IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 23 OF 2018

BETWEEN: **ESWANT RAO**

Plaintiff

AND: **VALEBASOGA TROPIK BOARD LIMITED**

Defendant

CORAM: **The Hon. Mr. Justice David Alfred**

COUNSEL: **Mr. S. Sharma for the Plaintiff**

Mr. A. Ram for the Defendant

Dates of Hearing: **18, 19 and 20 February 2019**

Date of Judgment: **22 February 2019**

JUDGMENT

1. The Plaintiff in his Statement of Claim says as follows:

   (1) He was injured in the course of his employment with the Defendant circa 15 August 2015.

   (2) He was employed as a welder and paid $188.10 with a deduction of $15.05 for FNPF, so his net salary was $173.05.

(3) It was an implied term of the Plaintiff's contract of employment that the Defendant would by its servants and/or agents take all reasonable care to provide a safe system of work, effective supervision of the same and would not expose the Plaintiff to a risk of damage or injury and would take all reasonable measures to ensure that the place of work and the machines he was required to use were safe.

(4) Circa 15 August 2015, the Plaintiff was directed by the Defendant to assist an employee named Aiyaz to take out the grapple from the digger. When the grapple and the boom were lifted by the forklift registration No. CQ 361 which was driven by Aiyaz, the Plaintiff was again directed to take out the grapple pin and while taking it out the boom of the digger slipped and injured him.

(5) The Plaintiff's injury was caused by the negligence of the Defendant, or its servants and agents.

Particulars of Negligence include:

(i) Failure to tie the grapple and the boom when it was lifted by the forklift.
(ii) Failing to provide safe and registered forklifts issued with certificates by the Land Transport Authority (LTA).
(iii) Failure to provide a safe and proper system of working or to instruct their workmen to follow that system.
(iv) Failure to provide adequate supervision at all times.
(v) Failing to take any adequate precautions for the safety of the Plaintiff while he was engaged in his said work.
(vi) Exposing the Plaintiff to a risk of injury of which they knew or ought to have known.
(vii) Failing to provide any safe or proper system of work.
(viii) Requiring the Plaintiff to engage in a dangerous activity without due regard to his safety.

(6) The particulars of the Plaintiff's injuries and treatment were set out.

(7) The Plaintiff would rely on the doctrine of res ipsa loquitur.

(8) The Plaintiff suffered special damages as set out.

(9) There was an alternative claim for workmen's compensation.

2. The Defendant in its Statement of Defence says:

(1) The Defendant admits the Plaintiff was in its employment as a welder but his duties included not only welding.

(2) The Defendant admits on 15 May (sic, August) 2015 the Plaintiff was working with Aiyaz to take out the grapple from the digger.

(3) The particulars of the Plaintiff's negligence include:

(i) The Plaintiff failed to follow instructions given by the Defendant and or its supervisors.
(ii) The Plaintiff failed to exercise adequate precautions for his own safety.
(iii) The Plaintiff failed to exercise care and was reckless about his own safety.
(iv) Failing to secure the grapple with a chain while lifting with a forklift.
(v) Not assessing the risk involved in putting himself in a position where he could be injured.

4. Alternatively the Defendant says the Plaintiff's negligence contributed to his injuries.

5. The doctrine of res ipsa loquiter has no application to this court.

3. The Plaintiff filed a Reply to the Defence.

4. The Re-Amended Pre-Trial Conference (minutes) include the following:

Agreed Facts

(1) On 15 August 2015 the Plaintiff was employed by the Defendant and paid a gross weekly wage of $73.76 less a FNPF deduction of $13.90.

(2) On 15 August 2015 the Plaintiff was working with Aiyaz and was taking out the grapple from the digger when the Plaintiff sustained injuries.

Issues

(1) What was the Plaintiff employed to do?
(2) Did the Defendant fail in its duty of care owed to the Plaintiff?
(3) Did the Plaintiff fail to exercise adequate precautions?
(4) Was the injury caused by the negligence or the breach of duty by the Defendant?

