

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**CIVIL JURISDICTION**

**Civil Action No.: HBC No. 141 of 2015L**

**BETWEEN** : **PARUSEWAN** of Raviravi, Ba, Farmer/Field Officer

**PLAINTIFF**

**AND** : **R.C.MANUBHAI AND COMPANY LIMITED** a limited liability Company having its registered office at Market Subdivision, Ba.

**FIRST DEFENDANT**

**AND** : **SHALENDRA KUMAR** of Vatiyaka, Ba, Driver.

**SECOND DEFENDANT**

**AND** : **KRISHNEEL CHAND** of Tagitagi, Tavua, Mechanic.

**THIRD DEFENDANT**

**Counsel** : Mr. Rajendra Pal Singh Chaudhary for the Plaintiff  
: (Ms) Shanelle Renee Lovegrove for the Defendants

**Date of Trial** : Monday, 11<sup>th</sup> and Tuesday, 12<sup>th</sup> June 2018

**Date of Judgment** : Friday, 21<sup>st</sup> September 2018

## J U D G M E N T

### (A) INTRODUCTION

On 27<sup>th</sup> August 2015, the Plaintiff filed a Statement of Claim seeking damages, costs and interest against the Defendants for personal injuries sustained by him in an accident which occurred at about 5.00 pm on 07<sup>th</sup> May 2014 at Kings Road, Raviravi, Ba. The Plaintiff claimed that the accident was caused by the negligence of the Defendants.

### (B) THE FACTUAL BACKGROUND

(1) The Statement of Claim which is as follows sets out sufficiently the facts surrounding this case from the Plaintiff's point of view as well as the prayers sought by the Plaintiff.

1. *THE First Defendant is a limited liability company registered in Fiji operating as hardware and building merchants.*
2. *THAT at all material times the First Defendant was the owner of a Truck registered number DK080.*
3. *THAT all material times the Second and the Third Defendants were the servants and/or agents of the First Defendant and were employees of the First Defendant*
4. *THAT on or about the 7<sup>th</sup> day of May 2014 the said Truck was parked on Kings Road, Raviravi, Ba next to a bus shelter facing towards Ba. The Second and Third Defendants were doing some work on the engine and/or the gear box of the said Truck. The cab of the Truck was lifted forward.*
5. *THAT as the Plaintiff was passing by the Cab of the Truck, the Second or the Third Defendant started the engine of the said Truck. A large metal piece thereon flew out of the engine compartment and struck the Plaintiff causing serious injuries to him*

### PARTICULARS OF INJURIES

*Admitted to Lautoka Hospital.*

*He had tenderness in the Abdomen and open fracture of the left iliac crest.*

### INVESTIGATION

*Radiological scan of the abdomen revealed splenic rupture and fracture of ribs was seen on x-ray.*

### DIAGNOSIS

- *Splenic rupture*
- *Multiple fractures*

### TREATMENT

- i) *Pain relief*
- ii) *Blood transfusion*
- iii) *Laparotomy*
- iv) *Wound care*
- v) *Antibiotics*

*He was discharged on 18<sup>th</sup> May 2014 for reviews in the clinic.*

6. *THE said accident and the resultant injuries occurred due to the negligence, carelessness and recklessness of the Defendants, its servants and/or agents.*

### PARTICULARS OF NEGLIGENCE

- i) *Repairing and/or attempting to carry out repairs on the said truck on a public road without due regard to the safety of the public including the Plaintiff.*
- ii) *Carrying out a dangerous activity in the vicinity of a bus shelter where people sit and gather.*
- iii) *Failing to warn the public and the Plaintiff to keep away from the Truck.*
- iv) *Failing to have warning signs to warn the public and the Plaintiff to keep*

*their distance from the truck*

- v) *Failing to have Orange cones around the truck to indicate people should keep away.*
- vi) *Failing to tow the Truck away to a garage or to the First Defendant's garage or depot to repair the same.*
- vii) *The Plaintiff shall also rely on the doctrine of Res Ipsa Loquitur.*

7. *THAT as a result of the matters aforesaid the Plaintiff suffered loss and damage, pain and suffering, loss of amenities of life and loss of earning capacity.*

PARTICULARS OF SPECIAL DAMAGE

- i) *30 trips for family members (15 days x 2 trips)  
From Raviravi, Ba to Lautoka Hospital and return  
at \$30.00 per trip = \$ 900.00*
  - ii) *6 trips for clinic by the Plaintiff from Raviravi,  
Ba to Lautoka Hospital and return at \$30.00 per trip = \$ 180.00*
- TOTAL = \$1080.00*

8. *THE Plaintiff also went to Melbourne, Australia on 22<sup>nd</sup> July 2014 for Medical treatment and/or consultation and incurred expenses as a result. The Plaintiff returned on 24<sup>th</sup> August 2014.*

PARTICULARS OF EXPENSES

- i) *Visa application fees = \$288.00*
- ii) *Return airfare (Nadi-Melbourne-Nadi) = \$1497.40*
- iii) *Paid to MIA Radiology = A\$250.75*
- iv) *Surgery Consultation at Derrimut Road  
Medical Centre =A\$110.00*

**(2) The Plaintiff claims from the Defendants:**

- i) *Special Damages in the sum of \$1080.00 as per paragraph 7.*
- ii) *The sum of \$1785.40 plus A\$360.75 as per paragraph 8.*

- iii) *General damages for pain and suffering, loss of amenities of life, and loss of earning capacity.*
- iv) *Cost of future medical care.*
- v) *Any other and further relief that seem just to this Honorable Court.*
- vi) *Interest.*
- vii) *Cost of this Action.*

**(3) The Defendants in their Statement of Defence pleaded, inter alia that;**

1. *The Defendants admit paragraphs 1, 2 and 3 of the Statement of Claim.*
2. *Save as to admitting that on or about the 7<sup>th</sup> May, 2015, the First Defendant's truck was parked on the Kings Road, Raviravi, Ba next to a bus shelter facing towards Ba, it denies the rest of the allegations contained in paragraph 4 of the Statement of Claim. The Defendants further say that the truck was parked on the side of the road due to a mechanical malfunction.*
3. *The Defendants deny paragraph 5 of the Statement of Claim and further say that:*
  - a) *The Defendants had put reflector cones around the truck to show hazard so that people kept out of the area.*
  - b) *Despite the reflector cones the Plaintiff by his own will entered the area marked as hazardous.*
  - c) *By doing so the Plaintiff exposed himself to a hazardous situation.*
  - d) *The extent of injuries, if any is denied.*
  - e) *The truck engine started on its own due to electrical malfunction, wherefore the Defendants plead the accident happened due to 'An Act of God'.*

