IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

AT LAUTOKA

Civil Jurisdiction

Civil Action No. 127 of 1978

BETWEEN: RAMESH SINGH s/o Mohan Singh Plaintiff

A N D : SUBHAMYA NAIDU f/n unknown Defendants
& Anor

Mr. Gordon Counsel for Plaintiff

Mr. G.P. Shankar Counsel for Defendants

JUDGMENT

This action arises out of an accident on Queen's Road just beyond Lautoka boundary in the Nadi direction near Field Forty junction which is on the left-hand side facing Nadi.

On 9.9.77 the plaintiff was driving a small Dhaitsu mini-type van which he used unofficially as a taxi in the direction of Nadi. He had a fare paying passenger P.W.5, ABDUL SHAKUR. He was involved in a head on crash with the second defendant who was driving a Toyota pick-up owned by his daughter the first defendant from the direction of Nadi. Both motor vehicles were total losses and the parties received injuries.

The plaintiff received a fracture of the right thigh and compound fractures of the right tibia and fibula.

The original joint defence dated 24/5/79 denied negligence and attributed the accident entirely to the negligence of the plaintiff. There were no counter claim. In an amended joint defence there was a counter claim for loss of the Toyota pick-up and an allegation of injury to the face of defendant 2 just below the left eye.

A police sketch plan put in by P.W.1, a police constable who visited the scene of the accident showed that the defendant's pick-up AO 781 came to rest almost broadside on across the centre of the road. Its front end was 7' from its offside of the road and its rear end was 9' from its nearside edge. The road is shown as 37' wide.

The plaintiff's van AK918 was overturned and lying in the cane field on its left-hand side of the road.

There is extreme conflict of evidence as to how the accident occured. The plaintiff and his witnesses allege that the second defendant pulled out to his wrongside in order to overtake a stationary taxi and collided with the plaintiff who was on his correct side. The defendant 2 denies that there was any taxi near the scene and alleges that the plaintiff lost control of his little van swerved to his offside collided with the 2nd defendant and then bounced over to its correct side and tumbled into the cane field. One side or the other is committing blatant perjury.

Accordingly I must endeavour to arrive at the truth by a close examination of all the evidence.

The plaintiff's independent witness P.W.3, Narsinlu, owns a cane farm in the immediate vicinity and adjoining Queen's Road. He is 61 years of age and sirdar of the local cane cutting gang. He was waiting by the Field Forty junction for the arrival of a cane train so that he could hand to its crew a ticket relating to loaded cane trucks to be hauled to Lautoka cane mill. In a bus shelter on the opposite side of the road he saw a man sitting. After a while he noticed the plaintiff's van approaching from Lautoka at a speed which he estimated at 30 m.p.h. At the same time a taxi approached from the direction of Nadi followed by the defendant's pick-up. The taxi stopped in response to a signal from the man who had been in the bus shelter and the second defendant cut out to overtake the taxi. At that instant the plaintiff's van was on its correct side and almost level with the taxi and the vehicles collided head on. The taxi moved off apparently at the instant of impact. He says the defendant's van came on to its wrong side of the white line at the time of the collision and he described how the plaintiff's van went up into the air and fell on to its side and how its passenger P.W.5 being thrown clear. P.W.3, Narsinlu, described how he and his gang freed the plaintiff from his van with aid of a crow-bar.

The independent defence witness was D.W.1 KRISHNA NAIDU, a laundry man employed at Lautoka hospital, who had finished work at 3.30 p.m. and had been visiting friends in the Natabua area. He stated that he was at a scene waiting for a bus to Lomolomo when the accident occurred. He supported the defendant's version of the accident stating that the plaintiff's van came over to its incorrect side, hit the defendant's van which was on its correct side, careered back to its correct side and fell over into the cane field on its left hand side of the road. He declared

that there was no taxi in the vicinity and stated that any reference to it was a fabrication.

The defendant 2 in his evidence said that he ha d seen the plaintiff's erratic driving and had reduced his own speed to 10 m.p.h. prior to the collision. In cross-examination he said his speed was probably 7 m.p.h. at the moment of impact.

I prefer the plaintiff's version of the accident for the following reasons.

His account of how it occurred is a more likely version. I appreciate the motor vehicles do get out of control and can involve others in an accident. Nevertheless it is strange that in daylight two vehicles are approaching each other on a straight road with no intervening obstacles or traffic. One of them gets out of control and does not run off the road on one side or the other but collides with the only vehicle in its immediate vicinity. That version in itself is more improbable than that of a motor vehicle overtaking another and thus colliding with an on-coming vehicle. Motor vehicles are always overtaking; it is a hazard which is happening all over Fiji at all times. On the other hand motor vehicles are not frequently running completely out of control and when they do so they often avoid colliding with other vehicles.

There is in my opinion further support for the overtaking version of the plaintiff from the condition of the vehicles after the collision. They were both written off. The plaintiff's van was a light mini Dhaitsu van. The extensive damage done to both vehicles suggests a considerable impact created by the combined momentum of both vehicles. According to the defendant 2 his speed was 7 m.p.h. at the moment of impact and his momentum could not have been great if his evidence were true. Therefore, according to the second defendant it was almost entirely the momentum of the plaintiff's mini van which caused the extensive damage to both vehicles. However, there is no evidence from the defence that the plaintiff's van was travelling at very high speed. I think that at the time of the accident both vehicles would probably be travelling at normal speeds to create the combined momentums required to cause such extensive damage.

