

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

Civil Action HBC 40 of 2011

BETWEEN : **MESULAME DRIGITA** of Nasoso, Nadi

PLAINTIFF

AND : **APENISA BULINAVUDA TUILEKUTU** of Legalega, Nadi

1ST DEFENDANT

AND : **SEINI BAVESI** of Legalega, Nadi

2ND DEFENDANT

R U L I N G

This ruling has been amended pursuant to Order 20 Rule 10 of the High Court Rules 1988 at paragraph 40. The original ruling circulated on Thursday 11 December 2014 erroneously calculated the total award (not inclusive of interest) at \$144,000. This has been amended to \$80,720 as per paragraph 40

BACKGROUND

1. On 23 March 2011, the plaintiff, Mesulame Drigita (“**Mesulame**”) filed a Writ of Summons and Statement of Claim against the defendants seeking damages for injuries he sustained as a result of an accident which occurred allegedly as a result of the negligence of the 1st defendant, Apenisa Drigita (“**Apenisa**”). According to the statement of claim, on 29 September 2009, Apenisa was driving vehicle registration number DD965, which is a van, along Namaka Road in Nadi. He drove the said vehicle so negligently and caused the vehicle to run over Mesulame.
2. Mesulame suffered a closed fracture of left femur, an open fracture of the right tibia and fibula and left Achilles tendon rupture. He was admitted at Lautoka Hospital for some eight (8) weeks or so from 23 September 2009 to 25 November 2009.
3. The second defendant, Seini Bavesi (“**Seini**”) is being sued vicariously by virtue of the fact that she was the registered owner of DD965 at all material times.
4. Against the defendants, Mesulame claims special damages in the sum of \$8080-00, general damages, costs and interests.

DEFAULT JUDGEMENT

5. Neither Apenisa nor Seini has filed a statement of defence. On 07 July 2011, Mesulame entered default judgement against Apenisa only. No default judgement was entered against Seini.
6. On 11 August 2011, Mesulame filed a Notice of Assessment of Damages which was duly served only on Apenisa. Again, that Notice of Assessment was not served on Seini.

ASSESSMENT OF DAMAGES

7. At the hearing on assessment of damages, only Apenisa attended. At the outset of the hearing, the clerk explained to Apenisa that the hearing was only on assessment of damages since default judgement had already been entered against him. He understood this.

PW1 – Mesulame's Evidence

8. Mesulame gave sworn evidence. He was 35 years old at the time of the hearing. He is self employed and lives at Nasoso in Nadi. Mesulame and Apenisa had been friends for a long time.
9. The incident in question happened on 29 September 2009. Mesulame was at Namaka in Nadi. On the morning in question, he and some friends were drinking *yaqona* grog. Just as they were about to finish the *yaqona* grog, Apenisa arrived in van DD965 and insisted that Mesulame mix some more *yaqona*. Mesulame obliged, mixed, and set up the *yaqona* for drinking – then went to the loo to relieve himself.
10. Whilst in the loo, Mesulame heard Apenisa start the engine of DD965. There were passengers in the van. Mesulame then quickly ran outside to stop Apenisa from driving away.
11. Outside, Mesulame saw his mate Mosese, standing beside the van and trying to persuade Apenisa not to leave and to hang out with them to finish the *yaqona* grog. However, Apenisa was bent on leaving. I gather from the evidence that Apenisa had some fare-paying passengers in his van.
12. Then, just as DD965 was about to pull away, Mosese ran around to the driver's side and pulled the ignition key out. However, Apenisa managed to get another spare key from one Livai and immediately restarted the van. He

then revved up the engine, at which point, Mesulame and Mosese ran out to the front of the van to form a barricade. Apenisa saw them both standing in front of the van, but he started to move his van. At that point, both Mesulame and Mosese jumped onto the front of the bumper of the van which was just starting to roll forward at a slow speed. I gather that they thought Apenisa would stop the van at that point as it had not really gathered momentum. However, according to Mesulame, Apenisa kept moving the van.

