IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0059 OF 2001S
(High Court Civil Action No. 348 of 1998s)

BETWEEN:

JONE SIQILA

Appellant

AND:

FIJI DEVELOPMENT BANK

Respondent

Coram: Reddy, P
Davies, JA
Ellis, JA

Hearing: Wednesday, 13th November 2002, Suva

Counsel: Appellant in Person
Messrs. D. Sharma and D. Prasad for the Respondent

Date of Judgment: Friday, 15th November 2002

JUDGMENT OF THE COURT

The appellant instituted proceedings in the High Court claiming damages from the respondent, his employer, for injuries he suffered in a motor accident which occurred on 25 July 1995. The appellant had already received compensation under the Workmen's Compensation Act Cap. 94 for his injuries by agreement dated 5th June 1996. In addition his employer had given him $1,700 to order him to be treated by a physiotherapist. The present proceedings were issued on 9 July 1998.

The Statement of Claim alleges neglience in that the car did not have seat belts and the driver did not exercise proper care - he felt asleep at the wheel. It also alleges breach of statutory duties under the Factories Act Cap. 99 (which was abandoned at trial) and the Health and Safety at Work Act 1996 in that the respondent failed to provide a safe system and place of work. These allegations based on the statutory duties add nothing of substance to the common law action based on negligence - it was an ordinary type of motor accident. Further the nature of the injuries suffered were pleaded thus:

> *"Particulars of Injuries suffered by the Plaintiff*
>
> *The Plaintiff at the material times was 45 years old, Right handed person. He sustained injuries to his right elbow and upper back. A diagnosis of supracondylar fracture of the Rt. Humerus was made. This fracture was manipulated under anaesthesia and followed up in the Orthopaedic Clinic.*
>
> *On Examination Following Injuries were found*
>
> *(i) Loss of Valgus Angulation of the Right elbow;*
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> *(ii) The range of Motion of the Right elbow was from 5 to 80 degrees;*
>
> *(iii) Movements were found to be painful;*
>
> *(iv) There was decreased light touch and pin prick sensation in the distribution of the ulna nerve;*
>
> *(v) He had a weak grip strength of his right hand;*
>
> *(vi) Ulna nerve motor deficit;*
>
> *(vii) X-rays film on 26/6/98 shows a malunited fracture of the lower end of the Right humerus."*

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The Health and Safety at Work Act came into force when the Gazette Notice was published after it had received the President's consent on 28 June 1996. The Act does not create obligations with retrospective effect and so can have no relevance to the events giving rise to the appellant's injuries or his settlement of his claim under the Workmen's Compansation Act.

Central to the submissions made to us is the appellant's claim that after he settled his claim he developed osteoarthritis in his right elbow and pain in the upper arm. His condition was described by Mr McCaig an Associated Professor of Surgery in his report of 21 July 1999:

> *"Mr Saqila was seen by me on 13 July 1999. He tells me that on 28 July 1995 he was involved in a road traffic accident. He sustained a closed comminuted fracture to the distal humerus. This was also complcated by ulna nerve palsy. This was managed, non-operatively.*
>
> *When seen today Mr Saqila complains of extreme pain throughout his upper limb. The shoulder to finger pains are especially so with cooler temperature.*
>
> *He takes regular medication for pain. Examination reveals a very anxious gentleman. He shoulder movement is complete but is painful at the extreme.*
>
> *He has a centermeter of arm muscle wasting. He lacks 5 degrees of full extension of the elbow with pain at the extremes of flexion. He has no measurable ulna nerve deficit.*
>
> *Radiographs show a well-healed fracture with mild post traumatic osteoarthritis of the elbow joint.*

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Opinion: Mr Saqila has improved from when last seen about two years ago, at which time he had a definite ulna neurological deficit. His fracture is healed. The extreme symptoms is the result of a shoulder hand syndrome (cansagia, reflex sympathetic dystoply).This is a poorly explained condition of post traumatic chonic pain syndrome. He is encouraged to persevere with his work, this in itself is excellent rehabilitation. He has been referred to the physiotherapists and will one continue his review. His long-term prognosis is good. This may be over an indefinite time frame.(Years)."

