

IN THE HIGH COURT OF FIJI  
AT LABASA  
CIVIL JURISDICTION

Civil Action No.51 of 2017

BETWEEN : RASHIK LAL

PLAINTIFF

AND : ASHWIN PRASAD

FIRST DEFENDANT

PARMOD ENTERPRISES LIMITED

SECOND DEFENDANT

CORAM : The Hon. Mr. Justice David Alfred

COUNSEL : Mr S. Sharma for the Plaintiff

: Mr A. Kohli for the First and Second Defendants

Dates of Hearing : 6,7 and 8 March 2019

Date of Judgment : 15 April 2019

## JUDGMENT

1. The Plaintiff in his Statement of Claim says as follows:

- (1) He was a pedestrian who was attempting to cross the road when bus registration number AU979 (the bus) bumped him causing injuries.
- (2) The First Defendant was the driver of the bus as a servant or agent or employee of the Second Defendant who was the registered owner of the bus.
- (3) **Particulars of the injuries**
  - (i) Fracture of frontal bone
  - (ii) Moderate head injury
  - (iii) Multiple lacerations of left external ear
  - (iv) Abrasions on left side
- (4) **Particulars of Negligence of the First Defendant include:**
  - (i) Exposing the deceased (sic) to a risk of damage or injury.
  - (ii) Failing to see the Plaintiff in sufficient time
  - (iii) Failing to give warning to the Plaintiff
- (5) **Particulars of Special Damages**
  - (i) Transportation - \$400
  - (ii) Medication - \$350
  - (iii) Medical Report - \$54.50

**Total - \$804.50**
- (6) The Plaintiff will rely on the doctrine of res ipsa loquitor.

2. The Defendants in their Statement of Defence say as follows:

- (1) They admit the Plaintiff was a pedestrian attempting to cross the road when he collided with the bus.
- (2) The accident was caused or contributed to by the negligence of the Plaintiff.  
Particulars of Negligence:
  - (i) Failed to keep any look out whilst crossing
  - (ii) Failed to cross at a safe place with caution
  - (iii) Failed to take proper precautions for his own safety

3. The Plaintiff filed a Reply to Defence.

4. The Pre-Trial Conference minutes dated 6 December 2018 include, inter-alia, the following:

Agreed facts:

- (1) The Plaintiff was a pedestrian attempting to cross the road when he collided with the bus.
- (2) The First Defendant was the driver of the bus as a servant or agent or employee of the Second Defendant, the registered owner of the bus.

Issues:

- (1) Whether the collision was caused or contributed through the negligence of the Defendant or the Plaintiff.
5. The hearing commenced with the Plaintiff (PW1) giving evidence. He was born on 1 January 1966.
6. At this juncture, the Court observed PW1 walks without a stick and without a crutch.
7. PW1 said he was working as a security guard but is now staying at home. His salary was about \$150 fortnightly. But for the accident he could have worked up to 60 years. He used to walk to work. On the day in question he knocked off from work at 6am. He was walking home, rain came, and he got into a private vehicle and got out of it at the branch point. He stood there, looked at both sides and crossed the road. He got to the right side of the road when the bus came and hit him. He did not see the bus, as his back was facing it. He did not rush across the road. When he was hit by the bus, he fell down and became unconscious. When he regained consciousness he was in hospital where he was for 1 week. His wife helped him in bathing and feeding and had to assist him for 8-9 months. After the accident his wife left work.  
  
(At this time, both Counsel agreed the total special damages is \$125).
8. He cannot now take part in soccer and gardening. The accident had an effect on his sex life. He is claiming general damages for pain and suffering, loss of amenities and loss of earnings.
9. Under cross-examination, PW1 said he was standing at the left side of the road when he saw the bus approaching. It was about 15m away. It was moving fast. He walked across the road.
10. PW1, at the request of Mr Kohli, demonstrated how he had walked at the time of accident by walking normally across the court room looking neither right nor left.

