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

CIVIL ACTION No. HBC 132/2014

BETWEEN	**SWARAN LATA** of Vatulaulau, Ba Domestic Duties as the administratrix of the estate of NISCHAL PRATAP late of Vatulaulau. **PLAINTIFF**
AND	**KUNAL KRITESH NAND** of Kumkum, Ba Driver **FIRST DEFENDANT**
AND	**LAL'S DIGGING WORKS LIMITED** having its registered office at Yash Law, Barristers & Solicitors, Vitogo Parade, Lautoka **SECOND DEFENDANT**
APPEARANCES :	Mr Patel & Mr Padarath for the Plaintiff Mr Nand (self -represented) for the First Defendant Ms Shafiq for the Second Defendant
DATE OF HEARING :	4th August 2020
DATE OF JUDGMENT :	22nd September 2020

DECISION

1 This action was commenced by the plaintiff in August 2014 by writ of summons seeking damages for and in respect of the death of her son Nischal Pratap in 2011 as a result of injuries he had suffered when hit by a car driven by the first defendant, who at the time, it is said, was employed by the second defendant.

2. When the proceeding were commenced the named second defendant was the Fiji Sugar Corporation Ltd (*FSC*), which was shown in the register of motor vehicle at the time as the owner of the vehicle that was involved in the incident. FSC issued a Third Party claim against Lal's Digging Works Ltd, to which it said it had sold the vehicle prior to the accident. In due course the plaintiff discontinued her claim against FSC and substituted Lal's Digging Works Ltd and the matter is now said to be ready for hearing, once the matter which is the subject of this decision is resolved.

3. The original writ of summons was served on the first defendant, Mr Nand on 21 August 2014, and Mr Nand signed an acknowledgement of service on his own account dated 27 September 2014 (although the acknowledgement is said to have been filed in court on 28 August).

4. In the plaintiff's statement of claim she sought:

i. Special damages (for funeral expenses) of $3,000.00
ii. Damages under the Compensation to Relatives Act 1920 for the benefit of the family of the deceased.
iii. Damages under the Law Reform (Miscellaneous Provision) (Death and Interest) Act 1935
iv. Interest at 6% per annum from the date of the accident to the date of judgment under the Law Reform (Miscellaneous Provisions)(Death and Interest) Act 1935
v. Costs.

5. On 28 January 2015 the plaintiff entered a default judgment against the first defendant, in the absence of a statement of defence, for the amount of special damages ($3,000), plus interlocutory judgment on each of the claims referred to in paragraph 4(ii) & (iii) above. Judgment for the special damages was entered on the basis that the claim for them was for a liquidated amount.

6. In the present application the first defendant seeks to have that judgment set aside. The application (filed by him on his own account, although obviously with some advice) was filed on 9 March 2020, and is supported by an affidavit by the first defendant sworn on the same date. The affidavit explains that when first served with the writ of summons in 2014 he instructed a Mr Mark Anthony and paid him $800.00 (at the hearing Mr Nand produced a copy of a receipt dated 10 September 2014 for $300.00 for money paid to solicitors in Lautoka, which corroborates this account to some extent). He says that Mr Anthony told him that he would file a defence. Mr Anthony also told him, the first defendant says, that if he was discharged of the traffic offence with which he was charged following the accident, the plaintiff would not be able to obtain judgment against him. His affidavit goes on to say:

> *8 That I verily believe that I have a meritorious defence to plead before this honourable court, if the default judgment is set aside and I be allowed by this court to file my statement of defence within 14 days.*
> *9. That the default judgment which has been entered against me is for unliquidated amount and has not been assessed by the honourable court till to date.*
> *10. That I was actually discharged by the Ba Magistrates Court on the 12th of September 2018 . (Annexed is a copy of the said judgment which is marked and referred to as Annexure 'A').*
> *11. That I also believe that as per the Constitution of Fiji, I have the right to fair trial in this matter.*
> *12. That upon doing the search and coming to know that default judgment has been entered in this matter, I immediately enquired with other solicitors the cost of making the application and the scale for the cost was high therefore I did not made this application with the appropriate time.*
> *13 That I am a small farmer just earning enough to feed my family and I am spending a lot as one of my children is sickly. (Annexed is a copy of the said judgment which is marked and referred to as Annexure 'B').*
> *14 That I verily believe that if the Default judgment is set aside, it will not have any prejudicial effect on the plaintiff and the second defendant as well because they are aware that I have been discharged in the traffic offence.*

