IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

AT COMMON LAW

SUIT NO. C.L. N.0001 OF 1982

BEWTEEN	EDWARD NICHOLSON	PLAINTIFF
A N D	UNIVERSAL FENCING LTD.	FIRST DEFENDANT
A N D	ALCAN JAMAICA LTD.	SECOND DEFENDANT

Dr. L. Barrett and H. Phillips instructed by Perkins, Tomlinson, Grant, Stewart and Company for Plaintiff.

K. D. Knight for First Defendant.

D. Jones and C. Isaacs instructed by Myers, Fletcher & Gordon, Manton and Hart for Second Defendant.

January 28, 29 & 30; July 15 & 31, 1985.

ELLIS, J:

The plaintiff alleges that on the 1st day of May 1980, whilst employed to the first defendant on premises owned and occupied by the second defendant, he suffered injury to his left eye. The injury has resulted in permanent blindness of the eye. The contends that the injury to his eye was caused by the negligence and/or breach of statutory duty of the defendants or each of them. In the circumstances, he seeks to recover compensation in the form of damages from the defendants.

The plaintiff evidenced his case by calling three persons including Dr. Vaughn other than himself and also by a Medical Certificate.

On the 1st of May 1980, the plaintiff who was then working with the first defendant for four (4) years was sent to do welding work at the second defendant's premises at the Kirkvine Bauxite Works. He worked as a Welder at other Bauxite works before namely at Port Esquivel and Ewarton Works.

As a Welder, he needed safety glasses or goggles, a welding shield, helmet, long gloves and boots. These items would apparently be supplied by the first defendant.

In May 1980, and in particular the day he was dispatched to Kirkvine Works, he had no goggles. He requested his supervisor a Mr. Somers to supply him with goggles. Somers gave him none with the reason that the Universal Fencing Limited could not afford to buy goggles as the Company had not collected any fees for the year. Somers however suggested that he plaintiff should borrow a pair from one of his co-workers. He accepted the suggestion but was unsuccessful in his request for a loan of goggles. He went to Kirkvine without securing a pair of goggles.

When his party got to Kirkvine they were given passes for entry to the works. He had no meeting with the management of the Kirkvine Works prior to his getting his pass.

On the Tuesday he and his colleagues were summoned to the Security Office. At the office he was told that his boots were insecure and should not be used on the site as there was the danger of his treading in caustic soda. He got a pair of new boots from the safety officer which would be paid for by his employer the first defendant. Having obtained the boots he worked at his welding without goggles until the day of the incident which damaged his eye.

On the Thursday, the day of the injury to his eye, his work party had lunch on the work site near to the power house and he had passed an area with the tanks. Before work resumption, he said he told Grant the leader of his party that he wished to go to the water cooler which was in front of the changing rooms 4 chains from the work site. According to him, he did not reach the water cooler as he diverted to obtain cigarettes. He saw some men, one of whom directed him under some tanks and up some stairs to a man from whom he would be able to obtain cigarettes. He looked carefully and saw that the tanks were empty and that there was no danger and seeing no sign prohibiting entry, he went to where he was directed to go. He did not succeed in his quest for cigarettes and on his return he looked up and he felt a hot substance in his eye. He was then 10 - 15 feet from the road way and about 80 feet from his work site. All the tanks were then above him.

On the same day of the injury he saw Dr. Vaughn who treated his injured eye. The doctor recommended an artificial eye but he is reluctant to have it inserted until if and when his eye gets worse.

The plaintiff claims that at the date of his injury he was earning $82.25 per week and had he continued to work as a Welder he would now be earning at least $177.00 per week. In addition to his loss of earnings he spent $200.00 on medication and has been spending $10.75 for eye drops every three (3) weeks from date of injury to the present time.

The first defendant's case was that the plaintiff was issued with safety goggles but neglected to wear them and was thus author of his own injury or contributed thereto. That defendant supported its case by calling Michael Somers the plaintiff's immediate supervisor and Kenneth Grant who was the leader of the fencing team on the day plaintiff was injured.

The second defendant contended that any duty it owed to the plaintiff was fully discharged by the erection of adequate warning signs on its premises. In addition, its safety officer instructed the plaintiff and others to be careful against dangers on the premises In any case, the plaintiff was a trespasser at the particular site where he received his injury. This defendant also contended that the plaintiff contributed to his injury.

LIABILITY:

Under this head, I apprehend the necessity for answers to the following questions:

(1) Was the plaintiff injured to his left eye?

(2) Was the plaintiff issued with safety goggles by the first defendant at the relevant period?

(3) Was the plaintiff a trespasser when he was injured?

