

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

**Civil Action No. HBC 68 of 2002**

**BETWEEN** : **YOGESHWAR PRAKASH** of Saweni, Lautoka, Unemployed, and a minor, by  
**PRAVINDRA PRAKASH** of Saweni, Lautoka, his father and next of friend  
**Plaintiff**

**AND** : **MOHAMMED YASIN KHAN** (father's name not known to the plaintiff) of  
Sabeto, Nadi, trading as Sabeto Valley Carriers, Carrier Operator  
**1<sup>st</sup> Defendant**

**AND** : **MARIKA VUNITABUA** (address not known to plaintiff)  
**2<sup>nd</sup> Defendant**

**AND** : **MINISTRY FOR WORKS AND ENERGY**  
**3<sup>rd</sup> Defendant**

**AND** : **THE ATTORNEY-GENERAL'S CHAMBERS**  
**4<sup>th</sup> Defendant**

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**FINAL JUDGMENT**

**Of: Inoke J.**

**Counsel Appearing:** **Mr. S. Krishna for the Plaintiff**  
**Mr. F. Koya for the 1<sup>st</sup> Defendant**  
**2<sup>nd</sup> Defendant In Person**  
**Mr. A. Tuilevuka for 3<sup>rd</sup> & 4<sup>th</sup> Defendants**

**Solicitors:** **Messrs Krishna & Co. for the Plaintiff**  
**Messrs Koya & Co. for the 1<sup>st</sup> Defendant**  
**Office of the Attorney-General for the 3<sup>rd</sup> & 4<sup>th</sup> Defendants**

**Date of Hearing:** **6, 7, 8 March, 4 April, 10 September 2007.**  
**Date of Judgment:** **5 August 2009.**

## **INTRODUCTION**

- [1] This is a claim by the Plaintiff for damages for injuries suffered as a result of the negligent driving of a car by the Second Defendant.
- [2] The Plaintiff sues the First Defendant as the owner of the vehicle, the Second Defendant as the driver, the Third Defendant as the employer of the Second Defendant and as the hirer of the car. The Fourth Defendant is joined pursuant to the provisions of the Crown Proceedings Act as the legal representative of the Third Defendant.
- [3] This is one of those matters that the trial Judge was not able to deliver judgment after hearing evidence. The parties have agreed, wisely and properly in my view, that I deliver judgment based on the trial Judge's notes of evidence and Counsel's submissions. This judgment is delivered under those circumstances.
- [4] It is my judgment that the Second Defendant drove the car negligently and injured the Plaintiff. However, the Plaintiff has failed to prove that the First, Third and Fourth Defendants are vicariously liable for the negligence of the Second Defendant or that the Second Defendant drove as their servant or agent.
- [5] I therefore award damages in the sum of **\$ 32,580** and costs of **\$2,500** to the **Plaintiff** to be paid by the **Second Defendant**.
- [6] The Plaintiff having lost his claim against the First, Third and Fourth Defendants, I also order that he pays their costs, **\$2,500** to the **First Defendant** and **\$5,000** to the **Third and Fourth Defendants**.
- [7] The reasons for my judgment are set out below.

## **THE ISSUES**

- [8] The issues here are (1) whether the Second Defendant drove negligently, (2) whether he was driving as an agent of the First Defendant, and (3) whether he was driving as an agent or employee of the Third Defendant.

[9] The Pretrial Conference (PTC) Minutes records that the Plaintiff, First and Third Defendants admit that the Second Defendant was negligent. With respect, this was not a matter for them to admit. In the absence of an admission by the Second Defendant that he was negligent, this was a question for the trial Judge to decide based on the evidence and the law.

### **CASE HISTORY**

[10] The Plaintiff filed his Writ and Statement of Claim on **6 March 2002**.

[11] The **Second Defendant** was not legally represented throughout. He has not filed a Defence but appeared at the trial in person and ran his own defence.

[12] The **First Defendant** also did not file a defence and was unrepresented during the early life of this case.

