

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

Antigua and Barbuda

Claim No: ANUHCV 2018/0516

BETWEEN:

OMARI SAMUEL

Claimant

and

SAMMY'S CONCRETE INCORPORATED

Defendant

Before:

Justice Jan Drysdale

Appearances:

Jarid Hewlett of counsel for the Claimant

Charlesworth Tabor of counsel for the Defendant

2022: January 12th

March 15th

JUDGEMENT

[1] **Drysdale, J:** The Claimant claims against the Defendant damages for personal injuries sustained in the course of employment.

BACKGROUND

- [2] The Claimant, a 22-year-old man was employed as an unskilled labourer with the Defendant. On 21st November 2015, the Claimant was working on the conveyor belt on the Defendant's premises breaking down large clumps of sand into smaller clumps. During the course of his work, the Claimant slipped, and his left foot got caught in the conveyor belt resulting in injury. The Claimant filed these proceedings alleging that the Defendant failed to provide a safe system of work and proper or adequate safety equipment.
- [3] The Defendant denied liability and alleged that the Claimant was extremely negligent in getting his foot caught in the way of the conveyor belt and therefore contributed to the unfortunate accident. The Defendant also asserts that the work the Claimant was performing required him to stand on a platform which was away from the conveyor belt. The Defendant concludes that it was only the Claimant's absentmindedness and or negligence which caused the accident and not any fault of the Defendant to provide a safe system of work or proper equipment as alleged. The Defendant also underscored that since its inception that this was the first such incident that had occurred. The Defendant therefore denied liability and or damages claimed.
- [4] The parties attempted mediation but the same being unsuccessful the matter proceeded to trial. The Claimant alone presented witness statements one by a medical practitioner and the other by himself. The Defendant having failed to file any witness statements challenged the evidence of the Claimant through cross examination. At this juncture only the evidence of the Claimant will be considered to determine liability. If the same is proven the Court will then assess all other material evidence to conduct an assessment. The relevant evidence to establish liability is contained hereunder.

THE EVIDENCE

The Claimant

- [5] The evidence of the Claimant is that sometime in 2015 he was hired as an unskilled labourer by Mr. Samuel, the Managing Director of the Defendant. His assigned duty initially was to be a driver. However, Mr. Samuel encouraged him to be involved in other aspects of the business including welding, cleaning the concrete from the trucks and other odd jobs.
- [6] On Saturday 21st November 2015 he was cleaning one of the concrete trucks when Mr. Samuel instructed him to leave this task and assist him. He was instructed to break down wet sand in the funnel so that it

could fall onto the conveyor belt. The reason for this was because the Defendant stored sand in an area where it not shielded from the elements causing the sand to clump when wet.

- [7] The witness deposed that this was the first time performing such a task. He explained that the procedure entails the sand being picked up by a backhoe and then dumped into a large funnel. However, because wet sand clumps together and does not fall out of the funnel his job was to break up the sand in the funnel so that it could fall onto the conveyor belt.
- [8] The witness stated that Mr. Samuel was driving the backhoe. That Mr. Samuel would dump the sand into the funnel and then turn the backhoe around for another load at which point he would hop onto the horizontal metal supports of the conveyor belt and break down the wet sand. Meanwhile Mr. Samuel would leave and return with another load of sand. When Mr. Samuel would return with another load, he would have to jump off the supports to get out of the way so that the sand could be dumped. That there was no stand or other area for him to do this job without standing on the supports.
- [9] The witness asserted that on the day in question Mr. Samuel was on his mobile phone the entire time and was in a hurry. As such he was not given much time between loads to get out of the way. During one of his Mr. Samuel's trips to dump the sand, he was trying to get out of the way when the rubber boots, he was wearing slipped and his foot got caught in the conveyor belt. He felt a sharp pain in his foot and pulled it away which caused the rubber boots to be torn off.
- [10] The witness insisted that at no time during his employment was he instructed to stand on any platform nor was there any platform available for him to stand on. That further the Defendant save for the provision of rubber boots had not provided him with any sort of safety equipment. Finally, that the nature of the job required him to be alert and as such at no time was he absentminded.
- [11] The evidence in chief of the witness was consistent on cross examination. However, he agreed that the backhoe was reversing at the time of the incident and therefore did not directly cause the same but reiterated that the lack of a platform was what caused the incident. He also explained that in performing this task that his back was turned to the backhoe and as such had to periodically turn to keep an eye out for the backhoe in order to know when to remove himself from the metal frame.