5. The hearing commenced with the Plaintiff (PW1) giving evidence. He has not been employed since the accident. He was employed as a welder by the Defendant. His pay was $108.60 per week plus overtime. On the day in question, after PW1 had completed welding on a digger, Aiyaz the foreman of the mechanical side asked him to help him remove the grapple pin. A forklift was used to lift the boom of the digger, by Aiyaz who was driving the forklift no. CQ 361 owned by the Defendant. Aiyaz asked PW1 to assist him in removing the pin which PW1 did. When they had completed and PW1 moved 2 steps back, the boom slipped from the forklift and fell. After PW1 had finished he was facing away. The boom fell on his back when PW1 was leaving for tea. He was thrown forward and his head and neck hit on a pile of scrap metal.

6. PW1 said at that time the digger did not have an engine and so the boom for the first time was being lifted by the forklift. PW1 did not have training in the removal of the pin. Juicy (PW1's supervisor) did not give him any instructions on the removal of the pin. He did not ask any questions about how to remove the pin as Aiyaz has a lot of experience and that is why Aiyaz is the mechanical foreman. The boom weighs 1 ton. The foreman, Aiyaz had arranged everything and had attended to tying the forklift. If PW1 had been asked to do that particular job, he would have tied everything. This was the first time the boom was lifted by the forklift.

7. At this juncture after the Court pointed out the discrepancy as to the date of the accident, Mr Sharma applied to amend the date. Mr Ram had no objection. The Court amended all references to 15 September 2015 to the correct date of 15 August 2015.

8. PW1 continued that when he arrived at the hospital he was conscious but had no power in his body, was suffering pain and his right leg was not walking. He was discharged after 1-1½ hours. He said he has difficulty sleeping. He cannot do gardening. His sexual activity has decreased. He is not able to work as a security guard.

9. At this time, both Counsel agreed on the total of special damages at $1,000.

10. PW1 concluded by saying if everything were o.k., he would have worked till the retirement age of 55 years.

11. Under cross-examination, PW1 gave his previous work history. He had worked with the Fiji Sugar Corporation from 2000 – 2013 but had not there removed grapples nor buckets. PW1 said if the boom was tied to the forklift, the accident would not have occurred. He did not see if it were tied as he depended on Aiyaz and Aiyaz was the foreman and Aiyaz knew everything very well. Aiyaz called PW1 to take the pin out. Everything was arranged and PW1 just went to help Aiyaz take out the pin.

12. PW1 said he was examined by Dr Asa thoroughly for 4 hours. Dr Asa put him through all the machines. He never told Dr Asa of his urinary, bowel or sexual problems. Dr Asa took x-rays of him. PW1 said he cannot do things that require force or use power. He would have done office work, but was only educated to Form 3. He cannot do a course to get a new skill to get some income. He agreed if the load was tied to the forklift, the accident would not have happened. He agreed if the boom had been tied to the forklift then the boom would not have slipped.

13. PW1 said whatever work he did, he did properly and the foreman, Aiyaz should have done everything safely. Even when Aiwa was knocking the pin, there was no movement.

14. In re-examination PW1 said when Aiyaz was lifting the boom, PW1 was doing another job.

15. The second witness was Preeant Prasheel Anand, the Customer Service Officer of the LTA, Labasa. The vehicle No. CQ 361 is owned by the Defendant and the registration of the vehicle expired on 17 December 2008. It could not be operated since 2008.

16. Under cross-examination by Mr Ram, PW2 said the forklift No. CQ 361 cannot be operated in a yard.

17. The next witness was Ms Nileshni Devi (PW3), the wife of the Plaintiff. On 15 August 2015 she saw the Plaintiff at home. He was in a very bad condition. He could not walk and complained of pain over the whole body. She and his brother assisted him. The Plaintiff complained to her about painful urination and bowel movement. He cannot mobilise without a stick. Prior to the accident his sexual activity was good. Now when he attempts sexual intercourse he has pain. Prior to the accident, he took part in sporting activity. Now he cannot.

18. Under cross-examination by Mr Ram, PW3 said the Plaintiff went to hospital in the last week of December 2018 (but was not admitted).

