

JAMUNA PRASAD

v

RAGHWA NAND MAHARAJ

[HIGH COURT, 1993 (Fatiaki J), 12 February]

Civil Jurisdiction

Negligence- occupiers liability- extent of duty of care- contributory negligence- personal injuries- loss of eye and disfigurement- assessment of damages- Factories Act (Cap 99)- Occupiers Liability Act (Cap. 33).

In an action for damages for personal injuries the High Court compared liability under the two Acts and assessed damages.

Cases cited:

Bunker v. Charles Brand and Son Ltd. [1969] 2 Q.B. 480

Slatter v. Clay Cross Co. Ltd. [1956] 2 Q.B. 264

V. Parshuram for the Plaintiff

M. Sadiq for the Defendant

Civil Action in the High Court.

Fatiaki J:

In this case the plaintiff seeks damages for injuries he sustained as a result of being struck on the left side of his forehead by an iron fastener clip which became dislodged when the belt of the defendant's rice mill broke.

There is no real dispute as to the cause or extent of the plaintiff's injury only as to the liability. The plaintiff alleges negligence on the defendant's part in the following respect:

- “(a) failing to comply with the statutory requirements under the Factories Act (Cap. 99);
- (b) failing to provide guards round machinery operated in the rice mill;
- (c) failing to maintain and keep in good repair and condition the belt fitted to the rice huller;
- (d) failing to protect the plaintiff from latent risks on the defendant's premises.”

and further claims damages under the provisions of the Occupiers Liabilities Act (Cap. 33).

- A The defendant for his part denies any negligence in the operation of his rice mill or liability under the Occupiers Liability Act which he avers is inapplicable to the circumstances of the case. Alternatively he raises contributory negligence and the defence of *volenti non fit injuria*.

- B The essential facts of the events of the day are not seriously disputed and may be briefly set out as follows:

On the morning of the 25th of April 1989 the plaintiff accompanied his father-in-law to the defendant's shop and rice mill where they had intended to purchase some grocery items and hull some paddy.

- C At the rice mill the plaintiff's father-in-law's paddy was hulled and loaded onto an ox-drawn sledge. The plaintiff and his father-in-law however remained beside the mill whilst the defendant was involved in hulling the paddy of another customer who had arrived at the mill whilst the father-in-law's paddy was being hulled.

- D It was during this latter hulling that the belt which connected the huller to the motor snapped and a metal fastener clip (Exhibit 1) broke loose from the belt and embedded itself deep in the plaintiff's forehead rendering him unconscious.

In the doctor's words:

- E "When the patient was admitted he had a penetrating metallic foreign body piercing the head breaking through the skull and lacerating the brain at the frontal area and also lacerating the left eyeball. The object was embedded into the patient's bone ..."

- F The plaintiff was rushed to the Labasa Hospital where the iron clip was removed. His damaged left eyeball was also removed and he was admitted as an in-patient for approximately 3 weeks.

- G The plaintiff has since had an artificial eye ball inserted into his vacant left eye socket and although he has recovered somewhat from his traumatic injuries there is now a permanent loss of an eye and disfigurement in the form of a depression in his forehead. He also suffers from persistent headaches, blurred vision and watery eyes during any extended reading and is required to wear corrective spectacles. He feels more acutely the effects of working in the sun and seasonal variations of weather. So much then for the brief facts of the case.

In his claim the plaintiff invokes generally the provisions of the Factories Act

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(Cap. 99). No effort has been made to refer either in the pleadings or in counsels, written submissions to the statutory duty which it is alleged the defendant failed to perform other than some vague reference to a "common sense approach".

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Having carefully considered the scheme of the Factories Act (Cap. 99) however I am satisfied that the Act principally deals with the safety and welfare of employees or persons working in a factory and not with volunteers or invitees on the factory premises.

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I am similarly doubtful about whether or not the defendant's rice mill which the plaintiff describes as a make-shift operation could be described as a factory.

Then the plaintiff relies on the provisions of the Occupiers Liability Act (Cap. 33) and on this score the plaintiff's claim rests on firmer ground. In particular the Act provides as follows:

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- "4. (1) An occupier of premises owes the same duty, the common duty of care, to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

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- (2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

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- (4) In determining whether the occupier of premises has discharged the common duty of care to the visitor, regard is to be had to all the circumstances, so that, for example -

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- (a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated, without more, as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and

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- (5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor, and in this respect, the question whether a risk was so accepted

shall be decided on the same principles as in other cases in which one person owes a duty of care to another.

