BANK OF CEYLON
V.
CARGILLS (CEYLON) LIMITED

COURT OF APPEAL
WIJETUNGE, J. AND
VIKNARAJAH, J.
C.A. NO. 57/82 (F)
D.C. COLOMBO 84093/M
FEBRUARY 06 AND 07 1989.

Banking - Bank draft - Negligence - Fraudulent use of the Bank draft - Actus novus interveniens.

HELD:

There is no negligence where the precaution set out in the Manual of Instructions was observed in drawing up a bank draft. Failure to use a carbon or rubber stamp does not amount to negligence.

In cases of negligence, damages can only be recovered if the injury complained of not only was caused by the alleged negligence but was also injury of a class or character foreseeable as a possible result of it.

Indian ink had been used to write the bank draft and until this case there had been no instance of an alteration or forgery of a bank draft written in Indian ink.

What is new and independent which could not reasonably be foreseen in generally a supervening human act. Here there was a novus actus interveniens and the Bank is not liable.

Cases referred to

1. *Paris* v. *Stepney Borough Council* (1951) 1 All E.R. 42, 49
2. *Morton* v. *William Dixon* (1909) S.C. 807
3. *Wright* v. *Cheshire County Council* (1952) 2 All E.R. 789
4. *Overseas Tankship (U.K.)* v. *Morats Docks & Engineering Co. The Wagon Mound No. 1* (1961) 1 All E.R. 404, 415
5. *Hughes* v. *Lord Advocate* (1965) 1 All E.R. 705
6. *Collettes Ltd.* v. *Bank of Ceylon* (1984) 2 Sri L.R. 253, 300
7. *Wodds* v. *Duncan* (1946) A.C. 401, 442
8. *Weld - Blundell* v. *Stephens* (1921) A.C. 956, 986

APPEAL from judgment of the District Court of Colombo.

J.W. Subasinghe P.C. with *D.J.C. Nilanduwa* for defendant - appellant

H.Soza for Plaintiff - respondent.

Cur. adv. vult.

March 31st, 1989

VIKNARAJAH, J

This is an appeal by the defendant bank from the judgment of the learned District Judge entering judgment for Rs. 2,000/- being damages suffered by the plaintiff as a result of the Kurunegala branch of the defendant bank issuing the Bank draft P1 negligently in that the Bank failed to write the body of the bank draft on carbon and did not use, a rubber stamp with the words "not to exceed Rs. 12/-".

The facts briefly are that the bank draft P1 had been obtained on 24.1.1979 on an application made to the Kurunegala branch of the defendant Bank. The bank draft was for Rs. 12/-. On the same date, that is on the 24th inquiries were made from Mrs. Meegama an executive in the plaintiff Company in Colombo whether they would accept a cheque as payment for goods to which inquiry she told them that goods would be sold only on cash being paid. On the following day, 25th, in the afternoon an unknown person in sarong who came the previous day met witness Lanerolle who is the Manager of the Wholesale Distribution Department and presented the Bank Draft, P1 drawn on the Bank of Ceylon, Kurunegala in favour of the plaintiff Company. The Bank Draft was for Rs. 12,000/- and dated 24.01.79. The unknown person purchased goods to the value of Rs. 12,038/40. Rs. 38/40 was paid in cash by the unknown person who presented the draft. When the plaintiff presented the Bank draft P1 to the bank of Ceylon, City Office it was dishonoured

on the ground that the Bank draft was only for Rs. 12/-. When the Kurunegala Branch had issued the Bank Draft P1 for Rs 12/- following the usual practice, it also sent an advice note to the City Office Colombo giving the particulars of the Bank Draft. The advise note has been produced marked D2. It is admitted that the plaintiff as a result suffered loss of Rs. 12,000/-

In para 6 of the plaint plaintiff pleads that the defendant has wrongfully and unlawfully caused the said loss and damages to the plaintiff in the sum of Rs. 12,000/-, by reason of the negligence of the Bank in facilitating the unauthorised and fraudulant raising of the amount of the said Bank draft by diverse acts of omissions to wit, inter alia:

(a) failure to use a carbon in order that the original writings and figures would appear on the reverse.

(b) failure to state the amount in words on the top of the said Draft thus "not to exceed Rupees twelve".

(c) failure to use a bold stroke to separate the Rupees and the cents shown in figures.

(d) failure to use a cheque writing instrument.

It is common ground that the draft was issued for Rs. 12/- that it had been fradulently raised to Rs. 12,000/- and that therefore the defendant was entitled to refuse payment of Rs. 12,000/- on the draft P1.

The defendant in its answer inter alia took up the defence that the Bank exercised reasonable care in the issue of the draft.

