EDDIE McCAIG v ABHI MANU (ABU0010 of 2011; ABU0012 of 2011)

COURT OF APPEAL — CIVIL JURISDICTION

CALANCHINI AP, CHITRASIRI, BASNAYAKE JJA

2, 21 March 2012

Damages — assessment — quantum of damages — damages for pain and suffering — damages for loss of amenities — medical negligence — loss of bowel and bladder function — sexual dysfunction — whether award of damages was excessive — loss of earning capacity — housing — nursing care — cleaning materials.

The appellant performed spinal surgery on the respondent. During the surgery the respondent suffered damage to sacral nerves, as a result of which he lost bowel and bladder control and sexual function. The appellant was found to be liable for negligence and the High Court awarded $410,000 to the respondent.

Held –

(1) The dispute is only with regard to the amount awarded under pain and suffering and loss of amenities. On this the respondent and his wife and daughter gave evidence which was unchallenged. The High Court had considered the evidence adduced by both parties very carefully. In making its award, the High Court had given reasons for awarding such sum for pain and suffering and loss of amenities.

(2) The respondent left Fiji to join his children in New Zealand and did not make himself available for any employment in Fiji after retirement. Therefore the respondent is not qualified to make a claim for loss of earning. Further, the appellant is not liable to pay for the respondent to purchase a house in New Zealand, therefore this claim has to fail.

Appeals dismissed.

Cases referred to

Attorney-General v Arvind Kumar and Kamini Devi (CA Appeal ABU 0084 of 2006S), distinguished.

Thurston v Todd [1965] NSWR 1158, cited.

R. Green with *P. Prasad* for the Appellant

C. B. Young for the Respondent

[1] Calanchini AP. I agree with the judgment and proposed orders of Basnayake JA.

[2] Chitrasiri JA. I agree with the judgment and proposed orders of Basnayake JA.

[3] Basnayake JA. On 7th September, 2001 the respondent underwent spinal surgery at the CWM hospital, Suva. The appellant was the specialist surgeon who performed the operation. During the surgery the respondent suffered damage to sacral nerves as a result of which he lost bowel and bladder control and sexual function. The respondent sued the surgeon for negligence and damages. The respondent lost his case in the original court. The respondent appealed to the Court of Appeal. On 24.3.2006 the Court of Appeal found the appellant liable for negligence and entered judgment in favour of the respondent. The case was remitted to the original court to assess damages to be awarded to the respondent. The appellant's special leave to appeal to the Supreme Court against the decision of the Court of Appeal dated 24.3. 2006 was refused by the Supreme Court on 22.7.2008.

[4] When this case was remitted back to assess the damages, the learned Judge without hearing any evidence delivered judgment on 12.5.2006 awarding damages in a sum of $ 701,000 together with a sum of $ 6000 as costs. The appellant appealed against this judgment to the Court of Appeal. The Court of Appeal by its judgment dated 7.11.2008 (Reported in *Eddie McGaig v Abhi Manu* [2008] FJCA 76) set aside the judgment dated 12.5.2006. The Court of Appeal ordered to remit the case to High Court to conduct a hearing on the assessment of damages to be awarded to the respondent.

[5] After inquiry the learned High Court Judge of Lautoka delivered judgment on 16.2.2011 awarding a sum of $ 410,400 to the respondent. The breakdown of this figure is as follows:-

(i)	Damages for pain and suffering and loss of amenities	$300,000
(ii)	Interest thereon.	$48,000
(iii)	Extra Cleaning Expenses	$10,400
(iv)	Nursing Care	*$52,000*
	Total	*$410,400*

The learned Judge also awarded the Respondent a sum of $ 3000 as costs.

