IN THE HIGH COURT OF FIJI
AT LABASA
APPELLATE JURISDICTION

Civil Case No. HBC 41 of 2017

BETWEEN : **RAVIRAVI SAWMILLING & TIMBER MERCHANTS CO. LIMITED**

APPELLANT

AND : **MOHAMMED IMTIAZ RAM**

RESPONDENT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. A. Sen for the Appellant
Mr. S. Sharma for the Defendant

Date of Hearing : 22 August 2019

Date of Judgment : 5 June 2020

JUDGMENT

PERSONAL INJURY: DAMAGES Special damages – General damages – Compensation for pain and suffering – Criterion used by court to assess damages – Consideration of comparable awards – Measures of compensation for pecuniary loss – Calculation of the lump sum – Principles on which appellate court acts

The following cases are referred to in this judgment:

1. *Livingstone v Rawyards Coal Co. (1880) 5 App Cas 25; [1880] UKHL 3*
2. *British Transport Commission v Gourley [1956] AC 185*
3. *Nasese Bus Company Limited v Muni Chand [2013] FJCA 9; ABU 40. 2011 (8 February 2013)*
4. *Broadbridge v Attorney General of Fiji [2001] FJ Law Rp 97; [2001] 1 FLR 389; HBC 0201/93S (7 Nov 2001)*
5. *Attorney General of Fiji v Broadbridge [2005] FJLawRp16; [2005] FLR 85; CBV 0005 of 2003S (8 April 2005)*
6. *Wells v Wells [1998] 3 WLR 329*
7. *Todorovic v Waller [1981] 150 CLR 402*
8. *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd [1981] HCA 3; (1981) 145 CLR 625 (2 February 1981)*
9. *Jefford v Gee [1970] 1 All ER 1202*
10. *Rawaitale v Tropic Forest Joint Venture Co Ltd [2011] FJHC 281; HBC 176.2004 (20 May 2011)*
11. *The Permanent Secretary for Health and another v Kumar [2012] FJSC 28; CBV 0006.2008 (3 May 2012)*
12. *Fiji Forest Industries Limited v Rajendra Mani Naidu [2017] FJCA 106; ABU 001.2014 (14 September 2017)*
13. *Shankar v Naidu [2001] FLR 358*; [2001] FJCA 19; ABU 0003U.2001S *(18 October 2001)*
14. *Mere Labaivalu v Pacific Transport Co Ltd [2017] FJCA 61; ABU 0059.2014 (26 May 2017)*
15. *Kumar v Kumar (2018) FJCA 106; ABU 42 of 2016 (6 July 2018)*
16. *Amendra Millan v Mukesh Chand* Civil Appeal *[2019] FJCA 47; ABU 0119.2017 (8 March, 2019)*
17. *Sheik Mohamed Amin v Vishwa Chand and Courts (Fiji) Limited [2012] FJHC 1015; 39.2008 (13 April 2012)*
18. *Singh (an infant) v Toong Fong Omnibus Co. Ltd [1964] 3 All ER 925*
19. *Watt (or Thomas) v Thomas [1947] 1 ALL ER 582*
20. *Clarke v. Edinburgh & District Tramways Co. [1919] S.C (H.L.) 35*
21. *Powell v Streatham Manor Nursing Home [1935] A.C. 250*
22. *Charles Osenton & Co v Johnston [1941] 2 All ER 245, [1942] AC 130*
23. *Benmax v Austin Motor Co. Ltd [1955] 1 All ER 326*

1. This appeal is against the order dated 26 June 2019 of the Hon. Master of the High Court of Labasa granting special damages of $12,136.00 and general damages of $53,133.12, including $40,000.00 for pain and suffering, to the respondent, who sustained injuries while performing work for his employer, the appellant, who complains that these sums were awarded in the absence of evidence justifying the award of such sums, and also that a wage payment of $4,125.00 should rightly have been deducted from the damages awarded to the respondent. The court based its award on evidentiary medical assessment that the respondent had suffered a permanent incapacity of 14%, which included an assessment of 9% incapacity of his hand.

