

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 44 OF 2014
(High Court No. HBC 4 of 2013)

BETWEEN : **SEVESA DAUNIVALU**
(as the father and next friend of)
1. Anare Waru Nuisonia
2. Meliki Tinai Tukania
3. Makereta Qauqau Tukania

Appellants

AND : 1. **RAMODHARAN NAIR**
2. **DALIP CHAND AND SONS LIMITED**
3. **MOHAMMED NASIR**

Respondents

Coram : **Basnayake, JA**
Almeida Guneratne, JA
Prematilaka, JA

Counsel : **Mr. A. Sen for the Appellants**
: **Mr. A. Kohli for the Respondents**

Date of Hearing : **8 November, 2017**

Date of Judgment : **30 November, 2017**

J U D G M E N T

Basnayake, JA

[1] I agree with the reasoning and the proposed orders of Guneratne JA.

Relevant Background facts

- [2] This is an appeal from a judgment of the High Court of Labasa dated 21st May, 2014 on the quantum of damages awarded in a personal injury case arising out of a road accident which had taken place on 24th January, 2010.
- [3] A vehicle belonging to the 2nd Respondent and driven by his employee, the 1st Respondent, had struck a vehicle which had been parked on the side of a road from behind.
- [4] The Appellants, three minor children, who were in that vehicle with their parents, had suffered injuries. Their mother was killed instantly and the father was injured as well.
- [5] In Civil Action No. 7 of 2012 the Labasa High Court found that the said vehicle owned by the 2nd Respondent had been driven negligently by the 1st Respondent.
- [6] The liability issue being thus determined, the father (Sevesa Daunivalu) as next friend of the Appellants (original plaintiffs) claimed damages on behalf of them. (The Statement of Claim – is at 13 to 15 of the Copy Record and the Statements of Defence of the 1st Respondent and the 2nd Respondent are at pages 19 – 21 and pages 23 – 25 respectively of the Copy Record).
- [7] At the time of the accident the 1st Appellant was a minor child of over 6 years, the 2nd Appellant a little over 3½ years and the 3rd Appellant, an infant, of just over 6½ months.
- [8] After conclusion of the proceedings on the claim for damages as aforesaid, the learned High Court Judge in his impugned judgment (pages 6 – 11 of the Copy Record) made the following orders:

- (a) For the 1st (plaintiff) Appellant - an award of a sum of \$10,000
For the 2nd (plaintiff) Appellant - a sum of \$50.00
For the 3rd (plaintiff) Appellant - a sum of \$16,000.00

(holding as he did, for their pain and suffering with 6% interest from the date of issue of writ to the date of the judgment.

- (b) \$3,000.00 as costs of the action.

(The said relevant orders for the purpose of this Appeal are at page 11 of the Copy Record).

- [9] It is against that judgment that the father, of the said plaintiffs-appellants, as their next friend, has preferred this appeal.

The Grounds of Appeal

(at pages 2 – 3 of the Copy Record)

- “1. *The Learned Trial Judge erred in law in failing to make the correct award to the appellants in accordance with the established principles of assessment of damages.*
2. *The Learned Trial Judge erred in failing to consider the pain and suffering and the nature and extent of the injuries of the appellants by reasons of the accident caused by the 1st respondent.*
3. *The Learned Trial Judge erred in law and in fact in failing to consider the submissions made to him on behalf of the appellants together with the decided authorities when making an appropriate award.*
4. *The Learned Trial Judge erred in law and in fact in making an appropriate award for special damages consistent with the evidence adduced in court.*
5. *The Learned Trial Judge erred by taking into consideration irrelevant matters and failed to take into consideration relevant matters, in particular the unchallenged evidence of the appellant and their expert witness pertaining to pain, suffering and damages.”*

Consideration of the grounds of appeal as against the reasoning of the High Court

- [10] I shall deal with the said grounds of appeal cumulatively for they flow into one another while making some initial observations in regard to Ground 4 viz : where the word not appears to have been omitted after the words, “erred in law and in fact,” (in the first line thereof). If the said ground is read without the said word “not” it cannot be a ground of appeal. Accordingly, I am prepared to regard that omission as “an accidental slip”. If it were to be otherwise, the said ground (No.4) would have to be rejected in the absence of an application by the appellants to amend the said ground of appeal though such a right had been reserved by them at paragraph 6 of the Notice/Grounds of appeal (vide: page 3 of the Copy Record).
- [11] In the light of those initial observations I shall now proceed to deal first with the said ground of appeal (No. 4) as to the claim for special damages.

