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

CIVIL APPEAL NO.ABU 0055 of 2021
[High Court Civil Case No. 141 of 2011]

BETWEEN : **ASERI VAKATAWA**

Appellant

AND : **SHIVAANI PRAKASH**

Respondent

Coram : **Jitoko, VP**
Dayaratne, JA
Qetaki, JA

Counsel : **Mr. E. Narayan with Mr. M. Khalim for the Appellant**
Mr. D. Singh for the Respondent

Date of Hearing : **07 July, 2023**

Date of Judgment : **28 July, 2023**

JUDGMENT

Jitoko, VP

[1] I have had the advantage of reading in draft the judgment of Dayaratne JA and I express my entire agreement with his reasoning and conclusions to dismiss this appeal.

Dayaratne, JA

[2] In this appeal the Appellant seeks to set aside the judgment of the High Court of Suva dated 27 October 2021.

The case in the High Court

[3] The Respondent instituted action in the High Court against the Appellant claiming damages for injuries caused to her consequent to a road accident. She was 23 years old at the time of the accident.

[4] On the basis that the accident was caused due to the negligent driving of the Appellant, the Respondent claimed: general damages (including interest at the rate of 6% per annum), special damages (including interest at the rate of 3% per annum), loss of future earnings, past gratuitous care, costs for future care, costs of suit and interest at the rate of 4% per annum on Judgment sum until payment in full.

[5] The Appellant in his Statement of Defence denied negligence on his part and took up the position that the injuries to the Respondent were caused solely or alternatively due to the contributory negligence on the part of the Respondent.

[6] The Respondent gave evidence and led the evidence of a doctor who had examined her. She produced her wage slip, Fiji Police Medical Examination Form and two medical reports.

[7] The Appellant himself gave evidence and led the evidence of a private investigator whose services had been procured by the insurance company that had insured the Appellant's car that was involved in the accident. A report prepared by the private investigator and a piece

of paper on which the Respondent made certain writings whilst giving evidence were produced by the Appellant in support of his case.

[8] The learned High Court Judge in his Judgment found that the Appellant 'was negligent and that his negligence caused the accident'. He also held that the Appellant had failed to establish contributory negligence on the part of the Respondent.

[9] Having concluded that the Respondent was therefore entitled to damages, he awarded the following:

(a) General Damages - $75,000 for pain and suffering as well as a sum of $10,000 for a permanent scar. Interest on General Damages in a sum of $5,100

(b) Loss of Earnings - $4,409.08

(c) Special Damages - $1,324.49. Interest on Special Damages $39.73

(d) Gratuitous Care -$480

The Grounds of Appeal urged by the Appellant

[10] In his appeal before this court, the Appellant has raised four grounds of appeal. They are;

*"**Ground 1***

That the learned Judge erred in law and in fact by not determining all the natters and delivering Judgment dated 27th of October 2021 and which was in the circumstances against the evidence and the weight of the evidence.

Ground 2

That the learned Judge erred in law and in fact by holding on the available evidence that the Appellant owed a duty of care and breached that duty of care owed to the Respondent including being negligent and as a result the Respondent being entitled to damages and total amount of $91,944.22 together with sum of $2,000 as costs.

Particulars

(i) That the evidence fails to support the Respondent's claim as the same is inadequate, unreliable and inconsistent. The Respondent did not prove

the allegations made in the Statement of Claim on a balance of probabilities.

(ii) *The Respondent in her evidence through her witnesses whether circumstantial or direct in nature, failed to successfully substantiate that the Appellant breached the duty of care and that there being no breach, the appellant is not liable for the injuries sustained by the Respondent. The evidence substantiates that the Plaintiff was solely liable for the injuries she has sustained.*

(iii) *The Respondent's action itself was dangerous and negligent and the Respondent should be held solely responsible for her injuries. She put herself in harm's way and she knew he ought to have known what she was doing was dangerous and negligent.*

(iv) *We submit that the accident happened on a straight road and at all material the Respondent ought to have had a proper lookout for oncoming vehicles before crossing.*

(v) *The Respondent in failing to look out for oncoming vehicles, crossed negligently and recklessly which led to the accident. The appellant in that spontaneous moment in no way possible could have avoided the accident as a result of which he had applied the brakes immediately upon impact. Since the Defendant was travelling at the legal speed of 60km per hour in that area, the vehicle could not be expected to come to an immediate halt after braking and nor fast.*

Ground 3

That the learned Judge erred in law and in fact in making a high award of quantum of damages and which was in all circumstances excessive and/or unsupported by evidence or any credible evidence.

