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

CIVIL APPEAL NO. ABU0003 OF 2001S
(High Court Civil Action No.HBC 160 of 1996S)

BETWEEN:

RENUKA SHANKAR

Appellant

AND:

CHANDAR GOPALAN NAIDU

Respondent

Coram: The Rt. Hon. Sir Thomas Eichelbaum, Presiding Judge
The Rt. Hon. John Steele Henry, Justice of Appeal
The Hon. Sir Rodney Gallen, Justice of Appeal

Hearing: Monday, 15 October 2001, Suva

Counsel: Mr. V. M. Mishra for the Appellant
Mr. V. Kapadia for the Respondent

Date of Judgment: Thursday, 18 October 2001

JUDGMENT OF THE COURT

By a decision dated the 15th of December 2000 Scott J. awarded damages to the appellant in respect of losses alleged to have been caused by a motor accident. The appellant now appeals against that judgment seeking that the award of damages be set aside and an increased sum be substituted.

The respondent in his turn filed a notice of cross appeal contending that the judgment should be varied by setting aside the damages award to the appellant and substituting a reduced figure.

The case arose out of a serious motor accident which occurred on the 15th of October 1994. The appellant was driving towards Suva having in the car with her her dog and several students from the school at which she taught. She was taking the students to an award ceremony in Suva. There was a head on collision between the car driven by the appellant and that driven by the respondent. The damage occasioned to the vehicles was severe and that belonging to the appellant was written off. The appellant also sustained injuries.

By proceedings issued out by the High Court of Fiji in Suva on the 10th of April 1996 the appellant sought to recover damages from the respondent. The statement of claim indicates that damages were sought on the following basis:

(a) General damages.

(b) Damages in respect of the appellant's motorcar.

(c) Special damages.

(d) Costs of the action.

(e) Such further or other relief as the court might consider just and expedient.

The special damages were not further detailed.

The respondent filed a statement of defence denying liability and alleging contributory negligence on the part of the appellant.

The proceedings did not come before the High Court until the 18 of January 2000.

The issues both of liability and quantum remained alive until the end of the hearing when the respondent conceded liability so that only the question of quantum remained in issue.

At the conclusion the judge awarded damages as follows:

1. Pain and suffering and loss of amenities	-	$60,000
2. Loss of salary 5 x 7,600	-	$38,000
3. Special damages	-	$ 5,850
TOTAL	-	$103,850

The appellant contended that the judge was wrong in both fact and law and applied wrong principles in determining the amount awarded to the appellant for loss of salary. It was also the contention of the appellant that the figure of $60,000 for general damages was inadequate to reflect the circumstances of the appellant. The appellant contended that the judge was wrong in not awarding any sum for the permanent facial and elbow scarring which the appellant suffered. Finally it was the contention of the appellant that the judge was wrong in refusing to allow interest on the damages awarded under the provisions of the Law Reform Death and Interest Miscellaneous Provisions Act.

In his cross appeal the respondent contended that the sum awarded by way of general damages was excessive. (b) That the sum awarded for loss of past salary was excessive

(c) That the trial judge erred in awarding special damages in the sum in which he did.

The appellant put forward a preliminary objection to the court hearing the cross appeal asserting that in terms of the rules the only way in which the respondent could cross appeal was to initiate an appeal within the time and according to the procedure contemplated by the rules. Counsel submitted that notifying the cross appeal as had been done in this case was inadequate according to the laws of Fiji.

Rule 19(1) of the Court of Appeal Rules is in the following terms:

> ***"19(1) A respondent who, not having appealed from the decision of the Court below, desires to contend on the appeal that the decision of that Court shall be varied, either in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of that contention and the precise form of the order which he proposes to ask the Court of Appeal to make, or to make in that event, as the case may be."***

Mr. Mishra submitted that a variation as contemplated by the rule differred from an appeal and that it was not open to the respondent to rely upon the provisions of the rule. He was unable to point to any authority which supported his contention. The procedure adopted by the respondent in this case is common and has been followed in many other cases. We are satisfied that the procedure adopted by the respondent in this case, that is the filing of a notice under the provisions of rule 19 of the Court of Appeal Rules was correct and that there is no basis for setting aside that notice as sought by Mr. Mishra.

The other contentions which go to damages can only be considered in relation to the evidence made available to the judge in the High Court and the conclusions he reached on that evidence.

At the time of the accident the appellant was 39 years of age. She was a school teacher who had been teaching for approximately 15 years. She had obtained a Diploma of Education from the University of the South Pacific and had also obtained a certificate of basic computer programming. She appears to have enjoyed her teaching and to have accepted responsibilities relating to it as is evidenced by the fact that she was taking students to an award ceremony when the accident happened.

