

326

IN THE FIJI COURT OF APPEAL

At Suva

Civil Jurisdiction

CIVIL APPEAL NO. 66 OF 1990
(Civil Action No. 260 of 1986)

BETWEEN:

CHANDRAKANT BHUKHAN

APPELLANT

-and-

DHIRAJ LAL BHUKHAN

RESPONDENT

Mr. H. M. Patel for the Appellant
Mr. H. K. Nagin for the Respondent

Date of Hearing : 12th August, 1992
Date of Delivery of Judgment : 30th SEPTEMBER, 1992

J U D G M E N T

The facts upon which this appeal turns can be shortly stated.

On 27th March 1985 the appellant (plaintiff) was assaulted by the respondent (defendant) who struck him on the head with some metal bar or tool. The appellant suffered lacerations and concussion. He was taken to hospital, the lacerations to his head were stitched, and he was discharged on the same day. He remained at home in bed for at least a week recuperating, returning to the hospital on one or more occasions for the

dressings to be changed. An x-ray of his skull showed that there was no fracture.

During the following 12 months the appellant consulted two doctors Dr Singh during 1985 and on 27th March 1986, and Dr Sharma on 3rd April 1986 and 27th May 1986. For the purposes of this appeal it need only be mentioned that the doctor who saw the appellant on admission, and who no doubt had the benefit of the x-ray, reported: "There probably will not be permanent injury". Dr Singh examined him, reported on the complaints and went on: "No obvious neurological lesion detected (sic). In view of the above symptoms still persisting it may be appropriate to assume he has develop (sic) Post Traumatic Migraine. I feel consultation with his neurologist will be helpful to reach some definite diagnosis (sic)." In a report dated 28th May 1986, Dr Sharma set out the symptoms (no doubt as related by the appellant), what his clinical examination revealed, and finished.

"Comments and Conclusion: This patient had sustained laceration to his scalp and concussion to his brain when hit on the head in March 1985. He is now getting symptoms of headache, heavyness, buzzing noises in his ears and loss of memory. These have resulted from the knock on the head and will continue for a indefinite period in future. His work will suffer because of this and I would calculate his permanent residual incapacity from these as four percent."

The appellant brought proceedings for damages, which were commenced in the High Court on 8th March 1990 and concluded on 3rd August 1990. Judgment was delivered on 10th December 1990.

The proceedings were only contested on the matter of damages. The appellant was awarded special and general damages in the sum of \$1,368.00 for bodily injuries inflicted on him by the respondent. He was dissatisfied with the award and appealed on a number of grounds seeking variation or rehearing. Ground 3 of the Appeal reads as follows:

"THAT the Trial Judge erred in law and made a cardinal error in after the close of evidence received information and which he took into consideration in reaching his conclusion about Mr. Sharma's credibility as an expert witness."

Dr Sharma gave evidence. He is a surgeon, holding fellowships from the Royal Colleges in both London and Edinburgh, and the Royal Australasian College. It is necessary to refer to his evidence. He diagnosed post concussional syndrome which, on examination of the appellant in 1990, he did not think would improve or get much worse, it was static. His opinion was based on all his symptoms; these were consistent with his injury. At p 22 of the record he said: "There are no neurologists in Fiji" He continued (p 23):

"The Plaintiff's symptoms are neurological but it does not necessarily need a neurologist to interpret them."

Q: If I told you that a consultation with a neurologist would be helpful you wouldn't agree?

A: I could diagnose equally well in this case - in trauma cases.

The majority of head injury cases in Australia, England and New Zealand are dealt with by a General Surgeon. He should know the management, complications and sequelae of head injuries."

He produced, and there were handed up to the Judge without objection, various extracts from medical journals relating to post concussional syndrome, which referred to symptoms similar to those exhibited by the appellant and which can result from relatively minor head injuries, that they are not psychoneurotic, and that even mild injury resulting in loss of consciousness for as little as 5 minutes can cause brain damage. These were not made exhibits; it is not known to what extent, if at all, they were taken into account. In relation to the comments of one writer, Dr Sharma said (p 34):

"Miller says the symptoms seldom persist in the persons he examined. I have done many personal injury reports. I have seen a case where a patient is exaggerating to get money but where I feel this, I do not pay much attention to him."

He added that: "I have lost count of the number of people with similar injuries to the Plaintiff's I have treated" (p 34).