Particulars

(i) *The Respondent did not adduce any evidence in her support apart from herself when there were 2 eye witnesses who saw the accident in terms of her evidence, the Respondent herself was discredited during cross-examination as she had admitted that she put herself in danger thus contradicting her claim.*

(ii) *The Respondent negligently contributed to the accident which caused her injuries as pleaded in the Statement of Defence.*

(iii) The Respondent failed to file and serve a Schedule of Special Damages no later than 38 days after the case had been set down for hearing pursuant to Practice Direction No. 3 of 1993 and Respondent's failure to adduce a single iota of evidence to substantiate her alleged expenses during evidence.

(iv) The Respondent failed to give evidence on what tablets she required and used in the past and whether she is still using the said tablets. The Medical simply says the Plaintiff has reached maximum medical improvement and the Doctor confirmed this meant no medical intervention required.

(v) The Respondent is not entitled to any special damages as claimed by her due to the differing figures, failure to file and serve a Schedule of Special Damages no later than 38 days after the case had been set down for hearing pursuant to Practice Direction No. 3 of 1993 and due to the total absence of evidence.

(vi) The Respondent wrote the accident date, her mother's name and her own name on a piece of paper including writing her phone name Samsung core-prime. Her handwriting was neat. In evidence, the Respondent agreed that she could still study further and get a better job. Even at the request of the Bench, she raised her arm high.

(vii) Doctor Enoch evidence stated the condition of radial nerve paralysis is not a permanent disability and heals within 8 months or longer. He confirmed that it was possible for the Plaintiff to have improved after 2 years. Doctor Enoch also could not agree with Doctor Buadromo's assessment as he is not trained or qualified to assess whereas Doctor Buadromo is a qualified assessor.

(viii) There was no scientific or concrete proof before the Court to substantiate that a power grading was done to assess her disabilities in terms of extending or moving parts of her left upper limb.

(ix) The Respondent's injuries are not so serious so as to disable her from working and earning in the future.

Ground 4

That the learned Judge erred in fact and in law in not holding that the injuries occasioned to the Respondent was solely or alternatively contributed to by the negligence of the Respondent.

Particulars

(i) Failing to keep any or proper lookout or to have any or any sufficient regard for her own safety when walking;

(ii) Failing to pay or any sufficient heed of the Vehicle on the material road;

(iii) Emerging into the Vehicle's path without first ascertaining or ensuring that it was safe to do so;

(iv) Failing to give any or any adequate warning of her approach to the Appellant;

(v) Failing to the move further towards the side of the material road when approached by the Vehicle;

(vi) Failing to take reasonable care in all the circumstances."

[11] At the hearing before us, learned Counsel for the Appellant submitted that he was infact relying on the grounds of appeal pertaining to contributory negligence and the damages awarded being excessive.

Evidence led at the trial

[12] With regard to the evidence that was led at the trial, I do not consider it necessary for me to engage in a narration of my own and wish to rely on the concise narration of the learned High Court Judge contained in his judgment. In paragraphs (7) and (8) he has dealt with the evidence led on behalf of the Respondent whilst in paragraphs (10) and (11) he has dealt with the evidence led on behalf of the Appellant. I reproduce them here as follows;

"[7] The Plaintiff [PW1] gave oral evidence and in summary told the Court that she was involved in an accident near the Koronivia Road Junction on 13th April 2017 at 7.30pm upon her returning home from work. She was crossing the road following two others and was one step away from the footpath when she was bumped on her left side by a car coming from Nausori heading to Suva. As a result of the impact, she came onto the windscreen of the car and fell off. She saw the car ten to fifteen metres away. There was no pedestrian crossing from where she crossed the road. Further, there was no warning sign given by the Defendant driver. Her evidence was that after the accident she was conveyed to the Nausori Health Centre and subsequently to CWM Hospital by an ambulance where

she was admitted for two weeks. She was in pain and after the accident she thought she would die. Her injuries were an open fracture on her left arm and bruises on the left leg. A metal plate and screw were inserted in her left arm. PW1 showed her scar in the shape of a crescent and the mark where the plate and screw were inserted. She was in plaster for three months with very serious injuries and admitted for two weeks. She remained in bed for six months. After the accident the Defendant visited her and told her what had happened on the day of the accident and prayed for her.

