IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO.ABU 0119 of 2017
[High Court Civil Case No. 13 of 2015)

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| BETWEEN | : | AMENDRA ANAND MILLAN |
| | | *Appellant* |
| AND | : | MUKESH CHAND<br>R C MANUBHAI & CO. LTD |
| | | *Respondents* |

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| Coram | : | Calanchini, P<br>Chandra, JA<br>Lecamwasam, JA |
| Counsel | : | Mr A. Sen for the Appellant<br>Mr A. Kohli for the Respondents |
| Date of Hearing | : | 22 February, 2019 |
| Date of Judgment | : | 8 March, 2019 |

## JUDGMENT

**Calanchini, P**

[1] I have read in draft form the judgment of Chandra JA and agree that the claim for loss of future earnings should be increased to $120,000 and that interest is not awarded on future loss of earnings

**Chandra, JA**

[2] This is an appeal from a judgment of the High Court delivered on 4 September 2017 seeking enhancement of the award of damages. The Appellant claimed damages for personal injuries suffered as a result of a motor vehicle accident on 31 August 2012 along Labasa – Seaqaqa Highway at Vaturova. The action was brought against the driver (1st Respondent) of the motor vehicle and the owner (2nd Respondent) of the vehicle. The learned High Court Judge awarded damages to the Appellant in a sum of $143,907.16 and $5000.00 as costs.

**Background**

[3] The Appellant had been a passenger in a truck (CJ 620) on his way to Labasa to attend the Northern Festival. The truck had tumbled as a result of its fender being struck by truck DN 720 which was driven by the 1st Respondent.

[4] The learned High Court Judge had concluded that the accident had occurred due to the negligence of the 1st Respondent and held that he and his employer the 2nd Respondent were liable in damages for the injuries sustained by the Appellant.

[5] As set out in the judgment of the learned High Court Judge, the Appellant had been admitted to Labasa Hospital after the accident as he had sustained extensive injuries. It had been observed that he had an open fracture of the left elbow, radial nerve injury, mild head

injury and facial laceration. The Appellant had undergone general anesthesia for a wound wash and debridement. After a discussion with Dr. Taloga it had been decided to transfer the Appellant to CWM Hospital.

[6] The Appellant had been admitted to CWM Hospital on 2 September 2012. He had been taken to the theatre on 3 September 2012 for a repeat wound washout and a formal exploration of the injury. According to the report of the Orthopedic Consultant, Dr. Savenaca Rusaqoli, intra operatively, in addition to the open avulsion fracture of the lateral epicondyle (meaning a bone from the outside part of the distal had been pulled out and the skin and flesh is opened up) of the left humerus (arm bone), his radial nerve had severed, brochioradialis, ECRL, ECRB, and radial head fracture. There has also been extensive soft tissue and skin loss.

[7] Dr. Taloga who had given evidence at the trial had stated that when one does not have radial nerve the wrist would hang and the Appellant's radial nerve had been completely severed. He had also undergone skin grafting, the grafts been taken from his thigh. In his report Dr. Taloga had stated that the total impairment of the Appellant was 38%.

[8] The Appellant had been discharged from hospital on 21 September 2012, and he had to attend clinics thereafter on a regular basis.

**The Judgment of the High Court**

[9] The learned trial Judge after a careful assessment of the evidence concluded that the accident had occurred due to the negligent driving of the 1st Respondent.

[10] The learned High Court Judge awarded damages in a sum of $ 143,907.16 which was tabulated as follows:

| DAMAGES | AWARDS | INTEREST | TOTAL |
|---|---|---|---|
| A. **Special** | $3,552.00 | $106.56 | $3,658.56 |
| B. **General** | | | |
| i. Pain and Suffering | $80,000.00 | $4,800.00 | $84,800.00 |
| ii. Past Nursing Care | $2,310.00 | $138.60 | $2,228.60 |
| iii. Loss Future Income | $50,000.00 | $3,000.00 | $53,000.00 |
| | | | $143,907.16 |

[11] The learned High court Judge also awarded the Appellant costs in a sum of $5000.00.

**The present appeal**

[12] The Appellant is now seeking to appeal the judgment and has listed the following grounds of appeal and has prayed that the damages be re-assessed by this Court:

> *"1. The Learned Trial Judge erred in law in failing to make a correct award to the appellant in accordance with the established principles of assessment of damages.*
>
> *2. That the Judge erred in law and in fact in not awarding appropriate damages under the various heads as claimed and made the awards extremely conservatively in all the circumstances of the claim having regard to the very serious nature of the injuries.*
>
> *3. The Learned Trial Judge erred in failing to consider the pain and suffering and the nature and extent of the injuries of the appellant by reasons of the accident caused by the servant and agent of the respondent and failed to make an appropriate award for loss of future earning capacity when the evidence conclusively established that the appellant was incapable of performing his normal work functions and there was a total permanent disability.*
>
> *4. The Learned Trial Judge erred in law and in fact in making an appropriate award for past and future nursing care consistent with the evidence adduced in court.*

5. *The Learned Trial Judge erred in law and in fact in failing to consider the submissions made to her on behalf of the appellant together with the decided authorities on similar injuries when making an appropriate award.*

6. *The Learned Trial Judge erred in taking into consideration irrelevant matters and failed to take into consideration relevant matters, in particular the unchallenged evidence of the appellant and his expert witness pertaining to pain, suffering and damages and made an award extremely conservatively without taking into consideration the socio economic living conditions prevalent at the time of making such award.*

7. *That the Learned Trial Judge erred in failing to apply the correct multiplier and multiplicand when assessing appellant's award.*

8. *That the Appellant reserves the right to add, amend the grounds of appeal and adduce further evidence for the purpose of appeal once the same becomes available.*

9. *And such further and other grounds as the Appellant may be advised in due course upon receipt of the copy record of the proceedings.*

10. *Wherefore the appellant prays that the damages to be re-assessed by the Appellant Court."*

[13] At the hearing of the appeal Counsel for the Appellant emphasized on the damages that were awarded for future earnings and submitted that the sum awarded, which was $50,000.00 was inadequate.

[14] The grounds of appeal taken together are to the effect that the damages awarded were inadequate and that the damages awarded for pain and suffering and for loss of future earning should be increased.

[15] The learned High Court Judge had awarded a sum of$ 80,000.00 with interest at 6% per annum from the date of the writ to the date of last day of the trial amounting to $4,800.00

for pain and suffering having considered in detail what the Appellant had undergone after receiving injuries as succinctly set out in the judgment as follows:

> *"120. The evidence of Milan on the pain and suffering and the loss of amenities of life have not been successfully contradicted. I find that with an injury of an open fracture in the left elbow which was exposed and bleeding and could cause sepsis caused Milan immense pain. He also had facial and head injuries which added to the pain he was undergoing as a result of the fracture in the elbow. He was not able to bear the pain and would be unconscious at times.*
>
> *121. To treat that injury he again had to go through the pain of getting medications, treating the wound and dressing the same. He was bedridden for 14 days and was living with the help of the nursing care provided to him by the hospital and his family.*
>
> *122. Even his immobility caused him pain. He had to be fitted with tubes and be administered drugs most of the time. All that caused him pain in addition to the injuries.*
>
> *123. He was not able to eat which made him weak and as a result feel feverish and faintish when he was asked to walk after 14 days of confinement to bed. His health in terms of being properly nourished had deteriorated.*
>
> *124. His injury was such extensive that Labasa hospital was not able to manage the same. He had to be sent to Suva and in travelling to Suva he again underwent a lot of pain.*
>
> *125. His injuries have left him incapacitated at the extent of 38 percent which is substantial.*
>
> *126. His arm is cosmetically not appealing and he hides that all the time. He has got scars on his arms and is not able to extend his wrist as result of which he will not be able to use both his hands which is needed for most tasks and enjoyment of life. He is a very young man and like everyone else he is enthusiastic to enjoy life. That is restricted for him in the way he described in his evidence which I accept in total. He has lost future enjoyment of life. He will continue to suffer pain and I do not overlook that fact.*
>
> *127. For his past and future pain and suffering and loss of amenities of life, I award him a sum of $80,000.00 I also award him interest at the rate of 6 percent per annum from the date of the write to the date of the last day of the trial which calculates to $4,800.00 The total award for pain and suffering and interest calculates to $84,800.00"*

[16] The Appellant had claimed $ 90,000.00 on account of pain and suffering and the learned High Court Judge awarded$ 80,000.00 which I feel is adequate having considered what the Appellant had undergone.

[17] Counsel for the Appellant in his submissions regarding the damages for loss of future earnings submitted that the learned High Court Judge's determination of the multiplicand at $10,000.00 was adequate but submitted that the multiplier of 5 years would not adequately compensate the Appellant. What Counsel for the Appellant was seeking was a multiplier of 20 years.

[18] Granting of damages for loss of future earnings has been a difficult area in cases where claims are made for personal injuries. There is a fair amount of speculation on possibilities and uncertainties that go with such assessments and even the methodology of using the multiplicand and the multiplier has not always been resorted to. As it was stated by the Supreme Court in **Attorney General of Fiji v Broadbridge**. [2005] FLR 85, the trial judge is free to decide whether to adopt this method or arrive at a figure by any other means when it was stated that:

> *"There is no challenge to the courts' ability to approach loss of earning capacity in a manner that dispenses with the conventional multiplicand/multiplier approach. 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".*

[19] The learned High Court Judge adopted the multiplicand/multiplier approach and as stated above Counsel for the Appellant was satisfied with the multiplicand adopted and his only complaint was that the multiplier was not adequate.

[20] The multiplicand/multiplier approach has been succinctly stated in Charlesworth on Negligence 6th Edition as follows:

> *"...the normal method of assessment used by the courts is first to calculate as accurately as possible the net annual loss suffered, which is usually based on an average of the plaintiff's pre-accident 'take home' pay, as the multiplicand. Next a figure for a multiplier has to be chosen which will be appropriate in all the circumstances having regard to such matters as the age, the pre-accident state of health, the past work record and the important factor that the plaintiff will be receiving a lump sum payment, which it is expected will be invested."*

[21] In the present case, the Appellant was 18 years old when he was injured on 31 August 2012. He had been a student at the University following a course in plumbing and had completed 3 out of 5 stages at the Fiji National University. He had been following this course with the ambition of going overseas and working as a plumber. After treatment when he was in a position to attend to his studies he had completed the remaining 2 stages in 2014. However, since he was not in a position to attend the practicals he had to give up his idea of pursuing a career as a plumber. This was mainly due to the fact that his left hand was seriously injured and virtually disabled, as a result of which, he could not use both hands to do plumbing work.

[22] When the appeal was argued , Counsel for the Appellant stated that the Appellant not being able to complete the course in plumbing had to choose some other vocational studies and that he was aspiring to become a primary school teacher. He had by the time the appeal was heard completed two years of a four year course at the Fiji National University and he would be completing his course in another two years , which would be the year 2021. It is thereafter that he would be in a position to seek employment as a Primary School Teacher. Counsel for the Respondent did not raise any objections regarding what Counsel for the Appellant had stated about the Appellant at present.

[23] The Appellant was a student at the time of the accident and not in employment. In her judgment the learned High Court Judge has stated that the Appellant had been a bright student at school as he had obtained good marks in Form 6 in 2011. In situations of this nature unlike in the case of one who had been in employment at the time of injury, it is difficult to arrive at a figure regarding what he would have earned when he was able to find employment after qualifying for employment. It is necessary to embark into the area of speculation as to the position of the injured prior to the injury and what his potential would be after the injury specially when there is insufficiency of evidence to gauge such potential.

[24] In the case of **Wade and Others v. Allsopp and Another** (1976) 10 ALR 353 (cited in **The Permanent Secretary for Health and Another v. Semi Voliti** [2016] FJCA 131; ABU0040.2014 (30 September 2016) it was held at p.358

> *"...plaintiff not yet embarked upon a career, what is to be compensated is the loss of a chance to earn unimpaired by the accident which caused injuries, and that in evaluating that chance due regard must be had not only to all the normal external vicissitudes of life but also to the possibility that, for reasons personal to himself, a boy's future may not justify the promise of his early years. It is undeniable that considerations such as these must play a part in any assessment of the lost earning capacity of a young plaintiff."*

[25] In this case the difficulty of arriving at what should be the reasonable multiplicand would not arise as the learned High Court Judge had taken into account the aspiration that the Appellant had of becoming a plumber and what he may have earned per annum on being able to be employed and arrived at the figure of $10,000.00 per annum as the multiplicand.

