

IN THE MAGISTRATE'S COURT
AT NADI,

CIVIL ACTION NO: 070/2021

BETWEEN:

JACK GREY VOSAWALE of Nasoso Road, Nadi.
First Plaintiff
JESSE DAVID VOSAWALE of Nasoso Road, Nadi.
Second Plaintiff

AND

SAVNIL DANVESH KUMAR of Nasoso, Nadi.
First Defendant
NEHA NIKITA of Nasoso, Nadi.
Second Defendant

Before : Resident Magistrate (Mrs) Nirosha Kannangara
For Plaintiffs : Mr. Viliame Lagonilakeba of Millbrook Hills Law Partners
For Defendants : No Appearance
Date of the Judgment : Thursday 23rd February, 2023.

**JUDGMENT
(EXPARTE)**

I. Introduction

1. The Plaintiffs instituted this action against the Defendants claiming the following;
 - i. General Damages for physical Pain and suffering and Mental Trauma and suffering to be confined to the jurisdiction limitation of this Honourable Court;
 - ii. Special damages as provided at trial; any award to be confined to the jurisdiction limitation of this Honourable Court;
 - iii. Punitive and/or Exemplary Damages to be confined to the jurisdictional limitation of this Honourable Court;
 - iv. Post Judgment interest of 5% per annum pursuant to Order XXXII Rule 8 of the Magistrates' Court Rules;
 - v. Solicitors cost in the sum of \$3,270.00;
 - vi. Costs on Solicitor/Client indemnity basis; and
 - vii. Plaintiffs limit their claim to the jurisdiction of this Honourable Court,
 - viii. Such further and incidental relief as this Honourable Court may deem just in the circumstances

2. I noted that in the statement of claim under the prayer the claims were not quantified, no monetary values were given justifying that the claim is within the jurisdiction of this court.

3. The Plaintiffs were given 21 days to file an amended statement of claim but no steps were taken by the Plaintiffs. On 11/02/2022, the Plaintiffs' lawyer informed the court that the sum claimed has been specifically stated in the Writ of Summons.
4. On 20/08/2021, the Plaintiffs filed affidavits confirming the service made to both the Defendants.
5. The Defendants did not appear before the court and the matter was kept for formal proof on 17/06/2022.
6. The hearing was conducted on 17/06/2022 and adjourned and continued on 30/08/2022.

II. Evidence

7. The following witnesses were called to give evidence for the Plaintiffs' case.
 - (i) Amy McGowen,
 - (ii) Mousheen Khan,
 - (iii) Jesse Vosawale,
 - (iv) Adi Arieta Vosawale
8. At the trial the following documents were tendered as Exhibits for the Plaintiffs' case.
 - (i) PE 1 - Medical Report of the Second Plaintiff
 - (ii) PE 2 - Medical Report of 4th Plaintiff witness Arieta Vosawale
 - (iii) PE 3 - Medical Report of the Second Plaintiff's infant child
 - (iv) PE 4 - Photographs after the Accident
 - (v) PE 5 - Letter from Namaka Police Station
 - (vi) PE 6 - Quote from One Stop Paint
 - (vii) PE 7 - Quotation from OSPC

- (viii) PE 8 - Genuine Spares Valuation
- (ix) PE 9 - Demand Notice dated 24/06/2021
- (x) PE 10 - Demand Notice dated 24/06/2021
- (xi) PE 11 - Receipt from Lovely Car Rentals
- (xii) PE 12 - Receipt from Cool Car Rentals
- (xiii) PE 13 - Vehicle Search of IC 263
- (xiv) PE 14 - Vehicle Search of IR 409
- (xv) PE 15 - Invoice of Legal Fees from Millbrook Hills

III. Analysis of Evidence and Final Determination:-

9. I am not reproducing the evidence given by all 4 witnesses for the Plaintiffs' case.
10. At the Trial, the First Plaintiff did not come before the Court to adduce any evidence.
11. The evidence in brief of the Second Plaintiff is that on 28th March 2021, he drove vehicle IR 409 while his wife and the infant child were seated at the back seat of the car. Savnil Danvesh Kumar drove vehicle IC 263 from his opposite direction negligently and bumped into the vehicle IR 409 he was driving causing severe damages to the said vehicle bearing no. IR 409 and causing injuries to him, his wife and the son. Exhibit PE 5 was the Police Report filed by the Second Plaintiff confirming the accident. I perused the said Police Report and noted that the driver of IC 263 was issued a TIN for careless driving. At the trial, there was no evidence tendered to the Court to confirm whether the First Defendant paid the TIN or disputed to the TIN or that he was found guilty or not guilty and acquitted from the Court.

12. The Second Plaintiff stated in his evidence that the said vehicle bearing no. IR 409 is used by both the Plaintiffs. As at the date of the accident, as per exhibit PE 14, the registered owner of vehicle bearing no. IR 409 was the First Plaintiff.
13. As per the evidence adduced by the Plaintiffs witnesses and the exhibits tendered at the trial it is evident that the Second Plaintiff is seeking damages for vehicle No. IR 409; compensation for injuries sustained by him, his wife and the infant child; costs for using a rental car after the accident for their day to day use in place of the damaged vehicle bearing no. IR 409 until end of June 2021 and legal costs.
14. In the statement of claim the Plaintiffs had stated the particulars of negligence, the particulars of general damages and the particulars of special damages. The claim was sought for special damages in the sum of \$11,130.00 till end June 2021. In the writ of summons the Plaintiffs' claim special damages in the sum of \$11,130.00. After perusing through the writ and the statement of claim this Court believes that the Plaintiffs' instituted this action seeking \$11,130 to be paid by the Defendants as special damages to the Plaintiffs'.
15. The burden of proof lies upon the party who substantially asserts the affirmative of the issue (*Robins v National Trust Co. (1927) A.C.515*). The burden of proof in any particular case depends on the circumstances in which the claim arises. In general the rule which applies is "*Ei qui affirmant non ei qui negat incumbit probatio*". It was held in *Levy v Assicurazioni Generali (1940) A.C.791* that "*this rule is adopted principally because it is but just that he who invokes the aid of the law should be the first to prove his case; and partly because in the nature of things, a negative is more difficult to establish than an affirmative*".
16. The standard of proof required in civil cases is generally expressed as proof on the balance of probability. **Lord Denning** in "*Miller v Minister of Pensions (1947) 2 All E.R.372*) held that "*if the evidence is such that the tribunal can say "we*

think it more probable than not' the burden is discharged, but if the probabilities are equal it is not".

