In the High Court of Fiji

At Labasa

Civil Jurisdiction

Civil Action No. HBC 9 of 2019

Abigail Asenaca Alpatina Kinikinilau

Plaintiff

v

Vellaidam

First defendant

Dalip Chand & Son Limited

Second defendant

Counsel	:	Mr A. Sen for the plaintiff
		Ms R. Raj for the defendants
Date of hearing	:	19th and 20th September,2019
Date of Judgment	:	8th May, 2020

Judgment

1. This is a claim for damages for personal injuries. The plaintiff, in her statement of claim states that on 26th April, 2016, she was crossing the Labasa-Seaqaqa Road,(Road) at Tuatua Housing and came on to the opposite side of the first defendant's carriageway, when the first defendant "*negligently, recklessly, dangerously and unskillfully*" drove bus registration No. HA 260,(Bus) on the incorrect side and violently collided with her. The collision was caused solely due to the negligence of the first defendant, the driver of the Bus. The particulars of negligence are pleaded. The second defendant is the owner of the Bus and liable for his negligence.

2. The defendants do not deny the collision. The statement of defence states that any injuries suffered by the plaintiff were due to her sole negligence or recklessness or has been contributed to by her. The particulars of negligence are pleaded.

The determination

3. The issue before Court is whether the collision was caused by the negligence of the first defendant or that of the plaintiff. Alternatively, whether the plaintiff contributed to the accident.

4. The plaintiff,(PW1) in evidence in chief said that she boarded the "*Solove*" bus and got off at Tuatua, to take the school bus to Labasa Muslim College at Wailevu. She looked left and right. The Road was clear. She looked right again and crossed. After she crossed the double white line and was two steps ahead, the Bus overtook the bus she alighted from and hit her on her left side, on the wrong side of its carriageway. The bus she alighted from was parked,(parked bus). In cross examination, she denied that she ran across the road and did not look on the right side. She said that both sides were clear. In re-examination, she said that the Bus came from her right side. At that juncture, Ms Raj, counsel for the defendants said that the Bus did come from her right side.

5. PW2,(*Corporal Talica, Traffic Officer of Labasa Police Station*) said that she prepared the Police Report. She produced the sketch plan. The Road has two carriage ways and is divided by a double white line. One carriageway goes to Town. The other to Wailevu. The Bus collided with the plaintiff on its incorrect side of the Road. It cannot go over the double line. The first defendant said that he applied his brakes. The length of the brake marks of 19.6 metres shows that the Bus was driven at a high speed of more than 50 kmph. The first defendant was charged for careless driving.

6. PW3(*Bimlesh Prasad*) travelled in the same bus as the plaintiff. He said that after she crossed two steps beyond the double line, the Bus came at a speed and hit her. The driver applied his brakes and stopped some distance ahead. In cross examination, he said that the Bus came within 2 minutes after she crossed the road. The Bus was far away when she was crossing.

7. DW1,(*Rosalin Devi*) said that the first defendant did not go over the double line. He was on the correct lane of the Road. The plaintiff suddenly crossed in front of the Bus facing the other side.

8. The next witness for the defence DW2,(*Prema Devi*) also said that when the plaintiff crossed, she did not look towards the side the Bus was proceeding. The Bus went towards the other line, in order to pass the parked bus. She did not know that the Road had a double line. She had travelled on that Road for 12 years.

9. Mr Sen, counsel for the plaintiff asked DW1 how she did not see the Bus overtaking the parked bus, but noticed that the plaintiff was looking in the direction of the parked bus. DW2, in cross examination admitted finally that she could not recall the direction the plaintiff was looking. She was not re-examined.

10. DW3,(*the first defendant*) said that on 26th April,2019, he was driving his Bus towards town. He passed a bus parked at a bus bay at Tuatua Housing He did not encroach on the double line. There was enough space to pass the parked bus. Suddenly the plaintiff crossed the Road looking towards the Town. She was 4 or 5 feet away from his Bus. He could not avoid hitting her. He went over the double line when he tried to save her and applied his brakes.

11. In cross examination, the first defendant said that the sketch map was correct. He agreed that all the brake marks were on the opposite carriage way and none in his carriage way. He overtook the parked bus at the same speed of 40 kmph at which he was driving. He agreed that he had to slow down when he sees a bus in front with passengers alighting. He told the Police that he was driving at 30kmph.

12. The final witness for the defence DW4,(*Harish Dutt*) said that he saw the plaintiff running in front of the Bus. The Bus did not go on to the other carriage way. In cross examination, he said that he did not notice the double white line nor the brake marks of the Bus.

