

FEAGAI (IOSEFA) v WESTERN SAMOA SHIPPING CORPORATION

Supreme Court Apia  
Dillon J  
24 March, 2 April 1993

NEGLIGENCE - personal injury and assessment of damages.

HELD: 20 year old oiler awarded \$52,000 general damages  
for one third loss of value of right leg.

CASES CITED:

- Speed v Thomas Swift & Co [1943] A.C. 557
- Wilson and Clyde Coal Co v English [1938] A.C. 57
- Gamser v The Nominal Defendant (1976-7) 136 C.L.R. 145
- Watson v Powles [1968] Q.B. 596
- Ward v James [1966] Q.B. 273
- Lemalu Puia'i v Frank Jessop [1960-69] W.S.L.R. 214
- Walter Jan Vermuelen v Attorney General and Others (1987)
- Matatumua Maimoaga v Lisi Vaai, Leota Tuatasu (Public Service Commission) and Another (1988)
- Uili v Malifa and Another (Samoa Observer) (1991)
- Retzlaff v Western Samoa Airport Authority and Polynesian Airline Holdings Limited (19.11.1991)

LEGISLATION:

- Accident Compensation Act 1978, Ss 22, 57, First Schedule
- The Workers' Compensation Ordinance 1960

K M Sapolu for Plaintiff  
T K Enari for Defendant

Cur adv vult

Between Friday the 6th and Tuesday the 10th December 1991, Western Samoa was battered by Cyclone Val bringing with it some deaths, several injuries and widespread property destruction. Of all the tales of that Cyclone, this action is the first to reach this Court. That is the simple background to the Plaintiff's claim for damages for personal injury brought against his

employer, the Defendant. On Sunday, 8th December, the Plaintiff was one of three (3) employees instructed to secure the Defendant's ship, "M.V. Salamasina" to the Apia Wharf. Whilst he was so employed his right leg was badly injured by a single flying roofing iron with the result that he is now left with permanent disability of his right leg.

The Plaintiff called eight (8) witnesses, the Plaintiff himself and three (3) others with seafaring experience, a medical doctor, a meteorological officer, hospital records clerk and a senior inspector of companies. There were seven (7) exhibits tendered to the Court on behalf of the Plaintiff. The Defendant in its pleadings had denied all allegations against it and put the Plaintiff to proof. No evidence was called by the Defendant but there was rigorous cross-examination of the Plaintiff and the Plaintiff's witnesses on the events of Sunday, 8th December.

The Plaintiff alleged general negligence by the Defendant in its duty to the Plaintiff, to provide a safe place of work, a proper and safe system of conducting its operations and proper and efficient supervision of those operations. In particular the Plaintiff alleged the Defendant was guilty of negligence in:

- (i) failing to take any or any adequate precautions for his safety;
- (ii) exposing him to a risk of injury which could have been avoided by reasonable care;
- (iii) failing to inspect the particular area of wharf before he was required to work there, so as to ensure that it was safe for his use;
- (iv) failing to adequately warn him of the dangers incidental to his work on the wharf;
- (v) failing to keep any or any proper look out to give adequate warning to him of any flying object approaching him;
- (vi) failing to observe that he was in a position of peril in the circumstances.

All of these allegations of negligence are standard pleadings and legally correct, in the general run of things. At first glance, they have a surrealistic quality when viewed against the background of a raging cyclone. The Defendant submitted that the accident was within the ordinary risks of service.

The detailed evidence from the Meteorological Officer of gale, storm and then hurricane warnings coupled with the considered evidence of Tavita Nikolao, captain of the Nafanua Patrol Boat through the former 1990 Cyclone Ofa, however, satisfied this

Court that the real negligence was in the Defendant, failing to secure the M.V. Salamasina on the 6th December or, put another way, waiting until the 8th December to secure the ship to the wharf. The ship should have been secured before the storm. Anything less than that was negligent, and the resultant injury to the Plaintiff from a single flying roofing iron is actionable in damages for failure to provide a safe system of work.

Speed v Thomas Swift & Co [1943] A.C. 557 per Lord Greene M.R. at pp 563-4.

