

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2017-01080

BETWEEN

ANAND MAHABIR

CLAIMANT

AND

DAMUS LTD

S & D CONSTRUCTION LIMITED

DEFENDANTS

Before the Honourable Madame Justice Margaret Y. Mohammed

Dated the 7th June 2018

APPEARANCES:

Ms. Candice Deen and Mr. Ijaz Mohammed Attorney at law for the Claimant.

Mr. Haresh Ramnath Attorney at law for the Second Defendant.

JUDGMENT

1. In the Claim the Claimant sought damages against the Defendants for injury to his left foot. The Claimant was employed by the First Defendant and the Second Defendant was the owner/operator of the Carry Deck Crane (“the crane”) which caused the injury to the Claimant’s foot. At the trial, the claim between the Claimant and the First Defendant was settled. The trial proceeded on liability between the Claimant and the Second Defendant.

2. The Claimant's case was that on the 9th November, 2013 at about 5.15pm, the Claimant whilst in the course of his employment with the First Defendant, as a Fitter, was assisting with re-installing enclosure panels on a turbine compressor on a compressor deck at Atlantic LNG, Point Fortin, Train IV, when the crane which was owned and driven/operated by a servant and/or agent of the Second Defendant was brought to a stop. The Claimant approached the crane to retrieve a pair of gloves resting on the crane when suddenly and without warning the driver/operator of the crane extended the rear outrigger of the crane it to crush the left foot of the Claimant as a result of which he sustained personal injuries.
3. The Claimant pleaded that it was the duty of the First and/or Second Defendants, and/or it was an express and/or an implied term in the contract of employment between the Claimant and the First Defendant inter alia, to take all reasonable precautions for the safety of the Claimant while he was engaged in his work, not to expose the Claimant to a risk of damage or injury which the First and/or Second Defendants knew or ought to have known, to take all reasonable measures to ensure that the place where he carried out his work was safe, and to provide and maintain a safe and proper system of work, to provide safe work to premises and to ensure workers follow such systems.
4. The First and/or Second Defendants in breach of its duty of care to the Claimant and/or in breach of the terms of the contract of employment with the Claimant, failed to provide a safe/suitable and/or proper system to perform his duties thereby resulting in the Claimant suffering severe personal injuries, loss and damages.
5. The Particulars of negligence against the Second Defendant, its servants and agents as outlined by the Claimant were:
 - “(a) Failed to warn or inform the Claimant that the rear outrigger of the crane was being extended;
 - (b) Failed to ensure that the buzzer on the crane was properly working to warn the Claimant that the rear outrigger was being extended;
 - (c) Exposed the Claimant to a foreseeable risk of injury;

- (d) Failure to provide for the Claimant a competent staff of men and/or competent employees;
- (e) Failure to conduct a proper risk assessment relative to the Claimant's occupation so that the Claimant is not exposed to any risk of injury;
- (f) Failure to provide any and/or any reasonable supervision for the use of the crane;
- (g) Failure to take suitable and sufficient steps to prevent the Claimant's left foot from being crushed by the crane which caused personal injury;
- (h) Failure to keep a proper lookout for other employees in the vicinity and in particular failure to note the presence of the Claimant."

6. The Second Defendant denied that it was solely responsible for the Claimant's injury. It contended that the Claimant's injury was caused or contributed by the Claimant's negligence. The Defendant averred that it was contracted by Atlantic LNG company to supply the crane and operator to work on the compressor deck in the plant. All safety personnel, risk assessment, spotters/banksmen and supervisors were the responsibility of the Atlantic L.N.G. Company of Trinidad and Tobago and/or the First Named Defendant.
7. Subsequent to the incident on the 9th day of November, 2013, the Second Defendant was informed by Atlantic LNG personnel that there was a minor incident that occurred but that it was sorted out. The Claimant was involved in the job to be executed and was aware that the crane was going to be immediately in operation. A spotter ("the banksman") was assigned by Atlantic LNG to the Second Defendant's equipment and the banksman gave instructions to the operator to proceed. Both the banksman and the operator walked around the equipment before to ensure that it was safe to operate the crane. The Claimant proceeded to lean on the crane while it was in operation. The operation of the crane and its operator was clearly visible and the Claimant saw or ought to have seen same. As such the Defendant contended that are necessary precautions were taken.
8. The Second Defendant also contended that the Claimant voluntarily accepted the risk of injury by wrongfully leaning on the crane whilst it was in operation with full knowledge of

the risk and injury to himself and thereby consented to, and accepted such risks and as a result he waived any claim in respect of the said injury or damage.