11. He continued that he did see the bus and he also crossed. He had walked 4m along the right hand side of the road when the bus hit him on his right hand and right side.
12. During re-examination, PW1 said before that date there was no need to cross the road. On that day he had to cross the road because the car had stopped on the left side of the side.
13. The next witness was Dr Maloni Bulanauca (PW2), the head of surgery in Labasa Hospital whose speciality is general surgery. He said it is possible for the Plaintiff to be gainfully employed.
14. Under cross-examination PW2 said it was possible the Plaintiff was hit on the right and fell on the left. There were no injuries to his back. There was no mention of any sexual problem. There was nothing documented of his being assigned a wheelchair or a trolley. The (medical) documentation does not show any weaknesses in walking, breathing or feeding. As pain waned the power continued to improve to 5/5. In March 2018 he was back to normal.
15. In re-examination PW2 said the Plaintiff's power improved as pain subsided.
16. In answer to the Court, PW2 said it was safe to discharge the Plaintiff on 17 November 2016.
17. The next witness was Corporal Kaushik Singh (PW3), the Investigating Officer. He said he drew the sketch plan. He said the accident was on the right hand side. The bus, was on the left side. It is possible to prevent an accident, the bus driver swerved to the right hand side. He said according to the witnesses the Plaintiff tried to run towards the bus.
18. Under cross-examination PW3 said he obtained the statements of the witnesses and based on their statements this explains why the accident happened on the right hand side.
19. The next witness was Peceli Savou (PW4). He said he was waiting for the bus with another Charles Lagi. He saw an Indian man get out of a car on the left hand side of the road, and cross over to the other side of the road. The bus bumped into the man. He and Charles picked up the man from under the bus.
20. Under cross-examination, PW4 said after the victim was loaded in a vehicle, he left for work. The police came home after 9 months and he gave a statement.

21. The penultimate witness was Charles Eric Lagi (PW5). He was waiting for the bus and PW4 was with him. A person got out of a car and crossed the road to the other side. While he was crossing, the bus came and bumped him. PW5 took a video of him when he was lying down under the bus. He showed this video to the police and it is with him. He gave a statement to the police at the police station one year after the accident.
22. Under cross-examination PW5 said he saw the man crossing and the bus. He thought the man would reach the other side. He did not see the man getting knocked.
23. In re-examination he said the Plaintiff had reached the other side.
24. The final witness was Ms Suman Lata (PW6), the Plaintiff's wife. She is not employed but in 2016 she was employed and earning \$160 - \$170 per week. She said the Plaintiff cannot work as he cannot hear properly, cannot see properly, hand and leg not functioning well, forgets things easily and is short tempered.
25. With the Plaintiff closed his case and the Defendant opened theirs.
26. Their first witness was Ashwin Prasad, the First Defendant and the bus driver (DW1). He said on the day in question his speed was 30-40 kmh as the road condition was not good. A car in front of his bus stopped and the Plaintiff came out. He ran 2m in front of the bus. DW1 swerved his steering towards the right side. He was driving on the left side of the road. The Plaintiff suddenly crossed. He ran from left to right. DW1 was 2m away and he swerved first and then braked, because the Plaintiff was running from the left. Because the Plaintiff was running from the left, DW1 swerved to the right. If he had swerved to the left the Plaintiff would have been crushed. The Plaintiff did not walk along the road. He ran suddenly in front. The Plaintiff kept running. DW1 tried to avoid, applied his brakes, and the bus came to a stop at that place. The Plaintiff was hit by the bus. The bus moved 1m after the collision. It was not true the Plaintiff had crossed the road and was walking along the road.
27. Under cross-examination DW1 said there was no pedestrian crossing there. The Plaintiff was crossing there. The Plaintiff was on the left side of the road and the bus also was on the left side. He crossed suddenly.

28. In re-examination DW1 said he did not know the Plaintiff was going to cross the road. He ran from the left so DW1 swerved to the right to avoid the accident. He ran 2m in front of the bus.
29. The next witness was Salaciel Salabogi (DW2) a passenger in the bus. Its speed was not fast. He saw an Indian man run in front of the bus from the left to cross in front of the bus to the right. The bus was on the left side of the road. He felt the bus swerving fastly to the right.
30. Under cross-examination DW2 said he saw the man suddenly running. At first he was standing and then suddenly he ran in front. The accident could not be avoided by the driver swerving left.
31. In re-examination DW2 said if the bus went to the left it would have bumped into the men standing there.
32. With that the Defendants closed their case and Counsel began their submissions.
33. Mr Sharma submitted the Plaintiff has established negligence against the Defendants. He confirmed it is the Plaintiff's case he was crossing the road and had reached the right hand side. The First Defendant chose not to apply brakes and chose to swerve to the right. The Plaintiff had already crossed to the right hand side when he was bumped. Counsel is not accepting the accident occurred on the left hand side of the road.
34. On quantum Mr Sharma submitted as follows:
  - (1) Pain and suffering (past, present and future) - \$95,000
  - (2) Loss of earning (he confirmed there was no written agreement) - 8 years x \$120 p.w = \$49,920. Retiring age 55 (government) and 60 (private sector)
  - (3) Loss of amenities - \$10,000
  - (4) Costs - \$3,500
35. Mr Kohli then submitted. The Plaintiff said he had crossed the road and was walking alongside the road when the bus come from behind and knocked him. The Plaintiff cannot be believed because the police sketch plan (Exhibit P6) shows the impact is 1.5m from the right edge. Why would the driver drive on the right side of the road? The natural/human thing to do is to move away from the person coming from the left hand and move the bus to the right to avoid the person. 2m is not sufficient thinking time to brake. Crossing in front of the bus is tantamount to suicide especially when the Plaintiff and his 2 witnesses were saying the bus was travelling fast. Dr Maloni said the injuries

were on the right hand, not the back. The Plaintiff was hit on the right side and fell on the left side. The driver had no time to halt or brake, and could not do anything at all. The Plaintiff's witness's evidence should be taken with a pinch of salt and not as gospel truth because one of them took a video and did not make a police statement till 6 months later and the video was not produced by the Plaintiff as evidence. The Plaintiff's claim should be dismissed.