[PW2] Doctor Enoch Kolinibaravi

[8] He stated in his evidence that he was the Surgical Registrar at the CWM Hospital and had conducted the medical examination on the Plaintiff [PW1]. He was referred to the medical report dated 27th June 2017 which was tendered into evidence as "Exhibit P2". He reported that the Plaintiff's [PW1] left humerus/arm was broken and had an open wound with a bone sticking out. Her elbow was fractured. He confirmed it was not a permanent disability and the injury heals within 8 months or longer. He carried out (ORIF) meaning Open Reduction Internal Fixation Surgery and screws were inserted to hold the bones together. PW1 was admitted on 14th April 2017 and discharged on 27th April 2017. She could not do things like before. PW2 was also referred to the medical report dated 14th June 2018 prepared by Dr Buadromo. He told Court that Dr Buadromo assigned 11% Whole Permanent Impairment (WPI) to PW1's injuries. PW1 could not agree with Dr Buadromo's assessment as he was not trained or qualified like him. He confirmed there was one year gap between his medical report and Dr Buadromo's medical report and there were improvements to PW1's injuries. He added that PW1's disability was permanent in nature and her earning capacity was reduced.

DW1 Aseri Vakatawa

[10] DW1 Aseri Vakatawa told Court that he recalled 13th April 2017 at 7.30pm wherein his vehicle registration number II814 was involved in a traffic accident at the Koronivia Road Junction. The Plaintiff [PW1] was involved in the accident. He was driving the vehicle registration number II814 owned by him and his wife and was insured with New India Insurance. He was driving from Nausori to Cunningham. It was during Easter.

He had knocked off from work and was heading home on his usual main route during traffic. The area was dark, dusty since the road construction work was ongoing. There was traffic on the road from Suva side heading to Nausori. Lights were opposing his eyes. The Plaintiff [PW1] suddenly

came through between two cars to cross to the other side of the road. The front middle part of his car bumped the Plaintiff PW1 on her left side and the Plaintiff [PW1] landed on top of the bonnet of his car. The accident occurred on the middle of the road. He disagreed that he failed to have a proper lookout and/or have sufficient regard for the Plaintiff PW1 when she was crossing the road. He stated that he was cautious and driving straight at a speed of 60KMPH and not driving at an excessive speed. He did not expect the accident to occur nor expected someone to cross between two cars. He reiterated that he did not see the Plaintiff [PW1] as he was fully concentrating on the road ahead.

After the accident, he admitted visiting the Plaintiff [PW1] at the hospital a couple of times since he felt sorry for the Plaintiff [PW1] as she was the victim of the accident. He pointed out to the sketch plan drawn by police and gave a statement to the police.

DW1 agreed in cross-examination that if he drove his vehicle a bit slower as a prudent driver, then the accident may not have happened. He confirmed that the Plaintiff [PW1] was 10 metres away from his car when he first saw her and it took 10 seconds to collide with her. He further said that he could not see the Plaintiff [PW1] cross the road between two cars and the lights. He also said that he could not make out whether it was his or her fault.

[DW2] Anirudh Kumar

[11] This Defence Witness told the Court that he was appointed by the New India Assurance to investigate the circumstances leading to the accident where the Plaintiff [PW1] was involved in an accident at Koronivia Road Junction on the Kings Road. The driver of the vehicle in question was Aseri Vakatawa [DW1].

He interviewed the Plaintiff [PW1] and obtained a written statement with photographs of her injuries sustained during the accident. He interviewed the Defendant [DW1] and obtained his written statement. He also interviewed two other eye witnesses who gave an oral statement to [DW2] but refused to give written statements. He compiled his report and submitted to the New India Assurance which was tendered into evidence as "Exhibit D2".

