

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No HBC 216 of 2009

BETWEEN : **ARUN KUMAR** fathers name Ram Bharos of Drasa, Lautoka,
Carpenter.

Plaintiff

AND : **VIJAY PRASAD** fathers name Gaya Prasad of Rifle Range,
Lautoka.

1st Defendant

AND : **ASHREEN LATA** fathers name Vijay Prasad of Topline
Lautoka, Accounts Clerk.

2nd Defendant

Appearances : Vijay Naidu & Associates for the Plaintiff
Qoro Legal for 2nd Defendants

R U L I N G

INTRODUCTION

[1]. Arun Kumar was walking down a steep narrow road off Chand Mari Street in Rifle Range in Lautoka on 29 June 2009 at about 10.00 p.m. to 10.30 p.m. when a car, registration number CX 351 which was being driven by the second defendant, and owned by the first defendant, landed on him in an overturned position after the car had back-flipped upon mounting the sloped embankment along one side of the road. Kumar sustained severe injuries from that. At the time the accident happened, there were many people in and around the vicinity. They had all been attending a wedding. The plaintiff and the defendants are very closely related. They also had been at the wedding.

[2]. All of the above is un-refuted by the defendants. The main contention appears to be on the issue of whether or not CX351 had hit the plaintiff first before it

veered off the road and back-flipped on Kumar and whether or not Kumar had been walking on the side of the road or right in the middle of the road. The defendants are also denying that the road in question was a public road.

[3]. The evidence that emerged at the trial is as follows.

PW1: Louis Williams

[4]. Doctor William is a qualified Ophthalmology from University of Auckland. Her qualifications and expertise were accepted without question by Ms Naidu. She runs her practice at Bayly Clinic.

[5]. Doctor William examined Arun Kumar at her clinic in 2014 when Kumar came to her for a second opinion regarding his eye condition. She wrote a report on 17 July 2014.

[6]. Kumar had told Dr. William that he had been involved in motor vehicle accident in 2009. As a result of that accident, one of Kumar's eyes was cut. The eye had become red and swollen. The cut was sutured, which sutures were later removed. The redness subsided and swelling reduced. However Kumar's eyesight was never the same. Some nerves were damaged.

[7]. Doctor William noted in her document that Kumar's vision was very poor. He had a shadowy vision and could only tell movement 10 to 15 cm in front of him. The left pupil was dilated all the time and was not responding to light. Its nerve was very white and dead. That condition is called Optic Atrophy.

[8]. Dr. William thinks that it is likely that the cause of the injury to the eye was the motor vehicle accident.

[9]. Doctor William said that there was a cut above Kumar's eye. She could tell that something had struck Kumar's eye with such force, pushing the eye ball back. Doctor William said that the nerve of the eye enters the brain by a very restricted opening of

the skull when the eye ball is pushed back, the nerves can be cut or the vein and arteries may get cut resulting in blood supply being cut off and so the nerve dies.

- [10]. Doctor William said that Kumar's condition is irreversible. The injury is not painful. Some pain may have been experienced during swelling immediately after injury but the damage is permanent.
- [11]. Doctor Williams report dated 17 July 2014 was tendered and marked **PEX 1**.
- [12]. In cross examination Doctor William said the pain is a subjective feeling. She said that although Kumar may not feel any pain in the nerve of the eye as the nerve was already dead, he may experience pain in other parts of the eye. She said laser may be used to prevent other complications but cannot improve vision. She said there was no current complication with Kumar when she last saw him. There was no re-examination.

PW2: Doctor Victor Wasson

- [13]. Dr. Wasson specializes in psychiatry. He looks after people with mental health or who have and psycho-social problems.
- [14]. Doctor Wasson met Kumar in 2014. After their meeting, he prepared a medical report dated 13 March 2014. This report is document No. 19 in the plaintiff's bundle of documents.
- [15]. Kumar had sought medical treatment from Dr. Wasson. Doctor Wasson said that he and Kumar had eight to ten sessions together. Kumar had said that he was experiencing sleep disturbance. He was isolated, withdrawn, and was easily fatigued. He had lost pleasure in pleasurable things.
- [16]. Kumar related to Dr. Wasson that he had been performing well at work but things changed after the accident. He said that Kumar had depressive symptoms.

