

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION
ACTION NO. HBC0412 OF 1997

NO. 04/2006L

BETWEEN: DINESH KUMAR and SUKDESH SINGH
(trading as Vatukoula Express Services of
Rakiraki)

PLAINTIFF

AND: THE ATTORNEY-GENERAL OF FIJI of
Government Buildings of Suva

FIRST DEFENDANT

PUBLIC WORKS DEPARTMENT of Ganilau
House, Suva

SECOND DEFENDANT

Mr D.S Naidu & Mr D. Kumar for the Plaintiff
Ms S. Tabaiwalu for the Defendants

Dates of Hearing: 21 June & 15 September 2005
Dates for Submissions: 29 September, 13 October, 21 October 2005
Date of Judgment: 13 January 2006

JUDGMENT OF FINNIGAN J

This is a claim by a Bus owning partnership against the public authorities for the loss of a passenger bus. The Plaintiffs seek \$95,000.00 for the written-off bus, \$20,000.00 for loss of use of the bus

for 5 - 6 weeks and a sum in general damages to refund what they paid out as compensation to passengers who were in the bus at the time it was written off.

The hearing could not be completed on its hearing date and for good reasons could not resume for three months. Thereafter it was adjourned so Counsel for the parties could file written submissions.

The bus was the express bus from Suva to Vatukoula. On 21 November 1994, on the Kings Road about 45 kilometers before Rakiraki the bus left the road, tumbled into the Wainibuka river upside-down and was destroyed. One passenger died, several were injured. The claimed cause of the accident was the condition of the road and the foundation for this action is the claimed negligence of the second Defendant in failing to display warning signs, failing to construct rails at the point where the bus went over and a failure to increase the width of the road from 12 feet to the national standard.

The Facts

The findings I am about to make are the objective view I had formed of the facts of the accident shortly after hearing the evidence of the five witnesses who gave evidence (all called by the Plaintiff) on 21 June 2005. The driver himself died according to one of the witnesses in about 1999. The fifth and a sixth witness gave evidence for the Plaintiffs on 15 September 2005, but not about the accident. The Defendants called no witnesses.

On 21 November 1994 the bus was descending slowly from the village of Tobu. The road was in process of being graded, the grader was

working perhaps 3 kilometers from the accident site. The driver had no assistant and there were no signs on the road warning that he was working. He was leaving a line of gravel behind him, up to 2 ½ feet high. He appears to have started work only recently before this because for the 3 kilometers or so between his machine and the accident site there was a long heap of gravel in the centre of the road. This indicated that he was making his first run, scraping the gravel from the side towards the centre. He would soon have returned to spread the line of gravel from the centre right across the road thus filling any potholes and leveling the road.

One witness said the heap was as much as 2 ½ feet high, and contained big stones, some perhaps 1 foot across. He also said a bus is normally about 8 feet wide and that the road would have been 13 feet or 14 feet or possibly 15 feet wide. He produced photos that he took the day after the accident. There was no other measurement evidence.

The accident site was a place where the road came around a bend and narrowed between a cliff rising up on one side and a cliff falling away to the river on the other side. The driver was keeping to the left near the river to avoid the gravel and to avoid another bus which normally came from the other direction at about this point. As the bus went around the bend the driver tried to get the front wheel over the heap of gravel to move away from the fall into the river. The front wheels went over the gravel but the left rear tyre started to slide and the whole rear of the bus slipped backwards over the edge and the bus tumbled backwards into the river, landing on his roof.

The driver was charged with causing death by dangerous driving but the charge was withdrawn. The Court at Rakiraki accepted that the

evidence establishing the above facts would have been insufficient to prove negligence by the driver beyond reasonable doubt.

The Plaintiffs have set out to establish on the balance of probabilities that the cause of this accident was negligence by the Second Defendant, in three ways;

- (a) Failure to display warning signs of Works to road users;
- (b) Failure to construct rails on the side of the road on the sharp bend to make the road safe;
- (c) Failure to increase the width of the road from 12ft to the National Standard.

