COMMOHNWEALTH OF THE BAHAMAS **2019**

IN THE SUPREME COURT **CLE/gen/No.01816**

Common Law and Equity Division

BETWEEN

HERBERT SMALL

Plaintiff

AND

SOL PETROLEUM BAHAMAS LIMITED

Defendant

Before: The Honorable Madame J. Denise Lewis-Johnson

Appearances: Donovan Gibson for the Plaintiff
Keith Major with Folla Swain and Denise Newton for the Defendant

Hearing Dates: 24 January, 25 January 2022

Submission Date: 21 September 2022

Civil - Negligence - Personal Injuries – Employer's Liability - Duty of Care - Standard of Care - Health and Safety at Work Act, 2002 - Safe system of work - Plaintiff claiming damages for injuries sustained while working as truck driver for the defendant - Whether Employer breached the duty to provide a safe working system – Causation – Whether employee mitigated his loss - Whether employee entitled to damages.

Introduction

1. By a Specially Indorsed Writ of Summons filed 19 December 2019 Herbert Small, ("the Plaintiff"), brings this claim against his former employer, Sol Petroleum Bahamas Limited, ("the Defendant") and seeks damages for their negligence

and/or breach of statutory duty which resulted in an injury allegedly from the use of the Defendant's work vehicles.

2. The Plaintiff states that the Defendant acted negligently and/or in breach of the Health and Safety at Work Act, Chapter 321 of 2002 Statute Laws of The Bahamas "the Act" by:

    a. Failing to provide suitable and sufficiently safe and maintained Road Transportation Wagons "RTW" for the Plaintiff to drive;
    b. Failing to warn the Plaintiff of the damages presented by the state of disrepair of the Defendant's RTWs;
    c. Causing or permitting the said RTWs to be or become or to remain dangerous and a safety hazard to the Plaintiff;
    d. Failing to institute or enforce any or any adequate system of inspection and maintenance of the said RTWs;
    e. Failing in all the circumstances to take reasonable care for the safety of the Plaintiff;
    f. Exposing the Plaintiff to unnecessary risk of injury; and
    g. Failing to provide the Plaintiff with a safe system of work.

3. The Plaintiff claims, inter alia, the following:
    a. Special damages in the sum of $5,488.49; and
    b. Damages for pain, suffering and loss of amenities.

4. In its Defence filed 5 February 2020, the Defendant denies liability and contends that the Plaintiff's injuries were caused by his own negligence and lack of regard for his health and safety. The Defendant argues that at all times it ensured the following:
    a. The provision and maintenance of a plant and system of work that were, so far as is reasonably practicable, safe and without risks to health;
    b. Arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of article and substances;
    c. The provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of the Plaintiff and all others in the employ of the Defendant;
    d. So far as is reasonably practicable as regards any place of work under the Defendant's control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks; and

e. The provision and maintenance of a working environment for the Defendant's employees that was, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.

The Plaintiff's Evidence

Herbert Small

5. The Plaintiff avers that he started his truck driving career in 1980. His career with the Defendant company began on 13 May 2013 amounting to a 33-year span in the profession. His employment with the company lasted approximately four years, all of which were not active duty. It is his assertion that two of the Defendant's vehicles, MV815 and MV818, contained defective seats.

6. He recalled his first injury as a truck driver occurred while being employed with Shell in or around 1990 to 1995. To treat his pain, he visited the offices of Dr. Tynes who prescribed him pain medication and provided a sick slip for time off for approximately two days. He claims that he would not classify this instance as an 'injury' as the pain went away once he took the medication prescribed. This injury was not disclosed as part of his medical history with any doctor he visited for the injury which formed the crux of this case.

7. Under cross-examination the Plaintiff was heavily questioned on his failure to complete a Defect Repair Form in relation to the defective trucks he drove. The Vehicle Defect Repair Form states that 'it is to be used in conjunction with the Daily Inspect Reported completed by the driver as a result of any defect reported in respect of any company vehicle'.

8. He testified that his Supervisor, Maja Kerr, oversaw the handling of the Defect Repair Forms and often complained that it was too much paperwork. Consequently, Mr. Kerr instructed him to note the defect on the daily inspection form and submit it. However, he could not produce the notations he made. The Plaintiff indicated that he also made verbal reports of the defects to his Supervisor and the Maintenance Technician. He believed that his verbal efforts were sufficient to constitute making reports of the defects.