7. Annexure A of the first defendant's affidavit shows that on 26 March 2018 the charge of dangerous occasioning death (under section 97(2)(c) Land Transport Act 1998) was withdrawn and the first defendant was discharged under section 169(2)(b)(ii) Criminal Procedure Act 2009. This section does not operate as a bar to subsequent proceedings against the first defendant. Annexure B was a medical report from the Department of Paediatrics, Lautoka Hospital dated 2 March 2012 that appears to confirm that the subject of the report, born on 10 July 2011 suffers from the medical conditions described in the report.

8. At the court's direction the first defendant also filed a draft statement of defence, so that we could see what his defence would be, if judgment is set aside. This again indicates that the first defendant has had some advice in preparing this, but is not particularly enlightening about the basis of the first defendant's defence, except that it denies negligence on his part. Curiously, while the first defendant admits to driving the vehicle which was alleged by the plaintiff to be involved in the 'accident' with the deceased, and admits that he was doing so in the course of his employment by the second defendant (which may be a useful admission from the plaintiff's perspective – the second defendant denies this), he denies that the vehicle was involved in an accident. The draft statement of defence does not allege contributory negligence on the part of the deceased, or that there was any other factor in the 'accident' that suggests that he was not negligent.

9. Also relevant background is the fact that although judgment was entered against the first defendant in January 2015, the plaintiff applied for and obtained leave of the court on 15 August 2018 to add the now second defendant, and to file and serve an amended statement of claim. The minute of the judge who dealt with that application notes the attendance of the first defendant in court (it seems that the first defendant has diligently attended court at most if not all the stages of the proceedings). The minute of 15 August 2018 records the following orders/directions:

- *... the driver who was the 1st defendant and 2nd named third party will remain as 1st defendant.*
- *the company Lal's Digging Works Ltd is added as a 2nd defendant.*
- *plaintiff shall file the amended statement of claim within 21 days and have it served on both the defendants*
- *both defendants shall appear through solicitors or in person. They are advised to retain solicitors.*
- *defendants will file the statement of defence in 21 days after the service of the amended statement of claim*
- *this order shall be served on the defendants within 21 days*
- *costs in the cause*
- *mention 27/9/18.*

10. However, notwithstanding the terms of this direction, the order that was sealed (and presumably served) did not incorporate the directions other than the second, third and final items listed in the judge's minute.

11 In due course (albeit not within 21 days as directed) the plaintiff filed and served its amended statement of claim, now alleging that the first defendant was employed by the new second defendant, rather than by FSC. When the matter was called on the 27th September 2018 as directed, the first defendant attended again, and the court made a direction as follows:

21 days given for both defendants to file amended statement of defence.

When the matter was next called for mention on 19 October 2018 the judge noted that the first defendant had applied for legal aid, and the case was adjourned to 20 November 2018. At that date the first defendant again appeared and indicated that he was still waiting for the outcome of his application for legal aid. There was no objection by the plaintiff to him having more time for this although the court did direct that the first defendant was to appear on the next mention date (23 January 2019) with counsel. There is no record in any of these minutes of the plaintiff relying on its judgment of January 2015.

12 When the matter was next called on 23 January counsel from the Legal Aid Office appeared for the first defendant. He indicated that the office needed to get approval from Suva, and that if approval to act was given sought leave to file a statement of defence and notice of appointment. The court allowed a further 21 days for this, and the matter was adjourned for mention to 13 February 2019.

13. Again on that date counsel from the Legal Aid office attended and asked for more time. There was again no objection from the plaintiff (and no reference to the judgment), and the judge adjourned the matter again to 8 March 2019. The same thing happened on that date, but this time (again without objection by the plaintiff) the court indicated that this was to be a final adjournment for 14 days to 25 March.

