

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. 84 of 2008

BETWEEN : **NIRBHAY CHAND** of Simla Housing, Lautoka, Unemployed.

PLAINTIFF

AND : **PACIFIC TRANSPORT COMPANY LIMITED** a limited liability company having its registered office at 169 Foster Road, Walu Bay, Suva.

FIRST DEFENDANT

AND : **SURUJ RAM SHARMA** of Nukuloa, Ba, Serviceman.

SECOND DEFENDANT

AND : **NEW INDIA ASSURANCE COMPANY LIMITED** having its registered office at New India Assurance Building, 87 M.G. Road, Fort Mumbai-400001 and having its principal place of business in Fiji at 2nd Floor, Harifam Centre, Greig Street, Suva.

THIRD PARTY

R U L I N G

[1]. Nirbhay Chand was a bus driver for Pacific Transport Company Limited in 2007. Suruj Ram Sharma was also employed by PTCL as a serviceman at the time. On 19 September 2007, at PTCL's Bus Depot in Tavakubu in Lautoka, Sharma was reversing a bus belonging to PTCL when it bumped Chand who was behind the bus. All this is admitted by the defendants. What the defendants deny however is that Sharma acted negligently when he reversed the said bus on the occasion in question. Instead, they plead that Chand was the one who was in fact negligent because, from where he was positioned behind the bus, he had all the necessary warnings that the bus in question was about to reverse.

- [2]. The facts which the defendants plead in reliance on that proposition are as follows:
- (i) Chand knew that buses do reverse out of the bus parking lot.
 - (ii) Chand, upon hearing the sound of the bus engine being turned on, should have been alerted immediately thereupon that the bus would be reversing out of the parking lot.
 - (iii) Chand, should also have been alerted by the bus reverse lights which were activated as soon as the bus was put on reverse gear.
 - (iv) Chand, if he had been alert, which he should have been as he was more than adequately warned and also given that the bus was reversing in slow motion, should have moved his body out of the way of the reversing bus.
 - (v) Chand, as a bus driver himself, should have appreciated that, from where he was positioned behind the bus, he was outside Sharma's rear vision.
- [3]. Relying on the above facts also, the defendants plead contributory negligence in the alternative.
- [4]. Notably, the defendants do admit that Chand suffered some injuries as a result of the accident. However, they deny the extent of the alleged injuries as pleaded by Chand in paragraph 6 of the statement of claim.
- [5]. In an affidavit filed by Chand sworn on 07 March 2012, he deposes that on the day in question, at about 6 pm, he had just finished doing his round and had driven his bus back to the depot. Many other buses were parked there. He parked his bus, got out and went and punched his card, and was walking towards the driveway afterwards when Sharma suddenly reversed the bus in question which came into contact with him and knocked him over. He deposes that his back was to the bus and he was walking away from the bus. He said most of the other buses that were there at the time had their engines running. Moreover, the bus that Sharma was in control of did not have a reversing beeper. He said after the bus had knocked him over, it kept reversing for a little while longer and he was trapped under the bus.
- [6]. Two persons, namely Jaswant Kumar who is a manager of PTCL and Atish Chand ("Atish") a driver of PTCL, have sworn affidavits for PTCL's case. Kumar deposes that the bus in question (registration No. DD280) was in perfect condition on the day in question and had all its signals, lights and

beeps in good working condition. He also deposes that Chand has in fact been employed by Khan's Buses as a bus driver since June 2008. Atish deposes that was driving buses for Khan's when Chand began employment there. He recalls Khan being a jovial character who "**seemed to be stress free**" and who did not, at any time, complain of any injury or pain. He adds that "**having worked with the Plaintiff as a bus driver for so many months, I have noticed no form of disability or problems with the Plaintiff and I verily believe that the extent of damages claimed by the Plaintiff is in fact doubtful and should not be believed**".

