In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: No 215

BETWEEN:-

BEVERLY SHARLYTTA ALLEN

Plaintiff

-and-

GOLD COAST COMPANY LIMITED

Defendant

JUDGMENT

(In Court)

Date of hearing: 19th – 21st October 2015
Date of judgment: 16th November 2015

Mr Samuel Riihiluoma, Cox Hallett Wilkinson, for the Plaintiff
Mr Bruce Swan, Apex Law Group Ltd, for the Defendant

Liability

The facts

1. This is a claim for damages for personal injury. The Plaintiff worked as a chef at Q's Bar and Grill, Warwick ("the premises"), where she was employed by the Defendant. The premises are rented by the Defendant from one of its directors, Mrs Brenda Augustus. On 14th November 2012 the Plaintiff had just arrived at the premises by taxi, where she was due to start work at 12 pm. She gave evidence that that was about the time at which she arrived. But Mrs Augustus, who was in the kitchen at the time and saw her arrive, said in evidence that she arrived at 12.10 pm.

2. It was pouring with rain when the Plaintiff arrived and the ground was wet. Mrs Augustus said that the Plaintiff was running, presumably because of the rain and possibly also because, on Mrs Augustus' account, she was late for work. The Plaintiff accepted that she was moving faster than she would on a sunny day but did not accept that she was running or that she was late. Her shoes were Crocs, which she said were worn by most chefs while at work as they absorb water.

3. The Plaintiff entered the grounds of the premises and made her way towards the kitchen door which opened off the patio. In order to get there she had to go down a ramp. The ramp was out of Mrs Augustus' sight. It was covered in slip resistant tiles. However, it was the unchallenged evidence of Dustin Archibald, a structural engineer who gave expert evidence on behalf of the Plaintiff, that the ramp was in breach of the version of the Bermuda Building Code 1996 ("the Code"), which was the version in force at the time. First, because it was too steep. It had a slope of one unit vertical in 5.5 units horizontal or 18.1 per cent whereas the maximum slope permitted under the Code was one unit vertical in 12 units horizontal or 8 per cent (Code 1016.3). Secondly, because there were no handrails (Code 1010.9).

4. The ramp was built by the Defendant. Gordon Ness, who is the Building Control Officer for the Department of Planning ("the Department"), gave evidence that the Department had given formal approval for construction work to be carried out at the premises including specific approval for the ramp. However the approval was based on the architect's plan which showed a ramp which complied with the Code. Mr Ness said that he had recently visited the site and that the ramp that had been built departed substantially from the ramp in the plan and was not in compliance with the Code. He stated that there was no mention of the ramp in the inspection history for the premises, which he said signified that it had not been inspected. Nonetheless, upon completion of the building works the Department had issued a certificate permitting the use of the premises as a restaurant. Mr Ness said that he would have to carry out an investigation as to how and why that had happened.

5. The Plaintiff gave evidence that a rubber doormat had been placed on the ramp. She said that it was placed in the middle of the ramp and that it covered the ramp's length. Presumably someone had put it there with the intention of making the ramp less slippery. She said that previously she had seen it in place outside the kitchen door. Mrs Augustus gave evidence that the mat was usually placed at the bottom of the ramp, although she said that there was another similar mat on the premises. She said that it was the responsibility of the porter to see that it was in place. She was not able to say from her own observations where the mat, which she described as an outside non-slip mat, was located that day. She produced as an exhibit a mat which she said was the mat in question, although the Plaintiff disputed this. Nothing turns on whether it was the same mat or merely a similar one.

6. The Plaintiff said in evidence that when she stood on the mat it slipped from under her and that she fell. That she slipped and fell is not in dispute. When she fell she broke her arm. As a result of her cries, Mrs Augustus and the taxi driver came to her aid. Mrs Augustus called for an ambulance and the Plaintiff was taken to hospital.