THE ISSUES

- [12] The issues for consideration are as follows:

- a. Whether the Defendant was negligent with respect to his common law duty to provide a safe system of work, effective supervision and proper or adequate safety equipment.
- b. Whether the Claimant contributed to the injuries sustained and if so to what extent
- c. Whether in the circumstances the Claimant is entitled to damages and the quantum

ANALYSIS AND THE LAW

Whether the Defendant was negligent in failing to provide a safe system of work, effective supervision and proper or adequate safety equipment

[13] At common law an employer has a duty of care towards its workers. Simply put this is a duty to take reasonable care to ensure the safety of its workers in all circumstances of the case¹. Lord Wright in the case of **Wilsons & Clyde Coal Company v. English**² describes this duty as a threefold obligation being 'the provision of a competent staff of men, adequate material, and a proper system and effective supervision.'

[14] This duty to take reasonable care is a high standard but not absolute one. As Lord Porter in the case of **Winter v. Cardiff R.D.C**³ endorsed this view and stated:

"The duty cast on the master is, of course, not absolute, but only to do his best to fulfil the obligation imposed on him, though, indeed, a high standard is exacted. As the law stands, that duty must be considered in relation to the circumstances of each particular case, and the question to be answered is whether adequate provision was made for the carrying out of the job in hand under the general system of work adopted by the employer or under some special system adapted to meet the particular circumstances of the case."

[15] The instant case concerns the duty to provide a safe system of work and the duty to provide adequate equipment. They will be explored hereunder.

¹ Paris v Stepney Borough Council [1951] AC 367

² [1937] 3 All ER 628

³ [1950] 1 All ER 819 at 822

Safe System of Work

[16] A safe system of work according to Clerk and Linsell on Torts⁴ is:

‘an overarching obligation supporting and supplementing the other aspects of the personal duty. At its lowest, it requires appropriate instruction of the workforce as to the safe performance of the task. But with a task of any complexity, it requires the use of a safe system of work. This may involve the organisation of the work, the procedure to be followed in carrying it out, the sequence of the work, the taking of safety of precautions and the stage at which they are to be taken, the number of workers to be employed and the parts to be taken by them, and the provision of any necessary supervision...”

[17] Central to this issue is the allegation that no instructions were given to the Claimant in the performance of this task and the failure to provide a proper delivery system of the sand onto the conveyor belt and the failure to provide property safety equipment.

[18] The uncontroverted evidence is that the Claimant, a driver was instructed by the Defendant to perform the task of breaking down wet clumps of sand in the funnel. Although the Defendant disputes the Claimant’s assertions that he was not given instructions on how to perform this task, I note that the Defendant has not submitted any protocols or instruction manuals which act as a necessary guide in the performance of this job to rebut this assertion. Further the Defendant not having filed any witness statement, the only evidence before the Court is that of the Claimant.

[19] On this issue the Claimant was unwavering and clear that not only was this his first time performing this task but that he was not given any prior instructions or guidance. Further the Claimant did not strike me as attempting to conceal the truth so after examining all of the evidence presented, I believe that although the Claimant was employed to act as driver and perform odd jobs where necessary he never previously worked in that capacity. Further that save being told in general what was to be done that he was not given any specific and or detailed instructions that would guide him in the careful performance of this job. Given the nature of the job and the risk entailed, it was incumbent on the Defendant to ensure that the Claimant was properly instructed and prepared to perform such a task. The fact that the Claimant may have been hired

⁴ 20th Edition page 861

to also perform other odd jobs does not assist the Defendant as this job is by no means within the category of what a reasonable person hired as a driver would be expected to perform in his daily routine.

[20] The issue of whether there was a platform upon which the Claimant could stand is also of relevant concern. The Claimant's evidence is that he stood on a metal frame, there being no proper platform upon which he could stand. The Claimant's evidence in this regard seemed somewhat unclear at times but I attributed it to a difficulty expressing himself and understanding the question posed and not to any attempt to mask the truth. Further the Defendant although asserting in its defence the existence of a platform did not present any viable evidence to establish this. I note that the Defendant exhibited to its defence a picture but failed to put the same into evidence. Notwithstanding that picture was undated and therefore is of little value to establish that a platform upon which the Claimant could comfortably stand existed prior to the accident. Therefore, I accept the Claimant's evidence that what existed was a metal frame and not any proper platform upon which he could stand. The resultant effect is that this failure created an unsafe system of work in that the Claimant was forced to balance precariously close to the conveyor belt on metal frame which provided limited support and or did not shield for him coming into contact with the conveyor belt should there be any sudden unplanned movement which should have been entirely foreseeable in the circumstances.

