IN THE COURT OF APPEAL, FIJI
[ON APPEAL FROM THE HIGH COURT]

Civil Appeal No. ABU 0015 of 2019
(High Court No. HBC 50 of 2017)

BETWEEN : **1. THE MEDICAL SUPERINTENDENT OF THE LABASA HOSPITAL**

2. THE ATTORNEY GENERAL OF FIJI

Appellants

AND : **KAMRUL BI**

Respondent

Coram : **Lecamwasam JA**
Almeida Guneratne JA
Jameel, JA

Counsel : **Ms. M. Motofaga for the 1st and 2nd Appellants**
Mr. S. Sharma with Ms. Ravusani for the Respondent

Date of Hearing: **07 February 2020**

Date of Judgment: **28 February 2020**

JUDGMENT

Lecamwasam, JA

[1] I agree with the reasons and conclusion of Jameel, JA.

Almeida Guneratne, JA

[2] I agree with the judgment, the reasoning, conclusion and the proposed orders of Jameel, JA.

Jameel JA

Introduction

[3] This is an appeal from the judgment of the High Court dated 31 January 2019, by which the learned Judge awarded to the Respondent, a sum of $50,000.00 as general damages for pain and suffering, on the basis of vicarious liability attributed to the 1st Respondent. The 2nd Respondent has been cited in terms of the Crown Proceedings Act.

[4] The Appellants have not challenged the findings of negligence by the Learned High Court Judge as well as the award of special damages, but seek to have the said award set aside or varied on the basis, that the said sum is disproportionate, not in keeping with current awards, and that the learned Judge had not set out reasons to justify the sum awarded.

[5] Learned Counsel for the Appellants relied on several past precedents in support of the contention that the award of $50,000.00 made by the learned High Court Judge was excessive. In the written submissions of the Appellant's, they state that the award should be varied to a sum between $10,000.00 and $ 25,000.00.

The proceedings before the High Court

[6] The Respondent and her husband testified on her behalf. On behalf of the Appellants, Dr. Maloni Bulanauca, General Surgeon attached to the Labasa Hospital testified.

[7] The findings of the learned Judge were that; the Respondent had been admitted to Labasa Hospital for an operation, she underwent surgery on 19 August 2015, and was discharged on 24 August 2015, she had not been told that a stent had been inserted, and that it needed to be removed in three months. As instructed at the time of discharge, she returned to the hospital after two weeks for further observation. At that time, she had complained to the Doctor that blood was present in her urine, in response to which she had been told by the Doctor that the bleeding would stop once the wound heals. When she saw Dr. Isireli after eight months, he had discovered another stone, for which he had prescribed antibiotics. She was then referred to the CWM Hospital by Dr. Isireli and underwent laser treatment there for the removal of the stones. This treatment had been very painful.

[8] Subsequently, on 29 March 2017, a second surgery was performed by Dr. Rajeev. While performing surgery, Dr. Rajeev had discovered that the stones had got attached to the stent, and he had removed both, the stent and the stones.

[9] The learned Judge found that Dr. Maloni Bulanauca's testimony was based on the medical reports, although he did express his professional opinion in respect of the insertion and removal of the stent. He testified that the second surgery had become necessary because a stent should not be allowed to remain longer than "usual", because it could cause blocks in the urinary tract, and stones could develop around the stent. The Respondent had been diagnosed with urine infection, the stent had been inserted temporarily to prevent the narrowing of the water pipe, the surgical wound ought to have healed in three months.

[10] The learned Judge believed the evidence of the Respondent when she that the Doctor who performed the first surgery did not inform her of the insertion of the stent. The learned Judge concluded that the failure to inform the patient that a stent had been inserted, as well as leaving the stent inside for longer than necessary amounted to negligence. The learned Judge found that the Respondent had been in pain for over eighteen months due the negligence of the Doctor who performed the initial surgery.

