Bombay High Court
Blanche Edith Cates vs Mongini Bros on 30 July, 1917
Equivalent citations: (1917) 19 BOMLR 778, 42 Ind Cas 82
Author: Kajiji
Bench: Kajiji
JUDGMENT Kajiji, J.

1. The plaintiff, Blanche Edith Cates, a qualified midwife and sick nurse, has filed this suit against Mongini Brothers, owners of a restaurant in Bombay, for damages for the injuries sustained by her. It appears that on the 4th May 1916 the plaintiff and her daughter went to defendants' restaurant at about 1-30 p. m. for lunch. They took their seats at a table whereupon a waiter switched on the electric fan which was suspended from the ceiling over that table. The plaintiff not requiring the fan asked the waiter to stop it and as the waiter switched it off it fell down with the motor dynamo and severely injured her left hand and shoulder. The plaintiff alleged that the fall of the fan must have been due to negligence for which the defendants are responsible. After she received the injuries it appears that the plaintiff was under skilled medical treatment for a month but in spite of such treatment the injury to her left hand permanently affected her use of it. The fingers of that hand had thickened and the joints had become stiff and some of the fingers had been fractured with the result that she was unable to use her left hand. She was thus not only incapacitated from carrying on her profession but was further inconvenienced by being deprived of the use of her left hand. Before receiving the injuries the plaintiff alleges that she earned as a midwife and nurse about Rs. 2,000 a year. She also said she suffered great physical and mental pain at the time she received the injuries and a month thereafter. Under the circumstances she claimed Rs. 15,000 for damages and she has arrived at that figure according to following particulars.

1. On account of bodily injury sustained, the pain undergone and shattering of plaintiff's health, Rs. 7,500.

2. On account of medical expenses incurred, Rs. 300.

3. On account of pecuniary loss for not being able to carry on her profession for the rest of her life, Rs. 7,200.

2. The defendants while admitting the fall of the fan denied that it was due to any negligence on their part. They said that the fall was entirely due to an accident for which they were not in any way legally liable to the plaintiff; however much they regretted the injury caused to the plaintiff's hand. The defendants said that the accident was due to some latent flaw in the material of the suspension rod which could not be seen and could not have been discovered by the exercise of due diligence and skill. Immediately after the accident it appears that the defendants sent the plaintiff with an assistant of theirs to the E.G. Hospital where the plaintiff's hand was. dressed and she thereafter voluntarily left the hospital to go home. The next day after the accident the plaintiff, her husband and daughter and some relations called at the defendants' restaurant and the plaintiff informed the defendants that her hand had been dressed and her husband told the defendants that he was not a rich man and the defendants without admitting their liability and out of sympathy for her offered to

share the medical expenses that might be incurred by her. A week or ten days after the plaiptiff's husband called again and informed the defendants that the plaintiff was going to Uran and that she would be attended to by a, doctor there. At that time the husband had a piece of paper in his hand in which there appeared certain figures which showed a total of about Rs. 220 as the expenses incurred The defendants on that occasion offered to contribute Rs. 150 without admitting any legal liability on their part. The following evening the husband called again and asked for Rs. 300. The defendants told him that the amount was excessive and again offered Rs. 150 without prejudice. The offer, however, was not accepted and the husband left the place. The defendants further disputed the amount of the damages and did not admit that the earnings were Rs. 2,000 a year as alleged by her. They further contended that the injury to the plaintiff was not of such a nature as would in capacitate her from carrying on her profession for life and that the plaintiff had very much exaggerated her injuries. Hence the present suit. The following issues were raised:-

1. Whether the fall of the fan was due to any negligence on the part of the defendants as alleged in para 3 of the plaint ?

2. Whether the fall was not due to the latent flaw in the material of suspension rod which could not be seen or could not be discovered by the exercise of due diligence as alleged in para 3 of the written statement ?

