IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 22 of 1989

Between:

THE ATTORNEY-GENERAL OF FIJI — APPELLANT

- and -

WAISALE NAICEGULEVU — RESPONDENT

Ms Clare Manuel, Counsel for Appellant
Mr R.I. Kapadia, Counsel for Respondent

Date of Hearing: 9th March 1990
Delivery of Judgment: 18th May, 1990

JUDGMENT OF THE COURT

This is an appeal by the Attorney-General against the ruling of Byrne J sitting in his appellate jurisdiction in Suva High Court in Civil Appeal No. 1 of 1989 whereby he upheld an assessment of damages by the Chief Registrar in favour of Mr Waisale Naicegulevu the Respondent in this appeal. The Respondent has also, though belatedly, cross-appealed against Byrne J's decision.

Basic Facts and Chronology of Events

The Respondent was an unestablished workman for the Public Works Department. On 9th April 1984 while he was working in a trench a large boulder fell on him trapping him for 1 1/2 hours. He was badly injured particularly in the legs. His left leg had to be amputated below the knee on the same day. His right leg suffered lacerations with a double fracture of the tibia and the fibula resulting in arthritis of the knee joint and consequent stiffness of the knees. He was confined to hospital for 2 months. The Respondent has been fitted with an artificial leg. He can only walk with the aid of crutches and can only do light duties. At the time of the injury the Respondent was 49 years of age. He has 6 children ranging from 12 to 21 years.

In March 1989 the Respondent commenced proceedings against the State in the High Court (Civil Action No. 269/89) by way of a Writ with statement of claim endorsed claiming general and special damages for negligence. In May 1988, judgment was entered against the State by consent with damages to be assessed by the Chief Registrar. In January 1989, the Chief Registrar assessed damages as follows:-

Special damages (Medical expenses - $342.80 plus loss of earnings April 1984 to July 1985 - $1841.84). (See p.60 of the Record)	$ 2,184.64
General damages for pain, suffering and loss of amenities of life. (See p.63 of the Record)	$25,000.00
Loss of prospective earnings. (See p.63 of the Record)	$22,102.08
TOTAL	$49,286.72

(*We note that at page 64 of the Record the Chief Registrar has summarized his assessments as follows:-*

" *1) Special damages = $ 2,184.04*
2) General damages for pain and suffering = $25,000.00
3) Loss of prospective earning = $22,102.08

TOTAL AWARD = $49,286.12 "

Obviously $2,184.04 for special damages should read $2,184.64 and therefore his total award should come to $49,286.72 and not $49,286.12.

Similarly at the top of page 60 of the Record the Chief Registrar purports to accept $442.80 as the sum properly incurred for medical expenses whereas the correct sum as claimed was $342.80. But we propose to ignore this error as an oversight of no ultimate consequence.).

In February 1989, the Attorney-General on behalf of the State filed an appeal against the Chief Registrar's assessment on the following grounds:-

(a) that the quantum of damages awarded was a wholly erroneous estimate and wrong in principle;
(b) that the Chief Registrar erred in law and in fact in assessing pain and suffering.

The Respondent then cross-appealed claiming that the damages awarded were too low and ought to be increased. Failure to award interest on damages was also made a ground of the cross-appeal.

On 5th July 1989 Byrne J dismissed both the appeal and the cross-appeal by upholding the Registrar's global assessment.

Grounds of Appeal and Cross-Appeal

The State then filed the present appeal on the following 6 grounds:-

1. THAT the learned Judge erred in law in finding that the global award of damages was not too high and that the learned Chief Registrar over-all made no error in principle in his assessment of damages in this case.

2. THAT the learned Judge erred in law in not reducing the damages awarded by the learned Chief Registrar in view of the learned Judge's finding that the learned Chief Registrar had erred in a number of respects for example in his mis-calculation of the Respondent's loss of wages.

3. THAT included in the said award of $49,286.12 was $25,000 for pain and suffering and loss of amenity, and $22,102.08 for loss of earning capacity. Each of these sums is excessive and ought to be reduced.

4. THAT the said sum of $25,000 is not consistent with the level of damages awarded to other Plaintiffs in similar circumstances in the jurisdiction.

