IN THE SUPREME COURT OF FIJI (WESTERN DIVISION) 000035
AT LAUTOKA
Civil Jurisdiction
Action No. 189 of 1975

BETWEEN

MOIDIN s/o Abran — Plaintiff

-and-

ABBAS s/o Abran — Defendant

Mr. Jai Ram Reddy, Counsel for the Plaintiff
Mr. S.R. Shankar, Counsel for the Defendant

JUDGMENT

On 15.10.74 the defendant struck the plaintiff with a knife severing the main bone of the right upper arm, and muscles and nerves controlling the fore-arm and some fingers of the right hand.

Since then the plaintiff, a carpenter and a block (or brick) layer, has not worked in those capacities. He claims $23.00 per week from 15.10.74 to 31.10.75 for loss of wages amounting to $1,242,00, and at the same rate from 31.10.74 to the date of judgment; travelling expenses of $20.00 and meals amounting to $15.00.

There is also a claim for general damages.

The Statement of Defence alleges that the plaintiff had struck the defendant on the head with a hammer and attempted to kill the defendant's family and the plaintiff was acting in self defence.

Paragraph 4 of the amended Statement of Claim alleges that the defendant was on 30.7.75 convicted for causing grievous bodily harm to the plaintiff with intent so to do c/s 255(a) P.C. and that the conviction raises a presumption that the defendant acted without just cause or excuse.

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Neither party was an impressive witness.

They are brothers and had been in dispute over ownership of a tractor and farming implements of their deceased father whose will divided his 23 acre farm between four sons and his wife. The plaintiff sold the tractor and took the farming implements and the police were called to investigate. Although nothing transpired from that investigation it indicates the degree of animosity which had developed. I am not inclined to believe the plaintiff's allegation that his father had given them to him. Although ownership of the tractor and implements is not an issue for determination here it reveals a background of rancour between the parties. Prior to being wounded the plaintiff was in Australia and in his absence the defendant chained the farm implements in his own compound. The plaintiff on his return went to the defendant's compound with a hammer and a hacksaw to retrieve them.

The plaintiff says that the defendant charged at him with an axe, that he threw the hammer at the defendant and fled not knowing if it had hit its mark. I do not believe that portion of the plaintiff's evidence and accept the defendant's evidence that when he remonstrated with the plaintiff the latter hit him on the head with a hammer. I find that the defendant then pursued the plaintiff with a cane knife and caused the injuries. I do not believe the defendant's evidence that the plaintiff ran home got a knife and came to attack the defendant. The plaintiff is left-handed but the defendant says that the plaintiff held the knife in his right hand. Moreover the injury to the plaintiff's right arm could scarcely be caused if they were face to face because the defendant held his knife in his right hand and a sideways blow from defendant would be directed to the plaintiff's left side. The defendant in cross-examination on this aspect pretended that he was dizzy from the blow on his head and he could not recollect any details; I did not believe him. There was no trace of the knife which the plaintiff allegedly had held in his right arm and which would certainly have dropped ...

when his right arm was almost severed.

I unhesitatingly conclude that when the defendant struck the plaintiff the latter was not armed.

Mr. S.R. Shankar, submitted that there was nevertheless sufficient provocation to the defendant to be considered as a factor in mitigating damages. He relied upon Australian authorities and upon Murphy v Culhane 1976 3 A.E.R. 533, in which Culhane killed a man who had gone to beat him up and he pleaded guilty to manslaughter. The deceased's widow, under the Fatal Accidents Acts, was awarded judgment on the pleadings. On appeal the judgment was set aside and a full hearing ordered on the grounds that the facts elucidated at a full hearing may show a complete defence to the tort, or point to matters aggravating or mitigating the damages. Lord Denning M.R. stated at p.533,

> "I would like to repeat what I said in Gray v Barr: 'In an action for assault, in awarding damages, the judge or jury can take into account, not only circumstances which go to aggravate damages but also those which go to mitigate them."

In Gray v Barr, 1971, 2 A.E.R. 949, the defendant shot Grays's husband who was having an affair with the defendant's wife in circumstances amounting to manslaughter. Lord Denning M.R. said at p. 957 that the judge or jury in assessing damages could take account of the provocation offered to the defendant.

I find that the plaintiff went with a hammer and hacksaw to unchain implements in the defendant's possession and in which the defendant claimed an interest. During the ensuying quarrel which arose when the defendant remonstrated with him he deliberately struck the defendant with the hammer on top of his head. It is unlikely that a hammer thrown at the defendant would land on top of his head but a deliberate blow could do so. The degree of provocation received by the defendant was substantial

enough to be a factor in assessing any damages to be awarded to the plaintiff.

The special damages arising from loss of earnings depend upon the plaintiff's rate of pay at the time of his injury and the type of work he was employed in at the time, He claimed that his earnings were $23.00 per week. However he was not constantly employed as a carpenter and/or brick layer, and when injured had been living and working on his father's farm. No doubt his services on the farm were of value when there was heavy work to do such as cane cutting and I would not like to rate them at less than the 55c an hour that he earned as a carpenter and brick layer. However the evidence indicates and it is well known that cane farming is not a 365 day per year occupation. I accordingly find that his loss of earnings whilst in hospital and as an outpatient were $23.00 per week as alleged in the Statement of Claim. This covered the period 15.10.74 to 21.1.75 according to the doctor, P.W.2, that is, 14 weeks at $23.00 per week which amounts to $322.00.

There is also a claim for loss of wages up to the date of judgment. This ofcourse depends upon his earning capacity as from 21.1.75; his opportunity for employment and his desire for employment and any actual employment he may have had.

The plaintiff has left me very much in the dark as to his disability. He raised his right arm revealing that when extended it was slightly bent at the elbow, and the third and fourth and little fingers drooped and he could not bring them into a horizontal position. I was not told how much feeling he has in those fingers nor whether he could make a fist, squeeze a ball, lift a bucket of water, etc. In cross-examination he said he felt he could not work as a "water boy" for a cane gang because raising and pouring water was difficult. The doctor, P.W.2, could not indicate the extent of the plaintiff's recovery because he failed to attend the hospital once per month for progress check.

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There is no evidence of muscle wastage due to lack of use. The plaintiff's apparent indifference towards his injury does suggest that he was not so concerned as to take possible measures to improve any defects.

I recorded during the hearing, that the plaintiff on raising from his seat in Court placed his hands upon the seat and appeared to use both hands to assist himself on to his feet. I also noted that when the Court rose at the close of the hearing he placed his right hand upon his right thigh and his left hand upon his left thigh as if he were using both arms to assist himself in rising.

The plaintiff was an unimpressive witness. He was untruthful as to the manner in which the quarrel developed which led to his being attacked by the defendant. He can drive a car and a van and fish with a net. There would have been no insuperable difficulty in having the plaintiff examined by a surgeon to determine the degree of disability. The doctor, P.W.2, has not seen him for over 3 years. He said driving a vehicle might not be safe, but he was probably thinking of a right-handed person and the plaintiff is left-handed. The doctor was not asked what his opinion would be in the case of the plaintiff being left- handed.

The plaintiff has not tried out his ability as a carpenter and I have the impression that such work may not exceed his capabilities. For long periods prior to his injury he displayed little interest in obtaining such employment. Thus from 1962 to 1971 he worked on his father's farm for some years and on his father-in-law's farm for some years except that he was in prison from 1964 to 1966 for chopping off his wife's arm and his mother-in-law's arm, Thus he has spent just under half his "working life" as a carpenter or brick layer and the other half as a farm worker.

It is for the plaintiff to prove his disability and

he has not given very much help in assessing that disability and has given almost no evidence of his efforts to adopt to it and work as a carpenter. I was not even told his age. Is the plaintiff giving as little information as possible in the hope that this or some other Court will fill in the gaps in a manner more favourable than he is justly entitled to?

On 10.5.73, the plaintiff's father died and in November 1973, the plaintiff returned to the farm which had, under his father's will, been divided between the plaintiff, the defendant, two other brothers and their mother (the widow). A year later the plaintiff was still on the farm when he as injured. In all the circumstances I consider it would be unfair to assess the plaintiff's damages on the basis that he always earned his livlihood as a carpenter or brick layer.

The plaintiff says that in 1976 he had 33 tons of cane on his section providing as income of about $300.00 but in 1977 he planted no cane. If he could grow cane in 1976 he could do so in 1977 and the medical evidence suggests that the plaintiff's arm will continue to show some improvement. Presumably he should be able to increase his output. In my view the plaintiff makes the most of his disability and wishes to conceal the true effectiveness of his right arm and his ability to extract some income from his farm. I think it probable that he could increase its productivity considerably.

Apart from the income potential from his farm I am satisfied that the plaintiff could do useful employment as a carrier driver. He has done this before when he earned $20.00 per week which is about $3.00 per week less than he earned as a carpenter. In so doing I ignore the income potential of his farm and may be accused of over-estimating the loss of earning capacity. I would accordingly rate his present loss of earning capacity as an employee at $3.00 per week.

It is difficult to estimate at what stage the plaintiff regained the ability to drive. I think a period of 6 months disability should be allowed on leaving hospital during which period he would not be working at all. On that basis the plaintiff would suffer further special damages amounting to $(26 x 23) = $598.00. I do no accept that he has been fully incapacitated up to the date of judgment.

His general damages I base on a loss of earning capacity of $3.00 per week and I allow a 15 years purchase which amounts to $2,340.00.

Regarding the claim for pain and suffering and loss of amenities I accept that his right arm aches a little when it is cold. I observe that he can still enjoy fishing and as already stated he is able to drive. Under this head I would allow $660.00 bringing general damages up to the round sum of $3,000.00.

Having found that the plaintiff was the instigator of matters which has created family friction in the recent years and that although it was his behaviour at the material time which sparked off an argument with the defendant his aggressiveness continued to the extent that he hit the defendant on the head with a hammer. He thereby provoked retaliation on the defendant's part which led to his own injury and I refuse the total damages arrived at by 50% on that ground.

Under the heading of special damages I allow $\frac{\$633}{2} = \$312$; and for general damages $\frac{\$3000}{2} = \$1,500$.

The defendant will pay the plaintiff costs.

5th May, 1978.
LAUTOKA.

(sgd.) J.T. Williams
JUDGE