36. Mr Kohli then submitted on quantum as follows:
- (1) Pain and suffering - \$50,000
  - (2) Nothing for loss of amenities
  - (3) 2 years loss of earnings at \$75 p.w - \$7,800 - (11/11/16 - 30/11/18)
  - (4) Costs - \$3,500
37. Mr Sharma in his reply said there was an error of judgment on the First Defendant's part. He stated the accident occurred on the right side of the road where the Plaintiff was walking. He was walking on the right side. Regarding quantum Counsel withdrew his submission re: memory and confirmed there was no document from Pioneer Security to confirm the Plaintiff was not working any more.
38. At the conclusion of the arguments I informed I would take time for consideration. Having done so I shall now deliver my decision on LIABILITY.
39. I have reproduced the evidence at some length because like every other running down action, this one will be decided on its own particular set of facts. That is why appellate courts in England are loath to upset a finding of fact by the trial judge and for that matter also his assessment of the damages. This is for the very sound reason that the judge who conducted the hearing had the fullest opportunity of observing the parties and their witnesses in the witness box, to gauge their veracity, to assess their credibility and consequently what weight to place on their testimony.
40. Having said that, I turn now to the case at hand. The Plaintiff has made it crystal clear from his statement of claim and the Agreed Facts that he was crossing the road. That was the case he set up for himself and which the Defendants had to meet and counter. However in the trial he made it equally clear that he had already walked 4 meters along the right hand side of the road before the bus hit him. This was also the stand his Counsel took in his submission and reply. Since the Plaintiff like every party is bound by his

pleadings and since the burden is on him to prove his claim as pleaded it must follow as the night does the day that he has failed to prove his claim.

41. Further evidence of such his failure is provided by the independent evidence of the police sketch plan (Exhibit P6) that the point of impact is 1.5m from the right hand edge of the road. It is therefore clear that the First Defendant's version of how the accident had occurred is the more probable if not the correct and true one. That the Plaintiff had got out of the car and suddenly crossed the road in the immediate path of the bus, thus giving the driver no opportunity at all to avoid a collision.
42. I am fortified in my decision by the only authority that has come up in my research on the defence of "agony of the moment". Raja Azlan Shah J said in the High Court of Malaya in *Govinda Raju & Anor v Lays* [1966] 1 M.L.J at page 190 that "The Plaintiff saw the motor-vehicle swerving into his path. Perplexed by being exposed to the danger created by the defendant he also swerved to his right in an attempt to avoid the accident but failed. To my mind, when a plaintiff is perplexed or agitated when exposed to danger by the wrongful act of a defendant, it is sufficient if he shows as much judgment and control in attempting to avoid the accident as may reasonably be expected of him in the circumstances. To that extent I am satisfied that the plaintiff had so acted in the circumstances. What is done or omitted to be done in the agony of the moment cannot be fairly treated as negligence. I therefore hold that there is no contributory negligence on the part of the plaintiffs".
43. In the above case the Plaintiff was in exactly the same situation as the First Defendant here.
44. In the present case it was the Plaintiff who placed the First Defendant in such an emergency and he cannot now be allowed to contend that the First Defendant should have swerved left. It would have been better if the Plaintiff had not embarked on what one witness described as a suicidal mission to cross the road in front of the bus. He should have waited for it to pass safely before crossing the road safely. He failed to do this. He is the sole author of the mishap. Therefore the Court dismisses his claim.
45. However, for the sake of completeness I shall assess the damages if liability had been established, which it has not.
  - (1) For pain and suffering - \$55,000
  - (2) Loss of amenities - NIL

- (3) Loss of earnings - \$75 p.w x 2 years - \$7,800 (*The doctor, PW2, said he was back to normal in March 2018*).
- (4) Agreed special damages - \$125.

46. In the result the Plaintiff's claims against the First and Second Defendants are hereby dismissed and the Plaintiff shall pay the Defendants the costs of this action summarily assessed at \$3,000.

Delivered at Suva this 15<sup>th</sup> day of April, 2019.



David Alfred  
**JUDGE**  
High Court of Fiji