IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0146 of 2018
[High Court at Suva Case No. HBC 168 of 2010]

BETWEEN	:	**JAGDISH PRASAD**
		Appellant
AND	:	**MINISTRY OF AGRICULTURE**
		1st Respondent
	:	**ATTORNEY GENERAL OF FIJI**
		2nd Respondent
Coram	:	**Almeida Guneratne, JA** **Lecamwasam, JA** **Jameel, JA**
Counsel	:	**Mr. R. Singh for the Appellant** **Ms. S. Taukei for the Respondents**
Date of Hearing	:	**14 September 2022**
Date of Judgment	:	**30 September 2022**

JUDGMENT

Almeida Guneratne, JA

[1] I agree with the reasoning and orders contained in His Lordship, Justice Lecamwasam's judgment.

Lecamwasam, JA

[2] This is an appeal preferred by the Appellant (the original Plaintiff), being aggrieved by the judgment of the High Court at Suva dated 31st October 2018 on the following grounds of appeal:

> ***"Grounds of Appeal:***
>
> 1. *The Learned Trial Judge erred in fact when he stated at paragraph 16 of the Judgment that the Plaintiff had not pleaded the particulars as to the cause of the accident or specific negligence that resulted in the accident when the Appellant had pleaded the same at paragraph 6 of the claim.*
>
> 2. *The Learned Trial Judge erred in law in maintaining at paragraphs 4, 5, 9, 10 and 25 of the Judgment that the Appellant had driven on the same road prior to the accident with no incidents when the fact that no prior incidents on the same road does not release the First Respondent from its statutory obligation pursuant to section 9(2) of the Health and Safety at Work Act 1996 to provide and maintain plant and systems of work and without risks to health to maintain the road's condition ensuring it's safe for the First Respondent's employees to utilize.*
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> 3. *The Learned Trial Judge erred in law in concluding at paragraph 38 of the Judgment that:*
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> > *The Plaintiff was employed in the said farm for a long time and he was fully aware of the road conditions inside the farm. This was proved by transporting things on the same way using a trailer on the same road.*
>
> (a) *when the First Respondent's statutory obligations pursuant to section 9(2) of the of the Health and Safety of the work Act 1996, is to provide and maintain plants and system of work and without risk to health including to maintain the roads condition ensuring is safe for the First Respondent's employees to utilize and*
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> (b) *when the defendant did not plead that the Applicant in any way contributed to the accident*
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> 4. *The Learned Trail Judge erred in law and in fact in including at paragraphs 27 and 28 of the Judgement that on the balance of the*

probability that the conditions of the road was not the cause of the accident based on the fact that:

(a) the Appellant had driver to the same road earlier with a loaded trailer and also with some people;

(b) the Appellant was able to drive the tractor and trailer without any difficulty;

(c) the Appellant did not state in his evidence that there was any difficulty in driving on the road due to the condition of the road;

(d) when it is the First Respondent's statutory obligation pursuant to section 9(2) of the Health and Safety at Work Act 1996 to provide and maintain plant and systems of work and without risks to health.

5. *The Learned Trial Judge erred in law and in fact in concluding at paragraph 25 of the Judgment that were no defects with the tractor since the Appellant had been driving the tractor with a trailer and transporting people including on the day of the incident when:*

(a) this does not release the First Respondent from its statutory obligation pursuant to section 9(2) of the Health and Safety at Work Act 1996 to provide and maintain plant and systems of work and without risks to health including maintaining the tractor; and

(b) the Appellants is not a qualified mechanic to raise issues if on the face of it the tractor was operating without any obvious signs of defect.

6. *The Learned Trial Judge erred in law in concluding at paragraph 29 of the Judgment of that Appellant had worked with the First Respondent for a long period of time and should take precautions when it is the First Respondent's statutory obligation pursuant to section 9(2) of the Health and Safety at Work Act 1996 to provide and maintain plant and systems of work and without risks to health.*

7. *The Learned Trial Judged erred in law and fact in concluding at paragraphs 17 and 19 of the Judgment that the Appellant failed to prove any of the particulars of negligence pleaded from a – g in the statement of claim when:*

(a) *Paragraph 6(a) – the Judge failed to take into consideration that the onus is with the First Respondent to provide adequate safety for the Appellant pursuant to the Health and Safety at Work Act 1996;*

