IN THE SUPREME COURT OF NAURU

CIVIL ACTION 12/88

BETWEEN TEORATI TEKOAUA

PLAINTIFF

AND NAURU PHOSPHATE CORPORATION

DEFENDANT.

Date of Hearing : 16.8.91
Date of Judgment : 26.11.1991
D. Aingimea for Plaintiff
Dwivedi for Defendant

JUDGMENT OF DONNE, C.J.

This is a claim for damages under the Law Reform (Miscellaneous Provisions) Act (U.K.) 1936 and the Fatal Accidents Acts (U.K.) 1846-59 by the trustee of the late Teorati Teokoaua who died on the 3rd. September 1987 as a result of an accident while working for the defendant. The plaintiff, his widow, brings the claims on behalf of herself and her 3 daughters two of whom at the time of their father's death were aged 7 years and 5 years respectively and one who was born 2 weeks after it. She died on the 1st Janaury 1988. The plaintiff was33 years old at the time of her husband's death.

The basis of the plaintiff's claim appears in the pleadings as follows:

4. The plaintiff claims that the cause of the accident was due to the negligence of the defendant.

PARTICULARS OF NEGLIGENCE

The defendant, his servants or agents were negligent in that they:

(i) failed to take reasonable care to provide and/or to maintain safe equipment for the deceased, thereby exposing him to unnecesary risk;

(ii) caused the deceased to work in a dangerous place when they know or ought to know of its dangerous position without safety means;

5. Further or alternatively the deceased's said accident was caused by the breach of statutory duty of the defendant, his servants or agents.

PARTICULARS OF BREACH OF STATUTORY DUTY

The defendant, his servants or agents:

(i) failed to carry out their common duty of care towards the deceased as required by section 2(2) of the Occupiers' Liability Act 1957;

(ii) failed to comply with section 5(1) of the Factories Act 1961 to provide sufficient and suitable lighting;

(iii) failed to comply with section 28(4) of the Factories Act 1961, that all openings in floors shall be securely fenced;

(iv) failed to comply with section 29(2) of the Factories Act 1961, that where any person has to work at a place from which he will be liable to fall a distance more than six feet six inches, then, unless the place is one which affords secure

> foothold and, where necessary, secure hand-hold, means shall be provided, so far as is reasonably practicable, by fencing or otherwise, for ensuring his safety.

The defendant admits that the deceased died while in its employment. By way of defence, it denies negligence. It also denies that was in breach of the statutory duty imposed on it by the abovestated provisions of the Factories Act. It contends that the lighting at the workplace complied sufficiently with the provisions of section 5(1) of the Act. It also pleaded that the requirements of sections 28(4) and 29(2) thereof could not be complied with since in the former case it was "impracticable" and in the latter case it was "not reasonably practiciable" to do so. In such circumstances, it contended, compliance was excused by the said sections. The defendant also alleged that the deceased failed to observe safety instructions and to use the safety equipment provided by it. This allegation of contributory negligence is implied by the deceased in its defence. It is not expressly pleaded. The Statement of Defence is prolix containing much more than is required or permitted under Rule 7 of Order 15 of the Civil Procedure Rules.

The plaintiff filed a reply the effect of which was to deny any negligence by the deceased and to plead a specific claim by way of damages $14,408. On the 29th. August 1991 the plaintiff filed an amendment

of the claim, her counsel having advised the Court on the previous day when final submissions were presented that he proposed so to do. The total claimed is $42,872.23

A plaintiff is not required in a claim for general damages, which this is, to state a specific amount in money for each item claimed or even give an overall figure for the total claim. A statement that the plaintiff claims unspecified dcmages suffices. However, I have amended the claim to substitute this new amount for the previous sum claimed.

On the evidence I find the following facts to have been established to my satisfaction:

The deceased Teorati Teokoaua, an I Kiribati, was an employee of the defendant, having commenced employment on the 24th September 1984. His employment was governed by terms of a written agreement. It was initially for one year with provision for extension. It was established that he was a good worker and that it was highly probable that he would have continued in his employment until the general repatriation of all Kiribati workers on the 1st August 1990. I accept that date as fixing the term of the deceased's employment with the defendant had he lived.

