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

CIVIL APPEAL NO.ABU 0059 of 2014
(High Court of Labasa Civil Action No. HBC 20 of 2012)

BETWEEN : **MERE FINAU LABAIVALU**

Appellant

AND : **PACIFIC TRANSPORT CO. LTD**

Respondent

Coram : **Basnayake JA**
Lecamwasam JA
Alfred JA

Counsel : **Mr. A. Sen for the Appellant**
Mr. A. Kohli with Mr. A. Nand for the Respondent

Date of Hearing : **8 May 2017**

Date of Judgment : **26 May 2017**

JUDGMENT

Basnayake JA

[1] This is an appeal by the appellant (plaintiff) against the judgment of the learned Judge. The appellant is seeking an enhancement of the quantum of damages awarded on 25 June 2014 of $ 67,015.90. The damages were awarded on the basis of vicarious liability.

[2] The action was originally filed against two defendants, the respondent being the 2nd defendant. The 1st defendant was the driver of the bus bearing registration No.EC 610. The respondent was the owner. At the trial the learned counsel for the defendants conceded liability. The only issue before court was on the quantum of damages.

[3] The accident concerned occurred on 13 September 2011. According to the submissions made, the appellant was a 17 year old girl at the material time. She was returning from school in a bus driven by the 1st defendant. According to her evidence the bus had being driven fast down a hill into a community hall extension. The bus had gone through the hall tearing it down to the ground. A piece of wood (a rafter) one metre long had pierced her body. She was stuck inside the bus with part of the piece of wood inside her body while the other part remained in the building. The learned counsel submitted that the piece of wood was 6" by 2" wide.

[4] For one hour she was stuck inside the bus as she could not get out or move with this wood inside her. People had to saw it off to rescue her. She was pulled out through the window. All this time the wooden piece was inside her body. Thereafter she was taken to Taveuni Hospital where the wooden piece was removed after surgery. According to her she could not walk for about a week thereafter. On 22 September she was taken to Labasa Hospital where another surgery was performed on her.

[5] The plaintiff gave evidence in court on 8 April 2014, more than two and a half years after the accident. She said that she had taken medication till October 2013. On being asked as to how she is able to give evidence sitting down, she said that it may be because she was seated under the air conditioner. She said that she had to give up her studies because of the injury.

[6] Dr. Meloni Bulanauca, the Chief Medical Officer of Labasa Hospital on his evidence said that he had examined the plaintiff on 20 September 2011. He had observed a penetrating injury to her abdomen. The wound was above her hip extending in a diagonal line to the

opposite left upper thigh. The doctor said that the wound was 1 metre across. This was due to the fact that the rafter was a thick piece of timber. Of the five categories of pain she was put in the fourth. When she was brought to Labasa, the wound was infected and wound debridement was performed on her twice. The doctor said that the plaintiff suffered a lot of tissue loss. Being a big wound and scar, it pulled on the surrounding tissues. He could not speak to her disabilities without having examined her. It was more than two and a half years since her operation. He could also not speak of her pain at present without an examination. However he said that physical disability of the lower limb would be approximately 15%. When the doctor was questioned about a complaint of the plaintiff that she is not the same, the doctor said, *"I would not doubt with her injuries"*.

[7] Under cross examination the doctor answered in the affirmative that the plaintiff suffered serious injuries and severe pain.

The Judgment

[8] The learned judge found that the only issue to be determined was the quantum. In his judgment the learned judge considered some previous judgments. In **Flour Mills of Fiji Ltd v Raj** (2001) FJCA 35 the court had awarded $85,000.00 for a lost arm. In **Amin v Chand** (2012) FJHC 1015 an award of $85000 was made for pain and suffering and $52,000 for loss of future wages. The learned Judge agreed with this judgment as it was supported by evidence. Also in **Nasese Bus Co. Ltd. V Chand** (2013) FJCA 9 (8 February 2013) an award of $65,000 was increased to $90,000 for pain and suffering for a crushed injury and fracture of the left leg and injury to right thigh together with an incapacity of 14%.

[9] The learned Judge stated in paragraph 4.10 that, *"Mere (plaintiff) endured agonizing pain in the aftermath of the accident, as resonated in the closing submissions filed on behalf of the defendants. She had a harrowing experience, when a piece of wood one metre in*

length pierced her left hip and protruded through her opposite thigh. She testified that she had 68 stitches across her body and a big scar of a patched hole in her thigh".

[10] Having said that, the learned Judge considered a sum of $60,000.00, *"for pain and suffering and loss of amenities in consideration of all the circumstances, including her limitation of movement and the post traumatic treatment she would require".*

[11] With regard to not having access to employment the learned Judge said, *that "there was a paucity of medical evidence"*. The plaintiff in her evidence said that she discontinued school as she could not sit on a chair. However when she was found seated while giving evidence she was questioned by the learned counsel for the defence as to how she was able to sit in court and testify. Another reason for the discontinuation of school was the fact that she had to leave home half an hour earlier due to her disabilities. On that evidence alone the learned Judge declined her claim for future earnings.

