

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

HBC130 of 2011

BETWEEN

AJEET KUMAR of Lot 12, Velau Drive, Kinoya in the Republic of Fiji.

PLAITIFF

AND

CANFORM INDUSTRIES LIMITED a limited liability company

having its registered office at 6 Lami Street,

Lami in the Republic of Fiji.

DEFENDANT

AND

DOMINION INSURANCE LIMITED a limited liability company

having its registered office at Level 2, 231 Waimanu Road,

Suva in the Republic of Fiji.

THIRD PARTY

Counsel : Mr. D. Singh for the Plaintiff
Mr. R. Prakash for the Defendant
Ms. S. Narayan for the Third Party

Date of Hearing : 16th November, 2016

Written Submissions : 16th December, 2016 and 23rd December, 2016

Date of Judgment : 14th February, 2017

JUDGMENT

- [1] The plaintiff filed this action to recover damages for the injuries sustained by him in the course of his employment.
- [2] On 18th October, 2010 the plaintiff, in the course of his employment, while adjusting the mould of the top dial of the press machine a fellow worker stepped on the peddle and the top dial fell on his hand severing three fingers in the hand.
- [3] The defendant in its statement of defence while denying that its negligence that caused the injuries to the plaintiff pleaded contributory negligence on the part of the plaintiff.
- [4] Since at all times material to the incident which led to the institution of this action the defendant had a Worker's Compensation Policy with the Dominion Insurance the defendant brought the Dominion Insurance as a party to the action (Third Party). The Third Party filed its statement of defendant wherein it averred that the defendant was in violation of the Clause 8 of the insurance policy which reads as follows;

The insured shall take all reasonable precaution to prevent accidents and must comply with all statutory obligations relating to employee safety and occupational health.

[5] According to the statement of claim of the Third party following are the particulars of failure on the part of the defendant;

- a) Contrary to manufacturer's specifications, failing to place pressure machines at sufficient proximity so as to enable sufficient and free movement of employees.
- b) Placing machines in close proximity with the walls and thereby restricting space for movement essential for operators at work, thereby, exposing the operators to potential risk of personal injuries.
- c) Contrary to manufacture's specifications, failing to ensure that the mould presser on which the plaintiff was assigned to work did have a metal guard for employee protection despite being fully aware that the presser was sharp and pressed down heavily within seconds of being loaded by a press of the pedal.

[6] At the pre-trial conference the parties admitted the following facts;

1. At all material times the plaintiff was employed with the defendant and the plaintiff had been in such employment with the defendant for a period of 14 years prior to the accident.
2. The scope of the plaintiff's responsibility, inter-alia, required the plaintiff to oversee the operation of all machines used by the defendant and to supervise all the workers who operated the machines.
3. The defendant was the occupier of the premises for the purposes of Occupiers' Liability Act.
4. On 18th day of October 2010, in the course of his employment, the plaintiff was injured on the defendant's premises.
5. At the time of the plaintiff's accident (injury), the defendant held a valid insurance policy with the Third Party and the period of insurance was from 8th June 2010 to 8th June 2011, the injury to the plaintiff being within such period.
6. The defendant's insurance policy cover with the Third Party covered the defendant against claim under the Workmen's Compensation Act and common law claims.

7. As per the policy, the defendant had notified the Third Party of the injury sustained by the plaintiff at the work site and also upon receiving the claim made by the plaintiff.

[7] As per the minutes of the pre-trial conference following are the issues to be determined at the trial;

1. Whether the defendant was negligent in failing to provide the plaintiff with a safe place of work, safe plant or equipment, and exposed him to an unnecessary risk of injury and/or whether the defendant had breached its duty of care to the plaintiff contrary to the Health and Safety at Work Act 1996 and Health and Safety at Work (General Workplace Condition) Regulations 2003?
2. Whether there was sole or contributory or any negligence at all on the part of the plaintiff?
3. Whether the plaintiff is entitled to general damages for pain and suffering and loss amenities and enjoyment of life and if so what is the quantum?
4. Whether the plaintiff is entitled to special damages and if so what is the quantum?
5. Whether the plaintiff is entitled to future economic loss and if so what is the quantum?
6. Whether the plaintiff is entitled to costs and if so what is the quantum?
7. If the defendant is held liable, whether the Third party must indemnify and cover the defendant pursuant to the insurance policy entered into and existing between the defendant and the Third Party at the time of the accident?
8. If the defendant is held liable, whether the Third party must indemnify and cover and pay all costs of litigation and other expenses on behalf of the defendant?
9. Whether the Third Party is justified in refusing to cover or indemnify the defendant in terms of the insurance policy held between the defendant and the Third Party for the period from 8th June 2010 to 8th June 2011?

- [8] The plaintiff's evidence is that on the day of the accident he was repairing a machine and he had been working on it for four days. The defendant is the foreman of the factory on the day of the accident at about 4.45 pm he had asked other workers to go home and continued to work on the machine. This machine is used to fix lids on paint tins. This machine consists of two parts, top part and the bottom part. When the power is on if the peddle found on the bottom of the machine the top part comes down. The photograph marked "D8" clearly shows the top and bottom parts of the machine. The plaintiff while keeping his hand between the top and bottom portions of the machine one Nadeem who was also an employee of the defendant company accidentally press the pedal and top part of the machine fell on the bottom part severing three fingers of the plaintiff's left hand.
- [9] Nadeem was called to give evidence by the defendant. He corroborated the evidence of the plaintiff as to the manner in which the accident occurred. He testified that the foreman was trying to open something in the machine and when he stood up his foot accidentally went on the pedal.
- [10] The flywheel of the machine does not stop immediately after switching off the power and the pedal works only when the flywheel is running. The plaintiff had started working on the machine before the flywheel stopped. If he waited till the flywheel stopped this accident could not have happened. All these facts are undisputed.
- [11] Mr, Riyaz Naushad Hussein is a director of the defendant company. He testified that the workers were given safety instructions. The documents "D4" to "D7" contain the safety instruction given to the workers. The attention of the court was drawn specially to instruction No. 3 in "D5" which reads as follows;

NEVER PUT **HAND** IN PUNCHING AREA WHILE LOADING COMPONENTS
ON THE PRESS.

