IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS. 90 of 2012

[2018] SCSC 09

MR JEAN-CLAUDE DOGLEY OF BEL AIR, MAHE
Plaintiff

Versus

PETITE ANSE DEVELOPMENTS LTD (REP BY THE GENERAL MANAGER, MR ALEX PORT-LOUIS, AND TRADING AS THE FOUR SEASONS RESORT SITUATED AT PETIT ANSE, BAIE LAZARE, MAHE).

Defendant

Heard: 29th May 2013, 13th October 2014, 30th October 2015 and 18th October 2017.

Counsel: Mr. A. Derjacques for the Plaintiff
Mr. E. Chetty and Mr. B. Hoareau for the Defendant

Delivered: 12th day of January 2018

JUDGMENT

S. GOVINDEN J

[1] This Judgement arises out of as plaint filed before the Court by Jean-Claude Dogley ("Plaintiff") of the 20th June 2012 against Petite Anse Development Ltd ("Defendant"), wherein the Plaintiff alleges that he suffered several injuries resulting from the Defendant's failure to provide a safe working environment during the course of his employment. On 19th September 2012, Defendant filed a Statement of Defence.

[2] Upon completion of the hearing, the Defendant and Plaintiff submitted final written submissions on 2nd June 2016 and 14 November 2017 respectively of which contents have been noted for the purpose of this Judgement.

[3] The following are the relevant factual background in a gist as per the Records as accepted to be adopted by both parties.

[4] The Plaintiff, is a qualified electrical and mechanical engineer, who was an employee of Defendant, a company engaged in the tourism industry trading as the Four Seasons Resort. On 4th February 2011, during the course of his employment, the Plaintiff attempted to inflate the tyre of a buggy vehicle belonging to Defendant. While inflating the tyre with air, however, the tyre burst causing physical injury in the region of Plaintiff's eyes and face. More specifically, the Plaintiff alleges that his injuries were due to Defendant's faute, namely failing to: (i) to establish a safe system of work; (ii) to provide eye safety goggles; (iii) to provide a pressure gauge to measure air pressure; (iv) to provide adequate supervision; and (v) to ensure safe and non-defective tyres.

[5] As a result, the Plaintiff maintains that Defendant's actions caused him loss and damages in the form of trauma and abrasion to the face in the sum of SR. 30, 000/-; Ecchymosis and hyphema to the left eye in the sum of SR 50, 000; Permanent vision loss at 6/4 to the left eye SR 250, 000/- and constant photophobia, vitreous opacities, and be dry eyes in the sum of SR. 50, 000/- hence a total of SR 380, 000/-.

[6] In its Statement of Defence, the Defendant generally contests the allegations. It principally maintains that it offered a safe working environment by providing a pressure gauge and safe, non-defective tyres, and that Plaintiff's injuries are due to his own negligence in failing to pay proper attention when inflating the tire and/or failing to employ properly or at all the pressure gauge.

[7] At trial, Plaintiff testified in person and also presented the testimony of Doctor Roland Paul Barbe ("Dr. Barbe") and the Defendant called one witness namely of Suarez Mansing, a security officer employed by the Defendant.

[8] The evidence of Dr. Barbe's of the 29th May 2013 with reference to two medical reports (Exhibit P1 and P2) rendered by doctors who had had consulted the Plaintiff reveals that the first medical report dated 14th February 2011 *(Exhibit P1)* indicate inter alia abrasions on the left eye, ecchymosis (like a black eye), hyphema (internal bleeding in the eye) but no detachment in the eye. And he testified that the second medical report dated 29th November 2011 *(Exhibit P2)*indicated that vision in the Plaintiff's right eye was 6/6, what somebody should see, and 6/12 in the left eye, which corresponds to a 50% vision reduction.

[9] He testified that no operation, without increased risk to sight, could be done to rectify his vision. He stressed that he could not ascertain whether the Plaintiff had 100% vision prior to the incident. He testified that the second report also indicated dry eyes in both eyes, vitreous opacities in the left eye, but that the hyphema was resolved. Moreover, he testified that the Plaintiff's biggest complaint was sensitivity to light and burning sensation, but that he did not see anywhere in the record that the Plaintiff had complained of loss of vision. He testified that Plaintiff only complained at the beginning when he had the injury of swelling eye, painful eye, and loss of vision in his left eye but no such complaint was recorded after the follow-up.

[10] Dr. Barbe further testified that based on the Plaintiff's last ocular examination in the first medical report (Exhibit P2) was shown a vision of 6/6 in the right eye and 6/4 in the left eye. And that this indicates a vision improvement in the left eye, indicating that the left eye had become better than the right eye. However, Dr. Barbe, further testified that the Plaintiff came in again on 14th May 2012. During that consultation, his vision in the left eye was measured at 6/18, less than 50%, and his right eye at 6/9, indicating a reduction in the vision. He testified that it is possible that both eyes deteriorated naturally.