17. The first witness Amy McGowen, the person who delivered the Second Plaintiff's wife and the child to the Nadi Hospital after the accident was called to give evidence by the Plaintiffs. As per her evidence both the Second Plaintiff's wife and child were shocked after the accident. She did not adduce any evidence to prove that both the victims of the accident were sustaining any visible injuries.
18. The Second witness who gave evidence for the Plaintiffs' case was Mr. Moshin Khan, the Medical Officer who examined the Second Plaintiff, his wife and the infant child at the Nadi government Hospital. He tendered the Medical Reports of the Second Plaintiff, his wife and the infant child as PE 1, 2 and PE 3 respectively. The specific medical finding stated in PE 1 are neck pain, hand swelling and pain and back pain no bleeding. The specific medical finding stated in PE 2 were swelling in the *shin* area (Doctor Khan described in his evidence referring to the Medical Report stating that the 4th Plaintiff witness sustained swelling in the front lower leg area) and abrasion on the forearm. As per the PE 3 the infant child has not sustained any injuries.
19. When I analyzed the evidence before me, I noted that the Second Plaintiff has stated that he was using IR 409 and that the First Plaintiff had been the registered owner at the time the accident had occurred.
20. The Second Plaintiff tendered exhibits PE 6, 7 and 8. He adduced evidence stating that PE 6 is a quotation for towing vehicle IR 409, PE 7 was a quotation to repair IR 409 and PE 8 was a valuation for vehicle registration no. IR 409. I believe the Second Plaintiff tendered the said exhibits PE 6, 7 and 8 to prove to the Court that he paid \$60/- to tow the vehicle from the accident scene, the quotation for repairing the said vehicle bearing IR 409 and the forced sale value of IR 409. As per Exhibit PE 14 tendered by the Second Plaintiff confirms that the

said vehicle IR 409 was disposed by the First Plaintiff on 6/4/2021, a week after the accident occurred.

21. The issue before me is that the First and Second Plaintiffs are seeking the Defendants to pay special damages for the hiring paid for the towing of IR 409 from Namaka Police Station. The difference between the depreciated valuation of the vehicle prior to sustaining damages and the sum it was sold. Hiring a Taxi from a Rent a car in the sum of \$690 by the Second Plaintiff. Hiring a Toyota Sai from a Rent a car in the sum of \$840/- by the Second Plaintiff and Hiring a Honda Insight from a Rent a car in the sum of \$840/- by the Second Plaintiff. There was no evidence tendered to this Court pertaining to sale of vehicle IR 409 by the First Plaintiff.
22. The Second Plaintiff is seeking general damages for injuries sustained by him, his wife and the child from the Defendants.
23. First I will deal with the general damages the Second Plaintiff is seeking from the court for pain and suffering incurred by him and his family.
24. The Second Plaintiff and his wife gave evidence in this matter stating the post trauma stress the parties were going through including the infant child after the accident was occurred.
25. I wish to quote the following stated by Master U.L. Mohamed Azhar in **Raiqueu v Chand [2020] FJHC 535; HBC124.2014 (17 July 2020)**:

"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] UKHL 3; (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.

06. The court, in assessing the damages for the injury caused to any party due to the tortuous 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.”

26. I believe in this matter the Second Plaintiff, his wife and the infant child were examined at the Nadi government hospital. The Second Plaintiff has not incurred any expenses for same. There were no receipts tendered at the trial to prove that the Second Plaintiff incurred any expenses for medical treatments. Further I believe the post trauma anxiety and depression is common to all victims of a car accident.
27. As per the evidence adduced by all four witnesses there is no evidence before this court to prove that the Second Plaintiff, his wife and child sustained any long term injuries or severe injuries causing any personal disabilities, any injuries physically or emotionally causing their future wellbeing or due to this accident that they sustained injuries causing loss of future earnings. I noted as per the Medical Reports the injuries are minor in nature. I see no evidence with regard to general damages sought by the Second Plaintiff.
28. The Second issue is the special damages sought by the Second Plaintiff. There is no clear evidence before this Court on what basis that the Second Plaintiff is seeking special damages from the Defendants being the driver of the said IR 409

not the registered owner. The Registered owner of the IR 409 never came before the Court to give evidence neither he made any claims against the Defendants by adducing any evidence. It is evident as per the Exhibits tendered to the Court at the trial the Second Plaintiff is claiming special damages being the person who drove the vehicle bearing no. IR 409 at the time of the accident for all the hiring of vehicles made by him from Rented Car companies for his day to day use from the Defendants including the difference between the forced sale value quotation and selling price of vehicle bearing no. IR 409.

29. I believe that the Second Plaintiff shall not make a profit out of the wrong done by the First Defendant to him and the Second Plaintiff has no legal right to stand and seek for special damages from the Defendants.
30. Based on the above facts, I dismiss the Plaintiffs' case without costs.
31. Notice of Intent to Appeal within 7 days

Thursday 23rd February, 2023.



NIROSHA KANNANGARA
RESIDENT MAGISTRATE