EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CIVIL SUIT)

BRITISH VIRGIN ISLANDS

BVIHCV 2011/102

LESTER ANDERSON

Claimant

V

PENNGOR LIMITED

Defendant

Appearances: Herbert McKenzie of Orion Law for the Claimant
Terrance B. Neale of Mc W.Todman & Co for the Defendant

(Negligence – employers liability – employers' duty at common law to take reasonable care for the safety of their workforce- painter falling off scaffold- whether accident due to unsafe system of work-whether employer liable for resulting injuries -quantum of damages)

2012: June 26

2012: July 3, 5, 18

JUDGMENT

[1] **Joseph-Olivetti J:** -The notable Renaissance sculptor/painter is said to have painted 12,000 sq. of frescoes on the ceiling of the Sistine Chapel in the Vatican in Rome and designed and built the scaffolding to enable him to execute his timeless masterpiece. No doubt, in so doing, the safety of himself and his assistants was paramount in his mind. Mr. Anderson is like Michelangelo in two respects only in that he was painting a ceiling and using a scaffold. Mr. Anderson in the course of his job fell off the scaffold and thus injured himself and he brought suit against his employers,

Penngor Limited (Penngor) for negligence in failing to provide a safe system of work. Of course we are here because Penngor denied liability claiming in essence that Mr. Anderson was distracted by the use of his cell phone and did not watch his step.

[2] The trial was a short one during the course of which we heard evidence from Mr. Anderson and for Penngor, Mr. Anthony Mason, Mr. Robin Sookraj and Mr. Andrew Gordon, its managing director testified. At trial the parties agreed to put all documents in the agreed trial bundle. At the end of the half day trial, on 26 June counsel sought and the court granted leave to exchange written closing submissions instead of oral addresses, by 3 July 2012. This was duly done by Penngor but Mr. Anderson was somewhat late, filing on 5 July.

Issues Arising

[3] The issues for the Court to determine may be stated as-:

(1) Is Penngor liable in negligence and/ or breach of contract for Mr. Anderson's injuries by failing to provide him with a safe system of work?

(2) Was Mr. Anderson wholly or partly responsible for the accident by his failure to exercise the necessary care and skill to be expected of an experienced painter in the circumstances?

(3) If Penngor is liable what is the appropriate measure of damages?

[4] The **gravamen** of Penngor's defence was (1) that Mr. Anderson was an experienced painter, (2) that he was negligent or acted in disregard of his personal safety by, **inter alia,** walking on the end of the scaffolding thereby causing same to tilt and be off balance; (3) he failed to exercise due care and skill expected of an experienced painter in that he was constantly distracted by his cell phone as he was constantly making and answering calls.

The Law- employers duty in the workplace

[5] An employer's obligation in the workplace is well established**.** He/she has a duty to use reasonable care to provide a safe place of work and a safe system of work, in short to take reasonable care for the safety of their workmen or women. Denning LJ in Clifford **v Charles H. Challen & Son** Ltd [1951] 1 KB 495 at 497 summed it up nicely in his inimitable way when speaking of the case of a workman who contracted dermatitis at work from the use of a known dangerous substance. The

learned judge explained: - "**The question is whether the employers fulfilled their duty to the workman. The standard which the law requires is that they should take reasonable care for the safety of their workmen. In order to discharge that duty properly an employer must make allowances for the imperfections of human nature. When he asks his men to work with dangerous substances, he must provide proper appliances to safeguard them; he must set in force a proper system by which they use the appliances and take the necessary precautions; and he must do his best to see that they adhere to it. He must remember that men doing a routine task are often heedless of their own safety and may become slack about taking precautions. He must therefore, by his foreman, do his best to keep them up to the mark and not tolerate any slackness. He cannot throw all the blame on them if he has not shown a good example himself**."

Findings of Fact

[6] Mr. Anderson is 30 years old. At all material times he was employed by Penngor having been so employed since May 2005. Penngor is a company which has been carrying on construction in the Territory of the Virgin Islands for about 30 years. He said he was hired as a general labourer and not a painter, a field in which he had little experience, but that at the time in question he had been asked to paint the ceiling of a house on which Penngor was engaged in building. It seemed strange as Mr. Neal suggested to Mr. Anderson in cross-examination that Penngor would allow an inexperienced painter to paint such a visible part of the house.