5. THAT the said sum of $22,102.08 was arrived at by using a multiplier of six which was an excessive multiplier to employ in the circumstances.

6. THAT the learned Judge erred in law, in view of the remarks of Lord Scarman in Lim Poh Choo v Camden & Islington Area Health Authority (1980) AC 174 at p 193-4 in that he took into account future inflation when upholding the learned Chief Registrar's assessment of damages.

The Respondent then obtained leave of this Court to argue late notice of cross-appeal on the same grounds as he advanced against the Chief Registrar's assessment in the Court below namely -

(1) That the over-all amount of damages awarded to the Respondent (original plaintiff) is low and that it should be increased bearing in mind the serious nature of the injuries sustained by the Respondent/Plaintiff.

(2) That the Court erred in law and in fact is not awarding the Respondent/Plaintiff interest on the amount of damages assessed.

Mr R.I. Kapadia, learned Counsel for the Respondent, frankly informed us that his client would not have cross-appealed if the State had not appealed to this Court. In fact he had no quarrels with the amounts assessed for special damages and for loss of prospective earnings. His concern was with the amount awarded for pain and suffering and the failure to award interest.

Outline of Appellant's Case

At the outset Ms Manuel, learned Counsel for the State submitted that the award is excessive and should be reduced by nearly $20,000 to $29,410.88. In a written skeleton argument she sets out the amount of damage under each of the three heads awarded by the Chief Registrar together with the amounts by which each head should be reduced. Her table is as follows:-

"

Head of damages	Award	Suggested Award	Difference
1. Special damages $2184.04 of which $342.80 i.e. medical and travelling expenses is not in issue	$342.80	$342.80	nil
Balance: loss of earnings April 1984 - July 1985	$1,841.84	$1,563.12 [A]	$278.72

2.	General damages for pain and suffering	$25,000.00	$15,000.00 [B]	$10,000.00
3.	Loss of prospective earnings	$22,102.08	$12,504.96 [C]	$9,597.04
	T O T A L S	$49,286.12	$29,410.88	$19,875.24

A. This lower figure is arrived at by using the Respondent's net wages, rather than gross wages in the calculation. The learned Judge accepted the State's submission that the Chief Registrar had erred in this respect and that it was correct to use the net figure.

B. This lower figure is in line with other awards in the jurisdiction.

C. The reduction based on -

(i) the principle of using net rather than gross wages as a basis for the calculation and

(ii) a multiplier of 4, rather than 6 which I shall argue is more appropriate."

Re Special Damages - Head 1

It will be convenient to first dispose of submissions made in respect of special damages (head 1) and loss of prospective earnings (head 3). As regards special damages, it will be seen that the only matter in dispute is the question of loss of earnings from April 1984 to July 1985.

We note that the Respondent claimed $1841.84 for loss of earnings as special damages particulars of which as given in the Writ (p. 25 of the Court Record) are as follows:-

"Loss of 1/3 earnings from 9/4/84 to 25/7/85 = 78 weeks
$70.84 x 1/3".

The Chief Registrar awarded the sum as claimed in the Writ, i.e., $1,841.84 obviously basing his calculation on the gross wages of $70.84 per week for 78 weeks (see p. 60 of the Record). Similarly, the Chief Registrar used gross wages for calculating loss of prospective earnings.

According to our calculation the period 9/4/84 to 25/7/85 comes to 67 weeks 2 days and not 78 weeks. However, since the figure 78 has not been disputed either before the Chief Registrar, Byrne J or this Court we do not propose to make any changes on the basis of this error.

As to the loss of earnings Byrne J dealt with the appeal submissions as follows:-

> "On the first ground of appeal Ms Manuel submitted that the Chief Registrar erred in assessing the respondent's loss of earnings from the 9th April, 1984 to the 25th July, 1985 at the sum of $2,184.00 and submitted that this figure was obviously based on the respondent's gross and not nett loss of wages. According to Exhibit D tendered to the Chief Registrar, the respondent's gross wage for a 44 hour week was $70.84 and his nett wage after tax and other deductions was $60.12 per week. The Appellant relies on the English case of British Transport Commission vs Gourley (1956) A.C. 185 in which the House of Lords held that in assessing loss of earnings, a court should award the nett loss after income tax had been deducted. I accept Gourley's case as good law in Fiji and uphold Ms Manuel's submission on this ground. However, for reasons which I shall state later this does not conclude the matter for the appellant." (See p. 9 of the Court Record.)