- [17]. Dr. Wasson explained that, generally, many things and factors cause mental illness and that there is no likely major factor for mental illness. Some contributing factors may have been pre-existing before the accident.
- [18]. Doctor Wasson said that Kumar was most traumatic after the accident. He said that Kumar would re-live the accident a couple of times a week. This would cause Kumar much distress and fear. He was easily startled. People with phobias tend to have an exaggerated response and he observed this of Kumar as well. He diagnosed Kumar with post-traumatic stress disorder.
- [19]. Doctor Wasson said there were two sub-types of post-traumatic stress disorders. One was associated with depressed mood. The other was associated with anxiety symptoms. He said the condition is caused by many factors. In Fiji, a multi-axial diagnostic system for psychiatric disorders is used. The multiaxial method of evaluation looks at five different axis or reference points against which the relative acuteness (if you like) of any given mental health case is classed or diagnosed. These five axes are:
- (i) psychiatric illness
 - (ii) personality disorder
 - (iii) underlying medical condition
 - (iv) psycho-social stress
 - (v) global assessment of functioning.
- [20]. Doctor Wasson said that hospital records confirm three factors present in Kumar (1) orthopedic (2) neurological (3) urethral injury. Kumar also had glucose. In terms of axis 5 (i.e. (v) above), which is the global assessment functioning, he said that Kumar demonstrated moderate symptoms of psychological stress which impairs and prevents Kumar from functioning.
- [21]. He said the field of psychiatry is relatively young in Fiji and the guidelines are not clear yet. He said Kumar is able to express himself but with some physical

disability. He had a sexual dysfunction. He said these cannot be tested in Fiji. If Kumar was sent overseas, he would have to go through a nerve conduction test. Kumar is on an anti-depressant drug called *fluoxetine*. This drug can be used also to treat obsessive compulsive disorders, post-traumatic stress or major or severe depression, anxiety disorders, and phobic disorders. He said he has not seen Kumar for three months now and cannot say if Kumar is well now or if he is improving at all. His report was tendered and marked as **PEX 2**.

[22]. Under cross-examination, Dr. Wasson agreed that Kumar's alleged sexual dysfunction cannot be confirmed. He would place Kumar on axis 4. He agreed that at the time Kumar came to see him, Kumar was 55 years of age. He agreed that age can be a factor. However, for depression, the teen to middle age tends to be the high risk group. When asked whether Kumar would still develop post trauma even if the accident had not occurred, Dr. Wasson explained that "post-trauma" occurs after trauma. He also said that Kumar is a known Ischemic Heart disease case.

PW3 – Rimal Karan

[23]. Mr. Karan is an Asset and Planning Manager for MWH Global Consulting Company which company manages road maintenance and asset management of the Fiji Roads Authority. Mr. Karan said he wrote a letter to the plaintiff's wife dated 10 December 2013. The said letter reads as follows:

Ms Manjula Devi
P.O. Box 868
LAUTOKA
Dear Madam

Re: Confirmation of Road off Chandmari Road Lautoka

Reference is made to you regarding the above.

Please be advised the concerned road is an unnamed road and is under the jurisdiction of FRA Road Network. For any further clarification in this matter please contact on 3100616 or 9991065.

Yours sincerely

Rimal Karan
Asset Management and Planning Manager
MWH New Zealand Ltd
Fiji Branch.

[24]. Mr. Karan also read a letter dated 20 January 2014 and identified his signature on the said letter.

Ms Manjula Devi
P.O. Box 868
LAUTOKA

Dear Madam

Re: Confirmation of Road Reserve off Chandmari Road Lautoka

Reference is made to your letter dated 12/12/13 regarding the above subject matter.

Please be advised MWH New Zealand Ltd is the appointed consultant of FRA for the processing of planning applications on their behalf.

We have reviewed your query for confirmation on the status of the above road reserve. Please be advised according to the approved survey plan DP5550 it is very clearly stated "Lot 30 & 31 to be surrendered and vested in council as road" All council vested road reserves are public roads and all type of road users are permitted to use these roads.

As per decree #3 of 2012 volume 13-3 all public road reserves are vested to FRA. By this decree all the public road network are under the jurisdiction of Fiji Roads Authority. It can be concluded the said road reserve you have highlight is currently under FRAs network for public roads. This is also to confirm this public road is unnamed.

I hope I have clarified your doubts regarding the confirmation of the said road reserve and should you have any further clarification regarding this matter please do not hesitate to contact on the undersigned contacts.

Yours sincerely

Rimal Karan
Asset Management and Planning Manager
MWH New Zealand Ltd
Fiji Branch

- [25]. Mr. Karan said that according to the Approved Development Plan 5550, Lots 30 and 31 were to be surrendered and vested in the Council as a road. DP 5550 was made on 23 February 1982. This is noted at the right hand column of the DP. He said that the accident happened on Lots 30 and 31. He said they are public roads. He tendered the relevant Gazette which is marked **PEX 6** which effectively made Lots 30 and 31 a public road.
- [26]. Under Decree No. 3 of 2012, Volume 13-13, all public roads vested in the Fiji Roads Authority.