[7] Had that evidence stood alone perhaps the point would have been decided in Penngor's favour. However, this point on which so much of the Defence rested of Mr. Anderson being an experienced painter can easily be put to rest by looking at the pleadings. In paragraph 2 of their Defence, Penngor admitted Mr. Anderson's allegations made in para 2 of his statement of claim (S/C) that he was employed as a builder's labourer on the construction site and that his duties included, inter alia, the painting of the roof and wall of the house. This therefore, was not in issue and albeit Mr. Anderson maintained his position as set out in para. 2 of the S/C despite being subjected to vigorous cross-examination and I accept his evidence also which indicates the admission in the pleadings was properly made.

[8] Accordingly, I find Mr. Anderson's version more creditable. I accept that on that day he was asked to paint but that he was not an experienced painter as Penngor would have us believe. I find that Penngor was engaged at that time on more than one project, that their experienced painters were on another project and so Mr. Anderson was asked to take his time and paint the ceiling as Penngor had a deadline to meet.

[9] Next, the height of the scaffold as claimed by Mr. Anderson was challenged. Mr. Anderson testified that he was working on a scaffold about 14 ft high. In cross examination he explained how he arrived at the height. He said that 2 scaffolds of 6ft each were joined together plus a platform or bulkhead made up of loose planks was placed on the scaffold. That there were two scaffolds joined was not disputed and I accept his estimate of the height of the scaffold on which he was working.

[10] I now turn to consider how the accident happened. In his pleadings Mr. Anderson relied on the doctrine of **res ipsa loquitur.** Mr. McKenzie, learned counsel for Mr. Anderson is noted did not address this point, hardly a helpful stance. Nevertheless, for the reasons advanced by Mr. Neale learned Counsel for Penngor, I accept that this doctrine does not apply. A fall from a scaffold does not necessarily mean that it would not have happened without negligence on the part of the owner here, Penngor or that the instrument that caused the accident was under the sole control of Penngor as Mr. Anderson must have erected it himself to enable him to do his job. See **Betitto Frett v John Schultheis et al Civil Appeal 2/2006 paras. 9 -16 and para.7-176 Clerk and Lindsell on tort (17edn)** both cited by Mr. Neal.

[11] Mr. Anderson was not absolutely clear as to how he fell. However, he was certain that the platform from which he worked was made up of loose planks which were not fastened to the scaffold and that there was a space between the planks and the sides of the scaffold. This was not disputed. He explained how he was working immediately before the accident. He said in chief that as he painted he moved along with brush in one hand and the paint tin in the other and that the board on which he was standing suddenly gave way and he fell. He tried to explain more precisely in cross examination and I accept that the board did not break. Mr. Anderson was not supplied with and was not wearing a safety harness and no fall protection was in place. The only logical inference having regard to the fact that the planks were not fixed to the scaffold is that he inadvertently walked too close to the end of plank and that it shifted causing the scaffold to tilt and him to fall.

[12] Did Mr. Anderson fall because of his own negligence in that he was constantly being distracted by his cell phone at the time of the accident? He claims that he was not. Penngor relied on the evidence of Mr. Robin Sookraj, a carpenter and that of Mr. Mason. Mr. Sookraj's, testimony is to the effect that he worked on the same project as Mr. Anderson and that he had observed him constantly using his cell phone which he kept strapped to his head under his shirt to conceal it, to make and receive calls whilst painting the ceiling. He said that he spoke to him about it and was told off by Mr. Anderson. His witness statement is striking from the absence of dates as to the alleged incidents of this user. Mr. Sookraj does not detail on what day he saw Mr. Anderson using the cell phone neither does he say he was doing so just before the accident. This evidence is so very vague that it cannot be treated as reliable.

