

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No: HBC 270 of 2019**

**BETWEEN** : **SIMIONE MALEWA** of Nabitu Village, Tailevu, Unemployed

**PLAINTIFF**

**AND** : **GREEN GOLD POST & POLE LIMITED** of limited liability company  
having its registered office at Princess Road, Sawani, Nausori.

**DEFENDANT**

Counsel: Plaintiff: Mr. Singh. D  
Defendant: Mr. Goundar. P  
Date of Hearing: 13.2.2023  
Date of Judgment: 02.05.2023

**JUDGMENT**

**INTRODUCTION**

1. Plaintiff filed this action seeking damages for loss of sight of one eye. The injury to Plaintiff was due to a wood speck ejected from Pine wood Tiller (the Tiller) of Defendant entering the left eye of Plaintiff. Plaintiff was working as Pine Post Tiller of Defendant when injury happened. Retina of left eye of Plaintiff had got completely detached after small wood speck, had got attached to Retina. Defendant's position was that Plaintiff was a hired person of an independent contractor, but stated all the equipment needed were provided by Defendant. Plaintiff denied this and stated that he was paid wages by Defendant directly depending on work done. Irrespective of whether Plaintiff was employed by Defendant or working for an independent contractor, Defendant owed a duty of care for all the workers from its machines. Defendant is admittedly a large scale Pine wood post supplier and the injury was from the Tiller used to remove bark of Pine wood harvested.

**FACTS AND ANALYSIS**

2. At the Pretrial Conference following facts were admitted

- a. Defendant is a limited liability company and its business is making timber poles.
  - b. 'On 19.10.2016 while Plaintiff was dressing a post pillar on the Defendant's premises a piece of post ship struck his left eye causing him injury and damage..'
3. Plaintiff gave evidence and stated how his left eye got injured while working with Defendant's premises doing his usual work of tilling Pine posts using the Tiller. According to Plaintiff he was employed by Defendant and he was paid directly, by the Defendant as Pine post tiller.
4. Plaintiff could not submit a contract of employment but there was no dispute he worked in Defendant's premises using its machine to make Pine posts, which is the product made by Defendant for sale.
5. According to statement of defence 'Plaintiff was not an employee of the Defendant but was hired as an independent contractor through Samuela Vikaitoga.'. This fact was denied by Samuela Vikaitoga who is the brother of Plaintiff. According to him Plaintiff was directly paid by Defendant, depending on work done as a Tiller of Pine Posts.
6. According to Defendant's Director, Krishan Murti, Plaintiff was employed previously with Defendant as an employee but this made them less efficient. According to him, he hired Plaintiff as an 'independent contractor' and paid on the basis of number of Pine posts that were cleaned and this had increased 'productivity' of Defendant.
7. He had admitted employing Plaintiff by Defendant earlier. If so where was the employment contract and how was it terminated. Admission of employment and failure to prove termination before alleged employment as 'independent contractor', proves on balance of probability that Plaintiff continued as an employee of Defendant but, under different method of calculation of wages depended on productivity.
8. While recognizing Defendant's right to employ a suitable management decision, to improve its efficiencies it cannot act negligently as there is a duty of care from a dangerous machine such as the Tiller which is the main equipment used to make Pine posts.
9. Without prejudice to above there was a duty of care to Defendant towards Plaintiff who operated the Tiller. In *Revill v Newbery* [1995] EWCA Civ 10; [1996] 1 All ER 291 it was held that in a personal injury claim for damages for negligence was not debarred from making any recovery by the fact that the claimant was a trespasser, as long as there was likelihood of injury.
10. Plaintiff in this action is not a trespasser hence the negligence of Defendant towards users of its main machine makes Defendant liable for damages.

