

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. 49 of 2009

BETWEEN : **NILESH RAM** father's name Ram Magan of Korokoro, Sigatoka, Chef.

PLAINTIFF

AND : **CORAL SURF RESORT LIMITED** a limited liability company having its registered office in Pricewaterhouse Coopers, 52 Narara Parade, Lautoka trading as **WARWICK FIJI RESORT AND SPA** of Korolevu, Sigatoka.

DEFENDANT

R U L I N G

INTRODUCTION

- [1]. Before me is an application for interim payment by the plaintiff filed on 17 September 2012 pursuant to Order 29 Rules 10 and 11 of the High Court Rules 1988 and under the inherent jurisdiction of this court. The application is supported by an affidavit sworn by the plaintiff on 14 September 2012. The plaintiff deposes that on 26 June 2008, he was injured during and in the course of employment with Coral Surf Resort Limited. He claims common law damages as well as damages under the Workmens' Compensation Act (Cap 94). It is alleged that as a result of injuries he suffered, he has become paralysed from the waist down which has rendered him a paraplegic (see paragraph [11] below for some insight into the magnitude of what actually happened).
- [2]. The plaintiff annexes three medical reports to his affidavit. The first report by a Dr. Chute dated 22 August 2008 sets out that he, Dr. Chute, had examined the plaintiff on 03 July 2008. On that occasion, Dr. Chute noted the plaintiff to have "*lower motor neuron, flaccid motor paralysis of his lower limbs secondary to electrocution from workplace injury on 26 June 2008*".
- [3]. Dr. Chute then writes that the plaintiff's "*symptoms have not improved since his last examination as mentioned...*" and that the plaintiff "*has been confined to wheelchair for mobilisation and has been having erectile dysfunction as well*".

- [4]. Dr. Chute assesses the plaintiff's incapacity as follows:
- | | |
|-----------------------------------------------------------------------------------------------------------------|-----|
| (i) <i>Motor and Sensory function both lower limbs: Cannot stand without a prosthesis or the help of others</i> | 65% |
| (ii) <i>Sexual Function:</i>
<i>No sexual Function</i> | 30% |
| (iii) <i>Total incapacity</i> | 95% |
- [5]. The second report written by a Doctor Mareko dated 18 November 2009 repeats Dr. Chute's observations. There was also another report written before Dr. Mareko's by a Dr. Bauleka (dated 10 July 2008) which appears to be consistent with the above two.
- [6]. The plaintiff deposes that he is in a desperate financial position. He has a wife and a child aged 6 to look after. There is no income in the family as his wife does not work and they have been relying on their relatives for support.

DEFENDANT'S POSITION

- [7]. The defendants have filed an affidavit of one Nita Smith to oppose the application for interim payment. Smith does not deny that the plaintiff was injured at work during and in the course of employment. However, she insists that the accident occurred as a result of an "Act of God", which, usually, is a general defence in tort law.
- [8]. When an alleged tortfeasor raises that defence, he or she is actually saying: "*whatever happened is a consequence of furious working of nature and was not foreseeable or preventable by me, so, I cannot be liable in negligence*".
- [9]. Essentially, what Smith deposes, and which appears to be common ground between the parties, was that on the day in question, 16 June 2008, the plaintiff, was at work at the defendant's Wicked Walu Restaurant, where he was assistant cook. I get the impression that the location of the restaurant in question, being in very close proximity to the sea, makes it very prone to sea surges. On the day in question, there was a sudden sea surge which swept right through into the restaurant.
- [10]. I gather that the amount of water in the restaurant was above waist level. The surge apparently, amongst other things, caused an electrical accident,

not to mention the chaos that resulted when items were swept and thrown about in the restaurant.

- [11]. The Head Executive Chef of the Restaurant, a Mr. Chris Zarkades, gave a very graphic account of the resulting calamity in a written statement he gave to the Fiji Electricity Authority:

Thursday 26-06-08 was the opening of the new wicked walu menu. We had a busy night with around 50+ bookings and some walk ins. Everything was going well it was 900 p.m. with 3 tickets left to prepare as we started getting some overspray from large waves hitting the restaurant from the southwest. I continued cooking trying to complete the three orders in front of me, as I was plating a plate I heard the screams of the guests. I looked up to see a wall of water engulf the lower part of the restaurant and the kitchen. It was quite a force and very scary as all the large equipment and tables were being lifted and thrown about by the large wave. I was positioned between the grill and the large stream table that was lofted up and pinned my chest against the grill, water was up past my waist and all the electrical sockets and light fixtures were popping and exploding. I was concerned about being electrocuted. I was able to push the stream table away from myself and I climbed up over the (sic). I saw one lady guest still on her back as she and her husband were washed off their seats. I assisted the others to clear the tables that was piled up around them and we got them up to higher part of the dining area. I then found that two of my staff were also injured, Ranesh (cook) said he had a shock to the arm and was smashed by debris as well as Nilesh (cook) had a lower leg injury. Specific details will need to be given by them.....I have a very sore chest and back and neck pain.

