

APIMELEKI KAVA

v.

A

JIKO FISHERIES LIMITED

[HIGH COURT, 1998 (Byrne J) 13 October]

Civil Jurisdiction

B *Damages- personal injuries- loss of eye.*

The Plaintiff who was a fisherman sustained severe injuries to and lost the sight of his left eye. The High Court HELD: that the Plaintiff's employer had been negligent in failing to prevent the accident and awarded the Plaintiff substantial general and special damages.

C

Cases cited:

Anjula Wati v. Vakatora Holdings Ltd and Others - unreported dated
17th October 1997

Jefford v. Gee [1970] 2 Q.B. 130

Kyci v. Utility Tyre Services Ltd - Current Law Digest October 1997

D *Latimer v. Lismore City Council* - NSW Supreme Court No. 600165/92.

Nominal Defendant v. Ischac. - NSW Supreme Court No. 40439/97

Ould v. McKee - District Court No. 321 of 1990 unreported

Prasad Trevis v. Newhopes Collieries Pty Ltd - District Court Brisbane
Case No. 1124/91

E Action for damages for personal injuries in the High Court.

R.I. Kapadia for the Plaintiff

No appearance for the Defendant

Byrne J:

F The Plaintiff is a fisherman by occupation now aged 29 and unemployed.

He was employed by the Defendant from 1992 until 31st December 1996 as a member of the crew on one of its fishing boats which operate out of Suva.

On 15th of October 1995 while working on one of the Defendant's boats "Royal Fortune" in the waters off Lau he was directed by servants or agents of the Defendant engaged in work on the same boat to unclip branch lines from the main fishing line and while doing this was hit by a snapped fishing line which flew on to his left eye causing severe injuries.

G

As a result of this accident the Plaintiff has lost the sight of that eye and has a scar approximately 3cm long extending from above the eyelid about half way to the left of that lid. He now claims damages for his injuries and alleges that they were caused by the Defendant failing to take any or any adequate

precautions for his safety while he was engaged in his work.

He bases his claim first under the ordinary principles of common law negligence and alternatively he alleges breach of the Factories Act (Cap. 99). Particulars of the alleged negligence are set out in the Statement of Claim annexed to the Writ herein which was issued on the 18th of June 1996. These are as follows:

- “(a) Exposing the Plaintiff to a risk of damage or injury of which the Defendant knew or ought to have known. A
- (b) Failing to take any or any adequate precaution for the safety of the Plaintiff while he was at work on the boat. B
- (c) Failing to provide him with adequate or suitable tackle or appliances, and in particular with any or any suitable protective face gear or goggles or effective screens to enable him to carry out his work in safety and to protect his eyes and face while he was working. C
- (d) Causing or permitting him to work without providing him with any suitable goggles or effective screens to protect his eyes and face when the Defendant knew that it was unsafe and dangerous for the Plaintiff to carry out his work without such protection. D
- (e) Failing to take any measures to protect the Plaintiff from being injured by snapped or flying fishing lines.
- (f) Failing to take any or any adequate measures whether by way of examination, inspection, testing or otherwise to ensure that the Plaintiff was not injured by fishing lines. E
- (g) Failing to move the boat uniformly to avoid high tension on the fishing line.
- (h) Failing to provide professional medical attention promptly.” F

The particulars of statutory negligence allege breach by the Defendant of Section 24 (1) and Section 63 of the Factories Act.

Section 24(1) requires an employer, so far as is reasonably practicable, to provide among other things a safe working place for his employees. G

Section 63 deals with the protection of eyes and states “suitable eye protection shall be provided for all employed persons where there are circumstances involving special danger to their eyes”.

The word “factory” is defined in Section 2(1) of the Act as including (ii) any premises in which the business of sorting any article is carried on as a

A preliminary to the work carried on in any factory and in (ix) any premises in which the business of making or mending nets is carried on incidental to the fishing industry.

Section 73 gives Inspectors the right among other things to make such examination and inquiry as may be necessary to ascertain whether the provisions of the Act are complied with in relation to any factory and any person employed in the factory.

B Section 80 deals with offences and penalties for any contravention of the provisions of the Act relating to a factory.

