IN THE COURT OF APPEAL
FIJI ISLANDS
CIVIL JURISDICTION

Civil Appeal No. ABU 89 of 2008
(On appeal from Suva High Court HBC 97 of 2007)

BETWEEN : BW HOLDINGS LIMITED

Appellant (Original Defendant)

AND : LAVENIA VULI

Respondent (Original Plaintiff)

JUDGMENT OF THE COURT

Coram : Byrne A.P
Inoke J.A
Calanchini J.A

Counsel Appearing : D. Prasad for the Appellant
D. Singh for the Respondent

Date of Hearing : 12 November 2009

Date of Judgment : 26 February 2010

INTRODUCTION

[1] The main point on appeal is whether an occupier is liable to a trespasser for personal injuries suffered on the occupier's land.

THE FACTS

[2] It was common ground that the Plaintiff in this case was a trespasser on to the subject land and the Defendant was the occupier of it.

[3] The facts as found by the learned trial Judge in his judgment of 17 December 2008 were:

[1] The defendant company is a land developing company. In 2006 it was engaged in carrying out subdivision works at Viria West Road, Vatuwaqa, Suva. The land is situated at the seafront at the end of the Viria West Road which is a cul-de-sac. In the process of developing the seafront land, the defendant had constructed deep drainage system with drainage chambers around the cul de sac.

[2] On 30th July 2006 at about 9.00 p.m. when the plaintiff was walking along the foreshore, she fell into an uncovered drainage chamber and fractured her hand. She had gone there to pray. It is for injuries to her hand that she is claiming damages. The basis of her claim is breach of statutory duty and negligence.

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[7] Hitendra Pande who is the project administrator of the defendant company told the court that the land in question belonged to the defendant company and a development was underway. He also stated that the defendant company had put up signs and posted security personnel at the site. If that is his assertion, it would indicate a measure of control by the defendant over the land in question. Accordingly I conclude that the defendant was the occupier of the land in question.

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[12] The plaintiff told the court that she had been there once before about a fortnight ago. She would therefore know that development work was going on. However she also told me that she did not see any holes on that occasion.

[13] Viria West Road is a cul de sac. Beyond the end of the street is the ocean. The ocean in itself is an attraction for many people for one reason or another. The plaintiff told me that she had gone there with three other persons. No one apparently stopped them from going there. She said there were no signs stopping them from going there. Joseph Francis who lived close by told the court that millions of people went there. That may be a hyperbole but I take it to mean lots of people went there. He said people went there to drink, party, take girl friends or just go for a walk. There were no street lights there.

[14] The development had been going on for years and the defendant therefore would or ought to have known about people wandering about at the site.

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[16] The defendant asserted that it took necessary steps to prevent entry by placing signs and empty drums on the road. Joseph Francis told the court that there were lots of signs there. He stated that the signs said it was restricted area; there were signs for workmen, vehicles and people. Hitendra Pande the project administrator told the court the signs said no trespassing and subdivision under development. These signs he said had been there since beginning of the construction which would be some time in the 1990s. Pande I believe was just a fill in witness. He had no personal knowledge about what happened in 2006 to the plaintiff. He had not visited the site where the plaintiff fell in a hole. In 2006 he was engaged in a different project in Lodoni, Korovou, many miles away.

[17] Francis I am of the view was called to prop up the existence of signs. He ended up saying there were no signs that trespassers will be prosecuted as Mr. Pande asserted. I find there were no signs at the site in 2006. The photos taken by Hitendra Pande were only taken few days before the trial and not in 2006. He admitted that the signs in the pictures look brand new.

[18] Even if signs existed, they would need to warn people that there existed danger of injury by falling into open drains and holes. The defendant as occupier knew of these dangers that would not be obvious to people coming there at night.

[19] I accept that portion of the evidence of Joseph Francis where he stated that lots of people visited the area. These persons were definitely not invited by the defendant... I find that even though the defendant may not have actively invited the people including the plaintiff, nevertheless, it did not stop them or discourage them from entering the area. People simply entered the area when they felt like. Permission could easily be implied here. In the event I am mistaken as to implied permission, I go on to consider the position of plaintiff as trespasser.

