

In the High Court of Fiji at Labasa
Civil Action No. 21 of 2013
Between
Mohammed Wahid Khan
Plaintiff
And
Mohammed Yasad Ali
Defendant

Counsel: Mr A. Sen for the plaintiff
Mr K.Ratulele for the defendant
Date of hearing : 12th April, 2017
Date of Judgment : 5th May, 2017

JUDGMENT

1. This litigation arises out of an incident that occurred on 7th October, 2008, at Salove Road, Wailevu. The plaintiff alleges that he was abused and assaulted by the defendant. He sustained severe injuries and was hospitalized. The defendant was convicted in the Magistrates Court for assault causing actual bodily harm. The defence states that the incident resulted from the plaintiff's own act of recklessness and negligence. The plaintiff claims general and special damages.
2. The plaintiff, in his statement of claim states that in the morning of 7th October, 2008, , the defendant "*improperly and unlawfully*" abused and assaulted him by punching him on his right eye. He violently kicked him on the back and right side of his face, until he collapsed and fell on the ground. The force used by the defendant resulted in him falling into the drain on the road and causing him injuries.
3. The defendant, in his statement of defence states that the incident resulted from the plaintiff's own act of recklessness and negligence. The particulars of negligence pleaded are : attacking the defendant; picking up a stone and threatening to hit the defendant and his vehicle with the stone; slipping and falling on the ground on his own and hurting himself on the gravel; all injuries sustained were through his unlawful actions. The plaintiff contributed to the injuries substantially through his own negligence.

4. The defendant, by motion filed on 24th January, 2014, took up the preliminary issue that the action was time barred under section 4 of the Limitation Act. On appeal from a decision of the Master, I held that the plaintiff's action was filed within time.

5. ***The hearing***

a. *PW1, (the plaintiff)*

PW1, in evidence in chief said that the defendant and he were both staying in Nabekavu earlier. Presently, both parties reside at Salove Road, Wailevu.

On 7th October, 2008, as he was proceeding on Salove Road towards the hospital between 7 and 8 am, he greeted the defendant who passed by in his van. The defendant came and punched him on his face three or four times and he fell onto the drain. The defendant then struck him with an heavy object on the back. He did not know how many times he was struck, as he was numb. His head was spinning. He could not see properly. His eyes were swollen.

Ahamed Shah, who lived in the vicinity, picked him up and took him to the Police in his car. The Police took him to hospital. He was given an injection and medicines. PW1 produced the Fiji Police Medical Examination Form.

On the next day, he went back to Labasa hospital, as he was in pain and could not sleep. He was admitted for 4 days. An X'ray was taken. He was given an injection and medicines. He had physiotherapy. He could not sit or stand nor go to the washroom. He went to hospital for treatment, as an out-patient.

He was admitted to hospital once again for 4 days. He referred to his medical report issued by the Labasa hospital. The Doctor informed him that he had injuries on his back. The defendant was charged and fined in the Magistrates' Court. The proceedings and judgment were produced.

Prior to the incident, he was a truck driver. He drove a 10 wheeler truck. He worked in his brothers' sugar cane farm. After the incident, he cannot sit nor walk long distances.

In cross-examination, PW1 denied that he fell into the drain, when the defendant's vehicle passed him. He said that he fell into the drain, only when the defendant came out of his vehicle and punched him.

It transpired that the parties attend the same Mosque.

It was put to PW1 that the defendant came to confront him, since he had assaulted one of his sons the day before. PW1 denied that allegation. He denied that he picked up a stone to attack the defendant. He pointed out that the defendant had no injuries. He was a young man, unlike himself who was 50 years at that time. As soon as the defendant came, he started to punch him. He could not pick up a stone.

Salove Road was a gravel road. It was not very wide. PW1 said that he had to step into the drain, when a bus and the defendant's car passed. He was standing on the drain, when the defendant approached him and punched him on both sides of his face. PW1 denied that he slipped and fell, when the defendant approached him.

