IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU
(Other Jurisdiction)

Civil Appeal
Case No. 16/1814 CoA/CIVA

BETWEEN: JOHN KENNEDY
Appellant

AND: JOHN TARIA
Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice Bruce Robertson
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd
Hon. Justice Paul Geoghegan

Counsel: *Mr. L. Malantugun for the Appellant*
Mr. R. Tevi for the Respondent

Date of Hearing: *12 July 2016*

Date of Judgment: *22 July 2016*

JUDGMENT

Introduction

1. This appeal concerns the amount of damages awarded to John Taria, an employee of the appellant John Kennedy for quite serious injuries, which he sustained in the course of his employment on 19 December 2014.

2. Mr. Taria is a single man, age 30 years, from Pentecost Island. He lives in Efate. From about August 2013 until the date of the accident, he was employed by Mr. Kennedy, who operates a business known as 3JS-Construction and Joinery Company in Port Vila. He was employed as a foreman, and his job included operating certain heavy machinery in the work place. He is right handed.

3. On 19 December 2014, Mr. Taria was operating a piece of machinery when he suffered a very severe injury to his right hand. In short, the injury resulted in the total loss of his ring and index fingers and the loss of about half of his middle finger of his right hand. He was taken to hospital where the wounds

were treated. He was discharged after five days. There is no medical evidence to suggest that, after a period for healing, the wounds did not fully heal.

Procedural History

4. The procedural history of the claim is unfortunate.

5. A claim by Mr Taria was first on made 21 April 2015. Mr Kennedy did not file a response, or any defence, before a directions hearing on 29 June 2015, when he was represented by counsel. He was given seven days, that is until 7 July 2015, to file a response and any defence or counter- claim. He did not do so.

6. In accordance with Civil Procedure Rules 9.1, 9.3 and 9.4, judgment in default of response and defence was entered for damages to be assessed. Directions were given for the exchange of evidence and submissions on the issue of quantifying the amount of Mr. Taria's damages.

7. Mr. Kennedy appears to have ignored them. Mr. Taria filed and served his witness statements and submissions, and the hearing on damages proceeded in Mr. Kennedy's absence.

8. The trial Judge then gave notice that he was to deliver his judgment on 21 March 2016. That ultimately got Mr. Kennedy to react. On that day he again appeared through counsel and asked for a further opportunity to appear and to oppose the claim. His counsel on that occasion said that he wanted to apply to set aside the default judgment, but cryptically also said that Mr. Kennedy only wanted to challenge the quantum of the damages. In any event, he was given 14 days to make such application, and to file any evidence and submissions if he wished to make.

9. He did not make any application under Rule 9.5 of the Civil Procedure Rules to set aside the default judgment within that period. He has still not done so.

10. He has not done so despite his defence filed on 6th April 2016 which admitted liability but cryptically "*only to the effect that it was the negligence of [Mr. Taria] in handling the machine*", and otherwise denying the allegations in the claim. That position was maintained in a refined form in the written submissions on this appeal. However, in the course of the hearing, counsel for Mr. Kennedy did not maintain the position. He indicated that Mr. Kennedy wished only to address the amount of the damages awarded.

11. In the Supreme Court proceeding, Mr. Kennedy did not appear on the hearing of the damages assessment. The trial Judge understandably, and correctly,

took the view that he could only properly consider the material provided by Mr. Kennedy which related to the appropriate amount for which damages should be assessed. If Mr. Kennedy disputed that judgment on liability, he needed to apply to set aside the default judgment. That extended to any allegations of contributory negligence: Fookes v. Slaytor [1978] 1 WLR 1293.

12. As noted, on this appeal counsel for Mr. Kennedy accepted that he could not rely on any submissions or material disputing liability (thereby putting aside much of what was in his written submissions related to that topic). That was clearly correct. He said that Mr. Kennedy wanted only to argue that the award of damages had been too high for the reasons specified in the notice of appeal.

13. That position enables the Court of Appeal to consider the appeal confined to the issues properly raised in the Notice of Appeal and as refined in the submissions.

The Judgment

14. The judgment was ultimately given on 6 May 2016.

15. The trial judge correctly identified the relevant pleadings, evidence and submissions:

    (1) The pleadings comprise the claim and the trial judge took into account the "defence" to the extent that it related to the issues of damages – relevantly simply constituting denials of the consequences of the injuries asserted;

    (2) The evidence comprise two sworn statements of Mr. Taria, a sworn statement of Jeffrey Tolang, a sworn statement of Edwina Baniala, and sworn statement of Mr. Kennedy again relevant only to the extent that it related to the issue of damages;

    (3) The submissions of Mr. Taria and of Mr. Kennedy, again only to extent that they related to the issues of damages.

