

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

**Civil Appeal NO.ABU 00 65 OF 2014**  
**(High Court Case No. HBC 2 of 2012)**

**BETWEEN** : **SEVESA DAUNIVALU**

**Appellant**

**AND** : **DALIP CHAND & SONS LIMITED**

**Respondent**

**Coram** : **Basnayake JA**  
**Almeida Guneratne JA**  
**Premtilaka JA**

**Counsel** : **Mr. A. Sen for Appellant**  
**Mr. A. Kohli for the Respondent**

**Date of Hearing** : **8 November, 2017**

**Date of Judgment**: **30 November, 2017**

**JUDGMENT**

**Basnayake, JA**

[1] I agree with the reasoning and conclusions of Guneratne, JA.

**Relevant Background facts**

- [2] This is an appeal from a judgment of the High Court at Labasa dated 30<sup>th</sup> July, 2014 on the quantum of damages awarded to the appellant in a personal injury case arising out of a road accident which had occurred on 24<sup>th</sup> January, 2010.
- [3] A vehicle belonging to the respondent and driven by his employee, had struck the Appellant's vehicle from behind which had been parked on the side of a road killing the Appellant's wife and injuring the Appellant and his three minor children.
- [4] In Civil Action No. 6 of 2012 the Labasa High Court had found that, the said vehicle owned by the Respondent had been driven negligently by his employee.
- [5] Consequently, the present matter had come up before the said High Court for assessment of damages to be awarded to the Appellant on account of the injuries sustained by him.
- [6] In the ensuing judgment the High Court made the following awards for damages.
1. As general damages a sum of \$40,000.00 for pain and suffering and loss of amenities of life and 6% interest per annum on that from the date of issuance of writ (23.02.2012) to the date of judgment.
  2. As future economic loss, a sum of \$3,462.20
  3. As Special Damages
    - (i) for past economic loss (\$1,924 + \$154)
    - (ii) travel expenses \$120, with 3% per annum as interest from the date of the accident (24<sup>th</sup> January, 2010) to 30.07.2014 (the date of the judgment)
  4. As Costs of the action, summarily assessed at \$3,000.00

[7] This appeal is against that judgment.

**The Grounds of Appeal (at page 2 of the Copy Record)**

1. **THE** Learned Trial Judge erred in law in failing to make a correct award to the appellant in accordance with the established principles of assessment of damages.
2. **THE** Learned Trial Judge erred in failing to consider the pain and suffering and the nature and extend of the injuries of the appellant by reasons of the accident caused by the servant and agent of the respondent and failed to make an appropriate award for loss of future earning capacity when the evidence conclusively established that the appellant was incapable of performing his normal work functions and there was a total permanent disability and further his condition was deteriorating by reasons of onset or arthritis.
3. **THE** Learned Trial Judge erred in law and in fact in failing to consider the submissions made to him on behalf of the appellant together with the decided authorities on similar injuries when making an appropriate award.
4. **THE** Learned Trial Judge erred in law and in fact in not making an appropriate award for special damages consistent with the evidence adduced in court. (the word 'not' is interpolated by me as being an obvious oversight for otherwise the said ground would not be a ground of appeal).
5. **THE** Learned Judge erred in taking into consideration irrelevant matters and failed to take into consideration relevant matters, in particular the unchallenged evidence of the appellant and his expert witness pertaining to pain, suffering and damages and made an award extremely conservatively without taking into consideration the socio economic living conditions prevalent at the time of making such award.
6. **THAT** the Appellant reserves the right to add, amend the grounds of appeal and adduce further evidence for the purpose of appeal once the same becomes available.

**Consideration of the Grounds of Appeal**

[8] Ground 1 being couched in general terms I shall deal with the grounds of appeal beginning with Ground 2 as to the sum of \$40,000.00 awarded for pain and suffering and loss of amenities of life.



**Submissions of Counsel on behalf of the Appellant in that regard**

- [9] Elaborating on his written submissions dated 22<sup>nd</sup> September, 2017, Mr. Sen contended that, the said sum so awarded was disproportionate to the injuries the Appellant had sustained having regard to past precedents in comparable cases.

**The injuries suffered by the Appellant**

- [10] The evidence of Dr. Malani Bulanova and the medical folder he referred to had revealed,
- (i) a 10cm laceration in the forehead.
  - (ii) a back pain spasm from the injury.
  - (iii) a period of 6 months to be able to walk and 9 months to 11 months to be able to go out.
  - (iv) possibility of osteoarthritis after 35 years.
  - (v) dislocation of the vertebrae.
- [11] At this point it must be noted that, what is recorded as the doctor's evidence is sometimes incomprehensible and I have made my best endeavour to extract what appeared to be the comprehensible parts. (vide: the doctor's evidence at pages 163 – 167 of the Copy Record).
- [12] The doctor spoke to the treatment and the range of medicines given to the victim. (pages 165 – 166 supra, in cross-examination).
- [13] In re-examination the witness concluded touching on four significant matters that may well have a bearing on the issue of re-assessment of damages awarded by the learned trial judge. They are:
- (a) the fractures caused to the spinal chord were “very dangerous.”

- (b) in the 6 months period in which the patient had been undergoing treatment “there was no improvement radiologically”.
  - (c) On 14<sup>th</sup> April, 2014 when the witness had seen the victim, he had shown “back pain” and,
  - (d) “He will never be normal.”
- (vide : at page 167, supra).

**At the other end of the spectrum**

- [14] At the other end of the spectrum were (a) certain spacio-temporal factors and (b) the trial judge’s observations and inferences on the truthfulness of the appellant’s evidence.

**(a) The spacio-temporal factors**

- [15] The accident had taken place on 24<sup>th</sup> January, 2010 and when it had been medically observed that the victim had sustained a L1, L2 and L3 wedge compression fracture, a 1.2 spinous process and a 6cm x 0.2cm forehead laceration which was sutured. (vide: the Medical Report at page 108 of the Copy Record).
- [16] The Appellant (victim of the accident) had been discharged from hospital on 8<sup>th</sup> February, 2010 but had continued to undergo treatment at the clinic and re-admitted to the hospital on 10<sup>th</sup> April, 2010 on a complaint of a recurring back pain for which (pain) relieving medicine had been administered. On 9<sup>th</sup> June, 2010, it would appear that he had been advised to have an X-ray, presumably on account of the complaint of the victim’s “back pain” in regard to which he had not shown improvement. He had not heeded the advice to see a specialist in September, 2010, when he had been seen by the hospital authorities and again in October, 2012. It is after a lapse of another 1½ years that, the Appellant appears to have visited the hospital on 14<sup>th</sup> April, 2014, apparently, with his previous complaint made in June, 2010 as to his recurring “back pain” (vide: pages 163-168 of the Copy Record, supra).

### **Reflections on the said spacio – temporal factors**

- [17] Given the said lackadaisical conduct of the Appellant, I must say, my initial impression stood against the learned Counsel's reliance on the decision of this Court in **Wati v. Permanent Secretary of Health** [2016] FJCA 72, taken together with, *inter alia*, other decisions such **Maka v. Broadbridge** [2003] FJCA 31, **Permanent Secretary for Health v. Kumar** [2012] FJSC 28, **Amin v. Chand** [2012] FJHC 1015, **Nasese Bus Co. Ltd. v. Chand** [2013] FJCA 9, and **Subash Mani v. Ramendra Kumar, et al** (High Court Civil Action 70/2005, 17 July 2007) based as it were on clear cut facts that, the injuries suffered by the victim would have continued in terms of pain and suffering resulting in the victim having to suffer consequential loss.
- [18] In contrast, the learned High Court Judge in the instant case found that, the appellant having suffered injuries, had endured pain and suffering up to a certain point of time, indeed up to the year 2014, for years since January 2010, when the accident had taken place.
- [19] Consequently, I feel no constraint in saying that, even if the evidence of the doctor who said in re-examination, that on 14<sup>th</sup> April, 2014 when he had seen the Appellant he had "back pain" and that, "he will never be normal", (thus, carrying the trappings of a "permanent impairment"), that was a factor the Appellant by his own lackadaisical conduct had brought upon himself.

### **(b) The trial Judge's observations and inferences on the truthfulness of the Appellant's evidence**

- [20] In that regard the learned judge observed *inter alia* that:
- (i) (although) the plaintiff stated that he could not even stand on his feet for 3 months and even after that he was able to stand only by holding onto the walls of the house and, that it had taken him 6 months to move out of the house, the evidence to the contrary as revealed from the medical folder was that he had visited the hospital in March, 2010 unaided and had even walked to the



examination room (per the High Court Judgment at page 12 of the Copy Record),

- (ii) There was no evidence that the Appellant's walk will be hampered in the future,
- (iii) Even when the Appellant had visited the hospital in 2012 he had not complained about persisting pain.

[21] Those were the main factors that appear to have weighed with the trial judge when he concluded that, the plaintiff was not truthful and not all of his evidence was credible.

[22] It would appear therefore that, had it not been for those factors, the learned Judge may have made a higher award than \$40,000.00 for "pain and suffering and loss of amenities."

#### **Was that award sufficient?**

[23] It is important to bear in mind in that context, that assuming for argument sake that, the plaintiff's said evidence was 'exaggerated', that exaggeration was in relation to the recovery time and the claim for loss of wages which the learned judge fixed as "up to June, 2010".

[24] Furthermore, even if the plaintiff's said evidence was to be regarded as self-serving, how could the plaintiff have exaggerated the L1, L2 and L3 injuries he had sustained? That being sheer medical evidence. Even if the 23% impairment which the doctor spoke to is regarded as a speculative factor? (vide: the judgment at paragraphs 26 to 28 at pages 16 – 17 of the Copy Record).

#### **Loss of amenities of life**

[25] Apart from that, the learned Judge held that "there was no evidence of reduction of enjoyment of life." (page 20 of the Copy Record).

- [26] After the accident he could not work as a carpenter as he had done before but was able to do only light work. He had earlier been involved in cultural activities where the participants would sit on the floor but after the accident he was able to sit only for about 5 minutes. (page 99 – Copy Record).
- [27] In his examination -in -chief the plaintiff was asked this:
- “Apart from working did you do anything else?” The plaintiff’s answer was “farming and rugby on Saturdays.”*
- [28] At the time of the accident the plaintiff was 41 years of age. It is not uncommon for a 41 year old Fijian to be involved in Rugby. It also does not require an exercise in semantics to infer, given the tenor of the said question and answer that what he meant was that, after the accident, he could not be involved in Rugby, quite apart farming activities.
- [29] In my view, the learned Judge has not even tokenly taken into consideration these factors in making his award.
- [30] That, taken together with what I have mentioned in paragraphs [20] to [24] above, drives me to the conclusion that, the damages awarded under the head pain and suffering and loss of amenities needs to be enhanced, which compelled me to revise the initial impression I had formed.

### **The Diplock Principles**

- [31] To what extent then is it to be enhanced? For, pain and suffering and loss of amenities being in the nature of non-economic loss *“it is not susceptible of measurement in money (and) any figure at which the assessor of damages arrives cannot be other than artificial.”* (per Lord Diplock in **Wright v. British Rail Board** [1983] 2 All ER 698.



- [32] The test as Lord Diplock (*supra*) suggested is “*basically a conventional figure derived from experience and from awards in comparable cases,*” subject to the rider which His Lordship himself added, viz: “*Great caution has to be exercised in the examination and analysis of comparable awards because the facts inevitably differ...*”

**Factors which an appellate court ought to take into consideration in enhancing an award for pain and suffering and loss of amenities**

- [33] Based on the aforesaid principles referred to in paragraphs [31] and [32] above (which I would like to Christen as **the Diplock Principles**, I propose the following criteria flowing from those principles (which I would like to name as derivative criteria) which an Appellate Court ought to take into consideration in enhancing an award made by the trial Court.

**Derivative criteria flowing from the Diplock Principles**

- [34] They are:
- (1) Relevant factors which the trial Court had failed to take into consideration.
  - (2) Absence or presence of a necessary nexus between certain factors the trial court is seen to have taken into consideration and the quantum of damages fixed in consequence of those factors.
- [35] In so far as the criterion referred to in paragraph 34(1) above is concerned, I hark back to the matters mentioned in paragraphs [25] to [29] of this judgment.
- [36] As regards the criterion referred to in paragraph 34(2) above, I refer back to the matters articulated at paragraph [23] of this judgment.

**The Revised Award I proceed to make**

- [37] Weighing those factors in the appellant’s favour as against the factors that influenced the trial Judge against him (*vide*: referred to at paragraph [27] of this judgment), I think that, on a balance, an enhancement of the said award of \$40,000.00 under consideration would be justified.

[38] Accordingly, I increase the said award to \$50,000.00 running the risk of being asked why not \$45,000.00 or \$55,000.00? That is the ‘artificiality’ Lord Diplock spoke of (supra, paragraph [31] above, as much as numerous precedents cited by parties before this Court, which had gone on the relevant considerations such as the age of the victim, nature of injuries sustained and the nature of lost amenities had declined to enhance the award made by the trial court in some, for example, (**Vishwa Chand v. Sheik Mohammed Amin** [2015] FJCA 143 and **Fiji Forest Industries Ltd. v. Naidu** [2017] FJCA 106) and the decisions which had enhanced the award, for example, (**Wati v. Permanent Secretary of Health** [2016] FJCA 72. **Mere Finau Labaivalu v. Pacific Transport Co. Ltd.** Civil Appeal No. ABU 0059 of 2014, 26<sup>th</sup> May, 2017 and **Nasese Bus Company Limited et al v. Muni Chand**, Civil Appeal No. ABU 40 of 2011, 8<sup>th</sup> February, 2013.

[39] That illustrates the point made by Lord Diplock which I have referred to above when His Lordship had cautioned that examination and analysis of comparable awards inevitably differ in the facts.

[40] This is why I felt the need to conceptualise and/or look for a rationale or basis in enhancing an award made by a trial Court which I have attempted to do and suggested above in this judgment.

#### **The award made by the High Court for future economic loss**

[41] The learned judge awarded a sum of \$3,463.20 for “future economic loss.”

[42] Going through the impugned judgment, it cannot be said that, the learned judge did not consider the evidence and percentages and formulae arising in that context employed in past precedents as well.

[43] The learned judge had found as follows:

*“Considering the evidence before me the impact of injury to the earning capacity has to be minimal or less than 10%. If not, the*



*plaintiff, would not have quit his medical reviews since June, 2010 nearly 6 months from the injury. Considering the evidence before me one cannot rule out any impact from the injury to the earning capacity as he was a casual worker and the radiological evidence shows unstable condition. The only logical conclusion is the impact of the said injury from the accident was less than 10% or not significant to the plaintiff or he was afraid of revealing his present medical condition."*

(page 23 of the Copy Record)

**Conclusion drawn by the Judge thereon**

[44] His Honour had concluded:

*"From the above contentions I take the one that is most beneficial to the plaintiff (i.e. the injury diminished the earning capacity by 10%?) So the multiplicand is 10% of \$74 (for a week) x 52 and considering the age of 41 the multiplier at 9 is used. So the economic loss is assessed at FJ\$3,463.20."*

**Mr. Sens's challenge to the said assessment**

[45] Learned Counsel posed the question thus:

*"How could that figure have been arrived at, 74 x 52 being without regard to the multiplier of 9 (even if a multiplier of 10 was to be ignored)."*

[46] Consequently, Counsel submitted the correct figure ought to have been,  $74 \times 52 \times 9 = \$34,632$ .

**My conclusion in regard to the award made by the learned judge for future economic loss**

[47] With due respect to Counsel's said submission, I do not think that, His Honour had erred in his calculation in that regard. In my view, the miscalculation is that of the learned Counsel in his use of the 'multiplier' as opposed to the 'multiplicand' which the learned judge had correctly employed.

[48] Accordingly, I make order affirming the award of \$3,463.20.



**Re : the trial judge's assessment and the ensuing award for special damages**

[49] I shall break the claim of the plaintiff for special damages as follows and deal with them accordingly.

**Past economic loss**

- [50] (i) Loss of earning (\$1,924 + \$154)  
(ii) Travel Expenses (\$120) and  
(iii) Nursing Care

[51] In regard to (i) above, the learned Judge is seen not being prepared to go beyond, 2010. I found no reason to interfere with that on the basis of his reasoning which I have recapped earlier in this judgment.

[52] In regard to (ii) above, I affirm the said award which the learned Judge made while making the observation that, he has been fair by the plaintiff in regard to the same which he made even in the absence of evidence to that effect.

**Re: the Appellant's Counsel's lament in regard to "Nursing Care"**

[53] Counsel was heard to submit that, nothing had been awarded on that ground.

[54] Adverting to the evidence on record, Counsel submitted that, in consequence of his wife being killed in the accident and the three infant children he was left with, it was his brother and mother who had taken upon themselves the obligation to take care of him. (vide: page 98 of his evidence as per the Copy Record).

[55] Asked whether he had to pay them back he answered "Yes". (page 99, *supra*).

[56] At page 100 of the Copy Record it is the plaintiff's evidence in regard to "nursing care" by "his brother and mum and others" (page 99 of the Copy Record) that might have impacted on him to "pay back" to them, "a sum of \$80 to \$90" (as being the cost

of tablets – supra, at page 100) which if construed in the context of the plaintiff's evidence, he had "promised to pay his brother back" (page 100, supra).

**Did such a promise in the nature of a moral obligation entitle the plaintiff for damages under the head "nursing care?"**

- [57] Such a moral obligation has been recognised in England without a further requirement of a legal obligation (vide: **Roach v. Yates** [1938] 1 KB 256). In **Schneider v. Eisovitch** [1960] 2 QB 430, the said obligation had been recognised categorising the expenses involved as "out of pocket expenses" borne by a third party (per Paull, J).
- [58] While it is true that Diplock, J in **Gage v. King** [1961] 1 QB 188, had distanced himself from the approach in **Schneider's** case (supra) on the ground that the test of recoverability of damages was "legal liability" (as opposed to "a moral liability") I found that, the two cases were not "*in pari materia*" given the additional factor that **Roach v. Yates** (supra) had not been cited in either **Schneider** (supra) or in **Gage's** case (supra).
- [59] For my part, I prefer Paull, J's view in **Roach v. Yates** (supra) which I adopt in my considered opinion as being the more appropriate approach in the context of Fiji.
- [60] The Plaintiff may recover any medical or related expenses, such as hospital, nursing or special accommodation costs that he has reasonably incurred or will reasonable incur as result of his injury, the former being part of his special damages and the latter part of his general damages (vide **Clerk & Lindsell on Tort** 16th Edition at page 272). The learned authors further state at page 264 that '.... in a series of decisions it has now been clearly established that the plaintiff can recover in respect of the services rendered irrespective of any legal obligation to reimburse the third party.' Consequently, I believe that although the plaintiff had not specifically pleaded "nursing care" in his statement of claim (page 92 of the Copy Record), the sum of \$80 to \$90, referred to in his evidence (page 99 of the Copy Record) and referred to by me at paragraph [56] of this judgment, should be awarded in the facts and circumstances of this case. However, this award should not be seen as undermining the well

established principle that the plaintiff should give warning in his pleadings of any special damages to avoid any surprise to the defendant at the trial.

**As “incidental reasonable services”**

[61] I do so as a matter of principle (although as regards a small amount of \$80 to \$90 taking the mean as \$85.00).

**The Claim for private doctor expenses**

[62] There has been no complaint in regard to that.

**Premtilaka JA**

[63] I have read in draft the judgment of Guneratne JA and agree with the reasons and orders proposed therein.

**Orders of Court**

1. *The appeal is partly allowed in that,*
  - (a) *the award of \$40,000 as general damages is increased to \$50,000.00 along with interest at the rate specified in the High Court Judgment.*
  - (b) *a sum of \$85 is awarded as special damages along with interest at the rate specified in the High Court Judgment for special damages.*
2. *Subject to the above the High Court Judgment is affirmed.*
3. *The Appellant is entitled to post-judgment (High Court) interest in terms of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap 27).*



4. *The Respondent is ordered to pay the Appellant a sum of \$2500.00 as cost in this Court.*



**Hon. Justice E. L. Basnayake**  
**JUSTICE OF APPEAL**



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



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