

IN THE FIRST CLASS MAGISTRATE'S COURT OF FIJI
WESTERN DIVISION AT LAUTOKA

CIVIL ACTION MBC No. 4 OF 2015

BETWEEN : **Lautoka General Transport Fiji Limited**, a limited liability company having its registered office at Bouwalu Street, Lautoka, Fiji.

Plaintiff

AND : **Bale Investment & Co Fiji Limited** a limited liability company having its registered office at Lot 12 Witherow Street, Nabua, Suva.

1st Defendant

AND : **Marika Kurodolo Naqali** of Nabua, Suva, Driver.

2nd Defendant

Counsels

Mr. Kumar, R of Faizal Khan Lawyers for the Plaintiff
N/A for the Defendants

Judgement

Introduction

1. The Plaintiff filed the Writ of Summons herein on the 22nd of January, 2015 against the Defendants claiming Negligence, Damages and Loss of Income in the sum of \$17,500.00, The Plaintiff is also seeking Costs on an Indemnity basis and any other Orders deemed by the Court as just.
2. The Plaintiff claims that the collision on 19th November, 2013 was caused by the Defendant's negligence. The particulars of negligence are as follows:
 - a. The 2nd Defendant while under the authority of the 1st Defendant was driving too fast in the circumstances.
 - b. The 2nd Defendant while under the authority of the 1st Defendant failed to keep a proper look out.
 - c. The 2nd Defendant while under the authority of the 1st Defendant failed to stop or control the Defendant's vehicle to avoid collision.

- d. The 2nd Defendant while under the authority of the 1st Defendant failed to exercise reasonable care and skill to avoid the collision.
 - e. The 2nd Defendant while under the authority of the 1st Defendant failed to sound the car horn to signal that he was approaching.
3. The Defendants have denied the allegations in the Statement of Defence dated 15th April, 2015. In paragraph 3 and 4 of the Statement of Defence, the Defendants state:
- a. That Plaintiff is put to strict proof and provide evidence that the bus was stationary lawfully on the side of the road at the Lomolomo stretch along the Queens' Highway before the alleged collision.
 - b. The 2nd Defendant strongly denies being prosecuted for the offence of dangerous driving as alleged under paragraph 7 hence puts the Plaintiff to strict proof to this effect.
4. The parties on the 27th of October, 2015 agreed to the following facts and issues:

(i) The Facts

- a. The Plaintiff is a limited liability company having its registered office at Lautoka, Fiji. The Defendant is also a limited liability company having its registered office at Nabua, Suva, Fiji.
- b. That at all material times, the 2nd Defendant was an agent and/or servant of the 1st Defendant. The 1st Defendant at all material times in control of the vehicle registration No. EF 614.

ii. The Issues

- c. Whether on or around 19th November, 2013 at 3.30pm, the 1st Defendant's vehicle while being driven by the 2nd Defendant collided into the rear of the Plaintiff's vehicle registration No. CU 505?
- d. Whether the collision was caused by either the Plaintiff or the Defendants?
- e. Whether as a result of the collision, the Plaintiff suffered extensive damage and as a result not able to generate income of approximately \$250.00 per day?
- f. Whether as a result of the Defendant's negligence, the total repairs and loss of income to the Plaintiff's bus amounted to \$17,500.00?

- g. Whether the Defendants have received numerous demands by the Plaintiff and whether the Defendants have wilfully failed and/or refused to pay the same?
 - h. Whether the Plaintiff is entitled to compensation for the loss, damages and costs sought in the Statement of Claim?
5. The Plaintiff has not raised the doctrine of 'Res Ipsa Loquitur' in his Statement of Claim and the Defendants have not pleaded contributory negligence in the Statement of Defence. The parties are therefore bound to their pleadings.
 6. On 1st May, 2015, Mr. Tuifagalele entered an appearance for the Defendants and sought clarifications on whether the matter was listed for a substantive hearing or a formal proof hearing. He was informed that the matter was listed for formal proof hearing. Mr. Tuifagalele then made an application to set aside the formal proof order. Mr. Kumar opposed the application on the grounds that there was no formal application filed before the Court. Mr. Tuifagalele was ordered to file a proper application and the matter was stood down until the end of the cause list.

