

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2008-01684

BETWEEN

DUKHARAN DHABAN

CLAIMANT

And

THE PORT AUTHORITY OF TRINIDAD AND TOBAGO (PATT)

THE SEAMEN AND WATERFRONT WORKER'S TRADE UNION (SWWTU)

DEFENDANTS

APPEARANCES:

Mr. A. Manwah for the Claimant

Ms. S. Indarsingh instructed by Ms. Bholai for the Defendants

DATE OF DELIVERY: 17th November, 2010

Before The Honourable Mr. Justice Devindra Rampersad

JUDGMENT

1. This claim was commenced on the 18th November 2008 – almost two years ago. The action was pursued against the first named defendant only for negligence and/or breach of the first defendant's duty of care and or breach of its statutory duty or that of its servants and/or agents. The particulars of negligence and/or breach of statutory duty were as follows:
 - 1.1. Failed to provide the claimant with a safe place of work as required by the Factories Ordinance Chapter 30/2;
 - 1.2. Failing to take any or any reasonable care to prevent injury or damage to the claimant from dangers on its premises of which it knew or ought reasonably to have known;
 - 1.3. Failing to take any or any adequate measures whether by way of periodic or other examination, inspection test or otherwise to ensure that the flooring between sheds two and three were in a reasonable safe condition and were not cracked, defective or dangerous or slippery when wet or otherwise;
 - 1.4. Failing to provide a safe system of work;
 - 1.5. Failing to warn the claimant that the floor was slippery;
 - 1.6. Failing to discharge the common law duty of care owed to the claimant.
2. As a result of the incident, the claimant claims to have suffered personal injuries, loss and damage which included cellulitis of the left shoulder, post traumatic cellulitis of the left shoulder, and hematoma of left shoulder. Loss and damages included two visits to one Dr. Moteeram, three visits to one Dr. Perris, a medical report from Dr. Louisaing and travel by taxi to visit medical doctors. None of the loss and damages was proven at all as no receipts were annexed to the witness statement of the claimant and no explanation was given as to why these receipts were not so annexed. In those circumstances, these special damages have not been proven as is required by law.
3. The burden of proof in respect of the negligence and/or breach of the duty of care lies with the claimant. It is for the claimant to prove the allegation together with the particulars set out in the statement of case.

4. The sole evidence in this respect is what is set out at paragraph 3 of his witness statement which is as follows:

"On or about May 9, 2004 whilst in the course of my employment as a driver with the first defendant I slipped on the wet floor between Sheds 2 and 3 of the first defendant's compound and struck my left shoulder on the center post of a vehicle I was entering and suffered injury to the said shoulder. I reported the matter of (sic) my supervisor."

5. I accept that the law on the issue of a slip is as referred to and stated by Jamadar, J in ***Diana Witherspoon v The Airports Authority of Trinidad and Tobago*** H.C.2533/1995 when he said: –

"A slip is quite a common incident of life and usually no harm is done, so it was incumbent on the plaintiff to show: (1) that the substance on the floor caused her to slip; (2) that the substance on the floor constituted an unusual danger; (3) that the defendants knew it to be dangerous."

6. The court has not heard nor received any evidence from or on behalf of the claimant that all of the above conditions/requirements were met. In fact, the court is left to surmise that the cause of the slippage was because of the wet floor rather than a clear unequivocal statement that the wet floor caused the slip.
7. Having regard to the authorities, the court finds that the claimant has failed to discharge the onus of proof in respect of these matters as is prescribed on a balance of probabilities. In any event, having regard to the evidence before the court including the evidence in respect of the contemporaneous documents including the "*Supervisor's Accident Form*" and the "*Treatment of Injury Form*" and the severity of the blow which would have been required for the extent of the injuries suffered by the claimant and which was commented upon by the defendant's witness Dr. Roache-Barker, it seems hardly likely that the claimant's version of the events which caused the accident are consistent with the extent of the injury.
8. Consequently, the court is of the respectful view that the claimant's action fails as he has failed to prove that the first named defendant was liable for the accident by way of negligence or breach of any statutory duty. In any event, the

claimant failed to address the court or to deal in any way in submissions with any alleged statutory duty under which the second defendant would have been labouring.