13. From Mesulame's evidence, it appears that he and Mosese did put out their hands onto the bonnet of the rolling van to try and stop it. However, all their human strength would not have been enough to halt the slow-rolling van. As a result, Mesulame and Mosese both fell back right onto the path of the van.
14. Mesulame said in evidence that Mosese managed to get up quickly and tap onto the windscreen of the moving van to alert Apenisa to stop the van as he, Mesulame, was pinned down and trapped under the van. Apenisa then stopped the van.
15. According to Mesulame, he was trapped in such a position under the van that his head was placed so very close to one of the rear tyres. Had Apenisa not stopped on time, his head would have been crushed under the weight of the van, which incidentally, had some passengers inside.
16. People had gathered around the incident. Apenisa, Mosese and Livai had to prop up the vehicle using a jack lever in order to be able to pull Mesulame out from underneath it. They then rushed Mesulame to Nadi Hospital where he was kept for a few hours after some initial treatment. From Nadi Hospital, Mesulame was then rushed to Lautoka Hospital where he was admitted from 29 September to 25 November 2009.
17. Mesulame handed up a bundle of documents. He claims:
 - (i). \$2,560-00 for transportation expenses for his family for the time he was admitted in hospital.
 - (ii). \$1,260-00 for food expenses
 - (iii). \$4,210-00 for medical expenses

18. Mesulame said that he used to work at an electrical company where he would lift heavy weights. He used to earn \$120 per week after deductions. He did not produce a pay slip.
19. He cannot do that anymore. He feels enormous pain on the left leg everyday and he cannot sit down for too long. The only thing he can do now is driving which he does now to support his family. He now earns about \$60 to \$70 per week.
20. Apenisa was charged by Police for Careless and Negligent Driving and pleaded guilty to these at the Nadi Magistrates Court.
21. On 06 October 2011, Mesulame was reviewed by Dr. Joeli Mareko. For that report, Mesulame paid \$300-00. He produced a copy of the receipt in court.
22. In cross-examination, Mesulame admitted that whilst he was in hospital, he received hospital food. He also said that his family visited him everyday.
23. He admitted that he did not keep any receipts for transportation or medical expenses.

PW2 – Mosese Veremalua

24. He confirmed all that Mesulame had said in evidence. He said that he thought Mesulame was dead under the vehicle. He had called out Mesulame's name but there was no response. Mesulame's face was turned to the side facing the road. His face was placed against the rear tyre. Mesulame's right leg was broken. There was a cut on one side of his forehead.
25. There was a Rotuman lady-nurse around there who advised them not to pull Mesulame out or he would loose a lot of blood. That was when they decided to lift the car up with a jack lever to free Mesulame. He said when they pulled him out, both of Mesulame's legs were just dangling and broken. On the way to the hospital, Mesulame was panicking in anticipation of death and he was just crying on the way.
26. At the Emergency Entrance, the staff whisked him off to the Emergency Room where a Pilipino Doctor attended to him and stitched up all the bruises. The Doctors and nurses cemented his right leg. He then accompanied the medical team to Lautoka Hospital.

27. On the way to Lautoka Hospital, Mesulame was just screaming all the way as he was in so much pain.

PW3 – Doctor Joeli Mareko

28. Dr. Mareko is an Orthopaedic Surgeon with over 13 years of experience in that particular field. He gave expert evidence and opinion on the injuries and the effect of the injuries on Mesulame.
29. Dr Mareko assessed resulting disabilities suffered by Mesulame at 25%.
30. A bundle of document was tendered which includes the relevant Land Transport Vehicle Registration for DD965, 2 medical reports, schedules of expenses, a letter from the Nadi Magistrates Court confirming the conviction of the 1st defendant and a receipt for medical examination.

Submissions of Plaintiff's Solicitors

31. Below I reproduce in full the submissions filed by Mesulame's solicitors:

ASSESSMENT OF INJURIES.

6. The plaintiff was 33 years old at the time of accident. He is 36 years old at the time of the assessment of damage. He was self employed and a driver. His injuries from the report by Dr. Rajeep Patel and Dr. Joeli, Surgical Registrar and Orthopaedic Surgeon respectively, show that the plaintiff was admitted at Lautoka Hospital on 23rd September and was discharged on 25th November 2011 which is 62 days. The injuries in which he was admitted and for which he was treated were:

- i) Closed fracture of the left femur;
- ii) Open fracture of the right tibia and fibula;
- iii) Left Achilles tendon ruptures;

He was operated where the following procedures were done;

- i) Extensive wound debridement of devitalized tissue of left foot
- ii) Inter medullary rod insertion of left femur
- iii) Inter medullary rod insertion of right tibia;

On post operative day 7 the plaintiff developed symptoms of desertion vomiting and no bowel output. He had emergency blood transfusion and was taken to the theatre for an emergency laparotomy where he was found to have about 30cm of his small bowel to be necrotic. The necrotic portion of the small bowel were resected and viable ends re-anastomosed.

