

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 22 of 2003L**

**BETWEEN** : **AKLESH NARAYAN** (father's name Hirday Narayan) of 13  
Jinnu Road, Lautoka, Panel Beater

**Plaintiff**

**AND** : **VICKY NARAYAN** (father's name Vijay Narayan) of  
Ravouvou Street, Lautoka, Manager

**1<sup>st</sup> Defendant**

**AND** : **KRIT PILLAY** (father's name not known to the Plaintiff)  
of Lovu, Lautoka, Accountant and Tax agent

**2<sup>nd</sup> Defendant**

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**FINAL JUDGMENT**

**Of: Inoke J.**

**Counsel Appearing: Mr V Mishra for the Plaintiff.**  
**First and Second Defendants in person.**

**Solicitors: Vijay Naidu & Associates for the Plaintiff.**  
**Self Representation by the Defendants**

**Date of Hearing: 18 January 2007**  
**Date of Judgment: 8 September 2009**

**INTRODUCTION**

[1] This is a claim for personal injuries suffered by the Plaintiff, Mr Aklesh Narayan, in a motor vehicle accident. He was a passenger in the vehicle driven by the Second Defendant which ran off the road and tumbled several times. The vehicle was owned by the First Defendant.

[2] The accident occurred on 6 October 2001. The Plaintiff's writ was filed on 16 January 2003 and the case heard on 18 January 2007. Mr Vipul Mishra appeared as Counsel for the Plaintiff at the trial. Both Defendants represented themselves. The learned trial Judge was not able to deliver judgment. The matter came before me on 24 July 2009 and Counsel for the Plaintiff asked that I deliver judgment based on the trial Judge's notes of evidence, the trial documents and his submissions.

### **THE TRIAL EVIDENCE**

[3] The parties and witnesses were not only related but knew each other. The First Defendant's father is a close friend of the Second Defendant who is also his accountant. The Plaintiff's father and the First Defendant's father are first cousins. The witness called by the Defendants worked with the Plaintiff for the same repairer. The Plaintiff was repairing the Second Defendant's car prior to the accident. The Defendants' witness was the third passenger in the vehicle and was hospitalised with the other two after the accident. The reason I mention these relationships is that it explains why the evidence that was given at the trial by the Defendants and the witness was doubted by the trial Judge.

[4] Further, Mr Mishra highlighted in cross examination of the two defendants that their Statements of Defence were very similar and appear to be produced from the same computer. I think the Defendants and their witness had a common self interest to protect. I therefore reject the evidence of the Defendants and accept the Plaintiff's version of what happened.

[5] The motor vehicle was registered in the name of the First Defendant. He migrated to New Zealand and left the vehicle with his father. It was kept at his father's garage and used by his father as his own. The Second Defendant was a regular visitor to the garage and used the vehicle during the two weeks leading up to the accident because his car was being repaired at

the garage. The Second Defendant was driving the vehicle when the accident happened on 6 October 2001. The First Defendant was in New Zealand at the time.

[6] The Plaintiff's evidence was that he was working on that day at the garage repairing the Second Defendant's car. He had been working on it for two weeks. He, the Second Defendant and another employee left the garage at about 7.30pm in the First Defendant's car. The Manager of the garage had told him to lock up and the Second Defendant was to drop him at home. The Second Defendant drove the First Defendant's car. They did not go directly to his home. Instead, the Second Defendant drove them to a house outside of Lautoka. The Second Defendant came out two hours later looking drunk. On their way back the Second Defendant drove at high speed and lost control of the vehicle as it sped down hill. It "zig zagged, missed a couple of posts and flew off the road and tumbled 3 times". The accident happened on a Saturday night at 10.00pm. The Plaintiff was unconscious and only regained consciousness on Sunday night.