The Defendant was in breach of its duty of care exercisable through its agent and employee, the Captain who issued the instructions to the Plaintiff and his two fellow employees, to secure the M.V. Salamasina on the 8th December as opposed to the 6th December.

Wilsons and Clyde Coal Co v English [1938] A.C. 57 per Lord Wright at p. 84.

It could well have been otherwise, if there was evidence of the ship breaking its mooring lines and an emergency having arisen, but there was no such evidence.

The Plaintiff was aged 20 at the time of the accident. He had been employed by the Defendant for one (1) year as an oiler. He retained his employment with the Defendant up until the end of August 1992 when he left because he felt that he was not able to carry out his full duties properly because of his injuries. No longer is he able to participate in marathon running, rugby or boxing, he is teased as being "vaepi'o", a cripple, and he now works on the family plantation.

The medical evidence and exhibits indicate nerve injury to the right leg with complete paralysis of the elevator muscles of the right foot and no dorsal flexion of the ankle. In April 1992, this was assessed as 35% disability. At trial, the medical doctor who last examined the Plaintiff on Monday, 22nd March 1993 gave in evidence his assessment as one-third of the right leg being lost to the Plaintiff.

Western Samoa has enacted Accident Compensation Legislation but under Section 57 of the Accident Compensation Act 1978, it has retained the right to actions for damages for personal injuries. Section 22 and the First Schedule to the Act sets out the lump sum payments attributable to permanent injury or impairment of bodily function as a percentage of \$3,000 for total incapacity. This sum was amended in 1988 from the original \$2,000 set in 1978. Total loss of a leg is set at 75%, total loss of a foot or of the lower part of a leg is set at 60%. The Plaintiff received some \$800 from the Accident Compensation Board representing some 27%.

It is necessary then for the Court to make an assessment of damages as being fair compensation to the Plaintiff. This should be by:

"examining separately each of the main heads of damage and allotting albeit tentatively and in a preliminary way, a separate sum to each head. Of course, the judge must guard against the danger that he will give compensation for the same damage twice, under separate heads. But the assessment by a judge must be a process of methodical consideration, not one of ungoverned intuition."

Gamser v The Nominal Defendant (1976-7) 136 C.L.R. 145 per Gibbs J. at pp 147-8.

The former practice was for a single global sum to be awarded without attempting either to itemise the proven heads of damage or to give any indication of individual assessments. This was to preserve the assessment of damages by a jury when one award of general damage was given.

Watson v Powles [1968] Q.B. 596 per Lord Denning M.R. at p 603.

"Now that the assessment of damages is no longer carried out by juries, judges should itemise their awards and explain, where necessary, the steps by which they have arrived at their respective calculations and assessments."

Ward v James [1966] Q.B. 273.

"There should be consistency in the awards of damages and scope for comparability of awards between judges."

Hitherto, the only reported decision of Western Samoa on assessment of damages for personal injury is Lemalu Puia'i v Frank Jessop, a 1969 decision of Spring C.J. in [1960-69] W.S.L.R. 214.

That involved a 53 year old dentist earning \$1,530 per annum who claimed \$12,000 general damages for the amputation of his right leg midway between the knee and the hip joint and its replacement by an artificial limb. He was awarded \$3,350 general damages.

At pp 222-3, the learned Chief Justice said:

"I am advised from the bar that there have been no previous decisions given in the Supreme Court of Western Samoa on personal injury claims which would be a guide or any assistance in the instant case."

"In considering this claim regard must be had, in my view, to the social and economic conditions existing in Western Samoa. The salaries paid in Western Samoa are generally much lower than those paid in respect of comparative positions in New Zealand or Australia. The Workers' Compensation Ordinance 1960 (in force in Western Samoa) provides that the maximum compensation payable in death claims is \$1,500 and for permanent total incapacity the maximum compensation is fixed at \$2,000."

".... I must, in my view, have regard to the social and economic conditions in this country in determining the amount to be awarded by way of damages. To be guided by awards given in other jurisdictions where different social economic and industrial conditions obtain would in my view be wrong as an award based on figures given in other jurisdictions could well disturb the current social pattern in this country."

I agree with all the sentiments expressed by the learned Chief Justice.

