

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0033 OF 1994S

(High Court Civil Action No. 363 of 1989) '

BETWEEN:

TACIRUA TRANSPORT COMPANY LIMITED

APPELLANT

-and-

VIREND CHAND f/n Ragho Prasad

RESPONDENT

Mr H. Lateef for the Appellant
Mr Tevita Fa for the Respondent

Date and Place of Hearing : 23rd February, 1995, Suva
Date of Delivery of Judgment : 2nd March, 1995

JUDGMENT OF THE COURT

On 11 December 1988 the Respondent, who was employed by the Appellant as a bus driver, was being driven to his home in a Toyota land cruiser by Amal Jeet Singh, another employee of the Appellant. As a result of Singh's negligent driving there was an accident in which the Respondent received a number of injuries. He commenced an action against the Appellant claiming special damages of \$2000 for medical and transportation expenses, special damages for loss of earnings, and general damages.

Liability having been admitted by the Appellant judgment was entered against it on 22 January 1991 with damages to be assessed by the Chief Registrar. The hearing as to damages was commenced before the Chief Registrar, but extended over more than a year, by which time the Chief Registrar had been appointed a Judge of the High Court. He therefore completed the hearing in that capacity. He fixed the damages as follows:

<i>"Special damages</i>	\$500	
<i>Interest thereon (see infra)</i>	\$238	\$738
<i>Loss of Earnings</i>	\$4860	

Interest thereon (see infra)	\$2560	\$7420
Loss of prospective earnings	\$7488	\$7488
General damages - pain and suffering and loss of amenities of life	\$20000	
Interest thereon (see infra)	\$9500	\$29500
		<hr/>
		\$45146"
		<hr/>

From this decision the Appellant now appeals upon the following grounds:

- "1. THAT the learned Trial Judge erred in law in awarding the sum of \$500.00 (FIVE HUNDRED DOLLARS) in special damages when no special damages was proved by the Respondent.
2. THAT the learned Trial Judge erred in law in awarding loss of earnings when there was ample evidence that the Respondent was capable of driving a bus.
3. THAT the learned Trial Judge erred in law in awarding the Respondent \$20,000.00 (TWENTY THOUSAND DOLLARS) in general damages for pain and suffering for such minor injuries as those suffered by the Respondent.
4. THAT the learned Trial Judge erred in law in awarding ten per cent interest on the damages when there was ample evidence that the Appellant was always prepared to pay a reasonable amount and also the delay was caused by the Respondent himself.
5. THAT the learned Trial Judge erred in law in awarding 10% interest on all the damages assessed when the Respondent failed to ask for interest in his pleadings nor was it raised in the submissions filed by his counsel."

We deal with these in turn.

1. Special damages - medical and transportation

There was no detailed evidence of any actual expenditure by

the Respondent on these matters although, as the Judge observed, there must have been some such expense. The Respondent was treated at the C W M. Hospital in Suva and for that purpose had to make a number of trips between Nausori and Suva.

In British Transport Commission v Gourley (1956) A.C.185 Lord Goddard stated that special damage "has to be specially pleaded and proved. This consists of out of pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation."

Similarly, Devlin J. in Hayward v Pullinger and Partners Ltd (1950) W.N.135 observed that unless special damages were contained in the Statement of Claim, evidence to establish them could not technically be relied on at the trial.

While we realise that the Judge was endeavouring to give some recognition of the fact that the Respondent must have been put to some expense, we are unable to see how there was any basis for him to make the award that he did. No specific sums were claimed in the Statement of Claim, and the Respondent in his evidence has given no indication of the number of trips he made for medical treatment. While the absence of receipts and other documents by reason of flood damage may not have been fatal there was in the end altogether insufficient evidence to enable a calculation to be made of the amount which should be awarded. In the course of the hearing in this Court, however, counsel for the Appellant indicated a sum of \$100 would be regarded as sufficient to meet the medical and transportation expenses and we understood counsel for the Respondent to agree that that sum would be accepted.

2. Special damages - loss of earnings

The Respondent was entitled to recover his proved loss of earnings from the date of the accident to the date of judgment. He claimed \$65 per week under this head. He was, however, paid his full wages by the Appellant from the date of the accident to

6 May 1989. It seems that during virtually the whole of that time he was working full time as a bus driver but he was then dismissed because of his inability to continue full time in that employment. Thereafter he took occasional temporary employment but for most of the time was unemployed. The medical opinion was that he was able to do certain kinds of work, and in particular as a driver, but could not do that for long periods. In those circumstances he is unlikely to have been able to obtain regular employment.

The Judge's method of calculating loss of earnings was to assess the proportion of a full working life of which the Respondent was capable and to apply that proportion to the period from 6 May 1989 to the date of judgment on the basis of the Appellant's pre-accident earnings. In this way he arrived at a figure based on two-thirds of the pre-accident wage, that is a loss of one-third.

There was a number of ways in which this head of damages could have been approached, but we find no error in the approach adopted by the Judge. We find it necessary, however, to differ from him in the actual figures which should be used in that calculation. The Judge adopted \$55 as the nett weekly wage at the time of the accident. The wages sheets produced in evidence show \$55.20 to have been the normal gross weekly wage, but there was deducted from that tax and provident fund payments. This left a nett wage of \$47.06. For present purposes, however, the provident fund payment should not be deducted as this was for the Appellant's benefit. Accordingly the correct nett figure for the calculation of loss of earnings was \$50.91. One-third of that is \$16.97, but it is reasonable to adopt a figure of \$17. The Judge's award of \$18 per week for 270 weeks should therefore be varied to \$17 per week for that period, a total of \$4580. Ignoring interest this is a reduction of \$270.

