

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

**CIVIL ACTION NO. HBC 284 of 2009**

**BETWEEN** : **Sushil Chand** of No. 44, Maqbool Road, Nadera.

**Plaintiff**

**AND** : **Aldex Trading** a liability company having its  
registered office at 71, Moala Street, Samabula.

**Defendant**

**COUNSEL** : Mr. D. Singh for the plaintiff.  
Mr. E. Narayan with Ms. K. Singh for the defendant.

**Dates of Hearing** : 12<sup>th</sup> & 13<sup>th</sup> April, 2016.

**Date of Judgment** : 17<sup>th</sup> May, 2016

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**JUDGMENT**

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[1] The plaintiff instituted these proceedings by way of writ of summons seeking special damages in a sum of \$5808, general damages for pain and suffering and loss of amenities of life, damages for past and future economic loss, costs for

future care, interest at the rate of 6% on general damages and at the rate of 3% on special damages and costs of the action. The plaintiff's claim for damages is based on negligence of the defendant.

- [2] The evidence of the plaintiff is that he was an employee of the defendant since its inception and on 27<sup>th</sup> November 2006 while on duty he sustained injuries. The defendant was engaged in manufacturing cabinets. On the day he sustained injuries while the plaintiff and the other workers were unpacking granite sheets one of the slabs slipped and struck his leg causing a fracture. Later he changed his position and said five slabs fell on his leg.
- [3] He was then admitted to the hospital and a surgery was performed on his leg. The x-ray picture tendered in evidence marked as "P2" clearly shows the injury caused to his leg. The defendant does not deny the fact that injury was caused to the plaintiff's leg. In the statement of defence the defendant only states that it can neither admit nor deny that fact in the absence of further particulars.
- [4] In cross-examination the plaintiff admitted that the defendant Aldex Trading was owned by his wife. According to his evidence the plaintiff was the General Manager, Production and Marketing. The fact that the plaintiff was employed by the defendant has been admitted by the parties at the pre-trial conference. The defendant also testified as to the difficulties he had to undergo due to the injuries and also on loss of income.
- [5] Before considering the evidence on damages the court must first ascertain whether the defendant owed a duty of care to the plaintiff and whether the defendant acted in breach of such duty.
- [6] On 27<sup>th</sup> November 2006 the plaintiff was working away from the usual place of business with other workers who were involved in making pantry cupboards and wardrobes. For this purpose certain number of granite sheets were transported to the place where the accident occurred and at the time the injury was caused the plaintiff and others were removing the granite sheets into the building from where they were unloaded. In the course of removing the granite



sheets one slipped and fell on the plaintiff's leg. He testified father that while they were removing the granite sheets two other were holding on to the remaining sheets and the working environment was safe.

- [7] The plaintiff's case is that the defendant negligently or in breach of Regulations 40(1) & (2) and 42(1) & (2) of the **Health and Safety at Work (General Workplace Conditions) Regulations 2003** allowed the plaintiff to carry heavy loads and also failed to ensure that work practices that involve manual handling are so designed, implemented and maintained as to be safe without risk to health and safety.
- [8] Regulation 42(1) & (2) of the Health and Safety at Work (General Workplace Conditions) Regulations 2003 provides as follows;
- (1) No employer shall require any worker to lift, carry, or move any loads so heavy that its lifting, carriage or movement would be likely to injure the worker.
  - (2) Where the maximum permissible weight which may be transported manually by a worker is more than 25kg, practicable measures shall be taken as quickly as possible to reduce it to that level except for work at an airport, where the maximum permissible weight which may be transported manually by a worker is set at 30kg.
- [9] Regulation 40(1) provides that the employer shall ensure that the manual handling that is likely to be a risk to health and safety is identified and assessed. Regulation 40(2) prescribes the factors which should be taken into account in assessing the health and safety of the workers.
- [10] These regulations impose a duty of care on the employer towards the employees not to make them lift anything the weight of which exceeds 25kg and the workers at the airport the maximum weight they can be required to lift is 30kg per person at a time.
- [11] In the instant case there is no evidence that the plaintiff was required or ordered to lift the granite sheets and to take them inside the building alone.

The evidence reveals that there were some more workers engaged in the same work with the plaintiff and there is no evidence that the plaintiff was required to or it was part of his duty to carry more than the weight prescribed by the above regulations.

[12] It is an undisputed fact that the weight of one granite sheet is much more than 25kg. However, the plaintiff was not carrying these sheets alone. There had been certain other workers to take these sheets inside the building and the sheets that fell on his leg were not the one he was carrying but what was on the ground slanted against the wall. It appears from the evidence of the plaintiff that when they were trying to lift a granite sheet the others that were slanted against the wall had fallen on his leg due to the negligence of the workers who were holding on to them.

[13] The learned counsel for the defendant submitted that it is trite law that a claim in negligence will only succeed if the plaintiff is able to establish;

- (a) that the defendant owed a duty of care to the plaintiff;
- (b) that the defendant breached the duty of care; and
- (c) such breach resulted in causing injuries to the plaintiff.

