IN THE HIGH COURT OF FIJI AT LABASA

CIVIL JURISDICTION

Civil Action No. HBC 11 of 2012

BETWEEN

NAREND PAL of Tagnikula, Wainikoro, Labasa, Salesman.

PLAINTIFF

A N D

GYANENDRA PRAKASH A of Tagnikula, Wainikoro, Labasa.

FIRST DEFENDANT

A N D

RAM PIYARE & SONS LIMITED – a limited liability company having its registered office at Namako House, Rosawa Street, Labasa.

SECOND DEFENDANT

Counsel	:	Mr. S. Prasad with Ms. Vreetika for the Plaintiff. The 1st Defendant appears in person. Mr. A. Sen for the 2nd Defendant.
Dates of Hearing	:	3rd, 4th and 5th October, 2016.
Date of Judgment	:	24th November, 2016.

JUDGMENT

[1] The plaintiff instituted these proceedings to recover damages for the injuries caused to him by the alleged negligent driving of the 1st defendant who was admittedly an employee of the 2nd defendant at the time of the accident.

[2] At the pre-trial conference the parties admitted the following facts:

1. The plaintiff was at all material times driver/salesman aged 45 years (D/B 4/12/1966) and employee of the 2nd defendant.
2. The 1st defendant was at all material times the driver of motor vehicle bearing registration No. EU 339.
3. The 2nd defendant was at all material times the owner of motor vehicle bearing registration No. EU 339.
4. The 1st defendant was driving the motor vehicle bearing registration No. EU 339 as the servant/agent of the 2nd defendant.
5. On the 14th day of December, 2010 being the material time the 1st defendant was travelling along Wainikoro road, Nubu, Labasa when the vehicle he was driving involved in an accident.

[3] As per the minutes of the pre trial conference following are the issues to be determined as agreed by the parties:

1. What was the weekly income of the plaintiff at the material time?
2. Was the accident caused or contributed by the plaintiff?

NEGLIGENCE OF THE PLAINTIFF BEFORE THE ACCIDENT

a. Was the plaintiff wearing seat belt while being seated in the passenger's seat of motor vehicle registration No. EU 339?
b. Did he take any or any adequate precaution for his own safety while being a passenger in the said motor vehicle?
c. Was the plaintiff travelling in the motor vehicle bearing registration No. EU 339 contrary to the statutory requirements stipulated in the Land Transport Act and Regulations?

NEGLIGENCE OF THE PLAINTIFF AFTER THE ACCIDENT

d. Did the plaintiff advise the ambulance driver of his alleged injuries and was the plaintiff travelling in the front seat in an upright sitting position when being conveyed from Wainikoro Health Centre to Labasa Hospital?
e. Did the plaintiff give timely consent for the performance of surgical procedures?

3. Did the accident occur solely as a result of the negligence of the defendants or did it occur as a result of sudden mechanical defect over which the defendants had no control?
4. Did the plaintiff receive injury as a result of the accident? If so, what is the extent of the injury of the plaintiff?
5. Has the plaintiff suffered pain and suffering loss of amenities of life and loss and damage and will he continue to suffer the same?
6. Can the plaintiff rely on the provisions of the traffic regulations and the doctrine of *res ipsa loquitur* to prove negligence of the defendant?
7. Are the defendants liable to pay special and general damages and costs to the plaintiff? If so the quantum thereof?

[4] It is the 1st defendant who knows exactly how the accident occurred. However, the plaintiff who was travelling in the vehicle at the time of the accident also can testify as to what happened immediately before the vehicle went into the river.

[5] It is the evidence of the plaintiff that on the day of the accident he was in the lorry with the defendant and at Lagilagi a small boy got into the vehicle and the child got

off the vehicle before the accident. After dropping the child off the 1st defendant took off on the 1st gear and changed it to the 2nd gear and to the 3rd gear. It was a gravel road and the accident had occurred while the lorry was going down the slope. It is his evidence that the vehicle was travelling very fast down the hill and the driver applied breaks but the lorry moved forward. The 1st defendant had pulled the hand breaks but he could not stop the vehicle. At the bend near the bridge the vehicle had gone into the river and turned upside down. Although it was suggested to him that he was not wearing the seat belt at the time of the accident he maintain the position that he was wearing the seat belt and it was released only after the accident. There is no evidence to support the contention that the plaintiff was not wearing the seat belt. There is only a suggestion that he was not wearing the seat belt which is absolutely insufficient for the court to act upon.

