IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 187 of 2018

BETWEEN: **NEHAAL YUGVEER** of Yasiyasi, Tavua, Student by his father and next friend **RONIL VIJESH CHAND** of Yasiyasi, Tavua, Farmer.

Plaintiff

AND: **RAJENDRA PRASAD** of Vatulaulau Stage II, Ba.

1st Defendant

AND: **JASNEEL PRASAD** of Vatulaulau Stage II, Ba, Driver.

2nd Defendant

Before : Master U.L. Mohamed Azhar

Appearance: Mr. R. Chaudhary for the Plaintiff
Both Defendants are absent and unrepresented

Date of Decision: 26th September 2023

DECISION

01. On or about 20th April 2016, the second defendant drove the motor vehicle bearing registration number EL 251 on King's Road, Yasiyasi, Tavua and bumped the plaintiff who was the pedestrian on the said road. The plaintiff sustained injuries due to this accident. It was alleged that the accident occurred due to the sole negligence, carelessness and recklessness of the second defendant and he at all material times was driving the said vehicle as the servant and or agent of the first defendant. The plaintiff being a minor sued both defendants by his father and next friend for damages.

02. The writ was duly served on both the defendants. However, they failed to file the acknowledgement of service of the writ. The plaintiff then entered the interlocutory judgment against both defendants. The interlocutory judgment also was served on both defendants. The plaintiff thereafter filed the Notice of Assessment of Damages pursuant to Order 37 rule 1 of the High Court Rules. Upon service of Notice of Assessment Damages, both defendants appeared in person and applied for legal aid; however their applications were rejected. They did not appear thereafter. The matter was then fixed to assess the damages, interest and costs. At the trial for assessing the damages the plaintiff's father, mother and Dr. Akthat Ali – the Consultant Surgeon - attached to Lautoka Hospital testified. A total of 12 Exhibits also were tended in evidence.

03. The plaintiff was born on 30.08.2010 and the motor traffic accident occurred on 20.04.2016. The plaintiff was about 6 years old boy attending class 1 in Rabulu Primary School at the time of the accident. The boy was immediately admitted to Tavua Hospital and within few hours he was transferred to Lautoka General Hospital by ambulance. The mother of the plaintiff accompanied him in the same ambulance. The plaintiff was admitted almost 4 months in Lautoka Hospital. He was in Pediatric Intensive Care Unit (PICU) for 90 days. The testimony of the Doctor is summarized in his report dated 10.09.2020. The report is exhibited and marked as Exhibit 12. The condition of the plaintiff at the time of trial was described as follows in the said Exhibit 12:

> Mr Nehaal Yugveer (6 years, Male) was admitted to Lautoka Hospital PICU following motor vehicle accident. He was a pedestrian hit by a car. Initially managed at Tavua Hospital and transferred to Lautoka Hospital by ambulance. He sustained severe head injury, 7th cervical spine fracture, multiple ribs fracture. He sustained severe injury, 7th cervical spine fracture, multiple ribs fracture, pulmonary contusions and blunt abdominal injuries. He was intubated and ventilated to support major organ function.
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> CT Scan revealed hyperdense foci on left frontal region of brain suggestive of intracerebral haemorrhage and diffuse axonal injury. Fractured transversed process of 7th cervical vertebra. Bilateral moderate lung contusion and retroperitoneal infra renal bleed (collection) in left abdomen.
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> This child was ventilated through tracheostomy tube and had received intensive care treatment of Polytrauma for more than 90 days (3 months) then transferred to Children's Ward for rehabilitative care for another 3 weeks.
>
> He was discharged for home care on 14/08/2016. Mr Nehaal has developed severe impairment as a result of injuries sustained due to Motor Vehicle Accident in 2016.
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> Last medical examination performed on 14/10/2020, Mr Nehaal Yugveer was noted to have severe growth retardation, malnutrition, paralysed, loss of bladder and bowel control.
>
> He is unable to communicate due to language deficit due to loss of intellectual and memory. He has developed disuse atrophy and rigidity of musculoskeletal system.
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> Mr Nehaal Yugveer is a special child with extreme limitations. He is dependent on caregiver for activities of daily living, for communication, mobilization, eating, drinking, toileting, bathing and grooming.

> With reference to American Medical Association; Evaluation of permanent impairment Edition 5, Table 13.6, Page 320, Mr Nehaal has (78%), seventy-eight percent whole person impairment due to mental impairment with CDR rating of 3.0 and 35% whole person impairment rating for difficulty to communicate as a result of loss of speech development.
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> Combination of the two impairment equates to 81% total whole person permanent impairment.