13. The defence did not challenge the sketch plan. It was not disputed that the Bus was in its incorrect carriage way.

14. I accept the sketch map and that the point of impact was on the incorrect side of the first defendants' carriage way. I find and accept the version of the plaintiff as to how the accident occurred credible and consistent with the sketch plan.

15. I find the evidence given by the first defendant that he changed lane and crossed the double line to save the plaintiff is contradicted by the position of the Bus with its brake marks of 19.6 metres in its opposite carriage way. It emerged that he did not tell this version to the Police.

16. I find the evidence of the other witnesses for the defence improbable and inconsistent with the objective sketch plan prepared by the Police.

17. In ***Faryna v Choiny***, [1952] 2 D.L.R 354 at page 356 a decision of the British Columbia Court of Appeal, the Court said:

> *On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility...The test must necessarily subject his story to an examination of its consistency with the probabilities that surround the currently existing condition.*

18. In my judgment, the Bus with brake marks of a length of 19.6 metres on the incorrect side of its carriage way clearly depicts that the first defendant was travelling at a high speed. I find there was absolute negligence on the part of the first defendant.

19. In my judgment, the first defendant was driving at a fast speed and he failed to keep a proper look out, failed to heed the presence of the plaintiff, slow down and exercise care and control to avoid the collision. He drove on to the incorrect side of the Road. I find the first defendant negligent and his negligence caused the collision.

20. It is admitted that the first defendant was the authorized driver of the Bus and the second defendant was its registered owner. It follows that the second defendant is vicariously liable for the negligence of the first defendant. In the result, the plaintiff is entitled to recover damages from the first and second defendants.

for the negligence of the first defendant. In the result, the plaintiff is entitled to recover damages from the first and second defendants.

21. I do not find any negligence by the plaintiff. I therefore hold that there is no contributory negligence on the part of the plaintiff.

22. The plaintiff has pleaded *res ipsa loquitir*. In the light of my finding on the facts of the case, the doctrine does not apply.

23. I shall now consider the quantum of damages.

24. The plaintiff said that after she was run over, she went underneath the Bus and got dragged with the Bus for 20 to 30 metres over potholes and gravel surface. The left side of her leg, back, forehead and chin were dragged. She was in severe pain. Her skin came off. She was in a shock. Her leg was swollen. She was admitted to the Labasa Hospital. She was in severe pain on the first and second nights. Her mother looked after her. After she was discharged 3 days later, she was able to walk slowly. The injuries started to heal slowly. She could not go to school for two months, as her legs were swollen and she could not walk properly. She still has nightmares when she crosses the road.

25. PW4, (*Ravuama Raqisia,Principal Medical Officer, Surgical Dept of the Labasa hospital*) said that the plaintiff had abrasions in her left forearm and left thigh, swelling of the left leg with a small laceration on her left forehead. She did not lose consciousness. There was minimal infusion within the left knee joint due to the trauma sustained. She had no fractures. It was expected that she could not go to school for two months, due to the swelling and secondary trauma. She suffered acute pain for the first few days. The pain was medically categorized as 4 out of 5. Her skin healed in 6 weeks. On 30th August,2018, her last date of review she had no swelling.

26. The medical report of 5th September,2018, provides that she sustained bruises on her left thigh and left forearm. She had a 1 cm laceration on her left forehead. Her x rays were

27. Mr Sen has drawn my attention to several judgments of the Court of Appeal commencing with ***Nasese Bus Co Ltd v Chand***,(2013) FJCA 9 . He submits in view of that decision, the plaintiff must be awarded $90,000 for pain and suffering.

28. Ms Raj, in her closing submissions, suggests a sum of $ 10,000 for pain and suffering.

29. In assessing damages, past awards are useful guides, provided the pain and injuries are comparable. The Supreme Court in ***Permanent Secretary for Health and Another v Kumar***,(Civil Appeal CBV 6 0f 2008 delivered on 3rd May 2012) stated:

> ..***regard must be had to awards made in comparable cases*** *in the jurisdiction in which the award is made...*(emphasis added, underlining mine)

30. 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.

31. The pain endured by the appellant in ***Mere Labaivalu v Pacific Transport Co. Ltd,*** Civil Appeal No. ABU 0059 of 2014,(26th May,2017) is not comparable with that suffered by the plaintiff in the instant case. The appellant had a traumatic penetrating injury which pierced her hip and extended through the pelvis to the anterior abdominal wall. Basnayake JA enhanced the damages awarded of $60,000 for pain and suffering to $90,000. He stated that "*Although it is not evident, I would like to mention..some of the crucial pain that the plaintiff would have gone through*".

32. In ***Vimla Wati v Permanent Secretary of Health,***[2016] FJCA 72(27th May,2016) 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 for removal of his gallbladder and not for the period of 71 days, until he was finally discharged.

