REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2007/02060

BETWEEN

DYIAL LATCHMAN

CLAIMANT

AND

BALGOBIN & SONS BANDSAWMILLING COMPANY LIMITED

DEFENDANT

BEFORE THE HON. MADAME JUSTICE JOAN CHARLES

Appearances:

For the Claimant: Mr. Rennie Gosine

For the Defendant: Mr. Ronnie Bissessar

Date of Delivery: 31st May 2011

JUDGMENT

BACKGROUND

[1] The Claimant is a 'cableman'; his job involves attaching a log to a cable in order to pull the log out of the forest. The driver of the

vehicle would release the cable, and the cableman would hold the cable and pull it to the log and then give the driver a signal to remove the log.

[2] The Defendant is a duly incorporated Limited Liability Company, in the business of felling trees and sawing of logs for sale as prescribed by the Forestry Division.

[3] On or about 11 a.m. on the 20th March, 2004, the Claimant, acting as a cableman, was in a bent position tying a log which was on the ground. A worker employed by the Defendant Company was felling a tree nearby, this tree fell onto another tree and the top of that tree broke off and fell on the Claimant's back.

THE CLAIM

[3] The Claimant contends that he was at all material times employed by the Defendant as a cableman and it was during the course of his employment on the 20th March, 2004 that he suffered personal injuries as a result of negligence and/or breach of employer's duty by the Defendant.

[4] The Claimant initially instituted proceedings on the 19th July, 2007 based on the same incident against Ruben Balgobin (Trading as Ruben Balgobin's Saw Mill) as the Defendant. However, the matter was subsequently withdrawn by the Claimant on the 2nd August, 2007.

[5] Subsequent to this action, the Claimant's Attorney, by a letter dated the 17th April, 2007, requested payment from the Defendant Company for the loss and injury suffered by the Claimant as a result of the incident but the Defendant has failed to make any reasonable compensation.

[6] Proceedings were then instituted by the Claimant on the 18th June, 2007, this time against the Company as the Defendant, claiming damages for personal injuries arising out of the Defendant's negligence as the employer.

[7] In his Statement of Case, the Claimant relied on the following Particulars of negligence against the Defendant Company:

i. Failing to have a manager/supervisor on site to provide adequate supervision whilst the Claimant was performing his duties;
ii. Failing to provide proper training on the job;
iii. Failing to instruct the Claimant on how to work in a dangerous area, where the cutting of trees were taking place;
iv. Failing to instruct the Claimant to move out of the area where the trees where being cut;
v. Failing to provide safety equipment such as a helmet and safety shoes;
vi. Failing to take any or any reasonable care to see that the

Claimant would be reasonably safe in performing his duties as an employee; and,

vii. Failing to have any safety systems in place.

[8] The Claimant submitted medical reports from the Port-of-Spain General Hospital, Dr. Stephen Ramroop and a MRI Report, which indicated that he suffered the following injuries:

i. Tenderness to the left posterior chest, anterior chest and C-X spine;
ii. Decreased range of movements to the C-Z spine and anterior and posterior chest;
iii. Fractured ribs (2nd -7th) posterior; and
iv. Permanent partial disability of thirty six percent.

[9] The Claimant is seeking:

i. Damages for personal injuries and consequential loss and expenses occasioned by the Defendant caused by the negligence and/or breach of Employer's duty;
ii. Costs; and,
iii. Interest at such rate and for period as the Court shall think fit.

THE DEFENCE

[10] The Defendant denied that it has ever employed the Claimant as a

cableman or in any position on the 20th March, 2004 or at any other time. In further denial of the Claim, the Defendant asserted the following:

i. It did not operate on Saturday, the day of the incident;
ii. It did not have any operation at a Teak Plantation but at Brickfield Plantation, Tabaquite, Rio Claro Road;
iii. Since 2003, it has not employed a cableman, as it had acquired a Caterpillar Log Skidder; a large mechanical vehicle operated by a driver for the removal of logs out of the forest.

[11] The Defendant also stated that these proceedings were previously instituted and constitutes an abuse of process as it is substantially the same matter seeking substantially the same reliefs as in the prior claim. Further, the Defendant avers that it was unaware of the incident as it did not receive a report or any other communication, until a correspondence from Messrs. Dipnarine Rampersad on the 4th February, 2006.

