IN THE SUPREME COURT
OF PAPUA NEW GUINEA

CORAM : WILLIAMS, J.
Friday,
4th August 1972

W.S. 74 of 1971 (NG)

BETWEEN : JOHN WILLIAMS
Plaintiff

AND : NEW BRITAIN QUARRIES PTY LIMITED
Defendant

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Williams, J.

The plaintiff sues for damages arising out of the alleged negligence of the defendant. The Statement of Claim alleges that, on 19th March 1970, the plaintiff was working in premises at Malaguna Road Rabaul in which his employers, Engine Repair Services, then carried on business. These premises were in close proximity to premises in which a company known as Rabaul Metal Industries Pty Limited then carried on business. On the day in question the defendant company by its servants and agents were performing certain work on the premises of Rabaul Metal Industries Pty Limited. In the course of this work the defendant company, by its servants and agents, so negligently, carelessly and unskilfully used certain explosives that the plaintiff was thrown to the ground by a blast resulting in injury to him. It is asserted that the defendant was negligent in that its servants or agents:

(1) used explosives in close proximity to the premises in which the plaintiff then was;

(2) failed to warn the plaintiff of its intended use of the said explosives and/or the danger arising from the use thereof;

(3) failed to take any or any sufficient or necessary steps to ensure the safety of the plaintiff.

The Statement of Claim further asserted that the plaintiff would rely on the fact that an explosion set off by the defendant's servants or agents caused a blast which

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injured the plaintiff was in itself evidence of negligence on the part of the defendant.

In the Statement of Defence the defendant admitted that, on 19th March 1970, the plaintiff was working in premises occupied by Engine Repair Services and that these premises adjoined or were in close proximity to premises then occupied by Rabaul Metal Industries Pty Limited. It denied the allegations of negligence contained in the Statement of Claim.

It emerged clearly from the evidence and was not in dispute that, on the day in question, the defendant company was engaged in work in the driveway of premises occupied by Rabaul Metal Industries Pty Limited. Two underground water storage tanks had been installed under the driveway and it was found necessary to have manholes leading into each of these tanks. In each case a 24' diameter concrete pipe was inserted into the top of the tank leaving portion of the pipe protruding above ground level. It thus became necessary to cut off at ground level the protruding portion of each pipe. This operation was carried out by the defendant company under the direction of its servant or agent, Mr. Gartner. It appears that an abortive effort had previously been made to cut off the unwanted sections of pipe with a hammer and chisel. It was then decided to use an explosive substance called "Cordtex". This, as I understand the evidence, takes the form of a plastic covered cord which is wrapped around the object to be cut at the place where it is desired that the fracture occur. The substance is then electrically detonated causing a fracture of the object at the required place following which the unwanted section is easily removed.

Mr. Mullins, the Inspector of Explosives for the Rabaul area, appointed under the Explosives Ordinance, was called on behalf of the plaintiff. In the course of his evidence he stated that the use of the substance "Cordtex" for cutting pipes was a normal and common use of the substance. The detonation of the substance

causes inward pressure to be exerted on the pipe causing a fracture line. Upon detonation a loud noise is made - a sharp crack like that of a rifle fired at close range.

It is clear upon the evidence, and I find as a fact, that the explosive substance was detonated around each of the two pipes simultaneously. I also find that at the time of detonation the plaintiff was about 30ft. away from the pipes. The pipes were in the driveway of the premises occupied by Rabaul Metal Industries Pty Limited. Between them and the place where the plaintiff was standing was, firstly, a space of about 6ft. in the driveway of Rabaul Metal Industries Pty Limited, then a concrete wall about 4ft. high, then the driveway of the premises occupied by Engine Repair Services (about 20ft. in width), then a fibro wall of the building occupied by that firm. The plaintiff was working at a bench about 6ft. beyond that fibro wall.

The plaintiff in his evidence stated that he was working at a bench with his back towards the premises of Rabaul Metal Industries Pty Limited. A customer, Mr. Gayne Bennett, had just entered the premises and he turned his head to speak to Bennett. There was a loud explosion "loud rather than violent". He immediately felt a pain in the back. He hung on the bench at which he had been working and then managed to get to the front doorway of the premises where he was forced to sit down because of the pain in his back. Bennett, he said, staggered backwards, put his hands behind him and fell down.

