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

CIVIL APPEAL NO. ABU118 OF 2005S
(High Court Civil Action No. 0084 of 2002S)

BETWEEN: SATISH CHAND

Appellant

AND: RAM DUTT

First Respondent

LABASA TOWN COUNCIL

Second Respondent

Coram: Ward, President
Scott, JA
Wood, JA

Hearing: Monday, 20th November 2006, Suva

Counsel: A Sen for the Appellant
J Ram for the Respondent

Date of Judgment: Friday, 24th November 2006, Suva

JUDGMENT OF THE COURT

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[1] The appellant brought an action in the High Court seeking damages for the injuries which he sustained in the course of his employment with the respondent council. His claim was dismissed by Justice Coventry on the basis that, while a duty of care was owed to him, the evidence did not establish a breach of that duty. It is from that decision that this appeal is brought.

FACTS

[2] On 16 October 2001, the appellant was detailed to stoke up the fire underneath some coal tar drums, in which coal tar was being heated to 360 degrees centigrade, before being mixed with kerosene and rocks, and then used to repair potholes. The system used is rudimentary, although it achieves its purpose. There was evidence that it had been in use for 35 years or so, without occasioning injury to any worker.

[3] The heating of the coal tar took place in an open sided shed. It has timber posts at the corners to support a corrugated iron roof. There was a single sheet of corrugated iron at ground level on two sides. The rest of the shed was open. There was a pit, approximately one foot deep and three feet wide, in the middle of the shed, above which were placed two strips of iron. The two halves of a 44 gallon oil drum were placed on these strips above the fire contained in the fire pit.

[4] The system of work required the labourer , in this case the appellant, to tend this fire by feeding it with charcoal and pieces of pine timber, from the open end of the pit. The fire was used to heat the coal tar in the drums to the necessary temperature preparatory to the addition of the rocks and kerosene, after which the mix was to be decanted and taken to the area of road on which other labourers were working.

[5] On the occasion of the accident, the appellant was instructed to stoke up the fire in the pit, which had been lit earlier in the day, but had died down. He said that he pushed in some pieces of timber, and charcoal, using his hands for the timber and a spade for the charcoal. After he pushed in a long piece of timber, from a distance of about 3 feet from the fire, it flared up causing his socks and overalls to catch on fire. He rolled on the ground and called for help. A co-worker arrived and extinguished the flames from his overalls and gloves by putting sand and gravel on him.

[6] He was taken to hospital and treated for partial thickness flash burns to his hands and right leg , which were estimated to cover 18% of his body surface. He remained in hospital for a time, and was unable to work for a longer period, although he eventually returned to light duties, and then to full duties. He was paid a part salary while off work, and made a claim for the loss of the balance of his wages, as well as damages for his inability to attend to his farm. He also claimed damages for pain and suffering and for the ongoing disabilities consequent upon his burns.

[7] It was common ground that the appellant had been provided with safety boots, overalls, leather gloves and a mask. It was also common ground that there was no hose or fire extinguisher in the shed, although whether they would have reduced the extent of his injuries was left undecided.

[8] The appellant was unable to offer any reason for the fire to suddenly flare up, and none was offered by the respondent. Its foreman gave evidence that if the fire goes out, kerosene is sometimes used to restart it. He acknowledged that sometimes the fire blazes out from the fire place, and that the fire would ventilate if wind came from the back. He agreed that the appellant may not have been burned if there were pots to stop tar leaking from the drums, although it is not clear whether this involved an acknowledgement that the tar was volatile and likely to combust if it falls into the fire. He did, however, give evidence that it took about 2 hours to heat the tar to 360 degrees centigrade, from which it might be inferred that its temperature was very much less than that at the time of the incident, a matter of relevance to the extent to which it had liquified.

[9] There was no evidence that coal tar had, in fact, leaked onto the fire. Nor was there any evidence of a sudden wind gust, or of any reasonably available and practicable system of work, or equipment which might have been used to heat and provide hot tar mix for use on roadways, and which might have prevented the accident.

[10] Justice Coventry found that there was no evidence as to what caused the fire to flare up suddenly. He made reference to the various possibilities that were suggested. They included the possibility that the shape of the fire pit and shed may have allowed a gust of wind to channel down the fire pit and blow the flame out; the possibility that hot molten tar had dropped onto the fire below and ignited; the possibility that the appellant had pushed the wood or charcoal into the fire with his boot and had approached too close to the fire, causing his overalls to catch light.

[11] His Lordship indicated that it was not acceptable to speculate about these or any other possibilities, and found that the fact of the flaring up did not speak for itself as showing negligence. In that regard, he accepted the respondent's argument that, while it had not offered any evidence as to the cause of the flare up, it had not been shown that the only conclusion open was that it was due to its negligence. Otherwise he was not satisfied that the appellant had made out a case of negligence on the balance of probabilities.

