IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. 02 of 2013

BETWEEN : **ABDUL JABEED** of Salove Wailevu, Labasa, Technician.

PLAINTIFF

A N D : **MOHAMMED NIYAZ ALI** of Soasoa, Labasa, Driver.

1ST DEFENDANT

AND : **KAMPTA PRASAD** of Vunivau, Labasa.

2ND DEFENDANT

Counsel: Plaintiff - Mr. Sarju Prasad

Defendant - Mr. Ami Kholi

Dates of Hearing : 4th March, 2014 and 14th April, 2014

Date of Submissions : 15th May 2014

Date of Judgment : 29th May, 2014

JUDGMENT

Introduction

1. The Plaintiff was about to enter main road from a private drive way and his head collided with an iron rod/frame which was attached to the canopy of the vehicle driven by the 1st

Defendant on the main road. The 2nd Defendant was the owner of the vehicle driven by the 1st Defendant. The incident happened at night and there were no street lights on the road. The 1st Defendant in his evidence stated that the iron frame had broken and got loosened from the strands and an iron part of the frame had collided with the Plaintiff. He admitted that the frame could not be transported inside the canopy hence tied to the canopy. The canopy was 6 inches taller than the roof of the Mitsubishi L200 single cab. The Defendants had pleaded contributory negligence, and stated dark clothing of the Plaintiff as a factor to that.

2. At the Pre Trial Conference following facts were admitted:

   a. 1st Defendant was the driver of the Motor Vehicle Registration No DV161.
   b. 2nd Defendant was at all material times the owner of Motor Vehicle Registration no DV161.
   c. 1st Defendant was driving the said vehicle as servant/agent of the 2nd Defendant.
   d. On 22nd March, 2012 at all material times the 1st Defendant was travelling along Salvo Road, Wailevu, Labasa when the vehicle he was driving was involved in an accident with the Plaintiff.
   e. The 1st Defendant was charged of the offence of improper loading and was convicted and fined by the court.

3. In the pre-trial conference the parties had raised 8 issues and they were as follows:

   "1. What is occupation (sic) of the Plaintiff and where did he live at the material time?

   2. What was the weekly income for the Plaintiff at the material time?
   3. Did the accident occur solely as a result of the negligence of the Defendants or was it solely caused, or contributed to by the negligence of the Plaintiff?
   4. Did the Plaintiff received injury as a result of the accident? If so what is the extent of the injury of the Plaintiff?
   5. Has the Plaintiff suffered pain and suffering (sic) loss of amenities of life and loss and damages and will he continue to suffer the same?
   6. Can the Plaintiff rely on the provisions of the Traffic Regulation and the doctrine of the ***res ipsa loquitur*** to prove the negligence of the Defendant?

7. Are the Defendants liable to pay special and general damages to the Plaintiff? If so the quantum thereof? "

Analysis

4. The Plaintiff's evidence was that he and another person were approaching the main road from a side private driveway when he saw a vehicle approaching from the left hand side of the main road with its head lights on and he stopped and asked the other person also to stop. Admittedly, the vehicle was driven on the wrong side of the road, that was on the right side of the main road thus making injury to persons on the right side of the road possible. The reason for driving on the wrong side was the bad condition of the road. The Plaintiff had not seen the iron frame before his head collided with it. The person who accompanied him had seen an iron rod at last moment and had taken cover of himself. The Plaintiff's head collided with iron frame and was fallen to a ditch. One reason the Plaintiff had not seen it was the head lights of the said vehicle and also the other person who was standing left to the Plaintiff who would have blocked a part of his sight to the left side. So depending on where the Plaintiff stood and the direction of the head light on the road it was possible that the Plaintiff could not have seen the dangerously stored frame on the top of the canopy. The place of accident was dark except light from said vehicle.

