

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

CIVIL APPEAL NO.ABU 0058 of 2014
(High Court of Labasa Civil Action No. HBC 19 of 2012)

BETWEEN : **JAYSHEEL JAINEET KUMAR** by his next friend and father
JETANDAR KUMAR SHARMA

Appellant
(Original Plaintiff)

AND : **PACIFIC TRANSPORT CO. LTD**

Respondent
(Original 2nd Defendant)

Coram : Basnayake JA
Lecamwasam JA
Seneviratne JA

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

Date of Hearing : 08 November 2017

Date of Judgment : 08 March 2018

JUDGMENT

Basnayake JA

- [1] The appellant was the original plaintiff. He filed this appeal against the respondent, the original 2nd defendant, to have the judgment of the learned High Court Judge dated 25 June 2014 set aside and to have the damages awarded re-assessed. The appellant being a

minor (born on 21 September 1995), this action was filed through his father as next friend to claim damages for severe injuries sustained in an accident which had occurred on 12 September 2011.

[2] The appellant was a passenger in a bus (Registration No. EC 610) driven by the 1st defendant. The bus belonged to the respondent. The injuries suffered have been described as:-

- Head injury and had a GCS 13/15 and was having seizures; (as described in the Medical Report dated 12 October 2011 (at pg. 75 of the Record of the High Court (RHC)).
- Left Frontal Epidural Hematoma;
- Open /Depressed Fracture of Left Frontal Skull.

According to the statement of claim (paragraph 7 at pg. 13 RHC) the plaintiff was accorded (*performed*) an urgent craniotomy on 14 September 2011. He was a Form IV student at that time and was aspiring to become a doctor. As a result of the accident the appellant suffered socially, psychologically, physically and was distressed with pain and limitation in mobility (paragraphs 8 & 9).

[3] At the hearing the defendants conceded negligence. The only question for determination was the quantum of damages. The learned Judge awarded \$ 80,000.00 as general damages together with interest in a sum of \$ 9200.00 and as special damages a sum of \$ 500.00 and interest \$ 39.00 totaling \$ 89,739.00. He was also awarded \$ 3000.00 as costs. Of the general damages \$ 70,000.00 was awarded for pain and suffering and loss of amenities. \$ 10,000.00 was awarded for the year of schooling lost.

[4] The learned counsel for the appellant in the written submissions tendered to the Court of Appeal claimed a sum of \$90,000.00 for pain and suffering together with interest and \$100,000.00 for loss of earning. He has also claimed a sum of \$10,000.00 for disfigurement of head. In paragraph 4.11 (pg. 5) the learned Judge states thus: "*I turn now to the next issue; which was a claim for future earnings. Mr. Sen in his closing submissions argues that Jayasheel (appellant) will find it difficult to find employment*

with his medical condition and lack of education. There was no medical evidence to that effect nor was Jayasheel's academic record produced to support the assertion that his performance in school slid down after he befell the accident". Again in paragraph 4.12; "I find compelling Mr. Koli's argument that Jayasheel would not have been discharged on 15 March 2012 from attending clinics, if he was still experiencing headaches, as contended". Again at 4.14 of the judgment the learned Judge stated that; "Dr. Bulanauca opined that the headaches were probably psychological". The learned Judge hence declined the claim for future earnings.

Grounds of appeal

- [5] The following grounds were urged in support, namely;
1. The learned trial Judge has erred in law in failing to make the correct award to the appellants in accordance with the established principles of assessment of damages.
 2. That the Judge has erred in law and in fact in not awarding appropriate damages under the various heads as claimed and made the awards extremely conservative in all the circumstances of the claim having regard to the very serious nature of the injuries.
 3. That the learned trial Judge has erred in law by not making an appropriate award for future earning capacity when it was unchallenged that the appellant had constant headaches and was not able to regularly attend school and that his performance was greatly reduced both academically and physically.
 4. Further and in the alternative, the learned Judge has erred in failing to take in to consideration the change in socio economic living conditions before making an appropriate award.
 5. The learned trial Judge has 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 when making the award.
 6. The learned trial Judge has erred in law and in fact in making an appropriate award for special damages consistent with the evidence adduced in court.

7. The learned trial Judge has erred by not taking into consideration relevant matters, in particular the unchallenged evidence of the appellant and their expert witness pertaining to pain, suffering and damages.

Evidence before court

- [6] The only evidence before court is that of the plaintiff and Dr. Maloni Bulanauca. The plaintiff gave evidence on 8 April 2014. At that time the plaintiff was studying in Form VI of Savusavu Secondary School. The plaintiff sustained injuries as a result of the bus that he was travelling in knocked against a building. After the accident the plaintiff became unconscious and regained consciousness only after two or three days. At the time of the accident the plaintiff was studying in Form IV. He said that during that time his position in class was about 4th or 5th place. After the accident he stated that he found it difficult to study till late at night. He said that he used to play soccer. He also had been helping his father (in farming).
- [7] After the accident he had lost one year in school and had had to repeat the exam. He complained that he could not concentrate in his studies and suffered headaches while watching television. Under cross-examination he said that he has a brother and a sister. His brother had studied at the Savusavu Secondary School; His sister at the USP (the University of South Pacific). Before the accident he had been used to obtaining 400 plus out of 600 marks. After the accident the marks had gone down to 200. However no documents were produced in proof of what was claimed. He said that after the accident he was told to wear glasses. Prior to the accident he did not have any eye problems.
- [8] Dr. Maloni Bulanauca was attached to Labasa Hospital. He produced a medical report dated 12 October 2011 from Taveuni hospital (pg. 75 of the Record of the High Court (RHC)). According to this report the plaintiff had sustained a head injury and had a GCS 13/15 and was having seizures. Dr. Maloni also produced a report dated 14 October 2011 issued by him (pg.74 of RHC). According to this report the plaintiff was admitted to Labasa Divisional Hospital for the period 14 September 2011 to 20 September 2011. He

had suffered the following injuries, namely; 1. Left frontal epidural hematoma. 2. Open/depressed fracture of left frontal skull.

- [9] On 14 September the plaintiff was accorded an urgent craniotomy. Doctor Maloni said that the plaintiff was having *seizures due to insult to nerves in the brain* which could be life threatening. He said that the operation was done by him and part of the skull was removed. Due to this removal the plaintiff has to refrain from engaging in heavy duty and contact sports. Under cross examination he said that he saw the plaintiff in the clinic on 3 November 2011, 15 December 2011 and 15 March 2012. He said the plaintiff was suffering from headaches when he saw the plaintiff on 15 December 2011. His neurological examination was normal and no abnormalities were detected. He was discharged from the clinic on 15 March 2012 as there were no further complaints. He said that he had no record of the plaintiff after 15 March 2012. He said in re-examination as follows in page 69;

Question: Does he have permanent scarring (scarring) on his head?

Answer : Depressed skull yes. Yes defect in the skull, we evacuated clots.

Question: Defect will be for life?

Answer : Yes.

Question: He has headaches?

Answer : Headaches is specific to head injury which he suffered.

Question: Was it a significant or minor head injury suffered by plaintiff?

Answer : Significant.

Question: Will pain go away?

Answer : Lifelong ailment.

Answering to the grounds of appeal

- [10] Of the several grounds of appeal, the sixth is concerning special damages. The learned counsel for the appellant in the written submissions filed in the High Court has claimed a sum of \$ 500.00 as special damages and as interest on the above sum a sum of \$ 28.75.

The learned Judge has awarded a sum of \$ 500.00 as claimed and awarded a sum of \$39.00 as interest. Therefore this ground is frivolous.

- [11] Grounds 5 and 7 also appear to be monotonous and need no consideration. Grounds 1, 2 and 4 are concerning general damages awarded and therefore could be considered together. Ground 3 is concerning future earning capacity and would be taken separately.

Grounds 1, 2 and 4

- [12] The learned Judge in paragraph 4.7 (pg. 9) has considered the pain the plaintiff sustained. *“It is undisputed that Jayasheel would have endured great pain, in the aftermath of the craniotomy. He was unconscious immediately after the accident. He woke up in the intensive care unit surrounded by machines. He continued to attend clinics until 15 December 2011”*. The learned Judge had reproduced the Medical Report (paragraph 4.5 at pg. 8 of RHC) issued by Dr. Maloni Bulanauca of Labasa Divisional Hospital dated 14 October 2011. I find that the learned Judge had also considered the submission made by counsel and the judgment of **Nasese Bus Co Ltd v Chand** [2013] FJCA 9 and arrived at the figure of \$ 70,000.00 as appropriate for pain and suffering and loss of amenities. The learned Judge has added another \$ 10,000.00 for the year of schooling the plaintiff lost thus making the general damages \$ 80,000.00 together with \$ 9,200.00 as interest, \$539.00 special damages totaling \$89,739.00 plus \$ 3,000.00 as costs.
- [13] The learned counsel for the appellant moves that the amount awarded for pain and suffering be increased to \$ 90,000.00 on the basis that another injured who sustained injuries at the same incident had been awarded \$ 90,000.00 in **Labaivalu v Pacific Transport Co Ltd** [2017] FJCA 61 (26 May 2017) where an award of \$ 90,000.00 was made by the Court of Appeal against \$ 60,000.00 awarded in the High Court as general damages.
- [14] A cardinal principle this court has to have in mind is the exercise of discretion by the trial Judge. Such discretion “in the estimation of damages ought not to be interfered with by an appellate court unless the trial Judge has erred in point of law or in his approach to the

assessment or unless the assessment itself, by its disproportion to the injuries received, demonstrates error on the part of the trial Judge” (Per Barwick CJ in Sharman v Evans (1977) 138 CLR 563 at paragraph 4 cited in The Permanent Secretary For Health and Another v Kumar and Two Others [2012] FJSC 28 (3 May 2012).

[15] The learned counsel for the appellant however does not show where the learned Judge has erred. The learned counsel strongly relied on the judgment of Lord Blackburn in Livingstone v Rawyards Coal Co (1885) AC 25 at 39 that, “*Compensation should as nearly as possible put the party who has suffered injury in the same position as he would have been if he had not sustained the wrong*”. Also Lord Scarman in Fletcher v Auto Care and Transporters Ltd [1963] 1 All ER 726 that, “*The damages awarded should be such that the ordinary sensible man would not instinctively think as either mean or extravagant but consider them to be sensible and fair*”.

[16] It is unfortunate that the learned Judge did not have the benefit of the Court of Appeal decision in Labaivalu’s (supra) which was decided much later. Further the injuries sustained by the plaintiff in Labaivalu’s cannot be compared with the suffering of the injured in the present case. Some of the pain the plaintiff in Labaivalu would have sustained and as observed in the judgment in paragraph 27 is reproduced below:-

“[27] The learned Judge in paragraph 4.10 of his judgment had considered the pain that the injured had suffered. He said that, “*Mere endured agonizing pain in the aftermath of the accident...She had a harrowing experience*”. Although it is not evident, I would like to mention here some of the crucial pain that the plaintiff would have gone through in this case.

- *A timber which is 6” x 2” x 1 metre piercing through the body of a living person.*
- *Having to remain in that position for more than one hour.*
- *Any and every movement of her would have brought her agony.*

- *She was nailed on to the timber inside the bus and there would have been bleeding.*
- *Although she too would have wanted to get out of the bus, she could not while others were fleeing.*
- *The trauma of it to think that if the bus moved forward some more she would have been ripped off.*
- *The vibration that occurred when the timber was being cut would have been agonizing as she was conscious.*
- *The trauma when she was taken out of the bus through the window.*
- *The agony while she was taken to hospital in a taxi with the log inside her body.*
- *Having to wait for the doctors to arrive from Labasa.*
- *The surgeries done.*
- *The wound debridement.*
- *The embarrassment”.*

[17] The learned counsel also relied on the Court of Appeal judgments of **Vimla Wati v Permanent Secretary for Health** [2016] FJCA 72 (27 May 2016) and **Fiji Forest Industries v Naidu** [2017] FJCA 106 (14 September 2017) in support for his claim for an increase of the award under pain and suffering. In Vimla Wati’s case an award of \$15,000.00 was increased to \$ 70,000.00 for pain and suffering. In Naidu’s, the Court of Appeal increased the sum of \$ 60,000.00 to \$ 90,000.00 for pain and suffering considering that adequate consideration had not been paid to the medical evidence, that with age the plaintiff’s hand would be of no use and eventually even his entire arm may be of no use and the disfigurement of his hand as well. In the High Court of Fiji judgment in **Anderson v Salaitoga** [1994] FJHC 42 (4 May 1994) Judge John Byrne (later Justice of Appeal) awarded a sum of \$ 215,000.00 out of which a sum of \$ 85,000.00 was awarded for pain and suffering and loss of amenities for a useless left elbow with painful degeneration changes, a right knee which will require replacement and established

osteoarthritis in both knees. She also had a head injury which has left her with scarring and severely damaged teeth.

Submission of the learned counsel for the respondent

- [18] The learned counsel for the respondent submitted that the court had made the correct award taking into account the established principles of assessment of damages. He submitted that the court found that the plaintiff suffered injuries and endured pain and suffering up to a certain time. The court had found that the plaintiff could not have endured pain and suffering at the latest after 15 March 2012. The medical folder of the plaintiff had recorded on 3 November 2011 that the injured had no complaints or abnormalities. On 15 December 2011 it is recorded that the appellant had headaches but the neurological examination was normal and no abnormalities were detected. On 13 March 2012 he had no further complaints and was discharged with the advice no need to return for treatment. There is no evidence of any record that the appellant ever returned thereafter with any complaints. The learned counsel submitted that it is not uncommon for people to exaggerate their claim. The court must be guided by the evidence and correct inferences drawn upon them.

Analysis

- [19] I am of the view that the learned Judge arrived at the figure of Fiji \$ 70,000.00 for pain and suffering and loss of amenities only after considering the gravity of the suffering, the submissions of the learned counsel and the authorities available at the time of delivery of the judgment. Considering the above matters, I do not think that what has been awarded is disproportionate to the injuries. Hence I am of the view that grounds 1, 2 and 4 are without merit and should be refused.

Ground 3

- [20] This ground is concerning future earning capacity. The learned Judge in paragraph 4.8 (pg. 5 RHC) stated that, "Dr. Bulanauca testified that Jaysheel has permanent scarring in his head, as resonated by Mr. Koli in his closing submission. I observed his depressed skull. He did not exuberate the joi de vivre that one would expect to see in an 18 year old

boy. Understandably, he had been medically advised against vigorous activities and sports. His countenance was visibly scarred”. However the learned Judge had declined a claim for future earnings. The learned Judge in paragraph 4.11 states, “I now turn to the next issue, which was a claim for future earnings. Mr. Sen (counsel for the appellant) in his closing submission, argues that Jaysheel will find it difficult to find employment with his medical condition and lack of education. There was no medical evidence to that effect, nor was Jaysheel’s academic record produced to support the assertion that his performance in school slid down, after he befell the accident”.

- [21] The learned Judge in the judgment itself had observed the deformity of the appellant. At the time of the accident the appellant was only a 16 year old boy who had suffered permanent scarring due to which he had to refrain from the behavior of a youth. The deformity on his head is for life. This could definitely affect his personality, employment and his marital prospects. At the time of the accident the appellant was educated in Form IV (in 2011). At the time of giving evidence in the year 2014 he was educated in a different school in Form VI. This shows the enthusiasm and the promising character of this boy.
- [22] In **Martin v Howard** [1983] Tas R 188 at 201-201) Nettlefold stated that, “A category of cases which has a distinct bearing on this case is exemplified by such decisions in the High Court as **Hutchison v Sward** [1966] ALR 1021, 39 ALJR 500; and **Wadd v Allsopp** (1976) 10 ALR 353, 50 ALRJ 643. The essential feature in that category of cases is that a young plaintiff has been seriously injured but, being young, his pre-accident capacity cannot be ascertained as the capacity of an established mature worker can be ascertained. You must endeavor to ascertain what his potential was as best you can and compare that with his potential in his injured state. The critical point is that what he is entitled to be compensated for is the loss of chance of achieving a greater level of reward during his working life than he is capable of achieving in his injured state. But there is a substantial difference between compensation for the loss of a chance and compensation for the destruction or impairment of a proven capacity”.

- [23] **Hutchinson v Sward** (supra) is an appeal by an infant plaintiff from a judgment for damages in respect of personal injuries sustained by him as a result of the respondent's negligence. The appeal is against the award of 4000 Sterling Pounds on the ground that the amount awarded is inadequate. The appellant was nearly four years at the time of the accident. He had been left with a permanent and serious defect vision. It was argued for the plaintiff that the trial Judge failed to appreciate the extent of the effect which his disability would have upon his future life in so far as it related to his earning capacity. The court held that the plaintiff's very limited field of vision must, of necessity, have a serious effect on the range of occupation which will be open to him later in life though of course, any precise assessment of damages for this loss is impossible. The High Court of Australia while appreciating the difficulty of assessing damages under this head held that it should be not unsubstantial and increased the award to \$16,000.
- [24] The High Court held that this disability, "must of necessity, prove a serious obstacle in a very wide field of academic or professional pursuits and that his ability will constitute a practical disqualification for many senior posts and for any position requiring the use of a motor vehicle and some substantial allowance must be made". In **Wadd & Others v Allsopp** (supra) the plaintiff, a school boy of 17 ½ years, suffered severe head injuries due to a motor car collision in 1971. The plaintiff was awarded \$74,000.00 at the trial. Of this \$45,000.00 was assessed in respect of impaired earning capacity. The New South Wales Supreme Court increased this amount to \$100,000.00. The High Court while dismissing the appeal to restore the quantum to \$74,000.00 held that \$45,000.00 was founded upon an unjustified assumption. The plaintiff still being a school boy when injured, it was necessary to form some estimate of what his future would have been but for the accident and to compare it with his likely future prospects in his post-accident condition. Stephen J (Pg. 647) held that the original verdict of almost \$ 74,000.00 represented a measure of compensation so inadequate as to justify inference on appeal. It follows that the range within which any proper award may lie must necessarily be substantially in excess of that sum. The sum of \$100,000.00 which on appeal was substituted for the original verdict is an amount which I regard as falling within such range".

[25] The learned counsel for the respondent conceded at the hearing of this appeal that the appellant should be awarded something for the deformity of the head due to the removal of part of the skull bone. The future loss could be considered coupled with this deformity. I am of the view that the learned Judge has erred by not considering any payment on account of the deformity and declining payment of future loss. The Court of Appeal of Fiji in AG v Broadbridge [2003] FJCA 31 (30 May 2003) held that while assessing loss of future earnings in personal injury claims the court does not require to adopt a specific basis such as that used in the multiplicand/multiplier approach. "The simple position is that compensation should as nearly as possible put the injured person in the same position as he or she would have been, had the wrong not been sustained". (This judgment was affirmed by the Supreme Court on 8 April 2005 in [2005] FJSC 4). Considering the several judgments pronounced by this court as well as the courts of neighbouring countries, I am of the view that a sum of \$ 50,000.00 would serve justice as future loss of earnings.

[26] Therefore this appeal is partly allowed. In addition to the award made by the High Court, the appellant is awarded a sum of \$50,000.00 by way of future loss. Interest of this sum to be calculated as per the Law Reform (Miscellaneous Provisions) (Death and Interest) (Amendment) Act 2011 from the date of the High Court judgment (AG v Valentine [1998] FJCA 34; (28 August 1998), Jefford v Gee [1970] 2 QB 130)) namely, from 25 June 2014 until payment in full at 4% per annum. The appellant is also entitled to costs in a sum of \$ 5000.00.

Lecamwasam JA

[27] I agree with the reasons and findings of Basnayake JA.

Seneviratne, JA

[28] I have read the judgment of Basnayake JA. I agree with his reasoning and findings.

The Orders of the Court are:

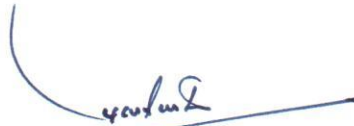
1. *Appeal partly allowed.*
2. *\$50,000.00 in addition to the award of \$89,739.00 and \$3000.00 costs, to be payable to the appellant by the respondent.*
3. *The appellant is also entitled to costs of this court in a sum of \$5000.00.*



Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL



Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL



Hon. Mr. Justice L. Seneviratne
JUSTICE OF APPEAL