9. The Plaintiff was asked why over the span of four years he failed to complete the Defect Repair Form if his notations on the daily form and verbal complaints proved

to be futile. He conceded that while it was his obligation to complete the Defect Repair Form as a RTW Driver, he went along with the instructions given to him by Mr. Kerr. When asked whether he didn't submit a Defect Repair Form because there were never any defects, he denied said allegation.

10. During cross-examination he remained unsure of when he sustained his injuries as it does not coincide with the period for his sick leave. In his statement of Claim, the Plaintiff claims that his injuries occurred in or around December 2017, however he began sick leave on 5 October 2017. He never returned to work before resigning on 20 September 2019.

11. The Plaintiff further admitted that he did not capture all photos of the car seats which were adduced into evidence. He was also unsure of which vehicles the seats belonged to. He accepted that none of the photos adduced showed the exposed metal which he claimed existed in his pleadings. He testified that while the metals may not be seen he felt them physically.

12. He was asked why he continued to work despite being in pain from his alleged injuries. He replied that if he was unfit for work due to medical reasons the Defendant company would often spite you and they're just going to treat you different.

13. The Plaintiff indicated that his symptoms have improved a bit but he is still going through a lot of pain. The pain is located in his legs, back and both feet.

Dr. Valentine Grimes

14. Dr. Grimes is an Orthopedic Surgeon with a fellowship training in spinal surgery. He was deemed an expert witness by the Court.

15. He first examined the Plaintiff in March 2018 who was then 62 years of age. He explained that lower back injuries were common to the Plaintiff's occupation.

16. Based on the temporal relationship and the type of work the Plaintiff performed, and the MRI finding, Dr. Grimes concluded that the injuries to his back were consistent with a work-related injury. He described his issues as acute and chronic.

17. His findings were that the Plaintiff has chronic wear and tear changes (facet joint osteoarthropathy) in his back due to his age and history as a truck driver. He

maintained however that the Plaintiff experienced a change in symptomatology as he now has two levels of his back which have changes which are wholly and solely different from the background of the wear-and-tear changes. Dr. Grimes explained that an additional episode had to occur for this to happen.

18. Dr. Grimes supported his findings based on the fact that after his 2017 injury the Plaintiff sought medical attention, required sufficient medication, and required physical therapy. All of which were not required for his first injury.

19. He clarified for the Court that he only saw photos of the seat which were sent by the Plaintiff.

20. He disagreed with the physiotherapy report produced by KTH Physiotherapy which alluded to the Plaintiff achieving complete independence at work, home and leisure within 12 weeks. Dr. Grimes noted that the physician was cautiously optimistic, which is reasonable. However, he would suggest that due to his expert experience with the Plaintiff he would not have expected that level of improvement.

21. Dr. Grimes testified that although he examined the Plaintiff late in his injuries, it is not a disadvantage as he was able to examine how he was behaving through the course of time.

22. He accepted that neither his report nor Dr. Robert Gibson's report sets out the true factual matrix of their assessments as neither referenced the Plaintiff's previous driving career prior to Sol.

Wayne Francis

23. Mr. Francis is employed by the Defendant company as an Operations Manager since 2008.

24. He outlined the purpose of the Vehicle Defect Form which is to identify any defects on the vehicle. He testified that upon being verbally notified of a routine maintenance issue with a worn seat in the RTW known as MVM815 in or about September 2017, SOL immediately placed the issue in its maintenance work tracker. The seat was replaced on the RTW on 24 October 2017.

25. He was unable to recognize the photographs of seats adduced by the Plaintiff.

26. Mr. Francis claims that there are no reports of the Plaintiff obtaining any injury while on the job in service to the Defendant.

Burdette Cartwright

27. Mrs. Cartwright is engaged as a RTW Driver at Sol since August 1996. She gave evidence on the process and procedure with filing a Defect Repair Form.

28. Mrs. Cartiwright stated that it was the obligation of the RTW Driver to inform the Defendant whenever a repair was needed. She claims that the RTWs and equipment were at all material times kept in a good and workable state for the performance of tasks by an RTW Driver.