9. In respect of the issue of breach of contract, even though not elegantly pleaded, the court is of the view that Dr. Roache-Barker's evidence was not shaken in cross-examination especially in respect of her reasoning for her preference for the diagnosis of Dr. Toby rather than that of Dr. Alexander, bearing in mind her assessment of Dr. Toby's seniority and specialization as opposed to Dr. Alexander, who was a junior doctor working under the hospital orthopedic specialist Dr. Lousaing with whom Dr. Roache-Barker was in constant contact. Further, no resume was provided in respect of Dr. Alexander and, without any evidence as to his expertise at the time, this court cannot place great weight on his certificate especially since he did not attend court to give evidence and be cross-examined on his certificate. In those circumstances, it seems reasonable for Dr. Roache-Barker to have placed greater weight on the views and opinion of Dr. Toby as opposed to Dr. Alexander (whom she said she taught and with whom she discussed the certificate as a result of which she formed the view that he did not appreciate what a driver was or what was required of the claimant as a heavy equipment operator).
10. Consequently, the court responds to the agreed issues filed on 26th February 2010 in the following manner:
 - 10.1. *Whether the claimant was injured during the course of his employment due to the negligence and/or breach of statutory duty of the first defendant* – the claimant has failed in discharging the onus of proof required of him in this regard;
 - 10.2. *Whether the claimant's injury was as a result of his own negligence or contributed to by his own negligence* – not enough evidence was provided in respect of this issue to allow the court to come to a finding in favour of the claimant;
 - 10.3. *If the claimant was injured did the said injury arise during the course of his employment with the first name defendant* – it was generally

accepted by the parties that the claimant was injured during the course of his employment but the extent of the injury was in doubt;

- 10.4. *In the event that the claimant was injured as a result wholly or partly by reason of the negligence and/or breach of statutory duty of the first named defendant what is the quantum of damages payable to him – having failed to prove the first named defendant's liability, the quantum of damages does not arise;*
- 10.5. *Whether the nature and effects of the injury increased by reason of the failure of the claimant to comply with the instruction of the first name defendant's physician – there was no evidence of this;*
- 10.6. *Whether the claimant was medically fit to continue his employment with the first named defendant or whether the contract of employment was frustrated by reason of the claimant's illness – the nature and effect of the claimant's contract of employment with the first named defendant was not pleaded nor was it addressed in the evidence. As a result, the court cannot make a finding as to the effect of any alleged injury on the contract. In any event, the uncontroverted evidence is that the claimant was declared medically unfit to continue his employment with the first named defendant and the court accepts that such a finding/declaration was reasonable in the circumstances prevailing at the time;*
- 10.7. *Whether in all the circumstances the first name defendant's decision to medically board the claimant was reasonable and proper – having regard to the medical evidence tendered in court and the explanation given by Dr. Roache-Barker which was not seriously challenged, the court finds that it was reasonable and proper in the circumstances of what ought to have obtained in the situation of a normal healthy person who would have been expected to have recovered by six weeks according to Dr. Roache-Barker.*

THE ORDER:

11. The claimant's claim is it therefore dismissed. In light of the fact that the claimant is legally aided, there shall be no order as to costs.

POSTSCRIPT:

12. The court wishes to express its gratitude to the attorney for defendant for the very helpful submissions and authorities provided. At the same time, it is necessary for the court to express its dissatisfaction with the conduct of the claimant's case and, in particular, the failure to procure suitably qualified professional expertise to justify/support the claimant's medical position especially since the nexus between the slip and the injury was put into question. The court would have needed cogent evidence that the injury was one which was consistent with the claimant's story as narrated in his witness statement. This was not done and this court was left with doubts in its mind beyond the fairly wide parameters of the test of a balance of probabilities as to the possibility of the claimant having sustained the extent of the injury he claimed. Directions were given since January of this year in this regard and were not complied with. The impression given was that the expert was only pursued at the very last moment by which time it was too late to have secured the assistance/services of the named medical professional. That, together with the failure to comply with the directions of the court in terms of the securing of the medical expert's evidence and the filing of submissions and of the CPR, in relation to compliance with part 40.1, showed that this claimant was ill-prepared to prosecute his claim properly, efficiently and effectively before this court.

/s/ Devindra Rampersad
Devindra Rampersad
Judge