In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HBC 07 of 2017

Vikash Kumar
Plaintiff
v
C.J. Patel & Company Limited
Defendant

Counsel: Mr S. Sharma for the plaintiff
Mr Ritesh Singh for the defendant
Date of hearing: 21st and 22nd January, 2019
Date of Judgment: 26th April, 2019

Judgment

1. The plaintiff was a Supervisor at the defendant's warehouse. The plaintiff states that he sustained serious injuries, when a forklift owned by the defendant and driven by its employee reversed on to him, without a proper lookout or notice. The statement of claim states that it was an implied term of his contract of employment that the defendant would take all reasonable care to provide and maintain a safe system of work, effective supervision and not expose him to a risk of damage or injury, of which they knew or ought to have known. The particulars of negligence are pleaded. The injury was caused in the course of his employment by the negligence and/or breach of statutory duty of the defendant. He relies on the doctrine of res ipsa loquitur. The plaintiff claims damages for injuries suffered. Alternatively, for compensation under the Workmen's Compensation Act.

2. The defendant, in its statement of defence states that any injury suffered by the plaintiff was due to his own carelessness and negligence and/or contributory negligence. He failed to take reasonable steps to ensure his own safety and protect himself from injuries. He exposed himself to a risk of injury by being present when the forklift was in use, without keeping a proper lookout and wrongly performed his task in a most unreasonable manner.

3. The plaintiff, in its reply to defence states that he followed established guidelines, procedures and directives of the defendant, in carrying out his normal duties. He was not contributory negligent.

The hearing

4. The plaintiff, (PW1) in evidence in chief said that when he was trying to remove a pallet with a pallet jack, as instructed by his Supervisor, a forklift came forcefully from behind and squeezed his leg with its tyre. He was facing the wall and could not see what was behind him. His leg got entangled and trapped between the tyre of the forklift and the handle of the pallet jack. He screamed aloud. The driver then reversed his forklift to the back and he fell. The Manager, PW2, (*Sanjesh*) and PW3,(*Ashnil*) tried to straighten his leg.The defendant's driver took him to hospital. The siren of the forklift was not working. If he heard the siren, he would have moved aside. There were no specific markings setting out his working area and the path the forklift operates. He could not have avoided the accident, as he was facing the wall and the forklift was speeding. He was wearing safety boots and a reflector jacket. Helmets were not provided.

5. In cross examination, the plaintiff said that the driver reversed at full speed. The siren was not working. He did not hear the sound of the forklift. The driver could see from his side mirrors that he was working at the place of impact. He was speeding. There were "*plenty*" of forklifts in the warehouse. He agreed that he had some degree of responsibility to look after himself. He denied that he contributed to the accident. In re-examination, he said that if he had seen a glimpse of the forklift, he would have moved. There were no markings on the date of the accident.

6. PW2,(*Sanjesh Shelvin Dass, formerly, a Frozen Goods Supervisor at the defendant company*) in evidence in chief said that on 16th January,2016 when the plaintiff went to bring a pallet jack, a forklift driven by DW3,(*Binesh Dutt*) reversed at high speed and bumped his leg. The plaintiff was fully unconscious. DW3 was not an authorized forklift the driver. He was an Aisle Supervisor. He drives at a high speed. There were no visible markings in the place where the accident occurred. The markings were painted after the incident. The plaintiff was facing the opposite side and pulling the pallet jack, when the forklift reversed. The siren of the forklift was not working. There was very little chance, a 2 to 3% chance that the plaintiff could have avoided the accident, as he was facing the other side and could not see danger coming his way. None of the workers were wearing helmets on that day, as there was a shortage of helmets.

7. PW3,(*Ashnil, formerly, a driver at the defendant company*) also said that DW3 was not an authorized forklift driver. On 16th January, 2016, DW3 knocked the plaintiff. He was driving at a very high speed of 25 kmph and talking on the phone while reversing. He could not stop .The fitness certificate of the forklift had expired. The plaintiff could not avoid the accident, as he was facing the opposite side. The reverse siren and revolving light of the forklift were not working, so he could not know that it was approaching. The place where the accident took place had no yellow markings. Yellow lines were painted subsequently. There were more than 100 employees, 4 forklifts and 3 "*Ridgecap*" forklifts at the warehouse. There were hazard warning notices. The forklift stopped after the accident. He said that it was not his duty to hoot the horn.