9. With respect to the particulars of negligence pleaded by the Claimant, the Second Defendant stated that:-
 - a) The crane was not designed with a buzzer as mentioned. It was manufactured with a back up alarm.
 - b) The operator was and is competent in his field with years of experience working elsewhere and on the same site and area where the incident happened.
 - c) The Claimant was part of the job and participated and signed the job safety analysis and Job Hazard Analysis.
 - d) Supervision was not the responsibility of Second Defendant but Atlantic LNG.
 - e) The operator of such equipment was requested to focus on the job. The banksman was responsible to provide signals and instructions to the operator.

10. The issue between the Claimant and the Second Defendant was whether the latter was wholly or partly responsible for the injury to the Claimant's foot which occurred on the 9th November 2013.

11. The Claimant's evidence in chief was that on the 9th day of November, 2013 he reported to work at Atlantic LNG, Point Fortin, Train IV at around 6:45am. He had to re-install enclosure panels on a turbine compressor on the Compressor Deck for the First Defendant. The enclosure panels were being lifted with the crane which was owned by the Second Defendant. The work crew comprised of approximately 8 men including the Claimant, Mr. Christopher Scott, the Foreman, Mr. Andrew Cooper, the banksman who were all employed with the First Defendant and Mr. Stanly Francique, the driver of the crane who was employed with the Second Defendant.

12. The Claimant testified that the work area was approximately 20 feet by 20 feet and within the work area there were two turbine compressors and the crane. One turbine compressor was anchored at each side of the area of the crane's operation. Caution tape was also placed to the front and back of the area of the carry deck crane's operation which was to prevent unauthorized personnel who were not part of the crew installing the enclosure panels from entering the work area.

13. At approximately 5:15pm on the 9th day of November, 2013 the Claimant testified that he had just completed re-installing the one-inch spool on a turbine compressor when he went to sit to rest on the grating steps which were within the area of the crane's operation and approximately 4 feet from where the carry deck crane was in operation. While sitting on the step he was observing the work taking place. He saw that the driver of the carry deck crane was signalled by the banksman to begin to move the crane forward in order to lift an enclosure panel from the lower level of the compressor deck on the north side. He then saw the driver of the crane drive it forward to pick up the enclosure panel from the lower level deck of the compressor. He then saw the banksman give the signal to the driver of the crane to lift the enclosure panel from the north side of the compressor deck and the driver then lifted the enclosure panel from the north side of the compressor deck. He then saw the banksman give the signal to the driver of the crane to reverse to the south side and turn towards the east and the driver then reversed to the south side to clear the area to swing the crane and turned it to the east side of the compressor deck. The crane had completed the swing of the enclosure panels from the north side to the east side. He did not see any signal given by the banksman for the enclosure panel to be placed down onto the platform. According to the Claimant, the Banksman must give a signal for each movement of the crane. The crane was brought to a stop with the enclosure panel secured in the crane's boom in a raised position.

14. The Claimant also testified that as the crane was brought to a stop, he proceeded to walk towards the crane which was approximately 4 feet away to retrieve a pair of gloves resting on the crane so that he could resume his work of installing the enclosure panel. He retrieved his gloves and as he was putting on his gloves, he suddenly felt excruciating pain on his

left foot. He immediately looked down and saw that the rear outrigger of the crane was extended over his left foot crushing it. His left foot was pinned between the rear outrigger and the ground. He did not hear the buzzer on the crane sound off to indicate that the rear outrigger of the crane was being extended.