[21] Also germane to the issue of a safe system of work is the manner the job was being performed. I note that the process itself has not been subject to challenge. Therefore, I accept that the Managing Director of the Defendant drove the backhoe and deposited the wet sand into the funnel. At that point the Claimant was expected to break it down to facilitate it passing smoothly in the funnel. This was done repeatedly with the Managing Director carrying several loads from the area where the sand was stored to the conveyor belt. Essential to this is the assertion that the Managing Director was on his mobile phone during the entirety of the process and that the time between the deposit of loads was relatively quick. I am mindful of the Claimant's evidence that in performing this task his back was to the backhoe and as such had to turn to keep an eye on when the backhoe was close in order to remove himself from its way. This coupled with the Managing Director being distracted he being on his phone, the short duration of time given to perform the task and safely remove himself from harm's way and the lack of a secure platform upon which the Claimant could stand I think when considered in the round make for a very unsafe work environment and system of work.

Proper or adequate equipment

[22] 'An employer must take the necessary steps to provide adequate plant and equipment for workers and he will be liable to any workman who is injured through the absence of any equipment which is obviously necessary or which a reasonable employer would recognize as being necessary for the safety of the workman'.⁵ The Claimant was only provided with rubber boots to perform his daily tasks. Whilst this may be sufficient to walk around the construction site doing smaller odd jobs and or driving the pump truck, this is certainly not sufficient for the task assigned given the circumstances. It is foreseeable that in the absence of a proper platform that an employee standing precariously close to the conveyor belt could lose balance and come into contact with the conveyor belt as happened in this case. From the totality of these facts it is clear that the requisite plant or equipment was not provided and therefore exposed the Claimant to an unnecessary risk to his safety. At the very least in the absence of a proper platform, proper protective footwear in the form of steel toed boots could have if not prevented the injury certainly minimized it. Therefore, rubber boots are not considered as adequate safety equipment designed to protect the worker when interfacing with such heavy machinery in the circumstances.

Whether the Claimant contributed to the injuries sustained

[23] The Defendant argued that at the very least that the Claimant was contributory negligent in the accident and thus should be held partially responsible for the same. The Defendant seemed however to resile from that position as no submission on that point was made in his closing submissions. Moreover, the Defendant failed to present the Court with any alternative measures that were available to the Claimant but which he failed to utilize thereby contributing to the as he puts it "most unfortunate accident". The fact that the Claimant according to his pleadings slipped and fell is in itself not indicative of contributory negligence. The circumstances of this case are that the Claimant was not provided with the proper plant or equipment to safely perform his job. The fact of slipping therefore is not sufficient as this should have been in the realm of contemplation by a reasonable employer having due regard for the safety of its employee.

[24] It is a trite principle of law that he who alleges must prove. In this case the burden falls on the Defendant to establish that the Claimant was partially responsible for the accident. The Defendant having presented no evidence to establish fault of the Claimant cannot succeed on this issue.

⁵ Commonwealth Caribbean Tort Law 5th edition by Gilbert Kodiline page 161

- [25] Therefore, having examined the duty imposed on the Defendant and the evidence and law I find that the Claimant has established his claim that the Defendant is liable for his injuries in breach of his common law duty of care. Liability having been established I will now move onto the issue of assessment of damages.