The plaintiff was cross-examined concerning this aspect of the matter I set out hereunder my note of the questions and answers:

Q. You heard an explosion?
A. Yes.
Q. You almost instantaneously felt pain?
A. Yes, they came together - no difference in time.
Q. You feel anything except pain?
A. No, a loud explosion like a lightning strike.
Q. You feel any force?
A. No, I felt no force.
Q. What do you say caused your injury?
A. The loud explosion.

Q. Did the explosion frighten you?
A. I didn't have time to be frightened.
Q. Did you jump or start?
A. I don't know - I felt a pain in the back. I can't say I felt a push or anything like that.
Q. It is untrue to say you were flung to the ground by the explosion?
A. Yes.

In his re-examination the following appears:

Q. You said you do not recall being shocked by the explosion?
A. All I can remember is the explosion and pain at the same time - I could have jumped but I have no recollection of it.

As stated earlier this is a claim in negligence, the negligence alleged being that the defendant company caused explosives to be used in close proximity to the premises in which the plaintiff was working without warning the plaintiff of the intended use of explosives or the danger arising from the use thereof and in failing to take care to ensure the safety of the plaintiff.

Upon undisputed evidence before me the explosive substance used was not dangerous in the sense that other explosives might often be. It cannot be detonated accidently but only by deliberate act. To a person in the position of the plaintiff standing some thirty feet away with a concrete wall and the fibro wall of the building in which he was working placed between the place where he was standing and the point of the explosion there was no foreseeable danger arising from blast force or flying debris. The only likely effect upon him of the explosion was from the loud crack which followed it.

It seems to me as a matter of common human experience that the effect upon a person of a loud sharp noise would usually depend (as was stated by the witness Mullins) upon whether it was unexpected or anticipated.

There is a direct conflict in the evidence as to whether the plaintiff had any prior notice of the intended use of the explosive. According to the plaintiff he had no prior notice. However, according to Gartner he had. Gartner said that a short time before preparing the charge he went into the premises in which the plaintiff was working and said to the plaintiff, "I am going to cut those two concrete pipes in the R.M.I. driveway with cordtex. It will make a fair amount of noise" to which the plaintiff replied, "That will be all right." Gartner also said that he informed one Briggs, who was working in the premises of Rabaul Metal Industries Pty Limited, of his intention to use the explosive. Briggs, who was called on behalf of the plaintiff, agreed that he had been so informed.

Gartner also stated that a short time after the explosion he was told something by Briggs as a result of which he went to the doorway of the premises occupied by Engine Repair Services and saw the plaintiff sitting in the doorway. He said to the plaintiff, "What happened John?" The plaintiff replied, "I heard someone call me - I turned my body and jumped when the explosion went off and I have hurt my back". Gartner said, "You knew we were going to fire that shot". The plaintiff replied, "Yes, I have been watching you - it is not your fault it happened." This conversation, said by Gartner to have taken place between the plaintiff and himself, was put to the plaintiff in cross-examination. The plaintiff did not specifically deny that it had taken place but said he did not believe that it had and had no recollection of it.

After a close consideration of the evidence I have reached the conclusion that the plaintiff was aware that the explosion was imminent. I prefer the evidence of Gartner when he said that he informed the plaintiff of his intention to use the explosive substance. I am also disposed to accept Gartner's evidence concerning the conversation between himself and the plaintiff very shortly after the explosion.

There are several matters which I think are relevant to the question of the credit to be attached to the plaintiff's evidence.

There is the evidence concerning the incident itself. The Statement of Claim (which, I must assume, was prepared on the instructions of the plaintiff) asserts that the plaintiff was "thrown down" by the blast. In his evidence before me he stated that this was not so and that he felt no force applied to him.

The plaintiff also stated in his evidence that Bennett, who had just entered the premises, was pushed over backwards by the force of the explosion. Bennett, who was called as a witness for the plaintiff, stated that he was outside the premises when the explosion occurred and was not pushed over by the force of the explosion. He described is as "only an air-bang - nothing solid behind it".

Several medical reports were tendered on behalf of the plaintiff without objection on the part of the defendant. Dr. Nommensen, a specialist surgeon attached to the Department of Public Health in Rabaul, in his report sated, "Mr. Williams claims he was flung to the ground by an explosion". The plaintiff in cross-examination denied that he had said this to Dr. Nommensen. Dr. Burton-Bradley, a specialist psychiatrist., in his report stated, "He (the plaintiff) says that there was an explosion next door and that he felt as though he had been 'kicked in the back and as though someone had torn me apart'". The statements attributed to the plaintiff in the medical reports tendered as part of his case are plainly at variance with his evidence concerning the incident itself.