8. DW1,(*Melvin Sharma, Administrative Manager of the defendant's warehouse*) said that the defendant had meetings with its workers and provided awareness of the danger in the warehouse with its machines. DW3 told him how the accident happened. He said that when he was reversing, he looked into the rear mirror of the forklift, no one was at the back and "*somehow it came back*". A forklift driver cannot speed at 25kmph in the warehouse. The forklift had a valid certificate. In cross examination, DW1 said that the plaintiff could have moved, although he was operating a palette with 40 to 50 kg and facing the opposite direction. There were 4 forklifts in the warehouse. It makes noise and the sound of the siren can be heard when it reverses. He agreed that on the day of the accident, the markings were not clear, but were visible. The markings gets dull and were repainted after the accident. It. He agreed that the accident could have been avoided, if the forklift had stopped before reaching the plaintiff.

9. DW2,(*Monal Narayan, Compliance Officer of the defendant company*) in evidence in chief said that the yellow markings were dull on the date of the accident. The plaintiff could have left the pallet jack when he heard the siren. The forklift was fully operative. In cross examination, he said that their investigations showed that the path was clear, when DW3 was reversing. He could not explain how the accident happened. He agreed that the driver of the forklift was required to continue to look at the mirror, while reversing and stop if he saw the plaintiff.

10. DW3,(*Binesh Dutt, Supervisor and driver of the forklift*) said that he was a dispatch supervisor for 15 years and authorized to drive a forklift since 2014. The forklift was fit for the purpose. He said that he checked the rear and since the path was clear, he reversed. He never saw the plaintiff, until he shouted, as he confirmed in re-examination. He denied that the siren was not working and that he was talking on the phone, while reversing. The forklift was fit for its purpose.

The pallet would have fallen if he was driving at 25 kmph, as contended. The plaintiff could have moved without the pallet jack, as it would have taken time to move it. In cross-examination, DW3 agreed that he came to know that the pallet jack and the plaintiff were behind him only when the plaintiff made a sound. The markings had dust on the day of the accident and were not clear, but were visible. It transpired that he was a dispatch supervisor. He was authorized to drive a forklift occasionally.

The determination

11. It is an agreed fact that the plaintiff suffered injuries in the course of his employment on 16th January,2016.

12. It is not in dispute that the plaintiff was moving a pallet, as instructed by DW1. DW1, in evidence in chief confirmed that he instructed the plaintiff as follows:

> *The pallet was in a place it was not supposed to be. It was in the dispatch area. So I told Vikash* (the plaintiff) *to put the pallet in the right place and after that I came inside the office... The pallet was full of goods.*

13. The plaintiff was facing the pallet with the pallet jack, when DW3, an employee of the defendant reversed his forklift on to him. The onus is then on the defendant to disprove negligence and establish that DW3 took all reasonable care, when reversing the forklift.

14. DW3, in evidence in chief, he said that the accident occurred as follows:

> *I took the forklift to lift a pallet and was reversing. I checked the rear vision mirror. It was clear. I applied reverse gear. I moved 1 meter back then I turned back and looked. It was clear, then I reversed.*
>
> Q *And then?*
>
> A. *After that I heard a "jor awaz"- loud voice.*
>
> Q. *When you heard the loud voice, who was there?*
>
> A *I heard someone saying "hama gor"- my leg.*
>
> Q. *When you said you heard the words my leg what did you do at that point in time?*
>
> A. *I looked back and saw Mr Vikash standing. Then I moved forklift forward.*
>
> Q. *How much?*
>
> A. *One meter in front*
>
> Q. *Immediately after you heard the word my leg, you looked back and you moved forklift in front, correct?*
>
> A. *Yes.*

15. The evidence reveals that DW3 had failed to continue to look back and reverse. In cross examination, he said that he did not see the plaintiff nor the pallet, until he shouted aloud. He said that he would have stopped if someone was there.

16. In my judgment, it is evident that his failure to look out and exercise reasonable care before reversing caused the accident.

17. The evidence of the plaintiff, PW2 and PW3 that there were no visible markings where the accident occurred was not denied by the defence. DW1 said that the markings were not clear, but were visible. DW2 and DW3 said that the yellow markings were dull on the date of the accident, due to dust. DW3 said that he saw the markings, though they were not clear. It transpired that the markings were repainted the week after the accident on Saturday, 16th January,2016 as admitted by the defence.

18. It also transpired in the evidence of DW3 that he was a dispatch supervisor, who occasionally drove a forklift. He said that the accident happened on one such occasion.

19. The evidence with regard to the hazard warning notice and awareness meetings are of no relevance as to what happened on 16th January, 2016. The crucial fact is that DW3 said that he saw the plaintiff and the pallet jack only after he was alerted by the plaintiff's loud cry. It was only then that he became aware that he had reversed onto him.

