IN THE SUPREME COURT OF SEYCHELLES

Claude Hoareau
of Bel Ombre, Mahe

Plaintiff

Vs

Land Marine Limited
Herein represented by its
General Manager Eugene Ah-Koon
Of old Port, Mahe

Defendant

Civil Side No. 234 of 2002

Ms. Lucie A. Pool for the Plaintiff

Mr. Lablache for the Defendant

D. Karunakaran, J.

JUDGMENT

This is an action in delict. The plaintiff in this matter claims damages in the sum of R100, 000/- from his employer, the defendant-company for a bodily injury he sustained, as a result of a "fault" allegedly committed by the defendant in that, the defendant-company failed in its duty to provide or ensure the plaintiff a safe system of work in its employment.

The facts of the case are these:
The defendant is a locally registered company. It is engaged inter alia, in the business of stevedoring and shore handling of sea-cargoes at the New Port, Victoria, Mahe, Seychelles. At all material times, the plaintiff was an employee of the defendant. He had been working with the defendant as well as with its predecessor for a total period of about eighteen years as forklift operator in the port-unit operation of the company. The plaintiff is now 67, retired and living on pension.

In the year 2002, the plaintiff was 61. He was still in employment with the defendant. In fact, it was the evening stage of his career as forklift operator with the defendant-company. According to the plaintiff, he was awaiting his retirement in a couple of years ahead on superannuation. In early 2002, one Mr.

Gerald Dina (DW1) was the Store Services Manager of the defendant-company. The company's Plant Manager Mr. Serge Cecil was then the plaintiff's immediate supervisor. On 16th January 2002, the plaintiff as usual reported to work at 8 am. It was a rainy day. The plaintiff's job on that day, involved duties inter alia, of operating a 7-ton forklift to transfer the cargo from the shore to the boat docked in the harbour. At around 10 am, while the plaintiff was operating the forklift to put a pellet of salt onboard a vessel, it started raining heavily. As the hood over the cabin of the forklift had been broken, rain directly fell into the cabin and wet the floor inside. The plaintiff was also getting wet as he had no raincoat on him since the employer had not provided one. The rain intensified and the plaintiff could not continue his work. He was coming out of the forklift so as to take shelter outside. Since the cabin floor was wet and oily due to oil-leak from the machine, he slipped, fell off the steps and landed on the ground outside. As a result of the fall and the impact, the plaintiff sustained injury to his left wrist. The crucial part of the plaintiff's evidence in this respect runs thus:

> "The forklift tent was broken. There was a sort of vent line in there, and on the sides there were nothing to prevent the rain from coming in. I had no raincoat… on several occasions I had asked for a raincoat; but they told me that it had not yet arrived. … on the forklift itself , there was something that protects the operator from rain; but it had been broken down and there was nothing that protected the rain from coming into the forklift on both sides… there was a bit of dust on the surface of the forklift. But, when the rain fell down it washed the dust away and underneath there was some oil… Only when there is problem with the machine, it is sent to the workshop, it is then that it is washed so that they will be able to see the problem with the machine, Apart from that, they do not wash or clean the forklift… When the rain started to fall, the rain was coming into the forklift and I was getting wet. So I was coming out of the forklift to hide away from the rain. The forklift itself has a step. I had to go down this step for me to get down from the forklift; it was then I slipped… when I fell down on my arm and the driver came to help me … and conveyed me to English River hospital… then I was transferred to Victoria Hospital… and then he (Dr. Alexander)

tried to fix my arm.. then he applied Plaster of Paris to my hand. I was given three months' leave... After the plaster of Paris was removed, I was given another three months' leave… But still something is wrong with my hand. There is a sort of protrusion, the bone is protruding. I cannot hold on to heavy objects at all... subsequently I went for physiotherapy for two months… I still feel pain in my hand"

The medical report in exhibit P1, dated 16th September 2002 compiled by the then Principal Medical Officer Dr. Jude Gedeon regarding the plaintiff's injury reads thus:

"***RE: Claude Hoareau -62 years- Belombre***

The above named gentleman presented at English River Health Centre on 16th January 2002. He had fallen onto his left hand while working in a forklift. He sustained injury to his left wrist. The clinical signs and symptoms at presentation led the attending doctor to suspect that there was a fracture of the wrist bones.