15. In cross examination, the Claimant testified that he had been a fitter for 9 years before the incident. He confirmed that before he sat on the step he had been installing panels on the side of a compressor .He accepted that before he went to sit on the step he had observed that the crane was moving and that he was about 4 feet away from it. On the day of the incident he was wearing a coverall which had pockets, gloves, steel tip boots and ear plugs. He stated that his gloves were on the crane since they were accustomed to putting it on the crane. He said at the time he put his gloves on the crane it was at a standstill and he placed his gloves on the top of the back fender which was over a wheel of the crane. He admitted that there were no wheels behind the crane but that the gloves were on the left rear fender. He said that the banksman was on the left front of the crane when he went to get his gloves. He stated that he did not know when the front legs of the outrigger came out since he was not watching the legs but the load. He agreed that the operator only moved the crane upon receipt of instructions from the banksman. He went behind the left rear of the operator. He accepted that he stood up about a second to put on his gloves which were on the left rear fender of the crane. He said that he was standing very close to the left rear fender when he was putting on his gloves. He stated that he was standing normal when he reached for the gloves.
16. The Claimant disputed that the manual which was exhibited to the witness statement of Marcus Deyal was for the same crane which caused the injury to his left foot. He stated that the purpose of the outrigger was to keep the crane stable. He also stated that when the legs came down straight it kept it stable. He stated that the legs of the crane came down straight then it touched the ground and then moved out. He denied that the legs of the crane came down at an angle. He could not state where he was when the legs of the crane had come down on the day of the incident. He recalled that he was putting on his gloves and

his left foot was pinned. At that time he was facing west and the crane had turned east. Later he denied that the crane rotated.

17. Counsel for the Second Defendant put to the Claimant that the crane was not manufactured with a buzzer for the outrigger. He responded that all the equipment had a buzzer. It was put to him that the crane only had a buzzer for reversing to which he responded that the buzzer had to be installed. He accepted that he produced no document to prove that the buzzer had to be installed to pass inspection. Yet he maintained that the buzzer had to be installed by the owner of the crane. He then changed his evidence to state that the buzzer was working but he did not hear it. He did not indicate where in his witness statement he stated that the buzzer was not working. He accepted that the operator had to pay attention to the banksman who was in front of him, and the bubble to level the crane which was in front of the banksman when operating the crane. He then changed his evidence to state that the banksman was at the side. He accepted that the operator would have been looking to the front at the banksman and the bubble and not to the back of the crane.
18. The Claimant stated that he did not know the lifting capacity of the crane and that he had looked to the east and the crane was facing north. In re-examination he stated that the outrigger was less than half of his arms length away from him.
19. The Second Defendant's sole witness was Mr Marcus Deyal. According to Mr Deyal he is a crane operator with the Second Defendant. He testified that the Second Defendant did not know about the Claimant's injury until the receipt of the pre-action protocol letter. He stated that the Second Defendant was contracted by Atlantic LNG company to supply the crane and operator in the plant. All safety personnel, risk assessment, spotters/ banksmen and supervisors were the responsibility of the Atlantic L.N.G. Company of Trinidad and Tobago and/or the First Named Defendant. Subsequent to the incident on the 9th day of November, 2013, the Second Named Defendant was informed by Atlantic LNG personnel that there was a minor incident that occurred but that it was sorted out. The area where the works were carried out was cordoned off and only authorised personnel were allowed to enter the project site. All workers in the field had knowledge of the crane and that it was operational on the site. A banksman also known as the spotter was assigned by Atlantic

LNG to the Second Defendant's equipment, and the banksman gave instructions to the operator to proceed. Both the banksman and the operator walked around the equipment before to ensure that it was safe to operate the crane. The crane was not designed with a buzzer. It is manufactured with a backup alarm which comes on only when the crane is in reverse gear. The crane did not come with any alarm for when the legs of the crane is coming down. The operator was and is competent in his field with years of experience working elsewhere and on the same site and area where the incident happened. He testified that supervision was not the responsibility of the Second Defendant. The operator of such equipment is requested to focus on the job. The banksman is responsible to provide signals and instructions to the operator. Being a crane operator for over ten (10) years, he had sufficient experience and knowledge of the operation of the Crane. He annexed a copy of the Operator's Manual of the crane as "A."