20. In my view, the question whether the driver was driving at an applicable speed limit or the siren was not working are not defences to allegations of negligence, if he failed to keep a proper look out before reversing, as in the present case.

21. Calanchini AP (as he then was) in ***Nasese Bus Co. Ltd v Chand,*** [2013] FJCA 9; Civil Appeal ABU 40 of 2011(8 February,2013) at paragraphs 23 to 24 stated:

> *Furthermore, in my judgment, it is not a defence to an allegation of negligence in the form of driving too fast under the circumstances to claim that the driver of the bus complied with the applicable speed limit. It may well be that even driving at a speed limit of 8kph is excessive under the circumstances.*
> ***I am satisfied that the learned Judge was entitled to infer that the driver was not driving carefully if he was satisfied on the balance of probabilities that the bus was being driven at an excessive speed under the circumstances and/or the driver was failing to keep a proper lookout.***
> (emphasis added, underlining mine)

22. In the result, for all the aforesaid reasons, I find DW3 was negligent.

23. The defence contends that the plaintiff contributed to his injury. He could have avoided the accident and moved when he heard the siren and sound of the forklift.

24. The plaintiff was performing a task entrusted to him by DW1. That task had to be carried out facing the pallet jack. When it was "*put it to* (him) *you that as an experienced staff of CJ Patel & Co, you could have avoided the accident if you were more careful ?*", he answered:

> *It hit me from the back and what experience there, I cannot see what is happening behind me.*

25. The plaintiff, PW2 and PW3 said that the siren of the forklift was not working. This was disputed by the defendant. The plaintiff said that he did not hear the sound of the forklift reversing.

26. I reiterate that these factors are not defences to an action for negligence for failing to keep a proper look out when reversing.

27. In ***Gani v Chand,*** [2006] FJCA 65;Civil Appeal No. ABU0117 of 2005 (10 November 2006) the judgment of the Court of Appeal stated:

> *The basic principle of contributory negligence is that, when a court is awarding damages to the plaintiff for injuries caused by the defendant, it may reduce the award if the plaintiff can be shown to have contributed to the injury by some negligence on his part. However, whilst the liability of the defendant arises from a duty towards the plaintiff, the assessment of contributory negligence is not based on a similar duty on the plaintiff towards the defendant. It was explained by Lord Simons in Nance v. British Columbia Electric Railway Co. Ltd [1951 AC 601, 611:*
>
> > *"The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the plaintiff to take due care, is, of course, indubitably correct.* ***But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured part to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the injury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury.***"

28. I do not find that the plaintiff was contributory negligent. I hold the accident took place because of the sole negligence of DW3, in the course of his employment. It follows that the defendant, as his employer is vicariously liable.

29. The defendant had a duty, both at common law and in terms of the Factories Act, to take all reasonable care to ensure that the plaintiff was not injured. Section 9 of the Health and Safety at Work Act requires every employer to ensure the safety at work of his workers.

30. In ***Kumar v Fletcher Construction Fiji Ltd,*** (1999) FJHC 124 Pathik J stated :

> *It is the common law that a employer has a duty to take reasonable care for the safety of his workmen in all the circumstances of the case. This duty exists whether the employment is inherently dangerous or not. The employer's duty of reasonable care is the ruling principle.*

31. Pathik J cited Lord Keith in ***Cavanagh v Ulster Weaving Co. Ltd,*** [1960] AC 145 at 166 as follows:

> ***..an employer is bound to take reasonable care for the safety of his workmen, and ..the question is whether the circumstances are such as to entitle judge or jury to say that there has or has not been a failure to exercise such reasonable care.***(emphasis added)

32. In my judgment, the defendant failed in its duty to provide and maintain a safe and proper system of working, adequate supervision and to take adequate precautions for the safety of the plaintiff. The plaintiff was exposed to a risk of damage or injury of which the defendant knew or ought to have known. I conclude that the defendant is liable in negligence for the accident and its consequences.

Injuries suffered

33. The plaintiff said that he was in severe pain in the aftermath of the accident. On a scale of 1 to 10, he experienced pain at the highest level. He was operated on multiple occasions . It transpired in his cross examination and the evidence of PW5,(*Dr V. Scott Buadromo, Surgeon, CWM hospital*) that he was initially hospitalized the CWM hospital for 1 month and ten days, as pleaded. After he was discharged, the pain eased to a level of 7. He stayed in his mother in law's house, as his house was in a squatter area on a low hill in Khalsa Road. His wife and mother in law looked after him. His sex life was affected. He cannot play soccer. He was admitted once again on 30th January, 2018 for 4 to 5 days when his leg was operated. He visits clinic every two weeks. The next clinic day was 29th January, 2019. He said that he continues to be in pain.

