Ng Hock Heng v Looi Kok Poh and Another
[2007] SGHC 25

Case Number : Suit 453/2006, RA 267/2006, 268/2006

Decision Date : 16 February 2007

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Palaniappan Sundarajaj (Straits Law Practice LLC) for the plaintiff/appellant; Suresh Nair Sukumaran and Victoria Xue (Allen & Gledhill) for the first defendant/respondent; Kuah Boon Theng and Karie Goh (Legal Clinic LLC) for the second defendant/respondent

Parties : Ng Hock Heng — Looi Kok Poh; National University Hospital (Singapore) Pte Ltd

Damages – Compensation and damages – Workman falling at place of work and suffering injuries – Workman undergoing surgery for injuries at hospital – Injury worsening after surgery – Workman claiming damages against doctor and hospital for worsening of injuries – Workman already receiving compensation from employer's insurer for injuries suffered from fall – Whether workman precluded from recovering damages from doctor and hospital – Sections 3(1), 18(a) Workmen's Compensation Act (Cap 354, 1998 Rev Ed)

16 February 2007 Judgment reserved.

Lee Seiu Kin J:

1 These are two appeals from the decision of the Assistant Registrar in Summons Nos. 4041 and 4050 of 2006 ("the applications to strike out") taken out by the first and second defendant respectively. The Assistant Registrar had allowed the two defendants' applications, and struck out the plaintiff's Writ of Summons and Statement of Claim on the basis that they did not disclose a reasonable cause of action. After hearing the parties, I allowed the plaintiff's appeals, and set aside the Assistant Registrar's orders. Both defendants have, with my leave, filed appeals to the Court of Appeal. I now give the grounds for my decision.

2 The plaintiff was a senior foreman in Poh Tiong Choon Logistics Ltd ("the employer"). On 29 March 2003, the plaintiff fell at his place of work and sustained injuries to his left hand and back. He became a patient of the second defendant ("NUH") from April 2003 and was treated by the first defendant, an Orthopaedic Consultant, for his wrist injuries.

3 Initially the plaintiff's wrist injury was treated conservatively but it did not improve. On 17 July 2003 the first defendant carried out a surgical procedure known as therapeutic arthroscopy on the plaintiff's left wrist. After the arthroscopy, the plaintiff continued to experience pain in his left arm and was subsequently diagnosed with Reflex Sympathetic Dystrophy ("RSD"). The plaintiff commenced this suit on 14 July 2006, alleging that the defendants had breached their duty of care to him by: (a) failing to obtain his consent to conduct a therapeutic, as opposed to diagnostic, arthroscopy on his left wrist; (b) failing to obtain his consent to insert two prosthesis ("the Kirschner wires") into his wrist as part of the arthroscopy; and (c) failing to adequately inform him of the known complications arising from diagnostic and/or therapeutic arthroscopy.

4 The statement of claim pleaded the following facts. Sometime in June 2003 the first defendant advised the plaintiff to undergo the wrist arthroscopy in order to diagnose the cause of his continuing wrist pain. When the plaintiff told the first defendant that he was averse to surgery, the latter

assured him that the procedure was safe and risk-free. However the plaintiff did not make a decision until he next saw the first defendant on 14 July 2003. On that occasion the first defendant told the plaintiff that the arthroscopy only involved two small holes on the wrist to introduce some instruments to find out the cause of the continuing wrist pain, and that it was a simple and risk-free procedure. Upon this assurance the plaintiff consented to the arthroscopy. At no point up to the surgery was the plaintiff informed by the first defendant or any other employee of the NUH that the wrist arthroscopy procedure was therapeutic as opposed to diagnostic, or about the use of any prosthesis, including the use of Kirschner Wires. The wrist arthroscopy was carried out by the first defendant on 17 July 2003 during which two Kirschner Wires were inserted. After the surgery the plaintiff continued to suffer wrist pain which was sometimes worse than before. His wrist was often swollen. As a result of this, the doctors at the NUH decided to remove the Kirscher Wires earlier than the normal period. This was done on 12 August 2003. However the pain in the plaintiff's left hand became unbearable and crippling and he was diagnosed by the doctors at the NUH to be suffering from RSD attributable to injury to the superficial radial nerve which runs along the wrist. This injury was inflicted either during the wrist arthroscopy or during the removal of the Kirschner Wires. In addition, one of the tendons in his left wrist, the extensor pollicis longus was also severed during the arthroscopy or during the removal of the Kirschner Wires. As a consequence, the plaintiff suffered and continues to suffer from almost complete loss of use of his left hand and perpetual pain and discomfort.

