

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

NO: HBC237 OF 2012L

BETWEEN: **KAVETANI NAQIQI** of Lawaki Settlement, Lautoka, Unemployed.

1ST PLAINTIFF

A N D: **MANOJ KUMAR** of Lovu Seaside, Lautoka, Handyman.

2ND PLAINTIFF

A N D: **HERBERT CONSTRUCTION COMPANY (FIJI) LIMITED** a limited liability company having its registered office at Suite 12, Town Council Arcade, Nadi Town. (In Receivership)

1ST DEFENDANT

A N D: **ELIZABETH LILIAN HERBERT** of Marine Beach, Denarau, Island, Company Director.

2ND DEFENDANT

A N D: **ANTHONY JAMES HERBERT** of Momi, Nadi, Company Director.

3RD DEFENDANT

A N D: **MALCOLM ANDREW HERBERT** 11 Thorn Place, P O Box 3022, Napier, New Zealand, Company Director.

4TH DEFENDANT

Appearances: Chaudhary & Associates for the Plaintiffs

N/A for the Defendants

Date of Trial: 28.06.2017

Date of Judgment: 07.02.2020

JUDGMENT

INTRODUCTION

1. The plaintiffs filed a writ of summons and statement of claim on 14 November 2012.
2. It is an agreed fact that both of them were employed by Herbert Construction Company (Fiji) Limited ("HCCFL") as Labourer/Carpenter at all material times.

3. It is also an agreed fact that both plaintiffs were injured in the course of their employment with HCCFL on 23 November 2009. I say this based on the Pre-Trial Conference Minutes executed by both counsel.

CIRCUMSTANCES LEADING TO THE ACCIDENT & INJURIES

4. As pleaded, on 23 November 2009, Naqiqi and Kumar were working on the Rajendra Prasad Building Complex in Tukani Street, Lautoka.
5. I gather that, at some point, a particular scaffolding pipe or tube broke. This pipe was supporting a platform on which the plaintiffs were standing whilst working on the building. Both men fell to the hard concrete tiled floor and sustained some personal injuries as a result. They claim for general damages for personal injuries they suffered as a result and also special damages. In the alternative they claim compensation under the Workmen Compensation Act.

ISSUES RAISED IN PTC MINUTES

6. The issues in the Pre-Trial Conference Minutes are as follows:
 - i) the extent of injuries sustained by the plaintiffs in the accident on 23 November 2009.
 - ii) whether the plaintiffs sustained the said injuries, if any, due to the negligence of the first defendant, its servants and/or agents.
 - iii) whether the accident happened due to the negligence of the plaintiffs.
 - iv) whether the plaintiffs suffered loss and damage, pain and suffering, loss of amenities of life and loss of earning capacity as a result of the accident.
 - v) whether, in the alternative, the plaintiffs are entitled to compensation under the Workmen Compensation Act.
 - vi) whether the Winding Up Order made against the first defendant has been set aside and / or revoked.
 - vii) whether it was the duty of the second, third and fourth defendants as Directors of the first defendant company to ensure that employees who were injured during and in the course of their employment with the first defendant would receive compensation for their injuries.

- viii) whether the second, third and fourth defendants were negligent in failing to keep and /or renew insurance cover for any injuries sustained by employees of the first defendant during and in the course of employment.
- ix) the quantum of damages, if any, payable to the plaintiffs.

HISTORY OF PROCEEDINGS

- 7. The statement of defence was filed by Koyas on 14 February 2013. Pre-Trial Conference Minutes were executed by both parties on 16 August 2014.
- 8. On 31 October 2014, K. Law filed a notice of change of solicitors to act for HCCFL.
- 9. I note also that on 28 November 2014, 01 April 2015, 05 May 2015, 06 May 2015, 13 July 2015 and 15 September 2015, both counsel were advising court that they were pursuing settlement. However, on 24 September 2015, a Notice of Discontinuance was filed by the plaintiffs to discontinue their claim against the second, third and fourth defendants who were directors of HCCFL. I did declare that that K Law was no longer acting for HCCFL after satisfying myself that the application had been duly served.
- 10. For the record, HCCFL's counsel did inform the Court that HCCFL's registered office was in fact their office, however, they did take the extra cautionary step of serving HCCFL at their worksite in Nadi.
- 11. On 01 October 2015, the case was called in Court and then adjourned for trial to 15 March 2016.
- 12. For one reason or another, this case was placed before me on 08 March 2016 when I then adjourned it to 31 August 2016 for trial.
- 13. About two weeks before the trial date, on 12 August 2016, K. Law filed a summons to withdraw as counsel for HCCFL. This was made returnable on the trial date of 31 August 2016.
- 14. On 31 August 2016, Mr. Chaudhary did not object to the application and the trial was vacated and adjourned to 20 September 2016 for mention to fix a new trial date.

