IN THE DISTRICT COURT
HELD AT TAURANGA

NP 133/94

BETWEEN	**DANNY THOMAS TITO** First Plaintiff	
AND	**TERRTU KARINA TITO** Second Plaintiff	
AND	**GRAHAM DONALD VOGT** First Defendant	
AND	**OWENS SERVICES BOP LIMITED** Second Defendant	

Date of Hearing: 10 May 1996
Date of Decision: 19 June 1996
Representation: G McArthur for the Plaintiffs
DH McLellan for the Defendants

DECISION OF JUDGE JR CALLANDER

This case arises as the result of a collision involving a Nissan car driven by Mrs Tito (the Second Plaintiff) and owned by her son Danny (the First Defendant). The car had been conditionally given by the son to his mother for her sole use. It was agreed between them that a formal transfer of ownership would take place once the son had made final payments under a hire purchase agreement with a finance company. Mrs Tito took possession of the vehicle before the son departed New Zealand to live permanently in Australia.

Mrs Tito had been visiting friends on the SS *Elizabeth Oldendorf* berthed at Berth No 11 at the Port of Tauranga on the evening of the 24th February 1993. At the time the *Elizabeth Oldendorf* was being loaded with logs. The First Defendant Mr Vogt, an experienced log stacker operator employed by the Second Defendant company, was using a Caterpillar log-stacking machine to load 12 metre logs into one of the cradles of the ship.

Over the course of the evening Mrs Tito had socialised with friends and consumed three cans of beer. Between 10.45 and 11 p.m. she decided to leave the wharf to go home. The car had been parked in a designated car park adjacent to Berth 11. She reversed the Nissan car out of the car park and then turned it to head between rows of logs towards the port exit. This was the normal exit route. Weather and lighting conditions were satisfactory. Her headlights were on. Apart from the log-stacking machine there was no other traffic in the area.

Mrs Tito had driven at a slow speed between 10 and 20 metres when a collision occurred between the two vehicles. Logs from the log-stacking machine fell from the jaws of the machine and crushed the roof of the Nissan in which Mrs Tito was the sole occupant.

Luckily she was later assisted from the vehicle without physical injury. She did, however suffer mental distress. She says this was "devastating, dramatic stress" mainly expressed through sweating nightmares in which she fearfully recalled the sound of crushing metal and of the car windows exploding under pressure. One month after the accident she sought medical advice during a single visit to Dr Harris. He confirms that she was tearful and upset. He prescribed relaxation exercises and ten diazepam tablets to help her sleep. She sought no further medical or other help.

Mrs Tito says she knew the log-stacker was operating in the vicinity of the car park but saw that it was stationary to her right as she left the car park. As a frequent visitor to the wharf over the last 9 years, she realised the dangers inherent in log-stacking activities and was aware of the warning signs at the gates to the Port. She appreciated that the operators of the log-stickers have limited visibility, but assumed Mr Vogt had seen the movement of the Nissan. When, at the last moment, she saw the log-stacker bearing down on her she sounded the horn of her car but realised that was futile given the loud engine noise of the log-stacker. A stevedore, Mr Wells, confirmed the dangerous nature of loading operations and the limited vision of the log-stacker operator.

Mr Vogt, the log-stacker operator, was aware that there were cars parked near where he working. He did not see the Nissan until the impact. He says that even in the car park the Nissan would have been in his blind spot. His frontal vision was blinded by the wide load of logs in the jaws of his machine.

The operator of a log-stacker is not, however, totally blind to what lies ahead. The evidence of Mr Ririnui makes it clear that vision depends upon whether the line of sight is obscured by the log load held in front by the jaws. This depends on the height to which the load is lifted. If the load is kept low - the lower jaw a half metre from the ground - then the operator can see over the load but only beyond 15 metres. With a wide 12 metre load side vision is also impaired and dependent upon the sight-line.

The evidence suggests that the logs being carried by Mr Vogt were being moved with the lower jaw about a metre from the ground. This only lets the operator see beyond about 20 metres.

