

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION
ACTION NO. HBC 135 OF 1996

No. 223 of 2006

BETWEEN: **LEBA LISI** of Vatakacevaceva, Ra,
 Domestic Duties suing on her behalf and
 for the Estate of a Deceased child.

Plaintiff

AND: **THE ATTORNEY GENERAL OF FIJI** sued
 on behalf of its servants and employees at
 Lautoka Hospital.

Defendant

Solicitor for the Plaintiff: Messrs Vuataki Qoro
 Solicitor for the Defendant: Attorney General's Chambers

Date of Hearing : 27 September 2005 and divers dates since
 until 10 March 2006
Dates for Submissions 7 April, 5 May and 12 May 2006
Date of Interim Judgment: 05 July 2006
Dates for Submissions
on Quantum : 28 July and 18 August 2006 (extended by
 consent to 18 August & 8 September
 2006)
Date of Final Judgment : 17 November 2006

FINAL JUDGMENT OF FINNIGAN J. ON QUANTUM OF DAMAGES

As directed in my interim judgment on liability delivered on 5 July 2006
 counsel were to file submissions in respect of quantum of damages. Mr. Qoro

on behalf of the Plaintiff by consent filed his submissions late on 18 August 2006 and counsel from the Attorney General's chamber saw me on 23 August 2006 at which time I approved an application to extend time for the Respondent's submission until 4pm on 8 September 2006.

I have waited since that date but no submissions have been filed and now I issue my final judgment. I find little to challenge in the submissions of Mr. Qoro and perhaps counsel for the respondent did likewise. I can do no better and be no briefer than to set them out here. What follows is a verbatim transcription.

1.0 INTRODUCTION

1.1 By its judgment dated 5th July 2005, this Honourable Court has found that the Defendant was negligent for failing to care adequately for the Plaintiff and for her unborn baby.

1.2 In **Waqabaca v Vudiniabola** [1996] FJHC 91, the Court stated at page 17 paragraph 3 that

"When liability is established or admitted, the Court applies the principle of 'restitutio in integrum' and it must award damages."

1.3 Further the Court at paragraph 4 page 17 stated that

"In making awards which are fair and reasonable the Court has to fall back on previous amounts so that the figures arrived at are in proportion to awards in other

*cases of those who have injuries of comparable severity
[Bristow J in him Pok Choo v. Camden and Islington
Area Health Authority [1979] Q.B. 196 at 2001 C.A]*

1.4 The Plaintiffs claim is summarized at paragraph [24] of page 11 of the Judgment of this Honourable Court that the Plaintiff is claiming damages for injuries to herself

1.4.1 Pain to her during the birth

1.4.2 Pain and loss subsequently from the loss of her child

And for the Child

1.4.3 Loss of life and the consequences for the estate of the deceased child

2.0 **GENERAL DAMAGES**

Pain to her during the birth

2.1 In relation to pain during birth, we quote from paragraph 10 and 11 at page of the Judgment that

"[10] The Plaintiff arrived and was admitted in the hospital at 5.45pm and it was clear from the x-ray that she was to deliver a large baby.

"[11] The Plaintiff remained in labour until the birth at 11.30pm. She could not push the child out. She had great pain which she had not experienced with her other births and several times asked the attending staff including Dr. Kafoa for a caesarian birth. He told her to continue with her labour.

2.2 In **Knight v West Kent Health Authority** [1997] EWCA Civ 2634 the Court stated at paragraph 1 under the heading Damages that

The Plaintiff is, however, still entitled to damages for the results of the admitted negligence, namely the failure to intervene at or about 8pm. In reality that means she should be compensated for 2 hours of no doubt painful labour which she should not have had to endure,

- 2.3 We respectfully submit that the Plaintiff is entitled to be compensated for the three hours of no doubt painful labour which she should not have endured if caesarian were conducted on her after she had requested it.
- 2.4 Further, the baby's arm was broken and the shoulder snapped when Dr. Kafoa pulled it. The baby emerged. It was on 11th January 1996. She fed the baby four times.
- 2.5 At 1600 hrs on 12th January 1996, the baby died. After she was told about, she cried. She was in pain.

