IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0018 OF 1996
(High Court Civil Action No. 22 of 1990)

BETWEEN:

LAUTOKA CITY COUNCIL

APPELLANT

-and-

ANARE ROBINSON

RESPONDENT

Mr. A. Patel for the Appellant
Mr. R. P. Chaudhary for the Respondent

Date and Place of Hearing : 23 May 1997, Suva
Date of Delivery of Judgment : 29 May 1997

JUDGMENT OF THE COURT

This appeal is against the Judgment of the High Court in favour of the Respondent in a personal injury action alleging negligence against the appellant.

On 24 September 1988 at Churchill Park in Lautoka which is a sports ground owned by the appellant, a rugby match had just been concluded. At the eastern or scoreboard end of this ground had been parked a portable stage mounted on roller/wheels. At the conclusion of the match an

employee of the appellant coupled up a ten ton tractor-roller to this stage. He then proceeded across the park amongst the spectators who were making their way to the exits. The respondent approached this stage to join a number of other young people who had already clambered on to it. He intended to do likewise. However, his attention was drawn to a white stone being pushed forward by one of the roller wheels. An elderly man walking beside the stage asked him to remove the stone. The respondent believing this man was another of the appellant's employees obeyed and moved under the stage. He picked up the stone and threw it clear. Unfortunately as he moved out from under the slow moving stage his sandal was caught and he was dragged under a roller/wheel. As a result his right leg was crushed and the resultant injuries necessitated the amputation of his lower right leg about one inch below the knee.

The respondent at the time of the accident was nearly 14 years old. By his mother he claimed against the appellant unspecified damages for pain and suffering, loss of amenities of life, and loss of earning capacity. Interest and special damages were also claimed.

In giving Judgment Lyons J found that negligence had been established and fixed general damages under those three headings at a total of $90,000.00 plus interest of $11700.00 on portion of the award calculated at 9% p.a. for 6½ years and special damages of $780. He assessed the respondent's contributory negligence at 10% and reduced the total award to $92,232.00. It is against that Judgment that the appellant now appeals and the respondent cross appeals.

Mr. Patel for the appellant advanced three principal grounds in support of his appeal. Firstly he submitted that the moving stage did not constitute an allurement or by itself a dangerous situation. Rather it was, so he said, the respondent himself who created the danger by going under the slow moving stage. As a consequence he claimed that the respondent was the direct and immediate cause of the injuries that he sustained.

But evidence at the trial disclosed that a lady teacher who was present had made the observation that somebody was going to get hurt because of the children and young people who were on the stage. Yet the driver of the tractor-roller took no steps to either stop the vehicle or clear the children from off the stage. Rather his failure to take any such action was itself an encouragement for the respondent to move towards the stage for the purpose of climbing on to it. In our opinion there was ample evidence for the learned trial Judge to conclude that the moving stage was in fact an allurement.

Secondly, Mr. Patel relied on the direction given by the unknown third party to the respondent to remove the stone from under the stage. In responding to that direction the respondent believed the old man was an employee of the appellant. But in relying on that evidence to support the defence of *novus actus interveniens* the appellant accepts that there was indeed such a person who had given instructions to the respondent to remove the stone from beneath the moving stage.

Lyons J rejected that defence and on the evidence, we consider he was justified in doing so. The negligence which lead to this unfortunate accident was caused by the appellant moving the stage

before the ground had been cleared and so creating the attraction for all those children who were already on it and to the respondent who moved towards it with the intention of also climbing on to it. Consequently it was the actions of the appellant that created the very risk of injury. As Mason CJ said in March v E.M.H Stramare Pty Ltd (1991) A.L.J.R 334 at 339:-

> ***"As a matter of logic and commonsense, it makes no sense to regard the negligence of superseding cause of novus actus interveniens when the Defendant's wrongful conduct has generated the very risk of injury resulting from the negligence of the Plaintiff or the 3rd party and that injury occurs in the ordinary cause of things. In such a situation, the Defendant's negligence satisfies the "but for" test and is properly to be regarded as the cause of the consequence because there is no reason in commonsense, logic or policy for refusing to so regard it."***

In our opinion the learned trial Judge was correct in finding that the directions given by the third party cannot excuse the appellant.

Thirdly Mr. Patel submitted that the damages awarded were manifestly excessive; that the interest had been incorrectly assessed; and that the 10% allocated for contributory negligence constituted an error both in law and in fact. The learned trial Judge has apportioned the general damages as to $20,000 for the past pain, suffering and loss of amenities from the date of the accident on 24 September 1988 to the date of Judgment - 19 April 1996, a period of 7½ years; and as to $30,000 for all the future pain suffering and loss of amenities. At the date of Judgment the respondent was 21½; he could therefore have a normal expectation of life to age 60 or 65 - i.e. some

40 years or more. Turning now to the award of $40,000 for future loss of earning capacity. The learned trial Judge explained the reasons for this assessment by taking into account the severe employment disadvantages the respondent would have to confront for the rest of his life as a result of the 45% bodily disability the accident had caused. There can be no doubt those disadvantages will in future be very real and certainly severe. Under no circumstances can it be suggested that this award is disproportionate to the injuries sustained so as to justify our interfering with it. In fact the general damages awarded are in line with the comparative awards set out in the written submissions presented to us by counsel for the respondent.

We are however concerned about the rate of interest which was fixed at 9% for 6½ years. Mr. Chaudhary conceeded that the normal commercial rate of interest for fixed deposits was 6½% and that is the rate we consider appropriate.

Mr. Chaudhary on behalf of the respondent made submissions in support of this cross appeal to the effect that no contributory negligence should be attributed to his client. We do not accept that submission. The 10% reduction we consider is appropriate. The cross appeal is refused.

The appeal in so far as it affects the award of interest is allowed. Interest will now be $8450.00. In all other respects the original award is upheld.

Counsel agree that costs in the Court below will only accrue from 1 July 1991. The respondent is awarded costs of this appeal but not on the cross appeal, such costs to be assessed by

the Registrar if the parties cannot agree.

The Orders of this Court therefore are:-

1) The appeal, except as to the variation of interest, is dismissed.

2) The cross appeal is dismissed

3) Costs to respondent as already ordered.

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Sir Moti Tikaram
President Fiji Court of Appeal

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Sir Maurice Casey
Judge of Appeal

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Mr Justice Dillon
Judge of Appeal

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