On the 3rd. September 1987, the deceased was working at the defendant's plant in the Rock Storage Bin, a building consisting of two platforms, Uppoer and Lower. The Bin is a link in the chain of operations ending in the shipping of phosphate for export. Mined phosphate is transported from the fields to the phosphate processing plant when it is, together with other processes, dried. After the drying, it is fed to the Storage Bin where it is held awaiting shipment. The deceased was working on the upper platform. This platform receives the treated phosphate which was deposited there by tractors. From there it is fed on to a conveyor belt on the lower platform for conveyance to the storage area. The feeding is done by the phosphate being fed through chutes down to the lower floor. The openings to the chutes are set in flush with the floor of the upper platform. The openings are about 8 feet in diameter and the chutes projected down to the lower platform would be about 10 to 12 feet in length. The openings at the material time were unfenced as was the platform having no hand or footholds. At the end of each chute is a steel plate which, when closed, stops the flow of phosphate therefrom. The closing and opening of each chute is controlled by a workman on the lower platform. A chute is opened when a decision is made as to where on the conveyor belt phosphate shall be deposited. The system to direct the operations

between platforms at the time of the accident involved one worker on the lower platform and one on the upper platform being equipped with a radio apparatus commonly called a "walkie talkie". When it was decided by the foreman on the lower platform which chute was to be opened, the worker on this platform communicated by the radio with his counterpart above him informing him which chute was to be opened. The chute was then opened by the worker below, the phosphate thereby being released to flow on to the conveyor belt. The worker on the upper platform on being informed of the chute to be opened would be required to move away from the opening.

On this day and time in question, the deceased was on the upper platform on his own. He operated the "walkie talkie" as well as shovelling and moving the phosphate. In the course of operations, a chute was opened below, the deceased fell into it and was suffocated. He was prised out of the chute by workmen. As is required by law the police were notified.

Inspector Aingimea of the Nauru Police arrived promptly on the scene before the deceased was taken to the Nauru Phosphate Corporation Hospital. He carried out a very thorough investigation and I have no hesitation in accepting his evidence as both reliable

and convincing. He found the Bin to be very dusty covered deep in phosphate and the visability limited to about 20 to 30 feet. That I am satisfied would be the visability concomitant with the operations normally carried out therein. According to a worker Mr. Tetiku who gave evidence, there were five workers on the lower platform and only the deceased on the upper. A worker Mr. Nanotake on the lower platform operated the radio there. He communicated with the deceased who told him to wait for his instruction. Later chute 49 was opened after appropriate radio communication and phosphate was released. This was followed by Nanotake calling the deceased advising chute 48 was to be opened. He received no acknowledgment from the deceased. The shute nevertheless was opened. It was found to be blocked then to be blocked by the body of the deceased. The conclusion of Inspector Aingimea was that the wrong chute to that designated was opened and the deceased obviously was standing near it. That probably was the correct conclusion.

The Inspector interviewed two engineer employees of the defendant, Mr. John Apurthan and Mr. Martin Donaldson. Apurthan admitted to him that he was the deceased's upervisor and was supposed to be with the men working at the Bin but that he was absent at the time. I am satisfied his presence there as supervisor

and overseer was essential. The area in which the men were working was a dangerous area. This was admitted by the engineers: Donaldson also said that there should have been warning signs about visability on the occasions of the moving of the phosphate. Apurthan said that at such times "you can see nothing".

The evidence satisfied me that the conditions at the workplace of the deceased were such that lighting was necessary. There was no lighting. Neither were the holes for the chutes in the platform fenced. The upper platform itself was over six and a half feet above the lower one, it had no footholds, handholds or fencing.

At the time of his death the deceased was 34 years old and was in good health. He earned from his employment with the defendant $50 per week with overtime which was not always available. In addition he received rations from the defendant worth $3,907.36 per year. He and his family received free medical service. Before he worked for the defendant, the deceased was engaged in fishing in Kiribati earning approximately $5 a day. His wife said he would have resumed this when he returned there. The plaintiff spent $200 for food for the mourners at the deceased's funeral.

The plaintiff was aged 35 years when her husband died. She was and is now in good health.

