

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 103 of 2015

BETWEEN : SARMILA PRAKASH of Lot 3, Adi Davila Road, Davuilevu Housing

PLAINTIFF

AND : TALIM HUSSAIN of Lot 03 Bui Iri Crescent, Waila 3B, Davuilevu Housing,
Taxi Driver,

1ST DEFENDANT

AND : MOHAMMED HABIB of Dalip Street, Nausori, Taxi Proprietor

2ND DEFENDANT

Counsel : Plaintiff: Mr. Daniel Singh
: Defendants: Mr. A. Vulaono
Date of Hearing : 17th November, 2017
Date of Judgment : 28th February, 2019

JUDGMENT

INTRODUCTION

1. This is Plaintiff's action for damages for personal injury due to motor vehicle accident. The Plaintiff had not seen the vehicle approaching as it had come from behind but the people around her had warned that the vehicle was driven dangerously and had stated to her that the driver of the vehicle might be drunk. The vehicle had hit the Plaintiff from behind and despite collision it had not stop. It was a white taxi and people around had shouted at it, and it had taken a turn at the end of the road and come back but it had not stopped at the place of accident but had proceeded fast. The people around had tried to top it, but without any success. The accident had happened on Saturday night around 8pm

and there were no evidence of other vehicles driving down on that road at that time. The people had noted the vehicle registration number and had given it to the Police and several people had given statements to the Police regarding identification of the vehicle. One such eye witness gave evidence at trial. 1st Defendant admitted driving along the road on the day of the accident on or around that time. He said that he was the driver of LT 963, but denied accident. No one had identified the driver of the vehicle that had hit the Plaintiff either prior or after the accident. There is no dispute as to the injury and or the percentage of permanent impairment due to the accident.

FACTS

2. Following facts are admitted in the pretrial:
 - a) The Plaintiff resides at Lot 2 Adi Davula Road, Davuilevu Housing.
 - b) 1st Defendant was employed as taxi driver of vehicle registration LT 963 in 2012.
 - c) 2nd Defendant is the registered owner of a motor vehicle registration number LT 963 which was insured at the material time in accordance with the Motor Vehicle (Third Party Insurance) Act with Sun Insurance Company Limited.
3. The Plaintiff and an eye witness who was standing by the side of the road at the time of the accident gave evidence. There is a bundle of documents submitted and both parties relied on that.
4. 1st Defendant gave evidence and admitted driving along that road in the course of employment on or around the time of the accident but denied he caused the accident and or that he saw the accident.
5. Since there is admission of employment of 1st Defendant as taxi driver and no evidence to contrary there is proof of vicarious liability to the 2nd Defendant if 1st Defendant's negligence is proved.

ANALYSIS

6. Plaintiff was walking along left side of the road after work, in the night and there were other people around to witness the motor vehicle accident that happened around 8pm. These people had warned the Plaintiff regarding the vehicle that collided shortly before the accident.
7. Considering the manner and speed of the vehicle people around Plaintiff had warned that the driver of the vehicle may be drunk, but before long it had collided with Plaintiff, from behind.

8. Plaintiff was walking on the left hand side of the road when a vehicle from back had collided with her and proceeded without stopping it. After the collision with the vehicle on the right side of the plaintiff her bones in the right leg were fractured and she was fallen on to the ground, but the vehicle that collided with her had not stopped.
9. Plaintiff had not identified the driver. She only knew that it was a white taxi. The people who had seen the careless manner in which the vehicle was driven had warned her before accident. They shouted at the vehicle after accident but the vehicle did not stop.
10. An eye witness who was on the side of the road expecting another person gave evidence at the hearing. He said that while he was waiting by the side of road he identified the vehicle that collided with the Plaintiff. He also said that there were people around and all of them had tried to stop the vehicle. He had identified the number.
11. While he was standing by the side of the road, the vehicle that met with an accident, was driven very close to the witness and had passed him and hit the Plaintiff from behind.
12. The eye witness who gave evidence, stated that he identified the vehicle but could not recognize the driver of the vehicle. He said that the vehicle was driven fast and after the accident it had taken a turn and came back but had failed to stop at the place of accident despite their effort to stop.
13. In the statement that he had given to the Police the vehicle was positively identified and number of the vehicle that collided with the Plaintiff was identified as having registration number LT963.
14. There were number of eye witnesses to the incident and they had also given statements to the Police confirming the number of the vehicle as LT963.
15. I accept the evidence of eye witness Malakai Waqata who gave evidence in court. There is no number of witnesses needed to prove a fact. His evidence prove the fact Plaintiff collided with LT 963 and after the accident it had not stopped.
16. The eye witness said he could not recognize the driver, but could state the registration number of the vehicle that collided with the Plaintiff on the date of the incident. This is the material fact in his statement, and it was not contradicted.
17. There is no evidence of any other vehicles travelling on that road at that time. If there were other vehicles at least one of them would have followed LT 963. The witness who

