

**IN THE COURT OF APPEAL**  
**ON APPEAL FROM THE HIGH COURT**

**CIVIL APPEAL NO. 048 OF 2012**  
**(High Court Case No. HBC 43 of 2009B)**

**BETWEEN** : 1. **ATTORNEY GENERAL OF FIJI**  
2. **MEDICAL SUPRINTENDENT, LABASA HOSPITAL**  
3. **PERMANENT SECRETARY FOR HEALTH**  
**Appellants**

**AND** : **MELANIA ROMANU TIKOTIKOCA**  
**Respondent**

**Coram** : Chandra JA  
Almeida Guneratne JA  
Kotigalage JA

**Counsel** : Mr. J. Mainavolau for the Appellants  
Mr. R. P Singh for the Respondent

**Date of Hearing** : 15 May 2014

**Date of Judgment** : 29 May 2014

**JUDGMENT**

**Suresh Chandra, JA**

I have read the judgment of Almeida Guneratne JA and agree with his proposed orders.

**Almeida Guneratne, JA**

**Matter for Determination in this Appeal**

- [1] This is an appeal from a judgment of the High Court of Labasa where inter-alia, general damages in a sum of \$10,000.00 was awarded for a personal injury caused to a new born baby through the negligence of hospital and/or medical authorities.
- [2] The appellants have not challenged the findings of negligence by the Learned High Court Judge as well as the award for special damages but seek to have the said award of \$10,000.00 set aside on the basis, that the said sum is excessive.

**Grounds of Appeal**

- [3] The notice of appeal dated 13<sup>th</sup> July, 2012 contained four (4) grounds of appeal but at the hearing, counsel for the appellants confined himself to three of them which are as follows:
1. *That the learned judge erred in fact and in law in awarding the sum of \$10,000.00 (Ten Thousand Dollars) to the respondent as general damages for medical negligence.*
  2. *That, the Learned Judge erred in fact and in law in awarding general damages to the plaintiff for pain and suffering and disfigurement and not taking into account Doctor Abhay Chaudhri's evidence that the plaintiff does not suffer from any permanent disability and the scar will in time contract.*
  3. *That, the Learned Judge erred in fact and in law by not placing a fair value on the disfigurement of the plaintiff.*
- [4] The said three grounds are intrinsically connected, grounds 2 and 3 being descriptive of or being reasons for ground 1 and I propose to deal with the matter accordingly.

### **Some Preliminary Observations on the Learned High Court Judge's Judgment**

- [5] The part dealing with the award of general damages is contained in pages 6 to 9 of the record of the High Court.
- [6] At the outset I would like to make some preliminary observations on the Learned High Court Judge's Judgment.
- [7] Placing the Australian precedent of **Pavic v. Australian Capital Territory** [2007] ACTS 97, at the forefront counsel for the plaintiff had urged for an award of \$20,000.00 (Twenty Thousand Fijian Dollars) whilst counsel for the defendants had suggested a sum of \$1,500 to \$2,000.00.
- [8] In **Pavic's** case the court had awarded a sum of \$50,000.00 (presumably Australian dollars) as general damages in a personal injury claim.
- [9] The Learned High Court Judge having examined the facts and circumstances of **Pavic's case** and having made the observation that:

*"It would appear the scarring is not comparable to the case before me",  
made the present award of \$10,000.00 (Fiji dollars) which is sought to be  
put in issue in this appeal."*

### **Appellants Counsel's Reliance on Doctor Chaudhri's Evidence**

- [10] The main thrust of counsel's argument was that, there was no impairment but only disfigurement for which argument he relied on the expert evidence of Doctor Abhay Chaudhri.

- [11] The Learned High Court Judge also noted that, Doctor Chaudhri had stated that “*the natural tendency was for the scar to contract with time.*”
- [12] This, it was said, is expected to happen when the plaintiff child reaches the age of 16 (years) but “the mark will not disappear” and further “the mark will stretch like (a) tattoo.”  
(Vide: Doctor Chaudhri’s Evidence at Folio 000170 of the Record of the High Court)
- [13] The Learned High Court judge had examined several case law precedents. His Lordship had even had an ocular inspection of the scar on the child.
- [14] I have already made the observation that the Learned Judge had distinguished the facts of the Pavic’s case (*supra*) from the instant case.
- [15] Accordingly, I am unable to agree with Counsel’s submission that, the Learned Judge’s decision stems from that case.

#### **Counsel’s Reliance on Past precedents**

- [16] Counsel relied on several past precedents in support of his contention that the award of \$10,000.00 made by the Learned High Court Judge was excessive.

