SYARIKAT KEJURUTERAAN SISTEMATIK SDN BHD ....Appellant

AND

PG KARIM BIN PG BUSTAMAM .....Respondent

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 7 of 2018)

Before: Burrell P, Seagroatt and Lunn JJ A.
19th November 2018

Headnote: Duty of care on employers to scaffolders working at height: Risk assessment and safe places of work; duty to enforce use of operative's personal protection equipment; cross-appeal on appropriateness of contributory negligence.

Ms. Wong Kah Hwa@Susanna Lim and Mr. Lim Szen (Messrs. Susanna Lim Partnership) for Appellant
Mr. Vincent Joseph and Ms Subrina Tan Yii Chun (Messrs. Sandhu and Co) for Respondents

Seagroatt, JA.:

This is an appeal by the employers, the defendant in the action, against the judgment of the former Chief Justice whereby he found that the employers had been in breach of its duty of care towards their deceased employee, and negligent, in being responsible for the fatal injuries of the employee when he fell from a ceiling or roof whilst working in the course of his employment on the 6th August 2013. He sadly died two weeks after his fall from the injuries he had sustained.

The Chief Justice found that the employers were 75 percent responsible and the deceased was 25 percent responsible on the basis of contributory negligence. He awarded damages of BND$182,640.082 reflecting the contributory negligence of 25% found by him. The appeal is in effect against the whole of the judgment, the appellants contending that there should not have been any finding of breach of duty of care or negligence against them. A brief survey of the workplace concerned and the serious risks involved in working at height from a platform on a ceiling that was largely constructed of gypsum on which no operative should be at liberty to walk, raises obvious problems for the appellants.

Since there was no eye-witness of where the deceased was working, or what he was doing when he fell, the material events have to be reconstructed from circumstantial evidence. There are post-event photographs of aspects of the general workplace but these have limited value. They show a fractured hole in the ceiling which is probably that made by the deceased but there is no intelligible commentary on these photographs to assist.

The deceased was a scaffolder of about three years experience working on the roof/ceiling of a painting chamber. That roof or ceiling was made of gypsum board a

fragile material not designed to withstand the weight of a human being. It was an obvious hazard or danger, and the employers conceded this, and explained the steps taken to guard against it. The deceased's task was to assist in the erection of scaffolding to install electric supply and ducting on the ceiling. It included the construction of a permanent walkway with handrails, on the ceiling, so as to afford protection from walking on the gypsum board ceiling.

It was alleged by the employers' scaffolding supervisor that at the end of the morning's work the deceased was told to take a break and that at some stage he slept. The supervisor woke him sometime around 1 o'clock and instructed him to do some work at ground level. The picture of what happened is far from clear but after the break the deceased was not wearing his protective equipment which included a harness and clips. Whether it was in the rest area, or on the ground floor is far from clear. Whether the rest area was on the ground floor or in the blasting chamber is also unclear. From the position of the hole in the gypsum ceiling created by his fall, it appears that the deceased took, or tried to take, a shortcut to reach the walkway, one section of which was railed, or guarded, with the other being unguarded in any respect, and also lacking in toe-boards. It is also suggested by the supervisor that the deceased was carrying transom tubes for the scaffolding at the time of his fall.

The plaintiff's case largely hinged understandably upon the evidence of Dr Shane Richardson, described as a Principal Forensic Engineer, since the scaffolder, on whose behalf the action was brought, sadly died from his injuries about 2 weeks after his fall from the roof.

Although there are pleadings in the action which contain, in the Statement of Claim, fairly exhaustive allegations of breach of duty of care and negligence, there is much repetition of the particulars of negligence. For example 7(a), (c), (d), (e) and (f) say the same thing in effect i.e failure to provide a safe place of work and safety equipment.

The Amended Defence is essentially a narrative of events taken no doubt from the defendant's employees. As a consequence it is unduly prolix. The meaning of parts of it is difficult to follow and the amendments made, which are essentially by way of striking out certain of the narrative or alleged facts and some of the counter allegations alleging negligence on the part of Mr. Agus, do not raise anything new. The defendant's case is that the deceased was the author of his own misfortune, and therefore solely to blame for the accident. It is a messy document which, in amended form, seeks to change the nature of their case against the deceased. There appears to be no statement of agreed facts so the judge's function at trial was to find all the essential facts from his view of the evidence of all the witnesses. Necessarily he would form a view of the reliability of the witnesses as to fact which were the defendant's employees. Obviously he was in the best position to make such assessment since he saw and heard these witnesses, and this court has not.