7. The Plaintiff claims that her injury was caused by the negligence and/or breach of contract, or alternatively breach of statutory duty, of the Defendant. In the further alternative, the Plaintiff alleges that the Defendant is liable to pay the Plaintiff compensation under the Workers' Compensation Act 1965 ("the 1965 Act").

8. The Defendant denies that it acted negligently or in breach of statutory duty. It alleges that the Plaintiff's injuries were caused or contributed to by her own negligence. The Defendant also denies that it is liable to compensate the Plaintiff under the 1965 Act.

Applicable legal principles

Negligence and breach of contract

9. Under the tort of negligence, an employer owes a duty to his employees to take reasonable care for their safety during the course of their employment. This includes the provision of a safe place of work with a safe means of access. The duty is personal and non-delegable. See Russell v Stephenson [2001] Bda LR 59 SC at 12 – 13 *per* Meerabux J and the authorities there cited. What is reasonable depends upon the foreseeability of harm, the magnitude of risk of harm; the gravity of the harm; the cost and practicability of preventing it; and the justifications for running the risk. See Hatton v Sutherland [2002] ICR 613 EWCA *per* Hale LJ (as she then was), giving the judgment of the Court, at para 32, approving the summary given by Swannick J in Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd [1968] 1 WLR 1776 Assizes at 1783 D – E.

10. This duty forms an implied term of the contract of employment, although it may be limited by agreement, or, in unusual circumstances, by implication. Nonetheless, an action brought by an employee against an employer for damages suffered by the former in the course of her employment is by convention usually brought in the tort of negligence rather than contract.

See Fagundo v Island Cleaning Services [2009] Bda LR 53 SC *per* Kawaley J (as he then was) at paras 24 – 25. The learned Judge who also stated at para 25 that personal injury claims against employers are therefore a special exception to the general rule that where parties have entered into a contractual relationship, the law of contract rather than the law of tort governs all rights and obligations between them.[1]

11. A tortious breach of duty by the employer will be actionable by the employee if the employee can show: (i) that the breach has caused or materially contributed to her injury – see Williams v Bermuda Hospitals Board [2014] Bda LR 22 CA[2] at paras 37 – 42 *per* Ward JA and Fagundo at para 48 *per* Kawaley J, and the authorities cited in both these passages; and (ii) that this kind of harm to this particular employee was a reasonably foreseeable result of the breach – see Hatton v Sutherland at para 23.

12. When deciding whether an employer has satisfied its duty of care to an employee, the Court is likely to have regard to the employer's statutory obligations relating to health and safety at work. Breach of these obligations may give rise to a separate cause of action for the tort of breach of statutory duty.

Breach of statutory duty

13. The Occupational Safety and Health Regulations 2009 ("the Regulations") impose a number of duties on employers. See Regulation 5(1). A breach of these duties will be actionable except in so far as the Regulations provide otherwise. See sections 22(2) and 22(5) of the Occupational Safety and Health Act 1982 and Robinson v Minister of Education [2011] Bda LR 18 SC *per* Kawaley J at para 8.

[1] The precise ambit of this rule has yet to be worked out in Bermuda case law.

[2] Currently on appeal to the Privy Council on the issue of whether material contribution is sufficient to establish causation for purposes of liability in negligence.

14. Regulation 5(1) provides that every employer must ensure that their place of employment or premises of which they have control meets the requirements of the Regulations. Thus the employer is under an absolute duty to comply with the Regulations and not merely a duty to take reasonable steps to do so.

15. Regulation 31 provides that the design, construction, inspection and renovation of a building, or any part of a building, that is a place of employment shall meet the requirements of the Code.

16. Regulation 2 provides that "*building*" includes any structure or erection of whatever kind or nature, whether temporary or permanent, and any part thereof.

17. Regulation 32(1) provides that passageways, stairways, walkways, entrances and ramps at a place of employment shall be kept free of obstructions that may endanger the health or safety of employees.