[6] The 1st defendant explaining how the accident occurred stated that one week before the accident he informed his employer that the breaks in the vehicle were not good and on his instructions he took it to Carpenters Motors but since the person who usually repairs it was on leave he showed the vehicle to another person who repaired it. It is the position of the 1st defendant that the breaks were still not good but when he told this to his employer he had asked him to load the lorry with defective breaks and drive it till the parts necessary for the repair arrive and the witness reiterated this in cross-examination.

[7] In cross-examination the 1st defendant was confronted with paragraph 4 of his statement of defence where it states as follows;

> Save for admitting that he was driving vehicle registered number EU 339 on 14th day of December, 2010 the property of the 2nd defendant along Labasa - Wainikoro road when it got out of control, veered off the road and fell in the river, he denies the rest of the contents of paragraph 4 of the statement of claim and says that the collision was caused by sudden mechanical defect over which he had no control.

[8] It appears that the evidence of the 1st defendant is different from what has been pleaded in the statement of defence. The 1st defendant however, said that he never instructed Mr. Kohli to file a statement of defence and it was his employer who took him to Mr. Kohli. He stated further that he did not tell Mr. Kohli that the accident

was due to a sudden mechanical failure nor did he ask Mr. Kohli to file a statement of defence on his behalf and it was his boss (the 2nd defendant) who instructed Mr. Kohli. What appears from the evidence of the 1st defendant is that he did not have money to retain Mr, Kohli to represent him in court. I do not see any reason to disbelieve the 1st defendant. Although it was suggested to the 1st defendant in cross-examination that he instructed Mr. Kohli to aver in the statement of claim that it was a sudden mechanical defect which caused the accident there is no evidence that the 1st defendant in fact gave such instructions to Mr. Kohli except the suggestion made to the 1st defendant in the course of cross-examination which is not sufficient for the court to act upon and arrive at the conclusion that the 1st defendant instructed Mr. Kohli to file a statement of defence on his behalf. In cross-examination the General Manager of the 2nd defendant company admitted that he took the 1st defendant to Mr. Kohli.

[9] Mr. Bhan Pratap, the Managing Director of the 2nd defendant company testified that the 1st defendant informed him that there was a minor problem in the brake system but it was later repaired. The fact that the breaks of the vehicle were defective is not in dispute. The question is whether the breaks were properly repaired.

[10] The 2nd defendant called the foreman of the Carpenters Motors, Mr, Chaudry who testified that the 2nd defendant's vehicles were serviced at their workshop and the vehicle involved in the accident was serviced in every 5000 kilometres and after every service they used to do a test running. It was his opinion that if the breaks become hard it can be a problem with the diaphragm or the vacuum pipe.

[11] The 2nd defendant tendered in evidence marked as "D1" a set of invoices pertaining to the repair of this vehicle two of which are duplicates. According to these invoices the breaks of the vehicle have been repaired on 30th June, 2009, 31st July, 2009 and 31st October, 2009. There is no document to show that the breaks of this vehicle were repaired or serviced thereafter until the date of the accident. The period between the last date the brakes of the vehicle were attended to and the date of the accident is little over a year. According to the plaintiff's testimony this vehicle was being used to deliver goods almost every day and the road was hilly and winding. When a vehicle carrying on heavy loads almost every day on winding and hilly roads the owner has a duty to keep it in proper mechanical condition.

[12] A driver who takes a vehicle on to a public road owes a duty of care towards the other users of the road and the passengers of the vehicle. A driver who drives a mechanically defective vehicle especially, a vehicle without a proper braking system puts the lives of the other users of the road and the passengers of the vehicle in danger.

[13] From this evidence the only reasonable conclusion the court could arrive at is that the 1st defendant has driven this vehicle knowing very well that its breaks were defective which amounts to negligence on the part of the 1st defendant. The 2nd defendant had been negligent in permitting the 1st defendant to drive such a vehicle on the road.

