

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. **HBC 162** of 2018

BETWEEN : **SURESH CHAND** of Sakoca Settlement, Driver.

PLAINTIFF

AND : **WASTE MANAGEMENT SOLUTIONS (FIJI) LIMITED** a limited liability company having its registered office at Lot 22 Wailada Road, Lami.

DEFENDANT

BEFORE : **Hon. Justice Vishwa Datt Sharma**

COUNSEL: **Mr. Singh D** for the Plaintiff

Mr. Prasad D. for the Defendant

DATE OF JUDGMENT: 28th March, 2024 @ 9-30am.

JUDGMENT

[Personal Injury Claim for Damages]

On the outset, I have noted that the Defendant has not pleaded **contributory negligence** rather **negligence** on the part of the Plaintiff.

Introduction

(1) The Plaintiff, Suresh Chand claims damages under various heads for personal injuries and/or in the **alternative** compensation under the Workmen Compensation Act against the Defendant as follows:

- (a) General Damages.
- (b) Special Damages.
- (c) The Plaintiff claims interest under the Law Reform (Miscellaneous Provision) (Death Interest) Act, Cap 27 on the award of general Damages at the rate of 6% per annum from the date of service of the Writ and at the rate of 3% per annum on Special Damages.
- (d) Gratuitous Care.
- (e) Loss of future earnings.
- (f) Costs for future care.
- (g) Costs.
- (h) The Plaintiff claims interest on Judgment sum at 4% pursuant to Law Reform (Miscellaneous Provisions) (Death and Interest) (Amendment) Decree 2011 until payment in full.

In the alternative:

- (i) Compensation under the Workmen's Compensation Act [Cap 94].
- (j) Costs.
- (k) Interest.

Plaintiff's Case

(2) The Claim for the injuries suffered by the Plaintiff was as a result of a Motor Vehicle accident at the corner of Marine Drive and Vetaia Street, Lami, when the truck he was driving **collided with an EFL electric Post** on or about 06th September 2016.

- (3) The Plaintiff alleges that the **Cause of this Collision was due to the brake failure** of his truck that he was driving on the day in question.
- (4) The Plaintiff further alleges **breach of statutory duty and/or negligence on the part of the Defendant for failing to ensure that the truck was safe to be used, brakes were properly serviced** and the truck was not inspected before it was given for driving.

The Defendants Contention

- (5) The Defendant's position is that the truck was in a proper condition and the brakes were all working properly.
- (6) The Defendant claims that it was the Plaintiff who drove the truck **carelessly which caused the accident and was charged for the offences of careless driving** and the Defendant denies any liability to pay any compensation to the Plaintiff since there was **no negligence on the part of the Defendant**.
- (7) However, the **Defendant's Contention is that the Plaintiff is liable for all the injuries that he suffered due to his own negligence**.

Oral Evidence

- (8) Altogether, 4 witnesses testified for the Plaintiff whilst 3 witnesses for the Defendant.

Analysis and Determination

- (9) The following primary issues were for hearing and determination in the trial:
 - [i] **Whether the Plaintiff's accident was caused by the Defendant's breach of the statutory duty and/or negligence? OR**
 - [ii] **Whether the accident was caused by the sole negligence on the part of the Plaintiff?**
 - [iii] **What all injuries the Plaintiff had suffered and to what extent the injuries is affecting the Plaintiff now and in future?**

[iv] Who is liable for the injuries sustained by the Plaintiff and if there is any compensation to be awarded to the Plaintiff?