A Defence was delivered on the 14th of April 1997 but before the hearing began before me on the 1st of April 1998 the solicitor for the Defendant sought leave to withdraw his representation of the Defendant on the grounds primarily that he was having great difficulties in obtaining proper instructions to defend the matter from the Defendant's insurers and that as the insurance cover was limited to only \$6,000.00 it was considered it may be in the interest of the Defendant to obtain the services of its own solicitors to defend the case. The application was made by Summons dated 27th of March 1998 and on the hearing I gave leave to Messrs Lateef & Lateef to withdraw as solicitors for the Defendant subject to them filing an Affidavit of Service on the Defendant of the Summons of the 27th of March within 24 hours. This was duly done and as there was no appearance either in person or by other counsel for the Defendant I directed that the action proceed undefended. Sworn evidence was then given by the Plaintiff and another witness and I shall now summarise that evidence.

E The Plaintiff stated that he is single, was educated to Form 3 and lives with his grandmother, uncle, aunt and two younger brothers. At the time of the accident he was the sole breadwinner for this family. After he left school he joined the army in 1987 and remained until 1990. He began working for the Defendant in 1992 and said that the Defendant has several fishing vessels and exports fish overseas. The normal practice was to leave Suva for a fishing trip lasting two weeks and then return with the catch. On the 15th of October 1995 he was fishing on the vessel "Royal Fortune" which had 9 crew, all Fijians, and 4 officers, all Koreans, comprising the Captain, First Officer, Chief Engineer and Second Engineer.

G He said the system of fishing was to lay a main line of heavy plastic for several kilometres.

Attached to the main line was a large number of smaller branch lines between 10 and 12 feet long with fishing hooks attached. These lines were spaced about 12 feet from each other and linked with the main line by clips. There were hundreds of such small branch lines on the main line which was fixed with a number of buoys which kept it afloat.

The system was to lay the main line and leave it for a few hours to enable fish to bite and then start pulling in the main line. There were two rollers on the boat and one member of the crew would then start rolling the wheel so that the main line would start collecting on that roll. This brought the smaller branch lines towards the boat and a member of the crew would then start bringing in the branch lines.

A

Another member unhooked the fish at the end of the line and put them in the cooler. The Plaintiff said this was a very delicate operation because the First Officer or Captain had to co-ordinate with the person operating the roller to ensure that the boat moved uniformly with the main line as it was being wound on the wheel. If there was no proper co-ordination tension would be created on the main line which could then snap. The Plaintiff said the line would also snap if the sea were rough or if the Captain or the First Officer were not sufficiently skilled to handle it.

B

In the event of the main line snapping which happened frequently, the boat was turned around to pick up the line because it was floating with the help of the buoys and the operation then resumed.

C

When the line snapped it sprang back and hit the crew including the Plaintiff frequently. The Plaintiff said that no goggles or protective clothing were provided by the Defendant for the crew working the lines. They complained to the Captain about this lack of protection but nothing was done to remedy the failure. The Plaintiff said that the Captain told them that if they did not like the work they could leave. As the Plaintiff had no other source of income he was forced to continue to work to feed his family.

D

On the 15th of October, which was a Sunday, they had laid the main line several miles and after a few hours they started pulling it in. They had caught a large number of fish. When the first roller was almost full the Plaintiff was taking a clip off the branch line.

E

Another member of the crew was next to him pulling in small lines taking fish off them and putting them in the cooler.

F

Suddenly the main line became tense and snapped. One end flew back on the boat and hit the left side of the Plaintiff's head at an angle. The Plaintiff then demonstrated showing that the line hit the right top of his forehead and across diagonally to his left eye and chin. The Plaintiff fell and slumped on to the deck. He was unconscious and when he regained consciousness after about half an hour he realised he was in his cabin. There was much blood on his face, he had headache and pain all over his body. He felt great pain in the left eye and had lost much blood. He had no strength.

G

The accident occurred at about 10.00 p.m. and while he was unconscious the Chief Engineer stitched the eyelid. He later told the Plaintiff he had done this. He also said that at the time the fishing was carried out under lights. The

only medication available was Panadol tablets which did not give him any relief and his eye continued to give him much pain.

A The nearest port to the boat when the accident occurred was Lakeba which the Plaintiff could see about thirteen miles away. They were then about two hundred miles from Suva.