5 The plaintiff seeks, *inter alia*, special, general and provisional damages, claiming that he had completely lost the use of his left hand as a result of the arthroscopy and was no longer able to discharge his duties as a senior foreman.

6 On 30 August 2004, two years before this suit was commenced, the plaintiff obtained an award under the Workman's Compensation Act in the amount of $64,680 from the employer's insurer ("the compensation award"). The quantum of this award had been based on a medical report prepared by Dr Alphonsus Chong on 3 June 2004 ("the assessment report"). It should be noted that this assessment was done almost a year after the arthroscopy had been performed. The assessment report had recommended a consolidated award of 44% for permanent incapacity. The defendants argued that since the report was based on the plaintiff's injuries as they presented themselves at that date, *ie*, 3 June 2004, the injuries identified therein necessarily included the complications he had suffered from the arthroscopy.

7 The defendants contend that the plaintiff is precluded by s 18 of the Workmen's Compensation Act (Cap 354 1998 Rev Ed) ("the Act") from claiming damages from the defendants in the present suit as he had already recovered compensation under the Act in respect of the same injuries. Therefore the plaintiff's Writ of Summons and Statement of Claim ought to be struck out for disclosing no reasonable cause of action under O 18 r 19(1)(a) of the Rules of Court (R5, 2006 Rev Ed) ("the Rules").

8 The plaintiff contended that at the present stage of the proceedings, it could not be established with certainty that the award related to *both* the initial injuries from his fall in March 2003, *as well as* the injuries caused by his wrist arthroscopy. The assessment report identified the plaintiff's injuries as being in the nature of "left wrist injury with scapholunate dissociation & lumbar spondylosis superimposed injury". According to the plaintiff, these were the injuries which he had been diagnosed with *prior to* the arthroscopy. The report did not take into account the injuries to his radial nerve and EPL tendon which had been caused by the arthroscopy, nor did it refer to his current affliction with RSD.

9 In the alternative, the plaintiff averred that even if the compensation award extended to the injuries from his arthroscopy, s 18(a) of the Act did not preclude him from filing this suit. In his

submission, the statutory preclusion under s 18(a) only extends to injuries compensable under the Act. However s 3(1) of the Act relates to injury the result of an accident arising out of and in the course of employment. According to the plaintiff, the injuries which were the subject of this suit are separate and distinct from the initial injuries which he had sustained during the accident "arising out of and in the course of [his] employment". These more recent injuries to his radial nerve and EPL tendon arose independently as a consequence of the arthroscopic procedure. The defendants' conduct of the arthroscopy amounted to *novus actus interveniens* which severed the chain of causation flowing from the plaintiff's initial injury at his workplace. The injuries which the plaintiff sustained subsequent to and as a result of the surgery therefore could not be said to be injuries "arising out of and in the course of employment" and accordingly fell outside the statutory bar in s 18(a) of the Act.

10 The Assistant Registrar allowed the defendants' applications and struck out the writ. In her opinion, it was clear that the compensation award had been based on the plaintiff's condition as at 2004, when the assessment report was made. The plaintiff had therefore been compensated for his affliction with RSD, and was precluded by s 18(a) of the Act from attempting to recover damages from the defendants in respect of the same injury. In addition, the Assistant Registrar found that the plaintiff's argument regarding s 3(1) of the Act was unmeritorious. Even if there had been *novus actus interveniens*, the fact remained that the employer's insurer had already paid for the injury resulting from the surgery. To allow the plaintiff to continue with this suit would allow him to seek double recovery. For these reasons, the Assistant Registrar struck out the plaintiff's Statement of Claim and Writ of Summons under O 18 r 19(1)(a) of the Rules. Dissatisfied with the Assistant Registrar's decision, the plaintiff appealed to the High Court.

11 The burden of proof of the defendants' breach falls on the plaintiff and would be a matter to be determined at a trial. The issue before me in this appeal is whether, assuming that the defendants had breached their duty to obtain informed consent from the plaintiff as alleged, s 18(a) of the Act precludes the plaintiff from recovering damages in this suit. There are two issues that fall to be determined:

(a) whether the compensation award had in fact included compensation for the surgical complications which the plaintiff had suffered; and

(b) if so, whether, in any event, the statutory bar under s 18(a) did not apply because the injuries to the plaintiff's radial nerve and EPL tendon were not compensable under the Act.