33. In ***Fiji Forest Industries Ltd v Rajendra Mani Naidu,*** Civil Appeal No: ABU 0019 of 2014, (14th September,2017) the respondent had loss of more than 50% use of his dominant hand. Jameel, JA stated " *that the percentage of disability alone is not the correct basis for calculation of damages. What must be considered is the degree of incapacitation of the limb, and its impact on the future of the victim.*". Jameel, JA stated that I had not placed adequate consideration to the unchallenged medical evidence and substituted a sum of $90,000 in place of the $60,000 I awarded.

34. Finally, Mr Sen cites the case of ***Kumar v Kumar,*** [2018] FJCA 106; ABU42.2016 (6 July 2018) where the appellant had undergone surgery for his fractured right leg. Chandra JA held that the sum of $18,000.00 awarded was inadequate and awarded $35,000.00, as the trial judge had not considered that he walked with a crutch nor the medical evidence.

35. Returning to the case before me, it was not disputed that the Bus dragged the plaintiff for 20 to 20 metres and she went underneath the Bus. She was in severe pain.

36. The claim that her leg is still swollen is inconsistent with the medical evidence.

37. The medical evidence provides that she was able to mobilize on the 4th day after she befell the accident. PW4 said that she would not have been discharged if her leg was still swollen. On 6th May,2016, the left knee joint had minimal swelling. She was mobilizing well. She was told that there was no need to return. On 30th August,2018, she had no swelling of her left knee.

38. In the light of the severe pain and trauma, the plaintiff underwent in the aftermath of being dragged 20 to 30 metres underneath the Bus, I award her a sum of $ 25,000 as general damages for pain and suffering.

39. The statement of claim states that the injury had a negative effect on the plaintiff's education, and there is a loss of earning capacity. There was no evidence adduced in support. It transpired that she completed Forms V and V1.

40. The disability, "*must, of necessity, prove a serious obstacle in a very wide field of academic or professional pursuits and that his disability will constitute a practical disqualification for many senior posts..*", as stated in ***Hutchison v Sward***,[1965-66] 39 ALJR 500 and cited by Basanayake JA in ***Jaysheel Jaineet Kumar v Pacific Transport Co Ltd,*** Civil Appeal no. ABU 0058 of 2014,(8th March,2018). In ***Hutchison v Sward***, the appellant was left with a permanent and serious defect vision. The Court held that the plaintiff's very limited field of vision must, of necessity, have a serious effect on the range of occupation which will be open to him later in life.

41. In ***Mere Labaivalu v Pacific Transport Co. Ltd,*** (*supra*) the Court of Appeal awarded $30,000 as future earnings to a student who complained that she could not go to school, as she could not sit and had to get ready half an hour earlier than before. Basnayake JA said:

> *The chairs that the school provides may not have been as comfortable as the ones found in an air-conditioned court house. Although healed she may not be the same person as before. I am not surprised that she took a longer time now to get ready to go to school. At the end it may be the mental trauma that discouraged her from going to school. .. I am also of the view that the learned Judge has erred by determining her medical condition after an observation that she was able to sit in court and thereby disbelieving her evidence that she could not go to school as she could not sit in those chairs.*

42. In ***Jaysheel Jaineet Kumar v Pacific Transport Co Ltd,*** (*supra*) it was held that the permanent scarring and deformity on the appellant's head could affect his personality, employment and his marital prospects. He was awarded a sum of $50,000.00 by way of future loss of earnings.

43. In ***Amendra v Mukesh Chand,*** Civil Appeal 0119 of 2017, (8 March, 2019) as also cited by Mr Sen, the appellant had to give up pursuing a career as a plumber, as his left hand was virtually disabled. He chose to become a primary school teacher. Chandra JA held that it would take 9 years from the time he met with the accident to find employment and increased the award for loss of earnings from $50,000.00 to $120,000.00.

44. I decline the claim for loss of future earnings.

45. Ms Raj agreed to the claim for special damages in a sum of $ 450 .

46. The plaintiff has claimed interest.

47. I award interest at 6% per annum on general damages of $ 25,000.00 from 1st May,2019, to 19th September,2019, and 3 % per annum on special damages on the sum of $450.00 from 26th April, 2016, to 19th September,2019.

48. ***Orders***

(a) I make order that there shall be judgment for the plaintiff against the first and second defendants in a sum of 26058.60 made up as follows:

(i)	General damages	25,000.00
(ii)	Interest on general damages	562.50
(iii)	Special damages	450.00
(iv)	Interest on special damages	46.10
	Total	$26058.60

(b) The first and second defendants shall pay the plaintiff costs summarily assessed in a sum of $ 5000.

HIGH COURT OF FIJI SUVA

A.L.B.Brito-Mutunayagam
Judge
8th May,2020
At Suva