[7]. I have read the Third Party's statement of defence. The New India Assurance Company Limited's case is, basically, that in the event the defendants were to be found liable for the damages and losses suffered by the plaintiff as a result of the accident, then the Third Party is not to be held liable to indemnify the defendants. That stance is based on several general allegations of fact by the Third Party:

- (i) firstly – that PTCL allowed Sharma to drive the bus when Chandra did not possess the necessary licence.
- (ii) secondly – that PTCL failed to provide reasonable and adequate lighting in its premises at all material times and this was a contributing factor.
- (iii) thirdly – PTCL failed to have the bus in question fitted with a beeping warning device that should sound off whenever the bus is in reverse gear.

[8]. I note that the Third Party pleads at paragraph 3 (d) of its statement of defence that "**if it is held that the plaintiff suffered personal injury by accident arising out of and in the course of employment, then the Third Party will pay the Workmen's Compensation in the sum of \$1,334.50 claimed by the Plaintiff in paragraph 8 of the Statement of Claim**".

[9]. What is before me now is an application for interim payments by Chand under Order 29 Rule 10 of the High Court Rules 1988.

[10]. An interim payment is an advance payment on account of any damages which a defendant may be held liable to pay. Under Order 29 rule 10 (1), the plaintiff may seek interim payment "at any time after the writ has been served on a defendant and the time limited for him to acknowledge service has expired".

[11]. **Order 29 Rule 11 (1)** of the High Court Rules 1988 (in its relevant part) provides that an order for interim payment in respect of damages may be made if the Court is satisfied of either of the following:

- (a) that the defendant has admitted liability for the plaintiff's damages, or
- (b) that the plaintiff has obtained judgment against the defendant for damages to be assessed; or
- (c) that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the defendant

[12]. In a personal injury case, an order for interim payment will only be made if, in addition to the Court being satisfied of the existence of any of the above (see paragraph 13 (a) to (c)), the Court is satisfied that the defendant is either:

- (a) insured in respect of the plaintiff's claim;
- (b) a public authority; or
- (c) a person whose means and resources are such as to enable him to make the interim payment.

(see **Order 29, Rule 11 (2)**)

[13]. In this case, it is not in dispute that an accident happened at the first defendant's worksite. It is also not in dispute that the plaintiff was injured as a result. What is in dispute is that the 2nd defendant drove the bus in question negligently and/or the extent of injury allegedly suffered.

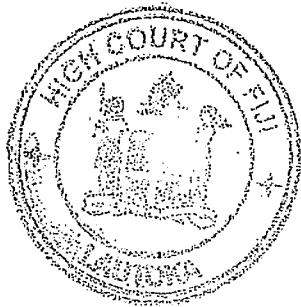
[14]. I note from a medical report of Dr. Joeli Mareko dated 09 July 2012 that the plaintiff **"was an inpatient for two weeks and then discharged. He is being reviewed at the clinics.....His right arm is quite disabled. His incapacity is assessed at 20% according to schedule"**.

[15]. To be an inpatient for two weeks is some indication of the seriousness of the injury. It is often the case that, the longer a period of hospitalization is, the more likely there is to be a finding that the injuries sustained were of greater severity. These will usually then set the stage for a finding of, and an award for, pain and suffering.

[16]. In this case, I accept that there is a lot at stake as to whether or not the defendants are liable under the Workmen's Compensation Act. I also accept that the insurer does appear to have a strong argument as noted above. However, I observe that the plaintiff is really only pleading a Workmen's

Compensation claim in the alternative. His primary cause of action is still under common law. And based on common law, I am of the view that if the action proceeded to trial, the plaintiff is likely to obtain judgment for damages against the defendants.

[17]. And while the extent of injury is indeed a valid question to be reserved for trial, there is no denying the fact that the plaintiff was hospitalized for some two weeks or so and that he would have suffered some discomfort/inconvenience during that time. After considering all, I am of the view that an interim payment of the sum of \$5,000 (five thousand dollars) is sufficient in this case. For the record, I make this award based on Order 29 Rule 11 (1)(c) and on Rule 11(2)(c).




Anare Tuilevuka
JUDGE
20 May 2014.