- (10) It is not in dispute that the Plaintiff was employed as a Driver by the Defendant; Waste Management Solutions (Fiji) Limited.
- (11) On or about 06th September, 2016, the Plaintiff during the cause of his employment was driving a Rubbish Collection/Disposal truck Registration No. FI080 when he collided the truck to an electric post at the corner of Marine Drive and Vetaia Street, Lami.
- (12) The Defendant was the owner of the truck Registration No. FI 080.
- (13) The Defendant denies that the brakes of the said truck Number FI 080 failed. However, the Defendant alleges that the accident was solely caused due to the negligence of the Plaintiff.
- (14) **The Plaintiff, Suresh Chand (PW2)** told court in his evidence that he was employed as a driver by the Defendant, Waste Management Solutions (Fiji) Limited:

Between 10am to 10.30am, he was coming back after dumping rubbish at the Noboro Landfill. He drove along Queens Highway, slowed down at the road humps and climbed up 3 to 4 hills, drove past the Lami Bridge near cement factory, passed fisheries department; Kalakana Village and Novotel Hotel. He came closer to Lami Village, downhill and he applied the brakes and it was all fine. He slowed down his truck as he approached Lami Town and was driving at 25 to 30kmph. He saw a Pajero in front of him, 4 to 5 car distance ahead of his truck. This Pajero stopped suddenly at the foot crossing opposite Lami Market. He applied the brakes, the brake paddle went in, again he applied the brakes two times, the truck did not stop and to avoid the accident, he swerve to his left and hit the EFL Post. He suffered injuries, pain and right leg was broken, admitted in hospital for 18 days. One to two weeks prior to the accident, the truck brakes were tested. No one drove the truck to check on the brakes. The mechanics looked after the trucks. The Plaintiff every morning would check his truck for oil and water, sometimes with a boy, never checked truck with any mechanic. He was charged for careless driving, found guilty and paid a fine. His boss told him to plead guilty and the burden will be off their head.

- (15) **[PW3]- Police Corporal 5270 Ashneet Sharma**, interviewed the Plaintiff, Suresh Chand. On 6th September, 2016, the witness had seen the sketch plan drawn by PC Koresi of the accident [Exhibit P3]. The Plaintiff told him that the accident was caused due to the brake failure while avoiding a vehicle in front of his truck. There were no tyre marks on the Tar-seal. He did not inspect any tyre marks. Skid marks were drawn by PC Koresi on sketch plan,

skid marks comes if tyre is locked if not soil can be pressed by heavy truck. If you apply brake, tyre jams and grass is pressed.

- (16) **[PW4] Etuate Koroi, Chief Executive Officer of Land Transport Authority of Fiji** stated that the Brakes can fail at any time because of slow leakage and have air in hydraulic system and makes the process slow. The witness confirmed that he did not inspect the Plaintiff's Truck. If brakes are applied suddenly, the tyre marks will be left on the road. Further, if there is a leakage in the brake system, it will not give sudden brake failure, it will take time. He did not inspect the truck FI 080. If the Driver applies a sudden brake, it will leave tyre marks and also on grass verge.
- (17) **[DW1] Nitin Chandra, vehicle examiner from Land Transport Authority** told Court that **he inspected Vehicle Registration No. FI 080** at Lami Police Station on 07th September 2016. Front head lights were damaged. **Overall brakes in good working condition order. No indication of brake failures and there were no leakages and no mechanical defects found.** Inspected fluid leakages at individual wheels and leakage at Master Cylinder in FI 080, **it was in order, no brake failures.** In Cross examination he said, accident took places on 06th September 2016 and examined vehicle on 07th September 2016. If brake failure and air in brake system, paddle will go to the floor, if it leaks.
- (18) **[DW3] Mahendra Prasad** told Court that he was employed by the Defendant Company as a mechanic. The drivers check the truck every morning and the mechanic are there with them before the truck leaves the yard. The truck the Plaintiff was driving, had no mechanical problems. The Plaintiff- Suresh Chand, checked the hydraulic oil, brake fluid, water and all was in order. There was no problem with the brakes since it was serviced 2 to 3 weeks ago. The Plaintiff did not complain about the brakes not working properly when he left the yard. **He visited the scene of the accident and saw the truck smashed into the electric post. He inspected the truck, touched the inside of the wheel drum and it was dry. He checked front and rear of all tyre drums were dry which rules out brake failure.**
- (19) The question that comes to mind at this stage of the proceedings is **"whether in fact the accident and the injury that was caused was the result of the failure of the brakes of the Plaintiff's truck?"**