[14] The 1st defendant in his evidence attempted to place the entire responsibility of the accident on the 2nd defendant which is not possible under the law. If the court finds the 1st defendant responsible for the accident the 2nd defendant becomes vicariously liable as the employer for the negligent acts of the 1st defendant.

[15] The learned counsel for the plaintiff also relied on the maxim "***res ipsa loquitur***" which means "***the thing speaks for itself***". One is presumed to be negligent if he or she had the exclusive control of whatever caused the injury even though there is no specific evidence of an act of negligence, and without negligence the accident would not have happened. Once the court draws such a presumption the burden shifts to the defendant to explain how the accident occurred. In this case the 1st defendant who was the driver of the vehicle at the time of the accident testified in court and explained what transpired from the time the vehicle was taken to the road up to the time of the accident.

[16] The plaintiff called Dr. Sunil Kumar, a consultant surgeon attached to Labasa Hospital to explain the injuries sustained by the plaintiff in the accident. He was not the doctor who treated the patient nor did he have the medical record of the plaintiff he only brought to court a report prepared by Dr. Jaoji Vulibeci, the Medical Superintendant of Labasa Hospital. It is his evidence that the medical record of the plaintiff has been misplaced. The doctor testified that he was not the Head of the Surgical Unit but he discussed this matter with Dr. Jaoji. When the plaintiff attempted to mark the document at page 16 of the agreed bundle of documents it was objected to on the basis that it was not identified by the plaintiff. This is a

medical certificate issues by a government hospital containing the name of the plaintiff as the patient. There is no necessity for the plaintiff to identify the document. However, this document was not tendered in evidence.

[17] Dr. Jaoji is a General Surgeon with 24 years of experience. He is the doctor who handles all orthopaedic surgeries at Labasa Hospital. He is the doctor who treated the plaintiff in this case. The medical report issued by him on 25th June, 2014 was tendered in evidence marked as "P4". The doctor testified that skull traction was done on the plaintiff. In acute cervical spine trauma, skull traction is done to reduce a dislocation or fracture, to immobilize an unstable lesion until definitive treatment (operative or conservative) is possible or, more rarely, as a definitive treatment until healing occurs. The doctor also testified that during that period the patient has to be in bed and cannot move about and with the injuries of this nature it is possible to have continuous pain but the doctor does not say for how long such pain would remain.

[18] It is common ground that the plaintiff was in hospital for two to three months. There is no formula to calculate damages for pain and suffering. The court must award an amount arbitrarily but reasonable after the taking in to consideration the facts and circumstances of each and every case.

[19] The learned counsel for the plaintiff cited the following authorities on the calculation of damages for pain and suffering.

[20] **Salaitoga v Anderson** Civil Appeal No. ABU0029 of 1994 - In this case the court awarded $85,000.00 as damages for pain and suffering. In that case the injuries suffered by the plaintiff were much more serious than the plaintiff in this case. She had sustained multiple fractures, lacerations and concussion. The plaintiff in this case did not sustain such serious injuries.

[21] **Kamea v The Attorney General** [2002] FJCA 496; ABU0049.1999S (23 January 2002) - In this case the court awarded $70,000.00 as damages for pain and suffering and loss of amenities of life. In that case the plaintiff who was a nine year old child at the time of the accident suffered permanent brain damage due to the accident.

[22] **Yanuka Island Ltd v Elsworth** [2002] FJCA 65; ABU0085U.2000S (16 August 2002) - In this case $50,000.00 was awarded as damages for pain and suffering and loss of amenities of life. In that case too the plaintiff suffered brain damage due to the accident.

[23] **Singh v Katonivere** [1997] FJHC 261; Hbc0242d.94s (10 December 1997) - In this case the plaintiff was awarded $61,000.00 as General damages.In that case he had over 60 X-rays, was given 52 pints of drips and three pints of blood. He was unconscious for about three days and underwent 17 surgeries.

[24] **Singh v Rentokil Laboratories Ltd** [1993] FJCA 26; Abu0073u.91s (20 August 1993) - In this case the plaintiff was awarded $60,000.00 as damages. In awarding damages the Court of Appeal made the following observations:

> The plaintiff appellant was aged 39 years at the date of the accident. On the day of the accident he was conveyed to the Lautoka Hospital suffering inter alia, from the injuries to all limbs except the left leg. Additionally the comminuted fracture of the right humerus was associated with radial nerve palsy.

