In the High Court of Fiji
at Labasa
Civil Jurisdiction

Civil Action no. HBC 42 of 2016
Mahend Prasad
Plaintiff
v
Ajay Singh
First defendant
And
Rajendra Deo Prasad
Second defendant

Counsel: Mr A.Sen for the plaintiff
Mr A. Pal for the defendants
Date of hearing: 10th and 11th July,2018
Closing submissions of the plaintiff filed on 12th July, 2018
Date of Judgment: 28th September,2018

Judgment

1. The plaintiff claims damages for injuries sustained by him in an accident on 8th May, 2015, when he was a passenger in bus bearing registration no. DI 556 driven by the first defendant. The plaintiff, in his statement of claim states that the first defendant negligently caused the bus to get out of control and collide with another bus. The collision was caused solely by the negligence of the first defendant, as servant and agent of the second defendant, the owner of the bus. The particulars of negligence are pleaded.

2. The defendants in their amended statement of defence states that the accident involved two buses, DI 556, driven by the first defendant and HL 344, owned by Dalip Chand & Son Limited. The collision was caused by the negligence of the driver of bus registration number HL 344. The particulars of negligence are pleaded.Dalip Chand & Son Limited is vicariously liable for the actions of its driver.

The determination

The accident

3. PW1, in evidence in chief said that on 8th May 2015, he boarded bus bearing registration no. DI 556, at the Labasa market at 5.30 pm. He sat in the passenger seat behind the driver, the first defendant. The bus travelled at a fast pace and bumped a Dalip Chand, (DC) bus near the FSC. The DC bus was parked on the road. There was enough space for the DI 556 to pass the DC bus on the right side. The first defendant did not try to stop his bus and collided with the DC bus at an angle. The evidence of the plaintiff,(PW1) as to how the accident occurred, was not challenged in cross-examination.

4. PW2,(*Corporal Talica,Traffic Officer*) produced the rough sketch plan and fair sketch plan of the accident. He said that the accident occurred on the left side of the road. The DC bus was in front of DI 556. A driver has to maintain a 2 to 3 vehicular length distance between his vehicle and that in front of him, in order to be able to stop, if that vehicle halts. The rough sketch plan depicts brake marks of a distance of 20.4 metres. The first defendant was driving at a high speed. There was space on the right side of the DC bus for DI 556 to pass. The first defendant was trying to avoid a head on collision and hit the DC bus at an angle. The first defendant, in his caution interview, admitted he was driving close to the bus in front of him and that he bumped the bus.

5. PW3,(*Dev Anand*) in his evidence said that on 8th May,2015, he boarded a DC bus at 5.30 pm. As the bus proceeded along the Labasa/ Bulileka Road towards the FSC mill, a passenger rang the bell. The driver slowed down and stopped. The DC bus was stationary, when another bus bumped from the rear side. The passengers in that bus,(thirty five to forty of them) were crying and shouting. The plaintiff's wife was shouting for help, as the plaintiff was crying in pain. His leg was broken and hanging. PW3 said that he picked up the display board of the bus and put it under the plaintiff's leg. The driver of bus DI 556 did not assist the plaintiff.

6. DW3,(*Ajay Singh, the first defendant*) in evidence in chief said that on 8th May,2015, 10 mts after he left the Labasa bus station, he bumped into the rear side of a DC bus at 5.30pm. The DC bus had stopped near the Bhadhur junction. Since vehicles were plying on the right side, he applied the brakes, turned left to avoid an accident occurring on the right side and bumped the bus ahead. He was driving at 45 kph. There was a 20 metre long tyre mark, as his bus skidded, since it had 30 passengers and there was gravel on the road. The drivers' side of his bus bumped the DC bus. The plaintiff was seated behind him. He got injured. DW3 said that he was unable to keep a safe distance between his bus and the bus ahead, due to the traffic at that time of the day. If he did, another vehicle would have come in front. He was charged for dangerous driving, but convicted for careless driving.

7. In cross examination, DW3 admitted that: the accident occurred due to his negligence; the 20 mere brake mark showed the high speed at which he was driving; and, his close proximity to the DC bus. He was not re-examined.