- (20) The Plaintiff's counsel submitted that the Plaintiff, Suresh Chand straight after the accident at CWM Hospital told the doctor that the brakes of the truck that he was driving had failed. This statement was rather made contemporaneously with the occurrence of the accident and is consistent with what he told Police Corporal Ashneet Sharma who interviewed the Plaintiff.
- (21) On the other hand, the Defence Counsel in his written submissions does not dispute the fact that the Plaintiff, Suresh Chand was injured in the accident. However, his contention is that the injury is not an issue herein, rather, the brake failure of the Plaintiff's truck is the issue.
- (22) Upon a careful scrutiny of [PW2] Suresh Chand, the truck driver's evidence, confirmed that the brakes in the truck FI080 was fine and there was no issue when he left the yard in the morning of the accident to dump rubbish at Naboro Landfill. He drove along Queens Highway, slowed down at the road humps and climbed up 3 to 4 hills, and when coming back from Naboro Landfill, drove past Lami Bridge, Fisheries Department, Kalakana Village and Novotel Hotel, came closer to Lami Village downhill and the Plaintiff applied his truck's brake and all along his journey the brake of the truck was fine.
- (23) The Plaintiff came closer to Lami Police Station, the Pajero in front of his truck about 4 to 5 car length stopped at the zebra crossing and it was only then that the Plaintiff in the spur of the moment reacted to apply the brakes of his truck to come to a stop. However, it was too late for him then to do that and therefore the Plaintiff swerved his truck to his left to save the accident and avoid hitting the Pajero into its rear and eventually ended up hitting the electric EFL Post.
- (24) **The sketch plan [Exhibit -P3]** shows that tyre marks of the Plaintiff's truck measuring at 13.5m in the flower area and footpath before hitting the EFL Post and coming to a stationary position. It can further be ascertained from the sketch plan that the front wheels of the Plaintiff's truck would first hit the pavement edge, then the truck will climb up onto the flower area and/or garden and then to the footpath. This impact of wheels to the pavement edge and then onto the garden would obviously slow down the speed of the vehicle. However, the tyre marks made on the garden and part of the footpath is evident of the fact that the brakes of the Plaintiff's truck was applied and that is why evidence of brake marks appear on the garden and part of the footpath.

- (25) [PW3] Police Corporal 5270 Ashneet Sharma tendered the sketch plan [Exhibit - P3] drawn by Police Corporal Koresi into evidence. He stated in his evidence that the tyre marks were seen. However, there were no tyre marks and/or brake marks on the tar-sealed road. The Plaintiff told him that the cause of the accident was the Trucks brake failure.
- (26) In cross-examination, the witness told the court that **'skid marks come if tyre is locked, if not, then soil can be pressed by heavy truck. If you apply brake, tyre gets jammed and grass pressed.'**
- (27) [PW4] Etuate Koroi, Chief Executive Officer of Land Transport Authority stated that **'the brake can fail at any time because of slow leak and have air in hydraulic system and makes the process slow.'** **'For sudden brake failures caused by air in system, if you apply brakes, brake paddle will go down to the floor.'** However, he did not inspect the Plaintiff's vehicle FI080.
- (28) Upon scrutinizing the evidence of witnesses (PW4) - Etuate Koroi, (DW1) - Nitin Chandra, (DW3) - Mahendra Prasad and (PW4) - Police Corporal 5270 Ashneet Sharma; their evidence confirms that if the brakes were applied suddenly, it will leave tyre marks on the tar-seal and on the grass verge. Although, there was no evidence of any tyre marks left on the tar-sealed road at the scene of the accident, there is **evidence of 13.5 meters of tyre marks left in the flower area and part of the footpath as is evident from the sketch plan tendered into evidence as Exhibit - P3.**
- (29) (PW1) Dr. Pauliasi Bauleka gave evidence and referred to the Medical Report he had prepared [Exhibit - P1]. The Plaintiff suffered close fracture of his right Tibia, struggling with injury. Had some pain at its lower limb. Leg bit short by 2cm as a result of injury. The Plaintiff suffered 8% permanent incapacity and was able to state the permanent incapacity based on the American Medical Association Guide 5th Edition Assess. He stated that the Plaintiff is having some difficulties but is rehabilitating well and should be able to go back into driving. He was restricted from lifting heavy things and/or climbing ladder. The Plaintiff will not have any difficulty in doing any gainful employment.
- (30) The onus was on the Plaintiff, Suresh Chand to counter and prove or challenge that the Truck's brakes that he was driving on the day in Question in fact failed upon its application