If the 2nd defendant was travelling on his left-hand side at a more 7 m.p.h. and was struck head on by an approaching vehicle which was travelling fairly fast it would tend to push him backwards or at least halt him on his own side of the road. However, the 2nd

defendant's car moved from its own side and finished partly over the white centre line. It is unlikely that the plaintiff's van could have dragged it across the road and even more unlikely that it could have knocked it there. The 2nd defendant says that the left side of his car received the brunt of the impact. In that case one would expect the defendant 2's car to be pushed round to the left but it swung round to the right finishing up at right angles to its original course.

The police officer's plan indicates a quantity of broken headlamp glass lying on the second defendant's offside of the white centre line. Whilst the broken glass is unlikely to indicate the exact point of impact between two vehicles which were in motion it is likely that if the accident happened on defendant 2's side of the road that the broken glass would be found on that side. The position of the broken glass suggests that the collision occurred on the 2nd defendant's wrong side of the road.

My deductions point to the inaccuracy of the account given by the defendant 2 and his witness.

On the other hand the location of the broken glass suggests that the plaintiff was on his proper side of the road when the accident occurred.

The final position of the plaintiff's van, 6' beyond the left hand side of the tar-sealed road suggests that it was more likely to have been on its left-hand side just before the accident than right over on to its right hand side.

The original statement of defence simply denied negligence on the part of the defendant no. 2 and alleged that it was the plaintiff who was negligent. It was filed on 24.5.79. Then on 25.1.80 leave was granted to amend the S. of D. by setting out injuries received by defendant No. 1, daughter of the 2nd defendant and the owner of the pick-up, amounting to shock and bruising for which she was treated at Lautoka hospital but not detained. The amendment also alleged facial laceration to defendant 2 with specialist treatment in Australia costing $1600 inclusive of air fares and rented accommodation. Defendant 2 also claimed $3,500 the value of the Toyota pick-up. Of course that item of damage should have been counter-claimed by the first defendant Subhanna Naidu.

Subhanna Naidu does not seem to have attended the hearing. She did not give evidence.

In the light of the amended defence showing that defendant 1 was a passenger in the car the evidence of defendant 2, D.W.3, reads very strangely and I quote from the record.

"On 9.9.77 I drove A0781. It is "owned by Subhamna (deft.No.1) my daughter. She was not in the car."

Although the deft. 2 mentioned his own admission to Lautoka hospital he made no reference to his daughter's (deft.No.1) going to the hospital.

That rather serious conflict between the counter-claim in the joint statement of defence and deft. 2's evidence reflects upon his credibility and persuades me that my analysis of the evidence showing that the deft. 2 was wholly to blame is probably correct. The counter-claim fails.

I turn now to consider the quantum of damages to be awarded to the plaintiff for the negligence of the deft. 2 as servant or agent of deft. No. 1.

The plaintiff is 36 years of age and a carpenter. There is nothing to suggest that he enjoyed other than good health at the time of the accident. He is married and has 4 children below the age of 15 years. He had worked for various employers including Northern Furniture Ltd. and his nett earnings were about $38 per week. From time to time he has suffered periods of unemployment and at the time of the accident he was not in employment. As a result of the accident he cannot do the class of work he used to do and gets a lower rate of pay when he is employed. As an off job man for anyone who engages him he can earn about $7.00 per day but sometimes he has to take on work as a farm labourer at $4.00 per day. Those figures do not help much in assessing his loss of earning capacity. But he did say that before the accident his rate was $1.10 an hour and afterwards it was 0.94 cents an hour i.e. a drop of 16 cents an hour. Based on a 44 hr. week that would represent a loss of $7.00 per week in earning capacity. Using a multiplier of 15 I find that if he were constantly employed, his overall loss of earning capacity due to his injuries would probably be $(15 x 52 x 7) $5,460. However, his own evidence shows that he was not always in regular employment. I estimate periods of unemployment to average out at about 20% of his available time and therefore assess his future loss of income at $4,400.

His left leg shortened by about ¾" and he cannot put pressure on it e.g. in digging.

His condition in hospital was such that for the first 16 days he was in the intensive care unit. He was in hospital from 9.9.77 till 21.10.77 and an out-patient until 21.7.78. There is possibility of his developing arthritis. Dr. Wellby said he would be unable to work for 8 months following the accident. The S. of C. prays for loss of earnings of $100 per month but does not set out the period time during which the plaintiff was out of employment as a result of the injury. The evidence shows that he was not employed at the time but he was obviously filling in the gap by operating an illegal taxi. It is apparent that he is a man who is not loathe to direct his energies to any useful form of employment and I consider that a claim for $100.00 per month is not excessive. In full employment as a carpenter he could have been earning $160 per month nett. I award him $(8 x 100) under that head of special damage = $800.00.

I allow his claim of $100.00 for hospital and travelling and $2,000 for the value of his van which was not seriously contested.

Thus the special damages total $(800 + 100 + 2000) = $2,900.

There is now the claim for pain, suffering, deformity of the leg, loss of amenities and the general reduction of overall facility. He did have pain killing injections for about 2 weeks and continued to have a great deal of discomfort. The plaster was removed from his leg on 4/1/78. Metal pins or a pin were used to help unite the fractures. I am inclined to the view that these items of general damage will be sufficiently compensated by an award of $4,250. The total then is $(4,250 + 4,400 + 2,900) = $11,550.

There will be judgment for the plaintiff as against both defendants for the sum of $11,550 on the plaintiff's claim. Costs to be taxed in the plaintiff's favour on the claim and counter-claim.

LAUTOKA

15 February, 1980.

(Sgd.) (J.T. Williams)

JUDGE