IN THE FIJI COURT OF APPEAL
AT SUVA

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0065 OF 1995S
(High Court Civil Action No.51 of 1993)

BETWEEN:

ROTHMANS PALL MALL (FIJI) LIMITED — APPELLANT

-and-

EDWARD NARAYAN — RESPONDENT

Mr. B. N. Sweetman for the Appellant
Mr. H. A. Shah for the Respondent

Date and Place of Hearing: 24 February 1997, Suva
Date of Delivery of Judgment: 28 February 1997

JUDGMENT OF THE COURT

The Respondent, Edward Narayan, was awarded damages and interest of $81,200 against the Appellant (Rothmans) by Sadal J. in the High Court at Lautoka on 22 September 1995 for the injuries he suffered in an accident on 26 October 1990 while travelling as a passenger in a car driven by William Amputch, a fellow employee of Rothmans. His Lordship found that the accident was due to the driver's negligence while in the course of his employment, rendering Rothman's liable. The Company appeals against that finding and against the amount of the damages. Mr Amputch had also been sued and allowed judgment be given against him by default. There could be no argument about his negligence and the only issue of liability in this appeal is about Rothman's responsibility as his employer.

Liability

Mr Narayan had joined Rothmans as a promotional repesentative on 2 October 1990 and after an initial training period was engaged in promoting and selling its cigarettes in the area from Sigatoka to Raki Raki, for which he was supplied by his employer with a car and operated from his home at Lautoka. His Lordship found that his work was not confined between the hours of 8 am and 5 pm, and involved visiting shops, supermarkets and villages selling and promoting his employer's products. Mr Amputch had trained the respondent at Suva. He had been working with Rothmans under similar conditions since October 1989, and also had a Company car.

On 25 October 1990 Mr Narayan returned to his home at Lautoka from Raki Raki where he had been working with Mr Amputch. The latter arrived later in his Company car with a young woman. They had a meal and drank beer, and Sadal J. found they went to a night club, and around midnight Mr Amputch decided to return to Suva. Mr Narayan accompanied him, and His Lordship seems to have accepted that he had personal reasons for the trip. It was not clear whether the young woman was to be dropped off at her home on the way past Nadi, or was being taken on to Suva as well. The accident happened at Nawai some distance further along from Nadi, when the car ran off the road.

His Lordship said it was not in dispute that Mr Amputch was at Raki Raki in the course of his employment and had decided to return that night by Queens Road to Suva, where he had his office. It is not clear from the evidence whether he did have an office in Suva, or merely worked out of his home there, as Mr. Narayan did from Lautoka, using it to store the cigarettes and other products taken on the road to their respective territories. Mr. Sweetman submitted that he was doing no more than returning home after his day's work at Raki Raki. However, Mr. Amputch was called by the appellant and said in cross-examination that his base was Suva and that he was returning there on business. This accords with the respondent's evidence about the way employment as a Rothman's represetative was conducted from a home base. Accordingly we agree with His Lordship that Mr. Amputch's journey to Suva that night was made in the course of that employment; he was doing something he was employed to do - see **Hilton v Thomas Burton Ltd** [1961] 1 All ER 74, 77. While he may have departed from that employment in visiting the respondent's house for dinner and socialising afterwards, he was back on its course and on the way to Suva when the accident happened.

There was a Company notice to staff of which Mr Amputch was aware, that during working hours all non-Company personnel

must have prior management approval before travelling in a Company vehicle; after working hours, only immediate family were allowed, and others must be approved. It concluded with a warning that the Company would not be responsible for injuries to non-authorised personnel. Mr Amputch said he did not tell the respondent about this instruction while training him, and the latter said he did not see it. Accordingly, there could be no suggestion that he was aware of the Company's disclaimer of responsibility, and a defence of "volenti non fit injuria" was not pursued on appeal.

It was submitted for the appellant that even if Mr. Amputch could have been acting within the course of his employment in driving to Suva, nevertheless his action in giving an unauthorised lift to his two passengers took him outside its scope. Mr. Sweetman referred us to a number of decisions in similar cases in which the Court concluded that because of such misconduct, the vehicle was not being driven on the employer's business. His Lordship dealt with this submission by referring to the well-recognised distinction between prohibitions that limit the sphere of employment and prohibitions that deal only with conduct within that sphere. The distinction was recognised by this Court in Attorney General v Kamla Wati and Mangaiya (Civil Appeal No. 19 of 1984). In the circumstances of this case Sadal J. was entitled to conclude that the prohibition about

carrying passengers fell within the second category, and we agree that Mr. Amputch was doing nothing that took him outside the scope of his employment at the time of the accident. Accordingly the appellant was vicariously responsible for the respondent's injuries.

