SUPREME COURT OF NOVA SCOTIA
Citation: Walsh v. Marwood Ltd., 2009 NSSC 15

Date: 20090121
Docket: Hfx No. 104865
Registry: Halifax

Between:

Larry Joseph Walsh

Plaintiff

v.

Marwood Limited

Defendant

Judge: The Honourable Justice Glen G. McDougall

Heard: December 10 - 14, 2007; January 9, 2008, in Halifax, Nova Scotia

Counsel: David P.S. Farrar, Q.C., on behalf of the Plaintiff
Philip M. Chapman, on behalf of the Defendant

By the Court:

INTRODUCTION:

[1] On December 18, 1991, the plaintiff was injured when a load of lumber fell on him at the defendant's lumber yard. This proceeding arises out of that incident. The proceeding was commenced by Originating Notice (Action) and Statement of Claim filed on May 12, 1994. The defence was filed on December 7, 1995. Discoveries were held between February 1997 and February 2006. The issues of liability and damages were severed by agreement of the parties. This decision deals with liability only.

[2] The plaintiff elected to receive benefits from the Workers' Compensation Board ("the Board") rather than pursue a claim against the defendant. The Board is subrogated to the plaintiff's rights and is advancing the proceeding in his name. The

defendant's view is that this was an industrial accident which is covered by Workers' Compensation legislation.

FACTS:

[3] In December 1991 the plaintiff was employed as a short-haul trucker by Brian Densmore Enterprises. He had been driving trucks since 1983. The defendant was a manufacturer and seller of lumber products and operated a pressure treatment plant in Brookfield, NS ("the Marwood property"). At the time of the accident both the plaintiff's employer and the defendant were registered employers under the *Workers' Compensation Act*, R.S.N.S. 1989, c. 508 (as amended).

[4] The Marwood property was bounded on the west by Highway 102; on the north by property owned by Brookfield Lumber Co.; on the east by a CN rail line; and, on the south by property of Canada Cement Lafarge ("Lafarge"). The Marwood property was reached by a right-of-way on land owned by Lafarge. This access road connected the Marwood property to Highway 289. It was approximately half a kilometre in length. According to the defendant, there was an iron gate near the Marwood end of the access road which was the only entrance to the Marwood property. The defendant says the gate was closed and padlocked when the lumber yard was not operating. The Marwood property covered an area of some 51 acres.

[5] The plaintiff arrived in his truck at the Marwood property around lunchtime on December 18, 1991. He had already delivered two loads to the lumberyard that day. It was snowing. The plaintiff was hauling a load of 15 bundles of 6" x 6" x 16" lumber. Each bundle consisted of about 35 pieces stacked in three tiers on the bed of the tractor trailer. He had hauled the load from the MacTara mill in Upper Musquodoboit. The two lower tiers were stacked side-by side while the top tier was a single row running down the centre of the lower bundles. On arriving at Marwood the plaintiff reported to the office where the load was checked. He was directed to the area in front of the stacker where he parked on a slanted area of ground. He exited the truck, leaving the engine running, and began to unfasten the nylon straps that secured the load to the truck bed. He first retrieved a bar from a storage compartment which he used to loosen and unhook the straps. The straps were loosened on the driver's side and then unhooked on the passenger's side. The plaintiff then returned to the driver's side to roll them up. Meanwhile, a Patrick No. 1 forklift, operated by the defendant's employee Barry Kolstee, approached the truck from the passenger's side.

[6] The plaintiff testified that usually the forklift operators would give drivers sufficient time to roll up the straps or to throw them under the truck so that the forklift would not drive over them. He also said that the forklift operators would usually make contact before beginning to unload. On this occasion, he said he did not see or hear the forklift. Mr. Kolstee commenced unloading the top bundle which was sitting on the middle of the trailer. Moving it onto the forks required some manoeuvring due to the bundle's location and the limitations inherent in the equipment. Mr. Kolstee was required to move the bundle with the forklift then set it down in order to insert the forks more securely beneath it. When the forklift set the bundle down, it slid towards the driver's side of the truck landing on the plaintiff. The plaintiff testified that he did not remember where he was standing when the wood fell on him.

[7] Darren O'Connell, who worked as a forklift operator (as well as other jobs) at Marwood, was in the area of the treatment plant when the accident happened. He saw Mr. Kolstee near the back of the truck and the plaintiff on the driver's side rolling the straps when the bundle slid off. He said the practice was for the forklift operator to locate the driver before beginning to unload the bundles. It would be safe to proceed when the forklift operator saw the driver and the driver saw the forklift.

