

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 0001 OF 1998S
(High Court Civil Action No. 242 of 1994L)

BETWEEN:

THE ATTORNEY-GENERAL OF FIJI
KINJOJI KATONIVERE

Appellants
(Original defendants)

AND:

JAINENDRA PRASAD SINGH

Respondent
(Original plaintiff)

Coram:

The Hon. Sir Moti Tikaram, President
The Rt. Hon. Sir Maurice Casey, Justice of Appeal

Hearing:

Tuesday, 18 May 1999, Suva

Counsel:

Mr. D. Singh for the Appellants
Mr. R. I. Kapadia and Mr. D. Prasad for the Respondent

Date of Judgment: Friday, 21 May 1999

JUDGMENT OF THE COURT

In a judgment given in the High Court at Labasa on 10 December, 1997 Pathik J found the second appellant/defendant guilty of negligence and awarded the respondent/plaintiff \$116,866 damages including interest (after a reduction of 10% for contributory negligence) in his claim against the appellants arising out of a traffic accident on 16 June 1993. The appellants' appeal against that award and interest and against the assessment of contributory negligence at that figure, contending it should be 50%; while the plaintiff has given notice (which he called a "cross appeal") contending that the damages should be increased and contributory negligence rejected.

Contributory Negligence

The accident happened at 1.30 p.m. while the plaintiff was driving a light van up a hill at about 30 kmph on a gravel road which had recently been graded. The defendant (a Government employee) was driving a Pajero down the hill just behind another vehicle which was throwing up dust and stones. The plaintiff said he was on his correct side and the Pajero came across out of a cloud of dust and collided with his van. In finding the defendant liable His Lordship said: -

"I find as fact that [the defendant] who was following a vehicle in front of him, whilst trying to avoid the dust thrown by this vehicle went to his incorrect side to such an extent that thereby he came in the path of the vehicle from the opposite direction. Because he was not keeping a proper lookout and because he was at some speed and also following the 'track' left by the grader collided with the Plaintiff's vehicle. The defendant admitted that he did not see the plaintiff's vehicle because it was dusty. He said in his statement to Police that "I tried to avoid hitting the stones so I moved to the right side of the road and suddenly the van came from the opposite side. Before I could stop I hit it head on."

He found contributory negligence against the plaintiff in two respects. First, that he took insufficient evasive action to avoid the accident, despite the fact that he saw the defendant's vehicle in front of him some distance away; and secondly, that because of the ill-defined tracks left in the gravel by the grader encroaching on the respective drivers' sections of the road, drivers were forced to come in each others' path. This would appear to be a finding that the plaintiff was not on his correct side. However, as his counsel pointed out, this does not accord with the plaintiff's evidence that he was on his correct side, nor with the defendant's evidence that the plaintiff's vehicle was on its correct side all the time. The defendant freely admitted crossing to that side to avoid the dust and stones being thrown up by the vehicle just ahead of him. It is significant there was no difficulty about the plaintiff passing that particular vehicle.

The only evidence suggesting such a driving fault by the plaintiff came from the defendant's passenger, Mr. Wai, who said the defendant had moved across to avoid the dust, but his vehicle was still on its correct side of the road with its right tyres on the centre line, while

the right tyres of the plaintiff's van were across the centre line. He said that when he saw a collision was imminent he closed his eyes. In the light of the clear evidence of the two drivers that the plaintiff's van was always on its correct side, and of the defendant's statement that he moved to the incorrect side of the road, Mr. Wai's evidence must be of doubtful value, particularly when, as a passenger, he did not have the same direct view of the road and the position of the vehicles as that enjoyed by each driver. Nor, if he was correct, would one expect there to have been a head-on collision in which the van was pushed back 40 feet, as stated in evidence. The onus of establishing contributory negligence is on the defendant, and having regard to the fundamental difference between him and Mr. Wai on this aspect, we feel obliged with respect to differ from His Lordship, and to hold that the defendant did not establish that the plaintiff was not on his correct side of the road.