There was no medical evidence at all called on behalf of the defendant.

In his judgment, the Judge referred to the evidence that "there are no neurologists in Fiji" (p 64); he continued (p 65):

"He also claimed that the majority of these cases in Australia, England and New Zealand are dealt with by general surgeons, a claim which I find quite strange in view of my own personal experience in private practice in Victoria as a lawyer. I shall come back to this matter later."

He did come back to it; it is desirable to quote the passage from the judgment in full (pp 69-70):

"I now wish to return briefly to the evidence of Mr. Sharma. I regret that I can put little credence on his evidence in this case. I find it surprising that a medical practitioner of his experience should be unaware that there has been a functioning neurological unit at the Colonial War Memorial Hospital for the past 20 years, according to information I have received from the hospital after the close of evidence and yet according to his evidence he was Senior Consultant Surgeon at the Colonial War Memorial Hospital between 1974 and 1978. Despite this, he said that there are no neurologists in Fiji. I can only ask myself what could Mr. Sharma have been doing during this time to be unaware of the existence of a neurological unit in his own hospital? I also find it surprising that Mr. Sharma did not refer a patient whom he states quite definitely he believes to be suffering from or has suffered some form of brain injury to this unit for exploratory examination.

If Mr. Sharma so believed in my view it would have been prudent for him and in the Plaintiff's interest to have sent the Plaintiff either to Sydney to undergo magnetic resonance imaging commonly known as "MRI" which to my knowledge has been in use since 1984 as a definitive method of testing for brain damage or to New Zealand for what is called "computerized axial tomography" commonly referred to by neurologists as "CAT" scan, there being no MRI machines or CAT scan machines in the Colonial War Memorial Hospital.

In my judgment either of these examinations would have revealed the existence or otherwise of any brain injury and, should one exist, the extent of the injury. In my opinion in a case of this kind in which the outcome must depend on the extent of the

injury allegedly suffered by the Plaintiff, such supporting evidence is paramount.

I derive support for this view from my own experience as a private practitioner in Melbourne over nearly 20 years handling numerous workers compensation and personal injury cases, I found that where there was any suspicion of brain injury in persons either for whom I was acting or acting against, the patient was invariably referred to a neurologist and there was never any question of them being treated by a general practitioner or general surgeon because neurology is a specialised field of medicine. The result is that I am generally unpersuaded by the Plaintiff's claim of serious injuries."

It is immediately apparent that these remarks must vitiate the finding of the Judge on quantum.

Firstly the Judge relied on knowledge he had received "after the close of evidence" following his own inquiries. It was used to discredit the evidence of Dr Sharma.

The statement made by the Judge about the neurological situation, assuming it was correct, could not even be suggested as being a matter of common knowledge, let alone of judicial notice. It seems the Judge did not know about it until after the hearing. No one knows the source of his information "from the hospital" or how reliable it was. The matter was never put to Dr Sharma. It was never established that at any relevant times there was a qualified neurologist at the unit, assuming one existed. And having criticised the Doctor for not knowing of the existence of the unit (which was an assumption made by the Judge) he then added a further criticism, namely that the

Doctor did not refer his patient to a unit that the Judge had said the Doctor was not aware of.

But of course the matter did not stop there. The Judge goes on to point out that if, as he said, Dr Sharma believed that the appellant had suffered brain injury, then the Judge believed it would have been prudent to send him to Sydney or Melbourne to undergo some treatment which the Judge believed was a definitive method of testing for brain damage, and which he believed would reveal the existence or otherwise of brain injury. He goes further. He indicated that he thought the evidence from such sources to be "paramount", a conclusion deduced from his own experience as a practitioner, from which practice also the Judge believed there was never any question of a person who might have been thought to be suffering brain damage being treated by a general surgeon.

That is enough on its own to indicate why the finding must be set aside. These matters were simply not in evidence, and were certainly not matters of judicial notice. None of them were ever put to the witness, so any chance of explaining, commenting or otherwise dealing with them was never afforded.

The appeal will be upheld. The finding and award of the Judge will be set aside, and the matter remitted to the High Court for re-hearing before another Judge.

Michael M Helsham

.....
Mr Justice Michael M Helsham
President, Fiji Court of Appeal

Motji Tikaram

.....
Sir Motji Tikaram
Resident Judge of Appeal

Mari Kapi

.....
Sir Mari Kapi
Judge of Appeal