[8] Mr. Kolstee testified that he had been working at Marwood for about six months when the accident happened. He received training on how to properly operate the forklift from Randy Creelman, the production co-ordinator. Mr. Creelman showed him how to do things and then watched while he did them himself. He knew it was necessary to be aware of the location of the driver while unloading. He knew that winter conditions required extra caution and that ice on the lumber could cause it to fall off the forks. On the day of the accident he was operating the Patrick No. 1 forklift in the vicinity of the treatment plant. He said he drove around the rear of the trailer and saw that the driver was near the cab at the front of the trailer. He did not recall sounding his horn or making eye contact with the plaintiff. He said he saw the plaintiff taking off the last two or three straps and saw them being pulled over the top of the load. By the time he drove around the end of the trailer to make sure the plaintiff was out of the way, the straps were all off. He assumed that the plaintiff heard the forklift. He could not say whether the plaintiff saw him. There was no contact between the two of them before he started unloading. After proceeding back around the rear of the trailer to the passenger's side, Mr. Kolstee raised the forks and lifted a bundle which then had to be repositioned. When he set it down, it started to move. It then slid off and fell on the driver's side. He said it was about 45 seconds between the time he saw the plaintiff and when the bundle of lumber began to fall.

[9] The Patrick No. 1 forklift operated by Mr. Kolstee was not registered with the Registry of Motor Vehicles. It had no headlights (other than work lights on the mast), no back-up lights, and no turn signals. William Lounds of the Registry of Motor Vehicles testified that he would not have registered a forklift as described by the defendant's counsel. There was evidence from Mr. Creelman that Patrick No. 2 and 3 forklifts had been used to off-load rail cars but Mr. Kolstee said he had not used the No. 1 for this purpose. According to Mr. Creelman, the Patrick No. 1 forklift was used for work with the stacker. He said it was loud and needed to rev up in order to lift its forks.

[10] The Marwood property took deliveries of timber from Western Canada which was delivered by rail three of four times per year, according to Mr. Creelman. The railway siding was located on CN-owed land. He said it was not necessary for the forklifts unloading the rail cars to go onto the highway. He had not seen the Patrick No. 1 forklift used for this purpose although he could not exclude the possibility that it might have been so used. He acknowledged that the forklift on occasion had gone beyond the gates of the Marwood property and onto the access road.

[11] While the overwhelming majority of its business was conducted with wholesalers, the Marwood establishment conducted limited retail sales. The extent of this business was described by Mr. O'Connell, Mr. Creelman and David Armsworthy who was production manager in 1991. Mr. Armsworthy testified that there was some retail selling of dimensional lumber (2x4s and 2x6s). This product was stored to the south of the office near the access road. The lumber would be carried to this area by forklifts which would traverse the access road. Most retail sales were made to contractors, employees and members of the public. Purchasers would report at the office to inquire whether the required product was available. If so, Marwood employees would assist in loading the customer's vehicle. According to Mr. Armsworthy, retail sales were not a daily occurrence and there was insufficient retail activity to warrant dedicating an employee to the task. Retail sales mainly occurred during the summer. Customers' vehicles generally did not go past the office. In addition to lumber, some fence posts were sold, generally to farmers, who would be escorted to the storage area to pick them up. There was also limited and irregular access to the "Timber Hill" area, where "wood ends" from trimmed timber were stored. There was one person who regularly collected wood ends to use as firewood. Mr. Armsworthy said there was no signage (in 1991) indicating where customers

should or should not travel on the property. There was a gate at the entrance to the Marwood property which was locked when the plant was closed.

ISSUES:

[12] The issues are as follows:

(1) Did the accident result from driving a motor vehicle that was registered or required to be registered under the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293 (as amended) thereby falling within the s. 19 exception to the statutory bar established by s. 18 of the *Workers' Compensation Act*?

(2) If the proceeding is not statute-barred, is the defendant liable in negligence for the plaintiff's injuries, and was there contributory negligence by the plaintiff?

(1) IS THE ACTION STATUTE-BARRED?

Registration under the MVA

[13] The version of the *Workers' Compensation Act* that was in effect in December 1991 provided for an injured worker's right of action, in addition to making a claim under the *Act*, at ss. 17(1) and (2):

> **Election to sue or claim compensation**
>
> 17(1) Where an accident happens to a worker in the course of his employment in such circumstances as entitle him or his dependents to an action against some person other than his employer, the worker or his dependants if entitled to compensation under this Part may claim such compensation or may bring such action, provided a written notice of election to bring such action or to claim compensation shall be made to the Board within six months from the date of the accident.
>
> **Compensation to cover difference in awards**
>
> (2) If such worker or his dependants bring such action and less is recovered and collected than the amount of the compensation to which such worker or dependants would be entitled under this Act, such worker or dependants shall be entitled to

> compensation under this Part to the extent of the amount or amounts of such differences.

[14] Section 17 went on to provide for the subrogation of the Board to the position of the injured worker:

> **Subrogation of the Board**
>
> (3) If such worker or dependants, or any of them have claimed compensation under this Part, the Board shall be subrogated to the position of such worker or dependant as against such other person for the whole or any outstanding part of the claim of such worker or dependant against such other person.
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> **Right of Board to sue or release its claim**
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> (4) It shall not be obligatory upon the Board to sue for or require payment of damages caused by such accident unless it shall think fit to do so, and the Board shall have full power to compromise such cause of action or release its claim therefor if, in its discretion, it thinks it inadvisable to bring action for such damages.

