

DAVID BARNARD

THE CIVIL COURT
IN ACTION

BUTTERWORTHS

THE CIVIL COURT IN ACTION

by

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DAVID BARNARD

PREFACE

The average student almost invariably finds the study of civil procedure confusing and tedious. This is particularly unfortunate because, when he qualifies, he will find that the every-day problems which take up most of his time are not matters of substantive law but are questions of practice. This book is intended to assist the student barrister, articled clerk and legal executive in understanding civil litigation by showing how the rules are applied in real instances. It is also designed to be used by anybody who is starting out in practice and needs a straightforward explanation of the basic procedure.

Throughout the text, I have followed the method adopted in "The Criminal Court in Action" of using examples which refer to actual localities and courts. All the examples, however, are purely fictional and no reference is intended to any persons living or dead.

I wish to thank the editorial staff of Butterworths for their very great assistance to me in preparing this book. I am most grateful to Mr. R. C. L. Gregory of the Lord Chancellor's Office for permission to reproduce from the County Court Practice the table on pre-trial review which he originally prepared for the Rules Committee. I have received a great deal of help and criticism from members on both sides of the profession in producing the manuscript; in particular, I should like to thank Mr. Harry Herman who read the whole of the introductory part of the book, Mr. Edward Davidson who made valuable suggestions on the section concerning originating summons procedure, Mr. Andrew Pitt who gave me the benefit of his knowledge and experience of enforcing judgments and Mr. Seton Pollock C.B.E. who very kindly advised me on the passages dealing with the Legal Aid Scheme. Needless to say the responsibility for any errors which may remain is entirely mine.

I am very conscious in writing a practical guide to civil litigation of the debt I owe to my pupil-masters, the late Mr. Peter Downe and Mr. Julian Priest (now one of Her Majesty's Counsel), who in a few months taught me more about litigation than I could have learnt from years of studying the White Book.

Finally I would like to express my best thanks to my typist who in more ways than one is responsible for the appearance of this work.

David Barnard

The Temple
July 1977

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PART ONE

OLIVER TWIST *v.* WEST MIDDLESEX
SALVAGE CO., LTD.

TWIST *v.* WEST MIDDLESEX SALVAGE CO., LTD.

On 1 April 1975 Oliver Twist (who was just 17) began working at a factory in Southall belonging to the West Middlesex Salvage Company. Oliver had only just left school and this was his very first job. His employers were a company who had a contract with the local council for disposing of bulky salvage. One of the machines Oliver was going to learn to work consisted of a large press. Cardboard boxes, crates, paper, etc. were forced into a special compartment by a hydraulic ram while at the same time a press came down and pressed the salvage into a compact bale. This machine was always operated by a man called Sikes. Oliver used to watch Mr. Sikes working the press and pretty quickly understood how it worked. There was one snag; sometimes odd boxes would spill out of the press compartment. When that happened Sikes would grab the box and pull it away while the ram was working and before the press descended. Of course this should have been done with the machine switched off but since there was always a lot to be done and since Sikes was anxious to earn the biggest bonus possible every week, he used to pull the boxes out quickly before the ram had stopped moving and the press had fully descended. It all looked very easy.

After Oliver had been working at the factory for a couple of weeks, Sikes let Oliver have a go on the press and Oliver showed he knew just how to work it. There was a great deal to be done and it was a help to Mr. Sikes to have a boy available who could take over when he was busy.

One Wednesday when Oliver had been at the factory for about three weeks Sikes left him in charge of the machine whilst he went over to the manager's office. Oliver went on working the press quite happily for about a quarter of an hour until to his annoyance he saw one of the cases was coming out of the compartment. Oliver did not bother to stop the machine—Mr. Sikes never did that. He just went over to the press compartment and started to tug the box. It would not come out and Oliver grasped the top of the box and tried to get it free. Oliver realised the press was coming down but had not appreciated the force of the ram because quite suddenly he realised he could not get his hand free. "Help!" he shouted, "Bill come quickly." Luckily for him Mr. Sikes was just coming out of the manager's office—he ran to the machine and threw the master switch and everything stopped, but by this time Oliver was unconscious because his hand had been crushed by the ram. Sikes put the machine in reverse whilst one of the men telephoned for an ambulance.

