IN THE SUPREME COURT OF BELIZE, A. D. 2019

CLAIM NO. 428 OF 2019

BETWEEN:

(LEVI DUECK REIMER	**CLAIMANT**
(	
(AND	
(	
(ARTURO HUMES	**1st DEFENDANT**
(EDWARD PENNER	**2nd DEFENDANT**
(PETER KOOP	**3rd DEFENDANT**
(HEINRICH KOOP	**4th DEFENDANT**
(ABRAM KOOP	**5th DEFENDANT**
(DAVID KOOP	**6th DEFENDANT**
(ELVIN PENNER	**7th DEFENDANT**
(d.b.a. "KOOP SHEET METAL"	

BEFORE The Honourable Madam Justice Sonya Young

Decision Date:

5th October 2022

Appearances:

Ms. Misty Marin and Mrs. Kia-Marie Tillet for the Claimant.

Ms. Velda Flowers for the Defendants.

KEYWORDS: Negligence - Personal Injury of Employee - Safe Place of Work - Safe System of Work - Employer's Liability - Vicarious Liability - Pleading Negligence - Special Damages - Receipts in Spanish - General Damages - Severity of Injury - Loss of Amenities

JUDGMENT

1. On the afternoon of September 12th, 2017, Mr. Reimer says he was hit in the back by a forklift driven negligently by the First Defendant as servant or agent of the Second to Eighth Defendants (the Koops) at their metal supplying business - Koop Sheet Metal. This occurred while Mr. Reimer was in the course of his duties as an employee of the Koops.

2. Mr. Reimer claims that the Defendants had failed to discharge their duty of care towards him by providing him a safe place of work with adequate safeguards or preventing access to dangerous machinery, particularly the forklift. As a result, he sustained injuries, suffered loss, and incurred expense. He seeks special and general damages, interests, and costs.

3. The Defendants all deny negligence and say that the Claimant caused or contributed to the incident through his own negligence. He was performing a task which was not in his job description, in an area in which he was not to be working. He also failed to adhere to the safety rules, practices, and procedures.

4. Rather than keep a proper lookout for or step out of the way of the forklift, which was in active operation, he intentionally or negligently placed himself in harm's way to collect damages. Moreover, the forklift had only made slight contact with Mr. Reimer so any condition which he says he suffered as a consequence must have been preexisting. His situation was made worse because he failed to seek medical attention in a timely manner.

5. They ask that the Claim be dismissed in its entirety with costs to the Defendants.

Preliminary Issues:

6. The Defendants, in their closing submission, raised two preliminary issues which must be dealt with before progressing any further.

7. The first concerned the state of the pleadings in relation to the allegations of negligence. Counsel for the Defendants urged that they were not only bad but so defective that the Defendant could not possibly know the case being made against them.

8. Counsel asked the Court to consider **Rule 8.7(1)** of the **Belize Civil Procedure Rules** which requires that a claimant must include in his Claim Form or Statement of Claim all facts on which he relies.

9. She also asserted that where an allegation of failure to provide a safe system of work is made, the Claimant is obliged to plead and prove what the proper system of work was and how it had not been observed. She relied on the Eastern Caribbean Supreme Court case of ***Cheryl Malone v AMS Financial Services Ltd Claim No BVIHCV 2013/0241***.

10. In her oral submissions in response, Counsel for the Claimant reminded that the case on which the Defendants relied was persuasive only. She then directed the Court to specific sections of the pleadings which she said were sufficient to particularize the allegations made. Counsel also highlighted certain areas of the Claimant's own witness statement which added meat to the bones of the pleadings.

The Court's Consideration:

11. It has always been perplexing when parties are able to file a defence and engage in a full trial before suddenly realizing that the pleadings are so defective that the other party's case is unknown. It is clear in this case that the pleadings on both sides could certainly have been drafted better.