- [12]. The defendant also pleads contributory negligence.

ALLEGED MALINGERING

- [13]. The defendant alleges too that the plaintiff is malingering. On this, the defendant relies on an affidavit of a Dr. Talonga who medically examined the plaintiff on 09 September 2010.
- [14]. Dr. Talonga has misgivings about the injuries alleged by the plaintiff. He observes that, in the case of paralysis below the waist, one would expect, amongst other things, muscle wasting. He says that the plaintiff did not have any muscle wasting of his lower limbs.
- [15]. Dr. Talonga also opines that the medical reports prepared by the plaintiff's doctors only document the plaintiff's subjective symptoms. What these reports do not contain is a thorough neurological examination.
- [16]. It is not clear to me whether Dr. Talonga himself did carry out a neurological examination, or, if he did, whether it was thoroughly done.

- [17]. Dr. Talonga says that he did examine the plaintiff on 03 July 2012 but did not see any sign of deterioration or muscle wasting.
- [18]. The defendant also relies on a report of a Mr. Anirudh Singh, an investigator engaged by its insurer, QBE Insurance (Fiji) Limited, who went and saw the plaintiff at his own house and who expressed his misgivings about the plaintiff's alleged injuries based on his own observations.

PLAINTIFF'S REPLY

- [19]. The plaintiff says that the defence of "Act of God" is not available in the circumstances of this case because the waves had been entering the restaurant for about an hour from 8.00 p.m. to 9.00 p.m. The sea had turned rough right at the beginning and only got rougher as the night wore on. The plaintiff says that he did warn the Head Executive Chef but to no avail. He seems to argue that the surge was foreseeable, and that the mishap was preventable and avoidable as it was within the power of the Head Executive Chef to call the shots accordingly.

...after about 8pm the sea was getting very rough and some waves were entering the Restaurant.

..by 9pm big waves were entering inside the kitchen area.

...I was scared and worried. I told my boss Chris Zarkades... that we should immediately stop work and move out of the area. Not only the workers but the guests were in danger too.

My boss refused to listen to me and said we should continue working as only a few orders were left. This is not an Act of God, but a considered decision by a human being, i.e. my boss and an employee of the Defendant.

- [20]. The plaintiff vehemently denies the allegations of malingering. He says that Mr. Anirudh Singh had come to his (plaintiff's) house on a witch-hunt mission and would say the things he said.

THE LAW

- [21]. An interim payment is an advance payment on account of any damages which a defendant may be held liable to pay. Under Order 29 Rule 10 (1), the plaintiff may seek interim payment "at any time after the writ has been served on a defendant and the time limited for him to acknowledge service has expired". Order 29 Rule 11 (1) (in its relevant part) provides that an

order for interim payment in respect of damages may be made if the Court is satisfied of either of the following:

- (a) that the defendant has admitted liability for the plaintiff's damages, or
- (b) that the plaintiff has obtained judgment against the defendant for damages to be assessed; or
- (c) that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the defendant

[22]. In a personal injury case, an order for interim payment will only be made if, in addition to the Court being satisfied of the existence of any of the above (see paragraph 13 (a) to (c)), the Court is satisfied that the defendant is either:

- (a) insured in respect of the plaintiff's claim;
- (b) a public authority; or
- (c) a person whose means and resources are such as to enable him to make the interim payment.

(see Order 29, Rule 11 (2))

[23]. In this case before me, this court must be satisfied of two things. Firstly, it must be satisfied of the requirements of Order 29 Rule 11(1)(c). In other words, that if the action were to proceed to trial, the plaintiff would on the balance of probabilities, obtain judgment for substantial damages against the respondent.

[24]. Secondly, this court must be satisfied that the defendant is insured in respect of the plaintiff's claim (as per Order 29 Rule 11(2)(a)).

APPLYING THE PRINCIPLES

[25]. As to whether the defendant is insured in respect of the plaintiff's claim, the affidavit filed in opposition to the application was sworn by Smith, who holds the position of Claims Officer at QBE Insurance (Fiji) Limited. Smith deposes at paragraph 3 of her affidavit that "*this proceeding is being defended by QBE on behalf of the Defendant under an insurance policy*". Hence, this satisfies the Order 29 Rule 11(2)(a) limb.

