IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. 06 of 2012

BETWEEN : **SEVESA DAUNIVALU** also known as **SEPESA DAINIVALU**, of Wailevu, Labasa.

PLAINTIFF

A N D : **RAMODHARAN NAIR** of Wailevu, Labasa, Driver.

1st DEFENDANT

AND : **DALIP CHAND AND SONS LIMITED** a limited liability company having its registered office at Ritova Street, Labasa.

2nd DEFENDANT

AND : **MOHAMMED NASIR** of Soisoi, Tabia, Labasa.

3rd DEFENDANT

Counsels : Mr. A. Sen for the Plaintiff

Mr. Ami Kohli for the Defendant

Dates of Hearing : 4th March, 2014, 16th April, 2014 and 30th May, 2014.

Date of written submission: 14th & 19th June, 2014

Date of Judgment : 30th July, 2014

JUDGMENT

INTRODUCTION

1. The Plaintiff was one of the persons injured in a fatal accident where his wife died instantaneously and their three children suffered injuries. The liability of this action, by consent of the parties decided on HBC Labasa High Court Civil Action No 7 of 2012.

The personal injury actions of the other persons injured were taken for trial one after the other. Plaintiffs' claim for the loss of his wife and the claims for injuries to the children were already decided.

2. The Plaintiff was travelling with his family on a single cab turned in to passenger carrier, which is common mode of transportation in Labasa. There were two other passengers travelling with them.

3. One of those passengers, who were seated in with the Plaintiff and his family, got down in the mid journey and since she had several belongings to be unloaded, the vehicle was parked on the side of the road for her to unload all her luggage. The Plaintiff was in the process of handing over of one of those luggages to the said passenger who had already got down and was standing on the ground colleting them, when the accident happened.

4. The bus driven by the 1st Defendant collided from behind of the single cab where the Plaintiff and his family were, with a considerable force and due to the impact the single cab carrier was thrown out from the place it was parked and landed outside the road inverted. The liability is already determined in the abovementioned action and determination as to it not needed in this case and I need not elaborate on that issue in this action other than to explain the circumstances in which the Plaintiff got injured to assess pain and suffering.

Assessment of Damages

5. With impact from the bus driven by the 1st Defendant, the Plaintiff was trapped under the vehicle and due to the weight of the part of the vehicle and the trauma of the collision, he got injured. The people who gathered to the accident site, had lift the vehicle and helped him out but he could not walk as his vertebra had got damaged (fractured) from the accident, apart from the laceration in the forehead and back side.

6. After the accident the Plaintiff's head was bleeding and he could not stand on his feet and he had pain on the lumber region of the spine and also on the head. After about 30 minutes he and his children were transported to the hospital and the Plaintiff was taken to

emergency room. His wound in the head was treated with five stitches under local analgesia in the operating theatre.

7. The Plaintiff incurred severe injuries due to the accident. According to medical report P2 he had sustained a L1, L2, L3 wedge compression fracture L2 spinous process and 6 cm X .2 cm forehead laceration which was sutured in the operating theatre. According to the doctor's evidence there was a contusion of 10 cm- 8 cm on the back side of the Plaintiff and a loss of skin in the said area. This injury was not stated in the medical report P2. Apart from this there was dislocation of vertebrae L2 and spinous process of L2 was also fractured but not displaced. But the medical folder evidenced these injuries, and the doctor who gave evidence referred to the medical folder while giving evidence and there was no cross examination on these facts and in the analysis of the evidence I consider that the Plaintiff had proved the said additional injuries.

8. The said medical report P2, contained a three line description of the injuries suffered at the time of the accident, which had not even recorded all those injuries correctly as the abovementioned injuries were not recorded ,and more importantly no evidence of his present status or his prevailing condition contained in the medical report(P2) which was obtained on 31.7.2013. The said medical report proves the injuries to the Plaintiff as corroborated by the oral evidence of the doctor who gave evidence examining the medical folder maintained at the hospital for the Plaintiff.

9. He was treated in the hospital from 24.1.2010 to 8.2.2010 and, was discharged, despite not having fully recovered. The Plaintiff was transferred from the hospital, after the discharge, in an ambulance to his brother's residence as there was no one to take care of him since his wife died in the said accident and his children were of tender age and could not take care of him.

