

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 204 OF 2014**

**BETWEEN** : **RUSTAM ALI** of Olosara, Sigatoka in the Republic of Fiji Islands,  
Unemployed.

**PLAINTIFF**

**AND** : **MOHAMMED SAHAIL MUKSHAD** of Sigatoka Town,  
Sigatoka in the Republic of Fiji Islands, Electrician.

**DEFENDANT**

**Appearances** : Mr J. Singh for the plaintiff  
: Mr R. Singh with Ms A. Swamy for the defendant  
**Date of Trial** : 16 October 2017 and 13 July 2018  
**Date of Submission:** 26 September 2018 (by the defendant)  
**Date of Judgment** : 05 October 2018

## **J U D G M E N T**

### **Introduction**

[01] The plaintiff's claim against the defendant arises out of an accident in which the plaintiff sustained injuries whilst he was a passenger in motor vehicle registration number EK 703 which was driven by the defendant. It is alleged that the accident happened as a result of negligence of the defendant which caused the collision between the two vehicles EK 703 and DN 377.

### **The Facts**

[02] The facts as stated in the statement of claim relevant to the claim are as follows.

[03] One Rustam Ali, the plaintiff was a passenger in motor vehicle registration number EK 703 driven by one Mohammed Sahail Mukshad, the defendant.

- [04] On 14 July 2012, at Sabeto, Queens Road, Nadi the defendant drove motor vehicle registration number EK 703 so negligently that he caused the vehicle to collide with motor vehicle registration number DN 377. The plaintiff was a passenger in vehicle registration number EK 703. The plaintiff sustained injuries as a result of the accident. He was taken to Lautoka Hospital where he was airlifted and transported to Colonial War Memorial Hospital as he was in a critical condition and after the treatment at the Colonial War Memorial Hospital he regained consciousness after 3 days. The doctors had to operate on his head to stop internal haemorrhage.
- [05] The plaintiff was admitted to the Colonial War Memorial ('CWM') Hospital from 15 July 2012 till 8 August 2012 for injuries sustained secondary to a motor vehicle crash.
- [06] The defendant was charged by the Police for Dangerous Driving contrary to Section 98 (1) and 114 of the Land Transport Act 35 of 1998 (case number 3547 of 2013) and was found guilty by the Nadi Magistrates Court on 18 October, 2013 and the court imposed a fine of \$200.00.
- [07] The plaintiff claims damages alleging that the defendant is liable for the injuries he suffered as a result of the accident.

### **The agreed facts**

- [08] The following facts were admitted between the parties at the Pre-Trial Conference ('PTC') held on 15 July 2015:
1. *That the plaintiff was a passenger in motor vehicle registration number EK 703.*
  2. *That the defendant at all material time had control, management and possession of vehicle registration number EK 703 and was driving the said vehicle.*
  3. *That on 14 July 2012 there was a collision at Sabeto, Queens Road, Nadi between vehicle registration numbers EK 703 and DN 377.*

## The Defendant's case

- [09] The defendant's case was that the collision occurred without the negligence on the part of the defendant and was due to an inevitable accident.