An X-ray of the wrist was requested and performed on the same day. The radiologist reported the findings of a comminuted *colle's fracture in the left wrist. He was then seen by the orthopaedic surgeon on call.*

After the fracture had been reduced, a cast (plaster of Paris-POP) was applied to immobilize the fractured site in position.
A check X-ray was done to confirm bone alignment and the patient was given an appointment for review in one month in the specialist out-patient department (SOPD)

(Sd) Dr. Jude Gedeon
Ag PMO"

Incidentally, the Medical Dictionary (by Farlex) defines "**comminuted fracture"** as a fracture, in which the bone is splintered or crushed whereas **Colles' fracture** means a fracture of the lower end of the radius, the lower fragment being displaced backward; if the lower fragment is displaced forward, it is a *reverse Colles' fracture.* Be that as it may. The plaintiff further testified that because of the said injury and fracture, he developed pain in his wrist. He had bone protrusion. It also affected his capacity to lift heavy objects, apart from disfigurement. Hence, the plaintiff took an early retirement that was, two years before his attaining the age of superannuation

According to the plaintiff, he had been performing work as forklift operator for about 18 years without any bad record or mishap prior to the said accident, in accordance with the instructions given to him by his supervisor at work. However, on the day in question, the accident happened solely due to the fault and negligence of the defendant in that, despite repeated requests the defendant failed to provide him raincoat/necessary protective clothes for the performance of his work in the rainy days. Besides, there was no one to supervise or instruct him during the course of his employment. Had the defendant given him a raincoat, according to the plaintiff, he would not have left the forklift at the material time, and the accident would not have happened. Normally, it was the practice among thee employer to provide raincoats or protective clothes to the forklift operators, whilst at work especially on rainy weather conditions. For instance, when the defendant used to rent out its forklifts with drivers to IOT to remove fish, the employer (IOT) always used to provide the drivers yellow raincoats or protective clothes. But, the defendant failed or neglected to provide such protective clothing and paid no attention to the forklift drivers and changing weather conditions whilst at work.

In the circumstances, the plaintiff contended that the said injury of his wrist and the consequential pain, suffering and impaired ability to lift heavy objects were caused solely due to the fault and negligence of the defendant-company in that, it:

1. *failed to establish a safe system of work to the plaintiff*

failed to provide proper supervision and instruction; and
failed to pay attention to the plaintiff's repeated requests for protective clothing; and
was negligent in all the circumstances of the case, including the fact that it failed to perform proper maintenance and regular cleaning of the forklift used by the plaintiff.

In view of all the above, the plaintiff claims that he suffered loss and damages in his estimate as follows:

a. Pain and suffering due to fracture of the left wrist R 50, 000.00
b. Disfigurement and permanent disability R 30, 000.00
c. Distress and inconvenience R 20, 000.00

Total ***R 100, 000.00***

Therefore, the plaintiff prays the Court to enter judgment in the sum of R 100,000/- against the

defendant with costs.

On the other side, the defendant denies all the particulars of loss, damages, liability and quantum of damages claimed by the plaintiff. According to the defendant, it was not negligent in any manner to be held responsible for the accident. The defendant's employee Mr. Gerald Dina (DW1), the Store Services Manager testified that although plaintiff had to operate the said forklift in pursuance of his employment, it was plaintiff's responsibility to report to his supervisor in case of any oil leak or inadequate maintenance of the machine. His supervisor would have then and there, made the necessary arrangements to clean it or for repairs. Further, he testified that a couple of months after this accident, the plaintiff got his retirement having attained the age of his superannuation. In cross -examination, he stated that he did not know whether the plaintiff had on the day in question, been given protective clothes or not. He also stated that all forklifts do not have hood but some of them have. Moreover, he testified that he did not know whether the forklift, which the plaintiff used on that particular day, had a hood or not. In the circumstances, the defendant-company contended that it neither committed any "fault" in law nor caused any occupational injury to the plaintiff through its negligence during the course of his employment. Therefore, the defendant sought dismissal of the action with costs.

First of all, as to the responsibility of the employer for the damage sustained by his worker in the course of employment it is relevant to note the following:

- Dalloz Codes Annotés (Ed. 1874) Under Article 1383:

77.Le maître responsable du dommage aux ouvriers qu'il employé, lorsqu 'il a négligé de prendre des précautions suffisantes pou garantir leur sécurité."

It is trite to say, the duty of the employer is to ensure that the work in which his employee is engaged should be safe. Any failure on the employer's part to do so constitutes "faute" and the employer is responsible for any damage resulting therefrom, which the employee may sustain *vide Servina v. W & C French & Co. Case No: 11 SLR 1968.*

I shall now turn to the issue of responsibility.