10. **Without any medical treatment or surgical intervention, the Plaintiff's condition had improved rapidly, and he had even visited the hospital unaided on 31st March, 2010 and sat on a chair. This fact was recorded in the medical folder** and revealed by the doctor who gave evidence for the Plaintiff. This evidence was contrary to the

Plaintiff's evidence that he was immobile for a considerable time period of over 6 months, which was compatible with the type of injury to the vertebra but Plaintiff had recovered earlier. Even the doctor without examining the medical folder confirmed such a long recovery time, considering the injuries to the Plaintiff, but later examining the notes of the doctors who treated when he first visited the hospital in March, 2010 said that Plaintiff was able to sit on a chair and walk unaided at that time and this was specifically recorded in the medical folder.

11. The doctor who examined the medical folder made this startling revelation to the court and this evidence was not challenged. The significance of that evidence is that Plaintiff in his evidence stated that he could not even stand on his feet for 3 months. The Plaintiff further said after first 3 months he could stand only holding walls of the house and it took 6 months to move out from the house. This is not correct as he had visited hospital in March unaided and also sat on a chair. In the analysis of the evidence relating to the recovery time Plaintiff's evidence is highly exaggerated and needs to be rejected. The Plaintiff was not truthful in his evidence relating to the recovery time.

12. The Doctor without examining the medical folder, in his evidence at the beginning of his evidence said considering the severe injuries accepted the Plaintiff's evidence relating to 6 month period where he could not even move freely, but later examining the notes kept by the surgical ward clinical reviews said Plaintiff had walked in to the examination room unaided and also was able to sit on a chair barely 2 months after the severe injury on31st March, 2010. This again indicate that the Plaintiff's exaggeration of time period was not an exaggeration by chance but had some knowledge about the type of injury and probable time of recovery. In the circumstances though I am not inclined to reject all his evidence it is not safe to admit all his evidence as credible evidence. He is directly benefited from an exaggerated claim and as an interested party to the action, his evidence needed to be examined cautiously.

13. The Plaintiff was readmitted 14.4.2010 as there was a foreign consultant at the hospital and his expert opinion was obtained and the Plaintiff was discharged. This second

admission was not due to any aggravation of condition as suggested in the written submission of the counsel not supported by evidence.

14. Submissions cannot manufacture facts not supported by evidence. The doctor said the reason for admission of the Plaintiff after review by clinical ward in his evidence in chief. Since there was a foreign consultant visiting the hospital at that time his opinion was obtained and even said consultant confirmed that no surgical intervention was needed for the Plaintiff to recover. There was no evidence as suggested by the counsel for the Plaintiff in his written submissions and this contention in the submission needs to be rejected.

15. Dr Maloni in his evidence said that the Plaintiff was again asked to come to the hospital in the month of September, 2010 to be admitted in order for the Australian visiting consultant to conduct a further review but the Plaintiff had not turned up for examination after June, 2010 for a review by the clinical ward, but had reported to hospital in 2012 regarding a swollen ankle and the doctor said that swollen ankle was unrelated to the injury from the accident. When he complained about the swollen ankle he had not complained about a back pain which sustained till April, 2010 and medication given for that effect. It is noteworthy that the Plaintiff had requested for social welfare in June, 2010 and this evidence was also recorded in the medical folder, there is no proof that he was granted social welfare indicating that he is able to work. The Plaintiff refrained from stating his request for social welfare in his evidence. The request for social welfare was made in June, 2010 but no pain was reported at that time. He was requested for a review in September, 2010 but he did not attend. Considering these facts it is safe to grant loss of full wages only up to June, 2010.

16. Non attendance of the Plaintiff to the hospital would indicate significant improvement of his physical condition, specially the back pain for which he was given medicine by the hospital. Considering the economic condition if the back pain persisted and he needed medication for that there was high probability of Plaintiff visiting the hospital, specially when he was requested to come in September, 2010 in order to obtain an opinion from foreign consultant and considering his desire to request for social welfare. The Plaintiff in

his evidence did not give any reason as to his non attendance to hospital after June, 2010 for the treatment for injuries suffered from the accident. The doctor said even if he visited out patient unit of the hospital it would get recorded on his medical folder, even for an unrelated injury as in the case of swollen ankle stated above. This proves that the Plaintiff did not visit the hospital for reviews after June, 2010 for the injuries relating to the accident. So, on the balance of probability the time period he could not work due to the injuries from the accident should not exceed 6 months for this period his wages and FNPF should be granted. (His annual salary was FJ$3,889.60 /52 weeks) x 26 = $1,944.80+ FNPF FJ$ 155.58).

