(51)

IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

APPELLATE JURISDICTION

CIVIL APPEAL NO. ABU0084 OF 2006S
(On Appeal from the High Court of Fiji, Suva
Civil Action No. HBC 45 of 2004)

BETWEEN	:	**THE PERMANENT SECRETARY FOR HEALTH**	*First Appellant*
		ATTORNEY-GENERAL OF FIJI	*Second Appellant*
AND	:	**ARVIND KUMAR** *(f/n Deo Prasad) &* **KAMNI DEVI** *(f/n Appal Sami) As parents & Next friends of Jashnil Kumar*	*Respondents*

Coram : Byrne, JA
Shameem, JA
Scutt, JA

Dates of Hearing : 11th , 18th , February 2008
Date of Judgment : 20th June 2008

Counsel : S. Sharma for the Appellants
S. Maharaj for the Respondents

JUDGMENT OF THE COURT

---

1. On 21 January 1996 at Lautoka Hospital Jashnil Kumar was born prematurely after 28 'weeks' gestation.

2. As Jashnil was born premature, the Lautoka Hospital kept him in an Incubator in the Premature-Birth Nursery in the Maternity Ward of the hospital for 3 weeks.

3. After being kept in the Premature-Birth Nursery for 3 weeks Jashnil was transferred to the Maternity Ward for another week.

4. While he was kept in the Incubator he was given supplemental oxygen and was later told by the Eye Specialist at the Hospital, Dr. T. Oo that as a result of over doses of oxygen Jashnil had developed a condition called RETINOPATHY of Prematurity (ROP) which ultimately led to his losing his eyesight.

5. The parents Arvind Kumar and Kamni Devi then issued a Writ for damages on behalf of themselves and their child (to whom we shall henceforth refer as Jashnil) against the Appellants claiming that they had been negligent in causing Jashnil's blindness by failing to monitor through their servants and agents, the Medical Practitioner and nurses responsible for Jashnil's care, the amount of oxygen he had been given whilst in the Incubator.

6. After a long trial the High Court gave Judgment on the 20 July 2006 for the Respondents, holding that the Appellants had been negligent treating Jashnil and awarded damages to the Respondents in the sum of $458,735.00 as well as interest.

7. The Appellants now appeal against the award of damages only and do not dispute the finding of negligence.

DAMAGES AWARDED BY THE HIGH COURT

The High Court awarded damages to the Respondents as follows:

1. Special Damages:	-	$ 755.00
2. General Damages for Pain & Suffering & loss of amenities:	-	$190,000.00
3. Loss of earning capacity:	-	$ 78,000.00
4. Economic loss (past & future) care	-	$160,000.00
5. Costs:	-	$ 30,000.00
Total (*excluding interest*):	-	$458,755.00

NOTICE OF APPEAL

8. In this appeal, the Appellants challenge the amounts awarded by the High Court, on the following grounds:

> *1. THAT the Learned Judge erred in law and in fact in awarding excessive and disproportionate damages of $190,000.00 for **pain and suffering and loss of amenities** to the Respondents.*
>
> *2. THAT the Learned Judge erred in law and in fact in awarding excessive damages of **$78,000.00** to the Respondents for **loss of earning capacity.***

*3. THAT the Learned Judge erred in law and in fact in awarding excessive damages of **$160,000.00** to the Respondents for **economic loss and for past and future care.***

*4. THAT the Learned Judge erred in law and in fact in making an excessive award of **$30,000.00*** as ***costs*** for legal and professional costs and disbursements.

9. The Appellants challenge the amounts awarded by the High Court under the following heads:

1. General damages Pain and suffering and loss of amenities including mental anguish to parents	-	$190,000.00
2. Loss of earning capacity	-	$ 78,000.00
3. Past economic loss – past and future care.	-	$160,000.00

We shall now deal with these grounds in their order.

Ground 1 – Pain, suffering and loss of amenities

10. Under this head of damages the learned Judge in the High Court awarded $190,000.00. The Appellants do not dispute that Jashnil would have suffered pain and discomfort and loss of amenities as a consequence of medical negligence. However they submit that the award of $190,000.00 is excessive and grossly disproportionate to the awards currently made by the courts in Fiji.

