IN THE HIGH COURT OF FIJI

AT LAUTOKA

[APPELLATE JURISDICTION]

CIVIL APPEAL NO. 55 of 2009

IN THE MATTER of an Appeal from a Decision and/or Judgment of His Lordship, the Honourable Judge dated 23rd day of May 2014 in the Lautoka High Court Action No. 55 of 2009.

BETWEEN : **FOUR R ELECTRICAL & GENERAL CONTRACTORS LIMITED** a limited liability company having its registered office at Kings Road, Yalalevu, Ba.

APPELLANT (Original 1st Defendant)

A N D : **NILESH WILLIAM** a steel fixer of Yalalevu, Ba.

RESPONDENT (Original Plaintiff)

Appearances : Mr Sharma V for defendant/appellant

Mr Chaudhary R.P for plaintiff/respondent

Date of Hearing : 13 July 2017

Date of Judgment : 18 September 2017

J U D G M E N T

Introduction

[01] This is an appeal, with leave being granted to the appellant to appeal out of time, against the decision of the learned Master (the Master) dated 23 May 2014 concerning the assessment of damages.

[02] Both the parties orally argued the appeal and tendered their respective written submissions.

Background

[03] On 30 March 2009, Nilesh William, the plaintiff/respondent (the respondent) issued a writ of summons together with a statement of claim against the appellant claiming damages for the personal injury he sustained in an accident that occurred on 18 February 2008. The respondent alleged negligence on the part of the driver (Abdul Nadeem who is the second defendant in the original proceedings) of the Truck (ET901). The respondent was a passenger of the Truck that was involved in the accident during and in the course of his employment with the appellant.

[04] The claim against the appellant was based on vicarious liability because the respondent alleged that the accident happened during and in the course of the employment with the appellant.

[05] Only the second defendant filed a statement of defence, which was subsequently struck out for non-appearance.

[06] The appellant did not file any defence to the claim. As a result, the respondent entered a default judgment against the appellant.

[07] Thereafter, the respondent issued a notice of assessment of damages and interest against the appellant. The appellant did not appear. The hearing on assessment of damages proceeded in the absence of the appellant. At the assessment hearing, the respondent and his doctor gave evidence. The Master who heard the hearing delivered his ruling. The Master entered judgment against the appellants jointly and severally in the sum of $137,245.00 with costs summarily assessed at $1,500.00. In this appeal, the appellant challenges that assessment as excessive in the circumstances.

Grounds of Appeal

[08] The appeal is based on the following grounds of appeal:

1. *That the learned Judge erred in law and in fact in placing heavy reliance on the Statement of Defence of the 2nd Defendant when in fact the said Defence as per his Lordship's own decision was struck out and therefore he ought not to have relied on the same assessing the quantum payable to the respondent.*

2. *That the Learned Judge erred in law and in fact in awarding excessive and disproportionate damages of $45,000.00 for pain and suffering and loss of amenities to the respondent.*

3. *That the learned Judge erred in law and in fact in awarding excessive damages of $66,000.00 to the respondent for loss of earning capacity.*

4. *That the learned Judge erred in law and in fact in awarding excessive damages of $8,000.00 to the respondent for medical costs and care when in fact in his own assessment, he held that there was no or insufficient evidence produced by the respondent to support the claim for such award.*

5. *That the learned judge erred in law and in fact in awarding special damages in the sum of $905.00 when there was no or insufficient evidence was produced to support such award and or the said award was made contrary to the established Common Law Principles relating to award for special damages.*

6. *That the learned Judge erred in law and in fact in awarding excessing costs of $1,500.00 to the Respondent*

7. *That the learned judge erred in law and in fact in awarding damages under various heads by failing to take into consideration that the respondent had acted on his own frolic by travelling in a vehicle unsafe for travelling and was not a passenger vehicle and thus his injury was attributed to the serious and willful misconduct of the respondent and therefore not liable to be paid compensation.*

Discussion

Ground 1

[09] The ground 1 appears to be abandoned. This ground was not argued at the hearing. As such, discussion on this ground is not necessary.

