VNLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. H.111/1988

BETWEEN	TASMA HENRY-ANGUS	PLAINTIFF
A N D	THE ATTORNEY GENERAL	DEFENDANT

Mr. Norman Samuels for Plaintiff

Mr. L. Pusey for Defendant

HEARD: May 4, 5, 9, 10, 1994
and November 18, 1994

Judgment

HARRISON J. (AG.)

This is an action in which the plaintiff claims against the defendant damages for negligence, and or in the alternative, nuisance or breach of duty under the Occupiers Liability Act in that on the 5th day of July, 1987 at about 8:00 p.m. the plaintiff whilst in the course of her employment as a ward attendant at Port Maria Hospital slipped on a floor and sustained serious injuries with the result that she now suffers from a permanent physical disability.

The Court found the following facts:

The plaintiff is now 43 years old and was an hospital ward attendant at the Port Maria Public Hospital. She was assigned to Harry Ward on the 5th day of July, 1987 and on this date, was sent by a nurse from Harry Ward to Martin Ward to fetch a blood pressure instrument.

Whilst the plaintiff was in Martin Ward she was asked by the nurse in charge, to empty a patient's bed pan as there was no ward assistant nor ward attendant there. She went into a sluice room; placed the bed pan in the sluice basin, and as she turned around to leave this room, she slipped in water which was on the floor.

The floor for this room is tiled and water is kept in an open drum situated in one corner of the sluice room. A container was used to dip in this drum in order to fetch the water since water was not available in the pipe line at the hospital.

The sluice basin is at the opposite side of the room from the drum so water has to be taken across to it in order to have the bed pans washed. No electric

light was in this room but light shone into it however, from a nearby bathroom.

I further find that the plaintiff had attempted to turn on the light in the sluice room in Martin Ward but when she operated the switch no light came from the bulb. She entered the room nevertheless; could hardly see, but was aided to some extent from the light in a bathroom which came through the door way.

Mr. Pusey in his usual style, submitted that it was common between the parties that there was a likelihood that water would be found on the floor of the sluice rooms. It was also common he says, that servants or agents of the defendant had a duty to see that the floor of the sluice room was kept free from water. The plaintiff's evidence clearly supports this contention as she testified that it was a normal occurrence to find water on the floor of the sluice room due to the water problem at the hospital. She admitted further, that either the attendant or ward assistant would be required to mop spilt water.

He further submitted that because the sluice room was dark, any reasonable, prudent person should proceed with caution because of a great likelihood that there could be water on the floor. Further, that there was no evidence that the plaintiff proceeded with any such caution.

He argued that the duration of time that the water was on the floor was important. The court would, he says, have to detrmine whether the defendant allowed the water to stay on the floor for an unreasonable length of time. It was insufficient therefore he argued, for the plaintiff to say that she went into room, water was on the floor and she slipped, in order to prove negligence. It was necessary to prove that there was knowledge that water was there (actual or constructive) and that the water was allowed to stay there for an unreasonable length of time. He sought reliance on the case of Davies v. DeHavilland Aircraft Co. Ltd. 1951 1 KB 50 and London Graving Dock Co. Ltd. v. Horton 1951 1 AER 1.

Mr. Pusey further argued that where the plaintiff knew that there was a risk of danger in pursuing a course of action and pursued and proceeded with full knowledge of this risk and has been injured, the defendant cannot and should not be held liable. Further, that it would not have been reasonably foreseeable by the defendant that the plaintiff who was employed as a hospital ward attendant and who would have among her duties, going into the sluice room to clean it among other things, that she would have slipped on water within her area of work.

He further submitted that it was not open to the court to hold that the absence of light or that the light was not working were factors which indicated negligence on the part of the defendant, his servants or agents.

So far as the cause of action in Nuisance was concerned, it was his view that the plaintiff failed to prove this cause of action. He submitted that for a private nuisance to succeed it is only available to a person who has suffered injury from an interference with an interest in land this was certainly not the case here.