17. The Defendant did not call any evidence. The doctor stated that Plaintiff had not reached the maximum medical improvement and there is room for improvement. The Plaintiff had not only avoided the review of his condition by the hospital, but also refused and or refrained from the examinations recommended by the doctor who gave evidence at the trial. This is peculiar, considering evidence of the Plaintiff where he complain of back pain and difficulty to sit for a longer time. The Plaintiff again in his evidence did not give a reason for not obtaining MRI scan recommended by the doctor which was not available at the time of the accident. The doctor said even the fees can be waived off if he was willing for such an examination.

18. The evidence of the doctor was that Plaintiff was examined by an Australian specialist once, and he had advised that there was no need of surgical intervention. The Doctor also said the probable complications arising from the surgical operations of the spinal cord, were factored in when taking such a decision. Similar injuries were not operated due the incidence of infections and other complications in such interventions through surgical means. He also said if such infections or complications occur in spinal cord it could leave the patient in a worse condition than he was before the operation. So, the decision not to conduct a surgical intervention to the Plaintiff was a professional decision, considering the pros and cons and not because of lack of know how in the hospital as contended by the Plaintiff.

19. The Plaintiff was able to come to hospital unaided for clinical reviews in March, April and June. All these instances he could freely mobile and he was examined by a foreign specialist in April and he was requested to come for such examination in September, but had not turned up for review after June, 2010 . It was also revealed that Plaintiff's conditions had not improved radiologically even as late as June, 2010.

20. Though the Plaintiff's outward condition gradually improved so that he could walk unaided, he was not able to perform his usual work as a labourer in the Department of Works. Radiologically there was no improvement in June, 2010 and that may be the reason for the request to come for an opinion from foreign consultant in September,2010 but the Plaintiff had not turned up for reviews since June ,2010. His medical condition contained in P2 only records of the injuries he suffered from the accident and according to that only treatment was the suturing of his forehead laceration.

21. The Doctor who gave evidence said according to the records, the pain of the Plaintiff would have been severe. He said L1,L2,L3 fracture was a very painful one the Plaintiff was administered a painkiller Pethidine 100 ml and this indicated a 3/5 range of a pain. He said Pethidine was 'dangerous' type of drug and would be given as last resort to relive pain if pain subsists from other medication or if all other types of pain relieving drugs fail.

22. According to BNF[1] (2011), independent and authoritative text about the drugs used in UK[2] it stated under 4.7.2 Opioid analgesics page 263)

> *'Pethidine produces prompt but short-lasting analgesia; it is less constipating than morphine, but even in high doses is a less potent analgesic. It is not suitable for severe continuing pain. It is used for*

[1] British National Formulary (2011, March)

[2] 'The BNF is a joint publication of the British Medical Association and the Royal Pharmaceutical Society. It is published biannually under the authority of a Joint Formulary Committee which comprises representatives of the two professional bodies and of the UK Health Departments. The Dental Advisory Group oversees the preparation of advice on the drug management of dental and oral conditions; the Group includes representatives of the British Dental Association. The Nurse Prescribers' Advisory Group advises on the content relevant to nurses. The BNF aims to provide prescribers, pharmacists and other healthcare professionals with sound up-to-date information about the use of medicines. The BNF includes key information on the selection, prescribing, dispensing and administration of medicines. Medicines generally prescribed in the UK are covered and those considered less suitable for prescribing are clearly identified. Little or no information is included on medicines promoted for purchase by the public'

analgesia in labour; however, other opioids, such as morphine or diamorphine, are often preferred for obstetric pain.'

23. The above description substantiate the pain suffered by the Plaintiff was severe. The Plaintiff was also given Fenagon and also anti-inflammatory drugs and antibiotics. He also stated that L2 vertebrae was dislocated , and there were fractures on L1, L2 and L3 vertebrae and they were not complete fractures that needed surgical interventions.

24. There was no evidence of permanent slip of discs. The counsel for the Plaintiff had submitted case of ***Amin v Chand*** [2012] FJHC 1015; Action39.2008 (unreported decided on 13 April 2012). In the said case there was not only an assessment of permanent disability at 18% as a whole person but also evidence of worsening conditions with time. His Lordship Calanchini J (as he then was) held,

'On top of that (i.e permanent impairment assessment report) it is necessary to recall the evidence given by the doctor at the trial. The doctor said that the Plaintiff's condition will not get better. It will get worse. There is a 50% chance that by the time Plaintiff reaches 60 years old he will not be able to walk.'

