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

CIVIL APPEAL NO. ABU 0105 OF 2018
(High Court of Fiji at Labasa in Civil Action NO. HBC 42 of 2016)

BETWEEN : **RAJENDRA DEO PRASAD**

Appellant

AND : **MAHEND PRASAD**

1st Respondent

AND : **AJAY SINGH**

2nd Respondent

Coram : **Basnayake JA**
Lecamwasam JA
Almeida Guneratne JA

Counsel : **Mr. A. Pal for the Appellant**
Mr. A. Sen for the Respondent

Date of Hearing : **3 May, 2022**

Date of Judgment : **18 July, 2022**

JUDGMENT

Basnayake JA

[1] This is an appeal filed by the Appellant/2nd Defendant to have the judgment delivered in the High Court of Labasa on 28 September, 2018, set aside. By this judgment the learned

Judge has awarded the 1st Respondent/Plaintiff a total sum of $85,248.65 together with costs in a sum of $3000.00.

[2] The grounds of appeal are as follows:-

1. *The learned trial Judge erred in awarding the sum of FJD 65,000.00 to the 1st Respondent as general damages for pain and suffering where such an award to manifestly excessive and inconsistent with the extent of the injury, the recovery period and the extent of recovery. The 1st Respondent suffered a close fracture of the tibia and fibula and had complete recovery with 0% whole person impairment assessment. The Appellant further contends that the award for general damages for pain and suffering was inconsistent with awards for similar injuries.*

2. *That the learned Judge erred in awarding special damages of FJD 15.00 per day for care giving for a period of 264 days. The period of care giving was inconsistent with the medical evidence indicating recovery within 6 months of injury. The Appellant contends that the period of care giving did not exceed 180 days and as such any award ought to have been limited to 180 days.*

[3] The Plaintiff was a passenger of bus DI 556 driven by the 2nd Respondent (1st Defendant) on 8 May 2015. The Plaintiff suffered injuries as a result of the bus he was travelling in meeting with an accident. It is not in dispute that the accident happened due to the negligence of the 1st Defendant. He was in the employment of the 2nd Defendant. The vicarious liability of the 2nd Defendant has been admitted.

[4] The only dispute in this case is with regard to the quantum of damages awarded to the Plaintiff as general damages amounting to $65,000.00 and the amount awarded by way of special damages for care giving for a period of 264 days at $15.00 per day amounting to $3960.00. The learned counsel for the 2nd Defendant concede a sum of $30,000.00 as general damages and a sum of $2700.00 for care giving. That is for a period of 180 days instead of 264 days at $15.00 per day.

[5] The plaintiff was awarded in all a sum of $85,248.65. This sum is made up as follows:-

General damages……..……..65,000.00
Interest on the same (at 6%)…….. 7150.00
Special damages…… 11,962.26
Interest on special damages (at 3%) ……. 1,136.39
Total……85,248.65

The special damages of $11,962.26 is made up as follows:

Transport and medication……$1000.00
Loss of wages and FNPF…….$7002.26
Care giver ($15 per day for 264 days…….…….$3960.00
Total…… $11,962.26

Special damages for care giver

[6] The Plaintiff was 43 years of age at the time of the accident. The Plaintiff giving evidence said that he suffered a broken leg which was hanging until it was supported with a board. He had to be in the bus for one hour until he was carried into a taxi and taken to hospital. He says that he was in pain and was taken in for an operation after more than three hours. He was discharged from hospital on 11 May 2015. At home he said that he could not use a flush toilet and had to use a bucket which was cleaned by his wife after use. He said he could not use a shower and used to wipe off. He said that he used crutches for a period of two years. He was nursed by his wife. He was questioned by his counsel that his wife took care of him for a period of six months.