Two Appeals

[6] Two appeals have been filed against this judgment and consolidated. The first appeal bearing No: ABU 0010 of 2011 was filed by the Office of the Solicitor General (by Notice of Appeal dated 28.3.2011). By this notice the Office of the Solicitor General moved to set aside the judgment of the learned Judge under several grounds. The other appeal bearing No: ABU 0012 of 2011 was filed (by Notice of Appeal dated 6.4.2011) by the Solicitors for the Respondents. The Solicitors for the respondents moved to confirm the order of the learned High Court Judge or in the alternative to increase the quantum up to $ 1,316,000 (rounded off). The above sum is made up as follows:-

i. Loss of earning capacity	$382,077.00
ii. Housing	$164,220.00
iii. Nursing care (Fiji & New Zealand	$688,220.00
iv. Cleaning material	$81,328.00

[7] When this case was taken up for hearing on 2.3.2012, the learned counsel for both parties conceded that the matter in issue relates only to the quantum of damages. The quantum awarded by the learned High Court Judge of Lautoka was $410,400. Out of this figure a sum of $300,000 was awarded for pain and suffering and loss of amenities. The learned counsel for the Office of the Solicitor General contended that he would be challenging only the amount awarded for pain and suffering and loss of amenities. The learned counsel indicated that he would consider a sum of $80,000 to $100,000 under this heading. A sum of $60,000 was suggested as reasonable for pain and suffering and loss of amenities in the written submissions filed on 2.3.2012 by counsel for the Office of the Solicitor General. The sum of $110,400 awarded under the other heads were unchallenged.

Evidence taken at the inquiry with regard to the assessment of damages held before the learned High Court Judge of Lautoka in the year 2010

[8] At this inquiry the following witnesses gave evidence:

For the Respondent
Page (in the High Court Record)

I. Apenisa Laweloa: Team Leader at FEA	257
II. Abhi Manu (Respondent)	259
III. Sashi Madhu Lata (Resondent's wife)	268
IV. Arishma Swastika Lata (Daughter of Respondent)	272

For the Appellant

1. Katherine King (Unit Leader at FEA).	277
2. Dr Alan Biribo	

[9] The learned High Court Judge in his Judgment dated 16.2.2011 had reproduced the evidence of the witnesses almost in verbatim. A summary of it is as follows:- *Leweloa* was the Team Leader at FEA in 2010. He had known the respondent for more than 20 years. He was aware of the medical condition of the respondent and the fact of his urine discharge. He states that the respondent had an unblemished record at the FEA. The respondent has worked for a period of 29 years and 4 months at FEA. His attendance and performance was good.

[10] Abhi Manu the respondent said that he worked as Team Leader from 1996 till 22.2.2008. After having been discharged from hospital after seven months he had gone to work. He said that he worked under pain.

[11] He described in detail the procedure adopted with regard to his urinary and bowel movements. He had a catheter inserted in to his penis up to the bladder. He was not aware when his urine bag became full. Therefore it had to be emptied every hour. He has had to visit Lautoka hospital every month to get the catheter changed. The changing was done by nurses and the trainees, which he found very embarrassing. Sometimes when he felt cold, he knew that he would need to go to the toilet. Sometimes it would get infected and there would be a burning sensation. Sometimes urine leaked and smelled. At the time of giving evidence in 2010 he was not using the catheter. However he wore diapers in the night as he was wetting the bed.

[12] He described the procedure carried out in removing faeces. For this purpose he uses a disposable glove. Wearing the glove he puts his finger in to his anus and pulls out stools. He does this three or four times a day and sometimes even in the night. He used to have a glove in his desk at work and keeps one in his car and in his pockets. Sometimes a glove has even been reused after cleaning with toilet paper. Up to the time of giving evidence there was no improvement with regard to his bowel movement and he has had to pull stools out using his fingers wearing gloves.

[13] He has not been able to have sex since the operation in 2001. After the operation he has had no erection. He had taken 'Viagra' on prescription. It had not been successful. Thereafter he said Dr Chris Hawke administered an injection on to the penis. It was painful. However it was not like before. Later he had taken the injection by himself one hour before sex. He had tried a couple of times to

have sex and failed. He was ashamed that he could not have sex. He said that now he prefers to go for walks and enjoys drinking beer.

