In The Supreme Court of Bermuda

CIVIL JURISDICTION
2014: No. 117

BETWEEN:

GLENN O. CHASE

Plaintiff

-v-

(1) FAIRMONT HOTELS (BERMUDA) LIMITED
(2) FAIRMONT MANAGEMENT LIMITED
(3) FAIRMONT RESOURCES LIMITED
(4) FAIRMONT SERVICES LIMITED
(5) FAIRMONT LIMITED
(6) WEST END PROPERTIES LTD.

Defendants

JUDGMENT

(in Court)

Personal injuries-accident at work-breach of statutory duty- negligence-failure to properly maintain equipment- failure to properly train staff -inability of Court to permit plaintiff to rely upon un-pleaded allegations advanced for the first time at trial

Date of Trial: June 25-26, 2018

Date of Judgment: June 29, 2018

Ms. Sara Tucker, Trott and Duncan Limited, for the Plaintiff
Mr Jai Pachai, Wakefield Quin Limited, for the Defendants

Introductory

1. The Plaintiff was employed by one or other of the Defendants as a part-time kitchen steward on May 9, 2011. Later the same week, he received an orientation which included a brief demonstration of how to use the freight elevator ("the Elevator"). He first reported for duty approximately two weeks later on May 25, 2011 for his first 8.00pm-12.00 midnight shift. Shortly after midnight on May 26, 2011, the Plaintiff reported to a Security Officer that he had badly injured his left hand while closing the vertical doors of the Elevator.

2. On March 25, 2014 the Plaintiff issued a Specially Endorsed Writ of Summons which was amended on October 23, 2014 pursuant to leave granted on October 9, 2014. The central allegation was that the Plaintiff's hand was injured because the Elevator doors were stuck and when he succeeded in opening them with a strap the top door came crashing down suddenly and his hand was crushed between the two doors. The following claims were asserted:

    (a) breaches of section 3 of the Occupational Health and Safety Act and regulation 40 of the Occupational Safety and Health Regulations 2009;

    (b) breach of the common duty of care under section 4 of the Occupiers and Highways Authorities Act 1978;

    (c) negligence (failing to maintain the Elevator in a safe manner and failing to provide a safe working environment).

3. The Plaintiff's pleaded case relied explicitly on allegations of failing to properly maintain the Elevator and its straps in a safe condition. The Defendant denied these allegations, relying on comprehensive Otis Elevator service records and the expert evidence of Mr. Lee Rigby. In the Plaintiff's Skeleton Argument served a few days before trial, his counsel advanced a new line of argument which was explored through his oral evidence and cross-examination at trial. This was the un-pleaded assertion

that the Plaintiff received insufficient training on how to use the Elevator and this caused or contributed to his injuries.

Findings: were the Elevator and its straps not maintained in a safe manner?

4. In my judgment there was no reliable evidence adduced at trial to explain precisely what caused the injury but the most plausible explanation is that the Plaintiff failed to operate the Elevator in a safe manner. The Plaintiff's own evidence was essentially as follows. He was employed as a part-time Kitchen Steward on May 9, 2011. Later that week he had an orientation during which the use of the Elevator was briefly demonstrated to him without any warnings being given as to potential safety risks or guidance as to how to respond to potential operational problems. He was then on call. He first attended work on May 25, 2011. At the end of his shift he was required to use the Elevator to dispose of refuse. According his Witness Statement dated December 19, 2017 (over six years after the event):

> "*…I pulled on a canvass strap, approximately six inches in length, to close the elevator door. When I pulled on the canvass strap I found that the door was stiff so I used both hands to effectively tug to free the Elevator door. When I managed to free the jammed door to the service Elevator it suddenly and simultaneously crashed down and up trapping my left hand and crushing it as a result.*"

5. This account was broadly consistent with the plea set out in paragraph 4 of the original version of the Plaintiff's Statement of Claim:

> "*The Service Elevator was stuck in the open position. The Plaintiff pulled on the canvas strap (approximately six inches in length), which hung from the bottom of the top door to the Service Elevator. The top door came crashing down suddenly and the Plaintiff's left hand was caught between the service Elevator's two vertically sliding doors, thereby causing him injury…*"

6. At trial, his case was that he had entered the Elevator and was attempting to close the doors from the inside. However, it was initially pleaded that:

> "*3. The Plaintiff attempted to close the Service Elevator from the outside, applying the method which the senior members of staff had instructed him, as required by the Defendant, despite the management of the Defendant's awareness that the Service Elevator was faulty.*"

7. He explained and I accept that the reference to closing the door from outside was a genuine error. This plea was then amended to read as follows:

> "*3. The Plaintiff attempted to close the Service Elevator from the inside, using a strap to close the door, as required by the Defendant…*"

