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

CIVIL APPEAL NO. ABU0007 OF 2003S
(High Court Civil Action No. HBC 353 of 1995S)

BETWEEN:

PLANTATION VILLAGE LIMITED
PLANTATION ISLAND RESORT (FIJI) LIMITED
MINIKA TAPPEN MANAGEMENT LIMITED

Appellants

AND:

GUY ANDERSON

Respondent

Coram: Sheppard, JA
Gallen, JA
Ellis, JA

Hearing: Thursday, 7th August 2003, Suva

Counsel: Mr. I. Razak for the Appellants
Mr. V. Maharaj for the Respondent

Date of Judgment: Thursday, 14th August, 2003

JUDGMENT OF THE COURT

This appeal involves the question whether the amount of $40,000 awarded for pain and suffering in a personal injury case was, in all the circumstances, excessive. The plaintiff in the action, the respondent to this appeal, claimed damages for injuries suffered by him on 6th September 1992 at Lautoka in the Fiji Islands when he was attempting to para-sail in the water surrounding the Plantation Village Limited's premises. The case was tried by Pathik J. He said that the equipment and personnel engaged in the para-sailing

exercise were the equipment and servants and agents of that defendant; it is one of the appellants in this case.

The defendants admitted liability for the accident which caused the injuries to the plaintiff. There was a claim for special damages amounting to $1,361.00. The amount was conceded by the defendants and there is no issue about it. His Lordship noted that the sum of $25,000.00 had been paid into Court on 25th February 2002. It was said that the sum was in full and final satisfaction of the claim. The amount was not taken out by the plaintiff until 27th March 2003..

His Lordship said that the plaintiff was an Australian. He was born on 28th July 1969 in New South Wales. At the time of the accident in 1992 he was 23 years of age. He was 33 years old at the time of the trial. He was a coal miner by occupation at the time and still is, but not where he had worked previously. The plaintiff was married early in September 1992. Immediately after the wedding he and his wife travelled to Fiji for their honeymoon. They intended to spend the whole of their honeymoon at the Plantation Island Resort.

The short facts of the matter are that at on the afternoon of 6th September 1992 the plaintiff paid to participate in para-sailing which was one of the leisure activities offered by the resort. He was taken to a pontoon where he was connected to harness which attached him to the motor boat which was to tow him and also the parachute which was to bring about his elevation. The defendants had omitted to release a part of the harness. The plaintiff felt himself being dragged forward by the boat which was towing him. He then felt a very substantial blow to the side of his head. He ended up in the water still attached to the parachute which was dragging him across the bay. He put his hand to the side of his face which had been struck and his hand was covered in blood and pieces of flesh. He was in the water for 5 minutes or so before he was rescued. During this time he struggled to free himself. He was fearful that he might be dragged under the water and drowned. Eventually he was taken on to the shore where he was attended to by a Dr. Williams.

His Lordship referred to a report from Dr. Williams dated 7th September 1992. There was fear at first that the plaintiff might have had some injuries to his brain. He was kept under review over night "passing a miserable and painful evening." Dr. Williams recommended that he return to Australia immediately to seek neurological assessment. The plaintiff and his wife returned to Sydney and consulted his local medical practitioner, Dr. MacKay.

His Lordship then made reference to a number of medical reports. No appointment could be made to see a suitable specialist until 27th October 1992 because the plaintiff was a public patient and there were delays in the public hospital system in New South Wales. The doctor eventually seen by the plaintiff was Dr. Bosanquet. He saw the plaintiff on 27th October 1992. His Lordship found that he had the following problems:

1. Jaw clicking every time he opened and closed his mouth.
2. Intermittent jaw locking.
3. Reduced movement of the right side of his upper lip on smiling, and
4. Pain on the right and left sides of his face.

Dr. Bosanquet found that the plaintiff had lacerations of his right cheek, damage to the buccal branch of the right facial nerve and menisco condylar dysfunction with the likelihood of an anteriorly displaced intra-articular disc. "Buccal" means relating to the cheek. "Condular' is something which relates to a rounded surface at the end of a bone and the word menisco refers to a cartilage.

