IN THE HIGH COURT OF FIJI AT LABASA
CIVIL JURISDICTION

Civil Action No. HBC 71 OF 2014

BETWEEN	:	**DEEP CHAND**
		PLAINTIFF
AND	:	**WAIQELE SAWMILLS LIMITED**
		DEFENDANT
BEFORE	:	**Hon. Justice Kamal Kumar**
COUNSEL	:	Mr S. Sharma for the Plaintiff
		Mr A. Sen for the Defendant
DATE OF HEARING	:	8 February 2016
DATE OF JUDGMENT	:	3 June 2016

JUDGMENT

Introduction

1. On 17 December 2014, Plaintiff caused Writ of Summon to be issued with Statement of Claim, claiming for special damages, general damages, interest and costs arising out of alleged injuries sustained by him in a workplace accident on or about 10 January 2012.

2. On 27 January 2015, and 18 February 2015, Defendant filed Acknowledgement of Service and Statement of Defence respectively.

3. On 16 April 2015, Plaintiff filed Reply to Statement of Defence.

4. On 27 April 2015, Plaintiff filed Summons for Direction and on 25 May 2015, being the returnable date of the Summons, Order in terms of the Summons was made by the Master of the High Court.

5. **Even though discovery of documents in personal injury claim is automatic (Order 25 Rule 8 of High Court Rules), Master of the Court while noting that discovery is automatic made Orders for parties to file Affidavit Verifying List of Documents as prayed for in the Summons.**

6. On 2 July 2015, Plaintiff via Plaintiff's solicitors' clerk filed Affidavit Verifying List of Documents and on 7 August, 2015, parties were granted fourteen (14) days to complete Pre Trial Conference (**"PTC"**). This matter was adjourned to 24 August 2015, for further direction.

7. On 24th August 2015, parties were given further (14) days to convene a Pre Trial Conference. This matter was adjourned to 8 September 2015.

8. On 8 September 2015, parties were granted further fourteen (14) days to convene PTC and file Minutes of PTC and this matter was adjourned to 16 September 2015, for mention.

9. On 16 September 2015, Counsel for Plaintiff informed Court that parties can hold PTC on that day. This matter was again adjourned to 2 October 2015,

and parties were granted further (14) days to convene PTC and file Minutes of PTC.

10. On 2 October 2015, Plaintiff's counsel informed Court that draft Minutes of PTC has been sent to Defendant's Solicitors when Defendant's counsel informed Court that he was responded to the draft. Court then directed parties to file Minutes of PTC by 7 October 2015, and adjourned this matter to 8 October 2015 for further direction.

11. On 8 October, 2015, Plaintiff's Counsel informed the Court that PTC is ready for signing. The Master then directed that the Minutes of PTC be filed by close of business on that day and directed Plaintiff to file Copy Pleadings within seven (7) days with Agreed Bundle of Documents to be filed within seven (7) days from thereafter. This matter was adjourned to 30 October 2015.

12. On 13 October 2015, and 20 October2015, Plaintiff filed Minutes of PTC and Copy Pleadings respectively.

13. On 30 October 2015, this matter was called before the Master when it was listed for trial on 8 February 2016.

14. Trial concluded on 8 February 2016, when parties were directed to file Submissions and this matter was adjourned for Judgment on notice

Issues for Determination

15. There is no dispute as to whether Defendant owed duty of care to Plaintiff and parties have accepted and agreed at paragraph 4 of the Minutes of PTC that that defendant owed duty of care to the Plaintiff.

16. The issues that this Court needs to be determined are:

    (i) Whether Defendant breached its duty of care owed to the Plaintiff.

    (ii) Whether that breach (if any) caused Plaintiff injuries.

(iii) Whether Plaintiff was contributory negligence.

Plaintiff's Evidence

17. Plaintiff gave evidence himself and called one (1) more witness.

18. During examination in chief, Plaintiff gave evidence that:

(i) At date of trial he was unemployed and prior to his injury on 10 January 2012, he was employed by Defendant as Log Yard Boy for seven (7) years.

(ii) His duties included measuring of logs.

(iii) On 10 January 2012, whilst working for the Defendant at the log yard he got injured when suddenly he heard a big noise and something came and hit him.

