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

CIVIL APPEAL NO. ABU 76 of 2018
High Court Civil Action No. HBC 37 of 2016

BETWEEN : **MITHUN YOGESH RAJ**

Appellant

AND : **FIJI SUGAR CORPORATION LIMITED**

Respondent

Coram : **Lecamwasam, JA**
Almeida Guneratne, JA
Jameel, JA

Counsel : **A. Sen for the Appellant**
N. Kumar for the Respondent

Date of Hearing : **03 February, 2020**

Date of Judgment : **28 February, 2020**

JUDGMENT

Lecamwasam, JA

[1] I agree with the reasons and the conclusions reached by Guneratne, JA.

Almeida Guneratne, JA

Background facts Relevant to a Determination of this appeal

[2] The Appellant, a carpenter, was injured in the course of his employment under the Respondent. The Respondent admitted liability and the trial was confined to the assessment of damages. The Appellant was thirty three years at the time of the accident. The Appellant in his evidence stated that he was a soccer player who played as a goal keeper. He and a doctor (Dr. Semiti Vakabua) gave evidence on the Appellant's behalf.

[3] The Appellant claimed General Damages, Special Damages in a sum of $2,982.60, Interest, costs of the action and in the alternative compensation under the Workmen's Compensation Act (Cap 94) (Vide: Statement of Claim at pages 11-14 of the Copy Record). The Respondent's Statement of Defence is at pages 19-23 and the Reply to the Defence is at page 25 of the Copy Record. The Respondent did not call any evidence but did subject the plaintiff and the doctor to cross-examination.

[4] The Learned Judge in his analysis of the evidence led on behalf of the Appellant and matters that were elicited in Cross-examination delivered judgment awarding a total sum of $126,656.92 which included the full sum of $2,982.60 claimed by the Appellant as special damages with interest for 498 days at 6% (on that total sum awarded) together with costs of the action summarily assessed at $3,000.

[5] It is against that judgment (vide: pages 4-9 of the copy record) the Appellant has preferred this appeal. The Notice and Grounds of Appeal are contained at pages 1-4 of the Copy Record.

The Resulting Issue that needs to be determined in this Appeal

[6] That is, in regard to the component on the award of general damages whether this Court could find the same to the extremely conservative and therefore amounting to an error, non-direction or misdirection on the part of the learned trial Judge in the light of the established principles and authorities on assessment of the same (as alleged by the Appellant) under the various heads coming under a claim of general damages vide:

(a) the serious nature of the injuries (pain and suffering)

(b) the changed socio-economic and living conditions.

(c) future earning capacity.

[7] Finally, there remained issue whether the Learned Judge took into consideration, as alleged, as having given consideration to irrelevant matters and did not take into consideration relevant matters in particular the evidence of the Appellant and the doctor's evidence pertaining to pain, suffering and damages.

[8] It is in that background of the matters that this court was obliged to look at, bearing in mind that this Court though sitting in appeal is entitled to look into the matter afresh as if a re-hearing as decreed in Rule 15 of the Court of Appeal Act (Cap 12) on the evidence on Record.

[9] Viewing the said matter in that perspective, I now proceed to examine the same in relation to the several heads of General Damages as referred to at paragraphs (6) and (7) above.

Re : the Seriousness of the injury (Pain and Suffering)

[10] The learned Trial Judge did address his mind to that viz: the circumstances in which the Appellant's dominant (left hand) had been incapacitated (rendered disabled to its full functional capacity).

[11] The range of injuries and the pain the Appellant suffered as stated in his evidence the learned Judge re-capped at Paragraph 2 of his Judgment, which was followed by the learned Judge's reference to the history and duration of the medical treatment the Appellant had had to undergo (vide: paragraph 3 to 6 of his Judgment taking in the injuries described in P4 and the medical report marked as P3 which had described the impairment (vide: Paragraph 15 of the learned Judge's Judgment).

[12] It is also necessary at this juncture to refer to the said injuries suffered by the Appellant as submitted by his Counsel in the High Court at paragraph 16 of the written submissions filed on his behalf preceded in paragraph 15 thereof.

[13] On that factual aspect, the learned Judge awarded a sum of $75,000 for the Appellant with 27% permanent disability deriving guidance from a precedent cited by Counsel for the Appellant. The award in that case was $70,000 (in the year 2010). The instant case being in the year 2018 the award being $75,000.

[14] That award was on the basis of the Appellant's own final assessment of 27% on the evidence extracted from the medical report (vide: paragraph 16 of the Judgment of the High Court).

[15] Consequently, in regard to the aspect of 'pain and suffering', I was unable to find that, the learned Trial Judge's said award failed to bear scrutiny even in the light of the several judicial precedents relied upon by the Appellant's Counsel, his lament being that the said precedents do not feature in the learned Judge's Judgment.