25. In ***Amin*** (supra) case the victim could not walk without crutches and even with crutches he could walk only a limited distance. In contrast the Plaintiff could walk unaided to the hospital and sit on a chair within 2 months from the injury and had not complained regarding the walking or his gait to the doctors when he came for reviews to the hospital. There is no evidence that his walk will be hampered, from this injury in the future. Only complain that remained after 3 months from the accident, was a back pain for which he was given relatively mild analgesia. There is no proof of continuing medication for any pain on balance of probability. Even when the Plaintiff visited the out patient unit in 2012 he had not complained about persisting pain from the injury of the motor accident. Six months after the accident in June, 2010 the Plaintiff had not complained about the pain and no medication is given for pain at that time. In the analysis of the evidence the situation in ***Amin*** (supra) cannot be considered a comparable one to arrive at a damage for general damages for pain and suffering. In that case there was a permanent assessment of impairment 18% and the evidence was that the person would not be able to walk by 60 with a probability of 50% which is a relatively high probability in the analysis of evidence.

26. In contrast the evidence produced by the Plaintiff is speculative. There is no impairment assessment done, but the doctor said in comparable injury may incur 23% impairment under AMA guide, but this cannot be accepted as Plaintiff's impairment assessment. According to the AMA guide there cannot be an assessment of the total impairment unless the Maximum Medical Improvement (MMI) reached and that had not been the case with Plaintiff's injury. It is noteworthy that Plaintiff was able to walk much earlier than comparable injury and it is not safe to speculate. (see ***Gammell v Wilson*** 1982 A.C 27)

27. AMA Guide (6th Edition), Chapter 2 (Practical Application of the Guide) of the AMA at p24 it states

> *'2.3c When Are Impairment Ratings Performed?*
> *Only permanent impairment may be rated according to the Guides, and only after the status of "Maximum Medical Improvement"(MMI) is determined as explained in Section 2.5e. Impairment should not be considered permanent until a reasonable time has passed for the healing or recovery to occur. This will depend on the nature of underlying pathology, as the optimal duration for recovery may vary considerably from days to months.* ***The clinical findings must indicate that the medical condition is static*** *and* ***well stabilized for the person to have reached MMI.****"(emphasis added)*

At p 26, of AMA Guide, MMI is defined under Section 2.5e (stated above) as follows

> *'2.5e Maximum Medical Improvement*
> *Maximum Medical Improvement refers to status where patents are as good as they are going to be from the medical and surgical treatment available to them. It can also be conceptualized as date from which further recovery or deterioration is not anticipated, although over time (beyond 12 months) there may be some expected change. The Guides, however does not permit the ratings of further impairment……*
> *Thus, MMI represents a point in time in the recovery process after an injury when further formal medical or surgical intervention cannot be expected to improve the underlying impairment. Therefore, MMI is not predicted on the elimination of symptoms and or subjective complains. Also, MMI can be determined if recovery has reached the stage where passage of time, or can be managed with palliative measures that do not alter the underlying impairment substantially, within medical probability.'*

28. I do not think that I need to go further to conclude that value of 23% permanent impairment, is highly speculative considering that the Plaintiff had not reached MMI. The doctor admitted that Plaintiff had not reached MMI as further rehabilitation is possible. So, the Plaintiff's impairment will be less that 23% and actual value cannot be considered under AMA guide at the time of hearing. Apart from that, the doctor was unable to suggest or justify this value and stated that it was a value that he obtained from an inquiry from another doctor, who never examined the Plaintiff or had even seen the injuries. So, on that basis again this value of 23% needs to be rejected. The conclusions that can be deduced from the doctor's evidence is that the Plaintiff's condition remained radiologically unstable considering the radiological evidence before him. The Plaintiff had suffered a severe pain that resulted severe analgesia at hospital, but this pain reduced and no complain of pain according to the reports from June, 2010. There is no evidence of prescription of medication for pain after June, 2010 as the analgesia is prescribed drug in Fiji.

29. On the balance of probability the Plaintiff had proved his condition is radiologically unstable without the proof of the percentage of that. The Plaintiff was advised not to lift heavy items more that 10Kg in April, 2010. The Plaintiff was a casual worker with the Department of Works and considering the nature of his work he was unable to work in the same place soon after the injury. There is no evidence that the advice given in April, 2010 is valid now, but there is evidence that radiologically Plaintiff's condition had not improved. Dr. Maloni did not state that Plaintiff cannot work either now or in future.

30. The Plaintiff had proved that he suffered a severe pain at the time of admittance to hospital and that was the reason for administering a severe pain relieving drug. When he was discharged from the hospital he was prescribed a relatively mild pain relieving drug and this was the only medication prescribed till June 2010. There was no evidence of such medication being prescribed after June, 2010 and more importantly there was no record of a complain relating to pain even on June, 2010 hence there was no prescription of analgesia beyond that period. The failure to attend for an examination by a visiting foreign specialist also indicate absence of a considerable pain after June, 2010. If pain

persisted at a considerable level a reasonable person would not refrain from visiting the hospital in September 2010.

31. In ***Wright v British Railways Board*** [1983] 2 All ER 698 Lord Diplock emphasized the importance in court making uniform awards in comparable injuries as follows

> *'My Lords, claims for damages in respect of personal injuries constitute a high proportion of civil actions that are started in the courts in this country. If all of them proceeded to trial the administration of civil justice would break down; what prevents this is that a high proportion of them are settled before they reach the expensive and time-consuming stage of trial, and an even higher proportion of claims, particularly the less serious ones, are settled before the stage is reached of issuing and serving a writ. This is only possible if there is some reasonable degree of predictability about the sum of money that would be likely to be recovered if the action proceeded to trial and the plaintiff succeeded in establishing liability.'*

32. It is the duty of the court to consider comparable awards by the courts before plucking a figure from air , as such figures would not only create bad precedence but also will create uncertainty as to the awards . It may not be easy to find an identical injury in a previous case but a similar or close or comparable one with some adjustments can be used to assess the damages for pain and suffering.

33. Lord Diplock further said in ***Wright*** (supra)

> *'Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that justice meted out to all litigants should be even-handed instead of depending on idiosyncrasies of the assessor, whether jury or judge, the figure must be 'basically a conventional figure derived from experience and from awards in comparable cases'.*

34. In ***Amin v Chand*** [2012] FJHC 1015; Action39.2008 (unreported) (decided on 13 April 2012) there was no evidence that Plaintiff's condition will not get better. Though the doctor said that Plaintiff will not recover fully that is not the same as worsening the condition that he is now. When he was asked about the possibility of osteoarthritis in the vertebrae he said that may occur. The evidence of the doctor was that there was still room for improvement through rehabilitation and the Plaintiff had not reached the maximum medical improvement (MMI).

35. The Plaintiff had not attended Labasa hospital in order to obtain free medical opinion form a visiting consultant as far back in September 2010. He had also not obtained MRI scan, which was recommended by the doctor who gave evidence at trial, in order to obtain a detailed diagnosis of his condition. The Plaintiff did not give any reason for such refusal for proper treatments. The actions of the Plaintiff has also contributed to his condition as he had refrained and or acted against the advice of the doctors by not attending to hospital for reviews after June, 2010 and also refrained from obtaining a MRI scan when requested to do so. The Plaintiff had also not taken any measure to rehabilitate himself in engaging in activities similar to swimming etc to improve his condition.

36. In Fiji Court of Appeal, ***Nasese Bus Company Ltd v Chand*** [2013] FJCA 9; ABU40.2011 decided on 8 February 2013 (unreported) there was evidence of permanent incapacity of 14% and a continuing pain due to the injury. It may be possible have a severe injury, but the pain may not persist for a long time as recovery process may be faster. In the said case, patient was shown to have experienced long term pain, swelling and stiffness in the ankle. There is no evidence of such long term pain in regard to the Plaintiff. The Plaintiff had not complained of the pain from June, 2010 until he submitted for examination by a doctor for this action. If the Plaintiff had a pain in June, 2010 why he did not complain that to the hospital was not explained. He had complained about pain in his previous visitation in March, and April, 2010. This again shows that Plaintiff did not have a pain when he visited hospital in June, 2010. If there was a pain why he failed to complain as done in previously needs explanation and why he did not attend the hospital in September, 2010 for a review and opinion from a visiting consultant also supports absence of pain from the injury. The credibility of the Plaintiff's evidence is shaken as he had lied to the court regarding the recovery which I have dealt earlier. The above case cannot be considered a comparable case for the award of pain and suffering for the Plaintiff.

37. In ***Yanuca Island Ltd v Elsworth*** [2002] FJCA 65; ABU0085U.2000S (decided on16 August 2002) (unreported) Fiji Court of Appeal granted FJ$ 50,000 for extensive bruising and a serious head injury.

38. The Defendants submitted High Court Labasa Civil Action No 70 of 2005 ***Subash Mani v Ramendra Kumar et al*** decided on 17.7.2007 (unreported) where the claimant was awarded $60,000 for pain and suffering. In that case it was held that working capacity and enjoyment of life was reduced by a factor of 50% due to the for following injuries

i. Abrasions on both forearms
ii. Pain on the anterior chest walls
iii. Fracture at the mid-shaft of the left radius.
iv. Pain at the back and on both hips.
v. Fracture of transverse L1,L2, L3 vertebra, fracture of the eleventh rib on the right resulting in his subsequent admission to hospital
vi. Incomplete Fracture of distal right fibula

39. The injuries in ***Subash Mani*** (supra) case were severe, specially considering the injuries of (iii), (v), and (vi). The only comparable injury from that is (v) above, but again that is combined with broken rib, which was not present in the Plaintiff's injuries. Though the Plaintiff was advised not to lift more than 10kg in March, 2010 there was no evidence of reduction his life expectancy or enjoyment of life. Considering the above award which was made in 2007 for extremely severe injuries, I award FJ$40,000 for the pain and suffering for the Plaintiff.

SPECIAL DAMAGES

40. According to the statement of claim following claims were made as special damages

i. Hospital Expenses 120
ii. Travelling $120.
iii. Loss of earning $1,200
iv. Private Doctor $180
v. Medical $500.

41. No documentary evidence produced for the proof of the expenses. The evidence of the Plaintiff does not support any treatment from a private doctor. The Plaintiff did not attend to free of charge hospital reviews after June, 2010 and free opinion from visiting Australian Consultant was not obtained and he also did not submit to MRI scan when he

was asked to obtain such a report. Dr Maloni, who recommended MRI scan said that if he did not have funds that could be arranged free of charge, but the Plaintiff had shown no enthusiasm for such diagnosis and his conduct from June, 2010 indicate this nature. So it is highly improbable for the Plaintiff to obtain medication privately spending money when he refused or refrained better medical service free of charge. There was no oral evidence to support even such an expense for medication. Despite the absence of documentary evidence the claim for $120 for travelling is allowed as he had visited the hospital thrice for reviews till June, 2010. He was, after discharge from the hospital, was transported from the hospital in ambulance belonging to the hospital, and no claim can be made for that.

42. There is no evidence of any other hospital expenses incurred by the Plaintiff and the claim for medical expense is not proved hence rejected. The special damages for nursing care in the submissions not claimed in the statement of claim. It is trite law that special damages are specifically claimed in the statement of claim. In the written submissions again the Plaintiff had claimed for $500 transport but in the statement of claim there was only a claim for $120 which I have already granted. The schedule of damage filed on the eve of the dates fixed for the trial, in violation of the practice direction also has deviated from the special damages sought in the statement of claim.

43. The cardinal principle in the pleading is that the other side is not to be taken by surprise. Not only did the Plaintiff refrained from claiming for nursing care, in the statement of claim but also refrained from leading evidence to prove the special damages claimed therein. Fiji Court of Appeal, ***Nasese Bus Company Ltd v Chand*** [2013] FJCA 9; ABU40.2011 decided on 8 February 2013 (unreported) at paragraph 65-67, stated as follows;

> *'65]. In a personal injury claim a plaintiff should provide in his pleadings (with an up to date amendment at the start of the trial) full details of his past loss of earnings. There is also an obligation on the part of a plaintiff to particularize the facts upon which calculations for past loss of earnings have been made.*

[66]. In the event that a plaintiff pleads and particularizes his claim for loss of earnings, evidence must be adduced at the trial to prove the claim. The burden rests on the plaintiff to prove a claim for past loss of earnings. In the event that the plaintiff does not plead and subsequently particularizes a claim for past loss of earnings, that Plaintiff will not be permitted to lead evidence in support of such a claim, save where leave has been given to amend the claim. These principles apply equally in Fiji. See ***The Head Teacher (Qalitu District School) and Others –v- Ilaitia Tuivere*** *(unreported civil appeal No. ABU 24 of 2009 delivered 13 September 2010).*

[67]. Furthermore, up to the end of the trial the issue of damages, both special and general, remained in dispute. Since past loss of earnings had neither been pleaded nor particularized, the Respondent was not entitled to adduce evidence and nor was she entitled to be awarded any sum by way of special damages in the form of past loss of earnings....'