The plaintiff asserts that he has a constant pain in the lower back which is exacerbated by bending or lifting and that by reason of this he has been unable to follow his previous employment as a mechanic. He says that he is now unable to effect repairs to his car as he previously did as this involves bending his back. In his cross-examination on this aspect of the matter the following questions and answers appear:

Q. How long is it since you tried to work on your car?
A. At Christmas time.
Q. You might be able to do some now?
A. No. Only three weeks ago I tried to do some work in the engineering shop of Rabaul Welding.

The clear inference to be drawn from this answer is, I think, that an unsuccessful attempt was made to do some work in the engineering workshop.

A Mr. Robert Petersen gave evidence for the defendant. He stated that approximately one month before he had seen the plaintiff at the workshop of Rabaul Welding Company. He saw the plaintiff working on a boat trailer. The work consisted of the cutting off of a jockey wheel with an oxy cutter and the welding on of a new wheel. The work involved "getting down low as the centre line of the trailer is about 18" high" and took an "hour or so". After completion of the work the plaintiff pushed the loaded trailer to a nearby vehicle steering it with the jockey wheel. He was assisted in the pushing by the witness and another man. Petersen also stated that on another occasion at about the same time he saw the plaintiff at the same workshop doing some work on a lathe. He removed a chuck from the lathe. The chuck with pulleys weighs about 70 lbs. The plaintiff, unaided, carried this and placed it on a bench about 1 ft. high some 6-10 ft. away. He then lifted a smaller chuck weighing about 18 lbs from the top of a cupboard about 10 ft. from the lathe and carried it to the lathe. After fitting it to the lathe he then worked the lathe for ½ to ¾ hour. Petersen said that he had first heard of this action two days before giving evidence. He appeared to me to be an impartial observer and I have no reason to doubt his veracity.

The plaintiff in the course of his evidence stated that he had, for many years, been active in the sport of sailing. Since the incident of the explosion however this activity had been confined to non-strenuous and non-competitive sailing with his wife in Rabaul Harbour. In cross-examination he agreed that he had taken part as a crew member in the recent Rabaul to Kavieng ocean yacht race.

Another feature of this matter arises from the medical evidence. No oral evidence was given by a medical witness. Several medical reports were tendered on behalf of the plaintiff without objection. Dr. Nommensen, a specialist surgeon, obviously had some difficulty in determining the nature and extent of any physical harm that the plaintiff may have suffered resulting from the explosion. The plaintiff had a previous back injury arising from a motor vehicle accident in 1964. An x-ray of the

plaintiff's lower back revealed the old injury sustained in 1964 but no significant changes from that time. Dr. Nommensen expressed the view that he had little doubt that the plaintiff has a degree of chronic low back pain which was probably worse than at the time of any earlier examination made following the 1964 accident and which appeared to date from the incident in March 1970. However he added that he was far from clear concerning the latter incident and stated that he would be able to express an opinion if he had a report from a psychiatrist concerning the plaintiff's mental condition. He thought the question of compensation neurosis existed. The final paragraph of Dr. Nommensen's report is as follows:

> "Furthermore, some information regarding the nature of the physical aspect of the injury, such as an opinion regarding the force of the explosion as it was likely to affect the patient, would help me in deciding whether his symptoms are consistent or not. You will appreciate that the assessment of back pains in the absence of x-ray changes and clear-cut physical signs is difficult."

Dr. Nommensen's report is dated 26th April 1972 approximately two months prior to this trial. Apparently he was not furnished with the psychiatrist's report nor the further information requested by him in the final paragraph of his report. In any event there is no evidence of any concluded opinion by him. The specialist psychiatrist in his report stated that he was unable to find any evidence of serious mental disorder and that it was reasonable to conclude that the plaintiff "suffers from a psychoneurosis dating from the episode of the explosion and that these symptoms would disappear or be reduced in intensity should he receive material compensation."