[26] Counsel for the Appellant was satisfied with the figure of $10.000.00 as the multiplicand and there was no objection by Counsel for the Respondent in taking the multiplicand at that figure. The only issue in this case therefore is as regards the multiplier, which the learned High Court Judge fixed at 5 years. Counsel for the Appellant submitted that the

multiplier in the present case should be enhanced to 20 by taking into account the position that the Appellant was in, with a permanent disability of 38%. Counsel for the Appellant relied on the decision in **Semi Voliti** (supra) where a young boy whose right hand which was his dominant hand was amputated below the elbow as a result of injuries received in an accident. There the learned High court Judge had arrived at the figure of $7500.00 as the multiplicand and given 20 years as the multiplier. The Court of Appeal held that the multiplier was appropriate.

[27] To consider the Appellant's submission regarding enhancement of the multiplier, it is necessary to consider the purpose of taking into account the multiplier in awarding damages for loss of earnings. Taking into account *Charlesworth's* explanation of the multiplier (cited above), it is arrived at by taking into account the age, pre-accident state of health, the past work record and the fact that the injured would be receiving a lump sum which is expected to be invested.

[28] The Appellant was a student in good health at the time of the accident, aged 18 years and according to his present position would be capable of getting employment after completing the course that he is currently following which would be in two years time. This would mean it would take at least 9 years from the time that he met with the accident to find possible employment. On this basis the multiplier of 5 years chosen by the learned High Court Judge would not be adequate. In these circumstances a multiplier of 12 would seem to be reasonable in determining the loss of earnings of the Appellant. This would mean that the multiplicand which is $10,000.00 would be multiplied by 12 to arrive at the figure of $120,000.00 as loss of earnings.

[29] The Appellant had claimed interest in his statement of claim. The learned High court Judge had awarded $3000.00 on the basis of interest at 6% on the amount of $50,000.00 which was awarded for loss of future earnings from the date of the writ to the last date of trial.

[30] The Court of Appeal in **Attorney General of Fiji v Charles Valentine** ABU 0019 of 1998S; (28 August 1998) laid down guidelines regarding the award of interest where damages are awarded for personal injuries. S.3 of the Law Reform (Miscellaneous Provision) (Death and Interest) Act of was considered and cited the conclusion in **Jefford v Gee** [1970] 2 QB 130 as follows:

> *"1. Special damages: Interest should be awarded from the date of the accident to the date of trial at half the appropriate rate. (Usually special damages such as hospital expenses, loss of wages etc. accrue on a day-by-day basis. Rather than the Court making a series of interest calculations from the time each was incurred, it can achieve a broadly appropriate assessment by taking a figure representing a mean or average for the period. Half the interest over that time may be accepted as a suitable compromise figure in most cases).*
>
> *2. Loss of future earnings. No interest should be allowed. (This is because the plaintiff does not become entitled to this money until the award is made and so has not been kept out of it to justify giving interest.)*
>
> *3. Pain and suffering and loss of amenities. Interest should be awarded at the appropriate rate from the date of service of the writ to the date of trial."*

[31] Applying the above guidelines to the present case, the award of interest on future loss of earnings by the learned High Court Judge would be incorrect. In our judgment the award of loss of earnings awarded by the learned High Court Judge of $50,000.00 would be enhanced to $120,000.00 and there shall be no interest on the said sum.

**Lecamwasam, JA**

[32] I agree with the reasoning and conclusions and he proposed orders of Chandra JA.

***Orders of the Court:***

1. *The appeal of the Appellant is partly allowed.*

2. *The judgment of the High Court is varied in respect of the award of damages for loss of future of earnings and in its place a sum of $120,000.00 is awarded for loss of future earnings without interest.*

3. *The Respondent to pay the costs of the proceedings in the Court below which the learned Judge fixed at $5000.00.*

4. *Parties to bear their own costs of the appeal.*

**Hon. Justice W. D. Calanchini**
**PRESIDENT COURT OF APPEAL**

**Hon. Justice S. Chandra**
**JUSTICE OF APPEAL**

**Hon. Justice S. Lecamwasam**
**JUSTICE OF APPEAL**