PW4 – Umesh Kumar Nand

- [27]. Umesh Nand said that 12 June 2009 was his wedding day. He was inside the house when all of a sudden, people shouted “accident”!. He came outside the house and saw a car overturned. He knows the plaintiff as his uncle. The defendant also is his uncle. They were both attending his wedding. He said he did not actually see the accident. He knew that the car belonged to the first defendant.

PW5 – Rajesh Kumar Nand

- [28]. Rajesh Nand said the accident happened sometime in 2009. On the day of the accident, his family was hosting celebrations for the wedding of his brother Umesh. He had been sitting inside a shed where part of the celebrations was being held when he heard a loud noise at around 9.30 to 10.00 p.m. Startled, he and some other men ran out to find a car tumbled and lying on its hood with all of its four wheels exposed in the air. That car was owned by his uncle

(first defendant). As far as he was aware, the second defendant had control of the car when the accident happened. Rajesh Nand said he saw the plaintiff trapped under the car. He said he did not notice the 2nd defendant at that time. He said that many people had gathered around the car. Someone then took the plaintiff to the hospital.

[29]. In cross-examination, Nand confirmed that he did not actually see the accident. He only saw the overturned car with the plaintiff underneath it. He understood that the plaintiff had been drinking yaqona. It was put to him that the second defendant, his mother and two children were inside the car when it tumbled and that they had been pulled out. Nand said he did not see anyone inside the car. He said he saw the 2nd defendant, his mother and the two children outside the car.

PW6 – Satish Prasad

[30]. Satish Prasad owns the house at which the wedding took place in June 2009.

PW7 – Dr. Joeli Mareko

[31]. Dr. Mareko prepared a Report on Arun Kumar. They are documents 1 and 18 on the Bundle of Documents. The history related to him was that there had been an accident on 12 June 2009 when a vehicle tumbled over and rested on Kumar. Kumar was immediately rendered unconscious from the impact. He would regain consciousness later. Dr. Mareko read from his Report as follows:

Fractured bilateral

4th-5th ribs fracture

Treatment – pain relief, antibiotics, head injury observation, insertion of suprapubic catheter.

Treated for head injury and visiting neurologist. Attended to him.

2014 examination – persistent chest pain, headache, loss of memory.

Gave him 18% disability. Permanent disability. Reconstruction urethra.

Med Report 12/11/09 – PEX7

2nd Report 15/07/14 –PEX8

- [32]. Documents 8, 15, 16, 20, 21, 22 and 23 were tendered by consent and marked PEX 9 to 16.
- [33]. In cross examination, Dr. Mareko explained how he arrived at the 18% assessed incapacity.

PW5 – Shalen Vijendra Mani

- [34]. Shalen Mani was also at the shed for the wedding celebrations. He said he saw the 2nd defendant driving the car whilst the plaintiff was walking along the side of the road on the right. The second defendant's car then crossed the road and bumped the plaintiff. The plaintiff was left crawling on the road after impact.
- [35]. I understand from Mani's explanation that the road itself was sloped leading to the main Chand Mari Street. There was a steep and high embankment running parallel to one side of the road. After hitting the plaintiff, the car would then veer off the road onto the steep embankment and then flop-landed on the plaintiff who was then still lying on the road. He said he saw all this and he was one of the ones who pulled the plaintiff from under the car. He was also one of the ones who rushed the plaintiff to the hospital.

[36]. In cross-examination, Mani said the vehicle was upside down when it rested on the plaintiff. It was put to him that, if the plaintiff had been walking along the right side of the road, the accident would not have happened. He replied that he had a clear view of everything from where he sat in the shed. He said the plaintiff was walking along the side of the road and not in the middle of the road as was suggested to him. He said when the car came onto the road, its lights were not turned on. He saw Kumar crawl on the road after the car hit him before the car tumbled over and land on Kumar. It was put to him that the second defendant had attempted to maneuver the car to avoid hitting Kumar, as a result of which the car had tumbled over onto Kumar. He refuted this. Asked why he did not give a statement to the police, he said the police did not come to him.

PW6 –Arun Kumar

[37]. Before the accident, Arun Kumar was working at Denarau Investments Limited as a carpenter and plumber. He earned \$150 per week. He identified his wage slip which was shown to him in Court which is document number 13 of the Plaintiff's Bundle of Documents. The wage slip was tendered and marked **PEX17**.