Witness Bernard Fernando who is an Assistant General Manager gave evidence. He stated that he was also earlier Chief Inspector of branches. He counts 37 years service in the Bank and is well aware of the practice that prevails in the Bank of Ceylon. This witness admitted in evidence that the Bank has a duty to take reasonable precautions in issuing a bank draft to safeguard the interest of the person in whose favour the bank draft was issued because the Bank forsees that fraudulent alterations could be done on a Bank draft issued by the Bank.

Learned Counsel for appellant conceded that the Bank owed a duty of care to the plaintiff.

The matter in issue is what is the standard of care which the bank owed the plaintiff and had the defendant Bank failed to exercise that degree of care which is required from the bank.

Counsel for appellant submitted:

(i) that the plaintiff has followed the practice that was existing in the Bank for many years and that the Bank had acted in the ordinary course of business and followed banking practice.

(ii) that the damage which the plaintiff suffered was not foreseeable damage - remoteness of damage.

(iii) the alteration of the Bank draft is a novus actus interveniens

Counsel for respondent submitted that the Bank had not taken reasonable steps in preventing a forgery in that the Bank had not used a carbon paper and that a rubber stamp with the words "not exceeding Rs.12/-" had not been stamped on the draft.

Plaintiff's witness Lanerolle stated in evidence that he had accepted drafts issued by People's Bank and Bank of Ceylon from customers. He stated that drafts are usually handwritten, the figures and words handwritten. His complaint is that a carbon paper was not used and that the endorsement not exceeding Rs. 12/- was not there on the draft P1. Lanerolle stated that he had accepted Bank drafts which were not written on a carbon paper and without the rubber stamp endorsement. Lanerolle stated that he had accepted Bank of Ceylon drafts which were not written on carbon paper and without rubber stamp impression. Lanerolle's position was that as Bank advises customers to use carbon paper when writing cheques, the bank also should have used a carbon paper when writing out drafts to prevent alterations. Although he noticed these omissions in the Bank draft P1, he accepted the Bank draft from an unknown person.

Bernard Fernando for the plaintiff gave evidence and stated that the bank followed strictly the Bank's Manual of Instructions D1 in regard to the drawing of the draft P1. This manual was last amended on 22.02. 1966 and there was no occasion to amend it thereafter.

In D1 it is stated that the Bank draft is a convenient method whereby a person without a bank current account may remit money with the same

facility as security as with a cheque. A bank draft has the added attraction that it is Bank paper and is readily accepted everywhere.

In the Manual D1 against the marginal note 'Preventions against unauthorised deletions and alterations' the following instructions are set out.

(i) All drafts to be issued should be made out on a pinpoint typewriter if available or should be written in Indian ink. This precautionary measure has been found necessary because there have been instances of endorsement and amounts written in ordinary ink having been deleted by the use of chemicals.

(ii) the amount in figures should be inserted as close as possible to the rupee sign. The amount in words should commence at the extreme left of the instrument.

Bernard Fernando in evidence stated that Bank drafts are issued only at main branches and there are about 200 such branches. He further stated that pinpoint typewriters are available only in the Colombo branches. The Bank stopped importing pinpoint typewriters as there were restrictions in the import of such typewriters and that is why Indian ink was used instead.

The Bank Draft P1 was drawn up in strict compliance with the Manual of Instructions D1 using Indian Ink and that is the finding of the learned District Judge. There were no pinpoint typewriters available at the Kurunegala Branch which issued the Bank Draft P1.

Bernard Fernando stated that in his 37 years experience in the Bank carbon paper was not used and the rubber stamp was also not used. He further stated that until the forgery in this case therewere no cases of alterations in Bank draft when Indian ink was used. He further stated that using carbon paper does not mean that alterations cannot be made because there have been numerous cases of forgery in regard to cheques although carbon paper was used.

The learned trial Judge in his judgment has stated that "this alteration would not have been possible if the bank draft was written on carbon and a rubber stamp was used with the words "not to exceed". The trial Judge has proceeded on the footing that if carbon paper was used and rubber stamp was used the alterations are not possible. This is in the

teeth of the evidence in the case. Bernard Fernando in his evidence has stated that there have been numerous cases of forgery where carbon paper has been used when cheques are written out. This is a clear misdirection on the facts. The trial Judge has failed to evaluate the evidence in the case correctly. The evidence of Bernard Fernando has not been rejected by the trial Judge.

