IN THE COURT OF APPEAL, FIJI

ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 37 of 2017
HBC 19 of 2014

BETWEEN : **SAHALIYA MUBRIKAH KHAN**

Appellant

AND : **VINODAN CHETTY**
COURIER DOCUMENTS PARCEL LIMITED

Respondents

Coram : **Almeida Guneratne, JA**

Counsel : **Mr S. Prasad for the Appellant**

Mr A. C. Kohli for the Respondents

Dates of Hearing : **29 July, 2020**

Date of Ruling : **19 August, 2020**

R U L I N G

[1] This is an application for leave for extension of time to file and serve the High Court Record out of time or alternatively to seek leave to file appeal out of time against the judgment dated 16th March, 2017.

Initial Reflections

[2] The applicable criteria in cases such as the present one have been laid down in **NLTB -v- Khan** [2013] FJSC 1, 15 March, 2013 and has been referred to subsequently in a plethora of decisions.

[3] In several of my own rulings, I had expressed the view that the decisive criterion is the "merits factor" meaning reasonable prospects of success in appeal should leave be granted. However, in a more recent Supreme Court decision, their Lordships' Court expressed the view that, the relevant criteria must be considered as a whole. (**Fiji Industries Limited v. National Union of Factory and Commercial Workers** CBV 008 of 2016, 27 October, 2017).

[4] In that case His Lordship, Justice Keith opined that "lawyers mistakes" should not be visited upon party litigants. In a decision in this very session I extended that to where there had been a "breakdown of communications" between lawyers and clients. (**Jone Batinika v. iTaukei Land Trust Board**, ABU 007 of 2020, 14 August, 2020, *vide*: also **Gatti v. Shoosmith** [1939] 3 All ER 916.

[5] In the background of the aforesaid reflections I shall now proceed to consider the applicability to the instant case of the relevant criteria such the length of delay, reasons for the delay, prejudice to the parties as laid down in **NLTB v. Khan** (supra) while holding back consideration of the "merits criterion" which I had labelled as the "decisive factor" as referred to at paragraph [3] above in my earlier rulings.

Consideration of the Criteria of the length of delay, reasons for the delay and prejudice to the parties

[6] Although there was disagreement as to the period of delay in the submissions made on behalf of the parties, that, there was "delay" was conceded by the Appellant.

[7] In so far as the reasons for the delay I accept the reasons adduced in the affidavits of Abdul Muhaiman Khan dated 16 April, 2020 and 9 June, 2020 in the exercise of my discretion, as against the affidavit in opposition of the 1st Respondent dated 11 May, 2020.

[8] As regards the "prejudice criterion", I took into consideration the facts that, this being a personal injury case arising out of a motor accident:

(a) the Appeal itself is for enhancement of damages which the learned High Court Judge himself awarded;

(b) but which, as regards the award for general damages, the learned Judge postponed until the plaintiff (the victim, a minor girl) reaches the age of 18;

(c) special damages awarded to the father (next of kin) without setting a time limit for the same to be paid.

(d) And, consequently, that, the Respondents do not face any risk of the said judgment being executed in whatever form and manner.

[9] Accordingly, I had no hesitation in holding that, the "prejudice criterion" could not be said to operate to the detriment of the Respondents.

[10] Thus, on a balance, the delay being conceded as against the reasons for the delay (which I have accepted), there being no basis for "the prejudice criterion" to have aided the Respondents, I now proceed to consider the "merits criterion".

Consideration of the "merits criterion"

[11] I shall begin by adverting to the findings of the High Court that led to a conclusion of 50% contributory negligence on the part of the plaintiff.

The High Court Judgment

[12] The learned High Court Judge considered the twin aspects of "the liability issue" and the "quantum of damages issue" thus:

On "the Liability issue"

"LIABILITY

40. Following on from what I have stated above, the facts are contained within a small compass. It is the Plaintiff's case that she was crossing the road when the accident occurred (see para 4, para 5 (a) and (e) of the Statement of Claim). This is substantiated by the sworn testimony of the Plaintiff's own witness, PW5 that he told the police the truth. So, I turn to his Police statement, Exhibit P4. In this statement he says that all of a sudden a girl (Plaintiff) and Fariz ran across the main road. The driver of the van swerved to the right to save Fariz but he could not save (Plaintiff) as she was also running to cross the road. In effect the Plaintiff's witness is saying the same thing as the Defendant who testified that he saw the boy running, he swerved to the right and then the girl came in running 2 metres from the van and he could not do anything. I accept the evidence of the Police sketch plan that the place of impact was on the Defendant's correct side of the road.

