IN THE COURT OF APPEAL, FIJI ISLANDS

Civil Appeal No. ABU0033 of 2009
[Action No. HBC 004 of 2005(B)L]

BETWEEN: ATTORNEY GENERAL OF FIJI
DIVISIONAL ENGINEER NORTHERN

Appellants

AND: UDAY CHAND

Respondent

Coram: Hon. Justice William Marshall, Justice of Appeal
Hon. Justice Kankani T. Chitrasiri, Justice of Appeal
Hon. Justice Sosefo Inoke, Justice of Appeal

Counsel: Mr. J Mainavolau for the Appellants
Mr. S Prasad and Mr. D Prasad for the Respondent

Date of Hearing: Monday, 8 November 2010

Date of Judgment: Friday, 17 December 2010

JUDGMENT

William Marshall JA

1. I agree with the judgment, the legal analysis and the reasons of Mr Justice of Appeal Kankani T. Chitrasiri and would dismiss the appeals.

2. I wish to make some observations on the matter of adequacy of pleadings. In a personal injury case it will be very rare if ever that a pleading point will succeed in non suiting a plaintiff either at first instance or on appeal.

3. The cases of **Clack v. Wood** (1882) 9 QBD 276 and **Thynne v. Thynne** (1955) P 272 are authority that under the Rules of the High Court and under the Court of Appeal

Act, this Court has power to amend the record and pleadings in the Court below and will do so if the interests of justice require it. Also as Lord Atkin explains in **Bell v. Lever Brothers Ltd** (1932) AC 161 at 216 :

> *"Further, I think that the Court of Appeal cannot without amendment decide a case upon an unpleaded issue of law which depends upon an unpleaded issue of fact. If the issue of fact can be fairly determined upon the existing evidence they may of course amend : but in any such case amendment appears to me to be necessary"*

4. In my view however an amendment is not required because the seat belt issue was properly raised and considered in the Court below. Calanchini J must be taken to have decided that an amendment was not necessary on account of the pre trial minutes of agreed issues and upon the Plaintiff / Respondent Mr Uday Chand including in his particulars of negligence:

> *"failing to provide a proper truck for the job assigned."*

In my view in so doing Calanchini J on the facts of this case decided correctly. It is to be noted that not only were Further Particulars not requested by the Defendants / Appellants, but that the 2nd Defendant proceeded to call evidence on the seat belt issue.

5. I agree with Chitrasiri JA that the authorities cited by him below on the point that the Court will in appropriate circumstances absolve the Plaintiff from pleading in wholly comprehensive detail where the case has been substantially pleaded in detail on his behalf. The facts here indicate that the Defendants accepted in the Court below that "a proper truck" would be one in which a seat belt is supplied for the use of the driver. If so their pleading point on this appeal is doomed to failure. Were the point to have merit, in my view, this Court would have allowed Mr Uday Chand to

amend on the facts of this case. The interests of justice in the present case would have required leave to amend.

6. In my view in any motor accident causing injury, practitioners should expressly raise the non supply or the non wearing of a seat belt in their Statement of Claim or in their Defence.

Kankani T. Chitrasiri JA

7. This is an appeal seeking to set aside the judgment dated 24th September 2009 delivered by His Lordship Calanchini J, who presided over the High Court of Fiji sitting at Labasa then. By that judgment, His Lordship awarded damages amounting to $74,786.27 plus $2000 costs to the Respondent (Plaintiff in the action filed in the High Court) in the following manner.

General damages (past)	$30,000.00
General damages (future)	$25,000.00
Interest on $30,000.00 at 5% from February 2005 till September 2009	$6,875.00
Special damages including interest	$19786.27
Assessed costs	$2000.00

8. Being aggrieved by the aforesaid decision, the two defendants (appellants in this application) filed this appeal and sought that the judgment of His Lordship Justice Calanchini be set aside.

9. Before looking at the merits of the appeal, it is necessary to narrate the facts of the issue for the purpose of clarity.

