

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 235 OF 2015

BETWEEN : SETARIKI VAKALOLOMA of Sabeto Village, Nadi, Retired, as the father and administrator of the estate of his late son Setoki Ceinaturaga deceased, of Sabeto Settlement, Nadi.

PLAINTIFF

AND : PARSU RAM of Nawaicoba, Nadi, Driver.

1st DEFENDANT

AND : JET SET HARDWARE, a limited liability Company having its registered Head office at Shop No. 11, V.L. Chauhan Building, Market Road, Nadi town, Nadi.

2nd DEFENDANT

Appearances : Mr Daniel Singh for the plaintiff

Mr R. Gordon with Mr W. Pillay for the defendants

Date of Hearing : 20 July 2017

Date of Submission: 17 August 2017

Date of Judgment : 08 November 2017

JUDGMENT

Introduction

- [01] The plaintiff, as the father and administrator of his late son Setoki Ceinaturga brought this representative action against the defendants for damages among other things. His claim arises out of an accident that occurred at Queens Road, Malolo, causing the death of his (plaintiff) son.
- [02] The defendants pleaded the accident was due to the negligence of the plaintiff in that he failed to exercise the required skill, care and caution of a reasonable pedestrian where the plaintiff's action amounts to a voluntary assumption of risk or alternatively the injuries were a result of contributory negligence on the part of the plaintiff.

The Background

- [03] The statements of the plaintiff in his statement of claim are as follows:
1. He is the father and the administrator of the estate of his late son Setoki Ceinaturga who died on the 11 September 2013 as a result of an accident caused by the first defendant, Parsu Ram.
 2. The first defendant was driving a vehicle registration number JET SET during the course of his employment with the second defendant, Jet Set Hardware.
 3. The second defendant was the owner of the vehicle registration number JET SET and is vicariously liable for the negligent driving of the first defendant.
 5. The Motor vehicle JET SET had a third party insurance, under and in accordance with the Motor Vehicle (Third Party Insurance) Act, with New India Assurance Company Limited.

6. On 11 September 2013, at Queens Road, Malolo, Nadi, the first defendant drove the said motor vehicle so negligently and unskillfully that he caused the same to bump the deceased who was walking on the road thereby causing his death shortly thereafter.

The Agreed Facts

[04] The following matters were agreed at the pre-trial conference held between the parties:

1. The plaintiff's son Setoki Ceinaturaga died on 11th September 2013.
2. That at all material times the 1st defendant was driving a motor vehicle registration number JET SET of which the 2nd defendant was the registered owner.
3. There was in existence with respect to the said Motor Vehicle JET SET a contract of insurance under and in accordance with the Motor Vehicle (Third Party Insurance) Act with New India Assurance Company Limited as the licensed Insurances thereof.
4. That this action be transferred to the High Court at Lautoka.

The Evidence

Plaintiff's evidence

[05] The plaintiff called 2 witnesses namely Viliame Tubakoto ("PW1") and Setariki Vakaloloma ("PW2").

[06] PW1 who was standing next to the deceased before the accident and saw the accident. He states in his evidence that:

- (a) He was standing next to the deceased on the Sigatoka side of the junction at the corner of Queens Highway and Malolo Road going towards Swami Vivekananda College.

- (b) He was called by someone whom he had played volleyball earlier with and as he turned and looked back after a few second towards the highway he saw the car hit the deceased. It didn't take more than a second.
- (c) He had seen the car that hit the deceased coming from Nadi direction and going towards Sigatoka direction before it collided with the deceased.
- (d) He said one car, a Denarau taxi was in front of the car that bumped the deceased.
- (e) He said this particular car was 10 to 15 meters from where he was standing when he first saw it.
- (f) The vehicle that collided with the deceased was at the back of the Denarau taxi.
- (g) He said it was about 6 – 7 pm and the lights on the car that hit the deceased were not that bright.
- (h) There were no street lights in the area.
- (i) He said the vehicle that bumped the deceased carried him about 40 meters away towards the Sigatoka side from where he was standing before it stopped.
- (j) He took his T- shirt from his knapsack bag which the deceased was carrying to stop the blood from the head of deceased and took him to the hospital with 2 others.
- (k) He said the deceased was trying to talk but there was no movement.
- (l) He also said the deceased was bumped 3 meters from where he was standing with him earlier.

