IN THE COURT OF APPEAL FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0004 OF 2007S
(High Court Civil Action No. 135 of 1996)

BETWEEN: THE ATTORNEY-GENERAL OF FIJI

Appellant

AND: LEBA LISI

Respondent

Coram: Byrne, JA
Pathik, JA
Powell, JA

Hearing: Tuesday, 8 April 2008, Suva

Counsel: R Green for the Appellant
K Vuataki for the Respondent

Date of Judgment: Thursday, 24 April 1008, Suva

JUDGMENT OF THE COURT

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[1] On 11 January 1996 Leba Lisi was admitted to Lautoka Hospital in labour with a very large child. The child died several hours after a delivery. The respondent's conduct of the delivery was grossly negligent and caused severe pain and distress to both Leba Lisi and the child. Leba Lisi brought proceedings against the hospital on behalf of herself and on behalf of the estate of her deceased child.

[2] The hearing took place over several days between 27 September 2005 and 10 March 2006. On 10 March 2006 the trial judge ordered the plaintiffs to file written

submissions on 7 April 2006 and the defendant to file written submissions by 5 May 2006. On 5 April 2006 the plaintiffs filed written submissions but, as at 5 July 2006, when the trial judge handed down judgment in liability, no submissions had been received from the defendant. The trial judge found that the defendant failed to care adequately for the first plaintiff and her unborn child and were negligent. He invited the plaintiffs to file and serve a written submission on damages by 28 July 2006 and the defendant to file a submission by 18 August 2006.

[3] In the event the plaintiffs' submissions on damages were, with the consent of the defendant, filed and served on 18 August and on 23 August 2006 the trial judge approved an application by the defendant to extend time for the defendant's submissions until 8 September 2006.

[4] The trial judge delivered final judgment on 17 November 2006 in which he said that no submissions had yet been filed by the defendant, that he could find little to challenge in the submissions of the plaintiffs and that perhaps counsel for the defendant had considered likewise. The trial judge set out in full the written submissions of the plaintiffs and ordered general damages in favour of the first plaintiff in the sum of $75,000 ($5,000 for pain & suffering at birth, and $70,000 for subsequent suffering) and in favour of the estate of the child in the sum of $79,880 ($2,500 for loss of expectation of life, $2,500 for pain & suffering before death and $74,880 for lost years and the prospect of a normal life). Interest on those sums was assessed at 6% simple from the Date of Writ (17 April 1996) to Date of Judgment amounting to $82,550. Costs of $2,500 were also awarded bringing the total judgment against the defendant to $239,930.

[5] The defendant had in fact prepared written submissions, being submissions dated 9 November 2006. It purported to file them the same day and served them on 13 November 2006 on the plaintiffs.

[6] In the Notice of Appeal the defendant/appellant's first ground of appeal is that the trial judge erred in finding that the defendant had not filed a submission on quantum and the second ground of appeal is that the trial judge erred in "adopting a verbatim transcription of the submissions of the plaintiff" without carefully considering the law in several areas.

[7] The other seven grounds of appeal contest each head of damage and interest. There is no appeal against liability.

The First Ground of Appeal- That the Trial Judge erred in stating that the defendant had not filed written submissions

[8] In his judgment of 17 November 2006 the trial judge said that he had waited for the defendant's submissions since 8 September *"but no submissions had been filed"*. The only inference that can be drawn from this is that the trial judge was unaware that the submissions of 9 November 2006 had been filed, which is hardly surprising. The trial judge speculated that the defendant had decided not to challenge the plaintiffs' submissions, and, given that the defendant failed over a two month period to file submissions on liability, and made no complaint when judgment on liability was delivered in the absence of such submissions, it was not unreasonable for the judge to so speculate.

[9] After 8 September 2006 the defendant lost its right to file written submissions. The proper course for the defendant to have taken was to have listed the matter before the trial judge on or prior to 8 September 2006 and seek leave to extend the time for filing of the submissions. The consent or otherwise of the plaintiffs would have been a relevant matter for the trial judge to take into account in deciding whether or not to grant an extension of time.

[10] In the circumstances the respondent cannot complain that its written submissions were not considered by the trial judge.

The Second Ground of Appeal- That the Trial Judge Adopted the Plaintiffs' Submissions Verbatim

[11] The trial judge was left without any assistance from the defendant. Finding *"little to challenge"* in the submissions of the plaintiffs' counsel he set them out verbatim in his judgment. He did not however adopt them verbatim. For example he did not allow the aggravated damages sought by the plaintiffs and he reduced the *lost years* damages sought by the child's estate from $80,000 to $74,880.

[12] In our view it was quite proper for the trial judge to set out the plaintiffs' submissions in his judgment. Moreover in some cases it will be quite appropriate for a trial judge to adopt a parties submissions in full. In this case the trial judge did not fail to carefully consider the law relating to damages and this second ground of appeal also fails.

[13] However failure of one party to render the Court any useful assistance does not absolve the Court of its duty to reach a correct and properly reasoned decision. This Court must consider whether the trial judge made appellable errors in relation to any of the other seven grounds of appeal.

The Third Ground of Appeal- That the Trial Judge Erred in awarding the mother $70,000 for subsequent pain & suffering

The Fifth Ground of Appeal- That the Trial Judge Erred in awarding the mother $5,000 for pain and suffering at birth

[14] In ***Fletcher v Auto Car & Transporters Ltd*** [1968] 1 All ER 726 at 750 Salmon LJ held that damages awarded for personal injury:

> *"should be such that the ordinary and sensible man would not instinctively think as either mean or extravagant, but consider them to be sensible and fair.."*

[15] In ***Anitra Singh v Rentokil Laboratories*** Civil Appeal No. 73/91 in a case where the Court of Appeal increased the award for pain and suffering said:

> *"We are mindful that setting the figure must be one appropriate for Fiji and the conditions which apply here. The level of damages in our neighbouring countries is persuasive but not decisive."*

[16] In the view of this Court it is not correct to interpret ***Anitra Singh*** (supra) as authority for any general proposition that damages for pain and suffering will be lower than those awarded in other countries. It is authority however for the proposition that Fijian cases are likely to be a better guide to the appropriate level of damages because the *"ordinary and sensible man"* must be read as *"the ordinary and sensible man or woman in Fiji"*.

[17] In this Court's view the trial judge, in light of earlier authorities, erred in awarding the respondent mother $70,000 for future pain and suffering and for awarding $5,000 for the pain and suffering at birth. The former figure is excessive, no doubt because it erroneously includes an amount for *"the claimed chance that the plaintiff may have lost financial support from the child in later years"*.

[18] In this case the circumstances of the birth were, due to the negligence of the respondent nothing short of horrific. The mother suffered severe pain which the respondent failed to alleviate and then had to witness her child die from injuries inflicted by the respondent. The death took place over a sixteen hour period

[19] The correct approach is to award a figure for pain and suffering which includes that suffered during the birth and for future pain and suffering. The continuing pain from losing a child may not be physical but it is real nonetheless and could be expected to continue for the mother's lifetime.

[20] The Court in ***Sangita v Emosi Voce*** HBC 372 of 2003 awarded $75,000 for the pain and suffering of a mother who lost her child, but in that case the mother also suffered permanent physical damage.

[21] In this case the Court considers a figure of $40,000 to be an appropriate award for pain and suffering. This figure does not include an element for loss of the chance of financial support from the child. That seems to be so speculative as to be unallowable under any head of damage. See ***Croke [a minor] v Wiseman*** (1981) 3 All ER 882 at 861, and ***Kandalla v British Airways*** [1980] 1 All ER 341.

The Fourth Ground of Appeal- That the Trial Judge Erred in awarding the child $74,880 for economic loss/lost years and the prospect of a normal life

[22] There is, inevitably, a great deal of speculation involved in making an award of damages under this head.

[23] In ***Benham v Gambling*** [1941] 1 All ER 7, the Court expressed the view that damages under this head, where the plaintiff is dead and not just disabled, should be *"moderate"*.

[24] The difficulties of determining an award under this head were discussed by Lord Diplock in ***Mallet v McConagle*** [1969] 2 All ER 178 who said that damages should be assessed with a *"sense of proportion"* in view of the conjecture that the exercise necessarily involves.

[25] The case the trial judge relied on, ***Waqabaca v Vudiabola*** [1996] FKHC 91, concerned a 2 year old child who was awarded $74,880 for spastic cerebral palsy sustained due to the negligence of the hospital during a surgical operation. It is of some use here but in the opinion of this Court the trial judge erred in making an identical award in this case.

[26] The appropriate award, in this Court's opinion, for this head of damage in this case is $25,000.

The Sixth Ground of Appeal- That the Trial Judge Erred in awarding the estate of the child $2,500 for loss of expectation of life

[27] The appellant is unable to demonstrate error with this award. This ground fails.

The Seventh Ground of Appeal- That the Trial Judge Erred in awarding interest on loss of expectation of life, lost years and the prospect of a normal life and pain & suffering subsequently.

[28] The Court of Appeal in ***AG v Charles Valentine*** ABU0019 of 1999 held that interest on special damages should be awarded from the date of the accident to the date of trial at half the appropriate rate and that for loss of future earnings no interest should be allowed at all.

[29] This Court respectfully agrees. The rate on special damages should therefore be 3%.

[30] The Court in ***AG v Charles Valentine*** (supra) held that interest on pain and suffering should be awarded at the appropriate rate from the date of service of the writ to the date of trial. There is nothing in these proceedings to indicate that an award at 6% on this item was inappropriate.

The Eighth Ground of Appeal- That the Trial Judge Erred in awarding interest from the date of Writ to the date of Judgment

[31] The proceedings were commenced promptly by the respondent, within three months of the birth. The award of interest is to compensate the respondent for being without her damages which, in an ideal world, would be paid shortly after the

damages were incurred. It is a discretionary matter and there is nothing before this Court to indicate that the trial judge's exercise of his discretion miscarried: ***House v The King*** [1936] 55 CLR 499.

[32] Ground 8 fails.

The Ninth Ground of Appeal- That the award of any interest was harsh and unjust considering the long delay in bringing this matter to trial

[33] There is nothing in the Court Record to indicate that the delay in bringing the matter to trial was the fault of the respondent. To the contrary, such delays as can clearly be attributed to the parties were the fault of the appellant, for example failure to file written submissions at all on liability and failing to file them within 2 months of the time limited to do so in the case of interest.

[34] For these reasons and the reasons above under Ground 8, Ground 9 fails.

Costs

[35] The appellant has had significant success in this appeal, the damages and interest having, it will be seen from below, being reduced from $237,430 plus costs to $107,000 plus costs. However if the submissions of the plaintiff on quantum had been filed within time the trial judge may have avoided the errors that this Court has had to correct. In these circumstances the appellant will be ordered to pay the respondents' costs of the appeal.

Orders

[36] The orders of the Court are:

1. Appeal allowed in part.

2. The orders of Finnigan J of 7 December 2006 are vacated and the following orders substituted:

General Damages for the first plaintiff's pain & suffering (at birth & future)	$40,000
Interest on $40,000 at 6% for 10 years 7 months	$26,600
TOTAL PAYABLE TO FIRST PLAINTIFF:	$66,600
General Damages for the Estate of the second plaintiff;	
Pain & Suffering before death	$2,500
Loss of expectation of life	$2,500
Lost years & the prospect of a normal life	$25,000
	$30,000
Interest on pain & suffering @ 6% for 10 years & 7 months	$1,600
Interest on loss of expectation of life, lost years & Prospect of a normal life @ 3% for 10 years & 7 months	$8,800
	$9,900
TOTAL PAYABLE TO SECOND PLAINTIFF:	$40,400

3. The appellant to pay the respondents' costs of the appeal as agreed or as taxed.

Byrne, JA

Pathik, JA

Powell, JA

Solicitors:

Office of the Attorney General Chambers, Suva for the Appellant
K Vuataki Law, Lautoka for the Respondent

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