Background

10. The respondent had been a driver by profession and at all relevant times he had been working under the second appellant. Admittedly, the Second appellant was the Divisional Head of Public Works Department in Labasa and also was the registered owner of the vehicle bearing No. GJ 448 involved in the accident that resulted in filing this action. First appellant, Hon. the Attorney General was made a party to the action to represent the Government of Fiji.

11. A person named Alifereti Roko, a fitter by profession also had been made a party (First defendant) to the action filed in the High Court and he had been on duty to assist the respondent on the day in question. He had not been made a party to this appeal.

12. On the 15th day of February 2002, the 2nd appellant instructed the respondent to deliver water to residents in the area of Siberia in Labasa and was issued with a job instruction sheet to do so. Accordingly, the respondent being the driver of the aforesaid vehicle bearing No GJ 448 commenced delivering water to the residents in the said location. First defendant Roko assisted the respondent in doing so. The vehicle used for this purpose was a seven ton, short wheel base Hino Truck and it was a fairly old vehicle. A water tank was welded on to the tray of this vehicle enabling to store 1200 gallons of water.

13. After leaving the depot, respondent with the assistance of Roko delivered water to three or four houses. Next house on the list was the residence of one Mr. Ram Bahadur in Siberia. At this point of time, the tank was filled with 600 gallons of water. The road leading to Mr. Bahadur's house was in a dilapidated condition and it was located towards the end of the road and was up on the hill.

14. Whilst travelling towards the house of Mr. Bahadur, the vehicle suddenly came to a stall and the engine gave way. Respondent then had applied the hand brake and kept his foot on the foot brake. Thereafter he had asked Roko who was assisting him to look for some stones which could be placed against the wheels in order to prevent the vehicle, rolling backwards down the hill. In the meantime vehicle started to roll backwards. According to the learned trial Judge, the reason for this rolling down of the truck was the removal of the respondent's foot from the foot brake. Thereafter in a short while, the vehicle rolled into a ditch on to the side of the road and then the tank fixed to the truck became dislodged.

15. At this sudden moment the respondent fell out of the vehicle causing injuries to him. He had lost his consciousness and was taken to the Labasa hospital and was in the hospital for about one month. He had suffered a close fracture of the pelvis and also a fracture of the left foot. According to the respondent, he could no longer enjoy the benefits of marriage and could not return to work as well. At the time of the incident, he was 57 years old.

16. Consequently, respondent filed action in the High Court of Fiji sitting at Labasa claiming damages from the two appellants and also from aforesaid Roko who were the three defendants to the action. Proceedings in that Court were commenced by way of writ of summons dated August 2005 even though the incident had taken place on 15th February 2002, more than three years after the incident. Proceedings in the High Court also have taken more than four years and ultimately judgment was delivered on 24th September 2009.

17. The Orders made by the learned High Court Judge in his judgment have been set out herein before in this judgment. Being dissatisfied with the decision of the learned High Court Judge, the second and third defendants filed this appeal seeking the reliefs mentioned therein.

Analysis

18. Even though the notice of appeal originally consisted of three grounds of appeal, learned Counsel for the appellants, had expanded it to 8 grounds and those are

found in their submissions filed subsequently. However, when the matter was taken up in this Court, the appeal was argued on the following heads.

1. Proof of negligence on the part of the second appellant
2. Contributory negligence on the part of the respondent
3. Assessment of damages awarded by the learned High Court Judge
4. Calculation of the interest component referred to in the judgment
5. Award of costs of the action.

Proof of Negligence

19. In the statement of claim as well as in evidence of the respondent, it is stated that the accident that led to the injuries were caused due to the negligence on the part of the second appellant, Divisional Engineer and the first defendant Roko. The learned High Court Judge after careful consideration of the evidence had come to the conclusion that the cause for the falling of the respondent out of the truck was the failure by the employer, in this instance the second appellant, to provide seat belts for the seat where the respondent was seated at the time of the relevant incident.

20. The learned Trial Judge had also decided that there was no negligence on the part of the first defendant Roko. No appeal had been lodged by the respondent against this decision of discharging him. Hence, the findings as to the discharge of the second defendant Roko from liabilities would remain intact.