Wakley Clarke

29. Mr. Clarke was employed as a RTW Driver with the Defendant's company from April 2010. His evidence outlined his daily duties as a Driver and he asserted that the Company was not negligent.

30. Mr. Clarke was not able to identify the photographs of seats adduced by the Plaintiff. He spoke to the process required in using the daily trip inspection form and the defect repair form.

The Issue

31. Whether Sol Petroleum was negligent and/or breached its duty to provide the Plaintiff with a safe system of work.

The Law

32. **The Health and Safety at Work Act, 2002** establishes the duty of employers concerning safety at the workplace. **Section 4** of the Act provides:-

> **4. (1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.**

(2) Without prejudice to the generality employer's duty under subsection (1) the matters to which that duty extends include in particular --

(a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;

(b) arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use handling storage and transport of articles and substances;

(c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees;

(d) so far as is reasonably practicable as regards any place of work under the employer's control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to arid egress from it that are safe arid without such risks;

(e) the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.

33. In **Sands v. Hutchison Lucaya Limited [2016] 1 BHS J. No. 65** Justice Evans quoted Swanwick, J, **in the case of Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd [1986] 1 WLR 1776,** at page 1783, stating:-

"...the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognized and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the

risk in terms of the likelihood -- of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent."

34. The duty of the employer however is not absolute. In **Mackey-Bethel and Canadian Imperial Bank of Commerce [1993] BHS J. No. 8** Hall, J stated:-

"Employers have no duty to ensure that the workplace is risk free. There are hazards in every workplace as there are in every household, and an employee does have the responsibility to take reasonable care for his own safety."

35. Similarly, in **Sturrup v. Resorts International (Bahamas) 1984 Ltd. [1991] BHS J. No. 103** Hall J also noted the following:-

"54. Each person, even while performing his duty as an employee, has to assume a measure of responsibility for his own safety and, by way of example, the plaintiff upon her daily circuit of the kitchen would have to be alert to several potential hazards – not from any breach of duty on the part of the defendant – but because such hazards would exist in the kitchen as would not exist at the Plaintiff's work station or in other parts of the hotel and only from the mere fact that it is a hotel kitchen.

55. In my judgment, the plaintiff has failed to show that her injury was caused other than by the style of shoe she chose to wear having became caught in a mat properly placed by the Defendant for the safety of its workers."

36. Evans J (as he then was) in **Ferguson v Grand Bahama Power Company [2011] 2 BHS J No.2,** opined:-

"However, just because an employee is injured on the job, does not necessarily mean that the employer has been negligent or has breached its statutory duty to the employee."

37. It is well established that there are three components of negligence: (i) there must exist a duty of care owed to the Plaintiff by the Defendant, (ii) there must be a breach of the said duty by the Defendant and (iii) due to the breach of such duty the Plaintiff has suffered injury and damage. **See Donaghue v Stevenson [1932] AC 562.**

38. The onus in this case rests upon the Plaintiff to prove, on a balance of probabilities, that the Defendant failed to provide a safe working system which resulted or materially contributed to the injuries complained of.

The Plaintiff's Submissions

39. The Plaintiff submits that he has satisfied all of the elements of the tort and the Court should find that the Defendant breached its duty of care and was liable for the injuries sustained by the Plaintiff.

40. There is no dispute that an employer has a duty to its employees to provide a safe system of work. The Plaintiff claims that a duty is owed to a truck driver to ensure that the seats in the truck where a driver spends long hours driving are in good condition and functioning properly. Especially when there are scheduled maintenance or an employee lodges a complaint.

The Defendant's Submissions

41. The Defendant contends that it did not breach any duty owed to the Plaintiff whether at common law or statutorily.

42. It was submitted that the Plaintiff failed to satisfy three out of the four elements needed for negligence. The key impediment in the Plaintiff being able to succeed in his claim and the foremost deficiency is the obvious and glaring absence of any documentation, medical or otherwise, which proves that the injuries complained of are as a result of any conduct or omission of the Defendant specifically.