that eventuated in an accident causing Damages to the vehicle and the injuries to him. There is no evidence by the Plaintiff or witnesses that the Plaintiff complained about the defects in the truck and the brakes at any time. The only evidence the Court has is that the Trucks brakes were all fine on the day of the accident.

- (31) Therefore, it can now be concluded from the above witnesses' evidence that there was no brake failure of the Plaintiff's truck FI 080.
- (32) The particulars of negligence enumerated in the Plaintiff's Statement of Claim at (b) that the brakes were maladjusted which reduced the efficiency of the brakes and caused overheating of the brake components causing brake fade, and total failure of the brakes, (c) - the truck, in particular, the brakes, were not properly serviced and maintained and (e) - failing to provide a truck with adequately maintained brakes which had not been serviced for sometimes before the accident. The onus was on the Plaintiff to prove as to whatever was pleaded by the Plaintiff in terms of the particulars of negligence in his Statement of Claim. However, the Land Transport officer (PW4) - Etuate Koroi and (DW3) - Mahendra Prasad, both told Court in their evidence that 'the brakes did not fail as they could not see any brake fluid leakage. If one looks at the air brakes, witness (DW3) Mahendra Prasad confirmed that it was semi air thus, brake fluids will be shown.' The witness (DW3) in his capacity as the Defendant's Mechanic also confirmed that the brakes were in good order and serviced, therefore, there were no issues with the Trucks brakes and that the Plaintiff did not complaint about the Truck brakes not working, when he left the company yard on the day of the accident.
- (33) This confirms that there were no defects on the truck, FI 080 on the day of the accident including the brakes maladjusted otherwise as alleged by the Plaintiff. The garage supervisor (DW3) Mahendra Prasad confirmed in his evidence that before the truck leaves the yard, he inspects the trucks, checks brake fluids, press brake paddles, oil, water and if there is any issue with the truck it will not leave the yard.
- (34) Reference is made to the case of: **Joasa Alani v Shiu Shankar, HBC 80 of 2007**, Justice Nawana held (paragraph 32)-

'The defendant cannot be faulted for an omission in the conduct of his affairs as a reasonable and prudent owner of a vehicle to know of the defect, which is not discoverable on a reasonable inspection.'

The defendant, in the absence of such knowledge of a mechanical defect, which is not easily discoverable; and, without any evidence on omission to constitute negligence cannot be regarded as having acted in breach of his duty of care towards the plaintiff.

His Lordship went further and said:

13. Upon an analysis of the evidence adduced on behalf of the plaintiff and the defendant, I would consider initially the liability, if any, of the defendant *vis-a-vis* the plaintiff in the tort of negligence.
14. The law requires the proof of four factors to impose liability in the tort of negligence on the defendant. They are:
 - (i) The duty of care owed by the defendant to the plaintiff;
 - (ii) The breach of that duty of care by the defendant in the sense that he failed to measure up to the standard set by law;
 - (iii) A causal connection between the defendant's careless conduct and the damage complained of; and,
 - (iv) That the particular damage to the plaintiff is not so unforeseeable or too remote.
15. The requirement of duty of care in the tort of negligence has been expounded in '*Clerk and Lindsell on Torts*'; 19th Ed.; *Sweet and Maxwell [2006]* at page 383 as follows:

"The duty in negligence, therefore, is not simply a duty not to act carelessly; it is a duty not to inflict damage carelessly. Since damage is the gist of the action, what is meant by 'duty of care situation' is that it has to be shown that the courts recognise as actionable the careless infliction of the kind of damage of which the claimant complains, on the type of person to which he belongs, and by the type of person to which the defendant belongs."
18. In transport accidents, the owner must take reasonable care in relation to the condition of the vehicle, the safety of goods as well as passengers. There will be no liability for latent defects that are undiscoverable on reasonable examination. However, there is a duty to inspect and test the vehicle periodically and to repair the defects, which a reasonable examination should have revealed." *see Clerk and Lindsell on Torts (supra) at pg. 508.*

- (35) I reiterate that the onus once again is on the Plaintiff to prove as per his particulars of negligence that the Plaintiff's truck brakes failed on the day of the accident. However, this issue of brakes failure, could not be established or proved by the Plaintiff as was required of him to do so accordingly.
- (36) The Defendant neither disputes nor doubts that the Plaintiff was injured during the accident on the day in question. However, the substantive issue before this Court is **whether there was a Brake failure of the Plaintiff's truck Registration No, FI 080 that in fact caused the accident?**
- (37) PW4 - Mahendra Prasad was employed by the Defendant Company and he confirmed to Court that he had inspected the truck and there were no brake fluids leaks from the wheels of the said truck. This evidence in the like was also confirmed by DW1 - Nitin Chandra, Land Transport Authority vehicle examiner and corroborated the same as well.
- (38) The evidence confirmed that the Plaintiff's truck FI 080 did not have any mechanical defects, in particular, any brake failures and/or defects and that the truck FI 080 was safe to be driven.
- (39) On the day in question, the Plaintiff, Suresh Chand realized very late that the Pajero in front of his truck, about 4 to 5 car lengths away had stopped at the zebra crossing opposite the Lami Market. He immediately needed to stop his truck in order to avoid hitting the Pajero into its rear. However, due to the speed at which the Plaintiff was driving. Then, could have stopped his truck, if he was driving at a slower speed of 25-30kmph and had that space of 4 to 5 car length in front.
- (40) He failed to come to a halt, by the time the Plaintiff applied his truck's brakes, because it was apparent that the Plaintiff was driving at a much higher speed. He had at that spur of the moment no other alternatives but to swerve to his left in order to avoid hitting the Pajero in front, and eventually hit the EFL post and came to a statutory position. The damages caused to the Truck that he was driving coupled with the injuries caused to the Plaintiff was a result of his own doing and careless conduct.
- (41) At the time when the Plaintiff hit the Electric Post, if his trucks brakes had in fact failed, then the eventual hitting of the truck into the Electric post would have caused a much

greater and/or extensive damage to the truck and the Plaintiff would have then sustained greater serious injuries.

In Conclusion

- (42) The Plaintiff, Suresh Chand no doubt was injured in the accident. The Plaintiff was a full time driver for the Defendant Company. He drove for the company for 2 years or less and would use the same road daily to dump Rubbish at the Naboro Landfill and Return and was fairly aware of the Road on which he daily travelled on. He admitted never being involved in an accident.
- (43) On the day of the accident, the Plaintiff did not have any problems with the truck brakes. However, prior to the day of the accident, long before, he in fact had problems with the truck brakes. As a result of the accident the Plaintiff was charged for one offence of careless driving, to which he pleaded guilty and paid a fine of \$300 and lost one (1) demerit point.
- (44) Every morning the mechanic with the driver would check the trucks before they drove out of the company yard.
- (45) The brake system in the said truck FI 080, was functioning well and the Plaintiff did not complain about any defects at any time. The evidence by the witnesses before the Court is that the truck brakes was fine. The garage supervisor also confirmed this in his evidence that before the truck leaves the yard, he inspects the truck and if there are issues with the truck then, the truck will not leave the company yard.
- (46) On the day in question, the Plaintiff, Suresh Chand drove his Truck from Lami to Naboro, passed several road humps and the brake all along was fine. As the Plaintiff came past Lami Police Station, a Pajero was some 4 to 5 car length ahead of him and he applied his trucks brakes to stop since the Pajero in the front had stopped at the zebra crossing. The Plaintiff failed to bring his truck to a standstill and swerved to his left and eventually collided with the electric post. Damages was sustained to the front of his truck as is evident from the picture as evidence tendered as Exhibit D5.