[12] **The trial judge’s findings on the claim for special damages**

In the statement of claim Re : Special Damages at paragraph 13 of the statement of claim the Appellants had (as plaintiffs in the original action) pleaded as follows:

“13. Particulars of Special Damages of First Plaintiff

- a. Hospital expenses.*
- b. Travelling*
- c. Private Doctor*
- d. Medical Report*
- e. Police Report*

Particulars of Special Damages of Second Plaintiff

- a. Hospital expenses.*
- b. Travelling*
- c. Private Doctor*
- d. Medical Report*
- e. Police Report*

Particulars of Special Damages of Third Plaintiff

- a. Hospital expenses.*
- b. Travelling*
- c. Private Doctor*

- d. *Medical Report*
- e. *Police Report*

WHEREFORE the First Plaintiff claims as follows:-

- (a) Special Damages (detail will be provided later)*
- (b) General Damages for pain and suffering & loss of amenities of life*
- (c) Interest*
- (d) Cost*
- (e) Any other relief this Honourable Court deems just and expedient.*

WHEREFORE the Second Plaintiff claims as follows:-

- (f) Special Damages (detail will be provided later)*
- (g) General Damages for pain and suffering & loss of amenities of life*
- (h) Interest*
- (i) Cost*
- (j) Any other relief this Honourable Court deems just and expedient.*

WHEREFORE the Third Plaintiff claims as follows:-

- (k) Special Damages (detail will be provided later)*
- (l) General Damages for pain and suffering & loss of amenities of life*
- (m) Interest*
- (n) Cost*
- (o) Any other relief this Honourable Court deems just and expedient.”*

- [13] Two aspects arise for consideration in that context, the first (procedural) and the second (substantive), in the context of established legal precedents and principles.

Procedural aspect

- [14] It is established law that, in a claim for special damages, the same must be pleaded specifically. Furthermore, special damages being in the nature of actual pecuniary loss suffered by a plaintiff (per Lord Denning in **Jefford v. Gee** [1970] 1 All ER 1202, at 1208 cited in **Fiji Forest Industries Ltd. v. Naidu** [2017] FJCA 106 per Madam Jameel, JA) the same must be pleaded and proved by evidence placed before Court. (vide: **Domsalla v. Ban** [1969] 1 WLR 630 and followed by me in my judgment in **Wati v. Permanent Secretary of Health** [2016] FJCA 72).

- [15] The Statement of Claim is dated 15th January, 2013 (pages 13 – 15 of the Copy Record). At paragraph 13 it refers to “particulars of special damages.” But those are broad heads. In the prayer there was an undertaking that (details will be provided

later). That was done by a schedule on 11th April, 2014. (page 53 [a] to [c] of the Copy Record. I do not think that the procedural requirements regarding “special damages” were met. (vide: also **British Transport Commission v. Gourley** [1956] AC 185.

[16] Consequently, I do not think I could go to the substantive aspect although the learned High Court Judge had looked at the schedule to the Statement of Claim (at page 8 of the Copy Record).

[17] For the aforesaid reasons, I see no basis to interfere with the trial judge’s conclusion in not awarding any special damages to the Appellants though for different reasons as articulated earlier and accordingly reject the said Ground (No. 4) of Appeal.

Re : The Awards made to the three Appellants as General Damages

[18] I shall first take the case of the 1st Appellant.

How the learned Judge evaluated the factors for and against the 1st Appellant

[19] According to the medical report (vide: at page 81 of the Copy Record), a 4cm laceration had resulted over the right parietal region and fracture to the right parietal bone (being injuries caused to the Appellant’s head).

[20] However, there had been no evidence of a stitched wound from sutures. The medical evidence had been that, the injury to the head was not a complicated and/or a serious one.

[21] The (1st) Appellant was about 6½ years and was schooling at the time of the accident. He was discharged within 4 days after admission to hospital. Although he had been complaining of headaches it had not been proved that they were a direct consequence of the accident.

- [22] The Appellant had shown some difficulty in engaging in educational activities in school which fact learned Appellant's Counsel sought to attribute to the trauma he would have been subjected to, in seeing his mother being killed. No doubt, that might have resulted in a psychological impact on him, but there had been no evidence to establish a *causal nexus* in that regard. There was no evidence as to any permanent impairment to the mental state of the child as well, although according to the medical evidence, the injury to his head would have been "very painful".
- [23] On a balance of those considerations I am unable to fault the learned Judge in having made the said award of \$10,000.00 to the Appellant for I could not see any misdirection/non-direction or an error in his said assessment, given the general legal principle applicable to an award of general damages that, save for one exception which appears to have been recognised in England where a provisional award is permitted to be made enabling a personal injury victim to re-apply for further damages, if a risk of further damage (e.g. Epilepsy) does in fact materialise (See: Section 32A of the Supreme Court Act, 1981 of England).
- [24] But, it is not the case in the (1st) Appellant's claim. The learned Judge has weighed the scales evenly. He has not failed to take into consideration any relevant factors or had taken into reckoning irrelevant factors.
- [25] Accordingly, I conclude that, the said award of \$10,000.00 made in favour of the (1st) Appellant bears scrutiny and consequently dismiss the (1st) Appellant's appeal for enhancement of the said award.

