IN THE HIGH COURT OF FIJI
AT LABASA

CIVIL JURISDICTION

CIVIL ACTION NO. 43 OF 2004

BETWEEN	:	**SURUJ NARAYAN**	*Plaintiff*
AND	:	**MINISTRY OF HEALTH**	*1st Defendant*
AND	:	**ATTORNEY-GENERAL OF FIJI**	*2nd Defendant*

Before the Hon. Judge - Mr Justice John E Byrne

Counsel	:	A. Sen for the Plaintiff H. Rabuku and Ms M. Rakuita for the Defendants
Dates of Hearing	:	21st, 22nd June 2007, 24th April 2008
Date of Judgment:		25th July 2008

JUDGMENT

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[1] **The Accident at Work**

On the 13th of August 2003 while in the course of his employment at Dreketi Contractors Limited of Labasa, as a

chainsaw operator, the Plaintiff suffered an injury to his right ankle. A tree fell on his leg and he could not pull his foot back. He called for help. A fellow-employee came and the Plaintiff gave this man the chainsaw and told him to cut the top and bottom parts of the tree with the object of releasing his foot. This was done eventually and the Plaintiff then walked one chain with the help of his fellow-employee to the main road where there was a vehicle belonging to his employer. He was taken in this vehicle to the Health Centre and then to Labasa Hospital.

[2] **The Treatment in Labasa Hospital**

He had an open wound on his ankle. At the hospital the wound was stitched and he was then admitted as an in-patient. He was x-rayed and was in the hospital for 19 days. During the first seven days his wound was cleaned and he was given pain-killers. No bandage was applied to the wound which was covered only with a piece of cloth. He said he was able to move around the ward, could move his toes and that the wound was getting better. Pain was decreasing. Then, he said, doctors cut and removed the stitches and told him that they were going to apply what he termed a *"cement plaster"*, known generally as a Plaster of Paris. He said that they asked him to sign a piece of paper, presumably a form of consent, but the Plaintiff refused to do so initially but later did so because he was told that his doctors were going to apply a plaster to the wound. He was then taken to the Operating Theatre and after the wound was cleaned he was

told that the cement plaster which was applied was made of very soft material.

[3] He said that he refused to sign the piece of paper first because he feared that if a Plaster of Paris were applied to an open wound it could become infected. He was then told that because a Plaster of Paris was soft they had to apply it over the foot but when the Plaster of Paris set they would cut a hole or window in it. He then agreed to sign the form.

[4] He said that no padding was applied before the plaster was placed on his foot. It was a complete plaster. After the plaster was applied he was taken back to the ward but the doctors or nurses did not cut any window in it. He came back to the ward about 3.00pm. The wound was paining - he described it as a burning sensation from the foot right up to the leg and complained about this to the doctors and nurses. One of the doctors told him *"I am a doctor - not you"*.

[5] He requested them to remove the plaster but they did not. He said that the first day after the plaster was applied the foot hurt him.

[6] On the second day the pain became worse. He told the doctors and nurses about this and asked them to remove the plaster but they refused saying that he was not a doctor.

[7] He was kept like this for about four to five days during which the pain got worse. He said he could not bear the pain any

longer and asked them to give him a pain-killer which they did and checked his blood pressure.

[8] After five days a window was cut on the plaster but the plaster itself was not. He said a young doctor treated him. After this doctor cut the window there was a very bad smell. The following day a nurse removed the window with her hand by simply pulling it off.

[9] Then he noticed a very bad smell. He said there was a thin layer of material left like plastic. The nurse then cleaned the wound. The same doctor then cleaned the wound also.

[10] The following day he was taken to the Operating Theatre again where the wound was cleaned and then he was taken back to the ward. He was kept there for two days when the wound was again cleaned and he was given an injection so that the area would become numb so that the wound could be cleaned. The injection rendered him unconscious. When he regained consciousness he saw that flesh had been removed and that the skin had turned black.

[11] When the window was removed and he noticed the bad smell he also noticed that his leg was swollen and the skin was black.

[12] After the window was cut he could move his toes. He was taken to the Operating Theatre twice for removal of the skin. When he returned to the ward he could not move his toes.