8. It was only in his oral evidence at trial that the Plaintiff indicated that he used the strap outside the Elevator which was the only strap visible rather than the strap attached the door itself which was inside the Elevator and was the one which should have been used. In his Witness Statement he deposed as follows:

> "*13…When I commenced employment with the Defendant Hotel I did receive orientation….I was shown how to manoeuvre the doors to the lift by pulling on the straps which were intact at the time of the orientation. There were two straps at the time of the orientation but at the time of the incident only one was visible….*"

9. It was very difficult to place much weight on the Plaintiff's oral account for the first time at trial that he pulled on the outer strap. What is also noteworthy is that in his Witness Statement the Plaintiff had an opportunity to clearly assert that the accident occurred because of his own failure to operate the doors correctly because he had not been properly trained (despite his pleaded case that he did as he was instructed to do). The following bare assertion was made:

> "*I since realise that the extent of the hotel's failure to train me adequately in my role has left me with life altering injuries….*"

10. This did not signify that the Plaintiff was either abandoning his pleaded case that his injury was caused by a faulty elevator or asserting for the first time an alternative plea that the accident was caused because he was inadequately trained in the safe use of the Elevator. The Plaintiff was in my judgment an essentially honest witness, in that when questioned by the Court at the end of his evidence on a point where he could easily have sought to embellish his evidence, he stated that he could not recall. Rather it appeared to me that the Plaintiff had convinced himself that the accident had been primarily caused by a defective piece of equipment rather than by his own human error caused in part by his unfamiliarity with operating the Elevator which he was using for the first time.

11. The earliest documentary record of the accident, and in my judgment the most reliable evidence, is the Accident Report which was started by Mr Colin Dunlop, a full-time Security Officer, and completed by his colleague Mr Kenrick Shillingford. Mr Dunlop received the complaint from the Plaintiff and sent him to the Hospital. The Plaintiff returned later that day and the Accident/Incident report form was completed by Mr Shillingford. Mr Dunlop recorded the following entry in the box "*How did the accident happen?*"

> "*Going down freight elevator to the loading dock. Closing the door and his hand got caught in the freight elevator in the main kitchen*."

12. In his Witness Statement dated May 1st 2014, Mr Dunlop asserted that the Plaintiff told him "*that he had his left hand on the door as he pulled on the strap*". I did not consider this disputed recollection to be reliable, even though it was very broadly consistent with what was recorded in the Report. Mr Shillingford later on May 26, 2018 ticked the box "*Procedures not known/understood*", and recorded the following entry:

> "*Not taught correct way to close door.*"

13. He also placed a tick in the box "*Tools & Equipment*" next to "*In unsafe condition*" and recorded:

> "*doors very stiff and had to be tugged on…*"

14. These two entries he testified were based on what the Plaintiff said to him. He also ticked the box "*Lack of concentration*" based on his own assumption of what had occurred. The impressively careful Mr Shillingford made the following entry in the box "*Action to Prevent Recurrence*":

> "*Meeting of dept heads and staff have a meeting and explore options available to improve on operation of lift*."

15. There was no indication form the Defendants' evidence that any meeting or further investigation ever occurred. On the other hand the comprehensive Otis Elevator (Company) (Bermuda) Ltd. ("Otis Elevator") Service Manager History Report for the

Elevator did not reveal any relevant defects with the Elevator, which was serviced on May 5, 2011 and found to be "running normal" on June 13, 2018. The only record of a broken strap being replaced (on June 8, 2011) related to the loading bay level landing. This was neither the outside strap on the kitchen level nor the strap inside the Elevator. In summary, on the day of the incident the Plaintiff:

(a) did complain of being inadequately trained;

(b) did complain about the doors being "*very stiff*"; but

(c) did not complain of any defective straps nor did he mention the top door "*crashing down suddenly*".

16. Mr John Morran of Otis was called by the Defendant to confirm the contents of the August 26, 2013 Report Mr Kevin Hollis had prepared on the operations of the Elevator. I accept his evidence that it is not possible for the upper door to come crashing down and that (although no report was made to Otis in connection with the accident) no relevant defects were found either before or shortly after the Plaintiff's injury occurred. I also accept his evidence that the service records accurately record all reports made to Otis about problems with the Elevator. In these circumstances I am unable to place reliance on the admissions which the Plaintiff attributes to Chief Steward Brian Hume and a Mr Mastalir (former employees' of the Defendants) about persistent problems with the Elevator. These admissions were supposedly made in a meeting about two weeks after the incident. I am inclined to accept the Plaintiff's evidence that what he understood as admissions were made, because he sought specific discovery of records of the meeting which the Defendants said did not exist. However, I am unable to form any clear view of the content and scope of what the Plaintiff believes was said. For the avoidance of doubt I reject the suggestion of a grand conspiracy between the Defendants and Otis to carry out undocumented repairs.