[14] The notion of duty of care is sometimes used in a separate and more specific sense, namely that for there to be a duty of care in a particular case the harm in question must have been foreseeable to the individual claimant. In *Bourhill v Young* [1943] AC 92, Lord Wright explained that foreseeability is always relative to the individual affected. This raises a serious additional difficulty in the cases where it has to be determined not merely whether the act itself is negligent against someone but whether it is negligent *vis-a-vis* the plaintiff. .... In order to keep conceptual confusion to a minimum, it is normally better to regard duty as giving rise to a *general* or '*notional*' question of this kind, and to leave the issue of whether a *particular* claimant can recover against a particular defendant to the question of causation or remoteness of damage. [**Markesinis and Deakin's Tort Law, Seventh Edition at page 104**].



[15] In **Bourhill v Young** (1943) A.C. 92 it was also held;

A man is not liable in the air. The liability only arises where there is a duty to take care and “where failure in that duty has caused damage”: see per Lord Macmillan in *Donoghue v Stevenson* {[1932] A.C. 562, 618}. In my opinion, such a duty only arises towards those individuals of whom it may be reasonably anticipated that they will be affected by the act which constitutes the alleged breach.

[16] In the case of **The Council of the Shire of Wyong v Shirt and Others** 146 C.W.R. 40 the High Court of Australia made the following observations on the question of duty of care;

In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant’s position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man’s response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant’s position

The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the

question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factor.

[17] In deciding whether the risk was foreseeable the court must consider whether at the time of the accident what the plaintiff was doing was within the purview his duties. It is the plaintiff's own evidence that he was the General Manager, Production and Marketing of the defendant. Although, it is a fact admitted by the parties that the plaintiff was an employee of the defendant, there is no evidence as to the duty the plaintiff was expected to perform. For the court to ascertain that it needs documents such as the letter of appointment and other related documents. The plaintiff was not able to tender any of these documents. In cross-examination the plaintiff stated that he did not have any of these documents including the details of his Fiji National Provident Fund account. In my view, what the plaintiff was doing at the time of the accident was not within the purview of his duties as the General Manager, Production and Marketing.

[18] If the plaintiff at the time of the accident was doing or engaged in kind of work which was outside the purview of his duties it cannot be said that the accident was foreseeable. The plaintiff did not state in evidence the nature of the work he was supposed to do as the General Manager, Production and Marketing. General Manager is an executive post in any establishment. According to the Cambridge English Dictionary the General Manager is a person who is in charge of all or part of an organization or company. Generally, following are the functions of a General Manager in any organization;

1. Oversee daily operations for the business unit or organization.
2. Insure the creation and implementation of a strategy designed to grow the business.
3. Coordinate the development of key performance goals for functions and direct reports.
4. Provide direct management of key functional managers and executives in the business unit.



[19] There is nothing on record to say that carrying granite sheets was part of the plaintiff's duties and if it was not, the defendant does not owe a duty of care to the plaintiff. Assuming that the plaintiff was also required to do the work of this nature while functioning as the General Manager, Production and Marketing it was his duty to create an environment to secure the safety of the workers. Although, it is a fact admitted by the defendant that the plaintiff was its employee there is no evidence that the plaintiff was paid a salary. Although the plaintiff stated in evidence that he was working for his wife who was the owner of the business. Witness Vikash Singh, the accounts clerk testified that the plaintiff was paid \$270 per week but failed to produce any documentary proof to substantiate this position. One does not have to corroborate every piece of oral evidence by documentary proof but when a particular position taken by a witness in the course of his evidence is challenged by the other party there is a burden cast on the party who relies on such evidence to bring additional proof of it. In this case, without any valid reason the plaintiff has failed to substantiate his position that he was only an employee who worked for a salary, to the satisfaction of the court.

[20] In deciding whether the defendant owed a duty of care it is also important to consider the manner in which the accident occurred. The injury was not caused to the plaintiff's leg while they were carrying the granite sheets into the building. According to the plaintiff's own evidence these sheets were slanted against the wall and there had been two people holding on to them to prevent them being fallen but somehow these sheets have fallen on the plaintiff's leg. This evidence is not sufficient for the court to impose negligence on defendant. The defendant is neither a natural nor a juristic person. It is not a company within the meaning of section 4 of the Companies Act (Cap 247). Section 4 of requires minimum of 2 persons to form a company whereas the defendant company is a sole proprietorship registered in the name of the plaintiff's wife. Therefore, if there was any negligence on the part of the defendant the plaintiff who is the General Manager of the defendant and/or his wife, the owner must take the responsibility.

[21] For the reasons aforesaid it is the view of the court that the defendant did not owe a duty of care to the plaintiff and the action of the plaintiff is accordingly, liable to be dismissed.

[22] Since the plaintiff has failed to prove that it was the defendant whose negligence that resulted in causing injuries to him the question of quantum of damages does not arise for consideration.

[23] The court accordingly makes the following orders.

**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 I make no order for costs.



*Seneviratne*

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**JUDGE**

17<sup>th</sup> May 2016.