[15] In the present case, the plaintiff opted to be compensated by the Board. As such, the Board is subrogated to the plaintiff's rights against the defendant. There is, however, a question as to whether the plaintiff had a right of action against the defendant under the legislation that was in force at the time. Section 18 of the *Act* barred a worker's right of action against an employer to which Part I of the *Act* applied. Section 18 said:

> **No right of action against employer subject to Part I**
>
> 18 In any case within the provisions of subsection (1) of Section 17, neither the worker nor his dependants nor the employer of such worker shall have any right of action in respect of such incident against an employer, his servants or agents, in an industry to which this Part applies, and in any such case where it appears to the satisfaction of the Board that a worker of an employer in any class is injured or killed owing to the negligence of an employer or of the worker of an employer in another class to which this Part applies, the Board may direct that the compensation awarded in such case shall be charged against the last mentioned class.

[16] On the face of the matter, the statutory bar would seem to apply. However, s. 19 provided an exception to the s. 18 bar when the injury involved a motor vehicle:

Section 18 does not apply

> 19 Section 18 shall not apply if the accident referred to in subsection (1) of Section 17 happens to the worker as a result of the driving of a motor vehicle as defined in the *Motor Vehicle Act* that is registered or required to be registered under that Act.

[17] The plaintiff says the three requirements of s. 19 are met in these circumstances. The defendant submits that the exception does not apply and says the plaintiff must prove every element of s. 19. The plaintiff says the onus is as described in **Smith** v. **Nevins**, [1925] S.C.R. 619, where Duff J. (dissenting), discussed the principle that "he who asserts must prove." He cited the following passage from the first edition of Halsbury's Laws of England:

> In legal proceedings the general rule is that he who asserts must prove -- a proposition sometimes more technically expressed by saying that the burden of proof rests upon the party who substantially asserts the affirmative of the issue.
>
> This rule is derived from the Roman law, and is supportable not only upon the ground of fairness, but also upon that of the greater practical difficulty which is involved in proving a negative than in proving an affirmative.
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> In applying the rule, however, a distinction is to be observed between the burden of proof as a matter of substantive law or pleading, and the burden of proof as a matter of adducing evidence. The former burden is fixed at the commencement of the trial by the state of the pleadings, or their equivalent, and is one that never changes under any circumstances whatever; and if, after all the evidence has been given by both sides, the party having this burden on him has failed to discharge it, the case should be decided against him.
>
> This rule is quite consistent with another rule, in which the burden of proof is used in a different sense -- a sense sometimes described as the minor, or secondary, sense -- and in this sense the burden of proof does shift in the course of the trial according as the evidence preponderates on one side or the other, as well as in obedience to certain presumptions. The burden of proof in this sense is said at any stage in the progress of the trial to rest upon the party who would fail if no further evidence were given.

[18] Duff J. went on to say:

> It is pertinent to observe ... that the party on whom the burden of proof rests in substantive law, the party whose duty it is, in order to succeed, to establish the affirmative of the issue, must fail if, when all the evidence is produced, the minds of the jury or other tribunal of fact, are in a state of real doubt as to the effect of the evidence....
>
> It is contended (I think fallaciously) that if the plaintiff has given prima facie evidence which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as to the decision of the question itself.... I cannot assent to it. It seems to me that the proposition ought to be stated thus: the plaintiff may give prima facie evidence which, unless it be answered, either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour; the defendant may give evidence, either by contradicting the plaintiff's evidence or by proving other facts; the jury have to consider, upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls upon them to answer. ... Then comes the difficulty -- suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff; in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able, by the additional facts which he has adduced, to bring the minds of the jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him.

[19] The plaintiff says the burden of proof does not change, but that the evidentiary burden does. The defendant says the plaintiff is asserting that the exception applies, and is therefore required to prove it. I am satisfied that I must decide on the basis of all the evidence whether the exception applies. It is clearly the plaintiff's task to establish this on a balance of probabilities.

(a) Was the forklift being "driven"?

[20] The *Motor Vehicle Act* defines "driver" at s. 2(l) as "a person driving or in charge of a vehicle and includes the operator of a motor vehicle...". The plaintiff says his injuries resulted from Mr. Kolstee's driving of the forklift. The defendant denies that the accident resulted from the "driving" of a motor vehicle. The defendant says the forklift was being operated, not driven. This question might be best approached in the context of determining whether the forklift is a motor vehicle.

(b) Was the forklift a "motor vehicle"?

[21] Determining whether the forklift constitutes a “motor vehicle” for the purpose of s. 19 requires a consideration of the registration requirements of the *Motor Vehicle Act*, which provides the following definitions of “vehicle” and “motor vehicle,” at ss. 2(ca) and 2(ad), respectively:

> (ca) "vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a public highway, excepting a motorized wheelchair and devices moved by human power or used exclusively upon stationary rails or tracks.
>
> ***
>
> (ad) "motor vehicle" means a vehicle, as herein defined, which is propelled or driven otherwise than by muscular power....