He told Court that the point of impact was towards the middle of the lane with a 16.4 metres brake mark. Legal speed in that area was 60KMPH. The road was under construction and had no footpaths or pedestrian crossings. It was dark at 7.30pm. The police sketch plan of the accident scene was tendered into evidence as part of his report as "Exhibit D2". He confirmed that the investigation report was written thirteen weeks after

the accident. He agreed that the Plaintiff [PW1] suffered serious injuries. He also agreed that the driver [DW1] would have seen the Plaintiff [PW1] ten seconds before the impact. The accident was forceful since the Defendant's [DW1] car windscreen was smashed. However, he could not confirm if the Defendant's [DW1] speed was excessive since he was not an eyewitness."

Determination by the High Court of negligence on the part of the Appellant

[13] In order to succeed in her claim, the Respondent had to establish on a balance of probability, negligence on the part of the Appellant and it is necessary for this court to consider as to whether the learned High Court Judge has duly considered this aspect.

[14] At paragraph 17 of his judgment, the learned High Court Judge has identified four factors that have to be proved in order to impose liability in respect of the tort of negligence. They are;

"i. The duty of care owed by the Defendant to the Plaintiff.
ii. The breach of that duty of care by the Defendant in the sense that he failed to measure up to the standard set by law.
iii. A causal connection between the Defendant's careless conduct and the damage complained of; and
iv. That the particular damage to the Plaintiff is not so unforeseeable or too remote."

[15] He has also referred to case law and rightly observed that the burden lay on the Respondent to prove that the accident in question occurred and the resultant injuries were caused due to the negligence of the Appellant (paragraphs 18-22 of the judgment).

[16] Thereafter, the learned High Court Judge has gone on to analyze in great detail, the evidence placed before him and concluded that the Appellant was negligent and that his negligence caused the accident (paragraph 47 of the judgment).

Determination by the High Court as to whether there was Contributory Negligence on the part of the Respondent

[17] Since the Appellant had taken up the position that the Respondent's injuries were caused solely or alternatively due to the contributory negligence on the part of the Respondent, it

was incumbent on the trial judge to look into that aspect and he has engaged in that task from paragraphs 49 to 72 of his judgment.

[18] The learned High Court judge at paragraph 49 of his judgment has set out the conduct of the Respondent as relied upon by the Appellant (in his written submissions filed in the High Court) to establish contributory negligence on the part of the Appellant.

[19] He has also referred to the authorities cited by the two parties (paragraphs 55-57 of the judgment) and has also relied on the ratio of three other cases (paragraph 61 of the judgment) in determining as to whether there was contributory negligence on the part of the Respondent. The learned trial judge has engaged in a careful analysis of the evidence that has been placed before him and meticulously identified the particular items of evidence that become relevant in such determination.

[20] Having done so, he has arrived at the conclusion that the evidence does not establish contributory negligence on the part of the Respondent (paragraph 72 of the judgment).

Consideration of the two grounds of appeal pertaining to Negligence of the Appellant (Ground 2) and Contributory Negligence of the Respondent (Ground 4)

[21] In order provide answers to the grounds of appeal pertaining to the above, it becomes necessary for this Court to carefully peruse the judgment of the High Court *viz a viz* the evidence led at the trial. As adverted to earlier, the learned trial judge has analyzed in great detail, the evidence that has been placed before him under these two heads separately. However, since it would result in repetition if I were to engage in an analysis of the evidence under the two different heads and also since the learned counsel for the Appellant submitted that he was infact pressing Ground 4, I will refer to the relevant parts of the evidence together and answer the two Grounds of appeal jointly.

[22] I am in agreement with the four factors that the learned High Court Judge has identified as being relevant in order to establish the negligence of the Appellant. They have been

reproduced by me at paragraph 14 of this judgment. They are factors courts have time and again identified as being necessary to establish the tort of negligence.

[23] I am also in agreement with what he has relied upon as being relevant in the determination as to whether there was contributory negligence on the part of the Respondent (referred to in paragraphs 49, 61 and 62 of his judgment). Nevertheless I will advert to this aspect in greater detail later.

[24] I will only refer to certain salient items of evidence that would be relevant in this determination.

[25] It is common ground that the place of the accident was very close to a junction and that the road construction was going on at the relevant time. The time of the accident was around 7.30 in the evening.

[26] The position of the Respondent was that she had got off the bus and crossed the road with two others. The other two had managed to complete the task while she was hit by the vehicle when she too was about to complete the task.

[27] Exhibit 2 which was a Report compiled by the private investigator Anirudh Kumar who testified on behalf of the Appellant, contained a sketch of the scene of the accident that had been prepared by the Police after the accident. This Report has been admitted by consent of parties and becomes relevant when analyzing the evidence given by the Respondent and the Appellant. The trial judge has correctly placed much reliance on this sketch as seen from his judgment. It is pertinent to bear in mind that the Police had drawn the sketch on the narrative given by the Appellant.

[28] The Respondent had been asked in cross examination whether she agrees that it was a dangerous place to cross the road and she has said she agrees but *'there was no crossing, no zebra line'* (at page 99 of the copy record). The Appellant too admitted that there were no pedestrian crossings in that area (at page 121 of the copy record). Witness Kumar who testified on behalf of the Appellant also confirmed this in his evidence and has specifically stated in his report (Exhibit D2) that *'there is no pedestrian crossing around the scene of the accident and pedestrians have to cross the road on a stop, look, listen and think basis'*

(at page 128 of the copy record). The parties are at variance however as to where exactly the impact was – whether it was at the middle of the road as stated by the Appellant or towards the edge of the road as stated by the Respondent. As observed earlier, the point of impact shown on the sketch is as related by the Appellant.

[29] The Appellant has stated in his evidence that he was driving at a speed of 60 kmph and that the maximum speed limit in the area was 50 kmph. There is a brake mark 16.4 meters in length from the point of impact which is proof of the fact that the brakes have been applied after impact and that the vehicle was travelling at high speed.

[30] The Appellant himself admitted under cross examination that it was not unusual for pedestrians to cross the road in the manner the Respondent did. He was familiar with the road since he commutes along that route on a regular basis (at page 123 of the court record). Asked during examination in chief as to whose fault caused the accident, he has said *'I could not make out whether it was her fault or my fault but to say that I was driving home on the correct side'* (at page 122 of the copy record). Then in answer to the question *'Would you agree with me that if you drove a bit slower as a reasonable and prudent driver this accident might not have happened, correct'* under cross examination, he said *'I agree sir'*(at page 123 of the copy record). Witness Kumar under cross examination admitted that taking into consideration the brake mark, it can be concluded that the speed would have been excessive (at page 131 of the copy record).

[31] The learned High Court Judge has arrived at the conclusion that the Appellant *'failed to keep any or any proper look out or to have any sufficient regard for the Plaintiff who was crossing the road'* and that he *'drove at an excessive speed'* and therefore found that the Appellant *'was negligent and that his negligence caused the accident'.*

[32] Taking into consideration the analysis of the learned High Court Judge and the items of evidence as laid out by me above, I see no reason to disagree with that finding of the learned High Court Judge.

[33] Learned counsel for the Appellant submitted that there was clear evidence of contributory negligence on the part of the Respondent and that the High Court should have apportioned at least 50% of the blame on the Respondent.

[34] Whilst the learned High Court Judge himself has referred to certain authorities in considering the issue of contributory negligence, I wish to refer to the recent case of **Narayan v Roshan [2019] FJCA 211; ABU 24 of 2018 (4 Oct 2019),** where the Court of Appeal dealt with in great detail, the applicability of contributory negligence.

[35] Describing what contributory negligence is, Her Ladyship Justice Jameel stated as follows; *'Contributory negligence is a defence that can be raised by the defendant in order to have the damages claimed against him reduced. It does not negate the finding of negligence against the defendant. The burden of proof lies on the defendant to prove that the claimant was contributorily negligent, and that it was such negligence that was the real and effective cause of the damage. Thus, the burden of proof lies on the defendant to establish that the claimant failed to take reasonable care of his own safety, and thereby contributed to the damage or injury. Contributory negligence thus has two limbs; causation and foreseeability'.*

'The enquiry in to whether the claimant failed to take care of his own safety is to be judged objectively from the point of reasonable person in the position of the claimant, under the circumstances in which the accident occurred, and what he knew, or ought to have known in the circumstances. It is true that the reasonable person will be presumed to take into account the possibility that others around him may be careless. However, a defendant who pleads contributory negligence is required to establish that it was the claimant's negligence that finally caused his own damage or injury, and that the cause of the injury was the contributing factor of the claimant, which caused by the danger or risk created by the claimant's carelessness'.

[36] It is clear that the Appellant is relying on the fact that the Respondent admittedly crossed the road when there was no pedestrian crossing in order to demonstrate her carelessness and that she failed to take reasonable care for her own safety.

[37] At the hearing before us the learned counsel for the Appellant pointed out the following questions and answers during the cross examination of the Respondent in his assertion that the Respondent had admitted her contributory negligence;

"*Q - So wouldn't you agree that it is a very dangerous place to cross?*

A - I agree but there was no crossing no zebra line

Q - and there was no crossing as well, do you agree?

A - yes

Q - So, you were crossing at a dangerous place where there was no crossing; you agree?

Q - yes"

[38] However, when court pointed out to him that the evidence revealed that there were no pedestrian crossings marked on the road in that area and hence it was inevitable that pedestrians crossed the road at some point, he agreed that it was so but stated that the Respondent should have exercised more care.

[39] It must be emphasized here that the portion of evidence as re-produced above cannot be taken in isolation in the determination of whether contributory negligence can be attributed to the Respondent.

[40] The fact that there was no pedestrian crossing in the area as admitted by the Appellant and his own witness and that it was not unusual for pedestrians to cross the road at different places in the absence of marked pedestrian crossings as adverted to herein before, the fact that the accident happened very close to a junction and it is invariably expected that oncoming vehicles would slow down when approaching such place as well as the Appellant himself acknowledging that the accident would not have happened if he drove at a lesser speed are factors that will have to be taken into consideration in such determination.

[41] As Parmour J said in the case of **Grayson v Ellerman Lines Ltd (1920) ACC 466** at 477 *'…….it depends entirely on the question whether the plaintiff could reasonably have avoided the consequences of the defendant's negligence'*.

[42] I am of the view that when the evidence is taken in its totality, it is clear that the causative factor of the collision was not the Respondent's conduct of crossing the road at a place where there was no pedestrian crossing.

[43] In the case of **Jones v Livox Quarries Ltd (1952) 2 Q.B. 608** at 615 Lord Denning stated that *'Although contributory negligence does not depend on a duty of care, it does depend on foreseeability, just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself'.*

[44] It is in evidence that the Respondent crossed the road with two others and it is not as though she simply ran on to the road without any proper look out. Hence as regards the test of foreseeability, I am satisfied that there was no way that the Respondent would have foreseen a speeding car knocking her down.

[45] Considering the above, I am unable find any reason to disagree with the finding of the learned High Court Judge that there was no contributory negligence on the part of the Respondent. Therefore, I answer both Grounds of Appeal in the negative.

Are the damages awarded excessive?

General Damages

[46] Learned counsel for the Appellant submitted that the general damages awarded by the High Court to the Respondent are excessive.

[47] It must be acknowledged that there is no scarcity of judgments of appellate courts regarding the computation of damages pertaining to personal injuries both locally and abroad. Courts have time and again dealt with such issue.

[48] The learned counsel for the Appellant has cited the case of **Attorney General of Fiji v Kotoiwasawasa [2003] FJCA 56; ABU0004.20003 (14 November 2003).** In this case, court noted as follows; *'In considering this matter we record that we have been assisted by the helpful joint judgment of* ***Barwick CJ, Kitto J and Menzies J in Planet Fisheries Pty v La Rosa [1968] HCA 62; [1968-69] 119 CLR 118****. At page 124 their Honors said: 'It is the relationship of the award to the injury and its consequences as established in the evidence in the case in question which is to be proportionate. It is only if, there being no other error, the award is grossly disproportionate to those injuries and consequences that it can be set aside. Whether it is so or not is a matter of judgment in the sound exercise of a sense of proportion. It is not a matter to be resolved by reference to some norm or*

standard supposedly to be derived from a consideration of amounts awarded in a number of other specific cases. ……. The principle to be followed in assessing damages is, in our opinion, not in doubt. It is that the amount of damages must be fair and reasonable compensation for the injuries received and the disabilities caused. It is to be proportionate to the situation of the claimant party and not to the situation of other actions, even if some similarity between their situations may be supposed to be seen'.

[49] In the case of **Attorney General of Fiji and two others v Tikotikoca [2014] FJCA 048 of 2012 (29 May 2014)**, the Court of Appeal looked at several authorities both in Fiji and elsewhere and made very pertinent observations with regard to the calculation of damages for personal injury. His Lordship Justice Suresh Chandra stated as follows;

'Sums awarded for different types of injury are necessarily arbitrary (or artificial) because there is no criterion for determining what a part of the body is worth (vide: Atiyah, Accidents, Compensation and the Law, 4th Edition, page 186).

That arbitrariness or artificiality cannot be overcome by a legislative tariff either. The sums awarded thus depend on the general experience and compensation precedents.

As has been said 'Compensation…. In general "…cannot be measured by Mathematics but by the application of reasonable common sense…" (vide: S & J and Another v Distillers Co. (bio chemicals) Ltd [1969] 3 All ER 1412)'.

[50] It is therefore necessary to consider as to how the learned High Court Judge has approached the question of damages. General damages that were claimed on the basis of pain and suffering has been considered by the trial judge from paragraphs 73 to 90 of his judgment.

[51] Needless to say, it was necessary for the trial judge to take into consideration the nature of the injuries suffered and the extent of any permanent impairment in the computation of damages. This had to be done by recourse to the evidence of the Respondent and the doctor who testified on her behalf and the medical reports that were tendered in evidence.

[52] At paragraph 75 of the Judgment, the learned High Court Judge has summarized the evidence of the Respondent with regard to the injuries suffered by her. It is as follows;

'The Plaintiff [PW1] stated in her evidence in chief that after the accident she was in pain and could not move her body. She thought she would die. She was conveyed to the Nausori Health Centre and subsequently rushed to the CWM Hospital in an ambulance. She said that she suffered an open fracture on her left arm, cuts and bruises on her leg.

She was given the treatment. Doctors inserted metal plate and screws, which is still intact. Plaintiff [PW1] showed to court the injury on her left arm with a half moon crescent shape scar. She remained in plaster for three (3) months and the injuries received by her were serious. The left injured arm is her dominant hand. Her mother remained in hospital beside her bed during the period of her admission at the CWM Hospital for two (2) weeks. Upon her discharge, she was in bed at home for a period of six (6) months'.

[53] The evidence of Dr. Enoch Kolinibaravi and the medical reports that were produced through him (three in all which have been compendiously marked P2) have been dealt with by the trial judge at paragraphs 79 to 84 of his judgment.

[54] I will briefly advert to his evidence and the contents of the said medical reports. He explained that the Respondent's left humerus or the left arm bone was broken multiple times and that 'the bones were communicating with the outside'. The second injury had also been on the same humerus where there was a protrusion of the elbow which was also fractured (at page 109 of the copy record). Open Reduction Internal Fixation (ORIF) surgery has been performed and metals were inserted and screws had been used to hold the bones together. At the time of his examination of her, he felt that the process of healing would be about eight months but it depended from person to person and could even take longer.

[55] He has also explained that she also suffered a radial nerve injury whereby the muscles of the forearm are paralyzed thereby affecting the extension of the forearm and wrist. This is commonly called a 'wrist drop' which is a long term injury. She could also suffer from chronic pain and traumatic distress syndrome. There was scarring and further, she could endure psycho social effects, especially she being a female. He also stated that she will not be able to do strenuous work with that hand and further that it was her dominant hand (at page 112 of the copy record).

[56] He went on to state that *'and the nerve injuries again she would not practically wont be able to do anything use that hand for a long time until the nerve improves and then whatever sensation is impede there is risk of more injuries if a particular part of the hand is deviate to the nerve supply'*. He stated that chances of her developing bone arthritis was very high. He specifically said that *'With her left dominant hand injured with consequences such her ability to use that hand to be able to work for a living is also reduced'* (at page 112 -113 of the copy record).

[57] This doctor also gave evidence on the medical report prepared by one Dr. Vueta Scott Buadromo, Surgical Registrar at the CWM Hospital. This report has been admitted as evidence by consent of parties (at page 114).

[58] His report states as follows;

> *'More than (1) year after the accident and surgery she had seen much improvement. However she continues to experience pain in her left arm. Her paralysis and sensation has returned except for a small area between the first web space. Following her surgery she had been left with a large notable thick scar extending about 30cm along her left arm.*
>
> *Given tat she is left hand dominant and had needed a long recovery period. She had resigned from work and lives with family using the AMA 5e Guides to the evaluation of permanent disability and "The Fiji Work Care Guide". Table 16-15 impairments due to sensory deficits 5% Whole Person Impairment, for scar deformity using the TEMSKI chart 5% whole person impairment and for pain 3% whole person impairment.*
>
> *Shivani Prakash has reached maximum medical improvement and had a whole person impairment of 11%'.*

[59] The doctor finally opined that *'From the experience I have, I do not think that a re-assessment would make a difference to what Doctor Scott has assessed because and the injuries that he had stated that are still there are* ***most likely to be permanent*** *and there could be mild improvements every now and then but it shouldn't change much, that's from the limited experience that I have'* (emphasis added, at page 117 of the copy record).

[60] The above is ample evidence of the extent of the injuries and the permanent impairment suffered by the Respondent.

[61] The learned counsel for the Respondent has cited the case of **Nasese Bus Company Ltd v Chand [2013] FJCA 9; ABU 40. 2011 (8 February 2013)** where court observed that *'In the absence of any legislation in Fiji in providing guidance for assessing damages in personal injury actions, the observations of the Court of Appeal, in my judgment, can be regarded as an endorsement of the statement made by Lawton LJ in **Cunningham v Harrison [1973] QB 942** at page 956:*

'……. If judges do not adjust their awards to changing and rising standards of living, their assessments of damages will have less contact with reality than they have had in the recent past or at the present time'.

[62] In **McCaig v Manu [2012] FJCA 20; ABU0010.2011 (21 March 2012),** the Court of Appeal cited the following observation made by the trial judge; *'I would have had no hesitation in following what Mr. Justice Byrne, as he then was said in Iowane Salaitoga v Kylie Jane Anderson (CA 26/94; 17.10.1995) that it is high time the awards of damages in Fiji for personal injuries threw off its swaddling clothes and faced the reality of the real world'.*

[63] It must be noted that there cannot be a common yardstick by which the quantum of damages to be awarded for personal injury can be decided. Precedents can only be for purposes of guidance and cannot be rigidly applied. It depends on the facts and circumstances of each case and necessarily has to be commensurate with the injury and/or impairment suffered. A trial judge in his determination must apply his judicial mind and arrive at a figure that is neither excessive nor too meagre. Reasonableness under the circumstances ought to be the approach.

[64] The trial judge was in the best position to arrive at a figure having taken into consideration all matters and I am convinced that the figure arrived at is not excessive. The Respondent at 23 years of age was in the prime of her youth. The permanent disability suffered by her cannot be treated lightly. Therefore, I do not think that this court should vary the quantum of General Damages awarded by him.

Other damages awarded by the High Court

[65] Damages awarded by the High Court also include damages for Loss of Earnings, Special Damages and damages for Gratuitous Care. The learned High Court Judge has in his judgment given reasons as to why he is awarding such damages as well as the manner of calculation. In any event learned counsel for the Appellant did not contest the award of these damages and his attack was on the quantum of the general damages. I find that the learned High Court Judge was correct in his decision to award such damages and also agree with the manner of their calculation. Therefore, I do not wish to interfere with such determination. Ground No. 3 should thus fail.

Was the judgment of the High Court against the evidence and weight of the evidence?

[66] As pointed out by me herein before, the learned High Court Judge has clearly outlined the evidence led before him and has engaged in a detailed and meticulous analysis of such evidence under different heads. He has given reasons for the conclusions arrived at by him.

[67] Appellate Courts have consistently held that the decisions of trial courts will not be interfered with unless there has been a clear miscarriage of justice. I see none in this case. Therefore, Ground No. 1 must necessarily fail.

Conclusion

[68] For the reasons morefully set out in this judgment, I dismiss the Appeal.

[69] The Appellant is ordered to pay the Respondent a sum of $2500 as costs.

Qetaki, JA

[70] I have considered the judgment of Dayaratne, JA in draft form. I agree entirely with it and the reasoning.

Orders of Court

(1) Appeal dismissed.

(2) The Appellant to pay the Respondent a sum of $2500 as costs.

Hon. Justice Filimone Jitoko
VICE PRESIDENT, COURT OF APPEAL

COURT OF APPEAL
FIJI

Hon. Justice V. Dayaratne
JUSTICE OF APPEAL

Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL