IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 115

Suit 737/1998

Between

Parno

… Plaintiff

And

SC Marine Pte Ltd

… Defendant

GROUNDS OF DECISION

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Parno v SC Marine Pte Ltd

[1999] SGHC 115

Suit 737/1998
Lim Teong Qwee JC
30 April 1999

Judgment:

1. This is a claim for damages for personal injuries suffered by the plaintiff owing to the negligence or alternatively breach of duties under ss 33(3) and 33(7) of the Factories Act on the part of the defendant or of its servants or agents. The plaintiff alleged in the statement of claim that on 2 February 1998 in the course of his employment by the defendant he was standing on a platform on a pile frame when he was injured. The pile frame was mounted on one end of a dumb barge. It is not disputed that the barge was at the material time at anchor at the Port of Yangon in Myanmar where it was engaged in pile driving operations.

2. The defendant denied that it was guilty of any negligence or of breach of any duty. Further or in the alternative it alleged that the injuries were wholly caused by or contributed to by the negligence of the plaintiff.

3. I found that the defendant was negligent but that the plaintiff was guilty of substantial contributory negligence. I found the plaintiff three-quarters to blame. I dismissed the claim founded on the Factories Act. I was informed that

I should decide the question of liability only and in the circumstances I allowed the plaintiff half his costs and gave judgment accordingly. The plaintiff has given notice of appeal and these are my grounds.

Factories Act

4. Ms Ng conceded that ss 33(3) and 33(7) of the Factories Act did not have extra territorial application. The defendant owed no duties under either of these statutory provisions but she said that the defendant had not taken this point in its defence. I am unable to agree.

5. Paragraph 1 of the statement of claim states:

> "The defendants are and were at all material times the owners of the piling barge 'SUMPILE 8', being premises to which the provisions of the Factories Act, Cap 104, applies."

Paragraph 6 alleges negligence and breach of duties and gives particulars of the breach of duties under ss 33(3) and 33(7).

6. Paragraph 1 of the defence states:

> "Save that the defendants was and were at all material times the owners of the piling barge 'SUMPILE 8', paragraph 1 of the statement of claim is denied."

Paragraph 5 states:

> "It is denied that the defendants or any of their servants or agents were guilty of any negligence or breach of statutory duty as alleged in paragraph 6 …."

7. O 18 r 13(3) provides:

> "Subject to paragraph (4), every allegation of fact made in a statement of claim or counterclaim which the party on whom it

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> is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be; and a general denial of such allegations, or a general statement of non-admission of them, is not a sufficient traverse of them."

Paragraph 4 relates to damages and is not relevant for the present purpose.

8. There are only two allegations in para 1 of the statement of claim. One allegation is that the defendant was the owner of the barge. This is an allegation of fact and it is admitted in para 1 of the defence. The other is that the Act applied to the barge. This is not an allegation of fact and O 18 r 13(3) does not apply.

9. The allegation that the Act applies ought not to have been pleaded in that way. The plaintiff ought to have pleaded facts to bring the barge within the meaning of "factory" under the Act in which case the defendant would have been bound to plead specifically to those facts. This the plaintiff has not done and I see no reason for saying that the defendant should be precluded from relying on the defence that as a matter of law the barge was not a factory or that the Act did not apply to it or more specifically that it owed no duties under ss 33(3) or 33(7).

10. The defendant denied that the Act applied to the barge as pleaded in para 1 of the defence. I think this sufficiently pleads the defence. I also think the plaintiff has properly conceded that the Act did not apply to this barge while it was anchored at sea in the Port of Yangon. In my judgment the defendant owed no duties under ss 33(3) or 33(7) of the Act and was accordingly not in breach of any such duties.

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Negligence

11. The *Sumpile 8* was a dumb barge whose principal dimensions were 64.14 m (L) x 26 m (B) x 4.5 m (D). A pile frame was mounted at one end. At the other end was the accommodation which housed the control room and other facilities. The plaintiff was employed by the defendant as a rigger under a contract of employment dated 13 September 1997 and was assigned to the barge. He would have come on board the same day or soon after in September 1997. At that time the complement consisted of Mr Ishak bin Samat the master, Mr Sazali and another (control room operators), Mr Ahmad (co-ordinator and mechanic), another mechanic and six riggers. The plaintiff came on board as the seventh rigger. He had six years' experience as a rigger.

12. The pile frame was a steel tower structure with hoists and leaders to guide the hammer. The hammer was a Mitsubishi MH-72B diesel hammer. It was essentially a diesel engine with a cyclinder and a piston or ram. The hammer measured about 5.9 m and was secured to the two parallel leaders by four clamps.