The car was written off as a result of the collision. The insurer declined to meet the loss. Mr Danny Tito sues the Defendants for $8675.00 being the pre-accident value of the Nissan less the amount received for the wreck. Mrs Tito sues for $5.000 damages for mental distress and $646 special damages. There was insufficient evidence as to all but $20.00 of the special damages (the medical consultation fee and pharmacy bill) and Mrs Tito does not pursue the balance of special damages claimed.

The first question for decision is whether the defendants owed a duty of care to the plaintiffs? In short, whether Mrs Tito was a person so closely and directly affected by Mr Vogt's operation of the log-stacker that he ought to have had her in contemplation while moving the logs.

That, in turn, leads to the main point raised by the defence in this action. That point is that visitors to the wharf are aware of the dangers and must themselves take extra care to avoid collision with the log-stacker machines. The primary activity on the wharf is the loading of logs on ships. It is not a roadway but a wharf. The defence says this eliminated any duty of care: that visitors drive there at their own risk. If there was a duty of care the defendants say there was no negligence on the part of Mr Vogt.

On the evidence I am satisfied, however, that a reasonable operator in Mr Vogt's situation must have appreciated that other lawful users or licensees of the wharf could be endangered by the log loading operation. This is because visitors in cars are, and have been for years, allowed onto the wharf area immediately next to where Mr Vogt was working. There are even properly marked car parking spaces provided. So this is not a case where an unauthorised person enters a danger area at

her own risk. Accordingly I am satisfied that Mr Vogt and by him the Second Defendant ought to have had Mrs Tito in contemplation and owed her a duty of care.

The next question is whether there was a breach of that duty of care as the result of negligence on the part of Mr Vogt? The alleged negligence is that he failed to keep a proper look-out and that the collision would not have occurred but for his lack of care. This last is a plea of *res ipsa loquitur* - which is really just a way of saying that the court can reasonably infer from the circumstances that the collision would not have happened except for a lack of care on Mr Vogt's part. Negligence is simply the failure to exercise the standard of care which the doer as "the reasonable man" should by law have exercised in the circumstances.

The evidence is clear that Mr Vogt could not keep a proper look-out as this is inherent in the nature of the operation by reason of the logs being held in claws in front of the machine. This effectively prevents the operator seeing straight ahead. Had the log load been a half metre lower he may well have seen the car given that this would have improved his line of sight by reducing it from 20 metres to 15 metres. This difficulty of seeing from the machine increases the potential danger involved in manoeuvring the vehicle and in my view increases the need to take care in its operation when it is known that cars and pedestrians are lawfully permitted to move in the immediate vicinity. I am satisfied that more care should have been taken by Mr Vogt who honestly admitted he did not see the car at all - until the logs crushed the roof of the car. Negligence against him, and through him, his employer, has been clearly established on the balance of probabilities: a reasonable and prudent operator of such a dangerous machine would have kept a better look out to ensure that no car was in his path.

The Defendants claim that Mrs Tito was also negligent in a way that contributed to the accident. Ten separate allegations are made on page three of the statement of defence. On my view of the evidence it can not be said that she was negligent in : (b)failing to keep any adequate control over the Nissan; (d) failing to give any indication of her intentions (e); driving at night without her lights on; or (i) having the Nissan on the wharf at night time. There are no formal allegations that her

judgment was affected by liquor or that the warning signs on the gate limit her right to sue.

Mrs Tito was familiar with the wharf. She had been a frequent and permitted visitor to shipping at the Port of Tauranga for some 9 years. She was aware of the potential dangers as the result of log stacking activities on the wharf. She was familiar with warning signs at the entrances to the wharf. It is clear that she knew the log-stacking machine was working nearby and that the driver had limited visibility.

