

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 78 OF 2014
(High Court No. HBC 40 of 2010)

BETWEEN : **SAIFUD DIN**

Appellant

AND : 1. **ABDUL IRSHAD KHAN**
2. **AJESH VIKASH PRASAD**
3. **ATTORNEY-GENERAL OF FIJI**
4. **DR. JAOJI VULIVECI OF LABASA HOSPITAL**

Respondents

Coram : **Calanchini, P**
Almeida Guneratne, JA
Prematilaka, JA

Counsel : **Mr. S. Kumar for the Appellant**
Mr. S. Prasad for the 1st Respondent
No appearance for the 2nd Respondent
Mr. J. Pickering for the 3rd and 4th Respondents

Date of Hearing : **8 November, 2017**

Date of Judgment : **30 November, 2017**

J U D G M E N T

Calanchini, P

- [1] I have read in draft form the judgment of Guneratne JA and agree that the Appellant's appeal on liability and apportionment should be dismissed. I also agree that the award for future loss should be reduced in the manner proposed by Guneratne JA.

Essential facts

- [2] This is an appeal from a judgment of the High Court at Suva dated 11th November, 2014 involving a case of personal injuries caused to the 1st Respondent (original plaintiff) whilst travelling in a vehicle owned by the Appellant (original 2nd defendant) alleged to have been driven negligently by the 2nd Respondent (original 1st defendant) who was in the employment of the Appellant.
- [3] Consequently, the 1st Respondent had been admitted to Labasa Hospital where he had been kept for two weeks to receive treatment and thereafter transferred to CWM Hospital in Suva when part of his left leg, below the knee, had been amputated.
- [4] The 1st Respondent alleged that Labasa Hospital was responsible for his leg being amputated in that it had failed to administer proper treatment in time for which reason the Attorney-General as representing the Ministry of Health and one (Dr.) Jaoji Vuliveci a doctor attached to the Labasa (Government) Hospital had been joined in the action as third parties.

The Pleadings

- [5] The statement of claim of the 1st Respondent (the original plaintiff) is at pages 187 to 190 of Vol. I of the Copy Record which averred the particulars of negligence on the part of the 2nd Respondent (the driver of the vehicle), the Appellant (the owner of the said vehicle on the basis of vicarious liability), and the particulars of special and general damages. The 1st Respondent also relied on the doctrine of *Res Ipsa Loquitur*.
- [6] The Statement of Defence of the Appellant (owner of the vehicle in issue) is at pages 193 to 195 of Vol. I of the Copy Record which focussed for the most part on the initiatives he had taken to do his best for the 1st Respondent (Plaintiff). The relevant aspect for legal purposes was his position that the amputation of the 1st Respondent's leg was due to the negligence of Labasa Hospital (a Government Hospital) and the

doctor in attendance for the injured victim of the accident, failing to administer proper treatment on time, the reason why the 3rd Respondent (the Attorney General) had been added as a first named third party to the original action as representing the Permanent Secretary for the Ministry of Health on behalf of the Labasa Hospital and (Dr.) Jaoji Vuliveci of the said hospital (the 4th Respondent, the 2nd named third party in the original action).

- [7] The 2nd Respondent (1st defendant, driver of the vehicle) in his statement of defence, while attributing the negligence to the Appellant (1st defendant, owner of the vehicle) in getting him to drive the vehicle on a dangerous route as a result of which he himself sustained injuries and was hospitalised, counter-claimed against the Appellant for damages. (The 2nd Respondent's Defence and Counter Claim is at pages 199 -204 of the Copy Record).
- [8] The 1st Respondent (plaintiff)'s reply to the Statement of the Appellant is at pages 206-208 of the Copy Record. He did not reply to the 2nd Respondent's statement of defence and counter claim against the Appellant.
- [9] In the statement of defence of the third party referred to in paragraph [6] above, it was averred:
- a) that, they deny that the plaintiff was not treated for three days following admission to Labasa Hospital
 - b) that, Dr. Jaoji's initial advice to operate on the plaintiff's injured leg had been refused by the plaintiff and his mother who signed her denunciation on the medical folder. The third party denied that Dr. Jaoji had told the plaintiff (initially) that the injury was minor and could be cured.
- [10] Accordingly, the said third party sought an order dismissing the Appellant's claims (vide: the statement of defence of the third party – pages 215-217 of the Copy Record).