[38]. He was at the wedding on the day in question. The accident happened when he was making his way back home. He said he was unconscious after the car landed on him. When he regained consciousness, he found himself on a bed in hospital. He felt a lot of pain. He was injured mostly on the right. The right side of his ribs and pelvis were injured. He also injured his left eye which is

now completely blind. His right eye is beginning to get blurry. He said he also had a backbone injury.

[39]. He still feels the injuries and still goes to the hospital to this day. If he sits down for a long time, he will not be able to walk properly. He has had some surgical procedures to correct a problem he had with passing urine. He says his penis is not working.

[40]. Each visit would cost him \$30-00 which covers his return trip by carrier. He cannot tell how many times exactly he has been to the hospital.

[41]. He has not been able to work as a result of the persisting pain and disabilities he has suffered in particular, his flailing vision. He continues to take eye drops, sleeping pills and pain reliever. At the time of the accident, he was 52 years of age.

[42]. In cross examination, Kumar said he had been drinking *yaqona* with other men at a shed that had been set up at the top of the hill. At some point in the evening, he decided to go home. He left the shed and began to make his way to the small road at the top of the hill. To reach the road, he had walked past CX 351 which at the time, was still parked at the top of the hill. He did so. The car was parked at the top of the hill when he came to the road. A short while after he had walked some three or four steps, the car would proceed forward and hit him. The accident happened around 10.00 p.m.

[43]. Kumar agreed that the road was narrow. He strongly refuted that he had been walking in the middle of the road. To explain part of his claim for special damages, Kumar said that a bus service is provided around where he lives but

he would have to walk for about half a kilometer to get to it. Walking that long is hard in his condition.

PW7 – Manjula Devi

[44]. Devi is Arun Kumar's wife. She married Kumar in 1984 and they have two children. Devi works as an auditor.

[45]. Devi recalls that on 12 June 2009, she and her family had attended a wedding. At some point between 10.00 p.m. and 10.30 p.m., they decided to return home. She said she was getting ready to leave the shed but was not aware that her husband had already made his way to the road. However, she saw the car roll forward downhill and then tumble to rest on its back with its four wheels in the air. She said she rushed to the spot with everyone else to see what had happened. When she reached there, she heard people say:

“Johnny from Naviyago is under the car”

[46]. From there, she ran inside the shed. Her sisters were inside the shed. They held her and would not let her go to where her husband was. They told her:

“See, your husband is standing there”

[47]. When she turned around, she saw people holding him up. She then ran towards him. She called out to him but he did not open his eyes and did not talk.

[48]. She said the first defendant is her brother and the second defendant is her brother's daughter. She said the car, CX 351, belonged to her brother and the daughter had driven the car on the occasion in question.

[49]. She said she travelled with her husband to the hospital after the accident.

- [50]. She says that the day after the accident, her husband was having trouble passing urine. He was only able to pass urine after an operation. There were no fees charged for operations at the Lautoka Hospital.
- [51]. She says her husband has not recovered. Whenever he has a tension, he would have a headache. She says her husband cannot sleep well and has to take sleeping pills to sleep.
- [52]. Her husband's hospital cards were tendered and marked PEX 18 to 20.
- [53]. She says that whenever her husband has difficulty passing stools, he has to take tablets which are prescribed by doctors (bisacodyl, indometacin and a third one). Kumar also takes paracetamol, pencillin, fludec and eyedrops.
- [54]. She says Kumar still experiences chest pain, has broken ribs, back pain and headaches. She also adds that her husband has problems having sexual intercourse. The bottom part of his legs still cause him a lot of pain.
- [55]. In cross-examination, she was unable to produce any receipts for the medicines that she buys.

DW-1 Ashreen Lata

- [56]. Ashreen Lata, lives in Auckland in New Zealand. She works as an online despatcher. She said that the plaintiff, Arun Kumar, is her uncle. On the evening of 12 June 2009, she and her mother, father and two children were attending a wedding at Rifle Range at her grandparents' place where she grew up. She had parked the car near the mosque which is located at the top of the hill. At about 10.00 p.m., she and her parents decided to leave the wedding and return home. She, her mother and children got into the car and she began to drive downhill. As the car proceeded downhill, she saw her uncle and his son

walking also on the road towards the main road at the bottom of the hill. They were near a driveway entrance at some point along the road in front. She said that her uncle was walking right in the middle of the road. As her car proceeded downhill, her uncle tried to go to right side while his son, Avneel, tried to go to the left. All along, she was proceeding very slowly because the area was crowded and also because her two children were in the car. One or two other vehicles were also passing to come in from the main road at the bottom of the hill or go out onto the main road. There was no lighting but all her lights were on. She tried to swerve her car towards the right and then it tumbled.

