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IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 46 OF 1991
(High Court Lautoka Civil Action No. 59 of 1986)

BETWEEN:

WATISONI VUNIVI CHAND LAL	APPELLANTS
-and-	
RAJESHWAR PRASAD RAM NARAYAN ATTORNEY-GENERAL OF FIJI	RESPONDENTS

CIVIL APPEAL NO. 25 OF 1992

BETWEEN:

RAJESHWAR PRASAD	APPELLANT
-and-	
WATISONI VUNIVI CHAND LAL RAM NARAYAN ATTORNEY-GENERAL OF FIJI	RESPONDENTS

CIVIL APPEAL NO. 66 OF 1991

BETWEEN:

RAM NARAYAN	APPELLANT
-and-	
RAJESHWAR PRASAD WATISONI VUNIVI CHAND LAL ATTORNEY-GENERAL OF FIJI	RESPONDENTS

Mr. V. Mishra for Original Plaintiff
Dr. Sahu Khan for Original 2nd and 5th Defendants
Mr. R. Krishna for Original 3rd Defendant
Mr. Moses Gago for Original 4th Defendant

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Date of Hearing : 2nd February, 1993
Date of Delivery of Judgment : 15th October, 1993

JUDGMENT OF THE COURT

By consent of all parties these three appeals, all of which arise out of the same proceedings, have been heard together and it is convenient to deal with them as a single appeal. It is also convenient in order to avoid confusion that we refer to the parties by name or in their original context of plaintiff and defendants rather than as appellants and respondents.

On 11 February 1983 the plaintiff, Rajeshwar Prasad, was a passenger on the tray of truck No. AN857 when it came into collision with another truck, No. AF250. As a result of the collision truck AN857 was turned over and the plaintiff received substantial injuries.

On 10 February 1986 the plaintiff commenced a claim for damages in respect of his injuries. In that action he sued five defendants as follows:

1. Dayals Quarries Ltd, First Defendant, which was the owner of a digger hired to the Public Works Department (PWD) and of which the plaintiff was the operator.
2. Watisoni Vunivi, Second Defendant, who was the driver of truck AN857 at the time of the collision.
3. Ram Narayan, Third Defendant, who was the owner and driver of truck AF250.

4. The Attorney-General, Fourth Defendant, as representing the PWD.

5. Chand Lal, Fifth Defendant, who was the owner of truck AN857.

The plaintiff claimed damages jointly and severally against all five defendants.

It must be observed at the outset that there was a considerable lack of precision in the pleadings, notwithstanding various amendments, and this lack of precision is largely responsible for the tortuous course which the action followed. It was not assisted by the paucity of findings of fact by the Judge, and further confusion arose out of the various appeals which resulted.

Prior to the accident the plaintiff, whose employer was Chand Lal, the fifth defendant, was engaged as a digger operator on a contract being carried out by the PWD. The digger had been hired by the PWD from Dayals Quarries Ltd, the first defendant. The plaintiff normally travelled to and from his work each day in a vehicle provided by the first defendant, but on the day of the accident he travelled on truck AN857 along with other workers. Those passengers were on seats on the tray of the truck which had not been bolted down. Truck AN857 was owned by Chand Lal, the fifth defendant. Various questions arose for argument regarding the possible vicarious liability of Chand Lal and of the PWD and we will deal with these later.

There was a long delay before the action finally came on for hearing before Sadal J on 17 September 1990. The hearing occupied four days spread over about 6 weeks. Decision was then reserved with submissions of counsel given in writing. Judgment was delivered on 28 June 1991. We set out this sequence of events because the time involved and the spasmodic nature of the hearing may well have contributed to the general confusion in the case.

In the result there was a finding that both drivers had been guilty of a lack of care contributing to the accident and liability was apportioned as to 70% against Ram Narayan, the third defendant, and 30% against Watisoni Vunivi, the second defendant. The Judge held that Chand Lal was vicariously liable for the negligence of Watisoni Vunivi. The special damages were fixed at the agreed sum of $3779.60 and the general damages at $15,000. The total damages were then rounded off to $15,800. Judgment was accordingly entered against the second and fifth defendants for $5640 and against the third defendant for $13,160 with costs on the basis of that apportionment. Judgment was entered also against the plaintiff in favour of the first and fourth defendants with costs.