- [11] The Appellant's reply to the statement of defence of the third party is at page 219 of the Copy Record where he joined issue and re-iterated that the said third party was negligent in not providing proper and timely treatment which had resulted in the plaintiff's leg having to be amputated and that the said third party was in breach of their duty of care, fiduciary duty and general duty of care by not providing a qualified doctor to treat the plaintiff.

The High Court Judgment (pages 6 to 29 of the Copy Record)

- [12] I shall break up the impugned judgment into two parts namely:
- (1) The Final Orders of Court and,
 - (2) The findings made by Court that led the learned Judge to make the said Orders.

The Final Orders

- [13] The learned Judge entered judgment in favour of the 1st Respondent (the Plaintiff) against the Appellant (the 2nd defendant) in a sum of \$164,028.70 together with interest at the rate of 4% per annum until full payment is made. The breakdown of the said award was as follows:

(a)	General damages	\$75,000.00
(b)	Interest thereon	\$18,142.50
(c)	Future care and treatment	\$ 5,000.00
(d)	Special Damages	\$11,286.20
(e)	Loss of future earnings	<u>\$ 54,600.00</u>
	Total	<u>\$164,028.70</u>

- [14] The Claim by the Appellant against the third named party (3rd and 4th Respondents) as well as the counter claim of the 2nd Respondent (1st defendant) against the Appellant were dismissed. The Appellant was ordered to pay as costs, summarily assessed, a

sum of \$3,000.00 and a sum of \$2,500.00 to the 1st Respondent (plaintiff) and the said third party respectively. (vide: pages 28 – 29 of the Copy Record).

[15] The findings of fact made by the learned judge may be summarised thus:

- (i) Although the medical folder (referred to at paragraph 9(b) above) which (might) have shown that, the plaintiff's mother had denounced the request (advice) of (Dr.) Jaoji (the 4th Respondent) to operate on the plaintiff was missing in evidence, that did not affect the credibility of the witness (Dr. Jaoji) as to what had taken place (that is, the dialogue between the plaintiff and his mother on the one hand and Dr. Jaoji on the other). According to the plaintiff's mother the doctor had said, when the plaintiff had been admitted to Labasa Hospital initially after the accident that, the injuries were minor.
- (ii) Consequently the learned Judge concluded that,
“the delay in operation caused at the Labasa Hospital (was) because the plaintiff and his mother did not agree” (to the operation on the plaintiff's leg) the parenthesis is mine.
- (iii) In so far as the “missing medical folder” was concerned, the learned Judge came to a strong finding that, the manner in which the Appellant gave evidence (taken together with his demeanor in the witness box) led him to the view that “the witness was untruthful”. (page 13 of the Copy Record).
- (iv) The Appellant having not led any evidence independently of the reliance on the said “missing folder”, the learned Judge held that he believed the evidence of (Dr.) Jaoji who explained the position convincingly.” (page 13, *supra*).
- (v) Distinguishing the decisions in Suruj Narayan v. Ministry for Health et al (Civil Action No. 43 of 2004) and Rogers v. Whitaker [1992] HCA 58, the learned Judge found that, the amputation of the plaintiff's leg was not due to the negligence in treatment or that the condition of the plaintiff had deteriorated because of any breach of duty of care owed to the plaintiff by the said named third party. (3rd and 4th Respondents).

