

In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HBC 379 of 2018

Anil Kumar
Plaintiff

v.

Esava Botitu
First defendant

Golden Machinery (Fiji) Ltd
Second defendant

Counsel: Mr Daniel Singh for the plaintiff
Mr S. Ali for the first and second defendants

Date of hearing: 4th October,2022

Date of Judgment: 19th April,2023

Judgment

1. The plaintiff states that he was driving taxi registration number LT 1114 towards Suva along Ratu Dovi Road. The first defendant was driving vehicle registration number IG 659 so negligently and unskillfully on Ratu Dovi Road that it went onto the opposite side and collided with his taxi causing him injury, loss and damage. The first defendant was driving the vehicle in the course of his employment with the second defendant. The second defendant was the owner of that vehicle. The plaintiff claims that the second defendant is vicariously liable for the negligent driving of the first defendant. Vehicle number IG 659 was insured with Dominion Insurance Limited.

2. The particulars of negligence of the first defendant pleaded in the statement of claim read:
 - i) *Driving at an excessive speed having regard to all the circumstances.*
 - ii) *Failing to stop, to slow down, to swerve or in any other way so to manage or control the said motor vehicle as to avoid the vehicle accident.*
 - iii) *Failing to keep any or any proper lookout or to have any or any proper regard for the oncoming taxi registration number LT 1114 in sufficient time or at all to avoid the said accident.*
 - iv) *Driving onto the incorrect side of the road on a no overtaking or crossing the double white line and colliding with the Plaintiff's oncoming taxi head on i.e. not passing to the left-hand side of the oncoming taxi safely.*
 - v) *Driving below the standard of a careful and prudent driver.*
 - vi) *In the premises failing to drive with due care and attention.*
 - vii) *Not having sufficient rest before driving the said vehicle.*
 - viii) *Conversing on a mobile phone and not paying due attention to the vehicles and road ahead.*
3. The defendants deny the claim.
4. At the commencement of the hearing Mr Ali sought to withdraw as solicitor for the first and second defendants. I declined his application.
5. On 27th April, 2022, when this case was called to fix for trial, Mr Ali represented the first and second defendants and the case was fixed for trial on 4th October,2022. On 30th September,2022, Mr Ali informed Court that he had not served his summons,(filed on 23rd September,2022) to withdraw as solicitors, on the plaintiff.

The determination

6. It is an agreed fact that the plaintiff was driving taxi registration number LT 1114 towards Suva along Ratu Dovi Road and the first defendant was driving vehicle registration number IG 659 in the course of his employment with the second defendant.
7. *Issues*
 - i. *Whether the 1st Defendant drove the said vehicle registration number IG 659 so negligently and unskillfully that he caused the plaintiff's injury, loss and damages.*
 - ii. *Whether the 2nd Defendant is vicariously liable for the negligent driving of the 1st Defendant.*

- iii. *The 1st Defendant are found to be liable;*
- a) *Whether the Plaintiff is entitled to general damages for pain and suffering and loss of amenities of life and if so, then the quantum?*
 - b) *Whether the Plaintiff is entitled to special damages and if so then the quantum?*
 - c) *Whether the Plaintiff is entitled to gratuitous care, and if so, then the quantum?*
 - d) *Whether the Plaintiff is entitled to loss of earnings and if so, then the quantum?*
 - e) *Whether the Plaintiff is entitled to costs of future care and if so then the quantum?*
 - f) *Whether the Plaintiff is entitled to claim interest under the Law Reform (Miscellaneous) (Death and Interest) Act, Cap 27 on the award of general damages at the rate of 6% per annum from the date of service of the Writ on General Damages and at the rate of 3% per annum from the date of accident on Special Damages and if so, the quantum?*
 - g) *Whether the Plaintiff is entitled to cost, and if so then the quantum?*
 - h) *Whether the Plaintiff is entitled to claim interest of judgment sum at 4% pursuant to Law Reform (Miscellaneous Provisions) (Death and Interest) (Amendment) Decree 2011 until payments in full and if so then the quantum?*

8. The plaintiff, (PW2) in evidence in chief said that he has been driving a taxi for 20 years. On 28th January, 2016, he was driving his taxi towards Suva along Ratu Dovi Road. The first defendant was driving vehicle registration number IG 659 in the opposite direction when he lost control of his vehicle, crossed the double crossing and hit the right side of his vehicle causing injury to his right side arm. He produced the sketch plan as contained in the defendant's bundle of documents.
9. The plaintiff was not cross examined.
10. The Report of the Traffic Officer, Valelevu Police provides that on 28th January, 2016, the plaintiff was driving his taxi registration number LT1114 towards Suva along Ratu Dovi Road, while vehicle registration number IG 659 was travelling in the opposite direction towards Laqere and vehicle IG 659 bumped the plaintiff's vehicle LT1114 causing damage.
11. I find that the first defendant was negligent and caused the accident by coming onto the plaintiff's vehicle from the opposite side of Ratu Dovi Road.

12. It is admitted that the first defendant was driving vehicle registration number IG 659 in the course of his employment with the second defendant.
13. In my judgment, the second defendant is vicariously liable for the negligence of the first defendant.

Assessment of damages

14. The plaintiff claims general damages for pain and suffering and loss of amenities and enjoyment of life, special damages and past economic loss.
15. Mr Singh, counsel for the plaintiff in his closing submissions has cited three cases to support his claim for a sum of \$ 50,000.000 as general damages.
16. Past awards can be used as a guide, but the facts of each case have to be considered.
17. In *Niranjans Autoport Ltd v Karan*, [2001]FJCA 38;ABU0005U.2001(18th October,2001), the plaintiff was assessed with 5% impairment and awarded \$50,000.00 as damages for pain and suffering and loss of amenities and enjoyment of life
18. The facts in *Niranjans Autoport Ltd* are clearly distinguishable from the present case. In that case, the plaintiff had suffered close head injuries, a fractured nose and a fracture of the left ankle. He was hospitalized for two days. His left leg was permanently shortened, a disability which was held would affect his earning capacity. The damages awarded included the estimate expense of surgery in Australia. The judgment of the Court of Appeal expressed the view that the assessment of 5% place on the injury to his leg was conservative.
19. In *Nisha v Chand*, Civil Action no. HBC 38 of 2016 (18th July,2018) as also referred to by Mr Singh, the plaintiff had suffered a mild head injury and wedge compression fracture of the thoracic spine at level T2. She was in hospital for 3 days was in severe pain, medically categorized as 5 out of 5. The medical evidence provided that she cannot bend nor stand for long and could no longer work as a labourer. I awarded her \$45,000.00 as general damages.

20. Nor can there be a comparison with a plaintiff who had 13% whole person impairment in the case of *Shankar v Fortech Construction Ltd*, [2005] CA no. 486 of 2003(24th August,2005). In that case, the plaintiff was unable to move her right arm and was incapacitated to work. She was awarded a sum of \$25,000.00 for pain and suffering.
21. Returning to the present case, the plaintiff said that in the aftermath of the accident, he was taken to CWM hospital. He was given an injection and pain killers, as his right arm was very painful. He was not admitted to hospital. He could not drive a taxi for three months. He earned \$ 250.00 a week. He claims loss of earnings. He said that his right shoulder arm is still painful.
22. PW2, (*Dr Pauliasi Bauleka, Specialist Orthopaedic Surgeon, CWM hospital*) said that he examined the plaintiff on 9th November,2022. He suffered a soft tissue injury on his right shoulder. He had no deformity. He has full power, 5 out of 5 on his left side. He has 3 out of 5 on his right side, one level less than normal resulting in reduced power. He produced his medical report.
23. The medical report of 9th November,2022, provides that the plaintiff was found to have-
- A good active range of motion of his right upper limbs*
No obvious deformity
Peripheral nerves intact
Power right upper limb- 3-4/5
Evidence of muscle wasting noted
- Calculations: Impairment Percentage.....*
5% whole person
24. The evidence of PW1 and PW2 was not challenged.
25. The Fiji Police Medical Examination Form concludes that the plaintiff's injury was consistent with "*musculoskeletal*" pain.
26. In the light of the principles applicable to assessing damages, I assess and award the plaintiff a sum of \$10,000.00 as general damages for pain and suffering and loss of amenities

27. A claim is made for loss of earnings for a period of three months from the date of the accident. The plaintiff testified that he earned \$ 250.00 a week.

28. The plaintiff's evidence that he could not drive his taxi for 3 months was not challenged.

29. In my judgment, he is entitled to loss of earnings in a sum of \$3250.00 (\$250 x 13 weeks).

30. The plaintiff claims special damages as provided in his statement of claim.

31. I am satisfied that the plaintiff would have incurred the following expenses :

| | |
|---|------------------|
| a. Purchase of medicine | \$ 100.00 |
| b. Charges for Police Report | 21.80 |
| c. Transport Expenses | |
| Day of discharge (28/1/16) | \$ 6.00 |
| 1 trip to CWM Hospital for x-ray | |
| (1 trip x \$10 x 2) by taxi | \$ 20.00 |
| 4 trips to Valelevu Hospital for review | |
| (4 trips x \$5 x 2) by taxi | \$ <u>20.00</u> |
| Total | \$ <u>167.80</u> |

32. I allow the claim in a sum of \$ 167.80.

33. The plaintiff has claimed interest. He is entitled to interest at 6% per annum on general damages of \$ 10,000.00 from 21st December,2018, (date of service of writ) to 4th October,2022 (date of hearing). He is also entitled to interest at 3% per annum on special damages of \$ 3417.80(rounded to 3420) from 28th January, 2016 (date of accident) to 4th October,2022

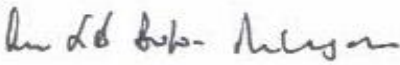
34. **Orders**

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

| | | |
|----|-----------------------------|-----------|
| a. | General damages | 10,000.00 |
| b. | Interest on general damages | 2250.00 |
| c. | Special damages | 3420.00 |
| d. | Interest on special damages | 129.00 |
| | | |
| | Total | 15799.00 |

There will therefore be judgment for the plaintiff against the first and second defendants in the sum of \$15,799.00 together with a sum of \$ 2000 as costs summarily assessed payable by the first and second defendants to the plaintiff.




A.L.B. Brito-Mutunayagam
Judge
19th April, 2023