19. The next witness was Dr Alipate Natoba Caginilou Vitukawalu (PW4). He is an orthopaedic surgeon and a specialist with the Fiji Medical Council. He treats muscular and skeletal diseases. The medical report dated 30 May 2018 (Exhibit P6) was prepared by Dr Malani who asked PW4 to come as he was attending a workshop in Labasa that day. Dr Malani is the general surgeon in Labasa. The date of the injury was 22 August 2015 and the Plaintiff was admitted 3 days later. He did not show any signs of weakness nor sensory deficit. He had urinary and bowel control. The medical reports were tendered as Exhibits P3 and P4 with no objection from Mr Ram.

20. PW4 said Dr Alan Biribo is the only neuro surgeon in the whole of Fiji. Any registered assessor can assess the permanent incapacity. Dr Malani is also an assessor. He said the Plaintiff admits to spasm at urination and are not the result of a medical test conducted by a doctor. The fractures are not related to a neurologic injury. The changes are normal and what one goes through as one ages. The injury is stable as exposed to an unstable one which would require surgery. "From the date of injury to date, the fractures should have healed, and therefore ***I am unable to explain why he is experiencing the pain he claims to be suffering"*** (underlining is the Court's to emphasize). From the MRI, PW4 cannot explain his present experiencing of pain. From the folder for the Plaintiff, the Plaintiff's last admission was on 14 February 2018 and the last documented review was on 24 May 2018. PW4 has no record of the Plaintiff being seen after 24 May 2018.

21. Under cross-examination by Mr Ram, PW4 said these degenerative spinal changes are the normal process of aging. The Plaintiff was admitted for back pain. ***He did not have any urinary or bowel or sexual complaints***. (emphasis supplied). In February 2018 he did not have these complaints, and PW4 cannot explain why in May 2018 he has these complaints. There is no mention in the 2017 report of these symptoms. It is normal to have symptoms nearer the accident then later. It is strange he has symptoms later and not earlier. The MRI has no report of any unhealed fracture. PW4 could not find any tests were done regarding urinary, bowel or sexual problems. In February 2018 none were documented. Pain is subjective and difficult to quantify. The MRI on 5 March 2015 and the blood examination and urine examination were normal. There is nothing in the folder of any muscular atrophy on the right side.

22. In re-examination PW4 said with regard to urinating and bowel movements the Plaintiff has no incontinence. With that the Plaintiff closed his case and the Defendant opened its case.

23. The Defendant's first witness was Serupepeli Vueta (DW1), the support officer. He provides administrative support to the Managing Director and the Logging Department. He knows the Plaintiff (PW1) who was employed as a welder and other tasks assigned by the supervisor. On 15 August 2015, PW1 was assisting Aiyaz in

removing the grapple from the broken down digger. PW1 was recruited, as a senior welder. DW1 had not come to the site of the accident. The Defendant paid PW1 2/3 wages from 23 August 2015 to 16 April 2017.

24. Under cross-examination, DW1 said instructions has been given to Aiyaz to remove the grapple from the broken digger. No demonstration had been given to Aiyaz and the Plaintiff on how to remove the grapple from the broken down digger. There was no supervisor present when Aiyaz and the Plaintiff removed the wheel. It was dangerous work but no supervisor was needed. On the day of accident, DW1 was at home.

25. In re-examination DW1 said he believed the Plaintiff had previously removed the grapple from the digger. He could not answer whether the forklift was defective or not.

26. The next witness was Hasif Khan (DW2). He was employed as an auto electrician as well as the OHS representative. His responsibility was to see that all the workers follow the OHS Rules and use proper equipment. He only looked after the workshop section in which Aiyaz and the Plaintiff were. They have monthly meetings on OHS where they tell the workers they need to tie properly before lifting heavy weights. They advise the workers to tie the boom with a chain before lifting so nobody gets hurt. On 15 August 2015, he was in the special room in the workshop doing his work. At about 10am one of the boys came running to him and told him the Plaintiff had been hurt. DW2 ran outside and saw the Plaintiff was injured and he took him to hospital. He started investigations on the same day. He did not witness them removing the grapple. He spoke to Aiyaz, the Plaintiff, Atish and Shamin. The digger had broken down and they were using a forklift. Aiyaz and the Plaintiff should have tied the boom to the forklift to prevent it sliding or falling down. As they removed the grapple the boom went up and moved towards the Plaintiff. The accident occurred because they did not use proper working procedure. He tendered his report as Exhibit D1.