There is no reference to the osteoarthritis in the particulars quoted above and it is accepted that the symptoms are a result of the accident injuries as is the related pain and ongoing discomfort.

The action came to trial in May and July 2000 before Shameem J. and she heard evidence for the plaintiff. At the close of the plaintiff's case, counsel for the defence applied to have the case dismissed as barred by s.25 of the Workmen's Compensation Act. Shameem J. decided that it was and the appellant now appeals. The appellant who appeared in person filed an elaborate attack on the judgment which we now set out;

"1. The trial Judge fell into error in failing to decide that the appellant's claim was for damages for an occupational disease resulting out of an injury caused in an accident and thus such claim was not statute bar.

2. The trial Judge fell into error in failing to ascertian and/or decide and/or conclude that the agreement regarding satisfaction of claim for injuries under the Workmen's Compensation Act was an estoppel against the Respondent from opposing any claim for an occupational disease under the Health and Safety at work Act - 4 of 1996.

3. *The trial Judge fell into error in not allowing the Appellant's winesses to benefit the Honorable Court about "Occupational disease" although the medical certificate was accepted in evidence and thus the trial Judge abrogated the appellant's right to adduce evidence.*

   The Appellant will plead Section 7(1) and (2) of the Health and Safety at Work - 4 of 1996.

4. *The trial Judge fell into eror in failing to find that the Appellant's claim was for an "Occupational disease" in accordance with Health and Safety at Work Act of 1996. Section 7(2) and the agreement for compensation executed between the parties under the Workmen's Compensation Act the said agreement was of no force and effect.*

   The Appellant will plead the Workmen's Compensation Act, Cap.94 ed. 1978, Section 35.

5. *The Respondent having elected to make Submissions on prelimary issue of law at the conclusion of the evidence given by the Appellant the learned Judge having dismissed the respondent's application thereafter erred in allowing the Respondent to call further witnesses on the same issue thereby allowing the respondent to have what may be described as a 'second bite at the chery' whereby great miscarriage of justice occurred to your Appellant.*

6. *The trial judge fell into error in accepting the evidence of Illiesa Dave(witness for the respondent) in preference to the appellant that he had explained the purport and effect of S:16 agreement when in fact the effect of S:25 of the Workmae's Compensation Act was neither specifically stipulated in the S:16 agreement nor explained to the Appellant before the Appellant executed the agreement.*

7. *The trial Judge fell into error in her failure to hold that S:16 agreement purportedly drawn by Department of Labour was defective not sufficiently informative and incapable of explaining to the Appellant his rights and entitlement under the Health & Safety at Work Act - 4 of 1996, Section 7(2).*

8. *The trial Judge fell into error and failed to take into consideration that the Appellant at the time he signed the S:16 agreement was not legally represented nor given any opportunity by the Department of Labour to obtain independent legal advise in relation to full legal*

implication of executing S:16 agreement and as such the Appellant was not aware of Section 7(2) of the Health and Safety at Work Act 4 of 1996.

9. *The trial Judge ell into error by holding that the Appellant's aggravated Medical condition appear to have been taken into account when in fact development of lOSTEOARTHRITIS condition developed after an injury thus defined as an occupational disease covered under the Workmen's Compensation Act Cap.94 - Part IV, Section 35(1),(a) & (b).*

10. *The trial Judge fell into error in coming to the conclusion as in ground 9 above without the benefit hearing and considering oral evidence from Doctors who prepared Medical Reports tendered as exhibits during the trial.*

11. *On the evidence before her ladyship, the trial Judge should have found as follows:*

    (i) *that the Appellant's claim was for an "occupational disease" pursuant to the Health and Safety at Work Act 4 of 1996 and that the agreement for compensation under the Workmens Compensation Act Cap 94 was not a bar.*

    (ii) *that the substantive issue before her was that the Appellant claimed or an occupational disease flowing from an accident.*

    (Iii) *that in order to determine the question of an "occupational disease" as evidence din the medical cetificate tendered in evidence.*