The Appeal

[12] It was submitted, first, that this was a case of escape of fire to which the principles in ***Rylands v Fletcher*** [1868] LR 3 H.L. 330 applied, giving rise to strict liability on the part of the respondent. No such case was pleaded or raised in the High Court.

[13] That principle is concerned with the bringing onto, and keeping on, land, of a potentially dangerous commodity, which is likely to do mischief if it escapes. We do not think that the establishment of a small fire in a specially constructed fire pit, within a shed that has a substantial area of clearance around the pit, involves the kind of danger in contemplation in that case, or in any of the many cases in which it has been applied: see in ***Whinfield v Lands Purchase and Management Board of Victoria and Anor*** (1914) 18 CLR 606 at 6. per Griffiths CJ and at 619 per Isaacs J.

[14] The appellant's alternative claim in negligence depended upon proof that the respondent breached its duty to exercise reasonable care for the safety of its employee, by failing to provide a safe system of work or safe plant or equipment. The existence of that duty was not, and could not be questioned. What is in issue is whether the respondent breached that duty, the onus of proving which rested upon the appellant.

[15] The degree of care required varies according to the probability of an accident occurring and the gravity of the consequences if it does occur: ***Paris v Stepney Borough Council*** [1951] AC 367. As was observed by Gleeson CJ in ***Swain v Waverley Municipal Council*** (2005) 220 CLR 517 at 520 the standard of conduct necessary to discharge a duty of care is usually explained in

> "terms of what would be expected of a reasonable person, both as to foresight of the possibility of harm, and as to taking precautions against such harm. Life is risky. People do not expect, and are not entitled to expect to live in a risk free environment. The measure of careful behaviour is reasonableness, not elimination of risk."

[16] To similar effect were the observations of the Privy Council in ***Overseas Tankship (UK) Limited v Miller Steamship Co Pty Ltd***. (The Wagonmound) No.2 [1967] 1 AC 617 at 642 that the decision in ***Bolton v Stone***

> "did not alter the general principle that a person must be regarded as negligent if he does not take reasonable steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man. What the decision did was to recognize and give effect to the qualification that it is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it."

[17] In ***Hamilton v Nuroof (WA) Pty Limited*** (1956) 96 CLR 18 the duty of care resting upon an employer was described by Dixon CJ and by Kitto J (at 25) in the following terms:

> "The duty... is that of a reasonably prudent employer and it is a duty to take reasonable care to avoid exposing the employees to unnecessary risk of injury. The degree of care and foresight required from an employer must naturally vary with the circumstances."

[18] It may be accepted that any process requiring the heating of a substance to a temperature of 360 degrees centigrade does call for an exercise of particular care, although more so in relation to the handling of the molten mix than the establishment of a relatively small fire in a contained pit, using charcoal and pieces of firewood. There is nothing particularly remarkable about setting and keeping a fire burning in such a pit. It is an occurrance that is observed in many different settings, and it is a necessary feature of life in both domestic and industrial activities, and cannot of itself be regarded as a dangerous activity. That this was so in the present case was indicated by the thirty five year accident free history of the procedure used.

[19] The difficulty for the appellant is that no evidence was offered of any reasonably practicable alternative system of work or alternative plant or equipment that should have been laid down or provided.

[20] The operation of heating tar to produce a bitumen mix had to be performed in order to repair the pot holes in roads within the Council district, since left unrepaired they were hazardous to motorists.

[21] As the authorities show when reasonable alternatives are offered, their cost and the possibility of them giving rise to different risks need to be taken into account, in

accordance with local conditions, as does the extent of the risk of the current procedure or equipment, and the necessity for the activity in question.

[22] In the absence of evidence of a reasonable alternative it becomes a matter for conjecture as to whether there was a failure to exercise the requisite degree of care. Speculation in this respect is not a basis for negligence: see ***General Cleaning Contractors Ltd v. Christmas*** [1953] AC 180 at 195; ***Neill v Fresh Food and Ice Pty Ltd***. (1963) 108 CLR 362; ***Australian Iron and Steel Pty Ltd. v. Krstevski*** (1973) CLR 666 and ***Maloney v Commissioner of Railways NSW*** (1978) 52 ALJR 292.

[23] Reliance was placed by the appellant on a number of decisions, where negligence had been established in circumstances involving a known source of danger, where the danger actually materializing was not identical with the danger reasonably foreseen. In those cases, for example ***Hughes v Lord Advocate*** [1963] AC 837, it was held to be sufficient if the accident which occurred was of a type which should have been foreseeable by a reasonably careful person. See also, in this respect, ***Hamilton v Nuroof (WA) Pty Ltd*** and ***General Cleaning Contractors Ltd v Christmas***.