Ground 2

[10] Ground 2 is that the Master erred in law and in fact in awarding excessive and disproportionate damages of $45,000.00 for pain and suffering and loss of amenities to the respondent.

[11] The appellants contended that the award of $45,000.00 for pain and suffering and loss of amenities to the respondent is exorbitant. They cited the case authorities of *Yanuca Island Ltd v Elsworth* [2002] FJCA 65; abu0085U, 2000S (16 August 2002) and *Kumar v Reddy* [2016] FJHC 311; HBC 282.2013 (8 April 2016)

[12] Conversely, the respondent submits that the sum of $45,000.00 should not be disturbed as it is not an outrageous or unreasonable award in view of the injury sustained by the respondent and all evidence before the Master. Essentially, the respondent's contention is that the award of $45,000.00 is slightly on the lower side.

[13] In his ruling the Master noted at para 19:

> *"...However, there is no evidence before me as to how the injuries have deprived him of the ability to participate in normal activities and thus to enjoy life to the full."*

[14] He further at para 21 states:

> *"...I make no award for pain and suffering during the period when William was unconscious. The injuries suffered by the Plaintiff in this case is far less serious than those suffered by the claimants in the above cases. I am of the view that the sum of $45,000.00 is fair for past pain and suffering and loss of amenities of life and also for future pain...*
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> *At para 23, he also states:*
>
> *"... his was a casual unskilled form of employment with no secure tenure..."*

[15] Doctor Arun Murari, Consultant Surgeon and head of Department Surgery, an expert witness the respondent called to give evidence

regarding permanent incapacity said (from pages 85 till 87 says) (doctor Murari's exhibit being Exhibit 5 page 8 of the supplementary records):

> *"Nerve injury recovering"*
>
> *"Right ear -at the time, damage to medium on the nerve of the ear. Could be reviewable. In most cases, as time passes, body heals itself"*
>
> *"Whether recovery— done"*
>
> *"Further recovery-little"*
>
> *"3% permanent incapacity" (full report exhibited as PE5)*
>
> *"Facial Neuro Palsy... It has recovered"*

[16] In the medical Dr Murari reported in PE5:

> *"...Since then he gradually improved and was discharged on 19 March 2008. On review on 18 April 2011 he complains of right sided headaches, hearing a constant whistling sound in his right ear (tinnitus), forgetfulness and a diminution in eyesight. His eyes have been examined by the ophthalmologist and he has been found to be myopic and astigmatic for which he needs glasses.*
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> *"For his headaches, forgetfulness and tinnitus he has been judged to have a whole body a permanent impairment of three (3%) percent."*

[17] In *Yanuca Islands* case, the plaintiff was awarded damages in the sum of $45,000 where the plaintiff suffered lacerations above right eyebrow, comminuted compound fracture of the left femur, puncture wounds on left thigh, lacerations on the left medical left knee and comminuted fracture of left patella. The injuries were treated by wound cleansing and suturing, daily dressing of the wound, antibiotics, skeletal fractions of the left femur with daily dressing internal fixation with K rod and internal fixation and wiring of fractured patella.

[18] The Master although found the injuries suffered by the plaintiff, in this case, is far less serious than suffered by claimants in the above case awarded $45,000 for past pain, suffering and loss of amenities of life and also future pain. As the injuries suffered by the plaintiffs is far less serious

than those suffered by the claimant in the above case and the respondent was hospitalized for about two weeks. I would accept, the appellant's contention that an order of $45,000 in the circumstances is exorbitant. In my opinion, considering the pain and suffering and loss of amenities of life and also for the future pain it would be appropriate and proportionate to award a sum of $25,000.00. The learned Master also awarded 6% interest on the sum from the date of the accident to the date of judgment (i.e. from 18 February 2008 to 23 May 2014). The learned Master rightfully granted interest at the rate of 6% from the date of the accident to the date of judgment. Therefore, the award of interest should not be disturbed.