- (vi) Consequently, the learned Judge held that, the said third party (the 3rd and 4th Respondents) were not liable to indemnify the Appellant in case the plaintiff's claim is decided against the original 1st and 2nd defendants (page 114 of the Copy Record).
- (vii) As regards the plaintiff's claim against the said original 1st and 2nd defendants the learned Judge concluded that, "on analysing the evidence ... the 1st defendant's negligence is proved on a balance of probabilities when the vehicle was driven ... the 1st defendant (having) lost control of the vehicle ... which caused injuries to the plaintiff." (vide: page 22 of the Copy Record).
- (viii) Furthermore, the learned Judge proceeded to hold that, "the 2nd defendant cannot disclaim his vicarious liability in terms of the decision of the Supreme Court in **Shell Fiji v. Sushil Chand**, CBV 003 of 2011, 4th May, 2012."
- [16] In consequence of the aforesaid findings (as summarised) the learned Judge awarded damages to the plaintiff (as referred to in paragraph [13] of this Judgment) under several headings as reflected at pages 22 to 27 of the Copy Record).

The Present Appeal

- [17] The present appeal is against that Judgment.

Notice and Grounds of Appeal

- [18] The grounds of appeal are contained at pages 1-2 of Vol.I of the Copy Record – viz:

- "1. That the Learned Judge erred in law and in fact in not evaluating the evidence of Dr. Emori Talogo an expert witness called by the Plaintiff when questioned by His Lordship on whether the leg could have been salvaged?
2. That the Learned Judge erred in law and in fact in coming to the conclusion that the Appellant/2nd Defendant is to pay the damages when the leg amputation was due to the Plaintiff not listening to doctors advice and/or delay in treatment by the third parties.

3. *That the Learned Judge erred in law and in fact in not coming to the conclusion that the delay in treatment by the second named third party caused the amputation of the Plaintiff's leg.*
4. *That the Learned Judge erred in law and in fact in not coming to the conclusion that the missing medical folder of the Labasa Hospital indicative of negligence as to the treatment that was administered on Plaintiff; hence there has been a miscarriage of justice.*
5. *That the Learned Judge erred in law and in fact in accepting Dr. Jaoji's evidence which was not supported by documentary evidence of the treatment given on the 15th February, 2008 and the case was heard more than 5 years in absence of medical folder. The question that begs an answer as to how can a doctor remember when he treats different patients every day. Does human memory appreciates after lapse of time or depreciates, can his evidence be relied upon in absence of the medical folder.*
6. *That the Learned Judge erred in law and in fact in not giving any weight to the evidence tendered by the Appellant/Defendant and his witnesses, hence there has been a substantial miscarriage of justice.*
7. *That the Learned Judge erred in law and in fact in not finding as a fact that the claims made by the Respondent/Plaintiff should have been against the third parties rather than 2nd Defendant, hence there has been a substantial miscarriage of justice.*
8. *That the Learned Judge's decision is unfair and unreasonable in all the circumstances and His Lordship failed to consider Workmen's Compensation Act as it is properly designed for injuries arising out of Employment.*
9. *That the Learned Judge erred in law in awarding far excessive amount of damages specially under the heading of future losses when the plaintiff's earning had increased in employment he got after accident which is contrary to the evidence led hence there is no loss of earning and there has been a substantial miscarriage of justice.*
10. *That such further and/or grounds as will be made out at the production of the Copy Record of the proceedings at the High Court."*

[19] I shall now proceed to consider and deal with the said grounds of appeal in the following order.

Ground of Appeal No. 8

[20] At the hearing of the appeal, learned Counsel for the Appellant, following an interchange of views expressed by the bench and him at the very commencement of the hearing agreed not to pursue the said ground. Thus, a consideration of the said ground stood out of the way for the purposes of this appeal.

[21] Before I proceed to deal with the other grounds of appeal, viewing them cumulatively, (save for Ground No. 9), it would be appropriate and indeed necessary to break up the injuries suffered by the plaintiff as a result of the accident in question as follows:

- (1) The initial injuries the plaintiff had suffered as a result of the accident at the point of time at which he had been admitted to Labasa Hospital for treatment.
- (2) The consequential amputation of the plaintiff's leg done at the CWM Hospital on the plaintiff being removed to it.