Grounds of appeal

[12] Seven grounds of appeal were filed in the notice of appeal (pgs. 1-4 of the Record of the High Court (RHC)). However the learned counsel for the plaintiff in his oral submissions invited court to consider only the first three grounds which I will reproduce below.

1. That the learned 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. That the learned Judge erred in law and in fact in not awarding appropriate damages under the various heads as claimed and made the awards extremely conservative in all the circumstances of the claim having regard to the very serious nature of the injuries.
3. That the learned trial Judge erred in law by not making an appropriate award for future earning capacity when sufficient evidence was adduced

that the appellant was incapable of being her natural self in conducting daily chores of life.

Submissions of the learned counsel for the plaintiff

[13] The learned counsel submitted that he is confining the appeal to general damages only. In that he specifically stated that he is seeking an enhancement on the award made for pain and suffering and loss of amenities in life and future loss. He submitted that the plaintiff lost her opportunities to complete her High School career. She has lost her youth. The accident has caused a large scar in her body and psychological trauma. The learned counsel relied on the judgments in **Vimala Wati v Permanent Secretary of Health** [2016] FJCA 72 (27 May 2016), **Shell Fiji Ltd v Chand** (2011) FJCA 6, **AG v Micheal Broadbridge** (Civil appeal NO. 0005 of 2003) and **Sheikh Mohammed Amin v Chand** (Action No. 39 of 2008).

[14] The learned counsel also submitted that the appellant is entitled to claim for pain and suffering and for future pain, suffering and loss of future earnings under general damages. The learned counsel claims $95,000.00 for pain and suffering and $20,000.00 for future pain and $30,000.00 for loss of future earnings.

Submission of the learned counsel for the respondent

[15] The learned counsel for the respondent submitted that he did not contest the liability in court. He also submitted that he honored the judgment and the plaintiff was paid in full. He submitted that the amount awarded as damages is reasonable and does not need an enhancement. He moves that the plaintiff's appeal be dismissed.

Quantum of damages

[16] This has been a difficult task for the Judges who are tasked with assessing the quantum for pain and suffering and future loss. The amounts of awards vary depending on the

seriousness of each case. In some cases the injuries and the disabilities may be manifestly clear with the availability of evidence in every respect. A detailed account gleaned from evidence from the injured with regard to the injuries and the pain and suffering and disabilities would assist the Judge in the ultimate computation. Also a detailed account of medical evidence with regard to the seriousness of the injuries and the treatment provided and opinions of medical personnel would be of assistance. The most difficult cases are those where the courts are not provided with adequate information.

[17] *"This court has over a number of years referred to the need to consider contemporary decisions when comparing awards of damages in respect of similar injuries"* (Calanchini AP (with Chitrasiri and Basnayake JJA agreeing) in **Nasese Bus Company Ltd. V Muni Chand** (supra). Thus the injured was awarded a sum of $65,000 for pain and suffering and loss of amenities past and future. The injured who was 18 years of age suffered a crushed injury fracture of the left leg with a degloving injury to the right thigh. The learned trial Judge declined to award the injured any damages for future loss of earnings as there was insufficient evidence to enable the court to make the necessary calculations.

[18] When similar cases are considered Judges are not bound to make the same award as the facts may differ. Comparative judgments may be used only as guidance. The judgment in **Cunningham v Harrison** [1973] QB 942 at 956 cited by Calanchini AP is timely, that *"if Judges do not adjust their awards to changing conditions and rising standards of living, their assessment of damages will have even less contact with reality than they have had in the recent past or at the present time"*.

Future Earnings

[19] Calanchini P referring to the Supreme Court decision in **Attorney General of Fiji v Broadbridge** (CBV 5 of 2003 (8 April 2005) said, that *"the Supreme Court decision does offer some comfort to trial judges who are all too often placed in a position where there is scant evidence upon which to fairly assess what amount of compensation will restore the plaintiff to the position that he would have been in had it not been for the*

harm caused by the negligence of the defendant. There is afforded to judges at first instance some flexibility in performing this task. Alongside that flexibility is the accepted requirement that, given the state of evidence, the trial judge must do the best he can".

[20] The Supreme Court said inter alia, that *"Loss of future earning capacity can be calculated on a broader basis, having regard to the evidence led in the particular case without being constrained by the traditional requirements of the conventional multiplicand/multiplier approach".*

[21] In the Nasase case (supra) with insufficient evidence to support future loss, citing **Attorney General of Fiji and Katonivere v Jainendra Prasad Singh** (ABU 1 of 1998 (21 May 1999) Calanchini AP (as he then was) held that, "At the date of trial she was only 24 and there was no suggestion that her life expectancy had been reduced as a result of her injuries. Under the circumstances she can reasonably be expected to be in and out of the workforce for at least 30 years. While conceding that "*there can only be a broad approach to this problem*" it was held that the justice of the case requires some award for future loss, and an award of $ 25,000.00 made.