Oliver spent a month in hospital. There was very little the doctors could do for his hand. His thumb and a finger were amputated, but they managed to save the remaining three fingers. After he had been in hospital for about a week the shop steward came round to see Oliver. When Oliver started work he had joined the union and had regularly paid his dues. He only had a very hazy idea about the union's activities and one of the things he had not realised was that trade unions keep funds available to assist the members who are injured at work to get compensation. The shop steward explained to Oliver that:

- (a) Everybody who is injured at work is entitled to benefit under the state-run National Insurance Scheme. The state, the employer and the employee contribute to provide a fund to assist persons injured at work irrespective of questions of fault. Oliver was told to apply at once to the local insurance office for benefit.
- (b) *In addition* to obtaining compensation through the state scheme, Oliver could sue his employers for damages for the personal injuries he received. Whether Oliver would succeed in such an action would depend on whether his employer was in some way at fault. The shop steward thought the machine should have been guarded so that Oliver could not have put his hand in the way of the moving parts. He strongly advised Oliver to fill in a union claim form which he would forward to the union's solicitors. This form is a questionnaire drawn up by the union to establish sufficient particulars of the accident for their solicitors to decide whether there is a valid claim. In a sense it fulfils the same function as the claim form drivers send in to their insurance company after an accident.

A couple of days later Mr. Nathaniel Wilkins received Oliver's claim form. Mr. Wilkins was employed by a large London firm of solicitors who specialised in trade union work. The very first thing he did was to write to Oliver's employers telling them that he was acting for Oliver and that on the information he had it was clear that his client's injuries had been caused by their negligence or breach of statutory duty under the Factories Act. At the same time he wrote to Oliver asking for:

- (a) a detailed statement of how the accident occurred;
- (b) the names and addresses of any witnesses;
- (c) a plan of the machine;
- (d) details of Oliver's loss of pay.

He also told Oliver that he would like to arrange for a medical inspection by a specialist on hand injuries when Oliver had been discharged from hospital. In the event Oliver remained in the hospital for a month before he was allowed home. Even then he had to return twice a week for an intensive course of physiotherapy on his hand. In the meantime Mr. Wilkins had received a reply from the insurers who acted for the company denying all liability and saying the accident was entirely Oliver's fault for putting his hand into a moving machine. Mr. Wilkins was not in any sense distressed by this letter; indeed, he would have been very surprised if it had said anything else. He noted that the letter ended: "Without prejudice, we would be grateful for the opportunity of arranging our own medical examination of your client". Mr. Wilkins wrote back agreeing to such an examination on condition that the insurers were responsible for his client's expenses in attending and would provide a copy of their report to Mr. Wilkins. He also asked in this letter for the name and address of the company's solicitors so that he could effect service of a writ upon them. This last remark was not pure belligerence. Although Mr. Wilkins fully expected the action eventually to be settled out of court, he knew that the insurers were more likely to treat Oliver's claim expeditiously if litigation was commenced against the employers. It followed that it was in Oliver's interest for the writ to be issued at the earliest possible moment. As Oliver was under 18, it was technically necessary for the action

to be brought in his father's name and so Mr. Wilkins wrote and obtained authority from Mr. Twist to bring the case.

The day after Mr. Wilkins received written authority from Oliver's father he sent his clerk down to the Law Courts to issue a writ. A writ is a formal document issued under the authority of the Lord Chancellor telling a defendant that a claim has been brought against him and that he must "enter an appearance", i.e. place himself on the court record, or judgment will be given against him. Every writ must have written on the back a statement, usually only in general terms, of the nature of the case against the defendant. In the present case it can be seen from the writ contained in counsel's brief (p. 12, *post*) that this "general indorsement" states the nature of the cause of action (i.e. negligence and breach of statutory duty), the date upon which the cause of action arose and the type of relief claimed (i.e. damages). The writ is prepared in the solicitor's office and the clerk takes two copies to the Central Office of the Law Courts. These copies are sealed with the court seal and one of them is stamped to show that a fee has been paid. The copy with the stamp is then retained by the court and the other copy is given back to the solicitors. The writ is then deemed to have been *issued*.