[11] The learned Judge found however, that there was no evidence that the negligence of the Doctor who performed the surgery, had caused any permanent impairment. On this basis, the learned Judge awarded a sum of $50,000.00 as general damages for pain and suffering, a sum of $2300.00 as special damages, and a sum of $3000.00 as costs (summarily assessed) against the Appellants.

Grounds of Appeal

[12] The grounds of appeal urged by the Appellants are reproduced below. They are:

1. *The learned Judge erred in law and in fact in awarding $50,000.00 (Fifty thousand dollars) which is exorbitant and grossly disproportionate to the current prevailing awards in Fiji and without providing any sound justification or reasons for the award.*

2. *There was no or no sufficient evidence upon which the learned Judge could reasonably conclude to award such exorbitant amount of damages for pain and suffering in the circumstances of this case and which is also inconsistent with his finding of fact that there was no evidence that the negligence of the doctor who performed the surgery cause any permanent impairment.*

Ground one - award of damages for pain and suffering disproportionate to prevailing sums and the absence of reasons

[13] In their written submissions before this court, the Appellants have addressed both grounds one and two together on the basis that they are related. I identify two aspects to ground one of the appeal; the first is that the award is "*disproportionate to current*

prevailing awards", (as articulated by the Appellants), the second is that the learned judge failed to give reasons for the sum awarded.

[14] In this regard, the starting point is that the assessment for pain and suffering cannot result in identical awards. In my view, an assessment and award of damages for pain and suffering presents more difficulty because it is inherently more subjective, than an assessment for loss of amenity.

[15] To support their contention that the learned Judge had not followed current prevailing awards in awarding damages for pain and suffering in this case, the Appellants relied on the cases of **Ravasakula v Wata** [2012] FJHC 1346; (28 September 2012), **Maibau v Medical Superintendant** [2012] FJHC 1176; 9 (22 June 2012), **Mani v Permanent Secretary Ministry of Health** [2012] FJHC 28; (20 January 2012) and **Ali v Ministry of Health** [2017] FJHC 907; (27 November 2017).

[6] For the purposes of augmenting their argument in respect of the need to make comparable awards, together with the bundle of authorities presented to this court on behalf of the Appellants, was attached a schedule of the awards made in five different cases comparing the sums awarded. Four of the judgements were that of the High Court. The only judgment of this court was **Attorney General of Fiji v Tikotikoca** [2014] FJCA 177; Civil Appeal 048.2012 (29 May 2014).

[17] I will have to commence by saying that although the learned Judge did not elaborate on the basis of how he arrived at the sum of $50,000.00, there was ample evidence before him which clearly established the pain and suffering experienced by the Respondent, and he believed the Respondent's evidence, and in my view, the learned Judge was justified in awarding the sum of $50,000.00.

The 'comparisons"

[18] In **Amin v Chand** [2012] FJHC 1015; (13 April 2012), decided on 13 April 2013, the High Court considered the guiding principles discussed by this court in **Attorney - General of Fiji v Sharma** [1995] FJCA 30; ABU0041.93S 17 May 1995) and **The Permanent Secretary for Health and Another v Arvind Kumar** [2012] FJSC (3 May 2012) (20 June 2008), declined to be guided by awards that went as far back as 1996. However, in line with 'recent awards', the court considered as reasonable, an award of $85,000 as general damages for non-pecuniary loss, in the form of past and future pain and suffering, and loss of amenity/enjoyment of life. The High Court in **Amin v Chand** (*supra*) awarded the Plaintiff $137,000.00 as general damages.

[19] On appeal to this court challenging a component of the general damages awarded by the High Court, in **Chand v Amin** [2015] FJCA 143; ABU 0031.2012 (2 October 2015), this court (Basnayake JA, Anthony Fernando JA and Wati JA agreeing) in affirming the judgment of the High Court, said:

> *"[14] It appears that the learned High Court judge has made a thorough analysis of the evidence in arriving at this figure of $85,000. A judge cannot be so mathematical and mechanical in the calculations of cases of this nature. However I do not find much disparity between the figures $70,000 and $85,000 while computing the damages under pain and suffering and loss of amenities which is intended to give recompense for the mental suffering and feelings of frustration that result from the victims inability to take part in activities (**Teybuner v Humblke** [1963] HCA 11; (1963) 108 CLR 491 at 507-8 per Windeyer J cited in Law of Torts by Balkin & Davis (supra).*
>
> *[15] Hence I am of the view that the award of $85,000 is reasonable. Hence this appeal is without merit and should be dismissed with costs fixed at $3000."*

[20] In **Anderson v Salaitoga [1994]** FJHC 42; (4 May 1994) the High Court awarded $85,000.00 for pain and suffering and loss of amenities. Although the facts in that

case are indeed very different from those in this case, that being a motor accident, and this, the repercussions of negligent post-operative care, nevertheless, the sum awarded in 1994 was far above the $50,000.00 awarded by the learned trial judge in this case.

[21] On the matter of comparison of awards, in **Shankar v Naidu** [2001] FJCA 19; ABU 0003U.2001S (18 October 2001), this court said:

> *"A comparison therefore between the sums awarded in individual cases is only of value if it takes into account all of the consequences both present and future physical mental and emotional in terms of the circumstances of the individual whose condition and future prospects are under consideration.*
> *While therefore the sums awarded by the judge in this case for general damages may appear high in relation to some other cases there was evidence to support the conclusion to which the judge came and there is nothing which would justify our interfering with his assessment of general damages designed to compensate the appellant in her circumstances for the position in which she found herself through no fault of her own."*

[22] The guidelines to be followed in determining compensation for pain and suffering and loss of amenities in cases of personal injuries, were laid down by the Supreme Court in **The Permanent Secretary for Health and Another v. Kumar** [2012] FJSC 28, CBV 0006.2008 (3 May 2012), where at p. 37 of its judgment, the Supreme Court held as follows:

> *"[37] There are three guiding principles in measuring the quantum of compensation for pain and suffering and loss of amenities. First and foremost, the amount of compensation awarded must be fair and should compensate the victim of the injury in the fullest possible*

manner, bearing in mind that damages for any cause of action are awarded once and for all, and cannot be varied due to subsequent eventualities, some of which could not even be anticipated at the stage a court makes an award. Hence, an award of damages should not only be fair, but also assessed with moderation, even though scientific accuracy is impossible. The second principle is that the sum awarded must to a considerable extent be conventional and consistent. Thirdly, regard must be had to awards made in comparable cases, in the jurisdiction in which the award is made. However, it is also open for a court to take into consideration a comparable award made in a foreign jurisdiction, particularly in cases where the type of injury is not very common, provided that the court takes into consideration differences in socio-economic and other relevant conditions that might exist between the two jurisdictions."

[23] In my view, these guidelines permit, and indeed require, the court to refrain from making a cursory assessment by looking at figures awarded in other 'similar' cases. They also envisage that the court will use its discretion to make a fact-specific award, devoid of blind adherence to irrelevant past awards. Indeed, it would be difficult if not impossible, to be bound by figures pertaining to what must necessarily be varied factual circumstances. Individual pain is hardly comparable and is an inherently unsuitable basis for uniformity.

[24] In **Emperor Gold Mining Company Ltd v Lepolo** [2011] FJCA 50, ABU0013.2009, (29 September 2011), the learned trial judge had awarded a sum of $100,000.00 as damages for pain and suffering. On appeal, this court reduced the award specifically on the basis that the learned trial judge had not taken into account, contributory negligence of the Respondent when he decided on the quantum of damages. Having factored in the nature and the extent of the negligence on the part of the Respondent, which is not relevant in this case, this court reduced the quantum by 40%. In arriving at its determination, this court said:

"When assessing the damages for pain and suffering and loss of amenities, it is necessary to look into the nature of the wounds and the period that it took to get the wounds healed and the nature of amenities lost. Such a test would depend on the evidence led at the trial."