Ground 3

[19] The appellant complains in ground 3 that the learned Master erred in law and in fact in awarding excessive damages of $66,000 for loss of earning capacity.

[20] The appellant submits that the award of $66,000 for loss of earning capacity is grossly high considering the permanent incapacity of 3% and in the light of the Doctor's evidence that the body would heal itself in most cases. However, on the other hand, the respondent submits that the sum of $66,000 awarded for loss of earning capacity is not excessive but should be increased and the respondent has filed cross-notice of appeal in this respect.

[21] When assessing the loss of earning capacity of the respondent the Master noted at paragraph 23 of this Ruling that:

> *"Courts hardly use a multiplier above 16. Although William was of a relatively young age at the time of the injuries, in this case, I consider 09 as appropriate considering that his was a casual unskilled form of employment with no secure tenure. As stated above, I consider William's weekly pay of $143. Hence my calculation under this head is:*
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> *Multiplier of 09 x $143 x 52 = $66,924.*

[22] In assessing the loss of earning capacity the Master has considered the respondent's wages as $143.00, the wages stated in the evidence of the respondent at the assessment hearing. The respondent's evidence was not challenged by the appellant at the assessment hearing as he failed to appear and contest the assessment proceedings. As the wages of the respondent was not challenged at the assessment hearing, the Master was entitled to consider the respondent's wages as $143.00 as the starting point in order to calculate the loss of earning capacity of the respondent. The Master appears to have taken the multiplier of 09 when assessing the loss of earning capacity which is, in my view is a bit high in view of the permanent incapacity of 3%. I would, therefore, apply a multiplier of 6 in the circumstances of the case. Accordingly, the respondent is entitled to recover the sum of $44,616.00 (Multiplier of 06 x $143 x 52 = $44,616.00).

[23] I would dismiss the respondent's cross-appeal to increase the award of loss of earning capacity, for it has no merits.

Ground 4

[24] The learned Master erred in law and in fact in awarding excessive damages of $8,000 to the respondents for medical cost and care when in fact in his own assessment he held that there was no or insufficient evidence produced by the respondents to support the claim for such award.

[25] In this regard, the appellant's contention is that $8,000 should not be allowed for future medical care in view of the fact that the respondent had not produced to court the necessary evidence in support of such a claim.

[26] According to the respondent, this award should not be disturbed as it can be safely assumed that the respondent will need at least painkillers. The respondent said in evidence before the Master that he was spending $10.00 per week for painkillers. The respondent was only 32 years of age on the date of assessment of damages.

[27] The Master at paragraph 33 of his Ruling states that:

> *"Notably, the medical reports record that William suffered tremendous loss of hearing and states that further auditory assessment is required and he may require the purchase of a hearing aid. No proper figures have been given to me as to the costs involved. William's evidence is also that his mother did take care of him for quite some time after he was discharged from hospital but there is no clear evince as to whether this is continuing to this day or will continue in future. However, I am prepared to take a nominal award of $8,000.00 (eight thousand dollars) under this head to over future medical costs and consultation fees and the purchase of a hearing aid as well as related incidentals such as travel/transport – as well as for the future purchase of pain killers".*

[28] In *Nasese Bus Company Ltd v Chand* decided on 8 February 2013 (unreported at paragraph 65-67, stated as follows:

> "[65]. *In a personal injury claim a plaintiff should provide in his pleadings (with an up to date amendment at the start of the trial) full details of his past loss of earning. There is also an obligation on the part of a plaintiff to particularize the facts upon which calculations for past loss of earnings have been made."*
>
> It made reference to case *Perestrello E Companhia Lititada v United Paint Co.* Ltd [1969] 3 All ER 479 the Court of Appeal at page 486 states:
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> *"The same principle gives rise to a Plaintiff's undoubted obligation to plead and particularize any item of damage which represents out-of-pocket expenses or loss of earnings, incurred prior to the trial and which is capable of substantially exact calculation. Such damage is commonly referred to a special damage or special damages but is no more than an example of damage which is "special" in the sense that fairness to the defendant requires that it be pleaded."*