Damages

No special damages were proved nor was there any claim for future economic loss. His Lordship awarded $60,000 general damages to cover pain and suffering both past and future and loss of amenities and enjoyment of life. In addition he awarded $10,000 for the possibility of future nursing care, and interest on the total at 4% p.a. from the date of the accident to the date of trial.

At the time of the accident in October 1990 the respondent was about 25, and had been married for some 3 years with 2 children. He was rendered unconscious and taken to Nadi hospital, and then transferred to Lautoka. Hospital notes describe multiple facial injuries, lacerated right hand with severed tendons and a closed comminuted fracture of the left femur. The wounds were treated, the tendons repaired, a rod was inserted in the fractured femur, and he was discharged on 1 December 1990. He was re-admitted for removal of the rod on 6

May 1991 and discharged 2 days later. Unfortunately there was a misunderstanding about his follow-up; the fracture had not re-united and there were complications requiring the re-insertion of the rod and bone grafting; after his discharge on 25 February he went in again on 14 September 1992 for 8 days for treatment of the quadriceps muscle contracture, followed by a further visit in October for manipulation under anaesthesia. He had two further short admissions in May and June 1994 when chronic osteomyelitis was diagnosed.

Apart from the lengthy period of pain and disability arising from these problems for some 3½ years after the accident, Mr. Narayan has been left with a stiff knee and a leg which is significantly shorter than the other and is turned outwards. Probably his worst affliction is a suppurating and unpleasant - smelling abscess on his thigh from the bone disease which will be permanent, soiling his trousers and bed linen. It requires dressing twice a day. The metal rod in his leg is a constant source of pain and discomfort, affecting his ability to have sexual intercourse.

As a result of the strain of caring for him after the accident his wife left him, taking the children, for about a year. When he was able to get back to work he found difficulty in getting employment, but had a job with a radio station at the

time of trial, although he said he had been missing work because of his problems and had been warned twice. Before the accident he said he was keen on sports and was a good soccer and tennis player, representing his High School, but is unable to play now. He also said he was right handed but now can hardly use that hand.

His Lorship traversed the medical evidence and referred length to the decision of this Court in **Attorney General of Fiji Dr Herbert Elliot v Paul Praveen Sharma** (Civil Appeal No. 41 of 1993). It upheld an award of some $60,000 general damages, after commenting that recent Fiji awards had been "somewhat below" that level and "well below" figures that might be thought appropriate in August 1993. Mr. Sweetman pointed out that the permanent disability in that case - amputation of the leg of a young single man - was worse than that in the present case. Insofar as one can make a comparison in such cases, it is difficult to discern a significant difference in the deprivation of the quality of life suffered by these two victims. Mr. Narayan has many of the problems that might be encountered by a man with an artificial limb; in addition, he has continuing discomfort from the loose steel rod, and a lifelong problem with bone disease and the discharging abscess. It is arguable that a straightforward amputation might be a preferable option. When to this catalogue of disability there is added the years of unsuccessful treatment,

we are satisfied that a high award was justified and we are not prepared to say that $60,000 was excessive.

However, the award of an additional $10,000 for nursing attendance cannot stand. With respect His Lordship seems to have been persuaded by speculation rather than proof that such a sum - or indeed any sum - was likely to be required to cover future nursing services. There was no claim to this effect and no evidence to support it, and Mr. Sweetman rightly complains that the defendant had no notice of it and no opportunity to contest it. We were informed by his counsel that Mr. Narayan is able to attend to dressing the wound himself.

The final point was the date when the interest at 4% should start. His Lordship awarded it from the date of the accident but Mr. Sweetman informed us that Fiji practice is to take the date the proceedings were issued as the starting date, and we did not understand Mr. Shah to disagree, although he said there were cases when by agreement it ran from the accident date. Mr. Sweetman referred us to the decision of the House of Lords in **Wright v British Railway Board** [1983] 2 All ER 698, in which the date of commencement of the proceedings was taken. There are arguments for selecting either date. Counsel did not dispute that interest was a matter in the discretion of the trial judge and we are not disposed to interfere with his decision that it

should run from the date of injury to the date of trial.

The result is that the appeal is allowed to the extent of reducing the damages to $60,000. As the appellant has only partially succeeded, we make no order as to costs.

Sir Maurice Casey
Judge of Appeal

Mr. Justice Gordon Ward
Judge of Appeal

Mr. Justice Peter Hillyer
Judge of Appeal

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