

**IN THE COURT OF APPEAL, FIJI ISLANDS**  
**AT SUVA**

*(On Appeal from the High Court of  
Fiji)*

**CIVIL APPEAL NO. ABU0054 OF 2006**

**BETWEEN** : **VATUKOULA JOINT VENTURE &  
EMPEROR GOLD MINING CO. LTD.**

*Appellants*

**AND** : **MUNI DEO s/o Chinmun Sami** *Respondent*

**Coram** : Byrne, J.A.  
Pathik, J.A.  
Shameem, J.A.

**Counsel** : Dr M S Sahu Khan for the Appellants  
Mr H A Shah for the Respondent

**Date of Hearing:** 12<sup>th</sup> February 2008

**Date of Judgment** 12<sup>th</sup> March 2008

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***J U D G M E N T***  
*of Byrne, J.A. and Shameem, J.A.*

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[1] This is an appeal from a judgment of the High Court at Lautoka (Finnigan J) given on the 12<sup>th</sup> of May 2006 in which the Judge awarded the Respondent a total of \$92,389.60 for general damages, loss of earning capacity

and interest and costs of \$1,000.00 making a total of \$93,389.60.

- [2] It was a claim for personal injuries and was brought by a former workman against his former employer for injuries suffered during the course of his employment.
- [3] The cause of action arose in June 1994. The Respondent then was aged 36. The action was initially filed in the Suva registry in July 1995 but was transferred to Lautoka in 1997. Thereafter it took a very leisurely course. The other main actor in the event, died. The facts which were not denied by the Appellants at trial were as follows:

The Respondent (*hereinafter referred to as the Plaintiff*) was an electrician and had been employed by the Appellants for about 18 months until he had an accident at work on the 6<sup>th</sup> of June 1994. There was a device called a "*field coil*", a 'U'-shaped device situated in a tower over 100feet above the ground in the Smith Shaft at the Vatukoula Mine. Alongside it was a thick steel vertical cable attached to a cage which moved the cage up and down. There was also a communication system within the shaft and this was all underground. Following instructions to replace the coil, the Plaintiff was dismantling it when the steel cable alongside started

moving, trapped his left leg and hoisted him upwards above the platform on which he was working to where the cable passed around a very large steel wheel carrying the Plaintiff partway around the wheel with his foot between the cable and wheel under the cable. His foot then left the wheel and he fell backward onto the platform. His left foot had been chewed up by the cable and the steel wheel. Just above the site of the field coil the cable ran around a large sheeve wheel, over an arc of 45 degrees, so that the cable changed direction from vertical to horizontal. It was around that 45 degree arc that the Plaintiff's foot travelled.

- [4] Immediately after the accident the Plaintiff was taken to the Vatukoula Gold Mine Dispensary and was then flown by helicopter to Lautoka Hospital as an emergency case. He was admitted to the hospital. His left foot was so badly injured that traumatic amputation of the left forefoot was carried out.
  
- [5] The Plaintiff remained an inpatient at the hospital until 5<sup>th</sup> July, 1994 and was thereafter seen regularly in the Orthopaedic clinic. He attended hospital until March 1995.

- [6] His disability has been assessed at 30% pursuant to the provisions of the Workmen's Compensation Act.
- [7] He is now unable to work as an electrician, is unable to stand for any length of time, cannot climb ladders which he had to do as an electrician, and his left leg remains painful.
- [8] Various particulars of common law negligence were given in the statement of claim including three which were obviously relevant if the Judge were to accept the Plaintiff's claim. These related to the winder. It was alleged that the Appellants (*Defendants*) caused or permitted the operator of the winder to switch it on without giving any or any adequate warning to the Plaintiff when they knew or ought to have known that the Plaintiff was installing the 'U' coil. It was also alleged that the Defendants failed to take any or any adequate measures to ensure that while the Plaintiff was working on the headframe changing the coil, no one switched on the winder.
- [9] The Plaintiff then pleaded statutory negligence against the Defendants and relied on various Regulations under the Mining Act. Those most relevant here are 108 and 147.