[25] In **Kumar v Pacific Transport Co Ltd** [2018] FJCA 15; ABU0058.2014 (8 March 2018), this court said:-

[14] A cardinal principle this court has to have in mind is the exercise of discretion by the trial Judge. Such discretion "in the estimation of damages ought not to be interfered with by an appellate court unless the trial Judge has erred in point of law or in his approach to the assessment or unless the assessment itself, by its disproportion to the injuries received, demonstrates error on the part of the trial Judge" (Per Barwick CJ in Sharman v Evans [1977] HCA 8; (1977) 138 CLR 563 at paragraph 4 cited in The Permanent Secretary For Health and Another v Kumar and Two Others [2012] FJSC 28 (3 May 2012).

[26] In **Kumar v Kumar** [2018] FJCA 106; ABU42.2016; (6 July 2018), in regard to damages for pain and suffering, this court having increased the award of the High Court said:

[*47] While it may be sufficient, on a practical basis to assess damages for pain and suffering or other non-pecuniary loss upon amounts awarded in previous cases, I am conscious, at the same time that, such an approach may not provide a conceptual basis for such awards in general terms in as much as one cannot find an explanation as to why awards vary in different jurisdictions in personal injury cases. In recent times, there has been an*

upward trend in the award of damages in personal injuries cases in Fiji as well.

[48] It may not be possible; to look for an all pervasive conceptual basis as to the awarding of compensation for non-pecuniary loss, for it necessarily will have to depend on such sums that are considered fair and reasonable compensation having regard to the socio-economic conditions of a particular jurisdiction. As Lord Morris said in ***West v Shephard*** *(1964) AC 326 at 346:*

> "*Money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation ...as far as possible comparable injuries should be compensated by comparable awards ...*"

Does the evidence justify the award?

[27] In order to answer this question, the following passage may be a suitable starting point:

> *"On this analysis pain needs no further elucidation; it may be noted that it will include, for the purposes of damages, any pain caused by medical treatment or surgical operation rendered necessary by the injury inflicted by the defendant. As to suffering, this would seem to include fright at the time of the injury and fright reaction"*. **Thomson v Royal Mail Lines** [1957] 1 Lloyd's Rep.99; cited in (McGregor on Damages, Seventeenth Ed. 2003, para 35-213, p1289).

[28] The Appellants' complaint that the award of the learned Judge was excessive and, or disproportionate to current awards, and that it reflects no reasons leads me to examine the evidence that was before the court. This is so because, the award of

damages for pain and suffering is undoubtedly fact-specific, subjective and necessarily linked to evidence.

[29] In this case, the learned Judge found that, it was the negligent post-operative care, namely the failure to ensure the timely removal of the stent after the initial surgery that was the direct cause of the formation of kidney stones for the second time. This led to the need to perform surgery for the second time, which later resulted in the need to be hospitalised for a third time to treat the surgical wounds that did not heal from the second operation. It was this, that led to the extended period of pain and suffering, the evidence in regard to which stood undisputed.

[30] The Respondent was subjected to laser treatment, in the hope that the stones would pass out naturally. Her description of the pain she underwent on the three sessions of laser treatment was as follows (RHC 591):

> *"My Lord when the laser treatment was done, they put an iron behind my back and it pains a lot the iron. They heat me at back and it pains, there is a severe pain and I shout really loudly"*
> *'My Lord, the two [2] times when the laser treatment was done, it was done to break the stones. On the 3rd treatment of the laser, there was a tube inserted and on that tube, the flesh started to come. So, on the third treatment they were removing the flesh from the tube."*

[31] However, the laser treatment was unsuccessful, and the newly-formed stones had to be surgically removed. The second surgery was performed by Dr. Rajeev, who had told her that the stones were located in the ureter. The Respondent's evidence was that after the operation, the pain she suffered was so severe, that she had to be assisted even to use the washroom.

[32] As a result of the wounds from the second surgery not healing, she had to be re-admitted to hospital and Dr. Rajeev had to be recalled to treat the wounds, which had

to be re-opened and cleaned, and again, she suffered severe pain during that process. It was also in evidence that the Respondent suffered pain when passing urine and stools, and that she continued to have back pain as a result of the laser treatment.

[33] All of these separate incidents that led to the re-hospitalisation would have undoubtedly caused the Respondent pain and suffering. Indeed, the cross-examination of the Respondent was limited to establishing that her consent had been obtained for the treatment. There was no cross-examination to demolish testimony in respect of either the incidence, or gravity of pain.

[34] Dr. Maloni Bulanauca who testified on behalf of the Appellants did admit that the Respondent required re-admission for the treatment of the wound that resulted from the previous (second), operation done at CWM, (RHC 624). He also testified that pain as a result of laser treatment is not 'uncommon' meaning that, the pain described to have been felt by the Respondent, was real. Thus there was no basis on which the learned Judge could have ignored the evidence in respect of pain and suffering.

Some aspects of the award of damages for pain and suffering

[35] The expression "pain and suffering" is now almost a term of art. (McGreggor, on Damages, Seventeenth Ed. 2003, p.1289.). "Suffering" on the other hand denotes the mental or emotional distress which the plaintiff may feel as a consequence of the injury: anxiety, worry, fear, torment, embarrassment and the like.

[36] Damages are awarded for actual pain suffered, both past and continuing. Thus, it is only conscious distress that is compensated; a person who is rendered unconscious as a result of the defendant's negligence, will not be entitled to damages under the sub- head of pain and suffering, although he may be entitled to damages generally. Such an award will include pain and suffering incurred in receiving medical

treatment immediately after the injury as well as later. **Jackson v Jackson** [1970] 2 N.S.W.L.R. 454.

[37] The amount of the award will depend among other matters, on the duration and intensity of the pain. It would be almost impossible to measure in monetary value, what pain is worth or how compensable it is. It is only because the law proceeds on the premise and presumption that money can provide some comfort to assuage to some degree, the pain suffered by an injured claimant, that the determination of the sum is a matter of extreme subjectivity. How then, does the court assess this sum? It would be impractical to set down inflexible guidelines and tariffs particularly in regard to assessment of damages for pain and suffering. In determining the sum to be awarded, there must be flexibility; but the court is usually guided by some factors.

[38] In accomplishing this task, it is the trial judge who is best suited to accurately assess the intensity and duration of the pain suffered and the circumstances under which the injury and the consequential pain occurred. In my view, it would be unacceptable to compare sums awarded with the organ or limb injured or damage, without also paying heed to the particular circumstances surrounding the occurrence of the injury, the aftermath of the incident, the nature of the claimant's occupation, and several other varying criteria. It is at this point that aggravating or mitigating factors come into play.

[39] Some aggravating and mitigating factors would be; whether the injury occurred under '*horrifying circumstances'* **Fruedhofer v Poledano** [1972] VR 287(295), whether the pain and suffering was caused as a result of reasonable measures taken as a consequence of the injuries, such as surgery or other treatment, **Cawrse v Cocks** (1974) 10 SASR 10, the credibility of the claimant's testimony, the contrast in the claimant's pre and post-incident situation, medical evidence regarding the debilitating or permanent nature of the injury or injuries, or evidence to the contrary and the treatment and management required to treat any ongoing symptoms.

Overturning the trial Judge's award

[40] **In Attorney-General of Fiji v Tikotikoca**, (*supra)*, this court said:

> *"[49] An award made by a trial court will not be overturned simply on the ground that the amount is too high.*
> *[50] A trial judge's assessment ought not to be disturbed unless some error in the Judge's approach is clearly discernible or there is some perversity or outrageousness or a clear error or a misdirected exercise of discretion".*

[41] Whilst this is a well-known rule, it is worth reiterating that unless this court finds that the trial judge's award is manifestly excessive, perverse or not open on the evidence, this court will be slow to overturn it. Ultimately, it is the evidence that plays the decisive role in the determination of the award. In this case the burden lay on the Appellants to rebut the Respondent's testimony relating to pain and suffering and this, they did not discharge.

[42] The repeated hospitalisations and continuous pain, could not have had no effect on the Respondent. Indeed, it would be fallacious to contend in view of the evidence presented in this case, that there was more proof or material needed for the learned Judge to have been satisfied that the Respondent suffered severe pain during the multiple hospitalizations, and surgery.

[43] In my view, the evidence clearly established that not only was the Respondent a victim of pain, but she was undoubtedly a victim of an extended period of suffering. She went through, the physical pain and trauma associated with not only one

surgery, but had to subsequently endure three sessions of painful and unsuccessful laser treatment, leading eventually to surgery for the second time. Even at that point, the Respondent's troubles were not over, the surgical wounds from the second surgery got infected and that had to be treated. She was hospitalized once more. That the Respondent had suffered was not to be doubted, nor did it require more proof.

[44] If unconsciousness is a basis on which damages is withheld under the head of pain and suffering, then multiple medical interventions and hospitalizations, is proof of extended periods of pain and suffering. I have no doubt that the Respondent did experience very real pain over an extended period of time, and that she suffered through it all.

[45] In the result, in the absence of showing that that the claimants in the cases relied on by the Appellants, were in much worse circumstances than the Respondent in this case, there can be no basis for accepting the contention of the Appellants that the award is disproportionate In my view, the learned trial Judge's award was not disproportionate or excessive; it was well founded, and I see no reason to set aside the award made by the learned trial judge.

[46] I turn finally to the Appellants' complaint that the learned trial judge failed to provide reasons for his award of $50,000.00. Whilst the trial judge must set out adequately his reasons for an award, it does not necessarily flow that the brevity of his reasons signifies an erroneous award. This court had to deal with a somewhat similar complaint in **Vinod Patel and Company Ltd v Prasad** [2000] FJCA 22; ABU0026B.98S (12 May 2000), and on that occasion this court said:

> *"That does not mean that on every occasion a judge will be in error if he fails to state reasons. The simplicity of the content of the case or the state of the evidence may be such that a mere statement of the judge's conclusion will sufficiently indicate the basis of a decision."*

[47] If I were to be guided by this, in this case too, the learned trial Judge did not doubt the credibility of the Respondent's testimony, which was amply assisted by the honest opinions of the medical experts. The fact that the Appellant's Counsel did not cross-examine the Respondent on her testimony in respect of the pain she had suffered, was an additional factor. Therefore, the learned Judge had no reason disregard the un- contradicted testimony of the victim, which was corroborated by the medical evidence. Had there been any medical evidence that contradicted the testimony of the Respondent, the duty on the learned trial Judge may have been more onerous. However, taking the entirety of the evidence in this case, I am unable to find a reason to conclude that the learned trial Judge was in error when he awarded a sum of $50,000.00 for pain and suffering. For the reasons set out above, I reject the submissions of the Appellants and dismiss ground one of the appeal.

Ground two- award of damages for pain and suffering despite absence of permanent impairment

[48] In my view, there is no bar to the award of damages for pain and suffering despite the absence of permanent disability. Permanent disability would have to be taken into account in arriving at the final figure in arriving at the award for damages, in relevant circumstances. However, permanent disability is not a necessary precondition to the award of damages under the head of general damages for pain and suffering. This stands on an independent footing. I therefore dismiss ground two.

[49] In the result, I affirm the judgment of the High Court dated 31 January 2019, and dismiss the appeal.

The Orders of the Court are:

1. *The Appeal is dismissed and the judgment of the High Court dated 31 January 2019 is affirmed.*

2. *The sum of $50,000.00 (Fifty Thousand) awarded as general damages is affirmed, with interest calculated from the date of service of writ, to the date of judgment.*

3. *The sum of $2300.00 (Two Thousand Three Hundred) awarded as special damages is affirmed, with interest at 3% from the date of writ to the date of judgment.*

4. *The 1st Appellant is ordered to pay to the Respondent costs in a sum of $3,000.00 (summarily assessed) as ordered by the High Court, and a sum of $3,500.00 as costs of this appeal, within 28 days of this judgment.*

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

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Hon. Justice F. Jameel
JUSTICE OF APPEAL