

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2017-02716

DERRICK MAHADEO

Claimant

AND

DESMOND BHOLA

Defendant

BEFORE THE HONOURABLE MADAME JUSTICE JOAN CHARLES

Appearances:

Claimant: Ms. Kelly-Jo Sirju instructed by Mr. Anand Rampersad

Defendant: Mr. Stefan Ramkissoon and Mr. David Mark Kidney
instructed by Mr. Wayne Beharry

Date of Delivery: 10th September 2020

JUDGMENT

THE CLAIM

- [1] The Claimant sought damages for personal injuries suffered during the course of his employment as a Fabricator with the Defendant as well as interest and costs.
- [2] The Claimant pleaded that the Defendant, who is a Private Contractor, hired him as a Fabricator at the material time. On the 18th June 2016, the Claimant, acting in the course of his employment, climbed up on scaffolding in order to take measurements to fit a template onto a glass frame in or around the roof area of the Southern Food Basket Supermarket. The said scaffolding was erected by the Defendant, his servants and/or agents. While walking across planks placed on the said scaffolding, the said planks became loose and the Claimant fell approximately thirteen feet to the ground. The Claimant averred that his fall and the injuries that he sustained therefrom were occasioned by the negligence of the Defendant, his servants and/or agents.
- [3] The Claimant pleaded the following Particulars of Negligence and asserted that the Defendant:
- i. Caused the Claimant to fall from a height of thirteen (13) feet;
 - ii. Failed to provide the Claimant with a safe place of work;
 - iii. Failed to set up and implement a safe system of work for the Claimant;
 - iv. Failed to provide any safety devices for the Claimant so as for him not to fall when the wooden plank and/or scaffolding became loose;
 - v. Erecting scaffolding in a safe and/or dangerous manner;
 - vi. Failing to provide the Claimant with safety apparatus whilst conducting his work;

- vii. Failed to take reasonable care and/or precaution to maintain a safe working environment for the Claimant;
- viii. Failed to adequately supervise the Claimant while performing his duties;
- ix. Exposed the Claimant to unnecessary risk of injury which they knew or ought to have known existed at the time of the accident;
- x. Failed in all the circumstances to take reasonable care for the safety of the Claimant at work;
- xi. Breaches of Occupational Safety and Health Act (OSHA).

[4] The Claimant averred¹ that he suffered the following injuries :

- a. Pain and swelling of the left foot especially in cold weather,
- b. Decreased plantar flexion by ten degrees
- c. Fracture of the left calcaneus and left navicular
- d. Thirty percent permanent partial disability

[5] The Claimant also pleaded² that he required hospital as well as home care as a result of the injury. He spent one week in hospital and thereafter remained an outpatient from the 23rd June 2016 until the 27th July 2017. He also underwent physiotherapy for the fractures of his ankle. The Claimant also pleaded that he endured pain for several weeks after the injury and was unable to care for himself; he therefore hired someone to perform his household chores and attend to him personally. He also maintained that since the injury, he has been unable to return to work and socialize.

¹ Parapgraph 9of the amended Statement of Case

² Parapgraph 10 of the Amended Statement of Case

THE DEFENCE

- [6] The Defendant denied liability for the accident which occasioned injury to the Claimant.
- [7] He admitted that he was a private contractor 'who employed and/or contracted the Claimant as a Fabricator'; he also admitted that he had instructed the Claimant to take measurements to fit a template into a glass frame in or around the roof area of Southern Food Basket.
- [8] The Defendant averred that he provided standard training/instructions to the Claimant during the initial probationary period and/or at the beginning of his employment³. He stated that pursuant to the said instructions provided the Claimant, the latter was required to observe the following:
- i. To ensure when using scaffolding, that it is affixed to a sturdy object when in use;
 - ii. To follow strict instructions and/or guidelines due to the dangers associated with using a scaffolding; and
 - iii. To conduct checks to determine whether there is any damage and/or problem with the scaffolding and if any are found, same is to be reported to the Defendant.
- [9] Mr. Bhola however denied that the Claimant was acting in the course of his employment. The Defendant asserted that the Claimant and other workers, in breach of instructions issued by him, failed to affix the scaffolding to the building. He confronted the Claimant who told him that he was comfortable working on the scaffolding with only one plank mounted thereon. The Defendant nevertheless gave instructions that the scaffolding be affixed to the building before he left the site.