There is sufficient evidence on record that the plaintiff, in the performance of his duty, as forklift operator was required to transfer, load and unload the heavy cargoes throughout the year, irrespective of the whether conditions of the day. The plaintiff has repeatedly asked his employer for protective clothes but it appears that the defendant did not pay any heed to the request of the plaintiff. The evidence of the plaintiff in this respect is reliable and more so not

contradicted by the evidence of DW1, who gave an impression to the Court, that he was not aware of the day-to-day activities of the forklift drivers, who were working in the port-unit for the defendant-company. There is unchallenged medical evidence on record that the plaintiff had a fall in the course of his employment and sustained fracture to his left wrist, and suffered pain, suffering and disfigurement. .

What must be decided here is whether the plaintiff has proved that the work he was asked to do was hazardous or in other words whether the defendant failed in its duty in taking all reasonable precautions to ensure his heath and safety in the employment.

On a careful examination of the evidence adduced by the plaintiff, I find that the work of operating a forklift during rainy days without protective clothes was not all together safe and free from danger. In other words, I find that such operation during rain was dangerous. Further, I am equally satisfied on evidence that the defendant failed in its duty in taking all reasonable precautions to ensure the plaintiff a safe system of work in the employment at the material time and whether conditions. Hence, I find the plaintiff has thus, established “faute” against the defendant. Hence, the defendant is liable for the loss and damages, which the plaintiff suffered therefrom.

I shall now move on to the assessment of damages.

The dearth of authority pertaining to damages in respect of this particular injury - fractured wrist - makes correct assessment by comparison with other domestic awards impossible. In relation to quantum in this respect, it seems to me that even the decisions of English Courts are inapplicable and inappropriate, as those decisions were made in an entirely different socio-economic climate, living standard and index.

Having said that, I note, the plaintiff is now 67 years old and a pensioner. He has been working with the defendant and its predecessor for eighteen year prior to the accident. At the time of the trauma, he was about to take retirement and pension. Despite the said fracture to his left wrist, he is now performing his daily chores like any other man of his age and health condition.

However, he should have obviously, suffered a considerable pain, suffering and inconvenience because of the injury. He has been admitted in hospital for treatment. The fracture is now aligned. He has been on paid medical leave for about six months following the said injury.

It is pertinent note here that in the case of *Rosalie and another v Duane and another SLR 1987 p121,* the Supreme Court of Seychelles having awarded damages for pain and suffering held inter alia:

(a) *In assessment of damages the rate of inflation would be a reasonable consideration; and* social development with its economic implications, to be reckoned in deciding quantum of damages;

In the instant case, for the right assessment of damages, I take into account the guidelines and the quantum of damages awarded in the following cases of previous decisions, which in my view could give some indication relevant to the case on hand:

(1) *Harry Hoareau Vs. Joseph Mein, CS No: 16 of 1988*, where the plaintiff was awarded a global sum of Rs30, 000/- for a simple leg injury caused by a very large stone. That was awarded about 16 years back.

(2) *Francois Savy vs. Willy Sangouin, CS No: 229 of 1983*, where a 60 year old plaintiff was awarded Rs50, 000/- for loss of a leg. That was awarded about 20 years back.

(3) *Antoine Esparon vs. UPSC, CS No. 118 of 1983,* where Rs 50,000/- was awarded for hand injury resulting in 50% disability and the plaintiff was restricted to light work only. Again this sum was awarded about 22 years back.

(4) *In Jude Bristol Vs Sodepec Industries Limited - Civil Side No.126 of 2002,* where Rs 160,000/- was awarded for an injury that resulted in amputation of distal part of the right forearm, that involved no loss of earning as the plaintiff continued to work doing light duties with his employer.

As regards the assessment of damages, it should be noted that in a case of tort, damages are compensatory and not punitive. As a rule, when there has been a fluctuation in the cost of living, prejudice the plaintiff may suffer, must be evaluated as at the date of judgment. But damages must be

assessed in such a manner that the plaintiff suffers no loss and at the same time makes no profit. Moral damage must be assessed by the Judge even though such assessment is bound to be arbitrary. *See, Fanchette Vs. Attorney General SLR (1968).* Moreover, it should be noted that the fall in the value of money leads to a continuing reassessment of the awards set by precedents of our case law. See, *Sedgwick* vs. *Government of Seychelles SLR (1990).*

In the final analysis, taking all the above into account, including the age and station in life of the plaintiff, his past and present pain and suffering and the fact that he may suffer some inconvenience from the said injury for the rest of his life, I award damages as follows:

(a) For pain and suffering I award damages in the sum of Rs20, 000/- to the plaintiff.

For disfigurement and permanent disability I award a sum of Rs10,000/- and
For distress and inconvenient in the sum if Rs 10,000/-

Thus, having given diligent consideration to all the facts and circumstances to the instant case, I enter judgment for the plaintiff and against the defendant in the sum of R40, 000. 00 with costs.

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D. Karunakaran

Judge

Dated this day of 18th October 2007