13. At the lower end of the upper section of the cylinder or upper cyclinder there was an arrangement of lifting lugs. This consisted of a pair of lugs with "eyes" through which a pin or bolt was inserted. This pin was for identification at the trial referred to as pin No 5. Pin No 5 was held in place by a smaller pin referred to as pin No 16 which was inserted through an opening at the end of pin No 5 away from its head. Pin No 16 was hairpin shaped so that it could stay in place. There was a similar arrangement of lifting lugs located on the diametrically opposite side.

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14. The hammer was started by a starter which was clamped to the leaders in such a way that it could be lowered onto a position alongside the upper cylinder of the hammer between the hammer and the leaders and raised above the hammer. An operator in the control room operated the hoists to raise or lower the starter. To start the hammer the starter would be brought alongside the upper cylinder of the hammer where it would engage a latch. The starter would then be hoisted up and this would raise the piston or ram within the hammer. This action allowed the fuel mixture to be pumped into the lower section of the cylinder or lower cylinder. At the design height the latch would automatically be released and the piston would drop. The compression of the fuel mixture in the lower cylinder would cause combustion resulting in an explosion which provided the down thrust to drive the pile and the rebound of the piston to continue the cycle. The hammer would be stopped quite simply by manually releasing the compression.

15. To drive a pile of the length the defendant was engaged in doing at the Port of Yangon when the plaintiff was working on board the barge the hammer had to be raised by securing the hoisting cables to the lifting lugs and hoisting it up. Guy cables would be shackled to the pile which would then be positioned under the hammer. The guy cables would be operated by winches on deck so as to hold the pile in position. The hammer would then be lowered onto the helmet covering the top of the pile. The starter would be lowered to start the hammer. Once the hammer was started the starter would be left in the same position as there would be no point in raising it any higher. The hammer would go down with the pile. When the pile had been driven to about three-quarters in depth the hammer would be stopped. The guy cables would then be removed from the pile in order that it could be further driven into the seabed to the design depth. The starter would be lowered to restart the hammer to continue driving the pile. In a

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12-hour working shift about four to six piles could be driven in. The operation to drive each pile to about three-quarters in depth could take two to three hours.

16. The plaintiff said in para 4 of his affidavit:

> "On the 2nd February 1998 at about 5.00 pm the Master ('Ishak') and the operator ('Sazali') were on duty in the operation room whilst the winchman ('Bobby') and the radio officer ('Ahmad') were on the ground in front of the piling machine. I was instructed by the Master to climb up the piling machine onto the platform about 40 metres from the ground, to repair the safety pin of the hammer which had broken loose. Whilst attending to the repair which was within sight of the persons in the operation control room, Sazali (from the operation control room) activated the pennant (starter) hammer (which commence piling) causing it to fall on my buttocks, injuring me seriously."

He corrected this in his examination in chief. He said he was instructed by Mr Ahmad who was instructed by Mr Ishak and that he was instructed to monitor the status of the hammer during piling and to attend to any repair and rectification necessary. He said after piling stopped he attended to replacing a safety pin which had fallen loose.

17. Mr Yuen did not object to the admission of this evidence but he quite properly pointed out that Mr Ahmad had not been called as the allegation in the affidavit was that it was the master who had instructed the plaintiff to climb up the pile frame to "repair the safety pin".

18. The plaintiff said that it was Mr Ahmad who assigned him to work on the platform of the pile frame. Under cross-examination he said:

> "Q: Anyone brought you up piling tower to tell you what your duties were?
>
> A: Yes.
>
> Q: He explained what you were to do up there?

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A: Yes.

Q: What he told you about what you were to do?

A: If any oil spills or loose equipment I would be asked to attend to it. If oil leaks, loose equipment like safety pin coming out. He told me to observe movement of hammer downwards. To check everything is okay. No loose bolts.

Q: Were you asked to inform anyone if you discovered any loose bolt?

A: Yes.

Q: He told you whom to inform?

A: To inform Ahmad. If I could do job myself I would do it. He did not specifically say to inform Ahmad. 'If anything serious, out of order, you call me.' He said that.

Q: Who this person you had to call?

A: Ahmad. He told me to go up platform in piling tower but he did not go up with me."

He knew that he was to call Mr Ahmad "if anything serious, out of order". If he could do the job himself he would do it.

19. The plaintiff said that the 'safety pin' he said in his affidavit he was instructed to repair was pin No 16. He said it had come out completely. It was not there but pin No 5 was still in position. Under cross-examination he said:

"Q: What were you trying to repair or to do?

A: I used small wire normally used for welding to make temporary safety pin.

Q: Item 16. Safety pin. Available at barge store?

A: Yes.

Q: You could have gone down to barge store to obtain it?

A: No time for that. I was rather worried might go slanting if not attended to quickly. My fear was if I did not insert safety pin temporarily pin No 5 might also come off. By 'slanting' I mean if pin No 5 came off load would be different.

Q: When you decided to put wire in as temporary measure piling operation had stopped?