    (iv) *that the Respondent was allowed to call further witness after the Respondent has completed its submission and yet denied the Appellant to introduce the doctors to support the medical certificate accepted as evidence.*

    (v) *that the Labour Officer who explained and witnessed the S:16 agreement had failed and/or neglected to fully explain to the Appellant his rights to compensation under the Health and Safety at Work Act - 4 of 1996.*

    (vi) *that no consideration was taken into account of the relevance and application of the Health and Safety at Work Act - 4 of 1996."*

For the reason we have already stated, the appellant cannot rely on the Health and Safety at Work Act. He also submits that his condition amounts to an "occupational disease" under Part IV of the Workmen's Compensation Act and seeks compensation under s.35. Claims under this section are limited to a "prescribed disease" The appellant's condition is not "prescribed" and that precludes any further consideration of this submission. These two conclusions effectively dispose of grounds 1,2,3,4,7,8,9,10, and 11. Nevertheless some of these grounds and grounds 5 and 6 involve submissions that the agreement entered into by the appellant and the respondent under s.16 of the Workmen's Compensation Act did not preclude the appellant from taking his present action in 1998.

The requirements for such an agreement to be binding are set out in s.16 which provides:

> ***"16.-(1) The employer and workman may, with the approval of the Permanent Secretary for a person appointed by him, in writing, in that behalf, after the injury in respect of which the claim to compensation has arisen, agree, in writing, as to the compensation to be paid by the employer. Such agreement shall be in triplicate, one copy to be kept by the employer, one copy to be kept by the workman, and one copy to be retained by the Permanent Secretary:***
>
> ***Provided that -***
>
> ***(a) the compensation agreed upon shall not be less than he amount payable under the provisions of this Act; and***

(b) where the workman is unable to read and understand writing in the language in which the agreement is expressed the agreement shall not be binding against him unless it is endorsed by a certificate of a district officer or a person appointed by the district office or Permanent Secretary, in writing, in that behalf, to the effect that he read over and explained to the workman the terms thereof and that the workman appeared fully to understand and appove of the agreement.

(2) Any agreement made under the provisions of subsection (1) may, on application to the court, be made an order of the court.

(3) Where the compensation has been agreed the court may, notwithstanding that the agreement has been made an order of the court under the provisions of subsection (2), on application by any party within three months after the date of the agreement, cancel it and make such order (including an order as to any sum already paid under the agreement) as in the circumstances the court may think just, if it is proved -

(a) that the sum paid or to be paid was or is not in accordance with the provisions of subsection (1);

(b) that the agreement was entered into an ignorance of, or under a mistake as to, the true nature of the injury; or

(c) that the agreement was obtained by such fraud, undue influence, misrepresentation or other improper means as would, in law, be sufficient ground for avoiding it.

4. All agreements made under this section shall be exempt from the payment of stamp duty."

In the present case the Permanent Secretary approved Mr Gyan Singh, a Principal Labour Officer in writing to act for him under s.16 and Mr Iliasa Dave was the district officer who explained the agreement to the appellant before he signed it. The

agreement was duly completed and the appellant did not challenge it under s.16(3). After hearing the evidence of the appellant and Mr Dave, Shameem J stated in her Judgment:

> *"The effect of section 25 is to create a statutory bar to civil action against the employer in respect of the same injury provided section 16 was complied with. The provisions of section 16 are mandatory and must be strictly proved (Vinod Patel and Company -v- Yatendra Prasad Civil App. No. AB00026B/98). In that case, a decision of the trial magistrate that an action was not statute-barred because the agreement under section 16 of the Act had not been approved by the Permanent Secretary or a person appointed by him, was upheld on appeal by the High Court and the Court of Appeal.*
>
> *In this case, the Plaintiff agreed that he had signed the section 16 agreement, agreed that he had been paid compensation in a lump sum, and agreed that he had been paid for permanent partial incapacity at 8.25%. However he said he did not understand that the agreement was a bar to future civil proceedings against the Defendant in respect of the same injury, that the agreement had not been explained to him and that he now suffers a degree of pain from the injury which is aggravated with the onset of osteoarthritis.*
>
> *His evidence was contradicted by the evidence of Iliesa Dave. He said that he had been authorised by the Permanent Secretary to explain the section 16 agreement to workmen, and tendered a copy of a memorandum confirming such authorisation. He said that the initial medical examination set the Plaintiff's level of incapacity at 10% but that a later report assessed this at 8.25%. This lower level was accepted by the Plaintiff. He said that he explained the agreement to the Plaintiff in the Fijian language and that he told the Plaintiff that the agreement prevented him from taking further proceedings against his employer. He said that the Plaintiff signed it, and that he signed it himself. He said that the agreement had then been approved by Principal Labour Officer, Mr Gyan Singh, on behalf of the Permanent Secretary.*
>
> *The letter of authorisation tendered by Mr Dave authorises him as follows:*