3. General damages

The amount awarded for general damages was \$20,000. This

was for pain and suffering and loss of enjoyment of life. For the Appellant it was argued that the injuries suffered by the Respondent were minor and did not justify the amount awarded.

It must first be observed that the amount for general damages is in the discretion of the Court. That discretion must, of course, be exercised judicially and upon the basis of the evidence given. So long, however, as there is evidence upon which the damages fixed could have been based then this Court will not interfere with the amount unless it can be seen to be plainly wrong. Opinions as to general damages may often vary widely without any of those opinions necessarily being wrong. We must therefore enquire as to whether there was evidence upon which an award of \$20,000 could be based.

Unfortunately the medical evidence was a good deal less informative than might have been hoped, but a number of matters emerged clearly enough.

The injuries to the Respondent as recorded on the first examination at the hospital were:

1. *Swelling of nose with Epistaxis.*
2. *Laceration, swelling and tenderness of right shoulder.*
3. *Superficial laceration on posterior aspect of right elbow.*
4. *Laceration on right knee.*
5. *Moderate to extreme tenderness on the left lower chest. An X-ray subsequently disclosed fractures of two ribs.*

The Respondent was off work for 3 weeks and then resumed on a virtually full-time basis for 20 weeks. Throughout that period, however, he was continually complaining of pain in various parts of the body. Some of this pain may well have been unconnected with the injuries received in the accident, but the

doctors appear to have accepted, as did the Judge, that there would have been some continuing pain which was related to the accident. Certainly it was sufficient for the Respondent to feel he was unable to continue his employment and he was accordingly dismissed.

Upon examination shortly before the hearing the doctors were agreed that the Respondent had been left with some permanent partial disability, although their estimates of the extent of that varied. He was considered to be fit for light work only. A limitation in the movement of his right shoulder was the main reason for his inability to undertake full-time work as a driver. In addition he had an obvious deformity of the nose and a deviated nasal septum which interfered with his breathing and may lead to other complications in the future. He also had a facial deformity resulting from a fracture of the right cheek bone. There was a paralysis of the muscles associated with that fracture which will affect his eating, talking and facial expressions.

These findings were accepted by the Judge and were the basis upon which an assessment of damages had to be made. As mentioned previously, opinions as to the proper measure of damages could vary quite widely, but there is little doubt that there was ample evidence to entitle the Judge to regard the degree of pain and suffering and loss of enjoyment of life as significant.

In these circumstances we can see no basis for saying that the award of \$20,000 was altogether out of proportion and we are not prepared to disturb it.

4 and 5. Interest

We can deal with these two grounds together as they both involve the question of the power of the Court to award interest rather than the rate at which interest should be paid.

Section 3 of the Law Reform (Miscellaneous Provisions)(Death

and Interest) Act Cap.27 provides:

"3. In any proceedings tried in the (High) Court for the recovery of any debt or damages the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages ..."

This provision must, however, be regarded as subject to the general provision that a claim for interest, as for any other relief, must first be pleaded. This was a matter considered by this Court in Usha Kiran v Attorney-General of Fiji F.C.A. No.25 of 1989, delivered on 23 March 1990. In that case the Court noted the English rule under which it is mandatory to plead specifically any claim for interest. The Court observed that there was no comparable rule in Fiji but, following the reasoning in the English Supreme Court Practice ("White Book" - 1991 edition para. 18/8/10), considered that interest, if sought, should be specifically pleaded. That judgment was followed and applied in Attorney-General of Fiji v Waisale Naicegulevu F.C.A. No.22 of 1989 delivered on 18 May 1990. We see no reason for departing from what is now the established practice of this Court.

In the present case, not only was there no claim for interest in the Statement of Claim, but the topic of interest was apparently not raised at the hearing and is not referred to at all in the written submissions made to the Judge on behalf of either party. In these circumstances there was no power for the Judge to include the provisions for interest in his assessment of damages.

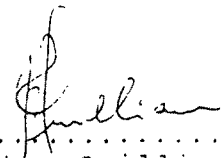
In the result the appeal must be allowed and the Judgment varied as follows:

1. *The special damages of \$500 for medical and transportation expenses are reduced to \$100.*
2. *The loss of earnings is reduced from \$4860 to \$4590.*

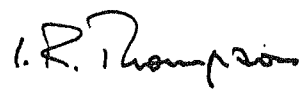
- 3. The awards of interest of \$238, \$2560 and \$9500 (totalling \$12,298) are deleted.

The total amount for which judgment should be entered for the Respondent in the High Court is accordingly reduced from \$45,146 to \$32,178. The Respondent remains entitled to his costs in the High Court, although based on the reduced amount.

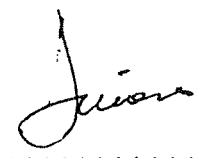
The Appellant, having succeeded in its appeal, is entitled to costs in this Court.



.....
 Sir Peter Quilliam
Judge of Appeal



.....
 Mr Justice Ian R. Thompson
Judge of Appeal



.....
 Mr Justice J.D. Dillon
Judge of Appeal