IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 73 OF 1991
(High Court Civil Action No. 111 of 1990)

BETWEEN:

ANITRA KUMAR SINGH — APPELLANT

-and-

RENTOKIL LABORATORIES LIMITED — RESPONDENT

Mr. R. Krishna for Mr. J.R. Reddy for the Appellant
Mr. T.W. Seeto for the Respondent

Date of Hearing : 13th May, 1993
Date of Delivery of Judgment : 20th August, 1993.

JUDGMENT OF THE COURT

This is an appeal from an assessment of $25000 for general damages in an action for damages brought by the appellant aginst the respondent due to a motor accident on the 16 July 1988.

At the pre-trial conference on 31 January 1991 the defendant admitted liability. The trial before the Honourable Mr Justice Saunders took place on 30 July 1991. It is worthy of note that the record at page 25 states "copy special damages lodged by consent" followed by:-

"Seeto (counsel for defendant)

Dispute Items 1
5
6
11
14"

No such identifiable document appears in the record before us. The Statement of Claim filed on 11 April 1990 does provide some particulars. The record of the pre-trial conference refers to 24 documents noted alphabetically. Only 10 exhibits were tendered at the trial.

It would seem likely that the items referred to by Mr Seeto relate to special damages which were not in issue before us. We feel that we may safely assume that they are not relevant to any of the items which go to make up the general damages award for this grievously injured man who whilst enduring some permanent or semi-permanent pain, disability and discomfort, has yet before him the possibility (or perhaps probability) of another major operation to his hip; another operation to the right numerus to remove a plate, to the left forearm and likewise another to the mandible are recommended.

The learned Judge gave a short judgment on 4 October 1991, having in the interim from trial received submissions on damages from both counsel. He found for the plaintiff in the full amount of special damages claimed and assessed general damages at $25000. It is from this latter figure that the appeal is brought, the appellant claiming that it is inadequate.

His Lordship's judgment was short. Since nearly all of it is relevant to this appeal, we set it out in total:-

> *"This matter is before the Court for assessment of damages arising out of a motor vehicle accident. Liability is admitted. A copy of list of special damages was lodged by consent and Items 1, 5, 6, 11 and 14 were disputed. Defendant did not call any evidence and never really contested the special damages, which I will allow in full at $31,945.86.*
>
> *Plaintiff owns a security business. He still owns the business and I cannot find any evidence that his business lost any money as a result of the accident. Plaintiff is now back in his original position as owner of the business, doing administration and sales.*
>
> *He suffered quite severe injuries as a result of the accident. In particular he may need a hip replacement in the future, he has trouble chewing, and has bad breath. His jaw continues to give him trouble. It should be noted that the New Zealand doctor gave the reason for the jaw trouble as being inadequate and defective treatment by the hospital in Fiji. He has much pain and discomfort and cannot take exercise as he used to before the accident. No figure has been suggested to the Court for general damages.*
>
> *I assess them at $25,000 bearing in mind any future loss of earnings (unlikely), cost of hip replacement and pain and suffering (considerable).*
>
> *Accordingly, there will be judgment for the plaintiff for $31, 945.86 special damages and $25,000 general damages, together with costs on the higher scale."*

It will be noticed that subject to the general prayer "such further and/or other relief.....", no claim was made for interest.

It is not in issue before us.

The Statement of Claim gave:-

"Particulars of Injuries

(i) *Cuts and lacerations of the head and neck region.*

(ii) *Bilateral compound fracture of the Mandible.*

(iii) *Fracture of right humerus.*

(iv) *Fracture of ulna right side distal one third.*

(v) *Fracture radius left side distal one third.*

(vi) *Fracture hand 5th metarcarpal and 3rd metacarpal.*

(vii) *Fracture right ribs and flail chest.*

(viii) *Fracture pelvis.*

(ix) *Fracture right medial mallealus."*

(the spelling is as it appears in the original)

The plaintiff appellant was aged 39 years at the date of the accident. On the day of the accident he was conveyed to the Lautoka Hospital suffering inter alia, from the injuries to all limbs except the left leg. Additionally the comminuted fracture of the right humerus was associated with radial nerve palsy. This was operated upon at the Lautoka Hospital and an A.O. plate was on the 21st July 1988 internally fixed. Exploration of the radial nerve revealed that it was intact but contused. It was left alone. All

other orthopaedic fractures and injuries except the mandible were treated conservatively.

The plaintiff was referred to Dr D.B. Adams, an Oral and Maxillofacial Surgeon in Wellington N.Z. for report and treatment of damage to the mandible. Whilst there Dr Adams referred him to Dr Anthony Griffin an Orthopaedic Surgeon of Wellington for assessement of his musculo-skeletal injuries. Dr Griffin's report of 6 December 1988 reported inter alia:-

Right upper arm

A soundly healed tender lateral scar. The humerus showed mild anterior and varus angulation. Satisfactory function in elbow and forearm but the right lower arm showed evidence of a radial nerve palsy, with grade IV activity in the wrist dorsi - flexor muscles but no detectable activity in the finger dorsi-flexor musculature. An area of anaesthesia dorsally at the base of the thumb was present. He could form a full wrist.

Dr Griffin felt that the amount of malunion was insufficient to warrant attempted correction but the metal plate would require removal. He suggested deferring this for at least 1 year. No other treatment was required, the palsy continuing to improve.

Left forearm

Obvious varus angulation near the wrist. Forearm rotation restricted to 40% of supinaton and 40% of pronation. Full movement left wrist and fingers. The fracture to this limb showed sufficient angular malunion to warrant correction by osteotomy and internal fixation of the bone.

Right Ankle

Loss of 10% of dorsi flexion, subtaloid joint motion reduced to about half nominal range. Foot and ankle showed good function.

Right Pelvis

X-rays showed minimally displaced fractures through left and right pubis with apparently some damage to floor of right acetabulum. The latter injury is already developing degenerative arthritis. This will progress and will lead to surgical treatment either femoral osteotomy or a total hip replacement. On 11 March 1991 Dr Griffin again reported that "in future it is likely that a right total hip replacement will be necessary". The current cost of such a procedure is about $10,000.00 (No doubt N.Z dollars).

We felt it necessary to deal at some length with these orthopaedic injuries to see whether this 39 year old man (born 9.8.49) who at the time of the incident, was conducting a Security Business employing 20 security guards has, from these injuries alone, had his earning capacity permanently impaired. The detail

of his operations and his normal involvement in them are sketchy, a defect in presentation of evidence that appears to affect most of the cases that have come before us at this May sittings. We feel entitled to infer that any security business with 20 guards must entail almost constant use of all four limbs for some part of each day. Supervision, investigation and constant inspections ought be part of any such successful occupation. Such work normally would not always be on level ground. Some climbing might be expected. We feel to go further in the absence of such details having been given in evidence, would be to indulge in guesswork. His Lordship's remarks on this aspect reflect a failure to apply the appropriate principles. Certainly the plaintiff left the Court without precise details of any direct financial loss he and his business will or might be expected to suffer in the future. It is however, obvious to us that a man with three such impaired limbs and a defective hip would not be nearly as efficient at most income producing jobs, as would a person of his qualifications who was uninjured. His Lordship appears to have overlooked his own notes of evidence in this regard. The plaintiff said of himself, since the accident:-

> *"Used to play soccer and swim at Saweni Beach. Cannot swim. Cannot walk normaly. Hip hurts after use for sometime. Cannot lift heavy object. Cannot do any labouring kind of work. Estimated cost of replacement hip as of now is $10,000. Degeneration of hip now."*

Later:-

> *"Much pain and discomfort - Still continuing."*

His Lordship's note of a submission by counsel for the plaintiff at the conclusion of evidence is most significant in view of His Lordship's finding.

> *"Reddy - Not much dispute - Cost of further care, pain etc and loss of prospective earnings"*

The incapacity of an injured plaintiff to perform alternative occupations always sounds in some money award unless he fortunately obtains some other equally lucrative job with good prospects of continuance. It surely cannot be said of a security business that there is little or no risk of its becoming unfinancial. The consequences of the injuries alone could force a closure, retirement or forced sale. In our view it cannot be said that his future earning capacity has not been substantially impaired.

So far we have said little of the consequences of the broken mandible. Apart from a worsening hip and the possible onset of anthritis when fractures are not properly set or a joint is involved, it is common knowledge that most injured people do accommodate to a degree with disabilities forced on them. It is difficult to put the mal-aligned jaw and its consequences in this character. His Lordship found "he has trouble chewing and has bad breath" - both disabilities very obvious and always with him. The injury and its consequences must sound in damages for loss of

earning capacity - particularly in any occupation that involves personal contract with the public and clients, old and new.

This injury also highlights the degree of pain suffering and discomfort this man has experienced since 16 July 1988, much of which he will continue to suffer in varying degrees for the rest of his life - working or socially. The evidence on the effects of this injury include these extracts:-

> *"I have a broken jaw. Cannot chew. Has to be very soft food. Bad smell from my mouth all the time. Very embarassing to me".*
>
> *"operation about 17.7.88 by Dr King. Not satisfied by the operation. Side of jaw swells with pus after I have been eating".*
>
> *"Doctor in N.Z said fault of doctors in Fiji. Inadequate treatment. Infection 2 weeks after discharge from Lautoka Hospital.*
>
> *I stayed home. Came to office, once a week or so. Could not walk. Doctor told me to sleep straight upright gave me drugs - pain killer and antibiotics".*

Pain and suffering must be compensated with money as best that money can achieve.

We have dealt at some length with the nature of the orthopaedic injuries, his series of hospitalised treatments and those which may lie ahead. The series of sequelae to the fractured mandible on 16 July 1988 cannot be adequately covered by quoting

extracts from the reports of Dr Chandra Exh.3 and Dr Adams Exh.4. They should be read in full. They reveal a case for a substantive award for pain and suffering alone. After describing the complex wiring operations of the 21 July 1988, Dr Chandra detailed the post operative events:-

> *"On 3/8/88, he developed an abcess over the incision area on the right lower border, which was drained and the wound healed well.*
>
> *On 15/5/88 the intermaxillary fixation was removed and the patient discharged from the hospital on 17/8/88. The interdental wires were removed on 30/8/88, and it was noticed that there was some mobility of the right bony segments.*
>
> *He was reviewed on 22/9/88, when it was noticed that the bony segments was still mobile and pus was draining from the area. He was put on 500mg amoxil and 250mg cloxocillin for seven days when the discharge stopped.*
>
> *Patient was seen again on 4/10/88 with a fluctuant swelling over the same area - pus was drained and he was put on amoxil for 7 days. The discharge stopped, but the swelling reappeared on 20/10/88, and pus was again drained on 21/10/88 and a rubber drain inserted for 2 days.*
>
> *He received 500mg Amoxil and 400mg flagyl x 8hrly for 7 days. Area has healed well since then and there has been no further episodes of the recurrent infection.*
>
> *However, the bone ends are mobile and an X-ray shows that the bony segments are not in correct appositon."*

In his report of 23 December 1988 Dr Adams tells of his operation to revise the fractures on the right side of the mandible. It was

an extensive operation which still left the plaintiff with some malunion of the mandible. Dr Adams also referred to a complaint of "a deteriorating periodontal condition present since the accident". He advised treatment which as the evidence disclosed, has not been effective. The "bad smell" persists. Additionally the plaintiff lost some of his teeth and requires now lower and upper dentires.

We are well aware of the principles that must guide us and which we must apply, before interfering with what is essentially a discretionary judgment of the Court below. Bearing in mind (i) the considerable pain and suffering, past, present and future, (ii) the loss of amenities of which some evidence was given and others are reasonably inferred from his residual disabilities, (iii) the loss of expectation of a happy life, of which little evidence has been given and virtually overlaps with (ii), and finally (iv) future loss of earning capacity as contrasted with the learned Judge's statement of fact which summarises to "same job, same money - no loss", we are of the opinion that the assessment of $25,000 for general damages was a wholly erroneous estimate and must be substantially increased. His Lordships figure must be taken to have included the cost of the hip replacement (a much stronger probability than he at one stage in his judgment posited) but which he expressly included at the end of his judgment as requiring to be taken into account. On a lower scale of probability would be the recommended further operations (some small) to the right humerus, the left forearm, the mandible and also the recommended dentures.

Even if one took the figure of NZ$10,000 estimated for the hip in March 1991 and arrived at a global figure of say $10,000 Fijian for future operations, it is 40% of the total awarded by His Lordship.

The hard question in this case is "by how much should it be increased"? We have been assisted by counsel with a substantial number of cases where the figures for pain and suffering and loss of amenities were in the order of $5000 or less. Most of these appear to have been decided in the early 1970's. A more recent decision (22 February 1985) by Mr Justice Cullinan is of more interest. In a very careful review of the evidence and of the decided cases in Fiji, for what we would regard as a "very bad leg case" he awarded $10,000 for pain suffering, loss of amenities and loss of earning capacity (where he had returned to his job with his former employer with good prospects of continuance) a sum of $5000.

As we mentioned in Pratap v A.G (Civ. App. 14 of 1992), we have sought to extract information on the range of awards in Fiji for various types of injuries. With rare exceptions they are well below the figures we might think appropriate at this time August 1993 or at the time judgment in this Action was given, October 1991.

We are mindful that in setting the figure it must be one appropriate for Fiji and the conditions which apply here. The

level of damages in our neighbouring countries is persuasive but not decisive - to be otherwise, would require a very detailed and prolonged investigation of factors influencing awards in each of those countries.

We favour the global approach to general damages whilst not disregarding the checks and balances that may come from itemising each of the four conventional heads. This like the annuity tables approach to test the multiplier selected, is not more than that - a check which may or may not help.

We have concluded that the appropriate assessment in this action for general damages should be $60,000.

The appeal will be allowed and the judgment varied by substituting that figure for the $25,000 assessed by His Lordship.

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Mr Justice Michael M Helsham
President Fiji Court of Appeal

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Sir Mari Kapi
Judge of Appeal

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Sir Edward Williams
Judge of Appeal