21. In the circumstances, it is clear that the matter to be considered is whether the failure to provide seat belts for the driving seat of the vehicle bearing No. GJ 448 that involved in the accident causing injuries to the respondent would constitute "negligence" on the part of the second appellant, Divisional Engineer.

22. Common law recognizes imposing of delictual liability on a person who acted negligently without taking proper care of the duties he or she owes towards a person

who had suffered loss or damage by the said acts of the person who acted negligently. This loss or damage may have been caused to his/ her person or to the property and it may be either physical or mental damage. Law in respect of the aforesaid negligent acts of a person has been developed through many judicial pronouncements in the common law jurisdictions. Hence, I will now turn to refer to a few relevant decisions where the law relating to negligent acts have been discussed with reference to the issue at hand since those decisions are considered as authoritative in Fiji .

23. In the case of **Blyth v. Birmingham Waterworks Co**. (1856) Ex 781 -784 Alderson B stated that :

> *"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."*

Lord McMillan in **Donoghue v. Stevenson** [1932] AC 562 said :

> *"The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence . . .The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty."*

24. By looking at those statements and also the other judicial pronouncements, it is evident that the proof of negligence in cases filed for delictual liabilities would depend on the circumstances of the respective cases.

25. Accordingly, it is necessary to ascertain whether the learned trial judge in this instance correctly applied the law to the facts of this case. His Lordship in his judgment had stated:

> *" I am satisfied that the failure by the employer to provide seat belts was the cause of the plaintiff falling off the truck which in turn resulted in his injuries."*

26. Admittedly, the truck that met with the accident which was driven by the respondent had no seat belts. Had the seat belts being fitted onto the driver's seat where the respondent sat, the driver would not have been thrown out from the seat causing him injuries. Moreover, it was in evidence that the engine of the vehicle when it was moving up towards the hill had suddenly given up. Therefore, it is clear that the main cause for the injuries of the respondent had been the sudden stall of the vehicle and more particularly the failure to fix the seat belts.

27. On the other hand, the evidence shows that the respondent had made every possible effort to have the vehicle under his control in order to avoid the accident. Therefore, it is clear that the respondent would not have been thrown out from the seat, had he been tightened to the seat with seat belts. In the circumstances, I am of the view that the cause for the respondent being thrown out from the vehicle was basically due to the absence of the seat belts of the vehicle that met with the accident. It is the same view that the learned trial judge also have taken in this instance after going through a protracted trial. Therefore, I am not inclined to interfere with his Lordships decision as to the negligence on the part of the second appellant.

28. Then the question arises whether is it the duty of the second respondent Divisional Engineer to provide vehicles with seat belts when the vehicles are being used for the duties such as the duty assigned to the respondent in this instance. It is pertinent to note that, the second respondent at all material times was the Divisional Engineer in the Public Works Department. He was in charge of the work place where the

respondent was attached to. Therefore, it should have been the duty of the second appellant to provide suitable vehicles for the employees to engage in the duties ensuring their safety.

29. In this instance the respondent had been employed by the second appellant and the respondent was under a duty to carry out the instructions of the second appellant. Therefore, it is clear that the second appellant had a duty of care to see whether the vehicle given to the respondent was mechanically sound and was fit enough to travel to a location such as the destination detailed to the respondent in this instance. Furthermore, the second appellant should have taken due care before he entrusted the delivery of water to the respondent and should have foreseen the condition of the road that was to be used by the respondent. It is also the duty of the second appellant being the person in charge of the transport; to have examined the vehicle of its road worthiness before giving instructions to the respondent.

30. The evidence also reveals that the respondent had made requests to the second appellant to have the seat belts fitted onto the seat in the vehicle in question. This is evident from the following evidence of the respondent.

(Judges Notes on 13.08.2009 – at page 238 of the record)

Did you ask for seat belts?
We wanted seat belts.
our bosses – we asked.
only verbal requests.

