

**FARABEAU v CASAMAR SEYCHELLES LTD**

**(2012) SLR 170**

A Amesbury for the plaintiff  
Frank Ally for the defendant

**Judgment delivered on 31 May 2012 by**

**EGONDA-NTENDE CJ:**

The plaintiff is a 36 year old former employee of the defendant. The defendant is a company registered in Seychelles carrying on the business of repairing, maintaining and fitting of fishing nets to commercial fishing vessels. It is contended for the plaintiff that on 11 August 2008 at New Port Victoria in the course of his employment with the defendant the plaintiff was injured when a bale of new fishing net fell on him. The plaintiff avers that the said accident was caused by the fault and negligence of the defendant and its employees, by reason of which he suffered injury, loss and damages.

The plaintiff sets out the particulars of fault and negligence of the defendant as follows: (a) that the defendant failed to provide a safe system of work and a workplace for its employees which included the plaintiff; (b) that the defendant failed to provide adequate supervision or any supervision at all; (c) that the defendant failed to warn or provide adequate warning of the dangerous nature and risk involved in the performance of the job at hand; (d) that the defendant failed to provide protective gear and equipment; and (e) that the defendant and its employees were negligent or reckless in all the circumstances of the case.

The plaintiff claims to have suffered the following injuries: (a) swelling and tenderness of left knee and a comminuted fracture of the left patella; (b) patella-femoral anchilosis restriction of movement; (c) atrophy of the quadriceps muscle; and (d) permanent disability.

The plaintiff therefore claims from the defendant the following sums of money under the said headings: (a) pain and suffering – R100,000; (b) loss of amenities – R150,000; (c) distress and inconvenience – R149,300; (d) permanent disability – R500,000; (e) medical report – R700; and (f) loss of earnings – R1,497,600; totaling to a sum of R2,397,600.

The defendant opposed the plaintiff's claim. The defendant accepts that the accident occurred on 11 August 2008 at New Port Mahé during the course of the plaintiff's employment with the defendant. The defendant further states that the plaintiff was assigned to zone 14 to remove a fishing net from a 40 foot container. The plaintiff climbed on top of the container to hook the net onto a crane. Once the net was hooked the plaintiff was required to descend from the top of the container. The tractor which

was pulling the container moved forward and the plaintiff who remained on top of the container tripped and fell off. The defendant contends that the plaintiff was injured as a result of his own sole negligence or fault or in the alternative the plaintiff contributed substantially to the said accident.

The defendant sets out particulars of negligence of the plaintiff as follows: (a) that the plaintiff failed to follow any or all of the safe systems of work provided by the defendant to all employees and supervisors; (b) that the plaintiff failed to follow any or all instructions of the supervisors on site; (c) that the plaintiff failed to listen and or follow any or all warnings regarding the safe mounting on and decent from the container; (d) that the plaintiff failed to use any or all of the safety equipment provided on site; (e) that the plaintiff failed to wear any or all of the protective gear provided on site; (f) that the plaintiff failed to descend from the container when required as per procedure; and (g) that the plaintiff was negligent and reckless in all circumstances of the case.

The defendant denies that the plaintiff suffered any injury, loss and damage or in the alternative that the plaintiff's claim is grossly exaggerated. He prayed that the plaintiff's action be dismissed with costs.

The plaintiff called five witnesses and the defendant called one witness. From the account of eyewitnesses at the scene of the accident what happened on that day is clear. The plaintiff arrived at his place of work in the morning. There was an assistant supervisor Mr Smith who was driving the tractor and there was another colleague named Mr Jim Mellon. The plaintiff in his ordinary clothes climbed onto a 40 foot container to remove the fishing net and hook it onto a crane. There was a tractor attached to the container which would pull the container forward. The plaintiff remained on the container.

The assistant supervisor, the most senior official of the defendant who was on site on that day, testified that he instructed the plaintiff to remain on top of the container as they continued to work. While the plaintiff was on top of the container he tripped and fell to the ground, most probably due to the container being pulled by the tractor. The plaintiff was injured and he was rushed to Victoria Hospital.

The plaintiff suffered multiple injuries including a fracture of the left patella. He was operated on twice but in spite of his recovery he has suffered among other things a certain level of permanent disability. He is not able to move his leg as he used to. Neither is he able to stand for long. He is no longer able to participate in sports. His sex life has been inhibited. He has failed to get alternative employment and lost the employment he had with the defendant. At the time he was working with the defendant as a labourer he used to earn R4500 per month. He claimed he was able to work with another organisation at the same time and his total monthly income would come up to about R8000 per month.

