

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL NO. HBC 121 of 2009

BETWEEN : Satend Kumar Sharma

PLAINTIFF

AND : Swadesh Prakash Chand

FIRST DEFENDANT

AND : Pacific Transport Limited

SECOND DEFENDANT

COUNSEL : Mr. V. Maharaj for the Plaintiff
: Mr. S. Sharma for the Defendants

Date of Judgment : 11 December 2013

JUDGMENT

Introduction

1. This is an action for damages commenced by the Plaintiff as the Administrator of the estate of his late daughter Prianshu Preeti Sharma who died on 8 day of November 2007 at Nasinu Road, Nasinu as a result of a motor vehicle accident.
2. The First Defendant was at all material times the driver of the motor vehicle FH 930. At the time of the accident the First Defendant was employed by the Second Defendant and the Second Defendant is the registered owner of the

motor vehicle Registration No. FH 930. The Second Defendant is made a party to the action based on vicarious liability.

Background

3. The Plaintiff alleges that the injuries sustained by the deceased which led to her subsequent death was caused as a direct result of the negligent driving of the First Defendant.
4. The Plaintiff also alleges that First Defendant was driving the said vehicle in an excessive speed, over and above the road speed limits, lost control of being able to stop to avoid colliding with the deceased. Hence the Plaintiff alleges that the accident occurred due to the negligence of the First Defendant.
5. The First Defendant denies liability on the basis of not exceeding the speed limits and also on the basis of alleging contributory negligence against the deceased having contributed 90% towards the cause of the accident, seeking apportionment of liability substantially against the deceased (exceeding 90%) and the liability on the part of Defendants being no more than 10%.

The Agreed Facts in Relation to the Issue of Liability and Quantum

6. The parties have agreed that:
 - “1. *The Plaintiff is the lawful father and duly appointed administrator of the estate of Prianshu Preeti Sharma.*
 2. *The Second Defendant was at all material times the driver and a servant of the First Defendant.*

3. *The First Defendant at all material times was the registered owner of vehicle registration No. FH 930.*
4. *On 8 November, 2007 the Second Defendant whilst driving the said vehicle owned by the First Defendant at Boila Circle, Nasinu was involved in an accident.*

The issues to be determined in relation to both liability and quantum:

- “1. *Did the child die as a result of the collusion by the motor vehicle FH 930?*
 2. *Did the accident occur as a result of the negligence on the part of the Second Defendant?*
 3. *Is the deceased guilty of any contributory negligence, if so, to what degree?*
 4. *If the Defendants are found liable then what is the appropriate quantum of the damages to be paid by the Defendant?*
 5. *Is the Plaintiff entitled to interest, if so then from what date and what rate?*
 6. *Is the Plaintiff/Defendant entitled to costs, if so, then at what scale?”*
7. The question of liability, naturally, must be determined first. I will initially summarise the totality of the evidence of both parties’ pertaining to liability.

8. If liability is established to any extent, I will then revert to the issues on the quantum of damages, and will summarise the relevant evidence on the quantum of damages then, as the issues for determination require the court to make a finding on liability, and, if necessary on quantum of damages, which I would obviously if so warrants, deal with later in my judgment.

Summary of the Evidence on Liability

9. The Plaintiff's case is that the First Defendant was travelling at an excessive speed, well above the authorized speed limit at the time, whilst attempting to overtake two vehicles, namely, a bus which was parked on the side of the road just in front of carrier which was also parked right behind the bus in a negligent manner as a result of which the first Defendant did not see and or lost control of the vehicle to bring the vehicle to a complete stop because of the excessive speed in order to avoid colliding the deceased, the nine year old girl, who was with two other older girls who were attempting to cross the road, behind the bus, in front of the carrier.
10. The main evidence adduced before me on behalf of the Plaintiff was by a Vulase Bitan. She was an elderly lady who resided in her house which happened to be very close to the scene of the accident.
11. In her evidence she stated that she had resided in that particular house in excess of 20 years.
12. She also gave evidence to the effect that she was sixty five years of age at the time of her evidence and accounted for class 8 education.
13. Her evidence also revealed that, she was staying at the verandah of her house facing Nasinu Road. She stated that she was cutting her niece's hair at that time.

14. She also stated that she saw three girls came off the bus, after the bus moved, she saw the three girls crossing the road in the direction of her house. She confirmed in her evidence that there was a stationary truck behind the bus.
15. According to this witness, the three girls were coming in a straight line one behind the other. She stated that whilst the girls were crossing she witnessed a white van (the vehicle driven by the First Defendant) came from behind the stationery carrier which she describes as “very fast” overtaking the truck and came into the lane closet to her home.
16. The witness also stated that the next thing she saw, that out of the three girls, only two girls were seen after the van hit the third girl. She states that she came running down at this stage, and yelled out at the driver.
17. After the bus stopped she had pointed out to them the body of the deceased lying on the road.
18. Notably the witness had difficulty in explaining to this court the exact locations of points of impact, marked on a sketch plan during the cross examination.
19. I note that the sketch plan was not a plan drawn to scale.
20. I also take note of the fact that line of questioning by the defence counsel during the cross examination of this witness, with an attempt to pin point certain exact locations as to where the bus, the twin cab, the stationary carrier and the area where the three girls were crossing, has to be weighed against the reasonable ability of a 68 year old lay witness with class 8 level education, trying recollect of an incident which occurred approximately six years earlier.
21. I could not help but note, with emphasis, where this witness towards the end of the cross examination states that:

“I am unable to understand the plan but you take me to the scene of the accident I will be able to point at the exact spots.”