- [11] The witness also testified that the company had a Workers Compensation Insurance Policy (D11) with the Dominion Insurance, the Third Party.
- [12] On behalf of Dominion Insurance Mr. Vikash Kumar, the Manager Claims, testified at the trial. His evidence is that claim was denied for not complying with the condition 8 of the insurance policy which reads as follows;

The insured shall take all reasonable precautions to prevent accidents and must comply with all statutory obligations relating to employee safety and occupational health.

- [13] Dominion Insurance conducted an inspection of the factory and wrote the letter dated 09th October, 2013 explaining the reasons why they refuse to compensate the plaintiff for the injuries sustained by him. In that letter it is, *inter alia*, stated as follows;

The search has further revealed that the pedal guards are essential for the safe operation of these machines. The pedal guard would have prevented the plaintiff from receiving injuries. Our solicitor is of the view that Canform Industries Limited failed to provide safety guards for the safe operation of the machine and as a result breached the occupational health and safety regulations.

- [14] The witness also tendered in evidence certain photographs taken in the course of the inspection. It is also the position of the 3rd party that the defendant has failed to act in conformity with sections 9, 20, 39 and 41 of the Health and Safety at Work Act 1996.

- [15] The accident occurred on 18th October, 2010 and these proceedings were instituted on 08th May, 2011. The witness for the Dominion Insurance conducted the inspection on 07th October, 2013 which is almost three years after the accident and more than two years after the institution of the these proceedings. The witness admitted that the claim was made within seven days after the accident. As admitted by the witness for Dominion Insurance they had not carried out the inspection at the factory where the accident occurred. By the time the inspection was carried out, the factory had been shifted to another location and the inspection had been done at the new factory. The witness specifically admitted that he was not aware whether the security breaches were there in the factory where the accident occurred. It appears from this evidence of its own witness that the Dominion Insurance has repudiated the claim without any valid reason.

- [16] The plaintiff came to court on the basis that he sustained injuries due to the negligence of the defendant. It is the defendant who brought the insurer as the 3rd party to the action on the basis that the insurer is liable under the contract of insurance entered into between the defendant and the 3rd party to compensate the defendant's employees whenever they sustained injuries while at work.

- [17] The main allegation of the plaintiff against the defendant is that the plaintiff failed to fix a guard or to take other adequate measures to prevent access to the operating paddle by any other person other than its operator.
- [18] The learned counsel for the plaintiff citing the decisions in **Sungravure Pty Ltd v Meani** [1964] HCA 16; (1964) 110 CLR 24 at 36-37 and **Bankstown Foundry Pty Ltd v Braistina** [1986] HCA 20; (1986) 160 CLR 301 310, submitted that a person will be guilty of contributory negligence if he or she ought reasonable to have foreseen that, if he or she did no act as a reasonable and prudent person, he or she would be exposed to risk of injury. The learned counsel for the plaintiff also cited the decision in Commissioner of **Raiways v Rupercht** [1979] 142 CLR 563 at 577 where it was held that an employee should not be held guilty on contributory negligence unless when he acted (or failed) this was done with full appreciation of danger. Carelessness by an employee due to confusion, fatigue, natural slackening of attention or preoccupation with what he was doing, was not to be regarded as contributory negligence.
- [19] Before discussing the law relating to contributory negligence the court must consider whether the plaintiff has been successful in establishing negligence on the part of the defendant. The burden of proving the alleged negligence is on the plaintiff. *Ei incumbit probatio qui dicit, non qui negat*, which means - He who asserts, not he who denies, must prove.
- [20] At the time of the accident the plaintiff was operating the machine. He was repairing the machine on the instruction of Mr. Hussain, a director of the company. According to the plaintiff's own evidence until the flywheel of the machine stops the pressure moulds work and after switching off the power it takes 15 to 20 second for the flywheel come to a complete halt. The plaintiff had put his arm into the pressure mould before the flywheel stops and during that short period Abdul Nadeem, a co-worker accidentally press the paddle causing injuries to his hand. There had been no reason for the plaintiff to put his hand into the mould before the fly wheel stopped.
- [21] A photograph of the machine on which the plaintiff working at the time he sustained was marked as "D8" by the 3rd party in evidence. In this photograph a paddle guard is clearly shown under the machine near the paddle. Before start repairing the machine the plaintiff should have placed the paddle guard in the proper place preventing the paddle being pressed accidentally. The management can provide safety equipment and

request the workers to use them to minimize accidents at the work place. They cannot be expected to be behind every worker all the time to see whether they are using the safety equipment.

[22] The cause of the accident in my view was the failure of the plaintiff to follow the safety instruction and the equipment provided by the employer. The court accordingly, concludes that the injuries were caused due to the total negligence of the plaintiff and there is no negligence of the part of the defendant.

[23] For the reasons aforementioned the court makes the following orders:

1. The writ of summons of the plaintiff is struck out and the action is dismissed.
2. Taking all the circumstances of this case into consideration the court does not order costs against the plaintiff. However, the defendant is ordered to pay \$3000.00 as costs to the 3rd party within twenty one (21) days from today.




Lyone Seneviratne

JUDGE

14th February, 2017