

IN THE HIGH COURT OF FIJI

(WESTERN DIVISION) AT LAUTOKA, FIJI

Civil Action NO. HBC 165 of 2014

BETWEEN : **JAGDISH KUMAR aka JAGDISH KUMAR SHARMA** of
Yalalevu, Ba, Legal Executive

PLAINTIFF

A N D : **RAM KRISHNA** of Bangladesh, Tavua Town, Tavua, Fiji.

FIRST DEFENDANT

A N D : **PREM KRISHNA** of Bangladesh, Tavua Town, Fiji,
Businessman

SECOND DEFENDANT

Counsel : Mr A Dayal for plaintiff

Mr V Sharma for defendants

Date of Hearing : 01 December 2015

Date of Judgment: 02 May 2016

J U D G M E N T

Introduction

01. The Plaintiff brought this action against the defendants claiming, among other things, damages for personal injuries. The claim arises out of a motor vehicle accident that occurred on 21 March 2014.
02. On the day of accident the plaintiff was the registered owner and driver of the vehicle registration number DU 090. The first defendant was the driver of the vehicle registration number EE552, which

belongs to the second defendant. The accident happened at the junction joining Nasivi Road. The Plaintiff was travelling along Nasivi Road, Tavua Town when the first defendant coming out of the junction.

03. The first Defendant was charged for careless driving through Traffic Infringement Notice and paid the fine of \$200.00.
04. As a result of the accident, according to plaintiff, he suffered personal injuries to his forehead, back of the abdomen, his leg and damage to his vehicle.
05. The defendant denies the plaintiff's claim and challenges that the alleged injuries were caused by the accident. He states that it is a pre-existing condition.

Issues

06. The primary issue that needs to be decided by the court is that whether the accident caused injuries to the plaintiff.

Evidence

07. At the trial, the plaintiff (PW1) gave evidence and called six other witnesses in support of his claim, namely (i) Fatima Nisha (PW2), (ii) Deepak Rajneel Sami-Police Officer (PW3), (iii) Hari Prasad (PW4), (iv) Sham Lal (PW5), (v) Shanta Kiren-plaintiff's wife (PW6) and (vi) Dr Malo.

PW1-Jagdish Kumar (The plaintiff)

08. The plaintiff in evidence said:

'This is the straight road when I was driving this guy came from this side his the vehicle on the left side. This person supposed to stop here and then move should my road is clear then enter. When I was coming in there all of a sudden he came in the path of my road then I moved

towards the centre line he kept on coming and he hit me on the left side. I was thrown inside my vehicle in the front. I moved towards the left side and he hit, went back, came and hit again. I was wearing the seatbelt.'

09. He further said he did not have pain immediately. After few minutes a clerk and a lawyer from Reddy & Associates came to the scene, took him to office and they took him to hospital. He was treated by Dr Malo.
10. Under cross examination PW1 said he was driving at 15kph, which is below the speed limit. He confirmed that the defendant's vehicle hit him twice. He also confirmed that he was not admitted in hospital overnight. He hesitantly admitted that Dr Malo was his preferred doctor.
11. Dr Malo in evidence said he medically examined the plaintiff on 21 March 2014. The plaintiff told him he had involved in an accident and complained of headache and abdominal pain. The witness confirmed that he did not note any physical injuries. He said that the Ultra Sound showed that there was a cystic structure in the left lumber region sized about 2.8 x 2.6cm with internal arcs in the abdominal wall.
12. Under cross examination Dr Malo said he had just one year experience at the time when he examined the plaintiff. He admitted that experience wise he did not know much about cyst and haematoma. He also admitted that he did not note any visible injuries. When asked whether he will agree with Dr Taloga's finding that the cyst is pre-existing, he said yes, if he had examined the patient.
13. The Police Officer Deepak in evidence said the first defendant was issued TIN for careless driving and not for speeding. He did not see any injuries on the plaintiff and no injuries were recorded, no bleeding and no sign of pain. He also said if he had noticed or had been

informed that injuries were sustained by the plaintiff, the charge would have been different.

14. The first defendant-Ram Krishna (DW1) gave evidence and he call Dr Emosi Taloga additionally.
15. DW1 in evidence said that he stopped at the junction, overtook the rubbish truck that was parked and on the main highway one lorry was parked that was blocking his way that he was unable to see clearly as he tried to move his vehicle in front the other vehicle came from the other side and hit the face of his (DW1's) vehicle. When the accident happened he declutched his vehicle so that the vehicle can roll back. He further said he hit the other vehicle once. He admitted that he was issued with TIN and paid the fine.
16. The defendant called Dr Taloga (DW2) who is an expert witness with more than 20 years' experience in the field confirmed in evidence that the plaintiff had a cyst and there was no sign of hematoma. He explained that cyst has wall and hematoma is just a collection of blood with no wall. He confirmed that the radiologist report is correct and the ultrasound is conclusive evidence to show that the plaintiff has a cyst. His report dated 26 June 2015 was tendered as evidence.

