In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012: No 448

BETWEEN:-

ROSHEA LORLETTE HILL-CROSS

Plaintiff

-and-

THE BERMUDA HOSPITALS BOARD

Defendant

RULING

(In Chambers)

Date of hearing: 6th January 2015
Date of ruling: 14th January 2015

Ms Arisha Flood, AAF & Associates, for the Plaintiff
Mr Allan Doughty, Isis Law Ltd, for the Defendant

Introduction

1. By summons dated 30th September 2014 the Defendant seeks an order that the Plaintiff's re-amended specially endorsed writ claiming damages in negligence for personal injury be struck out pursuant to Order 18, rule 9 of the Rules of the Supreme Court 1985 ("RSC") and/or under the inherent jurisdiction of the Court on the grounds that allegedly it discloses no reasonable cause of action; is frivolous and vexatious; will tend to embarrass and delay the proceedings; and amounts to an abuse of the Court's process.

Background

2. The Plaintiff was at all material times employed by the Defendant as a nurse's aide at the King Edward VII Memorial Hospital ("the Hospital"). On 29th April 2009 she was on duty there at the nurses' station in Cooper's Ward. It is her case that she was sitting studying the manuals in the station in preparation for a weekly quiz regarding various diseases. She got up to get another manual, but as she sat back down a colleague, Pedmini Lall, moved the chair from behind her. She fell heavily to the floor, landing on her backside. She alleges that Ms Lall moved the chair deliberately. On the Plaintiff's case, Ms Lall presumably did so a practical joke, because both she and another nurse who was present were laughing at the Plaintiff's fall. Ms Lall was a registered nurse and thus in a more senior position than the Plaintiff.

3. The Defendant admits that Ms Lall moved the chair when the Plaintiff was standing, but not as she was about to sit down, and avers that Ms Lall did not appreciate that the Plaintiff had intended to return to the seat. The Defendant alleges that the Plaintiff was the author of her own misfortune in that she should have looked to make sure that the chair was still there before attempting to sit back down. It is only fair to point out that Ms Lall, who is not a party to these proceedings, is no longer working in Bermuda and has not had the opportunity to respond to these allegations.

4. Following her fall, the Plaintiff experienced pain and discomfort around the base of her spine. She sought medical treatment at the end of her shift and subsequently. On 6th May 2009 she attended the Defendant's Employee Health Services ("EHS"), where she was seen by Dr Katherine Michelmore, who signed her off work for one week. On 13th May 2009 she attended EHS for review, and Dr Michelmore recommended that she should return to work but perform no unassisted lifting.

5. On 20th May 2009 the Plaintiff again attended EHS. Following a referral from Dr Michelmore, on 21st May 2009 she attended the fracture clinic, where Dr Panagal Chelvam diagnosed a case of coccydynia. Although there is some confusion on the papers, the contemporary records suggest that he certified her as fit for work but recommended that she undertake only light duties until 26th May 2009. Dr Michelmore obtained clarification from Dr Chelvam that "*light duties*" meant no unassisted lifting and advised the Plaintiff's supervisor, Nurse Sheila Whittaker, accordingly.

6. The Plaintiff alleges in her pleaded case that upon her return to work she repeatedly asked Nurse Whittaker that she be assigned to light duties until her symptoms improved, but to no avail. It is unclear whether this allegation relates to the period before or after 26th May 2009, or to both.

7. The Plaintiff claims that her injuries were exacerbated by a further incident which took place on 30th May 2009. The incident is described thus in the re-amended statement of claim.

> 5. The Plaintiff on 30th May, 2009 was working in Cooper Ward, when an elderly and obese male patient by the name of Mr [A] who had just been released from ICU required assistance for a sponge bath, change of clothes, and change of bed linen. The patient was approximately 5 feet 11 and weighed approximately 260 pounds and was aged 70 years old. The patient was drenched in his own urine and had been left immobile in his bed for over an hour in that condition. Mr [A]'s wife was also present and was most concerned that her husband was attended to.

> 6. As the Plaintiff was attempting to change the sheets of the patient, the patient stood up from his bed and he started to urinate blood and urine involuntarily; and in a state of panic, the patient gripped the plaintiff putting all his weight on her. The Plaintiff was put in the position to help the male patient unassisted to sit down back on his bed: thus causing the Plaintiff to experience a feeling that her "insides had dropped" which was injury subsequent to the first accident on 29 April 2009.