## The Evidence

### *Plaintiff*

- [10] At the trial, the plaintiff called 2 witnesses, the plaintiff himself ('PW1') and Anand Kishore ('PW2'). The only document plaintiff produced was his 3 pay slips issued to him by Beddarra Beach Inn Fiji namely ('PEX1A, PEX1B and PEX1C').
- [11] PW1 in his evidence states: '*on 14 July 2012, I was travelling with Sahail in his car for an engagement from Sigatoka to Ba. Then I was working at Beddarra Beach Resort as purchasing officer and supervisor. Sahail was driving. I was on the front seat beside him. 3 more passengers (Justin, Shabin and Anand Kishore) were in the car sitting at the back. On the way there was an accident at Sebato. I only came to know about the accident after gaining consciousness at CWM hospital, Suva. I did not know anything about the accident. After the accident the passengers told me. That's how I know.*'
- [12] Of the injuries, PW1 states that: '*My jaw broke. I did not eat for 3 months. They did operation. The eye nerve damaged. I can't see. I had some damage on the head. Dr said: 'there is no treatment for that.'* I gained consciousness after 3 days of the accident. I was in hospital for 3 months. I had lot of pain. I could not sleep and walk. I still have similar problem. I still can't eat hard meat. If I want to eat hard meat, it will take more than an hour. Since discharged from the hospital I have been staying with my sister in Suva. This is because of regular check-up at CWM. I can't travel to Suva from Sigatoka due to my financial constrain. I can't work as before. I can't walk under heavy traffic. I can't recall that I was a boxer. I can't participate in sport. I was a soccer player. I tried to work for other Company-building site at Carpenters for time pass. I can do simple work. I also tried to operate my own workshop. It was giving too much stress. I felt headache. I had to stop. After 2 month of discharge I came to Sigatoka. I go to Sigatoka hospital since then. I can't do full time employment. I have still pain after the accident. After the accident Sahail was charged for careless driving and fined. I claim general damages for pain and suffering, loss of employment/loss of ability to earn, interest and costs.'

[13] Under cross-examination, PW1 said:

- a) He has no idea how the accident happened. He was sitting in front. He was wearing seat belt.
- b) He was admitted to the CWM hospital for 3 months. Later he said about 3 months. He would admit if the Medical Report says 3 weeks.
- c) He admitted he is a registered boxer but he can't recall he lost by points or knock-out. His father used to train him. He admitted that in boxing there will be fighting, beating and punches exchange on the face and head.
- d) When suggested that he left Beddarra in 2014, he said he can't recall.
- e) He admitted that he drinks Yaqona with his friends.
- f) When it was put to him that he was not working at the time of the accident, he said: No.

[14] The second witness for the plaintiff was Anand Kishore ('PW2'). He was one of the passengers in the car driven by the defendant on 14 July 2012, the day the accident happened. His evidence was that: 'the accident happened at Sabeto. There were 4 cars in front of us. He overtook the 4 vehicles. The fourth vehicle suddenly indicated to turn right. We were travelling on the right side. By that time Sahail ended up with the accident and the car went into the drain. Ali (plaintiff) was bleeding from the nose and mouth. No response from him. We took him to the hospital. Sahail was over speeding may be at 130km/h. I told Sahail that he is over speeding. When he was overtaking it was 140km/h (metre reading). His driving was not steady. We could see the manner of his driving. I was monitoring how he was driving. I was telling him so that he cannot overtake oncoming vehicle. I could lean and see the metre. It was going up to 130km/h to 140km/h. At the time of the accident the vehicle was on the oncoming vehicle's lane. There was a junction on the right. The accident was at Sabeto between the fourth vehicle. It may be 80 km zone. He increased the speed of the vehicle. We took Ali to Lautoka hospital and he was in coma at Suva hospital. He was in coma for 3 days and admitted to the hospital for about a month. I visited him in hospital. There was clip on his jaw, pipe on the neck and injuries on the head. Ali was working for Beddarra as supervisor for maintenance. I was also working for Beddarra. After the accident Ali came for work and after sometime he was sent home. He was unfit to work. He was not coming on time. He was not working properly. Before the accident there was no such problem. Sometimes he does not work. His wife is working. He worked at Bony. Whenever he is fit he used to come. Before he used to play soccer and horse riding.

[15] Under cross-examination, PW2 states that:

- a) Plaintiff was sitting in front and wearing the seat belt. The seat belt was unbuckled and he was pulled out of the vehicle and taken to the hospital.
- b) He said he was friend of Ali and Sahail and related to Sahail. He (witness) is married to Ali's sister. Sahail is also related to him. His mother in law is related to Sahail's uncle.
- c) Sahail was driving at a very high speed-uncontrollable speed. He was worried about his safety but he did not tell Sahail to stop.
- d) He said the accident happened just opposite the junction. Sahail was on the right side to overtake 4 vehicles. Started overtaking before the junction (from the lane to the junction). The fourth vehicle indicated turning long time ago. The car we were travelling in collided with the fourth vehicle-near fender section (front wheel). The car ended up in the drain.
- e) Ali was bleeding. Only he was injured in the accident. He was admitted to the CWM hospital for about a month.
- f) He may have come to work at Beddarra till January 2014. We use to give money for his medicines.
- g) He said Ali was a boxer in 2006. He did not fight after 2006.
- h) Ali owns a horse for casual horse riding.
- i) When asked: he turned on the right because there was a dog on the left, he (PW2) said: 'No, I disagree.'