12. However, I accept the Claimant's argument that when the Claimant's pleadings are bolstered by the contents of his witness statement, they are able to give a full picture of the allegations of negligence. Save for the Claimant's submission about a lack of safety equipment. This allegation was not pleaded, and no evidence whatsoever had been provided by the Claimant of what this equipment might be and whether or not it was present.

13. Furthermore, the Defendants filed a Defence, made allegations of their own concerning contributory negligence, and could have amplified their own evidence in response to what appeared in the Claimant's witness statement if they chose to do so. The Claimant also pleaded that he would be relying on the legal principle of *res ipsa loquitur*. For all these reasons, the Claimant's pleadings are found to be sufficient to ground the claims in negligence against all the Defendants.

14. Counsel for the Defendant's second issue concerned the Claimant's failure to file a reply to the particularized allegations of contributory negligence made by the Defendants in their Defence. This, she submitted, ought to prove fatal to the Claimant's case.

Court's Consideration:

15. The Court reminds Counsel of **Rule 10.9(1)** which expresses that a Reply is not mandatory by the use of the permissive 'may' in relation to filing and serving this document. This is because there is an implied joinder of issues. A failure to file a Reply is most definitely not an admission of any matter raised in the Defence: ***See Blackstone's Civil Practice 2013 paragraph 27.1***.

16. The Defendants, therefore, can not be heard to say that the Claimant has somehow admitted the contributory negligence they have pleaded when the Claim clearly places full responsibility for the injuries on the Defendants alone.

17. The Court finds this issue to be without merit.

The Issues:

1. **Whether the Defendants were negligent?**
2. **Whether the Claimant caused or contributed to the accident?**
3. **Whether the Claimant is entitled to damages; and if he is, in what quantum?**

The Evidence:

18. Levi Reimer says he was hired as a carpenter by the Koops to build their office space. He earned $15.00 an hour. By September 2017, he had almost completed that task, so he was asked to assume janitorial duties. He does not say who asked him to do this. While sweeping the floor, he was struck in the back by a forklift.

19. He had noticed the forklift being driven on the west end and since he was on the east end, he did not believe he was in any danger. He admits that there are

usually a lot of forklifts actively operational in the area and there is usually a lot of noise.

20. He heard no one alerting him to move out of the way; and on being hit, he immediately fell to the floor. The driver stopped the forklift and came to his assistance. He was trembling but was able to walk a short distance before the pain caused him to sit on the floor. He was eventually able to get up and then drove himself home.

21. He continued to tremble uncontrollably and went to the Loma Luz hospital with his wife that night. He was given medication which eased the pain sufficiently that he reported to work the next day. However, over the next couple days, the pain intensified so he went to Social Security and eventually visited Dr. Andre B. Sosa and Dr. Dupuy.

22. He sought financial assistance from the Koops to help defray the cost of his medical care. They loaned him $37,500.00 but held a power of attorney for the sale of his property (house and land) at Unitedville.

23. He had surgery in Mexico which was very painful and left him with a scar on his back. He continues to have a burning pain from his lower back to hip and into his right leg. He now wears a brace and walks with a cane and can no longer drive for long periods as his right leg does not function properly. He is unable to fund a needed follow-up with his surgeon in Mexico.

Johan Nickoley:

24. The Production Manager at Koop Sheet Metal and manager of Levi Reimer. He says Mr. Reimer had finished what he was hired to do, and management was in the process of terminating him due to his age and health issues. He had become a liability since his previous injury for which the business had helped him significantly. His hearing also appeared compromised, and it was difficult to hold an ordinary conversation with him.

25. He had not, on the day given him, any tasks and Mr. Reimer must have taken it upon himself to sweep the floor by the garage area. That area is very busy and all employees, including Mr. Reimer, ought to know to take extreme caution while there.

26. He exhibited and reviewed a video recording of the incident. The driver's sight seemed obstructed by a coil of steel he was carrying. The forklift was moving forward. The forks touched Mr. Reimer whose back was turned towards the forklift, and he was pushed in a sideways motion. Mr. Reimer grabbed his right side and walked towards the door on the southeastern side, heading out of the building. Mr. Nickoley hurried to him and noticed a bruise and a small mark on his back. He seemed to be in pain and went home shortly thereafter.

