103

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. W089/1977

Between	Derrick Walters	Plaintiff
A n d	The Shell Co. (W.I)Limited	Defendants.

H. Edwards, Q. C., and E. Alcott for plaintiff

R. N. A. Henriques instructed by Messrs. M. Nunes of Lake, Nunes, Scholefield and Co. for the defendants.

Heard on: 6th November, 1980, 12th and 13th February, 1981

Handed down on: 3rd March, 1981.

Bingham J:

Derrick Walters the plaintiff in this case (who may conveniently be referred to hereafter as the plaintiff) was employed to the Shell Company W. I. Limited, the defendants (hereafter referred to as "the defendants") from 1949 to 1974 at its Fuel Installation Plant at Rockfort in Kingston.

On 4th May, 1972 after he had been engaged in filling a quantity of Drums with an oil known by the brand name/Spirux E. P. 140 which is used mainly in Boilers at Sugar Factories, he collapsed and had to seek medical aid from Dr. Anthony Feanny, a Medical Practitioner whom he had been consulting from sometime in 1964. As a result the plaintiff underwent certain radiological tests at the St. Joseph's Hospital on 9th May, 1972 which revealed that he had a peptic ulcer which was again active. The plaintiff continued to visit Dr. Feanny at regular monthly intervals from 5th May 1972 up to 3rd July, 1974. Although Dr. Feanny issued during this period only two medical certificates (exhibit 6) which recommended a total leave of absence from work of twenty-one days, the plaintiff has never again resumed working at the defendants' company plant. He was absent on a

plaintiff on 9th May, 1977, almost three years after he became redundant, launched this action against the defendants in tort for damages in which he alleges:

(1) A Breach of statutory Duty and or in the alternative;

(2) Negligence

The pleadings as they originally stood were dispensed with following the matter coming on for hearing on 6th November, 1980. Leave was then obtained by the plaintiff to file an amended statement of claim and this was subsequently done on 6th December, 1980, and was followed by an Amended Defence. No reply was ever filed to this Amended Defence.

The Amended Pleadings in this matter are rather lengthy and I do not propose in this judgment to refer to them in detail. I shall only do so in so far as I deem it necessary in order to highlight any particular features about them.

In the amended statement of claim the plaintiff avers the facts by which he alleges the defendants were in breach of their statutory duty under the Factories Act and Regulations in providing him with a safe system of work which he alleges in paragraph 18 resulted in his condition.

In paragraphs 9 to 17 the facts upon which he alleges negligence on the part of the defendants are set out.

In paragraph 19 it is alleged that as a result of the defendants failure to provide him with a safe system of work or to remove him from exposure to the type of work in which he was engaged, he is now permanently incapacitated.

The plaintiff, to sum up his pleadings, is alleging that the ulcer which he has was caused from the type of work in which he has been

material allegation as pleaded in the claim and denied in particular that they were in breach of their statutory duties to provide the plaintiff with a safe system of work or that they were negligent. The crux of their defence is to be found in paragraph 16 of the Amended Defence in which it is alleged that "the plaintiff's condition was due to a chronic peptic ulcer which the plaintiff had from 1964 and for which the plaintiff had been receiving treatment and that this ulcer had nothing to do with the nature of the plaintiff's employment". Although it is a cardinal rule of pleadings that each and every material allegation in a pleading if not denied is deemed to be admitted, there has been no attempt made by the plaintiff to reply to paragraph 16 of the amended defence. For although it is also a common practice in pleadings not to plead a reply in most cases, one would have expected that an allegation as serious as that set out in paragraph 16 of the amended defence on the face of it called for such a reply. Be that as it may the issues which arose on the pleadings for determination were:

1. was the plaintiff's condition caused by the nature of the work to which he was exposed by the defendants?

2. whether or not it was so caused, did the defendants have any knowledge of the plaintiff's condition?

3. if they did was there a failure on their part to take reasonable care for the plaintiff's safety with the resulting injury to the plaintiff?

4. dependent upon the claim being established under either head, the question of damages.

The plaintiff's medical condition, at least up to 1975 is not in dispute,. On examination of the evidence given by Dr. Feanny as well as upon a scrutity of the Medical Certificates (Exhibits 1 - 5) it is clear that the plaintiff up to 1975 was suffering from a chronic peptic ulcer.

behalf by his own doctor called in support of his case contradicted that very fact. It is the unchallenged evidence of Dr. Feanny that the ulcer which the plaintiff had was a condition which he diagnosed from in 1964, and it is the evidence of the plaintiff that the chemical and filling Plant was not established by the company before 1965. Although the plaintiff has sought in his evidence to challenge the very competence of his own doctor, who was called in support of his own case, by stating that he was being treated for arthritis and not for an ulcer in 1964, when Dr. Feanny gave evidence there was no attempt by the attorneys for the plaintiff to elicit this fact from him that the plaintiff was suffering in 1964 from arthritis and not ulcer.

Indeed although the defendants alleged in paragraph 16 of their defence that "the plaintiff was suffering from a chronic peptic ulcer having nothing to do with his employment", it was left unanswered on the pleadings. The evidence of the plaintiff of an arthritic condition in 1964 seemed to taken even his attorneys by surprise. It can, therefore safely be concluded that the plaintiff in so testifying sought thereby to deliberately mislead the Court by denying the fact that he had an ulcer for which he was being treated by Dr. Feanny from 1964. Clearly on the defence's pleadings supported by the evidence of Dr. Feanny as well as (Exhibit 1), the plaintiff's ulcer predated his exposure to the chemicals at the defendant Plant and it may therefore be inferred that it must have been the result of other conditions having nothing to do with those in existence at the defendant Plant up to 1965.

I will now turn, therefore, to the second issue, which to me was the single and most important issue in the case. Was the plaintiff's condition known to the defendants before the events of 4th May, 1972?

The plaintiff's account is that in 1966, about one year after working in the Filling Plant he started to feel severe pains in his stomach and consulted Dr. Anthony Feanny and received treatment. He also brought his condition to the notice of a Mr. Dearing who was then the Installation Manager at the defendant Plant. He requested Mr. Dearing to have him transferred to another section of the Plant "as the chemicals were affecting him". He was not removed, but worked at the Filling Plant for another two years up to 1969 when he was transferred to the Drum Filling Plant around July to August 1969. He remained at the Drum Filling shed for about $2\frac{1}{2}$ years. After his transfer he visited Dr. Feanny about 4 tines and the medicines which he was given made him feel better. His health was now very good. He then worked for $2\frac{1}{2}$ years to 3 years as normal as before.

Under cross-examination he admitted that between 1965 when he first went to work at the Filling Plant and May 1972 when he collapsed, he produced no medical certificates to Mr. Dearing or any other official of the company. He testified that he made many requests to both Mr. Dearing, and a Mr. Wood, who succeeded Mr. Dearing as Installation Manager, asking them "not to expose him to the chemicals at the Chemical Plant". These men, who are supposed to be very responsible officers of the company, did nothing about the matter,. Instead Dearing, if the plaintiff is to be believed, waited for over two years before removing him to the Drum Filling Plant. There is no evidence from the plaintiff, however, that during this period there was any recurrence of the symptoms which had caused him to have to be treated between 1966 to 1967. During the period 1965 to 1969 and thereafter there was always a company doctor available for a referral to be made upon any complaint by an employee of the company .

The plaintiff's demeanour under cross-examination by Mr. Henriques showed him up as the sort of person who was not being frank

Mr. Henriques about the circumstances under which he informed both Mr. Dearing and Mr. Wood of his medical condition, his account is even more revealing. He said:

"Ques: When you were sent back to the blending plant did you tell Mr. Wood that your doctor had said that you should not be put back at the blending plant?

Ans: No Sir, because he knew. Mr. Wood knew that already.

Ques: Why did he know that already?

Ans: Because I and Mr. Dearing told him that. I now say that I am wrong, we never told him that. I now say that I and Mr. Dearing told him that.

Ques: You did not find it necessary to tell Mr. Wood that?

Ans: I did not find it necessary to tell him that until the last time I got sick and went back to Dr. Feanny and got the certificate".

If anything can be finally gathered from the maze into which the plaintiff had found himself it was the fact that the first time that Mr. Wood, the Installation Manager, knew of the plaintiff's condition was after the plaintiff took ill on 4th May, 1972 consulted Dr. Feanny and obtained a medical certificate (Exhibit 1) which he brought to the Plant and handed it over to a Mr. Robotham the then Personnel Manager. The medical certificate (Exhibit 1) is most revealing as to its contents and the effect of it strikes at the very root of the plaintiff's case. It is dated 8th June, 1972 and reads:

"Re Derrick Walters:

> I have been attending above patient since 1964 for peptic ulcer of the stomach. Within the last year he has lost 30 lbs in weight and his general condition has deteriorated. <u>He has now become sensitive to the chemicals employed at his work place and I strongly recommend a change of employment</u>. His last XRays were done on 9th May and show his ulcer to be again active".

(The underlining is mine)

There is no evidence, however, that the plaintiff's condition was brought to any of the officials of the company between 1965 and May 1972. Although the plaintiff was emphatic in his assertions that he told Mr. Dearing of his condition, the plaintiff in his evidence elicited under cross-examination admitted that he never told Dr. Feanny before May 1972 that it was the chemicals which were causing his condition.

"Ques: Did you at any time between 1965 and June 1972 bring it to your doctor's attention that the work at the oil blending plant was what had caused your condition?

Ans: I never told Dr. Feanny that. He is a doctor. He must know".

It is very interesting in determining this critical issue of fact to observe the company's conduct following the receipt of Dr. Feanny's certificate of the 8th June, 1972 (Exhibit 1). Although the plaintiff produced two certificates covering a total of 21 days leave of absence following the issue of Exhibit 1, the plaintiff was never again put back to work at the blending plant, and so exposed to the chemicals to which to use Dr. Feanny's words "he had now become sensitive".