27. Under cross-examination, DW2 said Aiyaz was the mechanical supervisor while the Plaintiff's immediate supervisor was Yunus who was not there at the time. DW2 said he did not see Yunus directing Aiyaz and the Plaintiff in taking out the grapple. If Yunus had directed the tying of the boom, the accident could have been avoided. Aiyaz was the driver of the forklift and he used the forklift to lift the boom from the digger. If Aiyaz had tied the boom, the accident could have been avoided. Aiyaz as the senior could have instructed the Plaintiff to tie the boom or done it himself.

28. DW2 said the forklift CQ 361 needed to be registered with the LTA if it is used on a public road. But it was not registered because they were using it in a garage. It was not authorised by any LTA office on the date of the accident. He was not aware of the necessity for a certificate from the Labour Officer for any machinery to be operative. Just after the accident he came on the scene.

29. In re-examination DW2 said, Yunus is the same person as Juicy and is in-charge of 15 workers. He said the boom is resting on the forklift. If the forklift does not move, the boom will not move.

30. The next witness was Yunus Chandar (DW3), the Workshop Supervisor. On 15 August 2015, there was a digger and a grapple that needed to be removed. He instructed Aiyaz to remove the grapple and instructed him to tie the boom with a chain so it does not move. Aiyaz had requested the Plaintiff to come and help him. He was not in the yard that day as he had gone to town to get some spare parts. Because the machine had broken down and if the grapple was removed, the machine must turn to its side or move. That is why he asked for the boom to be tied with a chain. He later asked the Plaintiff why he did not use a chain and the Plaintiff said Aiyaz said not to use a chain. If he were at the scene he would have told them to tie the chain first before proceeding. Aiyaz did not use the correct procedure that he had instructed. Aiyaz did not tie with a chain.

31. Under cross-examination DW3 said, he delegated his responsibility to Aiyaz. Although requested by the Plaintiff, Aiyaz did not adhere to DW3's instructions. He was not aware that the forklift was not issued with a LTA licence. If he had known he

would not have allowed Aiyaz to use it. He agreed that lifting a one ton weight was dangerous.

32. In re-examination, DW3 said it was a workshop area and not a school.

33. The next witness was Dr Alvin De Asa (DW4), an orthopaedic surgeon. He said he saw the Plaintiff on 30 November 2017 for assessment of an injury to his back in an accident on 22 August 2017. He walked in with a walking stick and a limp and complained of pain on the right side of his back and of weakness on his right leg. The examination showed no muscle atrophy on his right leg by measuring the circumference of his thigh compared with his left thigh. Both circumferences were equal. If the muscle had not been used, they become thinner and this is known as muscle atrophy. There was no evidence of muscle wasting on his right leg. Due to the MRI finding of mild bulges and protrusions, his assessment was these could be pre-existing condition. The fractures were transverse fractures and not of the main spinal column. The fractures had healed without any complications. The Labasa O.P. had found no need for any surgical intervention as there was no apparent pathology in the nerves. Based on his clinical examination and results of diagnostics, the Plaintiff should be able to carry out most of his activities of daily living apart from vigorous physical activities.

34. As an assessor, DW4 relies on the AMA and his assessment is 5% WPI. In his clinical examination he did not see any medical evidence that would limit the Plaintiff doing most of his activities. There is an element of malingering. He observed the Plaintiff as he walked into his examination room and he also examined the Plaintiff as he walked out. Through the CCTV camera, the Plaintiff's limp improved. The Plaintiff walked in with a walking stick. A crutch is mainly used for a more serious injury to the leg, which you are not allowed to put full weight on. A walking stick is used more as a walking aid to maintain balance. From the initial injury he did not see any reason why the Plaintiff should be using crutches at the present time. For the 1cm scar he would say 3% would be high for it. He would say most activities using the Plaintiff's legs would be o.k. The Plaintiff should be able to do most of his normal activities. To say he could not do these things does not make sense, unless the

Plaintiff has suffered from some other condition and not the accident. He is unable to see why the Plaintiff cannot sit for long periods. The Plaintiff did not complain to him about these problems. The Plaintiff did not complain to him about passing urine. He did not complain about bowel movement. He did not complain about sexual dysfunction. The doctor said he did not see any reason why the Plaintiff should have these alleged complaints which are all related to nerve pathologies (disease). The doctor noted that the fracture was only T11 and yet 11% WPI is being awarded while the lumbar fractures L1, L2 and L3 were only given 10%. The pain complaints did not match up with the nerve injury. The lumbar fractures are fully healed. In the doctor's opinion 22% is high and not backed up by medical findings and results.