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(6) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not."

B

Learned counsel for the defendant seeks to exclude altogether the application of the Act on the basis that the word "premises" in the Act ought to be given a meaning restricted to the defendant's land and buildings and the contents therein and he cites as an example, the plaintiff being injured in the defendant's shop by some part of the building due to lack of repair, falling on him.

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I cannot agree. In my view the Act not only contemplates the static physical structure of the buildings and its contents but also any activity being conducted by the occupier in them whilst the visitor is upon the premises. In this latter regard it is undisputed that as part of the services provided to visitors to his premises, the defendant offered for a fee to thresh their paddy in his rice mill.

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As was said by Denning L.J. in Slatter v. Clay Cross Co. Ltd. [1956] 2 Q.B. 264 at p. 269:

"The duty of the occupier is nowadays simply to take reasonable care to see that the premises are reasonably safe for people lawfully coming on to them; it makes no difference - whether they are invitees or licensees. At any rate the distinction has no relevance to cases such as the present where current operations are being carried out on the land."

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In that case a tunnel was being used by the defendant company running its trains along the railway line that ran through it and in the course of which activity the plaintiff was injured. In this case the defendant was operating his rice hulling machine when the plaintiff sustained his injury.

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In my view it is beyond dispute that the defendant was the occupier of the premises in question namely the shop and rice mill upon which the plaintiff had entered as a visitor in terms of the Occupiers Liability Act and accordingly the defendant owed him the common duty "to take such care as in all the circumstances of the case is reasonable to see that (the plaintiff) will be reasonably safe in using the premises for the purposes for which he is invited or permitted by (the defendant) to be there."

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Learned counsel for the defendant however submits with hindsight that the plaintiff had gone to the defendant's premises with the declared purpose of buying biscuits and other things at the defendant's shop and as such he (the

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plaintiff) had no reason or excuse to enter or go to the rice mill which was in a separate building away from the shop albeit within the defendant's compound.

Again I cannot agree. The plaintiff had clearly accompanied his father-in-law who had brought paddy to be hulled at the defendant's rice mill. They were both present at the rice mill before and during the entire hulling process. The father-in-law had also helped the defendant. They had even remained close by the rice mill after the father-in-law's paddy had been hulled and in the circumstances it would not be unreasonable to infer that their presence at or near the rice mill was known to the defendant and had his permission and tacit approval. Indeed the evidence suggests that it was a fairly common occurrence to find people yarning around the rice mill whilst it was being operated and for persons bringing their paddy to be hulled to help the defendant by filling their paddy into tins in preparation for hulling.

It is convenient at this stage to deal with the warning sign which was erected on a post of the shed housing the rice mill and which was visible from the defendant's shop verandah. It read in English:

"WARNING : DANGER
Rice mill under operation
Please keep away."

Even accepting that such a notice did exist, the plaintiff and his father-in-law both denied seeing it nor had their attention been drawn to it by the defendant. Further the location and placement of the notice on the post (at roof height) was such that in the defendant's own words: "it could not be seen when near the rice mill". Needless to say even if the notice was at eye-level and clearly visible that does not guarantee the legibility of the writing on the notice with a maximum height of 2" when seen from a distance of a chain.

In similar vein the presence of a protective barrier around the sides and top of the rice mill belt whilst sufficient to restrain the belt in the event it should break, did not prevent the fastener clip of the belt becoming dislodged and escaping through the open space between the wooden planks which formed the barrier.

In any event the warning sign and protective barrier are inconclusive factors in an assessment of whether or not the defendant had discharged his common duty of care to visitors to his rice mill.

O'Connor J. In Bunker v. Charles Brand and Sons Ltd. [1969] 2 Q.B. 480 in holding in that case that knowledge of the danger did not absolve the occupier said of identical provisions of the Occupiers Liability Act (U.K.) at p. 489:

"I take the view that subsection (4) has to be read together with subsection (5), that the warning is a warning of the danger, and I take the view that the warning is not to be treated without

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more as absolving the Occupier from liability unless in all the circumstances it was enough to enable the Visitor to be reasonably safe".

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In the present circumstances in my view neither the warning sign nor the wooden planks surrounding the belt were "enough to enable (the plaintiff) to be reasonably safe". In my view the huller belt ought to have been completely enclosed under a solid protective cover.

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Accordingly I would hold that the defendant is in breach of his common duty of care owed to the plaintiff under the provisions of the Occupiers Liabilities Act (Cap. 33) and the plaintiff is therefore entitled to recover damages.

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The mere fact that other spectators were present around the mill at the time and were not injured is purely fortuitous. True the plaintiff was the only person injured by the flying fastener clip but that only serves to highlight the inadequacy of the protective barrier erected around the huller belt rather than any voluntary assumption of the risk on the part of the plaintiff by being present at the defendant's rice mill such as would support a plea of *volenti non fit injuria*.

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Having said that however the plaintiff in his own evidence admitted that on seeing the way the defendant's rice mill was set up he formed the view that it was "dangerous" and although I do not doubt that he would not have been aware of the exact nature of the risk or danger involved in the hulling operation I am satisfied from the evidence that the plaintiff did not in his own interest take reasonable care for his safety and so contributed not insignificantly to his own injury.

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Taking all the circumstances into consideration I have come to the firm conclusion that the plaintiff was 40% to blame for his accident and I so find.

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In his Writ the plaintiff claims by way of special damages - loss of wages and medical expenses the latter of which is made up mainly in travelling expenses for which having regard to the plaintiff's evidence on the matter I would allow a sum of \$150.00 under this head.

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As for loss of wages it is undisputed that the plaintiff was hospitalised as a result of his injuries for a period of almost 3 weeks. His evidence on this issue is very vague and quite unhelpful and indeed prompted learned counsel for the defendant to suggest that the plaintiff had gone to his father-in-law's at Valelawa on holiday and was therefore not working at the time of being injured.

There is some force in the submission. The plaintiff who gave his residential address as Navekavu, Waiqele, Labasa and his occupation as labourer was clearly doing neither at the time of his accident which occurred on a Tuesday morning. Nothing is known about why? or what? he was doing at his father-in-law's place in Valelawa but in any event it would appear that the plaintiff was a casual labourer who cut cane and drove cane trucks during the harvesting

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season and during the off-season worked as a casual farm labourer as and when he was able to get employment.

It is also fairly obvious that the wages he received fluctuated according to whether it was cane harvesting season or not. Indeed I was left with the distinct impression that the plaintiff had no regular source of income for a large proportion of any one year. Certainly neither was readily quantifiable.

The plaintiff however states that on the day of the incident he was a cane cutter and in answer to defence counsels questions he named the sirdars of the cane-cutting gangs that he worked with during the years 1988 to 1991 and the daily wages he received under each sirdar. He even claimed that he cut cane for a month after he had recovered from his injuries.

I am not unaware that during his evidence the plaintiff stated that he was unable to return to work for a period of 9 months. His Writ however claims loss of wages for a period of 3 months. No effort was made to amend this during the course of the trial. The difference between the two periods is significant and in the circumstances I am content to assess loss of wages on the basis of the latter period as being the more reliable.

Accordingly I have assessed the plaintiff's loss of wages as being $(\$90 \times 6) = \540

Under general damages I have considered the plaintiff's sworn testimony that as a result of his injuries he is no longer able to earn income from driving heavy cane trucks during the harvesting season and even though he continues to cut cane he is often absent from work due to headaches.

Needless to say the loss of an eye and disfigurement are permanent physical scars that the plaintiff will carry for the remainder of his life. Equally there are emotional scars that he must also bear such as the inevitable disorientation, frustration and often unwelcome curiosity generated by his injuries.

I have also borne in mind the evidence of the doctor that the depression in the plaintiff's forehead will remain and the compound fracture to his skull is likely to give problems in later life such as persistent headaches and although there is damage to one part of his brain there would be some compensation for the injury from another undamaged part. In Workmans Compensation terminology the loss of an eye represents a permanent partial incapacity of "40%" in terms of earning capacity which on an assumed weekly wage of \$30 represents and aggregate compensation figure of: $40\% \text{ of } \$ (260 \times 30) = \$3,120.00$.

Bearing the above factors in mind and recognising the seasonal and irregular nature of the plaintiff's employment and income I am content to award the plaintiff general damages under the following heads and amounts:

A	(1)	Loss of an eye	:	\$ 8,000
	(2)	Pain and suffering	:	\$ 3,000
	(3)	Loss of Earning capacity	:	<u>\$ 6,000</u>
		(using an annual loss of \$500 and a multiplier of 12)	:	<u>\$17,000</u>

which together with special damages amounts to $\$17,000 + 540 + 150 = \$17,690$ of which the defendant is liable for 60% which represents a figure of \$10,614.00 together with costs to be taxed if not agreed.

(Judgment for the Plaintiff)

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