43. The Defendant submitted that one must remember that the duties owed by employers pursuant to the Health and Safety at Work Act are all qualified by the test of being 'reasonably practicable' in every instance. This was demonstrated in the Bahamian case of **Ferguson v Grand Bahama Power Company Limited - [2011] 2 BHS J No. 2** where Evans J, found as follows:-

"56. However, just because an employee is injured "on the job", does not necessarily mean that the employer has been negligent or has breach its statutory duty to the employee and it seems to me that that is the real basis of the plaintiff's claim - because his injury occurred while he was "working", the defendant is liable.

57 It is, in my view, impractical to expect an employer to provide for every eventuality or create a procedure for every possible task that an employee has to perform. Further, the evidence is that the plaintiff was a 16-year employee and a senior mechanic who had been handling, lifting and pouring hydraulic fluid from 5-gallon containers for many years; that he, nor any other employee, had been injured while doing so. He admits that there was nothing dangerous about the job of lifting the container and pouring the oil therefrom; that, in fact, the 5-gallon containers were industry standard and as opined by Professor John Flemings in the 4th edition of Law of Torts at page 420, "...there is a sphere in which it is legitimate to leave a skilled workman the decision whether any difficulty he may encounter calls for managerial assistance for it would be a mistake to treat the relationship between him and his employer as equivalent to that of imbecile child and nurse."

58 I am satisfied on the evidence that the defendant did all that it could reasonably do to ensure that the plaintiff was provided with a safe system of work and the necessary equipment and training on safety measures to minimize the risk of injury to its employees, including the plaintiff."

44. The Defendant asks for a similar decision to be arrived at in the instant case similar to that of **Ferguson**. In **Ferguson**, the Court concluded that the damages complained of were not as a result or a failure on the part of the employer to observe its duties, with the result of the claim also being dismissed.

45. The Defendant focused primarily on the fact that the Plaintiff's driving career was not limited or exclusive to the Defendant and existed before he began employment with the Defendant.

46. The Plaintiff's failure to mitigate his loss was also expanded on by the Defendant. The Defendant states that as the Plaintiff continued to attend work despite his

injuries, he did not act reasonably towards mitigating his damages. It is on this basis that the Defendant asserts that he should be precluded from seeking to hold the Defendant responsible for damages flowing from the same, if any.

47. Reliance was placed on **Johnson v Brown and another [2016] 2 BHS J. No. 127** where Crane-Scott JA dealt with the mitigating of damages and its nature as a percentage based/proportional bar to the recovery of damages. It was stated:-

> **"17. As is well known, the mitigation principle requires the innocent party, following the defendant's breach, to take reasonable steps to avoid or reduce the loss flowing from the breach, failing which he will be unable to hold the defendant responsible for that part of the loss which is attributable to his failure to do so. Although most of the authorities on the duty to mitigate relate to contractual breach, the broad principles are equally applicable to tort, and in particular to actions for personal injury. Furthermore, what is reasonable is a question of fact in each case. See 18th Edition, Winfield & Jolowicz, "Tort" paragraphs 22-17 and 22-34.**

Decision

48. The Plaintiff's case centers on injuries that he alleges were caused by the Defendant's negligence in failing to provide a safe system of work. He alleges that he was forced to drive trucks that had defective seating which caused him long-lasting injury.

49. This Court is tasked with determining whether the Defendant took all reasonable steps in providing a safe system of work for the Plaintiff as is required by The Health and Safety at Work Act, 2002 and whether there was negligence.

50. The Plaintiff was employed as a RTW Driver by the Defendant company at all material times. I am satisfied that an active employment is sufficient to establish that the Defendant owed a duty of care to the Plaintiff. In this instance, the duty of the employer (so far as relevant) is to ensure that the vehicles provided to the Plaintiff to carry out his duties were reasonably safe to perform the work required.

51. I accept the evidence that the Plaintiff suffered an injury prior to being employed by the Defendant, and therefore started the job not in perfect health.

52. The Plaintiff's case is that the seats in the trucks were defective. He admitted to not filling out a Defect Repair Form and stated that he communicated the defect to his Supervisor, Mr. Kerr.

