Case Number:	Civil Case 379 of 1976
Date Delivered:	17 Mar 1977
Case Class:	Civil
Court:	High Court at Mombasa
Case Action:	Judgment
Judge:	Dermot Joseph Sheridan
Citation:	W Layton P Lougher v Kenya Safari Lodges & Hotels Ltd [1977] eKLR
Advocates:	M.A.C. Satchu for the Plaintiff. S K.Guram for the Defendant.
Case Summary:	**Lougher *v* Kenya Safari Lodges & Hotels Ltd** High Court, Mombasa 17th March 1977 Sheridan J ***Occupier's liability*** *– duty of care to visitors – restriction of duty by agreement – notice in hotel disclaiming liability for injury in or near swimming pool – plaintiff injured by fall outside changing room – plaintiff aware of hazards in changing rooms – whether contributory negligence – whether disclaimer effective.* A hotel owned by the defendant had a swimming pool with a changing room and toilets. In the vicinity of the pool a large notice was fixed to the wall stating that the defendant would not be liable for any injury arising out of the use of the pool or which was sustained in or near it. The floor space in most areas around the pool had been treated with a non-slip substance but the area outside the changing room had not been so treated; on occasions this area was used to clean sun-oil off mattresses for wheeled beds. In 1975 the plaintiff came to stay at the hotel. He decided to use the

pool and first visited the toilet in the changing room. He was bare-footed at the time. As he came out of the changing room he slipped on the floor outside where there was a pool of water. Although as an athlete the plaintiff was familiar with the usual hazards of changing rooms he did not anticipate this particular hazard. He suffered injury and sued the defendant for damages.

Held:

(1) That the defendant should have taken precautions against the probable wetness of the floor due to bare-footed swimmers walking on it and the mere fact that the plaintiff may have been aware that there might be hazards in using a changing room did not, in the absence of foolishness or recklessness on his part, constitute contributory negligence.

Appleton v Cunard Steamship Co Ltd [1969] 1 Lloyd's Rep 150 applied.

Jennings v Cole [1949] 2 All ER 191, *Bell v Travco Hotels Ltd* [1953] 1 All ER 638, CA,

Thomas v Bristol Aeroplane Co Ltd [1954] 2 All ER, 1, CA, and *Lowther v H Hogarth & Sons Ltd* [1959] 1 Lloyd's Rep 171 distinguished.

(2) That the notice restricting the defendant's liability could only be effective in respect of guests at the hotel if it were brought to their attention before the contract between them and the hotel was effected, eg by its display at the reception desk; accordingly, the notice did not exclude the defendant's liability for the injury sustained by the plaintiff and the plaintiff's claim for damages succeeded.

Olley v Marlborough Court Ltd [1949] 1 KB 532, CA, and *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, CA, applied.

Cases referred to in judgment:

Appleton v Cunard Steamship Co Ltd [1969] 1 Lloyd's Rep 150.

Bell v Travco Hotels Ltd [1953] 1 QB 473; [1953] 2

	WLR 556; [1953] 1 All ER 638, CA. *Jennings v Cole* [1949] 2 All ER 191. *Lowther v H Hogarth & Sons Ltd* [1959] 1 Lloyd's Rep 171. *Maclenan v Segar* [1917] 2 KB 325;86 LJKB 1113; 117 LT 376. *Thomas v Bristol Aeroplane Co Ltd* [1954] 2 All ER 1; 52 LGR 292, CA. *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163; [1971] 2 WLR 585; [1971] 1 All ER 686, CA. *Turner v Arding & Hobbs Ltd* [1949] 2 All ER 911. *Olley v Malborough Court Ltd* [1949] 1 KB 432. **Action** W Layton P Lougher instituted proceedings (Civil Case No 379 of 1976) against Kenya Safari Lodges & Hotels Ltd, the owner of the Mombasa Beach Hotel, for injuries sustained by him on the hotel premises when he was staying as a guest at the hotel. The facts are described in the judgment. *MAC Satchu* for the Plaintiff. *SK Guram* for the Defendant.
Court Division:	Civil
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	-
Case Outcome:	Judgment for the plaintiff with costs.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 379 OF 1976

W.LAYTON.P. LOUGHER.....PLAINTIFF

VERSUS

KENYA SAFARI LODGES & HOTELS LTD.....DEFENDANT

JUDGMENT

The plaintiff claims damages arising out of an accident which occurred at about noon on Sunday 30th November 1975 when he fell outside the men's changing room adjacent to the swimming pool at the Mombasa Beach Hotel, which is owned by the defendant company. He sustained a Potts fracture of his right ankle. As the defence elected to adduce evidence only on the question of the disclaimer notices, to which I will come later, the evidence of the plaintiff and Mr D W Strugnell, his main witness, stands virtually uncontradicted.