The Initial Injuries the plaintiff had sustained as a result of the accident

[22] On a perusal of the evidence given in that regard as appearing in the proceedings (vide: the Copy Record) and the notes made by the learned Judge thereon (vide: pages 360-419 of Vol. II of the Copy Record) and having regard to the grounds of appeal urged as well, I find there had not been any challenge to the said injuries the plaintiff had suffered initially as a result of the accident in question at the point of time when he had been admitted to Labasa Hospital for treatment. Accordingly, I shall not waste any paper in that regard.

[23] Moreover, the Appellant's Counsel, in his oral submissions as well as in his two skeletal submissions (dated 4th July, 2017 and 25th October, 2017) has not challenged the same and in fact did not dispute the Appellant's vicarious liability (vide: paragraph 3 of the Appellant's said skeletal submissions date 25th October, 2017)

urging that he be held liable only to the amount stipulated by the Workmen's Compensation Act, which contention Counsel abandoned as referred to in paragraph [20] above.

The Consequential amputation of the plaintiff's leg

- [24] In the result, this was the issue on which the present appeal before this Court was mainly focussed on, in as much as, the learned High Court Judge in his Judgment did not see it fit to separate the said initial injuries from the subsequent amputation of the plaintiff's leg in ascribing both liability as well as the damages he awarded as flowing therefrom on the 1st Defendant (who, it may be noted incidentally did not take part in this appeal though noticed to appear by an antecedent order of the President of this Court) and on the Appellant on the basis of vicarious liability.
- [25] It is in that background and conspectus of matters that I shall now proceed to deal with the rest of the grounds of appeal.
- [26] These grounds to my mind smack of defences based on *Volenti Non Fit Injuria* leading further to the defence of contributory negligence in its wake and *Novus Actus Interveniens* although not urged in so many words.
- [27] Consequently, it was necessary to look at the evidence on record in order to make an assessment in that regard.

The Evidence on Record

- [28] The plaintiff's mother in her evidence had stated that, when her son (the plaintiff) had been admitted to Labasa Hospital she had been told on the following day by Dr. Jaoji of the said hospital (the 4th Respondent) that,

"the way ... was to amputate the leg ... After the operation after a week the Doctor said leg to be amputated. ... Doctor never told me first three days that leg is to be amputated ... I became aware leg to be amputated on 26th or 27th February ... I am happy with treatment no complaints ..."

(vide: page 375 and 378 of the Copy Record).

[29] One (Dr.) Emoni Talogo who had been called to give evidence as an expert witness, on behalf of the plaintiff, when questioned, as to whether the plaintiff's leg could have been saved, had said that, "if the treatment was given properly at the earlier stage the leg would have early (sic) saved. If the proper treatment done limb would have been saved." (vide: at pages 380 – 381 of the Copy Record).

[30] Dr. Jaoji Vulibeci (4th Respondent) in his evidence (in the absence of the medical folder for which no explanation had been forthcoming) said that, he

"recommended amputation he (apparent reference to the plaintiff) was not very keen ... following the operation amputation was recommended. ... But mother and son (the plaintiff) refused to consent ... I knew that this leg ... should be amputated ... No way leg would have been saved ... I did whatever (sic) possible treatments to the patient. Plaintiff refused ... amputation. It was after admission ... It was after the consent the operations were done ... I kept for three days because they had (sic) not consented (sic) ... The amputation was necessary the amputation to the patient. ..."

(vide: pages 382 to 384 of the Copy Record)

What stood established on an analysis of that evidence?