[11] Finally, in attempting to explain the vision improvement recorded during Plaintiff's last ocular exam, Dr. Barbe first acknowledged the speculative nature of his opinion since he had not examined the Plaintiff. He testified that there was a possibility that his vision may have been wrongly recorded. However, regarding Defendant's counsel's suggestion that the deterioration measured in May 2012 had nothing to do with the injury, Dr. Barbe testified that there is a high possibility that the injury contributed to the deterioration because the fault was too big in stating: "you can't go from 100% down to 33 or 35%." Moreover, he testified that the deterioration in the right eye could be explained by the diagnosis of dry eyes, which he assumed was natural (i.e. not attributable to the injury, per the medical report) because tear film reduction automatically results in vision drop by a certain amount.

[12] Plaintiff's Testimony of the 13th October 2014 in line with the records of proceedings and which was not subjected to cross-examination reveals that the Plaintiff was an electromechanical engineer with around ten years of experience. He stated that he uses a buggy during his work for the Defendant and that it is company policy that buggy are supposed to left in a good state for the employee on the following shift. On the day of the accident, he testified that he had a flat tyre and proceeded to inflate it with an air compressor, to which was attached a pressure gauge, though it was not working. Given the defect in the gauge, he testified that he focused on the tyre itself to know when to stop inflating the tyre. And while he was still inflating the tyre that the tyre exploded while he was in a kneeling position.

[13] Thereafter, he was taken to the hospital, where he stayed for eight days. He testified that he could not see properly when he was discharged and could not see properly for six months after leaving the hospital. He testified that as of three year from the accident, he sometimes cannot see clear and sees black things coming inside his eye, which at times gets painful around two days a week. He testified that he has not been given spectacles or pain medication. He further testified that he does not know why the tyre was defective, but suggested that maybe the tyre was defective. Moreover, he maintained that the gauge was nor working well, that he was not given any supervision, that he was not give goggles, and vehemently denied being negligent.

[14] Mr. Mansing's testimony of the 30th October 2015 revealed that an investigation took place after the incident, which concluded that all the gauges and buggy tyres were fine. He testified that he believes the cause of the accident was that of the Plaintiff's carelessness because the gauge was there for him to use. However, on cross-

examination, he conceded that he was not there to see what had happened and how the Plaintiff had used or not used the gauge. When asked whether Plaintiff had been given goggles, he did not provide a response.

[15] I shall now move to consider the legal standard to be applied and its analysis thereto in this matter.

[16] With regards to the cause of action directly related to an allegation of *"faute"*, Article 1382 provides that:

> *"Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.*
>
> *Fault is an error of conduct which would not have been committed by a prudent person in the special circumstance in which the damage was caused. It may be the result of a positive act or an omission."*

[17] The Courts interpreting the notion of *"faute"* have found that it is an error of conduct, which emanates from the breach of a duty of care. [*See Pierre (born Timonina) v Attorney-General & Ors [2008] SCSC 34].* Moreover, the precise nature of the *"faute"* must be proved and the burden lies on the Plaintiff.

[18] With respect to injuries arising in the course of one's employment, the Supreme Court has ruled that:

> *"An employer is bound to provide a safe system of work to his employee. Failure to do so amount to a 'faute'. It is the duty of the employer to ensure that the work in which his employee is engaged should be safe, and failure to do so constitutes 'faute', and he is responsible for any damage that results to the employee."*

In the above regards, reference is made to the matter of*[Bristol v United Concrete Products Seychelles Ltd. [2010] SCSC 109]*

[19] More specifically, the Occupational Safety and Health Decree (the "Decree"), which applies to all employers (at its section 3 thereof), provides that it shall be the duty of every employer to ensure to provide protective equipment for his employees (at its section 4(f) thereof). Conversely, it also states that it shall be the duty of every employee while at work to take reasonable care for his own safety and to use such equipment as may be provided by his employer (at its section 8 (a), (c) thereof).

[20] Though Plaintiff is not involved in the construction industry, the Decree includes a provision applicable to construction industry type-work, which is useful to inform the Court of the scope of the employer's duty of care. It provides that:

> *"28. Where an employee is liable to suffer injury to his eyes as a result of dust, particles of material, radiation or otherwise from any process or work, an employer shall provide the employee with, and require him to wear or use suitable goggles or effective screens."*

[21] In the present case, the Plaintiff maintains that the Defendant failed to provide eye safety goggles, a pressure gauge, adequate supervision; and failed to ensure safe and non-defective tyres. Based on the evidence adduced, the Court finds that insufficient evidence has been presented to determine whether the pressure gauge was working properly and whether the tyres were defective. Moreover, it is not clear that inflating tyres for an engineer requires supervision. However, it its uncontested that the Defendant did not make available eye safety goggles.