04. Accordingly, the negligence and carelessness of the second defendant resulted in rendering the child - the plaintiff - as a person of 81 % impairment at the early age of 6. The plaintiff had such excruciating pain and continues to suffer the same for the rest of his life, because the Doctor testified that, he has reached his maximum medical improvement and no further improvement can be expected. The counsel submitted that, the plaintiff should be awarded a general damages in sum of $ 200,000.00 for pain, suffering and loss of amenities; a sum of $ 140,400.00 for economic loss; a sum of $ 22,464.00 for future care; a sum of $ 93,600.00 for future nursing care; a sum of $ 10,206.43 for special damages and interest at the rate of 6% on general damages and 3% on the special damages from the date of issue of Writ till the trial date.

05. The Supreme Court in **The Permanent Secretary for Health and Another v Kumar** [2012] FJSC 28; CBV0006.2008 (3 May 2012) laid down the guiding principle in measuring the quantum of compensation for pain and suffering and loss of amenities and held at paragraph 37 that:

> There are three guiding principles in measuring the quantum of compensation for pain and suffering and loss of amenities. First and foremost, the amount of compensation awarded must be fair and should compensate the victim of the injury in the fullest possible manner, bearing in mind that damages for any cause of action are awarded once and for all, and cannot be varied due to subsequent eventualities, some of which could not even be anticipated at the stage a court makes an award. Hence, an award of damages should not only be fair, but also assessed with moderation, even though scientific accuracy is impossible. The second principle is that the sum awarded must to a considerable extent be conventional and consistent. Thirdly, regard must be had to awards made in comparable cases, in the jurisdiction in which the award is made. However, it is also open for a court to take into consideration a comparable award made in a foreign jurisdiction, particularly in cases where the type of injury is not very common, provided that the court takes into consideration differences in socio-economic and other relevant conditions that might exist between the two jurisdictions.

06. In case of permanent disability of a woman at the age of 26, the Court of Appeal in **Rokobutabutaki v Rokodovu** [2000] FJCA 9; ABU0088U.98S (11 February 2000) awarded $ 150,000.00 for pain and suffering and for loss of amenities after reducing $ 50,000.00 from the original award of $ 200,000.00 by the High Court. On the hand in **Flour Mills of Fiji Ltd v Raj** [2001] 1 FLR 196 (24 May 2001) the Court of Appeal agreed with the amount of $ 85,000.00 fixed by the judge in 100% disability proved by medical report.

07. Both of the above matters were decided almost 23 years ago. In the case before me, the disability is 81%. A child at the age of 6 sustained severe head injury, 7th cervical spine fracture, multiple ribs fracture, pulmonary contusions and blunt abdominal injuries. He was intubated and ventilated to support major organ function, according to the medical report and the testimony of the Consultant Surgeon. In addition, the first and the third witnesses testified how the child suffered and continue to suffer. In fact, the court had an opportunity to talk to him during the trial and observed that, he has acute mental and physical pain and suffering. A very substantial award is called for in this circumstance. Considering all the circumstances and the other decided cases, I award general damages in sum of $ 180,000.00 for pain, suffering and loss amenities.

08. The plaintiff was in class 1 at the time of the accident. His mother is a teacher. She testified that, the son wanted to become a police officer like the daughter. Her testimony further reveals that, the plaintiff was doing well in his education and was a very playful boy before the accident crippled him. Given the educational background of the mother, it would have been possible for the plaintiff to go to high school and to achieve his ambition had the accident not occurred. In **Raisalawake v Kamea** [1999] FJHC 156; HBC284.1996 (30 August 1999), a healthy 9 years old boy had permanent brain damage with personality disorder after the accident. The court assessed the future economic loss on the basis of $ 100 per week with the multiplier of 18 years, and awarded a sum of $ 93,600.00 for future economic loss. The counsel for the plaintiff submitted that, a sum of $ 150 per week is reasonable and the same multiplier could be applied here too given the age of the plaintiff. Having considered the totality of the evidence before the court, I concur the submission of the counsel. I calculate the future economic loss at the rate of $ 150 per week and use the multiplier of 18. Accordingly, I award a sum of $ 140,400.00 ($ 150 x 52 x 18) for future economic loss.