I place little or no weight or importance, however, on the present level of accident compensation set by the legislature. It is notorious that whilst wages and salaries are adjusted for the upper echelons of the community, and for parliamentarians themselves, very little is done on a regular or continuing basis to upgrade primary workers compensation. That is not peculiar to Western Samoa. The New Zealand Accident Compensation Legislation, hailed as a model at the time of its introduction in 1972 has been allowed to moulder and now is undergoing major amendment further eroding the principles governing its introduction.

There have been major shifts in social economic and industrial conditions in Western Samoa since 1969. The large number of motor vehicles with a comparatively high proportion of expensive, quality 4 wheel drive units bears witness to that.

One indicator to which I attach real significance is the appearance in the Courts of large awards:

Walter Jan Vermuelen v Attorney General and Others (1987), Mahon J on 2.5.87 exemplary damages of \$75,000.

Matatumua Maimoaga v Lisi Vaai, Leota Tautasi (Public Service Commission) and Another (1988), Ryan J on 7.9.1988 damages including exemplary damages of \$100,000.

Uili v Malifa and Another (Samoa Observer) (1991), Ryan CJ on 4.10.91, \$20,000 damages for defamation upheld by the Court of Appeal on 9.3.1993.

Although such awards are not comparable to the present problem of assessing damages for personal injury they do give support to my view that there have been such major social and economic changes in Western Samoa since 1969 that a fresh consideration of the assessment of damages for personal injuries is called for.

The following assessment of damages then is available for other Courts to follow or for the Court of Appeal to consider.

The Plaintiff's injuries were itemised in the Amended Statement of Claim and supported by the Plaintiff's own evidence and the medical evidence/exhibits introduced. They are substantial injuries to the right lower leg leaving the Plaintiff with a permanent limp, together with anxiety depression and headaches, initial psychological problems which have now been largely resolved. I consider that an appropriate amount for such injuries is in the range of \$25,000 to \$35,000 say \$30,000.

Then the loss of amenities and enjoyment of life is particularised in the Amended Statement of Claim as inability:

- (i) to play rugby or volleyball;
- (ii) to compete in marathons, the Plaintiff's favourite sport;
- (iii) to engage in onerous physical work such as in a taro plantation for consumption and additional income;
- (iv) to enjoy his occupation to the full as a result of his disfigurement;
- (v) to walk normally without a limp;
- (vi) to escape humiliation and embarrassment in being referred to in a derogatory manner as "vaepi'o" (bent or twisted leg);
- (vii) to choose a suitable marital partner without the limits imposed by his disfigurement and the anxiety and depression accompanying such limitation.

I consider that an appropriate figure for such loss of amenities and enjoyment of life is in the range of \$7,500 to \$12,000 say \$10,000.

Particulars of pain and suffering for the six weeks in hospital were itemised and there were periods of pain after discharge from hospital, for which an appropriate sum would be in the range of \$1,500 to \$2,250. I fix the sum at \$2,000.

There is no evidence of loss of earning capacity available to the Court. The Plaintiff was an oiler on the Defendant's ships and in evidence he described himself as being a mechanic as well as interested in all forms of athletics. However, I believe some consideration needs to be given to the loss of the Plaintiff's ability to earn in the future with his disability, compared with his ability prior to the accident. I assess this figure for 30 to 40 years of a working life, in a range of \$15,000 to \$25,000 at \$20,000.

Taking all matters into account and ensuring that compensation is not given twice for the same damage under separate heads, I consider that the correct figure for the Plaintiff would be \$52,000 together with special damages that were not challenged, of \$75. The claim for loss of wages was withdrawn by the Plaintiff at trial.

The only previous damages assessment for personal injuries in Western Samoa in recent years was in Retzlaff v Western Samoa Airport Authority and Polynesian Airline Holdings Limited (19.11.1991).

There the loss of the Plaintiff's right eye and its replacement by a glass eye resulted in an award of \$70,000 general damages together with special damages of \$15,332.32. Evidence of the need for ongoing medical treatment and visits to New Zealand required to obtain a fresh eye from time to time substantially increased the general damages in that instance, even though the degree of disability for total loss of vision in one eye (normal vision in the other eye) at 30% was comparable to the degree of disability in this instance.

There will be judgment for the Plaintiff for \$52,075 together with costs and disbursements according to scale.