IN THE FIJI COURT OF APPEAL
Civil Appeal No. 25 of 1989

Between:

USHA KIRAN — Appellant

- and -

THE ATTORNEY-GENERAL OF FIJI — Respondent

Mr J.R. Reddy for the Appellant
Ratu Jone Madraiwiwi for the Respondent

Date of Hearing: 1st March, 1990
Delivery of Judgment: 23rd March, 1990

JUDGMENT OF THE COURT

This is an appeal by the Appellant who is dissatisfied with the quantum of damages awarded her against the Respondent, the second defendant in the action, by Mr Justice Sadal in his Judgment dated the 15th day of August, 1989. The claim against the first defendant was withdrawn in the Court below.

There were originally four grounds of appeal as under:-

(1) That the learned trial Judge erred in law and on the facts by awarding the Plaintiff $30,000 for pain suffering, loss of amenities and expectation of life which said amount is grossly inadequate having regard to the serious nature of the injuries suffered by the Plaintiff and the extent of her disability as a result.

(2) That the learned Judge erred in law and on the facts in assessing the Plaintiff's cost of future care at $18,000, a grossly inadequate sum having regard to all the facts and circumstances of the case.

(3) That the learned trial Judge erred in law and on the facts in awarding the Plaintiff the sum of $9,000 for loss of future earnings and that the said award is not supported by the evidence adduced and is grossly inadequate having regard to all the circumstances of the case.

(4) That the learned trial Judge erred in law and on the facts in making the order for the investment of $55,800 of the total damages awarded without an application from the Plaintiff or hearing the Plaintiff before making such Order.

The fourth ground was abandoned by Mr Reddy at the hearing but he applied for and was granted leave to amend the grounds of appeal by adding a further ground as follows:-

"That the learned Judge erred in law in not allowing interest in respect of the sum awarded for pain, suffering, and loss of amenities from the date of issue of the Writ."

The learned Judge awarded the Appellant the sum of $67,880. Of this sum $10,880 made up of a number of items, treated as special damages, is not in dispute.

She challenges only the quantum of the awards in respect of three items referred to in the first three grounds of appeal, which Mr Reddy contends are grossly inadequate.

Liability was admitted by the Attorney-General and the only issue at the trial was the quantum of damages.

There is no dispute as to how the unfortunate Appellant, a young healthy woman, became a person described by one Doctor as almost in a "Vegetative state" nor is there any real dispute as to her present state and prognosis for the future.

We can do no better than repeat the findings of the learned Judge on the history of this case.

"The plaintiff, Usha Kiran is an Indian female married with three children. She is 31 years old. On 2nd January 1986 she was admitted to the Sigatoka Hospital for a gynaecological operation for tubal ligation. She was given an overdose of anaesthesia prior to surgery. As a result she became unconscious and remained so for a few days. She was transferred to Lautoka Hospital. She was discharged on 20th January 1986 in a wheelchair. She suffered very severe brain damage because of negligence of hospital's staff. Liability is admitted and the issue before me is as to the quantum of damages. The action against first defendant was discontinued. Through her husband as next friend she has brought this action for damages for personal injuries against the defendants.