2.6 In **Sangita Devi v Enosi Voce & AG HBC 372** of 2003, this Honourable Court awarded \$75,000 (seventy five thousand dollars) for pain, suffering and loss of amenities. This is a case where a mother aged 24 years old delivered a baby on 10th November 2000 but never saw the child nor was she given the opportunity of having a funeral.

She also began suffering from uncontrolled urination resulting from the operation conducted by the Hospital

2.7. Although, the facts of the above case may be different, it is somewhat similar to the fact that she had also lost her child. However, Sangita did not go through the pain endured by the Plaintiff in giving birth as well as the distress she and the baby had encountered.

2.8. Be that as it may, we respectfully submit that an award of \$75,000 be given to the Plaintiff for pain and suffering during birth and loss of child.

Aggravated Damages

2.9 This head of damages is awarded to compensate the Plaintiff for the mental distress she had to endure or undergo as the result of the Defendant's negligence.

2.10 The Defendant in this knew that the Plaintiffs baby was a large one. During labour, she was in pain and she requested for a

caesarian. Three hours later the Plaintiff and the child were both distressed.

2.11 Further, the Defendant did not monitor the Plaintiffs labour. Only an intern, who was inexperienced at the time, was available to assist. But he did not take any steps to call for assistance from experienced doctors in the hospital

2.12 As your Lordship as indicated in **Sangita Devi v Enosi Voce & AG HBC 372 of 2003** at page 11 paragraph 19 that

"In the context of other surgical and gynecological misadventures that have come before the Court in the last 18 months this one is the worst. This Plaintiff has been treated worse by the hospital authorities (even including the Plaintiff Leba Lisi) than any other Plaintiff in my experience. This is a clear case for an award of aggravated damages.

2.13 Like the **Sangita Devi** case, we respectfully submit that this a clear case for an award of aggravated damages.

2.14 We respectfully submit that this Honourable Court should award aggravated damages of \$15,000 (fifteen thousand) as awarded in **Sangita Devi's** case.

3.0 **CLAIMS UNDER CAP 29**

3.1 In *Narayan v Attorney General* [1996] **FJHC** 149; HBC0611.93S (9th October, 1996), the Court stated at page 2 paragraph 2 that

"The Fiji Act broadly corresponds to the English Law Reform (Miscellaneous Provisions) Act 1934 and is therefore concerned with the recovery by the estate of damages accruing before or as a result of the death".

3.2 So the claim under cap 27 allows the estate to recover damages accruing before or as a result of the death.

3.3 The Heads of Damages recoverable under Cap 27 include:

a. **Loss of Expectation of Life**

We submit that the nominal figure of \$2,500 must be awarded to the estate under this head (**Hari Pratap v AG** FCA 14/92 - FCA Reps 93/276)

b. **Funeral Expenses**

As already indicated by this Court, there would be no claim under this head for funeral paid by a person called Alisi. So we are not claiming under this head.

c. **Pain and Suffering**

According to the evidence, the nurse told Dr. Kafoa that both the mother and the child were in distress. And that the baby's head was outside the birth canal with the umbilical cord' round around the baby's neck.

Further, the baby's right arm bone was broken by Dr. Kafoa and the shoulder snapped. The Deceased suffered for about 16 hours before the baby passed away at 1600hrs on 12th January 1996.

In **Medical Superintendent v Ismail** [2001] FJCA 29; ABU0050U.2000S (18th October 2001, fixed an amount of \$2500 for the 18 hours the deceased suffered unnecessary pain, discomfort and general lack of care.

In **Narayan v AG** [1996] FJCH 149; HBCO611.93S (9th October, 1996), the Court award \$2500 to the deceased who died from dehydration caused by repeated vomiting over a period of 8 days.