[22] Section 13 requires “[e]very owner of a motor vehicle, trailer or semi-trailer intended to be operated upon a highway in the Province” to register the vehicle, with certain exceptions not relevant here. As has been noted, the forklift was not registered and the evidence of a registry official was that he would not have registered it. The plaintiff, however, says the forklift was a “vehicle” in that it was “capable of being driven on a highway and was therefore a device upon which persons or property could be transported or drawn on a public highway.” It was, it is submitted, also a “motor vehicle” by virtue of being propelled “otherwise than by muscular power.”

[23] The defendant submits that at the time of the accident, the forklift was not being used as a “motor vehicle.” The defendant says that any liability on its part results not from Mr. Kolstee driving the forklift but from his failure to direct the plaintiff to stay clear of the trailer during the offloading process. The defendant cites **Roed** v. **Tahsis Co.** (1977), 4 B.C.L.R. 176; 1977 CarswellBC 140 (S.C.), where a forklift operator in moving a pile of lumber caused another pile to fall on the plaintiff. Liability arose from the operator’s failure to warn the plaintiff as well as from occupier’s liability. The defendant says the word “drive” has received a more restrictive interpretation than has “use or operation” of a vehicle. The defendant says it is not sufficient that the motor vehicle is being used in order for liability to arise; rather, it is necessary that it be travelling between two points: **R.** v. **Steeden**, [1995] B.C.J. No 1413 (C.A.) at para. 21, where such a construction was applied to a careless driving provision.

[24] The defendant relies on two recent Supreme Court of Canada decisions: **Citadel General Assurance Co.** v. **Vytlingam**, 2007 SCC 46, and Lumbermens **Mutual**

Casualty Co. v. **Herbison**, 2007 SCC 47. In **Citadel General** the tortfeasors had carried a boulder to an overpass in a car and subsequently dropped it on another vehicle causing injuries to the occupants. The issue was whether this constituted an indirect use or operation of a motor vehicle. Binnie, J. wrote that in order for insurance coverage to arise "there must be an unbroken chain of causation linking the conduct of the motorist as a motorist to the injuries in respect of which the claim is made" (para. 25). In **Lumbermens Mutual**, a deer hunter used the headlights of his truck to illuminate a field and accidentally shot another hunter. Binnie, J. held that the loss or damage did not arise either from the ownership or from the direct or indirect use or operation of the vehicle. It was insufficient that the "use or operation of the tortfeasor's motor vehicle 'in some manner contributes to or adds to the injury'" (para. 14).

[25] The defendant submits that in **Citadel General** and **Lumbermens Mutual** the court rejected the "but for" test, that is, liability founded on the basis that the injuries would not have occurred "but for" the use of the automobile. This, the defendant says, entailed a rejection (in tortious situations) of the analysis in **Amos** v. **Insurance Corp. of British Columbia**, [1995] 3 S.C.R. 405, which asked, first, whether the accident resulted from "the ordinary and well-known activities to which automobiles are put;" and, second, whether there is "*some* nexus or causal relationship (not necessarily a direct or proximate causal relationship) between the appellant's injuries and the ownership, use or operation of his vehicle or is the connection between the injuries and the ownership, use or operation of the vehicle merely incidental or fortuitous." (emphasis in original) The defendant says – citing **Lumbermens Mutual** – that the **Amos** "causation" test applies only to the interpretation of an insurance policy as between an insured and an insurer. Based on this reasoning, the defendant submits that offloading lumber from a tractor trailer may constitute "use" of a motor vehicle but it does not constitute "driving" for the purpose of section 19. The defendant goes on to argue that the forklift was not being operated as a motor vehicle and that it was the operation of auxiliary equipment, not the forklift itself, that caused the accident. The defendant says the forklift was a specially-designed piece of equipment that was able to both convey itself and its load from place to place and also to lift and lower cargo (such as lumber).

[26] In cases where oil or gasoline overflows from tanker trucks, it has been held that this activity does not constitute "use or operation" of a motor vehicle: **Peters** v. **North Star Oil Ltd.** (1965), 53 W.W.R. 321; 1965 CarswellMan 47 (Man. Q.B.);

F.W. Argue Ltd. et al. v. **Howe**, [1969] S.C.R. 354. The operation of a pump from a stationary vehicle was held to be unrelated to the use of a motor vehicle *qua* motor vehicle. Similarly, in **N.S. Power** v. **Tank Lines Ltd.** (1978), 31 N.S.R.(2d) 629 (S.C.T.D.), the court held that pumping oil out of a trailer causing an overflow and resultant contamination constituted "damage to property occasioned by or arising out of the ownership, maintenance, operation or use of a motor vehicle," under the *Limitation of Actions Act*. Hallett J. said that in **Peters**, the court "recognized that the words used in the standard automobile policy, which are virtually identical to those used in the Nova Scotia limitation provision, are much broader than the words of the Ontario Act 'occasioned by a motor vehicle.'" (para. 25). The defendant says the use of the word "driving" in the *Workers' Compensation Act* is more restrictive than "ownership, use or operation" thus providing a stronger basis to conclude that operation of the forklift did not amount to driving as contemplated by the *Act*.