8. It is an agreed fact that the first defendant was convicted of the offence of careless driving and fined $200.

9. Section 17(1) read with 17(3)(a) of the Civil Evidence Act, 2002, provides that a person convicted of an offence by a court in Fiji, is taken to have committed the offence, unless the contrary is proved.

10. The Court of Appeal in ***Prasad v Lata,*** (2005) FJCA 39 cited Lord Denning in ***Stupple v Royal Insurance Co,***(1971)1 QB 50 at pg 72, who explained the effect of the equivalent section in England , as follows:

> *It shifts the legal burden of proof...the defendant must show that he was not negligent....otherwise he loses by the very fact of his conviction.*

11. The evidence clearly reveals that the first defendant,(DW1) was negligent. He admitted his negligence in colliding into the rear of a stationary vehicle in front of him, and that his negligence caused injuries to the plaintiff. It is an agreed fact that the second defendant was the owner of bus and the first defendant was driving the bus, as his servant and agent. Accordingly, the second defendant is vicariously liable for the negligence of the first defendant.

The plaintiff's evidence on the effect of his injuries

12. The plaintiff, in evidence in chief said that in the aftermath of the accident, he was thrown. His left leg was broken and hanging on his skin. He was seated in the bus for one hour. He was shouting in pain. He was carried and taken to the Labasa hospital in a taxi. At the hospital, after three hours, he was taken to the X-ray theatre and then put on a drip. He was given an injection and tablets. A cast of plaster of paris was put on his leg. It was a painful experience. He was hospitalised for 3 days. The cast was removed after several months. He was given a pair of crutches. He said that he used crutches for two years.

13. He continued to state that he did not have the luxury of a flush toilet in his home, so he used a bucket for a month. His wife cleaned the bucket. She fed him. He could not shower. He was wiped. He could not go to work, as his leg was in plaster. He still has pain. His gait is abnormal. The left sole of his shoe wears out more than his right sole. His legs point sideways. His leg is a bit thin and crooked. He can neither spray fertilizer,plough his 15 acre farm nor drive a vehicle with a clutch, as his leg pains and swells. He did not have an auto vehicle. Two years after the accident, he drove from Cawaira to Labasa town on six occasions, but his left leg started to pain. He cannot play soccer, as he did.

14. The plaintiff complains that his leg still pains and swells. His gait is abnormal. He used crutches for two years. He cannot cultivate his farm nor drive a vehicle.

The medical evidence

15. PW4,(*Dr Alipate Navunisaravi,Orthopaedic Surgeon,Labasa hospital*) said that the medical records of the plaintiff provides that on 17th June, 2015, an x ray revealed new bone formation. The healing process had started. On 23rd November 2015, when he was seen by an Orthopaedic Surgeon, it was confirmed that invasive treatment was not required, as his bone and fracture was healing well. He was advised to put weight on his leg. There was nothing abnormal in the healing process. On 27th January, 2016, the x-ray depicted that the fibula had healed and established union of his tibia.

16. PW4 produced the medical report of 24th February, 2016, of Dr Maloni Bulanauca, General Surgeon of the Labasa Divisional hospital. This reads as follows:

> ***This gentleman is known to this facility under the care of the Surgical Service over the period 08/05/15 to 11/05/15 as an in-patient and thereafter as an out-patient till WPI % assessment on 19/02/16****. Out-patient attendance include 17/06/15, 05/08/15, 09/09/15, 07/10/15, 04/11/15, 13/11/15, 23/11/15 (Mr Loefler), 02/12/15, 27/01/16 and 19/02/16...*
> ***He suffered a closed fracture of the left lower limb (non-displaced complete transverse fracture of mid to distal tibia and fibula) secondary to direct trauma.*** *...*
> *He was admitted was observation and pain relief. Treatment accorded includes analgesia (Panadiene, Morphine and Ibuprofen), TEE prophylaxis (heparin), immobilisation of the lower limb (POP) cast and physiotherapy.*
> *He informs us that he needs assistance with crutches when he ambulates distances more than 20m or generally out of house. His limiting symptom being pain of which he occasionally medicates with Ibuprofen or Panadol (whenever supply avail) and approximately three times a week. He states that he is currently not in active employment nor been successful in being able to do other chores.*
> ***On examinations he does not show leg length discrepancy or neuro-vascular deficit. He is able to weight bear. Radiologically he has shown fracture healing and evidence of remodelling.***
> ***He has been seen by an Orthopaedic Surgeon on 23/11/15 whereby no invasive treatment was confirmed to not be required apart from more weight bearing of which the patient was informed and keen to continue****.*
> *The assessment for patient required best to use the ROM estimates (ref: AMA –Guides to the Evaluation of permanent Impairment).*
> ***His evaluation revealed 11% Whole Person Impairment*** *(reference to tables 17 – 11 to 17 – 13).*(emphasis added)

