

SECOND DIVISION

[G.R. No. 165413, February 22, 2012]

**PHILAM INSURANCE COMPANY, INC. AND AMERICAN HOME
INSURANCE CO., PETITIONERS, VS. COURT OF APPEALS, AND
D.M. CONSUNJI INC., RESPONDENTS.**

D E C I S I O N

SERENO, J.:

In this Petition for Review on Certiorari under Rule 45, petitioners Philam Insurance Company, Incorporated (Philam) and American Home Insurance Company (AHIC) seek the reversal of the Decision of the Court of Appeals (CA) in CA-G.R. CV No. 60098 dated 28 June 2004 and its Resolution dated 24 September 2004. The CA Decision reversed and set aside that of the Regional Trial Court (RTC) of Makati City in Civil Case No. 95-540 dated 28 April 1998.

The CA ruled against petitioners' demand for the recovery of the value of the insured's generator set (genset) against private respondent D.M. Consunji Incorporated (DMCI), whose alleged negligence damaged the said equipment.

The antecedent facts are as follows:

Four gensets from the United States of America were ordered by Citibank, N.A. (Citibank). Petitioner AHIC insured these gensets under Certificate No. 60221 for USD 851,500 covering various risks.^[1] The insurance policy provided that the claim may be paid in the Philippines by Philam Insurance Co., Inc, AHIC's local settling agent.^[2]

Citibank's broker-forwarder, Melicia International Services (MIS),^[3] transported the gensets in separate container vans. It was instructed by Citibank to deliver and haul one genset to Makati City,^[4] where the latter's office was being constructed by the building contractor, DMCI.

MIS was further instructed to place the 13-ton genset^[5] at the top of Citibank's building. The broker-forwarder declined, since it had no power cranes.^[6] Thus, Citibank assigned the job to private respondent DMCI, which accepted the task.^[7]

On 16 October 1993, DMCI lifted the genset with a crane (Unic-K-2000) that had a hydraulic telescopic boom and a loading capacity of 20 tons.^[8] During the lifting process, both the crane's boom and the genset fell and got damaged.^[9]

The events leading to the fall, based mainly on the signed statement^[10] of DMCI's

crane operator, Mr. Ariel Del Pilar, transpired as follows:

The genset was lifted clear out of the open top container by the crane. After clearing the container van, the crane operator, Mr. Ariel del Pilar, had to position the genset over the vicinity of the storage area. To do this, the boom of the crane carrying the generator set had to be turned (swing) to face right and stopped when it loomed over the storage area. The genset was swinging as it came to a stop following the right turn. The crane operator waited for the genset to stop swinging for him to perform the next maneuver. The boom had to be raised three (3) degrees more from its position at 75 degrees, up to 78 degrees. At 78 degrees the genset could be lowered straight down to the delivery storage area.

The genset stopped swinging. The crane operator proceeded to raise the boom to 78 degrees. While so doing, the crane operator felt a sudden upward movement of the boom. The genset began to swing in and out, towards the crane operator, then outward and away. The body of the crane lifted off the ground, the boom fell from an approximate height of 9 feet, first hitting a Meralco line, then falling to the ground.^[11]

After two days, DMCI's surveyor, Manila Adjusters & Surveyors Co. (MASC) assessed the condition of the crane and the genset.^[12] According to its Survey Certificate, the genset was already deformed.^[13]

Citibank demanded from DMCI the full value of the damaged genset, including the cost, insurance and freight amounting to USD 212,850.^[14] Private respondent refused to pay, asserting that the damage was caused by an accident.^[15]

Thereafter, Citibank filed an insurance claim with Philam, AHIC's local settling agent, for the value of the genset. Philam paid the claim for PhP 5,866,146.^[16]

Claiming the right of subrogation, Philam demanded the reimbursement of the genset's value from DMCI, which denied liability.^[17] Thus, on 19 April 1994, Philam filed a Complaint with the RTC to recover the value of the insured genset.^[18]

At the trial court, petitioner Philam did not invoke *res ipsa loquitur*. Rather, during the pre-trial conference, the parties agreed on this sole issue: "Whether or not the damage was the fault of the defendant or within their area of supervision at the time the cause of damage occurred."^[19]

The RTC ruled in favor of Philam and ordered as follows:

WHEREFORE PREMISES CONSIDERED, judgment is hereby rendered in favor of plaintiff as against defendant ordering the latter to pay plaintiff as follows:

1. the amount of PhP 5,866,146.00 as actual damages with interest at 6% per annum from the date of filing of this Complaint until the sum is fully paid.
2. the amount equivalent to 25% of the sum recoverable as attorney's fees;
3. cost of suit.

SO ORDERED. [20]

The trial court ruled that the loss or damage to the genset was due to the negligent operation of the crane:

This Court finds that the loss or damage brought about by the falling of the genset was caused by negligence in the operation of the crane in lifting the genset to as high as 9 feet causing the boom to fall [sic], hitting the Meralco line to ground, sustaining heavy damage, which negligence was attributable to the crane operator.[21]

DMCI appealed to the CA, which reversed and set aside the RTC's Decision. The appellate court ruled that the falling of the genset was a clear case of accident and, hence, DMCI could not be held responsible.

In this case, plaintiffs-appellees failed to discharge the burden of proving negligence on the part of the defendant-appellant's crane operator and other employees assisting in unloading the genset.

