

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2018/0117

BETWEEN:

LENFORD MCDONALD

CLAIMANT

AND

ASHLEY LATCHMAN
(Trading as Agri Plus)

DEFENDANT

Appearances:

Mr. Ronald Marks and Mrs. Patricia Marks-Minors for the Claimant

Mr. Stanley John QC with Ms. Keisal Peters for the Defendant

2020: 13th October
19th November

JUDGMENT

Byer, J.:

- [1] This was an extremely short case in which only three witnesses were called to give evidence before the court.
- [2] The claimant's case is that the defendant, his employer at the time, had not provided a safe system of work and as a result he suffered injury to his eye during the use of a weed trimmer. The defendant's case is that he having provided the appropriate safety gear to the claimant to undertake his work, that the claimant failed to do so and that he was therefore the author of his own injury either in whole or in part.
- [3] The court therefore determines that the issues arising for consideration on this matter are:

(1) Whether the injury sustained by the claimant was due to the defendant's negligence in failing to provide a safe system of work.

(2) If the defendant was negligent, can the claimant be found contributorily negligent for the way the injury occurred?

[4] In order to make these determinations it is essential for the court to consider the evidence that was led by the respective parties.

The Evidence

[5] The claimant told the court that on the 9th November 2015 he was transported to work by the defendant to the premises of a client to undertake landscaping work. His duties on that day were to trim the grass with a weed wacker/trimmer. While he was carrying out these duties, he was required to be in same area as one of co-workers who was also trimming the grass. As he and his co-worker carried out their duties, an object flew from the weed wacker/trimmer of the co-worker and struck him in the eye causing permanent damage.

[6] The claimant stated categorically and was quite unshakable on cross examination, in the view of this court that the defendant whose responsibility it was to provide the safety gear used to buy the gear when they first started working but that he had stopped doing so in the recent times. He therefore made it clear that he was forced to wear makeshift protective gear and that on the day in question he had no goggles as the same were not provided to him by the defendant.

[7] The defendant himself gave evidence and his evidence was entirely consistent with his case as pleaded. The defendant maintained that he always provided his employees with safety gear. The claimant, the defendant stated was one of his most senior employees and that he was a supervisor but that the claimant consistently refused to wear his safety gear including his goggles. He recalled that the claimant had to be told several times to wear the goggles by both him and other employees. In fact he told the court, on cross examination, that on the day of the incident, the claimant had his goggles but that the same were in fact on his forehead where he would have usually worn them despite being warned several times not to do so. In fact, from the defendant's evidence it appeared that the claimant on that day did not use any of the protective gear that he issued but that the claimant had been allowed to work at the site.

[8] The defendant's sole witness was the co-worker of the claimant one Osbourne Peteronella. Mr. Peteronella was the co-worker who was working closest to the claimant and from whose weed wacker/trimmer the claimant states he got injured. His evidence was the defendant gave all of the employees protective wear and that they got such gear at least twice a year. He told the court that

he personally was always fully supplied with his protective gear and that he never had to buy any gear for himself.

Findings of Facts

- [9] In assessing this evidence this court accepts that the claimant presented himself for work on the 9th November 2015 and he was deployed by the defendant together with several other co-workers to the property Grand View Hotel where they were tasked with several jobs meant to clean the surroundings of the property.
- [10] I further accept that on that day, the claimant did not have his protective gear, that he was not provided with any that day and that the defendant had not in recent times done so for his employees although he certainly had done so in the past.
- [11] I accept that the claimant in carrying out his instructions as issued by the defendant was struck in his eye as the same was uncovered and he was injured as a result.
- [12] The defendant sought to raise two other points that seemed to have been based on their instructions though not pleaded. These were that the claimant was acting outside the scope of his employment in that the allegation was that he was working in an area that had not been designated to him to so work. However I do not accept that this occurred but rather as the claimant stated that he worked *“upper part in front the hotel- I worked from front of the hotel to the gym and that is where I got damaged.”* Additionally, *“I had to work up down, I had to come to the area to the gym, Ashley told me to finish there that the gym opening at 12 and no one was to go back there after lunch”*.
- [13] The claimant never accepted the suggestion that he was working in an area not designated to him to work and I accept on a balance of probabilities that at all material times he was acting in the course of his employment at the direction of the defendant.
- [14] The second allegation was also made by way of submissions in which the defendants suggested that the claimant had raised an issue of vicarious liability when he gave evidence that his injury had occurred as a result of a projectile having issued from the weed wacker/trimmer of his co-worker. However, it is clear to this court that the claimant had not pleaded that as part of his case and in any event the court accepts that his evidence merely gave the factual matrix as to how he had been injured. This court does not accept that he was at any point placing blame or alleging negligence of his co-worker but that at all times recognizing and maintaining the failure of his employer to provide him with a safe system of work.

- [15] The fact that the manner in which he was injured involved a co-worker in this court's mind does not change the pith and substance of the claimant's pleaded case and in any event these considerations, if they were valid, does not detract from the court having to make a determination as to whether the defendant was in breach of his duty as employer of the claimant.

Issue #1: Whether the injury sustained by the claimant was due to the defendant's negligence in failing to provide a safe system of work

- [16] In assessing this issue, it was clear to the court that this court was being asked to consider the common law duty owed by an employer to his employee. Although the claimant pleaded breach of a statutory duty, this court was not referred to the statute in the pleadings or the submissions before or after trial.
- [17] It was therefore abundantly clear that this court was not being asked to provide itself with the necessary research material and the consideration of this issue will be limited to the common law duty an employer to their employees.
- [18] By common law, the duty of the employer is one to take reasonable care for the safety of their employees. However it was recognized that the duty was not an "absolute one and can be discharged by the exercise of due care and skill which is a matter to be determined by a consideration of all the circumstances of the particular case."¹
- [19] In the case at bar, the claimant must prove that a legal duty was owed to him, that the defendant breached that duty and that the injuries sustained were received as a result of that breach of duty owed to him.
- [20] This court will therefore consider the alleged breaches as pleaded by the claimant.
- (i) **Failing to take any adequate precautions for the safety of the claimant while engaged upon the said work.**
- [21] It was incumbent upon the defendant to organize a safe system of work and ensure that it was adhered to. That is, the responsibility was to ensure "the setting of the stage...the sequence in which the work is to be carried out, the provision in proper cases of warnings, notices and the issue of special instructions."²

¹ **United Estates Limited v Durrant** [1992] 29 JLR at 470 per Wolfe JA

² **Carlton Halstead v Special Security Services Ltd** ANUHCv2012/0004 per Lanns J at paragraph 39

- [22] In the **Carlton Halstead**³ case, this aspect of the duty falls to be considered differently as between experienced and inexperienced employees. Thus where there are more inexperienced employees the employer would be in breach of this requirement if there was insufficient training and instructions. This cannot apply where there is an experienced employee however, who is familiar with the manner in which the work is conducted and is aware of any warnings that may be applicable.
- [23] In the case at bar, it was clear that the claimant had been an employee for many years, in fact on his own admission he had been with the defendant for a period of 13 years at the time of the accident.
- [24] In his own words, he was the longest serving employee, and he was the most experienced person on the team⁴.
- [25] In this court's mind it was therefore well within the defendant's purview to consider that the claimant knew what he was doing and that he would have known how to handle the equipment provided in a manner that was both safe and appropriate.
- [26] In this court's mind the defendant's actions in relation to an experienced employee as the claimant was were reasonable and I therefore do not find that the defendant breached his duty by failing to provide adequate precautions for the manner in which the claimant undertook his work in all the circumstances.
- (ii) **Exposing the Claimant to a risk of damage or injury which the defendant knew or ought to have known existed.**
- [27] When this court considers the evidence that was led in this matter, it does not accept that the claimant was exposed to risk. The claimant was an experienced employee and knew what was expected of him and what he was instructed to do. This was not a situation where the employee was hired to handle an unknown substance or entity which was inherently dangerous and was uninformed to that fact.
- [28] In the nature of this relationship as between the claimant and the defendant, there was no need to educate the claimant as to the risks to which he would have been exposed, as this court accepts that he was so aware.
- [29] In examination in chief the claimant accepting that there was a risk of which he knew, he had this to say, *"I therefore began to use my own sunshades/sunglasses and face protection, being a*

³ Op Cit at paragraph 40

⁴ Evidence on cross examination at trial of the matter

bandana or shirt tied around my face to carry out my work... I was forced to protect myself the best way I could in order to keep my job."

- [30] I therefore do not accept that the defendant was in breach by exposing the claimant to risk in the sense of an unknown unclarified risk.
- (iii) **Providing for use by the claimant and/or requiring him or allowing him to use equipment without proper safety gear when the Defendant knew or ought to have known that it was unsafe or dangerous for him to do so thereby exposing him to a foreseeable risk of injury.**
- [31] When this court considers this particular of negligence, what is clear in this court's mind, that there exists a necessity and an obligation on the employer to supply requisite safety equipment AND an obligation to ensure that there is strict adherence in their use.
- [32] It was in fact clear from the evidence of the defendant and his witness, that the claimant, when he was provided with safety goggles, did not wear them.
- [33] The claimant's version is that the defendant used to make provision of the goggles but that this was not a practice that was continued and certainly did not obtain in the period immediately before the accident although there was no evidence as to when the provision of the same ceased.
- [34] The defendant and his witness of course came and told the polar opposite that the defendant had consistently provided goggles to all the employees but that the claimant had had to be warned on several occasions or reminded to wear his goggles.
- [35] With regard to the provision of the goggles, this court accepts on a balance of probabilities that the defendant had at one point and perhaps even continued to do so, but sporadically supplied goggles to the claimant and his fellow employees. I do not accept that the goggles were provided with any frequency and that at some point employees were required to provide their own safety equipment.
- [36] When the letter⁵ that was provided by the defendant from the purported supplier of the safety accessories and the actual equipment was analyzed by the court, it clearly showed that the defendant had indeed been a purchaser of equipment and safety accessories since 2002 but it did not seek to offer a date of that last provision to the defendant of these items.
- [37] The claimant's evidence as to the provision of the safety goggles was unshaken in this court's mind and generally and more specifically this court accepts that the claimant was a witness of truth.