(iv) At that time he flew and fell down and didn't know what happened.

(v) The workmen who took him to hospital told him that the loader's lock ring hit him.

(vi) Distance between the loader and where he was measuring the logs when he was hit was about ten (10 metres.

(vii) Loader was used to pick logs and bring to them for measuring.

(viii) The lock ring hit the post first and then hit him.

(ix) It was not the first time lock ring came out as it happened once before and at that time it hit the building.

(x) As to whether he took precaution he said that he told operator to tell his foreman to make it properly as he didn't know when it will come out.

(xi) He did not see lock ring coming out as he was doing his work.

(xii) He found out that Bissun Dutt came to assist him.

(xiii) He was not warned by his supervisor to take precautions because lock rings come out of loader.

(xiv) Defendant had more loaders.

(xv) When he heard the noise he was standing on his section after finishing his work.

(xvi) One Ravinesh Chand was working with him at the time of accident and when he heard the noise distance between him and Ravinesh Chand was about five (5) metres.

(xvii) Log was measured outside the building.

(xviii) The sound occurred because of loader's tyre busting.

(xix) He found out that company vehicle took him to hospital.

(xx) He could not know that tyre will burst and the lock ring will come out.

(xxi) Driver of loader, Mukesh Chand was Defendant's employee.

(xxii) He wore trousers and safety boots and his trousers' was torn and safety boot was cut.

(xxiii) He found out that the loader picked up the timber it was on a load and the tyre burst.

19. During cross examination the Plaintiff:

(i) Agreed that tyre of the loader was quite big and to secure it there is lock ring which is four (4) metre is diameter and is a big piece of metal.

(ii) Agreed that the driver took the loader to work and along the driveway the tyre burst, the lock ring came out hit another object and then hit him, completely fractured his leg, bruised his foot two (2) bones out his foot and he fell down.

(iii) Agreed that like anybody else he would not know that the accident would happen.

(iv) In response to the suggestion that when you both in a factory you expect things to happen, like there is a lot of machinery, logging trucks that passes along the driveway and passes along within the yard, you have to be very vigilant to see for your safety that nothing comes your way he stated that when he is working he does not know when lock ring would come out.

(v) Agreed that it was purely an accident and was not maliciously done, like Mukesh would not do anything to hurt him.

(vi) When asked if he was watching the loader when it came on the driveway he said he was concentrating on his work.

(vii) When it was put to him that Defendant's company is a reputable company who generally takes a lot of came about its machines and regularly serviced them and they got their own workshop, he stated that it was not serviced properly and that is why the tyre burst.

(viii) Stated that the lock ring came out before.

(ix) When it was put to him that only reason lock ring came out was because the tyre burst otherwise it would not come out he stated that tyre was not changed in time and it was plain.

(x) He did not know service history of the loader and when the tyre was fitted.

(xi) In seven (7) years the tyre of the loader burst four (4) times.

(xii) When it was put to him that he knew the tyre would burst he stated he did not know it would come and hit him.

(xiii) Stated that he knew tyres would burst, but he did not know how to protect himself.

(xiv) When it was put to him that he has to be cautious at all times and he sees something flying towards him, he should always avoid it, he stated that he was not looking, he heard the noise and the lock ring came and hit him and he cannot be looking at loader tyre all the time.

(xv) Agreed to the suggestion that accident was no fault of company but was purely an accident.

20. In re-examination, the Plaintiff stated that he did not see the lock ring that flew from the loader so that he could have avoided it.

21. Plaintiff's witness was Bissun Dutt Sharma, Market Vendor of Wailevu.

22. During examination in chief Mr Sharma gave evidence that:

(i) On 10 January 2012, he was employed by Defendant's company.

(ii) When lock ring hit the Plaintiff he was about 10 to 15 metres away from the Plaintiff.

(iv) At first he heard the noise and when looked back he saw Plaintiff falling down and then they ran and picked him up.

(v) He did not see lock ring hitting Plaintiff, because it was too fast and he heard the noise only.

(vi) If he was in place of Plaintiff he could not have avoided the accident.