44. From the above ratio the claim for nursing care as a special damage claimed for the first time in the schedule of special damage without supporting pleadings needs to be rejected. Without prejudice to that, the plaintiff was transported to his brother's house in an ambulance, and he could not walk or stand upright in February, 2010. He was able to walk and sit on a chair unattended for the reviews in March, 2010 and since the plaintiff's evidence regarding the recovery time it is proved to be false it is uncertain how much time he needed nursing care so there is no proof of time period to award any special damages for nursing care So, even on that ground the claim for nursing care needs to be rejected and no proof of duration of the nursing care on the balance of probability.

45. The Plaintiff was born on 8.2.1969 at the time of the accident he was 41 years old. At the moment he is not employed in the work that he did with the Department of Works due to his condition after the accident. He admitted that he could do light work he was advised only to refrain from lifting more than 10 Kg. He has a farm where he had cultivated vegetables and there goats and cows, too. So, he could still engage himself as a self employed person. The Plaintiff states that due to the injury he has lost income from his farm, but when he was employed week days he was fully engaged in the work with Department of Works. Now, he can be engaged fully with the farm. He was advised in March, 2010 not to lift more than 10 Kg and this does not prevent subsistence farming and may even improve his physical condition as a physical activities at moderate level

will be beneficial for health. It is noted he was specifically advised to walk as an exercise in April 2010.

46. According to the evidence of the Plaintiff he worked in the Department of Works as a casual worker. The farming was done with the help of his wife and already he had claimed a weekly income of $60 per week for the same farm in Action No 7 of 2012. Again the Plaintiff is trying to obtain claim for the same farm for his alleged loss of contribution .Apart from the said farm he stated that he had 6 cattle, 30 goats, and 2 horses. He also said that since he lived close to the river sea food was obtained from the river and if there was an excess he used to sell fish and crabs. I do not consider that he had lost income from farm due to his physical condition after the accident. He has more time to engage in the farm and he was not advised against such physical activities or swimming. In fact in the cross examination the Plaintiff admitted that activities such as swimming could improve his condition. So physical activities will improve his condition if done with care and proper advise. In any event there is no proof of loss of income due to his injuries from the said farm on the balance of probability, too. Apart from the Plaintiff's statement there is no evidence to support such a claim. The credibility of the Plaintiff's evidence is shaken.

47. In cross-examination the Plaintiff stated that the doctors had advice him not to do heavy work. This may be to prevent strain to his vertebrae which may still be recovering from the trauma of the accident. He had refrained from attending to hospital for reviews since June, 2010 so it is unclear whether the advise given at that time is still valid.

48. It is worth to consider the burden of proof and proof of liability as to economic loss due to the injury beyond June, 2010. The Plaintiff had not complained about pain when he visited the hospital in June, 2010. He had refrained from attending to further review which was due in September, 2010. In June, 2010 there is no advice given not to lift heavy objects (> 10 Kg). He was advised to walk in April, 2010 review by the visiting consultant.

49. In Assessment of Damages for Personal Injury and Death(4th Edi) by Harold Luntz (LexisNexis Butterworths) at p95 on the Proof on Balance of Probability states;

> *'Proof on balance of probabilities.*
> *All issues in civil case need be resolved on the balance of probabilities. One issue in any case where damage is the gist of the action, such as an action for negligence, is whether the defendant's wrong caused damage of a type that is recognized by the law as satisfying the requirement. Even where the plaintiff is able to prove the minimum damage required for the purposes of the cause of action, any consequential condition for which the plaintiff claims compensation must similarly be proved on the balance of probabilities.....'*

50. So, the burden of proof lies fairly and squarely with the Plaintiff for economic loss due to he injury. The Plaintiff should prove the injury caused to the Plaintiff prevented him from doing his usual work. In this case the medical report P2 only state injuries suffered by the Plaintiff. Dr. Melon, in his evidence while examining the notes kept by the hospital said the Plaintiff was advised not to lift heavy objects on 31st March, 2010 and subsequently on 15th April, 2010 he was advised to walk. On 9th June, 2010 he was not advised to do special activity or refrained from any activity, but was asked to use the corset in sleeping. So no special behaviour pattern expected from the Plaintiff beyond June, 2010, but the recommendation of corset and radiological examination indicate some degree of recovery yet to be completed.