[26]. On whether, if the action were to proceed to trial, the plaintiff would obtain judgment for substantial damages against the respondent, it seems beyond question to me that the plaintiff was injured on the day in question and that this all happened during and in the course of employment. The

only issue is the extent of injury suffered. I accept that the allegation of malingering is a valid one for the defendant to make, considering the observations of Dr. Talonga. I also accept that this is a matter of medical opinion at the end of the day which is a triable issue. But I am also mindful that the plaintiff is pleading common law damages and, in the alternative, an award under the Workmen's Compensation Act.

[27]. As for the observations of Mr. Singh, the investigator that QBE hired, all he seems to do is make observations on what appears to me to be the plaintiff's tendency to be guarded and private and to draw conclusions from it.

[28]. As to the defence of Act of God, I accept that this may be a valid defence to be raised by Coral Surf in respect of the plaintiff's common law claim based on an allegation of negligence and/or breach of duty. However, the defence may not be available against a claim based on the Workmen's Compensation Act (Cap 94). I say this because, after all, the scheme of the Workmen's Compensation Act, as provided under section 5, is to make the employer liable for all *personal injury by accident* in the workplace.

*Employer's liability for compensation for
death or incapacity resulting from accident*

5.-(1) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter provided, be liable to pay compensation in accordance with the provisions of this Act and, for the purposes of this Act, an accident resulting in the death or serious and permanent incapacity of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instruction from his employer, if such act was done by the workman for the purposes of and in connexion with his employer's trade or business:

Provided that-

(a) the employer shall not be liable under this Act in respect of any injury which does not incapacitate the workman for a period of at least three consecutive days from earning full wages at the work at which he was employed;

(b) if it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed:

Provided that where the injury results in death or serious and permanent incapacity, the court on consideration of all the circumstances may award the compensation provided for by this Act or such part thereof as it shall think fit.

(2) No compensation shall be payable under this Act in respect of any incapacity or death resulting from a deliberate self-injury.

(3) No compensation shall be payable under this Act in respect of any incapacity or death resulting from personal injury, if the workman has at any time represented in writing to the employer that he was not suffering or had not previously suffered from that or a similar injury, knowing that the representation was false.

[29]. Under section 5, all that the plaintiff need prove is that he suffered *personal injury by accident* which arose of his employment and that the injury occurred during and in the course of employment (see **Carpenters (Fiji) Ltd v Labour Officer for Katarina Esita** 36/84 FCA).

[30]. As for the definition of “*personal injury by accident*”, **The Workmen's Compensation Acts 1925 to 1938** by Willis 32 ed defines “accident” in the context of “personal injury by accident” as follows:

"The word "accident" does not necessarily involve the idea of something fortuitous and unexpected as formerly held (HENSLEY v WHITE (1900) 1 Q.B. 481. It includes injury caused by over-exertion in the ordinary course of employment (Fenton v. Thorley, [1903] A.C. 443; 5 W.C.C. 34 Digest 266, 2264). The word "accident", is used in the Act "in the popular and ordinary sense of the word as denoting an unlooked for mishap or an untoward event which is not expected or designed (per LORD MACNAGHTEN, *ibid.*, at p.448); or as denoting or including "any unexpected personal injury resulting to the workman in the course of his employment from any unlooked-for mishap or occurrence" (per LORD SHAND, *ibid.*, at p.451); or "any unintended and unexpected occurrence which produces hurt or loss" (per LORD LINDLEY, *ibid.*, at p.453).

[31]. In other words, in my humble view, in a contract of indemnification, including a contract of indemnification for a workmen’s compensation claim, an “Act of God” is irrelevant because the insurer assumes the risk of personal injury by accident. In other words, so long as the so-called “Act of God” has resulted in a *personal injury by accident*, it would appear to me that the insurer will be liable to the employer. This point was not argued by either counsel.

[32]. Having said that, I make the general observation that, in a contract of indemnification, an Act of God such as in a flood insurance case, may in fact be the central risk assumed by the insurer. I guess, the point is, if the defendant was serious with its argument on the point, it could have at least attached the insurance contract in question to substantiate its case theory.

CONCLUSION

- [33]. I am inclined to grant interim payment. But I will exercise caution and state here clearly that this interim award is not based solely on the relative strength of the plaintiff's claim under the Workmen's Compensation Act. I say this to avoid the complication that may arise under section 25 of the Workmen's Compensation Act and the potential argument that, if this interim award was based on the Workmen's Compensation Act, then the plaintiff would be precluded from pursuing a common law claim.
- [34]. This point was not raised by counsel but it will serve us all well to clarify it at this point.
- [35]. After taking all into account, I make an award of \$10,000 in interim payment to be paid by the defendant to the plaintiff within 14 days.
- [36]. Costs in the cause. Case adjourned to **14 February 2014** for mention at 8.30 a.m. before Master Ajmeer.

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Anare Tuilevuka
JUDGE
07 February 2014