The plaintiff was advised that his condition should be managed conservatively and he was referred to a prosthodontist, Dr. Fenton.

His Lordship said that the plaintiff had had to wear a dental occlusal splint for a period of six months. He described the splint as somewhat similar to a mouth guard worn when playing sport but that it took up almost the whole of his upper and lower jaw. It was "markedly uncomfortable, awkward and embarrassing." Although he used this for the period recommended by Dr. Fenton it did not improve the dysfunction so that his

problems were not solved. There was a further reference to Dr. Bosanquet and then back to Dr. MacKay. He thought that it was necessary to refer the plaintiff to a specialist neurologist, Dr O'Neill, at St Vincent's Hospital, Sydney.

Dr O'Neill first saw the plaintiff on 20th November 1992. He found that there was a right lower facial weakness. He ascribed it to trauma to nerves in the cheek and gum.

Dr. O'Neil reviewed the plaintiff on 8 March 1994. He said that there had been no improvement in the right lower facial weakness. He thought that this was likely to be permanent. His opinion was that as a direct result of the accident in September 1992, the plaintiff sustained permanent right lower facial weakness.

The plaintiff underwent further examinations. He was examined by Dr. Patrick on 1st March 1996 and 2nd July 2001. He noted the following matters:

1. *There is ongoing jaw pain bilaterally. He continues to have clicking sensation in the tempero mandibular joints both right and left.*

2. *He has difficulty chewing. He has difficulty eating a large hamburger, difficulty eating steak, and has to take just a very small bite from an apple or else cut it up.*

3. *He has difficulty opening his mouth wide.*

4. *On one occasion at the dentist in attempting to open his mouth wide a TMJ subluxed with a very loud clunk, startling the dentist somewhat. (TMJ is a reference to the temperomandibular joint, the joint connecting the cranium with the jaw bone.*

5. *After attending the dentist for a filling, for example, he will often have significantly increased pain at the jaw (TMJ's left more so than right) for some hours afterwards.*

6. *Chewing results in dull aching discomfort about both TMJ's and masseter regions. The right side of his face he feels is slightly droopy, more at the right side of the mouth. The right facial scar itself is now well healed, and represents minimal disfigurement (almost invisible).*

7. *He continues to have some diminished confidence, partly because of a somewhat "crooked" mouth, and because of difficulties eating.*

8. *Recreational activities largely revolve around home and the children. He works away for two weeks at a time at the mine. He has a house built, and has been involved in the indoor work and landscaping himself."*

In summing up Dr. Patrick said that the plaintiff's major ongoing problems from the accident were the temperomandibular joint dysfunction, some jaw pain and difficulty chewing. He said that the post-traumatic facial asymmetry was not major and the degree of it not readily apparent to the observer. Dr. Patrick said that the plaintiff had been advised not to have facial surgery because of the slight possibility of facial nerve damage resulting from the surgery itself. He thought that the plaintiff's decision not to have surgery was understandable Dr.Patrick said on 2nd July 2001 that there was a possible risk of facial nerve injury "however remote."

It is to be observed that there is an apparent inconsistency in the medical opinion, the earlier doctors referring to permanent damage to a facial nerve and Dr. Patrick referring to permanent damage to the temperomandilubar joint. However the matter is looked at, the evidence establishes that the plaintiff has a permanent disability consisting of pain and restriction of movement of the jaw.

Pathik J. said that he noticed and asked about some little marks on the plaintiff's face. The plaintiff said that it was a scar. Pathik J. found that, apart from the problems he had with his face and jaw there was nothing wrong with him physically. He could work as an underground miner. There were no other medical expenses. He was healthy enough to do housework, and gardening but not without discomfort. Pathik J. observed that there was "somewhat of a crooked mouth" on the right hand side when he smiled. In reaching his conclusion on the amount to be awarded for damages for pain and suffering, Pathik J. referred to a number of authorities. We have considered these generally but propose to refer only to three of them. The first is the decision of the Australian High Court in ***Planet Fisheries Pty Limited v. La Rosa*** (1968) 119 CLR 118. Here the Court dealt (at pp124 – 125) with a submission to the effect that in deciding whether or not an award of general

damages was excessive, the Court should seek out a norm or standard in the decisions of the Court for the assessment of general damages by comparison with which it was claimed that it would be seen that the award of $40,000.00 for general damages (in the ***Planet*** case) was disproportionate. A number of cases were referred to and the Court continued (pp.124-125):

> *"We would emphatically reject this submission. It is the relationship of the award to the injury and its consequences as established in the evidence in the case in question which is to be proportionate. It is only if, there being no other error, the award is grossly disproportionate to those injuries and consequences that it can be set aside. Whether it is so or not is a matter of judgment in the sound exercise of a sense of proportion. It is not a matter to be resolved by reference to some norm or standard supposedly to be derived from a consideration of amounts awarded in a number of other specific cases. We cannot think that the passage cited from Chulcough v. Holley ((1968) 41 ALJR 336 at p.338) should be understood as expressing a contrary view. The principle to be followed in assessing damages is, in our opinion, not in doubt. It is that the amount of damages must be fair and reasonable compensation for the injuries received and the disabilities caused. It is to be proportionate to the situation of the claimant party and not to the situation of other parties in other actions even if some similarity between their situations may be supposed to be seen. What was sought to be done in this case by the appellant's counsel, namely, to derive a norm or standard from a group of judgments of this Court reviewing awards of damages on appeal is erroneous. The same would be true if the same course were sought to be pursued in relation to awards of a Supreme Court or a County or District Court. The judgment of a Court awarding damages is not to be overborne by what other minds have judged right and proper for other situations. It may be granted that a judge who is making such an assessment will be aware of and give weight to current general ideas of fairness and moderation. But this general awareness is quite a different thing from what we were invited by Planet's counsel to act upon in this case. The awareness must be a product of general experience and not formed ad hoc by a process of considering particular cases and endeavouring, necessarily unsuccessfully, to allow for differences between the circumstances of those cases and the circumstances of the case in hand."*

We are in broad agreement with what the High Court has said. The second decision to which we need to refer is the decision of the Court of Appeal here in ***Anitra Kumar Singh v. Rentokil Laboratories Limited*** (Civil Appeal No. 73/91) where the court said:

> ***"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."***

His Lordship said that in the light of the authorities he approached the assessment of damages on the basis of the totality of the injury and disability. He referred to the judgment of Townley J. in ***Fowler v. Punter*** (1959) Qd R 510 (FC) at 526. Townley J. said that he deprecated any suggestion that one may take a list of physical injuries and from previous awards, assign an amount for each injury and thus arrive at a total.

Pathik J. referred to two other decisions one of which was ***Kay Lynette Bamforth and Anor. v. Fuel Supplies (Pacific) Limited*** in which so, he said, an award of $40,000 was made for facial injuries "on some facts similar to the case before me." In our opinion, the facts of the two cases are not similar. The reference to the ***Bamforth*** case was pursued by counsel before us. We do not regard this as at all helpful or indeed relevant.

His Lordship concluded his judgment on this part of the case by saying that, taking into consideration the pain and suffering and the plaintiff's present condition, he assessed general damages in the sum of $40,000.00.

Counsel for the defendants (the appellants) submitted that in all the circumstances the amount of $40,000.00 was manifestly too high. The learned judge's discretion had miscarried, not because of any identifiable error of principle but because the figure of $40,000.00 was a wholly erroneous estimation of the figure required fairly to compensate the plaintiff. In the words of the High Court in ***Planet Fisheries*** it was not proportionate to the situation of the claimant party.

We are in general agreement with these submissions. In reaching our conclusion we have borne in mind the advantage the judge had in seeing and hearing the plaintiff and seeing also the way in which his injuries affected him. The judge thus had a significant advantage over us. We have given this due weight but have reached the conclusion that the amount of $40,000.00 for pain and suffering in this case was excessive. We think that

the appeal should accordingly he allowed and the award set aside. In those circumstances it is for us to reach a conclusion on what a reasonable award should be. We proceed to that task.

Fortunately the plaintiff has made a good recovery from his initial injury. He has suffered no loss of earning capacity. He is able to do ordinary household tasks such as housework and gardening. He cannot be said to have suffered a significant loss of enjoyment of life. But the permanent effect of the accident upon him ought not be minimised. He does continue to suffer pain, although intermittently; he has the permanent restriction of movement in his jaw which has been described particularly when chewing certain kinds of food (this is perhaps his greatest problem particularly because of embarrassment which it causes him); and he is conscious of the slight scarring on his face and his crooked smile. These latter matters, objectively speaking, are not significant but subjectively they are to him and his reactions cannot be described as unreasonable.

The award for this head of damage is to compensate the plaintiff for pain and suffering suffered from the time of the accident when he was 23 years old for the balance of his life. In pain and suffering we include inconvenience, loss of enjoyment of life and, of course, the pain and restriction of movement he suffered in the past, suffers now and will suffer in the future.

The ordeal the plaintiff underwent at the time of the accident is the starting point. It must have been quite frightening. And then, until he returned to Australia, he had a genuine fear that he may have brain injury. Moreover he lost really the whole of the benefit of his honeymoon. This was the beginning of the couple's life together and his disappointment must have been considerable to say the least.

For a long period he had a continuing series of medical examinations. He had to make a decision whether to have an operation and he had the embarrassment and inconvenience of wearing the dental splint to which we have earlier referred. He had to wear this for 6 or 7 months. And finally he has been left with the pain, disability and the

embarrassment which will be with him, sometimes to a greater extent then others, for the balance of his life.

Awarding damages for pain and suffering is acknowledged to be a difficult task. Minds will differ as to the outcome of particular cases. Our experience and sense of proportion tell us that the amount of $40,000.00 was too high. We have reached the conclusion that the plaintiff will be fairly compensated by an award of $27,500.00. That is the amount to be substituted for the $40,000.00 which the learned judge awarded.

Our conclusion has resulted in the need to recalculate interest on the amount of the award, not only because of the reduction of the amount but also because of the longer period which is now involved.

Counsel have given us a schedule in which the new calculations have been made. They are agreed except for one matter. As earlier mentioned the defendant paid $25,000.00 into court in full satisfaction of the plaintiff's claim. This was not accepted and it remained in court. The plaintiff eventually took it out on 27th March 2003 presumably with the consent of the defendants. The plaintiff, through his counsel, seeks interest on the whole amount of the award up to and including 27th March 2003. The defendants' counsel says that interest on the $25,000.00 should cease on the date that it was paid in, namely 25th February 2002. We are of the opinion that the plaintiff's counsel is correct about this matter and that interest on the whole amount should run until 27th March 2003. This necessitates the addition of $1,600.00 to the amount included in the schedule for interest. The calculation as amended by us is as follows:

General damages (Pain & Suffering)	$27,500.00
Interest at the rate of 6% per annum on $27,500.00 from 31/7/95 to 27/3/03	$11,528.00
Interest at the rate of 6% per annum on $2,500.00 from 25/2/02 to 15/8/02 – (437 days)	$180.00

Special damages as awarded by the High Court	$1,531.00
Interest at the rate of 6% per annum as awarded by the High Court on special damages	$639.00
Total Damages	$41,378.00
Less Amount deposited into Court on 25/2/02	$25,000.00
Amount Payable	$16,378.00

The orders we make are as follows:

1) The appeal be allowed.

2) The orders made by Pathik J. be set aside.

3) The order for costs made by the learned judge remain.

4) There will be judgment for the plaintiff in the sum of $41,378.00 of which we note that $25,000.00 has been received in payment.

5) The plaintiff is to pay the costs of the appeal which we fix at $1,000.00.

6) There be liberty to apply in relation to any matter relating to the calculation of interest.

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Sheppard, JA

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Gallen, JA

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Ellis, JA

FIJI COURT OF APPEAL

Solicitors:

Messrs. Lateef and Lateef, Suva for the Appellants
Messrs. Maharaj, Chandra and Associates, Suva for the Respondent

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