

IN THE HIGH COURT OF KIRIBATI

CIVIL CASE NO. 71 OF 2011

	[TINIA BENN (BY HER NEXT FRIEND [KIRUA TAUNGEA	PLAINTIFF
BETWEEN	[[AND	
	[[PUBLIC UTILITIES BOARD	DEFENDANT

Before: The Hon Mr Justice Vincent Zehurikize

30 September, 10 October & 25 November 2014

Mr Raweita Beniata for Plaintiff

Ms Taaira Timeon for Defendant

JUDGMENT

Zehurikize, J: The plaintiff, who is a minor through her next of friend, sued the Defendant for general damages for pain and suffering. She claims interest thereon from the commencement of this claim. She also prays for costs of the suit.

The gist of the evidence which was adduced and not disputed is as follows:

The Defendant is a statutory corporation whose one of its duties is to generate, transmit and supply electricity.

On 30 April 2011 the Plaintiff who was about two years old was playing with her ball when it fell and entered into the Defendant's metre box which had been left open. When she tried to retrieve her ball she came into contact with a live electric wire whereupon she was shocked and sustained severe injuries on her right hand. She was saved from the metre box by one Tekarika Tekibwebwe (PW3) who pulled her off. She fell unconscious and was taken to a medical facility at Betio and then transferred to Nowerewere main hospital where she was admitted and treated for two weeks.

Medical examination as per Exhibit P1 revealed that the right little (5th) finger is deformed, bent medially, its growth is arrested, and unable to flex at its middle phalanx, due to the scar formed at this joint. The right third and fourth fingers had scars but their growth were not arrested so they grow accordingly but they will become stiff at times due to scars, and their range of movements will be affected.

The doctor concluded saying that the total incapacity of the injured right third, fourth and fifth fingers (in particular the fifth finger) was so severe that the young girl was unable to grip properly so it will affect her future and her daily-based activities. The doctor, however, did not assess the degree of permanent incapacity.

The gist of the defence case is that the opening of the metre box was an unpreventable action of a third party for which they cannot be held

responsible, and further they relied on the principle of *force majeure* in denying liability.

At the trial, Mr Beniata appeared for the Plaintiff while Ms Timeon was for the Defendant. At the close of their case both Counsel filed written submissions and later made some oral clarifications in open Court. Both Counsel presented forceful and useful submissions for which this Court is most grateful. In particular, they cited several authorities which will inform the basis for the decision of this Court.

The gist of Mr Beniata's submissions is that the Defendant owed a duty of care to the Plaintiff which duty they breached and as a result the Defendant is liable. While on the other hand Ms Timeon was of the view that there was no breach of duty of care and that the damage was too remote. That it was actions of third parties which led to the incident and that the Defendant is protected under Regulation 7 of the *Electricity Regulations 1981*.

From the evidence as a whole and submissions made by Counsel the issues for determination are:

1. Whether the Defendant was negligent;
2. If so, whether the Plaintiff suffered any damages;
3. Whether the damage was too remote and therefore unrecoverable;
4. Quantum of damages;
5. Whether the Defendant is immune from liability by virtue of Regulation 7 of the *Electricity Regulations 1981*.

As regards the first issue, negligence is established where the Defendant owed a duty of care to the Plaintiff and upon the breach of that duty the Plaintiff suffered damages.

The Plaintiff would have to be a "Neighbour" as described by Lord Atkin in *Donoghue –v- Stevenson* 1932 AC 562. The Court has to find out whether a reasonable man in the Defendant's position would have foreseen that his conduct involved a risk of injury to the Plaintiff or to a class of persons including the Plaintiff. See also *The Council of Shire of Wyong –v- Shirt & Others* (1980) 54 All ER 283. In short the Plaintiff must be such a person who reasonably can be foreseen by the Defendant as one that would be affected by his acts. That is the neighbour to whom the Defendant owes a duty of care.

In the instant case, the Defendant's metre box is situated at Takoronga in the neighbourhood of Nanomatoa Camp. There are residential houses around and a space where children would go to play. From the evidence on record, I have no difficulty in finding that the Plaintiff was reasonably foreseeable as a person who would be affected by the Defendant's negligent acts.

The next point to consider is whether indeed the Defendant was negligent in managing the metre box. It is not in dispute that the metre box was open and had been open for some time. According to the evidence of DW1 he made two visits to this site and each time found the metre box

open. On the last visit prior to the incident he found the metre box open but could not fix it because they were concerned with reading of metres. He simply nailed a temporary door on the box.

Further there is uncontested evidence that several employees of the Defendant were resident of this area and definitely aware that the metre box was not properly secured but nothing was done. According to the evidence of DW1 there was no system in place to properly secure the metre box. It was as a result of this unexplained laxity that this accident happened.

Considering the evidence as a whole and in particular that of PW1, PW3 and the evidence presented by the Defence through DW1 there is no doubt that the Defendant breached the duty of care they owed to the Plaintiff.

It was reasonably foreseeable that the Plaintiff would come into contact with live wires if the metre box was left open. That she would be affected by the Defendant's acts and or omissions. Consequently the first issue above is answered in the affirmative.

On whether the Plaintiff suffered damages, I have already detailed out the injuries sustained by the Plaintiff and that she went through pain and

suffering. She was hospitalized. All these were a direct result of the accident due to the negligence of the Plaintiff.

In view of the above, the second issue is also answered in the affirmative.