17. In cross-examination, PW4 said that the medical report of Dr Bulanauca of 24th February, 2016, provides that the fracture was healing. The witness said that he could not comment on the 11% permanent impairment assessment made on 19th February, 2016, as contained in that report. Dr Bulanauca, was a Consultant General Surgeon, not an Orthopaedic Surgeon. PW4 said that the two reports of Dr Taloga, (reproduced below) of 2017 and 2018 provide that the fracture has healed well. No further examination was required. The x ray of March 2018, shows that the fracture has completely healed. The plaintiff's contention that he used crutches for 2 years was inconsistent with his injury and the healing of his bone. The video recording of 20th April,2017, depicting the plaintiff walking without crutches is consistent with one who has recovered well. The swelling and lump were a result of the new bone formation.

18. In re-examination, PW4 said that pain and swelling three years after the injury is not related to the fracture, as it has healed. It is not normal to feel pain. The plaintiff can walk, run and drive.

19. DW2,(*Dr Taloga, Orthopaedic Surgeon*) said that the fracture of the plaintiff was fully healed. The healing of bones was complete. He referred to his reports of 14 May, 2017, and 27th March,2018. He rated zero per cent impairment assessment. DW2 read his observations in detail. He did not find him using his crutch. There was no evidence of swelling nor uneven gait. He did a clinical and radiological assessment and found that the fracture was healed. In a clinical assessment, if a patient experiences pain, it would be noted in the assessment. A fracture takes 3 to 4 months to heal for a person of 43 to 44 years. A patient is then advised to start weight bearing. He would get full mobility six weeks after the fracture heals. DW2 said that the x-ray of March, 2018. conclusively establishes that the plaintiff had no pain. Since the fracture has healed and united and he did not have arthritis nor instability in the knee, there was no reason for him to have used crutches. The plaintiff's complaint of a lump was a result of the new bone. The lump will not affect mobility. Since the fracture has healed, he would not experience pain. He can return to normal life and work on the field. He should be able to run. In 99% of cases, the bone gets healed. There should be no complaint of pain, when the bone has clinically and radiologically united

20. DW2's medical report of 14 May, 2017, states:

> ..***Mr Prasad walked into the clinic holding a single wooden crutch in his hand which he did not use at all. He has left this leaning against the wall when he walked to the examination couch. He does not have a limp. The leg lengths were same for the left and right with no swelling noted. The hip, knee, and ankle motion of the affected side were not restricted. There was no instability noted on the knee. The fracture has clinically united. The quadriceps (40cm) and the calf (30cm) circumferences were the same for both lower limbs.***
>
> ***The X-rays of the left taken on the day of the examination showed consolidated fractures of the lower shaft of the tabia and fibula. The bony alignment was normal. No radiological evidence of osteoarthritis was seen on the ankle....*** (emphasis added)

21. The medical report of 14 May,2017, provides inter alia that the plaintiff did not use his single crutch at all, he did not have a limp, his hip, knee and ankle motion were unrestricted and the leg lengths were same with no swelling. The fracture was united and his alignment was normal. He was given a "*rating of 0% permanent impairment*". I would note that this medical report was not disclosed by the plaintiff, although he requested it.