The Defendants have pleaded that the loss of the bus was caused wholly by the negligence of the Plaintiff's driver. Five particulars are pleaded including driving too fast, failing to keep a proper look out, failing to heed notices at the beginning of the road being graded, driving in a manner unsafe in all the circumstances of the road itself and the grading work and failing to manage the vehicle so as to avoid the accident.

The Defendants also plead five particulars of ways in which the Second Defendant took reasonable care in the circumstances including display of road warning signs at each end of the section being graded, ensuring that no gravel extra accumulated on the road, following all the standard safety guidelines and practices such as flagging down vehicles extra, constructing that section of the road "to the acceptable/National Standard" and providing all adequate and regular road features and warnings to make that part of the road reasonably safe for all road users.

Findings in Negligence

I have had the benefit of only the Defendants' submissions. Counsel for the Plaintiffs did not file submissions, even in response to those for the Defendants. I have considered the position of the driver. He controlled the bus and the situation. He clearly felt too close to the edge above the river and turned to drive through the heap of gravel. The Plaintiffs' witness said the heap was up to 2 ½ feet high. The question is, was this driving at the standard of the reasonable prudent driver? Clearly the bus was already very near the edge of the drop. The driver was caught between the gravel and edge. What were his choices? He could have stopped, he could then have assessed the situation if he was uncertain or felt unsafe. He could have either reversed or done something to reduce the hazard of the gravel (e.g. lower it, move it aside or wait for the grader, or the other bus driver) before attempting to drive across it. Finally, he could attempt as he did to drive across it without stopping. The question must be answered without the benefit of hindsight. My conclusion is that some of the blame must rest with the driver. He did none of those prudent things.

What about the working of the grader? It is not claimed that the grader driver was negligent for leaving a heap of gravel. The claim is that his employer was negligent in not having a safety barrier at a narrow and dangerous piece of road and in not having warning signs. I reject the Plaintiffs' first claim based on lack of warning signs, and need make no finding whether they were there or not. The gravel was there to be seen and from the evidence it is clear that the bus driver was already driving very carefully, expecting an on-coming bus on a portion of road which was not only dangerous for the drop into the river but was narrow and restricted by the cliff or hill on the opposite side. I reject the third claim

in negligence, that the second Defendant should have kept that portion of the road wider. This is because there was insufficient evidence for it e.g. about why the road was narrow, who owned the land which would have had to be taken away, how much work was involved in that undertaking, what if anything is "the national standard" and so on. There was no reliable evidence of the width of the road, or of any difference between that part and other parts of that road.

The only other cause of action left is the claimed failure to construct a safety barrier. Photographs taken soon after the accident showed a line of substantial white poles at the road's edge. These prove very little about the Second Defendant's duty of care. On the day of the accident the bus tumbled into the river because the driver turned across the path of travel and climbed the heap of gravel in the center. This brought the left rear wheel near the edge of a steep drop and either it went over the edge or the edge crumbled. That was an unusual situation which the driver faced, and helped to create.

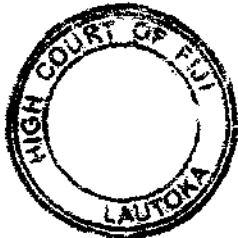
I am unable to see any duty resting on the Second Defendant to mitigate or somehow prevent what the driver did.

After much thought I am able to conclude only that this final pleaded claim must also fail. I uphold the submissions of Counsel for the Second Defendant that there is insufficient evidence to support it.

I was informed that one potential witness for the Second Defendant, like the driver, had died in the 11 years since the accident, and that the grader driver is paralysed and very ill. The outcome may have been different had the Court been able to offer these parties a hearing when they were ready for it, about November 1998.

Order:

I enter judgment for the Defendants. In the circumstances I make no order for costs.



At Lautoka

13 January 2006

D. D. Finnigan
D.D. Finnigan
JUDGE