- [31] That, (a) the leg would have had to be amputated anyway (the evidence of the plaintiff's mother herself when, within a day of the plaintiff being admitted to Labasa Hospital, Dr. Jaoji (4th Respondent) had said so, although she, in her evidence was seen making a play on the periods as to when such advice had been given by Dr. Jaoji;
- (b) she, (the plaintiff's mother) had been happy with treatment, no complaints (that is, treatment administered by the 3rd and 4th Respondents);
- (c) As against that, (Dr) Talogo's opinion that, "if the treatment was given properly at the earlier stage the leg would have been saved (etc). (supra, paragraph [29] above) remained to be questioned, in as much, he had seen the victim of the accident (the plaintiff) only after he has been brought to CWM Hospital from Labasa Hospital (an interval of as many as almost two weeks);
- (d) Finally, on an analysis of the evidence, it appears that there had been the first operation that was performed on the plaintiff (3 to 4 days after being admitted to

Labasa Hospital in regard to which the plaintiff, his mother and the Appellant had been vacillating about) but, to which they had eventually agreed, that is, in regard to the injuries with which the plaintiff had been initially brought to Labasa Hospital;

(ii) Then, in the second operation, after being removed to CWM Hospital, the leg of the plaintiff was amputated (the very advice Dr Jaoji of Labasa Hospital had given to the plaintiff's mother on that first day after the plaintiff had been admitted to the said Labasa Hospital).

Assessment and/or Analysis of the said evidence on Record in the light of the judgment of the High Court

[32] On a considered assessment and/or analysis of the said evidence as recounted above, in the light of the judgment of the High Court, I could see no reason to interfere with the said judgment of the High Court in so far as the Appellant's contention to transfer liability for the amputation of the plaintiff's leg, separated from the initial injuries the plaintiff had sustained as a result of the accident in question.

[33] I wish to add that, in that regard, the "medical folder" that was missing in evidence could not have made any difference to the evidence that appeared on record as recounted above and analysed.

The impacting legal principles

[34] I shall begin with Francis Bacon's rendering of the maxim – "*in jure non remota cause sed proxima spectator*" – that is, "It were infinite for the law to consider the causes of causes, and their impulsions one of another : therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree." (Maxims of the Law (1630))

The Immediate Cause

[35] Applying that maxim the immediate cause of the accident was the negligent driving of the vehicle in question by the 1st defendant whose negligence visited upon the

Appellant for the initial injuries suffered by the passenger (the 1st Respondent/plaintiff) on the basis of vicarious liability.

- [36] The amputation of the plaintiff's leg being not on account of the negligence on the part of the third party (3rd and 4th Respondents) that further damage also stood visited upon the Appellant.

Causa causans and causa sine Qua Non

- [37] Perhaps I could stop there, but I venture to go further in reflecting on the concepts of *Causa Causans* (cause of causes) and *Causa Sine Qua Non* (the cause if not for which).
- [38] Applying those principles as a corollary to the concept of the immediate cause, the said initial injuries suffered by the plaintiff as well the consequential amputation of the plaintiff's leg were attributable to the Appellant.

The applicability of the doctrine of Remoteness of damage

- [39] In that context, I can do no better than to echo the words of Lord Sumner wherein His Lordship said:

"The object of a civil inquiry into cause and consequence is to fix liability on some responsible person and to give reparation for damage done. ... The trial of an action for damage is not a scientific inquest into a mixed sequence of phenomena, or an historical investigation of the chapter of events ... It is a practical inquiry"

(vide: **Weld-Blundell v. Stephens** [1920] AC at p.986)

- [40] That view expressed by Lord Sumner has withstood the test of time reviving a view expressed as way back in the latter part of the 18th century in **Scott v. Shepherd** [1773] 2 WBL 892 foreshadowed in **Roswell v. Prior** [1700] 12 Mod. 636, 639 which had held that, "*he that does the first wrong shall answer for all consequential damages.*"

Conclusion on Grounds of Appeal Nos. 1 to 7

- [41] For the aforesaid reasons I reject the grounds of appeal 1 to 7 and dismiss the appeal as against the 3rd and 4th Respondents.

Consideration of Ground of Appeal No. 9

Ground of Appeal 9

- [42] *“That the learned judge erred in law in awarding far excessive amount of damages specially under the heading of future losses when the plaintiff’s earning had increased in employment he got after accident which is contrary to the evidence led hence there is no loss of earning and there has been a substantial miscarriage of justice.”* (page 2 of the Copy Record)

Loss of future earnings

- [43] The learned judge awarded a sum of \$54,600.00 for loss of future earnings (page 28 of the Copy Record).