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The falling of the genset to the ground was a clear case of accident xxx. xxx [D]efendant-appellant cannot be held responsible for the event which could not be foreseen, or which though foreseen, was inevitable.[22]

Accordingly, the dispositive portion reads:

WHEREFORE, there being merit in the appeal, the assailed Decision dated April 28, 1998 of the Regional Trial Court, Branch 61 of Makati City in Civil Case no. 95-1450, is **REVERSED** and **SET ASIDE**, and the complaint dismissed.

SO ORDERED.[23]

Hence, the pertinent issue in this Petition is whether petitioners have sufficiently established the negligence of DMCI for the former to recover the value of the

damaged genset. While this Court is not a trier of facts, and hesitates to review the factual findings of the lower courts, in this occasion, it would do so considering the conflicting legal conclusions of the RTC and the CA.

For DMCI to be liable for damages, negligence on its part must be established.^[24] Additionally, that finding must be the proximate cause of the damage to the genset.^[25] We agree with the CA that Philam failed to establish DMCI's negligence.

Negligence is the want of care required by the circumstances.^[26] It is a **conduct that involves an unreasonably great risk of causing damage**; or, more fully, a conduct that falls below the standard established by law for the protection of others against unreasonably great risk of harm.^[27]

Philam blames the conduct of DMCI's crane operator for the genset's fall. Essentially, it points out the following errors in operating the crane:

First, Del Pilar did not give any reason for his act of raising the boom from 75 to 78 degrees at the stage when the genset was already set for lowering to the ground.^[28]

Second, Del Pilar's revving of the motor of the boom "triggered the chain of events – starting with the jerk, then followed by the swinging of the genset which was obviously violent as it caused the body of the crane to tilt upward, and ultimately, caused the boom with the genset to fall."^[29]

It would be a long stretch to construe these as acts of negligence. Not all omissions can be considered as negligent. The test of negligence is as follows:

Could a prudent man, in the case under consideration, foresee harm as a result of the course actually pursued? If so, it was the duty of the actor to take precautions to guard against that harm. Reasonable foresight of harm, followed by ignoring of the suggestion born of this prevision, is always necessary before negligence can be held to exist.^[30]

Applying the test, the circumstances would show that the acts of the crane operator were rational and justified.

Addressing Philam's first submission, this Court finds that the records are replete with explanations for why the boom of the crane had to be raised from 75 to 78 degrees. Although the boom is already in the general area of the genset's storage place, still, it had to be raised three (3) degrees in order to put it exactly in the proper designation. At 78 degrees, the genset could be lowered straight down to the delivery/storage area.^[31] DMCI's crane operation team determined accordingly that there was a need to raise the boom in order to put the genset in the exact location. Indeed, the heavy equipment must be secured in its proper place.

Proceeding to the more contentious claim, Philam emphasized the apparent inconsistencies in Del Pilar's narration. In his signed statement, executed 15 days after the incident, Del Pilar stated that when he raised the boom from 75 to 78

degrees, he revved the motor, upon which he felt the sudden upward movement (jerk) of the boom followed by the swinging of the genset.^[32]

But in his affidavit, executed already during the trial, Del Pilar mentioned that he moved the boom slowly when he raised it to 78 degrees.^[33] Philam deems this narration questionable since the "slow movement" was never mentioned in Del Pilar's earlier signed statement.^[34]

Examining the signed statement and the affidavit of Del Pilar, petitioner Philam inaccurately portrayed his narration.

In his signed statement, Del Pilar already mentioned that he slowly moved the genset, and when it swayed, he waited for the swinging to stop before he lifted the equipment:

Itinuloy ko na ang pag-angat ng genset at pagkatapos ng malagpas na sa open top van container, **dahan-dahan na ako nagpihit o swing papunta sa kanan at pagkatapos ng nasa direksyon na ako ng paglalagyan, itinigil ko ang pagpihit o pag swing pagkatapos hinintay ko ang genset sa paggalaw at ng huminto na ang genset sa paggalaw, nagboom up ako mula 75° hanggang 78°, sa tantya ko at noong mag boom up, nag-rebolution (sic) ako at naramdaman ko na biglang gumalaw paangat (paboom-up) ang boom ng Crane No. CR-81 at nag-swing na naman patungo sa akin ang genset.** At nang ito ay umindayog papalayo sa crane ay doon ko naramdaman na iyong body ng Crane No. CR-81 ay umangat at nakita kong tumumba ang boom ng Crane CR-81 at bumagsak ang genset sa loob ng Citibank (sic) Parking Area. Noon ika-16 ng Octubre 1993 ng oras na alas 4:55 ng umaga." (Emphasis supplied.)

In his affidavit, Del Pilar's statements concentrated on the manner of lifting of the genset. At this point, he recalled that the boom was raised slowly^[35]:

- T: Papaano mo naitaas ang "boom" ng "crane" mula 75 digri hanggang 78 digri?
S: **Dahan-dahan lang po.**
T: **Pagkatapos mong maitaas ang boom ng crane sa 78 digri, iyong inumpisahan ibinaba ang "generator set" sa lupa subalit ito ay nagumpisang umugoy-ugoy o dumuyan-duyan palabas at papasok ang karga na "generator set" patungo sa akin. Ito ba ay tutuo?**
S: **Opo.** ^[36](Emphasis supplied.)

The affidavit, which the CA used as the main basis for its Decision, pertained exactly to how the crane's boom had been raised. It is only when a witness makes two sworn statements, and these two statements incur the gravest contradictions, that the court cannot accept both statements as proof.^[37]