IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 45 of 2017

BETWEEN: **CHANDAR KANTA** aka **CHANDRA KANTA** of Nawaka, Nadi, Domestic Duties.

Plaintiff

AND: **AKENETA LIAU NABOSE** of Vatutu Village, Nadi.

Defendant

Before : Master U.L. Mohamed Azhar

Appearance: Ms. Vreetika for the Plaintiff
The Defendant absent and unrepresented

Date of Decision: 26 April 2024

DECISION

01. The plaintiff on 09 July 2015 was walking at around 3.00 pm on the Nawaka Bridge. She was hit by a rental car bearing Registration No. LR 1791 belonged to Ezy Rent A Car Limited. The defendant was the driver at all material times. The plaintiff suffered multiple injuries which were particularized in the statement of claim. She alleged that, the said collision was due to the careless and negligent driving of the defendant. The plaintiff claimed special damages, damages for pain and suffering and loss of amenities of life, interest and cost on indemnity basis.

02. The defendant did not file the acknowledgment or the defence. The plaintiff then sealed the interlocutory judgment for default against defendant and filed the Notice of Assessment of Damages pursuant to Order to Order 37 rule 1 of the High Court Rules. The defendant attempted to set aside the default judgment; however, he did not proceed with his application. The hearing was finally fixed to assess the damages. The plaintiff claimed damages under various heads.

03. At the trial for assessing the damages, the plaintiff testified and called three more witnesses, namely her son, daughter in law and the General Surgeon Doctor Akthar Ali, attached to the Lautoka Hospital. The trial was held in two different dates. The plaintiff and two witnesses testified on the first date of trial and the last witness (Doctor Ali) testified subsequently on a later date fixed for continuation of trial. Doctor Ali tendered the Medical Report prepared by Doctor Rounak Lal – the Surgical Registrar at that time. The plaintiff was attended by a team of doctors and Doctor Lal was one of them. Doctor Ali too attended the plaintiff as Lead Surgeon. Doctor Ali was called to give evidence, because Doctor Lal had already left Ministry of Health and joined Fiji Airways.

04. It is the general principle of the law that the compensation should, as nearly as possible, put the party who has suffered in the same position as he would have been in, if he had not sustained the wrong. Lord Blackburn in **Livingstone v. Rawyards Coal Co.** (1880) 5 AC 25, held at page 39:

> I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

05. The court, in assessing the damages for the injury caused to any party due to the tortious act or omission of other, should consider the several factors such as injury, pain and loss of amenities, expenses incurred, loss of earnings and future losses etc. However, tort-sufferer should not make a profit out of the wrong done to him. Hamilton LJ in **Harwood v. Wyken Colliery Company** [1913] 2 K.B 158 stated at pages 169 and 170 that:

> In assessing damages for injury caused to a plaintiff workman by the tortious negligence of the employer or his servants a jury would be directed that, their damages being a compensation once for all, they must consider not merely past injury, pain and suffering endured, expenses incurred and earnings lost, but also future loss. They would have to measure in money the future effects of permanent or continuing disablement, but they must consider also the possibility of future diminution or loss of earnings arising independently of the cause of action, from increasing age, from accident or illness in futuro, and so forth. They would be directed that they had to give solatium for suffering and compensation for disablement, but so that the tort-sufferer should not make a profit out of the wrong done him, the object

being by the verdict to place him in as good a position as he was in before the wrong, but not in any wise in a better one.

06. The plaintiff in paragraph 9 of her statement of claim particularized the special damages. This includes a sum of $ 22.50 paid for police report; a sum of $ 7.00 paid for LTA search and travelling expenses in sum of $ 200.00. The plaintiff further stated in the same paragraph that, medical expenses to be quantified prior to the trial.

07. It is settled that, the special damages have to be pleaded and proved (Lord Goddard in **British Transport Commission v Gourley** [1956] AC 185). The specific damages are accrued and ascertained financial loss which the plaintiff had incurred. Unless agreed by the parties, special damages should be expressly pleaded; they must be claimed specifically and proved strictly (per: Edmond David LJ in **Cutler v Vauxhall Motors** [1971] 1 QB 418).