15. On 20 September 2016, the case was adjourned to 14 October 2016 for mention to fix trial date. On 14 October 2016, the case adjourned to 14 March 2017 for trial.
16. On 14 March 2017, Mr. Chaudhary appeared and there was no appearances by the defendants. Chaudhary applied to strike out statement of defence of defendants. After having noted that the application to withdraw by K. Law appeared to have been regularly served on HCCFL, I struck out the statement of defence on account of HCCFL's non-appearance in Court for trial.

TRIAL

17. At the trial the following witnesses gave evidence;
 - i) Kavetani Naqia (PW1)
 - ii) Manoj Kumar (PW2)
 - iii) Dr Joeli Mareko (PW3)
18. There was no appearance by or on behalf of HCCFL.

PLAINTIFFS' WAGES

19. The claim pleads that the first plaintiff Naqiqi was paid at the rate of \$2.25 per hour and earned an average \$104.00 per week and that the second plaintiff Manoj Kumar was paid an average of \$162.00 per week.
20. This is confirmed by the Notice By Employer of Accident Causing Injury which HCCFL had submitted to the Ministry for Labour and which PW1 and PW2 had tendered in evidence (PEX2 and PEX3).

INJURIES SUSTAINED

21. PW3 gave evidence of the injuries sustained which I accept. His Report dated 03 April 2002 and which he tendered (PEX 5) is reproduced in the submissions filed by the plaintiff's counsel (see below).

SUBMISSIONS

22. Chaudhary & Associates filed submissions on assessment of damages on 21st February 2018 which I reproduce in part below:

A) **FIRST PLAINTIFF – KAVETANI NAQIQI**

The First Plaintiff was born on 2nd February 1977. He is educated up to Fiji School Leaving Certificate according to the evidence he gave in court on 28th June 2017 on the Assessment hearing. His Birth Certificate is exhibit one. He was injured at work on 23rd November 2009 when he was 32 years old. He is 41 years old now. He suffered serious injuries in the accident as detailed in his medical report dated 3rd April 2012 which is reproduced in full below for ease of reference. It is exhibit 5:-

File: LH 8/1

Date: 03rd April 2012

MEDICAL REPORT

The above patient had an:

- i) *Open wound on the left elbow*
- ii) *Difficulty in moving the left hip*
- iii) *Pain and tenderness of the left hip*

INVESTIGATIONS

Radiological x-rays revealed:-

- i) *Fracture of the central acetabulum*
- ii) *Left ischiopubic rami*
- iii) *Multiple fracture of the ilium*
- iv) *Fracture dislocation of the left elbow*
- v) *Fracture L4 vertebra + L2 vertebra of the lumbar*

TREATMENT

The patient had:

- i) *Exploration of the left elbow wound. Excision of the wound*
- ii) *Skeletal traction of the left lower limb*
- iii) *Antibiotic*
- iv) *NSAID*
- v) *Physiotherapy*

The patient when last reviewed on 04.05.11 was still walking with crutches as walking aid.

He had:

- i) *Diminished ROM Left elbow – x-rays shows radial head fracture*
- ii) *Teardrop fracture of the L4*
- iii) *Left hip osteoarthritis*
- iv) *Cannot lift heavy load because of left hip pain*

His disability is thirty percent (30%).

Yours sincerely
SGD: Dr Joeli Mareko
Orthopaedic Surgeon
LAUTOKA HOSPITAL

The First Plaintiff has been a significant disability of 30%. He fell from an unsafe scaffolding which broke. He passed out and woke up in the hospital. He was admitted to hospital from 23rd November 2009 to 7th January 2010. He was given painkillers. He was taken to the theatre for surgery three times. He had back and arm and leg pain continuously in the hospital. He was not mobile and could not go to the washroom. He was discharged on crutches which he used for 6 months. He did not go back to work. He was weak.