16. There was no medical evidence. However, it is clear that Mr. Taria had lost the three fingers of his right hand but retains the pinch grip with his thumb and index finger. The trial judge, in the absence of evidence (including medical evidence) of any ongoing need for treatment, proceeded on the basis that the injuries had healed well after a relatively short time, so that apart from the consequences of the loss of the fingers themselves, Mr. Taria will not have further medical consequences or the need for further treatment.

17. There was ample evidence from Mr. Taria, Mr Tolang and Ms Baniala that, in the immediate period after the accident, Mr. Taria suffered very severe pain for a time, including that he twice fainted from the pain of his injuries in that period.

18. The evidence also showed that Mr. Kennedy had paid the medical expenses (usually called "*special damages*"), so there was no need for any order to reimburse Mr. Taria for them. Nor, for the reasons noted, was there any need to allow for any medical expenses that might be incurred in the future.

19. The topics that the trial judge addressed, and the allowances made, in respect were:

    (1) VT300,000 for past loss of earnings for the period of 10 months or so between the accident and October 2015 (when the evidence on the assessment of damages was completed), a loss which Mr. Taria's submissions called special damages- a description the trial Judge adopted;

    (2) VT2,250,000 for loss of earning capacity likely to produce a loss of earnings in the future;

    (3) VT3,000,000 for pain and suffering;

    (4) VT800,000 for loss of immunities of life;

    (5) VT277,0000 for interest from the date of the accident to the date of the judgment.

20. The total award of damages was, therefore, VT6,627,000. The total in the judgment at [25] does not include the VT300,000 for past loss of earnings.

21. It is noted that generally there is an allowance of a composite amount for pain and suffering and loss of amenities of life. This is because they are inter related. In this case, the pain and suffering (except for suffering related to the permanent restrictions on Mr. Taria's capacity to do things in the future) were separated in Mr. Taria's submissions, and the trial judge adopted that separation. To avoid any risk of duplication of damages, the Court of Appeal has treated those elements of the claim together.

22. Mr. Taria also made a claim for punitive damages in his submissions to the trial judge. That claim was not allowed as a separate item. There is no contention seeking to restore any allowance for that claim. Nor is there any cross-appeal seeking to increase any of the separate amounts allowed to make up the total

amount of damages. It will be necessary to refer briefly to the comments of the trial judge about punitive damage when addressing the grounds of appeal.

23. Finally, the trial judge entered interest on the damages awarded on 19 December 2014 to the date of the judgment at 5% per annum on the sum of VT5,550,000. Mr. Kennedy, through his counsel, did not complain of that allowance in principle or of the rate of interest applied, although he said that it may need to be adjusted depending upon the outcome of this particular grounds of appeal.

24. That calculation was made, as interest was allowed on all but VT800,000 of the award, namely the separate allowance for loss of amenities of life in the future. It will be necessary to return to the question of interest later in these reasons.

The Grounds of Appeal

25. Mr. Kennedy's submissions (refined from the grounds of appeal) attacked as excessive the allowances for loss of past earnings, for loss of future earning capacity, and for pain and suffering. He did not complain in submissions orally about the allowance for loss of the amenities of life.

26. In broad terms, the submissions were that there was no evidence to support those claims, and that the allowances in each instance were manifestly excessive.

Consideration

27. It is convenient to deal with two submissions which applied to all of the separate amounts which were the subject of criticism.

28. The submission that there was little or no evidence to support the claimed losses is obviously wrong. The evidence was that of Mr. Taria, Mr. Tolang and Ms. Baniala. The fact that medical evidence was not called does not diminish the significance of what they said about the consequences of the injuries to Mr. Talia, as they are consistent with the acknowledged loss of three fingers of his right (dominant) hand.

29. There is also a submission that weight, or not much weight, should have been given to the evidence of Mr. Tolang and Ms. Baniala. Mr. Kennedy had the opportunity to ask for them to be present for cross-examination if he wanted to challenge what they said. He did not take up that opportunity. The fact that each of those witnesses is a friend or acquaintance of Mr. Taria does not

routinely mean that their evidence should be discounted, or partly discounted, as unreliable. On the sort of matters to which they referred, it is expected that those who know a plaintiff will be the best placed to give evidence, as an observer, about the effect of severe injuries sustained by that plaintiff, to complement the plaintiff's evidence.

30. It is now appropriate to address the particular heads of damages which were the subject of criticisms.

(1) Past Loss of Earning Capacity

31. The arguments are that this claim is not supported by the evidence, or that the evidence should have been viewed with more circumspection, or that there is no documentary evidence to support the claim for loss of earnings, or that there was no medical evidence to justify "*the functional loss of [Mr. Taria's] 3 fingers*".

32. Those arguments are plainly wrong. In addition to the evidence of Mr. Taria, and his witnesses Mr. Kennedy himself gave evidence that Mr. Taria was earning VT30,000 per month, and that he did not earn that sum after December 2014. Nor is it disputed that Mr. Taria lost three fingers of his right hand, or that, by the time of the judgment, Mr. Taria had not obtained alternative employment.

33. In our view the allowance of about 10 months earnings from the date of the accident to October 2015 was a reasonable one, and certainly within the range of what was acceptable.

(2) Future Loss of Earning Capacity

34. Although the heading in Mr. Kennedy's written submissions is "*future loss of earnings*", the appropriate assessment is for the loss of earning capacity (past and future) as a consequence of the injuries: see eg. *Paff v. Speed* (1961) 105 CLR 549. The issue is the extent to which the loss of earning capacity is likely to cause financial loss in the future: *Graham Baker* (1961) 106 CLR 340.

35. The uncontradicted evidence of Mr. Taria, confirmed at least in respect of the several months immediately following the accident, is that there are many things which he now cannot do or cannot do as well and which he might otherwise have done in employment. The fact that he has not been re-employed by Mr. Kennedy is itself some evidence that he could not return to that work. Clearly, he is at least capable of working in some areas not involving complex or fine manual skills or movements. On the other hand, he is clearly

not totally unable to perform work. There are a wide range of jobs he could perform.

36. The primary judge noted his evidence that he cannot operate a computer or a laptop. It is clear that he could not do so in an efficient manner as an employee, but relatively limited and incidental use of a computer in employment might well be possible. His skills with his left hand may become greater over time. He also said that he had previously worked as a fisherman, on Pentecost island but said that he is no longer able to do that work. As that was not tested, whilst there are clearly some fishing activities which he could do, it is appropriate to proceed (as the trial judge did) on the basis that he could not do the full range of things required of a professional fisherman in the future.

37. The primary judge accepted (and it is not challenged) that Mr. Taria was, before his accident, likely to work to age 55, earning about VT30,000 per month. There is no reason not to accept that as a proper starting point. That represents, as a matter of arithmetic, future earnings of VT9 million.

38. Given his work history, the trial judge allowed for loss of earning capacity for the future of 25% of that amount. That is necessarily an estimate based upon the material before the trial judge.

39. In our view that is a conservative, estimate. Mr. Taria may well get an equally remunerative job in the future earning as much as he previously earned until aged 55. But he is not able to do some of the sort of work he would previously have done, including apparently the particular work he had done for Mr. Kennedy

40. He will not be able to compete equally in the labour market with those who do not have his physical impairment. In the absence of evidence about his employment opportunities, it was appropriate (as the trial judge appears to have done) to have adopted a conservative approach. His prospects of obtaining employment, and of being able to keep it, are significantly less as a result of his injuries than they were before. Of course all people are vulnerable to the ups and downs of the labour market, but in his case because of his permanent impairment to his right hand function, he is more vulnerable than others.

41. In our view the selected percentage of 25% is too conservative, having regard to those sorts of considerations. The starting point assuming a full working life with that level of earnings does not accommodate for the other routine risks of life, including other injury or illness or from time to time periods of unemployment: Wynn v. NSW Insurance Ministerial Corporation (1995) 184 CLR 485. Having regard to that, in our view it will be more appropriate to have

adopted a starting point of VT8 million rather than VT9 million as the potential earnings but for his injury and to have reduced that by 65% to VT2,800,000. We must take into account that that lump sum will be paid following the judgment, rather than be earned over life. Strictly speaking, because of the "*once and for all*" nature of such an assessment, the arithmetical allowance for future loss of earning capacity should be assessed at its net present value, rather than the full arithmetic calculation. That is, the value to Mr. Taria of VT2.8 million at the present time is considerably more than the value of the payment of VT2.8 million received over a working life see *Todorovic v. Waller* (1981) 150 CLR 402. We have a further reduction for that consideration of VT600,000. There was no submission by Mr. Kennedy on the topic, and no evidence as to what the net present value of such a figure would be.