(b) *Paragraph 6(b) – the First Respondent failed to direct the Appellant to stop work until such time the road and tractor were inspected and clear as safe for use.*

(c) *Paragraph 6(c) – the Judge failed to give due consideration as to the condition of the road that the Appellant was driving on.*

(d) *Paragraph 6(d) – the Judge failed to give due consideration of the fact*

(i) *the driveway was not well maintained and safe to use;*
(ii) *the First Respondent failed to produce any evidence that it had carried out a risk assessment in respect of the tractor and it is fair to conclude the Ministry never carried out a risk assessment;*
(iii) *the First Respondent did not have a formal program of maintenance in place either for the road or the tractor.*

(e) *Paragraph 6(e) – when the Learned Judge concluded that even if the start defect is accepted it is not the cause of the accident he failed to acknowledge this is symptomatic of the tractor's state. The Judge further failed to give due consideration to the fact that the tractor had not passed fitness nor was it registered with the Land Transport Authority as it is required to do.*

(f) *Paragraph 6(f) – the Judge failed to give due consideration to:*

(i) *Mr. Singh's evidence that the NRS employees including Mr. Singh had been instructed by their supervisor to fill the potholes with concrete blocks a week before the accident;*
(ii) *the road was not in a good condition.*

(g) *Paragraph 6(g) – the Judge failed to give due consideration to the Appellant's evidence that the tractor did not have a cover or safety frame. Nor did it have seatbelts. The Appellant was not provided any safety equipment to protect and or prevent from falling from the tractor.*

8. *The Learned Judge erred in law and in fact in concluding that the Appellant had failed to prove the particulars of breach of statutory duty of the Claim as follows:*

(a) *Paragraph 6(h) – the Judge failed to give due consideration that the onus whether it has satisfied its statutory obligations lies with the employer (in this case the First Respondent);*

(b) *Paragraph 6(k) – the Judge failed to note that driving on the road at the time was not safe for the Appellant;*

(c) *Paragraph 6(l) – the Judge failed in law in stating that there is no proof by the Appellant of this obligation when a statutory obligation shifts the onus of proof on the Respondent.*

(d) *Paragraph 6(m) – the Judge failed to give due consideration of the First Respondent's obligations under Regulation 55(1)(c), 55(1)(d)(i) and 55(1)(d)(ii) of the Health and Safety at Work (General Workplace Conditions) Regulation 2003 when the conditions of the road were such that the Appellant was at risk of falling injury himself.*

9. *The Judge erred in law in dismissing all of the particulars pleaded by the Plaintiff as to the breach of statutory obligations but failing to provide a written reason for dismissing the particulars of breach of statutory obligations at paragraph 6(n) of the Claim.*

10. *The Learned Trial Judge erred in law when after dismissing the Appellant's claim when he failed to award the Appellant compensation under the Workmen's Compensation Act 1994 together with interest and costs as:*

(a) *the accident occurred during the Appellant's employment (the Appellant was authorized to drive the tractor in the ordinary course of his duties at the time of the accident) and that the incident occurred when the Appellant was doing work which his employer did employ him to do or order him to do; and*

(b) *the incident occurred during working hours at the workplace."*

[3] The following is a brief account of the factual background which I have framed with the aid of the factual background contained in the Judgment of the High Court:

> The Appellant was employed as a fieldsman cum driver attached to a farm of the Respondent. On the morning of the alleged accident, i.e. 7th June, 2007 he

had been driving a GL 900 tractor with a trailer attached to it, along the gravel path between two large trenches/drains within the premises of the farm to transport some men and material. On the day in question, the plaintiff had refueled the vehicle and driven approximately 68 metres before applying the brakes to avoid colliding with some dogs on the road. This had caused the tractor to veer first towards the trench on the right side of the path, then regain traction, but again dangerously veer towards the trench on the left.

[4] The Plaintiff had jumped out of the tractor at this point, but both the tractor and the plaintiff had ended up in the trench on the left, causing the Plaintiff to suffer injuries from the tractor falling on his person. Despite this account which had transpired in the course of the trial in the High Court, the judgment of the learned High Court Judge states that the amended statement of claim did not contain a pleading as to how the accident occurred. The Plaintiff also remains the sole eye-witness to the incident.

