IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 187 of 2016

BETWEEN	:	**LIZHEN ZHANG** a.k.a **JENNY ZHANG** of 86 Ragg Avenue, Namadi Heights, Tamavua, Unemployed.
		PLAINTIFF
AND	:	**GAIRUDADHAJ** of 9 Miles, Nakasi, Vehicle Owner.
		DEFENDANT

Counsel	:	**Mr. Singh D. for Plaintiff**
		Mr. Narayan E. for Defendant
Date of Hearing	:	**3rd September, 2018**
Date of Judgment	:	**14th September, 2018**

JUDGMENT

INTRODUCTION

1. This is an action for damages for personal injury due to road accident. The Plaintiff was convicted of 'Dangerous Driving Occasioning Grievous Bodily Harm' in the Magistrate's Court on 23rd November, 2017 and was sentenced on 5th February, 2018. The Plaintiff suffered fractures of 4 ribs due to the accident and was hospitalized for about 10 days before discharged. She was also reviewed through clinical examination for about one month and she had left to China where she lived there after. According to her she had undergone some medical treatments abroad but no medical records were produced to prove that those medical treatments were relating to this injury. The plaintiff was 69 years old when the accident happened and was suffering from high blood pressure, diabetes and osteoporosis.

ANALYSIS

2. Following Facts are admitted in the pretrial conference

a. On 13th August 2013 the Plaintiff was involved in an accident with the Defendant.
b. At all-time material to this action the Defendant was the registered owner of a motor vehicle registration number LT 6793 which was insured at the material time in accordance with the Motor Vehicle (Third Party Insurance) Act with New India Assurance Limited.

3. At the hearing to the action the Plaintiff produced the ruling of the sentencing of the Defendant in the criminal proceeding where he was convicted for 'Dangerous Driving Occasioning Grievous Bodily Harm'. This was acting contrary to Section 97(4)(c)and Section 114 of the Land Transport Act,1998 in Traffic Case No 272 of 2013 in the Magistrate's Court in Suva on 3rd February, 2018.

4. In terms of Section 17 of the Civil Evidence Act, 2002 the burden is shifted to the Defendant to prove that he was not negligent under civil liability and this was an uphill task when a person was found dangerously driving on a road under criminal burden, beyond reasonable doubt. [see Court of Appeal decision of ***Janak Prasad v Mano Lata*** 2005 FLR 56]

5. The Defendant himself gave evidence and he also called the person who was travelling with him to the FRCA to collect some documents. So the second witness for the Defendant is a friend of the Defendant and in the analysis of his evidence he cannot be considered as an independent witness. Considering his evidence in totality his evidence cannot be considered truthful as regards to the negligence of the 1st Defendant.

6. The Plaintiff in his evidence did not admit that the road where the accident happened was a wide road but the second witness for the Defendant admitted that it was a wide road.

7. The Defendant stated that when he saw the Plaintiff she was about one meter from his moving vehicle which was travelling around 40-50km per hour. The second Defendant said the Plaintiff was ½ meter from the vehicle. In the test of probability this cannot be correct. The Plaintiff was an old woman and it is unlikely that she would run across the road to a moving vehicle, which is suggested by the Defendants' evidence.

8. From the sketch of the accident the road Queen Elizabeth Drive which is about 7.1m wide. After the collision the vehicle involved was stopped on the road and front of the vehicle was 5.5 meters from the right side edge and the back was 4.3 meters from the right side edge of the road.

9. The road is wide and straight and close to the impact there is a by road to the left side of the road where the point of impact happened. The Defendant is a Taxi Drive with lot of experience on the roads around the main city and he should have been careful as he was approaching a main junction where by road connects to the Queen Elizabeth Drive and this is where FRCA is also locate. According to the Defendant he was going to FRCA to collect some documents along with another person.

10. The Defendant had failed to prove that he was not negligent in this case. This is a burden on the Defendant upon the finding of the Magistrate's Court in the related criminal action. The Plaintiff was 69 year old person who could not move swiftly. She was already suffering from high blood pressure, Diabetics and also from Osteoporosis. It is unlikely that she could run or even walk fast. At the same time since the road is wide and straight the Defendant could easily see any person trying to cross the road. In any event since the Defendant was approaching a place where there is a by road the Defendant should have reduced the speed below 40-50 Km per hour. The time of the accident is also a material fact and according to the Defendant it was 8-9 am and this was a time lot of people including the workers of the FRCA and other customers arrive to this office and more crowded than usual. The Defendant being an experienced Taxi Driver he had disregarded these facts and had driven the vehicle negligently. From his evidence and also from the evidence of the person who was with him at that time failed to prove that he had taken reasonable care, while driving the Taxi prior to the accident.

11. Not only the Defendant had not taken reasonable care by driving dangerously but also had not noticed 69 year old woman crossing the road till she reached very close to moving vehicle about 1 meter , indicating that the vehicle was too fast or the Defendant

was not observing the other users of the roads. Since it was morning the day light is sufficient to see people moving around the place.

12. So on the analysis of the evidence it is proved that the Defendant was driving negligently and that resulted the accident.

13. Next the court needs to assess the damages for the injuries incurred to her 4 ribs. She stated that she could not move for three months and that evidence is not supported by a medical report, and the only medical report submitted indicated that she was discharged from the hospital after about 7 days and she had also attended clinics thereafter and she was making good progress of recovery during that time.

14. In ***Wati v SL Shankar Ltd; SL Shankar Ltd v Wati*** [2008] FJCA 103; ABU0078.2006S; ABU0086.2006S (18 April 2008) Fiji Court of Appeal held that $60.000 damages award by the court below was not excessive. In that case apart from the injury to the ribs there were other serious injuries. In that case the number of ribs fractured was 4 but other injuries were extremely serious in nature for example spleen was removed hampering natural immunization of the body from the germs, punctured lung and post-traumatic occasional headache and giddiness, linear scars on the left side (face, shoulder, posterior chest and abdomen), post-operative scar from splenectomy, loss of her spleen and ongoing need for immunization, punctured lung and drainage required at the time. All these indicate the award in this case for pain and suffering was not comparable to the case before me. It should be noted number of ribs fracture are not the sole guide for an award for General Damage for the pain and suffering.

15. Though the Plaintiff had four fractured ribs I do not have evidence of the extent of the damage to the ribs and there were no serious injuries other than the said fractures. It can be safely deduced that the award should be less than $60,000 considering the above award.

16. In ***Prakash v Ram*** [2011] FJHC 786; HBC356.2005 (5 December 2011) the High Court awarded $30,000 as compensation for pain and suffering in a case where three ribs that were fractured and 'lock jaw' that resulted the patient unable to eat for some time. The injuries and disabilities in that case were

> *'Injuries;*
> *a) Fracture of 3, 4 and 5 right ribs.*
> *b) Lacerations and depression of right side of leg, hip and shoulder.*
> *c) Lacerations and bruises on the left leg and left knee*
> *d) 4cm cut on the right back scalp of head*
> *e) Swelling of right side of stomach (abdomen)*
> *f) Swelling and contusion of right eye.*
> *g) Swelling and contusion of right arm*
> *h) Swelling on right sub mandibular area.*
> *i) Difficult in opening mouth.*
> *j) Difficult in eating.*
> *k) Abrasions on various parts of body.*
> *l) Shock and concussion.*
> *m) Blood coming out of nose.*
>
> *Disabilities;*
> *a) Loss of some power, and mobility and restricted movement of right hand and inability to lift ups and down with ease.*
> *b) Difficulty in working due to injury.*
> *c) Scarring.*
> *d) Inability to eat solid food for three weeks.*
> *e) Severe headaches*
> *f) Lock jaw.*
> *g) Pain in right hand and other areas of body.*
> *h) Inability to concentrate on work as previously.*
> *i) Inability to perform sporting activities as previously'*

17. ***Wright v British Rlys Board*** [1983] 2 All ER 698 it was held that awards should be consistent and held ,

> *'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. *The principal characteristic of actions for personal injuries that militate against predictability as to the sum recoverable are, first, that the English legal system requires that any judgment for tort damages, not being a continuing tort, shall be for one lump sum to compensate for all loss sustained by the plaintiff in consequence of the defendant's tortious act whether such loss be economic or non-economic, and whether it has been sustained during the period prior to the judgment or is expected to be sustained thereafter. The second characteristic is that non-economic loss constitutes a major item in the damages. Such loss is not susceptible of measurement in money.* ***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 (emphasis added).'*

18. The Plaintiff in her evidence did not state that she observed the road properly before crossing the road. There was no evidence of pedestrian crossing, too. Contributory negligence is pleaded as defence and the Plaintiff was also cross-examined on that. There is no evidence that the Plaintiff had carefully looked both sides of the road before she started crossing the road. She gave no evidence as to the manner in which the vehicle approached her before the accident and at what distance she saw it before the accident. This indicates that she was also negligent and had not properly examined the road condition before she decided to cross the road. This is also a negligent act and this had also contributed to the accident and her contributory negligence is assessed 10%.

19. The Plaintiff was 69 years old when this accident happened. Her 4 ribs were fractured and was hospitalized from 13.8.2013 to 20.8.2023.

20. The Plaintiff had attended clinical reviews for surgical clinics till 10.9.2013 and chest x ray had shown good healing of the rib fractures. She was under breathing exercises. There is no evidence when she was fully healed from this fractures. Her evidence was that it took 3 years and this is not proved on the balance of probability. The medical report submitted to the court indicates that she was recovering well before the accident.

21. The Plaintiff had admitted in her statement that she was suffering from number of NCDs. She was also suffering from Osteoporosis.

22. There were no evidence produced that the fractures were due to Osteoporosis. There was no evidence of the condition of the Osteoporosis or any other NCDs and on the balance of probability one cannot assume that the fractures of the ribs were due to her medical condition. None of her other bones were fractured from the impact and this also proves that fractures were mainly caused by the accident and the impact from the collision and falling to the ground.

23. Considering the authorities submitted by the Plaintiff the general damages of $35,000 is granted and considering that there was a contributory negligence of 10% the award is reduced to 31,500. There is evidence to prove special damages claimed in the statement of claim. That the Plaintiff had attended for surgical clinics and according to the evidence she had attended some medical treatment in China after going there. For traveling expenses and also for medication a special damage of $500 is granted. No evidence for medical treatments and medication after the accident was produced and there was no schedule submitted regarding that.

24. Though the Plaintiff is complaining about the pains due to the accident there is no medical report to support there is any permanent or prevailing impact on her health and this fact is not proved on the balance of probability.

25. The Plaintiff had also failed to prove that underwent several surgeries due to this accident as medical report produced show a good healing of the fractures without any complications.

26. There is no medical certificate to indicate permanent impairment and the medical certificate marked as P1 state that there is good healing of the fracture within a short period. According to the evidence presented she was in the hospital for 7 days and after that she was discharged. The Plaintiff said she could not move for 3 months and this is again not proved on the balance of probability. She had attended even surgical clinics

during this time and there are no details of any serious condition of the Plaintiff during each of the said visits.

CONCLUSION

27. Plaintiff had proved that the accident was due to negligence of the Defendant. There was no evidence of Plaintiff taking proper care while crossing the road. It was a wide road and accident happened during morning. The Plaintiff did not produce medical bills or documents to prove travel expense s during the treatment for the injuries. Considering the expenses a sum of $500 is granted. A general damage of $35,000 is granted and considering contributory negligence 10% is reduced. A special damage of $500 also granted. Cost of this action is summarily assessed at $3,000. An interest of 6% is granted from the date of the writ to the date of judgment for the general damages and for special damage 3% interest is granted from the date of the accident to the date of judgment.

FINAL ORDERS

a. The Plaintiff is awarded a sum of $35,555 as general damages for pain and suffering against the Defendant (i.e $31,500 with 6% interest from the date of writ to the date of judgment (from 23.7.2016 to 14.9.2018) and also $575 as special damages. (Total $36,130).

b. The cost of this action is summarily assessed at $3,000 to be paid within 21 days.

Dated at Suva this 14th day of September, 2018

HIGH COURT OF FIJI SUVA

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Justice Deepthi Amaratunga
High Court, Suva