And as to loss of prospective earnings he said as follows:-

> "The third ground of appeal bases itself again on Gourley's case. It was argued that in assessing loss of prospective earnings the Learned Chief Registrar again mis-calculated the respondent's loss of earnings at a gross rather than a nett amount and it would seem from the Chief Registrar's reasons that this is so. Ms Manuel also submitted that the Chief Registrar was wrong in using the multiplier of six years and not some lesser multiplier such as four. She argued that as the respondent/plaintiff was an unestablished worker there was no guarantee that he would remain in employment until the age of 55. She also argued that in

estimating future loss of earnings, the learned Chief Registrar should not have used a multiplier of five years as he did (see p.45 of the Appeal Book), but rather a multiplier of four years." (See p. 10 of the Record.)

The learned Judge was in error when he thought that the Chief Registrar used the multiplier 5. In fact he used the multiplier 6. (See p. 63 of the Court Record.)

The learned Judge's reasons for not amending the award for loss of earnings and loss of prosepctive earnings appear at p. 13 of the Court Record where he says:

"It is true that in particular parts of his award I consider the learned Chief Registrar has erred e.g. in his mis-calculation of the respondent's loss of wages. But this in my view is a mere detail. Ever since the case of Arthur Robinson (Grafton) Pty Ltd vs Carter (1968) 122 C.L.R. 649, the courts in Australia at least have held that a global view of damages, rather than an addition of damages under particular heads, must be taken by the courts. In that case Barwick C.J. warned of the danger of quantifying various items in isolation and then aggregating them to compare their total with the verdict. I take the law in Robinson's case to be good law in Fiji and accordingly I find that the learned Chief Registrar over-all made no error in principle in his assessment of damages in this case."

We agree that it is good law and equally good common sense that loss of earnings (and also loss of prospective earnings) should be calculated on the basis of net wages and not on the basis of gross wages as the Registrar did. Afterall the object of awarding special damages is to compensate the plaintiff for what he has actually incurred and/or lost. However, we cannot agree that the learned Judge was entitled to dismiss the relevant grounds of appeal on the basis that the errors were matters of detail and could be ignored if on global view the damages awarded were adequate. The error in our view was an error of principle which if allowed to stand as precedent can have serious consequences. We agree that the difference between what was given as loss of earnings and what should have been given is very small in this case but had the period of loss been longer (as is the case in respect of prospective loss of earnings) the

difference could have been quite substantial. Once it is established what the net wages is and what the period of loss is it is arithmetically possible to arrive at an exact figure. One is not required to make an educated guess. Ms Manuel has argued that $60.12 is the correct net pay (as shown in pay sheet Exhibit D) and that is the figure that should be used for calculating loss of earnings and loss of prospective earnings. This pay sheet shows that the net pay of $60.12 is arrived at by deducting the following items from the gross weekly wages of $71.56 which sum includes 72 cents for "taxable allowances":-

PAYE	- $ 3.70
Basic Tax	- $ 1.77
FNPF	- $ 4.97
Miscellaneous	- $ 1.00
Total deductions	**- $11.44**
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$71.56 less $11.44 = $60.12. Therefore the proper gross figure is $71.56 and not $70.84.

The deduction of $1.00 for 'Miscellaneous' is not disputed and nothing turns on it.

However, it is Ms Manuel's contention that for the purpose of this appeal the sum of $4.97 being Respondent's weekly contribution to the National Provident Fund should be deducted (in addition to deduction made for tax purposes) in arriving at the net wages. In support of her submission she cited the decision of the English Court of Appeal in Cooper v Firth Brown (1963) 2 ALL E R 31. The headnotes of this case read as follows:-

> "In assessing, in an action for negligence, the special damages of an employee for loss of earnings, where national insurance contributions have been currently deducted by his employer, the earnings to be regarded

> as lost are the net amount after making deduction for the employee's national insurance contributions that would have been deductible by law by the employers from the earnings, as well as (in accordance with the decision in *British Transport Commission v. Gourley*, infra) income tax on the earnings.
>
> Dictum of LORD TUCKER in *British Transport Commission v. Gourley* ([1955] 3 ALL E.R. 796 at p. 810) applied."