"In terms of provision (b) of section 16(1) of the Workman's Compensation Act, Cap.94, you are hereby appointed and authorised to read and explain to a Fijian workman in the Fijian language the terms of any agreement under which such workman is paid compensation under the provisions of the Workmen's Compensation Act Cap.94, and in pursuance of having done so to endorse to that effect the certificate on such agreement."

This authority therefore extends to reading, explaining and certifying the agreement. I accept Mr Dave's evidence that he did read and explain the form, and I accept that Clause 3(b) was explained to the Plaintiff which provides that "the workman shall accept the aforesaid lump sum in discharge of all the liability of the employer to pay compensation under the provisions of the Act in respect of the aforesaid injury to the workman."

I also accept his evidence that the Permanent Secretary had authorised the agreement under section 16(1) through Mr Gyan Singh whose signature he identified at the bottom of the form.

I therefore accept that the provisions of section 16 have been satisfied, and that under section 25 of the Act, this action is statute-barred."

In our view the Learned Judge correctly stated the law and her conclusions were open to her and justified by the evidence. In particular the appellant's contention that he was entitled to independant legal advice is incorrect, but in any event Mr Dave told him he could consult a lawyer if he wished. The appellant also submitted that it was unfair of the Judge to hear Mr Dave before determining the respondent's (defendant's) application Plainly she had to do so to meet the appellant's challenge to the validity of the agreement.

This leaves only the question of the statutory bar created by s.25 which provides:

"25. - (1) Where the injury was caused by the personal negligence or wilful act of the employer or of some other person for whose act or default the employer is responsible, nothing in this Act shall prevent proceedings to recover damages being instituted against the employer in a civil court independently of this Act:

Provided that -

(a) a judgment in such proceedings whether for or against the employer shall be a bar to proceedings at the suit of any person by whom, or on whose behalf, such proceedings were taken, in respect of the same injury under this Act;

(b) a judgment in proceedings under this Act whether for or against the employer shall be a bar to proceedings at the suit of any person by whom, or on whose behalf, such proceedings were taken, in respect of the same injury independently of this Act;

(c) an agreement come to between the employer and the workman under the provisions of subsection (1) of section 16 shalll be a bar to proceedings by the workman in respect of the same injury independently of this Act.

Section 25(1)(c) is plainly a conclusive bar to the appellant's present claim and Shameem J. was correct to enter judgment for the respondent. In short, as we endeavoured to explain to the appellant, his acceptance of a lump sum for his permanent partial incapacity includes compensation for the on-going consequences, pain and suffering resulting from his injury. If the worker's knowledge of the operation of s.25 be relevant to the operation of that section, we note that the trial Judge examined the question and was satisfied that the appellant was informed and understood at the time of signing the agreement that the making of the agreement would bar legal action for the recovery of damages for his injury.

The appeal is accordingly dismissed with costs to the respondent which we fix at $500.

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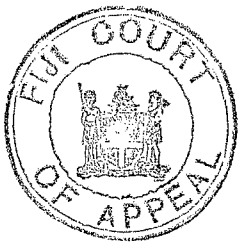
Reddy, P



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Davies, JA

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Ellis, JA

Solicitors:

Appellant in Person
Messrs. R Patel and Company, Suva for the Respondent

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