[7] A Corporal from the Traffic Division of the Lautoka Police Station was called on behalf of the Plaintiff. He tendered the Second Defendant's record of interview in which the Second Defendant admitted that it was his carelessness that caused the accident. The story he gave in his interview statement was that two cows crossed the road and he applied the brakes, they "became hard" and the vehicle ran off the road. The witness called for the Defendants, who was also in the vehicle at the time of the accident, gave a completely different explanation at the trial. His explanation was directed at shifting the blame to the Plaintiff. The Second Defendant was subsequently charged and convicted and fined for careless driving. The Plaintiff relied on the admission and conviction as further proof of negligence on the part of the Second Defendant.

[8] As for the use of the vehicle by the First Defendant's father I find that the father had the authority of the First Defendant to use the vehicle as if it

was his own. His father paid for the third party insurance and had control of the keys and the use of the vehicle.

### **IS THE SECOND DEFENDANT NEGLIGENT?**

[9] I accept the trial evidence and Mr Mishra's submission that the Second Defendant drove negligently and injured his client, the Plaintiff.

### **IS THE FIRST DEFENDANT LIABLE?**

[10] However, I do not agree that the Second Defendant drove the vehicle for the purposes of the First Defendant thereby making the First Defendant liable. I believe the vehicle was driven by the Second Defendant for his own purposes throughout.

[11] I recently considered the law in **Prakash v Khan** [2009] FJHC 160; HBC068.2002 (5 August 2009) and I quote from that judgment:

[26] There is a rebuttable presumption that a driver of a motor vehicle is prima facie driving as an agent of the owner of the motor vehicle. Several cases were cited by Counsel and copies supplied but I need only refer to **Chandra v Narain** [1997] FJCA 42; **Abu0051u.96s** (14 November 1997), citing **Manawatu County v Rowe** [1956] NZLR 78 approved by the Privy Council in **Rambarran v. Gurrucharran**, [1970] 1 WLR 556, 560:

1. The onus of proving agency rests on the party alleging it.
2. The fact of ownership of a vehicle gives rise to an inference that the driver was the agent of the owner; in other words, that fact alone in the absence of anything else, provides some evidence to go to a jury;
3. This inference can be drawn in the absence of other evidence bearing on the issue or where such other evidence as there is, fails to counter- balance it.
4. For the plaintiff to make the owner liable, the plaintiff must establish that the driver was driving the car as a servant or agent of the owner and not for the driver's own benefit and for his own concerns.

In **Rowe's case**, Mrs Rowe, while driving her husband's motor car with his consent, collided with the appellant's vehicle. The Court of Appeal held that she was not driving the car as a servant or agent of her

husband. In **Rambarran's case**, the Privy Council held that the father of a son driving the father's car with the father's general permission was not vicariously liable for the son's negligent driving. In allowing the appeal from Guyana Court of Appeal, the Privy Council noted that the occasion when the accident happened was not one of those specified by the appellant as one when the son would drive on his behalf; the appellant was unaware that the son had taken the car on that day nor did he hear of the accident until a fortnight after it had happened. These facts destroyed any presumption of agency and raised the strong inference that the son was not driving as the appellant's servant or agent.

[12] I find that even though the Second Defendant was driving with the knowledge and approval of the First Defendant's father and possibly the First Defendant himself, the Second Defendant was driving for his own purposes and not as agent of the First Defendant. The Plaintiff's claim against the First Defendant therefore fails.

### **QUANTUM**

### **PAIN AND SUFFERING AND LOSS OF AMENITIES OF LIFE**

[13] The Plaintiff was unconscious for about 24 hours. He was hospitalised for 2 weeks. He said he received injuries to his forehead, left hand and left leg. The doctors removed bone from his left leg and inserted a plate in his left hand. The medical report of his medical examination on the day after the accident recorded that the Plaintiff suffered fractures to his left patella and left distal radius, he was unable to stand, and the doctor's comments on the seriousness of injuries being "moderate leading to severe disability". The final medical report of 8 January 2007 stated that the treatment that was administered to the Plaintiff was "Pain relief, POP cast, Patellectomy of left patella and ORIF left distal radius." His then prognosis was "scars on the left knee and left wrist, diminished ROM of the left wrists, scarring of the left upper eye lid, 20% disability." His evidence at the trial was that his wife looked after him and assisted him in bathing and going to the washroom. He was in a wheel chair for 6 months. He needs assistance to walk and still uses

crutches. Walking makes his knee painful and swollen. He has a large four inch scar on his left hand from the insertion of the plate and screws in his wrist. He feels pain in his left hand and leg when cold. He cannot sit cross legged now. His sex life and relationship with his wife has been affected because of the pain in his left wrist and knee.

[14] He was 36 years old at the time of the trial. He has three children still alive, the eldest 10 years and youngest 11 months. His son died at 7 years old on 21 February 2005 because he could not afford to pay for his medication. He cannot run now or play soccer with his children which depress him.

[15] I discussed some of the case authorities for awards for pain and suffering and loss of amenities in **Prakash v Khan** [2009] FJHC 160; HBC068.2002 (5 August 2009) which I list below:

[38] In **Maka v Broadbridge** [2003] FJCA 31; **ABU0063.2001S (30 May 2003)** the trial Judge awarded \$75,000 and the Court of Appeal reduced it to **\$60,000**. The plaintiff's injury in that case was **fracture of the forearm bone** and a **fracture of the hip joint** sustained in a car accident in April 1991. The plaintiff was in severe pain according to the evidence. The injuries were exacerbated by the failure of doctors to properly diagnose the extent of the plaintiff's injuries. At the time of the trial he had shortening of the right leg, a significant loss of function of the right leg and wasting of his buttocks. The hip replacement caused him some restriction in movement so that he found it difficult to get into awkward places during the course of his work. The highest of such awards around that time for similar cases was \$85,000.

[39] In **Singh v Rentokil Laboratories Ltd** [1993] FJCA 26; **Abu0073u.91s (20 August 1993)**, the award the Court of Appeal gave an award of **\$60,000** for injuries which included a more severe pelvis injury and other injuries suffered in a car accident in July 1988. The trial Judge's award of \$25,000 for pain and suffering a loss of amenities was too low.

[40] In **Dre v Ministry of Health** [2009] FJHC 129; **HBC020.2007 (24 June 2009)**, I summarised some of the awards as follows:

(a) **Kotoiwasawasa & Another v Govind & the Attorney General** [Civil Action 192/2000], **\$95,000** was awarded for pain and suffering where the plaintiff suffered an injury to her leg in a motor

vehicle accident in 1996 which resulted in **amputation of her leg below the knee.**

**(b) Sharma v Prasad [HBU 40/88, Civ Appeal 73/91] – amputation of leg - \$100,000.**

**(c) FSC & Anor v Subramani & Anor [HBU47/93] – loss of both eye sight- 75 % - \$37,500.**

**(d) Salaitoga v Anderson [Civ Appeal 26/94] – severe head injury - \$85,000.**

**(e) AG & Dr Elliot v Sharma [Civ Appeal 41/93] – loss of leg - \$50,000.**

**(f) AG v Waqabaca [Civ Appeal 18/98] – cerebral palsy – loss of all bodily function - \$85,000.**

**(g) Flour Mills of Fiji Ltd v Raj [2001] FJCA 35 – loss of right arm - \$85,000.** In this case the Plaintiff's right arm required amputation above the elbow and he has been left with severe limitation of movement in his left hand and arm, his disability being assessed by a medical witness at 100% loss of working capacity. The trial Judge's assessment of \$85,000 for pain and suffering was upheld by the Fiji Court of Appeal.

In Dre (supra) I awarded **\$70,000.00** for pain and suffering and loss of amenities of life for the amputation of the plaintiff's dominant arm below the elbow as a result of medical negligence.

[16] In Prakash (supra) I awarded **\$30,000**. The Plaintiff's injuries were not severe. He suffered a fractured pelvis and superficial abrasion over his right shoulder. The treatment was bed rest, analgesics and physiotherapy. He was in hospital for two days. He attended 4 follow ups after discharge. The doctor's final report of 10 July 2006 was that the Plaintiff still felt pain and discomfort over the left inguinal area when lifting heavy objects and in cold weather. He enjoyed normal activity and daily living. His gait is normal. He has free movement of back, hip joints, knees and ankle joints and normal sensory and motor function in his lower limbs. His right shoulder is without pain and the Plaintiff has full range of motion. The fracture of his pelvis was well united. He was assessed to have 0% permanent disability.

[17] I think the type of injury and prognosis in this case is in the middle of the high range. The awards in these cases were around \$60,000 over ten years ago, the highest being \$85,000. I think a fair and reasonable award today would be **\$80,000** and I award damages under this head in that amount.

### **LOSS OF EARNING CAPACITY**

[18] He was a panel beater for 9 years before the accident. He has been unemployed in his trade since. He finds it very difficult to do work now because his left hand movement is limited. He needs to use his left hand to hold things such as welding rods. He feels pain in his left hand when doing panel beating. He has no income and is being supported by Social Welfare and his uncle and retired father. I accept his evidence that he was earning \$125 a week with the possibility of overtime at \$15 per day. I do not accept that he is totally unemployable so he can do light work. I also think that the 20% incapacity caused by his injuries is reflective of his ability to work. I think his loss of income earning capacity is about half which I fix at \$100 a week. Like his father, I think the Plaintiff could have worked to at least age 55 and I agree with his Counsel that I use a multiplier of 15. I therefore assess damages for loss of earning capacity at  $\$100 \times 52 \times 15 = \mathbf{\$78,000}$ . This figure takes into account loss of income from the date of the accident.

### **COMPENSATION FOR CARE BY HIS WIFE**

[19] The Plaintiff said he was cared for by his wife after the accident. This care is likely to continue into the future. This is care over and above that which a wife would give to an otherwise healthy husband and I believe she should be compensated. As I have said elsewhere, the time for gratuitous care by relatives is long gone. It was nearly 8 years ago that the accident happened. I arrive at the appropriate value of compensation by taking \$40 a week as the appropriate cost of care over those 8 years which computes to  $\$40 \times 52 \times 8 = \mathbf{\$16,640}$ . I make no allowance for future care because over time this need may dissipate.

### **SPECIAL DAMAGES**

[20] The Plaintiff also claimed \$887.20 for special damages being doctor's fees, travelling expenses to and from hospital, medication, reports and miscellaneous expenses. He tendered some receipts to substantiate his claim.

The claim is reasonable and I accept this amount as proved notwithstanding that all items have not been issued with receipts, rounded up to **\$900**.

### **INTEREST**

[21] Under section 3 of the **Law Reform (Miscellaneous Provisions) (Death and Interest) Act [Cap 27]** I can award interest on the judgment sum at such rate as I think fit on the whole or any part of the judgment sum for the whole or any part of the period between the date when the cause of action arose and the date of the judgment. No interest is chargeable on loss of earnings or care. I therefore award interest at 6% p.a. on the amount for pain and suffering from the date the cause of action accrued to the date of judgment which is 8 years x \$80,000 x 6% = **\$38,400**.

### **COSTS**

[22] The Plaintiff has won against the Second Defendant so he should pay the Plaintiff's costs which I assess at **\$1,500**. I make no award for costs in respect of the First Defendant.

### **ORDERS**

[23] I therefore give judgment to the Plaintiff against the Second Defendant only and make the following Orders:

1. The Second Defendant pays to the Plaintiff the judgment sum of **\$213,940** made up as follows:

Damages for pain and suffering	\$80,000
Loss of earning capacity	\$78,000
Compensation for care	\$16,640
Interest on damages	\$38,400
Special Damages	<u>\$ 900</u>
<b>TOTAL</b>	<b>\$213,940</b>

2. The Second Defendant pays to the Plaintiff the sum of **\$1500** for costs.
  
3. The Plaintiff's claim against the First Defendant is dismissed with no order as to costs.

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**Sosefo Inoke**

**Judge**

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