Further, the Plaintiff also received injuries as per the Medical Report tendered as Exhibit - P1.

The truck climbed over the edge of the road when he swerved to his left, onto the grass verge/ garden and then onto the footpath, finally hitting the electric post and coming to stationary position. Tyre marks of 13.5m are visible on the sketch plan tendered into evidence as Exhibit - P3. The Land Transport Officer confirmed to Court that there were no mechanical defects in the Plaintiff's truck.

- (47) The question that I pause to myself is "would the accident on the day in question have happened, but for the act and/or omission of the Defendant, Waste Management Solutions (Fiji) Limited if in fact the brakes of the Waste Management truck was not working? If the accident would have occurred even without any act or omission on the part of the Defendant, the Defendant Waste Management is not to be held liable liable.
- (48) The conduct expected of a motorist [in this case the Plaintiff] in all the circumstance are competing factors that are engaged in determining the negligence of a motorist, the Plaintiff as a driver of the truck was bound to take all precautions in order to avoid the accident on the day in question.
- (49) In my Judgment, it can only be concluded that the Plaintiff drove the truck FI080 on the day in question without due care and attention and when the Pajero vehicle in the front about 4 to 5 car length stopped at the zebra crossing, the Plaintiff was unable to stop his truck within time frame rather than the speed and the distance of the Pajero left him with no alternative but caused the Plaintiff to swerve his truck to his left and eventually collided with an electric post.
- (50) Therefore, it was the Plaintiff's negligence that finally caused his own damage to the truck FI080 and injuries to the Plaintiff, which was caused by the risk created by the Plaintiff's carelessness. This is supported by the fact the reason as to why the Plaintiff was charged for one count of careless driving and subsequently pleaded guilty to the charge and dealt with according to law.
- (51) Evidence reveals that the Defendant had taken all care to ensure that the truck FI 080 was checked before the Plaintiff drove out of the Defendant's company yard and that there were no mechanical defects and/or issues with the truck on the day of the accident. If the truck FI 080 had any issues and/or mechanical defects on it, than the evidence is that the truck

will remain in the yard. However, the truck was checked before it was driven out of the company yard and could not foresee any defects in particular in reference to the brakes.

(52) I find that the Plaintiff has failed to establish negligence on the part of the Defendant, Waste Management Solutions (Fiji) Limited.

(53) Accordingly, the Plaintiff's claim for damages sought under various heads, gratuitous care, loss of future earnings, costs of future care, interest and in the **alternative** workmen's compensation fails and is dismissed in its entirety.

Costs

(54) The substantive matter proceeded to trial with witnesses called to give evidence and subsequently parties filed written submissions.

(55) It is only fair that the Plaintiff is entitled to costs summarily assessed at \$1,500.

Orders

(i) The Plaintiff's Statement of Claim seeking for Damages and other relief and in the alternative Workers Compensation and Interest and Costs filed on 31st May 2018 is accordingly dismissed in its entirety.

(ii) The Plaintiff to pay the Defendant a sum of \$1,500 summarily assessed costs.

Dated at Suva this 28th day of March, 2024.



Vishwa Datt Sharma
PUISNE JUDGE

CC: Daniel Singh Lawyers, Suva
Diven Prasad Lawyers, Suva