42. We would therefore substitute the figure of VT2,100,000 in the allowance for loss of future earning capacity.

(3) Pain and Suffering and Loss of Amenities of Life

43. It is clear from the evidence that the injury was very painful. Mr. Taria has had to adjust his living to accommodate his difficulties. No doubt over time he will accommodate those difficulties better, but activities such as using a knife for eating have to now caused considerable anguish. Those sorts of challenges will confront him for many years. He will be conscious of, and no doubt significantly distressed by them from time to time.

44. Mr. Taria's evidence is that he has been unable to re-engage in his hobbies of volleyball, playing the guitar and keyboard, and his artistic and joinery activities have stopped. That is confirmed by Mr. Tolang and Ms. Baniala. Over time he may well be able to resume painting, albeit with more difficulty than previously. Over time his joinery activities may be able to be undertaken to a degree but there is no reason to reject his claim that he is presently unable to do that and does not expect to be able to do it in the future as well as previously .

45. The primary judge referred to certain Supreme Court decisions which might be seen to indicate the boundaries of the allowance under this heading. Before addressing the appropriate figure, it is necessary to make one additional observation.

46. The overall allowance for pain and suffering included a punitive aspect for Mr. Kennedy's "*neglect of duty and care*". To the extent, and it must be a limited extent, that that reflects an award of punitive damages, we respectfully consider that the award was erroneous. There is simply not enough known about the circumstances of the injury to impose an award of punitive damages for these

circumstances. It is not appropriate to impose an award of punitive damages for the conduct of Mr. Kennedy after the accident, that is having regard to the extent to which he sought to console or keep contact with Mr. Taria. The trial judge did not quantify the amount which he had included under that heading, but it is obviously a small amount.

47. If it be accepted that punitive (sometimes called exemplary) damages may be on occasion appropriate in respect of claims for damages for personal injuries, such an award may be made only where there is a particularly outrageous interference with or disregard of the injured person's rights or interests in the circumstances in which the injury occurred: see McLaren Transport Ltd. v. Somerville [1996] 3 NZLR 424; Lamb v. Cotogno (1997) 74 ALR 188. In our view the circumstances exposed by the evidence are inappropriate to have led to such an award.

48. Having regard to the cases to which the trial judge referred to, and those cases referred to in the respective submissions, and on the basis that the trial judge erroneously included in the assessment for pain and suffering some form of punitive damages, it is appropriate for the Court to revisit that head of damage. It is, as we have said, not a matter of science but a matter to be decided upon the whole of the evidence and in the particular circumstances of the case.

49. In our view the appropriate assessment for pain and suffering and loss of amenities of life should have been awarded or assessed in the sum of VT2,500,000.

(4) Interest

50. Interest on the judgment sum should be awarded only in respect of past losses, rather than losses to be incurred in the future. Consequently, in our view, the calculation of interest should be on the past loss of earnings, progressively suffered from the date of the accident, and as a proportion of the losses suffered in respect of pain and suffering and loss of amenities to the date of the judgment. Any calculation will be complex if it is precise, we have adopted a broad calculation based upon interest at 5% on the sum of VT800,000 from the date of the accident to the date of the judgment in the Supreme Court. That sum is VT36,000.

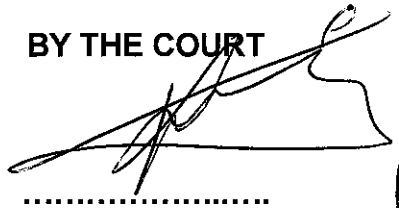
51. Consequently, the appeal will be allowed for the purpose of substituting for the damages as assessed the sum of VT4,836,000. Interest on the sum until it is paid from the date of this judgment calculated at the rate of 5% per annum should be payable on that sum.

52. Although Mr. Kennedy has succeeded in reducing the amount of damages on this appeal, he has only done so in relatively small respect. The amount of the damages now assessed is still very considerably in excess of the damages which, in the course of submissions, Mr. Kennedy through his counsel said was appropriate.

53. In our view, therefore, the appropriate order is that there should be no order as to costs of the appeal. The costs ordered by the primary judge in the Supreme Court should, of course, stand.

DATED at Port Vila this 22 day of July, 2016

BY THE COURT



.....

Hon. Vincent Lunabek
Chief Justice