5. Both the Plaintiff and the other eye witness said that the vehicle was driven fast. The said person who was with the Plaintiff, Mohamed Rafeeq, said it was very close when he saw a 'pipe' was about to collide with his head. He had a narrow escape due to his quick reflexes that made him to take precautionary measures just in time to save him, but he could not save the Plaintiff. This again indicates the speed on which the vehicle was driven in an unlit road on the wrong side of the road with an oversized iron frame tied to the top of the roof of the canopy on a dilapidated gravel road. After the accident said Mohamed had inquired from the 1st Defendant why he drove fast and he was told that 1st Defendant had to quickly deliver the iron frame as he had a prior commitment to build a 'shelter' for a friend in that evening. This evidence was not challenged in cross examination. Irrespective of the legally permitted speed on such a rural road, the

circumstances reveal excessive speed considering the time, road condition and the manner and type of the vehicle driven by 1st Defendant.

6. ***Nasese Bus Company Ltd v Chand*** [2013] FJCA 9; ABU40.2011 (decided on 8 February 2013) (unreported) Fiji Court of Appeal held that:

> *'[23]. Furthermore, in my judgment, it is not a defence to an allegation of negligence in the form of driving too fast under the circumstances to claim that the driver of the bus complied with the applicable speed limit. It may well be that even driving at a speed limit of 8kph is excessive under the circumstances.'*

7. Rafeeq was on to the left side of the Plaintiff and vehicle had come from the left side. He had more clear view of the vehicle than the Plaintiff as there was nothing blocking his sight to the left where the vehicle came from. So, it cannot be considered any negligence on the part of the Plaintiff that he could not take precautionary measures as Rafeeq did.

8. The 1st Defendant had admitted in his evidence that he drove on the wrong side of the road at the material time. He said it was due to the road condition and large pot holes on the road. In the cautioned interview, 1st Defendant stated the condition of the road as a reason to drive on wrong side. On the analysis of evidence, I accept that said reason of the 1st Defendant to drive on the wrong side, but the manner in which he drove proves negligence.

9. Even assuming that there were large pot holes on the left hand side of the road the vehicle should reduce the speed and slowly moved to the right hand side and should be careful as darkness and road condition would have increased the risk of injury to other users of road and driving fast on the wrong side of the road cannot be considered as applying required standard care for the other users of the road.

10. The 1st Defendant in his cautioned interview to the Police had stated that the iron frame had got loosened from the strands due to the bad road condition and that was the reason for iron frame colliding with the Plaintiff. In contrast to this, in his evidence 1st Defendant said, that the iron frame got broke and got loosened from the strands, before colliding with the Plaintiff. So, according to his cautioned interview the frame had got loosened first, but in his evidence first the frame was broken which resulted loosening the

frame from the strands. The latter version was not corroborated, not proved on balance of probability and I reject it.

11. In the cautioned interview 1st Defendant stated as follow;

> "Q: Did you tied the frame securely?
> A: Yes.
> Q: How then the frame fell down?
> A: Because of the bad road.
> Q: I put it to you that the frame was not securely tied as a result it fell. What can you say about it?
> A: According to my knowledge it was tied properly."

12. The 1st Defendant was given ample opportunity to explain the incident but he never said that the frame was broken before it collided and part of the frame had fallen on the ground 10 feet before the accident. The above questioning in the cautioned interview and answers to them indicate that soon after the incident when the mind was fresh the 1st Defendant had not stated that the frame was broken and that was the reason for loosening. So the contention that it was broken before accident cannot be accepted as it does not pass the test of consistency. This is an afterthought after listening to oral evidence for the Plaintiff.

13. According to the 1st Defendant one broken part had fallen even prior to the scene of accident! This was completely different version of events, after listening to all the evidence. This indicates a deviation and inconsistency that goes to the root of the material evidence of the 1st Defendant relating to negligently storing the iron frame. In the proper analysis of the evidence of the 1st Defendant indicate inconsistency *per se*.

14. According to the 1st Defendant's evidence in court the frame had broken prior to the accident, if so the collision had happened by a broken part of the frame. He said that the first part of the frame had fallen about 10 feet away from the incident. If so why he could not stop vehicle before the accident happened or at least did not attempt to mitigate the danger, was not explained. If the frame broke and piece of iron rod fell 10 feet from where they were, both the Plaintiff as well as Rafeeq would have noticed it and being the

driver of the vehicle that transported over sized iron frame dangerously tied to the canopy on a gravel road, the 1st Defendant should have noticed it and should have applied breaks immediately. There was no evidence of such reduction of speed. This is highly improbable version and could not pass the test of probability in the analysis of the evidence. I do not accept that the iron frame broke in to pieces before it got loosened from the stands and colliding with the Plaintiff as it had not passed the improbability test, apart from other reasons already stated.