[10] Regulation 108 requires the manager of a Mine to provide for the safety and discipline of workmen under his charge. Regulation 147 prohibits winding during repairs in the winding compartment.

[11] **The Judgment of the High Court and the Grounds of Appeal**

We shall now deal with the various grounds of appeal in their order. Ground 1 alleges that the learned trial Judge came to his conclusion on the issue of negligence even before he had evaluated the evidence of the parties and before considering all the relevant circumstances of the case. The Judge begins paragraph 3 of his Judgment thus:

*“What follows is my verbatim note of Plaintiff’s Counsel’s opening remarks.”* He then quotes Plaintiff’s Counsel’s opening which we have summarised above. The Appellants then quote paragraph 6 of the judgment which reads, *“The rest of the Plaintiff’s case is best summarized in Counsel’s closing remarks, you saw and heard the Plaintiff and can assess his*

*suffering. But he is a honourable man, he got work and now earns more, what we claim is the lost potential for earnings in the future”.*

[12] From these two paragraphs the Appellants submit that before evaluating the evidence of the Appellant and the Respondent and their witnesses the Trial Judge had concluded that there was negligence by the Appellants before he had heard the evidence.

[13] We do not agree. We find nothing sinister in the Judge's remarks as seems to be implied by the Appellants in this ground and submission. Before he made the remarks the Judge had heard all the evidence and reached his conclusion. He had not pre-judged anything as seems to be suggested by the Appellants. We therefore reject this ground of appeal.

[14] Grounds 2 &3 are as follows:

**Ground '2'** - The learned Judge erred in law in assessing the evidence by putting the onus of proof on the Appellant to prove it was not a maintenance day when the matter was not in issue in the pleadings.

**Ground '3'** - The learned Trial Judge in any event took irrelevant matters into account and did not take relevant matters into account in assessing the evidence of the Respondent and the Appellant's witnesses which included:

- i) In saying that there was no statement of the deceased Winder driver taken or produced.
- ii) No document or evidence of the Labour officer was produced.
- iii) The log book which had to be signed by anyone going to the site where the Respondent was working was not produced when this was not necessary to be produced when the Respondent in his evidence had admitted that he did not sign it.
- iv) In any event there was evidence that the relevant log book had been taken away by the Labour officer who carried out the investigations of the accident.

- v) The learned Trial Judge held, "*all this has little probative value*" in as much as the non-prosecution after immediate independent inquiring by the Labour officer had very relevant probative value.

We pause here to say that this is not what the learned Judge said in sub-paragraph (v). Paragraph 12 on page 6 of his judgment concludes with this statement "*all this has a little probative value and what value it has favours the Defendant*". We shall return to these paragraphs shortly but now quote sub-paragraphs (vi) & (vii).

- vi) says undue weight was given to the fact that the log book and other documents and the statement of the deceased Winder Driver were not produced and accordingly it militated against the credibility of the Appellant's witnesses.
- vii) it was held that it was not important as to who chose the carpenters to accompany the Respondent to carry out the repairs



which he was requested to do. This, says the Appellant, was very relevant to the issue.

**Ground '4'**- alleges that the learned Trial Judge erred in law in putting the onus of proof on various matters on the Appellant, particularly when such issues were not specifically raised in the pleadings. This ground is linked with ground 2 and we will deal with them here. The question of whether or not the day on which the Plaintiff was injured was a maintenance day, was not raised in the pleadings and therefore, strictly speaking, we can ignore it. However, the ground raises an important issue of evidence and the onus of proof. The rule in civil cases from time immemorial has been, and still is, that the burden of proof lies on him who asserts a fact, not on him who denies it. The Latin phrase which is now a well-known maxim of the law is '*et qui affirmat non ei qui negat incumbit probatio*'. This was referred to by Viscount Maugham in Joseph Constantine Steamship Line, Limited -v- Imperial Smelting Corporation Limited [1942] A.C. 154 at p.174. This was a frustration of contract case and Viscount Maugham said:

*"I think the burden of proof in any particular case depends on the*

*circumstances under which the claim arises. In general the rule which applies is 'ei qui affirmat non ei qui negat incumbit probatio'."*

[15] The first time the question of whether the day on which the accident happened was a maintenance day was raised in examination-in-chief of William Peckham, the Plaintiff's supervisor. He was asked at page 84 of the Record whether the day of the accident was a maintenance day or not and the witness replied, "*it was a normal working day*". The Plaintiff had never been cross-examined on this and so since it was the Appellant who had first asserted this issue it was incumbent on the Appellant to prove that assertion, not on the Respondent who denied it and who had never been cross-examined on it.

[16] The learned Judge said at page 10 of the Record, "*There is no evidence from the Defendant to support Mr Peckham's claim that 6<sup>th</sup> June 1994 was not a maintenance day*". As both parties agree that this matter was not referred to in the pleadings, either those of the Respondent or Appellant, the Respondent was not required to prove anything as to that claim. We therefore reject this ground. We pass now to Ground 3(i).

[17] The learned Judge commented on this at page 7 of his judgment, page 12 of the Record when he said, ***“No statement has been preserved that might have been made by the deceased Winder driver. Indeed, nothing that was shown to or concluded by the Labour officer in writing was produced in evidence. All of this reduces the credibility of the Defendant’s case”***. The Judge then continued a few lines later: “The case however was commenced within a year, shortly after the cheque (for \$12,000.00 as workmen’s compensation) was sent and rejected, and the Defendant was on notice that the Plaintiff was seeking to establish that it was liable for his injury. On balance we find the failures of the Defendant to protect itself against this claim can only weigh against the credibility of its evidence”. We consider this to be fair comment on the failure of the Appellants to produce any documentary evidence to support its case.

[18] The same comment applies to (ii). As to Ground (iii) the learned Judge said that there was evidence about the log book given by Mr Peckham who said that the Labour officer retained the log book and never returned it so that a new book was started. In our view the learned Judge was entitled to say at the end of paragraph 12 of his judgment, ***“all this has a little probative value and what value it has favours the Defendant”***.

- [19] We agree with the Judge's comment on that but would add that in our judgment the absence of the log book is not conclusive evidence against the Respondent and does not prove that the Appellant was not negligent.
- [20] Ground 3(v) claims that the failure of the Labour Department Mines inspector to launch a prosecution against the Appellants had very relevant probative value, meaning that it was at least some evidence of lack of negligence by the Appellant. We do not agree.
- [21] The basic proposition on breach of statutory duty is that, in the ordinary case, a breach of statutory duty does not, by itself, give rise to any private law cause of action. Such a cause of action can arise if it can be shown as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty - X (Minors) -v- Bedfordshire County Council [1995] 2 A.C. 633 at 731 per Lord Browne-Wilkinson.
- [22] We are satisfied that the Mines Act Regulations where relevant to this case are designed to confer on the class

of mine workers such as the Respondent protection for that class thus indicating a right to private action. In our view the failure to prosecute does not show any lack of negligence by the Appellant. There can be any number of reasons for failure to prosecute, for example a lack of evidence or because of the standard of proof required (*in this case the criminal standard of beyond reasonable doubt*) and whether such a standard of proof could have been established. It could also have been due to non-availability of witnesses or laxity on the part of the appropriate authority in prosecuting the matter or due to loss of relevant documents. If the Appellant wished to rely on this ground at the trial it could have called evidence from the Labour office but it failed to do so.

- [23] As to Ground 3(vi) that the statement of the deceased Winder driver was not produced, we can only agree with the comment of the learned Trial Judge that for the Appellant, a statement from the Winder driver would have been most crucial, not only on the issue of credibility of the witnesses of the Appellant but also as to whether the Winder driver was aware of the Respondent working where he was; whether the Winder driver should have been operating the cable at the time of the accident; and whether nothing was operating in the shaft that day because it was a maintenance day. Evidence as to these

matters would have clarified the question of negligence but none was forthcoming from the Appellant. Like the Trial Judge we do not consider it was important as to who chose the carpenters to accompany the Respondent to carry out the repairs but had the Appellant wished to do so we would have thought it not impossible for it to have called the relevant carpenter if the Appellant thought this so important. Again the Appellant failed to call evidence on what it claims was an important question. We therefore reject Ground 3(vi).