³ Paragraph 3 of the Defendant's Defence dated 10th April 2018.

[10] The Defendant pleaded that a short while later, he heard a commotion and discovered that the Claimant had fallen off the scaffold onto the ground. He observed that the scaffolding was not affixed to the building and that there was only one plank erected thereon. The Defendant put the Claimant to strict proof on his allegation of Negligence and averred that the Claimant's injuries were occasioned by the latter's own negligence or alternatively, that he was contributorily negligent.

THE REPLY

[11] In reply, the Claimant denied that the Defendant provided ropes or any other articles to affix the scaffolding to the building; further, that at all material times, only one plank of wood was provided by the Defendant to be mounted on the scaffolding for use by the Claimant. He also denied that directions were given by the Defendant to move the scaffolding and ensure that it was affixed to the burglar proofing and to use several planks instead of one.

[12] The Claimant averred that the scaffolding was assembled by a scaffolding company weeks in advance of the project; further, that safety checks on the scaffolding were performed by that scaffolding company.

EVIDENCE FOR THE CLAIMANT

Derrick Mahadeo

[13] The Claimant testified that in order to perform his duties as a fabricator, he had to climb thirteen (13) feet in height. He stated that his duties as a fabricator employed by the Defendant did not include the erection of the scaffolding which was done by the company which provided it. That company performed all the checks to ensure that it was safe for use. He assumed that it was safe when he climbed onto it in accordance with the

Defendant's instructions. Both he and the Defendant mounted the scaffolding and took measurements on the 18th June 2016; it was on a return trip, walking across the plank that he fell.

- [14] In cross-examination, the Claimant denied ever having been issued safety equipment by the Defendant to perform his duties as a fabricator. He related that he had been employed by the Defendant for seven to eight years before and had worked with him on many jobsites before. He denied that Bhola ever asked him or any worker to check that the scaffolding was secure or whether any equipment was functioning. Mr. Mahadeo stated that the scaffolding company was on the jobsite where they had erected scaffolding for the painters. Before the accident occurred, he had ascended and descended the scaffolding three times. Mr. Mahadeo testified that there was no burglar proofing on the building to which the scaffolding could be attached. He asserted that the scaffolding was not affixed to the building at the time of the accident.

Sunil Mahadeo

- [15] The Claimant's brother, Sunil Mahadeo, testified that while the Claimant was injured he cared for him and was paid three thousand dollars (\$3000.00) a month for the service. In cross-examination, however, he contradicted his evidence in chief and the testimony of the Claimant by asserting that he was not paid.

EVIDENCE FOR THE DEFENDANT

Desmond Bhola

- [16] The Defendant gave a witness statement and was cross examined.

- [17] He testified that he and the Claimant had worked together many times previously; he had hired Mr. Mahadeo because of his expertise as a fabricator.
- [18] He described the Claimant as one of his workers⁴ and asserted that he provided training protocols when the Claimant and other workers had to use scaffolding on a jobsite. He testified that he always instructed his workers to fully inspect all apparatus and scaffolding before use. Further, the Claimant and the other workers were instructed to ensure that the scaffolding was affixed to the building whenever it was moved from one area to another.
- [19] On the 18th June 2016, he observed that the workers had moved the scaffold but that it was not affixed to the building and that there was only one plank on it. He told the Claimant to fix these issues immediately; however, the latter said that he believed that the scaffolding was safe. Mr. Bhola testified that he repeated his instructions and told the Claimant to use the protective equipment provided, including a harness when using the scaffolding to perform his duties. Mr. Bhola testified that the Claimant and other workers disobeyed his instructions and proceeded to ascend and descend the scaffold without safety equipment and without securing it to the building. While doing this, the Claimant fell and was injured. The Defendant asserted that Mr. Mahadeo was contributorily or totally negligent which resulted in injury and loss to himself. The Defendant asserted for the first time in his witness statement that he provided a harness to the Claimant for him to use while on the scaffolding.
- [20] In cross-examination, the Defendant denied that he was a contractor, as stated in his witness statement and asserted that he was an installation technician. Contradicting both his Defence and witness statement, Mr.

⁴ Paragraph 5 Witness Statement of Desmond Bhola

Bhola claimed that the Claimant is a labourer and not a fabricator. His explanation for the contradiction was that he described the Claimant as a fabricator because “his lawyer said he was a fabricator.”