Under the particulars of negligence in the re-amended statement of claim the Plaintiff further alleged that earlier during her[1] shift [A] was in "*excruciating pain*".

8. The Plaintiff has confirmed this account in her reply and in an affidavit dated 12th March 2013. She exhibits to the affidavit a manuscript document marked RLEHC-5 which was annexed to a workmen's compensation/short term disability claim form signed by her dated 25th June 2009. The document, which is written in the first person, presumably by her, gives a slightly different account of the incident:

> I was asked to attend to a patient who was drenched in urine. His wife was irate and verbally attacked the nurse. I needed assistance. The patient was very upset and had been in extreme pain all morning. I told the nurse I needed assistance twice. She was attending to patients and said she'd be in. The wife wanted her husband done immediately. I started bathing the patient with the wife wanting to assist. The patient was extremely upset thus making mobility difficult. His sheets were drenched in urine and had to be moved. The wife and I had difficulty moving him (and the linen from under him) and eventually assisted him in standing. At that point I felt extreme pressure and pain in my rectum and pelvic areas and I felt like my insides had dropped. The patient started to panic again as urine and blood poured out of him onto the floor. His wife and I repositioned him on the bed and I called the nurse who immediately came.

[1] The pleading actually says "*earlier during the shift of the patient*", but I infer that "*patient*" should read "*Plaintiff*" as otherwise the averment would not make sense.

9. In the account in the pleadings the Plaintiff is injured when the patient, who has stood of his own volition and unaided, grips the Plaintiff and puts all his weight on her. In the account in the workmen's compensation/short term disability form the Plaintiff is injured as she assists the patient in standing and there is no mention of the patient placing all his weight upon her.

10. The Plaintiff had only recently joined the Hospital. On 14th April 2009 she attended a half day class on bed bathing and making, which included both a theoretical and a practical component. The purpose of the class was to teach all incoming nurse's aides techniques which would protect both the patient and the caregiver from injury while the patient was being bathed or moved so that the caregiver could change the patient's bedding. There is a conflict of evidence between Phyllis Hayward, who taught the class, and the Plaintiff, as to whether the Plaintiff was given the opportunity to practice these techniques during the class. However it is not disputed that Ms Hayward warned all the attendees, including the Plaintiff, not to attempt to move or lift a patient without the assistance of another staff member so as to avoid injury to their backs.

11. The Plaintiff was due to attend an all-day class on manual handling on 12th May 2009. However she was unable to do so as on account of her injury she was off work that day.

The law

Strike out

12. The principles applicable to striking out are not in dispute. They were summarised by the Court of Appeal in Broadsino Finance Co Ltd v Brilliance China Automotive Holdings Ltd [2005] Bda LR 12. Stuart-Smith JA, giving the judgment of the Court, stated at 4 – 5.

> Where the application to strike-out on the basis that the Statement of Claim discloses no reasonable cause of action (Order 18 Rule 19(a)), it is

> permissible only to look at the pleading. But where the application is also under Order 18 Rule 19(b) and (d), that the claim is frivolous or vexatious or is an abuse of the process of the court, affidavit evidence is admissible. Three citations of authority are sufficient to show the court's approach. In Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick [1999] EWCA Civ 1247, at page 17 of the transcript Auld LJ said: "It is trite law that the power to strike-out a claim under Order RSC Order 18 Rule 19, or in the inherent jurisdiction of the court, should only be exercised in plain and obvious cases. That is particularly so where there are issues as to material, primary facts and the inferences to be drawn from them, and where there has been no discovery or oral evidence. In such cases, as Mr Aldous submitted, to succeed in an application to strike-out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known….. There may be more scope for an early summary judicial dismissal of a claim where the evidence relied upon by the Plaintiff can properly be characterised as shadowy, or where the story told in the pleadings is a myth and has no substantial foundation. See eg Lawrence and Lord Norreys (1890) 15 Appeal Cases 210 per Lord Herschell at pages 219–220". In National Westminster Bank plc v Daniel [1994] 1 All ER 156 was a case under Order 14 where the Plaintiff was seeking summary judgment, but it is common ground that the same approach is applicable. Glidewell LJ, with whom Butler-Sloss LJ agreed, put the matter succinctly following his analysis of the authorities. At page 160, he said: "Is there a fair and reasonable probability of the defendants having a real or bona fide defence? Or, as Lloyd LJ posed the test: 'Is what the defendant says credible'? If it is not, then there is no fair and reasonable probability of him setting up the defence".

