

**IN THE HIGH COURT OF FIJI AT LABASA**  
**CIVIL JURISDICTION**

**Action No. HBC 04 of 2017**

**BETWEEN**

**MUKESH CHAND** a patient pursuant to Order 80 rule 1 of the  
High Court Rules suing by his next friend / guardian

**ELIZEBTH** the lawful wife of the plaintiff of

Wailevu Tiri in the Republic of Fiji.

**PLAINTIFF**

**AND**

**AIYUB KHAN** of Tabia, Labasa businessman in the Republic of  
Fiji trading business in the name and style of

**A K HIRE SERVICES.**

**DEFENDANT**

**Counsel** : Mr. S. Sharma for the Plaintiff  
Mr. A. Ram for the Defendant

**Dates of Hearing** : 15<sup>th</sup> & 16<sup>th</sup> August, 2018

**Date of Judgment** : 26<sup>th</sup> September, 2018

## JUDGMENT

- [1] The filed writ of summons seeking to recover damages for the injuries caused to him during the course of his employment.
- [2] In the statement of the plaintiff avers that on or about 09<sup>th</sup> June, 2016 he was directed by the defendant company to drive a grader at Daria, Wainunu, Bua and while trying to ascend the hill the grader started skidding and suddenly the engine of the grader stopped and started to roll down the hill. It is averred further that the plaintiff lost control over the grader and he jumped out of it.
- [3] According to the plaintiff the particulars of negligence of the defendant are as follows;
- i. Failure to provide fit and proper vehicle (Grader) with proper engine to the plaintiff before he was directed to drive the Grader.
  - ii. Failure to provide or maintain a safe and proper system of working, or to instruct their workmen including the plaintiff to follow that system.
  - iii. Failure to provide adequate supervision at all times.
  - iv. Failing to take any adequate precautions for the safety of the plaintiff while he was engaged in his work.
  - v. Exposing the plaintiff to a risk of damage or injury of which they knew of ought to have known.
  - vi. Failing to provide or maintain any safe or proper system of work.
  - vii. Requiring the plaintiff to engage in a dangerous activity alone without due regard to his safety.
  - viii. Instructing or allowing the plaintiff to drive the Grader to ascend the hill which the defendant knew or ought to have known that it was dangerous and risky.
  - ix. Failing to provide any care for the plaintiff to attend his surgical treatment abroad.
- [4] The defendant denies the allegations contained in the amended statement of claim. The defendant avers in his amended statement of defence that he did not direct the plaintiff to drive the Grader but asked him to operate the Grader for the purpose of grading a road that was being constructed in Waimanu, Bua.

[5] The defendant alleges that injuries if any were occasioned by the plaintiff through his own wilful neglect and gross misconduct. The particulars of the plaintiff's negligence as per the amended statement of defence are as follows:

- a. The plaintiff was directed to operate a Grader along a road that was already formed, engineered and designed by Fiji Roads Authority.
- b. The plaintiff was given strict instructions to level the base and sub base metal (ricks) and continue and progress with the work as per the design and specifications.
- c. That the Grader operated by the plaintiff had the necessary certificate of road worthiness and was constantly being checked, serviced and maintained by qualified mechanics and technicians.

[6] At the commencement of this action the plaintiff obtained orders from the court restraining the defendant from transferring, selling, dealing with, charging, mortgaging, assigning, disposing of or removing from this jurisdiction any of the properties mentioned therein and from withdrawing or transferring money kept in bank account under his name and/or A K. Hire Services name except for his day to day expenses and payments to be made to suppliers and creditors until further of this court.

[7] The defendant by way of counter-claim, claimed damages caused to him due to the above restraining orders.

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

1. On the 9<sup>th</sup> day of June, 2016, the plaintiff was employed as a Grader Operator by the defendant's company.
2. On the 9<sup>th</sup> day of June, 2016, the plaintiff was directed by the defendant to operate the Grader registration number EU585 for the purposes of grading the road at Waimanu, Bua, Labasa.

[9] The first issue to be determined in this matter is whether the injuries sustained by the plaintiff were due the negligence of the defendant as claimed by the plaintiff in his statement of claim.

[10] Since the plaintiff is paralysed he could not testified at the trial. The plaintiff's wife testified on his behalf. Plaintiff's wife saw him after the accident in the hospital and therefore, she was not in a position to tell the court how the plaintiff got injured. I

will consider her evidence in assessing the damages that should be awarded if I find the defendant was responsible for the injuries caused to the plaintiff while at work.

