Larame v Coco D'Or (Pty) Ltd
(2000) SLR 14

Danny LUCAS for the plaintiff
Antony DERJACQUES for the defendant

[Appeal by the appellant was allowed on 3 November in CA 5 of 2000.]

Judgment delivered on 29 January 2001 by:

PERERA ACJ: The plaintiff sues the defendant company in delict for personal injuries suffered in the course of his employment. Admittedly, the plaintiff was employed by the defendant company as a carpenter on a monthly salary of R3,500. The defendant company is a hotel and guest house. The plaintiff worked in the carpentry section when it was being constructed.

It is averred that on 9 October 1996, his forearm was severed by an electric saw, consequent to an employee of the company having switched off the "safety mechanism" and another employee switching on the electrical connection. The action is therefore based on article 1384(1) of the Civil Code.

Article 1384(1) provides that –

> A person is liable not only for the damage that he has caused by his own act but also for damages caused by the act of persons for whom he is responsible or by things in his custody.

The plaintiff avers that –

(a) The defendant's employees were at fault, negligent or reckless in the usage of the said electric saw.

(b) The defendant failed to employ a safe system of work and environment for his employees including the plaintiff.

(c) The defendant was negligent or reckless in all the circumstances of the case.

(d) The defendant failed to provide the plaintiff with proper and adequate facilities to work with.

(e) The defendant failed to insure the plaintiff against such risks and perils.

(f) The defendant through his servants, agents, employees or préposés was in all circumstances of the case, negligent in the performance of their duties

and responsibilities.

(g) The defendant failed to adequately, properly or in any way at all supervise, instruct or inform the employees of the dangers attached to the use or misuse of the various carpentry machines and equipment on the premises.

(h) The defendant failed to properly, adequately or at all educate, instruct and/or put notices relating to the safe usage of carpentry, machines, machinery and equipment on the premises.

The defendant denies those averments and avers that the accident occurred either due to the sole negligence of the plaintiff or at least due to his contributory negligence. It is averred that the plaintiff was the custodian of the electric saw and that he asked a fellow employee to switch on the machine for his use without ensuring that the safety device had been activated.

The plaintiff testified that he was employed with the defendant company for only 9 days prior to the date of the accident. According to his testimony, one Mr Bamboche, another carpenter, was in charge of the electric hand saw in that section; hence he obtained his permission whenever he required its use. On the material day, Bamboche used the machine and told him that he could use it. It was placed on a bench close to where he stood. The plaintiff testified that he asked Bamboche whether the safety switch was on or off and that he replied that it was off.

He did not further check the machine, and he brought some plywood to saw. He asked another employee, one Roxy Radegonde to plug the appliance to the plug point close by. Before he could handle the saw, it was activated and the circular saw started to run wildly over the bench, came in contact with his right forearm, severing it in the process. He further stated that Bamboche came running back and told him that he had forgotten to switch on the safety mechanism.

He was taken to the hospital with the blade of the machine still stuck to his arm. It was amputated, and he was warded for eight days. Dr A Korytnicov, the Consultant Orthopedic Surgeon, in his report dated 13 February 1997 (exhibit P6) states that the amputation was below the right elbow and that the plaintiff has a permanent disability of 50%. He also recommended a prosthesis for the stump.

The plaintiff, stated that he had worked as a carpenter for 49 years and that while working at Bodco Ltd, he had used electrical machinery. He stated that although at Bodco Ltd, instructions were given as to how these machines were to be used, no such instructions were given by the defendant company.

On being cross-examined, the plaintiff stated that when he commenced work at the defendant company, there was no mechanised saw to cut the wood. He requested one and Mr Stravens, the proprietor, purchased a new saw for use in the carpentry section. He maintained that Bamboche was put in charge of that machine, and that he always

got his permission to use it. He admitted that he knew how the machine worked, as he had worked with similar machines for about 10 years. He stated that he had told Bamboche to take precautions when using, as improper use was dangerous.