15. The negligence on the part of the 1st Defendant is evident. First he had loaded an over sized iron frame and transported it on the top of canopy in the night on an unlit road. The condition of the road was bad according to his own admission to the Police. Though there were no specific evidence as to the condition of the road on the place where the accident happened, he had driven the vehicle on the wrong side. The analysis of the evidence would show that he had driven it fast, too. In his admission to Rafeeq, 1st Defendant had prior commitment to meet on the said evening and that was the reason to drive fast. There was ample opportunity for the driver to stop the vehicle if a part of the frame had broken and fallen 10 feet before the accident, if he drove carefully.

16. Due to bad road condition he should have been more careful. Instead, the vehicle was driven fast on the wrong side of the road with oversize iron frame tied to the top of the canopy of the vehicle which was 6 inches taller than the roof /hood of the front cabin part. This also indicated that frame would have been at a height of a pedestrian of the road considering the height of a single cab Mitsubishi L200. According to manufacturer specifications the height of the vehicle roof is around 5 feet. These types of vehicles are common occurrence and even the court can consider the height to be around 5 feet. If the canopy was 6 inches above it would be ideal height of a person standing next to it on an even surface. If the surface was not even, as mostly in rural gravel roads, this may slightly be lower or higher, and remained dangerous to the pedestrians of the road. So when the 1st Defendant drove the vehicle on a narrow road in the night there was a high probability of injuring a pedestrian on the road. This incidence of injury to a pedestrian increased with the darkness and also with the speed of the vehicle and also with alleged road condition.

Contributory Negligence

17. Halsbury's Laws of England/Negligence Volume 78 (2010) 5th Edition) 5. Apportionment of Liability/(1) Contributory Negligence/79. Traffic cases
'....There is no rule of law that a motorist who collides with an unlit vehicle on a highway at night must be contributorily negligent; all depends on the circumstances[1]'

18. The burden of proof of contributory negligence is with the Defendant. The Defendant claimed contributory negligence on the part of the Plaintiff for his dark clothing at the time of the accident. On the balance of probability the Plaintiff had not reached the main road from drive way, and there was another person by the side of the Plaintiff. There was no evidence of poor sight of them as head light was directly on them and vehicle was on the wrong side. In the circumstances there was no contributory negligence proved by the Defendant. The mere fact of wearing dark clothing in the night would not be considered as contributory negligence unless it had contributed to the accident. In the circumstances of this case, there was no proof of contributory negligence. The Plaintiff was on a private driveway and according to him he had not reached the main road when the accident happened. The contention of the defence was that Plaintiff had reached the main road. Even so there was no proof of negligence from the dark clothing as Rafeeq was on the left side of the Plaintiff close to the Plaintiff and head light was directly on them. The close proximity of another person and also Plaintiff not reaching the main road were two factors that negate the claim for contributory negligence.

Assessment of Damages

19. The Plaintiff had produced a medical report dated 19/6/2013. This medical certificate was obtained more than one year after the incident. The medical report does not indicate whether the patient had reached the Maximum Medical Improvement, but the doctor who gave the evidence had examined the Plaintiff afresh and stated that the Maximum

[1] *Tidy v Battman* [1934] 1 KB 319. To park a lorry, with lights on, on the wrong side of the road has been held to be **contributory negligence:** *Chisman v Electromation (Export) Ltd* (1969) 6 KIR 456, CA. See also *Thompson v Spedding* [1973] RTR 312, CA (where the defendant runs his car into the rear of the claimant's car he may still prove **contributory negligence**); and *Chop Seng Heng v Thevannasan s/o Sinnapan* [1975] 3 All ER 572, PC.

Medical Improvement was reached and there were no disability or impairment. So, there was no proof of disability or impairment. The assessment should be confined to past pain and suffering and for special damages.