4. *The Defendants deny paragraph 6 of the Statement of Claim and further say that accident occurred due to an act of God and the injuries sustained due to the sole and or contributory negligence of the Plaintiff.*

PARTICULARS

- (i) *By his free will entered the enclosed area marked hazardous by three reflector cones.*
  - (ii) *Exposing himself to a hazardous situation.*
  - (iii) *Acting in complete disregard for his safety considering all the circumstances.*
  - (iv) *Ignoring warning signs.*
  - (v) *Failing to mind his business.*
  - (vi) *In all the circumstances it would be unreasonable to expect the Defendants to tow the truck to a garage, particularly as the Defendants had taken precautionary measures by putting reflector cones, and as it was unknown to the Defendants what the extent of the mechanical malfunction on the truck was.*
  - (vii) *The truck engine was switched off but started on its own due to a malfunction.*
5. *The Defendants deny paragraphs 7 and 8 of the Statement of Claim and put the Plaintiff to strict proof.*
6. *Except where expressly admitted the Defendants deny each and every other allegation contained in the Statement of Claim.*

**(4) The Plaintiff's 'Reply to Statement of Defence' is as follows:**

- 1. *THE Plaintiff joins issue with the denials in paragraph 2 of the Statement of Defence.*
- 2. *THE Plaintiff joins issue with the allegations in paragraph 3 of the Statement of*

*Defence and further states as follows:-*

- a) *No Reflector Cones were around the truck at the time of the accident. They were put there after the accident and injury to the Plaintiff.*
  - b) *The area was not marked as hazardous and the Plaintiff had every right to be where he was when he was hit by a flying metal from the truck.*
  - c) *The Plaintiff requires strict proof of the allegations in paragraph 3 (e) of the Statement of Defence.*
3. *THE Plaintiff joins issue with paragraph 4 of the Statement of Defence and further states as follows:*
- a) *There was no enclosed area marked hazardous as alleged. There were no Reflector Cones when the Plaintiff was injured.*
  - b) *The Plaintiff denies exposing himself to a hazardous situation and/or ignoring warning signs.*
  - c) *The Plaintiff requires strict proof of the allegations in paragraph 4 (vi) of the Statement of Defence.*
4. *The Plaintiff joins issue with paragraphs 5 and 6 of the Statement of Defence.*

**(C) The 'Minutes of the Pre-Trial Conference' record, inter-alia, the following;**

**B. FACTS ADMITTED**

- i) *That at all material times the First Defendant was the owner of a truck registered number DK080.*
- ii) *At all material times the Second and the Third Defendants were the servants and agents and employees of the First Defendant.*
- iii) *That on the 7<sup>th</sup> day of May 2014 the truck was parked on the kings Road, Raviravi, Ba next to a bus shelter facing towards Ba.*

C. *The issues are defined as follows:*

- i) *Did the Plaintiff suffer injuries on 7<sup>th</sup> May 2014 and if so, where and how?*
- ii) *Did the Plaintiff suffer the injuries, if any, due to the negligence of the Defendants, its servants and/or agents?*
- iii) *Were the Second and Third Defendants working on the engine of the truck with the cab lifted forward?*
- iv) *Did the Defendants put reflector cones around the truck prior to the Plaintiff sustaining his injuries, if any?*
- v) *Did the Plaintiff enter the area inside the reflector cones (if any) and approach the area where the truck was being repaired without regard to the warning signs (if any) and his own safety?*
- vi) *Was the area around the truck "marked as hazardous"?*
- vii) *Did the truck engine start on its own?*
- viii) *Did the accident happen due to "An Act of God" where the engine started on its own and a metal piece flew out of the engine and/or the gearbox and hit the Plaintiff?*
- ix) *Did the Plaintiff suffer the injuries due to his sole negligence?*
- x) *Is the Plaintiff contributory negligent?*
- xi) *The extent of injuries suffered by the Plaintiff (if any).*
- xii) *The quantum of damages, including special damages, if any, payable to the Plaintiff.*

(D) **DOCUMENTARY EVIDENCE**

The following documents have been produced to Court as evidence by the parties;

**The Plaintiff**

- |         |   |                               |
|---------|---|-------------------------------|
| PEX (1) | - | Birth Certificate – Plaintiff |
| PEX (2) | - | Australian Visa Application   |



- PEX (3) - Ticket – Fiji Airways
- PEX (4) - Charges (MIA Radiology)
- PEX (5) - Charges Tax invoice  
- [Surgery Consultant]
- PEX (6) - Payslip – Plaintiff
- PEX (7) - Medical Report – Plaintiff

The Defendants

- DEX (1) - Letter from Faiz Khan Lawyers dated 27/10/15
- DEX (2) - (Medical Opinion)  
Assessment Report of Parusewan
- DEX (3) - Permanent Impairment Assessment

(E) ORAL EVIDENCE

(1) Plaintiff's Case:

- ❖ The Plaintiff
- ❖ Dr. Murari Arun
- ❖ Baskaran Gopal
- ❖ Sri Nivasan Mani

(2) Defendants' Case:

- ❖ Shalendra Kumar (The Second Defendant)
- ❖ Krishneel Chand (The Third Defendant)
- ❖ Dr. Emosi Taloga

(F) **DISCUSSION AND DETERMINATION**

(1) Counsel on both sides have tendered extensive written submissions in support of their respective cases. I am grateful to Counsel for those lucid and relevant submissions and the authorities therein collected which have made my task less difficult than it otherwise might have been.

(2) The Plaintiff brought proceedings against the Defendants alleging negligence.

Negligence does not entail liability unless the Law exacts a 'duty' in the circumstances to observe care. (See; The Law of Torts, John G. Fleming, 09<sup>th</sup> Edition, Para 149).

"The liability for negligence whether we style it such or treat it as in other systems as a species of 'culpa' cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequences of a breach of that duty". (per Lord Macmillan, Donoghue v Stevenson, (1932) A.C 562, 618).

A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them. See; Le Lievre v Gould (1893) 1 A.B 491 at 497 per Lord Esher MR.

(3) With those considerations in mind, I now turn to the pleadings.