Analysis

17. The plaintiff claims general and special damages for personal injuries allegedly sustained following the accident.
18. The issue that arose was that whether the plaintiff sustained injuries in the accident. This is a liability issue. I will firstly deal with evidence led by the parties in respect of liability issue. In this regard, evidence of (i) the plaintiff, (ii) Dr Malo, (iii) Dr Taloga and (iv) the Police Officer Deepak are important.

19. The plaintiff was driving at very low speed of 15 km/ph. He states that he was hit twice by the defendant who entered the main road from other side without stopping at the junction. He said the defendant's vehicle hit his left side bumper. The other vehicle hit, rolled back and moved forward and hit him again. He was thrown in the vehicle and had a bump on his head on the right and also sustained injuries on his left side back with no visible wounds or cuts at that time.
20. The plaintiff was wearing seat belt. If he had worn seatbelt he could not have thrown inside the vehicle. Further, he should have received severe injuries if he was thrown inside of the vehicle after the accident. The plaintiff did not have any injuries and there was no sign of pain. After the accident the plaintiff went to his office. Later was taken to the hospital. He was treated and discharged. He was not admitted to the hospital.
21. Dr Malo examined the plaintiff on day of the accident and noted cystic structure. His medical report dated 30 January 2015 given to the plaintiff was marked as 'P/Ex-16' and tendered as evidence. The report reads:

'RE: JAGDISH KUMAR

The above named patient presented to Tavua Hospital initially on 21/3/2014 with the history of involvement in a Motor Vehicle Accident.

History noted that he was a driver in a vehicle and he was restrained with a seat belt when he was hit by another vehicle. He complained of headache, abdominal pain in his Left Upper Quadrant and pain on his left foot.

Examination of the head and left foot showed no open injury or obvious deformity. Abdominal examination showed slight tenderness in his Left Upper Quadrant.

X-ray of the skull and Left foot was done, showed no abnormality. **Ultrasound done revealed a cystic structure in the Left Lumber region** measuring about 2.8 x 2.6cm. He was sent home on Paracetamol and Ibuprofen for pain relief. (Emphasis provided)

The patient was then booked for Surgical Outreach Clinic which was held on 25/03/2014 where he was reviewed by the Surgical Registrar who advised for conservative treatment and the possibility hospital review should it not resolve.

The patient presented again to Tavua Hospital on the 03/04/2014 with complaints of Left Loin pain. Pertinent findings from the examination noted that there was tenderness in the left loin on deep palpation. There was no rebound tenderness or rigidity in the abdomen. He was then ordered for Ultrasound scan which revealed a cystic mass exist within his abdominal wall measuring 2.9x2.9x2.8cm. **He was advised that it was a hematoma and was sent home on conservative treatment.** (Emphasis provided)

He then returned on 14/04/2014 with the history of pain from the area where the cystic mass existed. A repeat scan was ordered and it was noted that the mass persisted. An ultrasound guided aspiration was attempted but it was unsuccessful.

Another excision was attempted on Friday 17/04/14 and a small amount of hematoma was evacuated. A repeat scan was done and it noted that the hematoma still existed. He was put on pain relief and referred to Lautoka Hospital for Surgical Clinic on 02/05/14.

The patient continued to experience pain the area months after that and had presented on several occasion and was treated with Pain Relievers (Brufen/Voltaren) and Paracetamol. The cyst is yet to absorb and still and Mr Jagdish Kumar is still experiencing pain in this area to date. Pain usually require constant tactile pressure to temporary relieve the pain.

For your information and assistance.

Kind regards.

Signed

Dr. Ilikena Malo (Medical Officer – MP1069)
Tavua Subdivisional Hospital'

22. Dr Malo was adamant that cyst could develop immediately. He had just one year experience at the time when he examined the plaintiff. Most significantly, he admitted that with his one year experience he did not have much knowledge about cyst and hematoma. He was evasive to cross examination question. However, he finally agreed,

when he was referred to Dr Taloga's Medical Report, to the finding of Dr Taloga.