(4) Did the second defendant adequately warn or protect the plaintiff against dangers on the premises?

There is no dispute that the plaintiff has suffered injury to the left eye. The evidence of Dr. Vaughn proves a complete loss of the eye. This question is therefore answered in the affirmative.

The second question turns on an examination of the evidence of the plaintiff and his witnessses on the one hand and that of Somers and Grant for the first defendant on the other.

It appears incredible that the plaintiff could only have had two (2) pairs of safety glasses since 1976, and that he had none from at least nine (9) months before the accident.

When one looks at the evidence of Somers in particular, the incredible nature of the plaintiff's claim dissipates. Mr. Somers a supervisor, with the first defendant could not say when was the last time the plaintiff received a pair of safety glasses. He could not say if during the period May 1980 his Company experienced a shortage of safety glasses. He said that in 1980 he issued one pair of glass to each Welder but he did not check the last date on which plaintiff was issued with glasses. He said he had satisfied himself that plaintiff's boots were sound on the day he was dispatched to Kirkvine Works yet on the very day on which the plaintiff started to work his boots were found to be defective.

In the light of those answers I am not impressed with the quality of Somers' evidence. He did not show that he knew anything about the issuance of safety glasses and he has not assisted the first defendant's case. Since the plaintiff is only required to make his case on a balance of probabilities, I hold that he has made out a case of not having any safety glasses issued to him. This question is therefore answered in the negative.

Mr. Jones for the second defendant says that the second defendant discharged its duty to the plaintiff under Section 3 of the Occupier's Liability Act. He said the Act imposes a common duty of care and does not make an occupier an insurer against injury to a person who acts unreasonably on its premises. He supported his contention by citing inter alia:

(a) Charlesworth on Negligence 5th Edition at page 251-2 and paragraph 381 - 2;

(b) Jenkins vs. Great Western Railway (1912) 1K.B. 525;

(c) Lee vs. Luper (1936) 3 All E.R.;

(d) Mersey Dock and Harbour Board vs. Proctor [1923] A.C. 253 at 260 and 261.

Dr. Barnett in his address referred to the fact that the building or area in which the plaintiff was injured was unfenced and had several entrances. It had no gate, door or barrier of exclusion. It was an area which contained several tanks with noxious substances in a state of agitation and flowing or boiling over and several men were seen working there at the material times.

He accepted the fact that signs were posted on the premises. However he contended that those signs were in positions convenient to physical adherence to the building and not dictated by possible effectiveness of warning.

He asked the court to say that the facts to which he referred indicate that the second defendant did not reasonably provide for the safety of the plaintiff and that the plaintiff was not a trespasser.

The Occupiers Liability Act Section 3 Sub-section 4 and 5 state:

" (4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances;

(5) 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".

In my opinion, the contention of Dr. Barnett is sound. In so concluding I am not unmindful of the existence of warning signs on the premises. But sub-section (5) as quoted, places a limitation on the effectiveness of warning signs by the occupier in absolving him from liability.

In all the circumstances, I am not satisfied that the second defendant by the signs enabled the plaintiff to be reasonably safe.

Why was no door or barrier placed around the area? Why were the signs not specifically referable to the tanks of caustic soda?

In my judgment, the plaintiff was not a trespasser in the precipitating area. I hold that he reasonably thought he could go into that part of the premises, he having seen persons there who registered no alarm at his presence, and who directed him to take a particular route to the canteen.

My findings here answer questions 3 and 4 posed above in the negative. Did the defendants' failure to (a) provide safety glasses and (b) adequately warn the plaintiff against dangers cause the injury to the plaintiff?

The plaintiff's claim against the defendants as pleaded at paragraph 5 of the Statement of Claim sounds in negligence and breach of Statutory Duty.

I will firstly examine the claim based on Breach of Statutory Duty and its connection with the first defendant.

The plaintiff in order to succeed, must show that on a balance of probabilities, his injury was the result of the breach.

In the case of Caswell vs. Powell Duffryn Associated Colleries Limited [1940] A.C. 152, 168 Lord MacMillan said:

> " The mere fact that at the time of an accident to a worker his employers can be shown to have been in breach of a Statutory Duty is clearly not enough in itself to impose liability on the employers. It must be shown that the accident was causally associated with the breach of Statutory Duty".

The cited passage was reflected in the speech of Lord Reid in Bonnington Castings Limited v. Wardlaw [1956] A.C. 613 at 620 thus:

> "The employee must in all cases prove his case by the ordinary standard of proof in civil actions; he must make it appear at least on a balance of probabilities the breach of duty caused or materially contributed to his injury".