35. Under cross-examination the doctor said, he would give 1% for the 1cm scar based on the work cover. He and Dr Malani used the same guidelines. He said part of the function of the lumbar is to hold the weight of the body. For the lumbar injury he would have given 5%. He based his assessment on the fractures. He did not find any evidence of muscle weakness nor of loss of muscle strength. This means he can use both legs equally. The 2nd MRI does not justify a finding of mixed sensory L3 and loss of muscle strength. He did not find any sensory loss. Pain is a subjective and not objective complaint.

36. In re-examination the doctor said the neurologic findings were unremarkable. Having the neurological report would not have changed anything.

37. With that the Defendant closed its case and Counsel began their oral submission.

38. Mr Sharma submitted the Plaintiff suffered injuries, loss and damage as a result of the Defendant's negligence. The Defendant failed to provide a safe system of work i.e. adequate supervision at all times. The supervisor was absent and he had delegated his duty to Aiyaz and directed Aiyaz to tie the boom to the forklift. Aiyaz was the employee, servant or agent of the Defendant, and he failed to tie the boom. The forklift No. CQ 361 used to lift the 1 ton boom had no certificate of fitness issued by the LTA. There was no independent report by the LTA saying the forklift was a safe machine to use that day. Being an experienced welder, does not shift the onus to the

Plaintiff to tie the boom to the forklift. Yunus (DW3) testified that if he were present the accident would have been avoided. Yunus said lifting the boom by the forklift was dangerous work and supervision was required.

39. With regard to quantum, Mr Sharma said the Plaintiff and his wife gave evidence of his pain and suffering. Dr Malani assessed permanent incapacity at 22% and this should be accepted. The general damages for pain and suffering and loss of amenities should be $100,000. As the Plaintiff was 36 years old at the date of accident, he claims 19 years loss of earnings and applies a multiplier of 15 years. The Defendant paid him for 1 ½ years. The loss of earning should $78,000 ($100p.w x 52 x 15). The special damages has been agreed at $1,000. There is no claim for loss of FNPF. Finally costs should be $4,000 for a 2 ½ day trial and interest.

40. Mr Ram then submitted. He said there was a safe system of work and method to follow. But the method was not followed and the boom was not tied down to the forklift and the accident occurred. Had the boom being tied, the accident would not have occurred. The Plaintiff should have tied the boom and then removed the pin. The forklift had no part to play in the actual accident. Mr Ram submitted in the alternative the Plaintiff was at least 50% contributorily negligent.

41. With regard to quantum, Mr Ram submitted the Plaintiff was not as bad as he says he is. The fractures have fully healed. DW4 (Dr Asa) said he found the Plaintiff malingering.

42. Dr Alipate said the same thing as Dr Asa. The quantum should be say $30,000 for pain and suffering and another $5,000 for loss of amenities. A fair multiplier is 2 years and the loss of earnings would be $10,400. From this should be deducted the 1 ½ years payment of his 2/3 salary - $5226 should be deducted from his loss of earning. Costs should be $3,000.

43. Mr Sharma in his reply admitted he had not asked Dr Asa any question on what type of work the Plaintiff could do.

44. At the conclusion of the arguments, I informed I would take time for consideration. Having done so, I shall now deliver my decision which will be in 2 parts (A) Liability and (B) Quantum.