At the time of the accident the appellant was living in a permanent defacto relationship with a Mr. Gopal. They had met in December 1993 and began living together in January 1994. In the same month they together set up a small business in Nadi. Mr. Gopal had been working for Wire Industries but he resigned the position in order to run the shop. They ran the business together although she continued teaching. In May of 1994 they moved the shop's location to the center of Nadi and widened the range of products sold. The judge noted that the appellant had told him that they were paying $880 rent and that the business licence for the shop was held in her name until the 4th of August 2000. The evidence indicates that both she and Mr. Gopal had put substantial sums of money into the business. She and Mr. Gopal planned to marry at the end of the year. The evidence indicates that the

relationship was a satisfying and fulfilling one for both and that they intended to have a child or children.

The accident was a very severe one as evidenced by the photographs of the vehicles involved. The injuries sustained by the appellant are set out in the report set out provided by a surgeon from Lautoka Hospital. His report reads as follows:

> *"Clinical Examination*
> *On admission she was fully conscious and well oriented. The following injuries were noted.*
>
> *Head*
> *1) Large hematoma on forehead measuring 5cm x 5cm*
> *2) 3cm laceration between eyebrows*
> *3) Hematoma over right orbit*
> *4) Subconsunctural hematoma right eye*
>
> *Limbs*
> *Deep laceration over right elbow. Anteriorly measuring 10cm x 3cm*
>
> *Trunks*
> *Multiple bruising over chest and abdomen*
>
> *Treatment*
> *1) Wounds were cleansed*
> *2) Lacerations sutured*
> *3) IV Antibiotics*
> *4) IV Dexacortin and head injury observations*
> *5) She was hospitalised for 9 days*
> *6) Antibiotic eye drops*
>
> *Prognosis*
>
> *1) Permanent facial scarring*
> *2) Post concussion headache*

The appellant's dog was killed in the accident.

Unfortunately the situation of the appellant did not improve. She attempted to return to her duties as a school teacher but at the time still needed the assistance of crutches and after three days she found it impossible to continue. She has never returned to her teaching position and it is her own belief that she will be unable to do so. Her life was disrupted in other ways. She could not stand for lengthy periods which affected not only her ability to teach but also her ability to assist in the shop. She was unable to carry out any household duties. Her relationship with Mr. Gopal deteriorated and she was unable to continue sexual relations with him. She appears to have been severely depressed and to have suffered from an inability to sleep.

In October of 1998 she was referred by her general practitioner to a psychiatrist at Saint Giles Hospital. In a lengthy and detailed report the psychiatrist concerned Doctor Ohaeri set out the information he had obtained from the appellant and gave his diagnosis as follows:

> *"Diagnosis : On basis of the above findings, Renuka clearly fulfilled the International Classification of Diseases, tenth edition, criteria, for the following diagnostic formulation;*
> *Post-traumatic Stress Disorder, with Persistent Severe Depression and Suicidal Ideation. Renuka has therefore shown abundant evidence of severe emotional harm consequent on the serious road traffic accident she was involved in on 15th October 1994.*
>
> *The emotional harm was of such severe degree that she has suffered serious psychosocial disability, leading to abandonment of a cherished teaching career, loss of earning capacity, impairment of sexual ability, and a frustration of ambition towards motherhood and a successful married life. In short, her entire social life has been so severely adversely affected that, she had felt fed up with life and entertained suicidal ideation.*

Using the criteria of the Diagnostic and Statistical Manual (DSM-IV) of the American Psychiatric Association, I would estimate that, as at time of our first consultation, her score on the Global Assessment of Social functioning (GAF) scale, would be 25 per cent. This is a grievous loss of social functioning for someone who, from all available evidence, had functioned at a GAF score of 100 percent before the accident of October 1994."

The doctor went on to say that the appellant had responded to treatment and he concluded that on the global assessment of social functioning scale she had improved from 25% referred to in his diagnosis to 60% at the time of writing, two months after she had first seen him. He went on to say however:

"On the negative side, however, my attempts at making her to drop her fear of sexual relationship with her husband, and accept the possibility of being a mother in the future, have met with much less success. There is also the reality that she cannot have back her beloved teaching career.

The residual areas of social disability consequent on the accident are, therefore, sexual relationship, marital stability and a professional career. At the physical level, she still experiences headache and is very conscious of scars. These are crucial areas which I shall focus attention in our on-going therapy sessions.

