IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 41 OF 1993
(Civil Action No. 728 of 1984)

BETWEEN

ATTORNEY-GENERAL OF FIJI
DOCTOR HUBERT ELLIOT — APPELLANTS

-and-

PAUL PRAVEEN SHARMA — RESPONDENT

Mr. D. Singh for the Appellants
Mr. A. Gates for the Respondent

Date and Place of Hearing : 2nd August, 1994, Suva
Date of Delivery of Judgment : 12th August, 1994

JUDGMENT OF THE COURT

This appeal is concerned only with the quantum of damages awarded by the High Court. Liability was admitted by the appellants and consent judgment entered in respect of it.

The claim was for damages for negligence and interest thereon. It related to medical treatment provided at the Colonial War Memorial Hospital between August and November 1982 for injuries to the respondent's right leg sustained in a soccer match in Suva on 1 August 1982. As a result of negligence, the medical treatment resulted in the lower part of the leg becoming gangrenous. It was amputated below the knee in January 1983.

At the time of the injury the respondent was 19 years old. His parents' home was in Fiji but he had gone to Australia to

study at a university in Sydney. He had returned to Fiji for a short visit. From 2 August 1982 to 3 November 1982 he was an in-patient at the Colonial War Memorial Hospital. On 5 November 1982 he returned to Sydney and was an in-patient at hospitals there until 4 February 1983.

As a result of the gangrene and the amputation the respondent suffered a great deal of pain; he continues to experience **"phantom"** pain in the lower leg. A prosthesis was fitted after the amputation; it has been changed several times. On occasions the stump of the leg has become ulcerated because of rubbing by the prosthesis.

Because of the pain and the consequent psychological effects the respondent was unable to complete his degree in 1984, as he had previously anticipated doing. Instead he completed it in 1986. The degree was that of Bachelor of Science. He had originally intended undertaking further study on completion of his degree, in order to qualify for appointment as a pathologist. Because of the pain and the consequent psychological problems he was unable to concentrate on studies well enough to undertake that course. However, he did undertake a Pathologist Technician's course at Sydney Technical College in 1987 and 1988; during that period he was working part-time and earning between Australian $16,000 and Australian $17,000 per annum. On completion of the course he obtained employment as a hospital scientist in the area of cytogenetics. His salary in July 1990 was Australian $35,000 per annum. At that time the salary of a

pathologist, according to evidence given by the respondent at the trial, was Australian $40,000 per annum. He gave evidence that in 1985 he could have earned Australian $25,000 per annum, if he had completed his degree in 1984. In 1988 he was granted a permanent residence visa to reside in Australia. From then until the trial he had continued to reside, and to make his career, in Australia.

The learned trial Judge awarded Australian $13,433 special damages, being $84,500 less $71,041 already paid by the appellants to the respondent. He also awarded Australian $20,200 interest on the special damages and Australian $184,000 general damages with Australian $165,600 interest thereon. That made a total of Australian $383,259, i.e. $454,300 less the $71,041 already paid. However, the judgment, as formally drawn up and sealed, inadvertently omitted the Australian $13,433, i.e. the balance of the special damages.

The appellants' grounds of appeal are:-

1. THE judge erred in law in using a multiplier which was excessive and inappropriate in the circumstance of this case.

2. THE Judge erred in law in using an interest rate of 4% payable on the special damages from the date of the issue of the writ.

3. THE Judge erred in law in awarding inordinately high general damages which were out of all proportion to the circumstances of the case and the previous decisions of the Courts of Fiji.

4. THE Judge erred in law in using an interest rate of 10% payable on the general damages from the date of the issue of the writ.

5. THE Judge erred in law in awarding damages in Australian currency instead of Fijian currency.

So far as ground 1 is concerned, in assessing loss of future earnings His Lordship used a multiplier of 20 and a multiplicand of Australian $5,000. The multiplicand was the difference between the salary of a pathologist and the salary received by the respondent as a hospital scientist. The loss of earnings resulting from the two years' delay in completing the degree course was one subject of the award of special damages. At the time of the trial the respondent was 27 years old. He had given evidence that he anticipated working until he was 55 years old and then retiring.

