IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE 362 OF 2001

BETWEEN:

YAHAYA ATIBU **PLAINTIFF**

and

JAMES AND MARGRET MAKHUMULA
t/a J & M GENERAL DEALERS **DEFENDANT**

CORAM: **J. KATSALA (JUDGE)**
M. Nkhata of counsel for the plaintiff
J. Gulumba of counsel for the defendant
M. H. Fatch official interpreter

JUDGMENT

Katsala J.

By a writ of summons issued on 5th February 2001 the plaintiff claims from the defendant damages for personal injuries sustained on 21st November 1998. It is alleged that on this date due to the defendant's negligence the plaintiff's right arm was amputated by a chick-feed making machine in the defendant's factory. The particulars of the alleged negligence have been spelt out which include, failing to make the said factory conducive to the working environment so as to avoid the accident, failing to provide protective wear to the employee, and failing to give the employee proper training as to how he can work in a dangerous factory so as to avoid the accident.

The defendant denies being negligent as alleged or particularized or at all and as is usual demands strict proof of the allegations.

In an action founded in negligence a plaintiff must prove that the defendant owed him a legal duty of care, and that the defendant breached that duty of care, and also that he suffered damage in consequence of the breach. Whether a duty of care is owed in any

given circumstance is a question of law to be determined by the judge. And the defendant will owe a duty of care if he could reasonably foresee that his act or omission would cause loss or damage to the plaintiff. In addition the defendant will breach his duty of care if, reasonably foreseeing loss or damage to the plaintiff, he did not take reasonable steps to avoid it. The authority for all these propositions is the celebrated case of *Donoghne v. Stevenson* [1932] AC 562.

The parties are agreed on the following facts. Yanu Yanu Bus Company Ltd employed the plaintiff on 1st November 1998 as a gardener. It would appear that this company has a close relationship with the defendant. It seems that the two enterprises operate from the same or nearby premises. The defendant is engaged in the business of making chicken feed among other feeds. On 21st November 1998, the plaintiff and a friend were chosen to help with work at the defendant's feed factory. The plaintiff was assigned to assist a Mr Simon while his colleague was assigned to a Mr Lameck. Mr Simon was working at the chicken feed mixing machine. The job involved, *inter alia*, pouring out the feed from the machine and parking it in bags. The plaintiff was assigned the job of taking the packed bags to a designated place within the factory.

Shortly after the plaintiff's arrival at Simon's work-station, Simon went out of the room leaving the plaintiff alone. The plaintiff then took over Simon's job. Whilst the machine was in motion, he opened the cover to the place where the elevator is to pour out the feed into a bin in readiness for bagging. He then pushed his right hand into the machine probably to take out the feed that seemed to be stuck therein. But the blades rotating therein struck it. He tried to pull it out but alas! He had no hand! His arm had been amputated just above the wrist.

The plaintiff alleges that he was not given any instructions on how to operate the machine and neither was he given any protective clothing nor was he warned of the dangers and or the risks of operating the machine. He says he only spent a minute with Simon before the latter left him in charge of the machine to continue with the job. It is submitted that the defendant owed the plaintiff the duty to ensure that he was safe and not exposed to unnecessary risk. By failing to warn the plaintiff of the risk and danger involved in the job, and failing to instruct him on how to operate the machine, and also failing to provide him with any protection clothing, the defendant breached this duty of care as a result whereof the plaintiff suffered damage. Many cases have been cited to support the submission.

The evidence before me shows that the defendant issued instructions to all production workers in the factory on the dangers posed by the machines. The evidence also shows that despite these instructions there is a "danger" sign in red ink on the cover that the plaintiff opened. The evidence also shows that the instructions and the prevailing practice are to open the cover only when the machine is switched off. This is for safety reasons.

The question I have to answer is whether the defendant indeed owed the plaintiff a duty of care as it has been alleged. And if the answer is in the affirmative then, whether that duty of care was breached.

The plaintiff in his testimony said that he was assigned the task of taking the bags packed with feed from the room to some designated place. From the evidence before me, this task did not pose any unusual dangers which the plaintiff ought to have been warned about. The plaintiff said that he spent about one minute with Simon before Simon left him alone in the room. And that Simon told him to continue with the job in his absence. He also said that during the time he was with Simon, he saw Simon open some place where the feed came out. I must say that I find it very difficult to believe that Simon could have asked the plaintiff to continue with Simon's job bearing in mind the time they had been together in the room and that this was the first time that the plaintiff had worked in the factory and also that he had never worked on the feed mixing machine before.

In *Bourhill v. Young* [1943] A.C. 92 at 101, Lord Russell of Killowen expressed the view that;

> "In considering whether a person owes to another a duty, a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man"

And in *Fardon v. Harcourt-Rivington* (1932) 146 L.T.391 at 392, Lord Dunedin said, "people must guard against reasonable probabilities but they are not bound to guard against fantastic possibilities." Therefore the likelihood of injury or damage being caused is a matter to be considered in determining what degree of care, if any, need be taken in any given circumstances when a duty to take care exists. Thus if the chance of injury is small, little or no precautions need be taken against it, but if it is great, precautions should be taken to prevent or avoid it. Now in the instant case can it be said that the defendant ought to have contemplated that the plaintiff would sustain injury if not warned of the danger or risk posed by the feed mixing machine? In other words was there a likelihood of injury being caused to the plaintiff?

The plaintiff was assigned to do a specific job, that is, of carrying the bags filled with feed by Simon to some designated place. As earlier said this job did not pose any unusual risks or dangers that the plaintiff ought to have been warned about. This job did not include operating the feed mixing machine. Therefore, in my considered opinion, it would be unreasonable to say that the defendant ought to have instructed the plaintiff on how to operate the machine or warned him of the risks or dangers posed by the machine or indeed, more specifically, of the danger of trying to clean the machine whilst it is in motion. I do not think that the defendant would have contemplated that the plaintiff would want to operate the feed mixing machine.

Let me say that I would have had a different view if, say, the plaintiff's clothes had been caught by, for example, a conveyer belt as he walked around the room. In such a case in my view, there would have been a case of negligence against the defendant for failing to guard the conveyer belt. But in the instant case, the plaintiff went ahead to attempt to do a job that was not part of his assignment. He deliberately strayed. And in his strays he did what the process prohibited. In his testimony, when explaining the process on his duty

station he said "we don't push a hand into the machine. You open the machine and the feed comes out to a place where it is removed from". So he pushed his hand into the machine when the process does not require anyone to push a hand into the machine. He did this in total disregard of the "danger" sign on the cover that he opened. I think what we have here is an overzealous worker who in a bid to impress his master, throws all caution to the wind. And as Greer J. said in *Bottomley v. Bannister* [1932] 1KB 458 at 476, "English law does not recognise a duty in the air, so to speak; that is duty to undertake that no one shall suffer from one's carelessness." On the evidence before me, it is my considered view that the plaintiff is suffering from his own carelessness. I find that the defendant did not breach any duty of care they owed to the plaintiff.

It is a pity that the plaintiff sustained such serious injury, which obviously has adversely affected his enjoyment of life, but on the evidence before me I am unable to join him in blaming the defendant for the injury. I therefore dismiss the action with costs.

Pronounced in open court at Blantyre this 31st day of December 2004.

J. Katsala
JUDGE