(4) **The Plaintiff's Statement of Claim in subsistence alleges that:**

6. *THE said accident and the resultant injuries occurred due to the*

*negligence, carelessness and recklessness of the Defendants, its servants and/or agents.*

PARTICULARS OF NEGLIGENCE

- i) Repairing and/or attempting to carry out repairs on the said truck on a public road without due regard to the safety of the public including the Plaintiff.*
- ii) Carrying out a dangerous activity in the vicinity of a bus shelter where people sit and gather.*
- iii) Failing to warn the public and the Plaintiff to keep away from the Truck.*
- iv) Failing to have warning signs to warn the public and the Plaintiff to keep their distance from the truck*
- v) Failing to have Orange cones around the truck to indicate people should keep away.*
- vi) Failing to tow the Truck away to a garage or to the First Defendant's garage or depot to repair the same.*

**(5) In the Defence of this action, the Defendants pleaded;**

- 3. The Defendants deny paragraph 5 of the Statement of Claim and further say that:*
  - a) The Defendants had put reflector cones around the truck to show hazard so that people kept out of the area.*
  - b) Despite the reflector cones the Plaintiff by his own will entered the area marked as hazardous.*
  - c) By doing so the Plaintiff exposed himself to a hazardous situation.*
  - d) The extent of injuries, if any is denied.*
  - e) The truck engine started on its own due to electrical malfunction, wherefore the Defendants plead the accident happened due to 'An Act of God'.*

4. *The Defendants deny paragraph 6 of the Statement of Claim and further say that accident occurred due to an act of God and the injuries sustained due to the sole and or contributory negligence of the Plaintiff.*

PARTICULARS

- (i) *By his free will entered the enclosed area marked hazardous by three reflector cones.*
  - (ii) *Exposing himself to a hazardous situation.*
  - (iii) *Acting in complete disregard for his safety considering all the circumstances.*
  - (iv) *Ignoring warning signs.*
  - (v) *Failing to mind his business.*
  - (vi) *In all the circumstances it would be unreasonable to expect the Defendants to tow the truck to a garage, particularly as the Defendants had taken precautionary measures by putting reflector cones, and as it was unknown to the Defendants what the extent of the mechanical malfunction on the truck was.*
  - (vii) *The truck engine was switched off but started on its own due to a malfunction.*
- (6) As I understand it, by their Statement of Defence, the Defendants denied the negligence alleged and to swim or sink they pleaded;

- ❖ **The defence of contributory negligence**
- ❖ **The defence of voluntary assumption of risk**
- ❖ **The defence of Act of God**

- (7) A vigorous attempt was made by the Defendants to categorize an electrical malfunction as an act of God. This is the '*reductio ad absurdum*' of the whole argument and I find it a source of amazement. However, they have fought it, and have been beaten upon it. At the conclusion of the Plaintiffs' and the

Defendants' case, Counsel for the Defendants, perhaps wisely, abandoned their Defence of 'Act of God'. The Defendants were not only clutching at a non-existent straw. They were expecting to be carried by it.

One word of caution, it is not permissible to fashion legal principles in someone's interest.

(8) **Liability**

(i) I now turn to the evidence of the Plaintiff's case.

**Parusewan (Plaintiff)**

On 7<sup>th</sup> May 2014 he was seated in the public bus shelter waiting for the fisherman. A truck was parked in front of the bus shelter. It was a ten wheeler truck loaded with a container. The cab was open and there were two RC Manubhai workers working on the engine. One of the men was facing the drain side and the other was facing the roadside. The Plaintiff got up and went to the back of the truck and his neighbor, Mr. Gopal, called him from across the road. When he was walking towards Mr. Gopal the truck started. At first the engine sounded normal and then after a few seconds it began to 'over race'. Then there was a *very loud sound like a bomb explosion*. He had turned around at the point when he heard the engine 'over race'. He was about two meters away from the truck. He felt something hard from the truck hit him and felt pain in his stomach and ribs. He fell and was trying to get up but Mr. Gopal told him not to because there were parts flying from the truck. There was a lot of *black smoke* and his body was covered with black smoke which came from the truck. The Plaintiff gave evidence that there was nothing around the truck; there were no warning signs or cones or anything like that, it was just the truck.

**Baskaran Gopal**

He lived near the bus stop where the truck was parked. In the afternoon of 7<sup>th</sup> May, 2014 he was at the opposite side of the road to the truck. He saw his cousin's son (the Plaintiff) and a man from RC Manubhai sitting in the bus shelter. The cab of the truck was up and there was another man from RC Manubhai working on the engine. He saw the Plaintiff coming from the back of the truck and called out to him. The Plaintiff was coming towards him and was facing him when suddenly the truck started and parts started flying. He saw the

Plaintiff lying on the ground and he told him not to get up as the "*metals were flying*". There was a lot of black smoke and when it cleared the Plaintiff got up and went to the front of the truck. Mr. Gopal said there were no cones or warning indications around the truck.

### **Sri Nivasan Mani**

Mr. Mani went to his farm to tie his livestock. While he was there he heard a loud explosion. He climbed up a tree to make inquiries and he had seen a black smoke. After 10–15 minutes later, he reached the truck and asked the two RC Manubhai workers as to what had happened. He said that he was told that a man had been injured and was taken to hospital. There were no cones or hazards around the truck. While he was standing 8ft away from the truck, he had seen the two workers putting cones around the truck. After a few minutes, he saw a large piece of metal and he took back to his house. He did not examine it at first. Later, the Plaintiff's nephew came to his house and found blood and hair on the large piece of metal.

(ii) I now turn to the evidence of the Defendant's case.

### **Shalendra Kumar (The truck driver) – The First Defendant**

He was employed by RC Manubhai (the First Defendant) as a driver. He was the driver of the truck in question, being motor vehicle registration no. DK 080. He gave evidence that on 7<sup>th</sup> May, 2014 he was driving the truck from Lautoka to Ba when he started experiencing issues with it. While driving, the truck would stop and then not move forward when the accelerator was pressed. He would have to turn the engine off and then on again for things to normalize. When the occurrence happened for the third time, he called his Company Director who told him to pull over to the side of the road and park the truck safely. The Company Director told him that he was sending a mechanic to have a look at the truck. He immediately pulled over at a bus stop on the left hand side of the road and parked outside the white road markings. He got out of the truck and immediately placed three orange cones along its right hand side and turned on the hazard lights. He then sat and waited for the mechanic in the bus stop.

Mr. Kumar first saw the Plaintiff when he alighted from a bus at the bus stop. He recalled that the Plaintiff was wearing a long shirt and pants. Sometime later, the Plaintiff returned to the truck, by which time the mechanic had arrived and was working within the engine compartment from the passenger's side. The

Plaintiff walked through the orange cones and started looking at the engine while holding the truck's tray. The Plaintiff was standing to the left of Mr. Kumar, who was standing on the driver's side next to the cab. The Plaintiff did not say anything to either Mr. Kumar or the mechanic, nor did either man say anything to the Plaintiff. He recalled that the Plaintiff was now wearing a white vest and shorts.

After failed attempts to get the engine started, Mr. Kumar turned the key in the ignition (under the instruction of the mechanic). Both men waited for the foreman to arrive. While they were waiting, the mechanic sat on the front tyre of the truck, going through his phone. At this time the cab of the truck was still open. Mr. Kumar remained standing on the driver's side watching the mechanic on his phone. The Plaintiff remained standing to Mr. Kumar's left. After about five minutes, the truck's engine suddenly started and went full throttle. There was a lot of black smoke and parts started flying from the truck.

