

NACANIELI MOCE

A

v

1. **NEORI RACULE**
2. **DURGA PRASAD**

[HIGH COURT, 1995 (Pathik J), 1 August]

B

Civil Jurisdiction

Negligence-multiple injuries-assessment of damages.

The Plaintiff suffered multiple personal injuries in a road traffic accident. This report is the High Court's assessment and award of damages.

C

Cases cited:

Attorney-General v Waisale Naicegulevu F.C.A. No. 22 of 1989

British Transport Commission v Gourley [1956] AC 185

Brunsdon v Humphrey (1884) 14 QBD 141

D *Ellison v Union Steamship Co. of New Zealand Ltd* [1939] NZLR 23

Mahendra Naidu v Ravindra Patel C.A. No. 105/79 (West Div)

Manley v Rugby Portland Cement Co. Ltd (1951) C.A. No. 286.

Tacirua Transport Co. Ltd & Viren Chand (Civ. App. 33/94)

Usha Kiran v Attorney-General of Fiji FCA No. 25 of 1989

E

Assessment of damages by the High Court.

T. Fa for the Plaintiff

No appearance for the Defendants

Pathik J:

F

On 27 June 1991 Judgment by default was obtained against the second defendant (D2) by the Plaintiff with damages to be assessed as no notice of intention to defend was filed by him. While these proceedings were pending the first defendant had died. Although D2 was served with "Notice to fix a hearing" dated 31 May 1994 he failed to appear on 8 June 1994; hence hearing of this Assessment of Damages was proceeded with in his absence.

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Mr. Fa was to file written submission but he recently indicated that he wished to be excused from doing so and would let the Court assess damages on the evidence before it.

The Plaintiff's claims arise out of a motor vehicle accident. He is seeking the following reliefs:

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|----|---|---|
| 1. | a declaration that the accident was the result of negligence on the part of the first defendant. | |
| 2. | a declaration that both the defendants are liable in law to pay for damages payable in this case. | A |
| 3. | Special damages | |
| | (a) Value of Plaintiff's vehicle \$ 4,000.00 | B |
| | (b) Loss of income at the rate of \$60.00 per week | |
| 4. | Pain and suffering \$40,000.00 | |
| 5. | General damages | |
| 6. | Costs | C |
| 7. | Any other relief this Court may deem fit. | |

The facts of this case are as set out in the Statement of Claim which includes Particulars of Negligence, Particulars of Injuries and disabilities resulting from the injuries. The Plaintiff has supplemented what he has stated in the Statement of Claim with his oral testimony in Court on the hearing of assessment of damages. To give the whole picture of the situation in this case, I can do no better than set out hereunder, which I hereby do, the contents of the Statement of Claim in so far as they are relevant:

- | | | |
|-----|---|---|
| “1. | The plaintiff is 43 years old married with one child. He is a carpenter by profession and at the relevant time and date was the driver/owner of private car No. AZ 901. | E |
| 2. | The 1st defendant at the relevant time and date was the driver of private car registration No. AW654 which was owned by the 2nd defendant. | |
| 3. | On 9/7/88 at about 6.30 p.m. the plaintiff was driving car registration No. AZ 901 along Grantham Road heading towards Nabua direction when his vehicle collided with car registration No. AW 654. This car No. AW654 was coming from the opposite direction heading towards USP direction and driven by the 1st defendant. | F |
| | Car registration No. AW 654 was overtaking another vehicle and so crossed the white middle line of Grantham Road and smashed into the plaintiff's vehicle. | G |
| 4. | The collision was the direct result of the negligence of the 1st defendant”. | |

5. As a result of this accident the plaintiff sustained severe and serious injuries for which he was admitted to CWM Hospital for about 2 months.

A

Particulars of Injuries:-

a) fracture of right ankle; b) fracture of right leg; c) fracture of right thigh just over the bone; d) fracture of right hand by the knuckles; e) loss of fourth finger on right hand; f) dislocation of right arm; g) deep cut on head; h) lacerations all over body.

B

6. After his discharge from hospital the plaintiff has been on crutches up till the day of writing this petition. During this period he has been unemployed and surviving by the love of his relatives and friends.

C

7. As a result of this accident, the 1st defendant was charged with dangerous driving, driving an unlicensed motor-vehicle and using a motor vehicle which did not have an insurance policy in force. He was found guilty of the charges on 24/01/89 and fined a total of \$70.00 (Seventy Dollars) and disqualified from driving for 12 months from all groups except groups 1 and 6.

