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

CIVIL APPEAL NO. ABU0078 OF 2005S
(High Court Civil ActionNo.HBC0341 of 2001L)

BETWEEN: BANK OF BARODA AND SANJAY KUMAR

Appellant

AND: SANIT LAL

Respondent

Coram: Ward, President
Eichelbaum, JA
Scott, JA

Hearing: Wednesday, 8th November 2006, Suva

Counsel: Ms A. Neelta for the Appellant
R.P. Chaudhary for the Respondent

Date of Judgment: Friday, 10th November 2006, Suva

JUDGMENT OF THE COURT

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[1] This appeal is, first, against a finding of liability in a motor accident case, and secondly, against the quantum of damages.

Background

[2] The plaintiff (now respondent) was employed by a security firm. At the time his work was at the premises of the Bank, the first defendant/appellant. As was the

usual routine he was being driven to work by the second defendant/appellant, a Bank employee, when the van ran off the road and the plaintiff was injured. The statement of claim gave various particulars of negligence on the part of each defendant and in addition relied on res ipsa loquitur. In turn the defendants denied negligence and pleaded the injuries occurred due to a tyre unexpectedly bursting. It admitted the vehicle tumbled and went off the road.

[3] In evidence the plaintiff said the van was being driven at an excessive speed and that he remonstrated with the driver, to no effect. As to the accident, he said the driver was going "over speed", he could not control the van and it tumbled. The next he remembered was waking up in hospital. In cross examination he said he had asked the Bank to check the pressure of the tyres as he had noticed a small leak. He denied hearing any sound of a tyre blowing up. For the defence, the second defendant was the only witness. He said he was travelling at 70 -80 kph when there was a sound like a gunshot, a big bang. Then the van bumped into a pothole, he applied the brakes, and the car tumbled. He denied there was any defect in the tyre, or in the vehicle. The police investigated the accident. In cross examination he was unable to supply any information regarding the maintenance of the vehicle or any relevant records. He said the tyre was at a police station afterwards but he did not know what had become of it. He did not inspect the van after the accident.

[4] Addressing liability, the Judge said:

> ***There is no evidence before the court as to why the tyre blew out. There is no evidence of the tyre having a nail in it or of it having incorrect pressure prior to the accident. There is no evidence of the tyre having been examined after the accident and there is no report or other evidence before the court proffering any view as to what occurred apart from the evidence of the defendant that there was a loud bang, the tyre blew out, he then hit the pothole and lost control.***

[5] Then after citing some authorities, the Judge stated his conclusions:

> ***There is no evidence before the court as to the ultimate cause of the accident. The only evidence is that the tyre blew out and the vehicle hit a pothole and then overturned. Why did the tyre blow out? This question is not answered. There is an absence of an explanation and a lack of evidence as to the specific cause of the accident.***
>
> ***In the circumstances, I am not satisfied as to the cause of the accident and in particular as to the cause of the tyre bursting. In these circumstances, it is appropriate to apply the principle of*** **res ipsa loquitur** ***and accordingly, I find for the plaintiff on liability.***

Liability

[6] In support of the appeal counsel for the appellant submitted that the second defendant's account of the accident ought to have been accepted. We comment there was no significant dispute about the facts, and that despite the paucity of the evidence, the Judge proceeded on the basis favourable to the defendants, namely that the tyre in fact burst. Counsel also submitted that the Judge gave insufficient weight to the fact the driver was not prosecuted, but given the different onus to be satisfied in a civil case and a criminal prosecution, this does not advance the appellants' case. It was also submitted the Judge should have preferred the defendant's evidence regarding speed, but the Judge did not base his conclusion on that ground. In any event this was a matter for the Judge's assessment. Further, there was a complaint that the Judge declined an application for the plaintiff to be recalled so that his police statement could be put to him, but since at that point the plaintiff's case had closed, this was a matter for the Judge and there is no basis for interfering with the exercise of his discretion. On the same subject, counsel for the appellant requested leave to admit the statement as additional evidence before this Court, but it would be wrong to do that when the plaintiff cannot be examined on it. Further, the statement plainly failed to meet the usual criteria for admitting fresh evidence. Accordingly we declined that application.

[7] This leaves the grounds, in effect, that the Judge misapplied res ipsa loquitur and should have held the plaintiff's injuries were caused through inevitable accident.

[8] The appellant relied on the decision of this Court in *Ramzan v Jagdish Chand Gosai* (1968) 14 FLR 136. That however was a straightforward application of the principle in cases such as *Barkway v South Wales Transport Co. Ltd* [1950] AC 185. Where the facts become sufficiently known, res ipsa loquitur has no application. Here, the Judge accurately summarised the relevant evidence in the first of the passages set out above. There was no evidence whatever as to the cause of the tyre burst. The Judge was left with the fact that a tyre burst, and the van tumbled and ran off the road, an event that does not normally happen if a vehicle is properly maintained and operated. He was entitled say that on an application of res ipsa loquitur there was sufficient evidence to justify a finding of negligence. There are no grounds for interfering with his conclusion on liability, with which we entirely agree.

Damages

[9] The plaintiff sustained multiple lacerations of the scalp, a bruised neck, bruising to the chest, contused lungs, and multiple lacerations and abrasions to the hands. The defendant's own medical report described the initial head injury as potentially life threatening. In the long term the most serious aspect seems to have been the head injury which included an extradural haematoma, requiring removal by means of burr hole surgery, and cerebral oedema. While the evidence is not precise, it seems the plaintiff was in hospital for somewhat less than two weeks.

