IN THE HIGH COURT OF FIJI AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. 96 of 2014

BETWEEN : **SURESH KUMAR** of Cuvu, Sigatoka, Fiji, Unemployed

PLAINTIFF

A N D : **MOHAMMED ALI** of Muka, Sigatoka, Fiji, Driver

1ST DEFENDANT

A N D : **PRAVILESH CHANDRAN NAIR** t/a **HIGHWAY CLIPPER** a sole trader having its principal place at Cuvu Settlement, Sigatoka, Fiji.

2ND DEFENDANT

Counsel : Mr D Prasad for plaintiff
Ms L Tabuakuro for defendants

Date of Trial : 25 & 26 May 2016

Date of Judgment : 24 August 2016

J U D G M E N T

Introduction

[01] The action has been brought by the plaintiff against the defendants for compensation and damages for personal injuries suffered as a result of a motor vehicle accident.

[02] At the trial, the plaintiff gave evidence on his behalf and called three other witnesses, namely Dr Mark Rokobuli, Navin Kumar (Police Officer) and Dhamendra Kumar (Police Officer), to support his case whilst the defendants called four witnesses, namely (i) Mohamed Ali (First Defendant), (ii) Pravilesh Nair (Second Defendant) (iii) Ram Chandar

Nair and (iv) Bimlesh Swamy, in support of their case. I will summarise in my analysis what each witness stated in his or her evidence.

[03] In addition, both parties had filed written submissions. I might say that the defendants filed their submissions after expiration of the time granted to them for that purpose.

The Facts

[04] Suresh Kumar, the Plaintiff was employed with Pravilesh Chandran Nair t/a Highway Clipper, the 2nd Defendant as a road side grass cutter and resides in Cuvu, Sigatoka.

[05] On 18th November 2013 the Plaintiff was assigned with other employees to cut grass by the road side at Queens Highway near Nadi. The plaintiff travelled in the company vehicle registration No. DE142 to the jobsite and in the afternoon was picked up by the same vehicle registration No. DE 142 to come back to Sigatoka.

[06] The vehicle DE 142 was driven by Mohammed Ali, the first Defendant and the plaintiff sat in the front seat beside the driver. Whilst travelling on Queens Highway the vehicle lost control and went off the road and collided with an electric post.

[07] The Plaintiff sustained severe injuries such as fracture of left tibia and fibula. He was taken to Nadi Hospital then to Lautoka Hospital where he was admitted and discharged following a surgery.

Agreed Facts

[08] The parties agree to the following facts:

1. That the second defendant is a sole trader business operating under the name style of Highway Clippers having its principal place of business in Cuvu Settlement, Sigatoka and engages in the business of weeding contractors.

2. That first defendant was at all material times authorised the driver of the vehicle registration No.DE 142 and also an employee/servant or agent of the second defendant.

3. That the plaintiff was at all material times an employee of the second defendant and was a passenger in the vehicle registration No. DE 142.

4. That there was an accident on the 18th day of November 2013 when the vehicle registration No. DE 142 skidded and collided into an electricity post.

5. The plaintiff sustained severe injuries as a result of the accident.

Defence

[09] The Defence says that the adverse weather condition on 18th November 2013 affected the road condition and the vehicle skidded on the road and the First Defendant was not able to control the vehicle.

[10] The Defence also says that the plaintiff was injured by failing to wear seat belt and he also failed to comply with road rules.

[11] The Defence further says that the accident occurred at 7.30 pm and was outside his working hours therefore cannot claim compensation either under Common Law or under Workman Compensation Act.

Issues to be Determined

[12] The following issues were raised for determination by the Court:

1. Was the Plaintiff authorised to travel in the vehicle DE 142?
2. Was the Plaintiff authorised to travel in the vehicle DE 142 on 18th November 2013 after completing his work and return to Sigatoka?

3. Was the 1st Defendant negligent in his driving in that he lost control and went off the road completely and collided with the electric post?

4. If liability is established what is the General Damages and Special damages to be awarded to the plaintiff. General Damages under the heads of: (a) Pain and Suffering and Loss of Amenities of Life, (b) Loss of Earning Capacity, (c) Interests and (d) Costs.

Analysis (Liability)

[13] I need to firstly decide the issue of liability. In doing so, I will determine the first and the second issues together that whether the Plaintiff was authorised to travel in the vehicle DE 142 on 18th November 2013 after completing his work and return to Sigatoka.