22. In my opinion and my judgment of the demeanor of this witness during her evidence under oath, I am convinced of the credibility of her.
23. I conducted an inspection of the accident site myself at the request of both counsel. I am well apprised of the clarity of the sequence of movements of the vehicle in question and the movements of the pedestrians, namely the three little girls one of whom is the deceased, on how less complicated it appears upon an inspection of the site as opposed to determine location on the sketch plan.
24. I now turn to summarise, more particularly on the question of the speed at which the vehicle driven by the First Defendant was travelling at.
25. The evidence of Vulase Bitan, clearly establishes, in my view that the vehicle was travelling at what seems to have been a speed excessive of the authorized speed limit.
26. This particular witness, in her examination in chief, stated that she witnessed, whilst the girls were crossing, a white van came from behind the stationary carrier “VERY FAST” overtaking the truck and heading in the direction of her drive away and came into the lane closest to her home.
27. Her evidence was also to the effect that, the twin cab was travelling at about 100 to 120 kilometer per hour when asked in re-examination as to how did the speed of the vehicle (twin cab) compared to other vehicles that she would have observed daily on that road, her answer was:

“this particular vehicle was travelling at a very high speed and hard.”

28. Evidence of speed at which the First Defendant drove his vehicle on the day in question is corroborated by the statement given to the police by Josaia Cakau. This eye witness at paragraph 20 of his statement which was admitted pursuant to Civil Evidence Act 2002 as evidence, on grounds that was not practical to call him as he resides overseas states:

“this girl flew some meters before landing on the road and from the place of impact this van past at a very high speed.”

29. Further corroboration of speed can be detected in the First Defendants own caution statement which he gave to the police. In this statement he admits that the speed limit on Nasinu road was 50 kilometers per hour, but the speed in which was traveling was at 65 kilometers per hour.

30. I need to make a mention of the fact that I have noted the inconsistencies in the statement given by him to the Police when compared to the evidence given by him on oath.

31. I think it is prudent for me to state at this stage of my judgment of my view the feasibility of an impact of the deceased to have got thrown some 18 meters from the point of impact, and to suffer the extent of the injuries as suffered as pleaded in the Statement of Claim, if collided against a vehicle travelling at only 50 kilometers per hour. My logical and practical conclusion would be that it would be an impossibility.

32. I take note of the fact that the first Defendant was charged and convicted by the Nasinu Magistrate Court of the criminal offence pertaining to the death of the deceased is relevant to the proceedings and as submitted by the Plaintiff counsel, such conviction has persuasive effect on these proceedings.

33. I also note that it is not in dispute that the First Defendant had been charged of the criminal offence of causing the death of the deceased under Section 97 (2) and Section 114 of Land Transport Authority Act and on 17 July 2013 the First Defendant was convicted of said offence and was given a prison sentence of 1 year and six months suspended for three years, amongst other orders.
34. Although pleaded, the defense did not put to any of the Plaintiff's witnesses, nor did adduced evidence through any of the defense witnesses that the accident was caused due to fault or any fault contributed to by the deceased.
35. Therefore, I reject the allegation of contributory negligence against the deceased, wholly.
36. I am satisfied of the evidence both direct and circumstantial that the death of the deceased occurred as a direct result of the First Defendant's negligence driving.
37. Accordingly in my view, the Plaintiff has established that the First Defendant was clearly driving at an excessive speed, causing the death of the deceased nine year old girl.
38. In the circumstances I dismiss any claim of contributory negligence against the deceased. I conclude that the accident occurred due to the sole negligence of the First Defendant. I hold the Second Defendant vicariously liable.
39. Accordingly, on the issues of liability to be determined by me, given that I have already concluded that the accident occurred due to the negligence of the First Defendant, and the Second Defendant been vicariously liable for the reason as set out above, I dismiss all defenses without any further consideration, in favour of the Plaintiff.
40. Having determined on the questions of liability, I now address the issues on quantum of damages as claimed by the Plaintiff.