34. PW4,(*Ravina Sharma, the plaintiff's wife*) said that she was 7 months pregnant when the plaintiff met with the accident. The plaintiff stayed at her mother's house, as their house was on low ground and he was unable to walk because of the rod in his leg. She looked after him, as he needed care. He was unable to sleep. They returned to their home 9 months later. Their sex life was affected. The defendant provided her transport on some occasions.

35. PW5,(*Dr V. Scott Buadromo, Surgeon, CWM hospital*) confirmed that the plaintiff underwent multiple surgeries. His left leg had a "*Tranversedmidshaft Tibial-fibular fracture*". The injury hit his bone at 90 degrees. He suffered compartment syndrome and underwent "*external fixation*"-scaffolding of bones. There is a high risk of psychological pain, but this was not assessed. He will get arthritis in his early 50's. He can mobilise with a single crutch. There was bone healing, but he was operated once again on 31st January,2018 and a rod was inserted in his leg. He continues to be treated as an out-patient. The chances that he will improve is a "*dilemma*".

36. The plaintiff's medical report of 28th January, 2016 reads as follows:

> *He presented with pain of the left lower limb and decreased range of motion of the same limb. Om examination the left leg was noted to be deformed and very tender to palpation.*
> *The neuro-vascular component of the left leg was intact.*
> *An x-ray of the left leg showed that he had a Left Tranversed midshaft Tibial-fibular fracture. (shatzker V).*
> *Mr. Kumar was treated with a long leg cast on the 19th of January, 2016. On the 27th of January his fractured bones had become infected and required debridement. He then was commence on intravenous antibiotic.*
> *He will be further admitted to treat the current bone infection and as for his prognosis he is looking at 6 months from 27th of January for bone healing and physiotherapy.*

37. The report of 14th September, 2017 states:

> ***The above patient was admitted to CWM Hospital on multiple occasions since January 2016. .. .Since then he has had a long hospital stay and underwent multiple surgery. He still attends special outpatient clinics under the orthopedic team. It has been 20 months since the accident and Mr. Kumar had reached maximum Medical Improvement for his current condition.*** *Given that his major fractures have not healed yet, further options of surgery has been discussed. These will require more hospitalization and carry their own risks of complications and failures. Currently Mr. Kumar has a Ratable impairments. Using AMAS guide to the assessment of permanent Impairment we can continue these impairments appropriately. Using table 17-5 Lower Limb Impairments* ***due to gait derangements Mr. Kumar meets criteria for Moderate impairment requiring the routine use of crutches is 30% of Whole Person Impairment.*** (emphasis added)

Damages

38. In determining damages, it is necessary to consider general level of comparable awards.

39. In ***Chand v Courts(Fiji) Limited and Sheik Mohammed Amin,*** Civil Appeal No: ABU0031 of 2012 (2 October,2015) the Court of Appeal upheld an award of general damages of $ 85,000, where the plaintiff was assessed with 18% whole person impairment. He had suffered back injury and could only walk with crutches.

40. The principles laid down in ***Chand's*** case to determine damages for pain and suffering was followed in ***Fiji Forest Industries Ltd v Naidu,***[2017]FJCA 106; ABU 0019.2014 (14 Sept 2017). Jameel JA at para 64 noted that the sum of $85,000 was awarded in 2012 and increased the general damages of $60,000 to $ 90,000 for 29% whole person impairment.

41. In ***Nasese Bus Co. Ltd v Chand,*** (*supra*) the victim had suffered a "*crushed injury fracture of left leg with a degloving injury to right thigh*". Scarring and progressive arthritis was apparent. Permanent incapacity was assessed at 14%. Calanchini P stated at paragraph 105:

> ***I do not consider that sufficient regard has been given to the future pain and suffering that will be suffered by the Respondent due to progressive arthritis. She continues to complain of pain. There is unchallenged medical evidence that is consistent with the pain that the Respondent claims she is experiencing. The arthritis is progressive and so is the pain. I consider a sum of $90,000.00 to be appropriate in this case.***(emphasis added)

42. The plaintiff's medical report of 27th December,2012, provides that he has a physical impairment of 30%. His gait is deranged. PW5 said that all his activities of daily life such as having a shower, going to the toilet and catching a bus are diminished. He cannot sit for long. He continues to be treated as an out-patient.

43. The plaintiff has undergone pain and suffering. He has undergone multiple surgeries. He has great difficulty in walking and has to use crutches. The crutches were provided by the defendant. He cannot stand for long. The medical evidence that he will face an onset of arthritis in his 50's was unchallenged. His sex life was affected. He can no longer play soccer. With respect to loss of amenities, damages must also compensate the plaintiff for no longer being able to do the things he was accustomed to do.