[13] Default judgment was entered against him and the First Defendant on 26 May 2002 and Notice of Assessment of Damages and Interest against them were issued on 25 July 2002 for hearing on **25 August 2002**. On **17 February 2003** at the Plaintiff's request the matter was adjourned sine die to give more time to the Plaintiff to obtain further medical evidence.

[14] In April 2003 **Koyas** became the solicitors for the First Defendant.

[15] The **Third and Fourth Defendants** had not been joined as defendants during this time.

[16] The matter came before a Judge in **August 2003** and called on several occasions after that but no substantive steps had been taken except for the matter being set down for hearing on **28 October 2004**. The hearing did not proceed on that day, the file having come before a new judge. Several adjournments ensued and on 17 June 2005 the default judgment was set aside by consent and the First Defendant given time to file his defence. No Defence appears to have been filed.

[17] In April 2006 the Plaintiff applied to join the Third and Fourth Defendant and to amend its statement of claim accordingly. Leave was granted on 19 May 2006 and the Amended Writ and Statement of Claim were filed on 25 May 2006. The respective Defences to the

Amended Claim and Replies were filed and the pleadings eventually closed in January 2007. The trial finally began on **6 March 2007** exactly 5 years to the day the Plaintiff filed his claim.

[18] I am glad to say that it is now possible for a litigant to file a case in the High Court at Lautoka and have his case heard and judgment delivered within a year, provided the lawyers involved have their documents filed in accordance with the time line set by the High Court Rules and they obey Court directions. This Court is very conscious of the saying: "Justice delayed is Justice denied" and I urge the legal profession to be as equally concerned lest it becomes a truism.

### **THE ADMITTED FACTS**

[19] The following facts were admitted:

- a. The Plaintiff was repairing a motor vehicle parked along the pavement of Namoli Avenue in Lautoka.
- b. The Second Defendant was the driver of a motor vehicle that struck the Plaintiff.
- c. The First Defendant was the owner of the said motor vehicle.
- d. The Second Defendant was convicted of dangerous driving in respect of the said incident.

### **THE TRIAL EVIDENCE**

[20] The evidence given at the trial did not require any in debt analysis. The facts were quite simple and I find the following facts in issue established:

- a. The Second Defendant drove the said motor vehicle on **8 April 2001** without due care and attention which eventually caused the plaintiff's injuries.
- b. He allowed himself to be distracted by his friends calling him from across the road whilst driving.
- c. The Plaintiff was not standing on the roadway or acted in any way so as to show fault on his part in being injured.

- d. It is not clear whether the car driven by the Second Defendant hit the plaintiff directly or that the vehicle that was being driven by the Second Defendant hit the vehicle that the Plaintiff was repairing and caused the latter vehicle to hit the Plaintiff on the left side of his pelvis. In any event, the Second Defendant's driving did cause the plaintiff's injuries.
- e. The First Defendant delivered the said vehicle to the uncle of the Second Defendant.
- f. The Second Defendant was not authorised by the First Defendant to drive the said motor vehicle.
- g. He was not driving for the purposes of the First Defendant.
- h. He was not authorised by his uncle or the Third Defendant.
- i. He was not driving as an agent or for the purposes of his uncle. His uncle had made a private arrangement for the car to be used by him to visit his daughter at boarding school on that weekend.
- j. The Plaintiff was not working at the relevant time. It was not working hours for him.
- k. The Second Defendant was driving for his own private purposes.

### **DETERMINATION OF THE ISSUES**

[21] I am grateful for Counsel's written submissions and copies of case authorities. They have helped greatly in the early delivery of this judgment.

#### **(1) WAS THE SECOND DEFENDANT NEGLIGENT?**

[22] I have found that the Second Defendant drove without due care and attention. He has been convicted of an offence directly relevant to this issue and by virtue of section 17 of the Civil Evidence Act 2002 and the Second Defendant's admission in this respect I find the Second Defendant negligent and that his negligence caused injuries to the Plaintiff.

