IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. B027/90

BETWEEN	CARLTON BROWN	PLAINTIFF
AND	MANCHESTER BEVERAGE LIMITED	FIRST DEFENDANT
AND	PATRICK THOMPSON	SECOND DEFENDANT

Eric Frater for Plaintiff
E.P. DeLisser for Defendants

HEARD: May 21, June 3 and 5, July 29, 1992,
July 8, 1994.

CHESTER ORR, J:

The plaintiff was employed to the first defendant to assort empty bottles at the first defendant's premises at Grey Ground in the parish of Manchester. The second defendant was employed to the first defendant as driver of forklifts on the said premises. There was a sorting shed where the empty bottles were assorted and separate and apart from this shed was a warehouse in which bottles of beverages for sale were stored. There were two bathrooms attached to this warehouse and entrance to these bathrooms was gained through the warehouse. The office of Mr. Albert Lowe, the Managing Director was situated inside the warehouse.

PLAINTIFF'S CASE

On the 31st August, 1987, the plaintiff had a shower bath in one of the bathrooms in the warehouse. On his return while walking through the warehouse he was hit from behind by a forklift driven by the second defendant. He fell and was pushed for a distance of about two yards along the floor of the warehouse. The forklift rested on his right leg, it was removed and he suffered injury to his right leg. The forklift was fitted with a horn but the horn was not blown nor was there any sound of the approach of the forklift before it collided with him. Mr. Lowe came on

the scene and spoke with him. Plaintiff became unconscious and regained consciousness in the Mandeville Hospital the following day. He remained there as a patient for about five (5) weeks and then was transferred to the Cornwall Regional Hospital where he remained until January 1988 when he was re-admitted to the Mandeville Hospital and discharged on the 13th February, 1988. He returned to the Mandeville Hospital for treatment three times weekly until 1991.

He used two crutches until 1991 and uses one at present. He is unable to walk properly - he walks by tipping and the use of a crutch. There are hideous scars on his right leg from his knee to the ankle and scars on both thighs from which skin was removed for a skin graft.

He has been unable to work as a result of the injury to his leg.

He stated that the second defendant was an apprentice - he had been driving for about six months prior to the accident.

In cross-examination he denied having stolen a bottle of Heineken Beer in the warehouse, placed it in his back pocket and walked backward in to the path of the forklift. He denied that the second defendant had been driving for over one year at the time of the accident. He received $3,667.00 from the first defendant after the accident. The plaintiff gave no evidence of injury to his left leg but a scar was seen on his left leg.

Dr. Deryck Brown deponed that the plaintiff was admitted to the Mandeville Hospital on the 31st August, 1987. He had a degloving injury to his right lower leg - the skin was partially removed from the knee to the ankle. It was still in contact but not enough to keep it alive.

There was a deep laceration on the left leg about the lower quarter of the tibia and running obliquely downwards and lateral towards the outer ankle. There was another cut running upwards from it.

There was extensive debridement of the right leg; process of clearing the wound and removing dead tissues.

Surgery was performed to save the skin on the right leg.

Plaintiff was transferred to the Cornwall Regional Hospital for plastic surgery. He was transferred back to Mandeville Hospital and treated as an outpatient.

He examined the plaintiff on the 30th May, 1992. The right leg had no cutaneous sensation. The left leg had a chronic ulcer and a scar. It appears that infection has entered the bone of this leg - the tibia. The plaintiff may now be having chronic osteomyelitis which will need antibiotics over a long period and may require further surgery. The range of movement in the right hip joint was normal but painful to execute the full range of movement.

The right knee was held in the flexion position at all times. At the knee joint it had lost about 50% of flexion and between 20% and 30% extension.

The right ankle joint was fused. The plaintiff could not move the joint.

The right heel cannot touch the ground while walking.

The left ankle has lost about 5 - 10% in plantar extension.

If the plaintiff is not able to get proper treatment for the wound to the left tibia and if it continues for another 5 - 10 years, there is a small danger of .5% that he might develop cancer. There is also the underlying danger of systemic infection from the wound.