[27] The defendant next argues that it is necessary to consider the purpose for which the forklift was being used at the time of the accident and specifically whether the accident involved a motor vehicle "*used as such*. It ... does not matter whether the vehicle is stationary or operating. The real question is the use of the vehicle at the time in question": **Dixon Cable Laying Co.** v. **Osborne Contracting Ltd.** (1974), 49 D.L.R. (3d) 243; 1974 CarswellBC 211 (B.C.S.C.), at para. 28. Based on this reasoning (drawn from **Argue**), it has been held that a backhoe digging a ditch was not operating as a motor vehicle (**Dixon Cable Laying**, *supra*); that a dump truck was not operating as a motor vehicle while dumping (**L. Blackburn Excavating Ltd.** v. **Salmon Arm Machine Shop Ltd.** (1977), 76 D.L.R. (3d) 190; 1977 CarswellBC 559 (B.C.S.C.) at para. 14); and that a cement truck was not operating as a vehicle while pumping concrete (**Cordeiro** v. **Lafarge Canada Inc.**, [1997] O.J. No. 4571; 1997 CarswellOnt 4379 (Ont. C.J. (Gen. Div.)).

[28] In **Jenkins** v. **Bowes Publishing Co.** (1991), 3 O.R. (3d) 154; 1991 CarswellOnt 453 (Ont. C.J. (Gen. Div.)), the court held that a forklift was being used as a motor vehicle when the operator negligently left the brake off causing the forklift to roll forward and injure the plaintiff. Granger J. made the following distinction, at para. 13:

> [T]he plaintiff complains of the negligence of Allen in the operation of the forklift when he left it parked on an incline without applying the parking brake or placing chocks under the wheels. The damage to the plaintiff was caused when the forklift moved forward. Distinct from the operation of the forklift as a motor vehicle was the

> use or operation of the forklift as a loading device. If the plaintiff had been injured by the negligent operation of the loading apparatus, s. 180 H.T.A. [*Highway Traffic Act*] would not be applicable, nor a bar to the plaintiff's action.

[29] After reviewing the caselaw, Granger J. said, at para. 17:

> These cases make it clear that there must be a causal relationship between the damage and the use of the machine as a motor vehicle if the limitation period in s. 180(1) H.T.A. is applicable. Here the damage was occasioned as a result of the negligent operation of the forklift as a motor vehicle. Accordingly, the plaintiff's claim if confined to the H.T.A. is statute-barred by the limitation provisions of the Act unless the defendants are precluded by their conduct from relying upon s. 180 H.T.A.

[30] In **Lanteigne** v. **Nova Scotia (Workers' Compensation Appeals Tribunal)**, 2002 NSCA 156; [2002] N.S.J. No. 519, the Nova Scotia Court of Appeal considered an appeal from the Workers' Compensation Appeals Tribunal in a situation where a truck crane, raised on built-in jacks, had injured two workers. The crane was registered for highway use. On the issue of whether the injuries resulted from the "use or operation of a motor vehicle," pursuant to the *Workers' Compensation Act*, the Tribunal had held that there was a distinction between the crane when it was driven "along a highway, as opposed to when it is stationary, with its wheels in the air, operating as a crane at a worksite. While operating as a crane, the Grove Carrier is an integral part of a worksite, and any injuries resulting from its use as a crane constitute the types of accidents and injuries primarily and directly addressed by the workers' compensation regime" (C.A. decision at para. 17). The Court of Appeal held, at paras. 29-31:

> It is apparent from reviewing the case authority that ... there is no "bright line of authority" that had to be followed. None of the Supreme Court of Canada cases, *Amos, Stevenson,* and *Argue*, while helpful, was decided in a similar statutory context or involved a close factual situation. None is clearly determinative as to the approach that should be taken nor as to the result in a situation involving a multiple purpose vehicle such as that before WCAT. Even in *Stevenson, supra* in which the court concluded that the multiple purpose vehicle there, a tank truck, met its "purpose test", the court acknowledged at p. 940 that there may be uses of multiple purpose vehicles which are separate and severable from the automobile or transportation function:
>
> > He [the appellant's solicitor] classified what was being done with a number of examples of similar non-automobile uses of such a

> vehicle: receiving visitors on a home trailer while stationary; using spray-painting equipment set up on and moved from place to place on a truck; a circus truck carrying a cage from which a lion escapes and does mischief; a peanut or like familiar stand set up in a truck and disposing of its wares at different places. These can, no doubt, be described as separate and distinct in their nature and purpose from that of the automobile; the use of the truck can properly be differentiated from the function of the apparatus or means conveyed; but the question is whether we have here such a severable activity.