Safe system of work

13. It is not in dispute that the Plaintiff had a duty to provide the Defendant with a safe system of work. See General Cleaning Contractors v Christmas [1953] AC 180, HL, eg *per* Lord Oaksey at 189 – 190. The statement of claim is best understood as pleading various ways in which this duty was allegedly breached.

Vicarious liability

14. An employer will be vicariously liable for the wrong of an employee if that wrong is committed by the employee during the course of her employment. The test is whether there is a sufficiently close connection between the employment and the act of the employee. It was stated with elegant simplicity by Lord Nicholls in Marjowski v Guy's and St Thomas NHS Trust [2007] 1 AC 224 HL(E) at para 10:

> A wrong is committed in the course of employment only if the conduct is so closely connected with acts the employee is authorised to do that, for the purposes of the liability of the employer to third parties, the wrongful conduct may fairly and properly be regarded as done by the employee while acting in the course of his employment: see Lister v Hesley Hall Ltd [2002] 1 AC 215, 245, para 69, per Lord Millett , and Dubai Aluminium Co Ltd v Salaam [2003] 2 AC 366 , 377, para 23.

15. This formulation was approved by Lord Steyn, giving the judgment of the Privy Council, in Bernard v AG of Jamaica, Privy Council Appeal No 30 of 2003; 2004 WL 2270264. Noting at para 21 that vicarious liability is a principle of strict liability and that there is therefore no requirement for fault on the part of the employer, he stated:

> This consideration underlines the need to keep the doctrine within strict limits.

16. Lord Nicholls acknowledged in Dubai Aluminium Co Ltd v Salaam [2003] 2 AC 366 HL(E) at para 25 that the "close connection" test affords no guidance as to the conduct required to satisfy it. But as he stated at para 26:

> This lack of precision is inevitable, given the infinite range of circumstances where the issue arises. The crucial feature or features, either producing or negativing vicarious liability, vary widely from one case or type of case to the next. Essentially the court makes an evaluative judgment in each case, having regard to all the circumstances and, importantly, having regard also to the assistance provided by previous

> court decisions. In this field the latter form of assistance is particularly valuable.

17. The fact that an act was done during the hours of employment and at the tortfeasor's place of work does not necessarily mean that it was done during the course of employment. As Lord Clyde noted in Lister v Hesley Hall Ltd at para 44:

> Acts of passion and resentment (as in Deatons Pty Ltd v Flew (1949) 79 CLR 370) or of personal spite (as in Irving v Post Office [1987] IRLR 289) may fall outside the scope of the employment. While use of a handbasin at the end of the working day may be an authorised act, the pushing of the basin so as to cause it to move and startle a fellow-employee may be an independent act not sufficiently connected with the employment: Aldred v Nacanco [1987] IRLR 292 .

18. The last case cited, Aldred v Nacanco [1987] IRLR 292, EWCA, is of particular relevance in that, as is alleged in the present case, it involved injuries caused to one employee by the horseplay of another. The appellant employee was injured in an accident which occurred in the washroom of the factory where she worked. The washbasins in the washroom were freestanding structures in the middle of the room. They were slightly unstable in that their rims would move an inch or so if given a hard push. When the accident happened the appellant was leaning against the rim of the washbasin talking with another employee. A third employee came into the washroom and decided to startle the appellant by giving the washbasin a push. It struck the appellant in the thigh. Startled, she turned round quickly to see what had happened, and in so doing twisted her back, thereby injuring herself. The Court held that the employer was not vicariously liable for the employee's conduct as, although the employee was present in the washroom during the course of her employment, what she did was a deliberate act which had nothing whatsoever to do with anything she was employed to do.