[07] During cross-examination PW1 states:

- (a) It was about 7.20 pm and dark.
- (b) No vehicles were coming from Sigatoka side.
- (c) The only vehicle he saw was the Denarau taxi coming from Nadi side before the accident happened.
- (d) Adi and Epeli who played volleyball earlier with him were behind him at Malolo road when he was standing at the junction with the deceased.
- (e) He was waiting with the deceased to cross the road to go to the other side to go to Nadi.
- (f) When he was shown Defence Exhibit 1 i.e. his Statement to the Police dated 11 September 2013 he confirmed the following:-
- (g) It was dark. No street lights.
- (h) He was standing on Sigatoka side at Junction to Malolo Road but did not face Sigatoka side.
- (i) He did not see the deceased crossing the road. He looked towards his friends behind him and suddenly looked back and the car was on the deceased within one second and the deceased was in the middle of the road.
- (j) He agreed the road was about 8 to 10 meters wide i.e. across.
- (k) He said deceased was in the middle of the road getting bumped but he did not see the deceased crossing the road.
- (l) When he was asked whether the car that struck the deceased was on the other lane i.e. Sigatoka to Nadi lane he said 'yes' but admitted it was on its correct side when it struck the deceased.

- (m) He said the lights on the vehicle that struck the deceased were not that bright and the Police never asked him if the beam was high or low.
- (n) He said if there was full lights on then the car would have stopped.
- (o) He said there was a car in front of the one that struck the deceased.
- (p) He said there were no crossing nearby.

[08] PW2 in his evidence states:

- (a) The deceased was his son.
- (b) The deceased was born on 11 August 1995.
- (c) He attended Swami Vivekananda College and was in form 6.
- (d) He played rugby, volleyball and athletics.
- (e) His ambition was to become a High School Teacher.
- (f) He spent \$3,000 on funeral expenses and \$1,000 on travel expenses. He did not keep the receipt.

The Defendants' evidence

[09] The defendants did not call any witness to give evidence. However, tendered the following documents.

- i. Fiji Police Force Statement of Viliame Tubakoto dated 11 September 2013 ("DE1").
- ii. Fiji Police Force Statement of Ravendra Raj dated 13 September 2013 ("DE2").

- iii. Key Rough and Fair Sketch plan of accident on 11 September 2013 drawn by PC 3459 Ramesh Naidu ("DE3").

The Law

[10] Regulation 3 of the Land Transport (Traffic) Regulations 2000 states:-

Keeping to the left

3 (1) The driver of a vehicle must:

- (a) keep the vehicle as close as practicable to the left or near side of the carriage-way except when –
- (i) making, or about to make, a right-hand turn in accordance with regulation 14; or
 - (ii) the left portion of the carriage-way is closed to traffic;
- (b) except when –
- (i) overtaking any vehicle proceeding in the same direction, subject to regulation 37;
 - (ii) the left side of the carriage-way is closed to traffic;
 - (iii) following the direction of a directional arrow or any other road marking pursuant to regulation 73(2) or a lane control light signal;
 - (iv) making a right-hand turn in accordance with regulation 14 or a U-turn in accordance with regulation 17; or
 - (v) there is a reasonable cause for not doing so.

- (c) keep the vehicle to the left of the central island when driving through a roundabout;
- (d) not drive the vehicle so that any portion of the vehicle is on, over, or to the right of the centre of the carriage-way if the driver's view of the road ahead is not sufficiently clear for the driver to do so with safety, subject to regulation 73.

Regulation 57 (2)(e) of the Land Transport) Vehicle Registration and Construction) Regulations 2000 states the low beam must be capable of illumination and rendering discernable under clear night conditions a person in dark clothing 45m straight ahead of the vehicle **AND** Regulation 51(4)(c) states the high beam must be capable of illuminating and rendering discernable under clear light conditions a person in dark clothing 100m straight ahead of the vehicle.

Discussion

- [11] The primary issue that needs to be determined by the court is whether the first defendant drove the vehicle number JET SET negligently and collided with the deceased.
- [12] PW1 is an eye witness. He saw the accident as a bystander. He in his evidence stated that lights on the car that bumped the deceased were not that bright, the car had gone on the other side of the road but at the time it collided with the deceased it was on its side of the road and after the impact the car carried the deceased on the bonnet and stopped some 40 metres away.
- [13] The Police Constable 345 Ramesh Naidu drew a rough sketch plan which the defendant tendered marked as 'DE3'. Although it was drawn in the presence of

the first defendant, the first defendant refused to sign. The sketch plan approximately states the speed of the car that struck the deceased when measurements, brake/tyre mark, broken pieces of glass, blood spots, broken number plate frame and position of flip flops are analysed in relation to the impact.