2. These sums were awarded by the Master after default judgment was entered in favour of the respondent, as the action was not defended by the appellant. The respondent had sought general damages and $16,582.34 as special damages, and alleged *inter alia* that negligence on the part of the appellant was the cause for the injury. Though default judgment was entered the Master made an assessment of special damages.

3. The appellant's grounds of appeal are these:

a. "*THAT the learned Master erred in law and in fact in granting $80.00 for a care giver when there was no evidence adduced by the respondent as to who was the caregiver and how much was paid to the caregiver.*

b. *THAT the learned Master erred in law and in fact in awarding $150.00 as miscellaneous expenses in absence of any evidence from the appellant and failing to consider that food and other services are provided by the hospital during the period of the admission.*

c. *THAT the learned Master erred in law and in fact in awarding $300.00 as travelling expenses in absence of any receipts being tendered in court and any evidence of the appellant travelling from Bua to Labasa Hospital.*

d. THAT the learned Master erred in law and in fact in awarding $12,136.00 as loss of earnings in form of special damages in absence of appellant providing a wages slip.

e. THAT the learned Master erred in law and in fact in not deducting $4,125.40 salary paid by the appellant after post injury period.

f. THAT the learned Master erred in law and in fact in taking into account that the respondent had 14% permanent incapacity when there was no medical report from a qualified assessor and failure by Dr. Alipate to provide the evidence as to what guidelines were used by Dr. Maloni to arrive at 14% permanent incapacity.

g. *THAT the learned Master erred in law and in fact in awarding $40 000.00 as general damages and further failed to refer to the established guidelines in assessing general damages in similar nature of injury cases*".

4. The respondent sustained injury while working as a machine operator at the appellant sawmill. The injury was to his index finger, which occurred when a piece of timber pushed his hand to the blade of the nearby saw. Soon after the accident, the respondent was first taken to the employer's home and, thereafter, to the Nabouwalu hospital, from where he was referred to the Labasa hospital. He spent several days in hospital before being discharged and attended clinic thereafter for treatment. His stiches were removed after about a week.

5. In his testimony, the respondent said that as a result of the injury, he takes longer to do work such as cutting grass and pulling cassava. He is unable to look after his cattle in the way he used to, and takes a long time to get dressed. Writing became uncomfortable. The swollen hand meant he was unable to help his wife with gardening. He was earning $164.00 a week at the time of the accident. The employer made no effort to offer him alternate light work at the mill.

6. Dr. Alipate Vitukawalu, an orthopedic surgeon gave evidence and produced the medical folder of the respondent. He said that the wound exposed the joint of the second finger of the right hand at the level of the knuckle and caused traumatic

loss of the tendon. Reading from the folder, he classified this as a "loss of extensor to the central slip". Treatment had included IV (which presumably refers to intravenous therapy), antibiotics, analgesia (known as pain killers, in common parlance), wound washes under local anesthesia at the theater for two days and debridement (which is the removal of dead or infected skin tissue to help heal a wound) under general anesthesia over four days. He underwent surgery on 28 July 2015. He was discharged on 3 August 2015, 12 days after his admission. He attended clinic on six occasions after his discharge from hospital. His sutures were removed on 13 August 2015 (at another point in his evidence the doctor gives the date as 11 August; this discrepancy for the purpose of the case is immaterial).

7. Continuing his testimony, Dr. Vitukawalu said that when the respondent returned to the clinic two weeks after discharge, he did not have any complaints, except for occasional pain. He didn't think the respondent would have been in great pain after sometime though he agreed in cross examination that severe pain would have been felt at the time of the incident. The respondent returned several times in the weeks thereafter. When he did return, there had been no issues with the wound, but clinic visits revealed reduced finger range motion, specifically with the middle and small fingers, and reduced flexion on the wrist. Subsequently, physiotherapy sessions were recommended though he was unable to say anything on the matter as the hospital notes made no reference to such sessions; the explanation being that physiotherapy notes were separately maintained and not contained in the respondent's medical folder.