Further on the determination of this critical issue of fact, the weight of the evidence and in particular the expert evidence of Dr. Feanny is contrary to the plaintiff's assertions of fact. It was the unchallenged evidence of the doctor that it was after the plaintiff's illness on 4th May 1972 that it was discovered for the first time that the plaintiff "had now become sensitive to the chemicals at his work place". As the plaintiff confirms that he did not tell his doctor for "he ought to know, he being a doctor" it is inconceivable that he would have told his employers. Logic as well as common sense would make any other situation untenable.

The company, therefore, was faced in June 1972 with the prospect of not continuing to employ the plaintiff any longer rather than to run the grave risk, contrary to the recommendations of Dr. Feanny and

who had between 1966 to 1969 and again in March 1972 refused his requests for a transfer from the same blending plant. I find his contentions in regard also untenable and against all reasonable probability. Indeed it his own case that the defendants acted promptly upon receipt of Dr. Feanny's recommendation contained in the Medical Certificate (Exhibit 1) He would in the same breath have me believe that he told Mr. Dearing that the chemicals were affecting him, but he Dearing gave a deaf ear to his requests for a long period of time of over 2 years without taking even the simplest precaution of referring the plaintiff to the company's doctor for an examination, which would have been the obvious course, as that adhered to in 1972 following the receipt of Dr. Feanny's certificate. Dr. Feanny's opinion in June 1972 is that the plaintiff "has now become sensitive to the chemicals employed at his work place". Yet the plaintiff would have me believe that this was a fact which had been known to him and to the defendants long before that date. I am unable to so conclude . Moreover his own doctor's evidence suggests the contrary view.

So with regards to resolving this critical question "did the defendants know of the plaintiff's condition?" One must say unhesitatingly that this fact could not have been brought to the defendants notice until after the certificate of 8th June, 1972 was issued by Dr. Feanny.

As it is the unchallenged evidence, that following the delivery of the certificate (Exhibit 1) the plaintiff was never again put to work in the blending plant up to the time of his redundancy in June 1974, the question of negligence on the part of the defendants cannot arise as on the basis of my finding on this critical issue, the evidence is that all reasonable steps were taken by the defendants to safe guard the plaintiff by removing him from the blending plant. They were therefore in so acting clearly

111

Dr. Feanny agrees that there are many persons suffering from ulcers who by means of a strict diet are able to engage in work. The plaintiff was therefore free to run the risk of working with the defendants company from 1964 when the ulcer was first diagnosed, and May 1972, rather than facing the possibility of being unemployed. Moreover, although surgery was recommended to him as a means of correcting his condition he took no steps to avail himself of this course up to the time he severed his relationship with the company in June 1974, and this despite the fact that he was on a continuous leave of absence on full pay from 5th May 1972 up to June 1974.

In so far as the claim of negligence is concerned, therefore, that claim fails.

Nothing much need be said with respect to the head of the claim in so far as it relates to the alleged breaches of Statutory Duty on the defendants part, for although the pleadings sought to allege in some detail the facts upon which the claim was based, no evidence of the breaches complained of was brought to support any of these allegations.

Mr. Edwards in his final submissions drew reference to the total absence of any officials of the defendant company as well as to the absence of expert witnesses being called to testity on their behalf.

The short answer to this is that the evidential position as it stood at the end of the plaintiff's case, and as it turned out at the end of the evidence was that, as there was no evidence adduced in support of the allegations set out under this head of the claim, there was nothing for the defendants to answer. It is for the plaintiff to prove his case if he can and not for the defendants to disprove it. The onus being on the plaintiff to adduce such credible evidence to establish their claim on either of the

Although the plaintiff alleged that he is now permanently incapacitated,, the medical evidence is to the contrary. He is merely now sensitive to the chemical environment at the defendants plant; that at least was the situation up to 1975. The Medical Report (Exhibit 4) in which both Dr. Feanny and Dr. Bell issued a joint medical report concerning the plaintiff's condition bore out this fact. Indeed although the claim was filed in 1977 there has been no medical evidence called to support the allegation of permanent disability on the plaintiff's part. He is certainly, in the absence of such evidence not debarred from pursuing some other vocation. This aspect of his claim therefore appears to lie in the realms of speculation on the question of damages. On the basis of the factual findings, however, the question of damages in the final analysis does not arise.

In concluding I wish to make one final comment. It has been the unchallenged evidence of the plaintiff that over two hundred workers were engaged in work of a similar nature to that to which he had been exposed. There were one hundred workers on the regular staff and another one hundred workers engaged at forthnightly intervals. There has been no evidence brought to suggest that at least one other workers has been affected by being exposed to the conditions which were in existence at the defendants plant during the period in question. It is inconceivable that with the sort of vibrant and vigilant trade union activities prevailing in the island and at the defendants plant, in particular with respect to workers condition at the work place, that the plaintiff's request to Management to be removed between the period in question would have gone unheeded. When the plaintiff took ill in May 1972 the union took up his