Nor can we agree with His Lordship's conclusion that the plaintiff did not take sufficient evasive action. He was suddenly confronted with the defendant's Pajero emerging "at speed" (per His Lordship) from a cloud of dust on its incorrect side of the road shortly behind one which had just gone past him safely. The plaintiff said the Pajero was about 40 feet away when he first saw it through the dust and it was not until it was about 2 car lengths away that he realised it was on his side of the road. He then braked and pulled to the left, but by then it was too late to avoid the accident. In this situation the comments of Lord Hailsham in Swaddling v Cooper [1931] 1 AC at p.9 are appropriate:-

"....the plaintiff has no right to complain if in the agony of the collision the defendant fails to take some step which might have prevented a collision unless that step is one which a reasonably careful man would fairly be expected to take in the circumstances."

We are satisfied that in the circumstances and in the light of all the relevant evidence, contributory negligence has not been established against the plaintiff. The appeal on this aspect must be dismissed, and the judgment varied in terms of the respondent's notice by quashing the finding of contributory negligence and the consequent reduction of 10% in the award of damages.

Damages and Interest Awards

His Lordship's award of \$116,866 was made up as follows:

<u>General damages</u>	\$60,000.00	
(covering the accident and injuries, pain and suffering past & future, loss of amenities & enjoyment of life)		
Interest thereon at 6.00 % p.a. from 16.6.93 (date of accident) to 10.12.97 (judgment on assessment of Damages)	\$16,200.00	\$76,200.00
<u>Special damages</u> (damages to van \$8500, medical expenses \$253, transport expenses \$1234)	\$9,987.00	
Interest thereon at 6.00% p.a. from 20.5.94 (date of issue of Writ) to 10.12.97 (judgment on assessment of damages)	\$ 950.00	\$10,937.00
<u>Loss of income</u> (17.6.93 to 31.12.94) i.e. 74 weeks at \$250.00 per week	\$18,500.00	
Interest thereon at 6% p.a. for the same period.	\$ 1,665.00	\$ 20,165.00
<u>Loss of prospective earnings</u>	\$19,200.00	<u>\$ 19,200.00</u>
		<u>\$126,502.00</u>
Less 10% Contributory negligence (On General damages \$76200 and Loss of income \$20165)		<u>9,636.00</u>
		<u>\$ 116,866.00</u>

The plaintiff at the time of the accident was a married man 28.5 years old, and at the time his wife was pregnant. He now has two children. His Lordship accepted that he was a highly

qualified motor mechanic working with his brothers in the family business for some years; and that if he had been employed elsewhere he could have been earning \$250 - \$300 per week.

Immediately after the accident he was pulled from the wreckage of his van and taken to Labasa hospital. His injuries were summarised in a medical report of 30 July 1996:-

1. *Fracture Displacement Distal shafts (L) radius and ulnar.*
2. *Fracture displacement proximal shaft (R) femur.*
3. *Fracture separation of the Pubic symphysis"*

His (L) forearm fracture was internally fixed on 14/7/93 with a pin and plate (later removed on 12/10/93 and 6/6/94 and his (R) femur fracture internally fixed with a K-rod on 2/8/93 (later removed on 18/1/95).

When recently reviewed on 17/7/96 he is freely ambulant without assistance and has a normal gait. X-rays reveal fracture union.

He complains of intermittent (weeks) lower lumbar back pains coupled with (L) hip, pubic area pains and (R) ankle pains radiating down from his (R) thigh. These pains occur at random and mostly after a day's prolonged heavy exertion.

Residual apparent scars are as follows:

- (i) (L) *forearm ventrum longitudinal scar 10 x 0.4 cm*
- (ii) (L) *dorsum longitudinal scar 10 x 0.4 cm*
- (iii) (R) *thigh lateral aspect longitudinal scar 34 x 0.4 cm from buttock to knee".*

General Damages Appeal

His Lordship noted that the plaintiff had made remarkable progress in the light of an earlier medical report predicting that he would be permanently crippled. He accepted that he was still attending hospital and was on pain killers; that his sex life had been greatly affected, being less frequent and enjoyable; and that he cannot play his favourite sports of soccer, volley-ball, table tennis and badminton because of restricted mobility. The plaintiff is left-handed, having had a deformed right hand since birth, and says the accident has left him with a weakened left arm, restricting particularly his working capacity. While counsel submitted that any award should include a substantial sum for future medical attendance, His Lordship rejected this. An

important feature in any award of general damages was the suffering from the accident itself and the very uncomfortable two months the plaintiff spent in hospital in traction and unable to move. He was subject to infection and a series of operations (13 to the leg and 4 to the arm) and other treatment over a period of 21 months.

