were not on the same side of the working platform as the side from which the appellant fell.

20 Given the photographic evidence and the appellant's account of how he fell into empty space, the absence of proper guard rails at the edge of the level 2 working platform is, in our view, the only credible explanation as to how the appellant fell. It follows that the judge should not have accepted Lim's testimony that the edge of the working platform at level 2 was barricaded.

21 Besides, there were two important features of Lim's evidence in particular which rendered it inadmissible evidence. The first is that Lim was not a witness of fact or an expert witness. He was from the company engaged to erect the scaffolding on the vessel's decks (*ie*, Multiheight). However, he was not responsible for and did not supervise the construction of the scaffolding and working platform. Lim had no personal knowledge of what scaffolding had been erected at the material time since he had not visited the vessel on 22 June 2002 either before or after the accident. Lim also admitted under cross-examination that he was not in a position to know whether the scaffolding in Module 10 of the vessel had been properly constructed or maintained as that was a temporary scaffolding. There were no written instructions or drawings as to where Multiheight was supposed to construct or dismantle the scaffolding and working platforms in Module 10. Similarly, there were no construction drawings that could confirm that there were guard rails made up by scaffolding poles "D" and "E". Lim was, therefore, not competent to give evidence on matters he had not seen or otherwise had no personal knowledge about.

22 It is an accepted principle that only expert witnesses may give opinion evidence. Notably, Lim was not called as an expert witness. Yet, he gave what was substantially opinion evidence under the guise of interpreting and explaining the layout and function of the scaffolding poles and the working platform in the photographs. This offends the general rule that inferences of fact must be made by the court and not the witness. The present situation is unlike those cases where a layman who has observed the primary facts is allowed to give inferential or opinion evidence on a state of affairs or a condition, for instance, that a person whom he had observed was drunk or ill or angry or looked old. Evidence of that nature can be received, but its weight and probative value are for the court to evaluate. In breach of the hearsay rule, Lim gave opinion evidence on what was in the photographs as though the contents of the photographs were proof of matters of fact.

23 The second feature which follows from the hearsay point is that the judge should not have

accepted Lim's views on the height of scaffolding poles "A", "B", "C", "D" and "E". As stated (see [19] above), scaffolding poles "A", "B" and "C" were erected horizontally and parallel to each other at varying heights. Scaffolding pole "D" was attached perpendicular to "B" at that end of "B" which was away from the I-beam and above the top of the generator. Although no evidence in terms of actual measurements was given, Lim stated that scaffolding pole "A" functioned as the upper rail and was waist-high; "B" was the middle rail and was knee-high; and "C" was above the ankle. The height of scaffolding pole "D" was important to the respondents' case and no doubt, appreciating the limitations posed by the available photographic evidence which we have highlighted earlier at [19], Lim's opinion was material. Lim was asked "to advise" on the height of scaffolding pole "D" without the benefit of any photographs showing the full length and overall view of scaffolding poles "D" and "E". Lim opined that scaffolding pole "D" functioned as the upper rail. That was because the top of the generator was lower than the working platform by about "2 to 3 feet". His opinion was not only based on his observations and the inferences which he drew from what he saw in photographs 2 and 3; his testimony went beyond what was in the photographs. He was allowed to express his subjective opinion on what was essentially a disputed issue of fact. As we stated earlier at [20] above, the judge should have rejected Lim's testimony that the open side from which the appellant said he fell was "fenced and barricaded".