[22] The issue then is whether Defendant had a duty to provide eye safety goggles to protect the Plaintiff. Where an employee is engaged in a potentially dangerous occupation, especially machinery belonging to the employer, the employer has a duty to provide a safe system for the employee to use that machinery. *(Reference is made to the case of Esparon v. Bristol [2001] SCSC 22]*. Though an employee may, an employee does not have a duty to request safety equipment from his employer. While the probability of a tyre bursting can generally be said to be low and unlikely, the fact that it may happen renders the inflation of tyres a potentially dangerous activity, as confirmed by the injuries suffered by the Plaintiff, which presumably could have been worse.

[23] The Court finds thus based on the evidence highlighted above, that the Defendant should have made available eye safety goggles for the Plaintiff to use and protect his eyes. Because an employer has a duty to provide a safe system of work where an employee is engaged in a *"potentially"* dangerous occupation, the Court find that the Defendant breached its duty by not taking all reasonable precautions to ensure the Plaintiff's health and safety in the employment and making goggles available for Plaintiff to use and protect himself. *(Reference is made to the case of [Fanchette v Dream Yacht Charters (Seychelles) Ltd.[2015] SCSC 125],* wherein, the Court found that an employer had failed to take all reasonable precautions to ensure the employee's health and safety.

[24] With respect to the claim of damages as afore-illustrated, having found that the Defendant breached its duty, the Court must now determine whether Plaintiff proved his injuries and whether he is entitled to his claim of damages.

[25] It was not contested that the Plaintiff suffered trauma and abrasions to his face and that his biggest complaint was sensitivity to light. Moreover, the second medical report indicated that vitreous opacities in his left eye and Plaintiff testified that since the incident, he: *"can see some black things coming inside [his] eye, then at times it gets painful."* Importantly, though Dr. Barber did not have the benefit of examining the

Plaintiff himself, Dr. Barbe testified that there is a high possibility that the injury contributed to the deterioration in the left eye because the fault was too big stating: *"you can't go from 100% down to 33 or 35%."*

[26] Nevertheless, the Court notes that Dr. Barbe also stressed that he could not ascertain whether the Plaintiff had 100% vision prior to the incident. This fact is essential for the Court to appreciate the alleged reduction in vision. Accordingly, the Court is unable to accept that Plaintiff proved that he suffered permanent vision loss in his left eye. It, however, finds that Plaintiff proved that he suffered trauma and abrasion to the face, ecchymosis and hyphema to the left eye, photophobia and vitreous opacities as claimed.

[27] With regards to the assessment of damages in tort cases, the Court recalls that damages are compensatory and not punitive. (Reference is made to the case of [*Jacques v Property Management Corporation* (2011) SLR 7]. Further, it is to be borne in mind that moral damage are specific to *"damage that is neither material nor corporal. It is something intangible as in the case of suffering." (Reference is made to the case of [Denis v Ryland[2016] SCSC 10].*

[28] Moreover, it is to be noted that the Seychelles has not established a method to assess moral damages. *(Reference is made to citing e is made to the case of (Michel & Ors v Talma & Anor (2012) SLR 95).*

[29] Nevertheless, in awarding delictual damages for personal injuries, *"the Courts have sought to maintain a certain amount of consistency in respect of particular types of injuries and at the same time been flexible when the circumstances and nature of the injuries in a particular case demanded a deviation from the general pattern."(Reference is made to the case of [Confiance v Allied Builders Seychelles, (1998) SLR 16].* Previous awards in comparable cases therefore are an important and useful guide, which, *"is not to say that damages should be standardized, or that there should be any attempt at rigid classification"(quoting Singh v Toong Omnibus Co [1964] 3 All ER 925).*

[30] In the instant matter, the Plaintiff has made several claims for damages, but he has not provided the Court with any guidance to evaluate his claim. Plaintiff alleges SR 30, 000 for the abrasion to his face, SR 50, 000 for ecchymosis and hyphema, and SR 50, 000 for photophobia and vitreous opacities. Without any statutory yardstick and in the absence of any guidance or evidence from the Plaintiff, the award this Court makes in the present case can only be arbitrary. *(Reference is made to the case of Denis v Ryland [2016] SCSC 10*].

[31] Though the Court finds that Plaintiff is entitled to damages for his suffering, it finds that the damages requested to be excessive given the nature of his injuries. Accordingly, the Court awards Seychelles Rupees Fifteen Thousand (SR 15,000/-) of damages for abrasions to his face, Seychelles Rupees Twenty Five Thousand (SR 25,000/-) for his ecchymosis and hyphema, and Seychelles Rupees Twenty Five Thousand (SR 25,000/-) for photophobia and vitreous opacities.

[32] I accordingly enter judgment in favour of the Plaintiff as against the Defendant in the total sum of Seychelles Rupees Sixty Five Thousand (SR 65,000/-) with costs for this action.

Signed, dated and delivered at Ile du Port on the 12th day of January, 2018.

S. Govinden

Judge of the Supreme Court