Mr. Kumar stated that at the time the engine started, no-one had been working on, or doing anything to, the engine. The mechanic was still sitting on the front left tire of the truck on his phone and he had been standing at the driver's side. The Plaintiff was standing on his left. He stated that while the parts were flying on he saw the Plaintiff falling on the ground but then got back up and walked towards the front of the truck. The mechanic then immediately ran around to the driver's side and shut off the engine by disconnecting the battery. When the smoke cleared he collected the parts that had flown from the truck and put them in the mechanic's van. The foreman arrived shortly after and the truck was towed to the garage in Ba. Afterwards they went to the Ba Police Station to make a report about the engine and the incident.

### **Krishneel Chand (The Mechanic) – The Second Defendant**

He was the mechanic employed by RC Manubhai who had attended to the truck in Raviravi on 7<sup>th</sup> May, 2014. Mr. Chand gave evidence that when he approached the truck he had observed three orange cones on its right hand side and had also observed that the truck's hazard lights were on. He saw the driver of the truck standing nearby and the only other person around at that time was a young woman outside the shop opposite the truck. Later on, while he was cleaning the truck's filter atop the engine compartment, he saw the Plaintiff walking towards the truck and through the orange cones. The Plaintiff was looking into the engine compartment and holding the truck's tray. The Plaintiff did not say

anything to him or the driver, and neither he nor the driver said anything to the Plaintiff.

After attempts to start the engine were unsuccessful, both Mr. Chand and Mr. Kumar waited for the foreman.

While waiting for the foreman, Mr. Chand sat on the front left hand tyre using his phone. They were simply waiting for the foreman and passing time. The cab was still open at this point. Mr. Kumar and the Plaintiff were still standing on the driver's side of the cab. After about 5 minutes, the truck's engine suddenly started and then went full RPM (throttle). There was a lot of black smoke and he could hear the sound of metal parts landing on the ground. He immediately ran around to the driver's side and disconnected the battery terminal to shut the engine. When the smoke cleared, he collected the parts that had flown from the truck and placed them in his van. He stated that the parts were the cast iron gearbox cover, the flywheel and the clutch pads. When the foreman arrived, the truck was towed to Ba and the engine incident was reported to the Ba Police Station for insurance purposes. He did not sustain any injuries.

(9) In an action for negligence, as in every other action, it is for the Plaintiff to give evidence of the facts on which he bases his claim to the redress which he seeks from the Court. The Plaintiff need only tilt the 'balance of probability'. The Court must feel an actual persuasion based on a preponderance of probability.

(10) The elements of the cause of action for negligence are itemized as follows:

- ❖ The existence of a duty, recognized by law, requiring conformity to a certain standard of conduct for the protection of others against unreasonable risks.
- ❖ The breach of that duty (negligence)
- ❖ Material injury resulting to the interests of the Plaintiff.
- ❖ The question of proximate cause.
- ❖ The absence of any conduct by the injured party prejudicial to his recovering in full for the loss he has suffered.



(11) With those consideration in mind, I turn to the Plaintiff.

(12) The Plaintiff's account of accident, as given in his evidence in chief, was as follows; (Page 3 to 10 of the transcript of evidence).

Examination in chief by the Plaintiff Counsel

Q: *Parusewan, what is the date of your birth?*

A: *26/01/1970.*

Q: *Have a look at this birth certificate. Is that your birth certificate?*

A: *Yes Sir.*

Q: *Plaintiff exhibit 1.*

Crt: *Yes, exhibit 1.*

Q: *Now, which school did you go to? Secondary school?*

A: *DAV College.*

Q: *And how far did you go at DAV College? Upto what form?*

A: *Form 3.*

Q: *And when did you finish form 3?*

A: *End of the year.*

Q: *Which year?*

A: *1983.*

Q: *And what did you do after that?*

A: *I was cutting cane.*

Q: *For whom?*

A: *I was a labour of my Father.*

Q: *Your Father had a Farm?*

A: *Yes Sir.*

Q: *What sort of Farm?*

A: *Cane Farm.*

- Q: *How long did you work for your Father?*  
A: *20 years.*
- Q: *Then after that?*  
A: *I start joined Western Division Drainage Board as a Labourer.*
- Q: *You joined what?*  
A: *As a Labour.*
- Q: *Joined what?*  
A: *Western Division Drainage Board.*
- Q: *Western Division Drainage Board. And when was that?*  
A: *2004.*
- Q: *2004?*  
A: *Yes Sir.*
- Q: *And you joined there as a?*  
A: *Labourer.*
- Q: *And where are you working now?*  
A: *Same company, Western Division Drainage Board.*
- Q: *And what is your position now?*  
A: *As a Field Officer.*
- Q: *You are a?*  
A: *Field Officer.*
- Q: *And when did you become a Field Officer?*  
A: *2007.*
- Q: *So, after working for 3, 4 years*  
A: *Yes Sir.*
- Q: *You became a Field Officer and you are still a Field Officer?*  
A: *Yes Sir.*
- Q: *And has your position been confirmed?*  
A: *Yes Sir.*

Q: *Okay. Now, I will bring you quickly to 7<sup>th</sup> of May, 2014, do you remember that date?*

A: *Yes Sir.*

Q: *What happened on that day? Why do you remember that date?*

A: *It was a accident day for me, it was a very bad day for my life.*

Q: *What happened on that date?*

A: *I had an accident from the truck.*

Q: *You had an accident. About what time did it happen?*

A: *5 to 5.30.*

Q: *In the?*

A: *Afternoon.*

Q: *Now, where did this accident happened? Where?*

A: *Raviravi, Ba.*

Q: *Raviravi, Ba. And can you explain to the Court what you were doing around 5, 5.30 when this accident happened?*