[21] The Defendant explained that while executing the job at Food Basket, he was assisted by five workers/labourers including the Claimant. He revealed that all his workers were trained by him – they started as apprentices and followed his practices.

[22] Further contradicting his Defence and witness statement, the Defendant stated that he was with his workers all the time while at work and that he never left them unsupervised at all. In answer to counsel, Mr. Bhola testified that the training that he provided his workers included the securing of scaffolding with ropes and repairing said scaffolding.

[23] Mr. Bhola later admitted that an installer had erected the scaffolding at the first location onsite. This witness stated that he would have seen any defect in the scaffolding if he had been present. He disclosed that Food basket Supermarket had rented the scaffolding but the scaffolding company merely delivered the pipes which his workers erected the scaffold under his supervision. After he instructed them to move it, they did so without first disassembling it. He knew this was wrong but did not stop the workers. He saw them place the planks on the scaffolding and was satisfied.

[24] His evidence before me was that on the day of the accident he instructed the Claimant to climb up the scaffolding without inspecting it to ensure that it was safely moved. He was also aware that the Claimant was not wearing any safety equipment; significantly he held the view that a harness was not necessary. He later revealed that there was nothing to which the harness could be affixed but he told the Claimant to take it in case a safety officer came along; the harness was ‘for show’.

[25] The Defendant called one of his workers as a witness – Stefon Gopee.

Stefon Gopee

- [26] In cross-examination, Mr. Gopee testified that he knew the Claimant as a fellow employee and knew him to be a fabricator. This witness also testified that he was a glazer/glass fitter. He was of the view that the functions of a glazer/glass fitter could easily be done by a fabricator and that the training for these two trades was 'not necessarily' different.
- [27] Mr. Gopee stated that the Defendant, their employer, had instructed them to break down the scaffolding, untie it and remove same to the new location; however, in disobedience to this instruction, the workers, including himself, simply moved the scaffolding to the new area. He also stated that it was not the job of the Defendant's employees to break down the scaffolding and move it and reassemble it in a different location. He admitted that all the employees, including the Claimant, did not 'tie off' the scaffolding because they all thought it was safe to use. It was also his evidence that the Defendant had inspected the scaffolding after it had been moved and informed the workers that it should be tied off.

ISSUES

- a. The main issue to be determined is whether the Defendant failed to provide a safe system of work for the Claimant by failing to provide safety equipment, or ensuring that the scaffolding was properly affixed and erected before asking the Claimant to use it.
- b. Another issue to be decided is whether the Claimant was contributorily negligent.

[28] The Court opined in **Keith Malchan v Republic Bank Ltd**⁵:

(78)In an action for negligence, the onus is on the Claimant to: (1) show that the Defendant had a duty of care towards him; (2) the Defendant breached that duty; (3) but for the breach of that duty of care the claimant would have not sustained loss; (4) the Claimant’s loss was foreseeable; and (5) the Claimant has suffered damage as a result.

*(79)The duty of care of an employer, other than that imposed by statute, is to take reasonable care for their employees’ safety. In **Wilson & Clyde Coal 2 Charlesworth and Percy on Negligence**, 12th Edition, para. 11-02 Page 25 of 32 Co. Ltd. v English³, Lord Wright opined:*

“I think the whole course of authority consistently recognises a duty which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm, or a company, and whether or not the employer takes any share in the conduct of the operations...”

Further, the employer’s duty is stricter than the duty to take reasonable care for oneself, and it exists whether or not the employment is inherently dangerous.⁶

*(80)This duty of care includes providing a safe place of work. Goddard LJ in **Naismith v London Film Productions Ltd.**⁷ opined that duty was:*

“... not merely to warn against unusual dangers known to him ... but also to make the place of employment ... as safe as the exercise of reasonable skill and care would permit.”

(81)The Common Law prescribes that it is sufficient that the employee’s place of work be maintained in as safe a condition as reasonable care

⁵ CV2007-04482 paras 78-82

⁶ Charlesworth and Percy on Negligence, 12th Edition, para. 11-05

⁷ [1939] 1 All ER 794, 798

by a prudent employer can make. The test to be applied is set out in **Stokes v Guest, Keen and Nettleford (Bolts and Nuts) Ltd.**⁸ where Swanwick J. opined:

“... the overall test is still the conduct of the reasonable and prudent employer, taking positive thought the safety of his workers in light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to make a more than average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does, and he must balance against this the probably effectiveness of the precautions. He must weight up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probably effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent.”