The plaintiff also testified that the safety switch had been covered with a masking tape, and that further the guard covering the teeth of the saw had been pulled back and tied with a piece of wire. The resulting position was therefore, that when the appliance was plugged the saw would turn immediately, and since the teeth were exposed, the circular saw would run along the table. The plaintiff stated that he did not see that the switch had been taped down from the position he was in and that he took the word of Bamboche for granted. An identical machine produced in Court showed that if the switch was pressed down and taped, the saw would rotate without any other manipulation as soon as electricity was supplied. According to the evidence, it is obvious that one would tape the switch for convenience when using the machine for a long time, although it was a potentially dangerous practice.

Roxy Radegonde, the person who plugged the machine at the request of the plaintiff testified that it was in the possession of Bamboche and that the plaintiff had to get his permission to use it. He stated that Bamboche brought the machine and left it on the table where the plaintiff was preparing to cut plywood. He further stated that he did not hear the plaintiff asking Bamboche whether the machine was in a safe position. He however testified that the guard covering the teeth of the saw had been tied up with a wire, exposing the teeth, and that the switch button had been pressed down and tied with a string. He also testified that the plaintiff took the machine from Bamboche and put in on the table where he was working, but was unable to say whether he could have seen the switch pressed down when he asked him to put the plug on.

Mr John Stravens, the proprietor of the defendant hotel and the employer of the plaintiff testified that he purchased the electric saw at the request of the plaintiff. He stated that that machine had its own safety devices and hence he could not be held liable for any injury caused as a result of the negligence of anyone using it. He further stated that the carpentry work involved was connected with the extension of hotel rooms and that the work is now complete. He however stated that Bamboche worked in the maintenance staff till recently. He maintained that there was nothing more he could have done as employer to prevent the accident.

Liability

The liability of an employer for the damages sustained by his servant in the course of employment has been considered in several cases by this Court. Some them are – *Hardy v Valabhji* (1967) SLR 98*, Servina v W & C French & Co* (1968) SLR 127, *Hoareau v UCPS* (1979) SLR 155, and *Adolphe v Donkin* (1983) SLR 125. These cases were decided on the French law principle that it was the duty of the employer to ensure that the work in which his employee is engaged should be safe and that failure on his part to do so constitutes "fault" and that he is responsible for any damages resulting therefrom which the employee may sustain.

According to the evidence in the case, the employer, supplied the electric saw, which had an inbuilt safety system. The teeth of the saw, when not in operation, closed automatically. On the basis of the evidence I accept that Bamboche, his employee, had tied it with a wire as he was using it for a long time. That was an interference with the safety system. Further the machine, after use, has to be placed on a "safety position" by the application of a particular switch. That too was either taped down or tied. Hence both safety devices had been interfered with. Had at least the guard to the teeth of the saw been in place, the saw would not have run along the table and severed the plaintiff's hand. The plaintiff testified that he did not handle the machine at any stage, and that he did not see that the guard nor the safety switch been tied or taped. He stated that he relied on the word of Bamboche that the machine was in a safe position to use. However Radegonde testified that the plaintiff took the machine to the table he was working on, and that he did not hear him asking Bamboche whether the machine was in a "safety position". The Plaintiff testified that he had experience working with similar machines and was aware of its dangerous nature. He was in these circumstances, not acting as a prudent man, if, as he claimed, he relied solely on an assurance given by a co-worker.

Article 1384(1) holds a person liable for damages caused to a third party by the act of a person for whom he is responsible or to someone by things in his control.

In the *UCPS* case (supra) the plaintiff, a qualified blaster, was employed by the defendant in its quarry. While testing holes charged with explosives, he was seriously injured consequent to a misfiring in one of the holes. The device used by him to test the holes was to his own knowledge dangerous. He had not been instructed by the defendant to use that device. The plaintiff sued the defendant for damages alleging negligence on the part of the defendant, that it failed to provide him with proper instruments for blasting, or that they were inadequate or defective, and that it did not provide a safe system of work.

It was held that the safe system was the use of an Ohmmeter. The defendant company had one, but it was out of order. Instead, torch battery and bulb were used to explode the detonator. But that had to be done from a position away from the rock face. The plaintiff had however stood directly over the rock face, and hence the battery had generated too strong a current which set off the detonator. It was in those circumstances held that although the explosives were in the custody of the defendant, there was direct intervention of man, and consequently article 1384(1) did not apply. The defendant was therefore found not to be liable in damages.