D

8. Since the accident on 09/07/88 the plaintiff who is a qualified carpenter and brick-layer has been unable to earn a living because of the injuries on his body particularly the injuries to his right ankle and right hand which have not completely healed.

E

9. As a result of the injuries sustained from this accident the plaintiff has suffered as follows:-

F

a) he is limping badly; b) he walks around with walking stick; c) he is without a finger on his right hand; d) he cannot carry any weight; e) he cannot do any work; f) he is unable to sit cross-legged; g) he cannot squat; h) he suffers from regular attacks of unexplained headaches.

G

10. The injuries plaintiff sustained has deprived him of his love for regular sexual affairs with his young wife and this has very much strained their marriage. Whenever plaintiff has sexual relationship with his wife now it lacks the vigour, interest, love and concentration he had before mainly because of his inability to maintain erection consistently.

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11. Since the accident and perhaps for many years to come with the fractures plaintiff sustained he would not be able to attend to his garden because of his body condition. A
12. The plaintiff is presently restricted in what he can do. He is unable to socialise as he used to do before.
13. As a direct result of this accident the plaintiff's private car was a write-off. He had purchased the car for \$4,000.00. B
14. The plaintiff says that at the relevant time and date the 1st defendant was driving the vehicle belonging to the 2nd defendant with knowledge that the said vehicle was prohibited from and with the 2nd defendant's permission. The 1st defendant was therefore driving as an agent of the 2nd defendant." C

The Court is required to assess damages as claimed.

On the evidence before me I find that the accident was solely the result of negligent driving on the part of the 1st defendant for which he was convicted and fined. Since the first defendant negligently drove with the permission of D2 and not having denied the allegation the latter is liable in damages for the injuries received by the Plaintiff. D

I find that the injuries suffered by the Plaintiff are as stated hereabove and elaborated upon in his evidence in Court. E

Dr. Welby Korwa gave evidence as to the nature of injuries he found on examination of the Plaintiff on 14 July 1992 when the Plaintiff saw him for medical examination for assessment of permanent incapacities. The doctor's medical report (exhibit P1) was tendered to court and is as follows:-

"History: On 9/7/1988 he was driving a car that collided with another car. He sustained injuries which required admission to Hospital. F

Injuries: As described by attending surgeon as - G

- 1) lacerations of scalp, right elbow and left pinna
- 2) fracture right femur
- 3) fracture right tibia and fibula
- 4) crush injury and open fracture right hand
- 5) fractured right 8th & 9th ribs

6) concussion.

A Examinations showed:

1) lacerations of scalp, right elbow and left pinna have healed. There is no permanent incapacities for these injuries.

B

2) There is malalignment of the fractured right femur which resulted in the femur being short of two (2) cms.

3) Arthritis of the right ankle joint is caused by short right limb.

C

4) Chronic eczematous dermatitis of lower limb is caused by crush injury to the leg. Venous stasis was caused by the crush injury.

5) Arthritis of the right wrist joint with physical loss of ring finger.

Permanent incapacities:

D

For arthritis of the right ankle joint and the vericose dermatitis I award him fifteen percent permanent in capacity. For loss of right ring finger and arthritis of the right wrist joint, I award him sixteen percent permanent incapacity. Total permanent incapacity = 31%".

E

The Plaintiff testified, inter alia, that at the time of the accident in 1988 he was 43 years old and is married. He is a qualified carpenter and brick layer and as a result of the accident he is unable to do the work which he is qualified to do. He worked for a construction company as a bricklayer. At present he is self-employed making 'caram boards'.

F

On the injuries he said that his right leg is itchy and swells from time to time. He walks with a limp as his right leg is shorter than the other. As a result of the injuries received he is unable to earn a living. He is without a finger in his right hand; he says that he cannot carry weight, cannot sit cross-legged, cannot squat, some times he has headaches and his sexual life is affected. As for the car which he purchased for \$4,000.00 it was a total write-off.

G

Assessment of Damages

On the evidence before me I am satisfied that the Plaintiff received the injuries solely through the negligence of D1 and the actual injuries received by him as a result of the accident are as stated by Dr. Welby and as testified by the Plaintiff himself. I also accept what the disabilities are as outlined in evidence.

I further find on the facts that D2 is equally liable as D1 (since deceased) to pay damages arising out of this accident.