#### **Guidelines Applied In Assessing General Damages**

- [17] The first is the case of **Fletcher v Auto Car and Transporters Ltd** [1968] 1 ALLER 726 where as a guide to assessment of damages Salmon LJ had opined that:

*“The damages awarded should be such that the ordinary sensible man would not instinctively think either mean or extravagant, but consider them to be sensible and fair.....” (at page 750).”*

- [18] The second is the case of Anitra Kumar Singh v Rentokil Laboratories Ltd (Civil Appeal No. 73 of 1991, decided in August, 1993) wherein the Court of Appeal of Fiji had stated this:

*"We are mindful that setting the figure it must be one appropriate for Fiji and the conditions which apply here. The level of damages in our neighboring countries is persuasive but not decisive." (at pages 12-13 of the judgment).*

- [19] In another case viz: Pillay v Chand [1998] FJCA 35, the Court of Appeal of Fiji, had regarded the circumstances of the case, previous decisions of the Courts in Fiji, nature of the injury, prospects of the injured person, degree of pain and suffering and the extent of loss of the amenities of life, as guidelines in assessing general damages.
- [20] Counsel also referred to a decision of the High Court of Fiji viz: Wati v Permanent Secretary of Health [2013] FJHC 564 where, two tests suggested by Lord Diplock in Wright v British Railways Board [1983] 2 ALLER 698 viz: Pre-trial settlement of a reasonable degree of probability about the sum of money that would be likely to be recovered if the action proceeded to trial and the plaintiff succeeded in establishing liability and the basic conventional figure derived from experience and from awards in comparable cases, were endorsed by the Court. (See also Ward v James [1965] 1 ALLER 563).
- [21] While most of these cases were concerned with motor accident cases, the ages of the plaintiffs ranged from 31 years to 56 years. Hence the usefulness of Pavic v Australian Capital Territory (*Supra*).
- [22] The Fletcher decision was in 1968, Singh's case being in 1993. Wright's case was in the year 1983, Pillay v Chand in 1998 and Wati's case in 2013.

- [23] Apart from the differences in the injuries involved in those cases, the different figures arrived at by different judges in assessing general damages is also to be noted. This is well illustrated by the Fletcher decision where Lord Denning, M. R with whom Lord Diplock, L.J concurred reduced the award made by the lower court whereas Salmon L.J. dissented and affirmed the award made by the trial court.
- [24] Indeed, assessment of damages is an estimate and an estimate is necessarily a matter of degree (vide: Owen v Sykes [1936] 1KB192). An overgenerous estimate of damages as an example of the kind of damages that ought to be given in a given type of case must be avoided.
- [25] Counsel for the Appellants in the lower court had suggested a sum of \$1,500.00 to \$2,000.00. In his written submissions filed in this court counsel himself had suggested an amount between \$2,500.00 to \$5,000.00. In the course of his oral submissions he was prepared to go up to \$7,000.00.
- [26] Sums awarded for different types of injury are necessarily arbitrary (or artificial) because there is no criterion for determining what a part of the body is worth. (vide: Atiyah, Accidents, Compensation and the Law, 4<sup>th</sup> Edition, page 186).
- [27] That arbitrariness or artificiality cannot be overcome by a legislative tariff either. The sums awarded thus depend on the general experience and comparable precedents.
- [28] As has been said "Compensation... in general "... cannot be measured by Mathematics but by the application of reasonable common sense..." (Vide: S & J and Another v Distillers Co. (Bio-chemicals) Ltd. [1969] 3 All ER 1412).

- [29] Learned Counsel has also referred to two High Court decisions.
- [30] In one case the plaintiff had suffered lacerations and scarring from a road accident and had been awarded \$5,000.00 (Fiji Dollars).
- [31] This had been in the case of Ritesh Narayan v TLTB & Joeli Dakunimata [Civil Action No. 275/2004] decided in the year 2008.
- [32] In Anisa Tuberi v Simon Gopal & Another [HBC 273/2000] the plaintiff had suffered minor injuries in a car accident and had sustained some scar (emphasis is mine) for which he was awarded the sum of \$1,000.00 the general damages. The decision was in the year 2000.

#### Counsel's Reliance on the Other Evidence

- [33] Counsel for the appellants found fault with the Learned High Court Judge for making the award for "disfigurement and pain and suffering" whereas there was no expert evidence called to establish pain and suffering.
- [34] How does an infant express pain and suffering? Infants do cry for various reasons, sometimes incomprehensible to adults. But in the instant case the evidence of the plaintiff's grandmother was that after the transfer to the NICU the plaintiff was feeling the pain and her hand (that is, her right hand) on which the IV burn was inflicted was weak.

- [35] The plaintiff's mother in her evidence said that, (the baby) was crying all (the) time from (the) time she was brought to the NICU.
- [36] The nurse had said not to put warm clothes on her as she was sweating. At home the baby was crying at night; she was sweating a lot and then pus had come out.
- [37] In response to a question posed by Court viz: whether or not there is a connection between impairment and disfigurement, counsel submitted that scarring is not disfigurement which amounts to incapacity or disability. This had been the evidence of Doctor Chaudhri as well.
- [38] But, the question here is whether the evidence of the plaintiff's mother and grandmother established pain and suffering.
- [39] I think it did.
- [40] This is further evidenced by the Medical Report of Doctor Abdul Mannan which was referred to by the plaintiff respondent's counsel. The swelling on the right hand, the wound that appeared later, removal of necrotic tissue from the wound, the daily dressings, the wound debridement etc. all showed that the baby's crying was not due to incomprehensible reasons but due to these constant invasions on her hand.
- [41] I do not think expert evidence was required for the Learned High Court Judge to infer "pain (actual) and suffering."
- [42] Appellant's counsel finally argued that, the plaintiff's mother's evidence revealed that, the plaintiff (now attending school) is not teased by anyone on account of the scar.



- [43] However, the plaintiff's mother's evidence was that "it is noticed."
- [44] Whenever it is noticed by someone it must surely cause embarrassment to the child.
- [45] Thus, although there is no permanent incapacitation or impairment, the plaintiff had to be adequately compensated for "the embarrassment of disfigurement". (vide: Taylor v R.V Chuck (Transport) [1963] 107 S.J. 910 cited by Clerk and Lindsell on Torts [(1989) 16<sup>th</sup> Edition at page 278]).
- [46] In personal injury cases where damages are claimed for pain and suffering, the principle is that compensation must be understood as providing the plaintiff with some solace for his misfortune (see Warren v King [1964] 1 WLR 1 per Harman L.J.).
- [47] Again in Lim Poh Choo v. Camden and Islington Health Authority [1980] AC 174 at page 187, it was said that:
- "the guiding principle can be expressed only in such vague terms as awarding what is fair or proper."*
- [48] It is to be borne in mind that, pain and suffering falls into that category of non-pecuniary damage which constitutes immeasurable elements. Thus, fair compensation is the standard.
- [49] An award made by a trial court will not be overturned simply on the ground that the amount is too high.

**Are there any Grounds to Disturb the Trial Judge's Award?**

- [50] A trial judge's assessment ought not to be disturbed unless some error in the Judge's approach is clearly discernible or there is some perversity or outrageousness or a clear error or a misdirected exercise of discretion.

**Conclusion**

- [51] I cannot see any clear discernible error in the Learned High Court Judge's approach. Nor can I see anything perverse, outrageous or misdirection in the exercise of his judicial discretion.
- [52] The several authorities cited by counsel and the principles emanating from there are in therefore perfect harmony with the approach adopted and the award made by the Learned High Court Judge.
- [53] The Learned Judge has placed a fair value on the pain and suffering caused to the plaintiff and the disfigurement.
- [54] The conclusion reached in Appellant's counsel's written submissions dated 30<sup>th</sup> April, 2014 is misconceived.

**Kotigalage, JA**

I agree with the conclusions and the orders of the judgment of Almeida Guneratne JA.

**The Orders of the Court are:**

1. *The appeal is dismissed.*
2. *The award of \$10,000.00 made by the trial Judge as general damages shall stand.*
3. *Interest at 6% per annum on the said sum of \$10,000.00 calculated from the date of Writ of Summons dated 30<sup>th</sup> September 2009 up to the time of this judgment.*
4. *Interest at 3% per annum on the sum of \$300 awarded as special damages from the date of writ of summons dated 30<sup>th</sup> September 2009 up to the time of this judgment.*
5. *In addition to the costs in the sum of \$2,000.00 ordered by the High Court, a further \$2,000.00 as costs of this appeal shall be paid.*



.....*S. Chandra*.....

**Hon. Justice S. Chandra**  
**JUSTICE OF APPEAL**

.....*Almeida Guneratne*.....

**Hon. Justice Almeida Guneratne**  
**JUSTICE OF APPEAL**

.....*C. Kotigalage*.....

**Hon. Justice C. Kotigalage**  
**JUSTICE OF APPEAL**