He had skin graft put on his right leg on 30th October 2009 by the visiting Interplast team. He had daily dressings done to the wound on the left ankle. He was again reviewed on the 12th of December 2009.

Upon review by Dr Joeli Mareko (on 5th October 2011) the plaintiff has:

- a) Scarry and deform right ankle.
- b) Scarry of left thigh.
- c) Persistent pain on his left thigh.
- d) Meddle sear of the abdomen 45cm.
- e) Difficulty in passing urine.
- f) Diminished ROM of the right ankle and left knee

Dr. Joeli Mareko assessed his disability to be 25%.

7. The plaintiff gave evidence that he is unable to lift heavy items. He is unable to walk long distances. During cold season he felt pain and unable to walk. He is unable to stand for longer period. The injury has affected the way he walks.
8. Dr. Mareko supports such evidence. He showed and explained the x-ray films to the Court with iron rod and screws, are visible, holding the bones together.
9. The evidence of PW2 described the plaintiff when he saw him underneath the vehicle as if "he was dead". He was stuck on the rear tyres. They have to use a jack to lift the vehicle in order to free him. His legs were "hanging" and he was in pain.

ASSESSMENT OF DAMAGES.

General Damages (Pain & Suffering)

10. In the present case the plaintiff is 33 years at the time of the accident. Dr. Joeli assessed his disability to be 25%.
11. In *Moce vs Racule* [1995];FJHCT 198; [1995] 41 FLR 187 (1 August 1995) the Court awarded the sum of \$31,652.00 to a 43 years old carpenter. He suffered injuries when he collided with the defendant's vehicle. He was assessed at 31% disability and injuries include:
 - 1) lacerations of scalp, right elbow and left pinna.
 - 2) fracture right femur.
 - 3) fracture right tibia and fibula.
 - 4) crush injury and open fracture right hand.
 - 5) fractured right 8th & 9th ribs.
 - 6) concussion.
12. In *Shila Wati v Ranjit Garment Limited* HBC 484/2003S (17 May 2005) the Court awarded a 48 year old female garment machinist with shattered left knee cap the sum of \$40,000.00. In *Josaia Buakula v Attorney General* HBC 196/2001A (24 August 2005) a taxi driver with fractured femur was awarded the sum of \$50,000.00. In *Raben Prasad vs Jan Bulldozing Company* HBC 292/2002L (16 March 2005) a truck driver aged 44 years suffered severe hip injury which lead to replacement was awarded \$50,000.00. In *Pranil v Sabeto Valley Investment Ltd* & Ali HBC 345/2001 (8 December 2004) the plaintiff aged 24 years old suffered compound fracture of the left femur and many other injuries and was hospitalized for 3 months and undergone skeletal traction and internal fixation with K-rod to the femur and wiring of the patella. The plaintiff was awarded \$50,000.00. In *Ram Karan v Nitanjans Autopart Ltd* HBC 330/1997 (3 November 2000) the plaintiff had left ankle fracture and a broken nose with some hip injuries was awarded \$50,000.00 in general damages and \$25,000 for loss of earning capacity. In *Anitra Kumar Singh v Rentokil Laboratories* =Covol Appeal No. 73 of 1991, a 39 year old male suffered fractured to his right humerus and ulna and left radius and also fractured ribs and pelvis and mandible. He was awarded \$60,000 as general damages. In *Satish Chand v Padarath Bros & Sons & Others* – Civil Action No. 0134 of 1995, where a 33 year old male suffered a fracture to his right femur, tibia and fibula. His permanently disability was assessed at 25%. He was awarded \$65,000.00 as general damages and \$49,140.00 for loss of prospective earnings. The total award was \$163,890.00
13. My assessment for general damages (pain and suffering) is **\$65,000.00**.