[23] The Plaintiff has also pleaded the doctrine of *res ipsa loquitur*. In the circumstances it is not necessary for me to decide this issue.

[24] I also find that there was no contributory negligence on the part of the Plaintiff.

(2) **WAS THE SECOND DEFENDANT DRIVING AS AN AGENT OF THE FIRST DEFENDANT?**

[25] The basis on which the First Defendant was joined and the Plaintiff sought to make him liable was simply that the First Defendant was the owner of the subject vehicle.

[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.*

[27] The Court in **Dee Cee's Bus Services Ltd v Car Rentals Pacific Ltd [2005] FJHC 239; HBA0001j.2004s (24 August 2005)** cited by Counsel for the Plaintiff did not differ from these principles.

[28] In light of the findings of fact that I have mentioned above, the Plaintiff's claim must fail against the First Defendant.

**(3) WAS THE SECOND DEFENDANT DRIVING AS AN AGENT OR EMPLOYEE OF THE THIRD DEFENDANT?**

[29] Similarly, the Second Defendant was not an agent of the Third Defendant – so the Third Defendant cannot be liable on the principles adopted and applied in **Chandra** (supra).

[30] The law on vicarious liability is submitted by Counsel for the Third Defendant, which I accept, to be as set out in **Shankar v Fortech Construction Ltd [2005] FJHC 238; HBC0486j.2003s (24 August 2005):**

*"A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (i) a wrongful act authorised by the master; or (ii) a wrongful and unauthorised mode of doing some act authorised by the master... On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside of it."*

[31] Counsel for the Plaintiff also cited **Wati v Buliruarua [2005] FJHC 128; HBC0070.2004 (8 June 2005)** where Singh J said that "one has to look at the closeness of the connection between the duties which, in broad terms, the employee was engaged to perform and his wrongdoing". In that case the question to be answered was whether the assault that took place was so closely connected with what the employer authorised or expected from the employee in the performance of his duties as a forklift driver that it would be fair, just and reasonable to conclude that his employer was to be held vicariously liable for the assault and resulting damage. Whether the alleged wrongdoing or tortuous act was violent or not was really immaterial. His Lordship found in that case that the assault was neither sufficiently connected with the employee's duties nor authorised by the employer that the employer could not be vicariously liable.

[32] Applying these principles to the facts as I have found them, the Second Defendant could not have been driving as an employee at the time of the collision. The Plaintiff's claim against the Third Defendant must also fail, and the claim against the Fourth Defendant fails accordingly.

## **FINAL OUTCOME ON LIABILITY**

[33] The final outcome is that only the **Second Defendant** is liable to the Plaintiff.

## **ASSESSMENT OF DAMAGES**

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

[34] The doctor that looked after the Plaintiff when he was admitted to hospital gave evidence. His evidence and Medical report said the Plaintiff suffered a fractured pelvis, the medical terminology being, a fracture of his **left inferior pubic ramus**, 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.

[35] The doctor also said that the fracture, like any bone fracture, would have been painful. It was a subjective matter as each person had a different pain threshold but nevertheless it would have been painful. He was given analgesics for pain relief, paracetamol and phenogan every three hours. The Plaintiff continued to take panadol for pain relief for sometime after he was discharged. The Plaintiff was on crutches for 4 months. It was recommended by the doctor that he got additional help. His mother helped him with his bathing and moving around. The injury to his shoulder made bathing and sleeping difficult and uncomfortable. He was seen by the doctor about 4 months after the accident on one of his visits and the doctor's examination showed that the Plaintiff had full range of motion and the bone fracture had completely healed. By November 2001 the only remaining complaint by the Plaintiff was pain in cold weather. Before his injury, the Plaintiff took a keen interest in soccer and volley ball. He was 18 years at the time. He says he still feels pain now when running. The Plaintiff does not appear to have the same keen interest in sport for reasons other than his injuries. As for his future employability, a lot of evidence was given at the trial on his employment history since the accident. He was a

trainee mechanic at the time of the accident. His injuries would have not stopped him from pursuing that career if he so wished. He is now working as a taxi driver.

