

IN THE FIJI COURT OF APPEAL AT SUVA
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO: ABU0064 OF 1996S
(High Court Civil Action No.HBC 0314 of 1987)

BETWEEN:

LOGANANDAN PILLAY

Appellant

AND:

SUBHASH CHAND

1st Respondent

THE NEW INDIA ASSURANCE COMPANY LTD

2nd Respondent

Coram:

The Rt. Hon. Sir Maurice Casey, Presiding Judge
The Hon. Mr Justice R. Savage, Justice of Appeal
The Hon. Mr Justice J.D. Dillon, Justice of Appeal

Hearing:

Tuesday 18 August 1998

Counsel:

Mr S. Maharaj for the Appellant
Mr M. Young for the 1st Respondent
Mr V. Kapadia for the 2nd Respondent

Date of Judgment: Friday 28 August 1998

JUDGMENT OF THE COURT

This appeal is from the judgment of *Lyons J*, delivered on 1 November 1996 seeking orders -

- 1) That the Judgment be set aside and Judgment given to the appellant;
- 2) That execution of the Judgment be stayed pending the final determination of this appeal.

The amended notice of appeal sets out 20 grounds of appeal. Counsel for the appellant suggests they may be conveniently considered under 4 broad headings as follows:-

- 1) vicarious liability;
- 2) Motor Vehicles (Third Party Insurance) Act - Liability of Third Party Insurance Company;

- 3) inefficient and/or insufficient legal representation; and
- 4) quantum of damages.

Since the filing of the appeal on 6 December 1996 the appellant has filed a notice of motion "for leave to adduce further evidence or facts by way of affidavit evidence during the hearing of this appeal as contained in the affidavit of Loganandan Pillay the abovenamed appellant and the affidavit of Muni Nadan". It is appropriate that we deal with this application before proceeding to a consideration of the appeal proper.

Muni Nadan of Lautoka, driver is not a party to these appeal proceedings. He was the first defendant in the High Court where he admitted in his Statement of Defence dated 15 July 1987 that he "was at all material times driver of motor vehicle registration no. BW 135" and that he "was driving the said motor vehicle at all material times as servant and/or agent of the second defendant" that is the present appellant who was at all times the owner of that motor vehicle.

On 2 September 1985 this motor vehicle was involved in a collision while being driven by the first defendant; the first respondent was a passenger at the time of the accident; it was alleged that the accident was due to the sole negligence of the first defendant; and that as a result of the collision the first respondent suffered serious injuries which are set out in the statement of claim and described in detail in the evidence of the orthopaedic surgeon Dr Krishna in the course of the trial.

Now more than 11 years later the appellant (the second defendant in the court below) seeks leave to adduce further evidence or facts by way of affidavit evidence of himself and the first

defendant (in the court below) against whom no judgment was entered. He is therefore not a party to this appeal.

The nature of the evidence sought to be admitted by the appellant may be briefly summarized as follows.

He now claims to have contracted to hire his van to the first defendant in return for a rental payment of \$100 per week and an undertaking to be responsible for all repairs and running expenses. The appellant denied that there was any employer/employee relationship. Rather it was a purely contractual arrangement.

That upon receipt of the writ and statement of claim he gave it firstly to his Third Party insurers the second respondent, and then to their solicitors, Messrs Krishna & Co. Subsequently he was told by Mr Krishna that the Third Party insurers were now denying liability and that he should consult another solicitor to look after his interests. As a consequence he consulted Mr Charles Gordon.

Mr Gordon died in 1990 before the action came to trial. He then engaged the services of Mr Shah who acted for him from 1990 up to the date of the trial in 1996. During the course of the medical evidence provided by Dr Krishna who was the first witness in the trial on 3 June 1996 Mr Shah's initial involvement was recorded by His Honour as follows:-

"Dr D. Krishna - Sworn on Ramayan in English. Care of Lautoka Hospital

Orthopaedic Surgeon (Post-Graduate).

Expects to be appointed Orthopaedic Consultant. He has possession of Hospital file on Mr Chand P.

Ex.1 Hospital File Re Plaintiff.

Ex.2 Bundle of medical reports - 24/1/94, 16/12/85 & 24/11/87.

I assess his total disability as about 30% of whole body.

(Mr Shah then arrived in Court and announced his appearance. The Court advised him of the progress in the matter thus far and brought him up to date on the evidence. Mr Shah apologised for the mix-up. Accepted.)

Witness continued ..."

Mr Shah's only other involvement in the trial is also recorded at the conclusion of Dr Krishna's evidence -

"No Cross-examination by Mr Shah.

"No Re-examination.

Court addressed by Mr Shah.

The 1st and 2nd Defendant admit liability on claim. I wish to call the 2nd Defendant LOGANANDAN to put in the policy, in issue to you. I seek leave to call him for that purpose. Leave granted to call (interpose) LOGANANDAN.