[14] It was common ground that the plaintiff was an employee of the second defendant and was a passenger in the vehicle registration No. DE 142 on 18 November 2013.

[15] The plaintiff in his evidence stated that on 18 November he was employed as a grass-cutter by the second defendant. That day he cut grass with others by the road side at Queens Highway Back road near Nadir. The company (2nd defendant) provided transport to and from worksite. He finished his work from Nadi Backroad at about 5.30pm and going to Sigatoka in the company vehicle DE 142. It was slightly raining in Nadi. He was involved in an accident in Uciwai around 7.30pm. He said that the lorry went off the road and hit an FEA post. He could not come out of the vehicle. Fire Authority people cut the vehicle and got him out of the vehicle at about 10.00pm. His left leg got fractured. He was taken to the Nadi hospital from there transferred to Lautoka hospital where he was treated for two weeks.

[16] When Pravilesh Nair (2nd defendant) giving evidence admitted that he provides transport to his employees and that on 18 November he

provided transport to the employees including the plaintiff from Sigatoka to worksite (Nadi) and back to Sigatoka. Under cross examination he said that Rajesh was his foreman, he was given the vehicle and he used it. He also said that Mohammed Ali, the first defendant was driving the vehicle No. DE 142 on the day in question.

[17] The second defendant never denied authorising the plaintiff to travel in the vehicle No. DE 142 to Sigatoka after work on 18 November.

[18] On admission made by the second defendant that he provided transport to the plaintiff to travel in the vehicle DE 142 on 18 November 2013 after completing his work and return to Sigatoka and evidence adduced in court, I would answer the issues number 1 and 2 affirmatively. I accordingly hold that the second defendant authorised the plaintiff to travel back to Sigatoka after completing his work in the vehicle registration No. DE 142 on 18 November 2013.

[19] I now turn to the third issue that whether the 1st Defendant was negligent in his driving in that he lost control, went off the road completely and collided with the electric post.

[20] When giving evidence in this regard the plaintiff stated that he was a grass cutter with the second defendant and was getting $106 per week. The second defendant normally assign the work and on 18 November 2013, he with his co-workers had travelled to Nadi for work by company vehicle and finished at 5.30pm, they had to load parts of the lorry into their vehicle (DE 142), on their way back to Sigatoka around 7.30pm the accident happened. He further stated that he spoke to the driver (the first defendant) to slow down before the accident and he was taken to Nadi Hospital at around 10.00pm before being transferred to Lautoka Hospital.

[21] It is to be noted that the plaintiff did not say anything about wearing seatbelt in his evidence in chief though this was an issue raised by the defendants.

[22] Under cross examination the plaintiff stated that at the time of the accident it was not raining.

[23] The driver, the first defendant in his evidence stated that the vehicle was hit a pothole which was filled with water and his steering had become loose as such it collided into the FEA post. He said that he applied brake but the car dragged to the post. He also said that prior to the accident there was nothing wrong with the vehicle.

[24] The second witness for the plaintiff was Naveen Kumar, the Traffic Police Officer from Nadi Police Station. He in his evidence in chief stated that he interviewed the driver, the first defendant who told him that the vehicle was defective, due to that the accident happened and there was report by the LTA vehicle examiner. Under cross examination this witness confirmed that there were no charges filed against the driver.

[25] The second defendant in his evidence stated that DE 142 was serviced when due and mechanically looked after at a registered garage in Sigatoka. His father (Ram Chandra Nair) also in his evidence stated that he inspected DE 142 and checked the dropper arm and moved it with his hands. He said that he can check the dropper arm without going underneath the vehicle as it is in the front. He also said that the vehicle worked for Water Authority, LTA did inspections four months ago, water Authority inspect vehicle and give approval to hire.

[26] In cross examination Ram admitted that he did not have inspection reports and report on potholes and road conditions. He was silent when it was put to him that drop arm fell due to corrosion.

[27] Defence witness Ram is not an independent witness. He is the second defendant's father. He tempted to give evidence in favour of his son. It is impossible to check the dropper arm without going underneath the vehicle by moving with hands as he said. He could not produce in court record of the maintenance of the vehicle though he said he has one. He

could not also produce the LTA vehicle inspection report. The vehicle that was involved in the accident was too old, manufactured in 1997. It was 16 years old at the time of the accident. The court can place little reliance on Ram's evidence that the vehicle was regularly maintained and he checked the vehicle on 18 November.