Bearing in mind that the contribution to the National Provident Fund is a compulsory deduction made by the employer under the provisions of the National Provident Fund Act Cap 219 for the benefit of the employee and is in the nature of compulsory saving which is paid to the employee on retirement together with the employer's contribution and interest thereon, we are of the opinion that such deductions should not be taken into account in arriving at the employee's net wages. Unlike income tax deductions which are intended to progressively satisfy the employee's tax liabilities as they accrue (and are therefore not refundable unless overpaid), the FNPF deductions are employee's own money to which he remains entitled throughout. Similarly, the national insurance contributions deducted in Cooper's case cited to us, was a deduction made to meet a liability and therefore was properly regarded as "lost". Those deductions did not constitute a saving for the employee. We therefore think that the ratio in Cooper's case has no application to the present appeal. In our view the sum of $4.97 being the Respondent's contribution to the FNPF should be added back to the sum of $60.12 in order to arrive at the correct net wages for the purpose of this appeal. This means that the true net is $65.09 and not $60.12. Therefore, the Respondent is entitled to $1692.34 ($65.09 x 78 x 1/3) and not $1841.84 as awarded by the Chief Registrar. Consequently, we reduce the sum awarded for loss of earnings from $1841.84 to $1692.34. This means that the total for special damages is now $2035.14, i.e. $1692.34 + $342.80 for medical expenses = $2035.14.

Re Loss of Prospective Earnings - Head 3

We now turn to grounds 3 (part) and 5 of the appeal against the award of $22,102.08 as loss of prospective earnings. This figure was obviously arrived at by multiplying 52 weeks' gross wages of $70.84 per week by 6. The State submits that the multiplier 6 is too high in the circumstances of the present case. For reasons already given, we regard $65.09 as the correct net amount to be used for computing loss of future earnings. We note that before the Chief Registrar the Respondent had asked that provision be made for loss of wages for 10 years whereas the State's position was that the multiplier 5 would be reasonable. However, before us Ms Manuel argued that the more appropriate multiplier is 4. She submitted that the learned Judge erred in law in not holding that multiplier 6 was an excessive multiplier to use in the circumstances of this case. The reasons for this submission in her own words are as follows:-

"1) A multiplier of 6 assumes that the Respondent would have worked for 6 more years i.e. until he was 55. This is unrealistic in view of the fact that he was an unestablished worker.

2) A discount was not made for the fact that the Plaintiff will receive the award as a lump sum.

Halsbury's Laws of England (4th ed) Vol 34 states at paragraph 86:-

> "Computation of future pecuniary loss: the multiplier and other factors. Since a plaintiff can invest his damages, the lump sum award in respect of future loss must be discounted to reflect his receipt of interest on invested funds, the intention being that the plaintiff will each year draw interest and some capital (the interest element decreasing and the capital drawings increasing with the passage of years), so that

> he is compensated each year for his annual loss, and the fund will be exhausted at the age which the court assesses to be the correct age, having regard to all contingencies."

In Lim Poh Choo v Camdem and Islington Health Authority (1979) 2 All ER 90, Lord Scarman said at p925 (when considering the multiplier for the cost of future care):

> "In the present case I attach major importance to the following elements of discount: the accelerated payment, the contingency that Dr Lim may not live out her full expectation of life, and the availability of capital as well as income to meet the cost of care."

I submit that similar considerations should be considered in this case and that a multiplier of 4 would be a more appropriate one in the circumstances."