44. In the light of the principles applicable to assessing damages, I assess the general damages for pain and suffering and loss of amenities of life in the circumstances of this case at $ 110,000.00 (One hundred and ten thousand dollars).

Special damages

45. The plaintiff gave evidence in respect of his claim for special damages as pleaded. He claims $ 1000 as transport and $1200 for medication totalling a sum of 2,200.00. He said that the defendant did not provide transportation on every occasion.

46. Although there were no receipts produced for travel expenses, the evidence established that the plaintiff had to travel to hospital and clinic on several occasions. The defendant provided transport on some occasions. The plaintiff testified that he was in pain and takes Brufen.

47. In ***Narendra Kumar v Sairusi Drawe, Minister for Home Affairs and Auxillary Army Services and The AG,*** [1990]36 FLR 90 at page 95, Palmer J stated:

> *Notwithstanding that not a single receipt has been produced in evidence I am satisfied from the Plaintiff's evidence that he paid those amounts*

48. I do not regard the claim for transport and medication to be unreasonable. I allow the claim of $2200.

Future earnings

49. The next claim is for loss of future earnings.

50. The plaintiff testified that he had studied up to Form 4 and did not have any other qualification nor a trade certificate. This evidence was not disputed.

51. It was put to the plaintiff by counsel for the defendants that he earns from playing "*dholak*", a musical instrument. The plaintiff said he played once in 2018. It was also put to the plaintiff that he can do light work. The plaintiff's response was that he cannot stand.

52. The medical evidence provides that he cannot do security work nor cleaning, as he would not be able to walk nor stand. This evidence was unchallenged.

53. PW5 said that he could engage in employment of a light work which entails sitting down.

54. In my view, it is unlikely that he would find the suggested employment, given his educational level. He was an Aisle Supervisor at the defendant.

55. A plaintiff is entitled to claim damages for his normal expectation of his working life, subject to a cutback for the contingencies and vicissitudes of life.

56. In ***AG v Suruj Narayan***,(ABU 0057 of 2008) Calanchini J (as he then was) cited the following passage from the decision of the House of Lords in ***Wells v Wells***, [1999] 1 AC 345 at paragraph 66:

> *A plaintiff who has been deprived of earning capacity, whether in whole or in part,has lost the chance of exploiting that capacity to the full... In most instances, the chance of so exploiting the capacity is high and this is reflected in the approach taken by the courts, which is usually to assume that it would have been exploited to the full, at least to the normal retirement age. That one hundred per cent probability is then discounted by the chances of its not being exploited due to the normal contingencies of life.*

57. Wati J in ***Eta Naqeletia v Kumar***,[2012] FJHC 29;HBC 19.2010(20th January,2012) used a multiplier of 8 for a 46 year old fish vendor.

58. In ***Fiji Forest Industries Ltd v Naidu,*** (*supra*) Jameel JA used a multiplier of 11 for a 41 year old casual labourer.

59. The plaintiff was 38 years old when he befell the accident. He has no known skill. In my judgment, a multiplier of 12 years is appropriate.

60. It transpired in the plaintiff's cross-examination that he had been paid two-thirds of his salary till June, 2018.

61. It is an agreed fact that the plaintiff's weekly salary was $ 117.95 net. In my judgment, he is entitled to a sum of $ 73600 (12 x 52 x 117.95) as loss of future earnings.

62. On the same basis, he is entitled to the employer's contribution of a sum of $ 5890.00($ 9.44 x 52 x12) for loss of future FNPF.

Interest

63. The plaintiff has claimed interest. Interest on general damages is awarded to compensate a plaintiff for being kept out of the capital sum. In the exercise of my discretion, I award interest at 6% per annum on the general damages awarded from date of service of writ(19th January,2017) to date of trial and 3% per annum on special damages awarded from date of accident to date of trial .

64. ***Orders***

The total sum awarded to the plaintiff as damages is $205022.00 made up as follows:

General damages	110000.00
Interest on general damages	13200.00
Special damages	2200.00
Interest on special damages	132.00
Loss of future earnings	73600.00
Loss of future FNPF	5890.00
Total	$ 205022.00

There will therefore be judgment for the plaintiff against the defendant in the sum of $205,022.00 together with a sum of $ 4000 payable by the defendant to the plaintiff, as costs summarily assessed.

HIGH COURT OF FIJI SUVA

A.L.B.Brito-Mutunayagam
Judge
26th April, 2019