- [57]. She and her family all managed to get out of the car despite its tumbled position. The car did not hit the plaintiff before it tumbled. She said however that the plaintiff had to be pulled out from under the car.
- [58]. She went to see the plaintiff at the hospital. She also went to the police station where she gave a statement. Her caution interview was tendered and marked DEX2. Some photographs were also tendered and marked DEX1.
- [59]. The road had an embankment on the side towards which she had swerved the car.
- [60]. Lata agreed in cross-examination that her father is the owner of the car. She was the one who was driving the car on the day in question. She insisted that Kumar had walked in the middle of the road. Asked why she did not stop the car then, she said that from the middle of the road, Kumar had proceeded to the side as if he would enter the gate at the driveway entrance. However, he suddenly came back onto the road. She admitted though that she could have

stopped but she did not. She agreed that he was visible, that the car was in good mechanical condition and that she had a valid driver's license. She denied though that she had bumped him before the car overturned on him.

[61]. In re-examination, she read from her caution interview questions and answers which indicate that she had told police that he had been walking in the middle of the road. She said she swerved the car to avoid hitting Kumar. When asked why she did not stop, she simply said she could not stop it.

ANALYSIS

[62]. I accept Rimal Karan's (**PW2**) evidence that the road in question is a public road. I note also that it is unrefuted that the car driven by the second defendant was slowly proceeding downhill along the road in question when it veered off the road and mounted onto the sloped embankment along one side of the road. As a result of that, the car back-flipped and landed on the plaintiff in an overturned position. It is also unrefuted that the plaintiff sustained severe injuries from that.

[63]. What seems to be disputed is:

- (i) whether the car driven by the second defendant had hit the plaintiff first before it veered off the road onto the embankment.
- (ii) whether the plaintiff had been walking in the middle of the road.

[64]. As to whether Arun Kumar had been walking in the middle of the road or along the side of the road, the two conflicting testimonies are that of **PW5** Shalen V. Mani on the one hand and that of Ashreen Lata (1st defendant) on the other.

[65]. Of the two, I prefer **PW5**'s evidence who said he saw Kumar walking along the side of the road and not in the middle when the car hit him before veering off

the road and later overturning on the plaintiff. I am of the view that it is more plausible that the reason why the second defendant suddenly swerved the car to the right was because the car had hit the plaintiff.

[66]. Having said that, even if the car had not hit the plaintiff first, the fact is that the second defendant was still responsible for having caused the car to veer off the road onto the steep side embankment and later overturning on the plaintiff causing injuries. In which case, it will be said that all of the injuries sustained by the plaintiff was caused by the impact of the car overturning on him. I believe that if the car had overturned on the plaintiff while he was upright, the injuries would have been more severe and he would likely have died.

[67]. I find that the accident happened because the second defendant was negligent in failing to exercise a reasonable standard of care in her control of the car, considering:

- (i) that she was driving the car down a steep road
- (ii) that it was after 10.00 p.m. at night
- (iii) that the road was very narrow
- (iv) that the lighting was poor
- (v) that the place was crowded with people attending the wedding

[68]. I find the first defendant liable for the injuries suffered by the plaintiff.

[69]. The second defendant was, at all material times, the owner of the car. As such, he is also vicariously liable for the negligence of the second defendant. In **Jan v Sukhlal** [1968] FJLawRp 36; [1968] 14 FLR 64 (22 April 1968):

In running-down cases in which the owner is not himself driving the vehicle, he is vicariously liable for the injuries caused only if the vehicle was driven by his servant or agent or if he has retained control over the driving of it.

[70]. In **Ganesh v Ali** [1978] FJLawRp 30; [1978] 24 FLR 147 (30 November 1978)

It is necessary to consider firstly the legal principles which render an owner vicariously liable for the negligent driving of his vehicle by another. In *Morgans v Launchbury* [1972] 2 All ER 606 at p. 620 Lord Salmon says:—

"As I understand the authorities the law at present makes the owner or bailee of a car vicariously responsible for the negligence of the person driving it, if, but only if, that person is (a) his servant and driving the car in the course of his employment or (b) his authorised agent driving the car for and on his behalf..... Thus, mere permission to drive is not enough to create **vicarious** responsibility for negligenceSo far as I know, until the present case, *du Parcq* LJ's statement of the law in *Hewitt v Bonvine* [1940] 1 KB at 194, 195, has never been questioned: 'The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty.'"

Lord Wilberforce in *Morgans'* case (*supra*) at p. 609 says:

"It is said, against this, that there are authorities which warrant a wider and vaguer test of vicarious liability for the negligence of another; a test of 'interest or concern'

On the general law, no authority was cited to us which would test vicarious liability on so vague a test, but it was said that special principles applied to motor cars. I should be surprised if this were so, and I should wish to be convinced of the reason for a special rule. But in fact there is no authority for it. The decisions will be examined by others of your Lordships and I do not find it necessary to make my own review. For I regard it as clear that in order to fix vicarious liability on the owner of a car in such a case as the present, it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty. The substitution for this clear conception of a vague test based on 'interest' or 'concern' has nothing in reason or authority to commend it. Every man who gives permission for the use of his chattel may be said to have an interest or concern in its being carefully used, and, in most cases if it is a car, to have an interest or concern in the safety of the driver, but it has never been held that mere permission is enough to establish vicarious liability."

We respectfully agree with the statement made by Lord Donovan in *Rambarran v Gurrucharran* [1970] 1 All ER 749 at 751 when he said:

"Where no more is known of the facts, therefore, than that at the time of an accident the car was owned but not driven by A it can be said that A's ownership affords some evidence that it was being driven by his servant or agent. But when the facts bearing on the question of service or agency are known, or sufficiently known, then clearly the problem must be decided on the totality of the evidence."

However, once the facts are known such an inference and presumption may be rebutted. In *Rambarran's* case (*supra*) Lord Donovan said further —

"A case raising an issue similar to that in the instant case arose in New Zealand in 1955 — *Manawatu County v Rowe* [1956] NZLR 78. There the wife of Mr Rowe, while driving her husband's car with his consent, was in collision with a vehicle driven by one of the appellant country's servants. Mr Rowe brought an action against the country claiming

damages. The trial judge held that both drivers were guilty of negligence, Mr Rowe's wife being 75 percent to blame. The question then arose whether her negligence could operate to reduce the damages otherwise recoverable by her husband: and this depended on whether at the time of the accident the wife was driving as the servant or agent of her husband. It was held both by the trial judge and a majority of the New Zealand Court of Appeal that she was not: and that Mr Rowe was entitled therefore to recover the damages awarded against the county in full. After considering the English cases of *Barnard v Sully* (1931) 47 TLR 557 and *Hewitt v Bonvin* [1940] 1 KB 188 and certain New Zealand and Australian cases dealing with the same problem, the Court of Appeal stated the principles which it deduced therefrom thus: 1 The onus of proof of agency rests on the party who alleges it. 2 An inference can be drawn from the ownership that the driver was the servant or agent of the owner, or in other words that this fact is some evidence fit to go to a jury. This inference may be drawn in the absence of all other evidence bearing on the issue, or if such other evidence as there is fails to counterbalance it. 3 It must be established by the plaintiff, if he is to make the owner liable that the driver was driving the car as the servant or agent of the owner and not merely for the driver's own benefit and on his own concerns. It is also interesting to observe that Hutchinson J, one of the majority who gave judgment for Mr Rowe, remarked in the course of his judgment that the fact that his wife had the right to use the car whenever she pleased went a long way to destroy any presumption of agency on her part."

INJURIES

[71]. The medical reports tendered record that Arun Kumar sustained the following injuries and conditions:

- a. Damaged left Eye (Report Dr Louise William PE1)
- b. Fractured Bilateral Suprapubic Fracture (pelvic Fracture)
- c. Fracture 4th and 5th Rib
- d. Head injury.
- e. Post-Traumatic Stress disorder with Anxiety symptoms and depression (Report Wasson).
- f. Urethral Stricture (Urethral injury)

Eye Injury

[72]. I accept Doctor Williams (**PW1**) report dated 17 July 2014 that Kumar sustained a cut on the left eye and some optical nerves were damaged as a result. The left eye nerve has optic atrophy and is dead. This condition is irreversible. The injury is not usually

painful, although Arun Kumar might have experienced some pain during swelling immediately after injury.

- [73]. In **Amish Chand v Sudhakar Chandra & Others** Civil Action No. HBC 0135 of 2000L, the plaintiff lost sight to his left eye. He was awarded a sum of \$100,000.00 comprising \$40,000 for pain and suffering (\$15,000 for past and \$25,000 for future) and loss of amenities and \$ 60,000 for loss of earning capacity.
- [74]. In **Vinita Mala Chand v Vinod Patel & Ors** (Civil Action No. HBC 255 of 2000) the plaintiff a student, lost sight of her right eye. She was awarded \$40,000 for pain and suffering (\$15,000 for past and \$25,000 for future) and \$60,000.00 for loss of earning capacity.