(Judges notes on 14.08.2009 – at page 245 of the record)

I check all 18 – no seat belts
Everything was OK except the seat belts
Can you refuse to drive if something not right.
We are told by boss to drive the truck.
Did you raise missing seat belts.
I told the dispatcher.
Only verbally.
Any complaint requires a special form.

Yes it is a form
Give it to supervisor.
If there's a problem – we don't drive it.
But you did that day.
Yes – we complained but nothing was done.
Did you think it was dangerous.
Yes.
Past complaints about seat belts.

31. Despite these requests, the second appellant had given instructions to the respondent to carry out the duty of delivering water using the vehicle that had no seat belts. Therefore it is clear that the second appellant had acted in a negligent manner when he gave instructions to the respondent to deliver water to its destinations making use of the vehicle that met with the accident.

32. I will now turn to examine the defence that was taken up by the appellants in this connection. Contention of the appellants was that the fact of not having the seat belts in the vehicle could not have taken up by the respondent since he had not averred such a matter in the pleadings filed in the High Court.

33. It is pertinent to note that even though nothing is mentioned as to the seat belts in the statement of claim of the respondent, Court had allowed to raise an issue without any objection from the appellants as to the condition of the vehicle in question. This issue had gone into the case record at the time the pre-trial conference was held. This issue reads thus:

> *"18. Was the second defendant negligent in providing a truck which was not suitable for the job assigned to the plaintiff?"*

33. When an issue is accepted in a trial taken up in a Court of law, it is the duty of that Court to answer the issue and have the answer recorded clearly in the judgment.

Therefore, when an issue is raised as to a fact in issue, the Court cannot refuse to record evidence relevant to that issue though such matters have not been pleaded since a duty is cast upon the Court to answer the issue upon consideration of the evidence. In fact after the issues are framed, pleadings go to a side and it is necessary to allow the parties to bring evidence relevant to the issue in order to answer the same.

35. In this instance, the appellants did not object to the raising of the aforesaid issue as to the condition of the vehicle. Probably, the reason for not objecting to the issue may have been that it was based upon paragraph (b) (a) of the statement of claim of the respondent. It reads thus:

> *"B) Negligence of the Second Defendant*
> *(a) Failing to provide a proper truck for the job assigned"*

36. Accordingly, the evidence as to the condition of the vehicle had been led without any objection. Such evidence had been admitted not only without any objection but those had not even been challenged or controverted. Therefore, the learned High Court Judge could not have disregarded that evidence even though the particular aspect namely the absence of seat belts had not been pleaded by the respondent. Accordingly, the decision of the learned High Court Judge to act upon the evidence as to the absence of seat belts though it had not been pleaded specifically, is not wrong in law.

37. Moreover, authorities mentioned herein below state that it is difficult to plead each and every fact in detail in the pleadings and such matters should be determined considering the circumstances of each case.

Gautet v Egerton (1867) L.R. 2 CP 371, West Rand Central Mining Co. v R [1905] 2 KB 391, North Western Salt Co Ltd v. Electrolytic Alkali Co. Ltd *at p 425*, Soma Raju v. Bhajan Lal CA No. 48 of 1976, Philips v. Philips (1878) 4 Q.B.D 127 at p.139.

38. The aforesaid authorities, whilst highlighting the necessity to have the facts that are to be led in evidence averred in the pleadings, also mention that no plaintiff can state the entirety of an incident giving full details of it in the pleadings. Therefore, it is seen that if the opposing party is not taken by surprise as to a particular fact, Court may allow evidence as to such fact, to go into the record depending on the circumstances.

39. In this instance, the respondent had pleaded as to the overall condition of the vehicle. Such a pleading would cover the condition of the engine and all other necessary parts of the vehicle as well. Therefore, the appellant would not have been taken up with surprise when the evidence as to the seat belts was led. That also may have been the reason that the defendants did not object to the evidence been led as to the seat belts.

40. In the circumstances, it is my view that there is sufficient material even in the pleadings of the respondent as to the seat belts. Even if the particular averment in the statement of claim is not clear enough as to the presence of the seat belts, Court is not prevented from acting upon such evidence since there had been an issue framed to that effect and also that the evidence had been led accordingly. In the circumstances, it is my considered view that the learned High court Judge has correctly decided as to the negligence on the part of the appellant, relying upon the evidence as to the absence of the seat belts in the vehicle provided by the second appellant to the respondent to deliver water to the residents of Siberia. Hence, the defence of not pleading the absence of seat belts in the vehicle involved in the accident is not sustainable.

41. At this stage, it is pertinent to refer to a few authorities in respect of the duty cast upon an employer towards his servants since the matter in issue also relates to a similar situation. In **Wilson & Clyde Coal Co.Ltd v. English** 1938 A.C 57. Lord Wright described the nature of the duty owned by a master to a servant as :

> *"I think the whole course of authority consistently recognizes a duty which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm, or a company, and whether or not the employer takes any share in the conduct of the operations. The obligation is threefold, as I have explained [i.e. 'the provision of a competent staff of men, adequate material, and a proper system and effective supervision']."*

Also in **Paris v. Stepney** B.C [1951] AC 367 Lord Oaksey at page 384 expressed his opinion by saying that :

> *"The duty of an employer towards his servant is to take reasonable care for the servant's safety in all the circumstances of the case"*

42. The above opinions expressed in the common law jurisdictions also support the decision of the learned High Court Judge as to the proof of negligence on the part of the second appellant. In the light of the above, I am not inclined to interfere with his Lordship's decision as to the said proof of negligence of the appellants.

Contributory Negligence

43. Learned Counsel for the appellants submitted to Court that the respondent having undertaken to deliver water to a place in a hilly area on a dirt road should have taken proper care as to the safety of himself as well as the vehicle before he started his journey. He therefore has argued that the respondent also had acted negligently in this instance. His argument is that had the respondent acted with care, he could have avoided such serious injuries. Accordingly, it is seen that the Counsel for the appellants is of the view that there had been contributory negligence on the part of the respondent. In support of this contention, learned Counsel for the appellants has

referred to the case of **Stapley v. Gypsum Ltd** [1953] AC 663 at 662. In that decision, it is stated:

> *"a court must deal broadly with the problem if apportionment, and, in considering what is just and equitable, must have regard to the blameworthiness of each party, but the [claimant's] share in the responsibility for the damage cannot, I think, be assessed without considering the relative importance of the acts in causing the damage apart from his blameworthiness."*

44. Keeping the relevant authorities in mind, I have carefully looked into the contents of the judgment and also the evidence led in this case. His Lordship Justice Calanchini in dealing with this issue of contributory negligence has referred to **AC Billings and Sons Ltd v. Riden** [1958] AC 240 and has quoted the following passage from that decision:

> *"if the Plaintiff knew the danger, either because he was warned or from his own knowledge or observation, the question is whether the danger was such that in the circumstances no sensible man would have incurred it or, in other words, whether the Plaintiff's exposing himself to the danger was a want of common or ordinary prudence on his part. If it was not, then the fact that he voluntarily or knowingly incurred the danger does not entitle the defendant to escape from liability."*

45. Having referred to the said decision, His Lordship Justice Calanchini had expressed his view as to the contributory negligence in the following manner.

> *".....it is difficult to identify any other reasonable course of action or option that was available to the plaintiff."*
>
> *"He really had no choice under the circumstances but to request the assistance of his passenger, the first defendant."*

46. It is seen that the above statements in the judgment had been made after due consideration of the evidence that was led in this case. Therefore, I find that His Lordship in this instance has correctly applied the law to the given facts. Facts of this case had not permitted the trial judge to decide that there was contributory negligence on the part of the respondent.

47. At this stage, it is also pertinent to refer to a passage in **Jones v. Livox Quarries** [1952] 2 QB 608 where Denning L J had described the way in which the presence of contributory negligence should be looked at.

> *"although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless."*

48. In this instance too, the respondent could not have foreseen the harm caused to him before the accident. In the circumstances, it is my considered view that the learned High Court Judge has correctly applied the law to the facts of this case when he considered negligence on the part of the respondent.