- [11] Witness Irshad Ali was also a worker who at the time of the accident was there with the plaintiff. His evidence is that the plaintiff operated the grader forward down the slope and reversed it and then the engine stopped. The grader then rolled down and toppled off the road, hit two trees and stopped but in re-examination the witness said that the grader did not topple. The plaintiff was thrown away from the grader and was unconscious. He also said that when the grader started rolling down the plaintiff signalled him to move away. In cross-examination the witness said that the plaintiff was not wearing the seatbelt. He also said that the plaintiff turned the steering wheel to the left and if he turned it to the right he would have been dead.
- [12] Witness Anand Sami Gounder said when he came to the scene of the accident the grader the accident had already happened and the engine of the Grader was no running. He also said that he could not say why the engine stopped. He testified further that if the engine stops suddenly the vehicle become uncontrollable and the steering wheel cannot be operated. In cross-examination the witness confirmed that the steering wheel does not work once the engine is stopped. He also said the he had operated grader on both hilly and flat surface and immediately after the engine stops the breaks might work for a short time.
- [13] The defendant's first witness Mansoor Khan had gone to the worksite after the accident occurred. He is not a witness to the incident. His evidence as to manner in which the plaintiff got injured is totally based on what he heard from the other workers who saw the accident. He said that when he went to the worksite he saw the tire marks and the Grader skidded off the road and rolled down. Later, MWH, the company that was in charge of the road works, Police and a mechanic had come and inspected the Grader and they could not find any defect in the Grader. He also said that the following day that is on 10th June, 2016 the company used the same Grader to do the remaining work. The witness testified further that he has 10 years' experience in operating Graders and there have been instances where the grader stopped while operating and in such a situation the operator must apply foot break and if it does not work he must apply maxi break which is an emergency break, within five seconds. It is also his evidence that if the plaintiff

was wearing the seat belt he would not have been injured. He also confirmed once the engine stops the steering does not work. It is also his evidence that if the plaintiff was wearing the seatbelt he would not have been injured.

- [14] In cross-examination the witness said that the plaintiff was a very senior operator and there was no chance of the Grader tumbling once the maxi break is applied.
- [15] Witness Mohammed Yusuf is also an eye witness to the incident. He said while Mukesh Chand was operating the Grader it went sideways and rolled and Mukesh was on the road. Thereafter, he has taken him to the hospital. In cross-examination the witness said the police did not record as statement from him and he does not know whether the Land Transport Authority officials came to the scene.
- [16] Witness Faiyaz Khan is the officer in charge of all operations of the defendant company. He said every morning he has a meeting with the workers to see whether there any complains and on the day of the accident there were no complains. This witness has not seen the accident he had gone to the scene after he was informed about the accident by the other workers. He testified further that he engaged one Pradeep, a technician to check the Grader on the day after the accident and everything was in a working condition and maxi-break was also working. He also said that the plaintiff's wages were paid until these proceedings were instituted.
- [17] In cross-examination the witness said if Mukesh applied breaks the vehicle should have stopped and Mukesh should not have reversed the Grader up hill. The normal course is that the driver brings the grader down the hill turn and goes back and that is the way the Grader should be operated. He testified that he did not inquire whether Mukesh needed treatment abroad but if there was a referral they would have considered it.
- [18] Praddep Mudaliar, the mechanic testified that he has experience in heavy machinery maintenance and on 10<sup>th</sup> June, 2016 he examined the Grader which was parked by the side of the road. His finding after examining the Grader is that it was free of any mechanical defect and that there was also no problem in breaking system. He said that once the engine stops foot-breaks will work for about ½ hour until the air pressure reduces and when maxi-breaks are applied the Grader cannot be moved and the wheels get locked. He also confirmed that when the engine is stopped the steering does not work.


- [19] The plaintiff called Ms. Tawake, an officer from the Land Transport Authority. She said the licence of Grader expired on 09<sup>th</sup> June, 2016 and it was re-registered on 10<sup>th</sup> June, 1996. In cross-examination the witness said the fitness certificate of the vehicle was valid till 15<sup>th</sup> July, 2016.
- [20] The plaintiff came to court on the basis that injuries suffered by the plaintiff was due to the negligence of the defendant and the particulars of negligence as averred in the statement of claim. The burden is on the plaintiff to establish that the defendant was negligent as alleged in the statement of claim. The plaintiff failed to establish any of the acts of negligence complained of. From the evidence adduced by both parties it appears that plaintiff has not operated the Grader the manner in which he should have operated it and also that he had been negligent in not wearing the seatbelt.
- [21] Unfortunately for him the plaintiff was not in a position to testify at the trial. It is within his exclusive knowledge how the accident occurred. However, the court has to make a decision whether the defendant was responsible for the injuries caused to the plaintiff on the evidence available before it. The court, in the adversarial system of administration of justice, has no power to call for evidence.
- [22] The plaintiff also relied on the maxim *res ipsa loquitur* which means fact speaks for itself. The requirement that had to be satisfied before a *res ipsa loquitur* could be made in favour of the view that the defendant had breached a duty of care owed to the claimant were first set out by Earl CJ in **Scott v London and St Katherine Docks Company** (1865) 159 ER 665,667:
- ‘where the thing [which caused the accident complained of] is shewn to be under the management of the defendant ....and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants, that the accident arose from want of care.’
- [23] In the instant case the vehicle was in total control of the plaintiff and how the accident occurred was within his personal knowledge. Unfortunately he was not in court to testify at the trial because he was paralysed. The defendant’s witnesses established that the vehicle was in proper mechanical condition. Therefore, the maxim *Res ipsa loquitur* cannot be applied to the facts of this case.

[24] For the reasons set out above the court is compelled hold that the plaintiff has failed to prove that the injuries he suffered was as the result of the defendant's negligence.

ORDERS

1. The action of the plaintiff is dismissed.
2. Taking the circumstances of this case into consideration I do not order costs in this matter.



  
Lyone Seneviratne

**JUDGE**

26<sup>th</sup> September, 2018