[5] According to the amended statement of claim, the Plaintiff had instituted action against the Defendants subsequent to the accident on the basis of a failure of the Defendants to fulfill certain statutory obligations of an employer. The learned High Court Judge found that the burden of proof is on the Plaintiff to prove on a balance of probabilities, any negligence on the part of the 1st Defendant and the causal link between such negligence and the occurring of the accident.

[6] Adducing evidence before the High Court, the Defendants claimed that the accident occurred as a result of the Plaintiff driving at an excessive speed on high gear between the short distance of the fueling place and the stretch of gravel path where which the accident occurred. The learned High Court Judge found that the Defendants' explanation was more probable on a consideration of all material evidence presented to court, as the failure of brakes could not have caused such an incident in the manner explained by the Plaintiff. Therefore, the learned High Court Judge found that the

Plaintiff had failed to establish that the cause of accident resulted from one or more of the alleged acts of negligence of the 1st Defendant.

[7] The contention of the Appellant could be condensed in to two points: (1). that the accident was caused due to the negligence of the Respondents in contravention of their statutory obligations under the Health and Safety at Work Act 1996, and (2). that the learned High Court Judge has erred in overlooking the application of the Workmen's Compensation Act 1994 to his case.

[8] The fact that the accident occurred in the course of the Appellant's employment is not in issue. As per the pleadings, it is clear that the tractor involved in the accident was owned by the first Respondent and was used for transport purposes within the property of the first Respondent. As a driver employed by the first Respondent, one of the tasks assigned to the Appellant was to drive the tractor to move labour and material around the property. Therefore, I will dispense with the need to indulge in any lengthy exploration as to whether the tractor was used within the course of employment, at the work place, and for an authorized purpose. The facts are so clear as to the above position that it needs no further proof.

[9] This court safely presumes that the machine was in motion at the work place, during working hours, and for an authorized task. Consequently, the accident falls within the ambit of Section 5(1) of the Workmen's Compensation Act 1994. However, Proviso (b) to Section 5(1) provides that "*if the injury to a workman is attributable to the serious and willful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed*". Therefore, it is necessary to determine if the conduct of the Appellant vitiates the obligation of the Respondents to pay compensation.

[10] The Health and Safety at Work Act 1996 regulates Workplace Health and Safety of Workers as defined in the Act. Section 5 of the Act defines a 'workplace' as '*any place, whether or not in a building or structure, where workers work*' and a worker is considered

to be 'at work' throughout the time he is at his workplace. As such, Section 9 of the Health and Safety at Work Act 1996 sets out duties of employers to their workers, which *inter alia* requires the employer to maintain the workplace in a safe condition without risks to health and to provide and maintain a safe working environment with no health risks and adequate facilities for the welfare of workers. Therefore, the first Respondent had a duty to ensure the safety of its workers.

[11] It is hence pertinent to delve into the evidence to determine whether the first Respondent has complied with the above statutory obligations or if the averments contained in paragraph 6 of the statement of claim filed by the Appellant hold water. It was noted at the outset in this case that, the sole eye-witness to the incident is the Appellant himself as the accident had occurred at a time when the Appellant was driving himself with no other person in the vicinity. Hence, this Court has to place considerable reliance on his evidence, aided to some extent by circumstantial evidence.

[12] The Appellant alleges that the first Respondent, the Ministry of Agriculture was negligent in failing to take any of the precautions listed under (a) to (g) in paragraph 6 of the statement of claim, namely:-

> *[a] Failing to take any or any adequate precaution for the safety of the Plaintiff.*
> *[b] Failing to warn the Plaintiff of the danger to which he was exposed.*
> *[c] Failing to provide the Plaintiff with a safe place of work.*
> *[d] Failing to devise, institute and maintain a safe system of work.*
> *[e] Failing to repair and/or maintain the Tractor*
> *[f] Failing to repair, maintain and upgrade the gravel road to Naduruloulou Research Station.*
> *[g] Failing to take any or any adequate precaution for the safety of the Plaintiff while he was engaged upon his work.*

[13] Cumulatively, the above allegations relate to the state of the farm road on which the accident occurred, and to the mechanical condition and maintenance of the tractor which the Appellant was driving at the time of the accident.

