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

CIVIL APPEAL NO. ABU0070 OF 2005
(High Court Civil Case No. HBC0300 of 2001L)

BETWEEN: **MOHAMMED SHAHIM** *Appellant*

A N D : **RAKESH CHAND** *Respondent*

Coram: **Ward, President**
Barker, JA
Ellis, JA

Hearing: **Thursday 1st March 2007**

Counsel: **S Maharaj for appellant**
R P Chaudhary for respondent

Date of Judgment: **Friday 9th March 2007**

JUDGMENT OF THE COURT

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[1] The respondent was the driver of a van which was involved in a collision with a four wheel-drive vehicle driven by the appellant on the Rakiraki to Lautoka Road on 4 April 2001. The respondent brought an action in negligence seeking damages for injuries received by him as a result of the accident.

[2] His case briefly was that he was driving towards Lautoka when the appellant's vehicle, coming in the opposite direction, swerved to the respondent's side of the road. The respondent swung his van to the left but the appellant's vehicle collided with it, striking it on the right hand side and spinning it round so that it came to a halt facing back towards Rakiraki. The appellant's vehicle travelled a short distance further, ending up nearly off the road, also on the respondent's side.

[3] The respondent claimed that he did not leave his side of the road and the respondent's van hit his vehicle. The plan submitted in the trial showed the debris from the impact was virtually on the centre line.

[4] The learned trial judge found in the respondent's favour and awarded a total of $72,484.00 of which $65,000.00 was general damages and the remainder special damages and interest.

[5] The first three grounds of appeal challenge the judge's finding of liability on the overall ground that it was against the weight of the evidence. The fifth ground questioned the award of interest and the sixth and seventh dealt with the basis upon which the judge assessed the quantum of damages.

[6] It appears that the trial in the High Court was fixed to start on 20 July 2005 but, on 19 July 2005, the appellant filed a summons seeking a preliminary hearing for the determination of an issue arising out of the interpretation of the terms of an insurance policy held by the appellant with Sun Insurance. The fourth ground of appeal relates to the judge's ruling on that issue.

[7] We have not heard argument on that matter. It was a remarkable step for the appellant to have taken. The claim was in tort. The insurance company was not a party and the question for which a ruling was sought had not been pleaded at any stage. The record of the pre-trial conference shows it was not raised at that stage either.

[8] Despite acknowledging the action had been pleaded at common law and had nothing to do with any question of the plaintiff's employment, the judge proceeded to give a short written ruling in which he dealt briefly with the effect of the particular clause of the policy on the Workman's Compensation Act. He then dismissed the summons on the ground that he had insufficient material to determine the matter. He would have been better to have refused to hear it. Instead, he was drawn into wasting the court's time on an issue which had nothing to do with the case he was to try.

[9] In this Court, Mr Maharaj for the appellant, based his submissions in respect of the first three grounds on the trial judge's evaluation of the evidence. We can deal with them shortly. This Court has frequently referred to the reluctance of an appellate court to interfere with the primary judge's findings of fact. He has the advantage of seeing the witnesses and hearing the evidence. That gives him an advantage over the appellate court which has to rely on the written record and so the latter will only interfere if the record reveals that the trial judge's conclusion is clearly unreasonable on the facts as found, or is based on a fundamental error.

[10] In this case, the judge simply explained his finding by stating that he accepted the evidence of the plaintiff and of the sole independent witness to the accident. Evidence was also admitted under section 17 of the Civil Evidence Act that the appellant had been convicted of dangerous driving as a result of the collision. The judge directed himself on the weight of that evidence in accordance with the well-known cases of *Hunter v Chief Constable of West Midlands* [1982] AC 529 and *Stopple v Royal Insurance Co Ltd* [1971] 1QB 50 as applied by this Court in *Jana Prasad and others v Mano Lata* ABU 26 of 2004, 4 March 2005.

[11] Counsel for the appellant has pointed out the conflicting evidence of the plaintiff and the defendant. Even if he was able to persuade this Court that there was little upon which the judge could distinguish between them, the conviction shifted the burden to the defendant to show on the civil standard than he was not negligent. The learned judge considered that position and found that he had failed to discharge that onus. We see no reason to interfere.

[12] The respondent received serious injuries to his head, right foot and left leg. The latter included a facture of the third metatarsal on his right foot and of the tibia and fibula of his left leg. He was examined by a consultant orthopaedic surgeon in November 2003 and July 2005. He reported on the later date that the respondent had shortening of the left leg, diminished movement of the left ankle and knee and still suffered headaches and dizziness. He assessed a disability of 30%. There was no indication that this consultant was qualified to express a view on neurological injuries

[13] The respondent was also examined by an orthopaedic surgeon on the instructions of the appellant in June 2005. He agreed with the major conclusions of the plaintiff's witness but discounted the headaches on the ground that he could find no anatomical explanation. Largely on that difference, he assessed the disability at 12%.