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[32] In the present case there was development being conducted between the cul de sac and the sea. There is evidence that lot of people wandered around the area. I also found that there were no signs which informed the public of danger of holes. The defendant ought to have known as a reasonable person that a person could fall into an uncovered or an unbarricaded hole or drains. It should have realized the likelihood of such risk and could have placed adequate visible signs in all three languages or barricaded the holes with rope or nylon cords or covered them with planks. This would not have involved a huge financial outlay.

[33] Accordingly, I find that the defendant failed in its duty to act with humanity to the plaintiff. Accordingly it is liable.

[4] His Lordship therefore based his judgment on breach of the occupier's duty under the **Occupier's Liability Act** [Cap 33] or, alternatively, on breach of the common law duty owed to a trespasser.

THE GROUNDS OF APPEAL

[5] The Grounds of Appeal as appear in the Notice of Appeal were:

1. **THAT the learned trial Judge erred in law and fact that the Respondent was a visitor when she trespassed onto the Appellant's land which was being developed.**

2. **THAT the learned trial Judge erred in law and fact that the witness of the Appellant was just a fill in witness and failed to give consideration on the evidence that there were signs of "no trespassing" and "no entry".**

3. **THAT the learned trial Judge erred in law and fact that the Appellant was liable for the injury of the Respondent as a trespasser as there was no visible signs in all 3 languages when in fact the Respondent spoke in English, understood English and the signs of no trespassing was in English which the learned Judge refused to consider.**

4. **THAT the learned trial Judge erred in law and in fact by not considering the law on duty of care to trespassers by only considering duty to act with humanity and failing to make any regard (sic) to the set precedents on duty to trespassers.**

5. **THAT the learned trial Judge erred in law and in fact by awarding $17,825.00 to the Respondent in damages when in fact he erred in holding Appellant liable when there was no duty of case owed to Respondent as she was a trespasser.**

[6] The Respondent filed Grounds of Cross-Appeal as follows:

1. **The learned trial Judge erred in fact and/or in law in arbitrarily awarding only $15,000 for pain and suffering which is low and requires and award variation to at least $20,000.**

2. **The learned trial Judge erred in fact and/or law in awarding only $1,188 for loss of wages contrary to evidence adduced at the trial that the plaintiff was earning much more.**

3. **The learned trial Judge erred in fact and/or law in awarding interest on pain and suffering only till 12 December 2008 erroneously, when in fact it should have been up to 17 December 2008 being the date of judgment.**

4. **The learned trial Judge erred in fact and/or law in awarding interest on loss of wages from 9 March 2007 whereas in fact it should have awarded from 30 July 2006 i.e. the date of accident up to the date of judgment being 17 December 2008.**

5. **The learned trial Judge erred in fact and/or in law in awarding only $2,500 as costs instead of higher awards being awarded by the court in recent cases.**

GROUND 1

[7] **Ground 1** relates to His Lordship's finding that the Plaintiff was a "visitor" because the Defendant had given her "implied consent" to enter into the subject land and was therefore owed the "common duty of care" under **section 4** of the **Occupiers' Liability Act**.

[8] His Lordship held that "consent" could be implied from the circumstances of the case. The bases on which he came to that conclusion appear at paragraphs 15 and 19 of the judgment:

> **[15] It is for the plaintiff to establish a licence to enter. A licence cannot be easily implied *"Repeated trespass of itself confers no licence"*: Edwards v. Railway Executive (1952) 2 ALL ER 430, 436. A licence cannot or may not be implied merely because the owner knew of plaintiff's presence or has failed to take necessary steps to prevent his entry. There must be evidence of express permission or that the occupier has so conducted himself that he cannot be heard to say that he did not give permission: Edwards at page 437.**
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> **[19] I accept that portion of the evidence of Joseph Francis where he stated that lots of people visited the area. These persons were definitely not invited by the defendant. However Section 4(2) also extends to visitors *"permitted by the occupier to be there"*. I find that even though the defendant may not have actively invited the people including the plaintiff, nevertheless, it did not stop them or discourage them from entering the area. People simply entered the area when they felt like. Permission could easily be implied here. In the event I am mistaken as to implied permission, I go on to consider the position of plaintiff as trespasser.**

[9] **Section 4** of the Act provides:

> **4.- (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.**
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> **(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. (our emphasis).**
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> **(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that, for example, in proper cases-**

(a) an occupier must be prepared for children to be less careful than adults; and

(b) an occupier may expect that a person in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

(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; and

(b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated, without more, as answerable for the damage if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps, if any, as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor, and in this respect, the question whether a risk was so accepted shall be decided on the same principles as in other cases in which one person owes a duty of care to another.