Arturo Humes:

27. A 14-year employee of the Koops' business was a daily forklift operator during that time. He says that at general staff meetings, they discussed forklift safety on several occasions and the area where he worked that day had been designated as a forklift lane. It was usually busy. That day he noticed Mr. Reimer sweeping and he did not seem to be bothered that he passed quite closely to him.

28. He picked up a very big coil and moved the vehicle slowly forward (3 miles an hour). His view was obscured by the coil. He heard a low cry and stopped. He realized he had touched Mr. Reimer with the forks. He followed Mr. Reimer to the exit and told him sorry. Mr. Reimer groaned and seemed to be in pain. He noticed a red mark on his back. He stayed with him for 20 minutes until he was sure he was being attended to. He wondered how Mr. Reimer could not have heard the forklift and move out of its way.

Elvin Penner:

29. Part owner of the Koops' business and one of the Defendants. He says, Mr. Reimer had previously claimed to have hit his head while he worked on the construction of their office. The business assisted him by expending over $10,000.00 for his medical needs. He had no Social Security as the business, which was Mennonite owned, had opted not to participate. The Koops decided to accede to Mr. Reimer's request to return to work on the ground that Social Security be paid for him.

30. He seemed to be a liability due to his age, medical history, and loss of a significant degree of his hearing. They agreed to pay him $15.00 an hour averaging about $547.00 weekly. Around 7th September 2017, he had completed construction of the office for which he was hired. On the 12th, he was pushed by a forklift and began receiving certain benefits from Social Security. The business also loaned him money to assist with his medical needs. It was secured by a power of attorney to sell his house and land. There is now a balance of $57,614.13 outstanding. Mr. Reimer could have done the surgery in Belize free of charge but opted to go to Merida instead.

Whether the Defendants were Negligent:

31. The Claimant, as an employee of the Koops' business, was owed a duty of care which had been breached when he was struck in the back by a forklift while he was sweeping the factory floor.

32. The 1st Defendant/driver of that forklift admits that he was unable to see the Claimant at the time of the accident as the coil he was carrying obstructed his view. He also admitted that he should have driven in reverse rather than attempt to drive forward as he did, knowing his sight was obstructed. The Court finds that undoubtedly, this Defendant breached his duty of care owed to the Claimant.

33. The Court also finds that the Koops' also breached their duty of care to the Claimant. They did not provide a reasonably safe place or system of work. There were no clear markings on the factory floor or anywhere in the factory indicating the path of the forklift or advising persons that once the forklift was in motion, they should stand clear of any designated area. This is clear from the video evidence provided by the Defendants, and Mr. Nickoley admitted this under cross-examination as well.

34. There was evidence from the Defence (Arturo Humes) that at general staff meetings, there had been discussions about forklift safety and that all employees were required to attend. Be that as it may, it does not negate the need for signs within the factory confine which would indicate the need for additional caution especially when the forklifts were in motion.

35. There was no evidence that the Claimant had attended or been trained. He was a carpenter hired to perform a specific task. He was not one of the workers who usually worked in the forklift area. Further, the precise nature of these discussions remains unknown and there was no expression of a clear safety policy which was made known to the employees who worked around these heavy equipment.

Was the Claimant Contributorily Negligent:

36. The burden of proving contributory negligence is on the Defendant who alleges it. These Defendants say that the Claimant was not assigned the job of sweeping the factory floor and ought not to have been in that vicinity. Their evidence in this regard leaves much to be desired.

37. Not only was the Floor Manager willing to acknowledge under cross-examination that someone other than himself could have assigned the task to the Claimant, but he also admitted that sweeping is a standing order for all staff. This Court agrees with the Claimant that it was more likely than not that the Claimant had been assigned the task and was simply there while acting in compliance. The video provided by the Defendants showed him clearly sweeping.