[14] The prayer in the claim was for special damages and general damages for pain and suffering, loss of amenities of life and loss of earning capacity.

[15] The judge dealt with the loss of earning capacity separately from the other components of general damages. The appellant had opposed an award under this head on the ground that, whilst the respondent had been earning $97.87 per week prior to the accident, he had since been employed in a more sedentary post in which he earned $174.00 per week.

[16] The judge applied the reasoning of Henry JA in *Apal Swamy Naidu v Bechni and Subarmani* Civil Appeal 43 of 1974, where the injured man was retained by his employer without any reduction of pay and was later promoted by him:

> "[The judge's] finding is no more than a finding that Appellant is not at the present time suffering any financial loss as the result of his injury and, if he continues in his present employment, he will never suffer any loss. The real question is whether his capacity to earn has been adversely affected and, if so, what is reasonable compensation for such loss. There is no justification for limiting this head of damage to loss of his present employment resulting from his disability.

> What if his employment is terminated for any other reason? Is he to be bound to be an employee for one employer all his working life and lose all chance of choice?"

[17] That was the correct test. Counsel for the appellant suggests that the fact the respondent now holds a better paid job shows his earning capacity in the work for which he was best qualified has not been "adversely affected". The evidence was that he held a diploma in management and so it was the effect on his capacity to hold management positions which was to be used as the guideline. We do not accept that is a correct application of the test as explained by Henry JA

[18] The manner in which the judge dealt with the question of general damages apart from the loss of earning capacity was less than helpful. Having pointed out that earlier cases are of limited assistance in determining an appropriate level of award at the present day, he dealt with the subject very briefly:

> "If I accept that the plaintiff has a permanent disability somewhere between 12% and 30% some assistance is gained from *Sunil Chand v J S Hill and Associates Ltd and anor* – HBC 0154 of 1998L where the plaintiff with incapacity of 20% was awarded the sum of $30,000.00 by way of general damages."

[19] He gives no further reasons and gives no indication of how he relates the sum to the evidence of the respondent's injuries. Neither does he give any reason for his award of $20,000.00 noted below

[20] The actual sums awarded are set out in the schedule of damages at the conclusion of his judgment:

"General damages	$30,000.00
Interest @ 6% from 4/10/01 – 26/8/2005	$ 7,000.00
Future	$20,000.00
Loss of earning capacity	$15,000.00
Special damages	$ 431.00
Interest @ 3% from 12/4/01 – 26/8/05	$ 53.00
TOTAL	$72,848.00"

[21] There are no reasons given apart from the apparent adoption of the award in the *Sunil Chand case* presumably because the percentage disability was approximately midway between the two figures he had been given in this case. The judgment is silent on what is encompassed by the word "Future". Whether it is for future pain and suffering or loss of amenities of life or both is unexplained.

[22] Whilst the consideration of an award of interest requires a separation of past and future loss, in a case of this nature it is unnecessary to assess general damages under separate heads. The risk is that the awards are likely to overlap and result in a false total figure. However, the use of a global figure does not absolve the court from the need to explain its conclusion. In the present case, this Court is left with nothing upon which to base a consideration of the propriety of the judge's method of assessment.

[23] We bear in mind the limited role of an appellate court when reviewing the amount of damages awarded. It was recently explained by this Court in *Bank of Baroda and Sanjay Kumar v Sanit Lal*; Civ App ABU 78/05, 10 November 2006:

> "We are mindful of the limitations imposed on an appellate review of damages. Putting aside cases where an irrelevant factor has been taken into account or a relevant factor overlooked or there has been some other error of principle, this Court can only interfere where the award is well out: where the award can be stigmatised by one of the well known descriptions such as inordinately high, wholly out of proportion or quite unreasonable. Subject to that, it is the Court's duty to scrutinise the amounts in issue to maintain as far as possible a reasonable parity with awards in like cases."

[24] The total general damages amount to $65,000.00 and the appellant suggests that is too high for a case of this nature and asks that we consider reducing them. We do consider that the general damages are too high and that no adequate explanation for such a high award was given by the Judge.

[26] Doing the best we can with the limited material available, we think that, at best for the respondent, a proper award of general damages should be $50,000.00. The judgment is varied accordingly and consequential adjustments must be made.

