

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 16 of 2017

BETWEEN : **PRITIKA PRIYA VERMA** of Vaqia, Ba, engaged in Domestic Duties.

1ST PLAINTIFF

ROHAN RONAK PRASAD of Vaqia, Ba, a minor by his father and next friend **BIMLESH PRASAD** of Vaqia, Ba, Labourer.

2ND PLAINTIFF

AND : **DAYAL'S QUARRIES LTD** a limited liability company having its registered office at Yalalevu, Ba.

1ST DEFENDANT

AND : **SHAINIL PRASAD** of Rarawai, Ba, Driver.

2ND DEFENDANT

Appearances : Mr R. Chaudhary for the plaintiffs
: Mr K. Patel for the defendants

Date of Hearing : 14 November 2017

Date of Submissions: 1 December 2017 (plaintiffs), 23 January 2018 (defendants)

Date of Ruling : 5 March 2018

R U L I N G

[On assessment of damages]

Introduction

[01] This ruling concerns assessment of damages.

[02] The plaintiffs' claim stems from a vehicle accident that occurred on 12 August 2016 in which the plaintiffs sustained injuries. They claim, among other things, special

damages, general damages for pain suffering, loss of amenities of life and loss of earning capacity.

[03] Upon the defendants' admission of liability, the matter proceeded to the assessment of damages. At the hearing, the plaintiff called three witnesses namely Pritika Priya Verma, the first plaintiff ('PW1'), Dr Eddie Mc Caig, an Orthopedic Surgeon ('PW2') and Dr Arun Murari, a consultant surgeon ('PW3').

[04] The defendant did not call any witness.

The Evidence

[05] PW1 in her evidence states that:

- a) She was born on 8 February 1985 (a copy of her birth certificate was tendered as PE-5). On the date of the accident (12/8/2016), she was 31 years old. She is a housewife and is 32 years old at present. Before her marriage, she did work in a garment factory where she earned \$180.00 per week. She is from a farming background and used to work on her father's farm before the marriage.
- b) She suffered injuries in the accident. She was fully conscious after the accident and felt pain throughout – from the time of the accident till she was conveyed to Lautoka Hospital in an ambulance and beyond. At the time she was taken to the theatre twice for operation and manipulation. She was on drips and pain killers.
- c) She was on crutches. She still uses a walker (crutches). She presently stays with her parents as on her own she is not able to do all the household chores. She cannot walk without her crutches. She has pain in her left leg. She cannot stand for long or at all without her crutches. She takes Panadol for pain. She is not able to do gardening as before. She used to play netball in school but now she cannot.
- d) (In respect of her son-second plaintiff) she stated that he is a minor. He is her son. He was born on 21 July 2008 (His birth certificate is annexed to the submission marked 'B1'). He was also injured in the accident. He was taken to the Mission Hospital first and then transferred in an ambulance to the

Lautoka Hospital. He was in the same room with her. She saw the Doctor bandaging her son's left hand. The son was in pain and crying. His left ear was also bleeding.

[06] Under cross-examination she states that:

- a) She admitted that she did not have receipts for expenses incurred on travelling to the clinic at Nukuloa and Lautoka Hospital.
- b) When asked 'has your fracture and the injury healed', she said 'No'.
- c) She said she is taking tablets-Panadol when she has pain.

[07] PW2 who is an orthopedic surgeon at the Lautoka Hospital. He graduated as a Doctor in 2004 and holds a Masters in Surgery. He produced three medical reports. Two of them were prepared by him on 6 January 2017 and 8 November 2017, respectively and another one prepared by Dr Madhukar Prasad dated 28 October 2016. His evidence is that:

- a) The injuries suffered by Mrs Verma, the first plaintiff were very serious- "open fracture of her left tibia and fibula". She was "placed in an external fixator for fracture stabilization". This was removed from her leg on 8 November 2016, in the operating room (medical report dated 8 November 2017). On 5 December 2016, it was noted that the fracture still had not fully united clinically.
- b) He in his medical report dated 8 November 2017, inter alia, states as follows:-

'On her last examination Mrs Verma still uses a walking aid to assist her mobilizing and complains of constant pain.

X-rays (30/10/2017) show that her tibia and fibula fractures have healed in slight varus, anterior displacement with less than 2 cm shortening. She was relative osteopenia in her ankle joint.

Mrs Verma is still recovering and will still need rehabilitation.'