11. The Respondents have filed a cross-appeal claiming:

(i) that the award of $190,000.00 as general damages be varied and increased to $220,000;

(ii) the award of $78,000.00 for loss of earning capacity be varied and increased to $228,800;

(iii) the award of economic loss and for past and future care of $130,000.00 be varied and increased to $421,200;

(iv) the award for alteration to the Respondent's house of $15,000 be varied and increased to $35,000;

(v) the award for sundry expenses of $15,000. be varied and increased to $25,000;

(vi) that the rate of interest awarded on the general damages be increased to 8% from the award of 5% from the date of issue of the Writ (20 January 1999) to the date of Judgment;

(vii) that interest on past costs of care and special damages be similarly increased to 5% instead of 2½ % and be awarded from 20 January 1996 to the date of Judgment;

(viii) that Statutory interest be awarded on the total award from the date of Judgment on 20 July 2006 to date of the payment at the rate of 5% and that there be an order that the costs of Court of Appeal and the Respondents in the Court of Appeal be paid by the Appellants;

12. The Appellants submit that although the Learned Trial Judge acknowledged that *"in making awards which are fair and reasonable, the Court has to fall back on previous amounts so that the figures arrived at are in proportion to awards in other cases"*, the Court awarded a figure that is grossly disproportionate to other comparable awards.

13. This appeal raises some important questions about the current level of awards of damages for pain and suffering in Fiji because it is said by the Appellants that in arriving at an amount of damages for pain and suffering

the Courts must take into account the socio-economic conditions of Fiji. By this the Appellants mean that because Fiji is classed as an *'undeveloped'* country' awards of damages for pain and suffering must be lower than those in more developed countries.

14. The Court has been referred to numerous cases in Fiji and overseas which are said to support this contention.

In our Judgment it is time to review what has almost become dogma in the award of damages under this heading in Fiji.

15. We start with a basic principle of medicine and biology:

The design of the human nervous system is universal and does not change according to a litigant's race, age, class, environmental factors, or social standing.

The transmitting brain waves do not recognize these factors.

16. It follows therefore in our view that an under-privileged litigant who suffers injury hurts just as much as a wealthy, or socially important litigant who suffers the same injury.

Therefore, at least in theory, each is entitled to the same compensation under the law.

17. This Court has held constantly over the years that the latter statement is incorrect and that an *'under-developed'* or *'undeveloped'* country cannot afford to pay awards of damages comparable to those in more developed countries. Implicit in this contention is that, were it to be otherwise, the flood gates would open and unsuccessful Defendants would be ordered to

pay damages comparably higher than those awarded in more developed countries and would suffer dire financial consequences.

18. This Court considers for reasons on which we shall expand later, and with great respect to previous decisions of this Court, that this prophecy of doom can no longer be supported in Fiji.

19. We now consider the grounds of appeal in their order. We begin with the citation by the Appellants of this Court's Judgment in **Attorney-General v. Paul Praveen Sharma** (Civil Appeal No. ABU0041/93) in which the Court stated that it had a duty to maintain a consistency of awards in similar cases. At p.8 of the judgment it said -

> ***"The third ground of appeal concerns the level of the general damages awarded in relation to the circumstances of the case and the previous decisions of the courts in Fiji. There is no doubt that in fixing the quantum of general damages a Trial Judge, having calculated the amount which appeared to be appropriate under the various heads of such damages, must then consider whether the total of those amounts is itself appropriate in all the circumstances of this case. In coming to a conclusion on that matter he should have regard to the need for consistency in the level of general damages awarded in similar cases".***

20. This Court agrees that there should be consistency in the level of general damages awarded in similar cases but we add this rider, that if there has been an error in the approach of the courts to the award of general damages for pain and suffering then it must say so. There should not be consistency merely for consistency's sake. Of course, to some extent, the

so-called socio-economic conditions of Fiji must be relevant but in our Judgment they should not be an over-riding factor in the assessment of damages under this head. The task of the Court must be to arrive at a proper figure in current Fiji dollars which will properly compensate a person who has suffered pain and loss of enjoyment of life. We agree with the statement of the Court of Appeal in **Joseva Rokobutabutaki** & **Attorney-General -v- Lusiana Rokodovu** (Civil Appeal No. ABU0088/1998) - Judgment of 11th February 2000 - p.5 that:

> ***" Each case must depend on its own circumstances, but pain and suffering and loss of amenities of life are not susceptible of measurement in terms of money and a conventional figure derived from experience and awards in comparable cases must be assessed."***

We also agree that the Court should refer to other awards *"as not more than broad guidelines to ensure that (the Judge) is on the right track".*

21. The Appellants rely on the decision of this Court in **Yanuca Island v. Peter Elsworth** (Civil Appeal No. ABU85/2000) in which the Court reduced an award of general damages for pain and suffering and loss of amenities from $120,000 to $50,000 and said at p.6 of the Judgment, echoing once again the sentiment of the appropriateness of consistency in awarding general damages as follows:

> ***"We are also persuaded that the initial starting point for pain and suffering and loss of amenities (enjoyment of life) at $120,000.00 was too high and out of touch with the amounts usually awarded in Fiji for personal injuries. We return to this matter later but in broad terms our view is that awards beyond $100,000.00 are rare and***

> ***only occur in cases of the most serious nature. Even without the other problems already referred to we would have allowed the appeal on this issue of quantum of general damages".***

22. The learned Trial Judge in this case relied upon the High Court decision in **Rokodovu** where the High Court had awarded damages for pain and suffering of $200,000.

23. The Court of Appeal in **Rokodovu** allowed an appeal against this award and reduced it to $150,000. The Appellants submit that in this case the Learned Trial Judge failed to take into account that Rokodovu's was a paraplegic case in which *" the amount for pain and suffering and loss of amenities is considerably higher".*

24. Perhaps the pain and suffering and loss of amenities of Lusiana Rokodovu was considerably higher than that suffered by Jashnil in this case. We say *"perhaps"* advisedly because in our judgment one of the greatest losses a person may sustain is that of his eye-sight.

25. As the Trial Judge said at p.40 of the Court Record - *"The infant lives in a world of darkness. He has a painful existence both mentally and physically having completely lost one of the body's most important senses when he can only hear sound and perhaps imagine".*

26. Jashnil will never in the future be able to see the sun rising or setting over a calm sea and watch the various light changes as it does so; he will never see the colours of a rainbow because no matter how they are described to him he will never understand what those colours are. He will never see rain coming over the sea with the visibility changing as it does so because no amount of description will be able to convey to him as it does to some

people this magic of nature. If he ever marries and has children he will never see his children's faces.

27. And yet the Appellants say he has received too much.

28. He will never be able to appreciate the beauty of wet roofs beneath the lamp-light or, as the Poet Rupert Brooke wrote in his poem, ***"The Great Lover"***, *"firm sands; the little dulling edge of foam that browns and dwindles as the wave goes home."* He will never see the magic of a variety of flowers in a garden or have the joy of watching children at play or of kittens playing with a ball of wool, throwing caution to the wind as they do so. These are the little things of life the sight of which will, in the present state of medical knowledge, be forever denied to him. And yet the Appellants say he has received too much.

29. In Elsworth's case this Court said, *"Awards beyond $100,000 are rare and only occur in cases of the most serious nature"*. Seriously we ask, *"Is not this such a case?"* In our Judgment it is.

30. The Appellants submit that *"whilst accepting that the Respondents' child did suffer pain and may have lost amenities, the severity of such claim has been exaggerated."*

31. We pause for a moment here to ask, *"How can it possibly be said that Jashnil only "may" have lost amenities, and that the severity of his claim has been exaggerated?"* This Court has no doubt that Jashnil has lost many amenities, only some of which we have so far mentioned and we cannot accept that the severity of his claim has been exaggerated.

32. The Appellants next allege that *"the pain and suffering and loss of all amenities was nowhere close to the catastrophic endurance, pain, suffering*

and permanent disabilities left in other cases where awards have been much less". If this be true then in our Judgment it is time these awards were reviewed and that in future, in any similar cases, higher awards must be the order of the day. This is not to say that they must be increased radically because we consider that awards of damages should be increased only by gradual increments.

33. It was then submitted by the Appellants that in the case of **Attorney-General v. Tevita Waqabaca,** (Civil Appeal No. ABU0018/1998), a 5-year old boy suffered cerebral palsy due to lack of oxygen. He had 100% loss of bodily function, and at the date of the trial he was barely 3feet tall. He had no prospect whatsoever of recovering and was totally dependent on others for the rest of his life. It was submitted that his injury was much more extreme than that of Jashnil as he had no potential whatsoever in his life. That maybe so but we then ask, what potential does Jashnil have in Fiji or anywhere else because of his loss of sight? The answer must be very little. His prospects for employment are severely limited. He will never be able to drive a car or to engage in much if any manual work compared with other members of the community in full possession of their faculties. With adequate facilities and proper support at university, it may be possible for him to take up a teaching career or to enter a profession such as law, particularly in academia. However he could never become a Doctor or Dentist or a Veterinary Surgeon, just to give some examples of professional employment. Indeed, it is arguable that access to employment and public amenities for those with a disability is even more limited in Fiji than in more wealthy and developed countries. His prospects of gainful employment must be very low and yet the Appellants say he received too much.

34. In our Judgment this cannot be correct. To reduce an award of $190,000 to a mere $90,000 cannot be justified; rather, we consider that there is very

good reason for increasing the amount of general damages for pain and suffering to the amount claimed in the Cross-appeal, namely $220,000 and we so order. In our Judgment this is not an exorbitant amount to compensate Jashnil as much as money can, for the terrible injury he suffered at the hands of the Appellants.

Ground 2

35. We pass now to the second ground of appeal, that the learned Judge erred in awarding excessive damages of $78,000.00 to the Respondents for loss of earning capacity. It is submitted that this sum fails to take into account the chances of employment of Jashnil and that with the necessary discount, an award of $50,000.00 should be made under this head.

36. In arriving at this figure, the learned Judge used a multiplier of 15 and a multiplicand of $100.00 giving a multiplication of $5,200.00 by 15. In our opinion this multiplier if anything is a little low and the multiplicand also somewhat low but not so much in our Judgment that we should interfere with it. We therefore uphold the sum of $78,000.00 under this heading.

Ground 3

37. The Appellants allege that the amount of $52,000.00 for past cost of care was excessive. It is submitted that there was no evidence adduced that this was the amount incurred by the Respondent's parents to provide care from the date of birth to the date of Judgment. As this was past cost of care, this should have been specifically pleaded and strictly proven as special damages, which it was not.

38. There is considerable merit in this claim but the court cannot ignore the fact that the parents must have incurred some costs for caring for Jashnil

from 21st January 1996 until the date of Judgment. The Trial Judge assessed this loss as 52 weeks by $100.00 per week by 10 years - $52,000.00.

39. In so doing in our Judgment he fell into error and to an extent we accept the Appellants' submission on this. In our Judgment it would be reasonable to allow the Respondents $20,000.00 under this heading.

40. Objection is taken by the Appellants to the amount of $15,000 allowed by the Judge for future expenses being for the alteration to their house so that the Appellants and Jashnil may live in it together because of Jashnil's condition. It is true that the boy's father testified under cross-examination that he could make the necessary alterations himself at a lower cost of from $5,000.00 to $7,000.00 but we can see no reason why the father should be put to this trouble and expense and consider it is reasonable for the alterations to be made by professional builders. We share the Judge's view that $15,000.00 is a reasonable amount and have little doubt reading the transcript that the father probably agreed to this lower amount because it is clear from his answer to counsel that he had not really given any thought to it. He was not asked by counsel, probably naturally, how he arrived at these figures.

41. The Learned Judge also awarded a sum of $15,000 for future sundry expenses for medical expenses, and special equipment such as Braille books, and special Computers. In doing so we agree with the Appellants' submission that he overlooked the important evidence adduced at the trial from Jashnil's father that the boy would be enrolled at the Fiji School for the Blind, where he is likely to remain for primary and secondary education up to Form 7. The boy's parents admitted that Braille books, special computers and other technical equipment are provided free to students at school. We agree that the Appellants' submission on this that the amount

of $15,000.00 which the Judge awarded should be reduced. In our view it would be reasonable to allow $5,000.00 under this heading because it is quite possible that not all the boy's expenses will be paid for by the school.

42. With the reductions we have made here we reduce the amount of $160,000 awarded by the Trial Judge to $118,000.00.

Costs

43. Under this head, the Learned Trial Judge awarded costs in the sum of $30,000.00. The Appellants submit that this amount is wrong in law as it could not be supported by the scale of costs under Order 62 of the High Court Rules 1988. We consider there may be some merit in this submission because on their face, the costs awarded by the Trial Judge appear too high. Therefore we propose that in lieu, the Order for costs made by the Trial Judge be varied and that there be an Order that the Respondents' costs be taxed if not agreed.

44. Taking all the matters we have mentioned into account we summarise the damages and interest to be paid by the Appellants as follows:-

1. Special damages (agreed)	-	$ 755.00
2. General damages - pain and suffering and loss of amenities	-	$220,000.00
3. Loss of earning capacity	-	$ 78,000.00
4. Past economic loss	-	$118,000.00
5. Costs - to be taxed if not agreed		-
6. (a) Interest at the rate of 5% from the date of Issue of the Writ 20/1/1999 to the date of Judgment 20/7/2006 on the amount of Cross Appeal	-	$ 82,500.00

7. Interest on past cost of care $20,000.00 @ 2½% from 21/1/96 to 12/7/04 - $ 4,250.00

8. Interest on $755.00 @ 2½% from 21/1/96 to 12/7/04 - $ 173.00

Orders

45. The result is that the appeal is partly allowed and the Appellants are ordered to pay the Respondents Arvind Kumar and Kamni Devi the sum of $25,178.00 being special damages - $755.00 and interest - $928.00, past cost of care and interest $24,250.00. The remainder of the award, namely general damages of $220,000.00, interest thereon - $82,500.00, loss of earning capacity and past economic loss as detailed, - $498,500.00 is to be paid into Court by the Appellants and invested by the Chief Registrar of the High Court on behalf of Jashnil Kumar until he reaches the age of 25 years with liberty reserved to the parties to apply to the Court should this be necessary on any aspect of the administration of the fund which will be administered by the Public Trustee. The sum of $25,178.00 is to be paid to the Respondents Arvind Kumar and Kamni Devi through their solicitor on behalf of those Respondents.

46. There will be orders in these terms.

Byrne John E, JA

Shameem Nazhat, JA

Scutt Jocelynne, JA

At Suva

20th June 2008