[28] Moreover, the first defendant was not charged for careless or dangerous driving on the basis that the vehicle was defective.

[29] Cases in which a mechanical defect can be relied on as a defence to a charge of dangerous driving must be rare. The defence has no application the defect is known to the driver or should have been discovered by him had he exercised reasonable prudence. (See R. Spurge [1961]2 QB 205; [1961]2 All ER 688; [1961] 3 WLR 23).

[30] In the case at hand, defect is known to the driver (the first defendant) or as an experienced driver should have been discovered by him had exercised reasonable prudence. I therefore hold that there was negligence on the part of the driver in driving the defective vehicle and that the second defendant was negligence in allowing his servant (the driver) to drive the defective vehicle to carry his workers to job site. The second defendant was under a duty to ensure that vehicle is mechanically sound for transporting the workers.

[31] The first defendant in evidence said that there was pothole filled with water, it was raining and he could not see the road and he was driving at 45-50km before the accident. The plaintiff in his evidence said that he told the driver before the accident to slow down as he was speeding. According to the plaintiff it was not raining at the time of the accident. Defence witness Ram stated in his evidence that it was drizzling at that time. If the driver had driven the vehicle at moderate speed he would have controlled the vehicle and avoided the accident. The defence witnesses have contradicted between them about the adverse weather condition at the time. I am unable to accept the driver's evidence that accident happened because there was pothole filled with water. It

appears to me that the accident had occurred due to over speeding. The driver had failed to take reasonable care in driving the vehicle with the passengers including the plaintiff. I therefore hold that there was negligence in driving on the part of the driver, the first plaintiff in that he lost control of the vehicle, veered off the road and crashed into the electric post.

[32] I now turn to the issue that whether the second defendant is vicariously liable to the negligence of the first defendant.

[33] The second defendant was the owner of the vehicle at the time. It was undisputed that the first defendant was driving the vehicle as the servant of the second defendant. The second defendant admitted that he provides transport to his workers to and from the worksite. He specifically admitted that he authorised the driver to bring the workers including the plaintiff in the vehicle (DE 142) from Nadi to Sigatoka after finishing work on 18 November 2013. Therefore the accident happened during the course of employment. I therefore hold that the second defendant as an employer is vicariously liable for the negligent act of his driver, the first defendant. I will now proceed to assess the damages payable to the plaintiff by the defendants.

General Damages

[34] The plaintiff claims special and general damages. He also claims interest and costs.

[35] In evidence the plaintiff stated that he was a grass cutter with the second defendant and was getting paid $106 per week. He also stated that after the accident he was taken to Nadi Hospital around 10pm before being transferred to the Lautoka Hospital where he had a surgery for fracture of his left leg. He was admitted at the Lautoka Hospital and discharged after one week. Thereafter he re-admitted for removal of the plate and discharged after one week. He was unable to work because of his injury. He had to travel to the hospital for check up

and was in pain. As a result of his injury, he cannot walk well as his foot would become swollen and he needed someone to look after him and ability to earn money and look after himself was impeded by his injury. He did not say anything in his evidence about wearing the seat belt although it was an issue raised by the defendants in their defence that the injuries sustained by the plaintiff also arise from his own negligent act by failing to wear his seat belt whilst sitting at the front passenger seat of the vehicle DE 142 at all material times.

[36] Under cross examination the plaintiff admitted that the 2nd defendant paid half salary and financially supported up until 2014, but denied receiving salary in 2015. He also admitted that his company did not terminate his employment. He stated that he was not able to walk.

[37] Dr. Mark Rokobuli called to give evidence for the plaintiff was the orthopaedic surgeon who made the assessment for permanent disability. According to his evidence, the plaintiff's injury was classed as an open fracture and fixtures were fixed from 19 November 2013 until it was removed on 1 April 2014. The doctor stated that when assessing the plaintiff in 2006, his assessment was that there was 6% permanent incapacity and the impairment was with regards to the plaintiff's calf muscle size. The doctor also stated that his left leg had healed and his alignment was good and his knee, hip and ankle had full range of motion. That in order to recover of his left limb, the plaintiff has been given medical advice to vigorously exercise the limb in order to gain strength and recover fully. The plaintiff uses the crutches on his own.

[38] The plaintiff is claiming general damages for pain and suffering and loss of amenities of life in the sum of $60,000.00.