24 A related and important consideration is whether there was sufficient objective evidence for the judge to make her own evaluation on the height of scaffolding poles "D" and "E". No one took measurements of the height of scaffolding poles "D" and "E", so there was no evidence that "D" was a safety rail 1.1m high as required by the Factories Regulations. The evidential deficiency or gap could not be made good by assessing the height of the poles from the photographs, as Mr Sreenivasan sought to do when he submitted on the dimensions of the scaffolding based upon a visual assessment of the distance between each rung of ladder 3. It must be remembered that a photograph is not proof of the dimensions of the objects depicted. It is not possible to work out distances and calculate measurements based on objects depicted in photographs under the guise of submissions. Instead, this is a matter for expert testimony, as can be seen from *United States Shipping Board v The Ship St Albans* [1931] AC 632. That case concerned a collision between two vessels. The point in the harbour at which the collision occurred was material. Photographs taken from a third moving ship showing the vessels just before and after the collision, with the frontage of the harbour in the background, were adduced in evidence. Based on the photographs, a surveyor fixed the focal point of the camera from which each photograph was taken, and then by reference to the background, attempted to geometrically determine and localise the collision. The surveyor's evidence was rejected by the House of Lords as the task mentioned required the science or skill of a qualified person and the surveyor was not such an expert witness. Lord Merrivale said (at 642):

> Clearly a photographic picture cannot be relied upon as proof in itself of the dimensions of the depicted object or objects, and cannot be made properly available to establish the relative proportions of such objects except by evidence of personal knowledge or scientific experience to demonstrate accurately the facts sought to be established.

25 Likewise, it was not permissible to gauge the height of poles "D" and "E" and the distance between the top of the generator and the working platform based upon a mere visual inspection of the photographs as Lim did. In the same way, it was not permissible to ascertain the height of the poles based on the distance between each rung of ladder 3 from the photographs as Mr Sreenivasan tried to do.

26 In the result, for the reasons stated, there was no countervailing evidence to contradict the appellant's evidence that scaffolding poles "D" and "E" were much too low to qualify as guard rails or operate as safety barriers. The appellant would not have seen pole "F" which was under the two

wooden planks shown in the foreground of photograph 2 (see [19] above). In these circumstances, it is open to this court to accept, which we do, that on a balance of probabilities, the appellant fell from the side of the insufficiently barricaded or guarded working platform at level 2, and not from ladder 3.

27 It was foreseeable that a workman like the appellant would fall from the insufficiently fenced side of the working platform and sustain injuries. Keppel's health, safety and environmental manual ("Keppel's safety manual") highlights in particular falls from a working platform or from the edge of a structure as one of the major types of accidents in the shipbuilding and ship repairing industry where the fallen persons either die or suffer serious multiple injuries. Common causes of falls from heights are likely to be an unguarded platform, an unfenced opening or an unfenced edge. Safety measures to prevent persons from falling from heights are, *inter alia,* the provision of guard rails at the open sides of scaffolding. Keppel's safety personnel were to ensure that BT Engineering, its employees and subcontractors observed Keppel's safety manual.

28 We accept that it was probable that the appellant did not exercise sufficient care to keep a proper lookout as to where he was walking. Even then, his lack of care as he made his way towards ladder 3 would not necessarily defeat the claim in its entirety. If BT Engineering was in breach of its duty of care to the appellant as his employer or if Keppel had failed to provide the safety provisions required of it under the Factories Act as the occupier of the shipyard, and as a result a workman, such as the appellant, was injured in a way which could have resulted from the breach, the onus of proof would shift to the respondents to show that their breaches of their duties of care to the appellant were not the proximate cause of the appellant's fall. The question in this case is whether the appellant would have fallen but for the absence of proper guard rails that could function as a barrier. If either BT Engineering or Keppel were in breach of their respective duties, then the appellant here would not in any sense be taking advantage of his own wrong if BT Engineering's or Keppel's breaches of duties coincided with his own negligence and continued up to the very moment of the accident. If the court is satisfied that there was fault on the part of both the appellant and the respondents, the issue then is one of determining the extent to which it is just and equitable to reduce the damages which would otherwise be recoverable by the appellant. We will be considering these aspects of the case below.

Liability of the respondents

29 In the present case, the non-delegable duty of care owed by BT Engineering to the appellant to provide a safe place of work continued even though Multiheight was engaged as the scaffolding contractor and despite the fact that the appellant was working at Keppel's premises: see *Charlesworth & Percy on Negligence* (Sweet & Maxwell, 10th Ed, 2001) at para 10-31. The appellant had suffered injuries while he was on the working platform set up by and under the charge of Multiheight. BT Engineering was required to erect scaffolding and working platforms for the conversion works. Multiheight had a scaffolding supervisor on site. This scaffolding supervisor from Multiheight was the person in charge of the erection and dismantling of the scaffolding, and it was he who had to observe, *inter alia*, Keppel's safety manual.