The plaintiff is the senior partner of a firm of solicitors practising in Cardiff in the United Kingdom. On 16th November he and Mr Strugnell, accompanied by their wives, arrived at the hotel to spend a holiday on the coast. Mr Stugnell had stayed in the hotel in 1974. At 10.50 am on 30th November, the plaintiff decided to go for a swim in the pool. Before doing so he went to the changing room to use the toilet, approaching it from the south wing where his room was. The lay-out of the pool and its environs is shown in the building plan. The plaintiff was bare-footed wearing swimming trunks. He had no recollection of seeing any water on the floor of the changing room. He heard someone come in while he was there. There was also someone in the shower. As he emerged from the changing room and put his feet on the slippery area about 4 feet 6 inches wide, before the step down, they went from under him and his body was thrown outwards to the right. As he fell, he heard a loud crack in his right leg. He saw water on the smooth area where he was lying. Mr Strugnell came to his rescue. He tied his legs together at the knees. The plaintiff was taken by ambulance to the Katharine Bibby Hospital where Mr McVicker manipulated the fracture and put the leg in a knee-length plaster. Next day, rather than face the hospital charges, the plaintiff returned to the hotel where he remained immobilised until his departure for the United Kingdom on 7th December. He then gave evidence of the difficulties he experienced in rehabilitating himself, including a longer tedious course of physiotherapy, and of resuming work at the office. I need not go into this in any detail as it is agreed that, by way of special damages, he is entitled to £3000, being the salary paid to Mr J Mayne, an assistant solicitor who was engaged by the firm during the enforced absence of the plaintiff due to his injury; the salary has been debited to his share of the firm's profits for 1976.

It is not disputed that the plaintiff still suffers considerable pain in the ankle after walking any distance, standing for periods, etc. He has not yet been able to resume his hobby of game-shooting which entails walking considerable distances.

Unfortunately for the defendant, one result of the injury was that a similar fracture which the plaintiff had sustained in the left ankle in 1963 during his rugby playing days (he is now aged fifty-one but had

been “capped” for Wales) “flared up” (to use his own words), and now he finds the left ankle as painful as the right ankle. He had not been having any trouble with it before the accident. When he became mobile again, the old injury made him feel insecure. He felt pain again. He concluded his evidencein-chief by saying that he had seen pool attendants scrubbing down the mattresses for the wooden wheeled beds which were kept in the store adjoining the changing room on the same area outside it. He had seen water on it.

In cross-examination the plaintiff admitted that, although this was his first visit to the changing room, people after swimming do use it with wet feet. As an athlete he is familiar with changing rooms and showers but he did not expect to find this treacherous trap. There are ways of minimizing such risks. He had no difficulty in finding his way in. He was not in a hurry on his way out, being relaxed and on holiday. Finally, the plaintiff stated that in 1975 he had no recollection of seeing a notice disclaiming liability on the wall on the left as one descends the ten steps from the assembly area to the pool. He agrees that it is there now.

Fortunately for the plaintiff, Mr Strugnell is an engineering and building contractor, also from Cardiff, and he was able to give some cogent evidence of the proper treatment of the surrounds of swimming pools so as to render them non-slippery. On his visit in November 1974, he noticed that those surrounds were finished in a granolithic concrete surface; perfectly smooth with no non-slip property. The same applied to the three sets of steps shown in the building plan. The ten steps photographed in the plan had a covering of a wide contour rubber mat which was easily removed. The steps down from the pool to the outdoor bar and the three steps down before the one step to the changing rooms had the same finish, as did the corridor between the changing rooms and the flower bed.

The surface of the floor in the men’s changing room had a terrazzo finish with no ebonite inserts to arrest continuity of movement, and the area immediately outside had the same granolithic concrete surface. On his earlier visit Mr Strugnell had been with a Mr and Mrs Graham. Mrs Graham had fallen heavily on her spine on the area adjacent to the steps leading to the changing rooms. The surface was entirely unsuitable and dangerous to have round a pool.