I shall now deal with the various items in the claim.

(a) Special Damages

The Plaintiff is claiming \$4000 for loss of his vehicle Regd. No. AZ901. All the evidence that there is on this claim is the Plaintiff's evidence that he purchased the said vehicle for \$4000 and that as a result of the said accident it was a "write off". There are no other evidence to support the claim. These bare statements are not sufficient when a person is claiming special damages. The Court should not be called on to assume that the Plaintiff suffered such a loss. Nor should the Court be asked to assess a figure in the absence of satisfactory proof of special damages. In Mahendra Naidu s/o Adiappa and Ravindra Patel s/o Motibhai Patel C.A. No. 105/79 (West Div), Williams J. said:

"No receipt or evidence has been tendered to show that hospital fees amounted to \$50.00 and I do not accept that figure. I am unable to guess what it would be and I do not allow it. As Lord Goddard and the F.C.A. have pointed out claimants are expected to call evidence supporting their claims and not simply to say this is what I have paid or suffered in losses then expect to be awarded those sums".

Special damage "has to be specially pleaded and proved. This consists of out of pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation". (Lord Goddard in British Transport Commission v Gourley [1956] AC 185).

It is stated in Munkman, Damages for Personal Injuries and Death 8th Ed. p.90 that "loss of property, or damage to property, as a result of the accident, may be claimed as an item of special damages: the destruction of clothing or personal belongings, for example, or damage to a motor car or bicycle. Strictly speaking, such a claim is a separate cause of action". See Brunsdon v Humphrey (1884) 14 QBD 141 where it is stated in the headnote that:

"Damage to goods and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action; and therefore the recovery in an action of compensation for the damage to the goods is no bar to an action subsequently commenced for the injury to the person."

- A Here no doubt, damage from total loss is recoverable but the evidence before me is insufficient to find for the plaintiff as special damage. But on the authority of Brunsdan (supra) a separate action could be brought to properly prove the claim.

I therefore disallow this claim in this action.

- B Under special damage the plaintiff further claims "loss of income" at the rate of \$60 per week. The evidence is that he is a qualified carpenter and bricklayer. At the time of the accident he earned \$60 per week nett and worked for Landmark Construction Company. He said that he was unable to work for the period 9 July 1988 to January 1992 (period of 3 years and 8 months) and hence he is claiming for loss of wages for this period.

- C The accident was on 9 July 1988. According to him he was admitted to CWM Hospital for two months thereafter.

There is no evidence as to how long he worked for the construction company. There is nothing to indicate that he was a permanent employee except that when he worked he was paid \$60 per week.

- D Although he received the injuries outlined hereabove, it cannot be said that he was unable to work at all.

- The doctor has stated that his permanent incapacity is 31%. I will therefore assess his loss of income as follows: (a) I will allow him loss of wages in full at \$60 per week for the period 9.7.88 to 9.9.88 (for 2 months in hospital),
E (b) for 6 months thereafter from 10.9.88 to 10.3.1989 at full pay and (c) at 31% loss of wages thereafter from 11.3.89 to 24.9.94 (date of hearing of assessment of damages).

Therefore calculated on the above basis it comes to: for (a) above \$480; for (b) \$1440 and (c) \$14112.

- F I will therefore assess his loss of income to date of trial at \$16032.00

(b) General Damages

- G The Plaintiff's claim for general damages is for pain and suffering from the injuries that he has sustained, loss of amenities of life, prospective loss of earnings and other material benefits.

To assess damages under this head one has to take into account the Medical Report herein.

(i) Loss of Prospective Earnings

Evidently the Plaintiff did not return to his previous employment as he said that he did not work at all after the accident. However the doctor had stated that there is 31% permanent incapacity. Hence in the case of the Plaintiff his loss of earnings will be 31% of \$60 per week which he earned commencing from 24.9.94 (date of hearing). In Ellison v Union Steamship Co. of New Zealand Ltd [1939] NZLR 23 at 225 O'Regan J said that:

"If the injured man has not resumed work and there is no prospect of re-employment at a reduced wage, then the medical evidence of the extent of his loss is the only available guide to the Court."

For the future, bearing in mind some of the decided cases I adopt a multiplier of 6 (six). It is stated in Halsbury 4th Ed Vol 12 at para. 1156 that:

"for a plaintiff in his thirties having a normal expectation of working life a multiplier of 14 or 15 has often been taken".