[14] The Respondent's wife Sashi Madhu Lata and daughter Swastika gave evidence corroborating the evidence of the respondent. They were a happy family before the operation with three children and two grand-children. Prior to the operation the respondent used to play soccer, go out fishing and go out for drinks. The respondent is not bedridden. He gave evidence in court. He eats by himself and goes for walks. However, she states that the operation had changed their lives altogether. The happiness they enjoyed has been snatched away. She complained that after the operation he could not insert his penis in to her vagina.

[15] She has given a detailed account of her having to do extra cleaning. She has also given evidence in detail about her frustrations. She has said that she was afraid thinking that he would harm himself. The arguments and flare ups, the smells and the extra effort made for cleaning has brought frustration in-to their lives. Evidence for the respondent was closed with her evidence.

The Defence

[16] The defence called two witnesses. Katherine King was the unit leader in 2010 at FEA. She confirmed about the performance of the respondent up to the time of his leaving the employment. She said that the medical condition of the respondent was not an impediment to his job. Even after the operation in 2001 the respondent showed himself as a good worker. It was common knowledge that the respondent was wearing a catheter. She was not aware of the condition relating to the bowel movement. She states that he did not smell of urine.

[17] Dr Alan Biribo was a Senior Registrar and acting Surgical Officer specialised in neurosurgical. He was one of the four doctors, who examined the respondent at CWM hospital on 4th May, 2010. The team consisted of two surgeons and two physicians. It was he who took notes while the others examined the respondent. He admitted that no tests were done with regard to urinary and bowel dysfunction. He said that even overseas doctors were not in the habit of doing this due to its complex nature.

[18] Through these witnesses the Appellant made an attempt to prove that the respondent either completely or partly healed from the injuries suffered and therefore the amount assessed could be reduced. However, if there was no recovery could the appellant still agitate to get the award reduced?

The inquiry held to assess damages

[19] The learned High Court Judge had the benefit of hearing the evidence of the respondent in person nearly 9 years after the damage was caused by the appellant. The learned Judge had observed that at the end of the first hearing on 2nd and 3rd May, 2005, the trial Judge and the Court of Appeal found the respondent totally disabled in urinary, bowel and sexual operation.

[20] The learned High Court Judge commenced hearing evidence from 10.5.2010 for assessment of damages. Having heard evidence the learned judge posed the question whether there was an improvement on the injuries the respondent has suffered, namely, the urinal and bowel dysfunction due to which the respondent needed a catheter to empty his bladder, manually extricate his faeces and sexual impotence. The learned Judge was mindful of the fact that damages are assessed now (in 2010) for injury caused in 2001.

[21] While assessing damages the learned Judge was conscious of the judgment of the Court of Appeal case in *Plantation Village Ltd v Anderson* [2003] FJCA 34; ABU 0007/2003S (14.8.2003) where 'the award for this head of damage is to compensate the plaintiff for pain and suffering suffered from the time of the accident...for the balance of his life. In pain and suffering we include inconvenience, loss of enjoyment of life and, of course, the pain and restriction of movement he suffered in the past, suffers now and will suffer in future'.

[22] To establish that the respondent has recovered from the injuries he suffered in 2001, the State (on behalf of the Appellant) had produced a report compiled in 2010, which is 9 years later. This was done after examining the respondent physically by four medical specialists.

[23] The learned Judge was critical with regard to this report (at pgs 25 & 26 of the judgment and pgs 30 & 31 of the High Court record). He said that;

> *'the methodology and compilation of that report leaves me with grave doubts as to its conclusion that Abhi Manu could not have suffered any disabilities and even if he did he had completely recovered'.*

[24] The learned Judge rejected this report on the basis that the examination of the respondent was casual and unprofessional. Further that the doctor who gave evidence had only taken down notes and did not do an examination himself.