It was put to him that the medical report provides that he was punched only on the left side of his face. If he fell face forward, the medical report would have shown injuries on his face. It was also put to him that the bruises on his face were a result of him falling on the ground and hurting himself.

He said that when he was hit, he fell on his right side. He was not sure on which side he fell nor what the defendant used to punch him. He put his hands on the ground, to avoid more injuries. He denied that the injuries were as a result of him slipping and hurting himself on the ground. He had injuries on the left side of his face.

It transpired that he had met with road accidents earlier. He got better after his accident in 1980, and continued driving. He admitted that on the earlier date of trial, when an adjournment was sought on his behalf, he had walked from his home to the bus shelter and Nasea Medical Centre.

He was not re-examined.

b. *PW2, (Dr Jaoji Vulibeci, Medical Superintendent of the Labasa hospital)*

PW2, in evidence in chief said that his medical findings were consistent with the history related by PW1. PW1 had a compression fracture in the "vertebrae L3". He produced his medical report setting out the injuries and percentage of permanent disability. PW1 walked with "an antalgic gait". He was admitted as an in-patient twice. He referred to the medical findings in the Fiji Police Medical Examination Form by Dr N. Farook. There was blood on his forehead. The conclusion that a blunt object caused the injury was consistent with his findings.

PW2 said that PW1 will not be normal as before. His compression fracture cannot be healed. It will be uncomfortable when he sits down. It is normal for him to be on painkillers. His condition will deteriorate with age.

In PW2's cross-examination, it transpired that PW1 had suffered pain in the lower back area in May, 2005. PW2 said that in 2005, he did not have a fracture. In 2008, he did. Abrasions could be caused by slipping on the ground. Injuries would be visible on the face, if punched.

In re-examination, PW2 said that if someone is pushed and falls, it is likely that he will get injuries on his toe. He reiterated that PW1 did not have a compression fracture in 2005, only in 2008.

c. *PW3, (Ahmed Shah, Accountant, USP campus)*

PW3 said that on the morning of 7th October, 2008, he heard a commotion outside his house. He heard someone calling his name and seeking his assistance. He saw a vehicle parked on the roadside. He went to the scene. He saw the defendant. PW1 was trying to get up from the ground. The defendant was standing. PW1 complained that the defendant had hit, punched and kicked him. PW1 was not holding anything. PW3 said that he dropped PW1 at Namara Police Station.

In cross-examination, PW3 said that he had not seen the defendant punching and kicking PW1. PW1 was related to him. When he comes to the Mosque, he does not sit normally, the way others do. He walks from Salove Road to the Mosque.

PW3 was not re-examined.

d. *DW1*

DW1, (the defendant) said that PW1 was his uncle. On 7th October, 2008, when he saw PW1, he parked his vehicle and asked him why he had punched his son the day before. DW1 said that he held both hands of PW1, as he picked a stone to throw at him. PW1 then slipped and fell. He did not punch nor kick his back.

He admitted that in his interview to the Police, he had said that that he pushed PW1 to the ground and slapped the back of his head.

When PW1 fell to the ground and shouted, PW2 came to the scene.

Salove Road is a wide road. Two vehicles can pass at the same time. On the last date of trial, when the case was adjourned, he saw PW1 clearing grass.

In cross-examination, DW1 admitted that he was charged with assault causing bodily harm in the Magistrates Court. The Magistrates Court heard the evidence of both sides. On 30th January, 2012, he was convicted for assault causing actual bodily harm, fined \$250 with ten days imprisonment in default. He did not appeal.

DW1 accepted that the Magistrates Court did not believe him. He denied that in his caution interview, he confirmed that he pushed PW1 to the ground twice and slapped him at the back. Mr Sen, counsel for the plaintiff put it to him that he had not challenged the caution interview.

He admitted that in his caution interview, he did not say that PW1 slipped when he was holding his hand.