- c) The fractures have healed in “slight varus”- that is there is inward angulation – that is towards the body mid line of the distal segment of a bone or joint. She also has “relative osteopenia in her ankle joint”.
- d) He explained osteopenia as referring to bone density that is lower than normal density. Bone density is a measurement of how dense and strong the bones are. Having osteopenia means Mrs Verma has a greater risk of fractures. He also said arthritis or osteoarthritic can affect her left ankle and this will cause her going on pain.

[08] When cross-examined, PW2 states:

- a) He agreed that his report does not mention of permanent disability.
- b) He said Mrs Verma can make some more improvement.

[09] PW3, is a consultant surgeon at the Lautoka Hospital. He gave medical evidence on behalf of Rohan, the second plaintiff. He tendered the medical report of Rohan Prasad dated 13 October 2016, prepared by Dr Rounak Lal, Surgical Registrar of the Lautoka Hospital (PE-4). He in his evidence states:

- a) Rohan had suffered injuries such as (a) Basal skull fracture and (b) Left forearm abrasions. He was treated with antibiotics and pain relief.
- b) He confirmed (referring to hospital folder) that Rohan was admitted to Lautoka Hospital from 12 August 2016 to 24 August 2016.
- c) He said although the report is from Dr Rounak Lal, many doctors attended to Rohan in the hospital.
- d) About the scars, he said Rohan is only 9 years old at present. He will grow in size in the years to come. The scars do not grow like normal skin. It can even contract. So, as the arm grows in size in terms of length and width, Rohan may need further surgery or skin grafting or plastic surgery. Apart from this, scars are very unsightly, prominent and visible and this could affect Rohan’s mental well-being as he grows older.
- e) He said Rohan may suffer from post-traumatic headaches in the future although he could not say this will definitely be so.

Discussion

[10] In light of the evidence, medical reports tendered on behalf of the plaintiffs and the submissions advanced by each party, I proceed to assess damages that would be awarded to the plaintiffs.

A) PRITIKA PRIYA VERMA (FIRST PLAINTIFF)

General damages for Mrs Verma.

[11] I was referred by the defendants to the Court of Appeal decision in Permanent Secretary for Health vs Kumar (2008, Fiji Court of Appeal, ABU0084 of 2006S, where their Lordship said:

“Each case must depend on its own circumstances, but pain and suffering and loss of amenities of life are not susceptible measurements in terms of money and conventional figure derived from experience and awards in comparable cases must be assessed”

[12] Mr Chaudhary on behalf of the plaintiffs referred to cases that deal with the assessment of general damages. He submits that the court should take account of inflation and as a result increase with time. He is asking an award of \$50,000 (past: \$30,000.00 (with interest at 6% to the date of judgment), future: \$20,000.00).

[13] Mr Patel, counsel for the defendants submits that a figure of \$23,000.00 for pain and suffering and loss of amenities should be awarded to the first plaintiff. He cited the following cases to show quantum of damages awarded for pain and suffering and loss of amenities caused by fracture of tibia and fibula:

- i) *Govind Sami v Kari Frances O’Brian & Seru Serevi*; HBC No. 349/97L the court awarded \$45,000.00.
- ii) *Kumar v Ali* [2016] FJHC 743; HBC 96.2014 the court awarded \$23,000.00.
- iii) *Prakash v Road Supervisor, Taveuni* [2016] FJHC 501; HBC 06.2013 the court awarded \$45,000.00.
- iv) *Kumar v Reddy* [2016] FJHC 311; HBC 282.2013 the court awarded \$18,000.00.

[14] In *Ali v Lautoka General Transport Company Limited* (Lautoka High Court Civil Action number 295 of 1999, the plaintiff was 18 years when he suffered an injury to one of his legs – both tibia and fibula with the broken fibula badly joined. His

hip was dislocated. He had ankle pain and there was the onset of Osteoarthritis. He was awarded a total of \$40,000.00 as general damages (\$20,000.00 past, \$20,000.00 future).

[15] In *Rakesh Chand v Mohammed Shahim* (Lautoka Civil Action number 300 of 2001), the Plaintiff was 36 years old at the time of the accident. He also suffered leg injury (tibia and fibula fracture) apart from other minor injuries. In the High Court, he was awarded total general damages of \$50,000.00 (\$30,000.00 past, \$20,000.00 future) plus \$15,000.00 for loss of earning capacity. On appeal, the total sum of \$65,000.00 was reduced to \$50,000.00.

[16] In *Abdul Karim v Tavita Tubuna and Attorney General of Fiji* (Lautoka High Court Action number 53 of 2007), the plaintiff was 44 years old at the time of the accident. He suffered a fracture of the right femur. The plaintiff was awarded a total of \$30,000.00 for pain and suffering (\$15,000.00 past, \$15,000.00 future).