Mr. Pusey finally submitted that he repeated the submissions in terms of reasonableness and duty of care in respect of the claim under Occupiers Liability.

Mr. Samuels for his part, submitted that the plaintiff had established her claims under the respective heads and was entitled to damages.

Now, it is well established, that at common law, a master may incur liability firstly, where his servant is injured, as a result of the negligent acts of his other employees in the course of their employment, or secondly, because of his own act or default, such as where he has failed to devise or, thereafter, maintain a safe system of work whilst carrying out some operation of work which involves risk. It is therefore the duty of an employer to take reasonable care for the safety of his servant.

Goddard L.J. had stated in Naismith v. London Film Productions Limited [1939] 1 All E.R. 794, that the duty for the employer to provide a safe place of work was, "....not merely to warn against unusual dangers known to them.....but also to make the place of employment.....as safe as the exercise of reasonable skill and care would permit." Undoubtedly, it should be added that regard must be had to the nature of the place of work when considering whether or not it is safe. The authorities make it abundantly clear that as long as the employer makes the working place as safe as it can reasonably be made, he has satisfied his obligation - see Charlesworth & Percy on Negligence 7th Edition, page 725 para. 11-09.

Now, it is quite possible that a place of work may become unsafe due to the existence of a temporary condition. In such a case the test to be applied, is whether or not a reasonably prudent employer would have caused or permitted the existence of that state of affairs of which complaint is made. What constitutes a breach of his duty in any given set of circumstances must therefore, be one of degree. The undermentioned cases seek to illustrate this principle.

In the case of Davies v. DeHavilland Aircraft Co. [1951] 1 KB 50, a workman had slipped on a patch of oil or water or both which had accumulated, possibly in a depression, on the concrete floor of a passage in a factory. Somervell L.J. was of the view that he felt it impossible to say that the mere existence of these conditions indicated any failure to take reasonable care to protect those employed from unnecessary risk.

There was the situation in Thomas v. Briston Aeroplane Co. [1954] 1 WLR 694 where the entrance to a factory became slippery owing to a sudden fall of snow, which froze as it fell a quarter of an hour or so before the facotry opened. A workman slipped on entering and his employers were held not liable on the ground that there had been no failure to exercise reasonable care.

In Latimar v. A.E.C. Ltd after an exceptionally heavy storm, the floor of a factory became flooded. When the water drained away it left an oily film on the floor which was slippery. Sawdust was put down but, owing to the large area of the floor, there was not enough to cover all the floor and a workman slipped on a part of the floor which had no sawdust. Lord Tucker in his judgment asked the following question:

> "Has it been proved that the floor was so slippery that, remedial steps not being possible, a reasonably prudent employer would have closed down the factory rather than allow his employees to run the risks involved in continuing work?"

As there was no evidence of any complaint or of any other person being in difficulty from the floor, the employers were held not liable, since they had taken all reasonable steps to deal with the conditions short of closing the factory or part of it, which would have been unreasonable in the circumstances.

In Vinnyey v. Star Paper Mills [1965] 1 All E.R. 175, a workman had been brought to the scene of a spillage of some slippery substance, which had been allowed negligently to escape on the floor. He was charged expressly with the duty of cleaning up the mess with a squeegee. Cumming-Bruce J. held that there was no reasonably foreseeable risk that he would slip and hurt himself in the course of performing such a simple duty.

The plaintiff has pleaded inter alia, in her statement of claim that the defendnat had not instituted a safe system of work. Now, what is the meaning of this term? According to the authorities, this term is used to describe the organisation

of the work, the way in which it is intended the work shall be carried out, the giving of instructions, especially to inexperienced workers, the sequence of events, the taking of precautions for the safety of the workers and at what stages, the number of persons required to do the job, the parts to be taken by the various persons employed and the time they shall do their respective parts. "Further, it includes or may include according to the circumstances, such matters as the physical layout of the job - the setting of the stage, so to speak - the sequence in which the work is to be carried out, the provision in proper cases of warning and notices and the issue of special instructions." (per Lord Greene in Speed v. Thomas Swift Co. Ltd. [1943] KB 557.