[16] That contention though strenuously pressed by Mr Sen for the Appellant, I was unable to subscribe to, for the simple reason that, what could be the basis on which this Court sitting as an appellate Court could substitute in a matter of awarding quantum for general damages for pain and suffering unless there could have been found to be something in the trial

Court's assessment of the same as constituting an error, perversity or amounting to some misdirection or non-direction on the facts and /or on the law.

[17] I could not find any reason in the learned Judge's judgment to disturb his assessment in that regard, that, the award he made in regard to 'pain and suffering'. Indeed as cautioned by Lord Diplock in **Wright v. British Rail Board**.

Great caution has to be exercised in the examination and analysis of comparable awards because the facts inevitably differ and the influence of other items in each total award play a part which it is not always easy to identify and measure." (1983) 2 All ER 698.

[18] I adopt that judicial exposition in the facts and circumstances of the instant case in the context of which I re-iterate what I have stated in paragraphs (15) and (16) of this Judgment.

[19] However, given the fact that personal injuries are classified as pecuniary (economic) and non-pecuniary (non-economic) on the loss being capable of assessment in terms of money, such loss would necessarily include loss of earnings and actual prospective (future) in the nature of non-pecuniary loss including loss of amenities and / or enjoyment of life.

[20] In the background of the High Court Judgment, the Grounds of Appeal urged, submissions made by Counsel and the authoritative judicial precedents, I shall proceed to address the said questions as follows.

Loss of Earnings (Past and Future – Assessment criteria)

[21] In the English case of **British Transport Commission v. Gourley** [1956] AC 185, Lord Goddard addressed that question of loss of earnings.

[22] In regard to past loss of earnings His Lordship laid down the criteria to assess such as being "the loss of earnings incurred down to the date of trial." (p.206, supra).

[23] With regard to future loss of earnings His Lordship laid down as the criterion to assess the same as being "the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future."

[24] Those criteria were approved by this Court in **Nasese Bus Company Limited and Vijendra Nair v. Muni Chand** (per Calanchini P. (with Chitrasiri JA and Basnayake JA concurring).

The Assessment of damages in that regard by the High Court

[25] For purposes of easy elucidation and reflections thereon I reproduce what the learned High Court Judge stated:

> *"20. The Plaintiff is not totally incapacitated he admitted that he can be even a supervisor in a carpentry workshop considering that he had worked for more than 8 years as a carpenter.*
>
> *21. His weekly salary was $189.45 and considering that his impairment as a whole person was less than 30% his future loss cannot be calculated on the basis that his total income is lost as done by the Plaintiff's counsel in the submissions. A suitable multiplicand needed to be calculated.*
>
> *22. Considering that the impairment was 27% as a whole person in my judgment $189.45/2 and half of FNPF contribution or (50% of $189.45 and FNPF) x 52 would be a suitable multiplicand as he has the potential for employment even in the same field he was engaged though not necessarily in the same capacity. I have considered that reduction of movement of functionality in thumb and index fingers are important for carpentry but it is not total loss and should not be calculated in that basis.*
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> *23. Since the Plaintiff was 33 years old a suitable multiplier is also needed. Considering the age of the Plaintiff at the time of the accident and selection of suitable multipliers in judgments, the multiplier of 8 would be suitable*

considering the contingencies of life and also unpredictability of future events.

24. So the future loss of wages is $189.45/2x52x8= $39,405.60
Future loss of FNPF is $16.47/2 x 52 x 8 = $3,425.76
Total Future loss is $42,831.36

25. No amount can be granted for supplementary loss as claimed by the Plaintiff as there is no certainty as to availability of such work and the amounts earned to consider further loss."

[26] Moving on next to the submissions made by learned Counsel for the Appellant in the light of the grounds of appeal urged, they were focused on his lament that, the learned Judge had erred in the way he applied the principles relating to the application of "the multiplicand" and "the multiplier".

[27] I am afraid I could not find a basis to agree with Mr Sen's contention in that regard for the following reasons:

(a) Counsel's reliance on this Court's judgment in **Fiji Forest Industries Limited v. Rajendra Mani Naidu** (Civil Appeal No. ABU 0019 of 2014 dated 14 September, 2017 as per the Judgment of Ms Jameel, JA (Basnayake JA and Prematilaka JA agreeing).

[28] In that case, as the facts would reveal the facts and circumstances stood different, which prompted Her Ladyship (Justice Jameel) to hold that, (in effect) the wrong multiplier had been employed. (See: Paragraph [77] of her Ladyship's judgment in the case.

(b) I also found occasion to look at the decision of this Court in **Saifud Din v. Khan and Others**, Civil Appeal No. ABU 78 of 2014, dated 30 November, 2017.

[29] That was a case in which I penned the principal judgment (Calanchini, P and Prematilaka, JA concurring).

[30] In that case, the Appellant's complaint was that the sum awarded as loss of future earnings was excessive in contrast with the instant case, where the complaint is that the sum awarded

as loss of future earnings is insufficient, while noting that, there was no complaint in regard to the actual loss the aggrieved party had suffered "up to the date of the trial."

