IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

CIVIL APPEAL ABU0126 OF 2006

BETWEEN	:	**ORANGE COAST INVESTMENT LTD.**	*Appellant*
AND	:	**IAN BAGSHAW**	*Respondent*

Coram	:	Byrne, J. A. Shameem, J. A. : Hickie, J. A.
Counsel	:	A. K. Narayan for the Appellant A. Patel for the Respondent
Date of Hearing	:	23rd October 2008
Date of Judgment	:	15th January 2009

JUDGMENT OF THE COURT

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[1] **Introduction**

The *Appellant* which is the proprietor of the Lautoka Hotel appeals against an award of $50,000 general damages, special damages and costs which was made in favour of the *Respondent* in the High Court in Lautoka on the 9th of November 2006. The *Respondent* had claimed damages for injuries sustained by him after he slipped and fell in the Lautoka Hotel on the 15th of August 2000.

[2] The *Respondent* is an amputee, having lost his right leg when he was 20 years old. At the time of the accident he was 40 years old and at the time of hearing of his claim he was 46 years old.

[3] The *Respondent* was mobile on crutches and chose to use these as opposed to prosthesis as he found it easier to balance. He was using crutches at the time of his accident in the *Appellant's* premises.

[4] The *Respondent* was a frequent visitor to the *Appellant's* premises and although being an Australian citizen, was a resident of Fiji for the previous 4 years where he carried on a business manufacturing fishing tackle for export to Australia.

[5] **The Accident**

The *Respondent* stated in evidence that on the 15th of August 2000 he attended the Lautoka hotel restaurant for breakfast which he did on three to four mornings per week. Shortly after leaving the restaurant he realised he left either his keys or his diary behind (it is immaterial which) and telephoned the hotel as to his loss. He then went to the hotel between 10.30 and 11.00am to collect his lost property. He went up the steps from the footpath to the restaurant, opened the door, took one step and then put his crutch out for the second step when he slipped and he hit his right shoulder on the edge of a small raised dais and slid into a flower pot. He testified that having spent 16 years on crutches he was always alert for slippery floors. He said he was familiar with this particular floor due to the regularity of his visits and he knew it to be a dimly lit area. As he entered the restaurant he could see one of the attendants near the bar and then slipped. He said to this attendant, *"Why didn't you*

put a sign out, someone will get injured". The attendant said, *"We don't get given signs only a sign on the bucket".*

[6] This was a reference to a mop bucket being used to mop the floor. The mop bucket was identified as carrying a warning sign on it which contained an image of a man slipping and underneath that in capital letters the words *"caution"* and underneath that, "wet floor". The *Respondent* said that he was not warned by anybody or anything when he entered the restaurant that the tiles were wet. He said the door was closed, as it always was, but was unlocked. The door was covered with a reflective film or tint which made it impossible to see into the restaurant from the outside until the door was open.

[7] He testified that after the fall he was in extreme pain but there was no visible damage. He went to see a local doctor who told him that he had not broken anything but after three weeks he travelled back to Australia where he saw a doctor in Adelaide, his home city, who said that he had a massive tear of the tendon which was not visible but could be seen on X-rays. He then saw an orthopaedic surgeon on the 11th of October 2000 who diagnosed the problem but could not operate for a further three weeks. The *Respondent* then returned to Fiji and travelled back to Australia on the 31st of October where he was operated on by Dr Andrew Saies in Adelaide. On returning to Fiji for his Court action, the *Plaintiff* was examined by Dr Joeli Mareko on the 18th of September 2006. He gave evidence that his shoulder was now tighter and stiff and not as flexible as it used to be. He found he was unable to move as quickly as he could in the past where it is clear he had been an athletic person, despite his disability.

[8] On being hospitalized for the operation he spent some three days in hospital and was not able to use his crutches for a further two weeks which necessitated the hire of an electronic wheelchair. His arm was in a sling for about 6 weeks and on the seventh week he recommenced using his crutches. During this period he had care in his house for a few hours per day for five weeks. He was taking pain killers including Panadene forte.

