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

CIVIL APPEAL NO. ABU0050/98S
(High Court Civil Action No.HBC0119 of 1997/L)

BETWEEN:

MARIKA LAWANISAVI
ISEI RAVISIVI

Appellants

AND:

PRADEEP RAJ F/N SHIU RAJ

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 the driver of 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 as follows:

(a)	Pain and suffering and loss of amenities	$ 90,000.00
(b)	Loss of wages	$ 2,658.24
(c)	Interest on (a) and (b) from date of injury to date of trial at 9%	16,650.00
(d)	Cost of future nursing care	20,000.00
(e)	Loss of prospective earning	60,000.00
	Total	**$189308.24**

The respondent was 36 at the time of the accident, married with two children and was a motor mechanic by trade employed as a mechanical supervisor in a commercial garage. He lost consciousness and was taken to hospital with a fracture of the right shaft of the femur, lacerations to the forehead and trauma to the chest. The medical report admitted in evidence stated that the lacerations were sutured, and the femur was fixed with an intermedullary rod, and that he recovered satisfactorily and was discharged on 4 April 1996 to attend the orthopaedic clinic, where he made regular visits. The fracture has healed.

He was off work for about one year, and on his return was given the post of service adviser because he was unable to carry out workshop jobs due to limitation of leg movement. The medical evidence described him as walking with stiffness of the right knee and hip, rendering him unable to squat because of pain and stiffness of the hip and knee. His social activities were said to be limited, and he cannot play contact sports.

An orthopaedic surgeon responsible for the report gave evidence that there was muscle and tissue damage associated with the fracture, and confirmed the respondent's description of pain and discomfort associated with the metal rod in his thigh. He said this could require surgical removal in future. The respondent also complained of difficulties with sexual intercourse because of the leg injury. By analogy with the Workers Compensation Act schedule the surgeon assessed his disability at 20% of total.

There is no doubt that the respondent suffered a serious injury to his leg, and was in considerable pain and discomfort for the time he was in hospital. He is left with a significant residual disability with on-going pain, and may require further surgery for removal of the metal rod, but there is nothing in the medical evidence suggesting this is anything more than a possibility. Any award of general damages must be substantial, but the question is whether the figure of $90,000 is (to use the language of appellants' counsel) "so inordinately high that it must be a wholly erroneous estimate of damage." An appellate court will not interfere simply because it might have made a different award: the award under appeal must be such that the court is driven to the conclusion that in all the circumstances the trial Judge must have misdirected himself or applied a wrong principle of law.

In Attorney-General v. Sharma (CA 41/93; 12 August 1994) the Court said at p9: "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.

The Court should aim at a level which bears a reasonable proportion to awards involving leg injuries 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 $90,000 for the injuries and disability suffered in this case is so greatly out of proportion with the damages given for those involving far more serious injuries that we can only conclude His Lordship erred in his approach, and therefore his assessment cannot stand. A proper award of general damages in all the circumstances would be $50,000.

The appellants also challenged the other awards as follows:

(i) **Loss of wages $2658.24**

This was the figure calculated by respondents' counsel for the period of one year's absent from work, during which he gave evidence that he was paid $95.50 per week, being two-thirds of his weekly pay. However, in a pay slip produced as Ex.1 for the week of 11 August 1986 (i.e. 5 months after the accident) his weekly pay was shown at the pre-accident level of $163.36, and his counsel was unable to explain the discrepancy which conflicts with and throws into question the respondent's oral evidence on this point. It would seem that this question of loss of wages was not fully explored in the High Court and we are left with conclusion that this part of the claim was not properly proved. However, we are prepared for the respondent to have the net loss of one third of his wages (i.e. $31.83) for five weeks covering the period he was in hospital, (rounded to $160) instead of the $2658.24 awarded.

(ii) **Loss of prospective earnings $60,000**

The respondent's wages increased to $174.99 since he returned to work in his new job, so there is no current loss of earnings. Nor was there any evidence to indicate that his employer was dissatisfied with his work, or that his job or wage level was at risk. His Lordship stated that the respondent had suffered a major set-back and could not return to his pre-injury level of performance as a skilled mechanic and that he had lost earning capacity; but that, lacking evidence of a range of future wages, he felt he should settle for a global approach, and he awarded $60,000 for loss of earning capacity.

Appellants' counsel submitted that he was not justified in awarding more than a nominal sum under this heading, in the absence of evidence of a substantial or real risk of the respondent losing his present job, citing Moeliker v. Reyrolle & Co. Ltd [1977] 1 All ER at pp17 - 18, where the Court held that if there is only a slight risk of the plaintiff losing his present job, or of being unable to get another or an equally good job, or both, then a low award is right.

The respondent's employer has treated him fairly so far, and seems unlikely to terminate his services or reduce his wages because of his disability. On the other hand, if he does lose this job, the respondent might be unlikely to get anything as good. To cover that risk of loss something more than a nominal award is called for, but nothing so high as the $60,000 which His Lordship thought appropriate. Such a sum given now for a future unascertained loss which may never happen assumes a degree of probability unsupported by the evidence. We think the respondent would be fairly treated by an award of $15,000 under this heading.

(iii) **Cost of future nursing care $20,000**

> ***"In respect of future care and attention there is no evidence to suggest he will be receiving care by a trained nurse. If assistance has to be hired it is likely to be of a fairly unskilled nature and almost certainly not all the time. He may need surgery in the future. Under this head I would allow the sum of $20,000.00."***

There was no evidence about the need for such care apart from the possibility that at some time in the future (maybe many years ahead) the rod might need surgical removal. There is no basis for believing that this must happen or, that if it does, an award of $20,000 paid now would be required for any nursing attendance outside hospital if it should be required. However,

some payment would be warranted to take account of the chance that such care might be needed and an award of $1500 seems reasonable to cover this possibility.

(iv) **Interest**

The appellants challenge the award of interest at 9% on general damages and loss of wages from the date of the injury to date of trial. 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 (30 April 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. The appeal is allowed to the following extent:

(a) General damages reduced from $90,000 to $50,000.

(b) Loss of wages reduced from $2,658.24 to $160.

(c) Loss of prospective earning reduced from $60,000 to $15,000.

(d) Cost of future nursing care reduced from $20,000 to $2,000.

(e) The award of interest of $16,650 is set aside and instead the respondent will have interest at 5% on $50,160 from 30 April 1997 to 31 July 1998.

2. The appellants to have costs of $1250 together with disbursements to be fixed by the Registrar if the parties cannot agree.

3. Any security lodged for costs to be refunded to the appellants' solicitors.

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Sir Moti Tikaram
President

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Sir Maurice Casey
Justice of Appeal

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Sir Thomas Eichelbaum
Justice of Appeal

Solicitors:

Ms Vasantika, Nadi for the Appellants
H.A. Shah Esq, Lautoka for the Respondent

FIJI COURT OF APPEAL

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