We have carefully considered the appellant's arguments but re not persuaded that the multiplier 6 was unreasonably high. n our opinion, the Chief Registrar was justified in taking the iew that the Respondent who was 49 years of age and in good ealth could have expected to work for another 6 years before etiring at age 55. As rightly pointed out by Mr Kapadia, many stablished workers find alternative jobs after retirement to eep the home fires burning. Furthermore, it is not unusual for nestablished staff to be re-employed after retirement on an ad oc basis. He also pointed out that the Respondent has also ost out on the prospect of earning overtime which he used to arn from time to time as shown by the evidence. As against this e have to bear in mind that the Respondent is getting ompensation for a continuous period, i.e. no account is being aken of possible loss of wages through absences. We agree that t would have been useful for the Chief Registrar to have ndicated whether or not he had taken into account the benefit hat would accrue to the Respondent by way of earning interest

on funds invested upon receipt of lump sum payment. Nevertheless, we do not think that on the totality of the printed evidence the learned Judge would have been justified in lowering the figure 6. In our view the estimate of 6 years prospective loss of earning on a balancing process was eminently reasonable and that the Chief Registrar did not act on wrong principles nor could his estimate of the period of loss be characterised as wholly erroneous. Ground 5 of the appeal relating to the multiplier must therefore fail except that the net wages should have been used as a multiplicand for arriving at the total loss of prospective earnings. According to our calculation the total now comes to $20,308.08 ($65.09 x 52 x 6). We therefore reduce the award of damages under the 3rd head from $22,102.08 to $20,308.08.

Re General Damages for Pain, Suffering and Loss of Amenities of Life - Head 2

Ground 3 (part), 4 and 6 can be dealt with together with ground 1 of the cross-appeal. The contestants have taken diametrically opposing stands - the Appellant says that the assessment of $25,000 is too high and the Respondent claims that it is too low, although the Counsel for the Respondent concedes that this Court ought to be slow to interfere with an assessment which has been upheld on first appeal by the High Court (Byrne J).

The Appellant's main complaints under this head may be summarized as follows:-

(a) The award of $25,000 is excessive and not consistent with the level of damages awarded in similar cases within this jurisdiction and therefore the learned Judge ought to have reduced the award made by the Chief Registrar.

(b) That the learned Judge was in error when in upholding the award of $25,000 he took into account future inflation.

In support of her first contention Ms Manuel produced a comparative table of five negligence cases decided in Fiji all of which involved leg injuries. In respect of the first four of these cases the damages awarded for pain suffering and loss of amenities ranged from $1,000 to $12,000. The last column of her table showed that if these awards were uplifted to take account of inflation since date of the awards they would range from $1,295 to $13,160. However, in the 5th case cited by her, namely that of Subhash Chand v. The Attorney-General (Civil Action No. 212 of 1984), the then Acting Chief Registrar awarded $27,500 for injuries broadly similar in many respects to the ones suffered by the Respondent. Subhash Chand was 32 years of age at the time of the accident which resulted in fractures of the left leg, lacerations to the right forearm and thumb and compound fracture to the right leg shortening it by 5 cm. He was confined to a wheel chair. This award was challenged by the Attorney-General by way of an appeal to a Judge on the ground that it was excessive (see SC Civil Appeal No. 14 of 1985). The appeal was dismissed. Ms Manuel submits that the award in Subhash Chand's case was totally out of line with other awards in our jurisdiction, that it is not binding on this Court and ought not to be taken as a good precedent.

Mr Kapadia on the other hand argued that Subhash Chand's injuries were comparatively minor and that he was able to go back to work as a Clerk at Public Works Department at a time when his case was still being heard. He drew attention to the following medical evidence given by Dr D.D. Sharma in respect of Respondent's injuries (see p.10 of the Court Records) which the Chief Registrar took into account in assessing damages:-

> "This man had both his legs crushed under stone while at work on 9th April, 1985. The left leg was amputated below knee. The right leg was also fractured badly and has healed

with malunion of bones and gross arthrities of the knee joint resulting in pain in the knee, ankle and lower leg. With only one normal leg which already has arthrities at the knee with stiffness he is severely handicapped. The right knee is going to deteriorate further causing pain. The changes in his leg are permanent and not likely to improve. I calculate his permanent residual incapacity, taking the Workmen's Compensation Ordinance Cap. 77 as guide, as follows :-

(1) Loss of leg below knee - 45% (1)

(2) Stiff right knee with arthritis - 70% of 45-31.5% (2)

Therefore Total Residual Incapacity = (1) plus (2) - 45 plus 31.5% - 76.5 percent".