The third issue is whether the damage was too remote and therefore unrecoverable. I find on the evidence on record that the damage suffered by the Plaintiff was a direct result of the Defendant's negligence. The damage was reasonably foreseeable. I agree and adopt a decision by the Court of Papua New Guinea in *Okev –v PNG Electricity Commission* (2006) PNGL 63 N3074 where it held that electricity is a dangerous thing and the standard of care imposed on those charged with the provision of electricity service is a high one. In fact in the instant case it is mere blatant negligence and recklessness that this incident happened.

The Defendant should have taken reasonable care to ensure that the electric wires are not exposed and or that they are insulated so as not to cause danger and risk to the surrounding community and the public in general. The metre box ought to have been fitted with a strong shutter under lock and key to make sure that it is not tampered with by the public so easily. I do not believe the suggestion that some neighbours were in the habit of tampering with the metre box in a bid to obtain illegal connections or re-connections. If that were so, the Defendant would have easily traced and exposed the culprits.

The case before me is a clear manifestation of sheer carelessness. The Defendant never bothered to keep the metre box properly secured. It was merely a behaviour of treating their responsibilities casually thinking it is business as usual.

The Defendant's attempt to hide behind Regulation 7 of the *Electricity Regulations 1981* is an exercise in futility. That regulation deals with matters of breach of contract and has no relevance to an action founded in tort. It reads:

"7. The Board shall not be liable in any circumstances whatsoever for any loss, injury or damage arising out of or in connection with any interruption in or failure of the supply of electricity or the provision of services or apparatus, necessary for an ancillary to the supply of electricity as a result or consequence of actual or anticipated *force majeure*".

"Force majeure" is defined under Regulation 2 to mean "any occurrence or circumstance beyond the control of the Board or a strike, lockout of workmen or other industrial dispute or a shortage or failure of supply of fuel or any other essential material".

It is clear that the above are some of the scenarios that can hinder the Board from the supply of electricity or other matters necessary for the supply of electricity. The Regulation is intended to protect the Board from liability for any breach or failure in the supply of electricity. It does not cover tortious acts such as negligence as in the instant case. There is no such a thing which can be read in Regulation 7. Consequently the alleged defence does not exist and therefore not available to the Defendant. In the present issue No. 5 is answered in the negative.

This leads me to the issue of quantum of damages available to the Plaintiff. In *Korieta –v- Broadcasting and Publication Authority*, Civil Case No. 8 of 2011 Sir John Muria the Honourable Chief Justice spelt out considerations which should be borne in mind when ascertaining the appropriate quantum of damages for the victim. He observed that this area of law is just developing in our jurisdiction and therefore the need to establish a measure of uniformity of awards bearing in mind the circumstances of our own jurisdiction. He went further to state:

“I feel it is important that in this area of the law, our Courts do pay regard to the cases decided by other Courts of similar developing jurisdictions. Of course, we should take heed of the principles and such guidance as we can from awards made by courts in developed jurisdictions. However, as Wooding CJ said we do so ‘making such adjustments as may be appropriate having regard to our own prevailing circumstances’, a view

which I respectfully adopt". I equally adopt the above approach.

With the above considerations in mind I now proceed to determine the quantum of damages available to the Plaintiff. It is important to note that the task of doing so is not a simple one bearing in mind that no case is exactly the same as the other. However previous decisions still remain of guidance as they offer some parameters within which to operate. Here in Kiribati the awards of damages for personal injuries appear to be in the range of \$15,000 and \$20,000.

In *Korieta (Supra)* the learned Chief Justice awarded the sum of \$20,000 as damages for the injuries suffered. This was a case where the Plaintiff came into contact with an antenna attached to a transmitter and was charged with electricity. As a result of this contact the girl of four years suffered shock, burns to the left wrist, and right foot. As a result of the severe burns three of her fingers had to be amputated. The injuries also left her with permanent ugly scars on her wrists and foot. She suffered pain and suffering and was hospitalized for a week. Her permanent incapacity was assessed at 45%.

In the instant case I have already set out the injuries sustained by the Plaintiff mainly that her right third, fourth and fifth fingers were injured. The fifth finger is deformed, bent medially, its growth arrested and unable

to flex at its middle phalanx. For the other fingers, it is said their range of movements will be affected.

The doctor found that the total incapacity of the three fingers was so severe that the victim was unable to grip properly so it will affect her future and her daily-based activities.

Having considered all the circumstances of this case and bearing in mind comparable damages awarded in cases of this nature in this jurisdiction and doing the best I can I find that the award of \$19,000 as reasonable compensation for the injuries suffered by the Plaintiff.

According to the writ of summons no special damages were pleaded. The law is that special damages must be specifically pleaded and strictly proved. I notice that particulars of special damages were introduced in the affidavit of Terikouea Taungea (PW2). Such evidence had no foundation since these damages were never pleaded. This Court cannot consider them. They are unawardable. Consequently, judgment is entered for the Plaintiff in the sum of \$19,000 as general damages only.

The Plaintiff prayed for interest from the date of commencement of the writ till judgment. I find that it takes long for any party to realize the fruits of judgment. Therefore the fair award of interest should be up to the time of payment in full. In the final results, the above award of \$19,000 shall

[11]

attract interest of 5% per annum from the date of commencement of the writ until payment in full. The Plaintiff is also entitled to costs of the suit which will attract similar interest rate from the date of judgment till payment in full.

Dated the 9th day of December 2014



THE HON MR JUSTICE VINCENT ZEHURIKIZE
Judge