30 Both Keppel as occupier and BT Engineering as employer were obliged to comply with the Factories Regulations. Regulation 4(1), which was in force at the time of the accident, imposes a duty on every occupier, contractor or employer to comply with the requirements of the Factories Regulations as they affect him or any other person employed by him, which in this case was the appellant. Regulation 4(2) imposes a duty on every occupier, contractor or employer who, *inter alia*, erects any scaffolding to comply with that part of the Factories Regulations which relates to the erection of scaffolding having regard to the purpose or purposes for which the scaffolding is designed at the time of erection.

31 The burden of proof was on Keppel and BT Engineering to prove that they had complied with the statutory obligations under the Factories Regulations. The respondents have failed to do so for the reasons set out below.

32 Keppel was in charge of the overall safety of the site, which was a "factory" within the meaning of the Factories Act. The insufficiently fenced or guarded working platform pointed *prima facie* to a definite breach of the safety provision imposed on the occupier of a "factory" under reg 85 which states:

> There shall be no opening in any working platform except to allow access to that working platform.

33 The respondents argued that reg 85 was not applicable as the opening through which the appellant fell was found outside that part of the working platform which was barricaded by the scaffolding poles and that the same reasoning applied in the case of regs 91(1) and 91(6). These arguments are no longer valid in the light of our finding that there were in fact no proper guard rails that could have served as a barrier against a careless worker falling off the edge of the working platform at level 2.

34 The respondents also argued that there was no breach of reg 9 read with reg 93(1)(*a*) as the height of the working platform was not more than 3m in this case. There was therefore no obligation to provide guard rails of adequate strength to a height of at least 1.1m above the working platform. The relevant regulations read as follows:

> **9.** Every open side or opening into or through which a person may fall more than 3 metres shall be covered or guarded by an effective barrier to prevent falls except where free access is required by persons or for the movement of materials.
>
> …
>
> **93.**—(1) Subject to paragraphs (4),(5) and (6), every side of a working platform or working place, being a side from which a person is liable to fall a distance of more than 3 metres, shall be provided with —
>
> > (*a*) a suitable guardrail or guardrails of adequate strength to a height of at least 1.1 metres above the platform or working place and above any raised standing place on the platform …

35 As stated, no measurement was taken of the height of the generator or the height of the working platform and scaffolding poles "D" and "E". Ismail's testimony was ambiguous. He said that ladder 3 was 3m in height and that the top of the generator was "slightly lower" than ladder 3. He did not testify as to the distance between the working platform and the top of the generator which was marked X on photograph 3. In our view, the respondents had not discharged the burden of proof, which was on them, to establish that (a) the height of the working platform from the deck up was not more than 3m, or that (b) the height of scaffolding poles "D" and E" was at least 1.1m. The appellant fell from the open side of the working platform and not from the top of the generator. It is more probable than not, and we so find, that the working platform at level 2 was more than 3m from the deck. Before the judge, the respondents' position was that the open sides of the working platform were barricaded as required by law. By that, they accepted, albeit tacitly, that the height of the working platform from the deck was more than 3m and not lower as they claimed in this appeal.

36 Having reached the conclusions above, it is unnecessary to deal with the other statutory provisions under s 33 of the Factories Act. However, we should briefly comment on ss 33(2) and 33(3) of the Factories Act as the judge considered them and was of the view that the respondents were not in breach of the subsections. Besides, it was an issue raised in this appeal (see [12] above).

37 First, the appellant fell from the edge of the working platform, which cannot be regarded as an opening in the floor within the meaning of s 33(2) of the Factories Act. This court in *Bohman v Jurong Town Corp* [1980-1981] SLR 167 held that unfenced edges of a platform were not "openings in floors" within the contemplation of the s 33(2). Accordingly, s 33(2) does not apply in this case. Second, s 33(3) is concerned with a safe means of access to and a safe place of employment. Given our findings at [26] and [35] above, the respondents were in our view in breach of s 33(3) of the Factories Act.