09. The testimony of the Consultant Surgeon reveals that, the plaintiff is a special child with extreme limitations. He is dependent on caregiver for activities of daily living, for communication, mobilization, eating, drinking, toileting, bathing and grooming. The first and third witnesses testified how the plaintiff is looked after during the school hours and at home. He is totally dependent on someone who can care him. The plaintiff is studying in the school where his mother is teaching and his sister too studying. The mother and the sister who is attending the same class have been looking after him. The condition of the plaintiff requires someone to look after him rest of his life. The plaintiff is entitled for damages for future nursing care, even though the service was gratuitous rendered by the

family members. The test to be applied in this situation is firstly, what are the services required, and secondly, what is the value of those services [**Griffiths v Kerkemeyer** [1977] HCA 45; (1977) 139 CLR 161; **Van Gervan v Fenton** (1192) [1992] HCA 54; 175 CLR 327; **Rokobutabutaki v Rokodovu** [2000] FJCA 9; ABU0088U.98S (11 February 2000)]. No doubt that, the condition of the plaintiff requires the services of a caregiver for rest of his life. The witness stated that, a sum of $ 100 was paid per week to one Tima for caregiving. The counsel submitted to consider the same amount with the multiplier of 18. I decide that a sum of $ 100 per week for a caregiver is reasonable and I award a sum of $ 93,600.00 ($ 100 x 52 x 18) for future nursing care.

10. The Consultant Surgeon further testified that according to the last medical examination he performed on 14/10/2020, the plaintiff was noted to have severe growth retardation, malnutrition, paralyzed, loss of bladder and bowel control. Therefore, the plaintiff should wear the diapers continuously. The father of the plaintiff stated that, he need 40 diapers per week. A sum of $ 21.00 is needed to buy four packets of diapers as each costs $ 5.25.00. I award a sum of $ 19,656.00 on the basis of $ 21.00 x 52 x 18 (multiplier).

11. The special damages should be pleaded and proved (Lord Goddard in **British Transport Commission v Gourley** [1956] AC 185). The specific damages are accrued and ascertained financial loss which the plaintiff had incurred. Unless agreed by the parties, special damages should be expressly pleaded; they must be claimed specifically and proved strictly (per: Edmond David LJ in **Cutler v Vauxhall Motors** [1971] 1 QB 418). The plaintiff pleaded the special damages claimed in this case; however, the question is whether those damages have been proved. Bowen L.J. in **Ratcliffe v Evans** [1892] 2 Q.B. 524 at pages 532 and 533 held that,

> The necessity of alleging and proving actual temporal loss with certainty and precision in all cases of the sort has been insisted upon for centuries: Lowe v.Harewood W.Jones.196; Cane v. Golding Sty.176; Tasburgh v. Day Cro.Jac. 484; Evans v. Harlow 5 Q.B.624.But it is an ancient and established rule of pleading that the question of generality of pleading must depend on the general subject-matter: Janson v. Stuart 1 T.R.754; Lord Arlington v Merricke 2 Saund. 412, n.4; Grey v. Friar 15 Q.B.907; see Co.litt 303d.Westwood v. Cowne 1 Stark. 172; Iveson v. Moore 1 Ld.Raym. 486. In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.

12. The plaintiff specifically pleaded the special damages in the statement of claim. The total amount claimed is $ 10, 206.43. It covers various expenses claimed to have incurred by the parents of the plaintiff. The witnesses tended the receipts for the same except the amount claimed to have been paid to the caregiver. A statutory declaration of the recipient was tendered for the proof payment for the said caregiver. Some of the receipts are not clear and it is unable to accurately ascertain the exact amount. There is no consistency in the receipts too. In any event, the parents of the plaintiff would have spent a considerable amount of money given the condition of the child. Considering all the circumstances, I award a sum of $ 8,000.00 as the special damages.

13. Furthermore, applying the reasoning of the Court of Appeal in **Attorney-General v Valentine** [1998] FJCA 34; Abu0019u.98s (28 August 1998), I allow the interest at the rate of 6% on the general damages for pain, suffering and loss of amenities from the date of writ to date of trial and 3% on the special damages from date of accident to date of trial.

14. In the result, I make the following awards:

    a. Special damages in sum of $ 8,000.00,

    b. Pain and suffering and loss of amenities in sum of $ 180,000.00,

    c. I award a sum of $ 140,400.00 for future economic loss,

    d. I award a sum of $ 93,600.00 ($ 100 x 52 x 18) for future nursing care,

    e. I award a sum of $ 19,656.00 for cost of future care,

    f. The interest at the rate of 6% on the general damages for pain, suffering and loss of amenities from the date of writ to date of trial and 3% on the special damages from date of accident to date of trial. and

    g. Summarily assessed cost of $ 2000.00.

15. Since the plaintiff is the minor, the father – the next friend should make application to the court pursuant to Order 80 of the High Court Rules for necessary directions upon receiving the amount awarded by the court in this case.

U.L Mohamed Azhar
Master of the High Court

At Lautoka
26/09/2023

HIGH COURT OF FIJI
LAUTOKA