38. The Defendants also say that the Claimant, having observed the forklift in operation, failed to keep a proper look out and to step out of its path as it approached. This position cuts both ways since Arturo Humes also admitted to passing the Claimant in that area before with the forklift so he knew that he was in the vicinity and ought to have used care when approaching that area.

39. The evidence, as it unfolded in relation to the Claimant, was that his back was to the forklift so he could not see it. The Claimant was also hard of hearing. It seems unlikely that sound would have alerted him sufficiently.

40. The Defendant's own witness, Mr. Nickoley, stated that he observed that the Claimant's hearing had deteriorated to a point where it was challenging to hold a normal conversation with him.

41. In these circumstances, the Claimant should not have been on that dangerous and busy factory floor. This was an environment where his hearing would be integral to warning him of impending danger. However, since the Court finds that he had been instructed to be there as part of his duties, no contributory negligence has been made out.

42. As stated earlier, there is no evidence before this Court of any established rules, safety practices or procedures which the business had. Since there is no such evidence, then an allegation that the Claimant failed to adhere or willfully disregarded same could not meet with success. The same goes for the *"established"* but unmarked forklift path.

43. There was also the allegation that the Claimant willfully placed himself in the path of the forklift for nefarious reasons. The Koops relied primarily on the fact that the Claimant had been injured on the job before and had been compensated as well as the evidence of Wayne Humes.

44. Mr. Humes, a fellow employee, testified that in the early afternoon of September 12th, 2017, Mr. Reimer approached him and had, what he considered

to be, a strange conversation with him. Mr. Reimer expressed to him that the only thing he needed now was to have an accident at Koop Sheet Metal so that the Company could take care of him for the rest of his life. Mr. Humes later learnt of the forklift incident involving Mr. Reimer.

45. This seemingly random sharing of pertinent information by the Claimant attracts suspicion. But when shared with someone who admits to being a family member of the First Defendant, it invites serious suspicion. Without more, this Court finds his testimony convenient, unbelievable, and unreliable.

The Assessment:

46. The Court accepts the Expert's testimony that the injury to the Claimant's spine was more than likely caused by the collision with the forklift. He stated clearly:

"Nonetheless, the energy of the impact would have had to be dissipated within the affected area of the body. The weight of the heavy vehicle would have caused his body to twist violently causing a grinding torsion in the spine. It is this grinding motion that breaks cartilaginous structures like discs and ligaments.

9. The spine works in unison because its bones are connected by tough ligaments, muscles and fibrous tissue. Although it has a great degree of flexibility, there is a limit to the amount of energy loading it can tolerate. The average forklift weighs 9,000 lbs., not including the cargo weight and would generate a large force even when traveling at 'low speed'. That several discs could have been affected simultaneously is not far-fetched in this situation."

47. The Expert, having considered all that was presented to him, including symptoms and the MRI findings, concluded that the cause of the injury to the Claimant would have been closer to 2017 than 2019. He also rejected the notion that the Claimant could have been injured or afflicted with his back in any considerable way prior to the incident.

48. He opined that he would have been in noticeable, excruciating pain if this was so. None of the Defendants' witnesses gave any evidence which could support him being in that type of pain. The Claimant himself testified that he had not been. This coupled with the fact that he was a carpenter who would obviously make use of his arms and back regularly leads the Court to believe that the incident actually caused the Claimant's injury.

49. The Claimant suffered injury to his spinal discs at L2-L3, L3-L4 and L4-L5. This resulted in the compression of the nerves in the lumbar spine and caused weakness that subsequently became chronic. The Expert did inform that his delay in confirming diagnosis and getting surgical treatment caused him to endure chronic pain and neuropathic changes to the lower limbs.

Surgery:

50. However, to live a comfortable life going forward, he needed only to control his weight and exercise regularly to maintain the strength of his spine and lower limbs. He must not push, pull, or lift anything over 40lbs, and he may have to take over the counter analgesics occasionally.

