

IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

CIVIL APPEAL NO. ABU0037 OF 2005

BETWEEN : KANTA SINGH *Appellant*
AND : DEO RAM *Respondent*

Coram : Byrne, J. A.
Pathik, J. A.
Hickie, J. A.

Counsel : H.A. Shah for the Appellant
S. Parshotam & S. Singh for the Respondent

Date of Hearing : 8th July 2008
Date of Oral Judgment : 8th July 2008
Date of Published : 20th January, 2009
Reasons :

JUDGMENT of the Court

- [1] At the conclusion of oral argument in this appeal from a judgment of the High Court at Lautoka (Connors J.) dated 29th April 2005, the Court stated that the appeal would be dismissed and that we would publish our reasons later. We now publish those reasons which, because of other commitments of the Judges constituting the Court, we were not able to do as quickly as we had hoped.

- [2] The Respondent sued in the High Court for damages for injuries sustained by him in the course of his employment with the Appellant on the 29th of March 2000.
- [3] He pleaded his cause of action in the alternative both under the common law and pursuant to the Workmen's Compensation Act Cap 94. His case was heard by Connors J. in the High Court of Lautoka on the 6th of April 2005 and on the 29th of April 2005 His Lordship gave judgment for the Respondent awarding him \$50,000.00 general damages plus interest and the sum of \$35,000.00 for loss of earning capacity together with a small amount of special damages and interest giving a total award of \$92,287.00. The Judge also ordered the Respondent to receive costs of \$3,000.00 from the Appellant. At the hearing before us counsel for the Respondent stated that since judgment had been delivered the Appellant had gone into receivership and that no consent for the prosecution of the appeal had been given by leave of this Court as required by Section 9(1) of the Bankruptcy Act Cap 48.
- [4] Counsel for the Appellant stated that although this was true, the consent of the Court could be granted later. We stated that we did not accept this submission because in our view Section 9 is mandatory. It reads as follows:

"On the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the

debt, or shall commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose”.

[5] It also transpired that at no time did the Appellant have any Workers' Compensation Insurance cover or any Employers' Liability Insurance cover. Neither of these insurances is compulsory under the laws of Fiji. Section 26(1) of the Workmen's Compensation Act Cap 94 states that the Minister for Labour may, by order published in the Gazette, require any employer to insure and keep himself insured with such insurers as may be approved by the Minister and published in the Gazette, in respect of any liability which he may incur under the provisions of the Act to any workmen employed by him. To our concern we were told by counsel that although the Workmen's Compensation Act came into force over 50 years ago, in all that time no Minister for Labour has ever published an order requiring an employer to insure his employees against Workmen's Compensation Liability. In our view this a disgrace and reflects no credit on the Ministers for Labour in the last 50 years for not making any orders under Section 26 but it also reflects no credit on Trade Unions who claim to have the interests of their members at heart.

[6] Were these Unions unaware of Section 26(1)? If so, why? If they were aware of it, did they ever request the Minister to make the necessary order? If not, did they consider that such order was of no importance to their members, and if so, for what reason or reasons?

Prima facie it seems to this Court to be a clear case of neglect by the management of such Trade Unions.

[7] The effect of all this is that the Respondent has not been able to recover any workers' compensation from the Appellant but has received only some 3 months sick pay. In practical terms the Respondent has received hardly anything from his employer who has shown in our view a shabby and cavalier attitude towards the Respondent. Something must surely be done to correct this unfortunate situation.

[8] We shall say more about the Workmen's Compensation Act towards the end of this judgment.

The Appeal must be Dismissed

[9] The fact that the Court has not given leave to the Appellant to pursue this appeal is enough for us to hold that the appeal should be dismissed but in fairness to the parties and for the benefit of the profession and the public it is desirable to say why, apart from this somewhat narrow ground for dismissing the appeal, we consider that it should also be dismissed as a matter of the law of negligence. We therefore turn to the facts.

[10] The Respondent was born on the 4th of January 1957 and at the date of the accident was 43 years of age, at the date of the trial 48 years of age and the date on which this appeal was heard 51 years old.

