

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION No. HBC 196 of 2015

BETWEEN : **ANURAG NAIDU** of Narewa, Nadi, Unemployed. **PLAINTIFF**

A N D : **YEES COLD STORAGE SEAFOOD LIMITED** aka **YEES COLD STORAGE LIMITED** is a limited liability company having its registered office at Queens Road, Namaka, P O Box 9252, Nadi Airport.

DEFENDANT

Appearances : Mr D. S. Naidu for the plaintiff
Mr R. Gordon for the defendant

Date of Trial : 18 & 19 July 2017

Date of Submission: 10 November 2017 (plaintiff)

Date of Judgment : 16 February 2018

J U D G M E N T

Introduction

[01] The plaintiff brought this action by issuing a writ of summons dated 6 November 2015, against the defendant claiming damages. His claim arises out of personal

injury he sustained as a result of an accident that occurred at his workplace on 29 July 2013.

Factual Backgrounds

[02] The factual backgrounds may be set out as follows:

- a) The plaintiff was employed as a Warehouse Assistant by the defendant company, which operates a wholesale/retail business.
- b) On or about the 29 July 2013, the plaintiff alleges that he was working in the Warehouse when he was directed by the supervisor to close the freezer door. The supervisor drove a forklift and on the forklift, he placed a pallet and directed the plaintiff to climb and close the freezer door.
- c) It is also alleged that the plaintiff stood on the pallet as directed by the supervisor, raised the same to allow the plaintiff to close the freezer door by pulling it down. In that process, the plaintiff slipped and fell from the pallet when the freezer door landed on his right leg and one of the blades of the forklift badly speared and injured the plaintiff's back and suffered injuries.
- d) The basis of the plaintiff's claim is that he suffered injuries as a result of the negligence of the defendant and/or its agents.

The Law

[03] Section 9 of the Health and Safety at Work Act 1996 (HSW) dealing with the duties of employers to workers states:

“Duties of employers to their workers

9. (1) *Every employer shall ensure the health and safety at work of all his or her workers.*

(2) Without prejudice to the generality of subsection (1), an employer contravenes that subsection if he or she fails-

(a) to provide and maintain plant and systems of work that are safe and without risks to health ;

(b) to make arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage or transport of plant and substances;

(c) to provide, in appropriate languages, such information, Instruction, training and supervision as may be necessary to ensure the health and safety at work of his or her workers and to take such steps as are necessary to make available in connection with the use at work of any plant or substance adequate information in appropriate languages -

(i) about the use for which the plant is designed and about any conditions necessary to ensure that, when put to that use, the plant will be safe and without risks to health ; or

(ii) about any research, or the results of any relevant tests which have been carried out, on or in connection with the substance and about any conditions necessary to ensure that the substance will be safe and without risks to health when properly used:

(d) as regards any workplace under the employer’s control -

(i) to maintain it in a condition that is safe and without risks to health; or

(ii) to provide and maintain means of access to and egress from it that are safe and without any such risks;

(e) to provide and maintain a working environment for his or her workers that is safe and without risks to health and adequate as regards facilities for their welfare at work; or

(f) to develop, in consultation with workers of the employers, and with such other persons as the employer considers appropriate, a policy, relating to health and safety at work, that will -

(i) enable effective cooperation between the employer and the workers in promoting and developing measures to ensure the workers health and safety at work; and

(ii) provide adequate mechanisms for reviewing the effectiveness of the measures or the redesigning of the said policy whenever appropriate.

(3) For the purpose of this section, any plant or substance is not to be regarded as properly used by a person where it is used without regard to any relevant information or advice relating to its use which has been made available by the person's employer.

(4) Any employer who contravenes or fails to comply with any provision of this section shall be guilty of an offence and shall be liable to a fine of not more than \$100,000 in the case of a corporation or \$10,000 in any other case.

The Evidence

[04] At the trial of the matter, the plaintiff, Anurag Naidu [PW-1] gave evidence for himself and he called two other witnesses; namely Doctor Mark [PW-2] and Avinesh Rattan [PW-3]. The defendant also called 3 witnesses: Rajesh Kumar, Transport Manager [DW-1], 2. Mohammed Zameer Khan [DW-2] and 3. Anirudh Kumar (DW-3).

Plaintiff's evidence

[05] PW-1's evidence is that:

- a) He was employed by the defendant as a store man freezer. He started to work for the defendant from 9 September 2009.
- b) On 29 July 2013, the freezer door was not closing. He went to his manager. The manager told him to go to the supervisor (Avinesh Rattan) take the forklift with the pallet attached to stand on and pull the door down so it can be repaired the next day. He tried to pull the door down. While trying to pull the door, he slipped and fell off the pallet and the door fell on his right leg and the fork of the forklift hit his back. He was taken to the Nadi hospital where he was given some tablet and asked to come next day for an x-ray. Next day he went to the hospital and he was x-rayed.
- c) After the accident, he is seeing doctors for back and leg pain. He worked for the defendant until 9 September 2013. Thereafter, the defendant asked him not to come to work as he is not fit to work. He also said after the accident his sexual ability has diminished.