[24] However in each of these cases, there was evidence of alternative measures that could and should have been taken to avoid that type of occurrence, such as ensuring the open manhole in ***Hughes v Lord Advocate*** remained attended by a watchman overnight or guarded by a fence; or in ***Hamilton v Nuroof (WA) Pty Ltd.*** by raising the bucket of molten bitumen by the use of a rope rather than by hand; or in ***General Cleaning Contractors Ltd. v Christmas*** by informing the employees of the need to test the window sashes before cleaning the windows or by providing wedges to prevent the windows closing.

[25] Faced with an absence of evidence as to the cause of the flare up, the appellant sought to rely on the doctrine of *res ipsa loquitur*. Under that doctrine, where the accident in question is such that it would not have happened in the ordinary course

of things if the defendant had used proper care, then the fact of its occurrence affords reasonable evidence, in the absence of any explanation by the defendant, that it arose from a want of care: ***Scott v London and St Katherine Docks Co*** (1865) 3 H & C 596; 159 ER 665; and ***Mummery v Irvings Pty Ltmited*** (1956) 96 CLR 99.

[26] The doctrine operates not as a distinct substantive rule of law. Rather it involves an application of an inferential reasoning process in circumstances where the plaintiff retains the onus of proving negligence: ***Schellenberg v Tunnel Holdings*** (2000) 200 CLR 121. Its effect is to pass an evidential burden to the defendant to provide an explanation for the accident that does not involve a want of care on its part.

[27] In ***Barkway v South Wales Transport Co. Ltd***. [1950] 1 ALL ER 392 where the doctrine was similarly said to be a rule of evidence, it was held that, if the facts are sufficiently known as to why or how the occurrence took place, then the doctrine does not apply, and the solution is to be found, by determining whether, on the facts as established, negligence is to be inferred or not.

[28] In ***NG Chun Pui v Lee Chuen Tat*** [1988] 132 S.J 124 the Privy Council confirmed that the rule is one of evidence alone, and does not cause the legal burden of proof to shift to the defendant.

[29] Where there are equally plausible explanations for the accident, that is explanations which have some colour of probability, then the plaintiff is back to where he started, and is required to establish his case by positive evidence.

[30] In most instances, it will be necessary for the defendant to call some evidence of an explanation that has a colour of probability: see, for example ***Moore v. R Fox & Sons*** [1956] 1 QB 596; ***Colvilles Ltd. v.Devine*** [1968] 1 WLR 475. It will not normally suffice for the defendant to put up mere theoretical possibilities.

[31] However, that depends first upon the Court being satisfied that, in the ordinary course of human affairs, the accident was unlikely to occur without a want of care on the part of the defendant. Unless that point is made good, the mere fact of the accident is not enough to raise a presumptive case of negligence: ***Franklin v Victorian Railways Commissioners*** (19959) 101 CLR 197; & ***Piening v Wanless*** (1968) 117 CLR 498 where *Barwick CJ* said, at 508:

> " If the occurrence is to provide evidence, it can only be that, within the common knowledge and experience of mankind, (the) occurrence is unlikely to occur without negligence on the part of the party sued."

[32] We are not persuaded that the mere fact of the fire flaring up is an occurrence which, within the common knowledge and experience of mankind, is unlikely to have occurred without negligence on the part of the defendant. It is in the nature of a fire to emit flame, and to burn with different degrees of intensity, depending upon the nature and volume of the fuel which is added to it, and the vigour with which the burning logs are turned.

[33] Although no evidence was called in this case to identify the cause for its flaring up, none of the possibilities mentioned by the plaintiff such as the gust of wind or spillage of coal tar (assuming it to have been combustible) had any evidentiary support for their occurrence. There were other possibilities available such as the action of the plaintiff in pushing the large piece of timber into the fire, or even standing too close to its flames.

[34] What the trial Judge had left was the mere circumstance that the fire flared, an event, which as we have observed was not one which could be fairly said to have been unlikely to occur without negligence.

[35] For these reasons we are not persuaded that error occurred. However since the point was taken by the respondent that it is not permissible for the appellant to

advance a case based on *res ipsa loquitur* without pleading it, we point to the decision in ***Bennett v Chemical Construction (GB) Ltd.*** [1971] 1 WLR 1571 which is to the contrary of that contention. That it is not to say that it would be other than desirable to particularise such a case in the interests of clarity.

[36] The order of the Court is that the appeal is dismissed Although the appellant has failed in this appeal, we consider that it was not unreasonable for him to have brought it. As it would be burdensome on him to have to pay the costs of his employer, we think the proper course is not to make any costs order.

Ward, President

FIJI COURT OF APPEAL

Scott, JA

Wood, JA

Solicitors:

Maqbool and Company, Labasa for the Appellant
Gibson and Company, Labasa for the Respondents

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