[11] He was educated to second term in class three at the Loma Indian School and upon leaving school he started working on his father's farm. Following this, he spent seven years working in a saw mill and five or six years at Valley Timber Mill. He then commenced work approximately 15 months prior to the accident with the Appellant. He was employed as a labourer and at the time of the accident he was earning \$66-\$70 per week

being paid at the rate of \$1.50 per hour working normally a nine hour a day, five or six days per week.

[12] Following the death of his father, the property was divided amongst all the brothers and the Respondent was given a piece of land for a house and where he also plants vegetables.

[13] On the 29th of March 2000 the Respondent arrived at work at about 7.30am. He was working on a house being built by the Appellant for the Appellant's son. He described his task as mixing cement and carrying bricks. He was directed by others what to do. He said that he was mixing the cement until about 1.00pm when he had lunch from 1.00-1.30pm and that after lunch, the son of the Appellant told him to go to the ceiling and pull wires for the electrician. He said that the ceiling was very dark and it was very hot. He had a small torch which had three batteries. He said he had never done this type of work before, not even for himself at his own home. He said he told the son of the Appellant that he had not done this work before and that he did not want to go in to the ceiling. He said because it was very dark and very hot, he did not know what he stepped on but only that he fell. He said he was about half way across the ceiling from the manhole and at the time he was wearing ordinary shoes which he described as having a plain leather sole. He was not wearing safety shoes and none had been provided. He said he was not wearing a safety helmet and none had been provided. The floor on which he landed was cement. He also said he was not provided with any form of safety harness or other safety equipment to fulfill the task.

[14] After he fell, the son of the Appellant took him to the Sigatoka hospital from where he was later transferred to the Lautoka Hospital where he was admitted and stayed for about six days. He said he did not return to work

to the Appellant and was unable to do any work for one year and six months after the accident. On returning to work he was employed on a pawpaw plantation where he was earning at the rate of \$1.50 an hour working 8 hours a day, two or three days a week. He could work for three or four days if his leg was alright but he experienced pain in his leg when it was cold and when it was hot he would have a terrible headache.

[15] He said at the time of trial he was taking tablets and spent on average \$3-\$5 per week. He is married with four children, the oldest of whom died in a car accident in 2004. He had a 20 year old son who is studying and doing mechanical work and a 19 year old daughter who stayed at home and a 7 year old child who was still at school at the time of trial. He said his wife also stays at home.

[16] Prior to the accident he was working on a nearby farm, earning \$10 a day and given food at weekends. He has been unable to return to that employment since the accident. The special damages incurred by the Respondent were admitted by the Appellant. Following the accident he was paid his sick leave which amounted to about 3 months pay and that is all that he received.

[17] The son of the Appellant gave evidence that he had taken the Respondent to hospital and to his house that was being built. He also acknowledged that he was present on the site at the time the accident occurred but denied that he gave any instructions to the Respondent.

[18] The foreman for the Appellant, Prem Singh, was working laying tiles on the ground floor of the property at the time the accident occurred. He says up until about 3.00pm the Respondent was engaged mixing grout for the tiler, Mr Ali. He said the Respondent fell through the ceiling about 2.4

metres and landed on a 1 metre high stack of tiles. He said he did not direct the Respondent to go into the ceiling. He was still an employee of the Appellant at the trial and gave evidence in the presence of the Appellant. This was also true of Mr Ali, the tiler who was still employed by the Appellant at the date of trial. He could only describe what the Respondent was doing prior to the accident. Two other witnesses gave evidence as to the employment of the Respondent at the trial with Sanko Agriculture Ltd. and confirmed that the Respondent was earning \$1.50 per hour and that his employment ceased in about February 2005. Whilst he was working he was taking home \$50-\$60 per week.

[19] **Medical Evidence**

Dr Taoi the Chief Medical Officer at the Surgical Unit of Lautoka Hospital gave evidence that the Respondent was admitted to the Lautoka Hospital on the 4th of April 2000 for head injuries sustained when he fell and that he was rendered unconscious on impact. He described the injuries sustained by the Respondent as a 5cm laceration on his occiput and that he was discharging cerebral spinal fluid from his right ear on admission. He remained hospitalized until the 9th of April. Whilst there was no radiological evidence, the Doctor was of the opinion from the clinical features that the Respondent suffered a fracture of the base of the skull. He was treated with pain relief and anti-biotics. The doctor described him as still suffering from post concussion headache, painful lower back, painful right hip and diminished sex drive. He said that on examination the Respondent had a limp on the right leg and some stiffness on the right hip joint.