(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.

WAS THE PLAINTIF A VISITOR?

[10] The threshold question is therefore: was the Plaintiff a visitor? The Act does not expressly define who a "visitor" is. The Preamble to the Act refers to persons being "lawfully" on the land so it does not give much assistance. However some guidance can be obtained from the words in s 4(2) which we have emphasised which suggest that a "visitor" is either an **invitee** or **a person whom the occupier has given permission to enter**. The Plaintiff was not an invitee. Did she have permission to enter? His Lordship held that she did

because permission could be "implied" from the circumstances of the case. Was His Lordship correct or is permission limited to "express" permission?

[11] Further assistance can be obtained from **Section 3** of the Act which 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.**
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> **(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 they 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; and accordingly for the purpose of those provisions the persons who are to be treated as an occupier and as his visitors are the same as the persons who would at common law be treated as an occupier and as his invitees or licensees. (our emphasis).**
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> **(3) The provisions of sections 4 and 5 in relation to an occupier of premises and his visitors shall also apply in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply, to regulate-**
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> > **(*a*) the obligation of a person occupying or having control over any fixed or movable structure, including any vessel, vehicle or aircraft; and**
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> > **(*b*) the obligations of a person occupying or having control over any premises or structure in respect of damage to property including the property of persons who are not themselves his visitors.**

[12] The emphasised phrase in **s 3(2)** therefore preserves the common law so the Act imposes a duty on the occupier to a visitor who is either an invitee or a licensee.

[13] The case of **Edwards** v. **Railway Executive** (1952) 2 ALL ER 430 relied upon by His Lordship is a case of a child being injured on the defendant's railway track. The question there was whether he was a licensee by implication from the facts and circumstances of the case. The House of Lords held that the circumstances did not give rise to such an implication.

[14] Was the Plaintiff a licensee by implication? We think the trial Judge was correct in finding that the Plaintiff was such a licensee. These facts support it. The Plaintiff had visited on a previous occasion. Many persons such as the Plaintiff visited the Defendant's land. There were no signs. The Defendant did not stop them or discourage them from entering the area. People simply entered the area when they felt like. The development had been going on for years and the Defendant therefore would or ought to have known about people wandering about at the site. We think the Defendant "has so conducted itself that it cannot be heard to say that it did not give permission": **Edwards** at p 437.

[15] The Appeal therefore fails on this Ground.

GROUNDS OF APPEAL 2 & 3

[16] We have much difficulty in extracting the main thrust of the Appellant's Grounds of **Appeal 2 and 3.** On first reading, we understood them to be a challenge on the assessment of the evidence by the trial Judge. If that is the case then we think the trial Judge was clearly entitled to come to that conclusion on the facts and has explained it and we are therefore reluctant to overturn these findings of fact. The Appeal therefore fails on these Grounds.

[17] However, to give the Defendant the benefit of doubt, we would read them, with considerable stretching of the words used, to be a challenge on the trial Judge's finding that the Defendant had breached its duty under s 4 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 ... permitted by the occupier to be there.**

[18] We find no reason to disagree with His Lordship's findings of fact and law and therefore dismiss this Appeal on these Grounds also.

GROUND 4

[19] Ground 4 relates to the common law duty that an occupier owes to a trespasser. We note that the Statement of Claim is based on liability under the Act only. We think it was not necessary for the trial Judge to proceed further and consider the common law. What His Lordship decided in the lower Court was therefore obiter. It did not affect the outcome in the High Court or in this Court and therefore does not require consideration by this Court. We think it should be left for decision at a later time when the appropriate case comes before the Court.

[20] The final result is therefore the Appeal is dismissed in respect of liability.