DW1 said that PW1 wanted to throw the stone, and hence he held him. He approached PW1 to confront him, why he punched his son. After he asked him, PW1 picked up the stone. Mr Sen pointed out to the witness that was not put to PW1 in cross-examination.

DW1 was not re-examined.

The determination

6. The case for the defence is that on 7th October, 2008, the plaintiff, (PW1) slipped and fell on his own, when the defendant, (DW1) held both his hands to prevent him throwing a stone to throw at him.
7. In evidence in chief, DW1 admitted that in his caution interview to the Police, he said that he pushed him to the ground and slapped the back of his head. He also admitted that in his caution interview, he did not say that PW1 slipped and fell on his own.
8. I found DW1 to give inconsistent and unreliable evidence. To my mind, his evidence that PW1 slipped and fell, when he held his hands is inconceivable and unacceptable for the following reasons.
9. Firstly, in the light of DW1's admissions at the caution interview.

10. Secondly, DW1 stated that he alighted from his vehicle to confront PW1, as to why he assaulted his son the day before. Clearly, he had the propensity and motive to assault him.
11. Thirdly, it is not disputed that PW1 cried out for help and PW3 came to the scene.
12. I find that PW1's version of events is consistent with the medical evidence and PW3's testimony. PW1 gave a truthful account of the assault.
13. PW2,(Dr Jaoji Vulibeci) said that his medical findings were consistent with the history related by PW1. His medical report provides that there was a compression fracture to the third component of the vertebra. He said that injuries would be visible on the face, if punched.
14. DW1 was convicted in the Magistrates Court for assault causing actual bodily harm and fined \$250 .He did not appeal the conviction. The contrary has not been proved by the defence.
15. The Fiji Police Medical Examination Form of PW1 provides :
 - (a) **Initial impression of the person to be examined** :*Distressed*
 - (b) **Specific Medical Findings** :
*L Lumbar region[Back]..of Bruises
Bruise ..or lateral aspect of head L eye
II toe abrasions*
 - (c) **Professional Opinion** :
Recent in origin
 - (d) **Summary and conclusions**: *Injuries mentioned earlier are most likely(secondary to) trauma by blunt object..*
16. PW2 confirmed that PW1 was admitted an in-patient of the Labasa Divisional hospital twice.
17. The medical report of 6th August, 2012, provides:

The above patient was admitted to us on 20/10/08 with a history of being assaulted by a man. He was punched and kicked on the back and later developed lower limb weakness.

*He was examined and found to have pain in the lower back bone with tenderness and weakness of the lower limbs. A back x-ray was done which showed **compression fracture of lumbar 3 vertebrae**. All other investigations were normal.*

He was admitted again on 30/10/08 for pain and examination showed that he was in pain anxious and concerned. No new clinical findings and x-rays were the same. He was put on bed rest and analgesics and discharged four days later.

Mr Mohammed had been followed up in the clinic with pain on walking and especially when sitting down for long. He had undergone physiotherapy.

Patient was examined for an impairment assessment on 20/06/12 with the following findings:-

History

- *Severe back pain when he sits for long.*
- *Have back pain when he walks few chains and stop because of pain.*

Physical Examination

- *Well built.*
- *Walk with an antalgic gait.*
- *Tenderness over the lower limb and vertebrae.*
- *No numbness, no muscle wasting.*
- *Straight leg raising – 60%.*
- *Reflexes normal.(emphasis added)*

PW2 gave the plaintiff a permanent impairment of 10%

18. Lord Denning M.R. in *Letang v Cooper*, (1965) 1 QB 232 at 239 said:

If one man intentionally applies force directly to another, the plaintiff has a cause of action in assault or battery, or if you please describe it, in trespass to the person.

