

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

CIVIL APPEAL NO. ABU0049/98S
(High Court Civil Action No.HBC154 of 1997/L)

BETWEEN:

MARIKA LAWANISAVI
ISELRAVISIVI

Appellants

AND:

PESAMINO KAPIENI

Respondent

Coram:

The Hon. Sir Moti Tikaram, President
The Rt. Hon. Sir Maurice Casey, Justice of Appeal
The Rt. Hon. Sir Thomas Eichelbaum, Justice of Appeal

Hearing:

Thursday, 5 August 1999, Suva

Counsel:

Ms V. Patel for the Appellants
Mr H.A. Shah for the Respondent

Date of Judgment: Friday, 13 August 1999

JUDGMENT OF THE COURT

This is an appeal against amount of damages and interest awarded to the respondent for injuries suffered in a traffic accident on 11 March 1996 when he was a passenger in a motor vehicle involved in a collision for which the appellants were responsible. An interlocutory judgment on liability was entered by consent against them on 29 August 1997 with damages to be assessed and they were dealt with at a hearing before Sadal J. at the High Court Lautoka on 19 March 1998. On 31 July 1998 he gave judgment for \$40,000 general damages covering pain, suffering and loss of amenities of life, with interest at 9% from the date of the accident to the date of trial, amounting to \$7,200; total \$47,200.

The respondent was 47 at the date of the accident, married with four children and employed as a supervisor at the Fiji Electrical Authority. He was taken to hospital suffering from a wedge compression fracture of the 12th thoracic vertebra which was described as stable in the hospital report admitted in evidence, requiring no treatment apart from remaining in bed, and he was discharged on 18 March to go home, where he stayed in bed a few weeks longer, being cared for by his wife. He said he was in a lot of pain and discomfort over that period, and his wife gave evidence that he could not move and needed daily attention with feeding and toilet requirements. He was last seen at hospital on 20 May 1996 and reported to be improving, experiencing pain only with standing long periods. It was thought he could return to work after about six months and the long-term prognosis was reserved. A doctor who saw him at the hospital gave evidence that it was a stable fracture with no damage to the spinal cord, and thought he would probably have pain for the rest of his life. The respondent said in evidence that he still had back pain and that his sex life is affected, a claim confirmed by his wife who also said his life-style had changed and that he could not do gardening etc. now.

The respondent suffered no loss of wages as he was paid by his employer for the time he was away, and he described his work as very light. Accordingly, there is no suggestion of any loss of earnings either past or future, and only general damages required consideration. In fixing them at \$40,000 His Lordship said he took into account three decisions of this Court, but none is of any immediate relevance as the circumstances were very different from those in the present case. However, in one of them (Attorney-General v. Sharma (CA 41/93; 12 August 1994) the Court said at p.9: "Pain and suffering and loss of amenities of life are not susceptible of measurement in terms of money; a conventional figure derived from experience and awards

in comparable cases must be assessed," citing Wright v. British Railways Board [1983] 2 All ER 698 at 699 per Lord Diplock, who added that this approach is necessary if the aim is that justice meted out to all litigants should be even-handed instead of depending on idiosyncrasies of the assessor.

There are no reports of assessment in comparable cases in Fiji, and the nearest appellants' counsel could find were two English cases referred to in the New Law Journal Digest of 28 March 1997 involving awards of fourteen thousand pounds, and an unreported Hong Kong case of the equivalent of SF13000, all of them for moderately severe back injuries broadly corresponding with those in the present case. However in Chan Wai Tong v. Li Ping - sum [1985] HKLR 176, an appeal from Hong Kong, the Privy Council sounded a warning at p.186 against paying regard to awards in other jurisdictions in fixing damages unless similar social and economic conditions exist. We think those comments very relevant to the assessment of damages for personal injury in Fiji, which should generally be done on the basis of local experience. The following comments by their Lordships at p.181 also bear repetition:

"Their Lordships consider that reference to guidelines is proper and useful and is to be encouraged. It tends to produce consistency in awards, and it assists practitioners to negotiate settlements of the many claims which are settled either in the early stages of proceedings before going to trial, or which never reach the courts at all. But the use of guidelines cannot do away with the need to compare the facts of the particular case under consideration with the facts of reported cases in which damages have been awarded by the courts. If attention is concentrated entirely on the description of the categories of injuries contained in the guidelines, without regard to the facts of actual decided cases, there is a risk that the description may be treated as if it had been contained in a statute, and may divert attention from proper comparisons."

There being no reports of comparable cases to act as guidelines for general damages in the present situation, the Court should aim at a level which bears a reasonable proportion to awards made in other cases, in the light of the relative severity of the injuries, and of the pain suffering, disabilities and loss of amenities. In Rothmans Pall Mall (Fiji) Ltd v. Narayan (CA 51/93; 28 February 1997) an award of general damages of \$60,000 was upheld for a 25 year old man who suffered multiple injuries in a traffic accident, being left with a leg infection requiring frequent dressing for the rest of his life. His situation was comparable with that of a man suffering an amputation and there was also a severe disability of his hand and continuing pain and discomfort. Attorney-General v. Singh (CA 1/98; 18 May 1999) involved another award of \$60,000 for a man of 28 suffering multiple fractures, with a lengthy period in hospital, and who was left with pain and restricted mobility and a weakened arm. In that case the Court took into account the impact of inflation on earlier awards when using them as a guidelines in later assessments. In Attorney-General v. Sharma (above) \$A50,000 was awarded to a young man whose leg required amputation after he developed gangrene as a result of his injury, involving lengthy hospitalisation and severe pain. He also suffered severe emotional stress.

Even allowing for increases in the level of earlier awards due to inflation, these cases indicate that the sum of \$40,000 fixed for the relatively moderate injury and disability suffered by the respondent is so far out of proportion with general damages awarded for those much more serious injuries, that we can only conclude his Lordship erred in his approach and his assessment cannot stand. A proper award would be \$25,000 in the circumstances of this case.

We had occasion to rule on interest on general damages for personal injury in Attorney-General v. Singh (above), and in line with that ruling they should have been awarded from the date of the writ (27 May 1997) to the date of judgment on damages (31 July 1998). As pointed out in that case, interest is given to compensate the plaintiff for being kept out of his or her money over that period, and on this approach there is no basis for limiting it to the date of the interlocutory judgment on liability. It was also pointed out that in the light of current economic condition in Fiji, a rate of between 4% and 6% is appropriate and we are satisfied that the 9% fixed by His Lordship was too high. Instead we fix 5%.

Result:

1. Appeal against amount of general damages allowed and they are reduced from \$40,000 to \$25,000.
2. Appeal against amount of interest allowed. The award of \$7,200 is set aside and in its place the respondent will have interest at 5% on \$25,000 from 27 May 1997 to 31 July 1998, to be fixed by the Registrar if the parties cannot agree.
3. Appellant to have costs of \$750, together with disbursements to be fixed by the Registrar if the parties cannot agree.
4. Any security lodged for costs to be refunded to the Appellant's solicitors.

Moti Tikaram

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 Sir Moti Tikaram
 President

M. Casey

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 Sir Maurice Casey
 Justice of Appeal

Thomas Eichelbaum

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 Sir Thomas Eichelbaum
 Justice of Appeal

Solicitors:

MsVasantika Patel, Nadi for the Appellants
 H.A. Shah Esq, Lautoka for the Respondent