B The Plaintiff says that he knew there was a Medical Centre at Lakeba which also has an airstrip and is about one hour's flight from Suva. The Plaintiff says that the Captain could easily have taken him to Lakeba whence he could have been flown to Suva but he did not suggest this to the Captain.

The boat remained at sea and returned to Suva as scheduled on the following Tuesday the 17th of October at about 8.00 p.m.

C He said that when he was in his cabin only the Fijian crew came to see him. When the boat reached Suva he asked the Captain for money to take him to hospital and was given \$5.00.

D At Suva the boat was met by a Mr. Alfred of Jiko Fisheries Limited who took him by car to his uncle's house to inform his family that the Plaintiff had been injured. His uncle then joined him and Mr. Alfred drove them to the Colonial War Memorial Hospital where they arrived about 10.00 p.m.

The Plaintiff was seen promptly by a doctor who cleaned his eye which was bleeding and bandaged it. He told him to go home and return the next morning to see an Eye Specialist which he did. The Eye Specialist removed the stitches and stitched the eye again under local anaesthetic.

E The Specialist told the Plaintiff to go home but come back to the hospital later which he did. The pain continued and so he was admitted on the 28th of October and remained as an in-patient for two weeks. The Plaintiff says during this time he was very weak and had headaches. He could not sleep and felt frightened. The doctor told him that his left eye had become permanently blind. The Plaintiff then tendered medical reports on his condition, one from the Colonial War Memorial Hospital which said that the Plaintiff had vision of hand movement only in the left eye and normal vision in the right eye. There was a left lower lid and upper lid laceration with dislocated lens and total hyphaema, meaning the anterior chamber of the eye had haemorrhaged.

F The lid laceration was sutured on the 18th of October but the damage to the left eye was so extensive that Dr. T.B. Sikivou, the Ophthalmology Registrar, said that the Plaintiff's vision was then only perception of light.

G On discharge the Plaintiff was seen in the Eye Clinic until the 8th of February 1996.

At the request of the Defendant's then solicitors the Plaintiff was examined in Fiji this year by an Eye Specialist Dr. Girish Jamnadas whose report after

giving the history is as follows:

"On examination vision his left eye is no perception of light. There is notching of the upper lid margin, i.e. there is loss of upper lid issue measuring 1.5cm in length. The cornea is normal. The eye is aphakic with a remanent of after cataract present which is appearing as a whitish scar. Also most of the iris is absent with a small portion of the iris remaining superiorly. Introcular pressure is 10mm mercury for each eye. Funduscopy in the left eye shows proliferative retinopathy of the left eye in the macula region. The right eye is normal with normal vision.

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The above patient has suffered complete loss of vision in his left eye rending him monocular. In addition to that he has suffered cosmetic deformity of his upper eyelid. I do not feel that there would be any useful vision gained with further surgery. If you require any further information please do not hesitate to contact me."

C

The Plaintiff says that his employers paid him his wages until December 1996 but he has been unable to work since the accident. He survives only because his grandmother, who is now aged 73, goes fishing from the Lami Wharf.

D

The Plaintiff says when he does any work, for example sweeping the house and bending down, he fells weak, and his head starts spinning. His condition is worse in the wet season when he gets neck pain and pain in his eye. He was admitted to hospital again on the 2nd of May 1997 because his whole body was weak and he had lost weight. He says he was in hospital for one month.

E

Before the accident he played rugby for pleasure but now could not do so because of his injury. He says that since the accident his personality has changed and he worries about his condition. He keeps remembering the accident and this makes him frightened. Before the accident he led a very happy life but now does not talk much and has no social activity. He mainly stays at home. In traffic he feels frightened as a pedestrian and in supermarkets and other markets feels uncomfortable. Now in a supermarket he goes direct to what he buys but before the accident he wandered around looking at goods. Before the accident he used to attend rugby matches but since the accident does not. At the time of the accident he was earning \$153.45 per fortnight nett. He has also lost his employer's contributions of \$11.55 per fortnight to the Fiji National Provident Fund from the 1st of January 1997 to the 28th of March 1998.

F

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The Plaintiff's uncle, Josefa Radanita then gave evidence. He said that before the accident the Plaintiff was very strong and active and talkative. Since the accident he has become quiet. Mr. Radanita has noticed the Plaintiff is nervous when in supermarkets and now remains at home most of the time. He cannot

stand for very long and lies down a lot.