[12] However, the Defendant submitted in the alternative, that should the Court find that the Claimant was an employee of the Defendant and he suffered injuries during the course of his employment, the Claimant was wholly liable and/or responsible for the injuries he sustained. The particulars of the Claimant's negligence are as follows:

i. Failing to take any and/or adequate precautions for his own safety and well being;
ii. Failing to heed and/or being reckless as to the danger of falling trees;
iii. Exposing himself to the risk of danger, damage or injury; and
iv. Failing to take any/or any reasonable care for his own safety.

ISSUES

[13] The following issues fall for determination by this Court:

i. Whether the Claimant was employed by the Defendant on the 20th March, 2004;
ii. Whether the Defendant, as employer, was in breach of its duty to take all reasonable care for the safety of the Claimant and not to expose him to the risk of injury; and
iii. Whether the Claimant has suffered, and continued to suffer, loss and damage as a result of this negligence.

Whether the Claimant was employed by the Defendant on the 20th March, 2004

[14] The **WORKMEN'S COMPENSATION ACT, CHAP. 88:05, SECTION 2** defines 'workman' as:

> *"… any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour or otherwise … and whether such contract is*

expressed or implied, oral or in writing, whether the remuneration is calculated by time or by work done, and whether by the day, week or month or with reference to any other period whatever…"

While in **Black's Law Dictionary**, 'employee' is defined as:

"*… a person who works in the service of another person under the express or implied contract of hire under which the employer has the right to control the details of work performance.*"

[15] In **Lee Ting Sang v Chung Chi-Keung**[1], Lord Griffins, when addressing the question of what was the appropriate Common Law standard by which a person was to be adjudged an employee, stated that "*[this] has proved to be a most elusive question … despite a plethora of authorities the courts have not been able to devise a single test that will conclusively point to the distinction in all cases*".

[16] Various tests have been devised over the years to determine this standard; in some instances the question was whether a worker was liable for tax or national insurance while in other cases it was whether there was a succession of pieces of work that might arguably be linked to form one employment under an overall 'umbrella' arrangement.[2]

[17] In **Chadwick v Pioneer Private Telephone Co. Ltd.**[3], Stable J commenting on the requirements for a contract of employment

[1] [1990] 2 AC 374
[2] Munkman on Employer's Liability, 15th Edition, p. 122, para. 4.11
[3] [1941] 1 All ER 522

stated:

> *"A contract of service implies an obligation to serve, and it comprises some degree of control by the master."*[4]

MacKenna J in **Ready Mixed Concrete (SE) Ltd. v Minister of Pension and National Insurance**[5] elaborated on Stable J's dictum by stating:

> *"A contract of service exists if these three conditions are fulfilled:*
>
> *i. the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.*
>
> *ii. he agrees, expressly or impliedly, that in the performance of the service he will be subject to the other's control in a sufficient degree to make that other master,*
>
> *iii. the other provisions of the contract are consistent with its being a contract for service."*[6]

[18] In cross examination, the Claimant asserted that he first met the Managing Director, Ruben Balgoin, of the Defendant Company on the 12th March, 2004, where he enquired about a job. He avers that Ruben Balgobin agreed to hire him at a salary of $80.00 per day and told him to turn out to work the next day, 13th March, 2004, at 7 a.m. The Claimant, by his own admission, stated that the position he was to be employed as was unclear, for this was not discussed on the 12th March, 2004.

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[4] *Ibid.*, p. 523D
[5] [1968] 2 QB 497
[6] *Ibid.*, p. 515

[19] The Claimant further stated that he did not turn out to work the next day because he was feeling unwell. However, there was no communication of this to the Defendant and no communication between the parties until the 19th March, 2004 when the Claimant went to Brickfield Plantation.

[20] On this day, 19th March, 2004, the Claimant asserted that he worked from 7 a.m. to 3:30 a.m. but did not collect any wages for the day's work, nor did anyone offer to pay him on that day although he spoke with Ruben Balgobin during the course of the day.

[21] On the 20th March, 2004, the Claimant came to work on Brickfield Plantation for 7 a.m. and stated that on the site was Larry Balgobin, who was the supervisor, along with two other employees – the timber jack driver and the saw operator. He stated that around 11 a.m. he was in a bent position tying a log on the ground, while the "saw man" was cutting a tree about fifty (50) feet away from him. The tree that was being cut fell onto another tree, and by the time the Claimant saw the tree falling in his direction he was unable to react; the branch fell on him and slammed him onto the tree he was tying. He avers that the reason he did not hear the tree falling was because the motor of the saw was very loud.