[13] He said that by this time his foot was getting worse. The doctors removed the Plaster of Paris but he could not move his toes and the skin was still black.

[14] When the flesh was removed he could see the bones in his foot. He stayed in the hospital for four days after this. He summarised his condition as *"more pain and condition getting worse"*.

[15] Next day he was told by his doctors that they wanted to cut his ankle because it had *"got bad"*.

[16] **Operation in Suva Private Hospital**

He refused and said that he wanted to ask his boss who spoke to the doctor and asked him to prepare a letter which he could take to the Suva Private Hospital. He was taken to the Suva Private Hospital at his own expense.

[17] There he was seen by Doctor Eddie McCaig. He was in the hospital for thirteen days. He was x-rayed and finally admitted as an in-patient.

[18] His leg was amputated four days after admission. He asked one of his doctors whether his leg could be saved but he was told that his skin had vanished and they could not save the leg. After amputation he felt a little pain but it was worse before the amputation.

[19] He said that he went to the Suva Hospital because he hoped his leg would improve. After four more days he returned to Labasa and incurred various expenses at the Suva Private Hospital.

[20] He said that after the operation he could not carry on his normal life for example by going to a toilet. Where he lives there is only a pit toilet because there is no water supply.

[21] He said that he lives more than 50 kilometres from Labasa. To have a shower he must go to the well where somebody fills a bucket and he pours water on himself. The well is about 44 yards from his house.

[22] **Post Amputation**

He confirmed that before amputation he played soccer for the Balewale team which is his local village team. He did gardening and planted rice and vegetables.

[23] The stump of his leg healed after about three months but he could not work. He says he finds it difficult getting on buses. Before his accident he used to go to the home of his employer and clear his vegetable garden. He paid him $25 to $30 per week although he did not work for more than two to three days each week. He said he cannot swim now. He tried but could not do so because he does not have any leg. It is difficult wearing trousers. He has pain in the stump in cold weather.

[24] He obtained an artificial leg from the Tamavua Hospital. The one he was wearing at the trial was the second he had had since his amputation. The first artificial leg cost him a thousand dollars and the second seven-hundred and seventy-five dollars. He said it was not a good leg and he wants to change it because it is broken.

[25] He says that he can no longer climb mountains or hills. He cannot return to his work as a chain-saw operator. If somebody helps him he can climb stairs. He has four children who were born before his amputation. The youngest was two days old at the time of the amputation. He says it is difficult to carry his youngest child for example to weddings. He also said that the doctors in the Labasa Hospital told him when he first went there that his foot would get better.

[26] It was put to the Plaintiff in cross-examination that he was admitted to the Suva Private Hospital twenty four days after he had been advised that his leg had to be amputated. The Plaintiff denied this and said that he was told only once, and at the last moment, when his leg was poisoned. This was on the day before he left for Suva.

[27] The Plaintiff called his former employer, Tahir Ali f/n Mumtas. He said that the Plaintiff was paid $3.33 per hour and he took home approximately $180 per week which included a housing allowance of $5 and he worked six days per week.

[28] After the accident he paid the Plaintiff $120 per week for three months. He said he saw the Plaintiff in the Labasa Hospital and for the first three to five days there was no bandage on his wound. After that he saw the Plaster of Paris on it complete. He knew that the cast had been removed after about five days. He said he saw the Plaintiff regularly after this. His skin was black and there was a bad smell and swelling. This witness was the last called by the Plaintiff but the first witness to give evidence for him was Dr Eddie McCaig an orthopaedic surgeon who holds a Fellow of the Royal Australasian College of Surgeons degree and is a well-known orthopaedic surgeon in Fiji. He amputated the Plaintiff's leg below the knee in the Suva Private Hospital. He was critical of the way the Plaintiff was treated in the Labasa Hospital and said in effect that he had not been properly supervised. He said that if a patient with such an injury as the Plaintiff's complained of pain and the plaster was not removed, pain was normally a sign of pressure within the plaster and if this was not removed the patient would have increasing pain and death of tissue. Medically this is called a compartment syndrome. He said that limbs have fibrous compartments and if a patient has increase in pressure within these compartments he will suffer pain and if the pressure is not released the tissue dies. When this happens gangrene is by definition death of tissue together with putrefaction which is infection.

[29] When Dr McGaig saw the Plaintiff he had a large ulcer on top of his foot and the bones in the foot were dead. He described this as a condition known as necrotic death. He

said that the Plaintiff could have developed a compartment syndrome some weeks earlier. When a complete cast is placed on a wound it is necessary to provide sufficient padding to allow for swelling. A compartment syndrome can be avoided to some extent by applying sufficient padding. He said that when a patient complains of pain on a wound his doctors should not prescribe pain-relief but should release the tight plaster.

[30] He had read the report of the Labasa Hospital which showed that the Plaintiff was given pain-relief. This consisted of a mild analgesic and sedation. He was given pethidine which is a strong pain-killer and an opiate. He was also given morphine, and Phenergan, a sedative causing sleep which also stops vomiting. He said that if a patient has a Plaster of Paris on an injured limb and there is bleeding then his doctors should try to discover the cause of the bleeding. They would need to elevate the limb and if necessary remove the plaster on the affected area.

[31] He said that initially the Plaintiff would have had his wound debrided so that one would expect the limb would have been elevated and there is no reference in the clinical notes about this. If the pain continued then pain indicates there was a compartment syndrome and so the tight bandage should have been released and the area opened up. If these were not done for some hours tissue death might occur. After seven days it would certainly occur.

[32] He said that the Plaintiff obviously had gangrene which was not detected. If it had been then the Plaintiff could have avoided the amputation of his leg below the knee. He said that after such amputation a patient can get phantom pain which is very real and not imaginary. Patients have been known to have this for the rest of their lives.

[33] He said that the Plaintiff's gait will never be normal again but this will depend on the prosthesis he is given. He said that the average cost of a prosthesis in Fiji is eight-hundred to a thousand dollars and in Australia, four thousand to five thousand dollars and even as much as thirty thousand dollars. He said that in Fiji prostheses for an injury suffered by the Plaintiff are very crude and the Australian product is much better. Each would last two to three years.

[34] All the Australian prostheses are custom-built. He said that the Plaintiff would have to remove his prosthesis in order to have a shower. He said that in Fiji public transport is not fitted with ramps as is the case in Australia where people with disabilities can enter public transport - trains, buses, trams - with comparative ease. He said that the removal of the leg will have psychological effects. A person who has such a leg removed has lost part of his body and so he or she must change his lifestyle and suffers from feelings of inadequacy.

[35] Dr McCaig estimated the Plaintiff's disability at 45% based on the Workers Compensation scale. Dr McCaig concluded his evidence-in-chief by saying that if due care had been taken of

the Plaster of Paris on the Plaintiff a lot of the pain might have been prevented and the likelihood of amputation would have been lessened. In cross-examination Dr McCaig said that an open wound has a high potential for becoming infected. There is a high incidence of infection with open wounds. He said that if a back slab had been applied to the Plaintiff this would have been mentioned in the clinical notes. It was not and so Dr McCaig assumed that the Plaintiff had a full Plaster of Paris applied to him. He also said that if a complete Plaster of Paris had been done on the 18th and 19th of August there would have been no attention to the wound until the Plaster of Paris had been opened. One cannot cut a window in a back slab but only on a full Plaster of Paris.

[36] He said that the facilities at the Suva Private Hospital are better than those in the public hospitals. He also said in answer to a question from the Court that if the various medications provided by the Suva Private Hospital, which were tendered in evidence, were not provided by the Labasa Hospital, the Plaintiff's infection would have got worse. This evidence marked the end of the Plaintiff's case.

[37] **The Defendant's Case**

Opening the case for the Defendants counsel said that the hospital made every effort to save the Plaintiff's injured foot. Even after the third day he refused amputation and the doctors applied other methods to try to save his foot. They applied a fore plaster and afterwards removed this and advised him again that he should have the foot amputated

but he refused and left the hospital without the advice of his doctor. He was not referred from the Labasa Hospital to the Suva Private Hospital. Therefore, said counsel, the Defendant intended to call one witness only who *"will give the Court a clear version of what happened in the Labasa Hospital during the Plaintiff's stay there"*. Mr Rabuku said that liability was denied.