18. Regulation 32(3) provides that travelled surfaces in a place of employment shall be slip resistant and kept free of splinters, holes, loose boards, loose tiles and similar defects.

Contributory negligence

19. The Law Reform (Liability in Tort) Act 1951 provides at section 3(1) that where any person suffers damage as the result partly of his own fault and partly of the fault of another, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the amount of damages recoverable shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for that damage. Section 3(1) contains a couple of qualifications to this principle, but they are not material to the present case.

20. A finding of contributory negligence may arise in relation to both the tort of negligence and the tort of breach of statutory duty. Indeed the Court made

such a finding in Russell v Stephenson. See pages 1 (causes of action); 23 (statement of principle) and 28 (finding).

21. In order to find a plaintiff contributorily negligent in a personal injury case it is necessary to find that she contributed to her injury. But that may not be sufficient. The degree to which the plaintiff is blameworthy will also be relevant. Eg where the injured party is an employee, the Court will more readily find contributory negligence if the plaintiff was acting to save herself trouble rather than acting in furtherance of her employer's business. See Russell v Stephenson at 23 and Fagundo at para 58, and the authorities cited in these passages.

Workers' compensation

22. Under section 4(1) of the 1965 Act, if an accident "*arising out of and in the course of the employment*" injures an employee then her employer shall be liable to pay her compensation. This principle is subject to various exceptions. Eg an employee is not eligible for compensation if her injury does not prevent her from earning full wages for at least three consecutive days or if her injury is attributable to her serious and wilful misconduct. Thus compensation under the 1965 Act is not dependent on the fault of the employer.

23. Employment is not confined to actually carrying on work at the premises but includes things necessary and incident to the employment. See St Helens Colliery Co, Ltd v Hewitson [1924] AC 59 HL *per* Lord Atkinson at page 76. Eg an injury will be sustained in the course of employment if it occurs when an employee is on her employer's premises for the purpose of arriving at or leaving work. See Gane v Norton Hill Colliery [1909] 2 KB 539 EWCA *per* Farwell LJ at 545.

24. Section 24(1) of the 1965 Act provides that a judgment in proceedings brought independently of the 1965 Act to recover damages against an employer in respect of an injury shall be a bar to proceedings at the suit of

any person by whom, or on whose behalf, such proceedings were taken, in respect of the same injury under the 1965 Act.

25. Section 24(2) of the 1965 Act provides that if in proceedings for damages brought independently of the 1965 Act the employer is found not to be liable, the Court can go on to consider whether compensation is payable under the 1965 Act.

Applying the law to the facts

26. The Plaintiff submits that she tripped and broke her arm because: (i) the ramp was built in breach of Code in that it was too steep and did not have handrails, and (ii) the mat placed on the ramp was in breach of the Regulations in that it was both a dangerous obstruction and a defect on a travelled surface. She submits that, as the Defendant, its servants or agents built the ramp and placed the mat upon it, her injury was caused by the Defendant's negligence and breach of statutory duty. I agree.

27. In my judgment the Defendant's duty of care required that it build a ramp which complied with the Code. This was a reasonable and proportionate requirement of the duty of care, as underlined by the fact that it was also and independently a statutory duty. The fact that somehow or other the Defendant obtained a certificate permitting the use of the premises as a restaurant after it had built the ramp does not alter the scope of the duty of care and is irrelevant to the terms of the statutory duty. It was reasonably foreseeable that the Plaintiff or other employee might trip and injure themselves on the ramp, particularly in wet weather.

28. I accept the Plaintiff's evidence as to how the accident occurred. She struck me as a careful and accurate witness. Thus I accept that a mat had been placed on the ramp and that the mat slipped from under the Plaintiff when she stepped upon it. In so finding I bear in mind that there were no witnesses to the accident, which happened out of sight of Mrs Augustus, and that the Plaintiff was the only witness from whom I heard who gave

evidence based upon her own observations as to the location of the mat at the time of the accident. The intention in placing the mat upon the ramp was no doubt to make the ramp safer. In fact, given the wet conditions, the gradient of the ramp, and the fact that the mat was not secured in place, the mat exacerbated the hazard posed by the ramp. That it exacerbated that hazard was in my judgment reasonably foreseeable.