[22] The Claimant testified that after the accident occurred he asked Larry Balgobin to go to his grandmother, Samdaye Lahourie, and get an ambulance. Larry Balgoin acquiesced and returned about

twenty (20) minutes later with the Claimant's grandmother and aunt, both of whom testified on the Claimant's behalf.

[23] Both witnesses' recollection of the events corroborates that of the Claimant's version. The grandmother was not shaken in cross-examination when she stated that a man approached her and identified himself as "Larry" and informed her that the Claimant was injured. In addition, the Witness Statement of Mohanlal Persad, a neighbor of the grandmother, also verifies the Claimant's version. He stated that the grandmother shouted out to him that the Claimant was injured and solicited his assistance to bring the Claimant out of Brickfield Plantation. While there, Mr. Persad stated that he spoke with Larry Balgobin, who identified himself and stated that he was the "boss man son".

[24] The Defendant has not adduced any evidence to contradict that of the Claimant that Larry Balgobin was on site at the Brickfield Plantation on the 20th March, 2004, where he was injured; that after the Claimant was injured Larry Balgobin on the request of the Claimant sought his grandmother and asked her to call an ambulance and that Larry introduced himself both to the grandmother and Mohanlal Persad. Additionally, he described himself as "the boss man son" to Mr. Persad.

[25] In **McQueen v Great Western Railway Company**[7], the Court held that:

[7] (1875) L.R. 10 Q.B. 569 at p. 574

"*If a prima facie case is made out, capable of being displaced, and if the party against whom it is established might by calling particular witnesses and producing particular evidence displace that prima facie case, and he omits to adduce that evidence, then the inference arises, as a matter of legal presumption, that the absence of that evidence is to be accounted for by the fact that even if it were adduced, it would not displace the prima facie case that has been established …* "

Further, in **Ian Sieunarine v Doc's Engineering Works (1992) Limited**[8], Rajnauth-Lee J. held:

"*In the absence of the witnesses … the Court is entitled to infer that the defendant has chosen to withhold evidence which should have either supported the plaintiff's case of at the very least would not have displaced the prima facie case. Accordingly, this court finds that the prima facie case has become a strong case in the absence of any evidence to dispute the matters established by the evidence of the plaintiff and his witnesses.*"

[26] In light of the foregoing, the Court accepts the evidence of the Claimant that:

i. The Defendant was working in Brickfield Plantation on the 20th March, 2004;

[8] H.C.A. No. 2387/2000

ii. He was employed by the Defendant as a labourer on the day of the incident;

iii. Larry Balgobin was the supervisor on site, which was supported by the Defendant as Ruben Balgobin stated that when the Company was in the field, it would often be Larry Balgobin who would be present on site; and

iv. Upon seeing the Claimant injured, Larry Balgobin was the one to inform the Claimant's grandmother of the incident.

[27] The Court does not accept that the Defendant does not work on Saturdays and never has in their nine years of operation, despite the size of the job, the complexity of the job and the deadline and accruing penalty imposed for breach of the deadline. For the mere fact of the accident happening on a Saturday, proves that the Defendant was carrying on work in the Brickfield Plantation.

Whether the Defendant, as employer, was in breach of its duty of care to take all reasonable care for the safety of the Claimant and not to expose him to the risk of injury

[28] The Court having found that the Claimant was indeed an employee of the Defendant on the 20th March, 2004 must now be satisfied on a balance of probabilities that there was a breach of the duty owed by the Defendant, as employer, to the Claimant, as employee, and that there was resulting injury, loss and damage.[9]

[9] Halbury's Laws of England, 4th Edition, Vol. 34, p. 46, para. 54

[29] The Court acknowledges that the nature of the works carried out by the Defendant is risky and dangerous and while safety gear and equipment may not have prevented the accident, as admitted by the Claimant, adequate supervision should have been given. In **Morris v Point Lisas Steel**[10], it was held by the Court that the duty of an employer toward his employee extends beyond the mere provision of safety equipment. In instances of dangerous and risky work that is to be performed, it is incumbent upon the employer to enforce safety guidelines and practices.

[30] The Court finds that the Defendant breached his duty of care to the Claimant by:

i. Failing to provide adequate supervision on the site whilst the Claimant was performing his duties;
ii. Failing to instruct the Claimant on how to work in a dangerous area, where the cutting of trees were taking place;
iii. Failing to instruct the Claimant to move out of the area where the trees were being cut; and
iv. Failing to take reasonable care to ensure that the Claimant would be reasonably safe in the performance of his duties as an employee.