Mr Kapadia also referred us to a number of local cases including that of Jokatama Vukiduadua v. Emperor Gold Mining Company Limited - Supreme Court Civil Action No. 794 of 1982 wherein plaintiff was awarded $25,000 general damages in 1984 for injuries received in 1981. The injuries to the plaintiff in this case consisted of a fractured vertebra and a damaged spinal cord with the result that he became an irreversible paraplegic paralysed from the waist down. The total damages that the plaintiff received amounted to $81,200.

Mr Kapadia rightly pointed out that even according to the appellant's own table Subhash Chand would today receive $36,000 as general damages if past inflation were to be taken into account. He submitted that his client deserved to receive much more for his pain suffering and loss of amenities.

Before deciding whether or not this Court ought to interfere with the sum awarded it will be convenient to first deal with the second limb of the complaint relating to inflation.

Re Effect of Inflation - Ground 6

The State contends that the learned Judge erred in law when

in dismissing the appeal he took into account, inter alia, future inflation. We were referred to p.14 of the Court Records where Byrne J states as follows:-

> "One does not need to be an economist to predict that even with the best will in the world the current inflation rate is not likely to drop dramatically in this country in the near future. Awards of damages must take this factor among others into account. I do so here. I believe justice requires that the respondent/plaintiff who has been unemployed since the date of his accident should not have his award reduced so as to disregard the current cost of living rate in Fiji."

Ms Manuel cited the following two cases in support of her submission:-

(1) Taylor against O'Connor (1970) 1 All E R 365.

(2) Lim Poh Choo v Camden Islington Area Health Authority (1979) 2 All E R 910.

In Lim Poh Choo's case Lord Scarman stated at p.193:-

"The trial judge said he made allowance for future inflation in the multiplier for cost of future care and in the multiplier for loss of future earnings. The law appears to me to be now settled that only in exceptional cases, where justice can be shown to require it, will the risk of future inflation be brought into account in the assessment of damages for future loss. It is perhaps incorrect to call this rule a rule of law. It is better described as a sensible rule of practice a matter of common sense. Lump sum compensation cannot be a perfect compensation for the future. An attempt to build into it a protection against future inflation is seeking after a perfection which is beyond the inherent limitations of the system. While there is wisdom in Lord Reid's comment (Taylor v. O'Connor, at p.130) that it would be unrealistic to refuse to take inflation into account at all, the better course in the

great majority of cases is to disregard it. And this for several reasons. First, it is pure speculation whether inflation will continue at present, or higher, rates, or even disappear. The only sure comment one may make upon any inflation prediction is that it is as likely to be falsified as to be borne out by the event. Secondly, as Lord Pearson said in Taylor v. O'Connor, at page 143, inflation is best left to be dealt with by investment policy. It is not unrealistic in modern social conditions, nor is it unjust, to assume that the recipient of a large capital sum by way of damages will take advice as to its investment and use. Thirdly, it is inherent in a system of compensation by way of a lump sum immediately payable, and, I would think, just, that the sum be calculated at current money values, leaving the recipient in the same position as others, who have to rely on capital for their support to face the future".

We respectfully adopt Lord Scarman's reasoning and therefore agree that the learned Judge erred in taking into account the prospect of future inflation. However, we cannot agree that had he not done so he would have certainly reduced the sum awarded. From reading the whole of his judgment it is clear that he did not think that the award was on the high side. Furthermore, in dismissing the appeal he relied on relevant authorities outlining the principles that ought to guide an appellate court in such cases as the present one.

In examining the various cases cited to us for purposes of comparison we have borne in mind three seemingly competing considerations -

(a) that each case turns on its own particular facts involving as they do an infinite variety of circumstances;

(b) that it is desirable that there should not be a wide disparity between damages awarded for broadly similar types of cases. (See Observations of Lord Diplock in Wright v British Railway Board [1983] 3 W.L.R. 211 at p. 214.); and

(c) that in any case the damages awarded must be fair and reasonable compensation in the social, economic and industrial conditions which prevail in the jurisdiction where the award is made. (See Jag Singh v Toong Fong Omnibus Company [1964] 1 W.L.R. 1382.)