A On this evidence I am satisfied that the Defendant was negligent at common law and alternatively was guilty of statutory negligence for failing to comply with Sections 24 and 63 of the Factories Act, I hold that at the time of the accident the fishing vessel on which the Plaintiff was employed was the Plaintiff's place of work and as such the Defendant had a duty to keep it safe for the Plaintiff at all times while he was employed.

B On the 15th of October 1995 it failed to do so. Also the Defendant was in breach of Section 63 in failing to provide suitable eye protection for the Plaintiff when his work involved special danger to his eyes. I find also that the boat was a factory within the meaning of Section 2 of the Act particularly sub-paragraph (ii) and sub-paragraph (ix). It now remains to assess the Plaintiff's damages.

C As a result of his accident the Plaintiff has suffered the loss of sight of his left eye and has a scar on the left eyebrow. The eye is unpleasant to look at because it is permanently bloodshot and I have no doubt is one of the reasons why the Plaintiff claims some loss of personality and has made him disinclined to mix with the public as he did before the accident. I believe this is a source of some embarrassment to him.

D In addition I cannot understand why the Captain of his boat did not go in to the port of Lakeba instead of remaining at sea to complete the fishing expedition.

E In my opinion it must have been obvious to any reasonable person on board the vessel that the Plaintiff had suffered a very serious injury and it was desirable to get medical attention for him as quickly as possible. In my judgment if the Captain or any of his officers did not know that medical assistance was available on Lakeba or indeed that it had an airstrip from which the Plaintiff could have been flown to Suva at least on the Monday morning, it would have been simple for him to ask any of the Fijian crew whether they knew if such services were available at Lakeba. Given their respective positions, I do not consider it was unreasonable for the Plaintiff not to have requested the Captain to go into Lakeba. I believe the Captain owed a duty of care to the Plaintiff in this regard to get medical assistance for him as quickly as possible and in my view this was no later than during day light on the 16th of October. Instead the Captain preferred to remain at sea and return to Suva only on the normal date. In the process in my judgment he caused the Plaintiff unnecessary pain and suffering which could have been at least mitigated considerably by his receiving qualified medical attention as soon as possible on the Monday morning.

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Counsel for the Plaintiff has referred me to a number of decisions of English and Australian Courts during the last six years and damages for eye injuries, beginning with two New South Wales Supreme Court decisions, Latimer v. Lismore City Council (decision of Master Greenwood) No. 600165/92 in

which a male student, aged 17 years who suffered blindness in his left eye following a detonator explosion was awarded \$95,000.00 for pain and suffering and loss of amenities of life. In Nominal Defendant v. Ischac (decision of Powell and Stein JJ) No. 40439/97 an unemployed male, aged 28 years was awarded \$112,500.00 for pain and suffering and loss of amenities of life for the loss of an eye following a motor vehicle accident. In Ould v. McKee Newton DCJ Southport Queensland, No. 321 of 1990, on 12th October 1993 awarded \$50,000.00 for pain and suffering and loss of amenities for a 28 year-old male who suffered the total loss of sight in his right eye in a motor vehicle accident on 12th June 1987. Like the Plaintiff in the present case the Plaintiff Ould became monocular as a result of the accident and Judge found that the eye was cosmetically unacceptable.

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In Trevis v. Newhopes Collieries Pty Ltd in District Court Brisbane Case No. 1124/91 Wylie DCJ awarded \$56,000.00 for pain, suffering and loss of amenities of life to a male paving contractor, then aged 36 years who suffered the loss of all the sight in the right eye following a motor vehicle accident on 9th December 1988.

C

In a recent English decision Kyci v. Utility Tyre Services Ltd reported in the October 1997 Current Law Monthly Digest at p.65, on the 1st of July 1997 His Honour Judge Quentin Edwards Q.C. awarded general damages of £23,000.00 to a male aged 31 at the time of the accident and aged 36 at the date of hearing who suffered total loss of vision in his left eye when a piece of wire measuring approximately 5mm broke loose from a tyre which he was remoulding and penetrated his left eye.