It must be borne in mind that an employer is not liable to his servant for any damage suffered arising out of the ordinary risks of the service when there is no negligence on the part of himself or his servants. The principle has been expressed by Glyn-Jones J in Hurley v. J. Sanders & Co. Ltd. [1955] 1 All E.R. 833 at page 836 as follows:

> "A great deal of work which has to be done is dangerous, and if it is not reasonably practicably for the master to eliminate or diminish the danger, then the risk is a necessary incident of his employment, and a risk which the servant is paid to take."

Liability in negligence is based on lack of reasonably foresight. That is, the injury to the plaintiff is the result of the breach of a duty owed by the defendant to the plaintiff, which breach created such a risk to the plaintiff which the defendant should have foreseen and which would cause harm to him, the plaintiff. Lord Wilberforce in the case of Anns v. Merton London Borough Council [1978] A.C. 728 had this to say on the duty situation:

> "...in order to establish that duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First, one has to ask whether, as between the alleged wrong-doer and the person who has suffered damage there is a sufficient relationship of proximity or neightbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to

> consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise."

Foreseeability is therefore a question of fact, and it is only by reference to the circumstances of each case under consideration that it can be determined.

In the instant case, the plaintiff, as an employee at the hospital was required to carry out various duties during the course of the day. What is abundantly clear from the evidence is that she was assigned work that ill-fated day on a particular ward, that is, Harry Ward. It is also unchallenged that as a ward attendant she can be given assignments by the registered nurse on duty. This was the case on the 5th July, 1987 when this plaintiff was sent to Martin Ward and further instructed to empty the contents in a bed pan whilst she was on Martin Ward.

The question therefore arises. Is there a breach of care that creates liability in the defendant when in carrying out these instructions the plaintiff slips and sustains injury? Was it reasonably foreseeable that she would have sustained injury when she entered the sluice room to carry out these orders?

In Parris v. Stepney Borrough Council (1951) A.C. 367, Lord Parker said:

> "The duty of an employer towards his servant is to take reasonable care for the servant's safety in all the circumstances of the case."

What are the particulars of negligence pleaded in the statement of claim, in this case? Paragraph 3 has particularised them as follows:-

> "1. The defendant his servants or agents failed to mop up water that spilt on the floor from time to time thereby rendering the said tiled floor to be in a slippery condition.
>
> 2. They failed to provide and maintain proper facilities and/or utensils for the collection distribution and use of water in the said dressing room and caused, permitted or allowed water to be stored in an open container, to be taken therefrom in smaller vessels to be used in various areas in the said dressing room when they knew or ought to have known that spillage in the process would cause the said tiled floor to become slippery.
>
> 3. They failed to provide or maintain sufficient staff to constantly clear the said tiled floor or any spillage of water thereon so that the said floor could be rendered

dry and, safe for users of the said dressing room including the plaintiff.

4. The defendant his servants or agents failed to provide a safe system of work for the plaintiff and allowed her to perform her duties on a slippery floor when they knew or ought to have known that the condition of the said floor was unsafe for her to perform her said duties."

Thus, the question for this court is: Did the defendant take reasonable care to carry out his operations as not to subject the plaintiff to unnecessary risk?

Matron Ives has told this court that attendants work on a shift basis. They did pantry and floor duties during the morning tour of duties. In the afternoons and nights, their duties became lighter so one person would attend to both pantry and cleaning of floors. The Matron further testified that during the afternoon shift, they would not be required to mop the entire ward and would attend to eventualities, like a spill, and see also to the tidiness of the sluice room.

As Mr. Pusey points out, it is common between the parties that there was a likelihood that there would be spilt water on the floor where the plaintiff slipped and fell. It is also common that it was either the ward attendant or ward assistant duty to see that the sluice room was kept free from water. Although it was not the plaintiff's duty to mop water on the floors in Martin Ward, she has admitted that if she saw it, it would be her duty to mop it up. This evidence was corroborated by the evidence of Matron Ives.