- [14] The first defendant opted not to give evidence. There is no explanation why he decided not to give evidence.
- [15] In *Jones v Dunkel* [1959] HCA 8; 101 CLR 298, the court said that when a party who is capable of testifying fails to give evidence without explanation this failure may lead rationally to an inference that the party's evidence would not help his case. The first defendant drove the vehicle that hit the deceased failed to give evidence without explanation. I infer that the first defendant chose not to give evidence because his evidence would not help his case.
- [16] PW1 gave straightforward evidence. He answered cross examination question clearly and promptly. He was a truthful witness. I accept his account of the accident that claimed the life of the deceased.
- [17] It was not in dispute that the first defendant drove the vehicle that struck the deceased on 11 September 2013. The first defendant was over speeding in an attempt to overtake the Denarau Taxi that was travelling in front. PW1 confirmed and said that the vehicle that collided with the deceased was at the back. The accident had happened all of a sudden. PW1 said that the accident happened within a second. The first defendant could not have seen the deceased in the middle of the road as the lights on his car was not that bright. According to PW1, the accident happened about 6-7pm and there were no street lights in the area. The

first defendant could not slam on the brake because he was over speeding. He was able to stop the car some 40 metres away from the point of impact. He bumped the deceased and carried him about 40 meters away towards the Sigatoka side from where he was standing before stopping the vehicle. The first defendant bumped the deceased who was crossing the road where there was no pedestrian crossing.

- [18] There is evidence before the court that the first defendant was negligently driving the vehicle registration number JET SET on 11 September 2013 at Queens Road, Malolo, Nadi and caused the same to bump the deceased who was walking on the road and thereby causing his death shortly thereafter. I find that the first defendant is liable to the death of the deceased.

Vicarious Liability

- [19] The second defendant was the owner of the vehicle registration number JET SET at the time of the accident. The first defendant was driving the vehicle during the course of his employment with the second defendant. These facts are not in dispute. I find that the second defendant is vicariously liable for the negligent driving of the first defendant.

Damages

- [20] I now turn to the assessment of damages.

Damages for pain and suffering

- [21] The deceased died in the hospital at 11pm on 11 September 2013. The accident occurred around 7pm that day. Undoubtedly, the deceased must have suffered pain until his death. PW1 said that the deceased was trying to talk but there was no movement.

[22] In *Sharla v Nasau* [2012] HBC 86 of 2003, a 32 year old cane-truck driver was adjusting the cable and winch at the back of his truck when another truck reversed and crushed him to death with the back tray of that truck. The deceased died on the way to the hospital which confirmed the death was not instantaneous. He was awarded \$25,000 for pain and suffering.

[23] In the case at hand, the deceased died in the hospital at 11pm, which is some 4 hours after the accident. Having considered all, I award \$20,000 for pain and suffering.

Funeral expenses

[24] The plaintiff claim \$3,000 for funeral expenses. This sum is reasonable given the traditional Fijian funeral rites. I allow this claim although there was no receipt of proof thereof. I accept the plaintiff's evidence that he did not keep the receipts for these expenses.

Travel expenses

[25] I award \$700.00 for travel expenses. It appears to be reasonable under the circumstances. The plaintiff claimed \$1,000.00 under this heading. However, he did not provide any receipt.

Loss of expectation of life

[26] In 1993, the Fiji Court of Appeal in *Pratap v Attorney-General of Fiji* [1993] FJCA 24; Abu0014u.92s (20 August 1993) approved award under this head. This was upheld in *Medical Superintendent v Ismail* [2001] FJCA 29; ABU0050U.2000S (18 October 2001).

[27] In *Medical Superintendent*, the Court of Appeal said:

Mr. Udit accepted that the conventional award of \$2500 under this head was appropriate. He submitted however, that applying the principle established in *Davies v. Powell Duffryn Associated Collieries Ltd.*[1942] AC 601, this was a benefit accruing to the dependants of the deceased and must therefore be deducted from the Cap.29 award. This was the approach adopted by this Court in *Jai Kissun and Anor v. Maciu Ualala and*

Anor FCA 61/79. The principle was applied in *Subamma v. Chandar* FCA 56/81. Counsel did not refer us to any later decisions of this Court in which that principle has been overruled, and in those circumstances we have concluded that the deduction must be made, and the award under Cap. 29 reduced accordingly.

- [28] Award for loss of expectation of life is benefit accruing to the dependents of the deceased. The plaintiff has brought this action as the father and administrator of the deceased's estate. I would, therefore, award a sum of \$2,500 for loss of expectation of life.