[31] The Court finds that although Larry Balgobin was the supervisor on site, he did not adequately perform his duties; which may be due to

[10] H.C.A. 1886 of 1983

inexperience or simply having to attend to too many things. The Defendant should have had someone on the site solely to monitor the felling of trees, and who would have been able to warn the Claimant, i.e. possibly by shouting out or otherwise signaling to him that a tree was about to fall and he should clear the area.

[32] The Court having found that the Claimant was the Defendant's employee and the Defendant was in breach of duty, will now go on to consider the quantum of damages, if any, to which the Claimant is entitled.

Whether the Claimant has suffered, and continued to suffer, loss and damage as a result of this negligence

[33] In assessing general damages payable by the Defendant, the Court had regard to the principles of assessment as laid down by Wooding CJ in **Cornilliac v St. Louis**[11]-

a. The nature and extent of the injuries sustained;
b. The pain and suffering endured;
c. The nature and gravity of the resulting disability;
d. The loss of amenities; and
e. The loss of pecuniary prospects.

In addition, regard was also had to the current level of awards in this jurisdiction, the principles of which are laid out in **Azziz**

[11] 7 WIR 491

Ahamed v Ragoobar[12] and the effect of inflation on the value of money and the fact that this is a 'once and for all' award as was noted in **Wright v British Railways**[13].

[34] In addition, the following were also taken into consideration by the Court:

i. The Claimant is not handicapped on the work market as by his own admission he recently sought employment in the latter half of 2009;
ii. Dr. Stephen Ramroop has indicated that there is no need for surgical intervention in the Claimant's case and although he walks with a cane, he is not incapacitated in any other way;
iii. The Claimant has been unable to prove his pharmaceutical expenses of $2,500.00 and by his own admission, stated that he could not afford to purchase same;
iv. The Claimant has claimed $1,500.00 monthly for the period 20th March, 2004 to the present, as monies paid to his grandmother for domestic assistance. However, his grandmother testified that she was not paid for caring for the Claimant when he was recovering from his injuries, nor did she expect to be reimbursed for her care of him; and
v. The Claimant presently earns $1,100.00 in disability benefits.

[12] 12 WIR 375
[13] [1983]1

[35] The Court applying the cases of **Molly Gaffar v Bertram Padmore**[14], **Teeluckchan Harbackan v Harold Samlal**[15] and **Osbourne v Singh**[16], where the injuries were of a similar nature, awards the Claimant $62,000.00 in general damages.

[36] The Claimant's case for loss of earnings as pleaded cannot be allowed, for by his own admission he was a casual worker who was employed from time to time. The award for special damages is as follows:

> Salary:
> $1,600.00 per month for one year = $19,200.00. However, because of the nature of the Claimant's employment this figure will be divided by two to be a more accurate representation of his yearly salary, amounting to a figure of $9,600.00.
>
> Loss of earnings:
> March 2004 – May 2011 = 7.2 years
> $9,600.00 x 7.2 = $68,800.00
>
> Disability Grant from the Government:
> *Benefits will only be calculated from September 2007 to present for the purposes of assessing damages.*

[14] HCS No. 953 of 1997
[15] HCS No. 1982 of 1985
[16] HCS No. 572 of 1977

September 2007 – September 2009 at $700.00 a month

= $16,800.00

September 2009 – May 2011 at $1,100.00 a month

= $20,900.00

Total Grant = $ 37,700.00

The Claimant's total disability grant will be deducted from his loss of earnings equaling $31,100.00.

Loss of Future Earnings:

The Claimant is a casual worker, who is now 50 years old receiving government benefits and can still do light work. The Court will apply a multiplicand of three in calculating his loss under this head.

$9,600.00 x 3 = $28,800.00

Award:

Special Damages		
	Loss of Earnings	$31,100.00
	Loss of Future Earnings	$28,800.00
General Damages		$62,000.00
	Total	**$121,900.00**

CONCLUSION

[37] The Court therefore makes the following orders:

i. The Defendant to pay to the Claimant the sum of $121,900.00;
ii. Interest on the sum of $121,900.00 at the rate of 6% from the date of filing this action to the date of judgment;
iii. The Defendant to pay the Claimant's costs in this action.

JOAN CHARLES
JUDGE