*Defendant's evidence*

[16] The only witness for the defendant was the defendant himself (DW1). He gave evidence on his behalf. His evidence was that: *'At Sabeto, a car was coming on right if I applied brake I could have collided. I turned right. Suddenly a vehicle appeared. There were 2 more vehicles. I could not stop. Other vehicle was turning at the junction without signal. I collided with the other vehicle. It happened suddenly. I had veered off. I was conscious. Ali was injured. He was bleeding. We removed him from the car and took him to the hospital. I did not know what injury he had. After the accident he (Ali) did not talk about the accident. After one year the police called me for the charge.'*

[17] Under cross-examination, DW1 states:

- a) He admitted that he pleaded guilty to the charge of dangerous driving and was fined by the Nadi Magistrate's Court.
- b) When the plaintiff was boarding the vehicle, he did not object.
- c) He admitted that he passed 3 vehicles.

- d) The dog suddenly crossed the road. It was just in front of the car-not even 2 metres.
- e) When asked that he had enough space to take his car back to the left, he said other cars slowed down.
- f) He admitted that when over taking he knew there is a junction.
- g) He admitted that he should not over take at or near the junction.
- h) He said 'yes' to the question that you (he) were on the oncoming lane.
- i) At the accident, Ali was injured, he was bleeding-blood on his clothes and was unconscious.
- j) He admitted that the injuries Ali received were due to the accident and he was admitted to the hospital for 3 weeks.

[18] During the re-examination DW1 said he pleaded guilty because he did not have money to retain a lawyer. There was a dog. There was gravel on the road side.

### **Discussion**

[19] The plaintiff claims against the defendant on the basis that the defendant was liable to pay damages for the personal injuries the plaintiff sustained as a result of the accident, which occurred due to the negligence on the part of the defendant. The plaintiff was one of the passengers in the car that was involved in the accident.

[20] It is not in dispute that on 14 July 2012, the car the defendant was driving (No. EK 703) was involved in an accident with another car (No. DN 377), on Queen's Road, at the Sabeto junction.

[21] The defendant pleaded that it was an inevitable accident.

#### *Liability Issue*

[22] The primary issue before the court is whether the defendant drove motor vehicle registration number EK 703 negligently that he caused the accident on 14 July 2012 which involved motor vehicle registration numbers EK 703 and DN 377.

[23] The plaintiff was not able to describe how the accident happened. He said he could not recall what happened, and he only knew he was involved in an accident. However, he was able to tell things after he regained conscious 3 days of the accident.

- [24] PW2 who was also a passenger in the vehicle driven by the defendant gave evidence as to how the accident happened at or near the Sabeto junction. He said the accident occurred while the defendant was overtaking 4 vehicles travelling ahead and in that process the defendant was over speeding. According to him, the accident happened on the right side of the road when the fourth vehicle turned right. He confirmed that the fourth vehicle was giving right turn signal a long time ago. PW2 further said when he looked at the speedometer it was indicating between 120km/h and 140km/h. The accident happened in 80km/h zone.
- [25] I find PW2 to be an independent witness. He is related to both, the plaintiff and the defendant. No rebuttal evidence was produced to discredit his evidence except for the defendant's evidence.
- [26] The defendant's evidence was that he turned the vehicle towards the right to save a dog that was crossing the road.
- [27] There is clear evidence, which I accept, that the defendant was over speeding in an attempt to overtake the 4 vehicles travelling in front of him near a junction. PW2 states that the defendant's driving was not steady and at the time of the accident the defendant was driving at 140km/h. On the evidence, the court can infer that the defendant was over speeding because one cannot overtake 4 vehicles at a normal speed or at the national speed limit which is 80km/h.