[17] In *Samuel Shalendra Sahay v Manju Reddy and Rajen Reddy* (Lautoka High Court Civil Action number 189 of 2003), the plaintiff was awarded \$25,000.00 for pain and suffering (\$15,000.00 past and \$10,000 future). He suffered the following injuries:-

1. Abrasion over the abdomen and legs.
2. Fractured right femur – a comminuted fracture.
3. Multiple lacerations over the abdomen.
4. Fractured right ulna.
5. Contusing to the right elbow.

[18] The court in *Champa Wati v Avinesh Raju and Attorney General of Fiji* (Lautoka High Court Civil Action number 37 of 2007) awarded \$22, 500.00 as general damages to the 67-year-old plaintiff for a fracture that was treated by open reduction including putting on the plate and pinning it with seven screws. At para 16 of the judgment, the court described the injuries and the treatment as follows:-

"[16] The plaintiff was admitted to Lautoka Hospital and stayed there 13 days. Her fracture was treated by open reduction and this included putting on the plate and pinning it with seven screws. She was immobile when discharged, her legs still in plaster. It remained in plaster from 3 to 4 months and she stayed home during that period. She said that thereafter she was in a wheel chair for 6 to 7 months but this I think surprised the doctor when he was told in evidence. She certainly was on crutches and she certainly is now using a stick. She

had been continually reviewed in the Orthopedic clinic at the hospital and her last review was shortly before this trial, on 28th April 2008. She still has occasional pain in her left knee and scars on the left knee 15 centimeters long and some diminished range of movement in the left knee. Future osteoarthritis is a possible future consequence. There are the assessments of her disability made by Dr Joeli Mareko who gave evidence at the trial. She said in evidence she can no longer use the pedal sewing machine or do gardening. She stands to say her prayers. None of these claims were discredited in cross examination."

[19] Mrs Verma was 31 years old at the time of the accident. She is 32 years old at present. According to Doctor Mc Caig (PW2), the injuries suffered by Mrs Verma were very serious-'open fracture of her left tibia and fibula'. She was 'placed in an external fixator for fracture stabilization'. This was removed from her leg on 8 November 2016, in the operation room (see PE-3). On 5 December 2016, it was noted that the fracture still had not fully united clinically. PW2 in his medical report (PE-3) states that: On her last examination, Mrs Verma still uses a walking aid to assist her mobilizing and complains of constant pain. X-rays (30/10/2017) show that her tibia and fibula fractures have healed in slight varus, anterior displacement with less than 2 cm shortening. She has relative osteopenia in her ankle joint. PW2 said Mrs Verma is still recovering and will still need rehabilitation. Mrs Verma in evidence states that she was taken to the theatre twice for operation and manipulation. She was on drips and pain killers. She was on crutches and still uses crutches. She has pain in her left leg. She cannot stand for long without her crutches. She is not able to do gardening as before. Mrs Verma gave straightforward evidence. Her evidence was not shaken by cross examination. She was a truthful witness. I accept her evidence.

[20] Having considered the conventional figure derived from experience and awards in comparable cases cited above and having considered the submissions made by the parties, I assess general damages for Mrs Verma at \$45,000.00 (past: \$30,000.00 (with interest at 6% p.a from 12 August 2016 to the date of this judgment); future: \$20,000.00) for pain and suffering and loss of amenities.

Special Damages

[21] In their statement of claim, the plaintiffs claim a sum of \$1,805.00 (for first plaintiff-\$1562.50 + for second plaintiff-\$242.50) as special damages.

[22] Special damages are measurable loss calculated between the date of injury and the date of trial. Every type of special damages must be specifically pleaded and proved.

[23] Mr Patel on behalf of the defendants, submits that special damages have to be specifically proven, which means that the plaintiffs need to produce receipts. The plaintiffs' claim for transportation should be disallowed.

[24] On behalf of the plaintiffs Mr Chaudhary submits that the plaintiffs claim of \$1,562.50 for special damages is reasonable and that it is well known that carriers do not give receipts. He cited the case of *Kumar v Drawe* 36 FLR 90 (24 July 1990) where the court held:

"...There is further a claim for medical expenses. The Plaintiff gave evidence that he paid Dr. Sharma \$225 for his report and \$25 for his first checkup and \$5 to the hospital for its report. Notwithstanding that not a single receipt has been produced in evidence I am satisfied from the Plaintiff's evidence that he paid those amounts and I propose to allow the sum of \$225 accordingly..."

