Coleman v Kolo

Court of Appeal
Morling, Ryan & Quillian JJ
Appeal No.20A/1990

6 June, 1991

Practice and Procedure - Appeal - argument on matter not pleaded in lower Court
Contributory negligence - not pleaded
Constitution - duty to put a defence not pleaded
Damages - severe injuries - economic less
Tort - negligence - contributory negligence - damages

The respondent was injured in an accident whilst in the employ of the appellant. A jury found in his favour and awarded $8000 damages, based on the appellant's negligence. On appeal it was argued that the trial judge should have put contributory negligence to the jury even although that had not been pleaded; and, alternatively, damages were excessive.

Held (dismissing the appeal):

1. None of the provisions of the Constitution (in particular Clauses 100, 101 & 4) obliged the trial judge to put contributory negligence to the jury.
2. A plaintiff is not required to assume that a defendant would seek at trial to raise a defence of which no notice had been given.
3. In any event, on a review of the evidence the defence of contributory negligence could not have succeeded, even if pleaded.
4. The respondent's injuries were severe; there was some economic loss; the verdict was quite high by local standards, but not so high that no reasonable jury could have arrived at it.

Statutes considered : Constitution - Clauses 100, 101, 4

Counsel for appellant : Mr Hola

Judgment

This is an appeal in proceedings which were heard before Webster J with a civil jury. In the proceedings the Plaintiff (who is the present Respondent) sought damages for serious injuries he received on 6th June, 1987. On that date he was employed by the Appellant assisting in lifting an anchor with a winch. It was the Plaintiff's case that the winch so that the handle of it spun out of control and struck him, causing serious injuries. The jury awarded the Plaintiff $8,000 damages. The appeal is brought upon two grounds. First, it is submitted that the trial Judge erred in failing to put a defence of contributory negligence to the jury. Secondly, it is submitted that the damages awarded were excessive.

As to the first ground of appeal it is conceded by Mr Hola, who appeared for the Appellant, that a defence of contributory negligence was not pleaded. Nevertheless, he submitted that it was the Judge's obligation to put the defence to the jury. It is fair to say that Mr Hola applied at the trial to the Judge to put the issue of contributory negligence to the jury but the Judge declined to do so.

As will appear from what I say later in these reasons, I do not think that even if a defence of contributory negligence had been put to the jury, it would have succeeded. However I shall first consider the argument put by the Mr Hola that this Honour had a duty to put the defence to the jury.

Mr Hola relied upon some provisions in the Constitution in support of his submission. He referred to clause 100 which provides, in part , as follows:

> "In civil cases the jury shall give judgment for payment or compensation as the case may be and according to the merits of the case."

He also relied upon section 101 which provides, in part, as follows:

> "In civil an criminal cases the judge shall direct the jury upon the law bearing upon the case and assist them in arriving at a just decision upn the case before them."

He also relied upon section 4 which in effect provides that there is one law in Tonga for non-Tongans and Tongans.

In my opinion none of the constitutional provisions to which I have referred obliged the learned Judge to put the defence of contributory negligence to the jury. It was the obligation of the Judge to hold the scales of justice evenly between the parties. The orderly conduct of proceedings in court requires the parties to clearly state their claims and their defences before the trial. In this case the defence of contributory negligence was not pleaded.

The Plaintiff was entitled to go to trial and put his case to the jury upon the basis that all he had show in order to recover a verdict was that his employer had been negligent. He was not required to assume that the Defendant would seek at the trial to raise a defence against him of which no notice had been given.

In my opinion if the Judge had acceded to the application to raise a last-minute defence of contributory negligence he would have run the risk of being throught to be less than even-handed in his conduct of the trial.

Mr Hola assumed responsibility for what he described as his own fault in failing to

plead a of defence of contributory negligence. In my opinion, he was not in any relevant way at fault in failing to plead the defence. To make clear what I mean by this observation it is necessary to refer in some little detail to the evidence. In substance the Plaintiff's case on negligence was that his employer required him to work with defective equipment. That claim was demonstrated to the hilt. The allegation of contributory negligence was based upon the following allegations. First it was alleged that about one month before the accident the winch malfunctioned to the Plaintiff's knowledge and therefore he should have been aware of the risk involved in using it. As to this circumstance, it is only necessary to say that the Plaintiff was not to assume that his employer had failed to have the winch repaired in the month following its earlier malfunction.

The second basis upon which it is said that contributory negligence was estabished is that the Plaintiff was careless for his own safety in that he failed to remover himself from the area where the winch handle would be flying in an effort to protect a fellow worker. His evidence on this question included - Question : Was the handle still in place still connected to the winch or has it come loose? Answer : It was still conected to the winch. Question : Up to the time that Peau moved away from it? Answer : Yes. Question : Did you say that you were still holding on? Answer : Yes. Question : Why? Answer : To protect Peau. Question : While the two of you were unable to control it you tried to stop it on your own? Answer : I loved Peau. Question : And did not loved yourself? Answer : No. Question : I put it to you that you were careless on that day what you say about it? Answer : No. Question : I put it to you that you were careless that day for the following reasons - you knew that the winch was not working properly, and as you stated as evidence the anchor was very heavy, and the three of you, yourself, Peau and Don were still unable control it, yet you alone still try to stop it, what you say about that? Answer : I still tried to control it because I was afraid something will happen to my workmate.

In my view that evidence did not establish contributory negligence. The Defendant himself gave evidence as follows:

Question : Who was in command of the operations on the day of accident?
Answer : I was. He said that he was operating the brake on the winch, and on page 68 "let go" and the winch spun with the handle on. His evidence included for the following..
Question : What in your opinion, was caused of this accident?
Answer : It is difficult to say. May be a signal to let go is given prematurely. The way Toviko was struck on the leg shows that he was well away from the winch. But somehow he lifted his leg and the very edge of the winch handle got the side of his leg.
Question : Please clarify again why do you think that Lutoviko was injured on his particular incident?
Answer : He did not move out of the way as he should have".

In my view the defence of contributory negligence could not have succeeded even if it had been pleaded. No grounds have been shown for disturbing the jury's verdict on liability.

I turn now to the question of damages. The Plaintiff's injuries were severe. He was 21 years of age at the time of the trial. According to the doctor who examined him on the day of accident he had multiple fractures of the left leg. He describes his injury as being " a major injury to his left leg". The Plaintiff was in hospital for approximately eleven

weeks, at the place where he was injured. Thereafter he was transferred to Vaiola Hospital at Nuku'alofa. He was in hospital, or receiving treatment in hospital, until December 1987. The evidence suggests that the Plaintiff must have suffered some economic loss. The evidence discloses that his employer sent him some money after the accident. But those payments ceased after a short time. His income at the time of the accident was about $30 a week but at the time of trial he was in other employment earning only $15 per week. The Plaintiff said, without challenge, that his wife left him after the accident because he had no income to support her. The Plaintiff is still a young man. It is true that he has made
160 a very good recovery, and I think the verdict was quite high by local standards. But that is not to say that it is so high that no reasonalble jury could have arrived at it. I do not think it should be set aside.

I would dismiss the appeal with costs.

I concur.

I also concur.

Appeal dismissed with costs.