At page 156: Mr. Sen A.: ..*Now for the 1st 6 months you said your wife took care of you. Did your wife work after the accident..?..*Sen A. :*Now 6 months your wife looked after you were you able to go out to clinic?..*Mr. M. Prasad: *No.*

[7] In the statement of claim (pg. 21) the Plaintiff claims a sum of $6,735.00 by way of special damages for the care giver at $15.00 per day for 449 days. However the Plaintiff does not

produce any evidence to support a claim for 449 days. The learned counsel appearing for the 2nd Defendant concedes a payment at $15.00 per day for a period of 180 days. That is for a period of six months. The learned Judge (pg.16) referring to the evidence of the Plaintiff states that the Plaintiff's wife looked after him and states as follows: "*In my judgment , the Plaintiff is entitled to claim for services provided by a care giver from the date of the accident till 27 January 2016, i.e. 264 days*". It is evident from D1, an assessment report dated 14 May 2017 (pg. 281) by Dr. Taloga, a specialist orthopedic surgeon, that the date the Plaintiff last attended the clinic was on 27 January 2016. However there is no evidence that the Plaintiff required the services of a care giver till then. I am of the view that the learned Judge erred in making an award for a period of 264 days amounting to $3960.00. This amount should be for a period of 180 days as claimed by the learned counsel for the 2nd Defendant. The Plaintiff's evidence supports a period of 180 days. Hence I am of the view that the amount of $3960.00 should be reduced to $2700.00 together with interest at 3% from 8 May 2015 to the date of trial.

General damages for pain and suffering

[8] Dr. Alipate Navunisaravi giving evidence said that the Plaintiff had a closed fracture of left mid shaft tibia and fibula. The bones were completely broken off and the leg was hanging. A cast of plaster of paris was put on his leg and was removed in 3 months on 5 August 2015. He said it was a high energy injury and the pain would be considerable. In the scale it would be category five. The x-ray showed five weeks after injury a new bone formation. The x-ray showed fibula had healed in 2016 and established union with tibia. The fracture had taken three to four months to heal. He said (pg. 115) that on discharge he was seen on 17 May, 4 November, 13 November, 2 December, 27 January 2016 and 19 February 2016. On all these dates the Plaintiff had complained of pain and swelling. He said the x-ray showed the fracture has completely healed.

[9] Dr. Taloga has examined the Plaintiff twice in 2017 and 2018 and prepared two medical reports. He said that in his assessment he did not find evidence of swelling or pain although the Plaintiff complained of pain and swelling whilst giving evidence. He said

that if a patient complained of pain he would do further investigation. He said if the fracture heals he should not use crutches. He said that according to the assessment the Plaintiff has fully recovered. He said once the fracture is united he should be walking normally and be able to run. He agreed that the pain in this case would be severe as bones were broken.

Judgment of the High Court

[10] The learned Judge states in his judgment in paragraph 24 that, "*The medical evidence conclusively establishes that the Plaintiff's fracture has healed well and he had "no pain" when clinically assessed as provided in his final medical report*". He describes the injuries and pain as follows: "*The plaintiff was in severe pain when he befell the accident. He had a closed fracture of his left lower limb, the mid shaft tibia and fibula. His left leg was broken and hanging on his skin. He was shouting in pain, as reiterated by PW3. He was seated in the bus for one hour. He was carried and taken to the Labasa hospital. He was attended to after three hours. The pain was categorized in a scale of 1 to 5 as 5 out of 5. It was a "high energy injury" and pain was severe. He was in hospital for 3 days. His leg was cast in plaster of paris for three months. He had attended the outpatient clinic on 10 occasions".*

[11] Referring to the submissions of the learned counsel appearing for the Plaintiff, the learned Judge said that, "Mr Sen, counsel for the plaintiff in his closing submissions claims $90,000 for pain and suffering. He has cited the case of **Eta Naqeletia v Kumar,** [2012] FJHC 29 (20 January 2012), **Nasese Bus Co Ltd v Chand** [2013] FJCA 9 (8 February 2013), subsequent decisions of the Court of Appeal and **Prabhu Lal v Sant Lal** [2016] FJHC 81 (10 February 2016). The learned Judge said that, "*In assessing damages, past awards are useful guides, provided the pain and injuries are comparable, as held in the following cases. The Supreme Court in* **Permanent Secretary for Health and Another v Kumar** [2012] FJSC 28 (3 May 2012) *at paragraph 37 set out the principles to be applied by courts when assessing 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 could not even be anticipated at the stage a court makes an award. Hence, an 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.***

[12] Quoting from Chandra RJA in **Avinesh Kumar v Rishen Kumar,** [2018] FJCA 106 (6 July 2018) ***:*** *The question that therefore arises as to whether the award granted by the learned trial Judge, is firstly fair, conventional and consistent, and how it compares with* ***comparable cases*** *in keeping with the principles enunciated in* **Kumar's** *case (supra) cited above.* Chandra RJA also cited the following two passages:

Lord Diplock in **Wright v British Railway Board,** (1983) 2 All ER 698 said :

if the aim is that justice meted out to all litigants should be even-handed instead of depending on idiosyncrasies of the assessor, whether jury or judge, the figure must be basically a conventional figure derived from experience and from awards in ***comparable cases****.*

Lord Morris in **West v Shephard,** (1964) AC 326 at 346:

Money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation .....as far as possible ***comparable injuries should be compensated by comparable awards*** *.....*

[13] Referring to previous judgments the learned Judge said, "In **Eta Naqeletia v Kumar,** (*supra*) a sum of $ 70,000 was awarded as general damages, as the plaintiff had lost the use of her dominant right hand. Wati J found that she had "*gone through excruciating pain with permanent disability of 19%".* In **Nasese Bus Co Ltd v Chand**, (*supra*) the Court of Appeal increased the damages of $65,000 awarded for pain and suffering to $ 90,000, as it was found that sufficient regard had not been given by the High Court to the future pain and suffering that the respondent would suffer due to progressive arthritis. The pain suffered by the appellant in **Mere Labaivalu v Pacific Transport Co. Ltd** [2017] FJCA 61 (26 May 2017) is likewise not comparable to that of the plaintiff in the instant case. The appellant had a "*traumatic penetrating injury involving a wooden object which had pierced her left hip and extended through the pelvis..*(and) *protruded through the anterior abdominal wall*", as provided in the medical report. She had 68 stitches across her body, a big scar of a patched hole in her thigh and extensive scars on her lower abdomen. The Court of Appeal enhanced the damages of $60,000 awarded by the High Court for pain and suffering to $90,000. Basnayake JA stated that "*Although it is not evident, I would like to mention..some of the crucial pain that the plaintiff would have gone through*", which was set out. Nor can there be a comparison with a plaintiff who had 18% whole person impairment, had to walk in crutches and was rendered permanently unfit for any further employment, as in **Chand v Amin** [2015] FJCA 143 (2 October 2015) where the award of $85,000 for pain and suffering and $52,000 for loss of future wages was upheld on appeal. In **Jaysheel Jaineet Kumar v Pacific Transport** [2018] FJCA 15 (8 March 2018) the award of general damages was increased by $50,000 for the deformity of the plaintiff and future loss.

[14] In **Fiji Forest Industries Ltd v Rajendra Mani Naidu** [2017] FJCA 106 (14 September 2016) as also referred to by Mr Sen, the Court of Appeal increased the damages from $60,000 to $90,000. In that case, the plaintiff's last finger of his right hand was amputated and total permanent disability was assessed at 29%. In **Vimla Wati v Permanent Secretary of Health,** [2016] FJCA 72 (27 May 2016) the appellant had undergone a surgery for the removal of his gallbladder, which was unsuccessful. His bile got damaged and he had to undergo a second surgery. The Court of Appeal increased the

damages from $15,000 to $70,000, as the High Court had awarded damages for pain only till the date of the second corrective surgery and not for the period of 71 days, until he was finally discharged.

[15] Kamal Kumar J (as he then was) in **Prabhu Lal v Sant Lal** [2016] FJHC 81 (10 February 2016) awarded a sum of $ 65,000 for past pain and suffering and $ 5000 for future pain and suffering. The plaintiff received injuries to his right rib and his left leg was crushed, shattered and broken to small pieces. He underwent surgery. A plate, nuts and bolts were inserted and his leg was put in cast. In **Nasese Bus Co Ltd v Chand,** (*supra*) Calanchini AP(as he then was) cited Lawton LJ in **Cunnigham v Harrison, [1973] QB 942** at page 956 as follows:

> "*..if judges do not adjust their awards to changing conditions and rising standards of living, their assessments of damages will have even less contact with reality than they have had in the recent past or at the present time."*

[16] "*In the light of the principles applicable to assessing damages, I assess the general damages for pain and suffering in the present case at $ 65,000".*

Legal Matrix

[17] It appears that the learned Judge could not get any support from the above cases to make an assessment. The amounts awarded in those cases were between $70,000.00 and $90,000.00 for much more serious injuries with permanent impairment or disabilities of varying degrees. In Eta Naqeletia (supra) the injured lost the use of her right hand and had gone through excruciating pain with 19% permanent disability. In Chand v Amin (supra) the plaintiff had 18% whole person impairment and was rendered permanently unfit for any further employment and was awarded $85,000.00 for pain and suffering. In Fiji Forest Industries Ltd case (supra) the plaintiff's last finger of his right hand was amputated with a 29% total permanent disability. In Prabhu Lal's (supra) the plaintiff received injuries to his right rib and his left leg was crushed and broken into small pieces.

[18] The learned counsel for the Plaintiff placed his reliance on the judgment of **Livingstone v Ram Yards Coal Co** (1885) AC 25 at 39 where Lord Blackburn said that, *"compensation should as nearly as possible put the party who has suffered injury in the same position as he would have been if he had not sustained the wrong".* He also submitted the case of **Fletcher v Autocare and Transported Ltd** [1969] 1 All ER 726 at 780 where Lord Scarman said that, "the damages awarded should be such that the ordinary sensible man would not instinctively think as either mean or extravagant but consider them to be sensible and fair". The damages must be recovered once and for all (**Attorney-General v Micheal Broadbridge** [2005] FJSC 4 (8 April 2005) and **Permanent Secretary for Health v Kumar** (supra)).

[19] Most of the principles the learned counsel for the Plaintiff relied on had been considered by the learned Judge in this case. However the learned Judge was not able to find a single case in comparison. The amounts awarded in those cases have been due to the gravity of injuries caused. The gravity of the injuries caused in those cases could not be compared with the injuries caused in the present case. The learned Judge has referred to the pain that the Plaintiff has suffered in this case. However in the assessment the Judge is required to make an award that is compatible. The Plaintiff in this case had 0% permanent impairment. Apart from the fracture in tibia and fibula he had no other wounds. The fracture too was considered to be a simple fracture and not commuted. He was hospitalized for three days from 8 May 2015 till 11 May 2015. His plaster of paris was removed within three months on 5 August 2015. As per the medical evidence the Plaintiff has attended the clinic last on 27 January 2016. As per the x-ray report the fracture was found to be completely healed.

[20] Considering all of the above facts I am of the view that a sum of $50,000.00 is a fair assessment for pain and suffering. Hence I set aside the award of $65,000.00 to be replaced with $50,000.00 together with interest at 6% from the date of service of writ (19 September 2016) to the date of trial (10 July 2018). I also set aside the award of $3960.00

($15 per day for 264 days) and replace it with $2700.00 ($15 per day for 180 days) awarded for the care giver together with interest at 3% per annum from 8 May 2015 till 10 July 2018. I also answer the two grounds of appeal in favour of the Appellant (2nd Defendant). The appeal is therefore partly allowed. Having considered the circumstances I am of the view that the parties should bear their own costs.

LecamwasamJA

[21] I agree with the findings and conclusion therein of Basnayake JA.

Guneratne JA

[22] I agree with the Judgment of Basnayake JA.

Orders of court are:

1. *The appeal is partly allowed.*

2. *The judgment of the learned Judge of the High Court is set aside with regard to the award made on general damages and the interest.*

3. *The award made under care giver in the Special damages is set aside.*

4. *In place of $65,000.00 an amount of $50,000.00 is awarded together with interest at 6% from the date of service (19 September 2016) to the date of trial (10 July 2018).*

5. *In place of $3960.00 for care giver a sum of $2700.00 together with interest at 3% per annum is awarded from 8 May 2015 till 10 July 2018.*

6. *All the other awards remain unaffected.*

7. *The parties to bear their own costs.*

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Hon. Justice Eric Basnayake
JUSTICE OF APPEAL

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

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