8. The respondent was advised that there was no need for further surgery and that he required physiotherapy for aggressive range motion exercise to move the joint fingers. On 27 August 2015, the respondent had complained of severe pain. Skin was taken from the respondent's forearm to cover the tendon deficit caused by the extensor injuries. There was no evidence suggesting that the respondent had difficulty in using his fingers to grip. Dr. Vitukawalu said that Dr. Tiko, a qualified assessor attached to the Labasa hospital, assessed the respondent of having a permanent impairment of 14% and the hand impairment at 9%.

9. On behalf of the appellant, its manager, Sarendra Singh, gave evidence stating that the company offered the respondent a job as a tallyman but that he preferred to wait and see rather than accept the position. A neighbor and relative of the respondent, Yusuf Khan, who in cross examination identified himself as Yakub Khan, also gave evidence on behalf of the appellant, which the Hon. Master has not referred to in her judgment. In his evidence, he states that the respondent carries on farming on his land with no apparent discomfiture, which, if true, would have implied that the respondent's future earning capacity would not have been as affected as made out and found to be so by the Master. On behalf of the appellant it was suggested that the witness was not on good terms with the respondent. For reasons not evident in the judgment, the Master has not given consideration to the evidence of this witness. The appellant, however, did not make much of this, and I will assume that the Hon. Master left this evidence out on a matter of credibility, and as such I will not venture to comment on his evidence.

10. The Master concluded that the respondent, who was 35 years old at the time of the accident and earning a weekly income of $164.00, was unable to find gainful employment. The judgment refers to the medical report as showing a reduced dorsiflexion of the index finger and insensate skin from the flap with a restricting scar at the second wave space of the dorsum of the hand. The Master found that the respondent would not be able to do the work he had been employed to do or any similar work requiring the lifting of heavy objects or machinery. The Master was of the view that the respondent was entitled to future earnings and used a multiplier of 11 to assess the loss of future earnings at $13,133.12 on the basis of a total disability of 14%, which was inclusive of the 9% hand impairment.

11. In awarding general damages, for the purpose of assessing loss of future earning capacity, the Master took into consideration the injuries suffered by the respondent and the evidence given by Dr. Alipate and Dr. Bulanauca. The court referred to the medical report by Dr. Bulanauca, who recommended that the respondent seek alternative employment as a watcher or cleaner. There is no evidence that the respondent made a serious attempt to find such alternate employment. The plaintiff's age of 39 years was considered in using a multiplier

of 11. The weekly wage of $164.00 was multiplied by 11 years and the ensuing amount of $93,808.00 was assessed at a disability rate of 14%. This resulted in a sum of $13,133.12 as a loss of future earnings.

Damages

12. Compensation should as nearly as possible put the party who has suffered in the same position as he would have been if he had not sustained the wrong[1]. The principles that govern a claim in damages for past and future loss of earnings in a personal injuries action was discussed in *British Transport Commission v Gourley*[2], where it was said by Lord Goddard:

> "In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damages, which has to be specially pleaded and proved. This consists of out-of- pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation. Secondly, there is general damages which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future".

13. The Court of Appeal referred to the above passage in *Nasese Bus Company Limited v Muni Chand*[3], and explained that the reference to "the future" in Lord Goddard's speech was a reference to the future from the date of trial, and in a personal injuries claim special damages includes past loss of earnings whilst general damages included anticipated loss of earnings. The court explained that the date of trial is the end date for past loss and the start date for future loss of earnings.

The High Court in *Broadbridge v Attorney General of Fiji*[4] (which decision was appealed to the Supreme Court[5]) referred to the decision in *Wells v Wells*[6] which

[1] Lord Blackburn in Livingstone v Rawyards Coal Co. (1880) 5 App Cas 25; [1880] UKHL 3
[2] [1956] AC 185 at 206
[3] [2013] FJCA 9; ABU 40.2011 (8 February 2013)
[4] [2001] FJ Law Rp 97; [2001] 1 FLR 389 (7 Nov 2001)
[5] Attorney General of Fiji v Broadbridge [2005] FJLawRp16; [2005] FLR 85; CBV 0005 of 2003S (8 April 2005)
[6] [1998] 3 WLR 329

quoted the words of Stephen J in the decision of the High Court of Australia in *Todorovic v Waller*[7]:

> "The Law entitles these plaintiffs to compensation for their losses and outgoings. In Barrell[8], I cited those authorities which, more than a hundred years ago, established and have ever since affirmed the cardinal principle of such compensation: that a Plaintiff is entitled to such compensation as will, as nearly as may be, make good the financial loss which he has suffered and will probably suffer in the future. Once liability has been established and the facts relevant to damages have been found it is then for the courts to give effect to that principle in their assessment of damages for economic loss. While there may be no one exclusive method of assessment appropriate to every circumstance, there is but one criterion by which the adequacy of any particular method may be judged: it is whether or not the result of the assessment fairly makes good the financial loss incurred.
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> The law, by insisting upon this principle, has established the proper measure of compensation for pecuniary loss: the actual process of assessment can then only be matter for reasoned estimation and computation. Rules and practices develop in the process of assessment and no doubt tend, by their judicial adoption in a legal system governed by precedent, to become current orthodoxy. But since the medium of compensation is money, whose purchasing power and income-yielding qualities may change over time, particular process of assessment, attuned to a particular state of the medium, may come to be no longer appropriate. It follows that since the sole function of the process of assessment is to attain what the law has fixed as the proper measure of compensation, there can be no place in the process for fixed rules of law: instead the process must be capable of adjustment in the face of changes in the quality of the medium of compensation. The current acceptability at any time of a process of assessment will depend, and depend only, upon whether or not its outcome fairly corresponds to what the law has set as the proper measure of compensation".

14. The phrase "special damages" refers to the actual pecuniary loss suffered by a plaintiff up to the date of trial owing to the wrongful act of the defendants. A plaintiff should be awarded interest on the sum which represents that loss as

[7] [1981] 150 CLR 402 at pages 427-428

[8] Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd [1981] HCA 3; (1981) 145 CLR 625 (2 February 1981)

from the date it was incurred[9]. In *Rawaitale v Tropic Forest Joint Venture Co Ltd*[10], the court declared that bare statements would not suffice when a person is claiming special damages, and that the court could not be expected to simply assume that the plaintiff suffered such loss. The court stated quite clearly that it cannot assess a figure in the absence of satisfactory proof of special damages, and that it is incumbent on the claimant to call evidence supporting its claims; a claimant cannot rely on what is stated in the written submissions and expect an award of damages.

15. The plaintiff sought special damages in a sum of $16,582.34 comprised of:

Transport, medication, miscellaneous expenses	-	$ 2000.00
Care giver (15 x 8 days)	-	$ 120.00
Loss of wages from 8/2/16 – 10/7/17 (82 weeks)	-	$12,256.54
FNPF (18% - $26.90 x 82 weeks)	-	$ 2,205.80
		$16,582.34

16. In assessing special damages, the Master observed that there was no evidence of the amounts spent on transportation and on medication after the respondent was discharged from the hospital. Therefore, no award was made for medication.

17. Although the respondent claimed $120.00 for the caregiver at the rate of $15.00 for 8 days, she was awarded $80.00 in the absence of receipts. A further $150.00 was given as miscellaneous expenses, while for transportation she was awarded $300. This amounted to an aggregate of $530.00 as special damages without taking loss of earnings into account.