Loss of earnings to dependent estate

- [29] In *Rika v Trustees of the Methodist Church of Fiji*, HBC 229 of 2009. A 17 year old female student got electrocuted within the school compound and died. A rotten wooden cross arm on the electricity pole had broken and the live wire was dangling some 12 metres above the ground. She was electrocuted on a windy and rainy night. Since it was difficult to assess damages for loss of prospective earnings for children/student, the Judge took into consideration the socio economic pattern of Fiji and in particular the availability of employment opportunities he also considered the fact that one's life is beset with contingencies, uncertainties, and vicissitudes and calculated his multiplier on a minimum scale. He stated the multiplier generally should be 20 years but considering uncertainties and vicissitudes of life and the fact that she would have married and had a family of her own he discounted the multiplier to 15 years. He then arrived at \$200 per month as the dependency multiplicand and awarded \$36,000 as loss of prospective earnings. His summary of awards and costs were as follows: 1. Special damages-3,530-00, 2. General damages-36,000-00, 3. Loss of expectations of life-2,500-00, 4. Interest on Special damages-424-00, 5. Interest on General damages-4,320-00 and 6. Costs-5,000-00 (Total: \$51,774.00).

[30] According to PW2, the deceased was born on 11 August 1995. He attended Swami Vivekananda College and was in form 6. He played rugby, volleyball, and athletics. His ambition was to become a High School Teacher.

[31] The deceased was 18 years old at the time of the accident. In Rika's case, the victim was 17 years old when electrocuted. I follow the Rika's case and assess the loss of earnings to the dependent estate at \$ 62,400 (\$80 per week x 15 years = \$62,400.00).

Contributory negligence

[32] The defendants state that the deceased's actions and any injuries were as a result of contributory negligence on the part of the deceased. They alleged the deceased recklessly stepped into the path of a moving vehicle whilst voluntarily using a busy stretch of highway as a walkway or footpath.

[33] There was no pedestrian crossing in the vicinity of the point of impact. Admittedly, counsel for the plaintiff submits that even if contributory negligence were allowed it should be more than 20%.

[34] It seems to me that the deceased failed to keep a proper lookout for vehicle or vehicular traffic on the busy stretch of highway before crossing. I would assess his contributory negligence to be at 30%.

Interest

[35] The plaintiff is entitled to interest on the judgment sum. The court has the discretion to fix a rate at which interest is to be paid. Section 3 of the Law Reform (Miscellaneous Provision) (Death and Interest) Act, Cap 27 provides:

"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 the judgment is given interest at such rate as it thinks fit on the whole or any part of the period between the date when the cause of action arose and the date of the judgment."

[36] Fiji Court of Appeal in Medical Superintendent's case approved interest of 5% from the date of death on the total award.

[37] In this case also, I fix the interest rate at 5%. The plaintiff will be entitled to interest on the judgment sum at the rate of 5% *p.a* to be calculated from the date of the writ of summons (9 July 2015) until the date of this judgment.

Costs

[38] As a winning party, the plaintiff is entitled to costs of these proceedings. The defendants also succeed in their defence of contributory negligence. I, considering all, summarily assess and award \$2,500.00 as costs.

Conclusion

[39] For the foregoing reasons, I give judgment in favour of the plaintiff. The total award is made up as follows:

General Damages for pain & suffering		\$20,000.00
Funeral expenses		\$ 3,000.00
Travel expenses		\$ 700.00
Loss of earning to dependent state \$80 per week x 15 years (\$80 x 52 x 15)		\$62,400.00
Sub total		\$86,100.00
Contributory negligence 30%		\$25,830.00
		\$60,270.00

The result

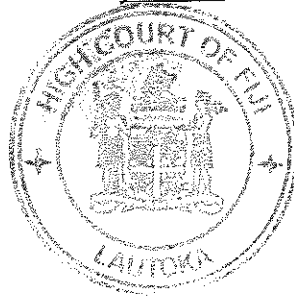
1. There will be judgment for the plaintiff in the sum of \$60, 270.00.
2. The plaintiff is entitled to interest on the judgment sum at the rate of 5% per annum from the date of the writ of summons (9 July 2015) till the date of the judgment.

3. The plaintiff is also entitled to costs of \$2,500.00, which is summarily assessed.

M.H. Mohamed Ajmeer
8/11/17

M.H. Mohamed Ajmeer

JUDGE



At Lautoka

8 November 2017

Solicitors

For the plaintiff, Daniel Singh Lawyer

For the defendant, Gordon & Company, Barristers & Solicitors