It cannot be disputed that water must be made available in an hospital at all times. As I have said before, no water was available in the pipe line hence the hospital provided this commodity in an open drum which is kept in a container in the sluice room. I would think that it was hopelessly impossible preventing spills when conveying water from the drum to the sluice basin. In light of this arrangements, one must consider what measures has the hospital put in place to eliminate or reduce the possibility of someone slipping should water remain on the floor. The evidence reveals that at the material time no ward attendant nor ward assistant was on duty at Martin Ward. There is also no evidence disclosing the time that the attendant had worked on this ward. Or one could probably ask the question, "Did such an employee work at all on Martin Ward that afternoon?" No evidence has been adduced and none seem to have been forthcoming.

There is no precise evidence of the duration of time, water was left unattended

to in the sluice room. The plaintiff testified however that she took up duties on the 5th July, 1987 at 2:00 p.m. and that her shift ended at 10:00 p.m. There is no evidence also as to the time she went to Martin Ward but it can be reasonably inferred that it was after 2:00 p.m.

The scene which we have then is, (i) there is no ward attendant nor ward assistant on Martin Ward to attend to eventualities, (ii) no warning signs are placed on the door or other visible place, and (iii) there is no light in the sluice room. Could she have disobeyed the nurse's order to take the bed pan to the sluice room? Or, could she have refused to enter that room upon discovering that there was no light? I am of the view that she would be obliged to carry out the order given by her superior and in doing so it could not be argued that she knowingly accepted the risk.

On the facts of the instant case therefore, this court, cannot say that the defendant has taken reasonable care for the safety of its servants/employees. An employer who knows of the conditions prevailing in the sluice room and does not take reasonably steps to eliminate or reduce the dangers, will be liable in damages in the result of injury to one of its employee.

I hold therefore, that there was a breach of duty of care to the plaintiff, that the defendant was negligent and is liable to her in damages.

One further question must be resolved. Has the plaintiff in any way contributed to the injury which she suffered? If she is, then damages will have to be apportioned to the degree of fault. On these facts which I have found, there is no room for contributory negligence on her part.

My next task is to quantify damages.

Special Damages

By consent the following items have been agreed between the parties:

(a) Medical expense for (i) Dr. Dundas - $3,160.00
(ii) Dr. Guy - $300.00 (iii) Dr. Wright - $560.00

(b) Cost of pelvic traction - $145.00

(c) Cost of heating pad - $240.00

There has been no challenge to the undermentioned items (i) - (iv) of special damages which I have found proven:

(i) Transportation

I will allow $2,877.00 under this head in light of the evidence adduced by the plaintiff.

(ii) Drugs

The amount of $1,530.00 is allowed.

(iii) Physiotherapy

I will allow the figure of $1,360.00 under this head.

(iv) X-ray

The amount of $110.00 is allowed for this item.

(v) Loss of Earnings

Mr. Pusey did submit that the plaintiff had been unable to prove with any certainty the loss of earnings. He further submitted that neither has she proved a future loss of earnings.

The plaintiff gave evidence that she was no longer receiving a salary from the hospital since October, 1987 and that she did not seek employment elsewhere. Under cross-examination she had admitted however, that after the incident she sold sweets and bag juice at a Basic School. She was unable however to quantify her earnings from this livelihood.

Mr. Pusey submitted firstly, that the plaintiff had failed to mitigate her damages. Secondly, since there was no evidence as to the type of job she could have gotten otherwise so as to balance it against the hospital job, the court would have some difficulty in accurately assessing how much earning she has in fact lost. He further submitted that this principle would be equally applicable if the court were to consider an award for handicap on the labour market under the head of General Damages.

Mr. Samuels, on the other hand, submitted that in the absence of sufficient proof of earnings, the court ought to apply and use the national minimum wage in order to do justice to the situation.