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A: Yes. Stopped. I quickly fixed wire."

The hammer might "go slanting" if pin No 5 fell off and an attempt was made to raise the hammer by securing the hoisting cable to the lifting lugs on the other side only.

20. The hammer had stopped. Unless the hammer was going to be raised to position a pile under it the lifting lugs were not going to be used. There would have been enough time to do what he knew it was his duty to do. He knew he had to tell Mr Ahmad. He said pin No 16 was missing. He needed one for replacement. It could be obtained from the store. It seems quite unlikely that he happened to find a welding electrode of the right length and to be able to bend it so that it could stay in place.

21. The plaintiff went on to say under cross-examination:

"Q: Know why piling work stopped?

A: I gave code sign to someone to stop it. Until I gave sign hammer was still working. Piling operation was still going on.

Q: Whom you gave code sign to?

A: Rigger below.

Q: Who?

A: Rizal.

Q: How you know he acknowledged or understood your code?

A: He ran off. So I thought he understood.

Q: How long after he ran off piling operation stopped?

A: One or two minutes. I mean soon after he ran off it stopped.

Q: You believed piling operation stopped because of your code signal?

A: Yes."

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He must have thought it was serious. It was serious enough for him to bring piling work to a stop. That would have alerted some of the crew of the barge if not all of them. He would have been asked the reason unless there was an obvious one. He might have told Mr Ahmad or someone else the reason.

22. The plaintiff was asked if he gave any indication to Mr Ahmad. He said under cross-examination:

> "Q: After you had given signal for piling operation to stop and piling operation had stopped you did not indicate to Ahmad why you stopped piling operation?
>
> A: Did not tell him. Pointed to spot where safety pin had come off its position. I pointed to Rizal. I pointed to spot immediately after giving code signal to stop. Before Rizal ran off.
>
> Q: In effect you pointed to spot only once and that was to Rizal?
>
> A: Yes.
>
> Q: If operation stopped why you feared pin No 5 would come off?
>
> A: My duty. Anything could happen."

Having brought piling work to a stop and having pointed to Mr Rizal the spot where pin No 16 had come off he did no more about telling anyone else. He then went ahead on his own to improvise with a welding electrode which happened to be there for him to use.

23. I find the plaintiff's evidence difficult to believe. Having brought piling work to a stop a workman in his position would have been anxious to let Mr Ahmad or even the master know why he had done so. Did he in fact give the signal to stop the piling work? This is what he said earlier under cross-examination:

> "Q: Accident occurred when this pile was already driven about three-quarters way into seabed and cables were being released?

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A: Yes. Cables were not completely taken out."

"This pile" was a reference to the fourth or fifth pile driven in that day. He knew the pile driving exercise. He was taken through it in cross-examination. He knew that when a pile had been driven about three-quarters in depth the hammer would be stopped for the guy cables to be removed. That was when according to this part of his evidence he said he was injured. The piling work had stopped not because he brought it to a stop but because the pile had been driven about three-quarters in depth.

24. The defendant had come to court to meet the plaintiff's case that it was the master Mr Ishak who had instruced him to climb up the pile frame "to repair the safety pin" and when he was attending to the repair the starter had been brought down and had injured him. At the time of the trial work was still going on in Myanmar and Mr Ahmad and Mr Rizal could not be made available to testify.

25. Mr Ishak said in his affidavit that piling had stopped when the pile had been driven about three-quarters in depth. About eight riggers were removing the shackles attached to the pile and he thought both shackles had been removed when he happened to glance upwards at the hammer. It was then that he noticed a man clinging on to the cables supporting the hammer. That man was the plaintiff.

26. The plaintiff knew that the starter would come down to restart the hammer after it had stopped for the guy cables to be removed. He said under cross-examination:

"Q: When pile is about three-quarters into seabed operation stops for cables to be released?

A: Yes.

Q: After cables are released operation continues?

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A: Yes.

Q: This is what happenes when each pile is driven in?

A: Yes.

Q: When piling operation stops for cables to be released starter comes down?

A: Normally that's what it is.

Q: Throughout period you are on piling tower when piles reach this depth starter comes down?

A: Yes.

Q: Starter. Large piece of equipment?

A: Yes.

Q: Nobody should approach hammer until starter comes down?

A: Agree.

Q: Anyone told you this or something you saw with your own eyes?

A: Nobody told me."

He knew that he should not approach the hammer until the starter had come down. No one told him this. No one had to.

27. On the evidence before me there can be no doubt that the hammer had not been stopped because of anything the plaintiff had done. It had stopped because the pile had been driven deep enough for the guy cables to have to be removed to continue piling. I find that he approached the hammer before the starter had come down. If he had noticed that pin No 16 had fallen off he would have told Mr Ahmad or someone else about it and would have waited to be told what to do. The hammer was not going to be raised for some time yet. Of course pin No 5 could fall off and hurt someone but that was not his evidence. I think he did not notice any such thing. He did not see that pin No 16 had fallen off.

