

In the High Court of Fiji at Labasa

Civil Jurisdiction

Civil Action No. 19 of 2012

Between: Jaysheel J Kumar by his next of friend and father Jetandar Kumar
Sharma

Plaintiff

And: Apakuki Seruwaqa

First defendant

And: Pacific Transport Company Limited

Second defendant

Appearances: Mr Amrit Sen for the plaintiff

Mr A.Koli for the defendants

Date of hearing: 8th April, 2014

JUDGMENT

1. *The statement of claim*

The statement of claim states that the plaintiff, Jaysheel J Kumar, (Jaysheel) is a minor born on 21st September, 1995. He brings this action through his father and next-of-friend, Jetandar Kumar Sharma. On 13th September, 2011, Jaysheel was returning home in bus bearing registration no. EC 610 belonging to the second defendant, when the bus got out of control and collided with several objects and buildings. The first defendant negligently drove the bus, in the course of his employment with the second defendant. The particulars of negligence are pleaded. As a consequence of the collision, Jaysheel sustained severe injuries. The first defendant was charged for dangerous driving causing death and bodily harm.

The particulars of injuries are stated as follows

- i) *Head injury and had a GCS 13/15 and was having seizures.*
- ii) *Left Frontal Epidural Hematoma.*
- iii) *Open/Depressed Fracture of Left Frontal Skull.*

He was accorded an urgent craniotomy on 14th September, 2011, admitted to the ICU and thereafter, to the surgical ward.

The statement of claim proceeds to state that at the time of the accident, Jaysheel was a Form 4 student at Bucalevu Secondary School Road in Taveuni. His dream was to become a doctor. He had to repeat Form 4.

It is alleged that Jaysheel suffered “*socially, psychologically, physically, distress with pain, limitation in mobility, and social well being and his education has been affected. He claims general damages for pain and loss of amenities*”.

2. The statement of defence of the first and second defendants

The defendants, in their statements of defence, state that the collision was caused by a sudden mechanical defect over which the first defendant had no control. The first defendant pleaded not guilty to the charge of dangerous driving.

3. The hearing

3.1 PW1 (Jaysheel)

Jaysheel said he was sitting in the third seat of the bus. He heard a sound. His head hit the iron frame in the front seat. He lost consciousness. He woke up in the intensive care unit of the Labasa hospital, two or three days later. Several machines were around him. Later, he was taken to a ward. He was discharged, ten days later. He had head surgery. He was in great pain and feeling very weak.

He was in Form 4 at the time he met with the accident. He missed a year in school, as he could not complete his annual examination. His head was paining. Earlier, his marks were good. He came 4th or 5th in class. Now, his marks are bad and he comes 17th or 18th in class. After the accident, he attended school three to four days a week, in 2012. He now finds it difficult to study till late in the night. He continues to suffer pain. He cannot help his parents. After the accident, he moved to Savusavu. He goes to Savusavu hospital every week.

Mr Koli, counsel for the defendants cross-examined Jaysheel on his performance in school and his absenteeism after his accident. He commented that no certificates nor sick sheets were produced, in support. Jaysheel said he had his eyes examined in Suva and was prescribed glasses.

In re-examination, Jaysheel was asked whether he had any problem with his eye sight or concentration, prior to the accident. His answer was in the negative.

3.2 PW2 (Dr Maloni Bulanauca)

Dr Bulanauca testified that he had to perform a craniotomy(surgery) on Jaysheel urgently, as he was in a life threatening situation. He had seizures. This meant that there was “*insult to nerves in the brain*”. He had a skull fracture. The operation took two hours. Apart from the cosmetic aspect, fracture of the skull could have a penetrating effect on the brain. Upon discharge, the patient was asked to refrain from heavy duty and contact sports, as part of his skull was missing. Cranioplasty was not done. The witness was unaware of the cost of cranioplasty.

In answer to the question posed whether the brain injury could make it difficult for Jaysheel to concentrate and study, Dr Bulanauca said that it was “*possibly psychological, hard to say it was purely physical*”. The headaches he said were “*probably neurological, consistent with (the) injury*”

There was permanent scarring after the operation. He could not determine permanent disability in respect of cranial damage. It was a difficult task. Jaysheel was seen by a team of neurosurgeons from Canberra. Their report was not available.

In cross-examination, it emerged that Dr Bulanauca saw Jaysheel after he left hospital as an in-patient, on three occasions. On the first occasion, there were “*nil*” complaints, no abnormalities were noted. On 15th December, 2011, the complaint was that he suffered headaches sometimes. However, the neurological examination was normal, no abnormalities were detected. On the last review, no further complaints were noted and he was discharged. Jaysheel was told that there was no need to return. In re-examination, Mr Sen, counsel for the plaintiff clarified that Jaysheel had a permanent scarring with a depressed skull. It was a significant injury, the defect is for life. Jaysheel did not have psychiatric treatment.

4. The determination

4.1 At the hearing, Mr Koli, counsel for the defendants conceded liability. The question for determination is the quantum of damages to be awarded to Jaysheel. The closing submissions filed on behalf, claims \$ 95000 for pain and suffering and \$ 100000 for loss of future earnings. Mr Koli, in his closing submissions, suggests a sum of \$ 40000 for pain and suffering.