[24] We have already dealt with the onus of proof question and will add nothing more.

[25] Ground 5 claims that the learned Judge erred in law in finding liability against the Appellant established. We do not agree. In our view there was ample evidence on which the Judge could find against the Appellants. At page 6 of his judgment (*page 11 of the record*) the Judge said:

***“It is surprising that the employer does not still have a record of some sort, a record of days worked, some statistics about work accidents, something still in existence about 6<sup>th</sup> June 1994. Added to that is the evidence***

*of Mr Peckham that there is now no record of the removal of a coil from the stores on that day. One would have been made that day had it occurred and clearly it did. No card has been retained in respect of the removal of this coil though one would have been completed . . . . no statement has been preserved that might ~~been have~~ been made by the deceased Winder driver”.*

[26] With all these comments we agree. This led the learned Judge at paragraph 14 of his Judgment (*page 7*) to say:

*“The balance of probabilities seems clear. The Plaintiff’s claims were made clearly, dispassionately and with precision. The Defendant’s claims, assuming them to be true would in the normal course have been substantiated by the documents which clearly at one time existed. Without them its factual claims have less probative weight than those of the Plaintiff. I took the opportunity to observe him while giving his evidence because of the dispassionate way in which he gave it”.*

[27] We agree with all those comments by the learned Judge. They highlight what has been said time and again by Courts in common law jurisdictions that, all other things being equal, a Trial Judge is in a far better position than an appellate court to assess the credibility of witnesses.

[28] As it was held in the case of Watt (or Thomas) -v- Thomas [1947] 1 ALL ER 582:

*“Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate court which is disposed to come to a different conclusion on the evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the judge’s conclusion”.*

[29] In his Judgment in Watt -v- Thomas, Lord Thankerton said at p.587, letters E-G:

*“It may be well to quote the passage from the opinion of Lord Shaw in Clarke -v- Edinburgh & District Tramways Co. (15)*



(1919 S.C. (H.L.), 37), which was quoted with approval by Lord Sankey, L.C., in Powell -v- Streatham Manor Nursing Home (1) [1935] A.C. 250). Lord Shaw said:

*“In my opinion, the duty of an appellate court in those circumstances is for each judge to put it to himself, as I now do in this case, the question, “Am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.”*

*Lord Shaw had already pointed out that these privileges involved more than questions of credibility. He said (ibid., 36):*

*“ . . . witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced on the printed page.”*

[30] We see no reason to interfere with the Trial Judge's assessment of liability and reject this ground of appeal.

[31] We pass now to the last three grounds of appeal beginning with Ground 6. This alleges that the learned Trial Judge erred in law in not taking into account the normal earnings of the Respondent in assessing damages but took into account the overtime pay received by the Respondent as if that was the normal earnings of the Respondent.

[32] The Trial Judge refers to this at paragraph 16 (*page 8*) of his judgment where he says:

***“While working with the Defendant he had very good earnings but mostly because of substantial overtime. His ordinary weekly income was \$298.00 per fortnight”.***

This seems contrary to the Respondent's evidence where at page 67 of the record he said that his normal ordinary pay without overtime was \$279.28 per fortnight but that after adding overtime it came to \$649.31. These amounts were not questioned, were not the subject of cross-examination by the Appellant and so the learned Judge was entitled to accept the Respondent's evidence. Accordingly in our judgment this ground also fails.

[33] We turn to Ground 7 which contains six sub-paragraphs. The first is that the learned Trial Judge erred by stating that assessment of damages is always a subjective assessment. With all respect to learned counsel we fail to see how it can be otherwise. Each individual suffers different degrees of pain and generally loss of earnings past and future. All Judges use their experience in civil actions both in the assessment of damages and the

impression made on them by witnesses. We have never heard the contrary suggested.

