

In the High Court of Fiji at Suva

Civil Jurisdiction

HBC No. 122 of 2011

Between: Alipate Lomani

Plaintiff

And: Solander (Pacific) Limited

Defendant

Appearances: Mr Daniel Singh for the plaintiff
Ms M. Tikoisuva for the defendant

Dates of hearing: 23rd and 24th April, 2014

Judgment

1. The plaintiff, a deckhand on the defendant's vessel alleges that he suffered a hernia injury, while transferring bundles of fish on board the vessel. The plaintiff claims that the injury was caused by the defendant's breach of statutory duty and/ or negligence. The defendant denies that the injury was caused by the alleged negligence or any negligence of its servants or agents. Alternatively, that the accident was caused or contributed by the plaintiff's negligence.
2. The statement of claim recites that it was an implied term of the plaintiff's contract of employment and/or it was duty of the defendant to take all reasonable precautions for the safety of the plaintiff while he was engaged in his work; not to expose him to a risk of damage or injury of which it knew or ought to have known; to provide and maintain adequate and suitable plant, tackle and means, to enable his work to be carried out in safety and to provide and maintain a safe and proper system and place of work.

3. The particulars of negligence pleaded read :
 - a) *Failing to provide the plaintiff with a winch, pulley, lifting tackle for loading or hauling bundles of big fish within the fishing vessel.*
 - b) *Failing to provide and maintain a safe place and/or system of work for the plaintiff who was engaged in hauling heavy bundles of fish at the material time.*
 - c) *Instructing, causing or permitting the plaintiff to work in a manner while lifting heavy bundles of fish which was unsafe.*
 - d) *Failing to provide the plaintiff with weight lifting belt to able him to lift, carry or move around heavy bundles of fish from one fish hold to another.*
 - e) *Failing to select proper and competent persons to supervise and direct the said work.*
 - f) *Failing to take any or any adequate or necessary measures whether by way of regular inspection, testing, examination or otherwise to ascertain whether it was safe for the plaintiff to perform the work in the manner he was doing.*

4. The defendants, in their statement of defence state that it maintained a safe system of work to ensure safety of its employees including the plaintiff from risks of accident and/or injury. The plaintiff was not transferring bundles of fish, as alleged. The practice was to transfer one fish at a time with the assistance of other deckhands.

5. ***The determination***
 - a. The plaintiff's case is that his injury was caused by the defendant's breach of statutory duty and/or negligence. The closing submissions of the plaintiff relies on the provisions of the Health and Safety at Work Act, No 4 of 1996.
 - b. The plaintiff, PW2, (*Eleki Bale*, also a deckhand) and DW1, (*Captain Thomas G. May*, Fishing Operations Manager of the defendant company) in their testimony explained the process how fish is caught, cleaned and stored in fish-holds on the defendant's boat. After cleaning, it is stored in another fish-hold. The next fish-hold was 3 meters away. The fish-hold is 6 to 10 feet in depth. The defendant produced a photograph of the configuration of fish-holes on the defendant's vessel.
 - c. The plaintiff, in his evidence in chief stated that on 17th October, 2009, (the third day after he boarded the defendant's vessel) he experienced pain and strain below the right end of his stomach, after transferring ten bundles of fish weighing 50 to 100 kilograms from one fish-hold to another. He suffered a hernia of the right

- side. The plaintiff said that had to bend low and lift bundles of fish to pass it to another workmate to drop it in the next fish-hold.
- d. The plaintiff and PW2 testified that weight lifting belts were not provided by the defendant.
- e. The preliminary question that I have to determine is whether there was a breach of statutory duty and/ or negligence on the part of the defendant, in failing to provide weight lifting belts.
- DW2, (*Dr Masood Husnon Ali*)
- f. The defendant called DW2, their company Doctor to testify. The plaintiff had consulted him after he reached Suva.
- g. DW2, in his medical report dated 19 May, 2011, said that on 6th November, 2009, the plaintiff had complained of “*lower quadrant abdominal pain on the left*”. An examination of the plaintiff revealed that he had a “*small inguinal hernia*”.
- h. DW2, in his evidence, said that it was possible to have pain on the left side with a right side inguinal hernia. He said that inguinal hernia “*manifests in adult life and straining could bring it on*”. Lifting weights can cause intra abdominal pressure.
- i. He said that weight lifting belts were for the protection of the back. The belt does not provide a lesser chance of getting hernia
- j. In the light of the uncontroverted medical evidence, I am of the view that the plaintiff has not established that the defendant failed in its duty to provide the plaintiff with a safe system of work and to take steps to protect him from risks which are reasonably foreseeable.
- k. The plaintiff did not establish that the existence of his medical condition was known to the defendant.
- l. Moreover, the plaintiff was an experienced deck hand. It transpired in the evidence of PW2 that the plaintiff befell the injury on his fifth journey as a casual hand on the defendant’s vessel. So the question of inadequate supervision, raised by PW2 in his evidence, does not arise.