[13] Furthermore, in cross examination, Mr. Sookraj said that he acted as deputy foreman when the foreman was on another site and so was concerned about Mr. Anderson's use of the cell phone. Yet, there is no evidence that he brought this potentially dangerous situation to the foreman's attention. What is however of the utmost significance is that Mr. Sookraj did not see the fall and it does not appear that he assisted in any way thereafter. Therefore, his evidence that Mr. Anderson's constant use of the cell phone caused his fall by distracting him from his work is merely speculative.

[14] I have considered Mr. Mason's evidence. He is the general foreman. He admits that he was not at that site on the relevant day as Penngor had another site on which he was engaged. Thus he bears out Mr. Anderson's evidence that he, Mr. Mason was not present at that site when Mr. Anderson fell. So, Mr. Mason not having witnessed the accident or its aftermath cannot help us as to what Mr. Anderson was doing when he fell. Interestingly Mr. Mason testified to giving him a warning a year ago when he started to work as a painter. This is what he said he told him- "I cautioned him as I did with every other new employee that it was necessary to be very careful whilst painting on scaffolding as he would be standing on a height and if not careful accidents may occur". He went on to say that this caution was given to him even though he was an experienced painter.

[15] Having seen and heard Mr. Mason I do not accept that he gave Mr. Anderson any such caution but even if he did that caution was not enough to absolve Penngor of its responsibility in law to

provide a safe system of work. What is apparent however, from the testimony of Mr. Mason and Mr. Sookraj is that both were aware that one could fall of a scaffold and injure oneself if one was not careful. This is a potential hazard of which Penngor as any reasonable contractor ought to have been aware and ought to have taken steps to ward against. They did not do so at all. Reasonable care for his safety could reasonably have been catered for by providing at the minimum some sort of safety harness or fall protection.

[16] With respect to the scaffolding, Mr. Mason testified that he was familiar with the scaffolding from which Mr. Anderson fell, that it was a 'relatively brand new' steel structure with wheels for easy movement, designed specifically for the purpose of painting and other construction tasks, which required some degree of elevation. Further, that he was aware that this type of scaffolding was frequently in use on construction projects throughout the Territory and that he did not think it was defective. Mr. Gordon's testimony on that aspect was to the same effect. Again, that evidence is too vague to admit of much significance. No details of when or where such scaffolding was seen in use and how it was actually used were given. In particular, neither witness spoke to the addition of a bulkhead or to the use of a safety harness or any other safety measures employed by workmen engaged in such work. I remark too the absence of any evidence from Penngor that they had examined the particular scaffolding after the accident and found it free from defects.

[17] Mr. Mason also testified to seeing Mr. Anderson whilst painting on the scaffolding stop to take or make cell phone calls like Sookraj he did not give any specifics as to time when he observed this. What is however abundantly clear, is that he did not witness him making calls on that day neither did he witness the accident as he was not at the site. Yet, Mr. Mason made so bold as to state his firm belief that the fall was caused by Mr. Anderson failing to give full attention to his painting job. I find it hard to believe that a general foreman seeing one in his charge conducting himself in such a dangerous manner did not take effective steps to stop this malpractice such as issue a written warning or bring this to the notice of the managing director. Indeed even if he saw it and took no such steps then he and through him Penngor would have failed to discharge their obligation to Mr. Anderson. His evidence therefore cannot stand up to scrutiny.

[18] In summary, the evidence by Penngor as to how Mr. Anderson fell amounts to no more than speculation. I find that the scaffolding on which Mr. Anderson was working with the added bulkhead

was at least 12 feet tall and this was a height from which any reasonable person could expect accidents especially if one is engaged in painting overhead which requires one to focus attention on the overhead structure. Therefore some safely harness or fall protection should have been in place especially as the bulk head only covered part of scaffolding and was not tied down to the scaffolding. I therefore, find that the method of work was unsafe and that Penngor was in breach of its obligation to provide a safe system of work. The breach resulted in Mr. Anderson's fall from which he sustained injuries. I do not find that Mr. Anderson caused or contributed to his fall in any way as I accept his evidence that he was not distracted by phone calls.

