

*whether damages awarded for loss of future earnings too low*  
*whether failure to consider local requirement*  
*entitled appellant to additional damages*

**IN THE FIJI COURT OF APPEAL**

**Civil Jurisdiction**

**Civil Appeal No. 61 of 1980**

*plaintiff injured in traffic accident suffered injuries to  
leg & knee, preventing her from doing seasonal, casual  
work.*

**Between:**

1. KAMLA WATI d/o Moti Lal
2. MOTI LAL s/o Bihari

*Personal Injury Damages - Future  
- earnings*  
*PI - Damages - Disfigurement,  
PI - Damages - Pain & Suffering*

Appellants

and

1. PARAS RAM s/o Dwarka Prasad
2. MANI LAL s/o Ram Charan
3. VINOD PATEL & CO. of Ba
4. GOVIND RAJU s/o Adi Mullah

Respondents

H.C. Patel and M.S. Khan for the Appellants.  
R. Krishna for the Respondents.

Date of Hearing: 15th July, 1981.

Date of Judgment: 31 JUL 1981

JUDGMENT OF THE COURT

Spring J.A.

This is an appeal brought by Kamla Wati from the judgment of the Supreme Court Fiji sitting at Lautoka on the 12th September, 1980, (in respect of Action No. 21 of 1979 Supreme Court of Fiji Lautoka Registry) on the grounds that the damages awarded to the appellants were unreasonably low.

An appeal by Moti Lal in respect of an action brought against the same respondents (Action No. 23 of 1979 Supreme Court of Fiji Lautoka Registry) was withdrawn before this Court.

In this action brought by Kamla Wati, damages were claimed in respect of personal injuries suffered by her in a traffic accident which occurred on the 9th March, 1976. We are advised that the action in the Supreme Court was

discontinued against the abovenamed 1st and 2nd respondents and continued against the 3rd and 4th respondents who admitted liability; the Supreme Court was concerned, therefore, solely with the quantum of damages to be awarded to the appellant. The learned trial Judge after hearing the evidence awarded the appellant -

- (a) the sum of \$5,000 for pain and suffering and the probability of the future loss of the appellant's patella in her right knee;
- (b) the sum of \$1,000 for loss of future earning potential and
- (c) the sum of \$500 for special damages: A total of \$6,500.

The appellant appeals to this Court on the grounds -

- (a) that the award of \$1,000 for loss of future earning potential was too low;
- (b) that the learned trial Judge failed to assess any damage for the facial disfigurement of the appellant;
- (c) that the injuries were serious and painful and that the sum awarded for pain and suffering was inadequate.

At the hearing of this appeal Counsel for appellant sought leave to file and argue an amended ground of appeal. Counsel for respondent objected to this application. This Court after considering the matter refused leave on the grounds that the application was made too late.

Turning firstly to the appellants claim that the sum of \$1,000 for loss of future earnings potential was inadequate.

The learned trial Judge in his judgment said :-

" As to her claim that she could no longer get casual work as she did before, there was really no reliable evidence of the regularity of her work or of what she was paid. Whether she could or would have continued to do such work is also doubtful. It is noted that since the accident in 1976 Kamla Wati has conceived and born three children, one of whom was born dead, and this would no doubt seriously have curtailed her ability to do outside work ..... For loss of future earning potential I award her \$1,000. "

Counsel for appellant contended strongly that the learned Judge had erred in making an award in respect of damages for loss of future earning potential which was wholly erroneous. The appellant at the date of the accident was 24 years of age. Admittedly she could not read nor write; however, she did casual farm work and in evidence she stated:-

" I used to have to fetch water from well and collect firewood and milk cow. Also worked on cane farm, hoeing, and planting cane. Earned about \$50-60 per month. Also did house work, washing clothes, milking cows, etc. Cannot milk cow now because I cannot bend leg or sit in right position now. Washed clothes at creek. Cannot do it now, have to employ someone to do it for me. Have to pay \$3 per day every day. "

Counsel submitted that had it not been for the accident the appellant would have continued doing casual work for many years and thereby enabled to supplement the family income. Counsel for the respondents submitted that the appellant had two children to care for and that she may have difficulty in obtaining casual labouring work. In cross-examination Komla Wati said:-

" Labouring work was seasonal, depending on when work was available. I used to go every day when someone called me. Some days I went every day, sometimes one or two weeks in a month. Husband

still a farm labourer. Don't know what he gets paid. For last three months have been at my parents, because I am often sick and my husband doesn't have enough money. "

Counsel for respondents further submitted that the appellant had been unable to produce to the Court any documentary evidence as to the amount that she had earned in the past and that in the circumstances it was extremely difficult to gauge her potential future loss. He submitted that the sum of \$1,000 awarded by the learned trial Judge was a generous award.

The assessment of damages for prospective loss of earnings is one which has to be made on the uncertainty of the future.

The general principle is stated in British Transport Commission v. Gourley [1956] A.C. 185 at page 212 where Lord Reid said:-

" The general principle on which damages are assessed is not in doubt. A successful plaintiff is entitled to have awarded to him such a sum as will, so far as possible, make good to him the financial loss which he has suffered and will probably suffer as a result of the wrong done to him for which the defendant is responsible. It is sometimes said that he is entitled to restitutio in integrum, but I do not think that that is a very accurate or helpful way of stating his right. He cannot in any real sense be restored, even financially, to his position before the accident. If he had not been injured he would have had the prospect of earning a continuing income, it may be, for many years, but there can be no certainty as to what would have happened. In many cases the amount of that income may be doubtful even if he had remained in good health, and there is always the possibility that he might have died or suffered from some incapacity at any time. The loss which he has suffered between the date of the accident and the date of the trial may be certain, but his prospective loss is not. Yet damages must be assessed as a lump sum once and for all, not only in respect of loss accrued before the trial, but

also in respect of prospective loss. Such damages can only be an estimate, often a very rough estimate, of the present value of his prospective loss. "

The appellant was 24 years of age at the date of the accident; she had been employed on a casual basis, in general farming work, and in our view such work would have continued to be available; we have also had regard to the range of awards in other cases decided by the Courts in Fiji awarding damages for future potential loss of earnings but in so doing we hasten to add that we are fully conscious of the caution that has to be exercised in paying any attention to the figures of other awards because of dissimilarity that the facts of one case may bear to the facts of another case; Singh v. Toong Fong Omnibus Co. /1964/ 3 All E.R. 925.

However, giving due weight to all the foregoing considerations and of the principles of law which should be observed by an appellate court in dealing with an appeal on damages from a Judge alone, we are of the opinion that the award of the sum of \$1,000 for potential future loss of earning was a wholly erroneous estimate. In our opinion the amount of the damages should be increased by an award of an additional \$1,250 for the appellant's prospective loss of earnings.

We turn now to the allegation that the learned trial Judge failed to assess any damage for the facial disfigurement suffered by the appellant in the accident.

Dr. Sharma examined the appellant on the 17th June, 1980, and found, that she had a 2" vertical scar in the middle of the forehead and a scar of 1½" on the cheek. The learned trial Judge in his judgment in discussing the injuries suffered by the appellant stated - "the scalp lacerations leave scars to

her forehead and below the left eye. She still apparently feels the effects of the injury below the left eye in cold weather. The scars constitute some disfigurement although this is reasonably mild".

Counsel for respondents urged upon this Court that the award of \$5,000 for pain and suffering and the probability of the future loss of the appellant's patella included an unspecified amount for the facial disfigurement suffered by the appellant. In our respectful opinion it was obligatory on the learned trial Judge to consider the claim by appellant that her face was scarred as a result of the accident. The facial disfigurement could not in our view be equated with pain and suffering.

Clearly the award of \$5,000 was a specific award for the injuries suffered by the appellant in respect of her right leg and the probability of the future removal of her kneecap coupled with the claim for pain and suffering.

Accordingly, we are not prepared to agree with the submission that the sum of \$5,000 was intended to be an award covering the facial disfigurement of the appellant. The learned trial Judge saw the scars some 4 years after the accident and made mention thereof in his judgment; he stated that the scars produced a facial disfigurement albeit that such disfigurement was reasonably mild.

We are of the opinion that the learned trial Judge overlooked making an award of damages for the cosmetic disability suffered by appellant. Accordingly we are of the opinion that we should make an award of damages in respect thereof; having considered the evidence and given due weight to all matters urged upon us by both Counsel, we fix damages for the facial disfigurement suffered by appellant in the sum

of \$750.

We pass now to the claim that the damages awarded for pain and suffering are inadequate. Counsel for appellant contended that the award of \$5,000 for pain and suffering and for the injuries suffered by the appellant to her right knee including the probability of having to have the kneecap removed were too low.

The learned trial Judge in making the award said:-

" With regard to pain and suffering taking into account the probability of future loss of the patella, I award her \$5,000. "

The learned trial Judge considered the medical evidence and said:-

" Her disability was assessed by Dr. Deodar Sharma at 20% to account for the patella, or 32% in taking into account further deterioration of the femur. Dr. Korwa assessed her disability at 12½% but he agreed that he has not taken into account the probable removal of the patella. His estimate must therefore be upgraded to around 20% disability. "

We are being asked to interfere with the learned trial Judge's assessment as to damages. Before we vary the award, however, it is incumbent upon the party wishing to disturb the award to satisfy us that the learned trial Judge's assessment as to the sum to be awarded was wholly erroneous or radically wrong.

We have read the transcript of the evidence and studied the judgment given by the Court below.

An assessment of damages for pain and suffering and of permanent disability are essentially questions of degree

and unless the learned Judge in the Supreme Court took an erroneous view of the evidence as to the damage suffered by the appellant or made some mistake in giving weight to evidence that ought not to have affected his mind we ought not to interfere.

Having considered the evidence and all matters urged upon us by Counsel, we are not prepared to say that the award was radically wrong and thereby justifying interference by this Court.

Accordingly the appeal is allowed in part and the judgment in favour of the appellant is hereby increased from \$6,500 to \$8,500. Appellant will have her costs of this appeal to be taxed if not agreed.

*J. H. Gault*

.....  
Vice President

*R. J. ...*

.....  
Judge of Appeal

*W. J. ...*

.....  
Judge of Appeal