The dictum Lord Goddard C.J. Bonham-Carter v. Hyde Park Hotels Vol. 64 (1948) T.L.R. 177 is of relevance where he states: "Being in the nature of special damages claims for loss of earnings must be specifically alleged and strictly proven." It has also been the practice that before a court awards damages for loss of future earnings, the loss must be proven to be "real assessable loss sufficiently proved by evidence." (See Lord Denning's dictum in Fairley v. John Thompson ltd. [1973] 2 Lloyd's Report, 40). Further, it has been established in a number of cases that awards made for "handicap on the labour market" concerned plaintiffs who were in

employment at the date of trial and from which there was a strong likelihood of their being dismissed. (See - Clarke v. Rotax Aircraft Equipment Ltd. [1973] 1 WLR 1570 and Fairley (supra).

The plaintiff has a duty to mitigate his/her loss. Pearson L.J. in the case of Darbishire v. Warren (163) 1 WLR 1067, has been instructive where he states inter alia:

> "The true meaning is that the plaintiff is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expand for the purpose of making good the loss. In short, he is fully entitled to be as extravagant as he pleases, but not at the expense of the defendant."

I unhesitantly reject the view suggested by Mr. Samuels that due to the plaintiff's physical condition she cannot be gainfully employed, hence she would be unable to mitigate her losses. It seems to have escaped Mr. Samuels' recollection of the evidence that in response to a question posed by him regarding the plaintiff being able to return to her former job, that Dr. Dundas has opined that the plaintiff could have returned to serve diet at the hospital.

It is my view therefore and I so hold, that the plaintiff has failed to satisfy this court under the head of loss of earnings.

(vi) Household Help

The plaintiff is entitled to household help to assist her in the domestic chores at the rate of $120.00 p.w. which sum when totalled is $43,680.00.

General Damages

The plaintiff was seen and examined by Doctors Ramanan, Watson, Wright, Guy and finally by Grantel G. Dundas, Consultant Orthopaedic Surgeon.

Dr. Dundas gave evidence at the trial. He testified that the plaintiff became his patient on the 25th February, 1988. She was referred to him by Dr. Guy. She complained then of difficulty in bending, lifting and twisting her body. On examination, he found her to be over-weight but had a normal respiratory and cardiovascular system.

Examination of the lumbar spine revealed that all movements were restricted by pain. She turned in bed with extreme caution. She was tender from 3rd lumbar to the 2nd sacral vertebra. Over the left sacro-iliac joint, tenderness was most

was most accentuated. It was also noted that she had spasm in the lower back muscles. She could straight leg raise easily to 90 degrees on the right but could only get to 50 degrees on the left. Sensation was diminished in her 5th lumbar dermatone on the left side.

Dr, Dundas diagnosed a left sacro-iliac contusion with possible lumbar disc prolapse.

X-rays were done and no fractures were revealed. She was sent to Dr. Wilson at St. Ann's Bay Hospital to be admitted for a period of 21 days for in-patient physiotherapy.

Dr. Dundas subsequently saw her on the 18th April, 1988. He discovered that the full range of therapy was not administered due to machine problems at the hospital. Upon examination, he observed that her back was more subtle and she could straight raise her legs on both sides to 90 degrees without much difficulty. There was however, a local tenderness over the left sacral iliac joint. He opted for her to continue therapy as an out patient. He saw her on several subsequent occasions ranging from 1988, 1989 and 1990. He had combined the therapy with the administration of anti-inflamatory medications. He also tried to encourage weight loss which the plaintiff succeeded to a certain extent. However, the area of focal tenderness and the restriction of free movement of the spine was never eliminated.

On the last but one examination of the plaintiff in 1992, Dr. Dundas assessed that she had reached maximum medical improvement. Finally he saw her on 13th May, 1993. She was complaining of stomach discomfort and this was due to the medication she was taking for pain relief.

Dr. Dundas testified that by using the guide for the evaluation of permanent impairment she was assessed as having 5% disability of the whole person. This disability was centred on her lower back.