In fixing \$60,000 for general damages for pain and suffering etc. His Lordship referred to awards in a number of recent cases, although only one of them (Narayan v Amputee and Rothmans (CA 65/1995; 28 February 1997) bears any resemblance to the present and where the same award was made; but it involved a leg injury causing such continuous trouble that a straightforward amputation might have been preferable. On the mistaken assumption that the injuries were comparable, respondent's, counsel submitted that what was a proper award of \$60,000 in 1995 for Narayan's injuries would now be increased to \$75,000 in order to take into account inflation and the devaluation of the Fiji dollar, warranting a similar increase for the present plaintiff. He produced schedules in support, but no evidence on this aspect had been given to the High Court. Nor would it seem that such a submission was made to the Judge, whose task was to fix damages at a proper figure in current Fiji dollars, referring to other awards as no more than broad guidelines to ensure that he was on the right track. While notice should be taken of inflationary trends, particularly when referring to cases decided some time ago, there was no call on him to engage in a precise analysis of them. This submission overlooked the fact that the future pain suffering and enjoyment of life in Narayan's case was likely to be far worse than that facing the present plaintiff, so that if Mr. Narayan's damages were being assessed today in relation to the present award to this plaintiff, they would undoubtedly be considerably higher.

We are satisfied that His Lordship did not err in his award of \$60,000 under this heading of general damages, which we regard as perhaps on the high side, but not excessively so.

Future Economic Loss Appeal

In fixing \$19,200 for loss of prospective earnings His Lordship was faced with a lack of evidence demonstrating any immediate drop in the plaintiff's earnings from the family business, or indicating that they were going to be reduced in the future. He accepted evidence that the

plaintiff's skills and experience would have enabled him to earn \$250 per week in outside employment, and understood him to say that his working ability had been reduced by 10%. He took it as meaning that his earnings had been reduced by that percentage of \$250 per week i.e. \$25 or \$1200 p.a. Using a conventional multiplier of 16, he assessed its present value at \$19,200. It now transpires that His Lordship was mistaken in his understanding that the plaintiff had estimated his loss of working ability at 10%. His counsel was adamant that his client had said 50%, and on checking with His Lordship as agreed by counsel, we were informed that this was indeed the case.

The appellants submitted that there was no evidence to support the assessment made by His Lordship, and we agree that there was none to establish such an ascertainable future loss. Respondent's counsel accepted that he could only advance under this heading the prospect that the plaintiff's earnings might drop if his disabilities (particularly the weakness of his arm) led to his being ousted from the family business, or having to take a smaller share of its income. We think the risk of this happening justifies an award of damages, speculative though it must be. However, the formula adopted by His Lordship based on a presumed weekly loss cannot be accepted as an appropriate method of compensating for this risk that at some uncertain time in the future the plaintiff might be faced with an uncertain drop in earnings. The fact that his ability to do the heavier work in the garage is reduced by 50% makes this risk more likely, but it is still only a risk and not an established fact capable of precise mathematical calculation. There can be only a broad approach to this problem, but it must do justice to both parties, and we think this will be achieved by an award of \$20,000 under this heading instead of the \$19,200 awarded by His Lordship.

Loss of Income Appeal

His Lordship accepted a loss of \$250 per week for 74 weeks between the date of the accident and the resumption of employment, amounting to \$18,500. There is an arithmetical error and the period should be 80 weeks, making the figure under this heading \$20,000. There is no merit in the submission that the defendant should receive a further amount from that date to the date of judgment, since there was no evidence of any loss. No other submissions were made in

support of ground 4 of the respondent's notice seeking payment of all the special damages claimed and we see no reason to disagree with His Lordship's refusal to accept them.