17. The Defendants' impressive expert witness Mr Rigby explained in a very straightforward way why the Elevator doors would appear stiff to someone unfamiliar with them. The force required to pull the doors closed is 21.6 pounds (they each weigh around 500 pounds). The doors could not become stuck for any reason (apart from a significant structural defect or corrosion). The proposition of a strap being stuck in the safety cage and jamming the doors was not feasible. The door could not come crashing down although the speed of closing would be increased by heavy sustained pulling. This was essentially because the connection between the upper and lower doors neutralised the effects of gravity.

18. Although he only examined the Elevator in 2015, Mr Rigby could see no evidence of any repairs having been carried out to the door tracks and ruled out any structural defects. He also firmly rejected the notion that tattered straps (provided they met the guideline minimum length requirement of 6") constituted a safety hazard. Although Mr Rigby insisted that only minimal training on how to use the Elevator was required, he did acknowledge having heard of hands being jammed between similar elevator doors by persons pulling the upper door down with the strap with one hand and attempting to pull the bottom door up with their other hand.

19. There was no credible evidence adduced by the Plaintiff supporting, nor was there any evidential basis for, a finding that the Plaintiff's injuries were caused by a failure to properly maintain the Elevator. Despite Ms Tucker's careful cross-examination, I accept the evidence of the Defendants' witnesses and find that the Plaintiff's account of how the accident occurred cannot be accurate. I am unable to make any finding as to precisely how the accident occurred but I find that there is no credible evidence that the Plaintiff's injuries were to any material extent attributable to a mechanical defect or any defect relating to the straps. In largely accepting Mr Rigby's evidence, I have borne in mind Ms Tucker's reminder that "*the evidence of an expert is not definitive; a jury may accept or reject it; so may a judge sitting as a judge and jury*": *The Trustees of the Seventh Day Adventist Church-v-Wilson* [1985] Bda LR 31 (per Harvey dacosta JA at pages 10-11).

20. The Plaintiff has accordingly failed to prove any of the specific breaches of statutory duty particularised under paragraph 7 (a)-(m) or the particulars of negligence set out under paragraph 9(a)-(f).

Findings: has the Plaintiff established that his injuries occurred because of a failure on the part of his employer to provide adequate training in relation to the use of the Elevator?

21. In the Plaintiff's Skeleton Submissions for Trial filed on June 21, 2018, the following arguments were advanced:

> "*18. It is submitted that S.3(2)(c) of the Occupational Health and Safety Act 1982 imposes a general duty on employers to provide such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the safety and health at work of his employees.*
>
> *19. It is submitted that the Plaintiff was not instructed, trained or supervised on or whilst operating the Service Elevator, In so far as the Plaintiff received information during his orientation the Plaintiff was shown how to manoeuvre*

the doors to the lift by pulling on the straps. At the time of the incident only one strap was visible.

20. The Defendants have not produced any information for the purposes of these proceedings to indicate training generally or for this particular Plaintiff. It is therefore submitted that save for orientation the plaintiff was not instructed on, trained or supervised in his use of the Service Elevator…

21. Further to paragraph 19 above, the Plaintiff was not informed, instructed or trained on what to do in the event that he encountered problems with the Service Elevator…"

22. Apart from a general plea alleging a breach of section 3 of the 1982 Act under paragraph 7(n) of the Amended Statement of Claim, a breach of duty grounded in inadequate training was neither pleaded nor particularised. The Otis Report was prepared on August 26, 2013 before proceedings were even issued but in anticipation of a claim based on defective equipment. The Defendants prepared Witness Statements shortly after the present proceedings were commenced from those persons who appeared to be potential witnesses whose evidence would assist the Defendants to meet the Plaintiff's pleaded claim, as filed on March 25, 2014 and/or as amended on October 9, 2018:

- May 1, 2014: Colin Dunlop and Kenrick Shillingford;
- March 28, 2015: Lee Rigby (Expert Report on the functioning of the Elevator).

23. Mr Pachai submitted that advancing by way of submissions on the eve of a trial an entirely new case was too prejudicial to the Defendant to justify permitting an application to re-amend at the beginning, let alone at the end of the trial. As regards the importance of pleadings and the unfairness to defendants of trial judges seeking to do justice to claimants based upon a theory of liability which has not been formally pleaded, the Defendants' counsel relied upon two authorities.