[19] In addition, Mr. Anderson testified and this was not refuted that after he was injured the foreman, Mr. Marcel Lopez gave him a lift to the road and left him to make his own way to the hospital by himself. -hardly what one would expect of a responsible employer. Fortunately, a passing motorist assisted him. He said that Mr. Lopez told him that he had to return to work as Mr. Gordon had said that if certain works were not completed by that Friday that he would not be paid. He was not challenged on that evidence. That picture paints a thousand words. And what is more, the foreman was not called to refute Mr. Anderson's testimony or explain Mr. Anderson's role that day and his working conditions and no explanation was offered as to why what appears to have been an important witness for the Defence was not called.

[20] I now turn to the issue of damages. I note with concern that Mr. McKenzie did not address damages and if I were to take this as an unwritten concession that no damages were sustained I would do Mr. Anderson a grave wrong. I would not do so in the light of his unchallenged testimony as to the injuries he sustained from is fall. Master Mathurin at Case Management conference properly did not order a bifurcated trial in such an uncomplicated case and it was counsel's obligation to assist the court by addressing all pertinent issues. We can only gain help on damages from Mr. Neale's submissions for which I thank him.

[21] The law on damages is well established. In essence, the claimant is to be compensated for his/her losses and put in the same position as he/she was prior to the accident as a far as money can do so. The court is called upon to make a fair and reasonable award having regard to the nature and extent of the injuries, pain and suffering endured, loss of amenities, the impact on the claimant's pecuniary prospects and the resulting physical disability. See the **locus classicus**, the Trinidad

and Tobago case of **Cornilliac v St. Louis,** Wooding CJ which has been adopted in the jurisdiction of the OECS. In doing so the court is also called upon to have regard to like awards for similar injuries in the jurisdiction and other jurisdictions with similar social and economic climates.

Mr. Anderson suffered the following injuries:-

(1) Fracture of scaphoid of the right wrist.
(2) Swellings over right **themar** eminence
(3) Pain on movement of right thumb and wrist.
(4) Pain to hip.

[25] Mr. Anderson was treated at the Peebles Hospital in Road Town on 25 August 2010 .His wrist joint was immobilized in a cast. He was not detained in the hospital but had to attend outpatients' clinic until 3 December 2010 and he had extended sick leave until December 12, 2010. See medical report of Dr. Trotman-Hastings TB pa. 28. He later consulted Dr. Patrick of B&F Medical Complex on 9 Dec. He had x-rays which showed minimal healing. On examination Dr. Patrick found that he had limitation of flexoral movement of the right hand (20%-30%) and some tenderness on the anterior of the wrist. He was thus advised to have a non- contrast MRI which he did on 4 January 2011 at the Eureka Medical Clinic. See TB 30.This report is enigmatic without medical testimony to explain its full importance. What little I can glean from it is that nothing abnormal was seen. Thus there is no evidence of any resulting permanent disability although at trial I noted that Mr. Anderson was wearing a support bandage on the injured wrist.

[26] Mr. Anderson testified that he is right hand dominant and the injury became a major handicap as he could not bathe properly or prepare his meals. He claims he suffered pains from the injury for over 6 months and was out of employment for 1 year. He was not cross-examined on these aspects. He said further that because he was unable to work and had no source of income he was evicted from his home and had to take up residence with his family and friends.

[27] He testified further that about a month after before his social security benefits were paid he sought some financial assistance from Mr. Gordon but was refused aid. As a result on 10 November 2010 his lawyer wrote to Penngor requesting compensation. By letter of 10 November 2010 Penngor denied liability. Then matters took a surprising turn as on 18 February 2011 Penngor (Mr. Gordon) wrote to Mr. Anderson advising that due to lack of work he was laid off temporarily. And subsequently on 15 March 2011 Penngor (Mr. Gordon) wrote again to him terminating his employment on the basis that they had no work. He was given severance pay. On 15 April 2011 Mr. Anderson filed suit.