> In its decision, WCAT took note of the cases relied upon by the appellant and Humphrey. It pointed out that *Amos*, which set out a two-part test the appellant considered applicable, did not involve a multiple purpose piece of machinery. It described *Larry's Crane*, which had the most similar facts, as "lightly reasoned" in that that decision did not refer to any cases pertaining to such machinery nor to *Amos* or *Argue*. It also observed that *Larry's Crane* had included a consideration of the French language text as an interpretive aid.

> It is my view that having regard to all these circumstances, WCAT was not patently unreasonable in its decision that the actions against Leil Cranes and Kennedy are barred by the operation of s. 28(1) of the Act because the fall of the crane did not involve the "use or operation of a motor vehicle."

[31] Accordingly, the defendant submits that the accident resulted from the operation of the hydraulic lift and forks as equipment auxiliary to the forklift and not from the operation of the forklift as a motor vehicle. Rather, the forklift was being used as a lifting device at the time of the accident. As such, the defendant submits, the section 19 exception is not engaged. Even if it was physically possible for the forklift to be driven on a highway and even if it was capable of registration, the defendant’s position is that this would not change the fact that is was not being operated as a motor vehicle at the time of the accident: see also **Adams** v. **Pineland Amusements Ltd.**, 2007 ONCA 844; [2007] O.J. No. 4724.

(c) Was the Marwood property a "highway"?

[32] The registration requirement contemplates that a motor vehicle, in order to fit the definition in s. 2(ad), is intended to be operated on a "highway." The definition of highway, at s. 2(u)(ii) of the *Motor Vehicle Act*, includes "private property that is designed to be and is accessible to the general public for the operation of a motor vehicle...". The plaintiff submits that the Marwood property meets this definition. He says that at the time of the accident the defendant sold products to the general public (rather than only to wholesalers) and the property was kept accessible to the general public for that purpose. The defendant's position is that even if the Marwood property was a highway, this does not render the forklift a motor vehicle for the purposes of the *Motor Vehicle Act*. In addition, the fact that a vehicle has been used on a highway occasionally does not mean it was acquired with the intention of such use. It is necessary to resolve the question of whether the Marwood property constitutes a "highway."

[33] The issue of whether a lumber yard was accessible and designed to be accessible to the general public was considered by the Workers' Compensation Appeal Tribunal in Decisions No. 2002-928-TPA and 2004-390-TPA. The Tribunal took the view that both design and accessibility must be present. In Decision No. 2002-928-TPA, the Tribunal concluded that there was no "plan, purpose or intention" that the lumber yard would be accessible to the general public. Among the factual considerations leading to this conclusion were

> the signage posted at the entrance to the yard; the presence of gates which, when closed, block the entrance to the yard; the configuration and operation of the premises as a whole; the requirement for the use of safety equipment in the lumber yard; and the fact that the company sells only to building supply companies and does not operate a retail outlet.... [T]he design of the premises, while perhaps less than optimal in preventing every unwanted entrant from being able to gain entry to the restricted area, was nevertheless intended to discourage access by the general public....The lumber yard was not designed for access by the "general public", as that term is ordinarily construed.

[34] In finding that the yard was not accessible to the general public, the tribunal took the view that "accessible" connoted "something more than mere availability or the opportunity for use." Rather, the term was

> intended by the Legislature to signify 'the right or opportunity to reach or use or visit', rather than mere opportunity for use. Unintended or illegal use could not have been the intention of the legislature, particularly when read in conjunction with the requirement that the private property be 'designed to be accessible'. What was intended was that the access be by 'right, permission or invitation' to the general public: Sawler, supra. Mere opportunity to access the private property, in circumstances where the intent of the owners is to preclude access to all but certain, limited invitees, is insufficient to satisfy the definition.

[35] The Tribunal said in the 2004 decision that "[r]estricted use of a road for purposes incidental to the ownership of property indicates a lack of access by the general public, whereas use for purposes unconnected with the ownership of the property is indicative of access to the general public."

[36] In the present case the plaintiff submits that the considerations that led the Tribunal to conclude that the lumber yard was not a highway are not present. The plaintiff says there is ample evidence of actual accessibility, and that evidence of design – i.e. intentional accessibility – is found in the lack of signage or gates restricting public access and the practice of selling products to the general public. As such, the plaintiff submits, the Marwood property was a "highway" for the purposes of the *Motor Vehicle Act*.