20. According to Mr Deyal, the legs of the crane come out to raise the entire crane including its tyres off the ground to prevent lifting from the tyres and instead the jacks would be used. The legs lift the crane only when lifting a load. The two shorter levers situated at the front in the operator's cabin of the crane is pushed forward for the legs of the crane to come down. The legs land sideways of the crane rather than downwards. The figure 3-45 at page 3-21 of the said crane Manual annexed as "A" above illustrated the operation of the legs of the crane. The legs of the crane take approximately 1.5-2 minutes on a normal time frame to touch the ground. While the crane is in operation, the loud sounds of the engine can be heard. When the legs of the crane are coming down the acceleration increases in the engine producing a louder noise from the crane. While the crane is jacking down, the operator monitors a levelling device inside the cabin of the crane to ensure that it is level. Levelling the crane increases stability when lifting a load, making sure the crane is level while lifting the load. However, this device only shows the level of the crane and does not show the surroundings of the crane. The cabin of the crane does not rotate. The crane operator at the time of the incident is currently off shore and he provided a report to the Second Named Defendant dated the 10th day of November, 2013 (the day after the incident) which he annexed as "B."

21. The report (“the operator’s report”) stated the following:

“After completing swing of the panel from the north side to the east, I put the load down. In order to complete the lifting and installation of the panel I had to secure the carry deck crane into position. I looked around and saw the area clear to extend the rear out-rigger and confirmed with the banks man. Mr Mahabir was seated on the stairs approximately four (4) feet away from the crane. I looked away to engage the control to extend the rear out-rigger. After I engage the controls, I heard someone screaming. I immediately looked out my window to the left side and saw Mr Mahabir and the banks man telling me to stop. I immediately retracted the out-rigger.”
22. The operator’s report was admitted into evidence through a hearsay notice. As such its contents were not tested in cross examination.
23. In cross examination, Mr Deyal admitted that he was not the operator on the day of the incident and he did not inspect the crane on the day of the incident. He stated that he was certain that the manual for the crane which he annexed was that for the crane on the day of the incident since he said that he operated it on the night shift. He accepted that there were different types of cranes and that every crane had different features. He denied that the crane came with a buzzer. However he acknowledged that it was possible to install a buzzer and that it could have been installed. He accepted that the speed of the outrigger was 1-2 minutes and if it was accelerated it was less than 1 ½ minute. He stated that when the outrigger is extended a loud noise is emitted and the engine also made a loud noise. He also stated that he became a crane operator by being certified and that the correct person to assess the competence of the operator at the time of the incident was not him but their boss, Mr F Ali. He acknowledged that he did not see any of the certificates of the operator who operated the crane on the day of the incident. He also agreed that in the operator’s report of the incident he did not state that the Claimant was injured.
24. Counsel for the Claimant submitted that the Court has to determine if there was a duty of care by the Second Defendant to the Claimant. In support Counsel referred the Court to the

decision of Rahim J in **CV 2015-02920 Randy Nanan v Trinsulate 2 Caribbean Limited and anor** and the authorities referred to therein. In particular Counsel argued that based on the learning in **Caparo Industries plc V Dickman and Ors. [1990] 2 AC 605** once the Court establishes that there was a proximity in the relationship between the operator and the Claimant, the Court must impose a duty of care. In the instant case since they were working together at the same site with a common agenda there was a proximity in the relationship. It was also argued that the duty of care extended beyond the banksman to the crane operator who could have seen out of the window of the crane. In this regard he referred to the operator's report. He argued that the crane operator breached his duty of care even if he was relying on the banksman he should have still taken steps to avoid any accidents. The Claimant's case was that the buzzer was not working properly and that the Court can take notice that a buzzer could have been installed. Also, there was a duty on the Second Defendant to take reasonable steps and if the buzzer was installed and working the injury may not have occurred.