53. The authorities establish that the employer can only do what is reasonably expected. An employer cannot shield every employee from every risk or hazard that can present itself during the course of their employment. I wish to reiterate the words of Evans J in **Ferguson v Grand Bahama Power Company [2011] 2 BHS J. No. 2**, where he states that "just because an employee is injured 'on the job', does not necessarily mean that the employer has been negligent or has breached its statutory duty to the employee."

54. If the Plaintiff experienced some discomfort during the course of his employment, the reasonable step to take would be to fill out a Defect Repair Form. There is no evidence of a follow up with his Supervisor on the verbal complaints.

55. As a truck driver with over thirty years in the profession, it is expected that he possess some degree of skill or knowledge of the risks associated with the job. It was incumbent on him to take steps to mitigate his injury and notify his employers of the defective seat.

56. The situation was exacerbated as the Plaintiff continued to attend work despite his pain. His failure to act aggravated the injury. This seems to be quite unreasonable. I understand that employees often find themselves having to balance their being absent from work and potential sanctions for same. However, there must be some responsibility placed on the Plaintiff. An employee cannot subject themselves to daily pain for the sake of attendance and take no steps to remedy potential long term injury, and in this case not advise the employer of the defective seat/equipment and the need for sick leave.

57. A reasonable truck driver would have informed his employer of any difficulty that impedes him from doing his job satisfactorily. Especially when the employer has provided a process to address defective equipment so the defect could be remedied.

58. I accept that the Defendant by way of a Defect Repair Form, provided workers with sufficient means of notifying them of a defect and thus provided an opportunity/procedure to rectify any defect there may be with the apparatus to be used during the course of an employee's work. It was the obligation of the employees to bring this to the attention of the Defendant.

59. There is no evidence before this Court that any other employee saw the seats as defective, felt any pain or discomfort from driving the same vehicles as the Plaintiff.

60. The duty to ensure a safe system of work is that of the employer, however once the procedure to notify them of a defect was put in place the burden shifted to the employee to show that they followed the procedure and the employer failed to rectify it. Employees cannot subject themselves to hazardous environments and blame the employer for what may occur. Had the Plaintiff filled out the form, thereby following what I deem to be a reasonable procedure put in place by the Defendant to notify them of a defect and the Defendant failed to rectify same, the Plaintiff would have been in better stead.

61. I am further of the view that the Plaintiff failed to provide direct linkage to his injury and the job based on the date of the injury and his pleadings.

62. The Plaintiff's inability to connect the photos he exhibited of the truck seat as the seats of the truck he drove was not helpful to his case. The Court accepts the evidence that they were not from the truck he drove.

63. An employer cannot cover every possible risk and thus in this case, a procedure was put in place that would cover every eventuality. Evidence was led that previously when advised through the DRF process of defect equipment it was replaced within six weeks by the Defendant.

64. The Defendant's failure to advise his employers cannot, should and ought not make them liable for that which they were not aware of. The Plaintiff led no evidence as to what other reasonable steps in circumstances of this case the Defendant should have taken.

65. The standard of proof in this case is on a balance of probabilities. Having had the opportunity to observe the demeanor of the witnesses and taking into account the evidence presented to this Court and application of the law, I find that the Defendant was not negligent and took all reasonable steps to provide a safe system of working for the Plaintiff.

Conclusion

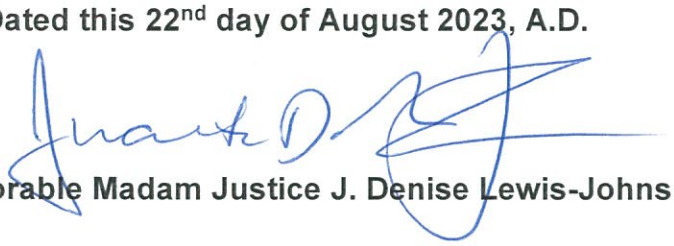
66. For all of the reasons stated above and in all the circumstances of the case, I find as follows:-

I. The Court is satisfied that the Defendant has not breached the Health and Safety at Work Act and did provide a safe place of work.

II. Accordingly, the Plaintiff's claim is dismissed.

III. Costs to the Defendant to be taxed if not agreed.

Dated this 22nd day of August 2023, A.D.



The Honorable Madam Justice J. Denise Lewis-Johnson