18. Loss of earnings is calculated by deducting earnings between the date of the accident and the trial date from the amount the respondent would have made if his earnings prior to the accident continued until the trial. The court awarded loss of wages of $12,136 for 74 weeks at the rate of $164.00 per week. The sum awarded as loss of FNPF was $2,184.48. Altogether, $14,850.48 was awarded as special damages.

[9] Jefford v Gee [1970] 1 All ER 1202 at 1209
[10] [2011] FJHC 281; HBC 176.2004 (20 May 2011)

19. The Master considered the evidence of Dr. Vitukawalu and the medical report by Dr. Bulanauca and concluded that the respondent was in pain for a number of days after discharge from hospital, and that for seven months he had attended clinic. The judgment makes mention of the restriction in the movement of the respondent's middle, ring and little fingers of his dominant right hand, his difficulties in getting dressed and his struggles with ordinary farming activities.

20. The court awarded a sum of $40,000.00 for pain and suffering and a sum of $13,133.12 for loss of future earnings, adding up to a sum of $53,133.12 as general damages. Interest was granted for special damages at 3% per annum from the date of accident to the date of judgment and 6% per annum from the date of service of the writ to the date of assessment of damages for general damages. Here again, the Master appears to have considered the amounts awarded by Fijian courts for pain and suffering, and loss of amenities in personal injury cases.

21. In *The Permanent Secretary for Health and another v Kumar*[11], the Supreme Court laid down the principles that the court should apply in assessing general damages for pain and suffering and for loss of amenities.

> "There are three guiding principles in measuring the quantum of compensation for pain and suffering and loss of amenities. First and foremost, the amount of compensation awarded must be fair and should compensate the victim of the injury in the fullest possible manner, bearing in mind that damages for any cause of action are awarded once and for all, and cannot be varied due to subsequent eventualities, some of which even could not be anticipated at the stage a court makes an award. Hence the award of damages should not only be fair, but also assessed with moderation, even though scientific accuracy is impossible. The second principle is that the sum awarded must to a considerable extent be conventional and consistent. Thirdly, regard must be had to awards made in comparable cases in the jurisdiction in which the award is made. However, it is open for a court to take into consideration a comparable award made in a foreign jurisdiction, particularly in cases where the type of injury is not very common, provided that the court takes into consideration differences in socio-economic and other relevant conditions that might exist between the two jurisdictions".

[11] [2012] FJSC 28; CBV 0006.2008 (3 May 2012)

22. In regard to damages on pain and suffering and loss of amenities, and on the time from which interest should run, the following words of Lord Denning MR in *Jefford v Gee*[12], which was quoted with approval in *Fiji Forest Industries v Rajendra Naidu*[13] is instructive:

> "When the compensation payable to a plaintiff is not for actual pecuniary loss but for continuing intangible misfortune, such as pain and suffering and loss of amenities (which cannot fairly be measured in terms of money) then he should be awarded interest on the compensation payable. But such interest should not run from the date of the accident: for the simple reason that these misfortunes do not occur at that moment, but are spread indefinitely into the future and they cannot possibly be quantified at that moment but must of necessity be quantified later. It is not possible to split those misfortunes into two parts: those occurring before the trial and those after it. The court awards compensation for them in one lump which is by its nature indivisible. Interest should be awarded on this lump sum as from the time when the defendant ought to have paid it but did not: for it is only from that time that the plaintiff can be said to have been kept out of the money. This time might in some cases be taken to be the date of letter before action, but the latest it should be is the date when the writ was served. In the words of Lord Herschell, interest should be awarded "from the time of action brought at all events "from that time onwards it can properly be said that the plaintiff has been out of the whole sum and the defendant has had had the benefit of it. Speaking generally, therefore, we think that interest on this item (pain and suffering and loss of amenities) should run from the date of service of the writ to the date of trial. This should stimulate the plaintiff's advisers to issue and serve the writ without delay - which is much to be desired. Delay only too often amounts to a denial of justice".

23. In the *Fiji Forest Industries Limited v Rajendra Mani Naidu*[14], the Court of Appeal made reference to one of its previous decisions, *Shankar v Naidu*[15] in which the court stated,

> "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

[12] [1970] 1 All ER 1202 at 1209
[13] *Supra*
[14] [2017] FJCA 106; ABU 0019.2014 (14 September 2017)
[15] [2001] FLR (1) 358 at 364; [2001] FJCA 19; ABU 0003U.2001S (18 October 2001)

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".

24. In assessing damages, past awards can be a useful guide, as has been recognised by the Supreme Court[16]. In *Nasese Bus Co Ltd v Chand,*[17] the Court of Appeal increased the award of damages from $65,000 to $90,000 for pain and suffering considering the effect of progressive arthritis. Similarly, in *Mere Labaivalu v Pacific Transport Co Ltd*[18], damages were increased from $60,000 to $90,000 for pain and suffering of the appellant who underwent a traumatic penetrating injury; this included an award of $30,000 as future earnings to the appellant, a student who gave up school after sustaining the injury. In *Fiji Forest Industries Ltd v Rajendra Mani Naidu*[19], Jameel JA, in increasing the award to $90,000 from $60,000, pronounced that "the percentage of disability alone is not the correct basis for calculation of damages. What must be considered is the degree of incapacitation of the limb, and its impact on the future of the victim". In *Kumar v Kumar*[20], the appellant underwent surgery for his fractured right leg; Chandra JA, increased the award from $18,000 to $35,000. In *Amendra Millan v Mukesh Chand*[21], the appellant gave up a career as a plumber, as his hand was badly injured. Instead, he became a primary school teacher; the Court of Appeal increased the award for loss of earnings from $50,000 to $120,000. In *Sheik Mohamed Amin v Vishwa Chand and Courts (Fiji) Limited*[22], the Court of Appeal held that in line with recent awards it considered a sum of $85,000 as general damages for non-pecuniary loss in the form of past and future pain and suffering and loss of enjoyment of life as reasonable compensation.

[16] Permanent Secretary for Health and another v Kumar, *Supra*
[17] *Supra*
[18] [2017] FJCA 61; ABU 0059.2014 (26 May 2017)
[19] [2017] FJCA 106; ABU 0019.2014 (14 September 2017)
[20] (2018) FJCA 106; ABU42.2016 (6 July 2018)
[21] Civil Appeal [2019] FJCA 47; ABU 0119.2017 (8 March, 2019)
[22] [2012] FJHC 1015; Action 39.2008 (13 April 2012)

25. In considering other awards, the Privy Council's counsel in *Singh (an infant) v Toong Fong Omnibus Co., Ltd*[23] is useful to remember. The Privy Council said:

> "It need hardly be emphasised that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before any comparison between the awards in the respective cases can fairly or profitably be made. If, however, it is shown that cases bear a reasonable measure of similarity, then it may be possible to find a reflection in them of a general consensus of judicial opinion".

A similar cautionary note was struck by the Court of Appeal in *Nasese Bus Company v Muni Chand*[24], where Calanchini AP stated that, "A 1994 decision cannot be relied upon as a reliable guide for the award of damages to be assessed at a trial in 2010".

26. There is not much to suggest that the Master was remiss in acting upon the evidence on record, taken as a whole, in arriving at her findings. The incident resulting in the injury was not challenged. Nor were the respondent's earnings or age at the time of the accident. By and large, the pain and discomfiture suffered by the respondent appear to be confirmed by the medical evidence. In the absence of adequate direct evidence, the Master appears to have used a common sense approach to assessing special damages in a sum of $530, excluding loss of future earnings, which was arrived at by the use of a multiplier of 11, which the Master considered to be reasonable in the circumstances, taking into account the respondent's age of 39 during the proceeding. Loss of future earnings based on his weekly gross income of $164 multiplied by eleven years gave a sum of $93,808, to which was applied the respondent's total disability of 14%, resulting in a sum of $13,133.12. The appellant has not satisfied me that the Master has misdirected herself in exercising the wide latitude vested in the original court to make findings of facts and in, personal injury cases, to award damages, the assessment of which may differ from one judge to another, depending upon individual perception. I am satisfied that the sum awarded in this case as special damages is not excessive.

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[23] [1964] 3 All ER 925 at 927
[24] *Supra*

27. The point that arriving at such findings is not often a straight forward task was made by Calanchini AP, in *Nasese Bus Company Ltd v Muni Chand*[25], referring to the Supreme Court decision in *Attorney General of Fiji v Broadbridge*[26] when he said,

> "The Supreme Court decision does offer some comfort to trial judges who are all too often placed in a position where there is scant evidence upon which to fairly assess what amount of compensation will restore the plaintiff to the position that he would have been in had it not been for the harm caused by the negligence of the defendant. *There is afforded to judges at first instance some flexibility in performing this task. Alongside that flexibility is the accepted requirement that, given the state of evidence, the trial judge must do the best he can*" (emphasis added).

The Supreme Court in *Broadbridge* stated,

> "There is no challenge to the courts' ability to approach loss of earnings capacity in a manner that dispenses with the conventional multiplicand/multiplier approach. Loss of future earning capacity can be calculated on a broader basis, having regard to the evidence led in the particular case without being constrained by the traditional requirements of the conventional multiplicand/multiplier approach."

The Supreme Court concluded:

> "It follows from the discussion detailed above that there is no principle, or rule of the common law, that requires any judge, in Fiji, who must assess future economic loss resulting from personal injury, to adopt a multiplicand/multiplier approach, whether for the purpose of calculating the value of the lost chance of future increased earnings, or for the purpose of calculating the present value, in lump sum terms of those future earnings. In a case of some uncertainty, such as the present, it may be appropriate for the court to calculate the value of the lost earning capacity upon a different basis, though never forgetting to discount for vicissitudes where appropriate and for the value of a certain lump sum.
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> We emphasise that nothing we have said should be taken as casting doubt upon the utility of the multiplicand/multiplier as a method by which to assess future economic loss in personal injury cases in this country. When properly applied it

[25] *Supra*
[26] Attorney General of Fiji v Broadbridge [2005] FJSC 4 CBV 5 of 2003 (April 2005)

> operates as a perfectly satisfactory method of carrying out what is always a most difficult task. It is, however, only a method by which the cardinal principal _ _ is to be fulfilled. Our point is simply that, as the common law stands, it is only one of a number of methods that can be used to assess such loss".

28. It is apposite to say that I may have arrived at a different conclusion in regard to the damages awarded, especially in regard to general damages. The evidence, I might have seen in a different light; also the pain, suffering and the inability to engage in activities as before. But, tread lightly I must, sitting here in appeal, into the matter of findings of an original court, unless such findings are unsupported by evidence. That is the prerogative of a judge hearing the evidence. Much more leeway is available to a judge sitting in appeal to arrive at inferences on findings made by the original court. I have not found, and the appellant has failed to convince me, that the Master has erred so much – in arriving at findings, making inferences and assessing the damages – so as to invite intervention to substitute the Master's judgment with a decision of this court.

29. In *Watt (or Thomas) v Thomas*[27], the House of Lords quoted the passage from the opinion of Lord Shaw in *Clarke v. Edinburgh & District Tramways Co*.[28], which was quoted with approval by Lord Sankey in *Powell v Streatham Manor Nursing Home*[29]. Lord Shaw said:

> "In my opinion, the duty of an appellate court in those circumstances is for each judge to put it to himself, as I now do in this case, the question, am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having these privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be duty to defer to his judgment".

He continued,

> "…witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their

[27] [1947] 1 ALL ER 582
[28] [1919] S.C (H.L.) 35
[29] [1935] A.C. 250

expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced on the printed page.

I am unable to determine one thing or the other, namely, whether the appellant or respondent was worthy of credit. It is a question of credit, where each gives a perfectly coherent account of what he had done and said, and contradicts the other. Under these circumstances it is impossible that the Court of Appeal should take upon itself to say, by simply reading printed and written evidence, which is right, when it had not had that decisive test of hearing the verbal evidence and seeing the witnesses, which the judge had who had to determine the question of fact, and to determine which story to believe.

In other words, whereas you might formerly find in the judge's notes some indication of the impression made on his mind by the witnesses, no trace of any such impression is to be found in the cold, mechanical, record of evidence".

30. In *Charles Osenton & Co v Johnston*[30], Viscount Simon LC said,

"The law as to the reversal by a Court of Appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty which arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified".

31. In *Benmax v Austin Motor Co. Ltd*[31], the House of Lords, referring to the power of the Court of Appeal to draw inferences from facts and make any order that ought to be made, said:

"This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a

[30] [1941] 2 All ER 245 at 250
[31] [1955] 1 All ER 326 at 327

witness. But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts. An example of this distinction may be seen in any case in which a plaintiff alleges negligence on the part of the defendant. Here, it must first be determined what the defendant, in fact, did, and secondly, whether what he did amounted in the circumstances (which must also, so far as relevant, be found as specific facts) to negligence. A jury finds that the defendant has been negligent and that is an end of the matter unless its verdict can be upset according to well-established rules. A judge sitting without a jury would fall short of his duty if he did not first find the facts and then draw from them the inference of fact whether or not the defendant had been negligent. This is a simple illustration of a process in which it may often be difficult to say what is simple fact and what is inference from fact, or, to repeat what I have said, what is perception, what is evaluation. Nor is it of any importance to do so except to explain why, as I think, different views have been expressed as to the duty of an appellate tribunal in relation to a finding by a trial judge. For I have found on the one hand universal reluctance to reject a finding of specific fact, particularly where the finding could be founded on the credibility or bearing of a witness, and, on the other hand, no less a willingness to form an independent opinion about the proper inference of fact, subject only to the weight which should, as a matter of course, be given to the opinion of the learned judge. But the statement of the proper function of the appellate court will be influenced by the extent to which the mind of the speaker is directed to the one or the other of the two aspects of the problem".

32. These authorities have persuaded me to tread carefully in assessing the findings of the Master. I have also resisted the thought to take account of what was expressed in *Cunningham v Harrison*[32] "If Judges do not adjust their awards to changing conditions and rising standards of living, their assessments of damages will have even less contact with reality than they have had in the recent past or at the present time". In my view, that observation might also apply, if unusually, to a situation where a diminution in awards could be considered by court due to exceptional changes in conditions. That question is not before court; perhaps

[32] [1973] QB 942

because the matter did not lend itself to be raised previously; and, I make no comment on the matter.

33. The appellant's grounds of appeal (a), (b), (c), (d), (f) and (g) are rejected as the Master has made findings that are substantially in accord with the evidence, and the discretion exercised in awarding damages appears reasonable and is not out of step with comparable judgments in Fiji. The appellant has failed to furnish any evidence in respect of ground (e). The appeal is dismissed with costs.

ORDER

A. The appellant's appeal against the judgment dated 26 June 2019 of the Hon. Master of the High Court of Labasa is dismissed.

B. The aforesaid judgment of the Hon. Master is affirmed.

C. The appellant is directed to pay the respondent $1,500.00 as costs summarily assessed within 21 days of this judgment.

Delivered at Labasa this **5th** day of June**, 2020**

M. Javed Mansoor
Judge

Solicitors:
SAMUSAMUVODRE SHARMA LAW *(for the Appellant)*
MAQBOOL & COMPANY *(for the Respondent)*