In this case the Plaintiff was in his early forties and he would have probably worked until 55 years of age. I have already assessed hereabove till 49 years of age. For the remainder of the period I will use a multiplier of 6. Working on the basis of 31% permanent incapacity it will come to 31% of 312 weeks x 60 = \$5620.

I therefore award the sum of \$5620 for prospective loss of earnings.

(ii) Pain and Suffering

The Plaintiff is entitled to damages under this head; he was hospitalised for two months. As stated in Kemp & Kemp (Vol. 1 p.2007 2-010)

"...the court must take into account, in making its assessment in the case of any particular plaintiff, the pain which he actually suffered and will suffer and the suffering which he has undergone and will undergo. Pain and suffering are not measurable by any absolute standard and it is not easy, if indeed possible other than in the most general way, to compare the degree of pain and suffering experienced by different people, however, the individual circumstances of particular plaintiffs clearly have a significant effect upon the assessment of damages".

In this case the Plaintiff did go through some pain and suffering as can be seen from the medical report and his own evidence. He still suffers discomfort

because his right leg is itchy and "water comes out" of the skin. He has to bandage it.

A (iii) Loss of Amenities of Life

The Plaintiff is entitled to have loss of amenities of life, which includes his complaint about how his sexual life is affected and the shortening of his leg. How he is affected has already been outlined hereabove.

B As stated in Kemp & Kemp, The Quantum of Damages (Vol I loose leaf Edition p.1009, 1-008):

C "There is a head of damage which is sometimes called the loss of amenities; the man made blind by the accident will no longer be able to see the familiar things he has seen all his life; the man who has had both legs removed and will never again go upon his walking excursions - things of that kind - loss of amenities." (Per Birkett L.J. in Manley v Rugby Portland Cement Co. Ltd [1951] C.A. No. 286.

D "This head embraces everything which reduces the plaintiff's enjoyment of life considered apart from any material or pecuniary loss which may be attendant upon the loss of amenity. What matters is the fact of deprivation of an amenity or amenities, not whether the injured person is aware of such deprivation ..."

E Upon a consideration of the foregoing facts and in the circumstances of this case I award the sum of \$10000 (ten thousand dollars) for pain and suffering and loss of amenities of life.

(c) Claim for Interest

F Since there is no claim for interest in the claim for damages in the pleadings no order will be made. Recently in a judgment delivered on 22 March 1995 in Tacirua Transport Company Limited and Viren Chand s/o Ragho Prasad (Civ. App. 33/94 F.C.A. 2/3/95, the Fiji Court of Appeal when dealing with the power of the Court to award interest "rather than the rate at which interest should be paid" said as follows:

G "Section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap. 27 provides:

"3. In any proceedings tried in the (High) Court for the recovery of any debt or damages the Court may, if it thinks fit, order that there shall be included in the sum for which

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judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages ...”

This provision must, however, be regarded as subject to the general provision that a claim for interest, as for any other relief, must first be pleaded. This was a matter considered by this Court in Usha Kiran v Attorney-General of Fiji F.C.A. No. 25 of 1989; delivered on 23 March 1990. In that case the Court noted the English rule under which it is mandatory to plead specifically any claim for interest. The Court observed that there was no comparable rule in Fiji but, following the reasoning in the English Supreme Court Practice (“White Book”- 1991 edition para. 18/8/10), considered that interest, if sought, should be specifically pleaded. That judgment was followed and applied in Attorney-General of Fiji v Waisale Naicegulevu F.C.A. No. 22 of 1989 delivered on 18 May 1990. We see no reason for departing from what is now the established practice of this Court.

In the present case, not only was there no claim for interest in the Statement of Claim, but the topic of interest was apparently not raised at the hearing and is not referred to at all in the written submissions made to the Judge on behalf of either party. In these circumstances there was no power for the Judge to include the provisions for interest in his assessment of damages.”

In the result in summary I award damages as follows:-

| | |
|--|-------------------|
| Special damages (loss of income) | \$16032.00 |
| General damages (loss of prospective earnings \$5620, pain and suffering and loss of amenities of life \$10,000) | \$15620.00 |
| | <u>\$31652.00</u> |

Accordingly there will be judgment for the plaintiff against the second defendant in the sum of \$31652.00 (thirty one thousand six hundred and fifty two dollars) with costs to the plaintiff to be taxed if not agreed.

(Damages assessed.)