[27] The judge awarded interest at 6% p.a. on the damages for past pain and suffering. The last ground of appeal relates to that award. Mr Maharaj does not challenge the rate of interest but does question the period for which it was ordered. As can be seen, it was awarded from the date of the filing of the writ to the date of judgment. The appellant's case is that it was no fault of his that the case was not listed for hearing until 20 July 2005 and so, he asks, why should the appellant be penalised.

[28] The respondent's response is exactly the same. The failure to obtain a hearing date was not his fault either.

[29] The overall principle is that a successful plaintiff is entitled to his damages from the date of service of the writ and the delays caused by the trial process should not reduce the value of that award. It is accepted that the delay in trial in this case was not the fault of either party but the fact remains that the effect of the delay is that the defendant has had the use of the money during that time and so he should not be disadvantaged by the award of interest.

[30] The decision is a matter of discretion for the judge and he explained the basis of his decision:

> "Interest is claimed by the plaintiff and there would appear to be no reason why it should not be awarded at a rate of, say, 6% in accordance with the provisions in *Jefford v Gee* as adopted in Fiji in *Attorney General v Charles Valentine*; Civil Appeal 19 of 1988".

[31] The principles in respect of awards of interest established by *Jefford v Gee*; [1970] 2QB 130, are conveniently summarised in the head note:

1. Interest on damages in personal injury cases should be awarded to a plaintiff only for being kept out of money which ought to be paid to him.
2. that the appropriate rate of interest should be that payable on money in court placed on short term investment account taken as an average over the period for which it was awarded
3. that in general interest should be allowed on special damages from the date of the accident to the date of trial at half the appropriate rate
4. that no interest should be awarded on damages in respect of loss of future earnings and that interest should be awarded on damages for pain and suffering and loss of amenities at the appropriate rate from the date of service of the writ to the date of trial.

[32] Applying those principles, and accepting that the appellant does not challenge the rate of 6%, it is clear the award from the date of accident was exceptional. The judge gives no indication why he adopted that date and we can see no reason why this case should depart from the normal rule. The writ was filed on 3 October 2001 and service acknowledged on 16 November 2001. The appeal is allowed on this aspect and the interest at 6% on the item identified as general damages in the schedule in the judgment is altered to read 'Interest @ 6% from 16 November 2001 to 26 August 2005' and the figure adjusted accordingly.

[33] After the appeal was lodged, the appellant applied for a stay of execution. The judge granted a stay conditioned on the payment of the full sum into court pending appeal. The appellant lodged a separate appeal against that order but the court directed that it be consolidated with this appeal. The ground is that the judge took into account irrelevant considerations unsupported by any evidence.

[34] By rule 34 of the Court of Appeal Rules, an appeal shall not operate as a stay of execution but the Court has the power to grant such a stay in an appropriate case. Whether or not to do so and whether or not to make it conditional in any way is a matter for the discretion of the judge.

[35] It is clear that the application was made on the basis that the damages were to be paid by the insurance company and so the sum was secure. The judge explained his reasons for including a condition of payment into court:

> "Regrettably, in this country and elsewhere where insurers who have appeared to be in an extremely healthy state one day have been exposed to be in extremely unhealthy state the next day. There can be no assurance that defendant will in fact be able to pay should the plaintiff be successful on appeal.
>
> As indicated earlier, the starting point is the plaintiff is entitled to the fruits of his judgment. It is I think untenable that a situation be allowed to exist which will create even a slight possibility that the plaintiff would not be able to receive the fruits of his judgment at an appropriate point in time."

[36] The appellant suggests that, whilst the court must be cautious, this is really conjuring up a reason and, if the judge was concerned about that situation, he should have heard evidence. As it was, his order was based on nothing more that mere speculation.

[37] We agree. However, the matter is no longer a relevant issue and no order is needed. In a ruling on 17 February 2005, a single judge ordered that the judgment sum should be paid into an interest bearing account within two days. The interest earned since then should be paid to the parties in accordance with the result of the appeal.

[38] The appeal is allowed in part. The general damages are reduced and the interest on the general damages for past suffering is to be adjusted. Since both parties have succeeded in part, there will be no order for costs in this Court.

Result

The appeal is allowed in part.

The judgment in the High Court is varied

(i) by reducing the total amount of general damages from $65,000.00 to $50,000.00

(ii) by adjusting the interest awarded on $30,000.00 commencing on 16 November 2001.

Ward, President

FIJI COURT OF APPEAL

Barker, JA

Ellis, JA

Solicitors:

Suresh Maharaj & Associates, Lautoka for the appellant
Messrs Chaudhary & Associates, Lautoka for the respondent