

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

**CIVIL APPEAL NO. ABU 42 of 2016**  
**(High Court HBC 282 of 2013)**

**BETWEEN** : **AVINESH KUMAR**

**Appellant**

**AND** : **RISHKEN SHANEEL KUMAR**

**Respondent**

**Coram** : Chandra JA  
Jameel JA  
Wati JA

**Counsel** : Mr A. Sen for the Appellant  
Mr V. Sharma for the Respondent

**Date of Hearing** : 19 February 2018

**Date of Judgment** : 6 July 2018

**JUDGMENT**

**Chandra JA**

[1] This is an appeal from a judgment of the High Court delivered on the 8 April 2016. The Appellant had commenced an action in the High Court claiming damages for injuries sustained by him as a result of a motor accident.

- [2] The Appellant had while riding a motorcycle on 25 May 2013 collided with the vehicle driven by the Respondent as a result of the Respondent suddenly taking a U turn without notice. The Appellant had been thrown out of the motor cycle and he sustained injuries.
- [3] In his statement of claim the Appellant alleged negligence on the part of the Respondent. He set out the injuries suffered by him as:
- (a) Open segmental fracture of right tibia and fibula;
  - (b) Lacerations to his back;
  - (c) Lacerations to his hip;
  - (d) Abrasions to his head.
- [4] The Appellant had been taken to Navua Hospital after the accident and later transferred to CWM Hospital and thereafter taken to Suva Private Hospital where he was admitted and treated. He had remained at Suva Private Hospital till 7<sup>th</sup> June 2013.
- [5] The Appellant claimed that he suffered loss and damage as a result of the accident in the form of pain and suffering, loss of amenities, and that he was totally handicapped.
- [6] The Appellant claimed special damages, general damages, interest and costs.
- [7] The Respondent in his statement apart from admitting that he was the owner and driver of vehicle ED 865, denied the allegations made against him and stated that he was unaware of the contents raised in the averments of the statement of claim.

**The Trial before the High Court**

- [8] At the commencement of the trial, the Respondent admitted negligence on his part and the case proceeded only on the quantum of damages. While the Respondent admitted negligence, it was proposed to produce a DVD which was prepared on 14 November 2014 in which the Appellant was featured, and which the Appellant had agreed to admit. The DVD apparently had five clips, but what transpires from the evidence in the record is that only two clips are referred to.



- [9] The Appellant's evidence comprised of the evidence of three Doctors, himself, his wife and one other witness. The Respondent did not lead any evidence.
- [10] It may be relevant to consider the evidence of the three Doctors who gave evidence, to whom the DVD was shown and who gave their opinions on what they observed of the Appellant as seen in the clips of the DVD.
- [11] Dr. McCaig was the first witness and had referred to Medical Report dated 26<sup>th</sup> June 2014 which he said was signed by his Father (Dr. McCaig Snr) and to his report dated 5<sup>th</sup> December 2014. He had not examined the Appellant since December 2014, at which time he was using crutches and not walking normally. He had recognized the Appellant in the first clip of the Video and stated that he appeared to be mobilizing well and had shown good mobility when driving the car, was fully weight bearing getting in and out of the car and was fully able to support body weight without using walking aids. Answering Court he had stated that using crutches means the Appellant was still in pain.
- [12] Dr. McCaig (Snr) had examined the Appellant on 16.6.2014 and in the report issued by him had referred to the injuries that the Appellant had suffered , the treatment he had been given, and he advised him to have the screws and rod that had been used in the surgery be removed. He had observed that in his present state he could not be able to return to manual type work. Dr. McCaig (Jnr) who gave evidence had issued a report on 3th December 2014 and stated that *"On review in 2014 he complained of chronic right leg pain and his x-ray's showed a delayed union of his tibia fracture. On the 4<sup>th</sup> of July 2014 he had removal of static interlocking screw to allow dynamisation of his fracture"*.
- [13] Dr. Taloga referred to the medical report given by him and referred to the fracture he observed that the fracture had united, and that the appellant should not have any pain. That he had not seen the medical report of Dr. Ronal Kumar. He had recognized the Appellant in the first Video clip and stated that he did not appear to be in pain nor was he in need of support for the right leg, that he could return to office work after the 2013



report and that he should be able to return to normal work in 2016 but he said that he had to examine him.

- [14] Dr. Taloga had in his Permanent Impairment Assessment dated 22 June 2014 when he had examined the Plaintiff at Suva Private Hospital stated that the Plaintiff walked into the clinic with a limp and a single forearm crutch for support. It stated that the wounds over the affected leg had healed well, the right quadriceps was wasted by about 2.5 cm., the right leg slightly edematous but motions to the knee and ankle were comparable to the left side. He stated that the permanent impairment as a result of the injury sustained by the Appellant is due to thigh muscle atrophy, which is rated at 4% of the whole person.
  
- [15] Dr. Taloga had examined the plaintiff on 15 June 2015 and issued a medical report dated 21 June 2015. In that report he has referred to the medical reports of Dr. McCaig and about his advice to the Appellant not to resume manual work. He also made reference to Dr. Raina Shimona and the CWM Hospital Psychiatric Team on 27/7/2014 diagnosing him to be suffering from Severe Depressive Episode. His examination had revealed that the plaintiff was using a single forearm crutch for support.
  
- [16] Dr. Ronal Kumar stated that he had examined the Appellant on 19th February 2016 and that he needed to use a single crutch. He said that according to the video clip he appears to walk normally, that he does not appear to be in pain, that his assessment would be different and that he would have to recalculate. He said that in Clip 3 the Appellant was using a crutch.
  
- [17] Dr. Ronal Kumar had seen the Appellant on 19<sup>th</sup> February 2016 at CWM Hospital and issued a Permanent Impairment Assessment Report after examining. He had observed the Appellant walking into the examination room assisted with a pair of crutches. In his determination he had stated: 33 months post injury and currently no ongoing treatment for patient and no procedures are planned in the next few years except for on-going Psychiatric evaluation and treatment which has not been accommodated in his report. He rated the total whole person impairment at 23%. He referred to the fact that the report



had been written in accordance with the current edition of the Fiji Impairment Guides and AMA 5.

- [18] The Appellant who was 38 years of age stated that at the time that he met with the accident he was employed as the Recovery Officer Legal at Vodafone. His position had been made redundant and he ceased to be an employee of Vodafone on 27<sup>th</sup> July 2013. Thereafter he had worked for Carpenters Fiji Limited from 15<sup>th</sup> September 2014 as Supervisor Recoveries but had resigned on the 4<sup>th</sup> of November 2014 on medical advice. As regards the injuries he suffered, he stated that he had been taken to CWM Hospital at first and thereafter on the same day he had been taken to Suva Private Hospital where he had been treated. He had been operated on in his right leg as there had been fractures to his tibia and fibula. It had been fixed with interlocking rod fixation. He had been in hospital for 14 days and he had not been able to mobilize. His wife had to assist him when he had gone home and had used crutches to walk about. He had attended clinic regularly. He said he had been prescribed anti-depressant medicines. He said that he could not walk normally and that he could not run or jog. When cross examined about the video clip he said that he could walk short distances without the aid of crutches and that he could not stand for a long time. His hobbies had been soccer, kickboxing and scuba which he said he was unable to do due to pain and discomfort.
- [19] The Appellant's wife, Reshmi Kumar, stated in her evidence about the treatment that her husband received, that he needed constant care as he cannot walk properly because of pain. That he could walk without crutches on flat surfaces. That apart from his leg problem, he had no other problem.
- [20] The learned trial Judge in his judgment relied on the medical report and evidence of Dr. Taloga where he had stated that the Appellant had a 4% permanent impairment. Much reliance was placed by the learned trial Judge on the video clips presented by the Respondent, in which the Appellant was seen walking without crutches, getting into a car and driving it. The Appellant was awarded as general damages \$18,000.00 less \$10,000.00 (which had already been paid to the Appellant by the Respondent as an interim payment), with interest at the rate of 6% per annum from date of filing of writ to



date of judgment for pain and suffering and loss of amenities. No award was made for loss of earnings, past, present or future, nor for any loss of earning capacity, partial or at all. The learned Judge opined that all the evidence suggests that the Appellant had made up his mind not to work anymore and not to take care of himself as any normal able bodied young man of his age would do. \$ 3031.35 with interest at 3% per annum from the day of accident to the date of judgment was awarded as special damages, and post judgment interest at the statutory rate on the judgment sum of \$11,031.35 to date of payment.

### **Appellant's Appeal**

[21] The Appellant filing his petition of appeal by himself, set down the following grounds:

- “1. The Learned Trial Judge erred and misdirected himself in law that in fact not considering the fact that the Appellant claim for economic loss both pre-accident and pose accident which there was sufficient evidence adduced by the Appellant's losses. It was open to the court to decide.*
- 2. The Learned Trial Judge erred and misdirected himself in law in his judgment the Appellant challenges the award on General damages \$18,000 by way of pain and suffering and loss of amenities as inadequate compensation and the failure to award any damages of loss of earnings either pre-accident or post-accident.*
- 3. The Learned Trial Judge erred and / or misdirected himself in law and in fact not considering the cycle of recovery needed for Appellant's injuries x-ray, medical reports, photos of the injuries were given as evidence to extent of injuries sustained. There was sufficient evidence adduced to the appellant. It was open to Court decision.*
- 4. The Learned Trial Judge erred in law and/ misdirected himself in law himself in the Judgment date which was printed and released by the High Court of Fiji at Suva that the Date of Judgment is 8 April 2015. Whereas it was to be 8 April 2016. (On the first page). Now the judgment of the Judge in paragraph 37 that having seen and heard him in the witness box and in the video, I am in a good position to assess the*



value of his evidence. My conclusion is his narrative cannot be accepted as the evidence of a reliable and credible witness. Again in paragraph 14, PW3 was in video clip 1, which has been taken in November 2013. (page 4) was again erred by the Judge it was November 2014. Now the Appellant doubt the judgment of the Judge which was signed off (page 13) believing that it was read and then signed by the Judge respectively.

5. *The Learned Trial Judge erred and/ misdirected himself in witness (PW2) in paragraph (1) that delay in recovery was due to the blood pressure in fact not considering that or taking into note of the psychoneurosis emotional instability and physical pain trauma the Appellant had at the time of accident which was been delayed from time of Accident till the treatment at Suva Private Hospital treatment delayed for more than 10 hours. The counsel of the appellant highlighted in witness paragraph 18(PW6) Appellant himself paragraph 25 (PW7) Reshmi Kumar (wife of the Appellant) time of accident point wasn't noted which happened at 10.55am went to Navua Hospital around 11.30am there was no doctor came told that it's a serious fracture on the right leg have to transfer to CWM by ambulance around 1430 ours transported to CWM all the necessary documents done nurse attended and told that have to wait for Doctor; waited till 19:30 hours then our family and friends decided to go to Suva Private Hospital then the Appellant was transported to Suva Private Hospital around 20:00 hrs all documents done then the nurse did all necessary actions required for urgent admission. Appellant Medical report dated 22<sup>nd</sup> September 2013 in paragraph 2 specified that the post operative rehabilitation was delayed due to complaints severe headaches from uncontrolled hypertension in fact unfairly the trial Judge not considering the fact that the psychoneurosis emotional instability and physical pain and trauma is a life time experience the appellant had at the time of accident which is ongoing. This there was sufficient evidence adduced by the appellant. It was open to the court to decide.*
6. *The Learned Trial Judge erred and / or misdirected himself in law and in fact not considering the fact that the Appellant will undergo removal of rod and screws once the leg have heal or replace the rod if infected in case. There would be uncertainty in his earning and drop of income or employment insecurity to the Appellant will be concerned about the likely result of treatment and whether he is able to resume a full role in his working and social life such fears, anxieties etc now appellant*



*live with psychological disorder on daily basis and ongoing. This there was sufficient evidence adduced by the appellant's medical reports. It was open to the court to decide.*

7. *The Learned Trial Judge erred and/or misdirected himself in law and in fact not considering the fact that while the defence counsel under cross-examination showing the video clip (1) to the independent witness 3 Doctors they had not clearly reveal to the witness PW1, PW2 and PW3 when the recording was done. It wasn't highlighted that was recorded in 2<sup>nd</sup> November 2014 (PW2) though it was November 2013 that reasons out the statements for PW2 thought it was November 2013 that reasons out the statements for PW2 in paragraph (10). PW3 was confused and thought may be 2016. That reasons out paragraph (14). The Judge himself erred and noted in paragraph (14) in the Judgment it was November 2013. This was on the first day of trial Monday the 4<sup>th</sup> of April 2016. It was open to the court to decide.*
8. *The Learned Trial Judge erred and/or misdirected himself in law in fact in not considering that the Appellant wasn't working in an office environment pre accident employment what he was doing debt collections as a bailiff was a field worker where he would has to drive and walk long distance as the nature of his job to serve writs of summons to the defaulters for recovery of debts as required. Paragraph 11 (PW2) Dr. Taloga paragraph 13 (PW3) Dr Ronal both agreed was highlighted that Appellant should/can do office type job didn't say any type or manual job. Due that which appellant sustained personal injury opportunity is limited or disadvantage in job market. The point wasn't noted. It was open to the court to make decision.*
9. *The Learned Trial Judge erred and/or misdirected himself in law and in fact unfairly not considering (PW5) Sashi Prakash Appellant former employer (BOC Fiji) that he joint Vodafone because they paid higher salary (pre accident). In paragraph 17, it was relevant and his testimony point was not taken in account. Which there was sufficient evidence adduced by the appellant. It was open to the court to made decision.*
10. *The Learned Trial Judge erred and/or misdirected himself in law that the PW4 Moureen Ronika Chand, the Human Resource debt collection and legal officer that the total reward package was \$34,588. Appellant was only paid \$4,727.29 when he was made redundancy company tried to look for alternative position there was none available. The Appellant counsel asked to highlight that whether they knew that the*



*Appellant was involved in an accident answer yes. Was Appellant still on sick leave PW4 answered yes. Did he return back to work after his physical inability caused by his accident injuries answer No. That this point was rise for the Judge to note in fact in not considering this point should have been noted. It was open to the court to make a decision.*

11. *The Learned Trial Judge erred and/or misdirected in law in fact in not considering the fact that in paragraph 44 Appellant didn't lose his job at Vodafone because of his injuries or disabilities he was redundant because of structural charges which was a future event Judge had concluded in fact not considering the fact when huge organization like Vodafone Fiji in 2013 only redundant one person position which was the Appellant. When Vodafone was fully aware of his accident events and physical inability caused in injuries which would not match his job which the appellant was doing before his accident in 25<sup>th</sup> May 2013.*

*Judge not considering the fact that contract valid (was) for 3 years which was made in 22<sup>nd</sup> April 2013 till April 2016. Judge in fact not considering the fact that after the Appellant accident 25/5/2013 discharged from hospital 7/6/13 made redundant on 17/7/13 while the Appellant was still in his recovery cycle not returning back to work because he was recovering at his home. Whereas the Appellant under the circumstances was unable to negotiate with management regarding his employment not giving opportunity to his right to be heard and his right to his respond. Appellant main consent was his recovery what any person would have done. It was open to court to make a decision.*

12. *The Learned Trial Judge erred and/or misdirected himself in law and in fact in not considering the fact that the Appellant was working on much lower salary after his accident with Carpenters Finance for \$20,000 per annually. Whereas he was Supervisor Recoveries that was an office desk job. Which there was sufficient evidence adduced by the Appellant. Point wasn't in noted in Judge Note. For losses of earnings capacity post accident. It was open to the Court to make decision.*
13. *The Learned Trial Judge erred and/or misdirected himself in law that in paragraph 8 getting in and out of the car. Whereas in the video clip 1 didn't show getting out of the car. Judge had misconcluded himself it was open to court to decide.*



14. *The Learned Trial Judge erred and/or misdirected himself in law and in fact not considering the fact that the appellant in video clips 5 and 6 was using his one crutch whereas he wasn't aware that was recorded which was presented in the court as evidence by the defendant counsel. Judge unfairly not take-in to account this point wasn't recorded in the Judge's note. Which there was sufficient evidence adduced by the appellant. That was open to the court to decide.*
15. *The Learned Trial Judge erred and/or misdirected himself in law and in fact not considering the fact that the video clip which was shown in court was recorded in 2<sup>nd</sup> November 2014, now/deferred 18 months before the trial date. This point wasn't noted by the Judge that was taking as evidence in court. It was open to the court to decide.*
16. *The learned Trial Judge erred and/or misdirected himself in law and in fact not considering the fact that Dr Ronal Kumar medical report was in detailed and more recent report which was from the Government Hospital dated on 19/02/16 also aware of Appellant current medical condition. It was open to the court to decide.*
17. *The Learned Trial Judge erred and/or misdirected himself in law or in fact not considering the fact that the Appellant is affected by his psychological problem and his treatment is ongoing. In paragraph 40 was in Judges noted that no psychiatrist was called to give evidence to confirm any mental problem. Counsel for the Appellant highlighted that Dr Jane Andrew Acting National Advisor Mental Health has immigrated due to no other doctors was available at trial date. It was noted in the Judge note. There was sufficient evidence adduced by the Appellant medical reports and was open to the court to decide.*
18. *The Learned Trial Judge erred and/or misdirected himself in law or fact considering the fact that in paragraph 23 the boxing gloves in his boot and they were on top of the crutches the Judge unfairly concluded that Appellant have gone back to his life which was before accident but not taking into account of medical reports by the doctors for the Appellant. For which this recording was done 18 months before the trial date and Judge fell into the error of rejecting other evidence as for the current medical condition of the Appellant. It was open to the court to decide.*
19. *The Learned Trial Judge erred and/or misdirected himself or in fact not considering the fact that in paragraph 41 Judges*



*noted that the report in CWM dated 16/2/2016 Appellant told doctor Ronal Kumar that he does not remember any events following this and only remembered waking up in at CWM hospital 2 days later. Also has a degree in taxation law and employment was with Vodafone as a legal – Protocol manager all this was purely imaginary by the Appellant where in Paragraph 15 HR Manager confirmed that he was employed as the debt collection and legal officer. Dr Ronal Kumar noted that the 1<sup>st</sup> version of folder was not presented to him. It was open to the court to decide about his mental behavior on his imaginary world he made post accident and it was clear that mental assessment not taken into account should have noted that it won't be beneficial to the Appellant for impairment report. Medical reports on psychiatric symptoms of (schizophrenia) psychotic disorder that distorts the way person thinks acts that is ongoing for indefinite time Appellant was diagnose July 2014 and September 2015 on mental status. Which there was sufficient evidence adduced by the appellants. It was open to the court it decides.*

20. *The Learned Trial Judge erred and/or misdirected himself by in paragraph 10 (PW2) was Mr Emosi Don tologa as an orthopedic specialized which he was taken as an expert witnesses that in Fiji pain is not considered in his report. That the Appellant has no basis for complaining of pain that after discharge 7 June 2013 should have gone back to work what he was doing after (office desk job) not considering the fact that appellant sustained a multiple fracture on his right leg (PW2). He told the court that he wasn't aware of any other doctors report in paragraph (10). Whereas on 21<sup>st</sup> June 2015 defendant counsel paid (PW2) Dr Taloga orthopedic clinic at Suva Private Hospital to write medical report for the Appellant in the report paragraph 2 he wrote in brief about medical report which he have seen which was written by other doctors in the same report he highlighted that the area around the ankle joint was discoloured. PW2 testimonies was hostile to the Appellant. PW2 credibility was in doubt and that he has misled the court. Which there was sufficient evidence adduced by the appellant. It was open to the court to decide.*
21. *The Learned Trial Judge erred and/or misdirected himself by in paragraph 11 only video clip, I was shown to PW2 that his walking and driving seem to not in pain in fact in not considering that the video clip was less than 20 minutes. PW2 was taken as an Expert in defendant submitted. PW2 after*



*seen the video clip said after June 2013 he should have gone back to what his was doing before. He misled*

22. *The Learned Trial Judge erred and/or misdirected himself in law and in fact in not considering the fact that PW3 Dr Ronal Kumar report shown the calculations but PW2 has not shown. That he has not seen the Plaintiff walking without crutches means 2016 when he came for medical report. This report was based on the most recent one. As the doctor in paragraph 14 PW3 assessment would be now be different and much lower based on the video clip 1 that means if that was 2016 or to his understanding when the defended then showed video clip 1 also told PW3 which was taken in November 2013 which would be 6 months after the accident in fact was taken in November 2014 which was 18 months after the accident which the defendants counsel mislead the PW2 in court. It was noted by the Judge. This there was sufficient evidence adduced by the appellant. It was open to the court to make a decision.*
23. *The Learned Trial Judge erred and/or misdirected himself in law and in fact in not considering the fact that the appellant counsel in examination Question 97 asked the Appellant what is the total amount was paid for your treatment \$19,946.58. Did asked how it was paid that was confirms by the wife. Paragraph 30 counsel for the defendant credibility was in doubt. In paragraph 31 counsel said he had no evidence but without evidence contended the insurance company. Unfairly the Judge has disallowed this there was sufficient evidence adduced by the Appellant.*
24. *The Learned Trial Judge erred and/or misdirected himself in law and in fact in not considering the fact that the Appellant contract came to early end and the contract was made on 22<sup>nd</sup> April 2013 which was for 3 years but terminated within 2 month after the Appellant's accident on 25 May 2013 in paragraph 18 Appellant (PW6) told the court point wasn't noted by the Judge. This there was sufficient evidence adduced by the Appellant was open to the court to make a decision.*
25. *The Learned Trial Judge erred and/or misdirected himself in law and in fact considering under cross examination by the defence counsel to PW4 will Vodafone Fiji would terminate a person with disability answer was no. Quality or type of question tended in court to the witness was putting words into a person's mouth or discriminatory rights to any persons or appellant. It was open to the court to make decision.*



26. *The Learned Trial Judge erred and/or misdirected himself in fact in not considering that the appellant told the court that he can walk without crutches to help him to relax. He can drive with his injured leg for a short distance not in heavy traffic where Appellant has to keep on pressing the breaks or long distance driving needs to stretch his legs. Cannot walk for long or stand or sit or work in feel pain in hot and cold weather on my ankle joints gets swelling and back pain in this circumstance Appellant cannot concentrate due to his discomfort and anxiety some times. He was working as Debtors collection officer work was field related job. That the Appellant is not claiming that he cannot walk without crutches he told the Court that when needed then Appellant does use crutches he told the court that when he needed then Appellant does use (crutches) on timely manner this was the testimony given by the appellant very fair to/for any person whose taking extra care for his injuries not to re fracture on the same leg. It was open to court decision.*
27. *The Learned Trial Judge erred and/or misdirected himself in fact in not considering that the doctors been issuing sick sheet means to (rest and alleviation pain) to the Appellant fit to light duty job as stated in paragraph (45) evidence was the issued sick sheet itself which there was sufficient evidence adduced by the Appellants that there are some uncertainty in his life or employment currently and had been visiting the hospital. It was open to the court to make decision.*
28. *The Learned Trial Judge erred and or misdirect himself in law in the Judges note that in paragraph 24 that Appellant denied that there is no mental issues and his lying in court about his impairment the Judge have misdirect himself or misconcluded.*
29. *The Learned Trial Judge erred and/or misdirect himself in law and in fact in not considering the fact the Appellant denied he resigned on 4 November 2014 because of the video in paragraph 22 whereas he was unaware of the video shooting till the following week. Appellant told the court that in mid 2015 till now his still looking for employment against but was unsuccessful because the previous job that he was doing was field related. I have to train to go back in office desk job where I will be getting less pay. Which there was sufficient evidence adduced by the Appellant. It was open to the Court to make decision.*
30. *The Learned Trial Judge erred and/or misdirect himself in law that the Appellant was driving his car in paragraph 23 he unfairly noted that Appellant was saying in video clip 1 the car*



*uses \$30 of fuel to travel 150km and he drives pretty fast and in fact not considering the fact that the appellant was driving at less than 30km per hour and not pressing the breaks only putting his right leg in very conscious manner not putting too much weight on the accelerator pedal and foot brake. He drove the car less than 1.5 km in distance. Appellant told the court that he was just trying to sell his car and convince them to buy where I needed money. It was open to the court to decision.*

31. *The Learned Trial Judge erred and/or misdirected himself in law and in fact not considering the fact that the appellant in special damages had paid for the paragraph 50 line 3 sum of \$13,500 to purchase his motor bike registration 992E and riding gear for \$3199 altogether total \$16,699 which was damaged in the accident was not allowed which there was sufficient evidence adduced by the appellant. It was open to court to decision.*
32. *The Learned Trial Judge erred and/or misdirected himself in law and in fact only relaying on video evidence which was taken on 2<sup>nd</sup> November 2014 clip (1) and in fact not considering the video clips 2, 3, 4, 5, 6 were the appellant was using walking aid not taking into note of that it was usual for any person with type of injuries like the appellant at some point of time have to use working aid to relax consequence aftershock for what was shown in video clip (1) current ongoing medical condition and uncertainty or difficulty in future of the Appellant Judge fell into the error of unfairly rejecting other evidence it determine that after looking at the video clip 1 the Judge had to pre conceive mind on appellants response. Where the Judge failed to take notes on points raise in the trial of Appellants which there was sufficient evidence adduced by the Appellant. It was open to the court to decide."*

[22] At the hearing of the appeal, the Appellant was represented by Counsel. An amended notice and grounds of appeal had been filed on behalf of the Appellant on 14<sup>th</sup> February 2018 which was objected to by Counsel for the Respondent. The objection was upheld and the Appellant chose to rely on the grounds of appeal filed originally.

[23] The grounds of appeal which apparently had been prepared by the Appellant himself were not in a proper legal framework and were longwinded and repetitive. However, I



have made an endeavour to summarise his grounds of appeal as being the failure of the learned trial judge to consider the economic loss, past, present and future; inadequacy of general damages for pain and suffering and loss of amenities; failure to consider psychoneurosis emotional instability, physical pain and trauma which the Appellant had at the time of the accident which is ongoing; failure to consider uncertainty in earning capacity and drop in income; failure to consider that the Appellant had been a field worker being a bailiff and one who had not been working in an office environment; failure to consider the entirety of the video clips and the date on which the video recording had been done; failure to consider the report of Dr. Ronal Kumar which was the latest detailed medical report; the wrong inferences drawn by the learned Judge regarding his gloves being found in the boot of the car; and the wrong inference regarding his ability to walk without crutches.

- [24] The Appellant had met with the accident on 13<sup>th</sup> May 2013 and had been hospitalised immediately and treated. He had been discharged on 7<sup>th</sup> June 2013 and thereafter had attended clinics regularly, during which time the rod and the screws that had been fixed earlier to correct the fractured right leg were removed.
- [25] The video clips which had been prepared (which the Appellant said was unknown to him at the time of such preparation) by the Respondent in November 2014, played a major role in the trial. The three Doctors who gave evidence based their evidence mainly on the clip showing the appellant walking without crutches to the car, getting into it and driving it away. Very little significance appears to have been placed on the clip showing the Appellant using the crutch to walk about. It is assumed that all the video clips were prepared on the same day.
- [26] If all the video clips had been prepared on the same day, it cannot be ruled out that the Appellant used a single crutch to walk, in comparison to the clip showing him getting into the car and driving it. This was consistent with his evidence and his wife's evidence that he could walk on flat surfaces without a crutch for short distances. Even the latest medical report, which was given by Dr. Ronal Kumar on February 2016 referred to the



fact that the Appellant had walked in with the use of a single crutch. This would show that the Appellant who was seen walking with a single crutch in November 2014 (the date of the video clip) was still doing so in 2016, as well.

[27] In respect of the video clip showing the Appellant walking to and getting into his car, all three Doctors stated that he seemed stable. It would have been relevant to note the time that the Appellant took to walk to the car, whether he used the crutch to get to the car to put it in the boot of the car and the time he took thereafter to get into the car etc. If the distance was a short distance, then it would be consistent with his evidence that he could walk only short distances without the crutches.

[28] Dr. McCaig stated in answer to court that using a crutch meant the Appellant was still in pain. There was no comment by Dr. Taloga regarding the video clip showing the Appellant walking with the aid of a crutch. But he stated under cross-examination that the Appellant should have been able to resume office work after the 2013 report and that he should be able to return to normal work in 2016, but stated however that he needed to examine him. On being shown the 3<sup>rd</sup> video clip Dr. Ronal Kumar in his evidence stated that the Appellant was using the crutch but did not make any comment on same. He in his evidence stated that he had not seen the Appellant walking without crutches.

[29] It would appear therefore, that the three doctors on seeing the video clip showing the Appellant getting into the car were of the view that the Appellant was stable and not appearing to be in pain. On the other hand, there is no separate comment by any of them regarding the clip showing the Appellant walking with the crutch.

[30] In the above circumstances, the question then arises is to the correctness of the inferences drawn by the learned trial Judge, regarding the condition of the Appellant, specially when he stated in his judgment at paragraphs 37 and 38 as follows:

*“37. I start by noting that one thing stands out in this case with the utmost clearness and that the admitted actions of the Plaintiff as shown in the video clip. He is walking without a single crutch and*



*unaided by anyone. He is walking without a limp. He skipped into the car and reversed it. He is using his right (injured) leg to operate the accelerator pedal and foot brake. He is saying to his passenger that he drives pretty fast. He displays a cheery disposition. In the boot of the car are his boxing gloves placed on top of his crutches. This surely is evidence of a return to his previous sporting activity and that the crutches are no longer needed. So it is therefore flatly incredible that he is alleging he is unable to work and need the nursing care of his wife. Having seen and heard him in the witness box and in the video, I am in a good position to assess the value of his evidence. My conclusion is his narrative cannot be accepted as the evidence of a reliable and credible witness.*

*38. I would have thought, seeing his performance in the video should have brought the Plaintiff back to reality. But it did not. It is a matter for regret that neither he nor his Counsel saw fit to prevent further expenditure of court time, by recognizing that a major part of the Plaintiff's claims had collapsed and acting appropriately, by for instance dispensing altogether with PW5 whose evidence was so irrelevant that the Defendant's Counsel asked him only one question to which the answer was the Plaintiff's lawyer called him to give evidence. And Plaintiff's Counsel continued to advance arguments for claims which fail in limine."*

- [31] It would appear that the learned trial judge had based his conclusions on his observations of the video clip in which the Appellant was seen getting into the car and driving off. There is no reference by the learned trial Judge to the video clip showing the Appellant walking with the use of the single crutch nor the evidence of the Doctors and their medical reports.
- [32] It is important to note that Dr. Taloga, on whose impairment assessment reliance was placed, had in his evidence only stated that the Appellant would have been able to get back to normal work in 2016, from which the inference could be drawn \*\*\*\*that the Appellant was having some disability and discomfort from the time of the accident in May 2013 to 2016.
- [33] It is usual for an Appellate Court to go by the inferences drawn by the trial Judge as he would have seen the witness's demeanour and deportment. It may be that the Appellant in the present case was trying to exaggerate and show Court his disability and overdid it as is often seen in actions claiming compensation for injuries suffered in accidents.



[34] But in the present case, with all due respect to the learned trial Judge, he seemed to have ruled out most of what the Appellant claimed because of his assessment of the Appellant, as described by him in paragraph 37 of his judgment.

[35] With that background I would venture to consider the claims of the Appellant, as regards adequacy of the general damages awarded for pain and suffering, loss of earnings, loss of earning capacity, interest, as they seem to be the main matters arising out of the grounds of appeal.

**Damages for pain and suffering and loss of amenities**

[36] The Supreme Court in **The Permanent Secretary for Health and Another v Kumar** CBV 6 of 2008 – 3 May 2012) set out the principles to be applied by courts when assessing damages for pain and suffering and loss of amenities as:

*“[37] 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 could not even be anticipated at the stage a court makes an award. Hence, an 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 also 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”.*

[37] In the present case, the learned High Court Judge awarded a sum of \$18,000.00 for pain and suffering and loss of amenities. The Appellant submits that this sum was inadequate.



The award has been based on the report of Dr. Taloga who had stated that the permanent impairment was 4%. On the other hand, Dr. Ronal Kumar in his report which was of a later date in 2016, that stated the permanent impairment was 23%, which of course he stated in his evidence after seeing the video clip when he also stated that he needs to do a reassessment. There is really no firm assessment regarding his permanent impairment, though Dr. Taloga in his evidence stated that he would stick to his 4% assessment, without requiring a further examination of the Appellant physically.

- [38] The question that therefore arises as to whether the award granted by the learned trial Judge, is firstly fair, conventional and consistent, and how does it compare with comparable cases in keeping with the principles enunciated in Kumar's case (supra) cited above.
- [39] The Appellant as a result of the injuries he received in his right leg, had been hospitalized, undergone surgery, attended medical clinics for the injuries suffered and had other complaints which he attributes to the injuries suffered, was able to walk only short distances on flat surfaces only without a crutch, but had to otherwise use a crutch for walking, he still has pain and discomfort, had lost his ability to participate in the sports that he indulged in earlier like soccer, kick boxing and scuba diving at a young age, being 36 years at the time of the accident.
- [40] In claiming damages for pain and suffering it would have been useful if the Appellant had led evidence as to the permanent nature of the disability that he had suffered, and in terms of a time period to establish for how long such discomfort would have to be endured, the period for which he would have to use crutches before being able to walk normally without such aids, the psychological effect that such discomfort had on him. Unfortunately, such evidence is not available in this case, although three doctors had given evidence on behalf of the Appellant.
- [41] The clear factors in favour of the Appellant are that Dr. Taloga's position that he would not be able to resume normal work until 2016, which is a period of about 3 years from the



date of the accident and the fact that he had been in employment only for about three months since the occurrence of the accident, his evidence that he was not in a position to resume his normal work which he stated was field work, being a bailiff, that he had been seen by Dr. Ronal Kumar using a single crutch to walk when he saw him in February 2016, (three years after the accident), his evidence that he was unable to walk long distances without crutches, and a crutch was needed according to medical evidence, as otherwise there would be pain.

- [42] There is a divergence of views regarding the permanent impairment assessment as Dr. Taloga has stated it is 4% without any specific basis to support same, while Dr. Ronal Kumar has stated it is 23% which had a more detailed basis, supported by medical guides. After seeing the video clips, Dr. Taloga said he would still maintain his assessment at 4%, (without examining the Appellant again), while Dr. Ronal Kumar stated that he would have to do a re-assessment.
- [43] The divergence in the permanent impairment assessment creates a dilemma as it becomes difficult to use comparative cases where the damages have been granted on the basis of permanent impairment assessment.
- [44] In looking for a comparable case in Fiji, the High Court decision in Asish Mudaiar v Rajesh Sharma and Another (Civil action No.3 of 2012 – 4 April 2014) comes very close to the present case. In that case the Plaintiff, who was 34 years at the time of the accident suffered injuries by being crushed between two buses and thereby fracturing his right femur. The nature of the injury was such that the plaintiff had to undergo similar type of treatment of surgery, insertion of a rod, removal of rod etc. There was no permanent impairment assessment, but the Doctor had stated in his evidence that he may have put down such assessment in the range of 22% to 25%. The Plaintiff was awarded \$60,000.00 for pain and suffering.
- [45] In the present case although the learned trial Judge based his computation of damages at \$18,000.00 for pain and suffering on the basis of the 4%, being the assessment given by Dr. Taloga, for the reasons set out earlier, that does not appear to be a proper assessment.



On the other hand, complete reliance cannot be placed on Dr. Ronal Kumar's assessment of 23% as he said that he needed to re-assess after seeing the video clip of the Appellant.

- [46] The loss claimed by the Appellant not being susceptible to measurement in money, any amount at which the Court arrives at, cannot be other than an artificial sum, and as Lord Diplock stated in Wright v British Railway Board (1983) 2 All ER 698,

*"if the aim is that justice meted out to all litigants should be even-handed instead of depending on idiosyncrasies of the assessor, whether jury or judge, the figure must be basically a conventional figure derived from experience and from awards in comparable cases."*

- [47] While it may be sufficient, on a practical basis to assess damages for pain and suffering or other non-pecuniary loss upon amounts awarded in previous cases, I am conscious, at the same time that, such an approach may not provide a conceptual basis for such awards in general terms in as much as one cannot find an explanation as to why awards vary in different jurisdictions in personal injury cases. In recent times, there has been an upward trend in the award of damages in personal injuries cases in Fiji as well.

- [48] It may not be possible, to look for an all pervasive conceptual basis as to the awarding of compensation for non-pecuniary loss, for it necessarily will have to depend on such sums that are considered fair and reasonable compensation having regard to the socio-economic conditions of a particular jurisdiction. As Lord Morris said in West v Shephard (1964) AC 326 at 346:

*"Money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation .....as far as possible comparable injuries should be compensated by comparable awards ....."*

- [49] The Appellant in his closing submissions before the High Court had claimed a sum of \$45,000.00 on account of pain and suffering and loss of amenities. Considering the totality of the evidence I would consider that the sum of \$18,000.00 awarded by the High Court for pain and suffering and loss of amenities as being inadequate and would award a



sum of \$35,000.00 for pain and suffering and loss of amenities as being fair and reasonable, considering the time that has lapsed since the occurrence of the injuries, taking into account the rise in cost of living and inflation.

#### **Loss of Past Earnings and Future Earnings**

- [50] The Appellant had been employed as a Bailiff by Vodafone at the time that he met with the accident on 13<sup>th</sup> May 2013. In July 2013 he lost his position at Vodafone as his post was considered redundant. Although he alleged that he lost his job at Vodafone due to the injuries that he received, it was denied by the witness who gave evidence on behalf of Vodafone. The witness gave evidence to the effect that there had been structural changes and as a result his post was considered redundant.
- [51] Having lost his position at Vodafone, the Appellant in his evidence has stated that he applied to get employment elsewhere but had not succeeded. However, in 2014 he had secured employment at Carpenters but had resigned on his own accord after one month on medical advice, which position of course was not established by any medical evidence.
- [52] Even at the time of the trial, the Appellant had not been in employment. His position being, that he was unable to get back to work because of his condition resulting from the injuries he received as a result of the accident, and certain psychological disorders for which he was being treated.
- [53] In the closing submissions made on his behalf, he claimed for loss of earning capacity a sum of \$78,000.00 on the basis of loss of salary he was receiving while working for Vodafone, \$26,000.00 per annum for 3 years. He also claimed for loss of future earnings on the basis of \$26,000.00 per annum for 5 years.
- [54] The Appellant in his evidence stated that his normal work was field work which he was unable to do after the accident. The medical evidence regarding his ability to work after being treated, was in the evidence of Dr.Taloga who said that he would be able to resume normal work in 2016, which was about three years after the accident.



[55] The learned trial Judge in his judgment in dealing with this claim for loss of earnings stated:

*"44. As for the loss of earning and loss of earning capacity I note the Plaintiff did not lose his job at Vodafone because of his injuries or alleged disabilities. Vodafone made him redundant because of structural changes, which was a future event after he returned to work.*

*45. Carpenters did not terminate him. He left on his own volition. If it were because of doctor's advice, no doctor came forth to give evidence that he advised the Plaintiff to stop working.*

*46. For the above reasons I make no award for loss of earning, past, present or future, nor for any loss of earning capacity, partial at all."*

*49. At the end of the day all the evidence suggests the Plaintiff had made up his mind not to work anymore and not to take care of himself as any normal able bodied young man of his age would do."*

[56] It would appear that the learned Judge who had made his determination earlier in his judgment about the Appellant on the basis of the video clip showing that he was walking without the aid of crutches, getting into a car and driving off and without giving much effect to the medical reports, had determined that the Appellant was in a position to have started working.

[57] The video clip was prepared in November 2014. Therefore at least a period of about 18 months had passed from the time of the accident to that date. If the learned Judge was of the view that the Appellant was able to work, it would have been after November 2014. Dr. Taloga in his report had stated that he could have done office work after 2014 and would have been able to do normal work after 2016.

[58] As stated above, the Appellant was doing field work in his job and that was the work that he was accustomed to do. Therefore there is a question as to whether he should have sought to do some office work, which he said he was not familiar with, after he lost his job at Vodafone. He had in fact taken up a job at Carpenters, from which he resigned after about a month on the basis that he was medically advised to do. However, this was



not established by evidence. However, the fact remains that the Appellant had not resumed work except for that one month at Carpenters.

[59] In view of such evidence, the learned trial Judge should have considered granting compensation for loss of earnings, and therefore his failure to do so, would be erroneous.

[60] The Appellant was not in employment since July 2013 (except for the one month at Carpenters in 2014), and the medical evidence supported the position that he would be able to do normal work after 2016, which is a period of about 3 years. In those circumstances, I would consider it reasonable to grant him three years salary for lost earnings on the basis of \$ 26,000.00 per annum, totaling \$ 78,000.00.

[61] The question that remains to be considered is whether the Appellant is entitled to loss of future earnings. The medical evidence is to the effect that he would be able to attend to normal work after 2016. In his evidence the Appellant stated that he tried to find employment but he had failed to do so. He was 38 years of age when the trial was taken up, and seemed to be in a fairly stable physical condition. It may be that he would take some more time to find suitable employment, but he did not seem to be disabled to such an extent that he could never be able to find suitable employment.

[62] The Appellant in his grounds of appeal had taken up the position that the learned High Court Judge had failed to take into account the psychological disorders he was suffering from. Though not expressly stated by the Appellant, this apparently was the basis on which he wanted to establish his claim for future earnings. His position that he was suffering from psychological disorders has not been established before the High Court. He appears to have attended medical clinics for such complaints but there was insufficient material to establish same. The learned trial Judge had considered this position and arrived at the conclusion that he would not consider such a complaint, as no psychiatrist was called to give evidence.



[63] It is possible that an injured person would not want to work after he is healed and would want to get the maximum possible by filing action and claiming damages from the wrongdoer who caused the accident. There must be sufficient and convincing evidence to establish the position that a claimant is unable to secure employment in the future to be considered as being eligible for loss of future earnings. Such evidence was lacking and this probably was the reason that the learned High Court Judge arrived at the conclusion that he was a person who did not want to work, though being an able-bodied young man.

[64] In these circumstances, this Court is reluctant to grant any compensation for loss of future earnings as it would appear that the Appellant was in a position to find suitable employment after 2016. In the result, the Appellant would be entitled only to past loss of earnings as stated above and not for loss of future earnings.

#### **Special Damages**

[65] The Appellant claimed the following as special damages:

1. Hospitalisation in Suva Private Hospital - \$ 19,946.58.
2. Medication \$ 2,074.35.
3. Loss as a result of damage to his motor cycle - \$ 16,699.00;
4. Transport expenses - \$ 500.00.
5. Loss of personal items, mobile phone and jewellery - \$3,259.00.

[66] The learned trial Judge allowed items 2 and 4 (totaling \$ 3,031.35) and disallowed items 1, 3 and 5 and set out his reasons for disallowing them, which are justifiable.

#### **Jameel JA**

[67] I have read the draft judgment of Chandra JA, and agree with the reasons and conclusions.



**Wati JA**

[68] I agree with the reasons and the proposed orders of Chandra JA.

**Orders of the Court**

1. *The Appeal of the Appellant is allowed in part.*
2. *The amount awarded by way of general damages is set aside and in its place the sum of \$25,000.00 (being \$35,000.00 less interim payment of \$10,000.00) is awarded with interest at 6% p.a. from the date of service of writ to the date of judgment;*
3. *A sum of \$78,000.00 is awarded as loss of earnings with no interest thereon;*
4. *The amount awarded as Special damages \$3,031.35 with interest thereon at 3% p.a. from the date of the accident to the date of judgment is affirmed.*
5. *Post judgment interest at the statutory rate on the judgment sum of \$106,031.35 to date of payment;*
6. *Costs in a sum of \$ 3000.00 to be paid by the Respondent to the Appellant.*



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

Hon. Madam Justice F. Jameel  
**JUSTICE OF APPEAL**

Hon. Madam Justice A. Wati  
**JUSTICE OF APPEAL**