The Evidence

7. The matter was recalled at 11:30 am, there was still no application for setting aside of formal proof order filed and/or before the Court. There was no appearance from the Defendants either, the matter proceeded by way of a formal proof Hearing.

The Law

8. In the case of **Fero Tabakakisuva v Sant Kumar** Civil Appeal No.12 of 1982, the Court of Appeal stated:

'as to negligence, the duty is that one should exercise reasonable care in ones actions, so as not to injure others. The test is whether the challenged conduct is reasonable, judged by the standard of the behaviour of the ordinary responsible citizen. Given proof of lack of reasonable care, then the duty is owed to anyone who could be considered as likely to be injured, the person who is so closely and directly affected by the act that he ought to reasonably to be in the contemplation of the careless person. So in negligence the test of duty is a question of assessment of standard of care.'

9. It is important to note that damages are conventionally divided into 'special' and 'general'. They are defined thus in **(Law of Torts by John F. Fleming 9th Ed. 1998):**

'Specials' refers to all items of damages capable of (more or less) precise qualification, comprising medical and other expenses as well as lost earnings up to the date of trial.....

'General damages' on the other hand; comprises all non-pecuniary losses, past and future, as well as future earnings (earning capacity).'

10. In the case of **Josaia Buakula v The Attorney General of Fiji** HBC 196 of 2001, in pages 6-7 of his judgment delivered on 24.08.2005, Pathik, J cited the relevant laws on "***special damages***" noting that:

"Special damages are accrued and ascertained financial loss (per Edmund Davies L.J. in Cutler v Vauxhall Motors 1971 1 Q.B. 418 at 426) which the Plaintiff has incurred. Subject to what I say hereafter unless agreed by the parties special damages should be expressly pleaded. They must be claimed specially and proved strictly.

The absence of receipts and other acceptable evidence have variously been dealt with by the Courts. Where there have been agreements there is no problem. However, it is proper to make a calculation based on sufficient evidence'.

The Evidence

11. Before calling its only witness, an application was made by the Plaintiff to strike out the Statement of Defence by the Defendants. There were no reasons put forward by Counsel, the application was therefore denied.
12. The Plaintiff called Mr. Harvindar Singh. The witness gave sworn evidence that he had the authority from the Plaintiff to give evidence in the matter. The authority letter was tendered as 'P1'. Mr. Singh stated that he has been in the employ of the Plaintiff for the last 18 years. He is currently the garage supervisor. He has a class 3 certificate in Automotive Engineering and a Heavy Diesel Mechanic Certificate.
13. The witness explained that the Plaintiff is a Bus Company that provides public transportation between the Nadi – Ba corridor and the rural area surrounding Lautoka based on a Road Route Licence issued by the Land Transport Authority. He further stated that the Bus Registration No. CU 505 was registered with the Land Transport Authority who had also issued a certificate of fitness at the relevant time. The registration notice and certificate of fitness was tendered as 'P2' and 'P3'.
14. Mr. Singh stated that on the 19th of November, 2013, the driver of Bus No. CU 505 called him at 3:40 pm, 10 minutes after the accident. The driver informed him that the Bus had an accident at Lomolomo, Lautoka. He had asked the driver whether he had reported the matter to the Police. The driver answered in the affirmative, he then went to report the matter to his boss. The driver of the bus was Mr. Anil Prakash Chandar. He was advised by the boss to go see the bus, assess the damage and see whether the bus can still run.

15. The witness stated that upon arrival at the scene, he noted that the rear of the bus was badly damaged. The frames and glasses were damaged. There were injuries to some school students who were in the bus. Mr. Singh stated that there was a Police Report about the accident. The report stated that the accident was due to the fault of the 2nd Defendant driver of the 1st Defendant. He tendered the Police Report as 'P4'. He further stated that the second vehicle involved in that accident was Motor Vehicle No. EF 614 that belong to the 1st Defendant. He tendered a Vehicle Registration Certificate for EF 614 as 'P5' from the Land Transport Authority.
16. Mr. Singh explained that the total cost of repairing the damage was \$14,500.00. A copy of quotation for cost of repair by the Plaintiff Company was tendered as 'P6'. The witness stated that the Plaintiff sought quotations from other Companies as to the cost of repairing the damage bus. A copy of quotation from United Coach Builders was marked as 'P7'. Mr. Singh further stated that it took about 12 days to complete repairing the damage and that the Plaintiff lost about \$3,000.00 in income within that 12 days. A copy of the driver's running sheet was marked as 'P8'. A demand notice was sent to the Defendant on the 10th of April, 2014, a copy was marked as 'P9'. However, the Defendant is still yet to settle the same. The Plaintiff seeks order in terms of the claim herein.

Legal Analysis

17. I have heard the oral testimony of Mr. Singh, the witness for the Plaintiff and I have read the written submissions filed on behalf of the same. Even though, the Hearing had commenced by way of formal proof, the burden of proving liability and negligence still remain with the Plaintiff.
18. Both parties have provided their version of what transpired via oral testimony and statement of defence respectively, however, it is for this Court to assess the evidence presented to determine the cause of the accident. This is the starting point.
19. Mr. Singh stated that at around 3.30pm on 19th November, 2013, the Bus No. CU 505 was parked stationary at Lomolomo in Vuda, Lautoka when it was hit from behind by the Motor Vehicle No. EF 614 belonging to the 1st Defendant and was driven by the 2nd Defendant. He had also relied on the Motor Vehicle Accident Report by the Fiji Police dated 6th February, 2014 to corroborate his evidence.
20. I have great difficulty in accepting the evidence by Mr. Singh as to how the accident happened. He was not an eye witness and was not present at the relevant time of the accident. The evidence that he gave is secondary evidence based on information he had gathered probably from the driver of the Bus No. CU 505 and from reading the Police report.

21. Mr. Singh stated that the accident happened at Lomolomo. The stretch of highway that Mr. Singh is referring to begins at the Vuda River running through the Barara Flats right up to the Sabeto River. He has not specified the exact location of the accident along that stretch of highway, whether it be Lomolomo Village or at around the Police Post or at around the Timber yard. He has stated that the Bus No. CU 505 was stationary along the highway. However, he has failed to verify the exact spot where the Bus No. CU 505 was parked and in proximity to the middle white line on the highway and/or from the side of the road. He failed to provide evidence as to the volume of traffic that particular day or the events leading up to the accident. The evidence presented by Mr. Singh regarding the accident is inconclusive.
22. Similarly, this Court cannot accept the Motor Vehicle Accident Report by the Fiji Police dated 6th February, 2014. The Report was written three months (3) after the alleged accident by a Police Officer who did not investigate the same. There is no rough sketch map and/or a fair sketch map of the alleged accident. There is no description as to visibility, the position of the two vehicles after the accident, the point of impact. There is no reference to any measurements taken to confirm the position of the two vehicles in proximity to the middle white line on the road and/or the side of the road. There is no reference to whether there were witnesses of the alleged accident. I cannot accept the claim that the 2nd Defendant was charged for dangerous driving as he was interviewed under caution and warned for prosecution. I find that the Police Report has no evidentiary value as to liability.
23. It is trite law that road users owe a duty to other road users whether it be other drivers, those riding a bicycle and/or a horse not to be negligent. However, in the case herein, in light of the foregoing, I make the following findings:
- a. I accept that there was an accident that occurred at Lomolomo in Vuda at around 3.30pm on the 19th of November, 2013, however, the evidence presented is inconclusive for a proper determination of the cause of the accident.
 - b. I therefore find that the Plaintiff has failed to prove liability against both Defendants.
 - c. The case is hereby dismissed.
 - d. 28 days to Appeal.

Ordered Accordingly,



JEREMAIA N. LEWARAVU
RESIDENT MAGISTRATE

22nd of June, 2017