⁵Letter from OSV Group Inc. dated 1/3/19 attached to the Witness Statement of the Defendant filed 2/4/19 as A.L.2

- [38] Both the defendant and his witness, a present employee, would have had an agenda to place the defendant in the best possible light. It is therefore on that basis that I prefer the evidence of the claimant and the sequence of events as provided by him.
- [39] That being said I therefore find that the defendant failed to provide the safety equipment as was required in all the circumstances and by failing to do so, that he breached his duty to the claimant in this regard.
- [40] Additionally even if the claimant on that day had a pair of goggles (whether provided by his own funds or by the defendant at some earlier time⁶) which he did not utilize properly⁷ the mere fact that the defendant had commented that the claimant did not wear goggles or did not wear them appropriately when he was working on previous occasions, clearly showed that there was a failure of the defendant to ensure that his workmen in fact wore the requisite safety equipment on the penalty of being deprived of working.
- [41] At no time was this done. There is no evidence that the defendant ever made the wearing of safety gear mandatory. In this court's mind this is unacceptable especially when it would have been clear to him that there was an inherent risk of injury to operators of weed wackers/trimmers.
- [42] Therefore there was an "...obligation on the part of the defendant not only to provide goggles but to give strict orders that they were to be used and to supervise [his] workmen at any rate to a reasonable extent in order to ensure that [his] orders were obeyed."⁸
- [43] Indeed as Denning LJ stated in the case of **Clifford v Charles H Challen & Son Ltd**⁹ *"the standard which the law requires is that they should take reasonable care for the safety of their workmen. To discharge that duty properly an employer must make allowances for the imperfections of human nature. When he asks his men to work with dangerous substances, he must provide proper appliances to safeguard them, he must set in force a proper system by which they use the appliances and take the necessary precautions, and he must do his best to see that they adhere to it. He must remember that men doing a routine task are often heedless of their own safety and may become careless about taking precautions. He must, therefore, by his foreman, do his best to keep them up to the mark and not tolerate any slackness. He cannot throw all the blame on them if he has not shown a good example himself."*

⁶ According to the defendant by his Witness Statement of 2/4/19 a week before the accident - at paragraph 13 of the Witness Statement

⁷ According to the Witness for the Defendant Osbourne Peteronella filed 2/4/19 at paragraph 6 where he stated that the goggles were on his forehead

⁸ **Morris v Point Lisas Steel Products Ltd** (TNT unreported 1886/1983) per Hosein J

⁹ [1951] ALL E.R. Vol 1 72 at 74

[44] This court is of the view therefore that the defendant in both not providing the goggles in the manner that he should have nor having ensured that his workmen wore the goggles or even wore them appropriately, fell short of providing a safe system of work and has therefore breached this duty to the claimant.

(iv) Failing to pay any or sufficient heed to the request of the claimant for more adequate equipment or safety gear.

[45] Although this court accepts that the defendant failed to provide goggles for the creation of a safe system of work, the only indication by the claimant that he had ever asked for the replacement of safety gear was in his examination in chief in which he said¹⁰ that the defendant refused to replace his safety equipment after they had become damaged or used when asked to do so. In contradiction the defendant stated that whenever the goggles were damaged, he replaced them to the point that some of the workmen would have two at one time. Then Mr. Peteronella's evidence was that he would get goggles every day.

[46] While this court does not accept the evidence of Mr. Peteronella or the defendant as to this issue of the provision of the goggles as I had indicated previously and the reason why, the evidence of the claimant that he had asked and not been provided is in this court's mind lacking in any specificity to assist the court in this regard.

[47] The onus is on the claimant to prove his case, he cannot prove particulars of negligence by simply including a pleading supported by a witness statement with the barest of information. On that basis this court is at a disadvantage of having the necessary information to make a proper finding.

[48] That being said, the evidence of the claimant remains uncontroverted in this regard and I find that he did in fact ask for the goggles but the same were not provided. Having already determined that goggles were not provided by the defendant as mandated to ensure a safe system of work, I would find that it would be an incongruous conclusion that the claimant would never have asked for the provision of the same when he admitted that the defendant had at one point provided the same.