At present he suffers from back pain. He cannot lift heavy loads. His left leg is short. He has back and hip pain especially in cold weather. He can only do light work now. He works for Tall Construction at present and is paid \$6.00 per hour. But he cannot work every day. He is absent about 1 week every month. His pay at Herbert Construction was \$104.00 per week as shown in Exhibit 2 – the LD Form/c/1 filed by the employer with the labour Department.

The First Plaintiff used to play rugby and soccer. He cannot do this now. He cannot do gardening – eg. planting and cultivation of cassava. He has pain even at rest and takes panadol for relief. He spends about \$10.00 per week on panadols and \$5.0-0 per week on massage oil.

DAMAGES

The First Plaintiff has claimed general damages and special damage in the sum of \$228.00. The following cases are discussed here:-

i) Raben Prasad v T F Jan Bulldozing Company Limited and Binay Dayal Lautoka High Court Civil action number HBC292 of 2002 was a case where judgment was delivered on 16th March 2005. The Plaintiff was 44 years old at the date of trial. He was 39 years old at the time of injury. He was hospitalized for 7 weeks. Dr Mc Caig assessed the Plaintiff as having a 20% permanent incapacity. On page 6 of the Judgment the Learned Judge states:-

“The medical reports and the evidence of Dr Mareko are all indeed consistent in describing the injury, the pain, the continuing disability and the need for a hip replacement as the only means of alleviating the pain. Dr Mareko indicates

that because of the age of the Plaintiff, it may be necessary for the hip to be replaced twice during his life”

The Court awarded damages as follows:-

General Damages:-

i)	Past	\$30,000.00
ii)	Interest from 10/9/02 to 17/3/05 at 6%	\$ 4,500.00
iii)	Future	\$20,000.00
	Past economic Less	\$20,202.00
	Interest at 3% from 14/11/99 to 17/2/05	\$ 3,182.00
	Future Economic loss	\$20,000;00
	Hip Replacement	\$18,000.00
	Special damages	\$ 200.00
	Interest at 6% from 10/9/02 to 17/2/05	\$ 30.00

We do note that there is no issue about hip replacement in the present case. However, the injuries were just as serious and the pain suffered in the past and the present is comparable.

- ii) **Bimal Prakash –vs- Makans Limited and Laxman Bhai Patel Lautoka High Court Civil action number HBC068 of 2004** was a case decided on 26th May 2006. The Plaintiff was 48 years old at the time of the accident. On page 3 of the judgment the Learned Judge describes the Plaintiff’s injuries and his hospitalization. Dr Mc Caig assessed the Plaintiff’s permanent incapacity as 40%. Dr Mareko assessed it as 35% (page 4 of the Judgment). Admittedly the injuries were more serious than those suffered by the Plaintiff in the instant case. General damages in the total sum of \$75,000.00 was awarded (\$35,000.00 past and \$40,000.00 future).
- iii) In **ALI v LAUTOKA GENERAL TRANSPORT COMPANY LIMITED Lautoka High Court Civil action number 295 of 1999** the Plaintiff was 18 years old when he suffered injury to one of his legs – both tibia and fibula with the broken fibula badly joined. His hip was dislocated. He had ankle pain and there was onset of Osteoarthritis. He was awarded a total of \$40,000.00 as general damages (\$20,000.00 past, \$20,000.00 future).
- iv) In **RAKESH CHAND v MOHAMMED SHAHIM Lautoka Civil action number 300 of 2001** the Plaintiff was 36 years old at the time of the accident. He also suffered leg injury (tibia and fibula fracture) apart from other minor injuries. In the High Court he was awarded total general damages of \$50,000.00 (\$30,000.00 past, \$20,000.00 future) plus \$15,000.00 for loss of earning capacity. On appeal the total \$65,000.00 was reduced to \$50,000.00.

- v) In ABDUL KARIM v TAVITA TUBUNA AND ATTORNEY GENERAL OF FIJI Lautoka High Court Civil action number 53 of 2007 the Plaintiff was 44 years old at the time of the accident. He suffered a fracture of the right femur. The details of injuries and the effect of the injuries are in paragraphs 41 to 51 of the Judgment and the Court is respectfully referred to the same in the case attached herewith.

In the above case the Plaintiff was awarded a total of \$30,000.00 for pain and suffering (\$15,000.00 past, \$15,000.00 future).