Damages

49. In law, damages are claimed to recover both pecuniary and non-pecuniary losses. Further, it is necessary to distinguish general and special damages since the amount and details of the latter has to be specifically pleaded whereas for the former, they do not. Pecuniary losses may be identified as expenditure incurred as a consequences of personal injury and the lost earnings. They include, loss of earnings of the claimant due to the injuries, medical and other expenses, extra expenditure such as increased living expenses as a consequences of the accident, expenditure incurred for the services provided by third parties on claimant's behalf and expenditure incurred even by third parties such as their travel expenses.

50. Enormous authorities are found in common law jurisdictions as to the way in which the said general damages for personal injuries are assessed. In **Fletcher v. Autocar & Transporters Ltd** [1968] IAER 726, it was held by Salmon J

"the damages have ordered should be ..... that the ordinary sensible man would not instinctively think as either mean or extravagant, but consider them to be sensible and fair."

51. In the case of **Anitra Singh v. Rentokil Laboratories Ltd** Civil Appeal No. 73/91, the Court of Appeal in Fiji held:

"we are mindful of setting the figure it must be inappropriate for Fiji and the condition applied here. The level of damages in our neighboring countries is persuasive but not decisive."

52. Lord Pearson in the case of **Taylor v. O'Connor** [1971] A C 115 at page 140 said:

"... that actuarial tables or actuarial evidence should not be used as the primary basis of assessment. There are too many variables, and there are too many conjectural decisions to be made before selecting the tables to be used. There would be a false appearance of accuracy and precision in a sphere where conjectural estimates have to play a large part. The experience of practitioners and judges in applying the normal method is the best primary basis for making assessments."

53. In keeping with the said authorities, I may now examine whether the learned High Court Judge had applied the law to the facts of this case. His Lordship has addressed his mind to the evidence of the two doctors namely Dr. Kurabui and Dr. Balram and has stated that the plaintiff suffered serious injuries that had prevented him from returning to work before he reached retirement age and left him with a permanent partial disability. He also has described in detail, the injuries caused to the respondent. In the judgment, he has considered the age of the respondent as well when assessing the quantum of damages.

54. Having considered the aforesaid matters in detail, His Lordship came to the conclusion that it is appropriate to award $30,000.00 up to the time that the trial was commenced and $25,000.00 as the future losses.

55. In the circumstances, it is clear that the learned High Court Judge evaluated the way in which the amount of damages was arrived at. Therefore, there is no reason for this Court to interfere with the decision of the learned High Court Judge.

56. The learned High Court Judge also had awarded special damages in a sum of $15,220.21. This decision was made upon considering the evidence relating to the past loss of earnings, loss of FNPF contributions, medical expenses and transport expenses.

57. In the circumstances, it is clear that the learned High Court Judge had come to his finding on a basis recognized by law. Hence, there is no reason for this Court to interfere with the decision as to the awarding of damages as well.

Interest

58. When the learned judge made order as to the interest, he has disregarded the period between the dates of the occurrence of the incident and the filing of action. Appellants should not be blamed for the delay in filing action and the learned trial Judge had carefully considered the delay in filing action and has held that the interests should not be given to that period though the injured respondent may have not attended to his day to day work in the usual manner during that period. Accordingly, the interest component of $30,000.00 on the damages was calculated to commence from February 2005 though the cause of action had accrued to him in the year of 2002. That shows that the learned High Court Judge had been mindful of the circumstances of each and every aspect of the case when deciding as to the interest component.

59. In my view the Defendants should pay assessed costs of this appeal to the Plaintiffs in the total sum of $3000.

Sosefo Inoke JA

60. I agree with the judgment of Kankani T. Chitrasiri JA.

William Marshall JA

ORDERS OF THE COURT

61. The orders of the Court are :

(1) The appeals of the 1st and 2nd Respondents be dismissed.

(2) The Respondents pay assessed costs of the appeal of $3000 (in total) to the Appellant.

William R Marshall

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Hon. Justice William Marshall

Justice of Appeal

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Hon. Justice Kankani T. Chitrasiri

Justice of Appeal

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Hon. Justice Sosefo Inoke

Justice of Appeal