[10] A medical report made in July 2005, shortly before the trial, listed the plaintiff's ongoing complaints as recurrent headaches and giddiness, left sided weakness, unsteady gait when walking, personality and emotional changes including forgetfulness, irritability to noise, and depression; tenderness over the burr hole scar and the scalp, a palpable 3cm diameter hole in the left temporal region, and

reduced alertness and slow reaction to commands. This report assessed the permanent disability at 42%. In evidence this medical witness said the plaintiff required regular analgesics for his headaches. Further, he suffered a significant limitation of neck movement on one side. The doctor had overlooked this in his report, and when giving evidence, that additional feature caused him to increase his estimate of permanent disability to 44%. The defendant tendered a report from an orthopaedic surgeon which mentioned, in addition, a stiff little finger of the left hand, held in 90 degrees of flexion. The surgeon assessed the permanent disability at 14%, excluding any allowance for psychological impairment.

[11] Additional to the disagreement over the assessment of the degree of permanent disability, there were other differences between the respective surgeons in that the plaintiff's witness referred to some quite serious disabilities which did not feature in the defendant's report. The judgment did not attempt to resolve these disparities, but he described the injuries as very serious and given that remark and the Judge's general approach to the question of damages, it can fairly be inferred that he viewed both the plaintiff's initial injuries, and his permanent disabilities, as severe, and he may well have regarded the extent of the permanent disabilities more in accord with the plaintiff's evidence than the defendants'. Addressing general damages the Judge said:

> ***The percentage disability which is somewhere between 44% and 14% is indeed significant. The 14% assessed by Dr McCaig is acknowledged not to include any psychological impairment. The head injuries sustained by the plaintiff were serious and there appears little dispute as to his resultant disabilities with respect to those injuries.***

[12] The Judge awarded $70,000 for general damages made up as to $30,000 for the past and $40,000 for the future. In addition there were awards for loss of earnings to date, future medical expenses, and interest but as these were not challenged we need not detail or discuss these items.

[13] Turning to future economic loss, the plaintiff who was aged 32 at the date of the accident was 36 at the time of trial. After being at school until Form 6 he worked as a clerk, in a video library and as the manager of a video shop. For significant spells of time he was unemployed. At the time of the accident he was working for the Bank as a security officer. In these various occupations his pay was between $50 and $70 per week, seemingly a net figure as the plaintiff refers to "cash". He had not worked since the accident. The Judge summarised the plaintiff's present situation as follows:

> ***The plaintiff is before the court as a single man, almost 37 years of age, who has suffered very serious injuries in a motor vehicle accident which have left him significantly disabled. He is a man with limited education and experience and is ill equipped to engage in gainful employment in his disabled state. He has not worked since the date of the accident and there are little prospects for him in the future. By virtue of the principles expressed in Appal Swamy Naidu v Bechai & Anor – Civil Appeal No. 43 of 1994, he is entitled to an award of compensation for his loss of earning capacity in the future. Prior to the accident and without his present disabilities the plaintiff was only able to work about 7 years out of 11 years.***

[14] Having decided on a multiplier of 16 and a multiplicand of $50 per week (the plaintiff's wage at the time of the accident) the Judge awarded $41,600 for future loss of earnings.

[15] We are mindful of the limitations imposed on an appellate review of damages. Putting aside cases where an irrelevant factor has been taken into account, or a relevant factor overlooked, or there has been some other error of principle, this Court can only interfere where the award is well out: where the amount can fairly be stigmatised by one of the well known descriptions such as inordinately high, wholly out of proportion, or quite unreasonable. Subject to that it is the Court's duty to scrutinise the amounts in issue to maintain, so far as possible, a reasonable parity with awards in like cases. No two cases are exactly the same and unless they

illustrate a point of principle there is little point in counsel citing ones that are totally disparate.

[16] The Judge had the advantage of seeing the plaintiff in the witness box, and also of hearing the plaintiff's surgeon give evidence to flesh out the information in his reports. Having regard to the principles set out above we would not be justified in interfering with the awards for past and future pain and suffering and loss of enjoyment of life.

[17] On future loss of earnings, however, we have come to the conclusion that the award must be adjusted. Given the plaintiff's age at the date of trial, 16 would be a high multiplier in any event. In this part of the judgment there was no reference to the plaintiff's work record. In the plaintiff's circumstances, where he had been unemployed, off and on, for about a third of his working life, it was an error of principle to leave that factor out of consideration. We adopt the discussion in *Damages in Tort* (D K Allen, J T Hartshorne & R M Martin, Sweet & Maxwell, 2000) at pp 231 – 230 to the effect that contingencies of this kind may be taken into account as a factor affecting the choice of multiplier. In our opinion, taking into account the degree of uncertainty about the extent to which, in any event, the plaintiff would have remained in steady employment, the appropriate multiplier should be 13. On that basis the calculation is $2,600 x 13 or $33,800.

Costs

[18] Having regard to the limited success of the appeal, we do not propose to alter the costs awarded in the High Court. For the same reason, we do not allow any costs on the appeal itself.

Orders

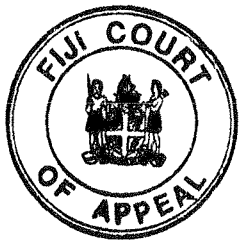
1. Appeal against finding of liability dismissed.

2. Appeal against award of damages allowed; set aside the award for loss of earning capacity and substitute a figure of $33,800.

3. Except as under (2), the awards of damages, interest and costs in the High Court stand.

4. No order for costs in this Court.

Ward, President



Eichelbaum, JA

Scott, JA

Solicitors:

Sherani and Company, Suva for the Appellant
Chaudhary and Associates, Lautoka for the Respondent

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