*41. To my mind this is a classic example of what we judges call an "agony of the moment" situation. In the Privy Council decision in **Ng Chun Pui & Others v Lee Chuen Tat and Another** [1998] RTR 298, Lord Griffiths said the trial judge "also failed to give effect to those authorities which establish that a defendant placed in a position of peril and emergency must not be judged by too critical a standard when he acts on the spur of the moment to avoid an accident."*

42. The best expounding of the applicable judicial view was expressed by Raja Azlan Shah J. in: Govinda Raju & Anor .v. Laws: [1966] 1 M.L.J. at page 190. He said: "The plaintiff saw the motor vehicle swerving into his path. Perplexed by being exposed to the danger created by the defendant he also swerved to his right in an attempt to avoid the accident but failed. To my mind, when a plaintiff is perplexed or agitated when exposed to danger by the wrongful act of a defendant, it is sufficient if he shows as much judgment and control in attempting to avoid the accident as may reasonably be expected of

him in the circumstances. To that extent I am satisfied that the plaintiff had so acted in the circumstances. What is done or omitted to be done in the agony of the moment cannot be fairly treated as negligence. I therefore hold that there is no contributory negligence on the part of the plaintiffs". This was a decision of the High Court of Malaya. Transposing "defendant" for "plaintiff" and vice versa, in my view, this is exactly what occurred in the instant case.

43. *In the result, if the Plaintiff had been an adult, I would have dismissed her claim with costs. But she is not, and so I go to expound my decision here. The Plaintiff, though not held to the same degree of care as a grown-up woman is still required to observe some degree of care in the interests of her own safety. It is the duty of the Court to determine this degree. I am of opinion that a 8 year old school girl should be aware of the danger to herself of crossing the road in the face of an oncoming vehicle. I find that the Plaintiff had failed to conform to the standard of care that can be reasonably expected of an eight year old schoolgirl in her position. On the facts and on the law, I find and I so hold she is fifty (50%) percent contributorily negligent. Consequently the damages she is entitled to will be reduced by 50 percent. With that I turn to assess the damages."*

<u>On the Quantum (on a 100% Basis)</u>

"<u>QUANTUM ON A 100% BASIS</u>

44. *The injuries are stated in the medical reports tendered. The Plaintiff is obviously relying mainly on Dr Schultz's report, Exhibit P9. I find this is not an adequate or comprehensive report. It fails because the Doctor did not interview the mother of the Plaintiff who from her evidence in Court would have been in the best position to tell of the Plaintiff's physical and mental condition, pre and post accident, as the normal primary caregiver. Further the report is not accompanied by any report from the female doctor who also conducted related medical interviews. Finally the Doctor did not ask for the school records of the Plaintiff.*

45. *All in all, the Court is unable to set great store by Dr Schultz's report and will accept his written description of himself as "semi-retired" and that the "disability might be reasonably attributed to the accident. But this is not sufficient to satisfy the standard of proof in a civil case which is a balance of probabilities.*

46. *The Court considers Dr Vulibeci's report as the more accurate and comprehensive one. In doing so, the Court will express its judicial opinion that the alleged PTSD of which Dr. Schults is the sole*

proponent has not been established. The more realistic and positive prognosis of Dr Vulibeci is accepted. In my opinion, the general damages for pain and suffering and loss of amenities that are both adequate and apposite will be the sum of $50,000."

[13] At this point I thought it was opportune to recap the grounds on which the Appellant has put in issue the judgment of the High Court (dated 24 April, 2017).