4.2 Mr Sen takes the plaintiff in four decided cases, as a standard of comparison with the injuries suffered by Jaysheel. The injuries are not comparable. In assessing

damages, past awards are useful guides, but the facts of each case has to be decided.

4.3 I would refer to the case of *Nasese Bus Co Ltd v Chand*, (2013) FJCA 9 as referred to by Mr Sen. The respondent had a crushed injury/fracture of her left leg and injury to her right thigh. Her incapacity was assessed at 14%. There was no satisfactory plastic surgical procedure to rehabilitate her. Calanchini PA increased the damages of \$ 65000 awarded by the lower court for pain and suffering to \$90,000.00. He found that sufficient regard had not been given to the future pain and suffering she would suffer, due to progressive arthritis. There was also unchallenged medical evidence that this was consistent with the pain the respondent was experiencing.

4.4 Jaysheel's medical report from the Taveuni Medical Subdivision of 12th October, 2011, provides that he was referred to Labasa Hospital, as he had sustained a head injury and was having "seizures".

4.5 His medical report from the Labasa Divisional Hospital of 14th October, 2011, states that:

The patient was known to have suffered:

- 1. Left/frontal epidural hematoma*
- 2. Open/depressed fracture of left frontal skull*

.....

Mr J Kumar was accorded an urgent craniotomy on 14/10/11 and subsequently admitted to ICU and thereafter to the MSW post-operatively.

Recovery was progressive and clinically stable. Upon discharge the patient and family are remaindered of continuous convalescence. Furthermore, the patient as been advised against vigorous activities and specifically those that may require the exposure of the opsite to trauma. Hence school duties and sports contact in nature is ill advised.

He is due for a neurosurgical counsel on October 17, 2011 with regards to the possibility of a cranioplasty to cover the cranical defect from the craniotomy. (emphasis added)

4.6 Mr Sen, in his closing submissions contends that Jaysheel has suffered a permanent total disability of his cranial nerves. A personal disability report, in support, was not produced. It was for the plaintiff to prove his case. I would note the report of the visiting team of neurosurgeons from Canberra who had

examined Jaysheel, was not made available. This leaves a gap in the medical picture.

4.7 Be that as it may, it is undisputed that Jaysheel would have endured great pain, in the aftermath of the craniotomy. He was unconscious immediately after the accident. He woke up in the intensive care unit surrounded by machines. He continued to attend clinics until 15th December, 2011. Dr Bulanauca said a crainoplasty was not done, to cover the defect in his skull. He was unaware of the costs of crainoplasty.

4.8 Dr Bulanauca testified that Jaysheel has permanent scarring in his head, as resonated by Mr Koli, in his closing submissions. I observed his depressed skull. He did not exuberate the joi de vivre that one would expect to see in a 18 year old boy. Understandably, he had been medically advised against vigorous activities and sports. His countenance was visibly scarred.

4.9 In my judgment, a sum of \$ 70,000 is an appropriate figure for pain and suffering and loss of amenities.

4.10 To that must be added the damages he suffered for the year he admittedly, lost in school, as a result of having to repeat a year. Mr Koli suggests a sum of \$5000. In my view, Jaysheel must be adequately compensated for the year of schooling he lost. I would award him \$10000 for this loss.

4.11 I turn now to the next issue, which was a claim for future earnings. Mr Sen, in his closing submissions, argues that Jaysheel will find it difficult to find employment with his medical condition and lack of education. There was no medical evidence to that effect, nor was Jaysheel's academic records produced, to support the assertion that his performance in school slid down, after he befell the accident.

4.12 I find compelling Mr Koli's argument that Jaysheel would not have been discharged on 15 March, 2012, from attending clinics, if he was still experiencing headaches, as contended.

4.13 Mr Koli relied on the notes made in the patient folder kept by the Labasa hospital. Dr Bulanauca explained the progress notes as follows:

3/11/2011 - nil complaints, no abnormalities

15/12/2011 - sometimes headaches, but neurological examination was normal, "NAD" (no abnormalities detected).

15/3/2012 - no further complaints and discharged and "NNR"(no need to return)

4.14 Dr Bulanauca opined that the headaches were probably psychological.

4.15 I decline the claim for future earnings.

4.1 I allow the claim for special damages in a sum of \$ 500, as agreed to by Mr Koli, in his closing submissions

4.2 The plaintiff has claimed interest. Interest on damages is awarded to compensate a plaintiff for being kept out of the capital sum. In the exercise of my discretion, I award interest at 6% per annum on the damages awarded from date of service of writ (3rd May, 2012,) to date of trial and 3 % per annum on special damages of the sum of \$ 107.50 from date of accident to date of hearing.

5. Orders

The total sum awarded to the plaintiff as damages is \$ 89739.00 made up as follows:

General Damages	80000.00
Interest	9200.00
Special damages	500.00
Interest on special damages	39.00
Total	89739.00

There will therefore be judgment for the plaintiff against the defendants in the sum of \$ 89739.00 together with a sum of \$3000 payable by the defendants to the plaintiff as costs summarily assessed.

25th June, 2014



A.L.B. Brito-Mutunayagam

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Judge