51. The Claimant must now be compensated for what he pleaded and proved that he has spent or lost up to the date of trial (special damages) as well as what he has suffered for pain and any future loss (general damages).

Special Damages:

52. His claim for expenses in Belize is allowed in the sum of $1,360.50 as receipts have been provided as proof and accepted. This sum includes all pleaded

expenses save the sum of $51.00 claimed for a urinalysis which was duplicated in the bill for consultation and labs.

53. The sum of $250.00 for taxi fare from Unitedville to the Karl Heusner Memorial Hospital, though not pleaded, was proved and has also been included. This is because there was evidence that the Claimant lived in Unitedville around the time of the incident and that he was present at that hospital on that date.

54. The expenses in Mexico claimed would generally have been allowed. Although there was evidence that the Claimant could have received the same care in Belize, there was nothing offered to confirm that cost would have been any less or any better in Belize. In fact, one witness for the Defendants stated that he himself had gone to Mexico to have the same surgery done at the same time. Further, there was no evidence that the Belize Social Security Scheme would have covered the cost in Belize as had been contended by the Defendants.

55. However, there remains the issue of the bills from Mexico being in Spanish and not interpreted. The Defendant asked that they all be excluded for this reason. The Claimant attempted to gloss over this issue in her submissions and even when asked directly about it during oral submissions, she urged the Court simply to accept the Claimant's word as he was a truthful witness. The Court finds this most unpalatable.

56. The Claimant pleaded that he had spent BZ $22,196.69 in Mexico. The bills seem all to be in Mexican pesos and there was no exchange rate provided. It was, therefore, impossible for the Court to place a pleaded expense with a

particular receipt because the figures were all different, and bizarrely the pleadings in this regard were in Spanish, as were the bills.

57. Although in her submissions Counsel for the Claimant attempted to give both pesos and Belizean dollars for a few (not all) of the expenses, this did nothing to help the situation. The Court could not properly scrutinize or consider the bills because they had not been interpreted. For this reason, the Court rejected all of the expenses purportedly incurred in Mexico and found that the expenses as pleaded had not been proven.

58. What had been proven, however, was the fact that after the incident the Claimant had gone to Mexico for surgery and the Defendants accepted this (evidence of Elvin Penner). The Court's Expert also relied on the reports generated during his sojourn there. There must reasonably have been an associated cost for which the Court could award a nominal sum. This Court awards $10,000.00 as it finds appropriate.

59. The Claimant pleaded loss of earnings of $55,251.45 for the period September 12th, 2017, to June 2019 the date of the filing of the Claim. It appears that the Claimant accepted the evidence of the Defendants that the Claimant earned an average of $547.00 weekly. This is the figure which the Claimant relied on in his submissions.

60. The Court accepts that the Claimant's age of retirement would have been 65 and the Defendant would have been under no obligation to employ or pay him beyond this age.

61. The Koops' evidence is that they had intended to terminate the Claimant within a few days of the incident. But other than their bald statement, there is nothing on which the Court could rely for what, again, seemed like a convenient position to assert. Even their actions do not align with this statement.

62. Since the Koops also stated that the Claimant had finished building the offices which he had been employed to build, it defies common sense and logic that he would simply have been kept on rather than been immediately released. Particularly, since he was older and was admitted by their witnesses to be somewhat of a liability (one said a major liability) as he seemed hard of hearing and had previously caused them to incur expenses for an injury at work.

63. For this reason, the Court finds that there had been no intention by the Koops to terminate him because he had finished the job for which he had been employed. Rather, it seems more likely than not that he would have been kept on to retirement one year later and the Court so finds.

64. The Court takes judicial notice that there would have been 55 weeks from the beginning of September 2017 to the end of September 2018 when the Claimant would have turned 65. This gives a total sum of $30,085.00 which would be awarded for his loss of earnings.