*LOGANANDAN - Sworn on Ramayan in Hindi -
Lautoka businessman.*

Ex.3 Policy of Insurance tendered.

I have the van. I used to carry goods in it. I was allowed to carry owner of goods. The van had a seat for that purpose. When purchased it was a brand new vehicle.

When bought, the seats in back were removed by Transport Control Board. Not allowed to carry passengers for reward. It was for goods.

Ex.4 Proposal Form for insurance.

*Class 3(a) is policy. No restriction to carry owner of goods.
When I ask driver on 2/9/85 to carry only the owner of goods.*

Mr Shankar - cross-examination

I do not know if Plaintiff was the owner of the goods. I was told so by my driver after accident. Driver is not here today. I do not know if owner pay extra premium. Transport Control Board said the van was passed as I had removed the seats.

Xexam Nil - Mr Cowie

No re-examination.

What follows after the appellant completed his evidence is also recorded -

"Mr Shah applied to withdraw. Mr Shankar no objection. Mr Cowie, no objection. Mr Cowie pointed out that the dispute re insurance is with Mr Shankar. Mr Cowie said it would be adviseable if Mr Shah stayed.

"The Court put to Mr Shah what Mr Cowie said and suggested he stay. Mr Shah said he is happy to withdraw. Mr Shankar's defence does not attack his client, it just denies liability. Court allowed Mr Shah and his client to withdraw if they wish. They withdrew and left the Court."

The appellant now applies to this Court to give evidence that Mr Shah had no authority to admit liability on his behalf and further that he failed to provide effective and sufficient legal representation.

The evidence proposed to be submitted by the first defendant in the court below - that is the driver of the van at the time of the accident - supports the contractual arrangements claimed by the appellant and disclaims any relationship of employer and employee.

Mr Maharaj relies on Rule 22(2) of the Court of Appeal Rules to support his application to adduce further evidence -

“22 (2) The Court of Appeal shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner:

Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds.”

While it is conceded that this Court does have “full discretionary power” as emphasised by Counsel the proviso limitations referred to above must not be overlooked. The principles to be applied were stated by Lord Denning in Ladd v Marshall (1954) 3 All E.R. 745 and adopted by this Court in Coir Industries Limited v Louvre Windows Limited F.C.A. - vol. 30 of 1984 as follows:-

- (a) the evidence could not have been obtained prior to trial by reasonable diligence;
- (b) it must be such as could have had substantial influence on the result;
- (c) it must be apparently credible.

There can be no doubt that where there has been a full hearing as in this case it would be “a grave injustice if a successful party were deprived of his Judgment by the emergence of material which should have been before the Court originally” refer: Australia and New Zealand Banking Group Ltd v Merchant Bank of Fiji 1994 F.C.A. at page 581.

The appellant had no less than three solicitors acting for him at different times between the date of the accident on 2 September 1985 and the date of the trial on 3 June 1996. The evidence now sought to be admitted was not only available at the trial; it was available at the date of the accident. The appellant's failure to produce the evidence now applied for really presents him with an insuperable difficulty. This more so when it was available to his three solicitors throughout the 11 years before the actual trial. Of course, the appellant now alleges that his difficulties emanate from his counsel's representation or lack of it on his behalf. He put it this way -

"The Appellant was denied his day in Court due to the actions of Mr Shah. The Appellant was denied his right to have his case properly defended. The Appellant should not be made to suffer as a result of Mr Shah failing to efficiently and/or effectively representing him."

The appellant's difficulty with that submission is that we have no information why counsel conducted the appellant's defence in the way that he did. Normally, there would be an affidavit disclosing that information. How and why counsel conducts a defence in a particular manner should not simply be left to conjecture or assumption.

In our view it would be quite unfair to the 1st respondent to allow the appellant to produce fresh evidence given the circumstances and background that we have referred to above. We therefore reject the appellant's application for leave to adduce further evidence.

We turn now to consider the four grounds of appeal argued before us.

Vicarious liability

Mr Maharaj argued this question on the assumption that the Statement of Defence filed by the appellant's solicitor did not in fact exist. Further he submitted that negligence was not established against the appellant nor was there any evidence that the first respondent was employed by him. The appellant's difficulty of course is first, that the statement of defence admits that the first respondent was his servant and, second, that Mr Shah unequivocally advised the Court on his behalf in the course of the trial that -

"The 1st and 2nd Defendant admit liability on claim."

The appellant in addition gave evidence which in no way retracted or refuted the admission of liability both in his Statement of Defence as well as by his counsel Mr Shah. His Lordship in the court below as a consequence was perfectly justified in deciding that "... The relationship of master and servant has been admitted in the pleadings" and thus holding that the claim against the appellant succeeded on that basis. In passing we record that His Lordship was in error in stating that the driver of the vehicle was indemnified by his employer by virtue of his employment. He no doubt meant to emphasize that an employer is liable for the acts of his employee, if done in the course and scope of his employment, but he does not indemnify the employee who also remains liable.