22. The medical report of 27 March 2018, of DW2 reads:

> *...The copies of reports by Dr. Maloni Bulanauca (24/02/16) of Labasa Hospital and myself (14/05/17) were available to me.*
>
> *According to Dr. Bulanauca, Mr Prasad had sustained a closed fracture to his left leg on 8/05/15. He was an unrestrained passenger in a bus that was involve in a collision and was admitted to the Labasa Hospital and discharged three days. At a time of the incident, Mr Prasad was working as a sanding machine operator.* ***He had attended his last clinic at Labasa on 27/01/16. He gave Mr Prasad eleven percent whole person impairment in his assessment on 19/02/16 based on range of motion estimates. The assessed joints have not been specified in his report.***
>
> *Mr. Prasad tells me that he has not returned to work since the time of his injury because of pain and swelling at the fractured leg. He uses a single axillary crutch for support all the time and take pain medications three times a day on alternate days. He was not able to show me his medication on the day of the examination.*
>
> ***The examination showed an average built male carrying a single crutch on the left side which was not really supporting his weight. The leg lengths were equal and there was no swelling or rotational deformity of the leg. The calves did not show any muscle wasting and the circumference measures a hands breath below the tibia tuberosity were nearly the (L = 31cm, R= 30cm) same. There was no pain felt when stressing the fracture with clinical union noted. The motion of the knee and ankle taken through the passive and active ranges did not show any restriction, although there was some active resistance to active motion at the knee. The knee did not show any swelling or ligament instability.***
>
> ***The X-ray of the leg on the day of the examination showed consolidated fractures of the lower tibia and fibula shafts. The alignment was normal.***
>
> ***The permanent impairment of Mr Prasad has remained unchanged from my previous assessment dated 14/05/17. There was no permanent impairment as a result of his injury.*** (emphasis added)

23. I find that the plaintiff's complaint of pain, swelling and use of crutches for 2 years is inconsistent with the medical evidence. The medical evidence provides that his fracture on his left leg had healed well, when he attended the outpatient clinic on 27th January,2016. The video recording of 20th April,2017, depicted him driving a van and walking without crutches. In re-examination he said that on 20th April 2017, he drove 6 to 7 km. He said that he did not have an automatic transmission vehicle.

24. In my judgment, the medical evidence conclusively establishes that the plaintiff's fracture has healed well and he had "*no pain*", when clinically assessed as provided in his final medical report.

Damages

25. I turn to the assessment of damages.

26. The plaintiff was in severe pain when he befell the accident. He had a closed fracture of his left lower limb, the mid shaft tibia and fibula.His left leg was broken and hanging on his skin. He was shouting in pain, as reiterated by PW3. He was seated in the bus for one hour. He was carried and taken to the Labasa hospital. He was attended to after three hours. The pain was categorized in a scale of 1 to 5 as 5 out of 5. It was a "*high energy injury*" and pain was severe. He was in hospital for 3 days. His leg was cast in plaster of paris for three months. He had attended the outpatient clinic on 10 occasions.

27. Mr Sen, counsel for the plaintiff in his closing submissions claims $90,000 for pain and suffering. He has cited the case of ***Eta Naqeletia v Kumar,***[2012] FJHC 29, ***Nasese Bus Co Ltd v Chand,***(2013) FJCA 9, subsequent decisions of the Court of Appeal and ***Prabhu Lal v Sant Lal,*** (HBC 25 of 2014).

28. In assessing damages, past awards are useful guides, provided the pain and injuries are comparable, as held in the following cases.

29. The Supreme Court in ***Permanent Secretary for Health and Another v Kumar,***(Civil Appeal CBV 6 0f 2008) at paragraph 37 set out the principles to be applied by courts when assessing damages for pain and suffering and loss of amenities:

> *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, some of which could not even be anticipated at the stage a court makes an award. Hence, an award of damages should not only be fair, but also assessed with moderation, even though scientific accuracy is impossible.* ***The second principle is that the sum awarded must to a considerable extent be conventional and consistent. Thirdly, regard must be had to awards made in comparable cases, in the jurisdiction in which the award is made.*** (emphasis added, underlining mine)

30. Chandra RJA in ***Avinesh Kumar v Rishen Kumar,*** [2018] FJCA 106 stated:

> *The question that therefore arises as to whether the award granted by the learned trial Judge, is firstly fair, conventional and consistent, and how does it compares with* ***comparable cases*** *in keeping with the principles enunciated in* ***Kumar's*** *case (supra) cited above.* (emphasis added, underlining mine)

31. Chandra RJA also cited the following two passages:

Lord Diplock in ***Wright v British Railway Board,*** (1983) 2 All ER 698 said :