The next step was for Mr. Wilkins to arrange for the writ to be *served*. In theory this could have been done by delivering a copy of the writ at the company's registered office but, since Mr. Wilkins had received a reply from the company's insurers stating the name of the solicitors instructed to accept service, he effected service on those solicitors. This was quite simply done by sending the original writ with the court seal and a photostat copy to the defendants' solicitors who retained the copy and sent the original back indorsed with a note to the effect that they accepted service on behalf of their clients. If you look at the writ (11, *post*) you can see the indorsement in the margin. At the same time the defendants' solicitors completed two "memorandum of appearance" forms (see p. 13) which they sent to the Central Office. The purpose of such an appearance is that the defendant has thereby placed himself on the court record. The court keeps a record of all appearances and sends one of the copies of the forms to the plaintiff's solicitors.

Several months now went by whilst both solicitors collated the evidence and obtained their medical reports. Both sides hoped that the case could be settled out of court. There were really three issues that concerned Mr. Wilkins:

- (1) Was there any negligence on the part of the defendant at all? He felt confident there was. Nobody, let alone an inexperienced apprentice, should be allowed to operate a machine with moving parts that are not fenced in.
- (2) Was there contributory negligence on the part of Oliver? Where an employee is also to blame for his accident the court has the power to reduce his damages "to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage". If Oliver had been an experienced workman, then Mr. Wilkins had little doubt that the judge would have held him substantially to blame for the accident. The position, however, seemed different in the case of a young boy just starting his first job.
- (3) Finally Mr. Wilkins was concerned to have an estimate of the damages Oliver would be likely to receive. So far as the actual money lost by Oliver

to the date of trial (called the “special damage”) was concerned, this was a simple matter of calculation. The largest item of this special damage would be Oliver’s loss of earnings whilst he was recovering. However, much more difficult to determine was the amount the judge would award Oliver as “general damages” for

- (a) the pain and suffering attached to the injury;
- (b) the irritation and loss of amenity and cosmetic defect in having a maimed hand particularly as Oliver was right handed;
- (c) his vulnerability on the labour market as effectively a one-handed man;
- (d) future loss of earnings if (as seemed likely) he would not be able to earn as high a salary in future as he would if he had retained the full use of both hands.

Mr. Wilkins knew that an award in the region of £7,000 could be expected for the first three heads of damage. So far as future loss of earnings were concerned this could not even be guessed at until Oliver had made a sufficient recovery to start back to work. In fact, Oliver spent some time at a government rehabilitation centre being trained to work with his left hand. Six months after the accident Oliver started a new job as a messenger boy working on a newspaper in Fleet Street at £20 per week take-home pay. Mr. Wilkins was able to use his contacts with the unions concerned to ascertain that if Oliver had carried on in the engineering firm his wages would have risen from £25 net per week at seventeen to £40 net at twenty-one. In the newspaper job, he would only be earning about £35 at twenty-one. It looked therefore as if there was a continuing loss of earnings in the region of £5 per week.

At this stage Mr. Wilkins decided to send his papers to counsel for an advice both on quantum (i.e. the amount of damages likely to be recovered) and on the question of contributory negligence. Counsel advised that Oliver was likely to receive £11,000 general damages (£7,000 in respect of the injury itself and £4,000 in respect of future loss of earnings) and that the court was unlikely to make any substantial deduction for contributory negligence. Mr. Wilkins then instructed counsel to draft a *statement of claim*.

Before any civil action comes to court, both sides are required to prepare a written statement of the allegation they intend to make. In the present case the statement setting out Oliver’s claim would show:

- (1) that on the relevant date the accident took place whilst Oliver was working for the defendants;
- (2) that it was caused by the negligence of the defendants;
- (3) that as a result Oliver sustained injuries and suffered loss and expense (i.e. special damage).

The statement of claim is set out at pp. 14–16 in counsel’s brief. When counsel’s draft came back, Mr. Wilkins checked one or two details and then had the pleading typed on special paper (known as “judicature”) and sent it by post to the defendants’ solicitors.

It was then the defendants’ turn to file a pleading in reply to the statement of claim. Although they knew that it was likely that the court would hold them to a certain extent to blame for the accident, their pleaded case would be that Oliver was wholly responsible for his own misfortune. Therefore they