Interest Appeals

Under s.3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27 the Court has a discretion to award interest at such rate as it thinks fit on debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of judgment. His Lordship chose 6% as the appropriate rate. The appellants submit it should have been only 4%, citing cases where this had been done. However, in other cases a rate of between 5% - 7% had been adopted - see Attorney-General v Valentine (CA 19/988; 28 August 1998). We cannot say the Judge wrongly exercised his discretion on fixing 6% in this case.

The appellants challenged his decision to charge interest at this rate on the whole of the loss of income award from the date of the accident to resumption of employment, whereas the loss was accruing at \$250 per week on a weekly basis. As pointed out in Attorney-General v Valentine to allow for this, interest in such cases should be awarded at half the rate for the period concerned - i.e. at 3% instead of 6%. Respondent's counsel calculated it at \$923 for the amended period of 80 weeks.

There was also a challenge to the award of interest on the general damages from the date of the accident, the appellant submitting that it should run only from the date the writ was issued - namely 20 May 1994. Such a matter is in the Judge's discretion, and we said in Attorney-General v Valentine that we were not prepared to interfere with a similar decision. Nevertheless we think it appropriate to reconsider this question of interest in claims for damages for personal injuries caused by negligence. Interest is awarded to compensate the plaintiff for being wrongfully kept out of the money to which he or she was entitled. But unlike most claims for simple debt, in these claims for damages the defendant may not know until the writ is issued (or at least until a letter of claim is sent) the basis on which general damages should be calculated and paid. Therefore it can hardly be said that the defendant is wrongfully retaining

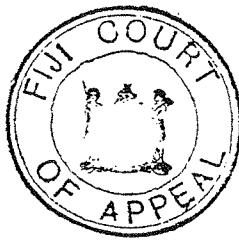
the plaintiff's money before then and on principle interest should not start to run in respect of non-economic loss in personal injury cases until the action is commenced. (See Lord Diplock's comments in Wright v British Railways Board [1983] 2 All ER 698 at 701). Such an approach would also have the advantage of encouraging the prompt issue of proceedings, helping to avoid the delays prevalent in this area of litigation. (We hasten to add that this criticism cannot be made here, as the writ was issued within a year of the accident)

For these reasons we think His Lordship should have taken the same approach as he did with the damaged van, and have awarded interest only from the date of issue of the writ.

Result:

1. The appeal against the assessment of 10% in respect of contributory negligence is dismissed, but the respondent's notice contending there should be no reduction for contributory negligence is upheld and that part of the judgment finding contributory negligence against the respondent and reducing the damages by 10% is set aside.
2. The appeal against the amount of general damages is dismissed, as is the respondent's notice contending that such damages should be increased.
3. The appeal against the award of \$18500 for loss of income is dismissed but the respondent's notice contending for an increase is upheld and the sum of \$20,000 is awarded in lieu of \$18,500 given in the judgment.
4. The appeal against the award of \$19,200 for prospective loss of earnings is dismissed but the respondent's notice contending for an increase is upheld, and the sum of \$20,000 is awarded in lieu of \$19,200 given in the judgment.
5. The appeal against the rate of interest at 6% is dismissed except that the rate of interest on the loss of income (item 3 above) shall be 3% instead of 6% awarded.

- 6. The appeal against awarding interest in the general damages (item 2 above) from the date of the accident is allowed and in lieu thereof interest at 6% is awarded from the date of the writ (20 May 1994) to the date of judgment.
- 7. As the respondent has succeeded on the major issue of contributory negligence he will have costs and disbursements against the appellants of \$1000.



Moti Tikaram

 Sir Moti Tikaram
 President

M. Casey

 Sir Maurice Casey
 Justice of Appeal

Solicitors:

Office of the Attorney-General Chambers, Suva for the Appellants
 Messrs. R. I. Kapadia & Company, Suva for the Respondent