14 When the matter was called on 25 March (before a different High Court judge, Mackie J having left the bench) there was no longer any reference to legal aid, although the first defendant continued to appear on each occasion. It is my understanding, as a result of what I was told from the bar, that legal aid had been declined because judgment had already been entered against the first defendant. Thereafter the new second defendant completed discovery, there was a pre-trial conference (only between representatives of the plaintiff and the second defendant) and the matter eventually came before me in September 2019 with the parties seeking a hearing date. The case was set down for trial on 16 March 2020. On the 9th March, a week before trial, the first defendant filed his application to set aside judgment and his affidavit in support. I set the application down for hearing on 20 March, and adjourned the trial to 30 April. Unfortunately the Covid 19 lockdown and restrictions intervened, and neither of these hearing dates were possible. In due course, once court resumed and I was again able to sit, the first defendant's application was heard before me on 4 August. A new trial date has not been set pending the outcome of this application.

15 I have set out the history because it illustrates a number of things about the lead-up to this hearing that I think are important. The first is that the first defendant has

continued to diligently attend court on every occasion that the matter has been called, not only when he was obliged to do so by a witness summons. The second is that in spite of the fact that judgment had been entered against him the court, at the time of the amended statement of claim without objection from the plaintiff, allowed time for the first defendant to get legal aid, and to file a statement of defence. I can only assume that it was contemplated that the amended statement of claim meant that the earlier entry of judgment no longer had any significance, given the significant amendments to the plaintiff's claim. A third matter that I think is important to note is that, except in connection with the present application, the first defendant has not been responsible for the delays in the resolution of this matter since it was filed in 2014. A number of factors have contributed to these delays, including matters that were outside the parties control, including the retirement of Justice Mackie in early 2019 when the case was otherwise ready for hearing, and the intervention of Covid 19 in 2020 (resulting in the closure of the courts and my unavailability for a period). Otherwise the conduct of the claim has been in the control of the plaintiff and her representatives, and a good part of the delay has centred around the fact that the claim was set down for trial when FSC was still a party, only to have the plaintiff concede that she could not succeed against FSC and would have to join the third party Lal's Digging Works Ltd as party to enable her to succeed against the owner of the vehicle (who presumably is insured). The first defendant is therefore not solely responsible for the delays in resolving this matter, and the delays created by him are relatively insignificant in the history of the proceedings.

The legal principles to be applied

16. The law on applications to set aside default judgments is well documented and oft repeated. The plaintiff's submissions in response to the present application fairly and responsibly refer to the main cases. Where judgment has been properly entered (i.e. where there is no suggestion of irregularity of judgment) the court, in the exercise of its discretion to set the judgment aside, will have regard to the following:

- whether the defendant has a substantial defence
- is the delay in filing a defence reasonably explained
- will the plaintiff will suffer irreparable prejudice if the judgment is set aside.

But it is clear that these are guidelines only, not rules that must each be thoroughly satisfied. As the Federal Court of Australia noted in **Davies v Pagett** (1986) 10 FCR 226 at 232 after a comprehensive analysis of the cases:

> *The fundamental duty of the Court is to do justice between the parties. It is, in turn, fundamental to that duty that the parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. Any limitation upon that opportunity will generally be justified only by the necessity to avoid prejudice to the interests of some other party, occasioned by misconduct, in the case, of the party upon whom the limitation is sought to be imposed. The temptation to impose a limitation through motives of professional discipline or general deterrence is readily understandable; but, in our opinion it is an erroneous exercise of the relevant discretion to yield to that temptation. The problem of delays in the courts,*

egregious as it is, must be dealt with in other ways: for example, by disciplinary actions against offending practitioners and by a comprehensive system of directions hearings or other pre-trial procedures which enable the Court to supervise progress - and, more pertinently, non-progress - in all actions.

In the final analysis the question that the court must answer is what does the need to do justice between the parties require. It will seldom accord with justice (in which the process by which decisions are reached is as important as the decisions themselves – *Not only must justice be done, it must also be seen to be done*[1]) to refuse a party the opportunity to present its defence. Although it is also said that *Justice delayed is justice denied,* and as Chief Justice of the United States Warren E. Burger noted in an address to the American Bar Association in August 1970:

> *A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society:*
>
> - *that people come to believe that inefficiency and delay will drain even a just judgment of its value;*
> - *that people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and over-reaching;*
> - *that people come to believe the law – in the larger sense – cannot fulfill its primary function to protect them and their families in their homes, at their work, and on the public streets.*

in recognising and honouring the essential truth of these ideas, just as important as giving an aggrieved party access to appropriate remedies in a timely way, is to give those against whom judgment may ultimately be entered a fair opportunity to answer the claims against them before a decision is made. This includes not disproportionately punishing them for what may be ignorant, inadvertent or careless failure to observe time limits, or to take opportunities to present their defence. Where excusing such failures causes true hardship for an innocent participant who is entitled to judgment, the court in the exercise of its discretion will usually decline to set aside judgment, but it is not doing justice to allow a party to retain the benefits of an unwarranted judgment because of a relatively minor default on the part of an opponent. Nor should it be forgotten that it often takes a full trial to properly determine where the merits of a dispute lie.