[20] These injuries were confirmed by Dr Mangajt, a consultant surgeon at the Lautoka Hospital who saw the Respondent on his admission.

[21] Liability

Counsel for the Appellant submitted at the trial that the Respondent at the time of the accident was on a "*frolic of his own*". This was not pleaded in the statement of defence.

- [22] The learned Judge stated it was clear from the evidence of the Respondent that he was directed to perform the work in the ceiling by the Appellant with the actual instructions coming from a supervisor or the son of the Appellant. The son of the Appellant stated in evidence that he was also a 50% owner of Kanta's Construction Company with the Appellant. The Judge then said, and we agree, "*to direct or even to allow a labourer to enter the ceiling cavity whilst wearing ordinary leather sole shoes and without a safety helmet or any other safety equipment is not only a breach of the Health and Safety at Work Act 1996 but is negligence on the part of the defendant*". He therefore found for the Respondent on the issue of liability, and again we agree with this finding. Given the significant disabilities the Respondent has suffered since his accident being his headaches, his hip, his back and his diminished sex drive and that on the medical evidence these incapacities will continue, we are satisfied that in making the award of general damages of \$50,000 the learned Judge committed no error. We are also satisfied that it was reasonable for the Judge to find the Respondent's loss of earning capacity as \$35,000.00. In making his award of \$50,000.00 general damages the learned Judge relied on a decision of Finnigan J. in Panish Prakash Chand -v- Ganpati Pala & Another – Civil Action No. 112 of 2004L and the decision of Scott J. in Dinesh Kumar -v- John Elder – HBC 560 of 1995S where an award of \$45,000.00 was made.

- [23] Before parting with this appeal we must refer to another aspect of the Workmen's Compensation Act which in our view demands amendment as quickly as possible. This is its retention of the old concept of the circumstances in which Workmen's Compensation will be payable. Section 5(1) states as far as relevant:

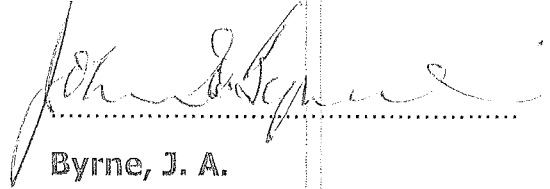
"If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter provided, be liable to pay compensation in accordance with the provisions of this Act"

- [24] It is not necessary to quote the whole of sub-section 1. We mention it to draw attention to the fact that this concept of liability for workers' compensation was abolished in Australia at the latest in about 1963. In Australia now a worker is entitled to claim workers' compensation if he suffers an injury arising out of or in the course of his employment. The old requirement of an injury by accident arising out of and in the course of the employment has thus been replaced. Why after nearly 50 years this has not been done in Fiji is again beyond our comprehension.

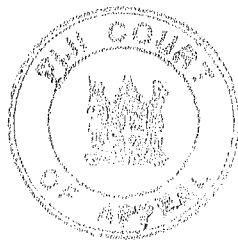
- [25] In the hope that something can be done about this serious omission in the law we are sending a copy of this Judgment to the Attorney-General in the hope that he will see fit to amend the Workmen's Compensation Act in the near future.

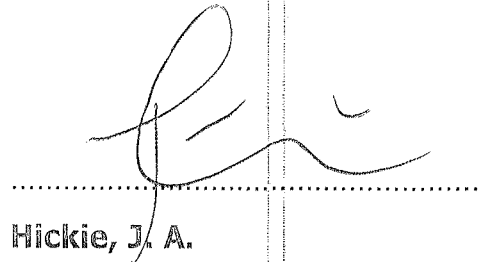
- [26] To summarise:

The appeal is dismissed and the Appellant is to pay the Respondent's costs of \$2,500.00.


Byrne, J. A.


Pathik, J. A.




Hickie, J. A.

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20th Jan.....2009