[28] Mr. Gordon said at para. 9 of his W/S that Mr. Anderson was released from his employment with Penngor on March 15, 2011, on, and I quote, "**the ground of redundancy since dramatic slow down in the economy made it extremely difficult for the company to secure projects to work on**." One would have thought that with such a dramatic slowdown that an equally dramatic and far-reaching effect would have been had on Penngor's labour force which would have left an indelible mark in the minds of Penngor's management yet when he was cross-examined as to how many other workers Penngor had laid off during that period he said he could not recall without access to his files. He did not even try to assist by giving an estimate. This begs belief and the only reasonable inference to be drawn in all the circumstances is that Mr. Anderson was being victimized for seeking compensation from Penngor which is his right if he was injured on the job as a result of his employer's failure to provide him with safe means and system of work. One would hope that we have come a long way from the days when a worker had little or no rights such as the deplorable situation which prevailed in Victorian times as depicted in Hard Times. This finding of course informs the court's view of the evidence for the defence and in particular that of Mr. Gordon.

[29] I have had regard to the nature and extent of the injuries suffered and to the obvious loss of amenities. Mr. Anderson was incapacitated for one year. His right hand was in a cast for several months, and being right hand dominant there can be no doubt that he suffered significant pain and was severely inconvenienced in all his daily activities.

[30] I have considered the cases cited by Mr. Neale which included ANU HCV 2005/0166 – **Sylvena Morson v Leron Lewis** and various digested cases from **Butterworths Personal Injuries** .In **Morson**, the High Court (Antigua and Barbuda -BlenmanJ.) awarded EC $20,000.00 for a comminuted fracture of the arm sustained by a passenger in a motor vehicle accident.

[31] Mr. Neale urged, relying in the main on **Morson**, that if liability is established then an award of $5,000.00 as general damages would be adequate. He submitted that the injuries in Morson were possibly more serious and converted the **Morson** ward to US dollars to make his comparison. In *my judgment* we cannot simply convert EC $ to US$ without more as one has to have regard to the prevailing social and economic situation in the countries which are being sought to be treated as comparable. In my judgment such an award would be palpably unfair and without reason.

[32] In all the circumstance this was a serious injury and in my judgment an award of $15,000.00 as general damages for pain and suffering and loss of amenities is fair and reasonable. Mr. Anderson is also entitled to pre- judgment interest at the normal rate and period on this award.

[33] I now turn to special damages. Although Mr. Anderson claimed special damages for medical expenses he submitted no bills or receipts, a serious lapse. Mr Neale contended that as special damages have to be specifically proved that in the absence of documentation no award should be made under that head. I am mindful of this principle but as this is a civil case it is still subject to proof on a balance of probabilities. Where documents exist or can be provided then it is eminently prudent and in accordance with best practice to disclose them. However, here we have the unchallenged evidence supported by the three medical reports that Mr. Anderson sought and obtained medical treatment for his injuries. I am certain that the court can take account of the fact that in the normal course of life generally, people in the medical profession like any other charge for their services. He did not say he obtained these services **gratis** either but testified that he paid over $400.00 for same. I am satisfied that he obtained those services and that he paid for them the amount he testified too and that that amount is not unreasonable having regard to the nature of those services. I therefore find that head properly proved and award him $400.00 with normal pre- judgment interest.

33] Mr. Anderson testified that he was out of work for one year. Prior to the accident he earned $1400.00 per month. He received Social Security benefits for some months amounting to 75% of his salary for that period. He would have been entitled to recover the shortfall but unfortunately he made no claim for loss of earnings. Mr. Anderson is to have his prescribed costs.

Conclusion

[36] In conclusion for the foregoing reasons judgment is given for Mr. Anderson as follows:-

i. general damages of $15,000.00 with interest at 5 % per annum from date of accident to judgment;

ii. medical expenses of $400.00 with interest at 3% per annum from date of accident until judgment;

iii.. Prescribed costs.

[37] By way of postscript I cannot resist remarking that this was my last trial in the Territory and I thank both counsel for their assistance and for conducting the trial in an amicable and efficient manner such that we did not expend all the time originally allotted to it -a welcome parting gift.

Rita Joseph-Olivetti
Resident Judge
Territory of the Virgin Islands