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

CIVIL APPEAL NO. ABU0047 OF 2003S
(High Court Civil Action No. 207 of 2002)

BETWEEN:

ROHIT VIKASH

First Appellant

TACIRUA BUS COMPANY

Second Appellant

AND:

SURUJ MATI PRAKASH

Respondent

Coram: Eichelbaum, JA
Penlington, JA
Scott, JA

Hearing: Tuesday, 6 July 2004, Suva

Counsel: Ms S Devan for the Appellants
Mr D Singh for the Respondent

Date of Judgment: Friday, 16 July 2004

JUDGMENT OF THE COURT

On 30 May 2001, the respondent, then aged 42, was severely injured in a motor accident, while a passenger in a bus driven by the first appellant and operated by the second appellant. At the trial of her claim for damages, the appellants did not contest liability. Dr Maharaj, the surgeon in charge of the respondent's case, listed her injuries as follows:

1. Open fracture of left humerus
2. Open wound of the left arm
3. Multiple facial lacerations
4. Left eye subconjunctival laceration and haematoma
5. Open fracture right nasal bone
6. Fracture maxilla, zygoma, and ethmoid bones on the left
7. Abrasions left breast
8. 6 x 3 cm open wound left axilla
9. 5.5 x 1 cm wound lateral aspect of left thigh
10. Cut over the left foot

The surgeon summarised the course of treatment as follows:

1. She was resuscitated with intravenous fluids
2. Pain relief injections were given
3. Dressings and bandages applied to open wounds
4. Blood and X-ray investigations were conducted
5. Specialised Surgical, Orthopaedic, Ear, Nose & Throat (ENT) and Dental operations were sought.
6. Debridement of all the open wounds were done under general anesthesia.
7. Immobilisation of left humeral fracture was done with a back slab.
8. In view of the severe injury viability of the left arm had to be observed.
9. A day after the accident, due to the extent of the injury the viability of the left arm was lost and she was taken back to the operating theatre and her left upper limb was amputated.
10. Wiring of the fractures of maxilla, xygoma and mandible were done.
11. Skin graft to the humeral stump and dressing changes on four occasions had to be carried out under general anesthesia in the operating theatre.

After 29 days in hospital the respondent was discharged home. She continued to suffer frequent headaches and body pain, including "phantom" pain in the amputated limb. She needs help with all the two handed activities of daily living, such as washing, dressing, laundry, and household and kitchen tasks . Arising out of the facial injuries, she has a disability of the mouth which means she cannot ingest cold food or beverages. She does not sleep well, and owing to the pain in her arm and face, no longer has sexual intercourse. The respondent concluded her evidence in chief by saying it would be better to be dead.

We interpolate that one criticism the appellants' counsel advanced was that the Judge was unduly influenced by that remark. We do not see any basis for that submission. To the

contrary, this illustrates the advantage held by the trial Judge in a case such as this, where he has observed the plaintiff and obtained a personal impression of her disabilities and the extent to which she continues to be affected by them. It is one of the reasons why appellate courts regard trial Judges as having a broad discretion in the assessment of general damages, a point to which we shall return. The advantage is prominent in the present case, where the evidence was sparse and defendant's trial counsel chose not to cross examine in any detail.

The respondent's principal permanent disability of course is the loss of her left arm. She was naturally left handed. Before the accident she worked as a tailor earning $50 per week. Now she is unable to work. But according to the specialist who gave evidence, it would be possible to have a prosthesis fitted, although this would have to be done in Australia, and the respondent would have to return once every three to five years for maintenance on the artificial arm. If the process was successful, the respondent would be able to carry out most two handed activity, including sewing and cooking.

Under conventional headings, the Judge assessed damages as follows.

Special damages The Judge made awards for loss of earnings, and items of property loss. These were not challenged on appeal.

Pain & suffering This heading covers pain and suffering, and loss of amenities of life past and future. After considering a number of previous awards, the Judge awarded $85,000.

Future economic loss Founded on the respondent's earnings of $50 per week the Judge took a base figure of $2600 per annum. He decided that a multiplier of 14 would be appropriate, less the 2 years for which the respondent had already been compensated as part of special damages. So on this basis the respondent would have been entitled to $31,200. But then the Judge referred to Dr Maharaj's evidence regarding the fitting of prosthesis. The Judge allowed six months for the respondent to have the prosthesis fitted and to get used to the artificial limb. So he said he would allow 6 months future loss of earnings only, but by mistake appears to have taken the figure appropriate to 12 months.