08. The plaintiff during her testimony tendered few Exhibits to substantiate the special damages caused due to the accident. The Exhibit 3 is the Official Receipt issued by the Lautoka Hospital to the plaintiff for the payment for the Medical Report. The plaintiff had paid a sum of $ 272.50 for the Medical Report as it is evident from the said Exhibit 3. The plaintiff also tendered the Official Receipt issued by the Land Transport Authority for payment made for search of record. It is marked as Exhibit 7 and amount paid was $ 6.63 and the plaintiff claimed a round up figure of $ 7.00 in her statement of claim for this expenditure.

09. The claim of the plaintiff for travelling expenses is $ 200.00. The plaintiff was hospitalized in Lautoka for 19 days from the date of the accident. She also attended Lautoka Hospital for review. It is evident from the plaintiff and her witnesses namely, the son and the daughter in law that, the daughter in law was assisting her during the day time to change the diaper and to take her to the washroom and to do her personal activities. The plaintiff is from Nadi and the son and the daughter in law used to travel from Nawaka, Nadi to Lautoka Hospital. The plaintiff stated that, they would have spent a sum of $ 50 per day for fuel. However, she was not sure of it as she clearly admitted. On the other hand, the son of the plaintiff in his testimony stated that, he had to pay a sum of $ 40 per day for the fuel, because he used to travel from Nawaka, Nadi to Lautoka Hopital.

10. The distance from Nadi to Lautoka is about 27 km. The son of the plaintiff would have travelled about 55 km per day had he come every day to visit the mother. The total amount the plaintiff claimed for travelling in her statement of claim is $ 200.00. Considering the number of the days the plaintiff was hospitalized and the subsequent review on few days,

I decide that the amount claimed in the statement of claim ($ 200.00) for travelling is reasonable.

11. The plaintiff testified that, they spent on buying the medicines; however, her son bought the medicine and she did not know how much he spent in total. The son too did not know how much he spent; however asserted that he spent some money for buying the necessary medicines prescribed by the doctors. He further stated that, he sometimes borrowed money from some other people to buy medicines. The medical report – Exhibit 8 shows that the plaintiff received multiple injuries which includes mild head injury and rib fracture. The Exhibit 5 is the photographs of the plaintiff taken whilst she was admitted in hospital. This Exhibit 5 is evident to the critical condition of the plaintiff after accident. No doubt that, the condition of the plaintiff would have warranted more medicines and other things such as diaper etc. Considering all the circumstances, I award a sum of $ 200 for medical expenses. Even though the plaintiff claimed a sum of $ 22.50 for police report, no evidence before the court to substantiate such amount.

12. Accordingly, I award the special damages in the following manner. A sum of $ 272.50 for the Medical Report; a sum of $ 7.00 for the payment made to LTA; a sum of $ 200.00 for travelling expenses and a sum of $ 200.00 for medicines. The total, is $ 679.50 and I round up as $ 680.00 and award it as the special damages.

13. The second head is the pain and suffering and loss of amenities of life. The leading English authorities on the principles applicable to damages for pain and suffering and loss of amenity are **Wise v Kaye** [1962] 1 QB 638 (CA), and **H West & Son Ltd v Shephard** [1964] A.C. 326. Though the damages for both pain and suffering and loss of amenities are generally claimed together under one head, there is a clear distinction between damages for pain and suffering and damages for loss of amenities. The former depend upon the plaintiff's personal awareness of pain, his capacity for suffering. But the latter are awarded for the fact of deprivation-a substantial loss, whether the plaintiff is aware of it or not (per: *Lord Scarman* in **Lim v. Camden Health Authority** [1980] AC 174 at 188). Further the principle of the common law is that a genuine deprivation, whether it is pecuniary or non-pecuniary in character, is a proper subject of compensation. The pecuniary loss was recognized in **Phillips v. London and South Western Railway Co.** (1879) 5 C.P.D. 280, and The House of Lords recognized the non-pecuniary loss in **H. West & Son Ltd. v. Shephard** (supra).