Furthermore, we have also borne in mind the principles which ought to govern appellate courts when dealing with appeals against award of damages. These principles are now well settled in Fiji - see Krishna Tandaiya v. Dharam Singh F.C.A. Civil Appeal No. 17 of 1978.

In so far as general damages go there was no basis on which the learned Judge would have been justified in interfering with the sum of $25,000 awarded by the Chief Registrar whose position was akin to that of a court of first instance which has had the advantage of seeing and hearing witness and thus assessing their credibility. This is an advantage not enjoyed by an appellate court. The following observations of Lord Thankerton in Watt v. Thomas (1947) A.C. 484 quoted by the learned Judge are therefore apposite:-

> "Where a question or fact has been tried by a judge without a jury, and there is no question of mis-direction of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnessess, could not be sufficient to explain or justify the trial judge's conclusion".
>
> "The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence".

Lord MacMillan's oft- quoted speech on assessment of damages and the principles which ought to guide an appellate court on an appeal against the quantum assessed, bears repetition. In Davies v. Powell Duffryn Associated Collieries Ltd (1942) 1 All E R 664 (E-F) he said:-

> "No doubt an appellate court is always reluctant to interfere with a finding of the trial judge on any question of fact, but it is particularly reluctant to interfere with a finding on damages. Such a finding differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate".

Later in the same speech Lord MacMillan (at pages 664-5 G-H) said:-

"Where, however, 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 an 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* (8), at p. 360. In effect, the court, before it interferes with an award of damages, should be satisfied that the judge has acted upon a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage 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 of excess or insufficiency".

The Appellant having failed to demonstrate before the learned Judge (and indeed before us too) that in assessing pecuniary compensation for pain, suffering and loss of amenities the Chief Registrar acted on wrong principles of law or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate, cannot hope to succeed. This limb of the Appellant's appeal must therefore fail.

We did not find it necessary to give separate and individual consideration to grounds 1 and 2 of the State's Appeal. They are general in nature and to some extent they overlap. However, we did keep them in mind when considering the arguments advanced against assessments under the various heads.

Re Ground 1 of the Cross-Appeal

As regards the first ground of the cross-appeal that the sum awarded was too small the onus was on the Respondent to show that the sum of $25,000 was not a substantial sum in the context of current monetary values. Once again we respectfully adopt the reasoning advanced by Lord Scarman in rejecting an appeal against insufficiency of award in Lim Poh Choo's case (already cited). At page 920 of the report Lord Scarman 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."

In our opinion it cannot be said that sum of $25,000 is not a substantial sum in the context of current money values. We, therefore, have no hesitation in dismissing the first ground of the cross-appeal.

Re Ground 2 of the Cross-Appeal

As to the second ground of the cross-appeal that the learned Judge ought to have upheld the claim for interest our answer is short. The Respondent cannot succeed because he did not ask for interest in his pleadings nor did his Counsel raise the issue of interest before the Chief Registrar, this latter fact was in fact taken in consideration by the learned Judge. Before us Mr Kapadia did not press the issue of interest. In fact he indicated that in future he would claim interest in his pleadings. (As to the need to include claim for interest in pleadings see this Court's recent judgment in Usha Kiran v. Attorney-General - Civil Appeal No. 25 of 1989.)

The final outcome of this appeal therefore is that the total special damages are reduced from $2,184.64 to $2,035.14 and the amount of loss of earnings is reduced from $22,102.08 to $20.308.08. The total damages that the Respondent is now entitled to is $47,343.22 made up as follows:-

Special damages	$ 2,035.14
General damages for pain, suffering and loss of amenities	$25,000.00
Loss of prospective earnings	$20,308.08
TOTAL	$47,343.22

The State's appeal is therefore partly allowed to the extent indicated above. The cross-appeal is dismissed.

There will, however, be no order as to cost in this appeal.

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(Sir Timoci Tuivaga)
President, Fiji Court of Appeal

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(Sir Ronald Kermode)
Justice of Appeal

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(Sir Moti Tikaram)
Justice of Appeal