From these judgments there were three appeals:

1. The second and fifth defendants appealed against the judgment entered against each of them on the basis that no negligence had been established against Watisoni Vunivi, the

second defendant and that accordingly neither he nor his employer Chand Lal, the fifth defendant could be liable to the plaintiff.

2. The third defendant, Ram Narayan, appealed against the judgment entered against him on the basis that there was no evidence of negligence on his part contributing to the accident, and that in any event the assessment of 70% contribution was too high.

3. The plaintiff appealed against the judgment entered against him in favour of the Attorney General, the fourth defendant, on the basis that there was vicarious liability of the PWD for the negligence of Watisoni Vunivi. The plaintiff appealed also against the quantum of damages as being too low.

Liability for the Accident

Putting aside for the moment any questions of vicarious liability, it is necessary first to consider the finding of the Judge that both drivers were at fault so as to have contributed to the accident. Unfortunately the Judge has made very few specific findings of fact and his reasoning throughout is sparse in the extreme. We have examined the record with care in order to try and satisfy ourselves as to what the evidence was capable of establishing.

The accident occurred at about 2 p.m. on 11 February 1983 on Monasavu Road between Waikubukubu and Monasavu. The trucks were travelling in opposite directions and met in the vicinity of a bend in the road and a culvert. Truck AF250 driven by Ram

Narayan was loaded with timber. The Judge found as a fact that, as the two vehicles approached each other, Watisoni Vunivi flicked his lights. There was ample evidence to establish that this had occurred. Watisoni said he had flicked his lights about three times, and Ram Narayan acknowledged that he had seen the lights flicked three or four times. The Judge has not made an express finding as to the reason for this having occurred, but he appears to have accepted that it was intended by Watisoni as a warning to Ram Narayan regarding his manner of driving. The Judge then found that this warning had not been heeded by Ram Narayan who had continued without reducing speed.

There was, again, no express finding as to where on the road the impact occurred, but the Judge may have attributed some significance to the fact that Ram Narayan's truck finished up wholly on its incorrect side of the road. The Judge found that the front part of Ram Narayan's truck "had hit the part of the tray near the driver's side of second defendant's vehicle". What is undoubted is that Watisoni's truck was tipped on its side, and Ram Narayan's truck finished up on the extreme edge of the road having travelled on past the other truck so as to stop behind it. It goes without saying that the impact must have been very severe to have turned Watisoni's truck over and for the two vehicles to have finished where they did.

Notwithstanding the absence of precise findings we have no doubt that there was ample evidence to support the Judge's conclusion that there had been a lack of care on the part of Ram

Narayan which caused or contributed to the accident. What the Judge said (p.71 of the record) was this:

> *"The third defendant admits he saw the flicking of lights of second defendant's vehicle. This would have given him a warning but there is no evidence that he applied his brake or slowed down. He just kept driving. He should have realised that there was some risk of a collision and in the circumstances he should have slowed down instead of continuing at that speed. The second defendant was familiar with the route. It appears that he approached the culvert with caution."*

It is clear from this passage that, whatever doubt there may have been as to the precise point of impact, the Judge was satisfied that the third defendant's speed and his failure to heed the warning given to him meant that he was negligent in a manner causing or contributing to the accident. We accept that this was a proper conclusion.

The finding that Watisoni was also at fault presents, however, greater difficulty. There is in the judgment no finding of fact at all as to any act of negligence on the part of Watisoni. It is true that both Ram Narayan and his passenger, Deo Raj Singh, (who was called on behalf of the plaintiff) said that the accident occurred on Ram Narayan's side of the road (although Ram Narayan later amended this to the middle of the road). There is no indication, however, that the Judge accepted that evidence and he seems to have been unable to make any finding as to the point of impact.

It remains the case, however, that the Judge formed the view that Watisoni had failed in some manner to exercise the care which he should have so as to have contributed to the collision. We think it is the obligation of this Court to examine the evidence in order to see whether there was anything which was capable of supporting that view notwithstanding that the Judge himself may not have expressed it. Upon a consideration of the evidence and of the case as a whole we think that there was.