*Conviction as evidence in civil proceedings*

- [28] After the accident, the defendant was caution interviewed and charged for dangerous driving. The defendant pleaded guilty to the charge and the Nadi Magistrate's Court imposed a fine of \$200.00 in October 2013. The defendant admitted that he pleaded guilty to the charge of dangerous driving and paid a fine of \$200.00.
- [29] The Civil Evidence Act (CEA), section 17 says that the fact that a person has been convicted of an offence is admissible in evidence for proving any issue relevant in any civil proceedings. Section 17 provides:

*"17 (1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the Fiji or elsewhere is, subject to subsection (3), admissible in evidence for the purpose of proving, where to do so is relevant*

*to any issue in those proceedings, that the person committed the offence, whether the person was so convicted upon a plea of guilty or otherwise and whether or not the person is a party to the civil proceedings.*

*(2) No conviction other than a subsisting one is admissible in evidence by virtue of this section.*

*...”*

- [30] The plaintiff has pleaded in para 16 of the statement of claim that the defendant was charged by the Police for dangerous driving contrary to section 98 (1) and 114 of the Land Transport Act 35 of 1998 vide case no. 3547 of 2013 and the defendant was found guilty by the Resident Magistrate Mr Wickremasekara at Nadi Magistrates Court on 18 October 2013 and fined \$200.00 and the defendant has paid the amount on 7 March 2014 and the plaintiff will rely on the case to prove negligence by the defendant. To which the defendant states that he does not plead to the contents thereof, and he further states that: the plaintiff is not entitled to plead a charge and the pleading of the charge is erroneous, misconceived in law, irrelevant and inadmissible.
- [31] The defendant's conviction on dangerous driving is still subsisting. Such conviction is admissible in the civil proceedings whether he was so convicted upon his plea of guilty or otherwise. It is immaterial that he pleaded guilty to the charge because he did not have money to retain a lawyer.
- [32] The plaintiff is, pursuant to section 17 of the CEA, entitled to rely on the defendant's conviction to prove his negligence driving. The defendant's conviction on dangerous driving is relevant and admissible to prove his negligence in these proceedings.
- [33] I disbelieve the defendant's evidence that he had to turn the vehicle to the right to save the dog that was crossing the road.
- [34] There is sufficient evidence to find that the accident happened due to over speeding in an attempt to overtake 4 vehicles that were travelling and that the



defendant failing to take proper measures when overtaking other motor vehicles. I further find that the collision occurred as a result of the defendant's negligence.

*Duty of care*

- [35] The plaintiff was one of the passengers in the vehicle the defendant was driving on the day of accident. When the plaintiff was boarding the vehicle, the defendant did not stop him and warn him that if he is travelling in the vehicle with him, he is travelling on his own risk.
- [36] It is well settled that drivers owe duty of care to other road users, be it another driver, passenger in vehicles, pedestrian, jay walker or joy rider (See *Ali v Nisha* [2018] FJHC 586; HBC5.2014 (10 July 2018)).
- [37] The plaintiff was a passenger in the vehicle driven by the defendant at the material time. Therefore, the defendant owed a duty of care. On the evidence, I find that the defendant has breached his duty of care towards the plaintiff by his negligent act. I would accordingly find that the defendant is liable to pay damages for the personal injuries the plaintiff sustained as a result of the accident caused by the negligent act of the defendant.

*Damages*

- [38] Since I have determined the liability issue, I will now proceed to assess the damages payable to the plaintiff by the defendant.
- [39] I have to assess the damages in the absence of medical evidence or medical report. The plaintiff did not call any medical evidence or produce any medical report in support of his personal injuries.
- [40] The defendant did not dispute that the plaintiff sustained injuries in the accident. He himself said the plaintiff was bleeding and unconscious when he (plaintiff) was drawn out of the vehicle after the accident.