- [36] The assessment of pain and suffering and loss of amenities is not an exact science but one based on awards handed down in previous cases and exercise of judicial discretion. An award under this head is to compensate for the pain the Plaintiff suffered during and after the accident, the likelihood of him suffering permanently for the rest of his life, the impact on his then current and future employment opportunities and enjoyment of his life generally.
- [37] The Plaintiff relies on two cases: **Singh v Rentokil Laboratories Ltd [1993] FJCA 26; Abu0073u.91s (20 August 1993)** and **Maka v Broadbridge [2003] FJCA 31; ABU0063.2001S (30 May 2003)**.
- [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 an 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.

- [41] Counsel for the Plaintiff asks that I award **\$65,000**. The Third Defendant says it should be only **\$5,000**. The First Defendant made no submissions.
- [42] The pain suffered by the Plaintiff in this case is not in the extreme. His employment opportunities have not been significantly affected, if at all. Neither is his future enjoyment of life. His injuries have fully healed and he has fully recovered apart from some pain that he may continue to suffer during cold weather. Having regard to these findings and the cases cited above, I think the sum of **\$30,000** is fair compensation for pain and suffering and loss of amenities.

#### **COMPENSATION FOR CARE BY THE PLAINTIFF'S MOTHER**

- [43] The Plaintiff claims a sum of money for the care that his mother had to give him during the first few months after the accident.
- [44] In **Dre** (supra), I said that the time for gratuitous care given by relatives for injuries suffered by a plaintiff as a result of negligence by a defendant is now over. I repeat the same here. There is ample case authority to support this view: **Rokodovu v Rokobutabutaki** [1998] FJHC 151; HBC0001j.1997s (9 November 1998)

- [45] The Plaintiff's mother gave evidence that she was employed as a garment factory machinist at the time of the accident earning between \$65 and \$80 a week depending on how much overtime she worked. She had to leave work for 18 months to care for her son.
- [46] In **Rokodovu v Rokobutabutaki [1998] FJHC 151; HBC0001j.1997s (9 November 1998)**, Pathik J referred to two Australian decisions which I respectfully adopt:

*"So far care has been provided by the plaintiff's parents. It was decided in GRIFFITHS v KERKEMEYER (1977) 139 CLR 161 that a plaintiff should receive damages representing the value of gratuitous services necessitated by the injury done to a plaintiff by a negligent defendant.*

*That decision was further explained by the High Court in Van Gervan v Fenton (1192) 175 CLR 327. It is now clear that the damages are to be awarded, not by reference to the sum, if any, expended upon services rendered to the plaintiff or to the loss incurred by any carer, but by reference to the market cost of providing the services needed by the plaintiff as a result of the damage suffered."*

*According to Mason CJ, Toohey and McHugh JJ, the quantification of the sum to be awarded for attendant care depends on the answer to two questions, at 338,*

*(a) What are the services required to satisfy the plaintiff's need resulting from the defendant's wrong?*

*(b) What is the value of those services?*

*I estimate the future care costs to be \$49,920.00 (Forty-nine thousand nine hundred and twenty dollars) (made up of \$60.00 per week x 52 weeks = \$3120.00 per year by 16 years = \$49,920.00)."*

- [47] I think the amount of \$70 per week would be a reasonable amount for someone to be paid to provide the care that the Plaintiff's mother provided. But I find that this care was not necessary after the Plaintiff was able to walk without his crutches, i.e., after 4 months. I therefore award a sum calculated as follows: 4months x 4 weeks x \$70/week = \$ **1,120.00** for the care already provided by the Plaintiff's mother. No award is made for future care.