11. For the Defendant an office Clerk Tania gave evidence and stated that she provided safety gear to the workers including Plaintiff. She said on the day of the incident Plaintiff had told her that he lost his safety glasses when he removed it to drink water. She stated that payments were made depending on the number of logs cleared. She admitted that workers including Plaintiff were allowed to work from morning to night, to achieve their targets.
12. She was not able to provide any written record of purchase of such safety gear or any records as to supplying such safety gear to Plaintiff on the day of incident or even prior to that.
13. There was not even a sign board to show that the area around the Tiller was restricted to access operator and others in vicinity required constant wearing of safety glasses. This shows gross negligent manner Defendant allowed its machines to operate. This negligent act was a breach of duty of care towards all probable visitors to the premises including and not limiting the operator of the Tiller.
14. Plaintiff in his evidence stated that the day before the incident he had worked for more than twelve hours and finished work at 9 pm and he had continued to work following day. According to him he had asked for safety glasses from Tania who gave evidence, but was told that she had not received and or they were not available with her. He said because of that he did not ask for safety glass on the day of the incident.
15. Tania also said that she only goes around once and apart from her there was only one office clerk working inside the office premises. The Tiller was not constantly monitored or even the area around that machine was not supervised, with necessary restriction and or with signs or boards.
16. There were no records of such visitation and or inspection of the Tiller when it was operational. This shows Tania's evidence on these facts cannot be accepted on balance of probability. Since she was employed with Defendant was not truthful about providing safety gear.
17. It is not disputed that Defendant provided premises and also machinery for the work. Harvested Pine stems were also provided but payment was made on number of Pine pillars that were tilled using its machine located in the premises of Defendant. The calculation of wages depending on the productivity is not a determinative factor to consider nature of relationship between Plaintiff and Defendant and or to the consideration of duty of care.
18. Krishna Murti admitted that the Tiller required supervision. It belongs to Defendant and it was installed in the premises and its maintenance as well as safety is entirely with Defendant. Plaintiff feeds the machine cut Pine wood and bark was removed from the

machine. So this machine is the key component of Defendant's business other than the labour needed to feed it and make Pine Posts. This machine is a permanent fixture in Defendant's factory and it belonged to Defendant.

19. Considering the nature of the machine in his evidence Mr. Murti said that no one was supposed to go in front of the machine, but failed to state whether such instructions were given and or exhibited with restricted area assigned to such a machine. From the evidence it is proved on balance of probability that this machine is an industrial machine that required constant supervision as admitted by Mr. Murti in his reexamination. So it is a dangerous type of industrial machine that needs special training to use it and constant supervision is needed.
20. According to Plaintiff he was one to two meters away from the machine when wood speck entered his left eye. It is not disputed that small parts of wood were ejected from the Tiller and a speck ejected with force from the machine entered the left eye of Plaintiff.
21. Admittedly Defendant had used a payment of wages depended on number of Pine posts made and this had increased the productivity. Any managements method can be employed to increase the productivity but it cannot be done at the expense of primary duty of care towards the workers who operate key machine of Defendant.
22. Defendant is not in a position to deny duty of care to worker due to management style employed to increase the productivity by using a payment dependent on work done.
23. Plaintiff said that he worked for nine hours before injury on that day and the day before he had worked for more than twelve hours. According to Plaintiff he was not provided with safety glasses. Defendant's both witnesses said that safety gear was provided without providing any evidence of such purchases or specifically records of such safety gear being provided to workers including Plaintiff.
24. In the circumstances on the balance of probability there is no proof that safety gear was supplied to Plaintiff on the day of the incident and or supervision of the Tiller by a competent person considering the danger it can pose to operators from airborne chips of wood, when Pine tree stems are cleaned by the Tiller.
25. Plaintiff got injured due to the negligence of Defendant by failure to supervise the Tiller and also operator and also not providing essential safety gear such as safety glasses.
26. In my mind Plaintiff cannot be considered as an independent contractor though he was paid wages depending on the number of Pine posts that were tilled.