[25] The plaintiff might have incurred expenses on account of transportation to the hospital for clinic and treatment. She could have used public transport for this purpose as she was on crutches. She gave evidence that she incurred expenses on travelling from Ba to Lautoka. In the circumstances, I am prepared to allow a sum of \$700.00 for special damages.

Loss of Earning Capacity

[26] The plaintiff in evidence stated that before her marriage she used to work in a garment factory earning \$180.00 per week. In cross examination, she admitted that she did not have any evidence of her previous employment. She did not produce pay-slip or even FNPf statement.

[27] The defendants submit that the first plaintiff's oral evidence is not sufficient for an award to be made for loss of earning capacity.

[28] Mr Chaudhary on behalf of the plaintiff submits that it is not necessary for an award under this head to show actual loss of earnings. As a result of the injuries and consequent disability, the plaintiff has suffered the loss of earning capacity. She is not physically fit or capable as she was prior to the accident. He cited two cases in support of his argument: 1. *Appal Swamy Naidu –v–Bechni and Anor* (CIVIL APPEAL NUMBER 43 OF 1994 FCA). 2. *Ravindra Pratap v Leoni Vavalagi and AG* (Lautoka High Court Civil Action number 52 of 1990 (4 August 1997)).

[29] In Appal, the Fiji Court of Appeal said on page 7:

"...The real question is whether his capacity to earn has been adversely affected, and, if so, what is reasonable compensation for such loss. There is no justification for limiting this head of damage to loss of his present employment resulting from this disability. What if that employment is terminated for any other reason? Is he to be bound to be an employee for one employer all his working life and loss all change of choice?"

[30] Justice Lyons in *Ravindra Pratap* stated on pp 4 -5;

"In his work he is back doing the same work as before [Driver/Salesman] but no long trips, such necessary constant use of clutch causes his leg to give some pain. In my view the Plaintiff would if thrown into the employment market, suffer a diminution of his employability for which he should be compensated. For example, the option of heavy work, such as furniture removal driver, is out for him. His injuries are precluding from doing such work"

[31] I accept Mr Chaudhary's submission that the plaintiff has suffered a loss of earning capacity as she is not physically fit or capable as she was prior to the accident. The plaintiff seeks an award of \$15,000.00 for loss of earning capacity. I, taking all into my account, award a sum of \$10,000.00 to the first plaintiff for loss of earning capacity.

B) ROHAN RONAK PRASAD (Second Plaintiff)

[32] MR Rohan is a minor. He was born on 21 July 2008. He was also injured together with his mother (Mrs Verma). He was taken to the Mission Hospital first and then conveyed in an ambulance to the Lautoka Hospital. The mother saw the doctor bandaging her son's left had. He was in pain and crying. His left ear was also bleeding.

[33] Dr Murari (PW3), Consultant Surgeon at the Lautoka Hospital gave medical evidence on behalf of Rohan. He said MR Rohan may suffer from a post-traumatic headache in the future. He did not rule out the likelihood of a headache occurring.

[34] The Medical Report of MR Rohan dated 13 October 2016 from Dr Rounak Lal (PE-4) states that:

1. *He was admitted under the care of the surgical department from the 12th to the 24th of August 2016.*

2. *Rohan was assessed as having:*
 - *Basal skull fracture*
 - *Left forearm abrasions*
3. *He was treated with IV antibiotics and pain relief. He underwent a change of dressing under anaesthesia on the 15th and 20th August 2016 respectively.*
4. *Mr Prasad's last documented review was on the 31st of August 2016 and was recovering well at that time.*

[35] I now turn to assess the general damages for Rohan for pain and suffering. For that purpose, I would consider general level of comparable awards made in similar cases.

[36] In *Burfoot v Fiji Resorts Ltd* [2013] FJHC 256; Action 16.2009 (29 May 2013), the plaintiff was awarded \$35,000.00 as damages for pain and suffering for skull fracture. The plaintiff suffered an occipital skull fracture and subdural haematoma with subsequent borehole surgery, resulting in vertigo, loss of balance, constant headaches, loss of taste and smell, loss of concentration and loss of memory which conditions are continuing.

[37] Similarly, in *Shivani Sandhya Prasad v Inland Tours of Fiji Co Limited and Nivend Reddy* (Lautoka High Court Civil Action Number HBC 295 of 1997) the 10-year-old plaintiff suffered multiple fractures and a fracture of the skull. Judge Lyons awarded \$30,000.00 for pain and suffering and loss of amenities of life. The victim was in the hospital for 19 days.