Under cross-examination he stated that he qualified in October 1980 and had undergone only six months training with Dr. Golding as an orthopaedic surgeon.

He cleaned the wound himself and prepared the patient, but did not perform the surgery nor was he present at the surgical operations. He did not see the plaintiff while he was on the ward. He had referred to notes made by the surgeon.

THE DEFENCE

There were four (4) witnesses for the Defence.

Mr. Albert Lowe the Managing Director of the first defendant deponed that his office was inside the warehouse. There were five bathrooms provided for the various workers.

Instructions had been given to the sorters, including the plaintiff, that they should use the bathrooms at the external side of the warehouse and that they should only enter the warehouse if he required them to attend at his office. The two bathrooms in the warehouse were not for use by the sorters.

On the 30th August, 1987, he was in his office and as a result of an alarm he went into the warehouse and saw the plaintiff lying on the floor of the warehouse and a forklift driven by the second defendant stationary in the vicinity of the plaintiff. He observed that the plaintiff's leg was injured and made arrangements for him to be taken to the hospital. He saw a broken bottle of Heineken beer partially on the ground and in the plaintiff's pocket. The engine of the forklift was diesel engine which was "pretty loud" when the forklift was being operated. He produced photographs of the warehouse and sorting shed and external bathroom. Exhibits 2 and 3.

The second defendant had been driving the forklift for over one year before the accident. He was not an apprentice driver.

Under cross-examination he admitted that what he referred to as a bathroom was in fact a room with a toilet and basin. He, however, said he considered that a bathroom. There were two shower booths on the premises: one outside the warehouse was for use by the warehouse personnel and the other for the salesmen. Sorters were not permitted to use the shower in the warehouse for security reasons - goods were stored in the warehouse.

Forklifts had horns attached.

Patrick Thompson the second defendant stated that he was the driver of the Forklift at the time of the accident and had been such for over one

year before. He entered the warehouse with the forklift, took up a load of beer on the pallet attached to the forklift, looked behind him and reversed in order to turn around for exit. He drove up on his left and went to his right to take up the pallett. He saw nothing. He leaned over on his left because the steering wheel is on the left. While driving he heard a bawling. He stopped, dismounted and saw the plaintiff lying on the floor to the right of the forklift with the pallet resting on his foot. He removed the pallet from his foot. The width of the passage in which he was driving was about 20 feet. He did not see the plaintiff before he heard the bawling. He was unable to see over the pallet hence he had to lean to the left and looked to his left. He kept close to his left as another forklift might have been entering the warehouse.

He saw a broken bottle of Heineken beer where the plaintiff was lying. Under cross-examination he stated that the pallet was high above his head. The bottles of Heineken beer were packed to his right as he left the warehouse.

Cecil Thompson a worker in the warehouse testified that he was packing bottles of Heineken beer in a box in the warehouse. The plaintiff entered the warehouse took a pint of beer from the box, put it in his right rear trousers pocket and walked away. The plaintiff "never looked right, he never looked up or down, he tried to dodge, I don't know from whom he backing away. I heard whoy!" He, Thompson, spun around and observed that the forklift had stopped. The driver Patrick Thompson dismounted and went to the front of the forklift. He also went and saw the plaintiff lying on the floor.

Under cross-examination he said he had never seen the plaintiff use the bathroom in the warehouse.

When he went to the front of the forklift he saw water running from the plaintiff's pocket and a broken Heineken beer bottle in the pocket which workers took.

Lascelles Lowe now a self-employed truck driver was employed to the first defendant company on the date of the accident as a warehouse helper and forklift operator. He said he was standing at the door of the office. He saw the plaintiff enter the warehouse, and then went to where the goods were packed. He took a pint of Heineken beer from a box, placed it in his trousers pocket and without looking where he was going backed right out into the forklift which was coming behind him.

He, Lowe, left the employment of the first defendant company in 1958.

Under cross-examination he said that the forklift did not push the plaintiff for any distance. It stopped immediately it collided with him. He had never seen the plaintiff use the bathroom in the warehouse. The forklift stopped in front of him, quite close to him. The plaintiff was between himself and the forklift.