29. I find that the Plaintiff was hurrying to get out of the rain. This was while she was en route to her place of work, having entered the grounds of the premises, so that she could carry on the Defendant's business. But I am not satisfied that when she stepped on the ramp she was moving in such a way that there was any contributory negligence on her part. In the Plaintiff's words, she fell because the mat moved, not because she was walking too fast. Neither am I satisfied that her choice of footwear was contributorily negligent. Ie I am not satisfied that the particular type of Crocs which the Plaintiff was wearing were unsafe to wear outdoors in wet weather or that, if they were, the Plaintiff knew or ought to have known this.

30. As to the workers' compensation claim, I find that the Plaintiff was injured in the course of her employment, having entered the Defendant's premises on her way to work. It is immaterial whether she was late for work, although I am not satisfied that she was. None of the statutory exceptions to an employer's liability to pay workers' compensation apply.

31. In summary, I find that the Plaintiff's injury was caused (and not merely contributed to) by the Defendant's negligence and breach of statutory duty. The Defendant is therefore liable to pay the Plaintiff damages.

32. Had I not found that the Defendant is liable to the Plaintiff in tort, I should have found that, as a result of the Plaintiff's injury, the Defendant was liable to pay workers' compensation.

Quantum

General damages

33. The Plaintiff's injuries were described in a medical report dated 13th November 2013 which was prepared by Dr Milan Oleksak, a consultant trauma and orthopaedic surgeon. The report was not challenged. Dr Oleksak stated as follows. Following the accident, the Plaintiff sustained a closed humeral shaft fracture to her left arm. She initially presented with radial nerve weakness which subsequently recovered following the application of an external fixator on 15th November 2012, ie the day after the accident, to stabilize the fracture. This was applied under general anaesthetic and the Plaintiff was discharged after a few days. The fracture united in three months and the fixator was removed after a four month period. She was followed up on three subsequent occasions, most recently on 4th October 2013, which was almost eleven months after the injury occurred. By this time the Plaintiff had regained full range of motion of her elbow and shoulder joint.

34. I was referred to the Judicial Studies Board Guidelines for the Assessment of General Damages for England and Wales at the section on Orthopaedic Injuries headed (F) Other Arm Injuries. In my judgment the relevant bracket is (d) Simple Fractures of the Forearm, where damages range from GB Pounds 4,750 to GB Pounds 13,700. The explanatory text states:

> "*Uncomplicated fractures of the radius and/or ulna with a complete recovery within a short time would justify an award in the region of GB Pounds 4,000. Injuries resulting in a modest residual disability or deformity would merit an award towards the upper end of this bracket.*"

35. In Bermuda, under the rule in Wittich v Twaddle, SC, Civil Jurisdiction 1979 No 117, the dollar value of an English award is calculated by doubling the GB Pounds figure.

36. Mr Riihiluoma, who appears for the Plaintiff, submits that, all other things being equal, a fracture of the humerus, which is in the upper arm, is more serious than a fracture of the radius or ulna, which are in the lower arm. In the absence of medical evidence I am not sure that I am qualified to make that judgment. However I note that the Plaintiff required surgery under general anaesthetic, was a hospital in-patient for a few days, and did not regain the full use of her arm for around eleven months. Happily, she is now fully recovered.

37. I was referred to the English case of Kew v Cook T/A The Old Coach House from the Personal Injuries Quantum Database. The date of trial was 22nd March 2013. The claimant sustained a fracture of the left distal humerus. Pain in the left arm was expected to resolve approximately two years after the accident. There was slight permanent loss of movement in the elbow, but this was unlikely to cause significant disability. The claimant was unlikely to require the removal of metalwork (presumably implanted through surgery). He or she was left with a permanent well-healed 22 cm surgical scar. The claimant was awarded general damages of GB Pounds 12,000, which at today's value would be GB Pounds 12,154 or alternatively GB Pounds 13,369.84, depending upon the uplift applied.