Contributory negligence

38 We now turn to the question of contributory negligence. The respondents contended that the appellant was wholly to blame for the accident and should bear full responsibility for the accident. We have to again emphasise that this was not a case where the only breach on the part of BT Engineering as the appellant's employer and Keppel as the occupier of the shipyard consisted of the sole act of the workman himself (for instance, where the workman fails to operate a machine in accordance with the safety features provided).

39 The accident took place in broad daylight and there was no challenge that there was enough natural lighting for the appellant to see where he was going. The appellant admitted that he had ample time to get to level 1. He had worked at shipyards in the past and had undergone safety courses at Keppel's shipyard. He had also attended organised safety talks and meetings both generally and specifically for the conversion works to be done of the vessel. He was familiar with the layout of level 2, having worked there for about a week before moving up to level 3. He had also gone up and down ladder 3 several times over a period of two to three weeks. The appellant's familiarity with the surrounding areas of level 2 would be a factor to be taken into account when assessing his culpability.

4 0 This accident could have happened if there was a degree of inattention or carelessness on the part of the appellant for his own safety: for instance, if he banged his shins on one of the scaffolding poles, walked into one of the poles and tripped over or fell from the insufficiently-fenced side of the working platform. It therefore behoved the appellant to keep a careful lookout. The fact of the matter was that the appellant had not looked at where he was going and this was the immediate cause of the accident. It was because of the appellant's neglect in this regard that he failed to notice the edge of the working platform and thus stepped off the edge of the platform. We find that the appellant was negligent in failing to observe the ordinary care which an ordinary prudent person would have taken for his own safety. Blameworthiness was there and to a higher degree than that of the respondents as employer and occupier of the site respectively. Accordingly, we apportion liability at 40% to the respondents and 60% to the appellant by way of contributory negligence.

41 We now come to the remaining issue in this appeal. The judge's finding, that (a) the appellant was not wearing a safety helmet and (b) the position in which he landed on the vessel's deck, was consistent with his having fallen off ladder 3 is, with respect, neither here nor there. First, we cannot readily draw any conclusion from the fact that the appellant was not wearing a safety helmet when he fell, as the appellant's head injuries were minimal according to the medical reports. The head injuries did not render him a quadriplegic. Instead, he became a quadriplegic because he broke his spine as a result of the fall. Second, the judge regarded the undisputed evidence that the appellant

was found lying on his back as a strong indicator supporting the respondents' case that the appellant fell off ladder 3. This was understandable given the judge's finding that the spot on the level 2 working platform where the appellant fell was fenced or barricaded. But we have in this judgment come to a different conclusion. In any case, accidents because of their very nature often happen in the most unlikely of ways. It is common experience that people sometimes perform feats by accident that they are unable to duplicate with deliberation. The judge herself acknowledged that the appellant could have been flailing around as he tried to save himself by grabbing something on the way down. This could have explained why he landed on his back.

42 Given the conclusion reached in this appeal, there was no need for this court to consider the appellant's fall-back claim for relief under s 33 of the WCA.

Conclusion

43 For these reasons, we allow the appeal to the extent that the appellant is entitled to 40% of the damages that are ultimately assessed as payable to him by the respondents. As for the costs here and below, we are of the view that the appellant is the successful party despite the apportionment of liability. The point is that the appellant's claim is not defeated by a finding of some fault on the part of the appellant in the light of s 3(1) of the Contributory Negligence and Personal Injuries Act (Cap 54, 2002 Rev Ed). In the court below, the judge had found that the appellant was entirely to blame for the accident. In contrast, we have found that he should bear only 60% of the blame. Accordingly, in the exercise of our discretion, we award the appellant full costs for this appeal and for the trial below. The security for costs furnished by the appellant is to be returned to the appellant or his solicitors.