In a dangerous situation like that I am satisfied that there was a special need for Mrs Tito to take care. There was a clear obligation upon her to make certain the way was clear before proceeding and to recognise the clearly foreseeable likelihood that the log-stacking machine might head her way and that she might not be seen. If there was any doubt she should have waited until the intentions of Mr Vogt were made clear. A reasonable and prudent motorist would have done so in those circumstances. I am satisfied that, upon the balance of probabilities, and for those reasons, Mrs Tito contributed to the occurrence of the collision, and was negligent.

Apportioning blame between two negligent parties is always a difficult exercise. Here I am satisfied, however, that the primary fault must rest upon the defendants. It is simply no answer to rely on the limited visibility of the operator and to suggest that all other lawful users of the wharf must do so at their risk when the log-stacker is operating. I do, nonetheless, have some sympathy for the defendants as it seems to me that the log loading operation takes place in difficult circumstances fraught with potential danger. The testimony of Mr Wells made that very clear. One can only wonder whether the Port Authority is wise in having a car park so close to the log loading area. It was lucky there was not a tragedy.

I believe the blame should be apportioned one third on the part of Mrs Tito and two-thirds on the part of the Defendants.

There are two remaining issues: (1)Can Mr Danny Tito be held vicariously liable for the negligence of his mother; and (2) Does Mrs Tito have a valid claim for mental distress?

Mr McArthur submits that Mr Tito can not be vicariously liable. He relies on the Court of Appeal decision in **Manawatu County v Rowe** [1956] NZLR 78. I agree.

On the facts there was no relationship between mother and son with respect to the Nissan of the sort needed to make the son vicariously liable for the negligence of his mother. There is no authority for Mr McLellan's submission that the relationship of mother and son is in itself sufficient to create an agency. Mrs Tito was not driving the car as the son's agent or servant, or for his benefit. The son is not vicariously liable for his mother's contributory negligence and is thus entitled to judgment without deduction.

I also find that Mrs Tito has a valid claim for mental stress. The Defendants submit that the decision of the House of Lords in **Page v Smith** [1995] 2 All ER 736 is an answer to the claim. In that decision the House held that the a Plaintiff can only succeed with such a claim if the Defendant's negligence has produced a recognisable psychiatric illness. Lord Keith of Kinkell was of the opinion that "There must be some serious metal disturbance outside the range of normal human experience, not merely the ordinary emotions of anxiety, grief or fear." (p739).

This is clearly not the view taken by our Court of Appeal. In **Mouat v Clark Boyce** [1992] 2 NZLR the Court upheld a $25,000 award of general damages for mental stress. Cooke P (as he then was) said at p 568:

> In my opinion, when the plaintiff has a cause of action for negligence, damages for distress, vexation, inconvenience and the like are recoverable in both tort and contract, at least if reasonably foreseeable consequences of the breach of duty.

Although the point was argued in great depth, neither Cooke P nor Richardson J considered such an award "for inconvenience worry and stress" was contrary to principle and wrong in law even though there was no nervous shock or neurosis established..

The mental distress and trauma caused to Mrs Tito was not prolonged or major. There was only one visit to a medical practitioner. But it is clear that a potentially fatal accident of this sort must have been very frightening and disturbing. She has only claimed $5,000 damages

In my view an award of $1500 is a proper award.

As earlier indicated the only special damages proved by the evidence were the doctors bill for $17.00 and pharmacy $3.00.

Judgment will be as follows:

(a) In favour of the First Plaintiff against the Second Defendant for $8675.00 being the quantum agreed between the parties.

(b) In favour of the Second Plaintiff against the First and Second Defendants for $1,000 damages for mental distress and $13.33 special damages(the Second Plaintiff's one third contribution having been deducted.)

(c) The First Plaintiff will have interest on $8675.00 at 11% per annum calculated by the Registrar from the day this claim was filed until today. The Court notes that the Second Plaintiff did not seek interest.

(d) The Plaintiffs will have costs and disbursements according to the scale. These are to be fixed by the Registrar.

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Decision of JR Greenall DCJ
Delivered Pursuant to Rule 536
[illegible] [illegible] [illegible] this 19/6/96
11.00am

Deputy Registrar
P. H. WATTS