A: *I was waiting for the Fisherman to bring the Fish.*

Q: *You were waiting for the Fisherman?*

A: *To bring the Fish so I can buy it.*

Q: *And where were you waiting?*

A: *In the public shelter.*

Q: *In the?*

A: *Public shelter.*

Q: *Shelter, bus shelter?*

A: *Yes Sir, Bus shelter.*

Q: *And that shelter you said is in Raviravi?*

A: *Yes Sir.*

Q: *And where was this, you said, this truck?*

A: *Truck was parked in front of the shelter.*

Q: *Whose Truck was it?*

A: *R C Manubhai.*

- Q: *What sort of Truck was it?*  
A: *It was a 10-wheeler Truck loaded with container.*
- Q: *Was the Truck there when you came to the shelter or it came later?*  
A: *The Truck was parked in the shelter.*
- Q: *When you came to the shelter?*  
A: *Yes Sir.*
- Q: *And then what happened, can you tell the Court? Did you keep sitting in the shelter?*  
A: *Yeah, I was sitting in the shelter waiting for the Fisherman.*
- Q: *Alright, do you want to speak in Hindi or English?*  
Crt: *Yeah, does he need some assistance, please ask him Mr Chaudhary?*
- Q: *Do you need assistance?*  
A: *Sometimes.*
- Q: *Sometimes?*  
A: *If I can't understand then.*
- Crt: *Is he comfortable in testifying in Hindustani or English?*
- Q: *If you want you can say it in Hindi, whatever.*  
A: *Okay, Hindi.*
- Q: *Hindi?*  
A: *Yes.*
- Q: *Alright. Now can you tell the Court what happened. Were you sitting in the bus shelter, did you keep sitting there or what did you do?*  
A: *I was keep sitting there.*
- Q: *And then what happened?*  
A: *My Lord, I was sitting there, and a Truck was parked there, R C Manubhai's Truck and two (2) men were working on the Truck.*
- Q: *Where were the men working?*  
A: *My Lord, 1 man was facing the drain side and one was the other side of the road, and they were doing something in the Truck.*

- Q: *And what was Truck's cab?*  
A: *The Truck's cab was open My Lord.*
- Q: *And then what happened, tell the Court? Alright, slowly.*  
A: *My Lord, he said he stood up and he wanted to go towards his home. He was going towards his home.*
- Q: *Now, you went behind the truck, you said?*  
A: *Yes.*
- Q: *And then?*  
A: *One of the guy was coming from that side he called me, I went towards him. And directly I crossing the road halfway.*
- Q: *You crossing the road?*  
A: *Yes. The guy which was on side of the road he went inside the cab and suddenly the Truck start and when it started, very slowly, suddenly then overrammed and I can't understand what happened and I just turned around. I heard something hit me and I fly away in the main road.*
- Q: *Okay. How far were you from the Truck when something hit you?*  
A: *Round about 2 metre, 2 ½ metre away from the Truck.*
- Q: *And were you standing or*  
A: *I was walking.*
- Q: *Going where?*  
A: *Going towards my home.*
- Q: *And do you know what hit you?*  
A: *At that time I do not know but. My Lord, he's not sure what exactly hit him but he knew something hard came on him and he flew.*
- Crt: *From where did it come?*  
A: *My Lord, he says from the engine side.*
- Q: *From the Truck?*  
A: *Yes.*
- Q: *Did you later on find out what hit you?*  
A: *My Lord, in the hospital and later when he went home then he found out what actually hit him.*

Crt: *What did he feel at that time, what did he feel?*

Q: *Yes, I'm coming to that Sir. Now, when you were hit, what happened to you?*

A: *My Lord, when the thing hit him, he said he felt the pain under his arms and on the side of his ribs and the stomach were all coming out.*

Q: *Alright, and then?*

A: *My Lord, one of the vehicles from his area took him to the hospital because he was in great pain.*

Q: *Whose vehicle was that?*

A: *My Lord, one of the villagers in his village.*

Q: *Now, which hospital?*

A: *Ba Mission hospital.*

Q: *Now you said the engine started.*

A: *Yes Sir.*

Q: *What else, did you see anything else?*

A: *No, no, I was not. My Lord, he was going and he said he heard the engine was starting. It was going on but he didn't consider them very firmly and he started going towards his home and then when the engine started with a loud sound he turned to face them and that's when the accident happened.*

Q: *Was the engine starting in a normal way or how was it starting?*

A: *Few seconds normal, after a few seconds it was very. My Lord, he said that sound was very loud, it's like, it was a bomb explosion and he got scared.*

Q: *Alright. Now, did you also see smoke?*

A: *Yes Sir.*

Q: *What did you see?*

A: *The smoke was on top of me when I was on the road.*

Q: *What kind of smoke?*

A: *Black smoke. Like something, burning smoke. My Lord, he says his body was covered with black smoke that came from the truck.*

Crt: *Which part of the Truck?*

Q: *Sorry Sir?*

Crt: *Came from which part of the Truck?*

Q: *Yeah, I think he said, which part of the Truck?*

A: *Engine and gear box part.*

Q: *And you said the cab was open?*

A: *Open.*

Q: *And when you were going towards your home, was somebody there?*

A: *Yes.*

Q: *Who?*

A: *One of my neighbor.*

Q: *What's his name?*

A: *Bhaskaran Naidu.*

Q: *Do you know him?*

A: *Yes Sir.*

Q: *Now, when you were hit, did he say anything?*

A: *Yeah, I try to get up but once I get up and he shouted, don't get up, the metals are flying away. So, I can't stand properly so I again fell down there.*

Q: *Now, when this Truck was parked there, were there any reflector count around it?*

A: *No Sir.*

DC: *Objection, leading Sir.*

Crt: *Yes, could you please reframe the question Mr Chaudhary.*

Q: *Now, was there anything around the Truck when you?*

A: *No, nothing.*

Q: *Just the Truck?*

A: *Just the Truck.*

Q: *Any warning signs?*

A: *No.*

DC: *Objection Sir, leading.*

Q: *I don't think Sir, I'm just asking a simple question.*

Crt: *No, I don't think that can be objected because specifically alright question, whether any warning on his side or not but yes, you may proceed.*

Q: *Simply asking whether there were any warning signs.*

Crt: *Objections overruled, next question please.*

Q: *Any warning signs around the Truck?*

A: *No Sir.*

Q: *Nothing.*

A: *Nothing.*

Q: *Any signs to say that it was a hazardous area?*

A: *No.*

Q: *If warning signs were there or if the cones were around the vehicle, would you have gone near?*

Crt: *I'm sorry, it's a hypothetical question Mr Chaudhary. That question cannot be allowed.*

Q: *Very well Sir.*

- (13) **'Baskaran Gopal'** who gave evidence for the Plaintiff did see the accident. His evidence is substantially in accord with the Plaintiff's evidence. I quote the following portion of his evidence given in his evidence in chief (Page 67 and 68 of the transcript of evidence).

Q: *Now, did you see Parusewan?*

A: *Yes, I saw him coming at the back of the truck then I called him.*

Q: *You called him?*

A: *Yes.*

Q: *He heard you?*

A: *Yes. And he was coming towards me and all of a sudden the truck start and blow and the metal hit him and that metal come right to the other*



*side of the road. The small pieces flying off and Parusewan fell down on the road. He wanted to get up again. I told him don't get up. Don't get up because the metal was flying all like that.*

- Q: When Parusewan was coming, in which direction was he looking?  
A: Parusewan was crossing almost he was half of the crossing line.*

I couple with that evidence, the evidence given at the cross examination (Page 69 of the transcript of evidence).