(vii) When Plaintiff came on the ground he was first going around, just like when you cut the chicken that is how he was.

(viii) He went to him with one of his operator.

(ix) Plaintiff's clothes and boots were torn.

(x) Prior to the accident the lock ring of the loader came out twice. Once, in the garage when it hit the rafter, and broke the rafter and the other occasion it went towards mangrove swamp (Tiri).

(xi) When lock ring comes out if you cannot see it until it makes the first contact.

(xii) Lock ring first hit the concrete skidding and then hit Plaintiff.

(xiii) When asked if the flying speed of lock ring decreased after hitting the wall he stated he did not see the speed and just heard the sound

when he looked back he saw Plaintiff falling and he went to him and found out that lock ring had hit him.

(xiv) He found that the lock ring had hit the concrete skidding before hitting Plaintiff when they came back from the hospital and saw the concrete had been broken.

(xv) No one would be able to see lock ring flying with their naked eye, even if they are watching the loader.

23. During cross examination Mr Sharma:

(i) Stated that he had been employed by Defendant from 2003 to 2013, when he got injured and resigned.

(ii) Agreed to the suggestion that Defendant Company is very safety conscious, it has its own workshop, employs more than one hundred people, accidents have hardly happened in the yard and gives safety treatment to the labourers.

(iii) He is not a mechanic but was told that lock ring holds the tyre and the size of the lock ring is about one (1) foot.

(iv) The loaders tyre is about same size as rear tyre of tractor.

(v) When it was put to him that lock ring is four (4) feet in diameter he stated that he is not a mechanic and can only say through his knowledge.

(vi) When it was put to him that he was lying when he said that when lock ring flies no one can see it he stated that people can see it but it happens so suddenly he only heard the noise.

(vii) In response to suggestion that from the time Defendant moved in 1991 lock rings have not come of the tyre he stated that it came out.

24. In re-examination the Witness:

(i) Agreed with counsels' suggestion that the lock ring does not cover the tyre and it locks to safeguard the tyre from coming out.

25. On 9 February 2016, counsel for the Defendant informed Court that Defendant will not be calling any witness, when parties were directed to file submissions and this matter was adjourned for Judgment on notice.

26. Whether Defendant breached its duty owed to the Plaintiff.

27. I make following findings:

(i) At the time of accident Plaintiff was employed by the Defendant as Log Yard Boy and his duties included measuring logs.

(ii) When the lock ring came of the loader tyre he was working in his section and did not see the lock ring until it hit him and caused him injury.

(iii) The tyre of the loader was plain. Mere fact, that Plaintiff did not know when the loader was serviced or tyre changed does not in any way contradict his evidence that tyre of the loader at the material time was flat.

(iv) The lock ring of the loaders' tyre came out before and came out twice before the accident during the period Mr. Bissun Dutt Sharma was employed by the Defendant and once during Plaintiff's employment.

(v) It was reasonably foreseeable that the lock ring of the loader tyre would come out at any time.

(vi) I find that Plaintiff and Mr Bissun Dutt Sharma, were credible witnesses as they gave credit to Defendant Company where it was due.

28. Defendant has not produced any evidence as to what precautionary and safety measures were taken or policies were in place to avoid injury to employees when an accident such as one in this case occurs.

29. On the basis of evidence led in Court and what this Court stated hereinbefore, I find that Defendant breached its duty of case owed to the Plaintiff to provide safe system of work.

Whether Plaintiff was contributory negligent.

30. In **Gani v. Chand & Ors.**[2006] Civil Appeal No. ABU 0117 of 2005 (10 November 2006) Court of Appeal sated the principle as follows:

"The basic principle of contributory negligence is that, when a court is awarding damages to the plaintiff for injuries caused by the defendant, it may reduce the award if the plaintiff can be shown to have contributed to the injury by some negligence on his part. However, whilst the liability of the defendant arises from a duty towards the plaintiff, the assessment of contributing negligence is not based on a similar duty on the plaintiff towards the defendant. It was explained by Lord Simons in Nance v. British Columbia Electric Railway Co. Ltd [1951 AC 601, 611]"

"The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the plaintiff to take due care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured part to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the injury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.