24. Mr Pachai, with allusions of *deja vu,* was not reticent about reminding me of the Court of Appeal decision in *Battiston-v-Grant* [2017] Bda LR 38. In that case I held that a Human Rights Act complaint could be decided in favour of a claimant on the basis of a legal point which had not been pleaded or expressly argued before the tribunal, because the failure to expressly plead the point was in my view a merely

"*technical*" defect in the human rights context. The Court of Appeal disagreed. Bell JA crucially opined as follows:

> "*31. The Chief Justice appears to have accepted that if it were to be possible to over-ride or by-pass the rules of natural justice, in terms of ignoring a failure to give a respondent an opportunity to appreciate and respond to the changed nature of the case against him, such a course could only be followed where such could be done without there being substantial injustice to the respondent. Given my view that it was not open to the Chief Justice to find that there was a breach of section 6(1) (g) of the Act when the Tribunal itself had not done so, it seems to me to follow that such a course would indeed represent a substantial injustice to Mr Battiston in this case …*"

25. Even more apposite because of the broad similarity of the issues addressed to those which arise in this case was the English Court of Appeal case of *Al Medenni-v-Mars UK Ltd* [2005] EWCA Civ1041. In that case the trial judge found for the injured claimant on a factual basis (that another employee had been responsible for her injury) which did not form part of her pleaded case. The Court of Appeal set aside the finding of liability. Dyson LJ opined as follows:

> "*21. In my view the judge was not entitled to find for the claimant on the basis of the third man theory. It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness.*"

26. In the present case the Plaintiff himself has at trial raised a new un-pleaded theory of liability, but Ms Tucker's primary position was that no amendment to the pleadings was required. Her fall-back position was that the Court should if necessary grant leave to amend. The critical question which arises is whether it would contravene the Defendants' fair trial rights if the Court were to entertain the failure to train issue despite the fact that it was never pleaded and was only explicitly advanced in a

Skeleton a few days before the trial. The question arises against the following litigation background:

(a) the accident occurred over 7 years ago;

(b) the 'failure to train' point was within the Plaintiff's own knowledge and could have been pleaded at the commencement of the action over 4 years ago;

(c) the Plaintiff appears to have made a tactical decision early in the litigation to avoid advancing a theory of liability which required him to admit not operating the Elevator properly and contributing to some extent to his own injuries;

(d) the Defendants prepared an almost irresistible defence to the Plaintiff's defective equipment claim which was unsupported by expert evidence;

(e) the 'failure to train point' was mentioned in passing in the Plaintiff's December 19, 2017 Witness Statement;

(f) the 'failure to train' point was first explicitly advanced on the eve of the trial as an afterthought, presumably because the Plaintiff's counsel appreciated that the case the Defendants had prepared to meet at trial was weak.

27. The 'failure to train' point appeared to me by the end of the trial to be the most arguable 'claim' in large part because the Defendants had advanced no defence to it through their evidence. Looking at the issue based on the Plaintiff's evidence alone, it appeared to me to be seriously arguable that an employee who was given a superficial demonstration of how to use the Elevator approximately two weeks before he first used and had his hand crushed had not been properly trained. This appeared to be a breach of the employer's statutory and common law duties to provide a safe system of work. I was not inclined to accept the evidence of Mr Morran and Mr Rigby to the effect that little or no training for the Elevator was required. Nor was I impressed by the absence of any evidence indicating that the Plaintiff's then employers properly investigated how his injuries occurred. Nonetheless I have no reason to doubt the evidence of all three locally based Defence witnesses that no other accidents similar to the Plaintiff's incident are known to have occurred before or since. In these circumstances it is impossible avoid the conclusion that the injuries he suffered must have been materially contributed to by the Plaintiff's own negligence.

28. It is impossible to make firm factual findings without hearing the Defendant's own evidential case on the 'failure to train' claim. The Defendants adduced no evidence to deal with the issue because they did not know (until the eve of the trial) that the Plaintiff might seek to formally rely on the point. Upon receipt of the Plaintiff's Skeleton Argument, Mr Pachai appears to have cannily prepared to meet a late application for leave to re-amend, which he duly resisted when it was very belatedly made at the final speeches stage at the end of trial. Who was in charge of the Plaintiff's staff orientation? What form do they say the 'training' took in early May 2011? Can they remember? Are they still employed by the Defendants? Can they be found? Those are the sort of questions which would have been examined by the Court if an application for leave to re-amend the Statement of Claim to plead the 'failure to train' point had been listed for an *inter partes* hearing well in advance of trial. In the event, it was impossible for Ms Tucker to effectively contest her opponent's submission that the Defendants would be seriously prejudiced by permitting the Plaintiff to rely at trial on a new case which the Defendants had no reasonable opportunity to meet.

29. I am accordingly bound to find that the Plaintiff is not entitled to pursue the 'failure to train' point on the grounds that it is in all the circumstances simply too late for an entirely new theory of liability to be advanced in relation to a cause of action which accrued 7 years ago.

Conclusion

30. For the above reasons the Plaintiff's claim is dismissed. I shall hear counsel if required as to the terms of the final Order and costs.

Dated this 29th day of June 2018 _____

IAN RC KAWALEY CJ