27. Defendant admitted that they provided all the equipment needed and Plaintiff was under direct and or indirect control of Defendant. According to Defendant's witnesses Plaintiff could work in the premises using Defendant's tools and machines. Plaintiff only provided labour, and everything else was supplied by Defendant.
28. In *Woodlad vs Essex County Council* 2014 1 All ER 482, held that even employment of independent contractors will not absolve the duty of care if there is special relationship or the work done was dangerous. In my opinion, Plaintiff had satisfied not only one but both requirements.
29. In this instance the work assigned had an inherent danger to workers from the nature of the machine and its flying wood specks around it. There were no supervision of the machine and there were not safety signs or special training or instructions given to the workers. This danger was not mitigated by Defendant, but tried to avoid the liability.
30. Apart from that there is special relationship between the Plaintiff and Defendant considering the nature of the work done by Plaintiff which was a typical employee with sufficient control except the payment was depended on work completed. This is akin to an employment rather than independent contractor. According to Defendant all the tools required including safety glasses were provided by Defendant.
31. Accordingly it is proved that Defendant had a duty of care towards workers who operated its main machine which cleaned, Pine tree stumps to make them Pine Pillars.

#### Assessment of Damages

32. Medical evidence revealed that Plaintiff was suffering from painful left eye and there was excessive pressure on the said eye indicating severe pain. The treatment and medication had relived the pain but there was undisputed evidence that the left eye will be removed in future as the pain cannot be controlled from the medication. Considering the pain and suffering including continuous suffering general damages for pain and suffering is assessed at \$50,000.
33. Plaintiff was born in 1972 and when this injury happened he was 44 years old. According the undisputed medical history of the Plaintiff he was not suffering from any decease including high blood pressure. So considering his good health for assessment of his economic loss, a multiplier of twelve is used considering discounting factors used by courts in assessment.
34. Plaintiff in his evidence said that his weekly wages varied and this can be due to work he could complete and also availability of Pine wood. Considering the variations in the

absence of fixed salary a weekly wage of \$100 is assessed and the multiplicand is 52X100 = 5200.

Future Economic Loss is 12X5200= \$62,400

Special Damages

- 35. Plaintiff in his evidence sought \$500 as travelling cost. He had travelled more than fifty times to the hospital for treatment and there will be more visits considering that it was proved that left eye must be removed in future as medication cannot manage the pain in future. Accordingly cost of travelling is assessed at \$500.
- 36. Similarly Plaintiff also claimed \$800 for medication and for the above reasons this amount is allowed considering the circumstances stated above.
- 37. Cost of this action summarily assessed at \$5,000.

Damages Calculation

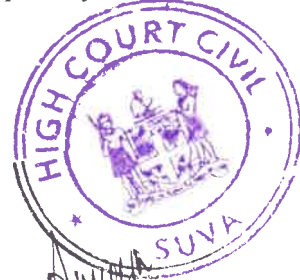
- 38. General Damages for pain and suffering \$50,000.
- 39. For this amount to be granted following considerations were made
  - a. Plaintiff had pain in blind eye.
  - b. Pain was treated with oral medicine.
  - c. Pain cannot be managed only with medicine and only remedy was to remove the blind eye, which will cause further pain and suffering.

|   |                  |
|---|------------------|
| For \$50,000 Interest 6% for 1282 days- (aprox)       | \$10,537         |
| <b>Loss of future earnings</b>                        |                  |
| Multiplicand (weekly wage (\$100) for 52 weeks) 5,200 |                  |
| Multiplier 12   |                  |
| Loss of future earnings is 12 x 52,000                | \$62,400         |
| <b>Special Damages</b>                                |                  |
| Medical Expense \$800                                 |                  |
| Travel Expense \$500                                  | \$1,300          |
| <b>Total</b>  | <b>\$124,537</b> |
| Cost of this action is summarily assessed \$5,000     |                  |

**FINAL ORDERS**

- a. Defendant is ordered to pay Plaintiff a damage of \$ 124,537.
- b. Cost of this action is summarily assessed at \$5000 to be paid by Defendant within 21 days.

**DATED** this 2<sup>nd</sup> day May, 2023.



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**Justice Deepthi Amaratunga**  
**Judge High Court, Suva**