[14] In the context of Fiji and even in developed countries, farm roads within farm premises are not constructed or paved in the same manner as highways. While well designed and paved farm roads may be a sound investment from an agricultural management perspective and improve the efficiency of farms, roads within farms are usually gravel or dirt roads and maintained only with general safety and mobility in mind. Anyone who uses these roads regularly can be presumed to be familiar with the condition of the road and in fact such roads are not as constructed like highways. No person familiar with farm life, certainly not a person who works routinely on a farm can plead ignorance of the condition of farm roads. The Appellant had been employed as a driver of the Ministry of Agriculture for a considerable period of time and had been regularly using the farm road on which the accident occurred for work. It is therefore reasonable to presume that he is well acquainted with the condition of the road in question.

[15] Further, although the Appellant contends that the said farm road was not maintained and that it was considerably potholed, it transpired in the course of evidence that the road had been repaired as recently as a week prior to the accident, which evidence was not disproved. It is impracticable to expect a farm road to be maintained in the same manner as highways, or for that matter even at a level of an urban road. The evidence of recent repairs dispels any doubt regarding the condition of the road having contributed towards the accident. It is ultimately up to the users, both regular and those less familiar, with such roads to navigate the roads with special care and at moderate speed. Therefore, I find that the first Respondent was not negligent.

[16] I now advert my attention to the allegation of the appellant that the tractor was not well maintained, especially the brake system which was defective. The only defect the tractor had, as per the evidence is that it needed to be roll-started or push started in order for the

engine to start. The Respondents have not specifically denied this allegation. They have however, in the statement of defense, taken up the position that they have no knowledge of the content in paragraphs 5, 6, and 7 of the statement of claim and put the Plaintiff to strict proof of the same. As the tractor had to be rolled start, one can presume that the first Respondent was lapse in not rectifying this particular defect. At the same time, despite the tractor being more than 15 years old no evidence was adduced to demonstrate that it had other defects which could contribute to an accident of this nature. A defect in the brake system can occur at any time, even in a well maintained vehicle including a tractor. Therefore, even if the accident occurred due to a defective brake system, it cannot be directly attributed to a lapse on the part of the first defendant, without sufficient evidence to the contrary.

[17] The evidence clearly suggests that the Appellant had driven only 67 meters from the refueling point when the accident occurred. After the accident occurred it was discovered that the tractor was in third gear, which undoubtedly points to the fact that the appellant had driven the tractor at a high speed upon leaving the refueling point. This finding is further fortified by the evidence of the Appellant that the failure of the brakes had caused the tractor to skid in a zig-zag pattern on the path. If the tractor had been driven at a moderate speed, faulty brakes would not cause it to skid out of control and the Appellant would have been able to gain control of the vehicle without much effort. The fact of the gear being in the third taken in conjunction with the skidding of the vehicle, I am satisfied that the appellant had driven the vehicle at high speed unsuitable for farm roads. Therefore, the learned High Court Judge had not erred in his finding in this regard.

[18] In conclusion, I am sufficiently convinced that the reason for the accident was due to the excessive speed at which the Appellant drove the tractor within a short distance, a manner of driving unsuitable for a farm road. The Appellant has not convinced this court of negligence of the first Respondent leading to the accident, on a balance of probabilities. I also find the Respondents are not in breach of their statutory obligations emanating from the Health and Safety at Work Act 1996. Further, the conduct of the Appellant in driving

at excessive speed despite being aware of the dangers of such amounts to misconduct, and negates with the obligation of the Respondents to pay compensation in terms of the Workmen's Compensation Act 1994.

[19] In light of the foregoing, I answer the grounds of appeal thus:

1. I find that the learned High Court Judge had erred in relation to ground 1 as the Appellant had set out the particulars as to the cause of the accident and specific acts of negligence that resulted in the accident at paragraph 6 of his statement of claim. However it does not affect the final conclusion reached by this court.

2. On ground of appeal 2, I find that the learned Judge had not erred in his findings.

3. I answer the cumulative grounds of appeal 3-10 in the negative.

[20] For the reasons I have given, I dismiss the appeal of the Appellant but considering the circumstances of the case the Appellant had to suffer due to the accident, I order the parties to bear their own costs.

Jameel, JA

[21] I agree with the reasons, conclusions and orders proposed by Lecamwasam JA

Orders of Court:

1) *Appeal dismissed.*
2) *No costs ordered.*

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Justice F. Jameel
JUSTICE OF APPEAL