3. Whether the defendants are liable in any and if so in what damages ?

3. On this counsel for the plaintiff contended before me that the onus lay on the defendants to prove that there was no negligence on their part, whilst counsel for the defendants contend that the onus lay on the plaintiff. The burden of proof in an action for damages for negligence rests primarily upon the plaintiff who in order to maintain the action must show that he was injured by an act or omission for which the defendant is in law responsible (see Hammack v. White (1862) 11 C.B.N.S. 588 and Manzoni v. Douglas (1880) 6 Q.B.D. 145) except in the cases where law presumes liability from an act or omission immediately upon proof of its occurrence. That is to say, an exception to the general rule that the burden of proof for the alleged negligence is in the first instance on the plaintiff occurs whenever the facts already established are such that the proper and natural inference immediately arising from them is that the injury complained of was caused by the defendants' negligence: see Byrne v. Boadle (1863) 2 H. & C. 722 and Scott v. London Dock Co. (1865) 3 H. & C. 596. To these cases the maxim " res ipsa loquitur" applies. But in cases where the injury is caused by the use of tackle or machinery for which the defendant is responsible there is no immediate inference that the defendant is at fault: Mackfarelane v. Thomson (1884) 22 Sc.L.R. 179 negligence? The Halsbury's Laws of England, Vol. XXI, p. 441. On this I held that the onus was on the plaintiff. But if the injury is traced directly to some defect in the tackle or machinery then the defendant must show that the defect was one for which he is not to blame: see Walker v. Olsen (1882) 9 R. (Ct. of Sess.) 946. Therefore the question which I havo to consider is, are the defendants, Mongini Brothers, guilty of any negligence? The fan in question was originally purchased from Jost & Co. It was of German make. It weighed about 50 lbs. and had four wooden blades. This was first fitted up about nine years ago on the ground floor premises of the defendants in Church Gate Street. When the defendants extended their premises to the first floor also the original rod was found short so

Messrs. Osier and Co., who had the installation, supplied another rod 31/2 ft. long, one in dispute and fixed the same fan to it. It remained there till March 1914 when it was removed to Esplanade Road premises by Cromptons and it remained there till the accident. At first Messrs. Crompton and Co. looked after the fans at Mongini's. But since May 1915 this contract was given to Messrs. Osier and Co., whose men went once a week on a Saturday to examine the fans. The rod in question was an iron gas pipe a slot being diametrically cut at the end 7/32" and a 1/8" split pin passed through the whole drilled in the fan shield and passed through the slot. There was 3/32" for play between the slot and pin. How does the plaintiff attempt to prove that the defendants were guilty of negligence? They have called two expert witnesses. The first is one Mr. R.G. Hyams, Assistant Electrical Engineer, Public Works Department. He in his evidence says:

I have seen thousands of fans; never seen a fan like the one in suit with a slot in the shaft. The method of boring a slot is not as good as a method of boring a hole. I am not surprised-at the break it was to be expected-owing to the thinness of the metal. Pipe is too thin for the weight of the fan. Ordinary mode of suspension is pin through a hole. Owing to the extreme thinness of the metal the break took place. This is the chief cause, no other cause. If the metal had been of proper thickness and the slot had not been then most probably accident would not have occurred. I cannot see any defect in the metal of the rod. I would have noticed the defect if I had seen immediately after the break. I consider it unsafe for a person to use a fan like one in suit because metal of the rod is too thin. This is the primary cause. A fan with a hole and pin is much stronger.

4. So according to this expert, thinness of the metal is the primary and only cause of the accident. It will be observed that according to him if the metal had been of proper thickness for the weight which is 50 lbs. then most probably the accident would not have occurred.' It must be observed here-that Mr. Watson and Mr. Simkins and Mr. Minnit, the expert witnesses for the defendants, all depose that the metal of the rod and threads in it are of the standard dimensions and that according to the evidence of Mr. Temple, the foreman in the G.I.P. Railway Workshop who had made certain experiments with rods similar to the rod in dispute, it would require a weight from 3 tons and 15 cwts. to 1 1/2 tons to-wrench the socket from the pipe. The second expert witness-for the plaintiff, Mr. Wise, General Manager of Messrs. Jost & Co., in his evidence, says: " I have not seen in Bombay or elsewhere a fan with a rod and a slot." His reasons for happening of the accident are:-

1. Weakening of the parts due to there being a slot.

2. Movement that takes place in starting and stopping which brings the split pin up with a jerk against one of the two pieces, i.e., sides of the slot.

3. Broken pieces work out its original position in the thread towards the pin there being clearance then that action slackens the other side and the whole fan body can slip off.

5. According to him the accident would not have happened if. the rod had been without a slot.

Cause of the breakage ia slot at the end of the rod and the pin which is smaller than the slot. It brought jerk every time and one day it gave way. I say the thinness is a contributory cause. Thinness

of metal is not the only primary cause of break. If the rod is very properly screwed and tight fit it will not move. If it was properly screwed and fit the pin would remain dormant notwithstanding the play. It is difficult to make out now if the breakage was due to the defect in the metal. It could have been detected if it had been examined at the date of the accident.