The appeal on this ground has not been established.

Motor Vehicles (Third Party Insurance) Act - Grounds
(Grounds 11 to 18 inclusive)

The question of liability under this heading is a matter of interpretation of the Third Party Policy that was current at the time of the accident. Paragraph 3(a) of this Policy limits liability to a "Light Goods vehicle with a carrying capacity up to 2 tons" which correctly describes and so provided Insurance cover for the appellant's van.

The policy however provides for exclusions and 1(b) of which is applicable -

"1. The Insurer shall not be liable in respect of any claims by any person who at the time of the accident was:

- a. (not relevant)...***
- b. driving or being carried in or upon or entering or getting on to or alighting from the said motor vehicle except in so far as the indemnity granted hereby must apply by reason of Sub-section 1 of Section 6 of the Ordinance when the liability of the Insurer shall be limited to the minimum amounts referred to in the Proviso to the said Sub-section of the said Ordinance".***

Section 6 of the Motor Vehicle (Third Party Insurance) Act referred to in the above exclusion clause provides as follows:-

"In order to comply with the provisions of this Act a policy of insurance must be a policy which -

- a. is issued by an approved insurance company***
- b. Insure such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle:***

PROVIDED THAT:

a. *such policy shall not be required to cover*

(i) *(not relevant)*

(ii) *save in the case of a passenger carried for hire or reward in a passenger vehicle or where persons are carried by reason of or pursuance of a contract or employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or*

(iii) *(not relevant)*

(iv) *any contractual liability."*

The appellant relies upon the purported classification of a third class of passenger discussed by the trial Judge in the course of his judgment. That is, not an ordinary passenger; and not a fare paying passenger; but a passenger who was the owner of goods and travelling in the same vehicle with those goods. It was suggested that payment limited to the carriage of the goods only somehow provided indemnity for the owner of those goods so long as he remained a non-fare paying passenger. We cannot accept that proposition. It certainly does not overcome the exclusion provisions of the policy which specifies that "the insurer shall not be liable in respect of any claims by any person who at the time of the accident was ... being carried in ... the said motor vehicle"

We are satisfied that there is no liability under the Third Party policy against the second respondent.

Inefficient and/or Insufficient legal representation
(Grounds 2, 3 and 19)

Mr Maharaj's difficulties in presenting any argument at all to support the lack of proper legal representation are compounded by our decision to refuse the admissibility of any further evidence. He is forced as a result to accept the statement of defence filed by Mr Krishna; not rejected by Mr Gordon; and not altered in any way by Mr Shah. He attacks "... Mr Shah's conduct and representation on the 3rd of June 1996 (which) fell far short of discharging his duty to the appellant".

Without evidence from any of the three counsel that have acted for the appellant in the course of these proceedings neither Mr Maharaj nor this Court can explore the vagaries of speculation in order to support such a ground of appeal.

For those reasons we reject that third ground of appeal.

Quantum

Leaving aside the special damages and an amount of \$1120 awarded for "gratuity assistance" provided by Mrs Chand during the hospitalization of her husband the damages were assessed at \$194,936.00 for general damages together with \$48,000 loss of wages inclusive of interest. Evidence of wages at the time of the accident was accepted as being \$20 per day or \$120 per week. The first respondent in evidence is recorded as saying that -

"Since accident have not done fishing. Have not obtained any other employment. I have no formal education. Left school in class 2 primary school. Have looked for work but not successful."

Taking those circumstances into consideration an assessment to compensate for loss of wages and inclusive of interest for the period of 11 years between the date of the accident and the date of the hearing can the amount of the judgment be justified?

It is the award of general damages which has caused us most concern. We have had some difficulty in following how the Trial Judge arrived at the amounts he awarded. His award of \$194,936.00 included \$35,000.00 for -

“loss of amenity (both past and future), pain and suffering inclusive of interest on past pain and suffering at 4% on \$12,000.00 damages for past loss”, and

\$159,936.00 was for -

“loss of future earning capacity (if working now), his weekly pay would be \$240.00. He is 37 years of age. He would have expected to have worked until 55-60 say another 20 years. Allowing for a discount as he is receiving the money “up front” as it were, an appropriate multiplier of 666.4 is applicable (See LUNZ ASSESSMENT OF DAMAGES FOR PERSONAL INJURY & DEATH 2nd ED - Appendix and TODORVIC -v- WALLER 1981 150 CLR 402 and GWYDER -v- PECK 1983 Qd R 351.”