[06] In cross examination, PW-1 stated that:

- a) He could not name his other colleagues who were present. He said he was alone. Later he said Zameer and 3 others in the freezer. Later on Alvin, Supervisor Rattan. Avinesh was not there.
- b) The freezer was pushed up before 4.30 pm. We opened the freezer at 4.00 pm. We opened and closed the door a number of times. He admitted the number was very high that he can't remember. He opened the door and closed the door at 4.30 pm.
- c) When asked if the door was high enough to allow the forklift to go in, he said "yes". Freezer No. 3. There are 6 freezers – some sliding doors and some with push-up doors.
- d) Manager Anjana told him to go to the supervisor, get the forklift attached to the pallet and go and attend to the door.
- e) He said "I jumped onto the pallets, height was raised, went to the door, pulled it down as the door was too heavy, I could not hold onto the door. My shoes were torn. I stepped and fell. The door fell on my right leg and my back hit the fork of the forklift. He said 'yes' to the question that as you fell, one of the blades of the forklift badly speared and injured your back.
- f) On 29 July, he told Doctor Mareko that he's having back ache and weakness in the leg. He was given tablets and allowed to go home and come back the following day. He went the next day and was x-rayed.

[07] PW-2, the Doctor who examined the plaintiff and issued the Medical reports, states in his evidence that:

- a) He examined Anurag Naidu. Dr Mareko also examined. Dr Mareko has retired.

b) He finally examined Mr Naidu on 17 October 2015, when he saw Mr Naidu he was using a pair of crutches. On examination, he mobilised the crutches with his left leg having a drag on the ground. Power in lower limbs on the left was 4/5 which is not normal power whereas the right was 5/5 full power. He heard what's noted here is an L3L4 power which is around 4/5. This is an assessment that's done to the leg where to straighten up the leg and on that left side his power was not normal 4/5 and this was to be noted to restrict due to pain. Sensation seems intact even though he feels it was different from T4. T4 Dermatome down is around the level of the nipple line down seems he had different sensation from there downwards but yeah that was noted in the report. And then moving on noted his investigations the MRI on the lumbar spine. MRI of the lumbar spine showed disc degeneration and disc bulges at multiple levels. This was L2, L3, L4 and L5 without any nerve root compression. Also on the MRI, there was disc degeneration and right paracentral disc herniation is seen at L5 S1 with nail tear. What this MRI is describing is looking at the spine so it's showing some degree of degeneration, meaning wearing out of the disc showing no compression of the nerve roots and there is also, put in simpler terms, swelling of the disc on the right side at L5 S1 with a tear within, and then with all this examination investigation. I noted down his assessment taken from reference to an assessment table on page 284 of the Ami Guide 5 table 15.3 which refers to category 2 which comes to 5% whole person impairment.

[08] In cross-examination, PW-2 stated that:

- a) The final assessment is done when a patient gets maximum improvement. Information is provided by the patient.
- b) Mr Naidu was sent home when he came to the hospital on 27 July 2013.
- c) There was no shift of vertebrate.
- d) He admitted that he did not weigh him and did not observe his weight.
- e) When explaining degeneration, he said degeneration is something that occurs over a period of time, and disc degeneration and disc herniation can happen over a period of time.
- f) He assessed Mr Naidu's disability at 5% based on his finding. He said 100% assessment means he cannot do anything.

- g) He admitted that accident would not have caused degeneration.
- h) He said there is no evidence for sexual inability.

[09] In re-examination, PW-2 said x-ray is a normal course and MRI shows back to normal.

[10] PW3's evidence is that:

- a) On 29 July 2013, he worked as a supervisor and also as a forklift driver. At about 4pm, Anurag came to him, not directly. Anurag told him "put me on the pallet to pull the door." He pulled the door. He pulled the rope then pulled the door. I stop the movement of the pallet. He stepped off the forklift. The forklift hit his left leg. The door did not fall. I did not take off his shoes.
- b) This is the first time Anurag pulled the door down. He has pushed the door extra up. The rope was shortened. I didn't know how it was shortened. There was no problem with the door.

[11] Under cross-examination PW3 stated that:

- a) Anurag told him about his work. He talks to Anurag over the phone. Anurag told him firstly he worked at Danny's after that at Red Brick. He has a driver's license. Currently, he is driving a bus for West Bus from town to Denarau in the afternoon or at night.
- b) He said on 29 July 2013, he did not direct Anurag to get onto the pallet on the forklift to be raised up.

[12] DW1 in his evidence states that:

- a) Anurag is his brother and is a bus driver (Nadi/Denarau). He is paid for it every Friday. Last time he drove was yesterday.

[13] Under cross-examination, DW-1 states that:

- a) He drove yesterday at 6.30 pm. He is working for West Bus. Books are in the office.

[14] DW-2's evidence is that:

- a) He used to work with Anurag. On 29 July, there was an accident. Anurag while pulling the door he fell off the forklift and the pallet hit him. He was not bleeding.
- b) After the accident, Anurag was working for Selva Tours. He was driving a car for a few years. He did not see Anurag getting onto the pallet.