38. Mr Riihiluoma seeks an award of general damages in the range $22,500 to $27,400. Mr Swan, who appears for the Defendant, suggests that, if I am against him on liability and contributory negligence, a figure of $12,000 would be appropriate. Ie roughly half of what the claimant in Kew v Cook was awarded. In my judgment, the Plaintiff's injuries fall at around the two thirds point of bracket (d) in the Judicial Studies Board Guidelines. I therefore award her general damages for pain, suffering and loss of amenity in the sum of $18,270.

Special damages

Cost of medical report

39. The Plaintiff claims $300 for the cost of Dr Oleksak's report. The cost is reasonable and the payment properly documented. She is therefore entitled to be reimbursed for the cost.

Medical expenses

40. The Plaintiff incurred medical expenses in the sum of $19,676. These were paid in full under her Government Health Insurance Plan ("HIP"). The Plaintiff obtained the policy and paid all the premiums herself. Payments made by an insurer on behalf of a plaintiff are treated as having been made by the plaintiff even if the insurer has signed the cheque. See W v Veolia Environmental Services (UK) Plc [2011] EWHC 2020 (QB); [2011] CTLC 193 *per* HH Judge Mackie QC at para 34. By parity of reasoning, the same applies if the insurer has remitted the funds to the recipient electronically.

41. For purposes of subrogation, the Health Insurance Department ("the Department"), with which the Plaintiff contracted for the policy, is in an analogous position to a private provider of health insurance. The Department is therefore entitled to be subrogated to the Plaintiff's rights against the Defendant for purposes of recovering the medical expenses which it has paid out. Accordingly, under this head I award the Plaintiff the $19,676 which she has claimed. There will be no double recovery as she will be liable to account to the Department for the funds.

Loss of earnings

42. As a result of her injury, the Plaintiff was not in a physical condition to start working again until around May 2013. On or about 10th May 2013 the

Defendant offered her an alternative position as a cashier. When cross-examined, the Plaintiff accepted that this was a reasonable offer. But she said that she did not wish to continue working for the Defendant as she felt that there had been a breakdown in the relationship of trust and confidence between them. She resigned by a letter from her attorneys dated 28th May 2013. The letter stated that the breakdown in trust and confidence flowed from the Defendant's failure to pay the Plaintiff the monies to which she was entitled under the 1965 Act, which it was said had caused her severe difficulties in meeting debts of her own.

43. The Plaintiff received Financial Assistance from the Government during the period for which she was off work. This came to $1,900 per month. During the course of the hearing the Defendant provided details of its payroll entries relating to the Plaintiff. She was paid hourly. On analysis, it was apparent that, although her earnings fluctuated depending upon the hours which she worked, they were on average materially less than the $727.60 net per week claimed in the Statement of Claim, which was based on a forty hour week.

44. In the circumstances the Plaintiff withdrew her claim for loss of earnings and I need not consider it further. Thus I make no finding as to whether she acted reasonably in refusing the Defendant's offer of alternative employment.

45. For the sake of narrative completeness I note that in May – June 2013 the Plaintiff worked part-time at Serenity Gardens Nursing Home and that in July 2013 she started working there full-time.

Cost of care given gratuitously

46. The Plaintiff's two adult children cared for her over a period of roughly six months. She (or her counsel) assessed its duration as 182 days. The care was provided chiefly by her daughter, Ebony Allen ("Ms Allen"). She gave evidence, which I accept, that she helped the Plaintiff to bathe and get dressed, and to cook and to clean. She also helped get her sister, the

Plaintiff's youngest daughter, ready for school and prepared her packed lunches.

