IN THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA.)

220

Civil Jurisdiction

At Port Moresby.

28th November, 1961.

9.30 a.m.

FREDERICK CHARLES AUGUSTINE NIGHTINGALE

v.

PACIFIC ISLAND TIMBERS LIMITED

JUDGMENT OF HIS HONOUR MR. JUSTICE OLLERENSHAW.

In this action the Plaintiff claims damages for personal injuries, fractures of the radius and styloid process of the ulna of his left arm, received by him on the 15th March, 1961, while he was employed by the Defendant as Bush Foreman in its timber getting and milling business at Otomata, Papua.

In his Statement of Claim and in his particulars, which are in evidence as Exhibit "2," he alleged that his injuries were caused by a piece of falling timber striking and breaking his arm, whilst he was driving a tractor. He claimed that the Defendant was negligent in providing the tractor in a dangerous and unsafe condition in that it was not fitted with an overhead guard, which was frequently referred to in the evidence as a canopy, to protect him from pieces of falling timber.

During the hearing, after the Defendant's Counsel had cross-examined and led evidence to suggest that the

Plaintiff's injuries may have been caused by a piece of timber thrown up from the ground by the tractor as it moved along, and, after he had led evidence directed to shewing that there was no practicable way of protecting the driver from timber thrown up in this way, I allowed an application by Plaintiff's Counsel to amend the Statement of Claim. I was reluctant, at first, to allow the amendment but after hearing Counsel for the Defendant I felt that I should allow it, even at the late stage at which the application was made. Defendant's Counsel volunteered that no question of costs was involved and so I allowed the amendment without terms except that I granted the Defendant's Counsel the adjournment asked for to meet the new issue. This was but a short adjournment because the Defendant's Counsel had already introduced and, to some extent, had explored the matters raised by the new issue.

This amendment was framed to allege negligence on the part of the Defendant in failing to provide side guards and fittings to the tractor to protect the Plaintiff from pieces of timber thrown up from the ground by the tractor.

Although some time was spent on both sides in further exploring the matters relating to the issues raised by the amendment, in the upshot it assumed no great importance, particularly for three reasons:-

(1) The Plaintiff firmly maintained, even when recalled upon the new issue, that his injuries had not been caused by a piece of timber thrown up, but, by a piece of timber, which fell from a tree;

(2) (a) The Plaintiff called no evidence to show that side guards had ever been used on tractors, while engaged in the work of timber getting. He, himself has had over thirty years experience in the timber getting business in the bush. The witness, Charles Maurice Gowers, a Saw Mill Supervisor, called by the Plaintiff, has had twenty-five years association

with the saw milling business, including some years as a proprietor;

(b) The Defendant's General Manager, Keith Andrew McBurnie, who has had twenty to twenty-five years experience in timber getting and milling, including upwards of six years in tropical countries, in cross-examination, said affirmatively that he had never known side guards to be used on tractors in timber getting. He also gave evidence to the effect that it would be impracticable and dangerous to fit such tractors with the side guards suggested by the Plaintiff; ar

(3) Plaintiff's Counsel, in his final address, submitted that, taking into account all the evidence and upon the balance of probabilities, the accident happened as a result of a piece of wood being dislodged from the tree and striking the Plaintiff and asserted that that was and remained the Plaintiff's case. He also submitted that the Plaintiff was not changing ground but that, if for any reason the evidence produced a finding that it was more likely than not that a stick came up from the ground, then the Plaintiff claimed that it was practicable to fit side guards and this was a question of conflict between the evidence of the Plaintiff and the witness McBurnie.

The Defendant relied upon a number of defences which led to many interesting questions of fact and law.

However, in the view I take, it is not necessary for me to discuss the issues raised by all the defences nor to find assistance in the not-inconsiderable number of recent decisions which have elucidated the law regarding the duties involved in the master and servant relationship.

The defence, with which I find myself concerned, is the denial that the Plaintiff's injuries were caused by any of the acts or matters complained of.

The Plaintiff's account of the circumstances in which he received his injury, that is while bulldozing a tree

or sapling with the tractor moving under a leaning tree, from which a piece of timber must have fallen and struck his forearm, was by no means convincing particularly when his evidence in chief was considered with his evidence in cross-examination. I gather from his case that no one else was present although the native driver, whose duty, at the time, was to drive the tractor, did drive him from the site of his injury in the bush to the mill.