In re-examination he stated that the plaintiff was to the right of the forklift.

The Statement of Claim averred inter alia that the plaintiff was a visitor within the meaning of the Occupiers Liability Act at the premises. Particulars of Breach of Common Duty of case were stated. No. 1 reads as follows:

> "Permitting an apprentice to drive and operate fork lift without supervision."

Mr. DeLisser submitted that the plaintiff was solely or contributorily negligent and was a trespasser under the Occupiers Liability Act. Mr. Frater maintained that the plaintiff was a visitor under the Act.

Findings of Fact

I accept the evidence of Mr. Lowe that the plaintiff was not permitted to use the bathroom in the warehouse and that he should only enter the warehouse if required so to do.

I accept the evidence of the plaintiff that while walking in the warehouse he was hit from behind by the forklift without warning. On a balance of probabilities I find that the second defendant was not an apprentice driver at the relevant time.

I reject the evidence of Cecil Thompson and Lascelles Lowe that the plaintiff stole a bottle of Heineken beer and stepped backwards into the path of the forklift.

I find that the second defendant was negligent. On his own evidence he was unable to see over the pallet on the forklift and did not see the plaintiff before the collision.

Although the plaintiff was a trespasser in the warehouse, the plaintiff owed him a duty of care. The learned authors of Clerk and Lindsell on Torts, 14th edition state at p. 140.

> "After Cooper's case (Southern Portland Cement Limited v. Cooper [1947] A.C. 623) there seems to be little if any difference between the kind of duty which an occupier owes towards trespassers and the ordinary duty of care in negligence, even at a purely theoretical level."

I adopt this as a correct statement of the law.

The question arises whether the plaintiff was contributarily negligent. At the time of the accident he had been employed for some twenty-two (22) years. He was aware that forklifts were used in the warehouse. He said he saw nothing or anyone when he entered the warehouse from the bathroom. I find that he did not exercise due care on his own behalf and as a consequence was also negligent. I assess his liability at 20% and the defendants 80%.

RE DAMAGES

Special Damages

The following items were agreed:

(I)	Medical Report	$100.00
(III)	2 pairs pyjamas at $200	400.00
(IV)	3 pairs slippers at $60	180.00

(V)	This was not seriously contested Transportation to Doctor in Mandeville.	$4,232.00
(VI)	Hospital expenses	4,445.00

Re (1) - Loss of earnings.

I award the sum of $20,300.00 as claimed less the amount of $3,667.00 received by the plaintiff	16,633.00
Total Special Damages	$25,990.00

General Damages

I accept the evidence of Dr. Spencer Brown that there was an injury to the plaintiff's left leg and that he saw the injury when the plaintiff was taken to the Mandeville hospital. There is a visible scar on the left leg. I find that this injury was received at the time the plaintiff was hit by the forklift.

There are no reported cases which coincide with this case. Both Attorneys cited Michael Dixon v. Jamaica Omnibus Services Ltd and ors Khan's Report Volume 3 p. 49, July 1987 in which an award of $50,000.00 was made for injuries to one leg. Using the current Consumer Price Index of 601.6 this would amount to $314,000.00 at present.

Mr. Frater also cited Clifton Edwards v. Calfin Browning reported at page 238 of Khan's Reports, Volume 3 in which an award was made in December 1990 of $150,000.00 for injuries to the right leg, now $544,000.00.

In my opinion an award of $730,000.00 would be appropriate in the circumstances of this case.

Re loss of future earnings.

The plaintiff was aged 45 at the date of trial. I employ a multiplier of 8. His earnings were $175.00 per week. 175 x 52 x 8 = $72,800.00 - scaled down to $70,000.00.

There will therefore be judgment for the plaintiff as follows:

Special Damages - 80% of $25,990.00	=	$ 20,792.00
General Damages - 80% of $800,000.00	=	$640,000.00
		$660,792.00

Interest on special damages at 3% and on $584,000.00 of General Damages at 3% for the relevant periods.

Costs to the Plaintiff to be agreed or taxed.

Finally, let me apologise for the delay in delivering this Judgment and the inconvenience occasioned thereby.