The plaintiff's claim in this suit would only be defeated if both these questions were resolved in the defendants' favour.

The scope of the compensation award

12 The first issue concerns a determination of a question of fact. The defendants relied on the compensation report to support their contention that the compensation award covered all of the plaintiff's conditions as at 2004. The plaintiff had submitted that this report did not unequivocally resolve the scope of the compensation award. Whilst the report, which was prepared after an assessment that took place more than a year after the accident, did suggest that the plaintiff's entire medical condition as at June 2004 had been taken into consideration, this had to be weighed against the fact that the report only made reference to the plaintiff's pre-existing medical problems arising from the original accident in 2003. No reference was made anywhere in the report to the plaintiff's affliction with RSD, or the damage sustained to his radial nerve. In addition, the doctor's recommended award of 44% for "permanent incapacity" was ambiguous in that it did not have any

further explanation as to the severity of injury that this figure signified.

13 These are factual issues that have to be decided after evaluation of the evidence adduced in the trial, in particular that of the doctor who made the compensation report. The burden is on the plaintiff to prove them, but it is not appropriate at this stage to strike out his claim. This ground alone would be sufficient to justify the dismissal of the defendants' applications.

The compensability of the plaintiff's injuries

14 The second issue pertains to the interpretation of s 18(a). The analysis must proceed on the assumption that that the plaintiff is able to prove the facts alleged in his statement of claim. Section 18(a) of the Act provides as follows:

> 18. Where any injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—
>
> > (a) the workman may take proceedings against that person to recover damages and may claim against any person liable to pay compensation under this Act, but he shall not be entitled to recover both damages and compensation;

The bar to recovery of both damages and compensation is in relation to an "*injury for which compensation is payable*" under the Act. The question then is whether the injury the subject of this suit is one for which compensation is payable under the Act.

15 The liability of an employer to pay compensation under the Act is set out in s 3(1) which provides as follows:

> 3. —(1) If in any employment personal injury by accident *arising out of and in the course of the employment* is caused to a workman, his employer shall be liable to pay compensation in accordance with the provisions of this Act.[emphasis added]

It is clear from the words emphasised in s 3(1) above that the injury compensable under the Act must be caused by an accident arising out of and in the course of the employment. In the present case the industrial accident had caused an injury to the plaintiff's left wrist. The defendants had, at some point, proposed to the plaintiff a particular course of treatment but had breached their duty to obtain informed consent for it from the plaintiff. In the event the wrist arthroscopy carried out had caused the injury which is the subject of the plaintiff's claim in this suit, the question is whether such injury falls within the ambit of s 3(1) of the Act.

16 To put the issues in perspective, it is useful to consider the following scenario. A workman's hand is mangled by machinery at his workplace and is treated in a hospital. A known complication develops, say gangrene sets in, and his hand is amputated. As this is a natural consequence of the injury, he is clearly entitled under the Act to compensation for the loss of the hand. Introducing a new element, the ambulance conveying him to the hospital meets with an accident when a drunk driver runs a red light and crashes into the ambulance. The workman sustains leg injuries for which his foot has to be amputated. It is equally clear that this injury did not arise out of and in the course of the employment but out of the negligence of the drunk driver. The issue before me is on which side of the divide lies the circumstances of the present case.

17 This issue does not appear to have been considered in Singapore. However the decision of the

English Court of Appeal in *Rothwell v Caverswall Stone Co Ltd* [1944] 2 All ER 350 is instructive on this point. The plaintiff there had met with an accident at his workplace and sustained a fractured dislocation of the right shoulder. However the first doctor who treated him negligently failed to diagnose the fractured dislocation. Had he been so diagnosed, the plaintiff could have fully recovered from this injury. When it was finally discovered by another doctor, it was too late for effective treatment and his right arm was permanently incapacitated. The Court of Appeal decided, by a majority, that the workman's incapacity did not result from the injury for the purpose of a compensation award under the English Workmen's Compensation Act 1925. The dissenting judge, Scott LJ, took the view that, having regard to the social policy underlying the Workmen's Compensation Act, the scope of the award covered all damages resulting from the injuries suffered by a workman in an industrial accident. However the majority held that they were bound by a line of authority beginning with *Humber Towing Co v Barclay* (1911) 5 BWCC 142, and which included *Rocco v Jones (Stanley) & Co Ltd* (1914) 7 BWCC 101, which held that negligent treatment by a doctor may constitute a new cause which has intervened in the chain of causation so that the incapacity of the workman was not attributable to the industrial accident. Du Parcq LJ summarised the state of the law in the following manner at p 365:

> "In my opinion, the following propositions may be formulated upon the authorities as they stand: first, an existing incapacity "results from" the original injury if it follows, and is caused by, that injury, and may properly be held so to result even if some supervening cause has aggravated the effects of the original injury and prolonged the period of incapacity. If, however, the existing incapacity ought fairly to be attributed to a new cause which has intervened and ought no longer to be attributed to the original injury, it may properly be held to result from the new cause and not from the original injury, even though, but for the original injury, there would have been no incapacity. Secondly, negligent or inefficient treatment by a doctor or other person may amount to a new cause and the circumstances may justify a finding of fact that the existing incapacity results from the new cause, and does not result from the original injury. This is so even if the negligence or inefficient treatment consists of an error of omission whereby the original incapacity is prolonged. In such a case, if the arbitrator is satisfied that the incapacity would have wholly ceased but for the omission, a finding of fact that the existing incapacity results from the new cause, and not from the injury, will be justified. In stating these propositions I am far from seeking to lay down any new principles of construction. I have sought only to collect, by a process of induction, such general, and necessarily vague, rules as seem to emerge from the decided cases. Such rules do no more than indicate the bounds within which an arbitrator is free to decide – the province of fact. It is constantly being said, and must always be remembered, that the arbitrator is the sole judge of the facts."

18 This part of the speech of Du Parcq LJ was cited and described as an accurate statement of the law by Lord Simonds, Lord Normand, Lord Morton of Henryton and Lord Reid in *Hogan v Bentinck West Hartley Collieries* [1949] 1 All ER 588. The workman there suffered from a congenital defect, viz. he had an extra thumb in his right hand. He met with an industrial accident and fractured the false thumb. It was treated by splinting but he continued to be in pain. He was then sent to the hospital where it was discovered that the fracture had not united. He was advised that an operation was required to remove not just the false thumb, but also the top joint of the normal thumb. The result of this operation was unsatisfactory as it left him with a tender stump which rendered him fit for light work only. The workman applied for compensation on the ground of this incapacity. The House of Lords held, by a majority, that this incapacity was not the result of the injury which was caused by the industrial accident. Whether a particular intervening act has become the supervening cause of the injury suffered by the workman was a question of fact to be determined by the arbitrator upon all the circumstances of the case. The two dissenting judges, Lord MacDermott and Lord Reid, were of the opinion that in interpreting the words "results from the injury" in the Act, regard ought to had for

the social policy of the legislation. Lord Reid stated that the Court of Appeal was correct in holding that it was bound by authority but he was of the view that the House of Lords, not being bound, ought to change the law as it stood.

19 The law in England in this regard has been established since 1911 in *Humber Towing Co v Barclay*, confirmed by the court of appeal in 1944 in *Rothwell v Caverswall Stone Co Ltd*, and affirmed by the House of Lords in 1949 in *Hogan v Bentinck West Hartley Collieries*. Employers and, more importantly, insurers in setting their premiums would have had regard to this position of the law when they assumed their liabilities. I can see no reason not to apply these authorities in Singapore.

20 Applying the statement of the law in *Rothwell v Caverswall Stone Co Ltd*, that:

(a) negligent or inefficient treatment by a doctor may amount to a new cause and circumstances may justify a finding of fact that the existing incapacity results from the new cause, and does not result from the original injury, and

(b) the court, if satisfied that the incapacity would have wholly ceased but for the negligent or inefficient treatment, may make a finding of fact that the existing incapacity results from the new cause, and not from the workplace injury.

I find that, on the assumption that the plaintiff is able to prove his pleaded case, the injury is not compensable under the Act on account of the *novus actus interveniens* of the defendants. Accordingly, the plaintiff is not precluded by s 18(a) from proceeding in this suit.

21 Counsel for the defendants submitted that if the compensation awarded to the plaintiff, which has already been paid to him, had included a sum for the further damages caused by the wrist arthroscopy, then permitting him to proceed with this suit would amount to double recovery. I see no merit in this argument. Either the injury is compensable under the Act or it is not. If it is not, then the fact that he has been compensated under the Act, erroneously it would seem, for those injuries does not act as a bar to this suit. I would have thought that it is recoverable from the plaintiff at the instance of the party who had made the payment but, as this may well be the subject of another action, I will go no further than this.

Conclusion

22 For these reasons, I allowed the appeals and set aside the Assistant Registrar's order striking out the plaintiff's pleadings in this suit.

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