14. The loss of amenities of life refers to the loss or reduction of a claimant's mental or physical capacity, suffered as a result of personal injuries, to do the things he used to do before suffering those injuries. In other words, it is deprivation of plaintiffs/claimants of the capacity to do the things which before the accident they were able to enjoy, and prevention

of full participation in the normal activities of life. The courts over the time have considered variety of physical and social limitations inherent in the injury itself. Being unable to engage in pre-accident interest such as hobbies and sports (**H West & Son Ltd v Shephard** [supra]); Loss of the capacity to use one's limbs (**Hunt v Severs** [1994] 2 AC 350); impairment of any one or more of the five senses (**Cook v J L Kier & Co Ltd** [1970] 2 All ER 513 and **Thompson v Smiths Shiprepairers (North Shields) Ltd** [1984] QB 405); loss of marriage prospects and deprivation of sexual pleasure (**Morianv v McCarthy** [1978] 1 WLR 155 and **Cook v J L Kier & Co Ltd** [supra]); inability to play with one's children (**Hoffman v Sofaer** [1982] 1 WLR 1350); loss of a craftsperson's pleasure and pride in work (**Morris v Johnson Matthey & Co Ltd** (1968) 112 SJ 32); loss of enjoyment of a holiday (**Ichard v Frangoulis** [1977] 2 All ER 461 and **Hoffman v Sofaer** [supra]); and inability to fish (**Moeliker v A Reyrolle and Co Ltd** [1977] 1 All ER 9). The above are some of the deprivation that attracted the attention of the courts in personal injury matters; however the damages under this head may take account of wide range of factors.

15. Undoubtedly, the courts which assess the damages for non-pecuniary deprivation and quantify it in monetary terms cannot come to a scientifically accurate amount. The courts may consider the comparable cases both in local and foreign jurisdiction and direct their mind to come to a fair and consistent amount of compensation, not forgetting the fact that, the amount so ordered is the one-time payment which cannot be varied by subsequent contingencies, even though those contingencies are direct results of the tortious act or omission.

16. The Supreme Court in **The Permanent Secretary for Health and Another v Kumar** [2012] FJSC 28; CBV0006.2008 (3 May 2012) laid down the guiding principle in measuring the quantum of compensation for pain and suffering and loss of amenities and held at paragraph 37 that:

> 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. However, it is also open for a court

> to take into consideration a comparable award made in a foreign jurisdiction, particularly in cases where the type of injury is not very common, provided that the court takes into consideration differences in socio-economic and other relevant conditions that might exist between the two jurisdictions.

17. It remains the general practice of the courts when awarding damages in respect of verity of non-pecuniary losses to make a one inclusive sum or a global award without dealing them as separate items (**H West & Son Ltd v Shephard** (supra) at 365; **Fletcher v Autocar and Transporters Ltd** [1968] 2 QB 322, 336C-E, 341-342, 364B-C).

18. The plaintiff in her testimony elaborated on the injuries she sustained due to the accident. The plaintiff was thrown to the drain due to the impact and she became unconscious. She was first taken to Nadi hospital and then transferred to Lautoka hospital. In her testimony she described the nature of the injuries she sustained. The plaintiff stated that, she sustained head injuries; the jaws and the ribs were broken. She was in hospital for 19 days. The daughter in law of the plaintiff was helping her. She was in severe pain even though she was given medicines. She was in pain for quite long time even after discharge from the hospital. She further testified that, the doctors drilled in her body too. The plaintiff admitted that, she was under anesthesia during the surgical procedures; however she felt pain after procedures. The plaintiff actually testified about her injuries in a layman's terms.