Although the road was for the most part wide enough to permit the two vehicles to pass without difficulty, it is to be noted from the photographs accepted in evidence that the collision occurred in the vicinity of a culvert which was situated at a slight bend and which resulted in a narrowing of the road at that point. The way Watisoni put it in his evidence was, "I was negotiating right hand bend when my motor vehicle tumbled". An understanding of this at once gives point to the comments made by the Judge. He noted that Watisoni had endeavoured to warn the other driver of some kind of approaching danger or difficulty. We have little doubt that this was the change in the road due to the bend and to its narrowing at the culvert. He was critical of Ram Narayan for not having slowed down.

Watisoni's evidence was not only that he gave the warning, but also that, at the time of impact, his vehicle was stationary. The Judge did not believe that evidence and accordingly it must be accepted that Watisoni continued moving.

His unsuccessful attempt to persuade the Court to accept that he had stopped lends credence to the view already expressed that there was a perceived danger in both vehicles proceeding in an attempt to pass in the vicinity of the culvert. The Judge found that Watisoni was familiar with the route and this is consistent with Watisoni's recognition that, having recognised the danger, he ought to have stopped. It was, of course, the obligation of both drivers to do what they could to avoid an accident.

The Judge observed that Watisoni appeared to have approached the culvert with caution. There seems little doubt that his view was that this caution was not in the circumstances sufficient and that Watisoni ought to have stopped. This view of the matter would at the same time explain the degrees of culpability found by the Judge, namely that Ram Narayan was primarily at fault for travelling too fast, but that Watisoni also contributed by not stopping.

We therefore consider that the conclusion reached by the Judge that both drivers were at fault was a proper one, and for similar reasons we are not prepared to interfere with the proportions of liability assessed by the Judge.

Vicarious Liability

The question of vicarious liability was argued before us under three headings, namely :

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1. The vicarious liability of Chand Lal for the negligent driving of Watisoni.

2. The vicarious liability of the PWD for the negligent driving of Watisoni.

3. The vicarious liability of the PWD for the lack of safety of the seating on truck AN 857.

We deal with each of these in turn.

1. The Liability of Chand Lal

A preliminary submission was made by Dr. Sahu Khan on behalf of Chand Lal that there was no sufficient pleading by the plaintiff so as to put the question of vicarious liability on the part of Chand Lal in issue. He referred to para. 6 of the Third Amended Statement of Claim which alleged:

> *"That Truck AN857 was at all relevant times owned by the fifth Defendant and the fifth Defendant is sued in his capacity as the owner of the said truck."*

Dr. Sahu Khan correctly submitted that this allegation was insufficient to support a finding of vicarious liability against Chand Lal. He omitted, however, any reference to para. 12 of the same document which alleged:

> *"That the second defendant had care, control and possession of vehicle No. AN857 with the express and/or implied consent and authority of the fourth and fifth defendants being either servant and/or agent of the fourth and fifth defendants."*

This rather involved pleading was denied by Chand Lal but was nevertheless adequate to give notice that vicarious liability on his part was an issue.

The submission based on the pleading is accordingly not accepted by the Court.

As we have earlier indicated the findings of fact in the Judgment are sparse in the extreme and, so far as Chand Lal is concerned, are confined to the observation that he was the owner of the vehicle driven by Watisoni. An examination of the transcript in the Record, however, shows what his position was, and that evidence was not in dispute.

Chand Lal said that he was employed by Lautoka General Transport Co. which had a contract from PWD. Chand Lal was to transport the PWD workers. For this purpose he supplied his truck and driver, namely Nelsoni. His evidence was, "Nelsoni had full control of the motor vehicle" (Record p. 65). On occasions when Nelsoni was sick he employed his son, Watisoni, to drive the truck, notwithstanding that Chand Lal had forbidden him to allow anyone else to drive it. Watisoni was paid by Nelsoni on these occasions by means of "grog and cigarettes" (Record, p. 63). It is clear that neither Nelsoni nor Watisoni was at any stage employed by the PWD. The task of transporting the PWD workers was to be performed by Chand Lal by means of his truck and driver.

From this factual background we consider the legal principles which apply.

The basic principle is clear, namely that ownership of a vehicle alone is not sufficient to make a person liable for the negligence of the driver. In order to make the owner liable it must be established that the driver was driving the vehicle as the servant or agent of the owner (Rambarran v Gurrucharran (1970) 1 All ER 749). In this case, had Nelsoni been driving the truck at the time of the accident and been negligent in the way that Watisoni was, then the vicarious liability of Chand Lal would have been beyond question because of the fact that Nelsoni was employed as Chand Lal's agent to have control of the truck for the purpose of transporting the PWD workers. However, Nelsoni was not driving. He had authorised Watisoni to drive on his behalf notwithstanding a prohibition against doing so. The principle which applies in such a case is clearly set out in Ilkiw v Samuels and others (1963) 2 All ER 879, a case which has a close similarity to the present case.

In that case the defendant's lorry was driven to the premises of the plaintiff's employers to load bags of sugar. The defendant's driver, Waines, put the lorry under a conveyor and then stood in the back of the lorry to load the bags. When the lorry had to be moved a fellow employee of the plaintiff, Samuels, offered to move it. Samuels was not employed by the defendant. Waines did not enquire whether Samuels could drive. In fact, he could not, and his negligent attempt to do so caused

the plaintiff injuries. Waines had been expressly forbidden by his employers to let anyone else drive. The defendants were held to be vicariously liable for the negligence of Waines in allowing Samuels to drive, because it was a mode, though an improper one, of performing the duties on which he was employed.

Diplock L.J. stated the principle at p.888 in this way:-

> *"Thirdly, the negligence found by the judge was negligence by Waines in his selection of the person whom he authorised to drive lorry. But to make this particular negligent act of Waines negligence for which the defendants are vicariously liable seems to be to involve the tacit assumption that the selection of a person to drive the lorry was one of the things which Waines was employed by the defendants to do. I do not think that it was. He was expressly prohibited from permitting anyone to drive the lorry besides himself.*
>
> *I would however affirm the judgment under appeal on the second and much broader ground. In my view the defendant's liability does not depend on the fact that Samuels was an inexperienced driver who had never driven a lorry in a confined space before, but on the fact that the lorry was driven negligently while being used for the purposes of the defendant's business under the contract of the defendants' servant, Waines, he being his servant employed by them to take charge and control of the vehicle while engaged on the task which was being performed when the accident took place. In my view, the liability would have been the same if Samuels had been a highly experienced driver, provided that his negligent driving on this occasion was the cause of the plaintiff's injuries."*

We think this passage is directly in point in the present case. We are accordingly satisfied that Chand Lal must be vicariously liable for Watisoni's negligence, and the Judge's finding to that effect was correct.

2. The Liability of PWD

The Judge found as a fact that Watisoni was not employed by the PWD, and there is ample evidence to support that finding. What we have already said as to the liability of Chand Lal applies with equal force to establish that there could have been no vicarious liability on the part of the PWD.

Watisoni was subject to the directions of the PWD (and in particular the sirdar) as to certain aspects of what he did, namely the completion of a driving record, the number of passengers to be carried, and the like. But there is no suggestion that he was subject to any direction of the PWD as to the driving of the truck. The act of negligent driving was referable only to the use of the truck for Chand Lal's business and not for the PWD.

We therefore conclude that the Judge correctly declined to hold the PWD vicariously liable.

3. Liability of Lack of Safe Seating

In the course of the hearing in the High Court, and in argument in this Court, some attention was paid to the question of whether there was any liability on the PWD by reason of the lack of safety of the seating on truck AN857. It was apparently the case that the workers carried on that truck were on seats which were not bolted down or otherwise safely secured. It was contended for the plaintiff that the PWD, having undertaken to transport its workers in this way, had failed to carry out its duty of care to those workers and was in this way liable to the plaintiff.

This contention might well have had considerable force, but it was met by the submission that no such allegation had ever been pleaded. On behalf of the plaintiff Mr. Mishra argued that there was a pleading which could reasonably be regarded as raising this issue. He referred to that part of the Third Amended Statement of Claim which alleged:

> *"9. That the collision was caused by the negligence and carelessness in the care and control and management of Motor Vehicle Nos. AN857 and AF250 which were driven by the second and third defendants respectively, details of which are as follows.....*
> *(e) Failure to pay due care and attention."*

We are unable to regard this as a pleading which is in any way directed to the adequacy of the seating on the truck and we must conclude that the PWD (Fourth Defendant) was never joined in issue on this topic.

Perhaps we should add that this may in the end have had little bearing on the result. The impact was so severe that truck AN857 was turned on its side. It seems inevitable that those seated on the back must have been thrown violently off and it could well be the case that secure seating would have done little to reduce the consequences to the plaintiff.

Summary

By way of summary on the question of liability we uphold the Judge's finding that both drivers were at fault in the collision, and that their degrees of culpability were as fixed by him.

We do not agree, however, that there was any basis for a finding of vicarious liability against the fourth defendant. That is a conclusion that there was direct liability for negligence on the part of Watisoni Vunivi, the second defendant, and of Ram Narayan, the third defendant, and to the proportions we have already referred to. There was vicarious liability by the owner of the truck driven by Watisoni Vunivi, namely Chand Lal, the fifth defendant, but no vicarious liability by PWD. Ram Narayan was, of course, the owner of the truck he was driving. The amount of liability falling on Chand Lal would be the same as that of Watisoni Vunivi.

Damages

The trial Judge had assessed general damages at $15,000 and special damages at $3,779.60. However, he entered judgment for the round figure of $18,800 in favour of the plaintiff Rajeshwar Prasad. He ordered Watisoni Vunivi (Original 2nd Defendant) and Chand Lal (Original 5th Defendant) to pay $5,640 as their share, their liability being joint and several. He assessed Ram Narayan's (the Original 3rd Defendant) contribution to be $13,160. He ordered that costs be paid in the same proportion.

Rajeshwar Prasad contends that general damages awarded are inadequate and has appealed to this Court on the following grounds:

> *"1. That the Learned Judge erred in law and in fact applied wrong principles in holding that loss of amenities was not present.*
>
> *2. That the Learned Judge erred in fact and in law in not applying or taking into consideration the multiplier principle in coming to a figure of general damages and did not apply correct principles when considering loss of prospective income.*

3. That the Learned Judge erred in fact and in law in not applying the principle of restitutio in integrum (that a successful Plaintiff is entitled to have awarded to him a sum which will make good to him the financial loss which he has suffered and probably will suffer as a result of accident) in ascertaining quantum of damages.

4. That the Learned Judge erred in not giving proper consideration to the evidence of Doctor Waqabaca in that the Respondent's vision and eye sight had been reduced as follows:-

(a) By one third without glasses
(b) By 19 percent with glasses
(c) the eye disability was quite separate from the ten percent disability assessed by Doctor Tami for the Appellant's other injuries."

At page 72 of the trial record, i.e. at page 4 of the judgment, the learned Judge states that Rajeshwar Prasad "was a humble, poorly paid labourer who probably had no extensive recreational hobbies or other such activities. Certainly loss of amenities was not presented". (Our underlining)

We propose to deal with all 4 grounds of appeal together as they all relate to inadequacy of damages awarded.

At the time of the accident Rajeshwar Prasad was almost 24 years old and in good health. He was a married man with 3 children. By occupation he was a digger operator earning a weekly wage of about $44.00. He was fond of music, played drum and enjoyed soccer.

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The learned Judge himself found that due to injuries received in the accident Rajeshwar Prasad could no longer play drum or play soccer. Further, the Judge made a specific finding on the evidence presented that Rajeshwar Prasad still experienced `sensations of dizziness and pain in his head'; this is some 8 years after the accident. He was satisfied that this condition was probably due to head injuries. Rajeshwar Prasad also cannot stand noise and is unable to work as a digger operator. Uncontradicted medical evidence places his disability at 10%. Furthermore, the Appellant's sight in both eyes has been reduced by about 33% but with glasses the sight impairment is only 19%.

The Appellant also suffered facial injury resulting in scarring and some distortion.

There was, therefore, ample evidence that as a result of injuries received the Appellant has suffered and is suffering substantial loss of amenities and enjoyment of life in addition to the pain and suffering he has undergone. His inability to play a drum, enjoy music, play soccer and his dizziness all contribute to loss of amenities and enjoyment of life. Furthermore, the permanent disfigurement of his face must be a source of continuing psychological anguish impairing enjoyment of normal life.

We, therefore, uphold the Appellant's appeal that the learned Judge erred in law and in fact in holding that evidence as to loss of amenities was not presented.

We are entitled to assume that having held that there was no evidence presented as to loss of amenities, the learned Judge's global figure of $15,000 for general damages could not have included any compensation for loss of amenities. The Appellant is clearly entitled to be compensated for such loss.

As to the complaint that the trial Judge ought to have used the multiplier formula in assessing general damages relating to future loss of earnings we are not persuaded that on the particular facts and circumstances of this case it was incumbent for the Judge to do so.

Although Rajeshwar Prasad is unable to function as a digger operator his disability is only 10%. He is still able to work as a farm labourer although his earning capacity is reduced. In general the multiplier formula is more suited to cases of death or permanent disability to earn a living.

Notwithstanding what we have said about the multiplier it is plain that there was an element of loss of future earnings to be taken into account. It would appear that the Judge was mindful of this as it seems unlikely that the general damages of $15,000 were intended to be based solely on pain and suffering. We consider however, that the allowance for loss of future earnings has not received full recognition. While not being able to make any precise calculation of the sum which ought to be attributed to loss of future earnings we think that the total of damages for the three relevant factors taken together, namely pain and suffering, loss of amenities and loss of future earnings was clearly too low.

Upon a global approach to the matter the award of $18,800 is set aside and in lieu therefore we fix the damages at $24,779.60 which sum includes the special damages of $3779.60. The total damages are to be borne as to two-thirds by the third defendant, Ram Narayan and as to one-third by Watisoni Vunivi and Chand Lal.

SUMMARY

For the reasons we have given we deal with the three appeals as follows :-

Appeal No. 46 of 1991:

The appeals of both Watisoni (second defendant) and Chand Lal (fifth defendant) are dismissed.

Appeal No. 25 of 1992:

The appeal of the plaintiff, Rajeshwar Prasad, against the dismissal of his claim against the PWD (fourth defendant) is dismissed.

His appeal against the quantum of damages is allowed and the damages are fixed at $24,779.60. In accordance with the proportions of liability already referred to there will be judgement in the High Court for $17,345.72 against Ram Narayan (third defendant) and for $7433.88 against both Watisoni and Chand Lal,

The fourth defendant, having successfully resisted the appeal of the plaintiff as to vicarious liability, did not contest the matter of quantum. However, it was a respondent in the other two appeals. Apart from an order for costs the Judge's order referable to it is affirmed, and each appeal against that order is dismissed.

Costs

The matter of costs of the participants other than the plaintiff creates a little difficulty.

The plaintiff joined the 4th defendant (PWD) as a party to the action and lost against it in the High Court. He joined this defendant in his appeal and lost against it. We are not sure whether the other defendants (2nd, 3rd and 5th) sought to make PWD vicariously liable in the High Court, but they certainly did in each of their separate appeals, and lost.

It can be noted that the 2nd and 5th defendants were represented by the same lawyers, and their interests were really the same.

In these circumstances we consider the proper order for costs is as follows:

Plaintiff's costs both in the High Court and in the Court of Appeal are to be paid by the 2nd, 3rd and 5th defendants in the proportions we have already mentioned.

Fourth defendant's (PWD's) costs in both the High Court and in the Court of Appeal are to be paid as to one-third by the plaintiff, one-third by the 2nd and 5th defendants and one-third by the 3rd defendant.

Second, third and fifth defendants are each to bear their own costs both in the High Court and in this Court.

Orders will be made accordingly.

.....
Mr Justice Michael Helsham
President, Fiji Court of Appeal

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Sir Moti Tikaram
Resident Justice of Appeal

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Sir Peter Quilliam
Justice of Appeal