

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

CIVIL APPEAL NO. AAU0054 OF 2007S  
(High Court Civil Action No. HBC243 of 2002L)

BETWEEN:            EDDIE MCCAIG

*Appellant*

AND:                ABHI MANU

*Respondent*

Coram:            Pathik, JA  
                 Powell, JA  
                 Lloyd, JA

Hearing:            Monday, 3<sup>rd</sup> November 2008, Suva

Counsel:            S. Sharma and H Hughes for the Appellant  
                 C. E. Young for the Respondent

Date of Judgment: Friday, 7<sup>th</sup> November 2008, Suva

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JUDGMENT OF THE COURT

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- [1] By Notice of Appeal dated 23 April 2007 the appellant appeals the whole of the judgment of Finnigan J delivered on 12 May 2006 in the High Court and seeks an order that the judgment be set aside. The trial judge made an award of damages in the sum of \$701,000.00 to be paid by the appellant to the respondent resulting from a medical negligence claim. In the Notice of Appeal the appellant states three grounds of appeal. In an Amended Notice of Appeal dated 22 September 2008 the appellant seeks the same relief as in the original Notice of Appeal but adds some additional grounds of appeal to those stated in the original Notice of Appeal.

- [2] Before proceeding further we should briefly outline the history of this matter. On 7 September 2001 the respondent underwent spinal surgery at the CWM hospital. The appellant was the specialist surgeon who performed the operation. During the surgery the respondent suffered damage to sacral nerves as a result of which he lost bowel and bladder control and sexual function.
- [3] In 2002 the respondent commenced a medical negligence claim against the respondent in the High Court. The claim was heard before the trial judge on the 2<sup>nd</sup> and 3<sup>rd</sup> of May 2005. The trial judge found for the defendant and dismissed the claim. The respondent appealed the judgment to the Court of Appeal. On 24 March 2006 the Court of Appeal allowed the appeal and found in favour of the respondent on liability. In so finding the Court of Appeal ordered that the matter be remitted back to the trial judge to assess the damages to be awarded to the appellant. Without hearing further evidence or submissions from the parties, on 12 May 2006 the trial judge delivered a supplementary judgment on the quantum of damages to be awarded, adjudging the damages to be paid by the appellant to the respondent in the sum of \$701,000.00 plus assessed costs of an additional \$6,000.00. The appellant petitioned the Supreme Court to grant special leave to appeal the decision of the Court of Appeal but in July 2008 leave to appeal was refused by the Supreme Court. We should add that in July 2008 the appellant made an interim payment to the respondent in the sum of \$250,000.00.
- [4] In deciding this appeal we feel it necessary to consider only the first ground of appeal in the appellant's Amended Notice of Appeal. That Ground is as follows:
- (a) 'That the learned judge erred in law and in fact in issuing a supplementary judgment without holding any further hearing of either evidence or submissions from the parties, and without formally calling the matter or the parties for assessment of damages, after the Court of Appeal (in March 2006) overturned the learned Judge's decision and made a finding of liability, and remitted the matter back for assessment of damages'.*

- [5] In support of that ground counsel for the appellant submits that it in the circumstances of the case to give proper effect to the order of the Court of Appeal remitting the matter back to the trial judge for the assessment of damages it was incumbent on him in accordance with the High Court rules to hold a further hearing assessing the quantum of damages, at which hearing the parties would have the right to call evidence and make submissions. Counsel further submits that this is particularly so since almost one year had elapsed from the time the trial judge had first heard the matter to the time he assessed damages and the circumstances of the respondent might well have changed in that period. Counsel also submits that the terms of Order 37 of the High Court Rules lends weight to this ground of appeal.
- [6] It is quite apparent from the record of the original hearing before the trial judge in May 2005 that only brief evidence was called relating to the assessment of damages suffered by the respondent. Whilst it is true that two witnesses called to give evidence by the plaintiff (Mrs Khan and Mr Chandra) at the original hearing before the trial judge did give brief evidence relating to the respondent's loss of earnings, the focus of that hearing was on liability rather than quantum.
- [7] We are of the view that in remitting the matter back to the trial judge for the assessment of damages, the Court of Appeal expected there to be a fresh hearing before him for that purpose. In our view that is implicit in the Court's order.
- [8] Given the passage of time from the handing down of the judgment of the trial judge on liability to the time of the assessment of damages we feel justice demands a fresh hearing to properly assess the quantum of damages to be awarded to the respondent. Had the Court of Appeal which remitted the matter back to the trial judge been of any other view then the Court itself could have made its own assessment based on the record and exhibits from the lower court which material it undoubtedly had before it. There is also strength in the appellant's submission that when assessing damages it is important to base that assessment on the facts and circumstances of the plaintiff as known at the time of the assessment. In the circumstances of this case this concern could only be addressed by a fresh hearing taking place. At the very least an updated medical

report would be needed to properly assess the damages to be awarded to the respondent.

- [9] Given our view that the Court of Appeal must have intended there to be a fresh hearing before the trial judge we are prepared to remit the matter back to the High Court for the purpose of a hearing into the assessment of damages. We do not feel this Court could adequately assess damages on the material contained in our appeal books. Witnesses will no doubt need to be called and issues of credit and weight addressed by a judge in the High Court.
- [10] Obviously we have concerns about the emotional, physical and financial burden to be carried by the respondent in having to attend a further hearing, but to do justice to both parties there is simply no other alternative but to hold a further hearing. But given what has taken place is not the fault of the respondent we can allay some of his fears with appropriate cost orders.
- [11] The orders we propose to make in the disposition of this appeal obviate the need for us to consider grounds 2 to 5 (inclusive) of the grounds of appeal contained in the appellant's Amended Notice of Appeal, the Respondent's Notice dated 7 October 2008 and the respondent's Notice of Motion dated 27 October 2008. The issues raised in the Respondent's Notice will no doubt be raised afresh at the hearing into the assessment of damages. Likewise, the great body of law dealing with the appropriate method of assessing loss of earnings (including future economic loss) referred to by both parties in their written submissions will be considered and debated before the High Court Justice presiding at the hearing into the assessment of damages.
- [12] Given that the trial judge is no longer sitting on the High Court of Fiji the matter will have to be dealt with by another Justice of the High Court.

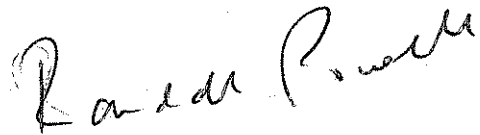
### Orders

- [13] The orders of the Court are:
- (1) The appeal be allowed;
  - (2) The whole of the judgment of Finnigan J dated 12 May 2006 be set aside;

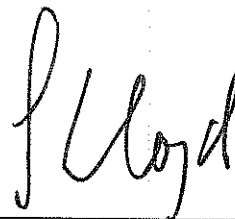
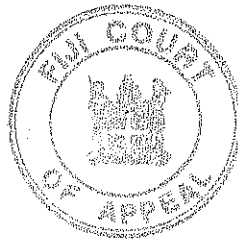
- (3) The order of the High Court sealed on 15 June 2006 be revoked;
- (4) The matter be remitted to a Justice of the High Court to conduct a hearing into the assessment of damages to be awarded to the respondent in accordance with the High Court Rules;
- (5) Each party to pay their own costs of this appeal;



Pathik, JA



Powell, JA



Lloyd, JA

Solicitors:

Office of the Attorney General Chambers, Suva for the Appellant  
Young and Associates, Lautoka for the Respondent