19. I was referred to a couple of other cases involving injuries caused or contributed to by an employee's horseplay. In Chapman v Oakleigh Animal Products (1970) 8 KIR 1063; [1970] EWCA Civ J0421-1 the plaintiff, who

was 16 years old, was working at the defendant's factory during the school holidays. Three employees decided to play a practical joke on him by spraying ice at him from a machine for grinding offal. To get him to stand near the machine one of them asked him to put his hand up the spout of the machine to clear a blockage. The plaintiff did so. Before he withdrew his hand the employee slipped and inadvertently turned on the machine, with the result that the cutting disc in the machine was activated and injured the plaintiff's hand. The defendant was held vicariously liable for the employee's negligence in putting him in a dangerous situation but failing to take reasonable care to ensure that he was not injured. The employee had ostensible authority to request the plaintiff to put his hand up the spout and it was the plaintiff's duty to obey any request, other than to do something manifestly obscene or criminal or highly dangerous, that he got from his fellow employees. (Presumably the request to unblock the grinding machine was not so highly dangerous as to justify disobedience.)

20. In Wilson v Exel UK Ltd [2010] CSIH 35, a decision of the First Division in Scotland, the pursuer, who worked as a clerkess, was injured as a result of a "prank" by her supervisor. Her case was as follows. The supervisor crept up behind her while she was sitting on a chair and, without warning, grabbed her ponytail tightly and pulled her head back as far as it could go. As he did so he made a ribald remark. As a result of the incident, the pursuer was injured. Over the two years prior to the incident, the supervisor had engaged from time to time in horseplay with the pursuer's fellow clerkess, also tugging her hair. He had surprised the pursuer on three previous occasions by approaching her from behind and "nudging her in the hips". The sheriff dismissed the case as irrelevant, which I take to be analogous to dismissing it on a strike out application on the basis of assumed facts. On appeal, the Court upheld the sheriff as the supervisor was engaged in a "frolic" of his own, in the sense of acting purely on a private venture unconnected with his duties as an employee. The decision was cited with approval by the Court of Appeal of England and Wales in Weddall v Barchester Healthcare Limited [2012] EWCA Civ 25.

21. When considering these authorities, I remind myself that, as stated by Judge LJ, giving the judgment of the Court in Mattis v Pollock [2003] 1 WLR 2158 EWCA at para 23:

> Lord Nicholls did not say that any earlier decision where the facts were similar should authoritatively decide a case where the facts were not identical. Second, it does not follow that he was approving each earlier decision, or implying that the reasoning which led to it remained equally valid after the Lister and Dubai Aluminium cases as it had been before. Third, in the ultimate analysis, Lord Nicholls was not suggesting that the court should do more or less than evaluate the specific features of the individual case, and having done so decide whether, as a matter of law, vicarious liability was established.

22. As well as previous cases, the courts will be guided by the policy considerations underpinning employers' vicarious liability. These have been articulated in different ways by different judges, but I find the statement by McLachlin J, giving the judgment of the Canadian Supreme Court in Bazley v Curry 174 DLR (4th) 45 at para 41, particularly helpful:

> The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.

The parties' respective cases

23. The Plaintiff claims that the Defendant is vicariously liable for Ms Lall's negligent conduct. She further claims that the Defendant is directly liable in negligence in that it failed to take such steps as were reasonably practicable to deter such behaviour by Ms Lall. It is not easy to discern the basis of this complaint from the pleadings but it appears to conflate two elements.

24. First, the plaintiff alleges that the Defendant took insufficient steps to train Ms Lall not to play potentially dangerous practical jokes on people in the workplace, which implies that Ms Lall could not reasonably have been expected to know any better. In response, the Defendant has submitted evidence that on 8th and 9th January 2003 Ms Lall, together with other incoming nurses, attended a training course on manual handling in which those attending were warned not to engage in "skylarking" or irresponsible physical behaviour as this gave rise to a risk of personal injury to patients and other employees.

25. Second, the Plaintiff alleges that Ms Lall had a negative reputation among the hospital staff on account of her treatment of patients and subordinate staff, and that the Defendant should have been aware of this and taken steps to address her allegedly inappropriate behaviour. This allegation was made for the first time in an affidavit sworn on 5th January 2015, ie the day before the hearing of the strike out application, and the Defendant has not yet had the opportunity to file any evidence in response to it.