17. Because in the present case the first defendant has not, perhaps understandably since he represents himself and is not a lawyer, set out with any degree of precision the basis of his defence, I have also looked at those cases that deal with the level to which a party seeking to set aside judgment must show that he has a good defence. It is clear that the bar is not particularly high. In ***Burns v. Kondel*** [1971] 1 Lloyds Rep 554, at 555, Lord Denning, MR said:

> *We all know that in the ordinary way the Court does not set aside a judgment in default unless there is an affidavit showing a defence on the merits. That does not mean that the defendant must show a good defence on the merits. He need only show a defence which discloses an arguable or triable issue.*

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[1] Lord Hewart CJ in **R v Sussex Justices, ex parte McCarthy** [1924] KB 256 (talking in that case about the recusal of judges where there might otherwise be a perception of bias or predetermination)

18. Counsel for the plaintiff, in opposing the first defendant's application, has referred me to a number of decisions, including two decisions of the Fiji Court of Appeal in which the court has reversed on appeal orders setting aside judgment entered by default against defendants who had failed to take timely steps to oppose the claims against them, essentially in both cases because the court was not satisfied that the defendants had an arguable defence. The cases referred to were **Pankaj Bamola & anor v Moran Ali** (unreported, 18 June 1992, Civil Appeal No. 50 of 1990) and **Wearsmart Textiles Ltd v General Machinery Hire Ltd** [1998] FJCA 26. The first of these cases involved an alleged trespasser against whom judgment had been entered that he vacate the property on which he was living. He claimed to have been a tenant of the plaintiff's predecessor in title. The Court of Appeal was satisfied that this, even if established, would not provide a defence to the claim for possession by the plaintiff, whose ownership of the land was not challenged. In the second case, **Wearsmart,** the plaintiff's claim was for defamation. The court concluded that the defendant had no defence on the merits, but did allow the defendant to contest the amount of damages when that issue arose for trial.

Analysis

19. Although this issue was not raised by the first defendant in support of his application to set aside judgment, and therefore has not been a factor in my eventual decision, I do not agree that the plaintiff was entitled to enter judgment for the amount of $3,000 claimed for funeral expenses on the basis that it is a 'liquidated demand' under Order 13, rule 1 – it is not.

20. A 'liquidated demand' is not merely a fixed amount of money. If that were the case any plaintiff would be able, by specifying the amount claimed (however outrageous that claim might be) to enter judgment by default for the amount whenever there is a failure to file a defence. That is not the law. Nor is it the law that any losses that are defined, such as funeral expenses, medical expenses, loss of wages, travel costs etc which may be claimed as special damages, are 'liquidated demands' in the sense intended by this rule. Instead the term refers to a demand where the amount for which the defendant is said to be liable has already been agreed to and therefore does not need to be proved. This agreement (i.e. agreement by the defendant as to the proper amount due) may, by way of example, be a loan agreement (in so far as it relates to the principal of the loan, but not interest – except perhaps a fixed interest amount as opposed to a calculation), an agreement for the supply of goods or services (in so far as it refers to a claim for the agreed purchase price), or a lease or tenancy (in so far as it claims rent for a specified period or periods).

21. The Fiji Court of Appeal in **Charan v National Insurance Co. Ltd** [1999] FJCA 40, although it relates to an insurance claim, upheld the principle that the key to whether an amount is liquidated or not is an agreement between the parties as to the amount for which the defendant is liable. If the amount, as opposed to the agreement to pay the amount, must be proved, the claim is not a liquidated demand. In the present case the statement of claim did not, and could not have, pleaded an agreement on the part of the first defendant to pay the funeral

expenses, let alone an agreement to pay $3,000 for the funeral. Both the first defendant's liability for, and the amount of the funeral expenses were matters that still needed to be proved by the plaintiff.

