IN THE SUPREME COURT **CIVIL ACTION NO. 1 OF 2003**

BETWEEN **MICKEY SEYMOUR** **PLAINTIFF**

AND **VASSAL GADOENGIN** **DEFENDANT**

P. Aingimea for Plaintiff
D. Gioura for Defendant

Hearing 11, 16 February 2004

DECISION

1. The Plaintiff was dismissed from his position as a Leading Hand in the Works Department of the Nauruan Public Service in August 1995, and an appeal was filed by Mr. Audoa of counsel in the same month with the Public Service Appeals Board.

2. At that point everything for one reason or another seems to have gone wrong for the Plaintiff. He does not appear to have got before the Board until August 1996. At that time, he had changed his counsel from Mr. Audoa to a Pleader, Vassal Gadoengin, the Defendant. He, on his evidence, was summoned by the Chairman of the Board, the Chief Justice, to his Chambers where he was informed that the appeal had been dismissed for want of prosecution.

3. Apparently, the defendant, though a Pleader of some years standing at the time, misunderstood the import of the term. He understood it to mean that the prosecution of the case rested with the Chief Secretary and that that prosecution had been dismissed, whereas the reverse was the case. The appellant had been denied a hearing in the Tribunal for want of prosecution and the appeal was dismissed.

4. Armed with this understanding, the defendant somewhat triumphantly informed the plaintiff that he had won and advised that the plaintiff should send a letter to the Chief Secretary to obtain reimbursement of the salary lost since his dismissal which at that point, was some twelve or so months earlier. Upon the evidence of the Plaintiff and his friends, who also appear to be relatives, in the euphoria of this short-lived moment, the defendant said he was not charging any fees but would be happy with two outboard motors, an Evinrude 30 HP, and a Johnson 40 HP. Both the plaintiff and defendant, first cousins, are keen fishermen. With that decided amicably, all went off to a good sized Chinese meal.

5. The plaintiff's fortunes then continued to fade. Mr. Seymour, the Plaintiff remained dismissed, no letter to the Chief Secretary appears to have been written at the time as advised, either by Mr. Audoa or the Plaintiff and no reimbursement for past losses came the way of the Plaintiff and he was, in his terms, short of two outboard engines. He, later, changed his legal representation and moved back to Mr. Audoa, but this appears not to have been until about March 1998. The evidence of the defendant was that he ceased to represent the plaintiff at the conclusion of the case, that is, on the day of the Chambers hearing with the Chief Justice, and the tendering of his advice that the Plaintiff or Mr. Audoa should write a letter to the Chief Secretary. It was inexplicable that nothing after September 1996, appears to have been done by the Plaintiff.

6. Later, the then Chief Justice, in noting a letter from Mr. Audoa of 3 March 1998 wrote on the letter that there was no power to order a rehearing that he could find but was prepared to hear submissions on the matter. Mr. Audoa was so informed of the note by the Chief Justice on 12 March 1998 that by February 1999 no submissions had been forwarded though the matter had been re-listed by the Board. In fact, the matter did not finally reach the Board until 10 December 2002, when it refused a rehearing of the matter.

7. From the records of the Public Service Appeals Board, it is clear that, in the August-September sessions of 1996, the Board had dismissed for want of prosecution 6 appeals, it had heard and allowed one appeal. A letter from the Secretary of the Board dated 18 September 1996 to the defendant had informed him of the result of the Seymour appeal, namely, that it had been dismissed for want of prosecution.

8. Without delving further into the curious context of the facts regarding the Seymour appeal and a number of others, the record of the Secretary of the Board would indicate to me that the Seymour matter along with others had been determined by the Board, and, in fact, this was the view of a subsequent Board in 2002 when it handed down its decision based as much on a presumption of regularity as anything else.

9. This civil case, however, depends rather more on the incident where the pleader for the plaintiff, the defendant, exclaims with apparent jubilation that the plaintiff had won and the resultant behaviour of the parties following that. There can be no doubt, as the Defendant himself admitted in evidence, that he completely misunderstood the import of the term 'Dismissed for want of prosecution'.

10. The plaintiff's claim was that there was negligent misstatement that misled the plaintiff into a belief that he would be re-employed and resulted in him giving the two outboard engines to the defendant as reward or payment for his work. Further, there was a claim in para. 28 of the claim that the defendant had deliberately lied and misled the plaintiff for his own advancement. There is no evidence that this latter claim was the case and this is rejected by the Court.

11. The Court accepts as to particulars, 1,5,6 and 7 that the plaintiff, at the time, was misled by the defendant's words that the plaintiff had won. The defendant was his professional legal representative and had a duty of care not to mislead the plaintiff. Whilst it arose from a misunderstanding and could easily have been corrected it was some time, almost an inordinate time apparently, before the plaintiff realized that he, in fact, had not won.

12. The leading case of Hedley Byrne v Heller [1964] AC 465 set the future path for liability for negligent misrepresentation. It was clear that the plaintiff would accept the statement of the defendant and that it was foreseeable that his future conduct would be determined by such a statement.