...this, however, is not to say that in all cases a plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully."

31. The Defendant relied on the case of **Stapley v. Gypsum Mines Ltd** [1953] 2 ALL ER 478.

32. The facts of **Stapley** case are stated in the judgement of Lord Reid at pages 484 and 485 which is as follows:

"Before the accident Stapley and Dale were working together, Staply being the breaker. He was a steady workman with long experience, but rather slow. He had for a time been a borer but had reverted to being a breaker. A well recognized danger in the mine is a fall of part of the roof. The roof is not generally shored up as any weakness in it can be detected by tapping it. If it is "drummy", giving a hollow sound, it is unsafe and must be taken down. There are three ways of doing this – with a pick, or with a pinch bar or crow bar, or by firing a shot. Whichever way is adopted, of course, men doing the necessary work must not stand immediately below the dangerous part of the roof. One morning when Stapley and Dale arrived at their stope they tested the roof and found it to be dummy. They saw the foreman, Church, about it and he ordered them to fetch it down. They all knew that that meant that no one was to work under the roof before it had come down. Church did not say which method was to be adopted. Both men were accustomed to this work and the method was properly left to their discretion. They used picks, but after half an hour had made no impression. The work was awkwardly placed as a fault ran across the mouth of the stope, the floor and roof inside being about eighteen inches higher than outside. Probably they could not use a pinch bar, but they could easily have prepared the place for firing a shot and sent for the shot-firer. Instead, according to Dale whose evidence was accepted, they agreed that the roof was safe enough for them to resume their ordinary work, and did so. There was a quantity of gypsum lying in the stope and if the roof had been safe their first task would have been to get to the haulage way. To do that, Staply had to enter the stope and break the gypsum into smaller pieces and Dale had to make preparation in the twitten. So they separated, and when Dale came back half an hour later he found Staply lying dead in the stope under a large piece of the roof which had fallen on him.

There is no doubt that if these men had obeyed their orders the accident would not have happened. Both acted in breach of orders and in breach of safety regulations and both ought to have known quite well that it was dangerous for Staply to enter the stope."

33. The Trial Judge in **Stapley** found that accident occurred due to Dale's fault and as such held Respondent liable but reduced the award by fifty percent , The Respondent appealed to Court of Appeal and the Appellant cross appealed. The Court of Appeal allowed Respondent's appeal and dismissed the cross appeal

34. The Appellant appealed to House of Lords which assessed contributory negligence at eighty per cent (80%).

35. Lord Reid in agreeing with the assessment of contributory negligence stated as follows:

"A court must deal broadly with the problem of apportionment, and, on considering what is just and equitable, must have regard to the blameworthiness of each party, but 'the claimants share in the responsibility for the damage' cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness. It may be that in this case Dale was not much less to blame than Stapley, but Stapley's conduct in entering the stope contributed more immediately to the accident than anything that Dale did or failed to do."

36. In **Stapley's case**, both Staply and Dale continued to work under the roof when they were ordered by their foreman to bring the roof down after they complained to him about the condition of the roof.

37. In this instance there no evidence was produced to show that the Plaintiff disobeyed any order or company policy or regulation.

38. I am not aware if the Defendant is saying that while the loader is in the yard all employees should then keep a look at the loader to ensure that they save themselves if loaders tyre bursts and lock ring flies out. No prudent employer will expect its employees do such a thing.

39. Mr. Bissun Dutt Sharma gave evidence, that he did not even see the lock ring flying and hitting the concrete skidding and then hitting the Plaintiff. He also, like Plaintiff did, only heard the sound of the tyre bursting.

40. As such I find that Plaintiff has not in any way, whatsoever contributed to the accident.

Costs

41. I take it into consideration that parties have been very corporative to the extent that Defendant did not call any witness and agreed on quantum.

Orders

42. I make following orders:

(i) Judgement is entered against the Defendant on liability.

(ii) Defendant do pay Plaintiff's cost assessed in the sum of $1500.00

HIGH COURT OF FIJI
SUVA

K. Kumar
JUDGE

At Suva
3 June 2016

Samusamuvodre Sharma Law for the Plaintiff

Maqbool & Company for the Defendant