Conclusion

From the above premises, Renuka has suffered severe emotional harm for the past four years, consequent on the highly traumatic accident of 15th October, 1994. Although she is responding to treatment, there are residual areas of social disability. It will take several sessions of treatment, perhaps lasting up to one year, for these highly important areas of social disability (i.e. sexual relationship, marriage and career/economic prospects) to be adequately addressed.

In concrete terms, her score on the Global Assessment of Social functioning scale has improved from 25 percent at the beginning of our treatment sessions to 60 percent, at the time of this write-up, i.e. two months later. In view of the resilient nature of the residual social

112

disabilities highlighted, I expect that she will function at this GAF score level of 60 percent for quite sometime to come. In other words, she has an estimated overall psychosocial disability of 40 percent, involving the crucially important areas of sexual relationship, motherhood, marriage, professional career and economic earning power.

This level of social functioning is a far cry from the 100 percent at which she had functioned before the accident of 15th October, 1994.

In view of the severe level of psychosocial distress and disability which she evidenced for four years, and the residual social disability that she now has, as well as the persistent headache and consciousness of physical scars; the case is well made for adequate financial compensation for the suffering and social disability which the accident of 15th October 1994 has caused Renuka."

In his submissions to the trial judge and in this court counsel for the respondent attacked the doctor's report and conclusions substantially on the basis that it was entirely dependent upon material which had been supplied by the appellant herself and which was for that reason to be regarded as suspect.

As the judge noted however the conclusions at which Doctor Ohaeri arrived were very similar to the conclusions of Doctor Aghanwa the psychiatrist called by the defendant who in fact arrived at the conclusion in January 2000 that her functioning was to be assessed at 31 - 40% under the system adopted by both psychiatrists. Doctor Aghanwa said:

"The GAF score of 31 - 40% is a remarkable deterioration in the psychological functioning in an individual who, from all indications, was previously functioning at close to 100%.

Conclusion

Renuka Shankar developed posttraumatic stress disorder (F43.1) and moderate depressive episode (F32.1) following the injuries sustained and losses suffered in the road and traffic accident of 15/10/94. In addition, she suffered a remarkable deterioration in her psychosocial ability as a result. She will require further psychiatric intervention."

The judge having heard the evidence expressed his conclusion in the following terms:

"I accept the evidence of both psychiatrists that the Plaintiff has suffered from severe emotional harm as a result of the accident and that she suffers from quite a severe level of psychosocial distress and disability. From what I was told I believe that she would respond to further treatment but neither of the doctors predicted whether she would ever again become her old self."

The problem facing the judge therefore was the way in which the plaintiff's experiences and condition should reflect in general and special damages.

It is appropriate at this point to comment on submissions made on behalf of the respondent with regard to claims brought on behalf of people suffering mental conditions of this kind. Obviously there must be problems in assessing mental states and converting them into appropriate monetary compensation. Nevertheless like any residual condition a mental state is a question of fact and resolution of questions raised by a claim of this sort must fall for determination on the basis of the evidence adduced before the court. In this case the judge had the advantage of careful and detailed reports from qualified psychiatrists who arrived at definite conclusions.

In arriving at his conclusion the judge said :

> ***The obvious physical infirmities which the Plaintiff suffered were painful but not especially grave and certainly not at all on the same scale as those suffered by Kylie Jane Anderson. It is the Plaintiff's post traumatic or post concussional mental condition which is the predominant cause for concern. Unfortunately there is little by way of precedent in Fiji to guide me. I find that the Plaintiff's life has been very much spoiled by what happened to her and I think that she should have $60,000 damages under this head."***

Counsel for the respondent submitted that by comparison with a number of other cases, of which that referred to by the judge was one, the amount awarded was excessive. He based this contention on a comparison of the physical injuries which were sustained in each of the cases to which reference was made.

Counsel for the appellant however maintained that the conclusion arrived at by the judge did not properly reflect the very serious effects which the accident had imposed on the appellant in terms of the life which she led and her future prospects.

The consequences of injuries sustained in an accident no doubt depend to a considerable extent on the nature of those injuries but the consequences also reflect the particular effect which those injuries have on the individual who suffers them. Mental and emotional effects although more difficult to assess and to translate into monetary terms are also injuries which are to be taken into account.

A comparison therefore between the sums awarded in individual cases is only of value if it takes into account all of the consequences both present and future physical mental and emotional in terms of the circumstances of the individual whose condition and future prospects are under consideration.

While therefore the sums awarded by the judge in this case for general damages may appear high in relation to some other cases there was evidence to support the conclusion to which the judge came and there is nothing which would justify our interfering with his assessment of general damages designed to compensate the appellant in her circumstances for the position in which she found herself through no fault of her own.