- Q: Now you said that Mr Parusewan had come from the back of the truck and then you called to him. Is that correct?*

*A: Yeah.*

- Q: And then you called to him, is that correct?*

*A: Yes.*

- Q: You only you had called him when he was already on his way back across the road?*

*A: He was coming from back of the truck and I called him Hey tavale, tavale is brother in law. I called him Hey tavale, come. He was crossing like this. Then the truck started because they were doing something there I don't know what they were doing.*

- (14) On the facts, I do not forget that the 'truck' was a ten wheeler loaded with a container which is relatively long in length.

Further, and perhaps more importantly, the engine and the gearbox is towards the front of the truck.

- (15) In the evidence in chief, the Plaintiff was asked; (page 7 and 8 of the transcript of the evidence)

*Q: And do you know what hit you?*

*A: At that I do not know but My Lord, he's not sure what exactly hit him but he knew something hard came on him and he flew.*

*Q: From where did it come?*

*A: My Lord, he says from the engine side.*

I couple with that evidence, the evidence of the Mechanic (the third Defendant) given at the evidence in chief; page 121 of the transcript of evidence)

Q: *So, what happened after the truck went full rpm? What do you mean by went full rpm?*

A: *The engine goes full high up.*

Q: *.....what happened when that happened?*

A: *Engine parts are flying. The parts from the engine was flying like a flywheel, the cover, the flywheel cover, clutch pads, truss plates, all went off.*

(16) The evidence of the Plaintiff and Baskaran Gopal presents to me an unconvincing picture of the accident. As correctly pointed out by the Defendants, had the Plaintiff been on the road within two or two and half meters of the very back of the truck, he would not have been within the trajectory of the parts which flew from the engine compartment. I do not accept the version as the truth, because it is not a possibility. Because, first, the gearbox and the engine is towards the front of the truck, Secondly, the container would have been an obstruction to the position of the Plaintiff. In the circumstances, the parts cannot fly two or two and half meters towards the back of the truck from the front of the truck near the engine compartment.

(17) I reach the conclusion that the Plaintiff's and Baskaran Gopal's account of the accident is inherently and intrinsically improbable.

This is sufficient to displace my acceptance of the testimony of the Plaintiff and Baskaran Gopal.

I disbelieve the evidence of the Plaintiff and Baskaran Gopal. They are dishonest and unreliable witnesses.

(18) I am not prepared to hold on the balance of probabilities that the parts flew two or two and half meters towards the back of the truck from the front of the truck near the engine compartment. Because it is not a possibility. Anything more shadowy, anything more unsatisfactory, anything more unlikely to produce persuasion or conviction on the mind of the Court, I can scarcely imagine. It is a

fact which would eat away the whole foundation of the Plaintiff's case. This item of evidence raises a very serious doubt on the truth of the Plaintiff's case.

(19) The exact position of the Plaintiff at the time of the accident is a crucial fact. The Plaintiff's entitlement to damages depends upon the Courts accepting his version of the events leading to the accident.

(20) What is the exact position of the Plaintiff immediately before and at the time of the accident?

The Plaintiff and Baskaran Gopal are not speaking the truth on this highly material substantive factual question.

(21) I reject the testimony of the Plaintiff and Baskaran Gopal on this highly material substantive factual question on the ground of lack of credit. The testimony of the Plaintiff and Baskaran Gopal could provide no proper basis for any reliable finding of fact on this highly material substantive factual question.

(22) In the proper exercise of the discretion, no Court is bound to accept evidence which is inherently and intrinsically improbable and the evidence which is inherently and intrinsically improbable will never provide a foundation for any cogent finding of fact, particularly when contradictory evidence is available. To my mind, there is nothing more frustrating to a tribunal of fact than to be presented with evidence which is inherently and intrinsically improbable.

(23) I have arrived at an adverse finding in regard to the testimonial trustworthiness of the Plaintiff and "Baskaran Gopal" on a highly material substantive factual question.

(24) Arriving at determination with regard to credibility and testimonial trustworthiness of a witness is a question of fact and not a question of law.

(25) The Plaintiff and Baskaran Gopal have given false evidence on a highly material substantive factual question of this matter.

- (26) Of course, I do not deny for a moment that the maxim '*falsus in uno, falsus omnibus*' (he who speaks falsely on one point will speak falsely upon all), is not an absolute rule which has to be applied without exception in every case where a witness is shown to have given false evidence on a material point.

All I am saying is that, when such evidence is given by a witness, the question whether other portions of his evidence can be accepted as true should not be resolved in his favour unless there is some compelling reasons for doing so.

- (27) In the present case, the falsehood is of such magnitude as to taint the whole testimony of the Plaintiff and Baskaran Gopal. The testimony afforded material for serious challenge to the credibility or reliability of these witnesses on a matter vital for the Plaintiff. In the instant case, there are no circumstances which exclude the application of the maxim.
- (28) There remains for consideration the testimony of Sri Nivasam Mani. He did not see the accident. His evidence was that there were no cones or hazards in respect to the truck. He says that he saw the two RC Manubhai workers putting cones around the truck after the explosion. The purpose of calling this witness and the purpose of his evidence, as I read and as I understand Mr. Chaudhary is to corroborate the version of the Plaintiff and Baskaran Gopal that there were no cones around the truck before the explosion and the cones were placed after the explosion.
- (29) I fail to see how he could corroborate the evidence of the Plaintiff and Baskaran Gopal. In my view he cannot do so. It is important to remember that the purpose of corroborating is not to give validity or credence to evidence which is suspect or incredible but only to confirm and support that which as evidence is credible.

Corroboration is only required or afforded if the witness requiring corroboration is otherwise credible. Seeking corroboration of a witness's evidence should not be used as a process of inducing belief in such evidence where such evidence is not credible.

- (30) Where was the Plaintiff immediately before and at the relevant time of the accident? Which way the truth lies?

It would be recalled that the Defendants version is that the Plaintiff walked through the orange cones and started looking at the engine while holding the truck's tray. The Defendants say that the Plaintiff was standing to the left of the truck driver (the first Defendant) who was standing on the driver's side next to the cab at the relevant time of the accident.

The Plaintiff deposed to the fact in evidence in chief that with the explosion there was a lot of black smoke and his body was covered with black smoke which came from the truck.

In cross examination, there was a suggestion that he had gotten black on him because he had been standing next to the muffler of the truck, with the muffler being on the driver's side near to where he had been standing. He indignantly denied the suggestion.

But the Plaintiff's evidence that his body 'was covered with black smoke' supports the Defendants version that the Plaintiff was standing to the left of the truck driver who was standing on the driver's side next to the cab at the relevant time of the accident.