The plaintiff relies mainly on the evidence of Dr Parshu Ram a very skilled and eminently qualified physician.
Dr Parshu Ram's evidence has not been seriously challenged. In fact there is a very large measure of consistency and agreement between the evidence of Dr Parshu Ram on one hand and that of Dr Frankl called on behalf of the defendants. Indeed Dr Frankl in cross-examination conceded that he accepted Dr Parshu Ram's medical report in every respect, save his qualification on the likelihood of the plaintiff developing Parkinsonism (stiffness, clumsiness and shaking) and epilepsy. Dr Parshu Ram expressed the view that as a result of severe brain damage - the damage which is diffused and extends over the whole area of the brain, it is possible the plaintiff will develop Parkinsonism and epilepsy.
Dr Parshu Ram expressed the opinion that there are symptoms and he listed them suggesting that Parkinsonism and epilepsy could develop. On the other hand, Dr Frankl, while not ruling out the possibility altogether, thought it unlikely that the plaintiff could develop Parkinsonism and epilepsy. Dr Frankl was less than convincing on this issue. Having categorically asserted that he would rate the chances of the plaintiff developing Parkinsonism and epilepsy at 10 percent, he severely revised that opinion to assert that he thought the chances were no higher than 0.5 to 1 percent. Dr Parshu Ram's evidence on this issue is to be preferred to the evidence of Dr Frankl. The plaintiff has established on the balance of probabilities that these conditions could develop and they are factors to be considered in assessing damages, particularly in terms of future care. It is stressed that apart from the difference of opinion on the chances of the plaintiff developing Parkinsonism and epilepsy there is a remarkable degree of agreement between the evidence of Dr Parshu Ram and Dr Frankl. There is no doubt at all about the severity and the far reaching consequences of the injury suffered by the plaintiff. The present condition of the plaintiff is due to hypoxia, i.e. reduced or loss of oxygen supply to the brain. As the brain cells do not regenerate the damage is irreparable. Both doctors agree that there will be no further improvement in the plaintiff's condition. In fact, Dr Frankl was particularly emphatic on this point. According to the medical evidence, there has been only slight improvement in the plaintiff's motor functions in the past three years. She is now able to walk slowly, can manage to dress, feed

by herself and attend to toilet procedures. But her mental functions remain unchanged and severely affected. She is unable to do any house work, indeed whe is incapable of any kind of economic activity. She is to that extent totally dependent. Since the surgery she has experienced heaviness and pain in the head, mainly on the right side.
Dr Parshu Ram said that heaviness and pain would be accounted for by the brain injury and that this condition is likely to continue into the future.

The plaintiff's memory for events has been severely impaired both recent and past. She does not remember how her illness was caused or the name of her husband or the number of children she has. Her orientation is poor. She is unable to write her name or do the simplest of calculations. There is a degree of visual agnosia (inability to recognise things she saw) and nominal aphasia (inability to name the objects she saw). She is unable to carry out alternating movements and suffers from intention tremor (shaking of hands).
Dr Parshu Ram concludes that the plaintiff suffered anoxic encephalopathy (brain damage due to lack of oxygen during the operation in 1986). As a result of this she has had severe damage to her mental and intellectual functions and intention tremor on her left hand. These changes are permanent. She also walks with a limp creating the impression that she might fall.

Dr Frankl who saw the plaintiff as recently as 7th March 1989 found that she was unaware of the year of the number of children she had. She could not remember one object at one time. Her speech was slow and she could give one-word replies only and she suffered from naming aphonia, i.e. inability to name such objects as belt, buckle or watch. She could not count up to five. She could not integrate spatially and had lost her left-right discrimination.

Dr Parshu Ram also testified that the plaintiff is not conscious of what has happened to her, although he thought that she might be vaguely aware that she was suffering from some difficulty, some illness.

Dr Parshu Ram also thought that the plaintiff's life expectancy is likely to be less than normal. He thought that even if she does not develop any further symptoms, she would still not be able to cope with the illness and that would reduce her life expectancy. If she were to develop Parkinsonism and epilepsy then life expectancy might be discounted by about twenty five percent. On the other hand, Dr Frankl who thought that the chances of the plaintiff developing Parkinsonism and epilepsy were more remote than Dr Parshu Ram, did not see any reason why the plaintiff should not live out her normal expectancy. In the case of an Indian female the life expectancy in Fiji is said to be 65 years.

> On the totality of the evidence, including the evidence of Dr Frankl, it would be correct to describe the plaintiff now as "virtually a human vegetable". Her existence cannot be anything but monotonous and as Dr Parshu Ram put it, she could be dscribed as in "almost a vegetative state". The fact that she is able to relate to others at a very basic and elementary level cannot be allowed to militate against the severity of the injuries she suffered and the consequential impairment to her intellectual functions and to her whole being as a person."