I accept the cited passages, albeit they are of only pursuasive authority, as correct statements of the law.

In this case, the plaintiff suffered his injury not during any welding operation. He was not even injured in the vicinity of the area of his welding operations. He has not given any indication that he would have worn his glasses had he been provided with a pair.

In all the circumstances, I cannot see any association of the breach of statutory duty with his injury. The plaintiff has not satisfied the statements cited in the cases above. He has shown no causal connection between his injury and the breach of statutory duty and his claim under that head fails.

But the plaintiff has,so to speak, another string to his bow in that he has also claimed in negligence. I am of the opinion that he can succeed on this ground.

There is evidence in this case that Grant the leader of the team had a pair of goggles. He was the man in charge of the plaintiff - the first defendant's alter ego : on the site but there is no evidence that Grant gave any order or any spervision as to the wearing of goggles.

That situation takes the case within Nolan vs. Dental Manufacturing Company Limited /1958/ 2 All E.R. 449. In that case, a workman failed in his claim under breach of statutory duty but succeeded because his employer had negligently failed to properly order and supervise his user of protective goggles. I would apply that decision to the instant case and find that the first defendant was negligent.

The second defendant's breach of the Occupiers Liability Act is indubitably causally associated with the plaintiff's injury. The area where he was,when he was injured,was within the direct control of this defendant and nothing was there to exclude him from that area.

CONTRIBUTORY NEGLIGENCE:

Both defendants allege contributory negligence on the part of the plaintiff. The plaintiff to my mind, at the highest can be said to have taken a risk when he went into the precipitator area. That risky entry cannot be held as being contributory negligence seeing that the facility for it was created by the second defendant's breach of statutory duty.

The plea of contributory negligence is of no avail to either defendant.

In the circumstances I hold that the defendants are liable in equal proportion to the plaintiff

DAMAGES:

The Special Damages claimed are:

(1)	Medication	$200.00
(2)	Eye drops	$461.25
(3)	Loss of income @ $82.25 per week from 1st May 1980 to January 1983	- $11,021.50
		$11,682.75

In addition to that amount Dr. Barrett says a sum of $7,000.00, being the cost of providing the plaintiff with an artificial eye. But there is evidence from Dr. Vaughn that the plaintiff is unwilling to have his defective eye replaced. In that case, since he cannot be compelled so to do, the $7,000.00 cannot be a reasonable item of Special Damage and it is not allowed.

The plaintiff will therefore have Special Damages in an amount of $11,682.75 with interest at 3% as of 1st May 1980, to date.

GENERAL DAMAGES:

Decided cases are a court's best tools even if they are sometimes blunt tools. There is in Jamaica, a paucity of decided cases on damages awarded for loss of eye. Indeed Dr. Barrett cited only two Jamaican cases that of Fisher v. Garrick at P. 150 of Khan's Book and Green vs. Edwards at P. 59 of Levy's Book. Those cases awarded in the first case, some $10,500 for the 50% less of the sight in one eye. The award also included damages for pain and suffering and loss of future earnings. In the other case an award of $11,000 was made for total loss of vision in one eye.

Based on those cases, Dr. Barrett invited the court to make an award of between $30,000 to $50,000 for the loss of the left eye.

The doctor's evidence is that from a medical perspective he would, and did advise, the substitution of an artificial eye for the defective eye. He felt this would remove the danger of the right eye becoming impaired by developing Sympathetic Ophtalmia and the substitution would also reduce the trauma of constant infection of the left eye.

It is clear therefore that the plaintiff is not willing to mitigate his damage, a factor which must go to reduce the amount of damages awarded in relation to cosmetic impairment.

Although he has completely lost the sight of his left eye, the medical report shows a visual impairment of 40%.

Holding as I do the two blunt tools in the form of the cited cases, I must nevertheless carve out a reasonable compensation for the plaintiff. I am of the view that an amount of $40,000 is a fair compensation in the circumstances for the loss of the eye and the consequential pain and suffering and loss of amenities including cosmetic impairment.

The plaintiff gave evidence to say that if he had continued in his employment he would now be earning $177 instead of the $90 he now earns. On that evidence, he claims loss of future earnings of the difference between $177 and what he now earns, with a multiplier of 10 years. If one calculates the difference to be approximately $90 per week one arrives at a figure of $46,800. Say $46,000 in round figures. I hold that $46,000 as loss of future earnings is a fair figure to award. The plaintiff will therefore receive $86,000 as General Damages with interest on $40,000 thereof at 3% as of the date of service of the Writ on 13th January, 1982.

He gets his costs to be agreed or taxed.

Stay of Execution granted to 30th September, 1985.