Mc Kerron: Law of Delict (Sixth Edition) at page 3 states as follows:-

> "The law does not require a person who owed a duty of care to another to take every possible precaution to avoid causing harm to that other. The standard of care which the law demands is the care of the diligens paterfamilias - the care which a reasonably prudent person would have exercised in the circumstances".
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> At page 34 Mc Kerron states:
> "In contracts the standard of care which the law demand varies with the particular contract in question. But in delict there is only one standard - the standard of the reasonably prudent person situated in the same circumstances as the defendant".

In the case of *Paris* v. *Stepney Borough Council* [1] Lord Normand stated as follows:-

> "The kind of evidence necessary to establish neglect of a proper precaution was considered in *Morton* v. *William Dixon* [2] by Lord Dunedin, Lord President. That was an action by a miner against his employers alleging negligence in failing to take precautions against the fall of coal from the top of the shaft, into the space between the side of the shaft and the edge of the cage. It was of course a Scottish case but in my opinion, there is no difference between the law of Scotland and the law of England on this point. The Lord President said (1909 S.C. 809):-
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> > "Where the negligence of the employer consists of what I may call a fault of omission I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds either - to show that the thing which he did not do was a thing which was commonly done by the persons in like circumstances or to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it",

"The rule is stated with all the President's trenchant lucidity. It contains an emphatic warning against a facile finding that a precaution is necessary when there is no proof that it is one taken by other persons in like circumstances but it does not detract from the test of the conduct and judgment of the reasonable and prudent man. If there is proof that a precaution is usually observed by other persons a reasonable and prudent man will follow the usual practice in like circumstances. Failing such proof the test is whether the precaution is one which the reasonable and prudent man would think so obvious that it was folly to omit it".

In the case of *Wright* v. *Cheshire County Council* (3) the facts are as follows:-

The plaintiff a boy aged twelve years was taking part in gymnastic exercises at a school managed and controlled by the defendants. He was in a party of ten boys who were engaged in the exercise of vaulting the 'buck'. The ten boys who had all had experience of the exercise, were vaulting one after the other and it was the duty of the boy who was last over to wait at the receiving end of the buck to assist as necessary the next boy to come over. As the plaintiff was vaulting, the school bell denoting that play time had arrived rang and the boy at the receiving end of the buck ran off without waiting to receive the plaintiff who fell and sustained injuries. At the time of the accident the instructor was a little distance away supervising the activities of other classes. Evidence was given that it was the proved practice in schools to leave boys who had a little practice to carry out the exercise by themselves, so as to give them self confidence, but evidence was also given by a physical training instructor that he considered the practice dangerous. The plaintiff sued for damages alleging that the defendants were negligent in failing to exercise reasonable care in not having an adult present at the receiving end of the buck.

The Court of Appeal held that the test of what was reasonable care in ordinary everyday affairs might well be answered by experience arising from practices adopted generally and followed successfully for many years. The evidence in the case was that the defendants had adopted a generally approved practice.

At page 795 Birkett L. J. stated as follows:-

"On the second point, if it be said the general system does not accord with the standard of a reasonable and prudent man all I desire to say is this, that when you have, as a fact in this case, a system in general use which had been adopted in this school and followed with perfect safety, so far as one knew, until this day, it is a very strong thing indeed to say that the authorities were negligent",

The Judge goes on to state:

"It appears that this was the first time such a thing had happened. In these circumstances, I feel it is impossible to say on the facts that any negligence was shown on the part of the defendants and for these reasons and for the reasons which have already been given by My Lord I agree with the conclusion that this appeal ought to be allowed".

The evidence in the instant case, in appeal, of Bernard Fernando who had been an executive in the bank and who had 37 years experience is that the bank had followed the general system that is prevailing in the Bank for more than 30 years in issuing this Bank Draft P1 and Indian ink was used for so many years and there has been no alteration until this case. The Manual of Instructions had been followed strictly. He further stated that it is not the practice to write drafts on carbon paper or to use the rubber stamp "not exceeding". This system had worked with perfect safety for so many years. Using carbon paper is not an insurance against forgery. The evidence of Bernard Fernando is that he had seen numerous cases of forgery where carbon paper has been used for cheques. The learned trial Judge has fallen into the error of thinking that if carbon paper and the rubber stamp impression were used by the Bank this alteration was not possible. I do not think that the omission of the use of the carbon paper and/or the rubber stamp impression is "a precaution which a reasonable and prudent man would think so obvious that it was folly to omit it".

I hold that the defendant was not negligent in not using carbon paper or the rubber stamp impression.

Remoteness of damages:- Novus Actus Interveniens "The plaintif must prove that the damage is traceable to the defendants' set with reasonable certainty and is not merely a conjectural result of it. He must further prove that the act was either *the* cause or *a* cause,

legally responsible for the damage; in other words that the damage is not too remote",

Mc Kerron - Law of Delict 6th Ed at page 128.