I have gained the strong impression that the plaintiff is a man who has become obsessed with this claim and is disposed to acknowledge only those things which he regards as being in his favour. In saying this I do not wish it to be necessarily implied that I think he is deliberately asserting false claims as it may very well be that he has over a period of time talked himself into a belief concerning a number of features of the matter. Whilst this may not be unusual in cases of this kind it nevertheless seems to me to be relevant in considering questions of credit.

The matters to which I have referred in the preceding paragraphs cause me to have some serious doubts concerning the reliance to be placed upon the evidence of the plaintiff, particularly where it is in direct conflict with the evidence of the defence witness Gartner. Gartner, upon the evidence, has a stake in the outcome of these proceedings. However, I have carefully considered his evidence and no reason appears to me why I should reject his evidence in favour of that of the plaintiff.

It seems to me that the foreseeable danger which might have arisen from the detonation of the explosive substance was that, if unexpected, it might startle someone in close proximity and thereby cause some injury. The plaintiff was some 30 feet away with a concrete wall between himself and the seat of the explosion. I am not satisifed that the explosion was unexpected so far as the plaintiff was concerned; on the contrary I accept Gartner's evidence to the effect that he warned the plaintiff of his intentions and that the plaintiff watched the preparation of the charges. In these circumstances I am not satisfied, upon the evidence, that the plaintiff has established any breach of a duty of care to the plaintiff on the part of the defendant.

It was said on behalf of the plaintiff that there was a breach of a duty of care on the part of the defendant in that the plaintiff was not advised to leave the building in which he was working. This arose from some evidence given by the witness Mullins to the effect that he would have suggested that the plaintiff leave the building and go into the open air. This, he thought, may have had the effect of reducing the sound level by eliminating some reverberations from the walls of the building in which the plaintiff was working. This was put forward as an opinion by Mullins. Mullins was shown to have had some experience in the use of explosives. However, I have considerable doubt whether the question of variation in the level of sound is one upon which Mullins has any special qualifications to express an opinion. Mullins also said that the existence of the concrete wall between the pipes and the place where the plaintiff was standing would have had a dampening effect on the sound. If the plaintiff had moved outside the building he may have lost the benefit of any reduction in sound caused by the wall. Bennett who was outside the building in which the plaintiff was working described the sound as a "loud bang" like a rifle shot fired in close proximity and that it caused his ears to ring. It appears from his evidence

that the sound level outside the building was quite high. It should also be mentioned that Mullins when first asked what might be considered the prudent practice before detonating the substance stated that it was sufficient to warn all people within a radius of 100 yards, by word of mouth, of the intention to explode. I am not satisfied that there was any breach of duty on the part of the defendant in failing to advise the plaintiff to stand in the open air rather than to allow him to remain in the building. In my view the only foreseeable risk lay in catching someone by surprise.

Reliance is also placed by the plaintiff on the so-called doctrine of "res ipsa loquitur". The Statement of Claim asserts that "the plaintiff will rely on the fact that an explosion set off by the defendant, its servants or agents, caused a blast which injured the plaintiff as being in itself sufficient evidence of negligence on the part of the defendant." However, in this case all the facts surrounding the incident have been canvassed in evidence. It has been said on many occasions that once the cause of an accident has been established and the relevant circumstances proved there is no further room for the operation of the so-called doctrine. As was said in the majority judgment of the High Court of Australia in Mummery v. Irvings Pty. Ltd. (1):

> "It would be a tedious task to attempt to traverse the whole field of cases in which the statement has been relied upon but consideration of the wide field of authority leaves no room for doubt that, once the cause of an accident has been established and the relevant circumstances proved, there is no further room for the operation of the principle. As Lord Porter said in Barkway v. South Wales Transport Co. Ltd.(1950) 1 All E.R.392; (1950) A.C.185; (1950) W.N. 95): 'The doctrine is dependent on the absence of explanation, and, although it is the duty of the defendants, if they desire to protect themselves, to give an adequate explanation of the cause of the accident, yet, if the facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether, on the facts as established, negligence is to be inferred or not'".

(1) (1956-1957) 96 C.L.R. 99 at p.115

There is, in my view, no room for the operation of the doctrine in the circumstances of this case.

In my view the plaintiff has failed to establish negligence on the part of the defendant and there must accordingly be judgment for the defendant with costs.

Solicitor for the Plaintiff: P.G. LeFevre,Esq.

Solicitor for the Defendant: F.N. Warner Shand, Esq.