[9] He was cross-examined extensively as to his experience with tile floors in Australia. He said that in general the floors were not as slippery as those in Fiji but in any event he was aware that the tiles in the *Appellant's* restaurant were slippery but he was not aware that they were wet on the morning that he entered and fell.

[10] Dr Joeli Mareko gave evidence that the *Respondent* had suffered a rotator cuff injury to the right shoulder and had had tendons repaired. Dr Mareko said that on examination he could hear crepitus in the shoulder and thought that there would be an early onset of osteo arthritis. Dr Mareko acknowledged that the *Respondent's* upper limbs were used for more weight bearing than the normal person as a result of him travelling on crutches due to his amputation.

[11] The two female employees of the *Appellant* who were present on the morning of the accident gave evidence on behalf of the *Appellant.* Robina Sami, who was no longer employed at the hotel at the date of trial, recalled the *Respondent* coming for breakfast as he regularly did and that after he left, he had telephoned about the loss of his property. She confirmed that his keys were there. She then put his keys behind the bar waiting for his return. She said that the *Respondent* came back about ten minutes later. There was nobody in the restaurant then and they

commenced mopping the restaurant as soon as it was empty every day. The other employee stated she was using a yellow bucket on which there was a caution sign but she could not recall which way the bucket was facing and whether the sign was in fact visible to a person entering the restaurant or not. She acknowledged that one could not see from the outside until the door is open and the door was always closed but unlocked. She recalls that on the next morning when the *Respondent* came in for breakfast the then manager of the hotel spoke to him and gave him a free breakfast.

[12] The manager said that as a result of comments made by Occupiers Health and Safety inspectors who had previously stayed at the hotel, the coloured buckets with the warning *"slippery when wet"* on them were purchased for use in the restaurant and throughout the hotel. He said there was a sign on both sides of the bucket. The learned Judge commented on this however, that the bucket was round and it appeared that the signs might or might not be visible to a person approaching. The manager also acknowledged that no signs were provided apart from the bucket.

[13] **The Law**

Section 3 of the Occupiers Liability Act Cap. 33 provides:

> "(1) ***The provisions of Sections 4 and 5, shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them.***

(2) The provisions of Sections 4 and 5 shall regulate the nature of the duty imposed by law in consequence of a person's occupation or control of premises and of any invitation or permission he gives, or is to be treated as giving, to another to enter or use the premises, but these shall not alter the rules of the common law as to the persons on whom a duty is so imposed or to whom it is owed; ..."

Section 4 then provides:

"(1) An occupier of premises owes the same duty, the common duty of care, to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

.....

(4) In determining whether the occupier of premises has discharged the common duty of care to the visitor, regard is to be had to all the circumstances, so that, for example-

(a) 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.

.....

(6) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not".

[14] The old common law attached special significance to knowledge of the dangerous condition of premises by either occupier or visitor. Knowledge by the occupier was essential to his liability to licensees, but to invitees his duty was to warn of dangers of which he knew or ought to have known – including, where appropriate, a duty to inspect periodically. This categorical distinction has now disappeared and liability will depend on

what in all the circumstances of each case reasonable care demanded for the safety of the particular entrant.

[15] The visitor's knowledge of the danger used to preclude all recovery; the duty to licensees never extended to other than *"concealed"* dangers, while that to invitees was limited to unusual *"dangers"* and, according to the much criticised decision of the House of Lords in **London Graving Dock –v- Horton** [1951] AC737 which precipitated the legislative reform in England, was also negated by the invitees knowledge of it.

[16] These technical distinctions have now been absorbed by the generalised test of reasonable care appropriate to the circumstances of the individual case.

[17] The legislative change in Fiji has been brought in the Occupiers Liability Act.