Future medical costs Dr Maharaj, the only witness on the topic, stated that the "rough cost" of an artificial arm could be up to $26,000. In addition, there would be airfares, accommodation in Sydney, taxis and meals. He spoke of a life expectancy of 68, so must have envisaged as many as 6 trips to Australia for replacement purposes. Dr Maharaj said the total costs could be about $200,000. The Judge made the following award:

Initial costs of prosthesis -	$26,000.00
Replacement costs four times @ 20,000.00 each	80,000,00
Airfares to Australia – 5 times	5,000.00
Accommodation 4 weeks initial	2,800.00
Taxi fares initial 4 weeks @ 20.00 per day	560.00
Accommodation for 4 additional trips each Lasting 1 week	2,800.00
Taxi fares in Australia per diem $20.00 for 4 trips for 28 days	560.00
	$117,720.00

Interest The Judge allowed interest on past loss of earnings and there has been no attack on that part of the award. He also allowed interest on the award for pain and suffering at 5% from the date of the Writ until judgment.

Total award The award totalled $ 216,523.09.

General damages

The appellants' first challenge was on the award of general damages. It was advanced solely on the basis that the figure of $85,000 was out of line with the level of damages in similar cases. As always, the difficulty is to discern the required level of consistency among awards which necessarily are based on different circumstances.

Emphasis was placed on two recent judgments of this Court, *Maka & AC v Broadbridge* ABU0063 of 2001, 30 May 2003 and *AC & Govind v Kotoiwasawasa & Ketenilagi* ABU0004 of 2003, 14 November 2003. Mr Broadbridge was aged 33, an aircraft engineer with aspirations to become an airline pilot. He suffered a severe hip injury requiring a hip

replacement operation and the likelihood of further replacement surgery in the future. Treatment had been lengthy. This court reduced the trial Judge's award of $85,000 general damages to $60,000. The loss of earning capacity was substantial, leading to a total award, after the adjustments made on appeal, of nearly $1 million. Enough has been said to show the case has little similarity with the present.

The second decision is more in point. One of the plaintiffs, Mr Kotoiwasawasa, had to undergo a below knee amputation of his left leg three days after his accident. Apart from concussion, from which he soon recovered, he does not seem to have sustained any other significant injury. Initially, he was an inpatient for 5 weeks. He went to New Zealand to have a prosthesis fitted, and then had to return for a replacement. On each occasion he was required to stay in Auckland for about 2 months. The plaintiff continued to suffer abscesses on the stump, needing further treatment, and it was predicted that the prosthesis would need to be replaced every 4 or 5 years.

At the time of the accident Mr Kotoiwasawasa was a medical student aged 20. The fitting of the prosthesis was successful; the accident and its consequences did not impair his medical career. He had even been able to resume playing cricket, albeit with limitations, but of course the loss of the limb had placed a number of constraints on his activities. Including figures of $25,000 for future economic loss, and $89,640 for future medical care, at first instance the total award was $225,090. On appeal the trial Judge's award of $95,000 general damages was reduced to $60,000.

Another judgment of this Court often referred to in quantum appeals is *Iowane Salaitoga v Kylie Jane Anderson* ABU0026 of 1994, 17 October 1995. Although the plaintiff in that case did not suffer the total loss of any limb, she sustained an horrendous catalogue of injuries, and at age 22, was left with significant permanent disabilities. It is impossible to do justice to these in a few words but medical opinion was that among other things, she was left with disabilities, in percentage terms, of 90 relating to the left elbow, 85 to the right knee, and 25 relating to the right ankle and heel. The total, in terms of whole body impairment, was put at 50 to 55%. The trial Judge's assessment of $85,000 for pain and suffering and loss of amenities was upheld, and the total award amounting to $217,500

remained undisturbed on appeal. In Ms Anderson's case the elements of pain, suffering and loss of amenities clearly were much greater than the present respondent's. There was no cross appeal, and the judgment may be read as containing hints that a higher award would have been sustainable. The case seems to be seen as an inhibition on higher awards; it should not be so regarded.