19. I turn to the question of damages.

20. *McGregor on Damages*, (17th Ed, 2003) states :

In so far as an assault and battery results in physical injury to the claimant, the damages will be calculated as in any other action for personal injury. (footnotes omitted)

21. In my judgment, the plaintiff is entitled to damages for pain and suffering. The medical evidence provides that he was hospitalized twice. He continues to be in pain.
22. He is unable to sit. He cannot walk long distances. He walks with the aid of a stick. He had to stand when giving evidence before me. With respect to loss of amenities, damages must also compensate him for no longer being able to do the things he was accustomed to do.
23. It was put to PW1 in cross-examination that he has been seen walking to the bus shelter and the Mosque. He candidly answered that one has to walk, if he does not have money.
24. PW2 said that PW1 will not be normal as before. His “*compression fracture of lumbar 3 vertebrae*”, cannot be healed. It will be uncomfortable when he sits down. It is normal for him to be on painkillers. His condition will deteriorate with age.
25. The principles to be applied when assessing general damages for pain and suffering and loss of amenities was laid down in *The Permanent Secretary for Health and Another v Kumar*, (unreported Civil Appeal CBV 6 of 2008 delivered on 3 May 2012 at paragraph 37:

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.

26. The closing submissions of the plaintiff claims a sum of \$40,000 as general damages for pain and suffering and \$10,000 as general damages for future pain and suffering. Mr Sen has cited several cases in support.
27. In ***Nasese Bus Company Limited v Muni Chand***, (Civil Appeal No. ABU 40 of 2011) Calanchini J (as he then was) increased the award of \$65,000.00 for a communitated fracture with 14% total permanent disability to \$90,000.00 on appeal
28. In ***Mahendra Prakash v Road Supervisor and AG***, (Civil Action No. 6 of 2013L) Kamal Kumar J awarded a sum of \$40,000.00 for pain and suffering, \$3,000.00 for loss of amenities and \$5,000.00 for future pain and suffering, where the plaintiff had 14% total permanent disability.
29. In the light of all the circumstances, I award PW1, a sum of \$45,000 for past and future pain and suffering and loss of amenities of life.
30. PW1 claims special damages in a sum of \$1,045.00, as travelling costs and for medicines purchased. No receipts have been produced in support.
31. The absence of receipts was addressed in ***Narendra Kumar (f/n) Shiu Kumar and Sairusi Drawe*** 36 FLR 90 at page 95. Palmer J stated:
- Notwithstanding that not a single receipt has been produced in evidence I am satisfied from the Plaintiff's evidence that he paid those amounts.*
32. In my view, the medical evidence supports the claim for travelling costs to hospital totalling \$ 750.00 and cost of medications in a sum of \$ 250.

33. The plaintiff has claimed interest.

34. Interest on general damages is awarded to compensate a plaintiff for being kept out of the capital sum –*Pickett v British Rail Engineering Ltd*, (1980) AC 136 at 137.

35. In *Jeffords and another v Gee*,(1970) 2 WLR 702 at 703, it was held that "*in general interest should be allowed on special damages from the date of accident to the date of trial at half the appropriate rate*".

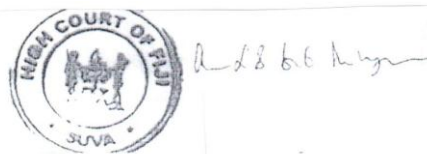
36. In the exercise of my discretion I award interest at 6% per annum on general damages of \$ 45,000.00 from the date of service of writ,(20th June,2013) to date of trial,(5th May, 2017) and 3% per annum on special damages on the sum of \$1000.00 from the date of assault to date of trial.

37. Orders

The total sum awarded to the plaintiff as damages is \$ \$52890.00 made up as follows:

a.	General damages	45,000.00
b.	Interest on General damages	6750.00
c.	Special damages	1000.00
d.	Interest on special damages	140.00
	Total	52890.00

38. The plaintiff is entitled to judgment against the defendant in a sum of \$52,890.00 together with post judgment interest at the rate of 4% on the sum of \$ 52890.00 from date of judgment until date of payment. The defendant shall pay the plaintiff costs summarily assessed in a sum of \$ 2500.



A.L.B.Brito-Mutunayagam
Judge
5th May, 2017