26. The Plaintiff puts her case with respect to the exacerbation of her injury in three ways. First, she alleges that the Defendant was negligent in that it required her to bathe patients and change bed linen when it had not provided her with adequate training for the purpose. It is her case that, particularly given what she alleges was the unsatisfactory nature of the course on bed bathing and making, she should not have been required to undertake such work until she had completed the manual handling course as she was not

adequately equipped with the necessary skills as regards moving and lifting patients to do so safely.

27. Second, the Plaintiff alleges that, irrespective of the adequacy of her training, the Defendant was negligent in that, although she was fit to attend work, she had not recovered sufficiently to meet the physical demands of caring for patients in a context which might require moving and lifting.

28. Third, the Plaintiff alleges that the Defendant negligently put her in a situation where her ethical duty to care for her patient – whom, it will be recalled, was over seventy years old and had been left immobile and drenched in his own urine for more than an hour – required her to attempt to change his sheets without waiting for assistance from a nurse even though this involved a risk to her personal safety.

29. The Defendant relies upon the fact that the Plaintiff had been warned not to attempt to move or lift a patient without the assistance of another staff member. Therefore, it is submitted, the Plaintiff voluntarily assumed the risk of injury. The case for voluntary assumption of risk is stronger (or, the Defendant would say, even stronger) on the facts as alleged in the workmen's compensation/short term disability form than it is on the facts as alleged in the particulars of claim, although the Defendant submits that it applies to both versions of the facts. The Defendant does not accept that the patient's condition gave rise to an urgent need for the Plaintiff to intervene, and submits that she should have waited until a nurse was available before doing so.

30. Many of the allegations in the re-amended statement of claim are somewhat abstract. However during oral argument they were clarified and made more concrete. It is the clarified allegations which I have summarised above. I am satisfied that the language of the pleading is sufficiently broad to include them all.

Decision

31. It is not properly arguable that Ms Lall's alleged misconduct was so closely connected with acts which she was authorised to do that, for purposes of the liability of the Defendant to third parties, it may fairly and properly be regarded as committed by her in the course of her employment. In so finding, and while appreciating that each case turns on its own facts, I derive assistance from previous cases on similar facts, specifically Aldred v Nacanco and Wilson v Exel UK Ltd. Chapman v Oakleigh Animal Products is distinguishable as the plaintiff in that case was acting pursuant to a request given on the ostensible authority of the employer. The strike out application therefore succeeds with respect to the claim that the Defendant is vicariously liable for Ms Lall's alleged misconduct.

32. The stupid and dangerous horseplay alleged was so obviously inappropriate that the Defendant was not required to address it in training. Nonetheless the Defendant has adduced uncontradicted evidence that as part of her training Ms Lall was warned not to engage in horseplay.

33. I am sceptical as to the eleventh hour allegations that Ms Lall had a reputation for inappropriate behaviour in the workplace which should have alerted the Defendant to take greater precautions to avoid her playing practical jokes on the Plaintiff. However it would be premature for me to determine this aspect of the strike out application at this stage.

34. I shall therefore adjourn the application to strike out the Plaintiff's claim that the Defendant was directly liable in negligence for Ms Lall's alleged misconduct until after discovery with respect to any relevant aspect of Ms Lall's disciplinary record has taken place, with liberty to restore.

35. As to the exacerbation of the Plaintiff's injuries ("the exacerbation point"), the possible conflict between her training not to perform any unassisted moving or lifting and her ethical obligation to care for her patient is best resolved within the context of a concrete finding as to what in fact happened at the patient's bedside. This cannot be done on the papers. If – and it is a

big "if" – the Plaintiff, even though unassisted, was under a duty to intervene, then the adequacy of her training may become relevant as to liability. So too may the fact of her recent injury, although, in view of the medical evidence mentioned above, that is more doubtful.

36. The Defendant has in my judgment failed to show that there is no realistic possibility of the Plaintiff establishing a cause of action consistently with the exacerbation point and the possible facts of the matter when they are known. The strike out application with respect to that point is therefore dismissed, although it is only fair to indicate that at present the Plaintiff's case does not appear to me to be a strong one. That, of course, may change at trial.

37. My provisional view is that, as both parties have met with partial success, the costs of this application should be in the cause. However if either party wishes to address me as to costs then that party has liberty to do so, provided that the Registry receives written notification of their intention to do so within seven days of the date of this ruling.

DATED this 14th day of January, 2015

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Hellman J