[15] In cross-examination DW-2 states that:

- a) He was told that the doors were jammed. The report also says about it. The second day of the incident he checked the door.
- b) We have to pull the door. It does not come automatically. He did not see him driving for Danny's but saw him driving a car a year ago.

[16] DW3 states in his evidence that:

- a) He interviewed Anurag. He said he is using crutches. He brought and showed the crutches and he took photographs. This is the only assistance he has. Got his statement and signed.
- b) The witness visited the next day to find out his movement unannounced. There was a lady who is his aunty and uncle and a young girl. The girl told the witness that the crutches were at home. Anurag has gone without crutches. The witness saw the same crutches that he saw the day before.

[17] In cross-examination, DW3 states that:

- a) They told the witness he (Anurag) left early morning. He would have gone by car.

Discussion

- [18] The plaintiff claims general and special damages against the defendant for the injuries he suffered in an accident occurred at work.
- [19] The position taken by the defendant is that the plaintiff's action amounts to a voluntary assumption and/or the total negligence on the part of the plaintiff and/or to contributory negligence on the part of the plaintiff.
- [20] It was not in dispute that the defendant operates a wholesale/retail business and that the plaintiff was employed as a Warehouse Assistant by the defendant.
- [21] The plaintiff states in his evidence that he suffered injuries at his work place which resulted in suffering from disability in that he is not able to carry out heavy physical work, that he was normally able to do prior to the accident and also stated that his sexual activity could no longer be maintained as a result of the workplace accident.
- [22] Mr Naidu, counsel for the plaintiff admits that in light of the evidence led by the defence through the witness who stated that the plaintiff was able to and was employed as a driver and that the plaintiff cannot maintain his claim of total disability.
- [23] Counsel for the plaintiff alleges that the defendant had breached section 9, HSW by failing to ensure that the work environment is safe at all times for all employees. There is no evidence before the court that the defendant was charged with violating the provision of section 9. The defendant did provide thick jacket, trousers and shoes to work in the freezer. Further, DW2 also works in the freezer. He said because of cold, the roller (freezer door) might have got jammed. The

plaintiff had failed to establish on a balance of probability that the defendant was negligent in ensuring safety at work.

[24] On the evidence, I am satisfied that the accident occurred in the course of the employment and that as a result of it, the plaintiff suffered pain in his leg and back.

[25] There is overwhelming evidence that the plaintiff is able to work. He is now driving Westbus for Denarau, Nadi-Denarau. This shows he is physically fit to work. The plaintiff in his statement of claim states that he is 100% disabled. In evidence, he stated that cannot work as he is unfit to work. The doctor (PW-2) said 100% disability means he cannot even eat. The plaintiff was seen with the crutches in court. However, the defendant's witnesses had seen him driving vehicle. The private investigator (DW3) had found the same crutches at his home when the plaintiff was away from home. The plaintiff was not truthful in saying that he is 100% disabled and he cannot work. I would, therefore, reject his evidence about 100% disability. Accordingly, I disallow his claim for loss of income.

[26] The plaintiff had pulled the freezer door down, in that process he fell and sustained injuries, albeit not external. I find that he is entitled to damages for pain and suffering. He had pain in the back and in the left leg.

[27] The medical report submitted by the plaintiff does not support that the plaintiff has lost his sexual performance as the result of the accident. I would, therefore, disallow this claim. His claim for loss of amenities also fails as there was no evidence in that regards.

[28] In *Alak Ram v Earnest Patterson (HC Civil Action No.210 of 1997*, Scott J awarded \$45,000 for pain and suffering and loss of amenities of life where the plaintiff had suffered several fractures in both legs.

[29] The plaintiff is able to work. He is driving heavy vehicle (bus) after the accident. There was no fracture. He had a final assessment on 2 October 2014, for his injury sustained on 29 July 2013. Dr Mark Rokobuli (PW-2) had done this final assessment. He in his medical report (PE3) states that the whole person impairment is 5%. Dr Mark in cross examination said degeneration and herniation develop over a period of time. It could not have occurred as the result of the accident. The plaintiff had complained pain in his back and the left leg after the accident. He had taken some medication for the pain. I would, therefore, award a sum of \$7,000 for pain and suffering. I disallow his other claims.

[30] I would decline interest and costs.

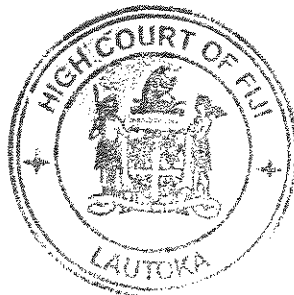
The Final Outcome:

1. There will be judgment for the plaintiff in the sum of \$7,000.00.
2. No order as to interest and costs.

Hafsaqina
16/2/18

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M.H. Mohamed Ajmeer

JUDGE



At Lautoka

16 February 2018

Solicitors:

For the plaintiff: M/s Pillai, Naidu Associates, Barristers & Solicitors

For the defendant: M/s Gordon & Co, Barristers & Solicitors