[34] Ground (iii) – We thus find no merit in this ground.

(iv) - says that the Trial Judge made an arbitrary award of damages. The Judge used the word 'arbitrary' in paragraph 20 of his Judgment dealing with loss of earning capacity. After referring to the Respondent's severely reduced use of his left leg and to the fact that this affected and reduced his future earning capacity he said, "*Making the best I can of it from the authorities cited and my general experience I assess the loss of earning capacity in much the same way as general damages. He was earning high overtime. Arbitrarily I assume a basis of \$35.00 per week, i.e. \$1,820.00 per year*".

Counsel for the Appellants seizes on the adjective arbitrary and submits that the Judge's assessment of loss of future income was made without any consideration of the evidence. It was perhaps an unfortunate use of language but we do not take it to mean what the Appellants contend. Websters Dictionary defines arbitrarily as "*based on random or convenient selection of choice*".

[35] The Oxford Dictionary defines it as *“not seeming to be based on a reason, system or plan”*. All we consider the learned Judge was saying here was that he arrived at a figure of \$35.00 per week without going into detailed calculations. He based his figure taking a general view of the evidence and in our judgment in arriving at \$35.00 per week tended to favour the Appellants.

[36] The Judge assessed general damages at \$35,000.00 and loss of earning capacity at \$34,580.00. Having carefully considered the evidence we find fault only in his assessment of general damages. He accepted Counsel's submission that the award should be \$35,000.00 which he said was not exaggerated. Had there been any cross-appeal by the Respondent we would have had no hesitation in increasing this sum considerably but in the circumstances must accept the Trial Judge's assessment.

[37] **The Award of Interest**

The problem for the Respondent arises from the Judge's award of interest of 6% from the date of Writ to judgment (11 years) of \$20,000.00 amounting to \$13,200.00 and interest at 4% for 11 years on \$21,840.00 amounting to \$9,609.00. The \$21,840.00 was the Judge's estimate of

loss of earnings for the past 12 years based on an amount of \$1,820.00 per year.

[38] Here we consider the learned Judge fell into error. It has been the law for many years that where interest is to be awarded it must be specifically claimed in the Writ. In this case it was not, nor was any reference to interest made in the submissions of Counsel for the Respondent. Counsel who drew the statement of claim in this case was also Counsel for the Respondent in Civil Appeal No. 25 of 1989 - Usha Kiran -v- The Attorney-General of Fiji. There Counsel for the Respondent had also failed to claim interest in his pleadings and he said that in future he would do so. Unfortunately for the Respondent here he again failed to make such a claim and in our view it is fatal to any award of interest made by the Trial Judge. The Court said at page 8 of the Judgment:

*“In England under Order 18 Rule 8 it is mandatory to plead specifically any claim for interest under the English Act. While we have no comparable rule in Fiji the reasons given in the 1985 ‘White Book’ at note 18/8/10 commend themselves to us. The passage is as follows:-*

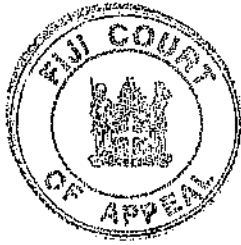
*“Interest – A claim for interest must be specifically pleaded whether it is claimed under S.35A of S.C.A. 1981 (see O.1, r.4(1) or otherwise, see para (4) of this rule negative Riches -v- Westminster Bank Ltd. [1934] 2 ALL ER 735. For S.35A, inserted by A.J.A. 1982, S.15(1) and Sched. 1, Pt.1, see Vol. 2 Pt. 17, para 5161 para (4) which requires a claim for interest to be pleaded reflects the fundamental principle that the pleading should give fair notice to the opposite party of the nature of the claim which is being made against him, with the relevant facts relied upon, so as to enable him to meet such claim and to prevent surprise at the trial. Thus, if the defendant has due notice of the plaintiff’s intention to seek an award of interest he will know the extent or totality of the plaintiff’s claim and he can better calculate what sum, if any, he should pay into court under O.22, r.1(8) or what sum he can fairly offer to settle the claim out of court, or even whether in all the circumstances he should allow the plaintiff to enter judgment in default of pleading. The claim for interest must be pleaded in*