Again at page 117 the same author states as follows:-

"It is to be observed that the question of remoteness does not arise until it has first been established that the act complained of was a *causa sine qua non* of the damage in other words, that but for the act the plaintiff would not have suffered the damage".

The evidence in the present case is that even when carbon paper had been used there had been numerous cases of forgery in respect of cheques. Therefore it cannot be said that but for this omission, alteration is not possible.

In case of negligence, damages can only be recovered if the injury complained of not only was caused by the alleged negligence but was also injury of a class or character forseeable as a possible result of it (Vide *Overseas Tankship (U.K)* v. *Morats Docks & Engineering Co. The Wagon Mound No.*[4] *Hughes* v. *Lord Advocate*[5])"The essential factor in determining liability is whether the damage is of such kind as the reasonable man should have foreseen".

(Per *Viscount Symonds in the Wagon Mound No.1* [4].)

In the case of *Collettes Ltd* v. *Bank of Ceylon (SC)*[6] Sharvananda J states as follows:-

"It is not for every consequence of a negligent conduct that a man is responsible in law. The guiding principle is that though the negligence of the defendant may have been one of the inducing causes leading up to the damage (a cause without which damage would not have been suffered - causa sine qua non) he will not be liable unless it was the "actual", "effective", "proximate" cause (causa causans) in the sense that he was blameworthy in being the cause of the plaintiff's damage. The defendant would not be liable, even though his negligence had been proved, if such negligence did not proximately cause that damage. The defendant's negligence should have actually caused the damage - Vide Mackintosh and Scoble in Delict- 5th Edn at page 77".

"At one time the law was that unforseeability was no defence (Re Polemis 19 21 3 K.B. 560) but the law now is that there is no liability unless the damage is of a kind which is forseeable (The Wagon Mound No. 1 Supra). The liability for damage today is thus based on the concept of forseeability. The damage should have been forseen by a reasonable man as being something of which there was a real risk unless the risk was so small that the reasonable man would feel justified in neglecting it".
Per Sharvananda J.

In the instant case in appeal the damage was not forseeable because the evidence is that Indian ink was used and there has been no alteration or forgery of a Bank draft until this case.

"Between the act of the wrongdoer and the final harmful consequences there may intervene either the act of some person or . . . some natural force which makes such a contribution to the ultimate result as to immunize the wrong doer's act and in fact insulate it from the result complained of. When such an intervening force becomes a superceding force so as to exonerate the wrong doer from liability the latter is entitled to have his defence on the maxim novus causa interveniens".
Mackintosh and Scoble - Negligence in Delict- 4th Edn 67.

A consequence is too remote if it follows a break in the chain of causation or is due to novus actus interveniens.

"It is the quality of the act" said Lord Simonds "which determines the issue, for it is not every intervening act which breaks what is called the chain of causation. If I throw a squib into a crowd, I am liable to the man who is hurt though intervening hands have passed it on. When I speak of the quality of the act, I refer in particular to that aspect of it which I believe to be all important in . . . the law of tort; namely whether it is an act which the actor could reasonably have contemplated or foreseen". *Wodds* v. *Duncan* (7)

What is new and independant which could not reasonably be foreseen is generally a supervening human act.

In Weld - Blundell v *Stephens* (8) *Lord Sumner* said:

> "In general (apart from special contracts and relations and the maxim respondeat superior) even though 'A' is in fault, he is not responsible for injury to 'C' which 'B' a stranger to him deliberately chooses to do. Though A may have given the occasion for 'B's mischievous activity, 'B' then becomes a new and independent cause".

In this case the novus actus interveniens is the alteration done by the unknown third party which could not have been foreseen by the appellant. The appellant had taken all reasonable precautions in the preparation and issue of the bank draft and evidence of Bernard Fernando is that in his experience he had not come across a case where letters or figures written in Indian ink had been altered as a forgery. Even if the omission to use a carbon paper and rubber stamp impression is a negligent act, I hold that the defendant is not liable because the damage was not foreseeable and because of the novus actus interveniens.

Learned Counsel for the appellant submitted that there is suffiicient evidence in the case to hold that the plaintiff was guilty of contributory negligence and he made an application that an issue be raised at this stage regarding contributory negligence of the plaintiff. Counsel for the respondent objected to this application as this is a new matter which cannot be raised in appeal. I do not think it necessary to consider the matter of contributory negligence as the appellant has succeeded on the other points raised in appeal.

I set aside the judgment of the learned District Judge and dismiss the plaintiff's action.

The appeal is allowed with costs in both courts.

WIJETUNGA, J. - I agree

Appeal allowed.