[25] The Appellant was employed at CWM hospital. The four doctors who examined the respondent too have been working for the CWM hospital and thus cannot be considered as independent witnesses. While giving evidence the doctor did not produce any reports to prove scientifically that the respondent has recovered from the injuries. Dr Alan Biribo admitted that no tests were done to evaluate the urinary and bowel dysfunction.

[26] Considering the evidence adduced by the respondent in 2005 and 2010 the learned High Court Judge was convinced that the bowel and sexual dysfunction are permanent disabilities with minor improvement with regard to urinal function.

[27] The learned Judge having considered a large number of cases found them to be unhelpful excepting the case of *Waqabaca v Attorney-General* (HBC 23 of 1997 and 60 of 1993S) where a two year old suffered irreversible brain damage after surgery-cerebral palsy and was awarded $85000 as general damages. This decision was upheld in appeal in *Attorney-General v Waqabaca* [1998] FJCA 43; ABU 0018U.98.S (13.11.1998). In this case the injured had no control over his muscles and suffered from a combination of involuntary, unwanted and uncontrolled movements. He was also liable to fall. He could not look after himself. He had no control over his bowel or urine movements and had to be kept under observation 24 hours a day. The appeal to reduce the award from $85,000 to $60,000 was dismissed.

[28] The learned High Court Judge has also considered the Court of Appeal case of *Rokobutabutaki v Rokodovu* [2000] FJCA 9; ABU 0088U.98S (11.2.2000). In this case the court reduced the trial Judge's award of $200,000 to $150,000. In this case the injuries the plaintiff suffered were severe where she became a paraplegic from the chest down and had no control over her bladder but limited control over her bowel movements. In this case the learned Judge could not find another case where damages for paraplegia had been assessed by the court. The Court of Appeal held that;

'each case must depend on its own circumstances, but pain and suffering and loss of amenities of life are not susceptible of measurement in terms of money and a conventional figure derived from experience and awards in comparable cases must be assessed'. The Court also held that 'inflation should be taken in to account when considering the present worth of past awards used for comparison'.

The Reasons for Awarding $300,000

[29] The reasons of the learned judge appear at page 28 (pg 34 of the HC record) in paragraphs 74 and 75 wherein the learned Judge states that in Waqabaca's case (supra) the award of $85,000 was made in 1998 for injuries suffered in 1985. In Rokodovu (supra) the award of $150,000 was made in 2000 for injuries suffered in 1994. The learned Judge states that over a period of ten years the courts have doubled the amount awarded as damages. The learned Judge states that 'an award nearly ten years on for Abhi Manu's disabilities suffered in 2001 extrapolated by the same factor leads me to an award of $300,000' (paragraph 74).

[30] The learned Judge felt that he was bound by the previous authorities due to which he had to confine himself to limits. He states as follows in paragraph 75 which I will reproduce.

> [75] 'I have arrived at this sum based on the law that binds this Court. Had I been allowed a free hand I would have awarded a much larger sum because I think there is nothing more humiliating and degrading than having to self extricate your own body wastes. 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'.

[31] The learned Judge made the above expressions as he had the first hand experience of listening and believing the agony of a hefty 117 Kg weighing man's story. The unfortunate incident occurred in 2001 due to the proven negligence on the part of the Appellant. The respondent failed in his effort in the High Court and was successful in the Court of Appeal. The Appellants appeal to the Supreme Court (supra) was dismissed.

[32] The Court of Appeal referred the case to the High Court for the second time to assess damages. An inquiry in to this assessment was held in 2010. This inquiry was held with regard to injuries suffered in 2001.

[33] After the Appellant was unsuccessful in the Supreme Court in 2008, the state had paid $250,000 to the respondent.

Submissions of the learned counsel for the Appellant

[34] The learned counsel for the office of the Solicitor General submitted that the amount awarded for pain and suffering and loss of amenities ($300,000) is too high. He further submitted that the amount awarded has to be in line with the awards made in similar cases in the region and that there should be a consistency. The learned counsel further submitted that lesser awards have been made in more serious cases. The learned counsel relied on the case of *Attorney-General v Edward Michal Broadbridge* (Civil Appeal No CBV 005 of 2003). This is a case involving a method of assessment adopted by the Court of Appeal in fixing damages for loss of future earnings. Therefore this case is not relevant. The learned counsel submitted that the onus is on the respondent to prove injury and loss (*Thurston v Todd* [1965] NSWR 1158).