20. In the statement of claim Plaintiff had following special damages claimed:

a. Hospital Expense.
b. Travelling.
c. Private Doctor.
d. Loss of earning.
e. Cost of obtaining Medical Report.

21. There were no evidence of hospital expense. For travelling expense the Plaintiff had produced P4 and P5 these were a boarding pass to a flight and a copy of boat passenger ticket, respectively and he said when he was in Suva he travelled but no receipts were produced. For air fare the Plaintiff was claiming $240 and for boat $65. Considering the circumstances the claim for travelling expense of $350 is allowed. There was no proof of any private doctor fees in his evidence. Plaintiff admitted that the private doctor he consulted had not charged from him. The cost of obtaining medical report according to P6 was $57.50. Special damages of $(350+57.50) is awarded and for that 3% p.a. interest is awarded from 22.3.2012 to 29.5.2014(date of judgment).

22. The Plaintiff was admitted in the hospital from 22.03.2012 to 24.03.2012 there were follow up clinics and the last was done on 16.05.2012. The head injury was a laceration which was not deep to the skull bone according to the evidence of the doctor who gave evidence referring to the medical folder of the Plaintiff. There was a closed complete fracture on distal 1/3 of right Radius. The fracture was manipulated and reduced under anesthesia and plaster of Paris cast was put on it. The fracture was a secondary injury as the Plaintiff was fallen to a ditch.

23. The Plaintiff stated that he could not work for 8 months, but his last visit to the hospital was two months from the accident. There was no evidence to support 8 months period where he could not work. If he could not work, he Plaintiff could not have waited without obtaining some kind of medical treatment during this time. There was no evidence of such treatment even in his oral evidence.

24. The Plaintiff was a technician and it was a skilled job. He needs a fairly high degree of concentration of his mind and proper coordination of eyes and hands to test delicate circuits of electronic devices, and to repair them. The skills of hands were vital for soldering of parts to electronic circuit boards and repairing these delicate circuits that are found almost every household items. Apart from this he may be repairing heavy duty machines like washing machines, refrigerators and air-conditioning units or any other devices that contained electronic components. All of this needed concentration and coordination of hands and eyes, and also grip to open in order to reach the electronic circuits. If not, very sensitive parts of electronic circuits may get damaged and a relatively low cost repair would lead to a expensive one. So, it is essential that the Plaintiff should be fully recovered to do the work he used to do at the time of the accident. Considering the type of injury and the skill needed to perform his work, I would consider 4 month income would be reasonable loss for past economic loss. This was two months after his last visit to the hospital for treatment.

25. The Plaintiff had embarked on a venture called 'Speed Line Electronic' when the accident happened. The registration of said business was obtained on the 2nd February, 2010. He had shared the premises of a large commercial building with another vendor. The Plaintiff could not establish exact income but stated his income was $200-250 per week, which would make around $1000-800 per month income. He paid only $100 per month for sharing the premises. He had not issued any receipts and had not submitted any income tax returns and was unable to provide any bank account details. In the circumstances it is difficult to assess his income. The court should be mindful of possibility of exaggeration of income. In the absence of any independent evidence to suggest his monthly net income I assess it to be $500 per month, after settling all the expenses for electronic components rents for the premises etc. For 4 months the loss of income is assessed at $2,000.

General Damages

26. The Plaintiff has claimed for future care and loss of earnings, but failed to prove any permanent impairment due to the accident. So claims for both future needs have to be

rejected in the absence of proof of permanent impairment. In contrary the doctor's evidence proved that the fracture and other injuries from the accident were fully healed.

27. The Plaintiff is entitled for past pain and suffering due to the injuries he sustained. The head injury was a laceration but it had not reached the skull bone. This was obviously an injury due to contact with the iron rod of the frame. The doctor stated that the Plaintiff had first complained about headache on 29.3.2012 but by 9.5.2012 there were no complains of headaches. According to the doctor there was no clinically significant headache. Due to the deep laceration up to the layer above the skull bone and the complete fracture the Plaintiff would have suffered a fairly severe pain. He had lost a considerable amount of blood and was unconscious after some time. The fracture was a closed complete fracture of distal 1/3 of right Radius. There were follow up clinics recommended and he had attended for those.