On his return visit in November 1975, Mr Strugnell found that the area immediately round the pool, the steps and the corridor had been treated with a cement texture application, probably sandtex which is a relatively cheap and easy preparation to apply. Its effect is to make a floor surface abrasive and non-slip. It is one of the recognised safety methods used around swimming pools. Although he does not specialise in building swimming pools, Mr Strugnell has built four; and he has one of his own. He also noticed that the rubber mat had been removed from the first flight of steps. Probably due to an oversight, the area outside the changing room had not been treated with sandtex. On two occasions Mr Strugnell had noticed the pool attendant cleaning the mattresses on the area with water and detergent additive to remove sun-oil deposits from them. Unless the floor itself was cleaned with a strong detergent there was a possibility that oil would remain on it thus rendering it more dangerous, especially to someone walking over it with bare feet.

Mr Strugnell noticed a number of notices on the wall going down to the pool. He thought that they related to the admission charges for nonresidents.

The plaintiff’s last witness was Mr HR Patel FRCS who examined him on 5th March 1977 after both ankles had been x-rayed. He elaborated on his report by saying that the definite signs of osteo-arthritis in the left ankle will be accelerated by the second injury and that arthrodesis to relieve pain will have to be performed earlier. Mr H J Richards FRCS, who examined the plaintiff in Cardiff, had come to the same conclusion in his report. Both ankles will become more painful as time goes on, with a lesser degree of

movement. Mr JH Jewell FRCS in his reports is in substantial agreement although he refers to arthrodesis of the right ankle. I think it is agreed that this operation can only effectively be performed on one ankle, leaving the plaintiff to endure increasing pain and discomfort in the other.

Mr AG Majala, the maintenance supervisor at the hotel, gave evidence that since 1973 there has been a notice 18 inches by 15 inches in English with white lettering on a blue background on the wall on the left, three steps from the bottom of the main steps leading from the assembly area in the following terms:

The hotel management shall be under no liability whatsoever arising out of the use of the swimming pool and the users of the swimming pool shall be deemed to renounce for themselves and their representatives all claims for compensation for injury (fatal or otherwise) however caused or sustained in or near the swimming pool.

In cross-examination, Majala agreed that there were other notices on the wall including a notice in four languages setting out the charges for swimming for non-residents. An attendant sat under the umbrella on the top of the steps on the right to sell them tickets. Some flower boxes would mean that guests and visitors would descend the steps away from the wall. Anyone approaching the pool or the changing rooms from the south wing, as the plaintiff says he did on this occasion, would not see the notice. It appears that it would be at eye level on the fifth or seventh step going down. I accept this evidence. It concluded the evidence in the case.

The plaintiff's cause of action is set out in paragraph 5 of the plaint as follows:

5.The matters complained of were caused by the negligence and breach of statutory duty of the defendant, their servants or agents.

Particulars

(a)Failing to use in the construction of the hotel building, such materials and floor surfaces as would prevent the floor from becoming slippery and dangerous.

(b)failing to inspect the floor regularly or at all;

(c)failing to sweep the water off the floor at regular intervals or otherwise failing to keep it dry;

(d)failing to warn the plaintiff that the wet cement floor was dangerous and slippery or that the wet cement floor constituted a danger;

(e)by reason of the foregoing and otherwise, failing to discharge the common duty of care to the plaintiff in breach of the said Act.

This is denied in paragraph 3 of the defence. The defence goes on:

4.The defendant says that the matters complained of by the plaintiff occurred solely as a result of his own negligence.

Particulars

The plaintiff was negligent in that he:

(a)failed to have any or any sufficient regard for his own safety;

(b)failed to take any or any reasonable precautions to ensure that he would not slip and fall;

(c)being in the changing and shower room failed to exercise any or any special care when he knew or ought to have known that the floor was or was likely to be wet;

5.In the alternative the defendant says that the matters complained of were substantially contributed to by the negligence of the plaintiff and repeats the particulars of negligence set out in paragraph 4(a) to (c) inclusive above.

After the close of the plaintiff's case an eleventh-hour application by Mr Guram, for the defendant, to amend the defence by renumbering paragraph 6 as paragraph 7 and by inserting a new paragraph 6 was allowed. It reads:

6. In the further alternative the defendant relies as exempting it from liability the existence of a notice in the vicinity of the areas where the accident occurs in the following terms – [the terms of the notice have already been referred to].