In terms of determining liability it appears to me important to determine whether, as the defence contended, a safe system of work was provided and protective clothing

provided to the workers but that the plaintiff failed to follow the safe system of work and/or at the same time failed to wear protective clothing. The defendant contends that they provided head gear and boots as well as a ladder for climbing the 40 foot container. Secondly that the plaintiff failed to care for his safety as a reasonable man ought to have done and thereby was responsible solely for the accident or contributed to the accident. See *Tirant and Anor v Banane* (1977) SLR 219.

The evidence available from those who were on the scene is that there were no helmets available at the scene that day. And though a ladder might have been available, it was unhelpful to climb and get on top and down of the 40 foot container as it was too short. As regards the instructions to hook the net onto a crane and then come down, Mr Smith who was the assistant supervisor and highest official of the defendant on site testified that that was not the way they worked. In fact he stated that he specifically instructed the plaintiff to remain on top of the container as the net was pulled out because repeatedly the plaintiff would be required to help and pull the net onto the crane. It would not be practical for the plaintiff to climb up and down every time that the net had to be hooked to the crane and that is why he was required to stay on top of the container.

I accept the evidence of Mr Smith on this point which is consistent with the testimony of the plaintiff as to the method of work that was being employed at the site. I'm satisfied that firstly in light of the nature of the work the defendant failed to provide for a safe system of work for an employee in the nature of the work that the plaintiff was doing. To stand on top of a container which was periodically being moved by a tractor is fairly dangerous work and the potential for accident quite high as happened in this case. There was no protective clothing provided at the site and in any case the helmet or boots that the defendant had claimed he made available without indicating where they were would not have protected the plaintiff from the injuries he suffered which was a fracture of the left patella. I am therefore satisfied that the defendant is liable for the injury suffered by the plaintiff.

In light of the testimony of Mr Smith I am unable to accept the defence case that the plaintiff was either the sole cause or contributed to his injuries. The plaintiff was following instructions of the most senior official of the defendant on site. If those instructions were contrary to the defendant's company instructions for safe working the blame would not lie upon the plaintiff but upon the defendant's supervisor giving such instructions to the plaintiff for which the defendant would be liable. As I have accepted the evidence of Mr Smith on this point I hold that there were no such instructions as has been put forth by Mr David Fabien. As the plaintiff followed instructions issued by the defendant's supervisor on the scene I am unable to find that he contributed to or was the sole cause of the accident.

The plaintiff has claimed damages for pain and suffering, loss of amenities, distress and inconvenience and permanent disability. From his testimony I accept that he suffered pain and suffering. And that there has been a loss of amenities together with permanent disability. He has not proved that he spent R700 on the medical report. I am hesitant

with regard to the claim for distress and inconvenience. I suppose distress will fall into pain and suffering or if the distress is caused by the permanent disability it would be subsumed in the claim for permanent disability together with inconvenience.

The plaintiff has claimed a sum for each item without necessarily explaining why it should for instance be R100,000 rather than R50,000. No guide by way of past awards of this court or other court for similar injuries has been provided to me by counsel for the plaintiff, Mrs Amesbury. Ms Alton who assisted Mr Frank Ally, counsel for the defendant, referred to some cases in her submissions but did not provide the citation nor make copies of the decisions available. As a result I have been unable to obtain any guidance therefrom.

In *Alan Tucker and Anor v La Digue Island Lodge* Civil Side No 343 of 2009 the Supreme Court awarded R190,000 to a plaintiff that had suffered a fracture of the knee with residual swelling and impairment of movement which was likely to grow worse with the development of osteoarthritis. He had incurred pain and suffering too. Rather than approach each head of claim separately, that is pain and suffering including distress and inconveniences, loss of amenities, and permanent disability which assessed at 30, I will give a joint award in respect of those injuries. In my estimation R350,000 will be sufficient recompense for injuries that the plaintiff suffered and continues to suffer by reason of the accident.

I accept, as he testified, that he was earning R4,500 per month and that since his accident he has been incapacitated in such a way that he is not able to get similar work or indeed any other work. I will generally apply the principles adopted by Sir George Souyave in *Chang Yune v Civil Engineering* (1973) SLR 259. I shall take the number of years of the plaintiff's expected working life (the difference between his age at the time of the accident (36) and the age of 63) and multiply the same by his annual income, and discount it for accelerated benefit and other imponderables including that he may well not have worked up to that age. I will discount it by a factor of 33%. I award the plaintiff the sum of R972,000 for loss of future earnings.

I therefore enter judgment for the plaintiff in the total sum of R1,322,000 [one million, three hundred and twenty two thousand only] with costs.

As the plaintiff's counsel was retained by the Legal Aid Fund, I direct that the party to party costs to be recovered from the defendant shall be paid into the Legal Aid Fund. Plaintiff's counsel shall present a bill of costs in this regard in the normal way.