[38] In *Dinesh Kumar v John Elder* (Lautoka High Court Civil Action Number HBC 560 of 1995), where the victim was 14 years and 4 months old and suffered a compound fracture and had residual disabilities. An award of \$45,000.00 was made for pain and suffering and loss of amenities of life.

[39] Having considered Dr Murari's evidence, the Medical Report issued in respect of MR Rohan and the general level of awards made in similar cases, I allow a sum of \$25,000.00 (Past:\$15,000.00 + Future:10,000.00=\$25,000.00) for Rohan for past and future pain and suffering. He will be entitled to interest on the award made for past pain and suffering at the rate of 6% p.a from 12 August 2016 till the date of this judgment.

Scars

- [40] Mr Chaudhary counsel for the plaintiffs submits that the first plaintiff is entitled to an award for the scars which is part and parcel of loss of amenities.
- [41] *Tuberi v Gopal* [2001] FJHC 268; [2001] 1 FLR 47 (2 February 2001) was a case concerned with relatively minor injuries compared to the present case, where Justice Gates (as he then was) awarded \$1,000.00 for a minor scarring. This award was made in 2001.
- [42] About the scars, Dr Murari said Rohan is only 9 years old at present. He will grow in size in the years to come. The scars do not grow like normal skin. It can even contract. So, as the arm grows in size in terms of length and width, Rohan may need further surgery or skin grafting or plastic surgery. Apart from this, scars are very unsightly, prominent and visible and this could affect Rohan's mental well-being as he grows older.
- [43] I have also seen the unsightly major scars on MR Rohan's left hand which stretches the whole length of the arm. The second plaintiff also tendered 3 photos of the scars.
- [44] Having considered Dr Murari's evidence and having seen the scars, I award a sum of \$20,000.00 for MR Rohan for the scarring.

Loss of Earning Capacity

- [45] There is no conclusive medical evidence to suggest that the injuries suffered by MR Rohan would diminish his earning capacity in the future. I would, therefore, decline to award damages for Rohan for loss of earning capacity.

Interest

- [46] Under s.3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27, the Court has the discretion to award interest at such rate as it thinks fit on debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of judgment.
- [47] In this case, I would allow interest at the rate of 6% per annum on the general damages granted for the past pain and suffering from 12 August 2016 till the date of this judgment (5 March 2018).

Costs

[48] As a winning party, the plaintiffs are entitled to costs of these proceedings. Taking all into my account, I summarily assess the costs at \$3,000.00.

[49] The summary of the assessment is as follows:

FIRST PLAINTIFF

General Damages

Pain & Suffering (past)	:	\$30,000.00
(with interest 6% p.a from 12 August 2016 till the date of this judgment (5 March 2018))		
Pain & Suffering (Future)	:	\$15,000.00
Loss of earning capacity	:	\$10,000.00
Special Damages	:	\$ 700.00

TOTAL		\$55,700.00
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SECOND PLAINTIFF

General Damages

Pain & Suffering (past)	:	\$15,000.00
(with interest 6% p.a from 12 August 2016 till the date of this judgment (5 March 2018))		
Pain & Suffering (Future)	:	\$10,000.00
Scaring	:	\$20,000.00

TOTAL		\$45,000.00
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Damages for first and second plaintiff	:	\$100,700.00
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(with interest 6% p.a from 12 August 2016
till the date of this judgment (5 March 2018))

Cost	:	\$ 3,000.00
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TOTAL		\$103,700.00
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The Final Results

1. There will be judgment in favour of the plaintiffs in the sum of \$100,700.00.
2. The plaintiffs will be entitled to interest on the total damages allowed for the past pain and suffering (\$45,000.00) from 12 August 2016 till the date of this judgment (5 March 2018).
3. The plaintiffs will also be entitled to cost of \$3,000.00 which is summarily assessed.

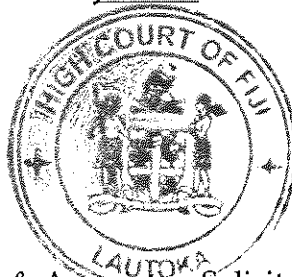
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M. H. Mohamed Ajmeer

JUDGE

At Lautoka
5 March 2018

Solicitors:



For the plaintiffs: M/s Chaudhary & Associates, Solicitors
For the defendants: M/s Krishna & Co, Barristers & Solicitors