19. However, the General Surgeon – the last witness called by the plaintiff – clearly explained the nature and seriousness of the injuries the plaintiff sustained due to the accident. The General Surgeon identified the Medical Report and stated that, the plaintiff's injuries were categorized into 6 types. First was the mild head injury. The second was right clavicular fracture, i.e. the collar bone fracture. This type of fracture happens if relatively high force is applied, and it takes 2 to 3 month for healing according to this witness. The doctor further stated that, there is a possibility for pain and discomfort even after healing. The third injury was 4th, 5th and 6th rib fracture. This injury too will take 2 to 3 months for healing. The doctor suggested that, this ribs are on the upper level of the chest and usually do not get fracture and there would have been intense force and the impact would have been significant in this case.

20. The doctor continued to explain and stated that, the 4th category was pulmonary contusion which means the bruises on the lungs. This was caused by the rib fracture. This could be life threatening too sometimes due to other complications that can be caused due to this. The fifth one was left side scalp laceration which takes average 6 weeks to heal. The last one was the left haemothorax, which is the collection of blood inside the chest cavity. According to the doctor, it was mild and a surgical procedure was carried out under local

anesthesia to drain the blood collection. Answering a question of the solicitor for the plaintiff on level of pain the plaintiff suffered, the General Surgeon stated that, the pain is a subjective symptom and it differs from elderly people to younger people. The reasons is that, according to the doctor, the level of tolerance varies from youngster to elder. It is high in elderly people and low in youngsters.

21. The plaintiff was born on 07 February 1955 as per the Birth Certificate (Exhibit 1). She was an elderly person of 60 years age at the time of the accident, nevertheless, she would have suffered lot of pain due to the nature of the injuries and the procedures. I bear in mind the three guiding principles laid down by the Supreme Court in **The Permanent Secretary for Health and Another v Kumar** (supra) and also consider other cases such as **Tuberi v Gopal** [2001] 1 FLR 47 (2 February 2001) and **Appal Swamy Naidu v Bechni and Anohter** FCA Civil Appeal No. 43 of 1974 (4 November 1974, unreported). The circumstances of those cases are not exactly same as in the present case and each case must be considered on its own merits. However, they can guide the court in arriving to a conventional and consistent amount of damages. Finally I award a global sum of $ 35,000.00 for pain and suffering and loss of amenities of life. This amount would not only be fair but also be consistent with what has been complained of, in this case.

22. The plaintiff testified that, she was working as a domestic servant at the time of accident. She worked as a house girl in 4 different houses in Nadi. She used to work 6 days in a week from Monday to Saturday. She earned $ 110 to $ 120 per week. An average of $ 20 per day. The plaintiff and the witnesses to stated that, even though she recovered, she could not do her usual duties and she stopped working as house girl. However, she was 60 years of old and on her retirement age at the time of the accident. Therefore, she will not be eligible to claim for damages under heads of loss of future earing and loss of earning capacity.

23. Furthermore, applying the reasoning of the Court of Appeal in **Attorney-General v Valentine** [1998] FJCA 34; Abu0019u.98s (28 August 1998), I allow the interest at the rate of 6% on the general damages for pain, suffering and loss of amenities from the date of writ to date of trial and 3% on the special damages from date of accident to date of trial. I summarily assess the cost in sum of $ 2000.00 in this matter.

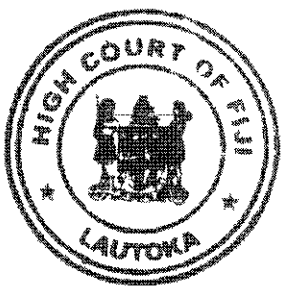
24. In the result, I make the following awards:

    a. Special damages in sum of $ 680.00,

    b. A sum of $ 35,000.00 for pain and suffering and loss of amenities,

c. Interest at the rate of 6% on the general damages for pain, suffering and loss of amenities from the date of writ (09 Mach 2017) to date of trial (30 November 2020), and 3% on the special damages from date of accident (09 July 2015) to date of trial (30 November 2020) ,and

d. Summarily assessed cost of $ 2000.00 payable to the Plaintiff within a month from today.



U.L Mohamed Azhar
Master of the High Court

At Lautoka
26.04.2024