Another case, based on "custody of things" was *Pool* v *Inpesca Fishing Ltd* (1988) SLR 115**.** In that case the plaintiff was a crew member on board a fishing trawler. While the net was being cast mechanically, the snatch block of the winch broke and the heavy metal wire swept with great force across the deck and threw the plaintiff on his back. He suffered serious injuries. It was held that the winch was in the custody of the defendant company and that, as the accident occurred due to a defect in the winch, the defendant was liable under article 1384(1) of the Civil Code. However in that case there

was evidence that thep Plaintiff had done an imprudent act by moving from a safe area with the intention of pushing the net overboard manually, and consequently he was 33 1/3 % contributorily negligent.

In the instant case, the electric saw had an inbuilt safety system which had been interfered with by an employee of the defendant company. Hence although the plaintiff himself was an employee of the defendant company, he was a third party in the accident.

In the case of *Danny Bastienne v Aquatic Sports Ltd* (CS 196/91) cited in L.E.Venchard QC *The Law of Seychelles Through the Cases* at page 499, the plaintiff was an employee of the defendant company. He was engaged in the operation of towing a yacht ashore on a trailer, together with other fellow employees. This operation involved the loading of the yacht onto a two wheeled trailer and hooking the trailer to a rope which was anchored to a pulley fixed to a tree on the shore, and the end of the rope tied to a jeep. The jeep pulled only when an employee on the beach shouted and gave a hand signal after the plaintiff who was fixing the rope to the hook on the trailer was ready. But on the day of the accident the intermediary "hand signaler" gave the driver of the jeep the signal prematurely and he pulled before the plaintiff had fixed the hook. The rope got entangled to his right foot and dragged him on the beach injuring his right ankle. As trial judge in that case, I found the defendant company vicariously liable under article 1384(1) for the negligence of its employee.

In the instant case, the evidence of the plaintiff and his witness, Roxy Radegonde, that Bamboche had interfered with the safety mechanism of the machine, making it potentially dangerous to any user, remains uncontradicted. Hence the defendant company is vicariously liable for the negligence of Bamboche who was working in the course of his employment. However the plaintiff must bear part of the responsibility for the accident. He admitted that he had experience working with such machines and that he had himself warned Bamboche about the potential danger if misused. In these circumstances, he ought to have acted prudently and checked the safety mechanism before asking his assistant to plug on the machine. He was therefore contributorily negligent. I assess the extent of such contribution at 50 %.

Damages

Under the head of "pain and suffering", the plaintiff claims R190,000. *Kemp and Kemp on the Quantum of Damages* defines "pain" as "the physical pain caused by or consequent upon an injury", and "suffering" as the mental element of anxiety, fear, embarrassment and the like to which the injury might have given rise in the particular plaintiff. This includes the aspect of any disfigurement. Undoubtedly, the plaintiff would have suffered excruciating pain consequent to the injury. Dr Alexander, the Consultant Orthopedic Surgeon testified that the plaintiff's right forearm was already severed on admission to hospital. The bleeding was arrested by suturing. He assessed the permanent disability of the right hand at 50%. He further stated that the harm caused to the plaintiff was both anatomical and psychological, and that psychological harm would persist for the rest of his life. Dr Alexander further testified that he recommended the

use of a prosthesis for the stump so that he may have some ability to hold things better, and for cosmetic reasons, but that the Medical Board had not approved that recommendation. He also stated that even if he had the use of a prosthesis, the degree of disability would not change.

The Plaintiff was warded in hospital for a period of 8 days. He stated that throughout his life he had been a professional carpenter, but he could no longer work in that capacity. He also stated that he could not perform many routine tasks he had done previously. On the basis of the medical evidence, all these disabilities are due to the 50 % disability of the right hand. Apart from the anatomical harm, the plaintiff also suffers permanent psychological harm. Although society treats the disabled with sympathy and understanding, any disabled person suffers embarrassment and anxiety. These are relevant considerations in the assessment of damages in the instant case.

On a review of cases in respect of personal injuries, the tendenc the courts appears to be that when the claim is for a loss of an organ or a limb, ther substantial award for such loss. On the other hand, in claims for fractured legs rms from which a claimant recovers completely, “pain and suffering” is a main ele in damages. Here too if there is only partial recovery, leaving a permanent dis , compensation is considered in proportion to the extent of such disability.