QUANTUM

[21] The Defendant/Appellant contends that the total award should not have been made because the trial Judge was wrong in finding the Defendant liable. The Plaintiff/Respondent contends that the quantum and costs awarded at trial are inadequate.

[22] Counsel submitted that the award for pain and suffering should be $20,000 instead of the $15,000 that was awarded. The trial Judge's findings in relation to her injuries were:

> **[34] The plaintiff suffered fracture of right distil radius. Her hand was placed in full cast of plaster. A medical report prepared by Dr Sitiveni Traill dated 7th August 2006 stated that the fracture was likely to take six weeks to unite and it would be three months before she could resume her duties. A further report prepared by the same doctor states that the plaintiff has full range of motion of her wrist but that the plaintiff complains of pain during cold and rainy days.**
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> **[35] At the time of her injury she had six children and one was one year old. Her right hand was the dominant hand and therefore she would find difficulty in lifting and playing around with her young baby which parents are normally accustomed to and which gives them mutual joy and satisfaction and of which she was deprived. She could also at least for three months not play volleyball and netball.**

[23] Comparative awards for pain and suffering and loss of amenities of life have been: **Lawanisavi v Raj [1999] FJCA 48; Abu0050u.98s (13 August 1999)** - fracture of the right shaft of the femur, lacerations to the forehead and trauma to the chest: $50,000; **Khan v Vunisinu [2004] FJHC 324; HBC0455J.2000S (2 April 2004)** – fracture of the right clavicle and lacerated wound to the right wrist and little finger resulting in the right shoulder instead of being cast in plaster was put in sling for 6 months: **$12,000**; - injury to **her left leg** with no "specific current residual" of several superficial lacerations of the left knee and patella area: **$2,000**; - fracture of **right arm** and **ankle: $15,000**;

[24] The awards in Khan were made in 2004 for an accident that happened in 1998. The Plaintiff here was injured in 2006. Taking all these into we think $15,000 is too low and agree with Mr Singh that the award should be $20,000.

[25] Mr Singh also appeals against the award of only $1,188 for loss of wages contrary to evidence adduced at the trial that the plaintiff was earning much more. How that amount was arrived is explained in the judgment and we find no error in it.

[26] He also appeals against the award of interest. He submitted the period of interest should be up to the date of judgment. **Section 3** of the **Law Reform (Miscellaneous Provisions)(Death and Interest) Act** allows the Court, if it thinks fit, to award interest on the whole or any part of the damages for **the whole or any part of the period** between the date when the cause of action arose and the date of judgment. The award of interest is discretionary. The trial Judge has exercised his discretion and this Court will not interfere with it. The Judge did not allow any amount for travelling and medical expenses. He considered that because the plaintiff could not give any detailed evidence of the way in which the sum of $400.00 was calculated for this expenses, he should not award her anything under this head.

[27] With respect, we consider this was unfair to the plaintiff. The Judge recognized that the plaintiff would have made trips to hospital and purchased some medication although she could not provide any details of this. In our view it would be fair to award the respondent/plaintiff $150.00 for travelling and medical expenses but not to award any interest on such expenses.

[28] Similarly, the award of costs is discretionary and we think there is nothing manifestly wrong with the amount awarded.

COSTS

[29] The plaintiff/respondent has effectively won in this appeal so she should have her costs paid which we summarily assess as $3,000.00.

ORDERS

[30] The Orders that we make are as follows:

1. The Appeal is dismissed.

2. The Cross-Appeal succeeds to the extent that the award of $15,000 for pain and suffering is increased to $20,000.

3. Interest on this sum of $2,100.00 is added.

4. This will result in the following awards of general and special damages and interest:

(a) Damages for pain and suffering	-	$ 20,000.00
(b) Loss of wages	-	$ 1,188.00
(c) Interest on general damages	-	$ 2,100.00
(d) Interest on (b)	-	$ 62.00
(e) Medical and Travelling Expenses	-	$ 150.00
TOTAL		**$23,500.00**

5. The Appellant is to pay the respondent's costs of $3,000.00.

Dated at Suva this 26th day of February 2010.

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J. E. Byrne, A.P

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S. Inoke, J.A

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W. D. Calanchini, J.A