[31] In the facts and circumstances of that decision I held thus:

> *"[44] The established evidence is that, the plaintiff was 24 years at the time of the accident (14th February, 2008) and earning $70 per week as a driver in the employment of the Appellant. The learned Judge himself found as a fact that the plaintiff was earning $135 per week from June, 2020 to October 2013. Then he had proceeded to hold that, Although he could not be employed as a driver. He could be engaged in another profession and earn his living to some extent. Accordingly, I use the multiplier of 15 at the rate of $70 per week (which he was earning before the accident) and award $70 x 52 weeks x 15 = $54,600.00.*
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> *[45] Learned Counsel for the Appellant, relying on the House of Lord's decision in **Croke v Wiseman** [1982] 1 WLR 71 contended that, the learned Judge had employed the wrong multiplier. **Croke's** case (supra) concerned with a child of seven years and having a life expectancy of 33 years, wherein a multiplier of 14 years had been employed.*
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> *[46] Consequently, counsel argued, that the plaintiff being thirty years at the time of the trial, his life expectancy therefore being much less, the correct multiplier ought to have been below 14.*
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> *[47] I also looked at the Australian decision in **Todorovic v Waller** [1981 150 CR 402 wherein it had been said that,*
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> > *'the present value of the future loss ought to be questioned adopting a discount rate of 3 percent … intended to make the*

appropriate allowance for inflation, for future changes in rates of wages generally or of process, and for tax either actual or notional …''(at p.409)

[48] The Appellant's counsel was heard to contend that, the learned Judge in the instant case had calculated 6% interest per annum and upon that had charged further interest at 4% per annum until payment is made, thereby failing to give any discount as to future loss.

*[49] I am inclined to agree with Counsel's contention in that, the learned Judge's approach goes against the principles laid down in **Todorovic's** case (supra), which I adopt in the instant case.*

[50] Accordingly, viewing the matter in the overall, as regards the award made by the learned Judge as to future loss of earnings claimed by the plaintiff, I agree with the contention of the Appellant's Counsel that:-

(a) the learned Judge had used the wrong multiplier; and

(b) he had failed to give a discount rate as to future losses.

[51] Consequently, I think the appropriate multiplier to have been used to 12 and not 15 which would work out to a sum of $43,680 to have been awarded as future loss of earnings (70 x 52 x 12)."

[32] In my judicial labour I also took time to look at another judgment penned by me in the case of **Sevesa Daunivalu v Ramodharan Nair et al** (in which Basnayake JA and Prematilaka JA concurred – Civil Appeal No. ABU 44 of 2014, judgment dated 30 November, 2017).

[33] In that case, on the question of general damages I could not find any error in the judgment of the High Court. (vide: paragraph (34) of that Judgment). I say the same in the context of the present case (and appeal).

[34] Consequently, on the principle that, an assessment of damages for loss of earnings (whether past or future) must be based on objective grounds and not subjective, I hold that, I could not find any error, misdirection and/or non-direction or anything perverse in the High Court Judgment in his application of the principles relating to "the multiplicand" and "the multiplier", in which regard, I add, the case of **Vimalawati v. The Permanent Secretary of Health** (ABU 0002 of 2014, decided on 27 May, 2016. NB: another Judgment penned by me with Calanchini P and Muthunayagam JA concurring) also stood of no assistance to the Appellant's cause.

[35] Finally, before I proceed to arrive at my conclusion in determining this Appeal, while I say that I took into consideration the submissions made by learned Counsel for the Appellant (both oral and written) as against the submissions made on behalf of the Respondent, the final test was to see whether there was a basis to find any fault in the High Court Judgment in regard to which I could not find any, even having given consideration to Mr Sen's arguments based on the Appellant's grounds of appeal that, the learned Judge had not considered the Judicial precedents cited to him which, in any event, would been found to be against him.

[36] That fact, taken together with the learned Judge in awarding the full sum as claimed by the Appellant as "Special Damages", I could not find any basis to interfere with the learned Judge's judgment.

Jameel, JA

[37] I agree with the orders proposed by His Lordship, Almeida Guneratne JA.

Conclusion and Final Determination of this Appeal

On the basis of the aforesaid reasons, I conclude that this appeal should stand dismissed in consequence of which I propose the following orders:

Orders of Court

1. The appeal is dismissed.

2. The Judgment of the High Court to stand affirmed *in toto*.

3. Given the fact that, the Judgment of the High Court was in July, 2018 and the parties find themselves in February, 2020, I make order for interest ordered to be paid by the High Court in its Judgment going up to the date of this Judgment.

4. In addition to the costs of the action in the High Court, the Appellant is ordered to pay a sum of $3,500 as costs of this Appeal.

5. The Appellant is ordered to pay the aforesaid sums within 28 days of this Judgment.

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

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Hon. Justice F. Jameel
JUSTICE OF APPEAL