- [41] In regards to his injury the plaintiff said: his jaw broke. He did not eat for 3 months. An operation was performed. The eye nerve damaged. He can't see. He had injury on the head. He gained consciousness after 3 days of the accident. He was in hospital for 3 months (Later he admitted it was 3 weeks). He had lots of pain. He could not sleep and walk. He is still having similar problem. Still, he can't eat hard meat. If he wants to eat hard meat, it takes more than an hour. He had to have regular check-ups at CWM. Now he can't work as before. He can't walk under heavy traffic. I can't recall that he was a boxer. He can't participate in sport. He can't work under too much stress. He felt headache.
- [42] I will consider general damages for pain and suffering only. I would disallow the claim for loss of amenities of life, loss of earning capacity, permanent facial dislocation and marks as these damages were not established through expert evidence. I would also disallow the claim for special damages in the sum of \$1,601.50, which includes expenses for police report, medical report, LTA search, hired taxi from Sigatoka to Lautoka hospital, telephone calls, medication and taxi fare for Suva check-up. The plaintiff was not able to prove that he really incurred these expenses.
- [43] There is no doubt the plaintiff sustained personal injuries as a result of the accident caused by the defendant's negligent act. He was bleeding in the nose and mouth immediately after the accident. He was unconscious for 3 days. An operation was performed on his head. It appears that the plaintiff sustained multiple injuries including head injuries. The injuries the plaintiff sustained in the accident were confirmed not only by PW2 but also by the defendant himself. It is true that there is no expert evidence to prove the nature of the injuries. However, there is sufficient evidence to establish that the plaintiff suffered injuries due to the accident. He was admitted to the hospital for less than 3 weeks. Pain and suffering the plaintiff had to undergo was apparent. I take all into my account and assess damages for pain and suffering at \$30,000.00. This, in my opinion, is just and appropriate in the circumstances of the case. The defendant accordingly will pay the sum of \$30,000.00 on account of general damages for pain and suffering.

*Loss of income*

- [44] I am also prepared to allow the claim for loss of income for the period the plaintiff was admitted to the hospital. He was in the hospital for 3 weeks. The plaintiff was working at Beddarra Resort before the accident. He produced his fortnight pay sheets for the months of November and January 2012 (PEX 1 (a) - \$268.37, (b)-\$226.81 and (c)-\$228.00). On that basis, I would grant a sum of \$720.00 for loss of income during the period the plaintiff was admitted to the hospital.

*Costs*

- [45] As a winning party, the plaintiff is entitled to costs of these proceedings. The plaintiff was appearing through counsel throughout the proceedings. He called one witness to give evidence on his behalf. The trial ran up to 2 days. He had to travel from Sigatoka for the case. He has appeared in court on a number of occasions. I consider all and summarily assess the costs at \$3,500.00.

*Interest*

- [46] The court has discretion to grant interest on the judgment sum. In this case, I decline to grant interest. The plaintiff did not push for interest.

**Conclusion**

- [47] For all these reasons, I find that the collision in which the plaintiff sustained injuries was due to the negligent driving of the defendant. I reject the defendant's contention that it was an inevitable accident. Therefore, he is liable for causing injuries to the plaintiff. The defendant must pay general damages to the plaintiff for pain and suffering in the sum of \$30,000.00. He will pay a further sum of \$720.00 for loss of income during the period the plaintiff was admitted to the hospital. The defendant will also pay the summarily assessed costs of \$3,500.00 to the plaintiff. I would decline to grant interest on the judgment sum.

**The outcome**

1. There shall be judgment for the plaintiff.
2. The defendant shall pay the sum of \$30,720.00 with summarily assessed costs of \$3,500.00.

*M.H. Mohamed Ajmeer*  
5/10/18  
.....

**M.H. Mohamed Ajmeer**

**JUDGE**

**At Lautoka**

**05 October 2018**

Solicitors:

For the plaintiff; M/s. Samusamuvodre Sharma Law, Barristers & Solicitors

For the defendant; M/s. Patel & Sharma, Barristers & Solicitors