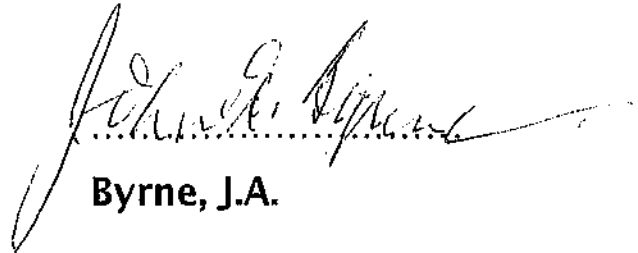
*the body of the pleading, and not only in the prayer though it should also be repeated in the prayer, (see O.18, r.5(1). It must identify precisely the ground or basis on which it is claimed, and whenever possible, the date from which and the rate at which the interest is being claimed, assuming, that is, that the date to which it is claimed is the date of the judgment. If the interest is being claimed under S.35A, the pleading should specifically so state, since it is not sufficient to state the claim as being "interest under the statute"."*

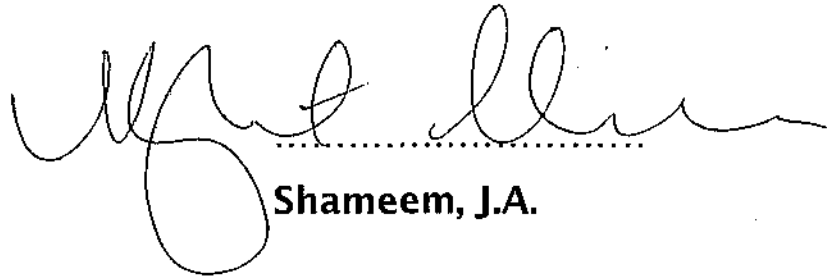
[39] Disallowing as we must the amounts of interest awarded by the learned Trial Judge this reduces the total award for the Respondent to \$69,580.00. This is approximately one quarter less than the amount awarded. To this extent we consider the appeal must succeed but the Appellants must pay some costs to the Respondent. But for the reduction we assess these in this Court at \$1,500.00 which reduced by one quarter (\$375.00) gives an award of \$1,125.00 costs to the Respondent. We would also allow the amount of \$1,000.00 costs fixed by the Trial Judge. The order we would make therefore is that the award of damages of \$92,389.60 of the High



Court be varied by substituting for that sum the amount of \$69,580.00 with costs as we have assessed them. There should be orders accordingly.



  
Byrne, J.A.

  
Shameem, J.A.

**Solicitors:**

Dr M K Sahu Khan for the Appellants  
Mr H A Shah for the Respondent



[3] In *Naicegulevu* (supra) this Court at p.20 said:

*“The Respondent cannot succeed because he did not ask for interest in his pleadings nor did his Counsel raise the issue of interest before the Chief Registrar, this latter fact was in fact taken in consideration by the learned Judge. Before us Mr. Kapadia did not press the issue of interest. In fact he indicated that in future he would claim interest in his pleadings.”*

[4] Although section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act, Cap. 27 provides as follows, this Court in *Tacirua Transport Company Limited v Virend Chand f/n Ragho Prasad* (Civil Appeal No. ABU0033 of 1994S – 1995 FCA) regarded this provision as “subject to the general provision that a claim for interest, as for any other relief, must first be pleaded”:

*“3. 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 ...”*

[4] It is worthy of note that in the present case, as in *Tacirua* (supra), there was neither a claim for interest nor was it raised at the hearing or in the submissions. Hence there was no power in the Judge to include the provision for interest in assessing damages. (*Tacirua*, supra).

[5] I adopt the orders made by Byrne JA and Shameem JA in this appeal.



  
D. Pathik

Justice of Appeal

At Suva

12 March 2008