47. Immediately following the injury Ms Allen, who worked as a hairdresser, took three weeks off work to look after the Plaintiff, although during that time she would go in to work for the occasional morning appointment. She estimated that over those three weeks she cared for the Plaintiff for around five hours per day, and that for the rest of the six month period she used to spend four and a half hours per day caring for the Plaintiff on the four days per week on which she used to work, and five hours per day on her three days off. Ms Allen stated that her brother would fill in if she was unavailable. She said that at work she used to make from $300 to $500 per day.

48. By comparison, Mr Riihiluoma referred me to a letter from Elder Home Care Services stating that in 2012 their standard hourly rate for the provision of home care was $26. This is the best (indeed the only) evidence which I have as to what the market cost would have been of providing care for the Plaintiff.

49. The Plaintiff is entitled to recover damages for the value of the gratuitous care provided by her children, which she will hold for them on trust, so that they will receive proper recompense for their services. See Hunt v Severs [1994] 2 AC 350 *per* Lord Bridge, giving the judgment of the House of Lords, at 355G and 363C. The Court has a broad discretion in assessing the amount of recompense. See the judgment of May LJ in Evans v Pontypridd Roofing Ltd [2001] EWCA Civ 1657 at para 25:

> "*In my judgment this court should avoid putting first instance judges into too restrictive a strait-jacket, such as might happen if it was said that the means of assessing a proper recompense for services provided gratuitously by a family carer had to be assessed in a particular way or ways. Circumstances vary enormously and what is appropriate and just in one case may not be so in another. If a caring relative has given up remunerative employment to care for the claimant gratuitously, it might well be appropriate to assess the proper recompense for the services provided by reference to the carer's lost earnings.*

If the carer has not given up gainful employment the task remains to assess proper recompense for the services provided. As O'Connor L.J. said in Housecroft v Burnett, regard may be had to what it would cost to provide the services on the open market. But the services are not in fact not being bought in the open market, so that adjustments will probably need to be made. Since, however, any such adjustments are no more than an element in a single assessment it would not in my view be appropriate to bind first instance judges to a conventional formalised calculation. The assessment is of an amount as a whole."

50. Where recompense is assessed by reference to the carer's lost earnings, the ceiling will be the commercial cost of providing the care. See Housecroft v Burnett [1986] 1 All ER 332 EWCA at 343 *per* O'Connor LJ. As to an appropriate adjustment to the cost of buying the services in the open market, on the particular facts of particular cases the courts have approved reductions of respectively 25 per cent and two thirds. See the cases mentioned in Willbye v Gibbons [2004] PIQR P15; [2003] EWCA Civ 372 at para 10 *per* Kennedy LJ. But as Ward LJ stated in Newman v Foulkes [2002] EWCA Civ 591, "*there is ... no conventional discount*".

51. I accept that the cost of buying care for the Plaintiff in the open market would have been $26 per hour. I award compensation under this head at the rate of $26 per hour for the three weeks which Ms Allen took off work to care for her and at a rate of $20 per hour, reflecting a discount to the market rate of just under 25 per cent, for the rest of the care which she and her brother provided gratuitously.

52. Ms Allen gave evidence that she worked a four day week. She would therefore have provided 12 days' care during the three week period when she was off work. For that period I award damages of $1,560 (ie $26 x 5 hours x 12 days). As to the remaining 170 days, I award damages of $16,030 (ie [$20 x 4.5 hours x 97 days] + [$20 x 5 hours x 73 days]).

53. Thus under this head I award the Plaintiff (to hold on trust for her carers) damages of $17,590.

Summary

54. I award the Plaintiff damages as follows:

    (1) Pain, suffering and loss of amenity: $18,270.

    (2) Cost of medical report: $300

    (3) Medical expenses: $19,676

    (4) Cost of care: $17,590.

55. The total sum awarded is therefore $55,836.

56. I shall hear the parties as to costs and interest. I am grateful to both counsel for their able submissions.

DATED this 16th day of November, 2015

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Hellman J