25. Counsel for the Claimant also submitted that the Claimant had a duty to ensure his own safety, even though he was in the line of sight with the banksman and he was in close proximity to the crane. Counsel asked the Court to attribute liability with 50% to the Claimant and 50% to the Second Defendant.
26. Counsel for the Second Defendant indicated that he did not dispute the issue of foreseeability since due to the close proximity that the operator, the banksman and the Claimant were working, there was duty of care to each other. Counsel argued that the issue was whether it was reasonably foreseeable for the operator to see the Claimant since if the Claimant was sitting on the step, the operator had to pay attention to the banksman. It was argued that based on the evidence both the banksman and the bubble were at the front and the operator was looking towards the banksman and the Claimant went to the back of the crane. The Claimant admitted that the operator must pay attention to the banksman and the bubble. Therefore, there was no need for the operator to look in the direction of the Claimant. There was no evidence to contradict that the banksman was at the front of the crane and that the operator was looking at the banksman and there was no need for him to

look towards the back. There was also no challenge to the evidence about the buzzer since it was not the Claimant's case that a buzzer could have been installed and the Claimant's evidence was that he did not hear the buzzer. He submitted that the Claimant's evidence was not credible and he failed to prove his case since there was no obligation on the operator to look in the Claimant's direction.

27. To establish a duty of care the onus was on the Claimant to demonstrate that there was the existence of a relationship of proximity or neighbourhood between the Claimant and the operator; the injury to the Claimant was reasonably foreseeable and the situation was one which the Court considers it fair, just and reasonable that the law should impose a duty of care (see **Lord Bridge of Harwich in Caparo Industries plc v Dickman and ors [1990] 2 AC 605 617-618 cited by Mendonca JA in Clyde Dindial v RBTT Bank Limited CA 244/2009**).
28. Counsel for the Second Defendant did not dispute that there was a relationship of proximity between the Claimant and the operator at the time of the Claimant's injury. The dispute centred on whether given the evidence the Claimant's injury was reasonably foreseeable to the operator and if it was a situation which the Court consider it fair, just and reasonable in law to impose a duty on the operator.
29. Whether something is reasonably foreseeable depends on the evidence of each case. Was it reasonably foreseeable for the operator to have noticed the Claimant at the rear of the crane when he engaged the rear outrigger? The operator's report was that before he engaged the rear out-rigger he looked around and saw that the area was clear to extend it and he confirmed this with the banksman. He said that the Claimant was seated on the stairs approximately four feet away from the crane. He looked away to engage the control to extend the rear out rigger and after he engaged the control he heard someone scream. His evidence was not tested in cross examination. Therefore I have attached limited weight to it.
30. The Claimant's evidence in cross examination was that the banks man was always in front of the operator; the operator was always facing the banks man; the operator took

instructions from the banks man before he engaged the out rigger; at the time the Claimant's left foot was injured he was retrieving his gloves which was on the left rear fender of the crane; he was less than his arm's length away from the crane at the time of the injury; he did not hear the buzzer before the rear outrigger was engaged.

31. Further, based on the Claimant's own evidence the operator was supposed to be looked at the banksman and the bubble which were in front of him before he engaged the rear outrigger. In my opinion even though the operator said that he saw the Claimant sitting on the stair which was four feet away, the operator's attention was supposed to be on the banksman who was facing him and who ought to have seen the Claimant get up from the stair and move to the rear of the crane. In my opinion, it was not reasonably foreseeable for the operator to see the Claimant move from the stair to the left rear of the crane since his focus was supposed to be on the banksman.
32. One of the Claimant's particulars of negligence against the Second Defendant was that it failed to ensure that the buzzer on the crane was properly working to warn him that the rear outrigger was being extended. The Second Defendant's Defence was that there was no buzzer on the crane but that there was a back up alarm. There was no cogent evidence from the Claimant to dispute the Second Defendant's assertion that there was no buzzer on the crane. Indeed the Claimant's evidence in cross examination on the presence of a buzzer to warn him was inconsistent and therefore undermine the credibility of his assertion. At first the Claimant testified that a buzzer had to be installed on the crane, then he stated that the buzzer on the crane was not working and later he changed that to he did not hear the buzzer on the crane. In my opinion the failure by the Claimant to establish that the crane was fitted with a buzzer which was supposed to warn him when the rear outrigger was being extended meant that the operator of the crane could not have reasonably foreseen that the Claimant was near to the rear outrigger when it was engaged.
33. For these reasons, I was not convinced that the injury to the Claimant's left foot was reasonably foreseeable to the operator and that it is not fair, just and reasonable to impose a duty of care on him.

Order

34. The Claimant's action against the Second Defendant is dismissed.

35. I will hear the parties on costs.

**Margaret Y Mohammed
Judge**