[35] The injury had been proved. With regard to loss, the dispute is only with regard to the amount awarded under pain and suffering and loss of amenities. On this the respondent and his wife and a daughter gave evidence which the learned Judge states, is unchallenged. The learned Judge had considered the evidence adduced for both the parties very carefully. In making this award the learned Judge had given reasons for awarding such sum for pain and suffering and loss of amenities. The learned counsel for the Office of the Solicitor-General did not make any submissions touching upon the reasons given by the learned Judge.

[36] The learned counsel for the Appellant also referred to the case of Attorney-General v Arvind Kumar and Kamini Devi, Next Friend of Jashmil Kumar (CA Appeal ABU 0084 of 2006S (20.6.2008). In this case $458,755 was awarded as damages for causing blindness to a child due to medical negligence. Of this $190,000 was awarded for pain and suffering. The appellant appealed against this award on the ground that it was excessive. The appellant argued that the amount awarded was disproportionate to other comparable awards considering that Fiji is an underdeveloped country and the award of damages for pain and suffering must be lower than those in more developed countries.

[37] The court held that 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 recognise these factors. It follows therefore that underprivileged litigants who suffer injury, hurt just as much as a wealthy, or socially important litigant who suffers the same injury. The task of the court must be to arrive at a proper figure in current Fiji dollar which will properly compensate a person who has suffered pain and loss of enjoyment of life.

[38] The court also held that the court should refer to other awards 'as not more than broad guidelines to ensure that the Judges are on the right track. The appellants alleged that the pain and suffering and loss of all amenities was nowhere close to the catastrophic endurance, pain, suffering and permanent disabilities left in other cases where awards have been much less. If this be true the court has held that then in our judgment it is time, these awards were reviewed and that in future, in any similar cases higher awards must be the order of the day'

[39] In this case the award for $190,000 for pain and suffering was increased to $220,000 in the Court of Appeal. The learned counsel for the Appellant complained that a person who became blind was awarded less. However considering the above reasons I am of the view that the facts of the case under review cannot be compared with that of Arvind Kumar's (supra) case for the reason that in Arvind Kumar's case the victim had been a baby while in the case in review the victim is a 117 Kg weighing man.

[40] For the above reasons I am of the view that this appeal is without merit. Hence this appeal is dismissed with costs fixed at $3000.

[41] The counter appeal filed for the respondent claimed $1,316,000. This is made up of different claims, namely (i) Loss of earning capacity, (ii) Housing, (iii) Nursing care and (iv) cleaning materials.

[42] The respondent commenced going for his employment as soon as the respondent left hospital. On 22.2.2008 the respondent on his own left the Company after submitting himself for a voluntary redundant scheme, and received benefits available under that scheme. The respondent thereafter migrated to New Zealand. I am of the view that the respondent left Fiji to join

his children in New Zealand. He did not make himself available for any employment in Fiji after retirement. Therefore the respondent is not qualified to make a claim for loss of earning.

[43] The respondent makes a claim for housing in a sum of $164,220. The respondent was living in a house in Fiji and decided to live in New Zealand. I am of the view that the Appellant is not liable to pay for the respondent to purchase a house in New Zealand. Therefore this claim has to fail.

[44] The respondent's claim for nursing care and cleaning had been well considered by the learned High Court Judge and there is nothing more left to review.

[45] For the above reasons the respondent's appeal too is dismissed.

Orders of the Court

[46] The orders of the Court:

A. Appeal and Respondent's Notice are both dismissed.
B. Appellant is ordered to pay Respondent's costs of the appeal fixed at $3000.00.

Appeals dismissed.