[37] The defendant says it is necessary to consider what is meant by the phrase "general public." In **Spencer** v. **Lutkehaus**, [1986] B.C.J. No. 130 (C.A.), the court considered a definition of highway that included the words "every road, street, lane or right-of-way, designed or intended for, or used by the *general public* for passage of vehicles, every private place or passageway to which the *public*, for the purpose of parking or servicing of vehicles, has access or is invited." (Emphasis added.) Lambert J.A. (concurring) said:

> [T]here is a change in the use of the word "public" from the first part of the definition to the second part of the definition. In the first part of the definition the word "public" is qualified by the words "the general" so that the question is whether the general public use the highway for Passage of vehicles. In the second Part of the definition there is no qualifying adjective. In my opinion, the reason for dropping the word "general" was not to suggest that each member of the public is to be dealt with on an individual basis, but rather, to avoid the difficulty where the access is not entirely universal. Such places as supermarket parking lots or service stations might not be thought to be used by the general public, but only by patrons of the particular supermarket or service station and, in my opinion, that was the reason for dropping

> the qualifying adjective where the word "public" is used in the second part of that definition.

[38] Hinkson J.A., with whom Lambert J.A. concurred, said: “the determination as to whether or not a private place or passageway is a highway within the meaning of that regulation does not vary depending on the purpose for which the particular individual entered upon the private place or passageway. Rather, it should be viewed objectively.”

[39] In **Dechant** v. **T N L Equipment Ltd.**, [1998] B.C.J. No. 2219 (S.C.), the court held that a private road leading to a trailer camp used by the defendant’s workers was not a highway because the general public did not have the use of it. Chamberlist J. said, at paras. 56-57:

> In the case of *Galligos et al v. Louis et al* (1986), 15 D.L.R. (4th) 458, Mr. Justice Locke, as he then was, had occasion to deal with the factual determination of whether or not a logging road on an Indian Reserve was a highway pursuant to the definition section of the *Motor Vehicle Act*. Beginning at p. 465 of that decision, the court reviewed the decision of *Larocque v. Lutz, supra*, and, at p. 466 quoted from *Regina v. Joe*, unreported, October 22, 1969, Number 222/69, wherein Davey C.J.B.C., said at pp. 3-4 of the *Joe* decision:
>
> > . . . If the argument of crown counsel is sound (and he concedes this is the case) it must mean that every serviceman, every merchant, every person who has business with a farmer who uses the farmer's road through his property from the highway to his residence, must likewise be using the road as the general public and so that road falls within the definition of "highway" as contained in the *Motor-vehicle Act*. Such an extension of the argument I think shows its absurdity.
> >
> > I have no hesitation in saying that the words in the definition of "highway" as being one "used by the general public for the passage of vehicles" means used by members of the general public for their own purposes and not for purposes connected with the reserve.
>
> That principle, it seems to me, is appropriate here where the plaintiff would have to demonstrate that members of the general public were permitted to or used the Camp road for their own purposes and not for purposes connected with the accommodation. No evidence was led by the plaintiff to indicate that the Camp road was ever used by members of the general public for their own purposes.

[40] The defendant says it "does not hold itself out as a retailer of wood products," and points to the 99 per cent of its sales that are made to wholesale distributors as evidence of this. The defendant says its retail sales "consist exclusively of the sale of treated lumber used for deck and fence construction," amounting to about ten sales per week during the construction season, between April and September. It also submits that public access is restricted to specified areas "immediately adjacent to the Marwood office," although individuals are occasionally allowed within the production compound to pick up scrap wood ends for no charge. The defendant notes that the definition of "highway" in the *Motor Vehicle Act* requires that the property be accessible to the general public for the operation of a motor vehicle; it is not sufficient that the area be accessible by foot. Additionally, the Act requires that access be available to the "property". As such, the defendant submits, access to a designated portion of the property will not suffice.

(d) Discussion

[41] I accept that it is necessary to consider whether the forklift was operating as a "motor vehicle" at the time of the accident. I am convinced that it was not. The forklift was not being used as a means of conveyance but as a piece of industrial machinery. Any movement that was underway along the ground was incidental to the job of removing the wood from the trailer. As in **Jenkins** v. **Bowes Publishing**, *supra*, I am satisfied that there is a distinction between "the operation of the forklift as a motor vehicle [and] the use or operation of the forklift as a loading device...". The forklift in this case, even if it was a motor vehicle, was not being "driven". Whether, this conclusion would differ given different facts – for instance, if the injuries had been caused by the forklift driving across the property – is a matter of speculation. The relevant question is how the forklift was being used at the time of the accident.

[42] One of the requirements of s. 19 was that the motor vehicle is one that is "registered or required to be registered." I am not satisfied on the evidence that this was the case. In fact, the evidence of the defendant's officials and Mr. Lounds satisfies me that the forklift in question was not "capable of registration" in any event. The mere fact that the forklift could have been physically driven on a highway would not bring it within the meaning of that section. Further, even if the Marwood property constituted a "highway" that alone would not render the forklift capable of registration. Rather, if the vehicle was incapable of registration, this would indicate that it could not be legally driven on the highway.