It is of some significance that the employer made the following allegations against the deceased in its original pleaded defence which it then withdrew striking them out by way of formal amendment. Some of them relate to what occurred by way instruction from the supervisor and the employer's original narrative of the events before the deceased's fall. They are significant in the extent to which they alter the employers'

version of events. Furthermore the Particulars of Negligence alleged against the deceased abandoned the following:

(d) – "Failing to put on his full body harness or any fall protection device issued to him by the defendant for use at height."

(e) Taking a short cut by walking on the gypsum board of the ceiling of the Chamber which is not an access instead of using the walkway specifically provided for access.

(f) Failing to use the walkway for access as he was instructed and as was his duty to obey.

Failing to heed the warnings and constant reminders by the defendant, its servants or agents, foreman, supervisors to take proper care for his own safety.

The picture thus left on the pleading, is of a defendant uncertain of facts and uncertain how to plead contributory negligence on the part of the deceased. It immediately raised the need to examine the defendant's witnesses on the sequence and nature of events and how they were contending the deceased was himself negligent.

The Judge's findings of fact

The evidence of Dr. Shane Richardson was accepted by the judge, who found him, wholly properly, to be an expert in the field of safety in work, place of work and access to and from it. He had considerable experience in evaluating the risk involved in such construction work. The defence sought to challenge his expertise on the basis of a lack of certain academic qualifications. This case called for a commonsense approach to safety, the risks involved and the steps taken to mitigate or eliminate them. On-site experience overrode any academic requirements. The site was patently a dangerous one for workers at that height – over six metres.

The judge therefore found that the deceased's fall was mainly caused by the defendant's failure to make a full and proper risk assessment, and its failure to provide proper supervision. No effective risk assessment on the painting chamber from which the deceased fell, was made until after the accident had occurred.

He also found that there was support for Dr. Richardson's conclusions in the evidence of Dr. Altaf who headed a team from the Occupational Health Division of the Ministry of Health. He visited the site and interviewed the workers who were on site at the material time.

The finding of Dr. Altaf was in accord with that of Dr. Richardson and specifically that no, or no adequate, precautions had been taken to reduce the risks, which were obvious.

From all that evidence the judge concluded that the deceased had been instructed to take transom tubes from the ceiling in the painting chamber and was doing so when he fell. The area where he fell was not barricaded and it was conceded that part of the walkway lacked any form of barrier even toe boards and the photographs taken, albeit three weeks later, clearly demonstrate this. Even had he been wearing full PPE (Personal Protection Equipment) it would not have helped him. There was no metal or

wooden guardrail to which the clip harness could be attached. The workers attitude to safety was a problem to be taken into account as reflected in the report from Dr. Altaf to the OHD.

Of significance is the judge's view of the employer's prime witness, Mr. Wilson the supervisor. He simply did not believe him when he said he told the deceased to go down to put on his PPE and harness, but, relying in part on the employer's own investigator's report, he noted that Wilson told him to start work. The judge then found as a fact that the deceased started to carry transoms to where they were needed for the erection of scaffolding to continue. In doing this he used what the witnesses described as a short-cut. This must have been well-known as such. It was not guarded. It should have been eliminated. Workmen are known or prone to take shortcuts if available. Having found that he did not believe the supervisor when he said he told the deceased to go down to the ground floor, the judge concluded that in taking the shortcut the deceased missed his footing and stepped on the fragile gypsum board. He was not wearing his protective clothing. His supervisor must have known this when he told him to go back to work after the break. The equipment was it appears on the ground floor when he started his rest period. It seems that the deceased had taken his rest up on the ducting. On that occasion at least, the supervisor had not told him not to do so when he came upon him taking his rest. The judge expressed his overall conclusion in the following terms – *"the defendant is solely and/or vicariously liable for all the losses and damages."*

<u>The issue of contributory negligence</u>

Despite finding that the employer was *"solely liable for all losses and damages"* he then went on to find that the deceased was also negligent and contributed to the accident. He based this on the employer's safety policy and the alleged training of workers to secure their compliance with basic safety rules. The deceased was an experienced scaffolder. Workers were not allowed to rest up on the ceiling area. There was a designated area. On this occasion at least the deceased did not use it. In view of the judge's findings on the supervisor's credibility – he simply did not believe him on any of the material matters leading up to the deceased's fall – his finding of contributory negligence is on the face of it, difficult to understand. Workmen in a dangerous working environment need supervision and constant reminders. The repetitive nature of the work often leads to momentary loss of awareness especially if they are working under pressure. They are vulnerable to momentary lapses. Familiarity with working conditions on site often renders them insensitive to permanent risks. The supervisor clearly failed on the judge's findings to give effect to aspects of the safety policy. It is not realistic to assume that he was unaware of the shortcut. He required the deceased to work when he was not wearing his safety harness. He should have made sure that the deceased went down and put on the safety harness before doing any work.

We have to remind ourselves that we are not the trial judge and have not seen or heard the witnesses and should interfere only where it is clear that the trial judge's approach and finding is inconsistent on the face of it.

On the judge's findings of fact the deceased was not told to go down to put on his PPE. He was in fact told to go back to work on being roused from his lunch-time rest, when he was not wearing his full safety equipment. He complied with the instruction and

proceeded to get some transoms. The shortcut must have been well-known to be such and it was not sealed off. Part of the walkway had no protective barrier or even toe-boards.

Although the defendant had a system designed to protect fully its operatives, in practice there were the clear failings identified and the supervisor, whose evidence the judge rejected, failed to apply the system in accordance with an overall duty of care. His instruction to the deceased to return to work overrode essential caution; from that, and the inherent dangers of incomplete safety provision, flowed this tragedy. A proper system and its application must provide for possible failures on the part of supervisors, and positive human reaction to instruction from senior staff.

The judge's findings should have led to a conclusion that the employers were solely, responsible for the accident, as he himself originally expressed, "solely and/or vicariously liable for all the losses and damages." There was no justification for a finding of contributory negligence.

The appeal fails and the judge's finding of contributory negligence is set aside and the cross-appeal in that respect succeeds. On that basis the respondent/plaintiff is entitled to the total amount of damages assessed by the judge.

The plaintiff respondent has, also cross-appealed in respect of certain heads of damage which the trial judge disallowed. They are (1) loss of dependency in respect of the deceased's mother and (2) loss of services of father/husband. These frequently feature in fatal accident claims. They call for close examination and more often than not are disputed by defendants. Furthermore they are often difficult to quantify and require evidence specifically on those aspects. In many instances the claims are inflated.

The difficulty for the plaintiff respondent is that these heads of loss and damage were not pleaded in the Statement of Claim and were not notified to the defendant until shortly before the trial started – a little over one week beforehand. Although some consideration was given to these heads during the trial the defendant in principal objected to the very late claim but seemed to adopt an ambivalent approach. However the trial judge disallowed them in view of the failure to plead them. He was in our view exercising his discretion properly.

It is important that a plaintiff identify its heads of claim at the outset so that the defendant can value the claim, subject to liability, and decide whether it wishes to make a payment into court or negotiate on the basis of known figures or make open offers in writing. We do not know what the defendant did by way of such, nor we should know. It is clear however that it could be prejudiced by the late emergence of additional claims. The structure of litigation proceedings is to prevent surprise, and potential prejudice and to ensure that a claim is properly formulated and presented with a view to achieving finality.

We are asked to do one of two things. Either we conduct an assessment exercise ourselves, hearing evidence, and submissions ourselves, or we remit it to the trial judge for him to carry out the same exercise. The former is neither practical not appropriate. We are not a trial court. The second would entail finding that he exercised his discretion wrongly. He did not do so. His reasons were valid though shortly stated.

In either case considerable cost would be involved. On the uncontentious picture given to us the plaintiff would have to bear those costs, of both parties, because its claim had not been properly presented.

In all these circumstances we will not entertain such a cross-appeal, which we dismiss. Because of the defendant/respondent's ambivalence at trial, which seemed to encourage the plaintiff to proceed with these heads of claim, we make no order for costs.

In respect of the appeal we dismiss it with costs to the respondent. The cross-appeal on the matter of contributory negligence is allowed with costs to the respondents. The cross-appeal in respect of the heads of damage is dismissed with no order as to costs. These are orders nisi in the event of any further argument on the matter of costs which will be heard on the 22 day of November 2018 at 9.30a.m.

There will therefore be judgment for the respondent/plaintiff for BND$243,520.11 damages.

Burrell, P.

Seagroatt, J.A. **Lunn, J.A**