Mr. Samuels had posed the following question to Dr. Dundas. "If the plaintiff's duties as an attendant in hospital is to clean and serve diet, would she be able to go back to that type of work?" Dr. Dundas responded: "The serving of diet is something she could return to do. The mopping of floors and cleaning duties I think it would serve to aggravate her discomfort and would not be recommended."

Under cross-examination, Dr. Dundas revealed that part of the therapy was for the plaintiff to reduce her weight. He opined that the less weight one had

the less strain that person would put on the joint and other parts of the body. When he first saw the plaintiff she was weighing 215 lbs. She had lost some 9 lbs. but was of the view that she would be comfortable probably at 140 lbs. It was also his view that pain would be reduced if she had accomplished the desired weight. He found no injury to any bone but the 5th lumbar nerve was damaged. He had not noticed any degeneration of the injuries. He was further of the view that she would have difficulty in sitting for long periods but that standing would be less painful than sitting. It was also his view that medication would relieve her pains but this would aggravate her stomach discomforts.

In coming to an award under the head of pain and suffering and loss of amenities, I bear in mind the evidence of the plaintiff herself and of Dr. Dundas who had assessed that she now has 5% permanent disability of the whole person. In my view, and bearing in mind that progress has been made, the plaintiff will not be incapacitated to the extent where she will be unable to join the work force.

I bear in mind the cases referred to my by Mr. Pusey in respect of awards for pain and suffering and loss of amenities. Of those referred, James Phillips v. Rudolph Palmer C.L. 1982/P075 reported in Khan's Vol. 2 on "personal Injuries Awards," is more relevant and useful. In that case the plaintiff had received a blow to his back and neck in 1980, with resulting pain in his right hip, loin and waist. He was treated by his Doctor until 1985. The accident had precipitated pain due to degenerative disc disease. He was unable to straighten his leg to 90 degrees when he experienced pain in the back. He was awarded $30,000.00 for pain and suffering and loss of amenities in 1985. Mr. Pusey suggested that an award of $150,000.00 with a maximum figure of $180,000.00 would be appropriate today.

Of some relevance also is the case of Maisie Gayle v. Whitman Associates Ltd. C.L.1991/G014 reported in "Casenote" Issue No. 2, under the title "Personal Injury Awards of the Supreme Court" compiled by K.S. Harrison, Registrar of the Supreme Court. In that case the plaintiff had sustained a lumbar disc prolapse with right sided sciatica and persistent excruciating low back pain radiating to the right buttock and right leg. She had pain when bending and there was a tightness in the hamstring. By consent damages were assessed on the 11th December, 1991 in the sum of $69,151.36. When one applies the current price consumer index this award would be converted to approximately $160,000.00 today. Some concession would have to be

given however, as it was not stated what proportion of this sum was in respect of pain and suffering.

In all the circumstances, I am of the view that an award of $175,000.00 would be reasonable under the head of pain and suffering and loss of amenities.

Mr. Samuels addressed me on the issue of loss of prospective earnings and that an award should be made under General Damages.

In light of the view already expressed pertaining to the plaintiff's earnings, I will not make an award under this head.

It is my view that the plaintiff will need household help hereafter. She is now 43 years old so I will use a multiplier of 8 years. The sum of $49,920.00 which results will be taxed down by one fifth for immediacy of payment. She will therefore receive $39,936.00.

I will make a modest award $15,000.00 for future medical expenses.

Conclusion

To summarize, my award is as follows:-

General Damages

Pain and suffering and loss of amenities	-	$175,000.00
Future household expenses	-	$39,936.00
Future medical expenses	-	$15,000.00
Total	-	$229,936.00
Special Damages	-	$53,577.00

There will be interest of 3% on the sum of One hundred and seventy-five thousand dollars ($175,000.00) from the service of the Writ until today. There will also be interest of 3% on Fifty-three thousand five hundred and seventy-seven dollars ($53,577.00) from the 5th July, 1987 until the 18th November, 1994. The plaintiff will have her costs taxed if not agreed.