We consider the Judge was right to regard the present case as meriting a high award of general damages. Without wishing to draw invidious comparisons between the loss of a leg and that of an arm, undoubtedly the amputation of the dominant arm, at shoulder level, is a grievous injury. The inability to perform a multitude of tasks in daily life which ordinary persons take for granted is an enormous handicap, and in the case of the respondent (unlike Mr Kotoiwasawasa) the successful fitting of a prosthesis has yet to be accomplished. An aspect deserving some consideration is the evidence that the success rate is 80%. Damages need to make allowance for the one in five risk of failure, a not insignificant proportion. This bears not only on future pain and suffering, and loss of amenities, but also on potential loss of earnings. One should not proceed on a basis of certainty that the respondent will be able to work full time without interruption. Further, it takes little imagination to conclude that the difficulties will not all be solved, or wholly solved, even if a prosthesis is fitted successfully and the respondent learns how to use it satisfactorily. Finally, for a woman in mid-life, even a satisfactory prosthesis is a significant social disability, bearing in mind the added difficulty of disguising the presence of a prosthesis in a tropical climate.

The present case has an important additional factor. Additionally to the loss of her arm, the respondent has sustained a permanent disability arising out of the serious facial fractures she suffered. Clearly this disability interferes with the normal enjoyment obtained from taking food or drink. Understandably its impact has been overshadowed by the loss of the arm, but had the facial disabilities stood alone, they would have merited a substantial award, and this must be reflected in the assessment.

On an appeal like the present appellants must do more than persuade the court that the members might have fixed a lesser figure had they had the initial responsibility. In this respect such an appeal is similar to a challenge to a Judge's exercise of a judicial discretion. Failing some error of principle, or misapprehension of the facts (and no such factors were advanced) the appellant must satisfy the court that there was a wholly erroneous estimate of the damages suffered; that the amount was grossly excessive, or wholly disproportionate, see *Pickett v British Rail Engineering* [1980] AC 136. In that case the Court of Appeal had increased the trial Judge's assessment of 7000 pounds to 10,000 pounds, but the House of Lords restored the Judge's figure, Lord Scarman saying (at 172):

Though to some the award of 7000 pounds may seem low, it is not so low as to support the inference that the judge's estimate was wholly erroneous. In a task as imprecise and immeasurable as the award of damages for non-pecuniary loss, a preference for 10,000 pounds over 7000 pounds is a matter of opinion, but not by itself evidence of error.

Similar principles have long been applied by this court, e.g. ***Pran Gopal Chandra v. Vijendra Kumar*** (Civ App. 6/80 – FCA B.V. 80/245), ***Raj Kumar v. Dharma Reddy*** (Civ. App. 62/88 – FCA B.V. 84/473), and ***Usha Kiran v. A-G*** (Civ App. 25/89 – FCA B.V. 90/17).

In the present case, we think the award of $ 85,000 was high, but we do not consider it was so high as to be categorized as grossly excessive or wholly disproportionate.

Future medical costs

At the outset we wish to express our dissatisfaction with the evidence presented and the lack of proper assistance given to the Judge under this heading. Trial counsel simply had the plaintiff's medical witness give oral evidence, unsupported by documents which could readily have been obtained, of the expenses involved in the plaintiff's future trips to Australia for the fitting and replacement of the prosthesis. The witness was familiar with the issue and could have been expected to be aware of the costs associated with the prosthesis itself. However, he also spoke about significant incidental expenses such as

travel and accommodation. All these costs and expenses, easily verifiable by counsel, could and should have been discussed and agreed in the pre-trial stages. However, defendants' counsel at trial (not Ms Devan) did not object to any of this evidence, nor subject it to cross examination, so it does not lie comfortably with the appellants now to submit that the evidence was insufficient to establish items relevant to this head of claim.

After examining each item in the Judge's calculation in the light of the evidence given we consider that there was in fact sufficient material for the Judge to fix the figures he did. If however on a future occasion trial Judges should decline to make an award based on such scant information, plaintiffs' counsel will have only themselves to blame.

As stated, in the assessment of the respondent's future losses, we accept the Judge's base figures as such. However, Ms Devan submitted that the Judge's calculation contained a fundamental error of approach. At the end of the respondent's life, the award made under this heading would be intact, meaning that she had been over-compensated. The correct approach is one which allows for the exhaustion of the capital so as to leave, in the ideal case, a nil balance. This Court explained this in *AG & Govind v. Kotoiwasawasa & Ketenilagi* (above) at 19-21 and it is unnecessary to repeat what we said there. The Judge, we add, did not have the benefit of that decision which was delivered after the date of his own judgment. However, it is not a new concept, and it may be useful to quote from the decision of the House of Lords in *Hodgson v Trapp & anor* [1989] AC 807. At 826 Lord Oliver said:

> ***The underlying principle is, of course, that damages are compensatory. They are not designed to put the plaintiff, or his estate in the event of his death, in a better financial position than that in which he would otherwise have been if the accident had not occurred. At the same time, the principle of making a once for all award necessarily involves an assessment both of the probable duration and extent of the financial disadvantages resulting from the accident which the plaintiff will suffer in the future and of the present advantage which will accrue to him from payment in the present of a capital sum which he would not otherwise have and which represents his future income loss. In the making of that assessment, account has also to be taken of a number of unpredictable contingencies and in particular that the life expectancy from which the calculation starts may be falsified in the event by supervening illness or accident entirely unconnected with***

> ***the event for which compensation is being awarded. Such an assessment cannot, therefore, by its nature be a precise science. The presence of so many imponderable factors necessarily renders the process a complex and imprecise one and one which is incapable of producing anything better than an approximate result. Essentially what the court has to do is to calculate as best it can the sum of money which will on the one hand be adequate, by its capital and income, to provide annually for the injured person a sum equal to his estimated annual loss over the whole of the period during which that loss is likely to continue, but which, on the other hand, will not, at the end of that period, leave him in a better financial position than he would have been apart from the accident.***

Although stated in the context of the assessment of future economic loss, in principle these remarks are equally applicable to other forms of future periodic expenditure or losses.

In the absence of actuarial evidence the Judge had to calculate, as best he could, a reduction in the gross total allowing for the fact that the plaintiff would receive, at the present, a lump sum to cover expenses to be incurred over a long period of time in the future, and would have the benefit of being able to invest that sum in the meantime. In a broad way this can be achieved by taking each future set of expenditure and calculating its present value. The judgment did not do that, at least not overtly. But it is possible that the Judge intended to achieve that effect by adopting a lower multiplier than one equating to the respondent's remaining lifespan. If she lived to 68, and on average required a replacement every four years, another 6 trips would have resulted. The Judge allowed for only 4, which on a broad approach, made a reasonable allowance for present value. If that was the intended approach, it was appropriate. Another approach would be to have recourse to actuarial tables, such as are accessible in texts, e.g. Harold Luntz, *Assessment of damages for personal injury and death,* or Kemp & Kemp, *The quantum of damages.* Taking by way of example the cost of one journey to Sydney for replacement of the prosthesis in 4 years' time, on the Judge's figures the total expenses (rounded off) would amount to $22,000. At 3% the present value, that is, the sum required, now, to compensate the plaintiff for that loss to be incurred 4 years into the future, is $19,547. A similar calculation can be made for each projected future trip at 4 year intervals.

Having regard to the possibility (we put it no higher) that the Judge may have made an error of principle we have made our own calculations, on the basis just outlined. On the assumption of an initial trip costing $30,000 and four further trips at $22,000 each, the total, discounting the cost of the further trips at 3%, is $96,000. On the assumption of 6 further trips, the figure is $119,000. We have rounded all the totals.

A question arises of the treatment of the contingencies which might occur, for example that the respondent might live for a longer or a shorter time than the general life expectancy, which according to the evidence was 68. We regard the contingencies as neutral. Since there were no submissions or indeed evidence regarding the impact of tax on the investment of the lump sum, we cannot address any taxation issues. Finally, although these are relatively minor items we note the Judge's calculations did not include any allowance for the earnings the plaintiff would lose during her trips to Sydney, nor for the likely increase in living expenses other than accommodation and taxis.

It would have been preferable had the Judge spelled out the approach he took to make due allowance for the present value factor, and his view on the contingencies involved. In the end however the issue is the integrity of the final result he reached. Taking into account all the factors we have discussed, we consider the appellants have not demonstrated that the Judge's assessment was so disproportionate as to justify interference.

Loss of future earnings

It was common ground that there had been an arithmetical error, and that the correct figure should have been $1300.

Multiplier

The appellants abandoned this heading.

Interest

Although appellant's counsel submitted that 5% was excessive, nothing said persuaded us the Judge made any error of principle in the exercise of his discretion.

Result

Under the heading loss of future earnings, we substitute $1300 for $2600. To this extent only, the appeal is allowed. In all other respects it is dismissed. We allow the respondent costs of $1,500 together with any disbursements as fixed by the Registrar.

FIJI COURT OF APPEAL

Eichelbaum, JA

Penlington, JA

Scott, JA

Solicitors:

Messrs. G.P. Lala and Associates, Suva for the Appellants
Messrs. R.I. Kapadia and Company, Suva for the Respondent

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