DAMAGES

- [26] The evidence of the Claimant is that after his foot got caught in the conveyor belt, he was rushed to the Mount St. John Medical Center. He was examined by Dr. Yearwood and underwent emergency surgery to remove his 3rd and 4th toes on his left foot. He remained hospitalized for 13 days before being discharged. He complained that even though the injury has been described as well healed that he experiences stiffness and difficulty moving the remaining toes. That he cannot run or engage in sporting activities and other social activities like dancing at fetes which he used to enjoy. He also cannot stand for long periods of time and cannot drive a manual vehicle. That he also experiences pain when the weather is cold.
- [27] Dr. Yearwood was called as an expert in these proceedings and provided evidence on the Claimant's injury and condition. He stated that he had examined the Claimant on the day in question and found him to be in obvious painful distress but fully conscious and oriented. Upon examination the Claimant was found to have multiple deep lacerations to the left foot that extended to the underlying tissue and bone. His wound was contaminated with debris and sand. Due to the nature of the injury his 3rd and 4th toes were completely amputated as there was no viable skin which could have been used to save them. Thereafter the Claimant was treated on the surgical ward with intravenous antibiotics and analgesics. After 13 days he was discharged and seen as an outpatient.
- [28] On 7th April 2016 the Claimant was seen at the clinic and his wounds were determined to be well healed. The Claimant however complained of stiffness to the foot when trying to move the other toes. A further examination conducted on 18th July 2020 revealed some scarring and a decreased range of motion of the 5th digit of the left foot. The Claimant was also observed to be walking with a limp. The Claimant's disability has been assessed as 12% impairment to his left foot, 8% to the left lower limb and 4% of the whole person. A recommendation of a customized orthotic shoe to reduce pain on walking was made.
- [29] Dr. Yearwood further explained that there is little to no muscle or tissue between the bone or skin and that standing for long periods of time can cause the Claimant discomfort and pain. He stated that this pain would increase with age.

[30] When questioned on the long-term effects of this injury, the expert stated that the edges of the bone were left on and that this was the cause of discomfort that the Claimant experiences when walking. He suggested that a surgery could be performed to shave it but that would still not fully alleviate the issue. He stated that the longer that fragment hits the ground the more discomfort the Claimant will experience. Further that as the Claimant gets older there will be less cushion for that bone and pain will get worse. Dr. Yearwood also testified that in terms of future employment and activities that standing for long periods would present challenges for the Claimant but that employment with a desk job the Claimant could easily function in that environment.

SPECIAL DAMAGES

[31] Special damages are not contested by the Defendant. Therefore, the sum of \$1,025.00 as claimed and proved is hereby awarded to the Claimant.

GENERAL DAMAGES

[32] These are damages which the law 'will presume to be a direct natural or probable consequence of the action complained of.'⁶ Such damages are not capable of precise calculation and for that reason the Court takes cognisance of the injuries sustained by the Claimant as well as similar cases which dealt with the issue of appropriate compensation in the circumstances.

[33] In assessing the appropriate measure of general damages, the Court also takes cognisance of the principles enunciated in the case of **Cornilliac v St. Louis**⁷ being the nature and extent of the injuries suffered, the nature and gravity of the resulting physical disability, the pain and suffering which had to be endured, the loss of amenities suffered and the extent to which, consequentially, the plaintiff's pecuniary prospects have been affected.

⁶ *Stroms Bruks Aktie Bolag v Hutchinson* [1905] A.C. 515

⁷ 1965 7 W.I.R 491

[34] As there appears to be an absence of multiple cases in this region dealing with this type of injury I have taken cognisance of the case of **Maynard v Jeffers**⁸ and the Jamaican case of **Andrew Crawford v Tikal Limited (Trading as Super Plus Food Stores Limited)**⁹ which I have found to be useful in determining quantum

Maynard v Jeffers – The claimant, a 27-year-old labourer, was offloading golf carts on the premises of Four Season's Resort (the third defendant) when his right big toe was severed by moving parts of a forklift truck driven by the first defendant, the employee of the second defendant. The claimant was rushed to the Alexandria Hospital where he underwent surgery to remove the mangled big toe. Eight days later, the distal phalanx or joint of the right second toe also had to be amputated. He was hospitalized for two weeks and experienced substantial pain. He continued to experience substantial pain after he was discharged from the hospital and his lower limb function has diminished substantially. As a result of his injuries, he was unable to play sports, a previous past-time, without great difficulty, if at all. He was unable to play with his son in the ways in which he was accustomed. There is future possibility that the loss of toe function may increase stress elsewhere leading to other future problems -particularly arthritis, bone inflammation (osteomyelitis) and inflammation of the joint lining (synovitis) due to the extra dependence for balance on the remaining toes and the possibility of a further amputation. The claimant was awarded the sum of \$95,000 for pain and suffering and loss of amenities taking into account the nature of his amputations, his gait abnormality, the requirement to wear special footwear and the future possible challenges.