In his reply to the defence, the plaintiff alleges:

2. In particular the plaintiff denies that he in any manner contributed to his own injury; the plaintiff alleges that the defendant ought to have known of the extremely dangerous situation created by the presence of water in the smooth floor which existed at the time in the men's room and did nothing to warn the plaintiff of the same.

The reference to breach of statutory duty on which the plaintiff relies is to section 3(1) and (2) of the Occupier's Liability Act which came into force on 1st January 1963 and which, being based on similar legislation in the United Kingdom, makes the English decisions of persuasive authority. It reads, along with subsection (4)(a) which deals with the effect of a disclaimer notice:

3. (1)An occupier of premises owes the same duty, the common duty of care, to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.

(2) For the purposes of this Act, 'the common duty of care' is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for, example) in proper cases – (a) an occupier must be prepared for children to be less careful than adults; and (b) an occupier may expect that a person, in the exercise of his calling will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example) (a) where damage is caused to a visitor by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe;

The occupier of premises now owes one standard of duty to visitors whether they be invitees or licensees, 28 *Halsbury's Laws of England* (3rd Edn), page 45 reads:

The common law requirement that the invitee shall use reasonable care for his own safety is replaced by the provision that the degree of care or want of care which would ordinarily be looked for in the visitor is a relevant circumstance; and limitations are placed on the effectiveness of a warning by the occupier in absolving him from liability ....

Again earlier at *ibid*, page 44:

In determining whether the occupiers has discharged the common duty of care to a visitor regard must be had to all the circumstances. Thus, where damage is caused to a visitor by a danger of which he has been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe.

In the present case would the warning notice cover the trap of the untreated area"

The second limb of the plaintiff's case is the implied warranty by common law by the hotel-keeper that the premises are, for the purpose of the personal use of his guest, as safe as reasonable case and skill on the part of anyone can make them: see 21 *Halsbury's Laws of England* (3rd Edn), page 450. In *Maclenan v Seager* (1917) 86 LJKB 1113, McCardie J said at page 1117:

So, too, as to premises generally, the rule, I think, is the same, and upon the decisions as they stand may be stated as follows – namely, where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties – unless it provides to the contrary – contains an implied warranty that the premises are as safe for such purpose as reasonable care and skill on the part of any one can make them. The rule is subject to the limitation that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair or maintenance of the premises; and the headnote to *Francis v Cockrell* (1870) LR 5 QB 501 must to this extent be corrected.

Can it be said that the defendant used reasonable care and skill in the maintenance of this potentially dangerous area of its premises" It had appreciated the danger by the remedial measures which it had instituted to the hotel facilities, including the changing room which was adjacent to the pool. I am unable to see how the plaintiff's familiarity with changing rooms and showers should have made him even more careful for his own safety. What was he to do" Proceed at a snail's pace or desist from using that particular toilet"

The particulars of his negligence are pleaded in general terms in the defence. I find it difficult to apply the defence of contributory negligence to the facts of this case. If someone had seen the plaintiff rush out of the changing room it might well have been otherwise. I think that *Appleton v Cunard Steamship Co Ltd* [1969] 1 Lloyd's Rep 150 is in point. There the plaintiff slipped on linoleum on a sloping floor in the defendant's steamship, The Queen Elizabeth, and it was held liable on the ground that it was slippery and should have been treated with non-slip polish. This was the first time the plaintiff had been on board the ship; as here it was the plaintiff's first visit to the changing room. Both of them were taking reasonable care for their own safety and did nothing foolish or reckless. It was not enough to prove that the plaintiff may have been aware that there might be hazards in using a changing room. The defendant should have taken extra precautions against the probable wetness of the floor due to bare-footed swimmers walking over it. The application of sandtex and the removal of the ritual of scrubbing the

mattresses to a safer place would have obviated the extra risk.