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28. There were platforms for workmen at regular intervals of the pile frame. The operations of the hammer had to be monitored and repairs carried out as necessary and the platforms provided access to the hammer. The plaintiff said that at the point of time when the hammer started to begin driving in a pile he would be standing on a platform and his "face would be about 2 m from the top of the hammer" and level with the upper cylinder where the starter would be to start the hammer.

29. As the pile was driven into the seabed and the hammer followed it down the plaintiff would periodically descend to a lower platform to continue monitoring the operations. At the appropriate time the hammer would be stopped for the guy cables securing the pile to be removed. Until the hammer was stopped the starter remained above. It was as counsel put to the plaintiff in cross-examination a large piece of equipment and no one should approach the hammer until the starter had come down. The downward movement of the starter was clearly a dangerous operation and there was a serious risk of injury to workmen who approached the hammer during such movement. Mr Ishak admitted in cross-examination that as soon as the hammer stopped for the guy cables to be removed the starter came down immediately. He said it was "to save time" and because of strong currents he had to get ready "very fast".

30. There was no dispute as to the defendant's duty to the plaintiff as his employer. Over 100 years ago in *Joseph Smith (Pauper) v Charles Baker & Sons* [1891] AC 325 Lord Herschell said at p 362:

> "It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk. Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the

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> risk of the employer's negligence, and the creation or enhancement of danger thereby engendered."

Many years later in *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57 Lord Wright said at p 84:

> "I think the whole course of authority consistently recognizes a duty which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen …."

See also *Wilson v Tyneside Window Cleaning Co* [1958] 2 QB 110.

31. Paragraph 4 of the statement of claim alleges several duties said to be owed by the defendant to the plaintiff as his employer and all were admitted in the defence but I think it is sufficient that I state that I agree that the defendant as the plaintiff's employer owed to him a duty to take reasonable care for the plaintiff's safety or as Lord Herschell put it to take reasonable care so to carry on its operations as not to subject the plaintiff to unnecessary risk.

32. I think there has been a breach of this duty by the defendant. While the pile was being driven into the seabed the starter remained idle at some height above the hammer. When the hammer stopped workmen would attend to the removal of the guy cables. Almost the entire crew on board the barge would be engaged either in actually removing the guy cables or in supervising or monitoring the operation. The starter had to come down to restart the hammer.

33. I accept that there was a need to act quickly as the barge was subjected to the conditions of the sea and although it was anchored there was a risk of movement which could adversely disturb the alignment of the hammer and the pile. Nevertheless it seems to me that the starter which had remained idle for some two to three hours ought not to be started on its descent to the hammer

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below without ensuring that it was safe to do so. One way might be for a workman in the plaintiff's position who would be best placed to see if it was safe to give a signal for the operator in the control room to bring the starter down. Alternatively there should be at least an alarm which should go off to alert those at risk before the starter commenced its descent.

34. The defendant's system of work did not provide for a signal to be given that it was safe to bring the starter down before doing so. No warning of any kind was given before doing that and not even while doing it. I think the defendant has failed to take reasonable care for the safety of its workmen. I think it has failed to take reasonable care so to carry on its operations as not to subject its workmen to unnecessary risk.

35. No one saw the accident but the plaintiff said he was struck by the starter when it came down. On the evidence it cannot be doubted that the defendant's breach of duty resulted in the injuries suffered by the plaintiff.

36. Section 3(1) of the Contributory Negligence and Personal Injuries Act provides:

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage …."

The defendant alleged contributory negligence which sufficiently pleads the statutory defence of contribution. See *Nance v British Columbia Electric Railway Co Ld* [1951] AC 601.

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37. As I have found the plaintiff knew that the starter would come down to restart the hammer. He knew that no one should approach the hammer until the starter had come down. No one had to tell him this. He knew it. It was an obviously dangerous thing to do and he knew he should not have done it. He approached the hammer before the starter had come down. He came close enough to be struck by it. He said he did so to replace pin No 16. I have found that he did not as he claimed notice that pin No 16 had fallen off but even if he had he ought not to have approached the hammer. He failed to take reasonable care of his own safety. This want of care on his part was his own fault which contributed to the injury sustained by him. I think that in the circumstances he was himself much more to blame for the injury. I would put his share in the responsibility for the injury at three-quarters. I think the damages recoverable should be reduced to such extent and I gave judgment accordingly.

Dated this 30th day of April 1999.

LIM TEONG QWEE

JUDICIAL COMMISSIONER

Lim Teong Qwee JC

Jeanny Ng (Jeanny Ng) for the plaintiff
Simon Yuen and Gerald Khor (Chong Yeo & Partners) for the defendant

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