13. In this statement of claim, the plaintiff also presented particulars of negligence 2,3 and 4 which went to the conduct of the case. There may, on the face of it , appear to be a degree of negligence in omissions but it was not very susceptible of proof as to what the pleader defendant did or did not do nor what was the nature of his summoning to Chambers. As the matter occurred nearly eight years ago, recollections of events become hazy on detail and this was apparent in the paucity of evidence before the Court. Indeed, a later Board took the view that there had been regularity and that the decisions were taken earlier by the then Board to dismiss a number of cases on the ground of want of prosecution. It was not at all clear to me in these proceedings what had happened in the Chambers gathering and, therefore, this Court was certainly in no position to make a finding. So far as the Plaintiff was concerned he had to rely on the effect of the negligent misstatement as to the outcome of this case.

14. But the question arises what damages arose from the event. What indeed were the plaintiff's out of pocket losses? The plaintiff in negligent misstatement is limited to tortious damage.

15. The plaintiff claimed, first, for the two engines, and, secondly, in the words of the plaintiff 'in the sum of $50,000 for the negligent (sic) he caused as this would have been the money won by the Plaintiff if the defendant had not mishandled the case'.

16. The mere statement of the second head of damage is almost sufficient in itself to exclude it. No proof of such damage was presented in evidence and, at best, it was based on the possible loss of money that may have been earned in the public service over a number of years if the Plaintiff had won his appeal against dismissal. This was a far fetched claim that bore little reality. In any event, neither was it calculated in any provable fashion nor set-off against any earnings in the intervening period. The Court simply dismisses this claim. Such a claim was dependent on other outcomes which simply could not be proven nor was any attempt made.

17. The first head of damage related to the engines. The plaintiff claimed that the two engines, which were loosely described to the Court as an Evinrude 30 HP and Johnson 40 HP, were given to the Defendant as payment for winning. The defendant claimed that, as the Plaintiff was a first cousin, he did not charge any fees, and that the engines were given to him out of a close family relationship and their fishing exploits together. The plaintiff loosely suggested that the engines were valued at $4,000 each – though no basis was shown for this.

18. If, as the Plaintiff claimed, it was a fee for services rendered then it was outrageously excessive that may open the defendant to complaint charges under the Legal Practitioners Act. A fee for services should be monetary fee at a rate determined before the case and has no contingent interest associated with it. Where fee payment is made in kind then an agreement in writing to that effect should be pre-determined. I dare say successful litigants for some reason may feel sometimes over generous and thus bestow other advantages on the professional advocate. But this can be no more than a gift though in the cold light of day may now be seen by the Plaintiff as payment for services. Where that situation occurred due to a negligent mistake of the legal professional, one might expect, as a professional and gentleman, and with understanding of his own folly, he would return the gift. That such course of action did not happen, one suspects, has led to this action. The Court does not, on balance, see the transaction as a fee reward but rather a gift from an unfortunately euphoric client. The evidence of other witnesses in support of the fee arrangement did not sway the court. It was a transaction between the plaintiff and defendant essentially and the family commitment seems to have been the leading factor. That it may have soured a little a close family relationship is an unfortunate by-product brought about, no doubt, by the non-return of the gift.

19. The Court dismisses the claim for the cost of the two engines.

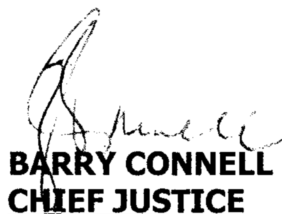
20. Before reaching the outcome of the case, I raise two other matters

21. First, immediately following the decision the defendant had proferred some advice for the plaintiff to write to the Chief Secretary to claim reimbursement and suggested that the plaintiff ought to seek advice and help of Mr. Audoa, a barrister and solicitor, for that purpose. As well, there was no contact, verbal or otherwise, between the Plaintiff and the Chief Secretary for a very long period extending to years on the outcome. I found the fact that he took so long to see Mr. Audoa and failed to contact the Chief Secretary almost unbelievable. If damages over this period had fallen to be assessed then undoubtedly there was contributory negligence by the Plaintiff. However, in the event this did not have to be assessed as my earlier remarks point out.

22. Secondly, the defence was not taken by the defendant, but the question of statutory limitation must have been at stake. However, as it was not raised, I shall not comment further upon it and it has no bearing on this decision. The case itself well illustrates the basis in principle for statutes of limitation, where recollections and evidence fade hazily into the past.

23. The position, therefore, is that whilst the plaintiff can point to a negligent misstatement by the defendant that the plaintiff had won, he was not able to prove in the context of the tortious action damages to which the defendant was liable. There were only two heads claimed that I have already dealt with. The plaintiff, therefore, failed in his bid to show that he had suffered damage under the tort of negligent misstatement. No other consequential damage was claimed.

24. The plaintiff has, of course, asked for costs of the suit. He has won on liability but failed to prove damage. Nevertheless, costs are in the discretion of the Court. The actions of the defendant were both ~~non~~ unmeritorious and unprofessional. Whilst I find the plaintiff's subsequent actions dilatory in the extreme, I am conscious that he was far from conversant in the ways of the law and, it seems, the public service. I have, therefore, determined that four fifths of the plaintiff's costs be paid by the defendant.



BARRY CONNELL
CHIEF JUSTICE

19/02/04