65. A total sum of $41,445.50 will be awarded as special damages.

General Damages:

Pain and suffering and loss of amenities:

66. There is no doubt that the Claimant suffered excruciating pain. There was the initial pain of the injury which the Expert described as chronic, then there was that associated with the surgery and the aftermath which includes scarring and the use of a brace and a cane to aid mobility. The Claimant will continue to experience some degree of pain which the Expert says could be controlled with over-the-counter medication.

67. The Expert, when questioned, explained that prolonged use of this type of medication may result in certain side effects. However, his report did not indicate that the Claimant had been presented with any and it had been more than three years since he had had the surgery. In the absence of any evidence, this Court is not about to make any conjectures as to his future as submitted.

68. The Claimant himself said he continues to experience tremendous pain or burning pain in his lower back and hip. He also relied on a letter from the Social Security Board which stated that in July 2018, he was found to have a 20% permanent disability. However, this finding could not have taken into consideration the surgery which Mr. Reimer had in 2019. The report by the Court appointed Expert did and there was no mention there of any permanent disability. The Court accepts the Expert's report in this regard.

69. The Defendants presented no comparable whatsoever. The Claimant, however, relied on the Guidelines for the Assessment of General Damages in Personal Injuries (14th ed, Oxford University Press 2017) 24 and asked that the sum of £30,910 to £55,590.00 be considered.

70. This sum was ascribed to an injury which seemed more severe than that suffered by the Claimant, and which also had resulting disabilities such as continuing severe pain and discomfort, impaired agility, depression, unemployability; to name a few. This Claimant was assessed as being employable and was expected to live a normal existence with only occasional analgesic use.

71. The Court finds that at best the Claimant had a moderate injury which according to the Guidelines **(ibid)** ought to attract an award of £22,130.00 to £24,340.00. There will be the usual 25% deduction to represent the difference in economies ***(Jenny Abolina Bonilla v Dr. Gilbert Landero and Attorney General of Belize BZ Claim no 721 of 2016)***.

72. The Claimant presented the Central Bank of Belize exchange rate of BZ 2.52 to the pound sterling. The Court finds the upper end of the scale of £24,340.00 to be an appropriate figure. The Koops have asked that this be reduced to reflect the Claimant's delay in securing the medical attention he needed. I find this a difficult position to comprehend.

73. The Koops themselves testified to the Claimant's impecuniosity and his efforts through them to get money merely to survive (*"to eat while he was not working"* - Elvin Penner). The Claimant himself said that in desperation, he sought a loan from the Koops after the incident.

74. The Court, therefore, rejected this argument wholesale and would only discount the sum by 25% as stated above. The sum of BZ$46,002.60 is, therefore, awarded for pain, suffering, and loss of amenities.

75. The Claimant also asked for a nominal sum to cover future expenses for the over-the-counter analgesics. This Court finds that the sum already awarded ought to cover the negligible cost of this medication. Its use was said to be occasional only. Furthermore, the Claimant was well in a position to prove what this sum was and would possibly be as it has been years since his surgery. He chose not to and instead asked for a nominal sum.

76. The Claimant also presented submissions on aggravated damages although it had not been pleaded. The Claimant should be mindful of **Rule 8.6 (2)** which mandates that *"A Claimant who seeks aggravated damages and/or exemplary damages must say so in the claim form."* This demands that it be specifically pleaded. The Court will, therefore, refrain from any consideration of these submissions.

77. The pleaded claim for loss of expectation of life seems to have been wisely abandoned as Counsel for the Claimant offered no submissions at all, and there was not a scintilla of evidence to support such a claim.

DISPOSITION:

It is ordered that:

1. Judgment for the Claimant.
2. Special damages are awarded in the sum of $41,445.50 with interest assessed at 6% per annum from the date of filing of the Claim to the date of judgment, and thereafter at the statutory rate of 6% until payment in full.
3. General damages are awarded in the sum of $46,002.60 with interest assessed at 6% per annum from the date of the incident to the date of judgment, and thereafter at the statutory rate of 6% until payment in full.

4. Costs to the Claimant in the sum of $5,000.00 as agreed.

SONYA YOUNG

SUPREME COURT JUDGE