> *"1. **THAT** the Learned Judge erred in law and in fact n finding that the Plaintiff was contributorily negligent for the accident even though the Plaintiff was only eight years old at the time of the accident and the First Defendant was over speeding and swerved to his incorrect side and struck the Plaintiff as was evidenced by the eye witness.*
>
> *2. **THAT** the Learned Judge erred in law and in fact in holding that the Plaintiff had been contributorily negligent even though the First Defendant was travelling at the speed of 50km/h and he neither applied the brakes nor did he slow down when he saw a school bus dropping off school children who were about to cross the road.*
>
> *3. THAT the Learned Judge erred in law and in fact in failing to give weight to the Official Fiji Road Code 2012 and failing to hold that the First Defendant was overspeeding under the circumstances as stated by the eye witness (PW5), the bus driver (PW4) and as marked on sketch plan that after the accident the First Defendant stopped at a distance of 36meters from the point of impact, and as stated in the infringements notices that the Defendant had the tendency of over-speeding.*
>
> *4. THAT the Learned Judge erred in law and in fact in failing to hold that there was sufficient space for the First Defendant to pass through without hitting the Plaintiff had the First Defendant been travelling at a safe speed under the circumstances, and had he not swerved to his incorrect side.*
>
> *5. THAT the Learned Judge erred in law and in fact by relying on the description of the accident site given by the Police witness, (PW7), who was only the Intervening Officer in this case and had never seen the accident scene nor did he have anything to do with the drawing of the sketch plan.*

6. *THAT the Learned Judge erred in law and in fact in failing to consider the seriousness of the Plaintiff's injuries, the intensity and continuing nature of her pain and suffering, nature of the Plaintiff's permanent brain damage and the Post Traumatic Syndrome suffered by the Plaintiff as stated in the medical reports and the MRI Reports and the evidence given by both the doctors at the hearing.*

7. *That the Learned Judge erred in law and in fact in failing to consider that the Plaintiff had been admitted to Labasa and CWM hospitals for a long period of time and she still continues to attend clinic for her persistent pain and suffering.*

8. *THAT the Learned Judge erred in law and in fact in failing to appropriately assess the pecuniary damages and cost of future care for the Appellant/Plaintiff although the same had been duly pleaded and particularized and a persuasive submission given at the end of the trial.*

9. *THAT the Learned Judge erred in law and in fact in failing to give weight to the report prepared by Dr Roland Schultz Dip.Sec.Ed., Dip.. Tchg, BA Med. (educational psych), MA (gen. & clin. Psychology, PhD (cross-cultural clin.) and the persuasive evidence given by him at the trial. Doctor Ronald Schultz is highly qualified psychologist and highly trained to give evidence in personal injury cases and that the words "semi-retired" and "disability might be reasonably attributed to the accident" in his report were misinterpreted by the Court.*

10. *THAT the Learned Judge erred in law and in fact in failing to accurately assess the Appellant's/Plaintiff's disabilities which will prevent her from living a wholesome life and finding employment in the future.*

11. *THAT the Learned Judge erred in law and in fact in holding that the Plaintiff's grandmother was not the primary care-giver even though the Plaintiff's mother in her evidence categorically stated that the Plaintiff being her first child was taken care of by her grandmother, as is a normal practice in extended Indian families."*

Assessment of the judgment of the High Court as against the grounds of appeal urged by the Appellant in the light of the recorded evidence

[14] In that overall assessment, at the outset I reject Ground 4 contained in the grounds/reasons of appeal on the factual aspect taken in the light of what the learned Judge said in his Judgment at paragraph 41 which I have recounted earlier.

[15] That is a factor that has some bearing on.

[16] However, given His Lordship's reasoning contained at paragraphs 42 and 43 of his Judgment (as recapped above), I was unable to find justification for the impugned finding on the basis of a 50% contributory negligence on the part of an eight year old girl when His Lordship held that,

> *"... the plaintiff had failed to conform to the standard of care that can be reasonably expected of an eight year old schoolgirl in her position."*
> (at paragraph 41 of the Judgment)

[17] In that regard I derived assistance from a decision of the Court of Appeal in England where their Lordships (Lord Denning, M.R., with two other Lord Justices) had held thus:

"an ordinary child of 13½ (unlike an adult) could not reasonably be expected to pause to see for herself whether it was safe to go forward ..."
being the essential part of the ratio of that decision which I extracted for the purposes of this Ruling. (*vide*: **Gough v. Thorne** [1966] 3 All ER 398).