45. This is a case where the court has had a full ventilation of evidence and canvassing of arguments. The record of the evidence contained in this judgment is there to establish that the decision was arrived at after a thorough evaluation of the evidence led on both sides and a careful consideration of the medical opinions of the doctors called by the opposing parties. That is why in a jurisdiction like England and Wales, the appeal court is reluctant to interfere with the considered findings of the trial judge for reasons which are clear. I note Mr Ram did not cite any cases. Mr Sharma, as wholly expected, immediately produced the Court of Appeal of Fiji decision in ***Nasese Bus Co. Ltd and Vijendra Nair AND Muni Chand*** [2013] FJCA9. Mr Sharma also cited the FJCA decision in ***Fiji Forest Industries Ltd v Naidu***. It appears that members of the personal injury claims section of the Bar consider the Nasese Bus decision as the bench mark case to be cited irrespective of whether the facts and injuries there are as different from the facts and injuries here as chalk is from cheese. Counsel should really do a bit more research for relevant authorities to assist sitting judges of the High Court of Fiji in deciding what is appropriate for the case at hand.

(A) Liability

46. Although the hearing ran for 2 ½ days, because of the evidence led and submissions made by Counsel on both sides, the court has been greatly assisted in reaching its decision.

47. I agree with Mr Ram that if the boom had been tied the accident could not have occurred. According to the evidence of Yunus (DW3) the workshop supervisor he had instructed Aiyaz to tie the boom with a chain so that it does not move. When Yunus asked the Plaintiff why he did not use the chain, the Plaintiff said Aiyaz said, not to use the chain. Yunus said Aiyaz did not use the correct procedure that he had instructed. Aiyaz did not tie with a chain.

48. The above coming as sworn testimony in the examination-in-chief of the Defendant's supervisor is sufficient in the considered opinion of this court to establish that the accident was solely and exclusively due to the negligence of the Defendant, its servants and/or agents. At the same time this evidence negates any contributory negligence of the Plaintiff.

49. If this were not sufficient, further evidence that wholly inculpates the Defendant was the use of the forklift No CQ 351 in the lifting. According to Mr Anand (PW2), who is with the LTA, the owner of the forklift is the Defendant. The registration of the forklift expired on 17 December 2008, it could not be operated since 2008 and in answer to Mr Ram, it cannot be operated in a yard. And it was precisely in the Defendant's yard that the forklift was being used. Again this points to the exclusive liability of the Defendant, as Yunus said if he had known the forklift had not been issued with a LTA licence, he would not have allowed Aiyaz to use it.

(B) Quantum

50. As neither Counsel has taken the trouble to produce authorities that are relevant to the instant case, the court shall assess damages as it thinks are fit, fair and adequate for the Plaintiff.

51. Dr Asa says the Plaintiff is malingering. According to the Oxford Advanced Learner's Dictionary, 6th edn, "malingering" means "to pretend to be ill/sick especially in order to avoid work". The court observing the Plaintiff entering the witness box on a crutch was impelled to recollect Shakespeare's words that all the world is a stage and all are actors. A sitting judge of the High Court of Fiji is not allowed to indulge in speculative assessments of injuries based on a crutch and visiting the Defendant with enhanced damages. Based on the medical reports on which the doctors on both sides were cross-examined, and on the evidence before the Court, a sum of $40,000 is fair and adequate damages for the pain and suffering and loss of amenities of the Plaintiff.

52. I accept Dr Asa's medical opinion that there is no medical reason why the Plaintiff cannot perform his normal daily activities. I also accept Dr Asa's medical opinion that is no medical reason why the Plaintiff cannot resume his normal work to earn his daily bread. Consequently I am unable to make any award for future loss of earnings except for a notional partial loss of earning capacity of a minimal amount for which I make an award of $5,000. I will award $5,174 for 2 years past loss of earnings.

53. In the result I order the Defendant to pay the Plaintiff.

(1) $40,000 as general damages.

(2) $5,000 for notional partial loss of earning capacity.

(3) $1,000 as special damages.

(4) $5174 for past loss of earnings.

(5) Interest on (1) above at the rate of 6% p.a. from the date of service of the writ to the date of judgment.

(6) Interest on (3) and (4) at the rate of 3% p.a. from the date of the accident to the date of judgment.

(7) Interest on the total judgment sum at the rate of 4% p.a. from the date of the judgment to the date of payment.

(8) Costs summarily assessed at $3,750.

Delivered at Labasa, this 22nd day of February, 2019.

.....

DAVID ALFRED
JUDGE
HIGH COURT OF FIJI