The Claim.

The negligence alleged is twofold. The first concerns the system and conditions of work, the second the breach by the defendant of certain statutory requirements imposed by the Factories Act 1961.

There is no question that the work the deceased was doing at the time of the accident was dangerous. The defendant's engineer admitted this. It involved handling and shovelling of large quantities of phosphate, an operation creating dusty conditions. Mr. Apurthan, the deceased's supervisor, told the police Inspector that in such conditions "you could see nothing". The area was not lit. That there should have been lighting in place and in operation at the time I have no doubt. Visability was I am satisfied very poor indeed. The deceased was left to work alone on the platform. He had no assistance in the task of moving the phosphate to ensure it was dropped through the correct chute designated to him by radio communication from one of the five workers who were working on the lower platform. The deceased was also required to operate the radio he carried. It is

clear that just prior to the accident there were communication problems between the platforms and it is probable the message designating the particular chute in question was either not received or heard by the deceased. The deceased's supervisor was absent from the area. That contention he should been there is incontrovertible. These proven facts establish in my view in the clearest possible way that the type of work and the conditions associated with it were such that to allow the deceased to undertake it alone and without any supervision was dangerous in the extreme. I am satisfied that the defendant by permitting, through the system of work at the time, these conditions to exist was grossly negligent. It is highly probable that had the supervisor or even another worker been present that the accident, with the resulting death, would not have happened. The plaintiff's allegations in paragraph 4 of her claim succeed.

The plaintiff's allegation of negligence concerning breaches of statutory duty relate to three sections of the Factories Act 1961. Section 5(1) provides.

> "(1) Effective provision shall be made for securing and maintaining sufficient and suitable lighting, whether natural or artificial, in every part of a factory in which persons are working or passing."

I have found that there should have been lighting. There was none. That non-compliance by the defendant is established.

Section 28(4) of the Act provides:

> "All openings in floors shall be securely fenced, except insofar as the nature of the work renders such fencing impracticable."

I have found that there was no fencing of the openings in the platform in question.

Section 29(2) provides:

> "(2) Where any person has to work at a place from which he will be liable to fall a distance more than six feet six inches, then, unless the place is one which affords secure foothold and, where necessary, secure hand-hold, means shall be provided, so far as is reasonably practicable, by fencing or otherwise, for ensuring his safety."

I have found that there was no footholds or handholds or fencing provided on the platform. The platform was over six and a half feet above the one below it. The statement of defence filed alleged it was impracticable to comply with the last two sections of the Act. If that were proved, then it would

provide complete answers to the failures to comply.

The onus of proving this impracticability is on the defendant Nimmo v Alexander Cowan and Co. Ltd (1968) A.C. 107. The defendant called no evidence to support this defence nor did it cover it in its examination of the plaintiff's case. In the result I find that this defence fails and consider the failure to comply with statutory duty constitutes negligence in two of the three breaches:

1. The failure to provide lighting as required by section 5(1) of the Act. I am satisfied that lighting was necessary in the circumstances and find the failure to provide it was a probable and contributing cause of the accident.

2. The failure to fence as required by section 28(4) of the Act. I am satisfied that the holes should have been fenced and I find the failure to so fence was a probable and contributing cause of the accident.

Although there was a failure to comply with the requirements of section 29(2) of the Act, I am unable on the balance of probabilities to hold that such failure contributed to the accident.

As to the allegation of contributory negligence, the defence alleged that the deceased failed to follow safety instructions or utilise the safety equipment provided. There is no evidence to support this allegation. The defendant addressed no evidence of the purport of the equipment it supplied and I find no negligence contributing to the accident as suggested by counsel in final address by reason of the deceased wearing "slip on" shoes instead of the issued boots. The allegation fails.

Having found negligence in the defendant, I now turn to the assessment of damages which must flow therefrom.

The value of the dependency.

Section 2 of the Total Accidents Act 1846 provides:

> "... Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not reovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict

shall find and direct."