28. The counsel for the defence in his written submission relied on Fiji Court of Appeal decision in ***BW Holdings Ltd v Vuli*** [2010] FJCA 16; ABU0089.2008 (unreported) decided on 26 February 2010. Here an award of $20,000 was granted upon the enhancement of the High Court award for $15,000 for pain and suffering. The injury of the said case was fracture of right distal radius with no permanent impairment. It was held:

> ***"QUANTUM"***
>
> *[21] The Defendant/Appellant contends that the total award should not have been made because the trial Judge was wrong in finding the Defendant liable. The Plaintiff/Respondent contends that the quantum and costs awarded at trial are inadequate.*
>
> *[22] Counsel submitted that the award for pain and suffering should be $20,000 instead of the $15,000 that was awarded. The trial Judge's findings in relation to her injuries were:*
>
> *[34] The plaintiff suffered fracture of right distil radius. Her hand was placed in full cast of plaster. A medical report prepared by Dr Sitiveni Traill dated 7th August 2006 stated that the fracture was likely to take six*

weeks to unite and it would be three months before she could resume her duties. A further report prepared by the same doctor states that the plaintiff has full range of motion of her wrist but that the plaintiff complains of pain during cold and rainy days.

[35] At the time of her injury she had six children and one was one year old. Her right hand was the dominant hand and therefore she would find difficulty in lifting and playing around with her young baby which parents are normally accustomed to and which gives them mutual joy and satisfaction and of which she was deprived. She could also at least for three months not play volleyball and netball.

[23] Comparative awards for pain and suffering and loss of amenities of life have been: ***Lawanisavi v Raj [1999] FJCA 48; Abu0050u.98s (13 August 1999)*** *- fracture of the right shaft of the femur, lacerations to the forehead and trauma to the chest: $50,000;* ***Khan v Vunisinu [2004] FJHC 324; HBC0455J.2000S (2 April 2004)*** *– fracture of the right clavicle and lacerated wound to the right wrist and little finger resulting in the right shoulder instead of being cast in plaster was put in sling for 6 months:* ***$12,000****; - injury to* ***her left leg*** *with no "specific current residual" of several superficial lacerations of the left knee and patella area****: $2,000****; - fracture of* ***right arm*** *and* ***ankle: $15,000****;*

[24] The awards in Khan were made in 2004 for an accident that happened in 1998. The Plaintiff here was injured in 2006. Taking all these into we think $15,000 is too low and agree with Mr Singh that the award should be $20,000."

29. In the said case the injury happened in 2006 and it was similar to the fracture of the Plaintiff happened in 2012. Apart from this, there was an injury to Plaintiff's head and considering the circumstances I ward $23,000 for pain and suffering and loss of amenities to life. An interest of 6% p.a. will incur to said amount from the date of issuance of writ (i.e. 9.1.2013) to the date of judgment (i.e. 29.5.2014).

Conclusion

30. The Plaintiff was negligent in transporting an oversized iron frame in the night. There were other factors like the speed of the vehicle and also driving on the wrong side of the road without proper look out that adds to said negligence. There was no contributory negligence proved. The dark clothing per se could not be considered as a contributory negligence if it had not contributed to the injury namely to visibility of the driver. In this case there was no such evidence. The Plaintiff is awarded $23,000 for pain and suffering and loss of amenities of life. For this 6%p.a interest is awarded from 9.1.2013 to 29.5.2014. There is no permanent impairment hence the claim for future loss is not awarded. Special damages for travelling expense $350 and cost of medical report $57.50 and loss of past income of $2,000 is awarded. For said special damages an interest of 3% from 22.3.2012 to 29.5.2014 is awarded. The cost of the action is summarily assessed at $3,000.

Final Orders

a. The 1st Defendant's negligence was proved and 1st and 2nd Defendants are jointly and severally liable for damages to Plaintiff.
b. The Plaintiff is granted a general damages of $23,000 and interest of 6% as stated above and special damages of $(350+57.50+2000)= $2407.50 and interest of 3% as stated above.
c. The cost of this action is summarily assessed at $3000.

Deepthi Amaratunga
Judge
High Court Labasa
29/05/2013

HIGH COURT OF FIJI
LABASA