[18] That case was in relation to a 13½ year old girl. The present case is in regard to an 8 year old girl as I picture her running across the middle of the road, when the driver (the 2nd Respondent) was speeding and not bothering to brake, though (in fairness to the said driver, either he had to hit that boy Fauf or her (the plaintiff) for which reason I was prompted to say what I said at paragraphs [14] and [15] above.

[19] The resulting inquiry therefore was to see whether it was to be 100% liability on the part of the 1st Respondent (driver) or ought to be less but certainly not 50%. Mr Prasad in his submissions also at some point appeared to adopt a somewhat condescending stance when he was heard to say that, at the most the plaintiff could have been regarded as having been 25% negligent.

The Principles of law established by well-known judicial precedents

[20] At this point I felt it incumbent on me to advert to some principles of law established by well-known judicial precedents.

[21] It was Lord Atkin who put it thus:

> *"... if the (Claimant) were negligent but his negligence was not a cause operating to produce the damage there would be no defence..."*
> (**Caswell v. Powell Duffryn etc**. [1940] AC 152 at 165, HL).

[22] However, His Lordship continued and had said:
"... I find it impossible to divorce any theory of contributory negligence from the concept of causation." (Supra).

How the Courts sought to mitigate the harshness of the doctrine of contributory negligence

[23] Going through the judicial annals in the aftermath of that "Atkinion view", one sees how the judicial mind in England had sought to mitigate the harshness of the doctrine of contributory negligence. (See: **Stepley v. Gypsum Mines Ltd** [1953] AC 663, HL per Lord Porter).

[24] Even before the case of **Caswell v. Powell** (supra) there had been in the wings the decision in **Davies v. Mann** [1842] 10 M & W 546 in which it had been held that, *"notwithstanding his own negligence, the claimant could recover damages because the defendant, had he been driving properly, could still have avoided the consequences of that negligence".*

[25] That decision appears to have been when "last opportunity rule" was introduced.

[26] Of course, as "Clerk and Lindsell on Negligence" point out,

> *"... the Courts are no longer concerned with the subtleties and refinements of the last will opportunity rule and the like. In order to decide whether the claimant's negligent conduct is contributory, one applies exactly those rules of causation."* (at page 309).

Consideration of the said principles and application of them to the instant case of a child of 8 years

[27] In that regard I was left with the following questions to address

(i) Could an 8 year old girl have addressed her mind to the so called last opportunity rule to have avoided being hit by the driver (1st Respondent)?

(ii) Could she have been expected to exercise reasonable care to act as an adult would have been expected to act?

Determination

[28] In that regard I have earlier referred to the English case of **Gough v. Thorne** (supra) (which was concerned with a 13½ year old girl).

[29] Apart from that decision, I also gave my mind to another English decision in **Jones v. Lawrence** (which involved a 7 year old boy). (vide: (1969) 3 All ER 267).

[30] In the said decisions of the highest Courts of England 100% negligence was ascribed to the tortfeasor with no contributory negligence being visited upon minors, particularly, having regard to their ages.

[31] The Appellant's lament being for enhancement of the damages awarded on a 50% basis, I have no hesitation in saying that, there is a strong prospect of success in getting that award enhanced. It is not for me, sitting as a Single Judge of this Court to set percentages. It is left to the full Court and/or the Supreme Court to do that. In other words, whether to reject the defence of contributory negligence wholesale as in the afore-cited English decisions or to distance from them for the Fijian jurisprudence in accepting the said defence to whatever degree in the context of children of tender ages.

[32] That itself is a question that amounts to an important public interest issue.

[33] For the aforesaid reasons I have no hesitation in granting leave to appeal and extension of time to file the Copy Records and proceed with the appeal:

Orders of Court

1. *The application of the Appellant for leave to appeal and extension of time to appeal as stated in paragraph [33] above is allowed.*
2. *The Appellant may advise himself to take proper steps as requisite in law to prosecute the appeal.*
3. *In all the circumstances of the case I make no order for costs.*

COURT OF APPEAL FIJI

Almeida Guneratne
JUSTICE OF APPEAL