> In that decision the court has also held that in awarding damages the court must take into account all the factors including the increase in the cost of living.

[25] The injuries sustained by the plaintiffs in the cases cited above are very serious in nature and in some cases disabilities caused are permanent. Taking all these factors into consideration the court decides that $30000.00 is a reasonable amount to be awarded as damages for pain and suffering and for loss of amenities of life.

[26] The plaintiff claims $23,907.00 as loss income from the defendant that is for the entire period between the date of the accident and the date of the written submissions. It is a fact admitted by the parties that from the day the plaintiff was injured the defendant has paid 2/3rd of his salary for 2 ½ years.

[27] According to the report of Dr. Jaoji (P4) after almost four years from the date of the accident the permanent impairment is 34% where as in the medical report of Dr. Taloga (D2) the permanent impairment of the whole person is 6%. Dr. Jaoji in his

evidence stated that he was not competent as Dr. Taloga and Dr. Taloga is a very experienced doctor. He also testified that when he prepared the report he did not have the benefit of reading the medical folder of the plaintiff. Dr. Jaoji is not a qualified assessor of impairment. His findings are based on his experience.

[28] Dr. Taloga testified that the plaintiff did not show any abnormality in his walk, there was no wasting of muscles and when the muscle wastage is tested the patient must assist but in this case the plaintiff resisted.

[29] To determine whether the plaintiff has a permanent disability which prevents him from engaging in his employment it is important to consider the evidence adduced by the parties on the behaviour of the plaintiff subsequent to the accident.

[30] Mr.Avinesh Chand is a relative of the plaintiff. The plaintiff's daughter is married to his brother. His evidence is that after the accident the plaintiff does not work. He testified further that he and the plaintiff with two others went to the jungle to cut timber but he did not use the axe to cut timber. The witness further stated that the plaintiff is taking part in social activities. When the witness was shown the photographs at pages 37 to 40 of the agreed bundle of documents he identified the plaintiff in those photographs. These photographs show the plaintiff attending social functions and moving a barrel in his garden. The plaintiff did not challenge this evidence.

[31] Mr. Nemani Valu is a caretaker attached to the Water Authority who used to walk along the road since 2010 where the plaintiff lives. It is his evidence that he had seen the plaintiff collecting firewood, gathering animal and feeding ducks and hens. He states further that to collect firewood the plaintiff has to walk for about half an hour. In cross-examination the witness said that he had seen the plaintiff carrying water buckets to feed the animals.

[32] Witness Ram Kumar testified that he saw the plaintiff with one Abhinesh about 2 ½ miles away from home holding a knife.

[33] When the two contradictory reports of Dr, Jaoji and Dr. Taloga are considered in this back ground the court will have to accept the opinion of Dr. Taloga as against the opinion of Dr. Jaoji.

[34] The 2nd defendant has paid, as admitted by both parties, 2/3rd of the plaintiff's salary for 2 ½ years after the accident which amounts to the full salary for almost 1 ½ years. The plaintiff's claim for loss of earnings up to the date of filing of written submissions is on the basis that he is unfit to earn his living due to the injuries sustained by him. But the evidence adduced by both parties and the medical report of Dr. Taloga does not show that he has any disability which is permanent in nature. For these reasons the plaintiff is not entitled to any damages for loss earnings.

[35] The plaintiff also claimed $500.00 as medical expenses, $54.00 for obtaining the medical report, $4000.00 as expenses incurred for transportation, $850 for calling witnesses and $400.00 as meal expenses. These are all fall under the category of special damages which must be proved by the plaintiff. No evidence was adduced to establish that the plaintiff in fact incurred these expenses.

[36] For the reasons aforesaid I make the following orders:

1. The 1st and 2nd defendants are ordered to pay the plaintiff $30,000.00 with interests on the said sum in terms of section 4(1) of the Law Reform (Miscellaneous Provisions) (Death and Interest) (Amendment) Decree 2011 from the date of the judgment until the entire sum is paid in full.

2. The 1st and 2nd defendants are also ordered to pay the plaintiff $3000.00 ($1500.00 each) as costs of this action.

Lyone Seneviratne,

JUDGE

HIGH COURT OF FIJI SUVA

24th November, 2016.