> *if the aim is that justice meted out to all litigants should be even-handed instead of depending on idiosyncrasies of the assessor, whether jury or judge, the figure must be basically a conventional figure derived from experience and from awards in* ***comparable cases***.(emphasis added, underlining mine)

Lord Morris in ***West v Shephard,*** (1964) AC 326 at 346:

> *Money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation .....as far as possible* ***comparable injuries should be compensated by comparable awards*** ..... (emphasis added, underlining mine)

32. In ***Eta Naqeletia v Kumar,***(*supra*) a sum of $ 70,000 was awarded as general damages, as the plaintiff had lost the use of her dominant right hand. Wati J found that she had "*gone through excruciating pain with permanent disability of 19%*".

33. In ***Nasese Bus Co Ltd v Chand,*** (*supra*) the Court of Appeal increased the damages of $65,000 awarded for pain and suffering to $ 90,000, as it was found that sufficient regard had not been given by the High Court to the future pain and suffering that the respondent would suffer due to progressive arthritis.

34. The pain suffered by the appellant in ***Mere Labaivalu v Pacific Transport Co. Ltd,*** (Civil Appeal No. ABU 0059 of 2014) is likewise not comparable to that of the plaintiff in the instant case. The appellant had a "*traumatic penetrating injury involving a wooden object which had pierced her left hip and extended through the pelvis..*(and) *protruded through the anterior abdominal wall*", as provided in the medical report. She had 68 stitches across her body, a big scar of a patched hole in her thigh and extensive scars on her lower abdomen. The Court of Appeal enhanced the damages of $60,000 awarded by the High Court for pain and suffering to $90,000. Basnayake JA stated that "*Although it is not evident, I would like to mention..some of the crucial pain that the plaintiff would have gone through*", which was set out.

35. Nor can there be a comparison with a plaintiff who had 18% whole person impairment, had to walk in crutches and was rendered permanently unfit for any further employment, as in ***Chand v Amin,***(Civil Appeal No: ABU 0031 of 2012) where the award of $85,000 for pain and suffering and $52,000 for loss of future wages was upheld on appeal.

36. In ***Jaysheel Jaineet Kumar v Pacific Transport,*** (Civil Appeal No. ABU 0058 of 2014) the award of general damages was increased by $50,000 for the deformity of the plaintiff and future loss.

37. In ***Fiji Forest Industries Ltd v Rajendra Mani Naidu,*** (Civil Appeal No: ABU 0019 of 2014) as also referred to by Mr Sen, the Court of Appeal increased the damages from $60,000 to $90,000. In that case, the plaintiff's last finger of his right hand was amputated and total permanent disability was assessed at 29%.

38. In ***Vimla Wati v Permanent Secretary of Health,***[2016] FJCA 72 the appellant had undergone a surgery for the removal of his gallbladder, which was unsuccessful. His bile got damaged and he had to undergo a second surgery. The Court of Appeal increased the damages from $15,000 to $70,000, as the High Court had awarded damages for pain only till the date of the second corrective surgery and not for the period of 71 days, until he was finally discharged.

39. Kamal Kumar J in ***Prabhu Lal v Sant Lal,***(*supra*) awarded a sum of $ 65,000 for past pain and suffering and $ 5000 for future pain and suffering. The plaintiff received injuries to his right rib and his left leg was crushed, shattered and broken to small pieces. He underwent surgery. A plate, nuts and bolts were inserted and his leg was put in cast.

40. In ***Nasese Bus Co Ltd v Chand,***(*supra*) Calanchini AP(as he then was) cited Lawton LJ in ***Cunnigham v Harrison,*** [1973] QB 942 at page 956 as follows:

> *"..if judges do not adjust their awards to changing conditions and rising standards of living, their assessments of damages will have even less contact with reality than they have had in the recent past or at the present time."*

41. In the light of the principles applicable to assessing damages, I assess the general damages for pain and suffering in the present case at $ 65,000.

Loss of future earnings

42. The plaintiff claims loss of future earnings.

43. The plaintiff was employed at Valebasoga Tropikboards Limited, as a despatch hand from January,2012, till 8th May, 2015, when he got injured. He was paid $ 154.12 weekly. The plaintiff produced a letter from Valebasoga Tropikboards Limited stating that he was unable to be continued in employment, due to the injuries sustained.