Summary of Evidence on Quantum

41. I take note of the fact that the deceased was a nine year old school child in Grade 3 at the time of her death.
42. The Plaintiff in the prayer of the Writ of Summons claims for damages under the following heads:
 - “1. *Damages under Compensation to Relatives Act (Chapter 29);*
 2. *Damages under Law Reform (Miscellaneous Provisions) (Death and Interest) (Chapter 27);*
 3. *General Damages;*
 4. *Special Damages;*
 5. *Interest pursuant to section 3 Law Reform (Miscellaneous Provision) (Death and Interest) Act Cap 27;*
 6. *Costs;*
 7. *Such other relief as the Court deems just and equitable in the circumstances.”*

Special Damages

43. The Plaintiff through his counsel had on 8 February 2013 filed a schedule of Special Damages claiming a sum of \$3,539.50 by way of special damages.

44. The above amount of special damages as claimed by the Plaintiff has been admitted by the defense.
45. Therefore I allow the award \$3,539.50 over that particular head of damage.

General Damages

46. The Plaintiff (the father of the deceased) gave evidence before me. His evidence was to the effect that he had four children (all girls) and with the death of Prianshu he is left with three daughters.
47. He stated that he comes from a humble background earning \$150.00 per week as a salesman. He stated that he is the only breadwinner and solely supported all his children from his income.
48. The Plaintiff also in his evidence before me submitted that, in relation to the deceased, she was in grade three at Rishikul Primary School.
49. His evidence was that the deceased was a very bright girl. This evidence was supported by a letter, tendered in evidence, from the Principal of Rishikul Primary School.
50. The Plaintiff's evidence further illustrated that the deceased had won a Hindi oratory contest and was chosen by her school to take part in oratory contest overseas. She could not do so, obviously, because of her untimely death.
51. The Plaintiff has stated that the deceased was a very helpful child at home, helping her mother with domestic chores.
52. The Plaintiff counsel based on evidence submits that, it would appear based on her school record, the deceased could have made it to be a Hindi Teacher, or a Hindi Radio Announcer, writer or such similar field.

53. It is not necessary for the Plaintiff to prove that he has a right to support by the deceased; what he (the Plaintiff) must establish is a reasonable expectation of a pecuniary benefit, as of a right or otherwise, from the continuance of the life.
54. In the instant case, the evidence points out that the deceased was a very bright student, and as such in all probability the deceased would have qualified as a teacher and supports the Plaintiff for some years perhaps her marriage, weighted against other uncertainties and vicissitude of life in general.
55. As decided in the **Permanent Secretary for Health vs A.G & Other (ABU 0084 of 2006S)**, in which the Fiji Court of Appeal stated that awards in Fiji have been very low and it was time that awards in personal injury, and by implication death cases, be re-looked at and awards must reflect the economic realities in terms of the real dollar value.
56. In my view, the courts in Fiji have since followed the approach adopted in the above case and made awards that truly reflects the changing economic and social realities of life.
57. This is evident by the award the sum of \$34,150.00 to a eleven year old child in the matter of **Moli vs Bingloor (2008)** FJHC 29 by Pathik J some ten years ago and an award of \$51,774.00 to seventeen year old at the time of her untimely death in the matter of **Rika v Trustees of the Methodist Church of Fiji [2012]** FJHC 2006 by Hetiarachchi J in the year 2012.
58. Therefore, based on the evidence before me in the present matter although there is no adequate evidence to conclude that the deceased would have made it to become a Hindi Teacher, Hindi Radio Announcer, writer, I am of the view given clear signs of bright young student who can be safely presumed to continue her ambition to gain decent employment in the workforce. The

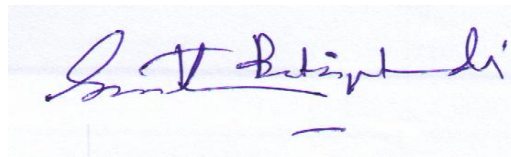
deceased would have, more than likely at the very least have earned at least \$100.00 per week given the nature of the employment opportunities currently available and to be further available in years to come and would have spent at least \$150.00 on her parents per month.

59. Taking a fairly conservative approach I am inclined to apply the multiplier of fifteen in this instance. Accordingly I award the Plaintiff the sum of \$FJD 27,000.00
60. In the exercise of my discretion I award interest at 6% per annum on general damages of \$27,000.00 from the date of writ to date and 3% per annum as Special Damages on the sum of \$3, 539.50 from the date of writ to date.
61. The total sum available to the Plaintiff as damages is \$36, 581.17 plus costs is made up as follows:

a.	General Damages	\$27, 000.00
b.	Interest on General Damages	\$ 5, 670.00
c.	Special Damages	\$ 3, 539.50
d.	Interest on Special Damages	\$ 371.67
	Total	\$36, 581.17

Costs

62. On the issues of costs to be decided by this court, I note that the Plaintiff's submission refer to formal offer to settle made pursuant to the principles of Carlder Bank via letter dated 19 July 2013.
63. Based on the above submission by the Plaintiff upon the correspondence to the Defendant dated 19 July 2013, which correspondences I have not witnessed during the hearing of this matter, I grant the Plaintiff's request, that the question of costs be reserved.

A handwritten signature in blue ink, appearing to read 'Susantha N Balapatabendi', is written over a light blue rectangular background.

Susantha N Balapatabendi

JUDGE