51. In any event on the available evidence it is safe to deduce that Plaintiff is not fully healed from the injury but its impact on daily life not proved on balance of probability. According to Dr Maloni, the Plaintiff did not co operate with the conservative injury management it had failed, but there is still room for further rehabilitation and improvement of his condition. Dr. Maloni said he will never be normal, but this does not prove economic loss or impairment that has any effect on his earning capacity. After a fracture or serious injury a person may not be normal again, as 100% healing to previous position may be impossible but whether this would have an impact on the earning capacity is what is needed in deciding loss of wages (economic loss).

52. The Plaintiff was a casual worker attached to the Public Works Department and after the injury. According to the Plaintiff he did not work in the said place of work since the accident. He was already granted loss of wages for 6 months as he had complained about pains in the back and medication given till June, 2010. He was not advised of special behaviour other than wearing corset when he is sleeping. His radiological examination in June, 2010 did not show improvement and was asked to come for review and opinion in September, 2010 but had not gone for reviews and again Dr Maloni examined him in 2014 and he was advised to obtain MRI scan but had not obtained it yet. The radiological examination proves that the plaintiff had not fully recovered and considering that he was a casual worker his earning capacity on the balance of probability would have diminished. The Plaintiff admitted that he can do light work. Considering that he is a person who had already exaggerated facts for his advantage he may be able to do most of his usual work as a casual worker. He was not advised to refrain from any particular activity. If his earning capacity was severely affected there was no reason for him to refrain from further reviews since September, 2010. Why he refrained from MRI scan even in 2014 needs explanation and a fact that needs to be considered in the analysis of evidence. The Plaintiff's credibility is a factor that needs consideration. He had refrained from obtaining a medical report that indicate his current medical status and its impact on his earning capacity. There is no medical evidence that suggest that Plaintiff was advised to refrain from what he usually did since June, 2010. Before that he was advised not to lift more than 10 kg. Considering the evidence before me the impact of injury to the earning capacity has to be minimal or less than 10%. If not the Plaintiff would not have quit his medical reviews since June, 2010 nearly 6 months from the injury. Considering the evidence before me one cannot rule out any impact from the injury to the earning capacity as he was a casual worker and the radiological evidence shows unstable condition. The only logical conclusion is the impact of the said injury from the accident was less than 10%, or not significant to the Plaintiff or he was afraid of revealing his present medical condition. From the above contentions I take the one that is most beneficial to the Plaintiff (i.e the injury diminished the earing capacity by 10% >). So the multiplicand is 10% of $74 (for a week) x 52 and considering the age of 41 the multiplier of 9 is used. So the economic loss is assessed at FJ$ 3,463.20.

CONCLUSION

53. The Plaintiff is granted FJ$40,000 for pain and suffering and loss of amenities of life. For this 6% interest amended from the date of issuance of writ to the date of judgment. For special damages loss of wages of $1,924 and loss of FNPF $154 and travel expense of $120 totality to FJ$2,198 granted and 3% interest is granted from date of injury to date of judgment. He is also granted a future economic loss of FJ$3,463.20.

FINAL ORDERS

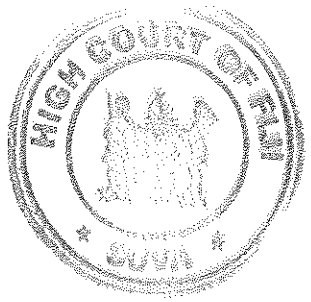
a. General Damages of FJ$ 40,000 for pain and suffering and loss of amenities of life and 6% p.a interest to that from the date of issuance of writ 23.2.2012 to the date of judgment.

b. For future economic loss an award of FJ$ 3,463.20 is granted.

c. Special damages past economic loss ($1,924 + $154) to travel expense $120 for these special damages 3% p.a interest accrues from date of accident 24.1.2010 to 30.7.2014.

d. The cost of this action is assessed summarily at $3,000.

Dated at **Suva** this **30th** day of **July, 2014.**



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Justice Deepthi Amaratunga
High Court, Suva