[22] In **AG of Fiji and Katonivere v Jainendra Prasad Singh** (supra) the Court of Appeal agreed with the learned counsel for the appellant that there was no evidence to support the assessment made by the trial judge to establish an ascertainable future loss. However the Court held that *"there can only be a broad approach to this problem".*

[23] In the present case the injured was a school going energetic student. She was only 17 years of age. She gave evidence in court two and a half years after the accident. She was a sportswoman. She was inter-school captain. She played volleyball, shot-put and took part in 400 meters running. Although not in a vegetative stage the accident has changed her life completely. There is lack of medical evidence with regard to her injuries and the repercussions. Although there is no evidence, I presume that none of her internal organs were damaged. There is no question that a log of the size of 6" x 2" x 1 metre in length suddenly pierced the body of the injured and was stuck in there for several hours. The

injured complained that she could not sit in school. That was one reason why she had to stay away from school. Another reason she said was that she had to get ready half an earlier. There is no evidence as to how soon she started going to school after the accident. She had to abandon her education later.

[24] The chairs that the school provides may not have been as comfortable as the ones found in an air-conditioned court house. Although healed she may not be the same person as before. I am not surprised that she took a longer time now to get ready to go to school. At the end it may be the mental trauma that discouraged her from going to school. Now what we have to consider is her position if this accident did not happen. Can anyone expect her to get employed or make an effort to get employed to calculate how much she has lost? Considering all the evidence I am of the view that we have to adopt the broader approach and decide how much she should be awarded as future loss.

[25] I am of the view that the learned Judge has erred in refusing the claim for future loss. I am also of the view that the learned Judge has erred by determining her medical condition after an observation that she was able to sit in court and thereby disbelieving her evidence that she could not go to school as she could not sit in those chairs. She had said in evidence that she took medicine seven months till before. It does not mean that she is completely out of danger or that she could live as before. I am of the view that the amount of $ 30,000 claimed by way of future loss is reasonable considering her abilities prior to the accident; such a promising young person with a bright future.

Pain and suffering

[26] In **The Permanent Secretary for Health and another v Kumar** (CBV 6 of 2008 (3 May 2012). The Supreme Court laid down the following principles the courts should apply when assessing general damages for pain and suffering and loss of amenities. "*There are three guiding principles in measuring the quantum of compensation for pain and suffering and loss of amenities. First and foremost, the amount of compensation awarded must be fair and should compensate the victim of the injury in the fullest*

possible manner, bearing in mind that damages for any cause of action are awarded once and for all, and cannot be varied due to subsequent eventualities, some of which even could not be anticipated at the stage a court makes an award. Hence the award of damages should not only be fair, but also assessed with moderation, even though scientific accuracy is impossible. The second principle is that the sum awarded must to a considerable extent be conventional and consistent. Thirdly, regard must be had to awards made in comparable cases in the jurisdiction in which the award is made. However it is open for a court to take in to consideration a comparable award made in a foreign jurisdiction, particularly in cases where the type of injury is not very common, provided that the court takes into consideration differences in socio-economic and other relevant conditions that might exist between the two jurisdictions".

[27] The learned Judge in paragraph 4.10 of his judgment had considered the pain that the injured had suffered. He said that, *"Mere endured agonizing pain in the aftermath of the accident...She had a harrowing experience"*. Although it is not evident, I would like to mention here some of the crucial pain that the plaintiff would have gone through in this case.

- A timber which is 6" x 2" x 1 metre piercing through the body of a living person.
- Having to remain in that position for more than one hour.
- Any and every movement of her would have brought her agony.
- She was nailed on to the timber inside the bus and there would have been bleeding.
- Although she too would have wanted to get out of the bus, she could not while others were fleeing.
- The trauma of it to think that if the bus moved forward some more she would have been ripped off.
- The vibration that occurred when the timber was being cut would have been agonizing as she was conscious.
- The trauma when she was taken out of the bus through the window.

- The agony while she was taken to hospital in a taxi with the log inside her body.
- Having to wait for the doctors to arrive from Labasa.
- The surgeries done.
- The wound debridement.
- The embarrassment.

[28] As stated in **The Permanent Secretary of Health and another v Kumar** (supra) an award is made once and for all. Therefore there cannot be another claim for eventual pain. For that reason I reject the claim for $ 20,000 under the heading, *"Eventual pain"*. For pain and suffering I consider a sum of $ 90,000 is appropriate in this case. I shall also award $30,000 as damages for future loss of earning capacity.

[29] I therefore allow this appeal, and increase the general damages to $ 120,000 with interest thereon and costs as below.

Lecamwasam JA

[30] I agree with the reasoning and conclusions of Basnayake JA.

Alfred JA

[31] I have read the judgment prepared by Basnayake JA. For the reasons he has given, I agree that this appeal must be allowed.

The Orders of the Court are:

1. *The appeal is allowed.*
2. *The award for general damages is increased to $90,000.00 together with interest at 6% p.a from the date of the service of writ (3 May 2012) to the date of this judgment (26 May 2017) less the amount*

already paid as general damages to the Appellant and thereafter at 4% p.a. to the date of realization.

3. *The sum of $30,000 is awarded for future loss of earning capacity with no interest thereon.*

4. *The amount awarded as special damages stays.*

5. *The Respondent is to pay the Appellant $2,000 as costs summarily assessed for this Appeal.*

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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Mr. Justice D. Alfred
JUSTICE OF APPEAL