gave evidence can be believed though there are some contradictions as to the facts in the statement recorded in the Police.

18. The witness had given the registration number of vehicle that collide to the Police. This is the material fact and that had not been contradicted. There were other people and their statements were also recorded and filed as part of set of documents in the court.
19. Counsel for the Defendant had cross examined the eye witness and his evidence is accepted as correct encounter of incident. He is a disinterested party and had given a statement to the Police promptly with the positive identification of vehicle but had not identified the driver.
20. The eye witness who was 18 years old at the time of the accident had given a statement to Police that is consistent with his evidence though there were some contradictions. The contradictions in a statement given to Police about 5 years early is normal and that also proves his truthfulness as to material fact as to the identity of the vehicle and not identifying the driver.
21. 1st Defendant was the driver of white taxi LT 963 at the time of accident. This is an admitted fact.
22. 1st Defendant in his evidence admitted driving along the same road on or around that time of the accident.
23. Since there is positive identification of vehicle by the people on the road, and 1st Defendant had admitted driving along the road on or around that time, it is proved that 1st Defendant had driven the vehicle at the time of the accident on balance of probability.
24. 1st Defendant had driven the vehicle in negligent manner causing injury to Plaintiff. Even after the accident he had not stopped the vehicle.
25. Though the Plaintiff was cross examined as to intoxication of her there is no pleading as to contributory negligence. So her state of intoxication is irrelevant.
26. On the balance of probability it is proved that the vehicle driven by 1st Defendant had collided with the Plaintiff and it was due to the negligent manner in which 1st Defendant drove the vehicle on public thoroughfare in a reckless and negligent manner.
27. Since the employment is admitted and there is no evidence to exclude vicarious liability 2nd Defendant is vicariously liable for the acts of 1st Defendant.

ASSESSMENT OF DAMAGES

28. The Plaintiff did not produce birth certificate and there is no admission as to date of birth in the minutes of pre-trial conference. In her oral evidence she stated that she was born on 25.10.1976 and it was not disputed in cross-examination, and the accident happened on 18.2.2012. So she was 35 years old at the time of accident.
29. The Plaintiff was admitted to CWM hospital on 19.2.2012 and remained there till 3.3.2012. She was again admitted from 3.4.2012 to 14.4.2012. She had suffered commuted fracture of right Distal Tibia and Fibula.
30. Soon after the accident Plaintiff was admitted to Nausori Hospital and subsequently to CWM Hospital where she underwent surgeries for compound fracture. So there were several fractures and it was difficult to heal all the fractures without disfigurement of leg. The pain for a compound fracture where there were multiple fractures was more compared with single fracture.
31. According the report of CWM Hospital she had her surgical wound debridement on 19.2.2012 and External Fixation insertion on 22.4.2012 and was discharged on 3.3.2012.
32. On her second follow up on 3.4.2012 he had osteomyelitis of External Fixator pin sites and was again admitted.
33. She was administered IV Antibiotics and was taken to operating theater on 12.4.2012 for Wound Debridment, Realingment of Tibia fracture Removal and Reinsertion of External Fixators.
34. All the above surgical interventions cause severe pain to the Plaintiff.
35. She was stable on discharge on 14.4.2012 but had complained about niggling pains. So even after healing of the wounds Plaintiff is experiencing pain and that can be accepted considering it was a compound fracture, and manner of healing.
36. For the past pain and suffering I award a sum of \$80,000 as general damages considering that she had undergone two surgical interventions and had to be admitted to hospital for a total period of nearly 2 months. The Plaintiff submitted a summary of awards in personal injury actions.
37. According to medical report obtained on 2.3.2014 regarding permanent disability the permanent impairment is assessed as 35% of whole person.