LOSS OF EARNING CAPACITY

The First Plaintiff has definitely suffered loss of earning capacity. The Court is respectfully referred to the First Plaintiff's disabilities as listed above. In the Raben Prasad case the Court awarded \$20,000.00 under this head. In the Bimal Prakash case the court awarded \$35,000.00. Damages for loss of earning capacity can be assessed by using the multiplier and multiplicand method or a global approach.

With respect we submit that the following awards would be appropriate in the present case:-

- | | |
|--|--------------------|
| i) General Damages for pain and suffering and loss of amenities of life: | \$45,000.00 |
| ii) Loss of earning capacity: | \$25,000.00 |
| iii) Special Damages: | <u>\$ 228.00</u> |
| Total | <u>\$70,228.00</u> |

B) SECOND PLAINTIFF – MANOJ KUMAR

The Second Plaintiff was born on 8th September 1976. His birth certificate is Exhibit 3. He was 33 years old on the date of the accident (23/11/09). He finished his Fiji School Leaving Certificate in 1983 and then started to work at various places joining Herbert Construction in 2008. He was the leading hand at the time of the accident earning \$5.00 per hour or \$162.00 per week as shown in Exhibit 4 – the LF Form/c/1 filed by the employer with the Labour Department.

He fell from the scaffolding like the First Plaintiff and later woke up in the hospital. He was admitted in hospital for two weeks. His injuries and treatment are recorded in his medical report dated 20th April 2012 from Dr Mareko of Lautoka Hospital and the same is reproduced below for ease of reference:-

20th April 2012

MEDICAL REPORT

The above patient, a builder fell from height of eighteen (18) feet when scaffolding broke. He fell to the floor and scaffolding hit his head when it fell on him on 23.11.09.

He had injuries to:

- i) Head
- ii) Inability to walk
- iii) Difficulty in breathing because of chest pains
- iv) Bleeding from the ears

ON EXAMINATION

He had difficulty walking, he was confined to bed. He had neck pain laceration of the scalp which had to suture. Tenderness and pain of the right side.

INVESTIGATIONS

Radiological x-rays reveal fracture Left 8 – 9 ribs. Fracture of the Ischiopubic ramus. Suspicious fracture of the base of the skull.

DIAGNOSIS

- i) Ischiopubic Ramus
- ii) Fracture 8 -9 ribs left side
- iii) Head injury

TREATMENT

- i) Pain relief
- ii) Head injury observation and treatment
- iii) Bed Rest
- iv) Suturing of Laceration
- v) Antibiotic

He has been subsequently seen in the clinic and he had:-

- i) Persistent headaches as result of the head injury
- ii) Hearing difficulties
- iii) Pain at the right pelvic region

His disability is twenty percent (20%).

SGD: Dr Joeli Mareko

Consultant Physician

LAUTOKA HOSPITAL

The Second Plaintiff was taken to theatre for surgery four times during his admission. He was in pain. He was told recovery would take time. He went

home in a wheel chair and used the same for 4 to 5 months. At present he suffers from constant headache. His left ear also pains. Right hip also pains. He uses panadol, deep heat and balm to control his pain and this costs him \$15.00 - \$2.00 per week. He can do some light work and does private work earning about \$80.00 per week. The Second Plaintiff was also a soccer player. He played as left link for the Tavua team for 3 years. He cannot play now.

GENERAL DAMAGES

The Court is respectfully referred to the cases referred to above. With respect it is submitted the following awards would be appropriate in this case:-

i) General Damages:	\$35,000.00
ii) Loss of earning capacity:	\$25,000.00
iii) Special Damages:	<u>\$ 1,192.00</u>
Total	<u>\$61,192.00</u>

The Plaintiffs are also entitled to cost in the matter which should be summarily assessed by the Court.

COMMENTS ON THE SUBMISSIONS

23. I have carefully reviewed the submissions and I agree with the assessment for both plaintiffs as follows

- a) Naqiqi - \$70,228.00
- b) Kumar - \$61,192.00

ORDERS

24. I enter judgement in favour of both plaintiffs accordingly in the sum of \$70,228.00 for the first plaintiff and \$61,192.00 for the second plaintiff. I award costs which I summarily assess at \$3,000 (three thousand dollars for their joint claim).



Anare Tuilevuka
Judge
Lautoka