22. However the basis for this decision is not the irregular entry of judgment for the funeral expenses, but because - although his explanation for the delays is not particularly convincing (I am referring here to the extent of the delays, rather than the initial failure to file a defence), and the strength and merits of his defence are not clear - I am satisfied that the first defendant should be given the opportunity to present his defence, and allowing him to do so will not cause injustice to the plaintiff.

23. As to the initial failure to file a defence, I have no reason to doubt what the first defendant says about his instruction and payment to a solicitor, and the advice he was given. At the point when the plaintiff made substantial changes to her claim, it seems that it was accepted by all parties that the first defendant should be entitled to defend that amended claim, albeit that he could not obtain the assistance of Legal Aid to do so, apparently because Legal Aid took the view that it was too late - judgment had already been entered against him by the plaintiff.

24. Although there is some uncertainty about the substance of the first defendant's defence to the claim I think that there is an important distinction to be drawn between a claim for negligence as a result of a road accident, and the cases dealt with by the Court of Appeal referred to above. In those cases, the Court was able to say on the basis of the facts disclosed that the defendants had no arguable defence to the claims for possession (**Bamola**) and defamation (**Wearsmart**). In the present case I do not feel able to say with any assurance that the first defendant has no defence. He denies negligence, and the evidence of the abandonment of the driving charge provides some (although not unambiguous) support for the possibility that he was not at fault. The plaintiff argues (in reliance on the decision of the High Court in **Lata v Valacegu** [2017] FJHC 91) that the withdrawal of the criminal charge against the first defendant is not decisive of the issue which is relevant in this proceeding, i.e. whether the first defendant was negligent (that was a case in which a defendant alleged to be vicariously liable for the actions the driver of a vehicle involved in a collision, sought to strike out the claim against it on the basis of the acquittal of the driver of the criminal charges against him. The court dismissed the striking out application, ruling that the acquittal did not mean that the driver was not negligent). I agree with this submission, and – with respect – to the decision of the Court in **Lata**, but while the withdrawal of the charges against him do not mean that the first defendant here was not negligent, it at least suggests (particularly in the absence of any explanation for the withdrawal) either that he may not have been at fault, or that there is a lack of evidence to establish that he was negligent.

25. On the issue of prejudice, the plaintiff does not argue that there is any particular prejudice to her from setting aside judgment, apart from the additional delay in bringing the matter to trial. This is a proceeding that was filed in 2014 and arises from a motor vehicle incident that occurred in 2011. It is true that the delay on the part of the first defendant in filing this application, and the resulting delay –

exacerbated by the intervention of the Covid pandemic in 2020 – to the trial of the claim, are regrettable to say the least. But the first defendant's conduct has not been the only, or even the main reason, for the many delays in bringing these proceedings to trial. The plaintiff's own conduct (or that of her representatives) has been an important contributing factor to those delays. Furthermore, I am not convinced either that setting aside judgment will cause delays that are additional to those that have already occurred, or that there is any real disadvantage to the plaintiff if judgment is set aside against the first defendant. As to the first, any steps that result from the setting aside of judgment can be managed by imposing strict time limits, and in any case can be accommodated within the time before there is hearing time available (likely now to be after March 2021). As to the second, the fact that the plaintiff has judgment against the first defendant does not bind the second defendant, or relieve the plaintiff of the need to prove the negligence of the first defendant if it is to obtain judgment against the second defendant. Setting aside judgment against the first defendant will not therefore add to the length of the trial, or change it in any significant way except perhaps precluding the rather risky possibility of the plaintiff calling upon the first defendant to provide evidence in support of her claim against the second defendant.

26. Taking into account all these factors I have decided that the default judgment entered by the plaintiff against the first defendant on 28 January 2015 should be set aside, and I so order. Since this application was necessitated by the first defendant's failure to file a defence in a timely way, I award costs in favour of the plaintiff against the first defendant in the sum of $500.00, which is to be paid by him within 21 days of the date of this decision.

27. The first defendant is to file and serve his statement of defence within 21 days of the date of this decision. The matter is adjourned for mention to the 14th day of October 2020 to enable the matter to be timetabled for hearing as soon as possible.

HIGH COURT OF FIJI
LAUTOKA

A.G. Stuart
Judge

At Lautoka this 22nd day of September, 2020

SOLICITORS:
Samuel K Ram, Solicitors, Ba – Plaintiff
First Defendant – self-represented
MY Law, Solicitors, Ba – Second Defendant