[38] The witness called by the Defendant was Dr Joji Vulibeci who holds the Degree of Bachelor of Medicine and Surgery from Fiji and the Diploma in General Surgery also from Fiji. He was at the Labasa Hospital when the Plaintiff was admitted on the 13th of August 2003. He said that the Plaintiff was suffering from a crush injury to his right ankle and had a deep wound in the ankle. The bone had been fractured and the wound was stitched to cover the tendon. He said the Plaintiff had a Class three fracture, 80% of which required amputation. He said it was also an injury to blood vessels. Every day after admission the dressing on the wound was changed and he was given intravenous anti-biotics to prevent the wound from becoming poisoned. He said the tests taken from swabs of the wounds showed that the hospital was using the correct anti-biotics.

[39] After three days the swab which was taken on the first day for testing showed an organism generally found in the soil. He said that the Plaintiff was advised twice to have his foot amputated, because he had a Class three fracture. He said that the smell which the Plaintiff complained of was caused by bacteria and no blood getting to the wound because of

the severity of his injury. From the records Dr Joji was satisfied the Plaintiff received proper attention. He said, however, that the wound did not respond well to the treatment he had received.

[40] He agreed with Dr McCaig that if a Plaster of Paris was applied to a wound the body heat and the Plaster of Paris would be an ideal breeding ground for the growth of bacteria. There will also be sweating if the wound were not allowed to breathe. He also agreed that if there was no padding and a Plaster of Paris was applied it would burn the skin. He did not agree that the Plaster of Paris exacerbated the Plaintiff's wound and made it worse.

[41] It will be noted from Dr Joji's evidence that he did not identify the type of fracture sustained by the Plaintiff but, more curiously, that certain portions of the Plaintiff's folder were not written by Dr Joji. He could not identify the author of such notes or authenticate the notes.

[42] The next matter to note is that on the doctor's evidence, there was an open wound and that this was infected by various types of bacteria. One must ask why was the entire wound covered by complete cast of Plaster of Paris thereby preventing the doctors from inspecting the wound and observing any process of healing? One must also ask why did it take the Plaintiff's doctors five days to cut a simple window to inspect the wound?

[43] It is undisputed that before the application of the Plaster of Paris the wound was not infected and there was no foul smell. It was only after the window was cut that a foul smell was noted and various skin debridements were done.

[44] Dr Joji did not say that the condition of the initial injury was such that skin debridement was necessary. This only became necessary after the application of the Plaster of Paris. Despite the doctor's assertion that he had advised the Plaintiff to have an amputation, which was forcefully denied by the Plaintiff, there is nothing in the clinical notes in the Plaintiff's folder to even vaguely suggest that such advice was tendered.

[45] When the doctor was cross-examined on this he said that he did not write any such prognosis and advice in a patient's folder because such advice became public and patients were discriminated against in the ward. I find this explanation extraordinary. If it is true then it reflects an appalling lack of privacy between doctor and patient in the Labasa Hospital.

[46] I am left with the unfortunate conclusion that Doctor Joji did not render the advice which he claimed to have given the Plaintiff.

[47] **Analysis of the Evidence**

I am satisfied on the balance of probabilities that the Plaintiff's condition was exacerbated because of the

application of a Plaster of Paris and failure by the Defendants to adequately manage it.

[48] What is transparently clear is that the Plaintiff's condition was improving before the application of the Plaster of Paris. Furthermore the application of a complete cast created an ideal breeding place for the growth of bacteria and organisms which accounts for the foul smell after the window was cut on the Plaster of Paris. Furthermore, the Defendants did not rebut the evidence of the Plaintiff that suggested that adequate padding was not applied.

[49] **Were the Defendants Negligent?**

Until fairly recent times in Fiji Courts have considered this question in the light of the direction to the jury of McNair J. in the case of **Bolam -v- Friern Hospital Management Committee** [1957] 1 WLR 582 at 586.

[50] In **Sidaway -v- Board of Governors of Bethlem Royal Hospital** [1985] AC 871. Lord Scarman who dissented in the decision stated the Bolam principle in these terms:

> ***"The Bolam principle may be formulated as a rule that a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion eventhough other doctors adopt a different practice. In short, the law***

imposes the duty of care: but the standard of care is a matter of medical judgment".

[51] In **Rogers -v- Whitaker** [1992] 109 ALR 625 the High Court of Australia refused to follow the practice of English Courts in applying Bolam to cases of medical negligence. The High Court rejected the Bolam approach and held that the question is not whether the conduct accords with the practice of the medical profession or some part of it, but whether it conforms to the standard of reasonable care demanded by the law. That is a question for the Court, and the duty of deciding it cannot be delegated to any profession or group in the community. The Court expressly disapproved Bolam and the House of Lords decision in **Sidaway -v- Board of Governors of Bethlem Royal Hospital**. In doing so the High Court quoted with approval the remarks of King C. J. in **F -v- R** [1983] 33 SASR 189 at 194 that:

> ***"The ultimate question, however is not whether the Defendant's conduct accords with the practices of his profession or some part of it, but whether it conforms to the standard of reasonable care demanded by the law. That is a question for the Court and the duty of deciding it cannot be delegated to any professional group in the community".***

In my Judgment **Rogers -v- Whitaker** is to be preferred in Fiji to Bolam's case, and I shall apply it to the facts of this case.

[52] On that footing I am satisfied that the Defendant was negligent. Fundamentally, the Plaintiff complains that a Plaster of Paris should not have been applied to his open wound and the evidence of Dr McCaig makes it quite clear that to do this was wrong medically.

[53] In their submissions, the Defendants complain that the Plaintiff *"voluntarily requested the assistance of his employer to discharge and remove him from the Labasa Hospital. They signed the removal form before removing the Plaintiff without the advice of the Hospital".*

[54] Given the facts as I have found them, I can only ask why should the Plaintiff and his employer have accepted the advice of this hospital which in my opinion could not be trusted in view of its failure to treat the Plaintiff correctly. They also complain that the amputation was performed twenty-three days after the day he was advised by Dr Joji that he required amputation and also eight days from the second time he was advised of this. I cannot accept this submission because, for whatever reason, there is no note of this in the Plaintiff's clinical notes. Furthermore there is no document signed by the Plaintiff stating that he refused amputation on the 16th of August after three days in the hospital. One would have thought that, to protect itself, the hospital would have been careful to have required the Plaintiff to sign such a refusal. I am satisfied that no such document was ever presented to the Plaintiff and I reject the submission.

[55] **Damages**

In what I can only regard as an extraordinary submission the Defendants submit that I should award damages for pain and suffering and loss of amenities of $2,000.00 but not more than $6,000.00. This submission flies in the face of cases even cited by the Defendants and which it is submitted I should follow in awarding general damages. On the 24th of April 2008, realising that the Court of Appeal would shortly thereafter be handing down a decision on awards of general damages in Fiji in Civil Appeal No. ABU0084 of 2006S the **Permanent Secretary for Health and Attorney-General -v- Arvind Kumar & Anr,** I called the parties to Suva for further submissions on general damages. I pointed out to them that in Paul Praveen Sharma, which was decided in 1994, general damages of $50,000.00 were awarded for amputation of a leg below the knee in almost identical circumstances to those of the instant case. On this occasion Ms Rakuita appeared for the Defendants, Mr Sen still appearing for the Plaintiff. He submitted that in view of the decision of the Court of Appeal in **Attorney-General -v- Kotoiwasawasa** ABU No. 4 of 2003S, delivered on the 14th of November 2003, I should award the Plaintiff at least $60,000.00. The Court of Appeal awarded this amount to a 20-years old medical student who suffered injury to his left leg requiring amputation below the knee following a motor accident on the 22nd of May 1996. After having had six operations it was considered that the leg could not be saved and a below knee amputation was performed. He then underwent three further operations for

the cleaning of the wound and a split-skin graft for the stump approximately one month after the amputation.

[56] The trial Judge awarded Avaieta Ketenilagi, the second Plaintiff in the action $95,000.00 damages for pain and suffering and loss of amenities. The Court reduced this award to $60,000.00 saying that *"the amount awarded when viewed objectively against the background of other cases was exceptionally high and out of touch with the established level of awards in Fiji for significantly more serious cases".* In Arvind Kumar's case in a Judgment delivered on the 20th of June 2008 the Court of Appeal considered the current level of awards of damages for pain and suffering in Fiji after it had been submitted that in awarding such damages the Courts had to take into account the socio-economic conditions of Fiji. By this, the Appellants in Kumar meant that because Fiji is classed as an *"undeveloped"* country, awards of damages for pain and suffering must be lower than those in more developed countries.

[57] The Court rejected this submission saying, at page 6 of its Judgment, that it is time to review what has almost become dogma in the award of damages under this heading in Fiji. In paragraph 15 of the Judgment the Court said:

> ***"We start with a basic principle of medicine and biology: The design of the human nervous system is universal and does not change according to a litigant's race, age, class, environmental factors, or social***

standing. The transmitting brain waves do not recognize these factors".

[58] In paragraph 32 of the Judgment the Court said that awards of damages should be increased only by gradual increments.

[59] That being so I consider that the Plaintiff in this case should receive an award of $70,000.00 for an injury which has caused him considerable distress and will do so in the future. With the greatest respect to the Court of Appeal's decision in Kotoiwasawasa, and in the light of what a differently constituted Court said in Arvind Kumar, I consider that the amount awarded in Kotoiwasawasa should now be regarded as inadequate. The law does not stand still, nor does the cost of living. Awards must take these matters into account in awarding damages.

[60] <u>Loss of Future Earnings</u>.

The Plaintiff earned $149.85 per week at the time of his injury and is not receiving any wages now. It is submitted that a multiplier of twenty should be used and although this may be thought a little high I find a multiplier of 19 reasonable in the circumstances of this case. This will give an amount of $148,051.80 under this head but regard must be had to the fact that the vicissitudes of life have to be taken into account. It is submitted that on the evidence, the Plaintiff has suffered a 45% total disability so that this amount should be reduced to $70,129.80. In my Judgment it is unrealistic to assess the Plaintiff's damages in this way.

He is at present unemployed and his 45% total disability cannot be taken to mean that he has a 55% chance of obtaining other work. One thing is certain, that he will have great difficulty in ever resuming work as a chainsaw operator. In my view such work can no longer be said to be open to him.

[61] Taking all these factors into account and allowing for the fact that the Plaintiff will receive a lump sum in which he can use now, rather than assessing his loss of future earnings in a way suggested by his counsel, in my Judgment it will be appropriate to award the sum of $85,000.00 for loss of future earnings.

[62] **Cost of Future Medical Care**

The Plaintiff needs a replacement prosthesis every two years and therefore in twenty years he might need ten replacements at a cost of $1,200.00 for the replacement giving an amount of $12,000.00 for this likely expense. Again, taking into account that he will receive such cost immediately and not over a twenty-year period, which of course could be less, I believe it reasonable to award $9,000.00 under this heading. Special damages have been agreed at $10,326.25. I therefore make the following awards:

General damages for pain and
suffering and loss of amenities of life - $70,000.00
Interest at 6% from 30th June 2004 to

30th of June 2007	-	$12,600.00
Loss of future earnings	-	$85,000.00
Cost of future medical care	-	$ 2,000.00
(no estimates of this were given but it is reasonable to award the Plaintiff some amount under this heading).		
Interest on special damages at 3% from the date of injury to the date of issue of the writ -1 year	-	$ 300.00
Total of special damages and interest-		$10,626.25.

Adding these various amounts together I arrive at a total figure of $189,225 for which there will be judgment for the Plaintiff. I also award costs of $5,000.00. There will be Judgment for the Plaintiff in these terms.

[John E Byrne]
JUDGE

HIGH COURT OF FIJI
SUVA

At Suva
25th July 2008