In the case of *Rene De Commarmond v The Government of S lles* (SCA 1/1986), where the claim was for the loss of an eye, the Court of Appe luced an award of this Court for loss of vision, disability and loss of amenities of l R60,000 and only R5,000 was awarded for pain and suffering. In *Mark Albert* v *PS* (CS 157/1993), where the claim was also for the loss of an eye. I awarded F 000 for permanent disability and loss of amenities of life, and R10,000 for pa d suffering. The aggregate sum of R145,000 under these two heads was reduce he Court of Appeal to R105,000. Ten years before the *Mark Albert* case, (supra) ıe case of *Antoine Esparon v UCPS,* (CS 118/83), the plaintiff, who was workir a stone crushing machine, suffered injury to his arm. He suffered a total disabili heavy work and a 50% disability for light work. Although the plaintiff's action was ssed on the ground that the accident occurred due to his sole negligence, Wood J ssed the damages for the purposes of an appeal. He stated that had the plaintiff be ccessful, he would have awarded R50,000 for pain, suffering, anxiety, distress anc total loss of use of the right arm.

Hence the quantum of damages for the loss of an organ or limb ased from R50,000 in 1983 to R65,000 in 1986 and to R105,000 in 1993. The in case comes eight years after the *Mark Albert* case.

In that case the Court of Appeal affirmed the consideration o tionary tendencies over a period of eight years between the *De Commarmond* c and that case, but reduced R40,000 from the award of R145,000 made by t ourt. There is no mathematical formula for increasing comparable awards made l s Court when there is no such evidence in the case. However, comparatively, the lc a limb is a greater

handicap than the loss of an organ like an eye. Hence on a consideration of the disability of the plaintiff in the instant case, and the comparable awards made by this Court I would award an aggregate sum of R125,000 under subheads (a) and (b) of paragraph 5 of the plaint.

Under subhead (c), the plaintiff claims R118,400 as loss of future earnings at R3,500 per month for 2 years. According to exhibit P3, the plaintiff was born on 3 July 1937. Hence he was 59 years and 3 months old at the time of the accident on 9 October 1996. He had therefore four years to reach the statutory retirement age of 63 years. The plaintiff however testified that he was a strong and robust person, and hence had it not been for the accident he could have worked as a carpenter well beyond the age of 63 years. In the case of *Daniel Adeline v Koko Cars Co (Pty) Ltd)* (CS 57/1995) I expressed the view that in calculating loss of future earnings, no distinction can be made between wage earners who retire at the age of 63 years and self-employed persons who may work beyond that age. Accordingly, on the basis of the "salary advice" (exhibit P1) the plaintiff's net salary was R3040 for November 1996. The claim in the plaint is however only for 2 years. Hence the plaintiff would be entitled to R72,960.

The plaintiff also claims R64,000 as loss of earnings for 20 months from the date of accident to the filing of the plaint at the rate of R3200 per month. However the plaintiff admitted that the defendant company paid the full salary for October and November 1996 although he had worked for only eight days in October when the accident occurred. He further stated that he is receiving social security payments ranging from R800 to R1000 since December 1996. The Court of Appeal in the *Mark Albert* case (supra) held that a tortfeasor is not entitled to benefit from any payment received by a plaintiff under the Social Security Fund. Hence the payments being received by the plaintiff from that fund are disregarded. However no award is made under this head as the award under subhead (c) has been made on a cumulative basis.

The plaintiff further claims R1000 paid for the medical report and R5400 as medical expenses. The claim for the medical report is substantiated by a receipt dated 5 March 1997 (exhibit P2), and is accordingly allowed in full. As regards hospital expenses, the plaintiff admitted that the treatment was free and that no special charges were levied from him for any medication. Hence no award is made under that sub head.
Accordingly, the total award is as follows-

1.	Pain and suffering, disfigurement and permanent disability	-	R125,000
2.	Loss of future earnings	-	R 72,960
3.	Medical report	-	R 1,000
			R198, 960

However on the basis of the 50% contributory negligence, the plaintiff is awarded half the total award.

Judgment is accordingly entered in favour of the plaintiff in a sum of R99,480, together

with interest and costs.

Record: Civil Side No 172 of 1998