- m. Lord Radcliffe in *Qualcast (Wolverhampton) Ltd v Haynes*, [1959] 2 All ER 38 at page 40 as cited by the FCA in *Emperor Gold Mining Co Ltd v Lepolo*, [2011] FJCA 50 and referred to by the defendant in its closing submissions, declared:

An experienced workmen dealing with a familiar and obvious risk may not reasonably need the same attention or the same precautions as an inexperienced man who is likely to be more receptive of advice or admonition. Here, no doubt, the question of delimiting the duty merges with the question of causation.

- n. The duty of an employer to provide “a safe system of work is.. a duty only to do what is reasonable” -Colman J in *Walker v Northumberland CC*, (1995) 1 All ER 737 at pg 759.
- o. Hale LJ in *Hatton v Sutherland*, (2002) 2 All ER 1 at paragraphs (29) – (30) said:

Unless he knows of some particular problem or vulnerability, an employer is usually entitled to assume that his employee is up to the normal pressures of the job. (emphasis added)

- p. In *Walker v Northumberland CC*, (supra) Colman J cited Miles CJ in *Gillespie v Commonwealth of Australia*, (1991) 104 ACTR 1 as follows:

..it is not necessary to consider foreseeability with respect to the existence of a duty of care, because the relationship of employer and employee itself gives rise to that duty of care. Foreseeability for present purposes is to be considered only in so far as the degree of remoteness of the harm sustained by the plaintiff set the parameters of the steps that a reasonable person in the position of the defendant would have taken to reduce the risk to the extent that any “unnecessary” risk was eliminated. In practical terms this means that the plaintiff must show that the defendant unreasonably failed to take such steps as would reduce the risk to what was a reasonable, that is a sociably acceptable, level. (emphasis added)

- q. The closing submissions of the defendant discusses the aspect of causation, since the plaintiff’s medical certificate of 31st March, 2010, provided that he “will/should be fit to resume duty on: 01/04/10”, while he was admitted to hospital on 6th April, 2010, and had an “*Elective Right Inguinal Hernia Mesh Repair*”.

- r. It is also pointed out that a medical certificate of 22nd February, 2012, the plaintiff produced states that he has a percentage permanent disability impairment of 64%, in respect of “*chronic pain in the Rt Chest and Iliac fossa*”, which is not related to the hernia.
- s. I do not find it necessary to go into the aspect of causation, since the plaintiff has not established a breach of statutory duty or negligence, in the first instance.
- t. In *Land Transport Authority v Lal*, (2012) FJSC 23; CBV19.2008 paragraph 44 as cited in the closing submissions of the defendant, the judgment of the Court stated:
- Causation is one part of a multi-stage test for legal liability in tort. For a person to be held liable for the common law tort of breach of statutory duty, that person must have (1) owed the plaintiff a statutory duty (2) breached that duty; (3) by so doing caused the damage to the plaintiff; and (4) that damage must not have been too remote.*
- u. Next, the plaintiff states that despite him experiencing pain, he was told by the Chief Officer, to continue to work, as there was no one to replace him.
- v. I note that DW2, after examining the plaintiff on 6th November, 2009, prescribed “*nurofen tablets*” (to provide relief from pain) and concluded that the plaintiff “*may wish to have surgery whenever he is ready*”. And the plaintiff had his an “*Elective Right Inguinal Hernia Mesh Repair*”, on 6th April, 2010, for the reason that the operation theatre was fully booked
- w. Be that as it may, these two factors clearly indicate that the plaintiff’s condition was not acute and did not require immediate attention. He had the repair done five months later.
- x. Finally, the plaintiff complains that the mother ship came twice to collect fish, but the Captain did not send him back, despite his injury. The defendant points out quite correctly that the plaintiff was free to leave the vessel, if he so desired. There were no restrictions forcing him to stay on board.
- y. In my judgment, the plaintiff’s case fails.

6. In the circumstances of this case and in the exercise of my discretion , I make no order as to costs.

7. Orders

- a. I decline the plaintiff's claim.
- b. No order as to costs.

15th February, 2016



A.L.B. Brito-Mutunayagam

A.L.B. Brito-Mutunayagam
Judge