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

CIVIL APPEAL NO. ABU 0079 of 2015
(High Court File No. HBC 0034 of 2012)

BETWEEN	:	1.	**ATTORNEY GENERAL OF FIJI**
		2.	**UMESH PRAKASH**
			Appellants
AND	:		**JOSAIA TAMANIBICI**
			Respondent
Coram	:		**Basnayake, JA** **Lecamwasam, JA** **Mutunayagam, JA**
Counsel	:		**Mr. J. Mainavolau for the Appellants**
			Ms. N. Tikoisuva for the Respondent
Date of Hearing	:		**09 November 2017**
Date of Judgment	:		**30 November 2017**

JUDGMENT

Basnayake, JA

[1] I agree with the reasoning and conclusions of Lecamwasam, JA.

Lecamwasam, JA

[2] This is an appeal from a judgment of the High Court dated 29th September, 2015 granting the relief sought by the Plaintiff-Respondent (hereinafter referred to as the Respondent) by awarding a sum of $62,238.21 together with costs in the sum of $2,000.00. The damages awarded comprised general damages, special damages, interest, future pain and suffering and costs.

[3] The facts in brief are; the vehicle driven by the first defendant appellant (hereinafter Appellant) collided with the horse ridden by the Respondent around 6.30 pm on 4th June, 2009, at which the plaintiff suffered injuries and the horse had died. The Appellants alleged contributory negligence on the part of the Respondent on the basis that the Respondent suddenly emerged from a by-road onto the high way on which the first Appellant was driving his vehicle.

[4] The grounds of appeal are as follows:-

1. *THAT the learned Judge erred in law and in fact in finding the first and second appellant liable for the injuries sustained by the respondent in the motor vehicle accident which occurred near Savusavu, Fiji on 4th June 2009.*

2. *THAT the learned Judge erred in law and in fact in awarding the sum of $1,073.12 (One Thousand Seventy Three dollars and twelve cents) to the Respondent as special damages.*

3. *THAT the learned Judge erred in law and in fact in awarding general damages to the Respondent for pain and suffering in the amount of $62,238.21 (Sixty two Thousand Two Hundred and Thirty Eight dollars and twenty one cents).*

4. *THAT the Learned Judge erred in law and in fact by not Placing a fair value on the injuries of the Respondent.*

5. *THAT the Learned Judge erred in law and in fact in not placing weight on DW1's evidence that the Respondent was riding on the horse without any reflector vest or lights.*

6. *THAT the Learned Judge erred in law and in fact in not placing weight on DW1's testimony that there was insufficient evidence in the conclusion of the first criminal investigation to lay charges on the Second Appellant.*

7. *THAT the Learned Judge erred in law and in fact in not considering DW1's evidence that it was the horse that jumped into the vehicle from the side of the road.*

8. *THAT the Learned Judge erred in law and in fact in failing to accept DW1's evidence that the vehicle which the Second Appellant was driving did not veer off the road and hit the Respondent's horse.*

9. *THAT the Learned Judge erred in law and in fact in failing to consider the Respondent's own admission in the police interview and in the civil trial that it was the horse, scared by the 'bright lights' that jumped into the vehicle's way.*

10. *THAT the Learned Judge erred in law and in fact in failing to accept that the Second Appellant was acquitted of criminal charges in relation to the accident and that therefore on this compelling basis the learned judge should and ought to have exonerated the Second Appellant from any liability in the present case.*

11. *THAT the Learned Judge erred in law and in fact in suggesting that the prosecutor in the criminal case against the second Appellant should have proceeded with the trial in Savusavu whilst failing to consider that it was due to the insufficiency of the prosecution's evidence that crumpled their case.*

12. *THAT the Learned Judge erred in law and in fact in refusing to accept the evidence of DW 4 that when the motor vehicle hit the horse the animal was one meter inside the road.*

13. *THAT the Learned Judge erred in law and in fact in refusing to accept the evidence of the Appellant's witnesses in the trial that the horse and not the 2nd appellant that was at fault causing the accident.*

14. *THAT the Learned Judge erred in law and in fact by holding the 2nd Appellant liable on the seemingly primary reason of 'yarning' (and that purportedly, therefore, he was not paying attention on the road and/or possible hazards) and failing to consider other important evidence attesting that it was dark, there were no lights or reflectors on the road, the horse was brown in colour (hard to see in the darkness) and the rider of the horse being the Respondent who was unsupervised, was not wearing protective gear such as reflector fitted vest.*

15. *THAT the Learned Judge erred in law and in fact in making an excessive award in special and general damages for the injury to the Respondent.*

Analysis

[5] At the pre-trial conference, parties agreed that:-

(i) At about 1830 hours on the 4th June 2009, the Respondent was riding his horse along the Savusavu-Labasa highway at Belua near Belogo when it was hit by the first Appellant driving vehicle registration number GM 832 owned by the Ministry of Lands.

(ii) At the time of the collision, the second Appellant was an employee of the Ministry of Lands driving the said vehicle in the course of his employment for the Government of Fiji.

[6] The 2nd Appellant in his evidence stated that he was concentrating on the pot holes of the road and therefore did not see the respondent or the horse. According to his own admission, he was driving at 65 km per hour with the headlights on (with full beam). He further alleges that the Respondent contributed to the accident by not wearing protective gear such as a reflector fitted vest.

[7] The 1st Appellant's conduct of driving at the speed of 65km per hour (although it is within the permitted speed) at dusk on an allegedly pot holed road, is in itself reckless when prudence would have required him to exercise more care. As per the sketch in page 137 of the High Court record, the brake marks from the place of impact and the place where the vehicle was stopped stretches to a distance of 62 meters. This is sufficient proof of the fact that the 2nd Appellant had not been able to stop the vehicle immediately after the accident and within a short distance. This establishes that the vehicle was driven at an excessive speed.

[8] According to the evidence of the Respondent, this horse is an animal which gets excited and frightened in the face of bright light. If the 2nd Appellant was mindful of potholes, he should have driven the vehicle at a much slower speed with dip lights on (not full beam). Any prudent and experienced driver knows (the 2nd Appellant is a driver with more than

20 years experience) that pot holes will not be clearly visible with the full beam on, as clear visibility of pot holes requires a dimmed light. I am not inclined to believe the assertion of the Appellants that he was driving at a slow speed mainly because of the length of the brake marks and due to the fact that he had his headlights (full beam) on.

[9] The other contention of the 2nd Appellant was that he could not stop the vehicle to prevent the accident as the horse emerged from the by-road on to the main road quite suddenly without any pre-warning. As the Respondent was not wearing a reflector vest, nor was he carrying any torch or light, the 2nd Appellant says he did not see the Respondent. As this area is said to be a rural area which has no street lights, visibility no doubt would have been very low for a pedestrian, but a vehicle with 'full beam' lights on cannot take refuge behind that explanation.

[10] In probing the issue of visibility, the evidence of Taraivini Ratumudu is quite revealing. She in no uncertain terms says at page 354 of the High Court record that she saw the horse about 200 meters ahead. She was the other person who was travelling with the defendant and she was seated in the vehicle at the time of the incident. Whether they were 'yarning' or otherwise, important fact is that she had seen the horse about 200 meters away. In view of this evidence, it is as plain as a pike staff that the horse's appearance was not as sudden and unexpected as the Appellant claims to be but had been on the road at least 200 meters ahead of the vehicle.

[11] Had the driver been more careful he should have seen the oncoming horse and therefore it is concluded that the driver had been careless and negligent.

[12] Therefore I conclude that the reason which contributed to the accident was the negligent and careless driving of the driver. The learned High Court Judge has dealt with the factual position of the accident and come to the correct conclusion in holding that the driver of the vehicle is liable and awarded damages to the Respondent.

[13] The Appellants have repeatedly stated that this court ought to take cognizance of the fact that the driver was acquitted in the criminal proceedings and hence should not place any liability on the part of the driver, however this is not an accurate contention as per the dicta in the judgment cited by the respondent in **Tebara v Attorney General** [1988]FJSC1; Civil Appeal No. 2 of 1980 with which I concur:

> *"Many examples could be suggested of ways in which what occurred or did not occur in the criminal proceedings may have a bearing on the judge's decision in the civil proceedings; but the judge's duty in the civil proceedings still to decide that case on the evidence adduced to him. He is not concerned with the evidence in the criminal proceedings except so far as it is reproduced in the evidence called before him..."*

[14] As per the evidence before Court, the driver was acquitted not on the merits of the case but because the prosecution withdrew the case due to reasons best known to the prosecution. Therefore the acquittal in criminal proceedings in regard to the accused has no bearing on the instant case. Therefore as I have already held, I do not see any reason to disturb the findings of the learned High Court Judge, except as to the orders in relation to the award of damages and interest which I will deal with the paragraphs to follow.

[15] The learned Judge at the conclusion of his judgment had awarded $1,226.10 as special damages to the Respondent whereas the Respondent has claimed only $800.00 as special damages. The following paragraph from the Supreme Court Practice (white book); 1997 Volume 1 p.315 paragraph 18/12/16 states:-

> *"Special damages in the sense of monetary loss which the plaintiff has sustained up to the date of the trial must be pleaded and particularized, otherwise it cannot be recovered."*

[16] In view of the above position, the award of $1,226.10 cannot be allowed to stand. Hence the award of special damages in excess of what is pleaded cannot be sustained and shall be limited to $800.00.

[17] At paragraph 10.27 of his judgment, the learned High Court Judge, had ordered $10,000.00 for future pain and suffering. In **Nasese Bus Company Ltd v Chand** [2013]FJCA 9; ABU 40.2011,(8 February 2013) Calanchini, JA (as he then was) had increased the damages from $65,000.00 to $90,000.00 on appeal. The facts of Nasese case can be distinguished from the facts of the instant case. In the Nasese case, His Lordship had observed:-

> *"[105] In view of the medical evidence adduced at the trial the evidence given by the respondent and the contents of the medical reports I have concluded that the award of $65,000.00 for pain and suffering is not fair compensation. I do not consider that sufficient regard has been given to the future pain and suffering that will be suffered by the respondent due to progressive arthritis. She continues to complain of pain. There is unchallenged medical evidence that consistent with the pain that the respondent claims she is experiencing. The arthritis is progressive so is the pain. I consider a sum of $90,000.00 to be appropriate in this case."*

[18] In the instant case, Dr. Taloga's assessment of the plaintiff carried out on 29th May 2014, (as per judgment of Kumar J) in paragraph 10.26, four months prior to trial showed "a well muscled young man without any limp. There was no lower limb length inequality. The right leg shows that ..."

The doctor does not disclose any probability of future suffering unlike in the Nasese Bus Company case. As the doctor is silent on the matter unassailably indicates absence of any future suffering. In the absence of medical evidence in support of the assertion, it is inappropriate to award damages under the limb of "future pain and suffering".

[19] Further the Supreme Court in the unreported civil appeal of **The Permanent Secretary for Health and Another v Kumar**;[2011] FHSC 5; CBV 6 of 2008 (11 March 2011) held , *"there are three guiding principles in measuring the quantum of compensation for pain and suffering and loss of amenities. First and foremost the amount of compensation awarded must be fair and should compensate the victim of the injury in the fullest possible manner, bearing in mind that damages for any*

cause of action are awarded ***once and for all****, and cannot be varied due to subsequent eventualities..."*

[20] On the strength of the above dicta, I set aside the amount of $10,000.00 ordered for future pain and suffering.

[21] The learned High Court Judge in awarding interest on both general and special damages at the rate of 6% per annum, had overlooked the provisions of the Law Reform (Miscellaneous Provisions) (Death and Interest) (Amendment) Decree 2011 (Decree No. 46 of 2011). Although he has referred to Section 3 of the above Decree, he had not adverted his attention to Section 4(1) of the said Decree which provides thus:-

> *"Judgment debts to carry interest*
> *4-(1)...*
> *(2) ....*
> *(3) Notwithstanding anything contained in this section, the State Proceedings Act or any other written law, no interest shall be payable on any Judgment Debt entered in any proceedings against the State, or the Attorney-General".*

[22] The learned Judge had been oblivious to the provisions of above Section 4(3). In view of this position, I hereby set aside the interest awarded by the learned High Court Judge, albeit the Appellants did not advert attention of court to this particular provision. However, the Honourable Attorney General and the 2nd Appellant are exempted from paying the above amount of interest or any amount of interest awarded by the learned Judge.

[23] In conclusion, I affirm the findings of the learned High Court Judge subject to the variations I have made and therefore conclude that the appeal is partly allowed, I order parties to bear their own costs.

Mutunayagam, JA

[24] I agree with the reasoning and conclusions of Lecamwasam, JA.

Orders of the Court are:

1. *Appeal partly allowed.*
2. *Appellants to pay the Respondent a sum of $800.00+ $45,000.00 = $46,300.00*
3. *Parties to bear their own costs.*

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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Justice B. Mutunayagam
JUSTICE OF APPEAL