D

If one were to convert those general damages into Fiji currency at the present rate of exchange it would be equivalent approximately to F\$69,000.00. However it must be remembered that the cost of living in England has, at least since the end of World War II, been much higher than in Fiji and for that matter Australia also. Thus it is considered in some quarters that bearing in mind the relatively low cost of living in Fiji compared with that of England it is unwise to simply multiply the English award by the current rate of exchange so as to equate it with Fijian dollars so that it might be said the award of £23,000.00 in Kyci is roughly equivalent to the same amount in Fijian dollars. If that be true, then with great respect to Judge Quentin Edwards, I must say that in my view such an award would be most inadequate in Fiji.

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More to the point in my view are the Australian decisions I have just quoted. Apropos of this I might add that I think it is commonly agreed in the profession that until recent years, despite the very high cost of living in England, awards there for general damages have been much lower than those in Australia for comparable injuries. It is true that in the last 10 to 15 years awards for general damages for personal injuries in England have been slowly rising but generally speaking as a guide I find Australian decisions far more helpful in the assessment of damages for particular injuries.

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Consequently, whilst I accept it will probably be a long time before an award

A of \$112,500.00 (Nominal Defendant v. Ischac) or \$95,000.00 (Latimer v. Lismore City Council) will be made in Fiji for the loss of sight of one eye I do not consider it would be outrageous to award the Plaintiff in this case \$50,000.00 for pain and suffering and loss of amenities as was done by Newton DCJ in Ould v. McKee.

B On the other hand, the usual practice of the law is to advance by gradual increments wherever possible. With due respect to previous decisions of the superior courts in Fiji until the last eight years I think it fair to say that increments in the award of general damages here have not been merely gradual but at times regrettably slow and almost painstaking.

That situation, I am grateful to see, has now changed.

C In the present case I consider that the Plaintiff should receive an award of \$50,000.00 for the loss of sight of his eye and the cosmetic defect arising from the scar on his left eyebrow and the unpleasant appearance of his eye due to the accident. This of course includes damages for the pain and suffering and loss of amenities he has had to endure since the accident. In addition the Plaintiff claims special damages of \$5,340.00 consisting of:

D	Medical Reports	-	\$60.00
	Loss of earnings at \$153.00 per fortnight from 1/1/97 to 28/3/98 - 32 fortnights	-	\$4,910.00
E	Loss of employer's contributions of \$11.55 per fortnight for 32 fortnights (1/1/97 - 28/3/98)	-	\$369.60

F The Plaintiff claims loss of prospective earnings in the future at \$80.00 per week. This is because it is argued that he has lost approximately one half of his former earning capacity and although he has been unemployed since the accident he recognises that there is probably some work of which he is now capable such as that of a cleaner. He told me that as such he could expect to receive between \$35.00 and \$40.00 per week if able to get such a job. I consider this reasonable and I told the Plaintiff that it is in his own interest to endeavour to find work as soon as possible otherwise he will continue to be reclusive which can not be good for him psychologically. He therefore claims \$80.00 x 52 weeks x 16 years (the multiplier) and the sum of \$66,560.00 under this heading.

G Although I am inclined to think that this may be a little pessimistic, in the absence of any argument from the Defendant as to a different amount and a different multiplier I am prepared to accept this sum as reasonable.

In addition the Plaintiff is entitled to interest on his damages which I assess as

follows:

General Damages \$50,000.00 by 5% from the
date the Writ was issued, 12th June 1996
to the date of judgment - 2 1/3 years - \$5,833.00

A

He is also entitled to interest on his special damages which is accepted here, following Jefford v. Gee (1970) 2 Q.B. 130, as half the rate on general damages from the date of accident to the date of trial. This amounts to \$344.00 and to this must be added his prospective loss of earnings of \$66,560.00. In total these sums come to \$128,077.00. Bearing in mind all other factors such as the impossibility of estimating precisely the amount of general and other damages I round this off to \$128,100.00.

B

There will be judgment for the Plaintiff against the Defendant for the sum of \$128,100.00 which automatically carries interest at the rate of 4 percentum per annum until satisfied and for which, as Pathik J. recently said in Civil Action No. 244 of 1995 Anjula Wati v. Vakatora Holdings Ltd and Others unreported judgment of 17th October 1997, no order of the Court is necessary.

C

The Plaintiff is also entitled to his costs of these proceedings which are to be taxed if not agreed.

D

(Judgment for the Plaintiff with damages assessed.)