Before undertaking any consideration of the adequacy or otherwise of those awards and how they were arrived at we at once acknowledge and are well aware of the principles that we must apply before interfering in the discretionary judgment exercised by His Lordship in making his award.

General damages must provide (1) for pain and suffering past, present and future; (2) for loss of amenities of life as a result of any residual disabilities; (3) for loss of expectation of

life that would have been enjoyed but for the accident; and (4) for any future economic loss attributable to his diminished earning capacity arising from the permanent nature of the residual injuries.

Contemporaneously with any assessment under those four headings the Trial Judge must also have regard as far as possible to other awards for general damages in Fiji in order to preserve a measure of consistency as well as fairness. This principle was referred to by this Court in Attorney General of Fiji and Doctor Hubert Elliot v Paul Praveen Sharma 1994 F.C.A. at page 358:-

"The third ground of appeal concerns the level of the general damages awarded in relation to the circumstances of the case and the previous decisions of the courts in Fiji. There is no doubt that in fixing the quantum of general damages a trial judge, having calculated the amounts which appear to be appropriate under the various heads of such damages, must then consider whether the total of those amounts is itself appropriate in all the circumstances of the case. In coming to a conclusion on that matter he should have regard to the need for consistency in the level of general damages awarded in similar cases. However, such similarity must include matters such as the pre-injury earning capacity or prospects of the injured person, not merely the nature of the injury. There may also be disparity in the degree of pain and suffering and the extent of the loss of the amenities of life. Disparity in such matters justifies disparity in the quantum of general damages."

The appeal in that case was allowed in part and the general damages reduced from \$184,000 to \$156,600 the amounts being calculated in Australian dollars.

On the other hand this Court in Anitra Kumar Singh v Rentokil Laboratories Limited 1991 F.C.A. No.73 expressed the following views -

"We are mindful that in setting the figure it must be one appropriate for Fiji and the conditions which apply here. The level of damages in our neighbouring countries is persuasive but not decisive - to be otherwise, would require a very detailed and prolonged investigation of factors influencing awards in each of those countries.

"We favour the global approach to general damages whilst not disregarding the checks and balances that may come from itemising each of the four conventional heads. This like the annuity tables approach to test the multiplier selected, is not more than that - a check which may or may not help."

In that case the original award of \$25,000 general damages was increased to \$60,000.

Applying those principles that we have just discussed we now consider the general damages assessed in this present appeal.

We have found some difficulty in following the learned Trial Judge's approach in respect of the figure of \$35,000. It covers the past as well as the future for he attributes to past loss in respect of pain and suffering and loss of amenities generally the sum of \$12,000. He allows interest on that sum but from when is not clear. One might think that the allowance for the future under this head must be more concerned with loss of amenities than pain and suffering. We are of the view that looked at overall the figure of \$35,000 should be reduced to \$25,000.

We have had difficulty in following His Lordship's application of the 666.4 multiplier that he has selected in order to calculate the figure of \$159,936.00. The practice in Fiji appears to be to determine a figure equating to the weekly or annual loss of earnings and then in the

case of a person of about this man's age to apply a multiplier of 14, 15 or 16. Counsel for the first respondent at the trial submitted that a multiplier of 14 was appropriate in these circumstances. What was the weekly loss of earnings likely to be? His Lordship appears to have accepted it was \$240 per week but we think this is too high a figure and a substantial reduction should be made for the first respondent's potential to find employment of some kind. The medical evidence of Dr Krishna does not suggest he cannot work at all and never will be able to do so. Further there is the uncertainty of being able to retain a high income job as a fisherman all his working life. We think it would be appropriate to assess the weekly loss at \$100. We think these factors have either been overlooked or not adequately allowed for in the calculations employed by the Trial Judge. On such a basis a figure of \$72,800.00 would be reached for economic loss and \$25,000 for pain and suffering and loss of amenities generally.

Adopting the global approach to the assessment of general damages followed by this Court in Anitra Kumar Singh v Rentokil Laboratories Limited and having regard to the checks and balances that come from itemising the various conventional heads of damages, we consider the appropriate assessment in this action for general damages should be \$100,000.00.

The appeal will be allowed and the Judgment varied by substituting the figure of \$100,000.00 for the \$194,936.00 assessed by His Lordship.

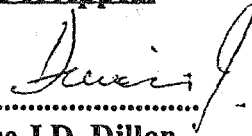
The first respondent is ordered to pay the appellant \$400 costs and the 2nd respondent \$300.



.....
Sir Maurice Casey
Presiding Judge



.....
Justice R. Savage
Justice of Appeal



.....
Justice J.D. Dillon
Justice of Appeal

Solicitors:

Messrs. Suresh Maharaj & Associates, Lautoka for the Appellant

Messrs. Young & Associates, Lautoka for the 1st Respondent

Messrs. Sherani & Co, Suva for the 2nd Respondent