- (31) On the probabilities, I am prepared to accept the version of the Defendants. The case of the Defendants is probable. The probabilities favored the conclusion that the Plaintiff was standing to the left of the truck driver who was standing on the driver's side next to the cab at the relevant time of the accident.

### **Res ipsa Loquitur**

- (32) The Plaintiff had pleaded the maxim '*res ipsa loquitur*'. The maxim is not a rule of law.

- (33) Kennedy L.J. in Russell v L& S.W. Ry (1908) 24 T.L.R. 548, 581 explains the meaning of *res ipsa loquitur* as follows:

*"The meaning, as I understand, of that phrase ..... is this, that there is, in the circumstances of the particular case, some evidence which, viewed not as a matter of conjecture, but of reasonable argument, makes it more probable that there was some negligence, upon the facts as shown and undisputed, than that the occurrence took place without negligence. The res speaks because the facts stand unexplained, and therefore the natural and reasonable, not conjectural, inference from the facts shows that what has happened is reasonably to be attributed to some act of negligence on the part of somebody; that is, some want of reasonable care under the circumstances. Res ipsa loquitur does not mean, as I understand it, that merely because at the end of a journey a horse is found hurt, or somebody is hurt in the streets, the mere fact that he is hurt implies negligence. That is absurd. It means that the circumstances are, so to speak, eloquent of the negligence of somebody who brought about the state of things which is complained of"*

Later, his Lordship adds;

*"Res ipsa loquitur in this sense; the circumstances are more consistent, reasonably interpreted without further explanation, with your negligence than with any other cause of the accident happening."*

The maxim comes into operation (1) on proof of the happening of an unexplained occurrence; (2) when the occurrence is one which would not have happened in the ordinary course of things without negligence on the part of somebody other than the Plaintiff; and (3) the circumstances point to the negligence in question being that of the defendant rather than that of any other person. The third requirement is usually fulfilled by showing that the instrument causing the damage was in the management and control of the defendant at the time of the occurrence, but this is not essential.

- (34) The case of Byrne v. Boadle 2 H. & C.722, 159 ER (Eng. Rep.) 299 (Exch. 1863); is regarded as the English tort law case that first applied *res ipsa loquitur*. In that case the Plaintiff (Byrne) was struck by a barrel of flour falling from a window as he walked past the Defendant's (Boadley) flour shop and sustained serious personal injuries. A witness testified that he saw the barrel but had not seen the

cause. Byrne did not present any other evidence of negligence by Boadle or his employees.

It was held that,

*"A presumption of negligence can arise from an accident. A party needs not present direct evidence of negligence when the mere manner and facts of the accident show that it could not have happened without negligence on someone's part. A barrel could not roll out of a warehouse window without negligence. This is an example of a case in which res ipsa loquitur ("the thing speaks for itself") applies. It is evidence that the barrel was in the custody of the Defendant and its falling is prima facie evidence of negligence. A Plaintiff who is injured in such a fashion should not be required to show that the barrel could not fall without negligence. A rebuttable presumption is created that Defendant was negligent and he has the burden to prove that he was not. The Defendant had a duty to ensure that those passing by his shop are not injured by objects under his control. In this case there was a scintilla of evidence with respect to negligence. The Defendant failed to show he was not negligent and the Plaintiff was to the verdict."*

- (35) The phrase has also been succinctly expounded by Lord Justice Morris in **Roe v. Ministry of Health (1954) 2 QB 66 at page 88:**

*"..... this convenient and succinct formula possesses no magic qualities; nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin. When used on behalf of a Plaintiff it is generally a short way of saying "I submit that the facts and circumstances which I have proved established a prima facie case of negligence against the Defendant." It must depend upon all the individual facts and the circumstances of the particular case whether this is so. There are certain happenings that do not normally occur in the absence of negligence, and upon proof of these a court will probably hold that there is a case to answer."*

- (36) In the case of **Lloyd v. West Midlands Gas Board [1971] 1 WLR 749; Lord Justice Megaw explained (at page 755):**

*"I doubt whether it is right to describe res ipsa loquitur as a 'doctrine'. I think that it is no more than an exotic, although convenient, phrase to describe what is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances."*

*"It means that a Plaintiff prima facie established negligence where (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of accident was some act or omission of the Defendant or of someone for whom the Defendant is responsible, which act or omission constitutes a failure to take proper care for the Plaintiff's safety."*

*"I have used the words "evidence as it stands at the relevant time". I think that this can most conveniently be taken as being at the close of the Plaintiff's case. On the assumption that a submission of no case is then made, would the evidence, as it then stands, enable the Plaintiff to succeed because, although proper inference on balance of probability is that cause, whatever it may have been, involved a failure by the Defendant to take due care for the Plaintiff's safety? If so, res ipsa loquitur."*

- (37) In Franklin v. Victorian Railways Commissioner (1959) 101 CLR 197; Dixon CJ said;

*"The three Latin words [res ipsa loquitur] merely describe a well-known form of reasoning in matters of proof. Convenient as it is sometimes to us to direct the mind along that channel of reasoning they must not be allowed to obscure the fact that it is a form of reasoning about proof leading to an affirmative conclusion of fact and that whenever the question is whether the proofs adduced suffice to establish an issue affirmatively, all the circumstances must be taken into account and the evidence considered as a whole."*

- (38) The High Court of Australia in Schellenberg v. Tunnel Holdings Pty Ltd. [200] HCA 18 held (Gleeson CJ and McHugh J);

*"Res ipsa loquitur is concerned with negligence arising from an unknown or unspecified cause. It is concerned with an external event whose cause is under the control of the defendant. It is a principle that is as much, perhaps more, concerned with proof that the defendant was causally responsible for the occurrence as it is with proof of a breach of duty."*



*"While Res ipsa loquitur may ameliorate the difficulties that arise from a lack of evidence as to the specific cause of an accident, the inference to which it gives rise is merely a conclusion that is derived by the trier of fact from all the circumstances of the occurrence. When it applies, the trier of fact may conclude that the defendant has been negligent although the plaintiff has not particularized a specific claim in negligence or adduced evidence of the cause of the accident. But it does nothing more."*

(39) **Fleming on Torts 9<sup>th</sup> edition at page 353 says as follows:**

*Unfortunately, the use of a Latin phrase to describe this simple notion has become a source of confusion by giving the impression that it represents a special rule of substantive law instead of being only an aid in the evaluation of evidence, an application merely of "the general method of inferring one or more facts in issue from circumstances proved in evidence."*

(40) **Street on Torts 14<sup>th</sup> ed at page 139 says as follows:**

*In the past, there has been a tendency to elevate res ipsa loquitur to the status of a principle of substantive law or at least a doctrine. In the 1970s, however, the Court of Appeal decisively swung away from that approach. In *Lloyde v West Midlands Gas Board*, Megaw LJ stated that res ipsa loquitur simply describes a method of reasoning:*