Loss of earning capacity

14. The plaintiff was working as an electrician before the accident. He earned approximately \$120.00 per week and more if he worked overtime. After the accident he drives a mini bus and earns approximately \$60.00 per week. The plaintiff failed to produce supporting documentary evidence. He told the Court he failed to keep any document because at such time he was unaware that he could be compensated by instituting proceeding in Court.
15. The plaintiff would have earned more if he had not suffered such injuries and could have driven day and night 7 days a week to support in family. He would have earned \$150.00 per week.

- 16.** In *Joasa Alani vs Shiu Kumar* [2008] HBC No. 56/2008; Civil Action 80/2007 at 10; paragraph 21; on assessing economic loss Finnigan J said:

"I know I would be safe in taking account of my judicial experience if I were to allow \$150.00 per week and I am going to go that far for this plaintiff. I believe I have a basis for it and the justice requires some award for economic loss. This is based on my experience of the evidence of other witnesses that I have heard in this Court".

- 17.** Pathik J said; (in *Prakash v Parmar* [1999] FJHC 126; HBC 0350 ; (19 November 1999);

I have considered awards made in somewhat similar types of injuries. Mr. Kapadia referred the Court to Scott J's Judgment in *Dinesh Kumar v John Elder* C.A. 560/95(S) where an award was made in the sum of \$45,000 for pain and suffering and amenities of life. There the injuries were, inter alia, fracture of left tibia and fibula and the resultant disability was assessed at 15%. The nature of injuries on DINESH were very similar to the one in the present case and Mr. Kapadia submits that a similar amount be awarded in this case.

Other cases which I have borne in mind and referred to and dealt with by Scott J are: *Rothmans Pall Mall Ltd v Edward Narayan* (FCA Rep. 1997/77), *Anitra Kumar Singh v Rentokil Ltd* (39 FLR 220; FCA Repts. 93/213) and *Attorney-General v Paul Praveen Sharma* (FCA Repts. 94/351). I have also been guided by the principles stated in the two Court of Appeal cases wherein judgment was delivered on 13 August 1999. These cases are: *Marika Lawanisavi, Isei Ravisivi and Pesamino Kapieni* (Civ. App. No. 49/98S) and *Marika Lawanisavi, Isei Ravisivi and Pradeep Raj* f/n Shiu Raj (Civ. App. No. 50/98S). The following observation in the judgment of the Court of Appeal on page 3 in *Pesamino Kapieni* (supra) is pertinent and worth noting in an assessment of damages:

However in *Chan Wai Tong v. Li Ping* - sum [1985] HKLR 176, an appeal from Hong Kong, the Privy Council sounded a warning at p.186 against paying regard to awards in other jurisdictions in fixing damages unless similar social and economic conditions exist. We think those comments very relevant to the assessment of damages for personal injury in Fiji, which should generally be done on the basis of local experience. The following comments by their Lordships at p.181 also bear repetition:

Their Lordships consider that reference to guidelines is proper and useful and is to be encouraged. It tends to produce consistency in awards, and it assists practitioners to negotiate settlements of the many claims which are settled either in the early stages of proceedings before going to trial, or which never reach the courts at all. But the use of guidelines cannot do away with the need to compare the facts of the particular case under consideration with the facts of reported cases in which damages have been awarded by the courts. If attention is concentrated entirely on the description of the categories of injuries contained in the guidelines, without regard to the facts of actual decided cases, there is a risk that the description may be treated as if it had been contained in a statute, and may divert attention from proper comparisons."

- 18.** Therefore in the present case I calculate the loss of earnings at \$90.00p/week,[the difference of prospective future earnings and the present earning – (\$150.less \$60.)] I use the multiplier of 15 [as used in *Prakash* 32 years old]

- 19.** The award under this head is \$90. X 52 weeks = \$4,680 X 15 = **\$60,200.00**

Special Damages

- 20.** In *Joasa Alani* (supra) Finnigan J, at 9 paragraph 18 & 19, said:

The law is he must prove actual expenditure or loss in order to be given compensation for that money lost. It is the law that I can take judicial notice of notorious facts.