Since we are being invited by Mr Reddy to vary the learned Judge's assessment of damages we set out the principles to be adopted by an appellate court. In Daya Ram v. Peni Cava & Others Civil Appeal No. 63 of 1983 this court accepted the view expressed in the case of FLINT v. LOVELL (1935) 1 K.B. 354, as applied in relation to awards made by a Judge alone, in the following passage from Davies v. Powell Duffryn Associated Collieries Ltd. (1942) A.C. 601:

> "Where the award is that of the Judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like the exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial Judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer L.J. in Flint v. Lovell. In effect the court, before it interferes with an award of damages, should be satisfied that the Judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground or excess or insufficiency."

We proceed now to consider the first ground of appeal:-

(a) Award of $30,000 for pain suffering & loss of amenities

Mr Reddy when asked by the court to point out where the learned Judge had erred in law and on the facts had to admit that the learned Judge had in his Judgment properly considered all aspects of the appellant's injury and her condition. Mr Reddy, however, argued that the learned Judge had made, to quote his own

words, "a wholly erroneous estimate of the damage suffered by the appellant".

Mr Reddy relies very heavily on the case of Lim Poh Choo v. Camden and Islington Area Health Authority (1979) 2 ALL E R 910. That case considered somewhat similar facts as had to be considered in the instant case. In each case the court had to consider serious permanent injury to a woman due to the negligence of a hospital.

In the House of Lords case the award for damages for pain suffering and loss of amenities was £20,000. Mr Reddy did not seek to argue that the appellant should be awarded the Fijian equivalent of £20,000 but he did stress that that case clearly demonstrates, that $30,000 awarded 11 years later, in 1989, does not adequately compensate the appellant and in fact is grossly inadequate. It was also contended by the Respondent in the Lim Poh Choo case that the award of £20,000 was too low.

Lord Scarman at Page 920 said:-

> "An award for pain, suffering and loss of amenities is conventional in the sense that there is no pecuniary guideline which can point the way to a correct assessment. It is, therefore, dependent only in the most general way on the movement in money values. Like awards for loss of expectation in life, there will be a tendency in times of inflation for awards to increase, if only to prevent the conventional becoming the comtemptible. The difference between a 'Benham v. Gambling award' and a 'West v. Shephard award' is that, while both are conventional, the second has been held by the House of Lords to be compensation for a substantial loss. As long, therefore as the sum awarded is a substantial sum in the context of current money values, the requirement of the law is met. A sum of £20,000 is, even today, a substantial sum. The Judge cannot, therefore, be shown to have erred in principle, and his award must stand."

We find ourselves in agreement with, in particular, the latter part of that statement and would apply it to the instant case.

A sum of $30,000 is even today a substantial sum. It has not been demonstrated that the learned Judge acted on a wrong principle of law, or has misapprehended the facts, or has, for

any other reason, made a wholly erroneous estimate of the damage suffered. Mr Reddy has suggested that $50,000 would have been appropriate. This is clearly an opinion only. We do not consider the learned Judge erred and accordingly the first ground of appeal fails.

(b) Cost of future care $18,000

The only point made by Mr Reddy is that the learned Judge did not adequately take into account the cost that might be incurred by the appellant should she develop a form of Parkinsonism or epilepsy. It is clear from the Judgment that the learned Judge did consider the possibility that the appellant might develop Parkinsonism or epilepsy. He used a multiplier of 15 without any deductions, a figure which has not been challenged. The annual sum of $1200 for cost of care is considered by the appellant to be too low. Lord Scarman however in Lim Poh Choo's case at Page 922 stated:-

> "The true principle, as counsel for the respondent conceded, is that the estimate of damages under this head must proceed on the basis that resort will be had to capital as well as income to meet the expenditure; in other words, the cost of care, having been assessed, must be met by an award calculated on an annuity basis."

If the annual sum of $1200 is the average annual cost of care for a 15 year period then in our view the sum of $18,000 invested should realise at least the sum of $1200 annually from income alone without recourse to the use of the capital sum of $18,000. We do not consider the learned Judge acted on a wrong principle or erred on the facts. Accordingly the second ground fails.

(c) Loss of future earnings $9,000

The learned Judge, having held that appellant's loss of earnings was $1200 per annum discounted that sum by fifty per centum on the basis that the appellant, having been fully compensated for the loss of earnings, would have had to expend half her income "on living expenses and pleasures" Mr Reddy contends that this is an incorrect approach where the claimant

is alive.

In Lim Poh Choo's case at Page 911 it was held (inter alia)

"(2) Loss of earnings

The plaintiff was entitled to substantial damages for loss of earnings despite the fact that she would never be in a position to enjoy them. However, the plaintiff was not entitled to any duplication of damages or to receive an award which gave her surplus over the true compensation for her deprivation or loss, and therefore the expenses of earning the lost income and the plaintiff's future living expenses were to be deducted from the damages awarded."

Lord Scarman at Page 921 of Lim Poh Choo's case stated:-

"The separate items, which together constitute a total award of damages, are interrelated. They are the parts of a whole, which must be fair and reasonable. 'At the end', as Lord Denning MR said in Taylor v. Bristol Omnibus Co Ltd, the Judges should look at the total figure in the round, so as to be able to cure any overlapping or other source of error. In most cases the risk of overlap is not great, nor where it occurs; is it substantial. Living expenses continue, or progressively increase, for most plaintiffs after injury as they would have done if there had been no injury. But where, as in Pickett's case, the plaintiff claims damages for the earnings of his 'lost years', or, as in the present case, the claim is in respect of a lifetime's earnings lost because, though she will live she cannot earn her living, a real risk arises that the plaintiff may recover, not merely compensation for loss, which is the entitlement given by law, but a surplus greater than could have been achieved if there had been no death or incapacity. Two deductions, therefore, fall to be made from the damages to be awarded. First, as the cases have always recognised, the expenses of earning the income which has been lost. Counsel for the respondent conceded this much. Secondly, the plaintiff's living expenses."

There is one significant difference between Lim Poh Choo's case and the instant case. The claimant in Lim Poh Choo's case was a fully employed Senior Medical Registrar. In the instant case the appellant is a housewife living in a home no doubt provided by her husband. She claimed loss of earnings which connotes she had a business of her own. In arriving at a figure of $1200 annually for actual loss of earnings the learned Judge appears to have erred in two respects. Firstly he appears to have considered from the husband's evidence that the value of her

labour on the farm was $25.00 a week. That clearly was the sband's loss and one for which he could possibly mount a claim.

Secondly, while we cannot see why her chicken and duck business should entirely disappear because of her injury the learned Judge's arithmetical calculation of 214 weeks at $1200 per annum is excessive. $1200 per annum is $23 a week to the nearest dollar. 214 weeks is $4922 and not $5350 which he allowed. There has been no cross appeal against this part of the award. The sum involved is not large and we choose to ignore the errors.

If the appellant is to be treated as having a business of her own she must be treated as having incurred expenses to earn that income. It is clear she and her husband jointly worked the farm and pooled their income to provide for living expenses of the family. The husband testifies that he made about $10,000 annually from the farm. The wife earned $1200. In considering her living expenses it must be borne in mind that she was legally entitled to be fully maintained by her husband. Her living expenses incurred by her personally would have been minimal. This is one aspect the learned trial Judge appears to have overlooked.

There would, however, be some expenses incurred in the chicken and duck business. There is no evidence to indicate what, if any, those expenses would have been but we are satisfied that her expenses would not amount to half her income. Doing the best we can on the paucity of the evidence before us we consider that a reduction of 1/4 of her annual income for 15 years amounting to $4500 would be reasonable. This represents a little under one dollar a day assumed to have been incurred in running her business which can only have comprised raising a few chickens and ducks for sale of eggs and the occasional bird for eating.

This sum of $4500 increases the award to $72,380.

The appellant succeeds on the third ground.

(d) Interest on award for suffering and loss of amenities

Mr Reddy relies on Lim Poh Choo's case as authority for interest to be awarded on awards for pain, suffering and loss of amenities and in particular to the case of PICKETT v. BRITISH RAIL ENGINEERING LTD (1979 1 ALL E R) 774 referred to at Page 920 in Lim Poh Choo's case.

Lord Scarman's Judgment at Page 800 indicates that it is a statutory duty for a court in England to award interest on damages unless there were special reasons otherwise not to do so.

Lord Scarman said:-

> "Secondly, the statute. Section 22 of the Administration of Justice Act 1969, amending s.3 of the Law Reform (Miscellaneous Provisions) Act 1934, provides that the court shall (my emphasis) exercise its power to award interest on damages, or on such part of the damages as the court considers appropriate, 'unless the court is satisfied that there are special reasons why no interest should be given in respect of those damages'. Such is the general rule laid down by the statute, which does, however, confer on the court a discretion as to the period for which interest is given and also permits differing rates. Nothing can clearer than the duty placed on the court to give interest in the absence of special reasons for giving none."

The 1969 English Act amended section 3 of the Law Reform (Miscellaneous Provisions Act) 1934 which has its counterpart in the corresponding section 3 in the Fiji Act, the Law Reform (Miscellaneous Provisions Death & Interest) Act. In section 3 of the Act the power to award interest is entirely discretionary.

Section 3 provides as follows:-

> "In any proceedings tried in the Supreme Court for the recovery of any debt or damages the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section:

(a) shall authorise the giving of interest upon interest; or

(b) shall apply in relation to any debt upon which interest is payable as of right, whether by virtue of any agreement or otherwise; or

(c) shall affect the damages recoverable for the dishonour of a bill of exchange."

In England under Order 18 Rule 8 it is mandatory to plead specifically any claim for interest under the English Act. While we have no comparable rule in Fiji the reasons given in the 1985 'White Book' at note 18/8/10 commends itself to us.

The passage is as follows:-

"INTEREST - A claim for interest must be specifically pleaded whether it is claimed under s.35A of S.C.A. 1981 (see 0.1, r.4(1) or otherwise, see para. (4) of this rule negativing Riches v. Westminister Bank Ltd [1934] 2 ALL E R 735. For s.35A, inserted by A.J.A. 1982, s.15(1) and Sched. 1, Pt.1, see Vol. 2 Pt.17, para. 5161 para (4) which requires a claim for interest to be pleaded reflects the fundamental principle that the pleading should give fair notice to the opposite party of the nature of the claim which is being made against him, with the relevant facts relied upon, so as to enable him to meet such claim and to prevent surprise at the trial. Thus, if the defendant has due notice of the plaintiff's intention to seek an award of interest he will know the extent or totality of the plaintiff's claim and he can better calculate what sum, if any, he should pay into court under 0.22,r.1(8) or what sum he can fairly offer to settle the claim out of court, or even whether in all the circumstances he should allow the plaintiff to enter judgment in default of pleading. The claim for interest must be pleaded in the body of the pleading, and not only in the prayer though it should also be repeated in the prayer. (see 0.18,r.5(1). It must identify precisely the ground or basis on which it is claimed, and whenever possible, the date from which and the rate at which the interest is being claimed, assuming, that is, that the date to which it is claimed is the date of judgment. If the interest is being claimed under s.35A, the pleading should specifically so state, since it is not sufficient to state the claim as being "interest under the statute"."

In our view it could be argued that Order 18r.7(1)(b) requires that a claim for interest on damages or a debt which carried no interest should be pleaded. There is statutory provision for granting interest on damages and if interest is sought it must in our view be specifically pleaded. In the instant case there was no claim for interest at all.

In any case while there was no claim for interest raised in the pleadings the issue was argued before the learned Judge. He did award interest on the items comprising the special damages but did not award interest on the sum of $30,000 awarded for pain suffering and loss of amenities. His award of interest has not been challenged.

In the circumstances we are not persuaded that the learned Judge overlooked the issue or that he erred in not exercising his discretion to award interest on the $30,000.

The fifth ground fails.

The outcome is that the appellant has succeeded on only one ground. The appeal is allowed.

The Judgment is varied to the extent of increasing the award to the sum of $72,380 and varying the order regarding the amount to be paid to the Public Trustee from $55800 to $60300.

The appellant is to have the cost of this appeal.

R Kermode

(Sir Ronald Kermode)
Justice of Appeal

Moti Tikaram

(Sir Moti Tikaram)
Justice of Appeal

H.D. Palmer

(H.D. Palmer)
Justice of Appeal