

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 322 of 2011

BETWEEN

MELVEEN RONALD SINGH aka **MELVIN RONALD SINGH** late an infant of
Namara Settlement, Khalsa Road, Nasinu in the Republic of Fiji,
Deceased suing by his next friend Dalip Kumar Singh also of
Namara Settlement, Khalsa Road, Nasinu in the Republic of
Fiji, Carrier Driver who is a person beneficially intended
in the **ESTATE OF MELVEEN RONALD SINGH aka**
MELVIN RONALD SINGH.

PLAINTIFF

AND

BERNADETTE SERA FILIPO NICHOLLS trading as **PLUMBING &**
PROPERTY SERVICES a Sole Trader Business having its
registered office a Auckland Street, Vatuwaqa,
Suva, in the Republic of Fiji.

FIRST DEFENDANT

AND

NARENDRA PRASAD of Lot 14 Mana Street, Narere, Nasinu, in the
Republic of Fiji.

SECOND DEFENDANT

Counsel : Mr. S. Singh for the plaintiff
Mr. G. O'Driscoll for the 2nd Defendant

Date of Hearing : 11th July, 2018

Date of Judgment : 22nd August, 2018

JUDGMENT

- [1] Dalip Kumar Singh the father of the deceased (plaintiff) instituted these proceedings to recover damages from the defendants for causing death of his son by negligent driving of the 2nd defendant.
- [2] The court entered default judgment against the original 1st defendant, Plumbing Services Limited and by a subsequent amendment the 1st defendant was named as Bernadette Sera Filipino Nicholls as the owner of the sole trader business called Plumbing & Property Services. The default judgment entered against the 2nd defendant is still remains valid and in force but the quantum of damages is yet to be assessed. Further, the 2nd defendant was convicted by the Magistrate's Court and sentenced for two years imprisonment. It is a fact accepted by the parties that the 2nd defendant appealed against the conviction and sentence and in appeal only the sentence was varied.
- [3] Section 9(1) of the Evidence Act 1944 provides:

In any civil proceedings the fact that a person has been convicted of an offence by or before any court in Fiji shall, subject to subsection (3), be

admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings:

Provided that, for the avoidance of doubt, it is hereby declared that no conviction which has subsequently been quashed or in respect of which a pardon has been granted or which for any other reason has lapsed or is deemed no longer to be a conviction, shall be a conviction for the purposes of this section and section 10.

- [4] Subsection (2) of Section 9 provides that in any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in Fiji he shall be taken to have committed that offence unless the contrary is proved.
- [5] Since the 2nd defendant did not come forward to adduce any evidence to the contrary he should be held liable for the negligent act which caused the death of the plaintiff.
- [6] When the matter was mentioned before me on 31st May 2018 the solicitors were asked to file the amended minutes of the pre-trial conference on or before 21st June, 2018 and the matter was fixed for trial for 11th and 12th July, 2018 but the parties did not file the amended minutes of the pre-trial conference even on the day of the trial.
- [7] Before proceeding to assess damages the court has to determine whether the 1st defendant Bernadette Sera Filipo Nicholls is vicariously liable for the negligence of the 2nd defendant. Before considering the evidence on this question it is important to consider the law relating to vicarious liability.
- [8] Vicarious liability is where one person is held liable for the torts of another, even though that person did not commit the act itself. It is therefore a form of strict liability (in that the defendant is not at fault). It can also be explained as a liability imposed on an employer to a third party for the tort of his employee committed in the course of employment.
- [9] The plaintiff in his evidence said that his son was knocked down by a vehicle but he did not see the driver at the time of the accident because at that time he was

inside the house. Any evidence adduced to establish the negligence of the driver is not relevant because a default judgment had already been entered by the court against the driver who is the 2nd defendant in this action. What the plaintiff has to establish that the 1st defendant is vicariously liable for the negligence of the 2nd defendant.

[10] This accident occurred on 02nd June, 2009. The plaintiff tendered in evidence marked as "P6" the vehicle owner's history. The registration number of the vehicle involved in the accident is DR 415 and according to the owner's history at the time of the accident this vehicle was owned by Plumbing and Property Services Limited, the original 1st defendant in this action. The learned counsel for the plaintiff also made submissions referring to the affidavit filed by the 1st defendant on 19th May, 2017 admitting that the ownership of the business was with Plumbing and Property Services. However, the ownership of the vehicle is not what is important here. The court has to ascertain whether the 2nd defendant at the time of the accident was driving the vehicle as an employee of the 1st defendant and also in the course of his employment. There is no evidence before this court to prove that the 2nd defendant, at the time of the accident, was driving the vehicle in the course of his employment for the 1st defendant to be held vicariously liable for the negligence of the 2nd defendant.

[11] The learned counsel for the plaintiff tendered the birth certificates of the two surviving sisters and the brother of the deceased which was objected to by the learned counsel for the 1st defendant. This should have been pleaded at the very first instance in the writ of summons. The learned counsel for the plaintiff submitted that brothers and sisters of the deceased are also entitled to damages under the Compensations for Relatives Act 1920. Section 4 of the Act provides:

Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death has been caused.

[12] Section 5 of the said Act provides:

Every such action shall be brought by and in the name of the executor or administrator of the deceased person, and the court may give to the parties respectively for whom and for whose benefit the action was brought such damages as are considered proportioned to the resulting from the death.

[13] Under this Act brothers and sisters are not entitled to damages. Therefore, the birth certificates of the deceased's sisters and the brother is not relevant to the claim before this court.

[14] The assessment of damages was based on the provisions of the Law Reform (Miscellaneous Provisions)(Death and Interest) Act 1935. Before assessing the damages it is important to consider the previous decisions on assessment of damages.

[15] In **Chand v Pradeep** [2001] FJ Law Rp 18; [2001] 1 FLR 83 (23 February 2001) the plaintiff sued as administrator of the estate of his daughter, who died in a fatal accident at the age of 14 ½ years.

It was held:

It is difficult in a case such as this to determine the degree of dependence of the Plaintiff on his 14½ year old daughter. Under the Compensation to Relatives Act section 4 a father is entitled to claim as a dependent, as here based upon financial loss or loss of support but no solatium for mental distress. Using a multiplier at 10 years, and a multiplicand of 760, \$7,600 awarded for pecuniary loss. For damages awarded under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act, a multiplier of 17 is appropriate for a damages award of (a) \$25,500 for lost years; (b) \$2,500 for loss of expectation of life and interest at 6% per annum for 3 years. Funeral expenses of \$1,000 for coffin box and 13 days of prayer, being reasonable, is allowed.

[16] The learned counsel for the plaintiff also relied on the decision in **Chand v Fusi** [2011] FJHC 668; Civil Action 31.2009 (25 October 2011). The facts in that case is quite different from the facts of the case before this court. In that case the person who died was 28 years of age at the time of his death and he was permanently employed with a salary of \$396.00 per fortnight.

[17] The Plaintiff testified that he spent \$4000.00 as funeral expenses but no documentary proof was tendered. However, the 1st defendant did not challenge this amount and also the court is of the view that this is a reasonable amount to be awarded as funeral expenses. There is no evidence as to his education that is whether he was a bright student in school. The learned counsel in his submissions says that he was a bright student which is not evidence before any court of law.

The learned counsel also submitted that brother of the deceased who is 19 years old is earning \$150 - \$170 per week but no evidence was adduced by the plaintiff in this regard. I am of the view it is reasonable to consider that the deceased would have earned \$20.00 as daily wages in calculating the damages. The total income for a year would have been if he was alive \$6720.00 (on the basis of 6 working days for a week).

[18] The plaintiff testified that after the marriage sons stay with the parents. It may be a custom and not a rule that the sons even after the marriage must stay with the parents. On the other hand after the marriage the children cannot be expected to spend the same amount of money on their parents as they used to when they were single. It is also important to note that they generally start earning at the age of 18.

[19] Taking all these factors into consideration I use the multiplier at 12 years and a multiplicand of \$3360.00 (50% of the annual income) and award \$40320.00 as pecuniary loss. The plaintiff is also awarded \$2500.00 for loss of expectation of life and 4,000.00 as funeral expenses.

[20] The court accordingly makes the following orders:

1. The 1st defendant is not vicariously liable for the negligence of the 2nd defendant.
2. The 2nd defendant is ordered to pay \$46,820.00 as damages to the plaintiff.
3. The 2nd defendant is also ordered to pay \$5,000.00 as costs of this action to the plaintiff.



22nd August, 2018


Lyone Seneviratne

JUDGE