[18] The High Court of Australia considered the issue of occupiers liability where similar legislation existed in **Australian Safeway Stores Pty. Ltd. –v- Zaluzna** 162 CLR 479 at page 487 where Mason, Wilson, Deane and Dawson JJ said:

> ***"It is a mistake to think that the failure of an occupier of dangerous premises to take reasonable care does not encompass an act or omission on the part of the occupier which suffices to attract the general duty. What is reasonable, of course, will vary with the circumstances of the Plaintiff's entry upon the premises. We think it is wholly consistent with the trend of recent decisions of this Court touching***

the law of negligence, both in this area of an occupier's liability towards entrants on his land and ... "

[19] The High Court of Australia has most recently considered the issue in **Neindorf –v- Junkovic** unreported [2005] HCA 75. This was a case of a person being injured in a garage sale when she tripped on the uneven surface of the driveway on which the sale was conducted. By a majority (Kirby J. dissenting) the Court held that it was unreasonable to expect the owner of the house in which a garage sale was being conducted to ensure that the premises were risk free. The majority quoted the Judgment of **Deane J. in Hacksaw –v- Shaw** [1984] 155 CLR 614 at 662-663 who said:

"... It is not necessary, in an action in negligence against an occupier, to go through the procedure of considering whether either one or other or both of a special duty qua occupier and an ordinary duty of care was owed. All that is necessary is to determine whether, in all the relevant circumstances including the fact of the defendant's occupation of premises and the manner of the Plaintiff's entry upon them, the defendant owed a duty of care under the ordinary principles of negligence to the Plaintiff. A prerequisite of any such duty is that there be the necessary degree of proximity of relationship. The touchstone of its existence is that there be reasonable foreseeability of a real risk of injury to the visitor or to the class of person of which the visitor is a member. The measure of the discharge

of the duty is what a reasonable man would, in the circumstances, do by way of response to the foreseeable risk".

[20] In his dissent, Kirby J. deplored the trend in *decisions of the High Court of Australia to depart from previous doctrine governing occupiers liability, thus undermining responsibility towards legal neighbours that lies at the heart of the modern tort of negligence. He said in paragraph 22 of the Judgment:*

"This Court should call a halt to the erosion of negligence liability and the substitution of indifference to those who are in law our neighbours. The erosion, and the indifference, has gone far enough".

[21] Fortunately there has not been such an erosion so far in Fiji. Under the old law of tort which lawyers of at least the presiding Judge's generation studied, a typical examination question required the student to decide whether in a case of an injury on premises the injured person was an invitee, a licensee or a trespasser.

[22] The category in to which the student thought the particular individual fell determined whether or not he could maintain an action for damages for negligence against the occupier. The change of approach in England and which was followed in Australia until **Neindorf –v- Junkovic** was the House of Lords decision in **Caparo Industries PLC –v- Dickman** [1990] 2AC 605 at 617. The House of Lords held that the three criteria for the imposition of a duty of care were foreseeability of damage, proximity of relationship and the reasonableness or otherwise of imposing a duty.

[23] Kirby J. said that this test was followed in most other jurisdictions of the common law including recently in Fiji by the Supreme Court in **Pacoil Fiji Ltd. –v- Attorney-General of Fiji** Civil Appeal No. CBV002 of 2005 unreported delivered on the 11th of July 2003 in which the Bench consisted of Gault, Mason and French JJ. Mason J. is a former Chief Justice of the High Court of Australia and French J. is the recently appointed new Chief Justice of the High Court. The Supreme Court said at page 17:

> *"The Court of Appeal approached the question of duty of care by reference to the principles in Caparo Industries –v- Dickman. Foreseeability of damage and "proximity" was satisfied. The critical issue was whether it was fair, just and reasonable to impose a duty "to take reasonable care not to reduce the protection promise so as to render the project non-viable".*

This Court prefers the approach of Kirby J. and of course is bound to follow the Supreme Court in Pacoil Fiji Ltd.

[24] **The Application of the Law to this Case**

This Court agrees with the finding of liability by Connors J. In our view the mere presence of a bucket with some sign on it stating *"caution, wet floor"* is insufficient in law to absolve the *Appellant* from liability to the *Respondent*. It would have been just as simple and far more effective had there been a board which one sees frequently around shops or restaurants in Fiji reading "*Caution*". And underneath that "Floor "Wet".