In short, the measure recoverable by a dependent is what is often called the value of the dependency i.e. the amount of the pecuniary benefit that the dependent could reasonably expect to have received from the deceased in the future. In the leading case of Taylor v O'Connor (1971) A. C. 115 at p. 140 Lord Pearson states:

> "There are three stages in the normal calculation, namely: (i) to estimate the lost earnings, i.e. the sums which the deceased probably would have earned but for the fatal accident; (ii) to estimate the lost benefit, i.e. the pecuniary benefit which the dependants probably would have derived from the lost earnings, and to express the lost benefit as an annual sum over the period of the lost earnings; and (iii) to choose the appropriate multiplier which, when applied to the lost benefit exspressed as an annual sum, gives the amount ofthe damages which is a lump sum."

The starting point in the calculation in this case is firstly the value of wages and rations received from the defendant earned by the deceased before his death and, secondly, what he would have earned after the cessation of his contract of employment with the defendant. As to the first calculation the evidence establishes he would have had approximately three more years of employment with the defendant. His earnings with the company were a maximum of of $50 per week. This included overtime.

However this was not always available and I would assess his annual wage at $2,300 per annum. The rations were worth $3,907.60 per annum. As to the second calculation it so established that his occupation of small commercial fisherman in Kiribati which I am satisfied he would have undertaken after leaving Nauru, would yield the family $5 per day and on the basis of a 6 day week, $30 per week.

The next step in calculation is to fix the number of years that it is anticipated that dependency would have lasted. The deceased was 34 years of age at the time of his death; he was in good health and I accept counsel's submission that a fair estimate of dependency would be 26 years. The plaintiff widow was 35 years. She is in good health and there is no reason to hold that her expectancy of life would be any less than that of her husband.

The resultant assessment of the dependants' loss is not determined by the multiplication of the number of years during which they have been deprived of the deceased's support; this would clearly produce over compensation as it would put the deceased's future contributions into the dependants' hands long before they would otherwise have received them and would enable them to enjoy the interest accruing in the intervening period. It is the present value of the

future contributions that is to be awarded. MacGregor on Damages (13th Edn) para 1220 at page 816.

Applying the above principles and on the evidence I would calculate the value of the total dependency as follows.

(a) Estimation of Total Earnings:

Lost Earnings from defendants employment:

3 years at $2,300 per annum	$ 6,900
Value of rations supplied as part of renumeration:	
3 years at $3,908 per annum	11,724
Income from commercial fishing Kiribati	
23 years at $1,500 per annum	
(Total amount payable over the period, $34,500 the present value of which I fix at	17,000
	$ 35,624

I have made no award for loss of free medical services of the defendant. The submission thereon was unsubstantiated.

(b) Estimation of Value of Deceased's Earning Not Used for Support of Dependants - to be deducted.

I accept counsel's submission that this should be the equivalent of one-quarter of the total -	8,908
	$ 27,716

Based upon this calculation I would assess by way of general damages at $27,800. In addition, I allow the sum of $200 for funeral expenses paid by the plaintiff. This award is made pursuant to the provisions of section 2(3) ofthe Law Reform (Miscellaneous Provisions) Act 1934. These expenses were necessary to comply with the demands according to custom to provide food and hospitality to mourners at the funeral.

I accordingly award to the plaintiff against the defendant the sum of $28,000.

There will be an award of costs against the defendant of $500 together with the cost of and incidental to the plaintiff's travel to and from Nauru to Kiribati to the Court for the purpose of giving evidence at the trial, such costs to be fixed by the Registrar.

One final matter is the question of the apportionment of the damages between the plaintiff and each of the children. Firstly, the claim is expressed to be brought by the plaintiff in behalf of herself and her three daugthers. The evidence establishes she also has a son aged 15 years. Secondly, it is the Court's task to apportion the damages between the plaintiff and her children. I have received no submissions on this from her counsel who alone is entitled to be heard on this.

Entry of judgment is deferred until this question is settled. As a guide I state that the amount to be apportioned is the net balance of the general damages

awarded after deduction of any legitimate charges, including solicitor and client costs approved by the Court. Counsel is given leave to make submissions thereon at a time convenient to the Court.

SIR GAVEN DONNE
CHIEF JUSTICE
26.11.91

Solicitor for Defendant : David Aingimea, Nauru
Solicitor for Defendant : Office of Secretary for Justice, Nauru.

SGD/iah