- 21.** In the present case the Court must accept the facts that the plaintiff incurs transportation cost for review and visitation by his family. I assess such expenses for \$500.00. On food I assess \$200.00 and for medication I assess at \$800.00. Despite the absence of receipts the schedule of expenses provided an idea of the expenses incurred. There is evidence of receipt for medical examination in the sum of \$300.00. In totality I calculate the award under such heading is **\$1,800.00.**

Interest

- 22.** The plaintiff also claims interest. In *Prakash* (supra) Pathik J said;

The pleadings contain a claim for interest and the plaintiff is entitled to under **section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act** which provides as follows:

"In any proceedings tried in the High Court for the recovery of any debt or damages the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment....."

I would award interest on general damages (on pain and suffering and loss of amenities) at the rate of 6% per annum... from 22 February 1994 (date of accident) to 19.11.99 (date of judgment on assessment).

23. I adopt the percentage interest of 6% used by Pathik J. Therefore O assess interest to the general damages is **\$15,000.00**

24. The plaintiff also seek cost summarily assess at \$2000.00

SUMMARY.

(i)	General damages (pain and suffering)	\$65,000.00
(ii)	Loss of earnings	\$60,200.00
(iii)	Special damages	\$ 1,800.00
(iv)	Interest of 6%	\$15,000.00
(v)	costs	\$ 2,000.00
	TOTAL	\$144,000.00

MY OBSERVATIONS

32. As stated, Mesulame was admitted at Lautoka Hospital from 29 September to 25 November 2009. That is a total of nearly 8 weeks altogether. He suffered fractures on both legs and had to have rods inserted into each leg. He even suffered complications on the bowel when *"about 30 cm of his small bowel was found to be necrotic"* and which portion was later *"resected and viable ends re-anastomosed"*.
33. He has been left with some permanent scars and feels persistent pain on left thigh and has difficulty passing urine. In light of the extent of injuries suffered and assessed incapacity at 25%, when considered against the cases cited by the plaintiff above, I would award general damages for pain and suffering and for loss of amenities at \$58,000-00. In a recent decision in **Lata v Kumar** [2014] FJHC 757; HBC222.2009 (21 October 2014), I did award \$70,000 in general damages for pain and suffering to a lady who had an assessed disability of 28% and also suffered similar injuries to Mesulame in this case and had screws inserted in both legs but who spent a total of 8 months in hospital.
34. For loss of earnings, no clear evidence was put before me as to how much he earned. He says he used to work for an electrical company and was paid \$120 per week. Now he is paid \$60 to \$70 per week driving taxis. I take this

to mean that he has not lost out entirely on his capacity to earn. Rather, his capacity to earn has been reduced by his assessed disability.

35. I will take \$120 per week as his earning and deduct \$70 per week from that for what he is capable of earning now and the difference of \$50 per week is what I will consider as his reduced earning capacity.
36. At the time of the accident, he was 36 years of age. A multiplier of 12 would be appropriate.
37. Therefore an award under this head would be as follows:
 - i. $\$120 \times 52 = \$6,240$
 - ii. $\$6,240 \times 12 = \$74,880$
 - iii. As Mesulame suffered 25% permanent incapacity, the award must then be reduced accordingly. Hence, 25% of the above figure would be **\$18,720.00** which is the sum I award for Mesulame as loss of earning capacity.
38. For special damages, clear evidence must be produced. In this case, no receipt has been produced before me substantiate the claim. However, I take heed of Mr. Justice Finnigan's words in **Joasa Alani** (see above) and make an award of \$2,000-00 to cover all travel, food, medicine expenses for Mesulame.
39. For interest, I award 6% interest from the date of accident to the date of judgement. I also award costs which I summarily assess at \$1,800 (one thousand eight hundred and eighty dollars only).

SUMMARY

40.

(i)	General damages (pain and suffering)	\$58,000.00
(ii)	Loss of earnings	\$18,720.00
(iii)	Special damages	\$ 2,000.00
(v)	costs	\$ 2,000.00
	TOTAL	<u>\$80,720.00</u>
	INTEREST	6% on General Damages

41. Since no statement of defence has been filed, I am not inclined to consider whether or not to reduce the award on account of contributory negligence or whether the doctrine of *volenti non fit injuria* should apply.



Anare Tuilevuka
JUDGE
Lautoka

16 December 2014.