In this case somewhat unusually the assessment of both past and future loss of earnings gives rise to difficulty.

There is no real problem in determining the income which the appellant would have received had she continued to work as a school teacher. The difficulty arises because it is contended that the appellant in her circumstances would not necessarily have continued to work indefinitely as a school teacher.

The respondent contends that the appellant on her own evidence had intended to have a child or children and that inevitably she would have given up her work in order to perform her duties as a wife and mother. He went on to assert that in most circumstances it

would have been much more appropriate for her to work in the family business which she could have done in conjunction with her obligations as a mother. Arising out of that it was submitted that working in a family business situated in a good part of the Nadi business area was likely to be more remunerative than working as a school teacher. Counsel also relied upon evidence from a private investigator whose investigations suggested that the appellant was much more able to work in the shop then her evidence suggested and that in fact she was working successfully in the business.

Counsel for the appellant contended that it was no longer appropriate to reflect gender differences in the assessment of damages and that it should not be assumed that a woman would work for a shorter period in a career then would a man. He submitted that the appellant was likely to have continued working as a school teacher and to have made arrangements for the care of her child if this was necessary to enable her to continue with her teaching career. He also submitted that the business was no substitute for that career.

It is in this area where major difficulties occur and this was appreciated by the judge. The judge came to the factual conclusion that had the accident not happened the appellant would in all probability have married Gopal and carried on teaching until the children arrived. He thought that she would then have left teaching and joined her husband in the running of the business when she had time to spare. The judge also expressed the view that he was inclined to doubt that the appellant was quite as useless in the business as she had made out. No doubt that conclusion was based on the evidence from the private investigator.

The judge accepted an annual net loss proposed by the appellant of $7,600 in respect of her teaching career. He then considered that an appropriate multiplier was a multiplier of 5 no doubt on the assumption that at the time the accident occurred her teaching career bearing in mind the considerations to which reference had already been made would have extended for only a comparatively limited number of years beyond the time at which the accident occurred.

At the time of the hearing of the case she had already been unable to work as a teacher for four years. An immediate reaction is that she must have been entitled to some additional sum for future loss of earnings. However her actual loss was assessed by the judge on a multiplier of 5 given his conclusion on the limited length of time she would have been expected to continue with her career if the accident had not intervened.

The evidence on this aspect of the matter is sparse. We appreciate the difficulties which the judge faced. In the circumstances we do not see that there is any breach of principle in the approach which he followed or that there is any evidence which is so convincing that we ought to substitute our views for those which led him to the conclusion embodied in his judgment. Accordingly we arrive at the conclusion that the appeal must fail in respect of the loss of earnings both past and prospective.

That leaves the question of interest. No claim for interest was included in the pleadings. The judge therefore followed the decision in *Usha Kiran v AG* FCA Reports

19/70. Counsel for the appellant submitted that that decision depended upon the practice in England which itself followed from the English rule under which it was mandatory to plead specifically any claim for interest. He submitted that there was no such rule in Fiji and accordingly it was open to the court to make an award of interest even although no claim for it had been included in the pleadings where the judge considered it appropriate to do so. The question was considered in this court in the case of *Tacirua Transport Company Limited v Virend Chand* judgment 2nd of March 1995 which noted that *Usha Kiran v Attorney-General of Fiji* had been followed in *Attorney General of Fiji v Waisale Naigulevu* FCA 22/1989 delivered on 18 May 1990. In the Tacirua case the court expressed the view that there was no reason for departing from what had become the established practice of the court. We agree with that contention and are not prepared to depart from it in the face of such continued authority.

In the cross appeal counsel for the respondent contended that the award for general damages of $60,000 could not be supported. For the reasons already expressed we do not accept that contention.

Counsel also maintained that the award for loss of earnings could not be supported and that in the circumstances already discussed an appropriate award would have been one year only bearing in mind the wedding plans of the appellant. We reject this contention also and consider that it was open to the judge to arrive at the conclusion which he did.

The cross appeal questioned other special damages and did so in the circumstances of the rather unsatisfactory evidence which had been placed before the court. We consider that it was open to the judge to come to the conclusion which he did and that the special damages should stand.

In conclusion therefore both appeal and cross appeal will be dismissed. Each party must bear their own costs save that the cost of the record is to be borne equally.

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Sir Thomas Eichelbaum
Presiding Judge

FIJI COURT OF APPEAL

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Rt. Hon. John S. Henry
Justice of Appeal

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Sir Rodney Gallen
Justice of Appeal

Solicitors:

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