(82) *It is also recognized that this duty encompasses the protection of an employee from temporarily unsafe conditions, as a place of employment may become unsafe owing to some temporary condition. The test to be applied is whether or not a reasonably prudent employer*

⁸ [1968] 1 WLR 1776, as cited in Charlesworth and Percy on Negligence, 12th Edition, para. 11-02

*would have caused or permitted the existence of that state of affairs of which the complaint is made.*⁹

ANALYSIS AND CONCLUSION

[29] After careful consideration of all of the evidence before me, I found the following facts:

- a. A scaffolding company originally installed and erected the scaffolding used by the Defendant and his workers on site;
- b. The Claimant was employed as a fabricator by the Defendant and not as a labourer as he asserted;
- c. It was not the Claimant's or other workers' responsibility to erect/move the scaffolding yet the Defendant instructed them to move said scaffolding to another location for use by the Claimant and other employees;
- d. The Defendant knew that it was unsafe to use the scaffolding if it was not secured to the building but authorised his employees including the Claimant to climb onto said scaffolding nonetheless;
- e. There was nothing to which the scaffolding could be affixed to the building ;
- f. The Defendant failed to provide the Claimant with safety equipment although he knew that it was his responsibility so to do (hence his instruction to the Claimant to take the safety harness with him on the scaffolding "in case a safety officer visited the site");
- g. The Defendant believed that a safety harness was not necessary even though the Claimant had to work from a height of some thirteen feet. He

⁹ Charlesworth and Percy on Negligence, 12th Edition, para. 11-26

acknowledged that the harness could not be used since there was nothing to which it could be attached;

- h. The Defendant knew that the scaffolding had not been disassembled and reassembled on the new location where the Claimant had to use it. He nevertheless instructed the Claimant to climb onto it without inspecting it to ensure that it had been safely moved or that it was stable and secure.

[30] I concluded that the Defendant was in breach of his duty of care to the Claimant as an employer; further, that he failed to consider the safety of the Claimant in light of his knowledge and the general practice regarding the use of scaffolding when working on tall buildings. Mr. Bhola clearly knew that the scaffolding had to be erected, disassembled and reassembled on each occasion that it was moved, yet he instructed the Claimant to use the scaffold knowing that this had not been done. He knew that there was a foreseeable risk of injury if the scaffold was not safely moved by workers trained and experienced in doing so, yet was reckless in his utter disregard for these safety precautions. Mr. Bhola knew that the likelihood of injury from a fall from thirteen feet would be high but completely ignored this risk.

[31] The Defendant's instruction to the Claimant to take the safety harness with him even though it could not be used, showed that Mr. Bhola was aware of the precautionary measures to be taken in order to avoid injury. This evidence also highlights the fact that the Defendant knew that the harness was an effective measure to prevent falls, and/or minimize the risk of falls and injury. I consider that his action of failing to ensure that the harness could be attached and used by the Claimant amounts to a cynical flouting of a practice designed to protect the Claimant from foreseeable injury.

[32] In the circumstances, I determined that the actions/failure of the Defendant outlined above do not amount to conduct of the reasonable and prudent employer taking positive thought for the safety of the Claimant.

[33] Overall, I found the Defendant to be an unreliable and uncreditworthy witness having regard to the contradictions between his pleaded case and evidence, between his evidence in chief and cross-examination and inherent inconsistencies in his evidence outlined above. I determined that he was not a witness of truth.

[34] On the other hand, I accepted the Claimant's evidence and account of the incident. I rejected the evidence of his brother with respect to the Claimant's pecuniary losses since it was contradictory. I am also of the view that the Claimant was contributorily negligent since he climbed onto the scaffold knowing that the scaffolding company ought to have moved it; he ought to have reasonably foreseen a risk of injury to himself by reason of this fact as well as the non use of a harness when he was atop the scaffold. Accordingly, I hold that he is ten percent contributorily negligent for his injury.

[35] I therefore Order:

- a. Judgment for the Claimant against the Defendant for ninety (90) percent of the Claim.
- b. The assessment of damages including Special Damages, Interest and Costs is transferred to a Master in Chambers.

**Joan Charles
Judge**