Pelvic Injury

- [75]. In the Medical report (22 June, 2011 by Dr Arun Murari PEX 14) Dr. Murari said that Arun Prasad suffered a pelvic fracture, rib fracture and urethral injury.
- [76]. In his medical report dated the 15 July, 2014 Dr. Mareko noted the following injuries in his report (PE 8) Fractured Bilateral Suprapubic Fracture.
- [77]. In **Prakash v Khan** (2009) FJHC 160, the plaintiff had suffered a pelvic fracture and was awarded \$ 30,000 as general damages.
- [78]. In **Kumari v Hasad** [2012] FJHC 1153; Civil Action 19.2009 (8 June 2012) the plaintiff suffered a pelvic fracture was hospitalised for a period of four days and took two months to recover. She was awarded \$30,000.00 in damages.

Fracture 4th and 5th Rib

[79]. In **Tacirua Transport Company Limited v. Virend Chand** (Court of Appeal) FLR Vol.41 page 44 the Court awarded \$20,000/= for two fractured ribs together with several laceration injuries; the sum of \$30,000.

[80]. In **Prakash v Ram** [2011] FJHC 786; HBC356.2005 (5 December 2011) the Plaintiff's 3rd 4th and 5th Rib was fractured. The learned Justice awarded the sum of \$30,000.00

Head Injury

[81]. That the plaintiff suffered head injuries is well documented in the reports.

Post-Traumatic Stress Disorder with Anxiety Symptoms & Depression

[82]. I also accept Doctor Victor Wasson's evidence that Kumar had suffered some psychiatric problems as a result of the injuries he received from the accident.

Urethral Injuries

[83]. The medical reports also note that Kumar suffered urethral injuries. In the report dated 07 June 2012, Dr Rajeev Patel noted that Kumar was suffering from Urethral Stricture.

[84]. In **Muakalou v Ministry of Health** [2011] FJHC 220; HBC481.2006 (**8 April 2011**), the Court allowed \$70,000.00 for pain and suffering and loss of amenities where the child plaintiff had lost 70-80 percent of his glans penis and the total permanent incapacity was 18%.

[85]. Kumar has urinary difficulties and his incapacity is assessed at 18%. The evidence is that, because of his injuries, Kumar has not been able to partake in sexual intercourse.

ASSESSMENT OF DAMAGES

General Damages & Pain & Suffering & Loss of Amenities and Loss of Earning Capacity.

[86]. Vijay Naidu & Associates for the plaintiff seek a global sum of \$170,000.00 for General Damages for pain and suffering and loss of amenities and loss of earning capacity.

[87]. Mr. Justice Pathik, in **Chand v Nauchi** [1997] FJHC 212; Hbc0302j.95s (11 June 1997) cited various cases which dealt with the basis upon which a global figure might be awarded for general damages.

[88]. In that case, Pathik J started by citing **Waldon v War Office** (1956) 1 W.L.R. 51 at 57 where Jenkins L.J said that reference to awards made in similar other cases may or may not be of assistance to a judge and that the decision whether or not to be guided by such cases must be a matter of discretion for the judge in every given case¹.

[89]. Pathik J then went on to cite the Fiji Court of Appeal decision in **Anitra Kumar Singh and Rentokil Laboratories Limited** (Civ. App. No. 73/91) where the Court acknowledged that, whilst the conventional method of itemising each

¹ Pathik J said:

In regard to reliance on previous cases I have borne in mind the observations of **JENKINS L.J.** in **WALDON v WAR OFFICE** (1956) 1 W.L.R. 51 at 57 when he said:

"I think that counsel can be trusted only to refer to other cases very sparingly, bearing in mind that each case depends upon its own facts, and only rarely can another case be of real assistance to the judge. And secondly, I think that the discretion must always be on the judge himself to decide whether in his view the reference to such other cases would or would not assist him."

head of damage may be useful in setting checks and balances, the global approach may be more appropriate in some situations².

[90]. Pathik J then went on to adopt a global approach in the case before him, and commented thus:

Here there were a number of injuries involving disfigurement although minimal, fracture of femur, motion of knee reduced to 70% and injury to an eye. There is also the possibility of developing osteoarthritis sometime in the future. A certain amount of pain and discomfort and a limp is still present. The applicant's sex life is also affected.

I have approached the assessment of general damages based on the totality of the disability and in this regard I adopt the words of **TOWNLEY J** in **FOWLER v PUNTER** (1959) Qd R 510 (FC), 526 when he said:

"I deprecate any suggestion that one may take a list of physical injuries and, from previous awards, assign an amount of each injury and thus arrive at a total. That process may, and perhaps necessarily would, result in the duplication of some elements, particularly with respect to the restriction on future activities, economic and social. In regard to those latter aspects of damage it seems to me that it is the totality of disability which has to be considered and that will seldom, if ever, be the equivalent of the sum of separate disabilities individually assessed".