[43] As to whether the Marwood property constituted a "highway," I am satisfied that this was not an area that was used by members of the general public for their own purposes and not for purposes connected with the lumber yard itself. While there was no exclusion of the public and members of the public entered the property in order to transact business, it is also clear that the general public's access was limited to specific areas – particularly the access road and the vicinity of the office – and that customers were normally escorted by a staff member while moving around the site on foot. The area with the strongest claim to "highway" status would be the access road but, as I noted above, I am not convinced that the fact that a forklift might have travelled on the access road would, by itself, render that vehicle registrable under the *Motor Vehicle Act*. Put differently, I am not convinced that the forklift was intended by the defendant to be "operated upon a highway" as contemplated by s. 13.

[44] Based on the foregoing I conclude that the accident did not result from driving a motor vehicle that was registered or required to be registered and as a consequence the s. 19 exception does not come into play.

(2) LIABILITY:

[45] Although I have already decided that the proceeding is statute-barred, I will, nevertheless, state my views on the issue of liability.

[46] The duty of care in tort, originally described in **Donoghue** v. **Stevenson**, [1932] A.C. 562, was set out with precision in **Kamloops** v. **Nielsen**, [1984] 2 S.C.R. 2, where Wilson J. described the elements as follows, at 10-11:

> (1) is there a sufficiently close relationship between the parties ... so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to that person? If so,
>
> (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

[47] The principles of causation were described in **Athey** v. **Leonati**, [1996] 3 S.C.R. 458, and subsequently reaffirmed in **Resurfice Corp.** v. **Hanke**, [2007] 1 S.C.R. 333, 2007 SCC 7. In **Athey**, Major J. said (citations omitted), at paras. 13-15:

> Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury....
>
> The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant....
>
> The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury.... A contributing factor is material if it falls outside the *de minimis* range....

[48] There does not appear to be any dispute as to causation. Clearly, Mr. Walsh's injuries were caused by the load of lumber falling on him. There is no dispute that he was acting in the course of his employment. The plaintiff submits that Mr. Kolstee's negligence is established as is the vicarious liability of the defendant. Mr. Kolstee did not make visual or any other type of actual contact with the plaintiff before beginning to unload the trailer without knowing exactly where the plaintiff was located on the far side of the trailer. He simply assumed that he was out of the way. The danger of this inherently dangerous work was increased by the snowy weather conditions and the slanting ground which called for extra caution. The plaintiff says Mr. Kolstee's duty of care in the circumstances required him to know, not assume, where the plaintiff was located.

[49] In the defendant's view, Mr. Kolstee took reasonable care to ensure that the plaintiff was not in the immediate vicinity of the unloading. Further, the defendant says, Mr. Kolstee could reasonably assume that the plaintiff was familiar with unloading procedures and would maintain a safe distance. The defendant submits that it was reasonable for Mr. Kolstee to assume that the plaintiff would stay out of the way. The defendant questions the plaintiff's credibility on the question of whether he knew that the forklift was in the vicinity and that unloading was underway, but I am not satisfied that the plaintiff's own evidence has been undermined.

[50] On the basis of proximity, there was clearly a duty of care owed by the defendant to the plaintiff. Unquestionably, carelessness by one of the defendant's employees in operating a forklift might result in injury to the plaintiff. The plaintiff's position is that Mr. Kolstee did, in fact, operate the forklift in a careless manner, and did cause damage to him for which the defendant is vicariously liable as his employer. Should I be wrong on the issue of the statutory bar, I am satisfied that negligence is

attributable to Mr. Kolstee and vicariously to the defendant as he was acting in the course of his duties. The evidence of the defendant's own witnesses supports the view that it was necessary for Mr. Kolstee to confirm that the plaintiff was out of harm's way and was aware that unloading was about to get underway.

Contributory negligence

[51] The defendant says the incident was largely attributable to the plaintiff's contributory negligence. He was a "frequent visitor" to the site, and was delivering his third load of the day. He was fully aware of the danger of remaining in close proximity to the trailer. A plaintiff has a duty to keep a proper lookout for his own safety, to be aware of his surroundings, and to be on heightened alert when he is in close proximity to dangerous activities: **Taylor** v. **Jollimore and Scotia Fuels Ltd.** (1989), 92 N.S.R. (2d) 17 (S.C.T.D.); **Austin** v. **MacKay**, [1998] N.B.J. No. 62 (C.A.); **Halliday** v. **Frank Larche Manufacturing** (1986), 75 N.S.R. (2d) 286 (S.C.T.D.); affirmed [1987] N.S.J. No. 381 (S.C.A.D.); **Graham** v. **Lee**, [2001] B.C.J. No. 44 (S.C.); **Driscoll** v. **Crombie Developments Ltd.**, [2006] N.S.J. No. 102 (S.C.); and **Gale** v. **White Bay Ocean Products Ltd.**, [2002] N.S.J. No. 93 (S.C.).

[52] In this case, I am not persuaded that contributory negligence has been established on a balance of probabilities. As noted above, I am satisfied that the plaintiff was not aware that unloading was underway. That being the case, his actions do not support a finding of contributory negligence.

CONCLUSION:

[53] For the reasons given, the plaintiff's claim is dismissed.

Justice Glen G. McDougall