23. The defendant called Dr Taloga who also examined the plaintiff. Dr Taloga is a Specialist Orthopedic Surgeon with 20 year experience in the field. His medical report dated 26 June 2015 (D/EX-2) given in respect of the plaintiff runs:

'26 June 2015

MEDICAL REPORT

Mr Jagdish Kumar

I had reviewed Mr Kumar in my clinic on 16/06/2015 for the purpose of this medical report. Copies of his Fiji Police Medical Examination Form (24/03/2014) and medical report (30/01/2015) by Dr Ilikena Malo were made available to them. The copies of ultrasound scan reports on 03/04/2014 and 21/03/2014 were also provided.

Mr Kumar was a restrained driver involved in a motor vehicle crash on 21/03/2014. He had complained of headache, left upper quadrant abdominal and left foot pain. Initial examination was unremarkable and ultrasound showing a cystic structure measuring 2.8cm x 2.6cm in the left lumbar region. The dimensions of the cyst basically remained the same two weeks later. After an attempted ultrasound guided aspiration and excision, Mr Kumar symptom has not resolved.

He continues to complain of constant pain to the area as a daily occurrence. He tells me that he takes Brufen three times a day for his pain since the accident. However, he was not able to produce any physical evidence of his medication on the day of the examination.

The examination did not show any distress. He does not have any abnormality of his gait or posture while standing or sitting. A 2cm transverse flat scar was evident over the left lower lumbar region. Slight contact of the examining finger on the scar resulted in excruciating pain. I could not appreciate underlying mass, as he did not allow palpation due to severe pain. Even the examination for motion of the lumbar spine was abandoned due to complaints of pain.

The examination of Mr Kumar did not show cause for his complaint. The level of his pain is not consistent with the examination and investigative findings. **In the true medical sense, a cyst has to have a wall and this takes time and does not develop within minutes or hours after an injury.**

In my opinion this cyst was an incidental finding on the day of the accident and is pre-existent before the injury. Therefore there is no ratable permanent impairment resulting from the said injury. (My emphasis)

Signed

Mr E.D.Taloga

BSc., MBBS, AOA Dip Orthopedics (Fiji)

Specialist Orthopedic Surgeon

Suva Private Hospital

Consultant Orthopedic Surgeon

CWM Hospital

Registration Number MP0438'

24. Dr Taloga in evidence confirmed that the plaintiff has a cyst. He further explained that a cyst has to have a wall and this takes time and does not develop within minutes or hours after an injury. Based on the radiologist report and ultrasound Dr Taloga's opinion is that this cyst was an incidental finding on the day of the accident and is pre-existent before the injury.

25. The plaintiff has preferred Dr. Malo. He travelled from Ba to Tavua to get treatment in Tavua Hospital where Dr Malo is a Medical Officer. Whereas, the same facility was available in the Ba Hospital. It seems that the plaintiff has preferred Dr Malo because he has given a favourable medical report for him.
26. Dr Malo is a general medical practitioner. He has not specialised in any area of medicine. He had just one year experience at the time when he examined the plaintiff. Therefore, he is not an expert to give an opinion on the subject.
27. On the other hand, Dr Taloga is a Specialist Orthopedic Surgeon. He has 20 years of experience in the field. In cross examination Dr. Malo himself admitted that Dr. Taloga's findings are accurate. The defendants were able to establish that Dr. Taloga is an expert on the subject. I would therefore accept his opinion that the plaintiff has a cyst which was an incidental finding on the day of the accident and is pre-existent before the injury.
28. The plaintiff's evidence that he sustained injuries as a result of the accident has little or no value. I therefore reject his evidence as unreliable.
29. The plaintiff has failed to show that the injuries were caused by the first defendant. This results in the dismissal of his claim with costs which I summarily assess at \$2000.00.
30. Since I have rejected the plaintiff's evidence as unreliable, whole of his claim is doomed to fail.

Conclusion

31. The plaintiff has failed to prove that the injuries were caused by the defendant. The plaintiff has a cyst, which was an incidental finding on the day of the accident and is pre-existent before the accident. I would

therefore dismiss the plaintiff's claim with summarily assessed costs of \$2000.00 payable by the plaintiff to the defendants.

Final Outcome

32. The following are the final outcome of this judgment:

1. Plaintiff's claim is dismissed.
2. Plaintiff will pay the defendants costs of \$2000.00, which is summarily assessed.

M H Mohamed Ajmeer 2/5/16

.....
M H Mohamed Ajmeer

JUDGE



At Lautoka

2nd May 2016

Solicitors:

For plaintiff: Dayal Lawyers

For defendants: Vijay Naidu & Associates