Mr. McBurnie gave positive evidence of going with the Plaintiff to the site, which the Plaintiff indicated to him, was the site of the accident, in the afternoon of the day of the accident.

This site, as described by Mr. McBurnie, had quite different features from the place described by the Plaintiff in evidence as the site of his injury and shewed no sign of the activity upon which the Plaintiff claimed he was engaged at the time, although the tractor, which the Plaintiff said he was driving was there. Furthermore, no piece of timber was found by either the Plaintiff or Mr. McBurnie, in the search which Mr. McBurnie said in evidence that they made there, which would fit the description of the piece of timber which the Plaintiff claimed he found on the tractor upon his return from receiving treatment at Abau some two to three days later.

The Plaintiff would not affirm or deny that this visit to the site with Mr. McBurnie took place and said that he did not or could not remember it.

This is but one of the matters that have led me to the conclusion which I shall shortly express.

I do not propose to discuss all the evidence and reasons which have led me to such conclusion. One other matter of importance is the Plaintiff's description in his claim for worker's compensation, Exhibit "6", of how the accident occurred, namely:

"Pulling logs by T.D.14 tractor to storage area;

Dead branch fell from tree in passing, dislodged

probably by tremor from tractor passing."

Although here the injury is ascribed to falling timber, the operation the Plaintiff says in this form that he was engaged upon is, as his Counsel was obliged to concede, quite a different operation from the operation described by the Plaintiff in evidence as the one he was engaged upon when he received his injury.

It was suggested by the Plaintiff that the filling-in of this claim form was left to the witness Gerard Simon Maria Hooy, the Defendant's Area Manager at Otomata, who actually wrote the answers to the questions in the form. However, this witness gave positive evidence that he wrote down what the Plaintiff told him to write, after cautioning the Plaintiff about the importance of the form and the information to be supplied in it. This witness also said that at or about this time the Plaintiff told him that nobody was with the Plaintiff at the time of the accident.

I accept the witnesses McBurnie and Hooy as witnesses of truth and where they are in conflict with the Plaintiff I prefer to accept their evidence.

Mr. Hooy gave evidence that in the afternoon of the day of the accident he said to the Plaintiff: "I suppose you have established with Mr. McBurnie where it happened and all that" to which the Plaintiff said "Yes." This is striking corroboration of the evidence of Mr. McBurnie that he was taken on that afternoon by the Plaintiff to the site, where the Plaintiff claimed to him, the accident had happened. I feel bound to say, however, that I would have accepted McBurnie's evidence without this corroboration. The Plaintiff when asked in cross-examination if he had met McBurnie that afternoon before seeing Hooy replied "Well I'm not going to say one way or the other. I wouldn't say Yes or No to it."

Having heard the evidence and seen the witnesses in the witness-box and after reading over the evidence and

the exhibits the conclusion to which I feel myself forced is that it is more probable than not that the Plaintiff received his injury from some cause other than a piece of timber striking his arm after falling from a tree or being thrown up from the ground.

The Plaintiff, when questioned by the witness Hooy on the afternoon of the accident said "I broke me arm on the damned tractor it could have been a stick from the tree or up from the ground or anything." The resolution of what really did break the Plaintiff's arm may lie in the "or anything" in this reply.

In any event I am left without any basis for a finding of negligence against the Defendant.

I am fortified in the conclusion, which I have reached in this action, by the observance that the Plaintiff's case was conducted by his Counsel with considerable astuteness and legal learning.

It may be some comfort for the Plaintiff to know that, in my opinion, his case could not have been presented with more persistent determination than that with which Counsel for the Plaintiff conducted it.

I, sitting as the Court to try this action, was assisted greatly by the patience and dignity, which he maintained throughout, notwithstanding provocation alongside him at the bar table which anyone who did not witness it would deem incredible in a Court of law. Behaviour of that kind must not occur again while I am presiding in this Court.

I find a verdict, and pronounce judgment for the Defendant and I direct that judgment for the Defendant with costs be entered accordingly.

I order that Exhibits "A," "B," "C," "D," "E," "F," "G" and "K" and Exhibits "1," "2," "3," "4," "5" and "6" remain in Court until after the time for appeal has expired.

I order, by consent, that Exhibits "H" and "J" may be handed out of Court forthwith to The Secretary of the Port Moresby General Hospital or his nominee, in writing.

The Port Moresby General Hospital, or, his nominee in writing.

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Working Agreement