6. From the evidence both of Mr. Hyams and Mr. Wise this surely is clear that if they had examined the rod immediately-after the accident they would have been in a position to say whether breakage was due to the defect in the metal. Further it is also clear that if the metal is not thin for the weight or is of standard dimensions and that if the rod was properly screwed and tight fit the pin would remain dormant and the rod with a slot would be of no consequence. Further they would consider a rod without a slot and split pin better and stronger. But this proposition is conceded by all, but the question for determination is not what is better or stronger or both but whether the rod in dispute suspended and attachad as it was, was not perfectly and reasonably safe. Can Mongini Brothers, the defendants, be blamed for having allowed such rod to be put up on their premises ? Mr. Wise, as I have said above, has admitted that if the rod was properly and tightly screwed and tight fit then the pin would not affect the slot in any way at all. Then why assume that the rod was not properly screwed in ? This fan was put up in 1914 by Cromptons' people and Mr. Watson says he had tested it after it was put up and the fan stood there for three years before the accident Mr. Simkins says in his evidence that the screw was not disturbed for eight years. Short rods are taken down from the ceiling instead of from the motor. Mr. Simkins in his evidence further says that short rods are never unscrewed from the motor. Rod in question was never unscrewed as far as ho remembered. Mr. Mongini in his evidence also states that the rod had not been taken out when the fan was removed from the old to the new premises. Therefore I hold that the fan in dispute was properly put up in 1914. Now in order to prove that the breakage was due to latent defect in the metal of the rod and not to the negligence of the defendants, they have called three expert witnesses: first is Mr. J.H. Simkins, Manager of Messrs. Osier & Co., Electrical Contractors of repute in Bombay. He in his evidence says :

I know the fan in suit. I was in Poona on the day of the accident. On the second day I returned. I went to see it at Mongini's. I found that the one side of the slot had broken off and remained in the motor. The portion broken showed on the other side of the pipe at the root of the thread a thin line of newly broken clear metal. The portion about the centre on the inside of the break showed about a quarter of an inch what was apparently an old crack or flaw in the metal. I concluded that was an old flaw of the manufacturers of the pipe as it was inside without being on the outside. The flaw could not have been detected by any skilful engineer even if the rod had been unscrewed. It would not have been visible as it was on the inside; even if it was on the outside it could not have been visible without magnifying glasses, I don't know if anything could have been done to have prevented breaking. It could not have been detected by any method that suspension rod was at fault. In my opinion the breakage is due to flaw in the metal in the inside of the pipe.

7. Mr. Simkin's reasons for coming to the conclusion that there was a latent flaw in the rod are these : The portion broken showed a new break of clean metal. Near the centre and inside of the rod the width of the clean metal was reduced to just a few specks of white metal. These few specks showed on the outside at the root of the threads. In the inside of the rod the metal was of a dark oxydised

rusty colour the same as it was then. The flaw might have been due to an old crack or to a faulty piece of metal. It is true that Mr. Simkins is an Electrical and not a Mechanical Engineer but has practical experience in mechanics. He struck me as truthful witness and his evidence I am prepared to accept. The most important witness for the defendants is Mr. H.M. Watson, General Manager of Messrs. Crompton & Co. He is an Electrical and Mechanical Engineer. He examined the fan within a week of the accident. He supports Mr. Simkins. According to him the accident was due to a latent flaw in the fan. An examination of the broken part showed bright metal over the part of the break and black oxide over the rest. The latent flaw could not have been discovered by any ordinary method of examination if the rod had been unscrewed from the motor. There was nothing to put one on the track that there was flaw if he was ordinarily examining. The factor of safety would in case of 50 lbs. weight work out at 60 to 1. Slot in itself is not enough to make it unsafe. A split pin prevented the motor from being unscrewed and did not make it, the least, unsafe. He does not think that the primary cause of the breakage was due to the thinness of the metal. It had absolutely nothing to do with it. The latent flaw was probably due to a piece of scale. According to Mr. Watson whose men supervised the installation in Esplanade Road and he was present when it was tested, the rod in suit when it was originally fitted up was a good tight fit. There was a play but it was unobjectionable. If the dent had been caused by the pin there would be a mark on the pin. There is no mark on the pin. The dent on the piece had absolutely nothing to do with the break. Mr. Davar for the plaintiff has suggested that Mr. Watson never examined the fan within a week after the accident as alleged by him and asks that his evidence not only relating to this but the whole of it should not be believed. Having regard to the evidence of Joseph, an assistant of the defendants, I hold that Mr. Watson examined the fan as deposed to by him and I see no reason to disbelieve his evidence but I must add that Mr. Watson impressed me most favourably. In my opinion his evidence should be accepted without any reservation. The third and last expert called on behalf of the defendants was Mr. John A. Minnit. He is a Mechanical Engineer, pure and simple. He has examined the rod and fan in suit. He says :