38. As for future loss of income the Plaintiff did not produce documentary evidence of her being employed at a workplace and proof of the salary or wages but on balance of probability she had proved she worked in a canteen.
39. The Plaintiff in her evidence said she worked in a restaurant or canteen and accident happened when she was returning from that work place in the night around 8pm. These facts were not disputed in cross-examination so I consider them proved on balance of probability.
40. There was no evidence of payment of salary or wages to her from an employer, but she said her income was about \$ 150 per week. There is no proof that she received wages as a cook, and or her weekly wages.
41. Permanent impairment of 35 % as a total person is a significant impairment and Plaintiff said that she cannot work now. She could mobilize with a pair of crutches and had complained about pain and swelling on the leg, though she was not attending any regular treatment.
42. In the medical report her condition is reported as follows;
- *The right leg was bowed anteriorly over the lower shaft with edema and multiple areas of hyper-pigmented skin spots from the healed pin sites. The lateral malleolus was covered with hypo-pigmented skin, which is shiny, smooth, and adherent to the underlying bone. The upper thigh also contained an area of hypo-pigmented skin, as this was the donor site for the skin graft. The fracture is still mobile when stressed with minimal tenderness. The anulation of the fracture has caused an apparent shortening of the leg by about 3cm.
- The X-Ray of the right leg on the day of the examination showed features on non union of the distal tibia and fibula fractures. The bones posteriorly angulated at 40°."
43. There is disfigurement due to accident on the right leg a skin graft was administered and right leg is 3cm shorter than the other . For disfigurement I award a damage of 10,000 considering the gender and also age of Plaintiff at the time of accident, and also shortening of a leg by 3cm and skin graft.
44. Plaintiff had incurred permanent impairment of 35% and it had affected her amenities of life and employment prospects.
45. For future loss I awarded a sum of \$ 80,000 considering the age of the Plaintiff and nature of the injury to her. She has to live with the injury for rest of her life and there is

no guarantee that this will not worsen in future. So there is certain risk in awarding damages in such an injury and court needs to take that in to consideration.

SPECIAL DAMAGES

46. Plaintiff did not produce any receipts of the expenses and said that all were destroyed due to natural disaster.
47. She had claimed \$120 for transport expenses and \$200 for medical expenses. I allow both in full though there were no documentary proof of them considering numerous clinics that she had attended and continuous pain that she suffers.
48. There is no proof of loss of earning due non production of documentary evidence as to her earning at the time of the accident. So claim for special damages for loss of earning is not granted.
49. The Plaintiff is granted 3% interest on special damages from the date of incident to date of judgment.
50. The Plaintiff is also granted 6% interest for the general damages.

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a) Special Damages

Medical	\$200.00
Travel	<u>\$120.00</u>
	\$320.00
Interest from 18.2.2012 to 28.2.2019 at 3% P.A	<u>\$67.46</u>
Total	<u>\$387.46</u>

b) General Damages

Past Pain and Suffering	\$80,000.00
Disfigurement (skin graft and shortening) -	<u>\$10,000.00</u>
	\$90,000.00
Interest 6% from date of writ (18.2.2015 to 28.2.2019)	\$21,614.80

Future Loss	<u>\$80,000.00</u>
Total	<u>\$191614.80</u>
Total damages (a+b)=	<u>\$192002.26</u>

51. The cost of this action is summarily assessed at \$3,000 to be paid by Defendant to Plaintiff within 21 days.

FINAL ORDERS

- a. The Defendants are jointly and severally liable for payment of \$192002.26 as damages.
- b. The cost of this action is summarily assessed at \$3,000 to be paid by the Defendants within 21 days.

Dated at Suva this 28th day of February, 2019.



Amara
 Justice Deepthi Amaratunga
 High Court, Suva