Re : the (2nd) Appellant's claim for enhancement of damages

- [26] The (2nd) Appellant – was a toddler of around 3½ years of age at the time of the accident. Being the younger sibling to the (1st) Appellant, the same trauma his elder sibling witnessed, in seeing the mother being killed in the accident, the (2nd Appellant) surely also must be presumed to have witnessed.

[27] Could the trauma that might have been caused to a 6 year old child as opposed to a 3½ year old child, in seeing the mother being killed in an accident be distinguished quantitatively? Or even qualitatively?

[28] With all due respect to the learned High Court Judge, even if I were to accept the observations and deductions he made in consequence as to the non-seriousness of the injuries which the 2nd Appellant had sustained, there were certain factors, in my view, that he was obliged to consider as being relevant factors and, they were:-

(a) Even in a temporary sense, the Appellant (2nd) had been injured to some extent.

(b) But, what about the trauma the (2nd) Appellant was subjected to, in seeing his mother being killed (as she was stepping out of the vehicle they were in, to breast feed her infant child, a 6 months old, the 3rd Appellant? (vide: the evidence as recorded in the civil action in regard to the liability issue in the Labasa High Court – No.7 of 2012 referred to at paragraph [5] above in this Judgment.

(c) Would that not have been trauma visiting the eyes and the mind of a 3½ year old? Was that a qualitative distinction to be drawn between a 3½ year old as opposed to a 6½ years old? How is a Court to assess the impact of the same?

(d) Does a Court need evidence based on psychology to make a general assessment in a situation of that nature?

[29] Those were relevant factors the learned Judge, in my view, was obliged to address. His Honour did not do that.

[30] Consequently, I was faced with the issue as to whether I should send the matter back to the High Court for a re-assessment of damages in regard to the said award made in respect of the 2nd Appellant or, acting in terms of the jurisdiction vested in this Court in terms of Rule 13 of the Court of Appeal Act, I should make an award substituting an award in place of the said award made by the High Court.

[31] I opted to act on the latter, two factors having weighed with me in that regard viz:

- (a) This litigation has been going on for no less than 7 years;
- (b) Regarding the said measly award given in the 2nd Appellant's favour, I feel, when he grows up, he would feel that, he has been cheated (in the facts and circumstances of this case). He may well ponder on the fact that, 'my mother being killed in the accident which had taken before my very eyes, was I not entitled to be compensated at least to some degree proportionate to what my elder brother had been awarded (viz: \$10,000.00)?'
- (c) In his eyes would not the (2nd) Appellant have felt as to where the concept of "vindictam spirantes" had gone? He may well feel, his elder brother being awarded a sum of \$10,000.00 and his infant younger sister of just 6 months being awarded a sum of \$16,000.00 as to why he had been awarded a sum of only \$50.00

[32] For the aforesaid reasons, in conscience and in law, I cannot condone the said award of \$50.00 granted to the (2nd) Appellant.

[33] On a balance therefore and on the basis of the foregoing reasons, which I have articulated above, taking into consideration:

- (a) the nature of the injuries sustained by the (2nd) Appellant "not serious" (in comparison with or in contrast with the injuries sustained by the (1st) Appellant.
- (b) but, where, I was unable to draw a distinction between the trauma that might have been caused to a 6½ year old (the 1st Appellant) as opposed to the (2nd) Appellant who was a 3½ year old who had seen his mother being killed in the very same accident and, subjected to the same trauma, the sum of \$10,000.00

shall leave the learned Judge's determination thereon untouched (at page 8 to 10 of the Copy Record).

Prematilaka, JA

[35] I have read in draft the judgment of Guneratne JA and agree with the reasons and orders proposed therein.

Orders of Court

1. *The appeal is partly allowed.*
2. *The Second Appellant is awarded a sum of \$1000.00.*
3. *Subject to the above the High Court Judgment is affirmed.*
4. *The Appellants are entitled to post-judgment (High Court) interest in terms of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap 27).*
5. *There shall be no costs of this appeal.*



Hon. Justice E. L. Basnayake
JUSTICE OF APPEAL

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

Hon. Justice C. Prematilaka
JUSTICE OF APPEAL