### **LOSS OF EARNINGS**

- [48] The Plaintiff also claims loss of earnings. He gave evidence, which I accept, that he was earning \$60 a week at the time of the accident. However, I will not allow a claim for lost wages from the date of the accident to 31 October 2002, the period during which the Plaintiff was unemployed. He had fully recovered to the extent of being able to work

within 4 months of the accident. I will therefore allow only the amount calculated by 4months x 4 weeks x \$60/week = **\$960.00**.

- [49] I make no allowance for the mother's loss of earnings. She is compensated by the award for nursing care above in accordance with the principle in **Rokodovu** (supra).

### **OTHER EXPENSES**

- [50] I also award a global sum of **\$500** for the other costs expended by the Plaintiff for his visits to the hospital, medicines and other medical expenses, police and medical reports.

### **INTEREST**

- [51] I have a discretion under section 3 of the **Law Reform (Miscellaneous Provisions) (Death and Interest) Act [Cap 27]** to 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.

- [52] The cause of action arose on the day of the accident, 8 April 2001. The first Writ was filed on 6 March 2002. The matter could have gone to trial by the end of 2002. The delay in having this matter go to trial had been exacerbated by the Plaintiff himself amending his claim to join the Third and Fourth Defendants. Whatever facts that made the Plaintiff join those defendants were readily available to him when he issued his claim. In any event, the Plaintiff would have known by 19 May 2005 when the First Defendant filed his affidavit in support of his application to set aside the default judgment, that the Second Defendant was not authorised by the Third Defendant to drive the car. In these circumstances, I make no award for interest.

### **COSTS**

- [53] I have discretion to award costs. The Plaintiff wins against the Second Defendant so he is entitled to his costs on a party and party basis. This is not a case for indemnity costs as far as the Second Defendant is concerned.

- [54] The trial went for over 5 days although only 3 of those days were actually taken up in evidence. The other two days were not used because Counsel advised the trial Judge that

the matter had prospects of settlement so the matter was adjourned for that purpose. Settlement did not eventuate. The facts are not complicated nor are the issues and the law. I make no allowance for the numerous attendances before the trial because I think the Plaintiff was largely responsible for them. The Plaintiff has asked for **\$2,500** for costs which I think is a reasonable amount so I award it accordingly.

[55] The Plaintiff has lost against the **First Defendant** and so he should pay the defendant's costs. I award the same amount, i.e. **\$2,500**, costs to the First Defendant.

[56] The Plaintiff has also lost against the **Third and Fourth Defendants**. In my recent decision in **Khan v Carpenters Fiji Ltd [2009]** (yet to be reported), HBC 132/03L, I discussed the principles applicable to the award of costs on an indemnity basis. Exceptional circumstances must exist for me to depart from the normal situation. As I take the view that these defendants have been joined unnecessarily without merit and that they have been joined simply in the hope that there was a defendant to pay damages, I think an award for indemnity costs is justified. I therefore award **\$5,000** costs to the Third and Fourth Defendants.

### **FINAL ORDERS**

[57] The **Final Orders** are therefore:

(a) Judgment is entered for the Plaintiff against the **Second Defendant** in the sum of **\$ 32,580** made up as follows:

(i) General Damages for Pain and suffering and loss of amenities	<b>\$30,000.</b>
(ii) Compensation for care rendered	<b>\$ 1,120</b>
(iii) Loss of earnings	<b>\$ 960</b>
(iv) Other expenses	<b>\$ 500</b>
<b>TOTAL DAMAGES</b>	<b><u>\$ 32,580</u></b>

- (b) There is no award for interest.
- (c) The Plaintiff's claim against the **First, Third and Fourth Defendant** is **dismissed** and judgment is entered for the defendants.
- (d) The **Second Defendant** pays the **Plaintiff's** costs of **\$2,500** within 2 months.
- (e) The **Plaintiff** pays the **First Defendant's** costs of **\$2,500** within 2 months.
- (f) The **Plaintiff** pays the **Third and Fourth Defendants'** costs of **\$5,000** within 2 months.

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**Sosefo Inoke**  
**Judge**

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