SANAILA BALEIWAI v ATTORNEY-GENERAL OF FIJI

HIGH COURT — CIVIL JURISDICTION

BYRNE J

19, 20, 22 February, 22 June, 9, 10 July, 14 August 2001, 12 February 2002

[2002] FJHC 274

Damages — personal injuries — damages against employer failing to provide safe working environment — employer liability — Construction Regulations reg 25(4) — Factories Act (Cap 99) ss 2(1), 24, 25(5).

Petitioner sought damages against his employer for personal injuries sustained while working. He alleged that the Defendant failed to provide a safe working environment. The Defendant denied liability.

Held — The Defendant was negligent since the danger of using the ladder without properly securing it to the roof either by some rope or by any employee holding it in place was obscured by the fact that no previous accident had occurred on the ladder. Failing to secure it properly meant simply that sooner or later an accident was bound to happen. Unfortunately for the Plaintiff it did.

Damages awarded.

Cases referred to

Donnelly v Joyce [1974] QB 454; *Griffths v Kerkemeyer* [1977] HCA 45(1977) 139 CLR 161, cited.

General Cleaning Contractors Ltd v Christmas [1953] AC 180, applied.

Jovesa Rokobutabutaki and Anor v Lusiana Rokodovu Civ App No ABU0088/1998S; *Lumley v Gye* (1853) 2 El & Bl 216; *Priestley v Fowler* (1837) 150 ER 1030, considered.

R. I. Kapadia for the Plaintiff

A. Adamu for the Defendant

Judgment

Byrne J. In this case the Plaintiff claims damages for personal injuries which he sustained in an accident at work on the 24th of February 1999 when he fell from a ladder in premises belonging to the Public Works Department at Laqere, Nasinu. At the time of the accident the Plaintiff was aged 55 and at the date of trial 57.

He is married and has five children. He had been employed by the Public Works Department for 22 years as a road sealer but from time to time because of lack of work due to lack of funds by the Public Works Department had to perform other duties.

The accident and evidence

On the 22nd of February 1999 his Supervisor Surendra Nath instructed him and his Foreman, one Sohan Singh and two other employees to change roof iron on the top of a building at the Nasinu Depot. This was a job normally performed by a carpenter.

The Plaintiff reported for work on the 24th of February 1999 and was told to repair the gate to the premises and not to do any more work on the roof. When the Plaintiff finished work on the previous day the ladder on which he and his fellow workers had gained access to and from the roof had been left resting against the metal edge of the roof. Sohan Singh then asked him to climb on to the roof and bring down from it the Plaintiff's working tools which had been left on the roof overnight. The Plaintiff climbed the ladder, got on to the roof and collected a hammer and a pinch bar which he then threw down from the roof. He then started to descend from the roof on the ladder which was described in evidence as a heavy grip and lock ladder known in the trade as a single extension ladder approximately 19 feet 5 inches long. It is called an extension ladder because it extends for half its total length.

About 9 am when the Plaintiff was descending the ladder he felt it slipping from where it was resting on the edge of the roof and as a result he fell from a height of approximately 12 feet on to a hard surface below consisting of cement, some gravel and grass. When he fell the ladder was not secured from the top nor was anybody holding it at the bottom. The ladder was made of aluminum. The Plaintiff fell on to his back and while lying on the ground the ladder fell on top of him. He was in much pain and at about 9.45 am was taken by the chief clerk at the premises to the Colonial War Memorial Hospital where he was admitted. He has suffered permanent and serious injuries of which I shall say more later and now claims damages from his employer for failing to take reasonable care for his safety. He puts this claim in two ways; first, under the Factories Act and the Construction Regulations, 1970 made thereunder and second, under the common law on employers' liability to their employees s 2(1) of the Factories Act (Cap 99) define a factory as meaning inter alia any premises in which persons are employed in manual labour in any process for or incidental to...

(a) …

(b) the altering, repairing, ornamenting, finishing, cleaning or washing an article.

Under s 24 an employer shall, so far as is reasonably practicable provide and maintain for its employees safe access and passage wherever an employee goes in the course of his employment or where he remains at any time and such area shall be safe at all times while the employee is there.

Section 25(5) states that all ladders shall be soundly constructed and properly maintained.

Construction Regulation 25(4) reads thus:

Every ladder or step ladder shall so far as practicable be securely fixed so that it can move neither from its top nor from its bottom points of rest and if it cannot be so fixed at the base, a person shall be stationed at the base of the ladder whenever it is in use to prevent its slipping.

The Plaintiff alleges that at the time of his accident he was employed in a factory and that his injuries were caused as a result of the breach of Construction Regulation 25(4) by the Defendant. He also alleges that the Defendant failed in its common law duty to take any or any adequate precautions for his safety at work. The Defendant denies liability.

The Plaintiff testified that prior to the accident he was a healthy person and led an active life. When he was admitted to the Colonial War Memorial Hospital he had developed sudden numbness and heaviness of both lower limbs and could not move.

Radiological examination revealed that he had sustained a compression fracture of the first lumbar vertebra due to the fall. His treatment involved initial bed rest followed by exercise and mobilisation. He has been left with bilateral loss of ankle flexion or extension.

He remained in the Colonial War Memorial Hospital from 24th of February 1999 to the 25th of March 1999 when he was transferred to the Tamavua Rehabilitation Hospital until the 27th of August 1999.

He now has no control over his bladder and bowel. He has a catheter fixed to him for collecting urine. He has to use special capsules (Bisacodryl suppositories) through the rectum to get bowel movements.

His sex life is completely ruined.

He has now almost complete loss of use of both his legs.

He has to use bilateral Ankle Foot Orthosis (AFO) to stabilise his ankles.

He now tends to forget things easily.

Both legs from his hip downwards are numb.

He encounters problems when sleeping. He is unable to sleep well.

His wife has to attend to him constantly for personal care.

His injuries are permanent.

Before the accident he was a keen jogger and gardener and earned a net income of $100 per month from growing root crops and vegetables. Now he has become largely inactive and totally dependent upon his wife for the simplest tasks and his personal care. His fellow employees and management regarded him highly as a hard, honest and reliable worker who has now become virtually an invalid. Medical evidence was given by his treating doctor, Dr JC Maharaj who has numerous professional qualifications and whose evidence was not seriously questioned by the Defendant.

Summarised Doctor Maharaj said:

> *Mr Sanaila Baleiwai sustained compression fracture of the 1st Lumbar vetebra resulting in spinal cord injury with paraparesis. He has residual weakness and loss of sensation to his lower limbs and neurogenic bowel and bladder. The injury to the spinal cord is permanent.*
>
> *His medical care needs would continue to include skin, bowel and bladder care, and prevention and management of medical complications that Mr Baleiwai is likely to develop due to his spinal cord injury. He will continue to require some degree of assistance in self-care.*

While he was giving evidence the Plaintiff at times winced with pain and because of the distress he felt giving evidence I released him from further attendance at the court at the conclusion of his evidence on the second day of the trial.

On the question of liability the Plaintiff called one witness Atekini Duaibe, a factories inspector who holds an International Diploma in Safety Engineering from London and has a graduate certificate from the University of Ballarat, Victoria, in Occupational Health and Safety. He has been a senior factories inspector for the last 13 years but has been concerned with industrial safety in the Department of Health and Safety for 33 years.

Mr Duaibe expressed the opinion that the Defendant was negligent in putting a metal ladder on to a metal surface which was not safe because the ladder was bound to move. He said that the Defendant should not have used an aluminum

ladder but rather a wooden ladder. He considered that the Defendant was negligent in not using a wooden ladder but also in not securing the ladder from which the Plaintiff fell either by a rope at the top or bottom or by having any employee hold on to the base as the Plaintiff descended. He said that the Plaintiff was a road sealing operator and that the job on which he was engaged was that of a carpenter. Consequently it was not safe for the Plaintiff to have been required to use the ladder.

It was put to Mr Duaibe in cross-examination that the ladder from which the Plaintiff fell had its own rubber grips at its base and thus was safe. Mr Duaibe said:

I say no matter what grip the ladder had at its base it was not safe.

I was impressed by Mr Duaibe and have no hesitation in accepting his evidence.

The Defendants called evidence but only from the Plaintiff's work colleagues. It did not call any medical evidence to contradict that of Dr Maharaj or any expert in industrial safety to contradict the evidence of Mr Duaibe.

The witnesses for the Defendant said that the Plaintiff was engaged as a carpenter to put new sheets on the roof but that he never worked as a carpenter. No one was holding the ladder because there was no place to tie it on the top. None of the defence witnesses said however that it was not feasible to have an employee hold the ladder at the bottom when the Plaintiff was descending it.

The defence witnesses were at some pains to say that they considered that ladder was safe because they had used it without incident for 2 full days before the accident.

Mr Duaibe's response to this was that this was irrelevant. The fact that the ladder fell from the roof was proof that it was not placed securely against the roof. I agree.

The law

There is no longer any mystery about the legal liability of an employer to its employees who suffer injuries during the course of their employment. The law may be stated simply thus:

> It is the duty of an employer to provide and maintain work premises in as safe a condition as reasonable care by a prudent employer can make them. I was thus rather amazed to read some of the submissions of the Defendant which in many ways seem to me to hark back to, if not necessarily yearn for, the bad old days of the past. Thus, I was referred to the remark of Coleridge J in *Lumley v Gye* (1853) 2 El & Bl 216 at 252 who said the Courts should not "allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts.

Lumley v Gye is a well-known case on breach of contract and I cannot understand how by even the most vivid stretch of legal imagination Mr Justice Coleridge's comments could be applied to a case of industrial accident. If, as the Defendant appears to contend it should, then I would only say that *Lumley* and another case on which the Defendant relies *Priestley v Fowler* (1837) 150 ER 1030 were decided when laissez-faire and the deplorable doctrine of common employment were at their peak.

Professor Fleming at p 575 of the 8th ed of his *Law of Torts* calls the doctrine of common employment "the most common nefarious judicial ploy for reducing the charges on industry which relieved employers from vicarious liability for accidents caused by the negligence of a fellow servant".

The rule in *Priestley* is generally thought to have given birth to the doctrine of common employment and yet in the instant case the Defendant quotes with approval from p 450 of the report where the court said:

> *The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most cases in which danger may be incurred, if not all, he is just as likely to be acquainted with the probability and the extent of it as his master. In the sort of employment, especially, which is described in the declaration, in this case, the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of other engaged under the same master, than any recourse against his master for damages could possibly afford.*

To ensure that I did not misunderstand the Defendant's submission on this its counsel underlined the parts I too have emphasised.

It must also be remembered that *Priestley* was decided when the Factories Acts were in their infancy and to a large extent the obligations of an employer for the safety of his employees were minimal and regrettably were encouraged in this by English judges.

Fortunately eventually good sense prevailed and now we have Factories Acts and other legislation which emphasise the need for an employer to provide safe working conditions. I will conclude my citation of cases with the remark of Lord Oaksey in *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, 189 who said:

> *Workmen are not in the position of employers. Their duties are not performed in the calm atmosphere of a boardroom with the advice of experts. They have to make their decisions on narrow window sills and other places of danger, and in circumstances in which the dangers are obscured by repetition.*

Allowing for the fact that the Plaintiff did not fall from a window sill but from a ladder, in my judgment Lord Oaksey's words are very apposite to this case. It would appear that the dangers of using the ladder without properly securing it to the roof either by some rope or by any employee holding it in place were obscured by the fact that no previous accident had occurred on the ladder. In my view this is no answer. Failing to secure it properly in my judgment meant simply that sooner or later an accident was bound to happen. Unfortunately for the Plaintiff it did.

For these reasons I find the Defendant negligent.

Damages

It was submitted by the Plaintiff that the court should award him $150,000 general damages. In my view and without in any way being thought to doubt the seriousness of his injuries, I consider such an award would be excessive. In *Jovesa Rokobutabutaki and Another v Lusiana Rokodovu* Civil Appeal No ABU0088 of 1998S in a judgment delivered on the 11th of February 2000 the Court of Appeal reduced an award of $200,000 general damages to $150,000 for a healthy woman of 26 at the time of an accident on the 17th of July 1994. The Plaintiff in that case had been left a permanent paraplegic as a result of the

accident so that there is some difference in the nature of her injuries and those of the Plaintiff. Taking into account the Plaintiff's age but ever conscious of the seriousness of his injuries I consider an award of $70,000 general damages is appropriate.

Loss of prospective earnings in the future

I accept that the Plaintiff will never be able to work again. There was evidence that his average weekly earnings prior to the accident were $124.57 and that in addition he produced a net income of $100 per month from growing root crops and vegetables. This evidence was not challenged. Based on the normal retiring age of 60 I therefore award him $124.57 x 52 weeks x 3 years as loss of future wages amounting to $19,432.92. $100 x 12 x 3 years (income from crops) $3600.

Special damages

Special damages are stated to amount to $11,135.86 most of which consist of loss of one third wages from the Public Works Department but also include an amount of $4500 being the value of gratuitous service by the Plaintiff's wife on a 24-hour basis from 27/8/99 to 2/2/01 for 75 weeks at $60 per week. I see no reason why I should not allow this sum.

Damages by way of costs for future care

It is now well-established law that a Plaintiff should receive damages representing the value of gratuitous services necessitated by the injury done to a Plaintiff by a negligent Defendant. This was first held in England in *Donnelly v Joyce* [1974] QB 454 and followed in Australia by *Griffths v Kerkemeyer* (1977) 139 CLR 161; [1977] HCA 45, a decision of the High Court of Australia. Such an award was also approved here by the Court of Appeal in *Lusiana Rokodovu* (above).

There was evidence that the Plaintiff's wife had been earning $60 per week as a domestic servant for five days a week but had to relinquish this work so as to look after the Plaintiff 24 hours per day. The Plaintiff claims $100 per week under this heading but I have not been informed how such an amount is calculated. Although the Plaintiff's wife will have to be on hand every day I consider an award of $100 per week is too high. On the footing that she was earning $12 per day for probably 8 hours I consider it reasonable to allow $80 per week for 8 years under this heading namely $33,280.

The Defendant made no submissions on damages but argued instead that it was simply not liable to the Plaintiff. Thus I have only the Plaintiff's evidence on estimated future losses.

To summarise I award the Plaintiff the following amounts:

(1)	General damages for pain and suffering and loss of amenities of life	$70,000.00
(2)	Loss of prospective earnings in the future	$19,432.92
(3)	Loss of income from crops	3600.00
(4)	Special damages	11,135.86
(5)	Damages by way of costs for future care	$33,280.00
		$137,448.78

To this will be added interest at the rate of 4% from the date of the issue of the writ 22nd October 1999 to the date of judgment 12th February on $70,000.00 = $6,533.32.

Interest on special damages at 2% per annum from 24th February 1999 to 24th February 2001 = $445.43.

Therefore there will be a total award of $144,427.53. In addition the Defendant must pay the Plaintiff's costs which I fix at $3000. There will be judgment in these terms.

Damages awarded.