44. DW2,(*Amrul Sharif, Human Resources Officer, Valebasoga Tropikboards Limited*) in evidence in chief said that the plaintiff's duties called for heavy work of lifting of plywood for loading for export. He was on contract and his extension was performance based. DW2 in cross-examination said that the plaintiff was a regular and good worker. His contract would have been renewed. There was no light duty work in his company. The work involves high risk injury. This witness was not re-examined.

45. The plaintiff was a despatch hand. In evidence in chief, he said that he sometimes operated a sanding machine. He was not a skilled worker. In my view, he could have easily fit into any other occupation and found alternative employment after his fracture healed. As Jameel JA stated in ***Fiji Forest Industries Ltd v Rajendra Mani Naidu,***(*supra*) at paragraph 75:

> ***The test is not whether the Respondent will remain employed by the Appellant. The relevant question would be whether there was the likelihood of the Respondent securing employment as a casual labourer in any place.*** (emphasis added)

46. Mr Sen pertinently asked the plaintiff in evidence in chief whether he tried to find alternative employment. His response was that he had chicken and ducks for consumption and received income from selling them.

47. The only reasonable conclusion that the Court can arrive at is that he was not interested in finding alternative employment, as he had sufficient income.

48. In the circumstances, I decline the claim for future earnings.

Special damages

49. The plaintiff claims the following as special damages :

Transport and medication	*- $1,000.00*
Loss of wages $154.12 per week till filing of writ (64wks)	*- $9,863.68*
Loss of FNPF- $13.40 x 64 weeks x 2	*- $1,715.20*
Care giver ($15 per day for 449 days)	*- $6,735.00*
Loss of supplementary income of $60 per week for 64 wks)	*- $3,840.00*

50. Mr Pal, counsel for the defendants agreed to the claim for transport and medication.

51. The plaintiff is entitled to loss of wages for the period 8th May,2015, to 27th January, 2016, (when his fracture healed) as follows:

Loss of earnings	$ 5856.56($154.12 x 38 weeks)
Loss of FNPF	$ 1145.70 ($ 30.15 x 38 weeks)
	$ 7002.26

52. The plaintiff claimed that he had a sugar cane farm, which he could not cultivate due to his injury. No evidence in support was produced. Neither a contract with the FSC nor tax returns were produced, as was pointed out by Mr Pal.

53. I do not accept the plaintiff's evidence in this regard. I did not find him to be a truthful witness. The claim for loss of supplementary minimum income is declined.

54. The plaintiff testified that his wife looked after him.

55. In ***Griffiths v Kerkemeyer,*** [1977] HCA 45 it was held that a plaintiff should receive damages representing the value of gratuitous services provided by his parents, as was necessitated by the injury done to him by a negligent defendant. ***Griffiths v Kerkemeyer,*** was followed by Pathik J in ***Rokodovu v Rokobutabutaki,***[1998] FJHC 151.

56. In my judgment, the plaintiff is entitled to claim for services provided by a care giver from the date of the accident till 27 January,2016, ie 264 days.

57. In my judgment, the plaintiff is entitled to special damages, as follows:

Transport and medication	$ 1000.00
Loss of wages and FNPF	$ 7002.26
Care giver ($15 per day for 264 days)	$ 3960.00
	11962.26

58. The plaintiff has claimed interest. In the exercise of my discretion under section 3 of the Law Reform (Miscellaneous) (Interest) Act, I award interest at 6% per annum on general damages of $ 65,000.00 from the date of service of writ,(19th September, 2016) to date of trial,(10 July,2018) and 3% per annum on special damages of $11962.26 from 8th May, 2015, to date of trial.

59. ***Orders***

The total sum awarded to the plaintiff as damages is made up as follows:

a.	General damages	65 000.00
b.	Interest on general damages	7150.00
c.	Special damages	11962.26
d.	Interest on special damages	1136.39
	Total	$ 85248.65

There will therefore be judgment for the plaintiff against the defendants in the sum of $85248.65 together with a sum of $ 3000 payable by the defendants to the plaintiff, as cost summarily assessed.

HIGH COURT OF FIJI
SUVA

A.L.B. Brito-Mutunayagam
Judge
28th September,2018