In my opinion the cause of the breakage is probably due to defect in. the material which occurred during course of manufacture of the rod. The primary cause of the breakage is due to flaw in the material probably caused by a scale in prooess of manufacture. The rod is not unsafe for the motor in suit because of the slot. I consider that the rod was absolutely safe when screwed to the motor in suit. The split pin had nothing to do with the accident. Split pin is put in as a precaution from the motor unscrewing from the rod. Split pin is not put for any other reason. The dent in the broken piece is not caused by the split pin. Thinness of the metal of the rod had nothing to do with the breakage. It is more than sufficient. The method of suspension of rod in suit is not unsafe. It would be too safe to have a rod with a hole and pin. It is true that Mr. Minnit examined the fan eight or nine months after the accident. It is possible but extremely difficult to locate the flaw at the end of eight months. Theory of flaw is not a surmise.

8. In his opinion the only feasible cause of the fall is latent flaw. The rod is of standard dimensions. Counsel for the plaintiff complained that the theory of latent defect was not put forth till the very late stage, nay, till the written statement was to be filed. It is perfectly true that it was not mentioned in the correspondence, but then it should be borne in mind that the correspondence ceased after 29th May 1916; but the suggestion that it was an afterthought has no foundation at all as it is

perfectly clear from the entries Ex. No. 11 put in from Mr. Darasha's Diary that Mr. Mongini had told him on 27th May 1916 that Mr. Simkin's opinion was that the accident was due to latent defect and that report was called for and that Mr. Darasha had the report on 29th May 1916. I hold that it was not an afterthought. In the course of the cross-examination of defendants' witnesses, Mr. Davar for the plaintiff made several suggestions from which the Court is asked to infer negligence on the part of the defendants and these may be shortly summarised as under :-

1. Rain water might have got into the suspension rod from the ceiling.

2. Constant screwing and unscrewing would weaken threads.

3. Workmen carried this fan from Church Gate Street to Esplanade Eoad carelessly and with jerks.

4. Wrong leverage was put on whilst screwing.

5. Dent on the piece broken.

9. Let us consider whether there is any evidence to support any of these suggestions. Not only there is not an iota of evidence to support them but all the evidence there is is the other way. On the evidence I hold that the fall of the fan was not due to any negligence on the part of the defendants but it was due to the latent defect in the metal of the suspension rod and that it was accident pure and simple. The question then arises, could the defendants, who are restaurant keepers and are in a position of invitees, have obviated this accident by exercise of any ordinary care, caution and skill ? This was not a case where more than ordinary caution and skill were required from the defendants and this is clear from Fawkea v. Poulson and Son (1892) 8 T.L.R. 725. It will be remembered that the defendants had a contract with Messrs. Olser & Co. dated May 1915 under which the fans in their premises had to be examined once a week and for this purpose Olser & Co. sent Moreshwar Ganpat. He went every Saturday to examine the fans at the defendants. He says:

First I remove the dust, then oil the fans and then see whether the carbon brushes were in good contact with the accumulator and then see if the blades were properly screwed on and whether the pin and rod were in order. After the inspection was complete I used to hang on the fan to see if it was tight. Then I started the fan. When I went to examine I did all these thinga. Inspection lasted an hour or hour and half. I went once a week on a Saturday. I inspected on 29th April 1910 six days before the accident. I found threads of one or two rods of the fans in the outside room loose and I reported this. Suspension was properly examined.

10. From this to my mind it is perfectly clear that on the 29th April 1916 six days before the accident the fan in dispute was passed as sound and found screwed perfectly tight otherwise Ganpat would have reported it to his master as he did in respect to others. It is true that except Osier nobody imported fans with slotted rods. But such have been imported in large numbers and even put up in Government Offices. They had imported very large numbers and never had a complaint. They have been discontinued by the manufacturers not because they are less safe but because they are more expensive and in the present state of competition it is not surprising. There is no doubt that it is

easier to fit up a fan with a slotted rod than a fan with a rod and a pin according to Mr. Simkin's evidence. During the last nineteen years Osier have imported over 25800 fans of this type and every fan that came from Spranges Electric Company of America had a slot in the rod. It appears that over 15000 had been sold and fitted up and no complaint of its fall had heen reported. Is a person bound to supply latest designs and inventions ? Answer is no: see The Great Western Railway Company v. Davies (1878) 39 L.T.N.S. 475.

11. The result is that I hold that there was no negligence, on the part of the defendants and that the accident could not have been obviated by the exercise of ordinary care, skill and caution on the part of the defendants. This being the case it is unnecessary to go into the question of damages. The result is that the suit must be dismissed with costs.