Andrew Crawford v Tikal Limited (Trading as Super Plus Food Stores Limited) Khans, Vol.6, page 68 where the claimant, 19, was injured on February 17, 2004 when his right foot was trapped in a malfunctioned elevator resulting in amputation of great toe. He was discharged from hospital within seven days and the stump completely healed by July 14, 2004. His prognosis was that he would be permanently impaired from the injury in his ability to participate in any activity that required speed and endurance. It was opined that the use of orthotics in his shoe could help him to be more functional on his job. He was assessed as

⁸ CLAIM NO. NEVHCV2004/0131 (decided 18th December 2015)

⁹ Khans, Vol.6, page 68

having a PPD of 2% whole person. He was also found to have suffered PTSD. In January 2007 he was awarded general damages in the sum of JM\$990,000.00 which updates to JM\$2,186,821.78 using the CPI for April 2015 or EC\$38,002.94.

[35] The obvious difference between the instant case and the above authorities is the specific toes which were amputated. The functionality of the big toes being greater than the others I am of the opinion that damages for the same would be greater. I note also that the impairment of the whole person was greater in the case of **Maynard** than in this case. I note also that in the case of **Crawford** whilst the impairment is less than the Claimant in that case the claimant suffered from PTSD which is not a feature in this case.

[36] I have taken into account inter alia the obvious painful distress experienced by the Claimant, the duration of time spent hospitalised, the continued residual pain from walking or other activities that require stress on the foot as well as the risk of future osteomyelitis (infection of the bone) and the medical opinion that this pain will increase as the Claimant ages. I have also taken note of the obvious effect that this injury will have on his pecuniary prospects. The Claimant is an unskilled labourer and because of this injury will be significantly impacted in the effective performance of this type of employment. However, the Claimant is relatively young and there is no evidence that he is unable to secure alternative employment which despite this injury he could readily perform. Therefore, I am of the considered opinion that damages for pain and suffering and loss of amenities in the sum of \$60,000.00 with a further sum of \$20,000.00 for loss of pecuniary prospects is reasonable.

Loss of Future Income

[37] Although the Claimant has raised the issue of loss of future income, he has not established the salary which he was earning at the material time. The Claimant has submitted no documents and further has not even attempted to make an unsubstantiated suggestion of what he alleged his income was. The Claimant failed to produce any tangible evidence which the Court can rely on to found loss of income on this basis. Lord Goddard CJ in the case of **Bonham-Carter v Hyde Park Hotel**¹⁰ in examining evidence presented for damage reminded the claimant of the duty to prove damage. He stated that:

¹⁰ (1948) 64 TLR 177

‘On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying: "This is what I have lost, I ask you to give me these damages". They have to prove it.’

[38] The evidence of the Claimant is not simply unsatisfactory but nonexistent. Therefore the Claimant having failed to satisfy the court of his income the claim for loss of future income is refused.

Interest

[39] As it relates to the issue of interest, the relevant guiding principles for determining the measure are found in the case of down in **Alphonso v Ramnath British Virgin Islands**¹¹ and are as follows:

- a) Damages for pain and suffering and loss of amenities, the Court should award interest from the date of the service of the claim to the date of trial at the rate payable on money in Court placed on short term investment and, in the absence of such evidence of that rate, the statutory rate of interest is to be used.
- b) In relation to special damages, interest is to be awarded for the period from the date of the accident to the date of trial at half of the rate payable on money in Court placed on short term investment.

[40] Pursuant to section 5 of the Judgments Act Cap 227 of the Revised Laws of Antigua and Barbuda the Claimant is entitled to interest for the period after judgment.

[41] The Claimant pursuant to CPR 65.11 is also entitled to 100% prescribed costs.

ORDER

¹¹ Civil Appeal No 1 of 1996

[42] In light of the foregoing, it is hereby ordered as follows:

- i. The Defendant has breached its personal duty of care owed to the Claimant to provide a safe system of work, proper instructions and adequate equipment.
- ii. The Defendant is found to be liable for the injuries of the Claimant.
- iii. The Defendant shall pay the Claimant the aggregate sum of \$80,000 as general damages for the personal injuries sustained with interest thereon at the rate of 5% per annum from the date of the accident to the date of judgment on assessment.
- iv. The Defendant shall pay the Claimant the sum of \$1,025.00 as special damages with interest thereon at the rate of 2.5% per annum from the date of the accident to the date of judgment on assessment.
- v. The Claimant is awarded prescribed costs in accordance with CPR 65.11
- vi. Interest.

Jan Drysdale

High Court Judge

By The Court

Registrar