The established evidence and the learned judge’s own findings

- [44] The established evidence is that, the plaintiff was 24 years at the time of the accident (14th February, 2008) and earning \$70 per week as a driver in the employment of the Appellant. The learned judge himself found as “a fact that the plaintiff was earning \$135 per week from June, 2010 to October 2013.” Then he had proceeded to hold that, “Although he could not be employed as a driver, he could be engaged in another profession and earn his living to some extent. Accordingly I use the multiplier of 15 at the rate of \$70 per week (which he was earning before the accident) and award \$70 x 52 weeks x 15 = \$54,600.00.

The contention of Appellant's Counsel in challenging the said quantum on the basis that it was excessive

- [45] Learned Counsel for the Appellant, relying on the House of Lords decision in **Croke v. Wiseman** [1982] 1 WLR 71 contended that, the learned Judge had employed the wrong multiplier. **Croke's** case (supra) concerned with a child of seven years and having a life expectancy of 33 years, wherein a multiplier of 14 years had been employed.
- [46] Consequently, counsel argued that, the plaintiff being thirty years at the time of the trial, his life expectancy therefore being much less, the correct multiplier ought to have been below 14.
- [47] I also looked at the Australian decision in **Todorovic v. Waller** [1981] 150 CR 402 wherein it had been said that,

"the present value of the future loss ought to be questioned by adopting a discount rate of 3 percent ... intended to make the appropriate allowance for inflation, for future changes in rates of wages generally or of prices, and for tax either actual or notional ..."
(at p.409)

- [48] The Appellant's Counsel was heard to contend that, the learned Judge in the instant case had calculated 6% interest per annum and upon that had charged further interest at 4% per annum until payment is made, thereby failing to give any discount as to future losses.
- [49] I am inclined to agree with Counsel's contention in that, the learned Judge's approach goes against the principles laid down in **Todorovic's** case (supra), which I adopt in the instant case.
- [50] Accordingly, viewing the matter in the overall, as regards the award made by the learned Judge as to future loss of earnings claimed by the plaintiff, I agree with the contention of the Appellant's Counsel that:-
- (a) the learned Judge had used the wrong multiplier and;
 - (b) he had failed to give a discount rate as to future losses.

- [51] Consequently, I think the appropriate multiplier to have been used is 12 and not 15 which would then work out to a sum of \$43,680 that ought to have been awarded as future loss of earnings. (70 x 52 x 12).

Was there anything more for this Court to address on in the context of Ground of Appeal No. 9?

- [52] I think not, for the reason that, although the said ground was couched broadly, the submissions of Counsel for the Appellant were focused on the award made by the High Court in respect of future loss of earnings as revealed from the skeletal submissions dated 4th July, 2017 as well as the subsequent skeletal submissions dated 25th October, 2017).

Prematilaka, JA

- [53] I agree with the reasons and the conclusions arrived at by Guneratne JA.

Orders

1. *The appeal against the judgment of the High Court in so far as the Third and Fourth Respondents are concerned is dismissed with costs fixed at \$2,500.00 to be paid by the Appellant to the said Respondents. This shall be in addition to the costs of \$2,500 ordered by the High Court in favour of the third and 4th Respondents.*
2. *The appeal against the judgment of the High Court in so far as the First Respondent (the plaintiff in the original action) is concerned is partly allowed to the extent that, the award of \$54,600 for future loss of earnings is reduced to \$43,680.*
3. *In consequence of Order 2 above, the Judgment entered in favour of the First Respondent by the High Court in the sum of \$164,028.70 is altered to a sum of \$153,108.70.*

4. *In addition to the costs of \$3,000.00 awarded to the First Respondent in the Court below, the Appellant is ordered to pay \$1,500.00 as costs of this Appeal to the First Respondent.*

W. Calanchini

Hon. Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL



Justice Almeida Guneratne

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

C. Prematilaka

Hon. Justice C. Prematilaka
JUSTICE OF APPEAL