*I doubt whether it is right to describe res ipsa loquitur as a "doctrine". I think that it is more than an exotic, although convenient, phrase to describe what is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It means that a claimant prima facie establishes negligence where (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident, but (ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the claimant's safety.*

- (41) **Flemming on Torts 9<sup>th</sup> edition describes the maxim Res Ipsa Loquitur at page 352:**

*In some circumstances, the mere fact that an accident has occurred raises an inference of negligence against the defendant. A Plaintiff is never obliged to prove his case by direct evidence. Circumstantial evidence is just as probative, if from proof of certain facts, other facts may reasonably be inferred. Res ipsa loquitur is no more than a convenient label to describe situations where, notwithstanding the plaintiff's inability to establish the exact cause of the accident, the fact of the accident by itself is sufficient in the absence of an explanation to justify the conclusion that most probably the defendant was negligent and that his negligence caused the injury. The maxim contains nothing exceptional; it is based on common sense, since it is a matter of ordinary observations and experience in life that sometimes a thing tells its own story.*

- (42) With the above considerations in mind, let me now pause here to consider Whether the doctrine of 'res ipsa loquitur' arises to the case at hand.
- (43) The essential elements of 'res ipsa loquitur' were restated by Gleeson C.J. and Mcvugh J in their Lordships joint judgment in "**Schellenberg v Tunnel Holding Pty Ltd**", (2000) HCA 18, (2000) 200 CLR 121, in the following terms;
- (a) there must be an absence of explanation of the occurrence that caused the injury.
  - (b) the occurrence must have been of such a kind that it does not ordinarily occur without negligence, and
  - (c) the instrument or agency that caused the injury must have been under the control of the Defendant.
- (44) All three necessary conditions must be satisfied if the 'res ipsa loquitur' principle is to apply to the instant case. At the Trial, Counsel for the Defendants conceded that the third necessary condition was satisfied. That is, the vehicle was under the sole management and control of the Defendants. The first and second conditions were not conceded.

In the present case, there is evidence of the facts surrounding the accident and its cause. The evidence of the Mechanic, Krishneel Chand (deposed in cross examination) that the occurrence of the engine suddenly starting on its own and going full throttle, leading to the gearbox exploding and injuring the Plaintiff could be due to an electrical malfunction was not challenged by the Plaintiff. That being so, the first and second of the three necessary conditions for the application of principle of 'res ipsa loquitur' are not satisfied, and the principle therefore cannot apply to the present case. The evidence of the Mechanic, Krishneel Chand while somewhat scanty, supports a credible explanation of the accident that is inconsistent with negligence, namely electrical malfunction. Not one word was put to the accuracy and the credibility of the fact (viz, the electrical malfunction) he has deposed to in cross examination. To my mind nothing would be more absolutely unjust than not to cross-examine him upon the accuracy and the credibility of the fact he has deposed to (viz, electrical malfunction) so as to give him notice and to give him an opportunity of explanation, not having given him such an opportunity, to ask the Court to disbelieve the fact he has deposed to. See; Dayman v Simpson (1935) S.A.S. R 320, Odgers, Pleading and Practice, 7<sup>th</sup> Edition, (1912) Page 312. I pause to say that once the accident is explained, no question of 'res ipsa loquitur' arises. The inference of negligence was, at best, a weak one. On the evidence, the circumstances of the accident do not speak "clearly (or) convincingly" of negligence. The explanation of the Mechanic Krishneel Chand, is sufficient to displace a weak inference of negligence arising from the occurrence. As Lord Porter said in "Barkway v South Wales Transport Co. Ltd (1950) 1 All E.R. 392, at 395." ".....if the facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found in determining whether, on the facts as established, negligence to be inferred or not."

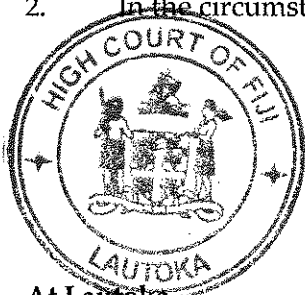
- (45) The crucial question for this Court is whether the Plaintiff is to be accepted and believed in the account he had given of the accident. There is no other evidence anybody can possibly give to avoid the Court in having to make its mind up about whether that is an acceptable account or not. It is simple as that. The Court simply applies the standard test which is simply this; has he discharged the proving of his case on the balance of probabilities? In other words, is the Court satisfied that it is more likely to be correct than not that what he says about the accident is correct? How can the Court possibly proceed when there is a serious credibility problem and as a result no reliance could be placed on his account of the accident? The answer is, it cannot.

(46) The Court should not wear blinkers. There is one aspect of the evidence adduced by the Defendants which is of some concern to the Court. I cannot shut my eyes to the fact that the Second Defendant, 'Shalendra Kumar' deposed that the Plaintiff was standing less than 12 inches away from him when the engine started on its own and going to full throttle, leading to the gearbox exploding and injuring the Plaintiff. Yet 'Shalendra Kumar' did not sustain any injury; not even a scratch mark. Of course, I do not deny for a moment that this fact of the testimony of Shalendra Kumar is open to question. All I am saying is that the Plaintiffs' evidence is highly improbable, highly incredible and worthless. (See paragraphs 16 and 17 above). The Plaintiffs' evidence appeared to be based highly on a reconstruction of events. The Court prefers the evidence of the Defendants (viz, the Plaintiff exposed himself to a hazardous situation) because it appeared to be somewhat logical, consistent, reliable and more likely. The probabilities favored the conclusion that the Plaintiff was standing on the driver's side next to the cab immediately before and at the relevant time of the accident (exposing himself to the danger of being injured). One final word, this is not a criminal case in which I am called upon to allow my imagination to play upon the facts and find a reasonable hypothesis consistent with innocence. A balance of probability is enough. And when the greater probability is that the Plaintiff was standing to the left of the truck driver (the first Defendant) who was standing on the driver's side next to the cab at the relevant time of the accident (exposing himself to the danger of being injured), why should this Court hesitate to find accordingly against the Plaintiff ?

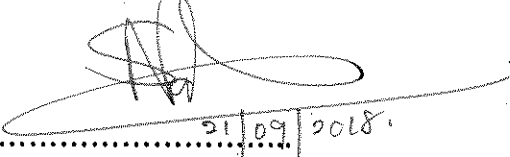
Thus, the Plaintiff has failed to establish liability on balance of probability. That is all what I have to say!!

**G. ORDERS**

1. The Plaintiff's claim is dismissed.
2. In the circumstances of the case, I make no order as to costs.



At Lautoka,  
Friday, 21<sup>st</sup> September, 2018

  
21/09/2018  
Jude Nanayakkara  
[Judge]