Before finally deciding the question of notice, I would like to refer briefly to the four cases cited by Mr Guram where the occupier was exempted from liability for slippery surfaces on their premises. In *Thomas v Bristol Aeroplace Co Ltd* [1954] 2 All ER 1 the icy surface at the entrance to a factory was caused by an exceptional snowstorm. In the present case the slippery surface of the area created an every-day situation which the defendant could have taken steps to avert. In *Bell v Travco Hotels Ltd* [1953] 1 All ER 638 the slippery part of the drive was 1/4 mile from the hotel at the far end of the drive, close to the main road; and it was held that the mere fact that part of the drive was slippery was not evidence of failure to take reasonable care by the proprietors of the hotel. Here the slippery surface was on the actual premises. In *Lowther v H Hogarth & Sons Ltd* [1959] 1 Lloyd's Rep 171 it was held that if there was oil on a ship's deck it was not an unusual danger for a stevedore who fell and was injured bearing in mind his calling with an appreciation to guard against any special risks ordinarily incident to it. Here the plaintiff had no such special calling. In *Jennings v Cole* [1949] 2 All ER 191 it was claimed that the plaintiff had slipped on a rug placed on a highly polished floor; but Lynskey J said at pages 192, 193:

I am satisfied that the floor was polished round, and not underneath, the rug, and that the plaintiff had been coming to these premises regularly for years .... she knew exactly what the conditions were.

Here, the untreated surface was an unusual danger of which the plaintiff was unaware. Mr Guram also cited *Turner v Arding & Hobbs Ltd* [1949] 2 All ER 911 which he admitted was rather against him. There it was held that vegetable matter on the shop floor which caused the customer to slip was an unusual danger and that the burden was on the defendant to explain how it came to be there, or to adduce evidence to show that reasonable steps had been taken to avoid the accident. Here, the defendant took no steps to discharge that onus of proof.

Subject to the question of notice I find that there is no defence to this claim. I am against Mr Satchu's contention that its wording is not wide enough to cover the changing rooms. They are "in or near the swimming pool". It was probably adequately displayed, even if guests did not approach the swimming pool via the steps. They had an opportunity of seeing it when they entered the main building for meals. A foreigner not conversant with English would probably not have been bound by it. The question remains whether the plaintiff was bound by it. On the authority of *Olley v Malborough Court Ltd* [1949] 1 KB 532 no excluding or limiting term will avail the party seeking its protection unless it has been brought adequately to the notice of the other party before the contract is made. There the notice disclaiming liability for lost or stolen articles was in the guests' bedroom and the Court of Appeal held that the contract was complete before the guests went up to their room and no subsequent notice could affect their rights.

When the plaintiff signed in at the hotel he was invited to avail himself of its facilities including the swimming pool. While a non-resident would probably have been bound by the notice as he paid his money at the top of the steps, a resident should have been warned by a notice at the reception desk. The plaintiff would be bound by the notice if its terms were sufficiently brought to his notice before-hand. As was said by Lord Denning MR in *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, 169:

He is not bound by the terms printed on the ticket if they differ from the notice, because the ticket comes too late. The contract has already been made.

See also *Chesire & Fifoot's Law of Contract* (8th edn), pages 126 to 128. The notice was probably also made ineffective by the catching provision of subsection (4)(a) or section 3 of the Act. It was not enough o enable the plaintiff visitor to be reasonably safe when he was negotiating the treacherous

surface of the area outside the changing room. The plaintiff succeeds on the issue of liability.

Finally, I come to the question of damages. Special damages have been agreed at (1) in the United Kingdom, £3053; and (2) in Kenya, Shs 3030. In assessing general damages I have to take into consideration the plaintiff's pre-existing disability. It will increase the damages awarded for the relevant injury, because the existing condition means that the relevant injury has a more serious effect that it would have had apart from the pre-existing condition. This, in particular, applies where pre-existing arthritis has been aggravated by the relent injury: see *Kemp & Kemp*: *Quantum of Damages* (1967), part 11, page 101. Mr Satchu, for the plaintiff, referred to three cases in 1974, 1969 and 1975 in part 10 of the same volume where sums of £3000. £3000 and £3500 were awarded for pain and suffering and loss of amenities in respect of a fractured ankle. The element of osteo-arthritis was present in all of them. Mr Guram referred to five cases between 1963 and 1970 where sums ranging from £1250 to £2500 were awarded as general damages for similar injuries; but as I read those older cases the onset of arthritis charges was less certain or lay more in the future. No local awards were cited to me. Doing the best I can on the material before me and bearing in mind the plaintiff's pre-existing disability, I award him Shs 90,000 as general damages. There will be judgment for the plaintiff for Shs 93,030 and £3053 with interest and costs.

Judgment for the plaintiff with costs.

Dated and Delivered at Mombasa this 17th day of March 1977.

D.J.SHERIDAN

JUDGE