If there had been such a sign in the Lautoka Hotel then we believe that the *Respondent* would probably not have been injured. He would have been put on his guard to watch his step when he entered the dining room. In failing to provide such a sign in our judgment the *Appellant* was guilty of negligence towards him and thus we consider the High Court committed no error. We see no reason to reduce the award of damages because of any contributory negligence by the Respondent because, as we have said, had there been a sign of the type we have mentioned, we consider that in all probability the Respondent would not have been injured. For too long, as this Court has said in its recent Judgment of 20th June 2008 in the **Permanent Secretary for Health, Attorney-General of Fiji –v- Arvind Kumar & Another** Civil Appeal No. ABU84 of 2006S, awards of damages for personal injuries have been generally below those in other common law countries. They must not be excessive but reasonable based on the injuries the claimant has suffered. We see nothing unreasonable in the award of $50,000.00 to the *Respondent* here and we refuse to interfere with it.

[25] There is however another matter which calls for our attention and that is the failure of the trial Judge to appreciate that most of the Respondent's special damages for medical treatment in Australia had been reimbursed to him by Medicare, (the Australian Government Health Scheme). The *Respondent* claimed these expenses as part of his special damages and we believe he must have realised that there was no requirement upon him to pay this money back to the Australian government as an award received in Fiji does not fall into the same category as an award received in Australia. As the Judgment stands the *Respondent* has been unjustly enriched by his claiming these expenses when he had already been reimbursed by Medicare. The result is that his claim for medical expenses in Australian dollars AU$7,674.95 must be reduced by the amount of

$5,557.95 which was his Medicare rebate. This leaves medical expenses claimed as special damages at $2,117.00 which will attract interest at 3 percent for six years, an amount of $381.00. He will be allowed special damages under this heading for $2,498 Australian dollars. The other awards made by the High Court will stand.

[26] Consequently, the Respondent is entitled to most of the costs we would otherwise have allowed in this Court and instead of an award of $2,500.00 we consider the sum of $1,750.00 is appropriate. There will be orders in these terms.

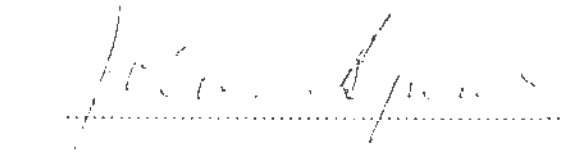
[27] **The Orders of the Court are as follows:**

(a) The Appeal in relation to the Award of $50,000.00 to the Respondent is dismissed;

(b) The Appeal in relation to the claim for medical expenses of AU$7,674.95 is allowed such that it is reduced by the amount of AU$5,557.95 (which was the Respondent's Medicare rebate from Australia) leaving a balance of special damages in the amount of AU$2,117.00;

(c) As a result of Order (b) above the special damages allowed will attract interest at 3 percent for six years ($381.00) totalling AU$2,498.00;

(d) Costs allowed in the sum of $1,750.00.



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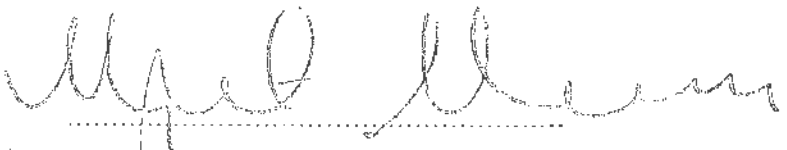

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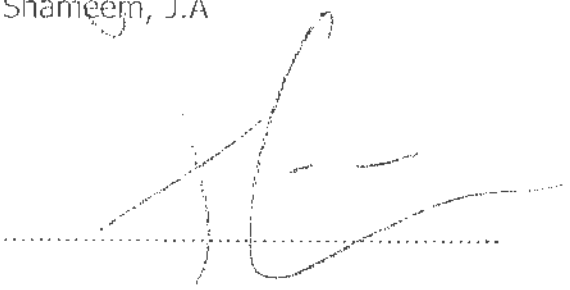

Hickie, J.A

At Suva, 15 January 2009