To sum up, therefore, in assessing general damages, pain and suffering, past, present and future, are taken into account; the loss of amenities of which evidence have been given and accepted as stated above are also considered. I have also given weight to other aspects like "facial disfigurement", "corneal laceration" and "sexual disfunction".

It is proposed to award a general figure for the sub-heads rather than attaching a figure to each sub-head because there are the multiple injuries suffered by the Plaintiff. As is said by **HAROLD LUNTZ** in **ASSESSMENT OF DAMAGES** for Personal Injury and Death 3rd Ed. at p.52:

"it is improper to award to each of the injuries a sum representing the amount which would have been awarded if that had been the only injury and then to add up the various sums to make the total award."

² The FCA had said as follows:

"... With some exceptions they (range of awards) are well below the figures we might think appropriate at this time August 1993 or at the time of judgment in this Action was given, October 1991".

The Court **Anitra Kumar Singh** then goes on to state further at page 12 that:

"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."

For the above reasons I award the sum of \$25,000.00 (twenty-five thousand dollars) as general damages.

[91]. I follow the same approach. In this case, I am of the view that the sum of \$130, 000 would be appropriate taking into account all the injuries suffered by the plaintiff and the sexual dysfunction and the mental disorder he continues to suffer.

Special Damages

[92]. The plaintiff seeks \$1,129.33 in special damages. I think that is a reasonable amount. I award special damages in the sum of 1,129.33 accordingly.

Loss of Past Income.

[93]. The plaintiff's solicitors submit as follows:

Paragraph 7 of the Statement of Claim, the Plaintiff after the injuries was not able to attend to work and claims for past wages.

He was tendered a copy of the wage slip PE 17.

For the loss of wages we submit as following:

Loss from 12th June, 2009 till 18th November, 2009

\$3.00 x 45 hours x 23 weeks equaling \$3105.00

Loss of FNPF

\$0.08 x 45 hours x 23 weeks equaling \$82.80

The total the Plaintiff claims for past income is \$3,187.80.

[94]. I accept the above and award \$3,187.80 accordingly for loss of past income.

Loss of Future Income

[95]. The plaintiff's solicitors submit as follows:

The Plaintiff was born on the 2nd of May, 1959, at the time of the accident, the Plaintiff was 50 years old.

The Plaintiff says he cannot do the task of plumbing anymore and as evidenced the injuries concerning his eye and pelvis (urethra) we submit the same to be well founded.

At the time of the accident the Plaintiff was a plumber in Denarau a private company. He was earning a gross pay of \$3,323.25.

He had no other health conditions and we submit that that his loss of income be multiplied till the age of 65.

As such \$3,323.25 x 15 equaling \$49,878.75 for loss of future income.

[96]. I am of the view that 15 is too big a multiplier to apply considering his age. I would give a multiplier of 5 only. Accordingly, I would make an award for loss of future income as follows:

$$\mathbf{\$3,323.25 \times 6 = \$19,939.50}$$

Future Medication & Transport

[97]. The plaintiff submits as follows:

The Plaintiff has highlighted that he still continues on medication regarding the injuries, he still continues to visit the Lautoka Hospital and still has to take medication (PE18, 19, 20).

We submit \$5000.00 as adequate costs for medication and transport.

[98]. I would reduce this to \$2,500 and make an award under this head accordingly.

Interest

[99]. I award interest on general damages at the rate of 6% p.a.

Costs

[100]. I summarily assess costs in the sum of \$3,000.

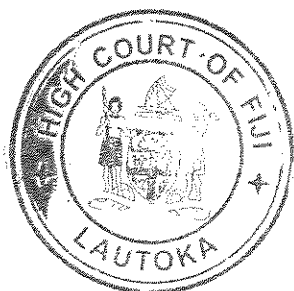
CONCLUSION

[101]. I make the following awards:

Head	Award
<i>General Damages & Pain & Suffering & Loss of Amenities & Loss of Earning Capacity.</i>	\$120,000

<i>Special Damages</i>	\$ 1,129.33
<i>Loss of Past Income.</i>	\$ 3,187.30
<i>Loss of Future Income</i>	\$19,939.50
<i>Future Medication & Transport</i>	\$ 2,500.00
<i>Costs</i>	\$ 3,000.00
TOTAL	\$149,716.13
<i>Interest</i>	6%

[102] The 1st and 2nd defendants are liable jointly and severally for the above sum.



Anare Tuilevuka
JUDGE
 12 October 2017