[39] In ***Lata v Kumar*** [2014] FJHC 757; HBC 222.2009 (21 October 2014), the plaintiff suffered fractured to both her legs and was initially treated external fixators. She continued to experience a lot of pain on her legs

especially during the cold and very hot weather when her leg started swelling. She was awarded the sum of $70,000 as general damages.

[40] In ***Govind Sami v Karl Frances O'Brian & Seru Serevi***, HBC No.349/97L the court awarded $45,000.00 for fractured leg.

[41] The plaintiff did not state in his evidence that he was wearing the seat belt. However, the first defendant in his evidence stated that the plaintiff was not wearing the seat belt after withdrawing his first statement that the plaintiff was wearing seat belt. If he had worn the seat belt whilst sitting at the front passenger seat of the vehicle, he would have told it in the evidence in chief, but he failed to do so. In this regard I accept the first defendant's evidence that the plaintiff was not wearing the seat belt at the time of the accident. The first defendant driver did not receive any injury in the accident.

[42] The plaintiff sustained fracture of left Tibia and Fibula as a result of the accident and he was taken to the Nadi Hospital and then later was transferred to Lautoka Hospital and admitted immediately. He was treated under observation for two week at Lautoka Hospital and then discharged. He had somewhat contributed to the injury by failing to wear the seat belt. I therefore, taking all into my account, would grant a sum of **$23,000.00** to the plaintiff as general damages for pain and suffering and loss of amenities of life.

Special Damages

[43] The plaintiff had specifically pleaded a sum of $2,552.50 for travelling to Lautoka Hospital for check-up and clinics, which includes $52.50 spent for medical report. He did not provide any receipt in support of this claim. He in evidence stated that he did not keep any receipt. Nonetheless, it is apparent that he would have gone to Lautoka Hospital from Sigatoka for check-up and clinics. I therefore grant a sum of **$1,052.50** under this head.

Loss of Earning/Future Earnings

[44] The plaintiff was earning $106.00 per week and after the accident he was not able to return to work. He said that after the accident he received wages until 2014 and thereafter no wages was given. He admitted that the second defendant (his employer) did not terminate his employment and that his employer financially supported him after the accident in terms of medical expenses.

[45] The doctor who gave evidence stated that the plaintiff's permanent incapacity was 6% and the impairment was with regards to the plaintiff's calf muscle size. He also stated that the plaintiff's leg had healed and the fracture had fully recovered.

[46] The plaintiff was earning $106.00 per week at the time of the accident. I would allow $106.00 per week as loss of earning capacity. At the time of the accident the plaintiff was 35 years of age when he got injured and had 20 years of working life until retirement age of 55 years. Loss of earnings at $106.00 x 52 weeks = $5,512.00 per annum. I would take multiplier of 13 years. Accordingly his loss may be assessed as follows: $106.00 x 52 x 13 = $71,656.00.

[47] The plaintiff suffered 6% permanent incapacity. Therefore the award may be reduced accordingly. I would award 6% of the above figure being **$4,300.00** rounded for loss of earning capacity.

[48] The claim for cost of future nursing care and treatment is not substantiated with evidence. He did not even call his wife to support this claim. I therefore decline to grant any sum under this head.

Interest

[49] Section 3 of Law Reform (Miscellaneous Provisions) (Death and Interest) Act gives the court discretion to grant interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any

part of the period between the date when the cause of action arose and the date of the judgment. In exercising this discretion, I award interest on general damages ($23,000.00). According the defendants will pay jointly and severally interest at the rate of 6% pa from 17 June 2014 (date of writ) to 25 May 2016 (the date of hearing).

Costs

[50] As a successful party the plaintiff is entitled to costs of this litigation. Having considered all, I summarily assess costs at $2,500.00. The defendants jointly and severally pay the summarily assessed costs to the plaintiff.

Result

1. There will be judgment in favour of the plaintiff.
2. The defendants will jointly and severally pay the sum of $28,352.50 to the plaintiff.
3. The defendant will jointly and severally pay interest on general damages ($23,000.00) at the rate of 6%pa from 17 June 2014 to 25 May 2016.
4. The defendants will jointly and severally pay summarily assessed costs of $2,500.00 to the plaintiff.

Hajmeer 24/8/16

.....

M H Mohamed Ajmeer

JUDGE

24 August 2016

At Lautoka

HIGH COURT OF FIJI LAUTOKA