[29] The Master appears to have awarded the sum of $8,000.00 as special damages for medical costs and care. This claim does not appear on the statement of claim. The Master found that there was no evidence produced by the respondent to support the claim for such award. The respondent did not plead such a claim in his statement of claim and adduce no evidence to support such a claim. In the circumstances, the Master should not have allowed this claim. I would, therefore, set aside the award of $8,000.00 for medical costs and care.

Ground 5

[30] The appellant challenges under this ground that the learned Master erred in law and in fact in awarding special damages in the sum of $905.00 when there was no or insufficient evidence produced to support such award and/or the said award was made contrary to the established common law principles relating to award of special damages.

[31] The appellant submits that the respondent has not tendered or exhibited all such as special damages which he sought and therefore, he was not entitled to such special damages.

[32] The respondent submitted that the respondent gave evidence as to how the sum of $905 was arrived at. (Page 85 of the record). It is common knowledge that people normally do not ask for receipts from Taxi drivers. Two trips in a taxi from Ba to Suva at $250 return is reasonable. 38 trips at $7.50 per trip from Ba to Lautoka is also reasonable. The respondent needed diapers and he has claimed for 4 packs at $30 per pack. The total sum of $905 claimed for special damages is reasonable.

[33] The learned Master at paragraph 34 of his Ruling states:

"William claims $905 in his special damages which I accept".

[34] The respondent had pleaded and provided particulars of special damages and he gave evidence in this regard at the assessment hearing. There was unchallenged evidence before the Master in relation to special damages. As his evidence was unchallenged there was no necessity for the respondent to produce receipts for special damages he claimed, which included transport and diapers. I am of the opinion that the Master was entitled to accept the respondent's evidence and award

special damages as claimed. Award of this claim need not to be disturbed. I do not intend to upset the 3% interest awarded on this claim.

Ground 6

[35] In that ground, the respondent says the Master erred in law and in fact in awarding excessive costs of $1,500 to the respondent. This ground has no merits. The award of cost of $1,500 was reasonable in the circumstances of the case.

Ground 7

[36] This ground was not argued before me. Therefore, further discussion is not necessary on ground 7.

Conclusion

[37] For all these reasons, I would allow the appeal, in part. I set aside the award of $137,245.00 allowed by the Master. Instead, I enter the following award in its place.

Pain & Suffering 6% interest from date of accident to date of judgment (i.e. from 18 February 2008 to 23 May 2014)	**$25,000** (i.e. $1,500 x 6 = **$9,000**)
Loss of Earnings	Multiplier of 6 x $143 x 52 = **$44,616**
Special damages	**$905.00**
Future Medical Costs & Care	Not allowed
3% interest on special damages	(i.e. 27.15 x 6 = **$162.90**)
TOTAL	**$79,683.90**
Plus Costs	**$1,500.00**

[38] There will be no order as to costs of this appeal.

Final Orders

1. Appeal allowed, in part.

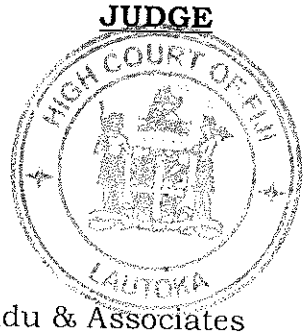
2. Award of $137,245.00 granted by the Master is set aside. Instead, an award of $79,683.90 with costs of $1,500.00 is entered.

3. No order as to costs of this appeal.

.....15/9/17.....

M. H. Mohamed Ajmeer

JUDGE



At Lautoka

18 September 2017

Solicitors:

For Appellant; M/s Vijay Naidu & Associates

For Respondent; M/s Chaudhary & Associates