[49] The claimant has therefore also proven this particular of negligence.

(v) Providing unsafe equipment and/or safety gear for the claimant's use.

[50] There is no evidence to substantiate this particular as pleaded and the court finds that this was not made out or proven.

¹⁰ Paragraph 8 of the Witness Statement of the Claimant filed on the 2/4/19

- [51] When this court therefore considers that the defendant failed to either provide the goggles or to ensure that the one that the claimant wore were worn properly to avoid risk, in this court's mind the defendant failed to provide a safe system of work.
- [52] For the sake of completeness the claimant also relied on the doctrine of *res ipsa loquitur* in the pleadings. As this court stated in the case of **Michelle Jones v The Saint Vincent and the Grenadines Port Authority**¹¹:
- "64. ... This doctrine sometimes assists claimants where it may be that the cause of the accident is unknown and they seek to rely on the facts of the accident itself.*
- 65. To rely on this doctrine the claimant must establish:*
- i) That the thing causing the damage was under the management or control of the defendant or his servants and*
- ii) That the accident was of such a kind as would not, in the ordinary course of things have happened without negligence on the defendant's part."*
- [53] In this case it is clear to this court that even though the claimant suffered injuries while in the employ of the defendant this court is not satisfied that the accident could have only occurred because of the negligence of the defendant and I do not accept that the claimant could therefore have relied on that particular doctrine.
- [54] The defendant is therefore negligent in that he failed to provide the claimant with the necessary safety goggles or to take any steps to ensure he wore the ones that he may have had properly to ensure that he would not be injured.
- [55] However, having found that this court must now go onto consider whether the claimant was also negligent in failing to take responsibility for his own safety.¹²

Issue #2: If the defendant was negligent, can the claimant be found contributorily negligent for the way the injury occurred?

- [56] In order for the court to determine whether the claimant has contributed to the accident occurring, the issue of contributory negligence and whether it applies in these circumstances must be addressed. The test to be applied with regard to making a finding of contributory negligence was succinctly stated in the case of **Melvina Frett-Henry v. Tortola Concrete Limited et al**¹³ where the Court of Appeal ruled that the primary questions that a Court must ask itself are two-fold. Those

¹¹SVGHCv171/2009 at paragraphs 64 and 65

¹²**Carlton Halstead** case at paragraph 42

¹³ Open Court

are whether the claimant on a balance of probabilities established: i) foreseen harm to themselves and ii) acted as a reasonable prudent person for her or his own safety and guarded themselves against the negligence of the Defendant.

- [57] Thus contributory negligence does not depend on a breach of duty attributable to the defendant but on a lack of care by the claimant for his own safety¹⁴.
- [58] Therefore when I consider the circumstances of the present case, it is clear to the court that the claimant satisfies the test as set out in the **Melvina Frett-Henry** case. The fact that the claimant himself said that having not obtained goggles from the defendant that he started using his sunglasses and face protection to carry out his work¹⁵, it is clear that the claimant would have foreseen an injury occurring and that by his failure, he did not protect himself from the negligence of the defendant.
- [59] Despite indicating that he had started to use an alternative to the safety equipment that was to be provided by the defendant he clearly stated¹⁶ “on the day of the incident while performing my duties I had no safety goggles.” Neither does it appear that he took any other precautions for his own safety.
- [60] I therefore find that the claimant contributed to his injury as suffered that day.
- [61] Further I also accept that it was the defendant’s initial negligence in failing to provide the necessary equipment that led to the claimant’s adapting to the circumstances and periodically utilizing alternatives. However, on the day of the incident, the failure of the claimant to even avail himself of those alternatives must now be subject to a deduction in damages for which the defendant is ultimately liable to pay.
- [62] I therefore find that the damages to be awarded to the claimant must be reduced by forty percent (40%) to reflect his failure to protect himself in all the circumstances.

¹⁴ **Alphonso & Ors v Deodat Ramnath** 56 WIR 183 at 188 per Singh JA

¹⁵ Paragraph 9 of the Witness Statement of the Claimant filed on the 2/4/19

¹⁶ Paragraph 9 of the Witness Statement of the Claimant filed on the 2/4/19

The order of the court is therefore as follows:

1. Judgment is entered for the claimant on the sole issue of liability.
2. Damages to be awarded to the claimant are to be reduced by 40% to reflect his contribution to the said injury.
3. Damages are to be assessed by a Master of the High court upon the said application being filed by the claimant within 30 days of today's date with leave to the defendant to file a response 14 days thereafter.
4. A date is to be set before the Master of the High court for case management of the application for assessment.
5. Prescribed costs to the claimant pursuant to Part 65.5 CPR 2000.

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar