

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

CIVIL APPEAL NO. ABU 101 of 2018
[High Court Civil Case No. HBC 266 of 2011]

BETWEEN : **PRITISHNA LATA BHAN**

APPELLANT

GABRIEL PARIWAL SINGH

1st RESPONDENT

AND : **NITIN RONESE MISHRA**

2nd RESPONDENT

Coram : **Basnayake, JA**
Lecamwasam, JA
Jameel, JA

Counsel : **Mr V. Kumar for the Appellants**
Mr R. Prakash & Mr. S. Nandan for the 1st Respondent
2nd Respondent In Person

Date of Hearing : **17 February 2023**

Date of Judgment : **24 February 2023**

JUDGMENT

Basnavake, JA

[1] I agree that the application to lead fresh evidence should be refused.

Lecamwasam, JA

[2] When this appeal was taken up for hearing on 17 February 2022, the court was informed by the Registrar that by Summons filed on 22 May 2022, the Appellant, sought an order from this court allowing her to adduce fresh evidence before this court.

[3] The appeal records initially made available to this court did not contain the said Summons and affidavit of the Appellant, and therefore when it was made available to court at the hearing of this appeal, the court had to consider the contents of the Appellant's affidavit. In view of the submissions made on the Summons by the learned Counsel, this court had to consider the applications as a preliminary matter, before hearing the substantive appeal.

[4] The learned Counsel for the Appellant supported the Summons and learned Counsel for the 1st Respondent made submissions in objection.

[5] In view of the submissions made in court based on the Appellant's affidavit, to which was attached a letter dated 30th June 2010 addressed to the Medical Superintendent of CWM Hospital by Pratap Singh, pointing out the improper treatment meted out by the said hospital which according to the Appellant, was a major contributor to the Special and General damages awarded against the Appellant in the High Court. The Appellant has stated that in her statement of defence dated 22nd September 2011 she had raised the defence of improper treatment by doctors and the 1st Respondent's failure to follow the

doctor's advice. However, the Doctor did not give evidence, it was only the Record Keeper of the Hospital who gave evidence and the documents were led through him.

[6] The Appellant states that the said letter was item number 22 in the 1st Respondent's verifying list of documents filed on 14th September 2012, and that the 1st respondent's lawyers breached their duty to court by not disclosing this letter, and or not adducing it as evidence in court. The Appellant states that the 1st Respondent's father himself claims improper treatment by CWM hospital, and that the change in the 1st Respondent's voice or the resulting medical condition (which was the basis on which the learned trial judge awarded special damages and damages for pain and suffering and loss of amenities and prospective or future earning capacity) means that the accident was not the proximate cause of the change. The Appellant states that the 1st Respondent deliberately refrained from disclosing in evidence, the said letter, although it was listed, because it would have affected the quantum of damages.

[7] The Appellant claims that if the letter is not adduced before court, it would cause her severe prejudice because the letter proves that the sole cause of the 1st Respondent's changed voice, and the resulting damage was due to improper treatment by CWM Hospital, and it was this that led the learned trial Judge to award the quantum of damages that he did. In the submissions before this court, Mr. Kumar for the Appellant adverted to the defence of *actus novus interveniens*, and submitted that this letter would establish this defence, and submitted that the quantum of damages would have been reduced, had this letter been produced as evidence in the trial, by the 1st Respondent, and therefore submitted that, had the said letter been produced in evidence, it would have been decisive and would likely have affected the verdict.

[8] On behalf of the 1st Respondent, learned Counsel submitted that; there has been no breach of duty to court, the letter now sought to be adduced as fresh evidence and was duly disclosed by the 1st Respondent in the Verified List of Documents, and it was up to the

Appellant to have adduced it if the Appellant had intended to rely on it. The writer of the said letter Pratap Singh was cross examined extensively by the Appellant's Counsel (p. 271 to 295 of the copy record), but no questions were put to him on the standard of care provided to the plaintiff, by CWM Hospital.

[9] Both parties relied on the principles in the seminal authority of **Ladd v Marshall** [1954] 1 All ER 745. On an examination of the material this court finds that the Appellant's application does not cross the first limb in the criteria set out in **Ladd v Marshall** [1954] 3 All ER 745, which is that the evidence must be such that could not have been obtained prior to trial by reasonable diligence. Since this was verified document, it was known to the Appellant, there was no element of surprise and the Appellant did not put it in cross examination, it is now not possible to adduce it.

[10] In terms of the proviso to s. 22(2) of the Court of Appeal Rules, in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted, except on special grounds.

[11] In any event, in terms of s. 22(3) of the Court of Appeal rules, this Court shall have the power to draw inferences of fact and give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require.

[12] In view of the above, the Appellants' Summons to adduce fresh evidence is refused.

[13] The appeal is set down for hearing in the normal course.

[14] **Jameel, JA**

I agree with the reasons and proposed orders of Lecamwasam JA.

[15] **Orders of the Court**

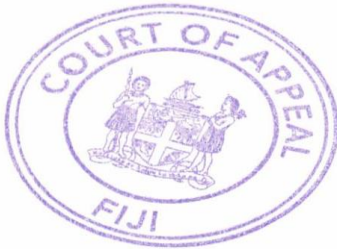
1. *Application for fresh evidence is refused.*
2. *The case will be called over in due course to fix a date for hearing of the appeal.*
3. *No costs.*



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Hon. Justice E. Basnayake
JUSTICE OF APPEAL



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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL



.....
Hon. Justice F. Jameel
JUSTICE OF APPEAL

Solicitors:

Mr V. Kumar for the Appellants

Mr R. Prakash & Mr. S. Nandan for the 1st Respondent

2nd Respondent In Person