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

CIVIL APPEAL NO. ABU 0002 of 2014
(High Court Case No. HBC 022 of 2011)

BETWEEN	:	**VIMLA WATI**
		Appellant
AND	:	**THE PERMANENT SECRETARY OF HEALTH**
		1st Respondent
AND	:	**ATTORNEY GENERAL OF FIJI**
		2nd Respondent
Coram	:	**Calanchini, P** **Almeida Guneratne, JA** **Brito Muttunayagam, JA**
Counsel	:	**Mr. A. Sen for the Appellant** **Mr. J. Mainavolau for the Respondents**
Date of Hearing	:	**4 May 2016**
Date of Judgment	:	**27 May 2016**

JUDGMENT

Calanchini, P

[1] I agree with the orders proposed by Guneratne JA and his reasoning.

Almeida Guneratne JA

Introduction

[2] This was a case of medical negligence, the factual matrix of which is recounted in detail in the judgment of the High Court. There were two surgical operations performed on the Appellant. The learned Judge found that the doctor who performed the first operation was guilty of gross negligence by his Judgment dated 25th October, 2013 and by a supplementary decision dated 31st October, 2013 awarded: *"$1,108 as special damages with interests at 3% p.a from 4 May 2010 to the date of Judgment (ie. 25.10.2013) and as general damages of $15,000 with interest at 6% p.a. from 11th June, 2010 to the date of the Judgment (ie. 25.10.2013)".*

[2] The defendants did not appeal against the said Judgment. This appeal is by the plaintiff who was awarded the said sum as damages.

Grounds of Appeal

[3] The grounds of appeal are set out in the Notice of Appeal dated 7th January, 2014, viz: that,

> *"1. The learned trial Judge erred in law in failing to make the correct award to the appellant in accordance with the established principles of assessment of damages.*
>
> *2. The learned trial Judge erred in failing to consider the pain and suffering of the appellant by reasons of the first operation which had caused her jaundice, billary peritonitis and a second operation.*
>
> *3. The learned trial Judge erred in law and in fact in failing to consider the submission made to him on behalf of the appellant together with the decided authorities when making an appropriate award.*
>
> *4. The learned trial Judge erred in law and in fact in making an appropriate award for special damages consistent with the evidence adduced in court.*
>
> *5. The learned trial judge erred in law and in fact in making the award of $15,000 to the appellant on the basis of a Magistrate's Court*

decision that was almost two decades old and which was decided within the confines of the jurisdiction of the Magistrate's Court.

6. *The learned trial Judge erred by taking into consideration irrelevant matters and failed to take into consideration relevant matters, in particular the unchallenged evidence of the appellant and her expert witness pertaining to pain, suffering and damages."*

Re: The Matter of General Damages

[4] The appellant has put in issue the sum of $15,000.00 awarded by the learned trial Judge as being inadequate on the grounds urged in the Notice of Appeal viz: "the pain and suffering" the appellant had had to undergo resulting from the first negligent surgery that was performed on her and the consequential loss of amenities.

A Brief Statement of the law

[5] I shall preface my inquiry into the factual content of the matter in issue by reflecting on the principles relating to assessment of general damages briefly.

Presumption in law as to General Damages

[6] The initial premise is that, general damages are those damages that the law presumes to have resulted from the defendant's tort. (Street on Torts, 11th Ed, Oxford University Press, 2006) This is because they are not capable of exact pecuniary assessment.

Why that Presumption cannot be regarded as being irrebutable

[7] But, how is that presumption expected to operate in a given case? Is it to be on the mere *ipse dixit* of a plaintiff who has been the victim of a tortious act? Or is it on a Court's assessment substituting a sum for the claim of a plaintiff? It cannot be either, for, if it was to be so, both would be arbitrary.

Resulting principles in Assessing General Damages

[8] Thus, the reason why, over the years, in developed jurisdictions, principles have come to be evolved in searching for a feasible approach to the issue of assessing general damages in personal injury cases such as in the instant case.

[9] In that regard, the principles and precedents have been based on nothing more and nothing less than a trial Judge's evaluation and assessment of the evidence, the initial burden being on the plaintiff as per the normal requirements relating to the burden of proof, just as in any other case where the trial judge is regarded as the arbiter of facts only to be disturbed if he should be found to have misdirected/ non-directed and / or erred.

[10] Bearing the aforesaid principles in mind I shall now proceed to examine the findings of the trial judge that have been put in issue by the Appellant in this Appeal.

The Findings of the High Court

[11] The factors that influenced the Judge in arriving at the said sum are contained at paragraphs 23 to 32 of his Judgment. These may be condensed as follows:-

1. The pain the plaintiff (appellant) was experiencing was due to her advanced age and there was no proof of permanent or temporary impairment from negligent surgery. There was no impairment assessment report. The plaintiff was unable to link the causation of her present difficulties to the defective operation.

2. The award for the severe pain is confined only till corrective surgery was conducted and the time period was from 4th May to 20th May, 2010 (ie. 16 days from the time of the negligent surgery to the date of the corrective surgery).

3. In view of the need for uniformity as to awards, regard has to be had to a Magistrate's Court decision of 1996 where the period of pain and suffering had been for nearly two months as opposed to 16 days in the instant case and the principles governing in **Wright v British Flys Board** [1983] 2 ALLER 698 at 699-70] were relevant.

Submissions on behalf of the Appellant

[12] Elaborating on the written submissions dated 13th April, 2016, learned Counsel for the appellant took issue with the learned Judge's findings and reasons given therefor on all fronts. His submissions which were made by reference to the evidence on Record may be recapped as follows:-

(A) **Re: Pain and Suffering**

Learned Counsel submitted thus:

(i) Adverting to the medical records, (vide: Volume of the Record furnished to this Court as 'Exhibits') Counsel was able to demonstrate that, after being re-admitted to Labasa Hospital on 20th May, 2010 after the 1st defective surgery she was finally discharged only on 30th July, 2010. To begin with, counsel submitted that, the 2nd operation was on 23rd May, 2010 and not on 20th May, 2010. So, the period between 20th May and 23rd May had not been considered by the trial Judge. Consequently, counsel submitted that, the learned Judge's deductions do not bear scrutiny.

(ii) Following from the aforesaid premise (i), Counsel submitted that, the computation of 16 days was an error and the period was 60 days, my own antithetical calculation for the period being 71 days.(20th May being inclusive and 30th July being excluded).

(iii) I now move to the aspect of 'impairment' whether "permanent or temporary" which learned Counsel for the Respondents was at pains in seeking to draw a distinction. On that, to recap the evidence on Record briefly, the plaintiff (appellant) had been an outgoing patient before the second operation, no doubt'. But, after she had been discharged from the CWM Hospital she had had to shuttle between Labasa and Suva on four occasions in four weeks. She had had to undergo physiotherapy as well.

Did the learned judge have regard to the said factors?

This was a query made by the presiding judge (His Lordship the President) and the Appellant's counsel's answer was "No". Learned Counsel for the Respondents was not able to counter that.

[13] On the basis of the foregoing analysis, I am driven to draw the conclusion, that a causal link, between the first surgical operation and the 'impairment' the plaintiff (appellant) was subjected to stood established.

[14] Accordingly, I venture to lay down as a proposition that, a victim of a tortfeasor (such as the appellant in the instant case) is entitled to have him/her compensated not only for any permanent impairment but even for a temporary impairment. Being asked from the Respondent's Counsel as to whether in regard to partial (temporary) impairment, medical evidence is required, counsel was not able to refer to any authoritative precedents.

[15] Next, I turn to the age criterion that surfaced in the submissions of the Respondent's Counsel. Counsel submitted that the plaintiff (appellant) was 61 years of age when the first (negligent) surgical operation was performed on her. But, could it be said that the sun had set on her life? Even assuming it to be so for argument sake, adequate twilight

still remained. Dr. Chowdhry's evidence on the aspect of old age itself was equivocal. He said "The patient is elderly so I can't confirm whether it is a result of complication from the operation. The patient's age can be reasons for (being) unable to bend. It may be possible due to severing of heptic duct." (at p.143 of RHC)

[16] The first operation was done in Labasa on 4th May, 2010. From there she had to be admitted to CWM Hospital in Suva and finally discharged on 30th July, 2010 followed by visits to the clinic until 24th August, 2010. (plaintiff (appellant's) evidence at page 140 – RHC). All this she did not have to undergo had the first operation been successful. In that context Dr. Chowdhary's evidence is most revealing. He was asked "If the 1st operation was done correctly would the patient have needed a 2nd surgery?" "No" was the Doctor's answer. On the whole, I have no hesitation in concluding that the connection between the first negligent surgery and "past, present and future pain and suffering" the plaintiff (appellant) had had to undergo stood established.

(B) Re: Loss of Amenities

[17] The appellant gave detailed evidence as to what she was able to do prior to the first negligent surgery and the difficulties she was experiencing thereafter. (pp.135 – 136 of the RHC. Indeed her bile would not have got damaged had it not been for that first surgery. While her evidence was unchallenged, counsel for the Respondents conceded that, to prove the same medical evidence was not necessary. The learned trial judge did not make an observation on that as was required in the circumstances.

Re: The learned High Court Judge's reliance on the 1996 Magistrate's Court decision and the English decision in Wright v British Railways Board (Supra)

[18] A copy of that decision was made available to Court during the course of the proceedings. That was a decision of the Magistrate's Court which at the time had limited Monetary Jurisdiction even if one were to regard the facts of that case as being comparable to the instant case. While I have no quarrel with the thinking reflected in

Wright's Case (Supra), I prefer to follow the judicial path pursued in **Shell Fiji Ltd v Chand** (2011) FJCA 6 (per Calanchini, P) which apparently had not received the attention of the learned trial judge. Applying and adapting the thinking in that decision I am of the view that, the figure arrived at by the learned trial judge for 'pain and suffering' and 'loss of amenities' (past and future) has not properly compensated the appellant. The overall context of compensation for personal injuries must be borne in mind in examining the intricacies of the rules on assessment of damages for victims able to prove the commission of a tort.

Re: Appellant's Counsel application for a Re – assessment of Damages by this Court

[19] The impugned judgment was in October, 2013. It transpired during the course of the proceedings in this court that, the judgment debt has not been satisfied yet. As was done in **Shell Fiji Limited** (Supra) I see no impediment in the law that prevents this court from re-assessing damages.

[20] The appellant claims a sum of $130,000.00 for "pain and suffering" ($90,000.00) and "future nursing Care" ($40,000.00) as general damages. There is no claim for "loss of amenities" in the written submissions of the Appellant although Counsel made oral submissions thereon.

[21] At this point I feel obliged to refer to the 2nd Ground of Appeal contained in the Notice of Appeal. Therein, the Appellant has averred that "the learned trial judge erred in failing to consider the pain and suffering of the appellant by reasons of the first operation which had caused her jaundice, biliary peritonitis and a second operation."

[22] But, did that first negligent operation cause her jaundice and biliary peritonitis?

The Medical Evidence Thereon

[23] Dr. Chowdhary who performed the second corrective operation, said in his evidence that:

"The patient could develop jaundice or peritonitis... In this case peritonitis..... The patient can have pain or not depending on construction ... Anybody with peritonitis will not have appetite and the patient will lose weight" (Page 143 of the RHC).

[24] So, it would seem that, the patient could but had not been visited with jaundice although symptoms as regards peritonitis referred to by the Doctor the appellant deposed to in her evidence. She said "My diarrhoea continued, I could not eat food .... I lost appetite. My body was burning, could not bear." (page 136 of the RHC)... 'After the operation body weight decreased a lot' (p. 137, id).

[25] Consequently not both jaundice and peritonitis but just peritonitis was established. Thus, if one were to break up the damages into three components viz:

(a) the complaints re: jaundice

(b) the complaint re: peritonitis

(c) other manifestations of pain and suffering, I feel compelled to prune down the claim for $90,000.00 to $60,000.00.

Re: The Claim of $40,000.00 for Future Nursing Care

[26] The evidence relevant to this claim may be excerpted as follows:

"After the 2nd operation my hands and face got swollen. My pain continued burning sensation .... My body pain reduced after 2nd operation. My health did not improve".

It is to be noted that, the Appellant's only evidence makes no mention of future nursing care.

[27] For the aforesaid reasons, I am not included to award the said $40,000.00 claimed for future nursing care. However, on the basis of what I have articulated earlier at paragraph 41 of this judgment I award a sum of $10,000.00 for loss of amenities.

Re: Assessment of the Award of General Damages

[28] Accordingly I sat aside the award of $15,000.00 made by the learned trial Judge and award a sum of $70,000.00 as general damages.

In the matter of Special Damages – re: statement of claim and the trial Judge's response to the said claim

[29] Special damages are awarded for a loss that will not be presumed. They are for damages that are actually incurred and capable of pecuniary assessment that must be proved. The rationale underlying this head of damages is to avoid injustice to the defendant and accordingly the claimant is required to give notice in his pleadings and substantiate his claim by evidence (see for eg: **Domsalla v Barr** [1969] 1WLR 630.

Did the appellant comply with those pre-conditions to succeed in her claim?

[30] The statement of claim which is found at pp.6 to 10 of the Record of the High Court (RHC) pleaded the following:

1. for Transportation - $500.00
2. for Medication - $300.00
3. for the Plaintiff's spouse's stay in Suva
   for 6 weeks @ $50 per day - $2,100.00
4. for engaging a housekeeper at $80 per week
   from the date of operation until the date of filing
   of the action ($80 x 58 days) - $4,640.00

The Trial Judge's Response to the said (itemized) claim

Re: The claim of $500.00 for transportation

[31] The appellant in her evidence stated that she spent $500 for taxi (at p.138 of the RHC) and she had had to make two visits to the Colonial War Memorial Hospital (CWMH) in Suva having gone by plane from Labasa. (p.141 of RHC) She does not appear to have claimed air fare from Labasa to Suva separately. The learned Judge while observing that there was no documentary proof of receipts for the said taxi fare nevertheless awarded a sum of $400.00, "including the airfare."

[32] Consequently, granted the paucity of the evidence on the aspect of airfare, nevertheless I feel that at least $450.00 claimed for transportation ought to have been allowed by the trial Judge on an overall assessment – in as much as the reduction of a $100.00 was on account of the lack of proof of money spent on the said taxi fare. Two visits as afore-counted surely would have amounted to at least ($25 x 2) = $50?

Re: Medication

[33] The only evidence given by the Appellant is found at page 138 of the RHC. She said, "I still pay (for) $300 for medicine."

[34] Responding to this evidence the trial Judge gave three reasons for refusing the sum of $300.00 claimed under the sub-head of medication viz:-

> *(a) The patient was given medication by the hospital and there was no evidence that she was asked to obtain medicine from outside.*

[35] No doubt, it was the mere *ipse dixit* of the appellant that was before the court. Yet, the same was not even tokenly challenged by the Respondents. Accordingly, having regard to the fundamental rules of evidence relating to proof and burden of proof, I am of the

view that, the said claim for medication for a sum of $300.00 stood proved and ought to have been allowed.

> *(b) A second and third reason given by the learned judge in denying the said claim was that the plaintiff's condition was due to her advanced age and, no causation to injury of Common Bile Duct and there is no proof of impairment from negligent surgery.*

[36] With all due respect to the learned Judge, I am constrained to say that, His Lordship appears to have mixed up a claim in the nature of general damages which is non pecuniary with an item associated with special damages which is pecuniary. Moreover, His Lordship's view on "causation to the injury of the Common Bile Duct" I have rejected as would be seen later in this Judgment.

[37] For the aforesaid reasons I hold that, the Appellant was entitled to the said claim of $300.00 under the sub-head of medication.

Re: Stay of Plaintiff's spouse in Suva for 6 weeks at the rate of $50 per day at the rate of $50 per day (42 days x $50) - $2,100.00

[38] The Appellant's evidence on this sub-head under the aforesaid claim for special damages is found at page 138 of the RHC (viz):

> "My husband looked after me or engaged another person..... spending $50 a day. After (being discharged) from CWMH 58 weeks at $30."

[39] Directed as it apparently was to the claim it must be said that, the said evidence is unintelligible to say the least. However, the learned Judge, who heard the witness (though the record as observed earlier is unintelligible), responded thus:

"The plaintiff had claimed $50 per day for six weeks she spent at a relative's place for expenses and claimed $2,100.00. Again there is no evidence to support this claim, but there is evidence that she was transferred to the CWM hospital at Suva from Labasa Hospital and she remained there for nearly one month. The plaintiff stated that her

husband accompanied her, but she did not tell that her husband visited her daily or there was such a need for one person to attend to her needs. She stated that once discharged her husband accompanied her home and they travelled together. Considering the evidence I will grant $600 for incidental expenses including expenses at staying in a relative's place in Suva for the period of one month" (vide: paragraph 26 of the learned Judge's Judgment).

Reflections on the learned Judge's re-capitulation of the evidence in question and the award of $600

[40] The learned Judge began his analysis of that evidence by initially holding that the claim that the plaintiff (appellant) spent at a relative's place lacked evidence to support the same. Yet, His Lordship is seen awarding "$600 for incidental expenses including expenses at staying in a relative's place in Suva for the period of one month"

[41] If so, what was the rationale for the learned Judge to have rejected the other aspects of the said evidence? What were "those incidental expenses" His Lordship referred to?

[42] Apart from all that, peruse as I did the entirety of the proceedings I could not find even a token attempt on the part of the Respondents to challenge the appellant's evidence as recounted above. I am of the view that the said evidence was uncontroverted.

[43] For the aforesaid reasons I hold that, the appellant was entitled to the said sum of $2,100 pleaded in her statement of claim.

Re: Having Housekeeper /Care provider at the rate of $80.00 per week from the date of the operation until the date of the filing of writ ($80 x 58 weeks)

[44] Under this sub-head the appellant claimed a sum of $4,640.00.

[45] The appellant's evidence on that is found at page 141 of the RHC, viz:

> *"When I returned home housegirl came for once a week in Labasa. After that twice a week from 2010 – 2011. We pay $12 per day"*

The learned Judge's treatment of that evidence

[46] Responding to that evidence the Learned Judge held in paragraph 27 of his judgment thus:

> *27. "The Plaintiff had claimed for expenses for a housekeeper. The present housekeeper's expenditure again could not be linked to the causation of the negligent surgery. The 2nd surgery was successful and the damage has to be confined to the pain and suffering of the patient due to the negligent operation. There is no medical evidence to support impairment due to the severing of CBD which had an effect on her health. In any event the Plaintiff in her evidence stated that house keeper is engaged only once a week at a rate of $12 per day. So, housemaid's expenditure should be restricted from 11th May, 2010 to 20th May, 2011 when she was readmitted for the 2nd surgery to the hospital. I have already granted a gross sum for the period that Plaintiff remained in Suva, hence that period cannot be included for housekeeper's expense. The Plaintiff and her husband were in Suva during that period. So the expenditure for housegirl is for 9 days at $12 is $108."*

Reflections on the learned Judge's analysis of the evidence in question and his conclusion

[47] The learned Judge is once again seen linking the said housekeeper's expenditure to the negligent surgery. His further reference to the patient's "pain and suffering" and 'impairment' shows that, he was once again mixing up a claim for 'special damages' with a claim for general damages.

[48] Although the Appellant claimed $80.00 per week for 58 weeks it was her own evidence that, the said housekeeper was engaged only once a week. If so, at the rate of $12 she claimed for a day, for 58 days, the damages she would have been entitled could have amounted only to a sum of $12 x 58 = $696.00.

[49] Therefore while the Appellant was not entitled to the sum of $4,640.00 claimed in her statement of claim for the said sub-head as special damages,she was however entitled to a sum of $696.00 and not to a sum of $108.00 as computed by the learned Judge.

Final Computation of Special Damages in this Appeal

[50] For the aforesaid reasons I proceed to set aside and/or vary the award made by the learned High Court Judge as follows:-

(a) The award of $400.00 on the sub-head of transportation shall be increased to $450.00.
(b) The claim for $300.00 for medication which the learned Judge did not award to stand allowed.
(c) The claim for $2,100.00 for the stay of plaintiff's spouse in Suva for 6 weeks, shall stand allowed.
(d) In re: the claim based on having a housekeeper /care provider for a sum of $4,640 which the learned Judge pruned down to $108.00 to stand enhanced to $696.00.

Re: The Matter of Interest on the decretal amount

[51] Learned Counsel for the Appellant brought to the notice of this court the reference by the learned trial judge to the date of issue of writ to the date of Judgment in regard to the payment of interest and pointed out that, the reference to the year 2010 in order 3 (b) of the High Court Judgment must be read as 2011 (specifically 11th June, 2011).

[52] Having received the consent of both counsel, the date was accordingly amended.

In the Matter of Costs

[53] Both counsel submitted that, no issue was being canvassed in that regard.

Mutunayagam, JA

[55] I agree with the reasons and conclusion of Guneratne JA.

Orders of the Court:

1. *Appeal Allowed.*
2. *The amount awarded by way of special damages is set aside and in its place the sum of $3,546.00 is awarded with interest at 3% from 4 May 2010 to 25 October 2013.*
3. *The amount awarded by way of general damages is set aside and in its place the sum of $70,000.00 is awarded with interest at 6% from 11 June 2011 to 25 October 2013.*
4. *The Respondents are ordered to pay the costs awarded in the court below and the costs of the appeal which are fixed at $5,000.00.*

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Hon. Mr. Justice W. Calanchini
President, Court of Appeal

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Hon. Mr. Justice A. Guneratne
Justice of Appeal

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Hon. Mr. Justice A. Mutunayagam
Justice of Appeal