His Lordship used a similar multiplier in assessing the future cost of purchasing artificial limbs. He said that he had chosen the multiplier of 20 for both loss of future earnings and the cost of purchasing the artificial limbs in order, "to make reasonable allowances for the contingencies and vicissitudes of life".

In Jefford v Gee [1970] 2 Q.B. 130 Lord Denning M.R. said that the amount awarded for loss of future earnings should be such that, if invested at interest, it would be sufficient to compensate for the future loss. In our view, once the multiplicand has been decided upon, the multiplier should be such as will be likely *over the years* to provide sufficient compensation without over-compensating. At the end of his working life the respondent should be no worse off, but also no

better off, than he would have been if he had suffered no injury and had worked to his full capacity throughout. That means that the lump sum, as well as the interest on it, should have been expended over the years to put the respondent in the position in which he would have been if he had suffered no injury.

If the multiplier is 20, 5% of the lump sum equals the multiplicand. In other words, if the lump sum can be invested at 5% interest, the lump sum is not reduced in monetary terms. However, its value may be reduced by inflation. In recent years the inflation rate in Australia, where the respondent is most likely to invest the lump sum, has been very low. A multiplier of 20 is, in our view, too high for calculating loss of future earnings. Mr Gates informed the Court that he had been unable to find a reported decision anywhere in which a multiplier exceeding 16 was applied in calculating damages for the loss of future earnings. We believe, having regard to the long working life which potentially lay ahead of the respondent, that 15 would be appropriate in the present case.

We note in passing that the appellants have not challenged the quantum of the multiplicand. That surprises us as there can be no certainty that the respondent would have been successful in qualifying himself for employment as a pathologist. However, in view of the course chosen by the appellants, that is not a matter which we have to consider.

The period which had to be taken into account in fixing a

multiplier for the purpose of assessing loss of future earnings was not the same as that to be taken into account for the purpose of assessing the future cost of purchasing artificial limbs. The former was the respondent's working life; the latter was the whole of his life. Further, some matters relevant to the fixing of the multiplier for the first purpose are not relevant for the second purpose, e.g. the respondent's employment prospects and the possibility of his returning to reside in Fiji. In our view a multiplier of 18 is appropriate.

The second ground concerns the rate of interest on the special damages. His Lordship assessed the amount of special damages as $84,474 and awarded interest on that amount at the rate of 4% from 31 July 1984, when the writ was issued, until 10 July 1990, the date on which the special damages were assessed. The appellants have pointed out that initially special damages were not claimed specifically. However, subsequently particulars of special damages were served in March 1987. They totalled $22,909; that did not include interest. Amended particulars of special damages, totalling $83,129, with a claim for interest, were served in July 1990.

In Wright v British Railways Board [1983] 2 A.C. 773 Lord Diplock, with whose judgment the other Lords of Appeal concurred, noted that interest was awarded to compensate for moneys being unlawfully withheld by the tortfeasor. He then observed at page 229 that "a person can hardly be said to be "wrongfully withholding" a sum of money owing to another at a time when the

amount, if any, that will ultimately be found to be owing is unknown and no demand has yet been made for it. The respondent in the present case did not plead that demand had been made for the special damages before March 1987. The first appellant paid the respondent $15,000 on 30 November 1989. So the appellants **"wrongfully withheld"** $22,909 from March 1987 to 30 November 1989 and $7,909 from then until July 1990 when His Lordship assessed the quantum of the special damages. It was only in respect of those amounts and those persons that interest should have been awarded to that date. His Lordship did not state why he did not award interest to the date of judgment in 1993. Possibly it was because the respondent was responsible for delivery of the judgment being delayed from July 1990 onwards; if that was the reason, it would have been helpful if His Lordship had made it clear. He had power to award interest either for the whole of the period between the date of issue of the writ and the date of judgment or for any shorter period within that period (see Section 3 of the Law Reform (Miscellaneous Provisions)(Death and Interest) Act (Cap 27)). The matter was not the subject of appeal by the respondent; so we have not changed the date to which interest is to be paid. There was no delay by the respondent before July 1990 such as would justify a decision not to award any interest at all.

The purpose of the award of interest on special damages is twofold: to put the injured person in the same financial position, so far as is possible, as he would have been in if the amount of the damages had been paid to him as soon as he served

his writ and to deter the tortfeasor from delaying payment. Special damages are awarded for economic loss; the assessment of their amount is not a matter of setting a conventional figure, as it is in respect of non-economic loss, (as to which see **Wright** (supra) at page 777) and the rate of interest is not to be simply what is conventional. As the award relates to a period which has elapsed when the judgment is given, the rates of interest and inflation during the period are ascertainable and speculation about matters which are uncertain is not required. However, no evidence of interest or inflation rates was presented to His Lordship. In those circumstances there is no basis for our reaching a conclusion that he erred in fixing the rate as 4%, which was certainly not unduly generous. Applying that rate to the amounts, and for the periods, referred to above gives a total of $2,700.

The third ground of appeal concerns the level of the general damages awarded in relation to the circumstances of the case and the previous decisions of the courts in Fiji. There is no doubt that in fixing the quantum of general damages a trial judge, having calculated the amounts which appear to be appropriate under the various heads of such damages, must then consider whether the total of those amounts is itself appropriate in all the circumstances of the case. In coming to a conclusion on that matter he should have regard to the need for consistency in the level of general damages awarded in similar cases. However, such similarity must include matters such as the pre-injury earning capacity or prospects of the injured person, not merely the nature of the injury. There may also be disparity in the degree of pain and suffering and the extent of the loss of the amenities of life. Disparity in such matters justifies disparity in the quantum of general damages.

In the present case, the result of our decision in respect of the first ground of appeal will be to reduce the amount awarded for loss of future earnings by $25,000 and the amount awarded for the future cost of purchasing artificial limbs by $2,400. We have found that the amount assessed for the future cost of purchasing artificial limbs was reasonable. $10,000 was awarded for the "estimated cost of future care". A written report from the Rehabilitation Centre in Sydney, which was received in evidence at the trial, referred to possible need of future care in the following terms:-

> "If needed, medical care will basically be associated with the supervision of [prostheses]."

There was no evidence of the likely cost. His Lordship observed that it was impossible to speculate with any accuracy what it would be. He chose $10,000 as "a reasonable sum" for the respondent to invest and have available to meet such costs when they arose. We do not find any error in that approach.

The remaining head of general damages identified by His Lordship was "pain and suffering and loss of amenities of life". Pain, suffering and loss of the amenities of life are not susceptible of ***measurement*** in terms of money; a conventional figure derived from experience and awards in comparable cases must be assessed (see Wright (supra) page 777). However, that conventional figure, reflecting society's view of current values, cannot be assumed to remain static in the presence of high inflation and substantial increases in the cost of living. His Lordship assessed the amount in the respondent's case as Australian $50,000.

The evidence was that the respondent suffered severe pain

from August 1982 to January 1983, that he was extremely distressed that his leg was amputated and attempted suicide in hospital shortly afterwards, and that he still experienced pain in the stump from time to time due to ulceration and also "phantom" pain. He had been an active young man, a keen sportsman. He can no longer participate in any sports requiring use of the legs and has in fact given up sport generally. He gave evidence that he was embarrassed in company by being one-legged and could not stand for more than 10-15 minutes; so he avoided social gatherings. He believed that, because of the loss of his leg, he was unattractive to women; at the time of the hearing in 1990 he was still single at the age of 27. The duration and intensity of his pain puts it at a fairly high level on the scale of pain and suffering of persons suffering injuries. His loss of the amenities of life is substantial but, comparatively, not at such a high level on the scale as his pain and suffering. The amounts awarded in recent times by the courts in Fiji for pain, suffering and loss of the amenities of life at a level somewhat below that level have been of the order of Fijian $25,000 - Fijian $35,000 (see e.g. Madhukar Nath Sharma v Vijendra Prasad (High Court Civil Action No. 40 of 1988: 6 August 1991)). However, in Anitra Kumar Singh v Rentokil Laboratories Ltd (Civil Appeal No. 73 of 1991: 20 August 1993) this Court, differently constituted, observed at page 12 that generally amounts awarded in Fiji for various types of injuries had been "well below the figures [it] might think appropriate" in August 1993. In our view Australian $50,000, as assessed by His Lordship, is appropriate in the present case.

The sum of the amounts which we regard as appropriate under the various heads of general damages is Australian $156,600. That total is, in our view, not unduly high.

We turn, therefore, to the fourth ground. Counsel for the respondent has conceded that interest should not have been awarded in respect of that part of the general damages attributed to loss of future earnings. That is because of the nature of that head of general damages. (See Clarke v Rotax Aircraft Equipment Ltd [1975] 1 W.L.R. 1570, a decision of the English Court of Appeal.) On the same principle interest should not have been awarded in respect of those parts of the general damages attributed to the future cost of artificial limbs and to the estimated cost of future care. Interest was properly awarded in respect of pain, suffering and loss of the amenities of life.

In Wright (supra) Lord Diplock, dealing with a statutory provision in England substantially similar to section 3 of the Law Reform (Miscellaneous Provisions)(Death and Interest) Act (Cap.27), observed at page 781 that, just as the amount awarded for non-economic loss could only be a **"conventional figure", "the award of "simple interest" at a particular rate on that lump sum as the method of assessing compensation for the temporary loss of the use of it between the date of service of the writ and the date of judgment is wholly conventional".** The rate set in any particular case should accord with guidelines established by the courts over time. For such guidelines to serve the purpose of promoting predictability and hence settlement of claims, in practice they must not be altered with any frequency; any alteration should be made only after **"the long term trend of inflation has become predictable with much more confidence"** (per Lord Diplock at pp. 785-786). It is clear that in England the courts have taken a restrained approach to setting the guidelines; the House of Lords set 2% as the rate to be awarded. In our view the rate of 10% set by His Lordship was much too high; we consider that a rate of 4% was appropriate.

So far as the fifth ground of appeal is concerned, Mr Singh has acknowledged that, if English law is followed, the courts in Fiji have power to award damages in foreign currency, should do so when that would most fairly compensate the plaintiff and could do so if the result would be more just. (See The Despina [1979] A.C. 685.) However, he submitted that, because at the time when the respondent, then 19 years old, suffered his injury his home was in Fiji with his parents even though he was studying at a university in Australia, damages should have been awarded in Fijian currency and at a level appropriate in Fiji rather than Australia. Mr Gates said that it was of little concern to the respondent in what currency the damages were actually paid, so long as they were calculated initially in Australian dollar terms and by reference to the losses he had actually suffered in Australia.

In Hoffman v Sofaer [1982] 1 W.L.R. 1350 the High Court, awarding damages to a foreign national for personal injuries suffered in England, did so in the currency of his country except for the damages awarded for pain and suffering. It is to be noted, however, that both counsel consented to that course being adopted.

In our view it is entirely appropriate, when assessing the amount of losses suffered not in Fiji but in another country, to do so in the currency of that other country and with proper regard paid to the circumstances of the injured person's life there. In this case all the economic losses and expenses for which the respondent is being compensated by way of general damages will probably occur in Australia; the majority of the

suffered in both Fiji and Australia in about equal proportions but the loss of the amenities of life has been, and is likely in future to be, suffered mainly in Australia. In our view the manner in which in this case the damages were assessed and awarded in Australian dollars was appropriate.

For the reasons we have stated the appeal is allowed in part. We set aside the award of interest on the special damages, the award of general damages and the award of interest thereon. In their place we substitute an award of Australian $2,700 interest in respect of the special damages, an award of general damages of Australian $156,600 and an award of Australian $18,150 as interest thereon. Therefore, when the amount of special damages, which remains unchanged at Australian $13,433, is included, the total amount of damages and interest is Australian $190,883.

We understand that the appellants have paid a substantial part of this amount since judgment was entered in the High Court.

In deciding what order should be made in respect of costs, we note that the matters on which the appellants have principally succeeded were ones in respect of which the errors were essentially made by the trial judge without the respondent having contributed to them. We note also that the Court, when it dealt in May 1994 with applications for a stay order and for the appeal to be struck out, made no order for the payment of the costs incurred in respect of those applications. The respondent

was substantially successful in respect of them. In those circumstances we consider it fair to order the respondent to pay 50% of the appellants' costs of this appeal, including their costs of the two applications, and we do so. The order for payment of costs in the High Court made by His Lordship is affirmed.

.....
(Sir Moti Tikaram)
President Fiji Court of Appeal

.....
(Sir Peter Quilliam)
Judge of Appeal

.....
(Mr. Justice Ian R. Thompson)
Judge of Appeal