In this case, we respectfully submit that an award of \$2500 should be awarded to the Estate for the unnecessary pain suffered by the deceased as a result of the broken arm and snapped shoulder as well as the umbilical cord wrapped around his neck that could reduce the amount of oxygen supplied to the child.

d. **Lost Years - Value of Dependence**

In **Waqabaca's** case, the Court at page 22 paragraph 2(d) stated

- (d) In **Daya Ram v Peni Cara & Ors** 29 FLR 1983, the Fiji Court of Appeal on this aspect of loss of earnings said:

"Accordingly the claim on behalf of a deceased estate for loss of earnings for lost years is now firmly established as on the same footing as the same claim by a living person, subject to the reservation as to deduction of personal living expenses. Authorities relied upon before this Court were Pickett v British Rail Engineering Ltd [1980] A.C 136; Gammell v Wilson [1980] 2 All E.R 557 (CA) and [1981] 1 All E.R. 578 (H.L) and White & Anor. v London Transport Executive [1982] 1 All E.R. 410 and are not the subject of challenge."

In this case, the child died 16 hours after birth. The child was big. We submit that he would have survived if Dr. Kafoa performed caesarian on the Plaintiff. He did not.

Even if the child were to survive, we submit that he would suffer from brain damage as the vaginal delivery was not successful and the baby was at risk of being deprived of oxygen for period

of time and taking into account that the umbilical cord was around his neck.

In Hallatt & Anor v North West Anglia Health Authority

[19981 EWCA Civ 675 (8th April 1998) stated that

"The reason why Thomas was born with such severe injuries was that there had been a critical complication during the attempt to affect a vaginal delivery. Thomas's birth weight was 12lbs 12 oz (5.788kg). He had an abnormally large body, a condition known as macrosomia. This meant that although his head was able to pass through the birth canal his shoulders were too large to do so and got stuck. This is known as "shoulder dystocia". If a vaginal delivery is attempted and is not successfully completed then there is a risk that the baby will have been deprived of oxygen for an excessive period of time and suffer brain damage. This is what happened to Thomas.

The child would have survived if the shoulder dystocia were done properly or caesarian performed as requested by the Plaintiff.

We submit that had he survived his parents and relatives would depend on him and that he would have worked to earn a living.

In Waqabaca v Vudiniabola, the Court awarded \$74,880 for loss of earnings for spastic cerebral palsy sustained due to the negligence of hospital in surgical operation.

In Waqabaca's case, the Court also cites cases in which an award for loss of earnings was made. This include **Thomas v Brighton Health Authority** (1996) PIQR Q44 where the Court awarded 200,000 pounds for loss of future earnings in the case of newly-born child after induced labour.

Given the above two cases and the circumstances of this case, we respectfully submit that an award of \$80,000 would be appropriate.

4.0 **INTEREST**

- 4.1 Interests are awarded on general and special damages. Section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27 gives the Court discretion to fix the rate of interest which should be paid.
- 4.2 As for general damages, the interests are awarded for the purpose of compensating a plaintiff for being kept out of the capital sum whereas interest for special damages covers the period from date of accident to the date of trial. (**Pickett v British Rail Engineering Ltd (1980) AC 136 & Jefford and Another v Gee** [1970] 2 WLR 702.)
- 4.3 **In Waqabaca's** case, the Court stated that there will be no interest awarded on loss of earnings as the Plaintiff who was 15 years would not have commenced work until he reached 21 years of age. The Court however, awarded 8% interest on general damages.

4.4 In **Sangita Devi v Enosi Voce & AG HBC 372/2003**, the Court awarded an interest rate of 6% on general damages.

4.5 In this case, we respectfully submit that an award of 6% interest be awarded on the general damages as from the date of injury/death i.e. 12th January 1996 to date of the finding of negligence by this Honourable Court on 5th July 2006 (more than 10 years)

5.0 **CONCLUSIONS**

5.1 In Summary the Plaintiff is claiming the following sum:

General Damages	:	\$ 75,000.00
Interest thereon 7% 3819 days	:	\$54,930.82
Aggravated Damages	:	\$ 15,000.00
Claim under Cap 27		
Loss of Expectation of Life	:	\$ 2,500.00
Pain & Suffering	:	\$ 2,500.00
Loss of Earnings	:	\$ 80,000.00
Costs	:	<u>\$ 2,500.00</u>
 TOTAL		 <u>\$232,430.82</u>

DECISION AS TO QUANTUM

There is little for me to add. I have my doubts about blaming the Defendant for the whole 3 hours of painful labour that counsel claims. It may be true that within that time Dr. Kafoa or somebody else should have taken a decision to intervene, but the fact that the labour got to the stage of shoulder dystocia is not itself evidence of any negligence by hospital staff. The legal and physical *iniuria* was caused by the decision on how to manage the actual birth which included managing the shoulder problem.

This Plaintiff is in a slightly better situation from the Plaintiff **Sangita Devi** in that she was spared the distress of never seeing her baby, of having no funeral, no resting place for her baby, not knowing of happened to her baby and vaginal fistula and uncontrolled urination. Therefore the \$75,000 awarded to the latter for her own pain and suffering represents greater trauma suffered by that Plaintiff herself.

In respect of aggravated damages, the claim was pleaded along with the other claims that counsel has mentioned. This however is not a case of unwarranted aggravation of the manner in which the Defendant inflicted the pain and loss on the Plaintiff as in **Sangeeta Devi's** case.

I should point out that the winding of the umbilical cord around the baby's neck was not caused by the negligence of anybody. I should note too that a possibility of brain damage arises from that fact and it is a factor to be taken into account, but not to increase any damages award. However there is an element of probable brain damage rising out of the method of delivery chosen by Dr. Kafoa. So I have to make some allowances that brain damage, hence

inability of the child to enter fully on a productive working **life**, **may** have *been* caused or contributed to *by* the chosen method of delivery.

I turn to the claim for loss of financial contributions by the child to his parents in his and their later years. One must necessarily enter the field of speculation. Only with care can an award be made. Life may not have delivered on this child's promise. I feel it is safe to include that element within the general damages awarded to the Plaintiff. For economic loss suffered by the child, I shall follow what was ordered in **Waqabaca** (above) on an agreed multiplier of 18 - \$74,880.

In the presumed pain and suffering of the child at birth and in the following 16 hours of life I refer to a similar-claim (for an adult man) in **Indira Wati** HBC 266 of 2003, judgment 08/2006, 3 February 2006, where \$15,000 was awarded under this head as well as **Ismail** (above).

Finally, there was nothing in the **Sangita Devi** award for Plaintiffs pain in the birth process or for the estate of the deceased child. More heads of damage are claimed in the present case.

These are my assessments:

General Damages for Plaintiffs suffering at birth	\$ 5,000
General Damages for Plaintiffs pain and suffering subsequently (This includes her pain from the loss of her child and an award for the claimed chance that the Plaintiff may have lost financial support from the child in later years)	\$ 70,000

General Damages for the Estate of the Child

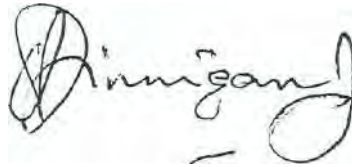
(i) Loss of expectation of life	\$ 2,500
(ii) Pain & Suffering before death	\$ 2,500
(iii) Lost years and the prospect of a normal life	<u>\$ 74,880</u>
	\$154,880

Interest on all those sums at 6% simple from
Date of Writ to Date of Judgment (17 April
1996 to 17 November 2006)

– 10 years 7 months \$7,800 p.a. \$ 82,550

Costs \$ 2,500

Grand Total **\$239,930**



D.D. Finnigan

JUDGE



AT Lautoka

17 November 2006.