IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION No. HBC 58 OF 2005
(Consolidated with HBC 74 OF 2005)

BETWEEN : **UMA PRASAD** as administrator on the **ESTATE OF PRASHANTIKA ANJANI DEVI** also known as **PRASHANTIKA ANJINI DEVI** of Maqere, Tavua, Deceased

PLAINTIFF

AND : **CHANDAR PRAKASH** of Vatia, Tavua

DEFENDANT

AND : **FIJI SUGAR CORPORATION LIMITED** a body corporate constituted under the Fiji Sugar Corporation Act (Cap. 209) having its registered office at Western House, Private Mail Bag, Lautoka, Fiji

THIRD PARTY

CIVIL ACTION No. HBC 74 OF 2005
(Consolidated with HBC 58 OF 2005)

BETWEEN : **SWASTIKA DEVI** of Maqere, Tavua, Student

PLAINTIFF

AND : **CHANDAR PRAKASH** of Vatia, Tavua

DEFENDANT

AND : **FIJI SUGAR CORPORATION LIMITED** a body corporate constituted under the Fiji Sugar Corporation Act (Cap. 209) having its registered office at Western House, Private Mail Bag, Lautoka, Fiji

THIRD PARTY

Appearances : Mr S Kumar for the Plaintiff
Mr N Padarath for the Defendant
Mr S Krishna for the Third Party

Date of Hearing : 1 & 2 October 2019 (trial)
4 December 2019 (submissions)

Date of Judgement : 30 January 2020

DECISION

INTRODUCTION

1. This is a claim by two plaintiffs arising from a motor vehicle accident that occurred on 24 June 2002 between a car driven by the Defendant Mr Chandar Prakash (in which the plaintiffs were passengers) and a train owned and operated by the third party, the Fiji Sugar Corporation (*FSC*).

2. The proceedings were commenced as two separate claims:

   i. The writ of summons in HBC 58/2005 was filed on 9 March 2005. It is a claim by Umar Prasad as administrator in the estate of his daughter Prashantika, a 20 year old student nurse at the time of the accident, who suffered severe head injuries in the accident, as a result of which she died just under a year later on 12 June 2003.
   ii. The claim in HBC 74/2005 was commenced by writ of summons filed on 10 August 2005. The plaintiff in that claim is Swastika Devi, sister of Prashantika, who was 17 years of age at the time of the accident. She suffered facial and other injuries that damaged her sight and still give her pain and discomfort.

3. In August 2008 leave was given to the defendant to issue a Third Party Notice against the Fiji Sugar Corporation. In his affidavit in support of the application for leave to join the third party the defendant stated that FSC (via its employees) had negligently left a stray railway cart in the middle of the road, and that that is why the accident occurred.

4. These two proceedings were consolidated in October 2009, and since then have been dealt with together. They were recorded as being ready for trial in November 2011, but for various reasons, including that the plaintiffs were obliged - through no fault on their part - to find new solicitors and counsel, the matter has only come to trial now, more than 17 years after the events that gave rise to the claim.

LIMITATION ACT 1971 – APPLICATION BY THIRD PARTY TO STRIKE OUT THE CLAIM AGAINST IT

5. A preliminary issue raised by counsel for the third party was whether the Third Party Notice should be struck out as being out of time, i.e. filed outside the limitation period fixed by section 4 of the Limitation Act 1971. This defence was raised by the third party in its statement of defence, and an application was made in August 2017 seeking orders that there be a trial of

the third party's strike out application as a preliminary issue separate from the main trial of the substantive claim. That application was heard and decided by Nanayakkara J in February 2018. In a ruling dated 27 March 2018 the Court dismissed the application to strike out the third party notice, and directed the issue of whether or not the defendant's claim against the third party is statute barred under section 4 of the Limitation Act 1971 was to be dealt with at the substantive trial.

6. At the conclusion of evidence I agreed to deal with and decide the third party's legal argument on the Limitation Act issue as a preliminary matter before asking for closing submissions of the parties. The case had been set down for four days, and when the evidence was concluded before the end of the third day, counsel for the defendant and third party were prepared to argue this issue before me at 2.30pm on the fourth day allocated for the trial. Since they had already argued the issue before Nanayakkara J, counsel already had their submissions ready. The potential advantage of dealing with the matter in this way was that if the third party's application was ultimately successful the court, counsel and the parties would be spared the need to address the claim by the defendant against the third party in closing submissions, and the subsequent decision. I excused counsel for the plaintiff from taking part in this argument. The plaintiffs have not made any claim against FSC (on the plaintiffs' evidence there is no basis on which they could have done so), and they therefore have no interest in whether FSC remains a party to these proceedings.

7. There is no doubt that if the plaintiffs had sought to join FSC as an additional defendant at the time it was joined as a third party in 2008, or thereafter, the limitation defence would, if pleaded, likely have resulted in that claim being struck out. This is because section 4(1)(d(i)) Limitation Act 1971 provides that claims for damages for personal injury must be commenced before the expiration of 3 years from the date on which the cause of action accrued.

8. However section 6 Limitation Act - rather than section 4 as relied on by the third party - applies to the third party claim by the defendant against FSC. That section provides:

> *6(1) Where under the provisions of section 6 of the Law Reform (Contributory Negligence and Tortfeasors) Act 1946, a tortfeasor (in this section referred to as the first tortfeasor) becomes entitled after the commencement of this Act to a right to recover contribution in respect of any damage from another tortfeasor, no action to recover contribution by virtue of that right shall, subject to subsection (2), be*

brought after the end of the period of two years from the date on which that right accrued to the first tortfeasor.

(2) For the purposes of this section, the date on which a right to recover contribution in respect of any damages accrues to a tortfeasor (in this subsection referred to as the relevant date) shall be ascertained as follows:

(a) if the tortfeasor is held liable in respect of that damage by a judgment given in any civil proceedings … the relevant date shall be the date on which the judgement is given …

9. In the present case, time does not therefore begin to run against the defendant – for the purposes of his claim to indemnity from FSC as a tortfeasor – unless and until judgment is entered for the plaintiffs on their claims against the defendant. This will only happen if and when I decide in these proceedings that the defendant is liable for damages on the plaintiffs' claims. Therefore because the third party claim has already been filed (in 2008), no question arises of the defendant's claim against FSC being outside the statutory limitation period, and FSC is not entitled to the benefit of the statutory limitation defence.

10. Mr Krishna, counsel for FSC, pointed out the potential absurdity – illustrated by this case – that results from the application of section 6. Instead of issuing his third party claim while the case against him was still undecided, the defendant is entitled to wait to see if judgement is awarded against him before commencing his claim for contribution from FSC. Had he chosen that course the defendant would have until early 2022 to file his claim for contribution. In that event a further hearing involving the same facts and presumably the same witnesses would take place more than 20 years after the accident to finally decide who was responsible for the collision. That would certainly be a bizarre and obnoxious situation.

11. It is however hypothetical in the present case. As Mr Krishna readily accepted, section 6 may have some concerning implications, but they do not arise here. In the event after counsel had had the chance to consider the implications of s.6 FSC elected to withdraw its application to strike out the third party notice, and so I did not need to decide that issue.

THE CLAIMS TO BE DECIDED

12. The plaintiffs' claims against the defendant Chandar Prakash are that they were passengers in a vehicle driven by him, which as a result of his negligence was involved in an accident in which they were injured. The accident occurred when the defendant's vehicle collided with a train on Kings

Road at Lausa, Ba on 24 June 2002. The defendant is alleged to have been negligent in the following respects:

(i) He failed to keep any or any proper lookout
(ii) He lost control of [the vehicle he was driving] and collided with a locomotive
(iii) He drove at a speed which was excessive in all the circumstances
(iv) He failed to stop, to slow down or swerve so as to avoid the collision
(v) He drove in a dangerous manner in all the circumstances.

13. In his defence the defendant admits that he was the drive of the car, and that the accident occurred. He denies that he was negligent, and says that the sole cause of the accident was the negligence of FSC in leaving the locomotive in the way of ongoing (sic) traffic. He has joined FSC as a third party. The plaintiffs have not sought to make any claim against FSC, for reasons that are obvious, taking into account their version of what happened at the time of the accident.

14. In his claim against FSC the defendant alleges that on the date in question, in the hours of darkness (the uncontested evidence was that the accident occurred around 10.30 to 11.00 at night) FSC by its servants or agents left a locomotive and/or carts unattended on a railway line which crossed Kings Road. The accident that took place was, the defendant says, caused by the negligence of FSC in the following respects:

(i) Failing to keep its locomotive and/or carts properly lighted in the hours of darkness
(ii) Failing to remove the locomotive and/or stray cart away from the railway line crossing the main road
(iii) Failing to put an warning signs showing the presence of the locomotive and/or stray cart
(iv) Leaving its locomotive and/or cart in a position and in a manner which was dangerous to all road users.

15. FSC denies these allegations, says that the accident occurred through the negligence of the defendant, and pleads the Limitation Act defence referred to previously. In support of its denial of negligence FSC relies on regulation 59 of the Land Transport (Traffic) Regulations 2000 which provides (in so far as it is relevant to this case):

> ***Obligations of drivers at level crossings***
> *59 The driver of a motor vehicle—*

(a) when approaching a level crossing must drive at a speed which will enable the driver to give right of way to an engine or trolley or any carriages or wagons approaching or crossing the level crossing;

(b) when approaching a railway level crossing on which any engine, trolley, carriage or wagon is stationary, must stop before reaching that crossing and must not proceed across the crossing until it is safe to do so;

(c) must not drive or attempt to drive a vehicle across a railway level crossing or other place on a railway when any engine or trolley or any carriages or wagons on the railway is or are approaching unless it is safe to do so;

16. Of course the fact that the defendant may be at fault for breach of this traffic regulation, or may otherwise have been negligent does not mean that FSC or its train driver was not also negligent in some way that contributed to the collision.

17. Although the plaintiffs' claim and all subsequent documents referred to the collision taking place between the defendant's car and a locomotive, it very quickly became apparent from the evidence at trial that the collision itself was between the car and one or perhaps two loaded sugar carts that may or may not have been part of a train. Clearly there is a difference between a car hitting a locomotive, and hitting the carriages/carts pulled by the locomotive. However no issue was taken by any of the parties about this discrepancy between the pleadings and the evidence and it was clear that no-one was caught by surprise or embarrassed by the evidence that was presented. In the circumstances, should it be necessary, I would give leave for the statement of claim to be amended to correct this discrepancy in the use of language.

FINDINGS OF FACT

18. Evidence was given by and for the plaintiffs by Swastika Devi and her father Uma Prasad (both in his capacity as father of the two young women who were injured in the accident and as administrator in the estate of Prashantika Devi). Premila Devi also gave evidence on behalf of the plaintiffs. She is the mother of the two young women, and her evidence mainly referred to the harrowing period after the accident when Prashantika was being cared for at home for nearly a year after the accident until she passed away.

19. Only one witness was called by each of the defendant and the third party, respectively the defendant himself, and Mr Naicker, the driver of the train that was involved in the accident. Only two of the witnesses who were called were able to provide evidence of the accident itself; they were the plaintiff

Swastika Devi, and the defendant Chandar Prakash. Other potential witnesses of the accident were Prasantika Devi, who has died, and Mr Prakash's wife – who was a front seat passenger in the car when the collision occurred. No explanation was offered, and Mr Prakash was not asked, as to why his wife did not give evidence. It may be that she is no longer available as a witness. In the absence of an explanation I attach no significance to the lack of any evidence from her. The FSC train driver and his pointsman were potentially witnesses of the accident, however the pointsman did not give evidence, and the train driver, Mr Naicker, did not see the collision take place – he was driving the locomotive at the front of the train, while the collision occurred with the last two carriages/carts of the 67 cart train – over 130 metres behind the locomotive.

20. The evidence given by the plaintiff Ms Devi and the defendant about what they were doing on the night in question is consistent. They had been visiting an acquaintance of the defendant, and were returning home at around 10.30pm. It was late at night, dark, and the road was not lit except by the headlights of the defendant's vehicle. There was no evidence of other traffic.

21. The road they were driving on was very familiar to the defendant, who said that he had been using the road at least once a fortnight (and sometimes more often) for the many years he had lived and worked in the area. He knew the railway crossed the road at that point. In his evidence he said that the road near the railway crossing was shaded by a large tamarind tree or trees, but Mr Naicker's evidence is that these trees were/are on the other side of the crossing from where the defendant was approaching in his car. There were no street lights in the area.

22. Mr Prakash says he was driving at 75kph (it was an 80kph area). Ms Devi suggests he may have been driving faster than this, but her evidence is vague and her qualification to make the assessment was not explored, and I do not rely on it.

23. Ms Devi agreed, in the course of cross-examination, that there were no barrier arms protecting the railway crossing, but she said that there was a sign on the roadside warning of the crossing, that the driver's window of Mr Prakash's car was half open, and that she heard the horn of the train, and saw the lights of the train before the car hit the train. She also said that Mr Prakash smelled of alcohol, but Mr Naicker, who helped all the occupants out of the car after the collision, said he did not notice any smell of alcohol on Mr Prakash as he helped him out of the car. Again, I am not satisfied that there is sufficient evidence to enable me to conclude that the defendant was affected by alcohol, and there is no allegation to that effect in the statement of claim.

24. In looking at the cause of the collision, and who was to blame, it is inescapable that there was a train crossing the road, and Mr Prakash drove into it. As the driver of the car it was his responsibility to drive in a way that he did not hit it.

25. In seeking indemnity or contribution from FSC the defendant alleges that FSC was negligent in the manner set out in paragraph 14 above.

26. The train driver Mr Naicker, giving his evidence on behalf of FSC, was asked to comment on the state of maintenance of the train and its carriages. In addition to saying that there was a powerful light shining backwards from the locomotive along the line of carriages, he suggested that the carriages/carts are regularly maintained, and that there was reflector paint on every carriage, such that the train would have been clearly visible in the headlights of the car.

27. I have to say I am rather sceptical about this last assertion. It would be an unfortunate co-incidence indeed if Mr Prakash has encountered that rare phenomenon, a sugar train sparkling with new reflector paint. I rather think that like most loaded sugar trains the reflector paint on the carts would have been well worn, and probably partly obscured by the sugar cane, and would not have been particularly easy to see on an unlit road. But Mr Prakash knew it was the cane cutting season, and that he was driving in a sugar farming area, approaching a railway crossing at night. A train crossing the road should have been something that he was on the lookout for. He had a duty to drive in a way that would enable him to avoid such foreseeable, albeit occasional, hazards.

28. Any argument that the defendant was not negligent is not helped by his own evidence. As his third party claim (recited above) indicates, his version of events that night is that it was not a train that he hit at all, but rather two sugar carts sitting apparently abandoned and stationary in the middle of the road, unconnected to any train. Not only does this seem inherently less probable than the poorly lit train scenario, it is inconsistent with the evidence of the only other witnesses to the events of that night, Ms Devi – who says she saw and heard the train – and Mr Naicker, who gave quite detailed evidence about his activities of that night, the number of carriages making up the train (67), the lights from the locomotive of both ahead and behind the rain (he said that the lights had sufficient range to light up 120 carriages), the checks carried out by the pointsman immediately before the train crossed the road, the sounding of the train's horn (from 150m before the crossing to after the last carriage had passed the crossing) and what he saw at the time of the collision (albeit from some distance away).

29. In his written closing submissions Mr Padarah, counsel for the defendant, made a valiant attempt to support the defendant's contention that two carriages had become detached from the train before the collision, and were sitting stationary, flagless and unlit in the middle of the road when the defendant drove into them. If I accepted that this is what happened I would certainly have concluded – notwithstanding the Traffic Regulations relied on by the third party – that FSC was at least partly at fault for the collision. But this is not what I took from the evidence. Although Mr Naicker gave a seemingly improbable estimate of 30-40 seconds for the gap between when he said he saw the flag fall on the last carriage, and when he saw the car's headlights shining along the track (indicating that there had been a collision), I took from his evidence that what he was referring to was the following sequence of events:

- the collision occurred as the train was crossing the road, when the car hit the last two carriages
- in the course of the collision the flag on the last carriage was knocked down, and the two carriages became detached from the rest of the train
- as a result of the collision the car was facing along the railway towards the locomotive, with its headlights still shining
- although initially those on the locomotive could not see past the loaded carriages eventually the movement of the train enabled the driver to see what had happened at the back of the train.

It was the sequence of these events that the train driver said took the time he estimates.

30. There is nothing in the evidence of Ms Devi and Mr Naicker that is remotely consistent with what Mr Prakash says happened, apart from the fact that the car hit the train. On the evidence before me I find that there was a train crossing the road as Mr Prakash approached the crossing in his car, and that for reasons that he has not explained, but which inevitably point to a lack of due care on his part, he failed to see and drove into the last two carriages of the train as it was moving across the road.

31. On the other hand I am not persuaded that there was any fault on the part of FSC, either in the manner alleged by the defendant in his third party claim or otherwise. The evidence that has been given suggests that the train was lit (both with flashing lights on the locomotive and a light shining on the carriages/carts), and was moving across the road crossing while sounding its horn. It was there to be seen, and was seen – as Ms Devi's evidence shows –

before the collision occurred. She even had time – she says – to shout out a warning. There is therefore no basis upon which I can find that FSC was negligent in its operation of the train on that night, particularly not in the manner alleged by the defendant, and the defendant's third party claim against FSC is dismissed.

Resulting Injuries And Loss

32. The consequences of Mr Prakash's negligence for the plaintiffs and their family have been awful. Swastika Devi slid under the drivers' seat as a result of the impact and suffered facial injuries when her glasses were smashed, which have caused permanent scarring and problems with her vision. She spent a week in hospital, and could not see or open her eyes for four days, and for some time thereafter she was still having bits of glass taken out of her face. She says that she still has some glass in her face, and has to use pain medication from time to time. This seems likely to be permanent (given that it is now 17 years since the accident and she is still suffering from these effects). At the time of the accident Swastika was 17 years old, she had just finished Form 6 at school, and was looking to follow her sister into nursing. As a result of her injuries, and the loss of her older sister from the accident (and witnessing her sister's suffering before she died) Swastika has not pursued that career path. She now lives in New Zealand where she has full time work as a kindergarten teacher. She is now married, and she and her husband have two young children.

33. The consequences for Prashantika were of course much worse, and her injuries also had a severe impact on her family. Such were the head injuries she suffered that she was flown by helicopter to the CWM Hospital in Suva, where she spent three months before she was discharged back to Tavua Hospital and then released into the care of her family. She was sent home to die, with no hope that she would recover or that her condition would improve. She was helpless for the rest of her life, unable to communicate, respond to care or feed herself. She had to wear nappies, and was fed through tubes through her nose. Her father described her condition in his evidence as being 'half –dead'. She was released into the care of her family because there was nothing more that the hospital could do, other than to monitor her condition. Her family had to feed her, take care of her, buy medication for her, and take her into Tavua hospital every 2-3 weeks for a check-up. Nurses would also come from the hospital to visit Prashantika at home to check on her condition.

34. Both Prashantika's parents gave evidence about the impact of her injuries on Prashantika herself and on the family. While she was in hospital in Suva her

mother stayed with family members in Suva so that she could support her daughter. Her father stayed at home in Tavua looking after Swastika. Once Prashantika returned home the whole family was affected by the need to care for and support her. She remained at home for nearly a year, before eventually passing away. Prashantika's mother gave moving evidence about the condition of her daughter and the efforts made by her and the family to care for her and make her comfortable.

35. In his closing counsel for the defendant commented on the absence of medical evidence to show the extent and likely long term impact of the injuries suffered by Swastika Devi. As I understood the evidence (and counsels explanation), medical records had been obtained by the plaintiff's former solicitor, who has now been struck off the roll of barristers and solicitors and so was unable to continue to represent them. It seems also that he then refused to hand over his files, including the medical records, until he was paid $40,000. The solicitors for the defendant provided copies of those documents to the plaintiffs' new solicitors (obtained from the plaintiffs previous solicitors in the course of the proceedings), but was not willing to consent to the admission of those documents in evidence except through appropriately qualified witnesses who could be cross-examined. As Mr Kumar pointed out for the plaintiffs, the accident had occurred over 17 years ago, and at least one of the doctors involved has since died. The matter was left with counsel for the plaintiff to decide what he wanted to do with the medical records, but in the event nothing was done, and no such records were put into evidence. Accordingly, the evidence the Court has of the injuries suffered by the plaintiffs is from the factual but non-expert evidence of the witnesses who were called based on what they experienced or observed.

36. I readily accept that in a case where the hearing on a claim takes place within a reasonable time after the events causing the injury the court will require – for the purpose of assessing damages - evidence on the likely future prognosis for the injured party. Here seventeen years have passed since the accident, and Ms Devi has been able to tell the court from her own experience over that period about the continuing physical and mental/emotional impact of her injuries and the trauma of the accident. I agree however with Mr Padarath that in the absence of medical evidence I cannot be satisfied that Ms Devi's hypertension (an increasingly common health condition) was caused by the accident. Nor can I rely on her hearsay evidence - to the extent that it is different from what she has suffered and continues to experience in the years since the accident - of what she has been told by her doctors about her condition.

37. Counsel for both the defendant and third party also commented on the absence of medical evidence to establish that the death of Prashantika Devi resulted from the injuries she suffered in the accident.

38. In cross examination of Prashantika's mother Premila Devi, counsel for FSC asked a series of questions that sought to explore whether Prashantika had died from neglect or a lack of proper care. Her mother vigorously denied this. When I asked counsel whether he would be calling any evidence to support this line of questioning he wisely decided he would not continue with it. I am completely satisfied having seen and heard the witnesses giving evidence on this topic, that:

i. Prashantika incurred severe head injuries as a result of the collision,
ii. these injuries meant that Prashantika 'lived' for the following 15 months in a comatose or semi-comotose state (Mr Prasad in his evidence said *her arm was broken, the back of the head was broken, and she was just staring; she didn't speak …*) during which she was fed through a tube in her nose, was incapable of movement or communication, and wore/used a urine bag and diapers for toiletting.
iii. She was discharged from hospital because the doctors could do no more for her. Her family was told that her condition would not improve, that she would die from her injuries, but the doctors didn't say (or know) when that might happen.
iv. The family did all that they could for their daughter, but despite that care, and regular monitoring of Prashanthika's situation both at Tavua hospital and by nursing visits to her home, her condition gradually deteriorated (as her doctors had told the family would happen), and she died.
v. her injuries and subsequent death were the result of the accident, and not from any intervening cause.

I am also satisfied that Prashantika's injuries and death had a devastating impact on both her and her family, and that the need to care for her and the manner of her death exacerbated that impact and made her and the family's suffering much worse than if she had been killed outright in the collision, or died immediately afterwards.

39. However what is not clear from the evidence is the extent to which Prashanthika might have been aware of her situation. Mr Prasad in answer to a question from me said that she did not appear to be aware of what was going on around her. However her mother, when giving evidence, said that they would turn her over in bed *we used to take her in the wheelchair and have*

shower because she was feeling bad … which suggests that Prashanthika had at least some level of awareness of her situation, such that her family were able to discern whether she was feeling comfortable or not. The fact that Prashanthika was unable to do anything for herself, or communicate, does not mean that she was completely unaware of her environment, or unable to feel pain or discomfort.

40. In personal injury claims, medical evidence may be factual (details about the injury suffered), and opinion evidence (about future treatment, prognosis, effects etc of the injury). When factual evidence is unavailable or equivocal, opinion evidence is often useful to help the court reach a conclusion about the significance of the facts. That opinion evidence can be given only by someone qualified as an expert on the subject matter at issue (section 15(1) Civil Evidence Act 2002). But the fact that medical evidence is usual, and may be useful, does not alter the fact that such evidence is only a means of providing the evidence necessary to enable the court to decide the case. In the end, the court's duty is to decide the case on the evidence that is presented, not on the basis of what might have been presented but was not, or what could have been better presented in another way.

41. The defendant, through his counsel, complains that if a medical report had been tendered in evidence by the plaintiff the defendant could have called his own doctors to give their expert opinion on the report. But there was nothing to prevent the defendant from calling for a copy of the medical reports, and if they found something in them that is contestable, or relevant to the defence, from calling expert evidence about those matters. If the plaintiffs wish to rely only on non-medical evidence to prove their case, of course they take their chances that the evidence may be inadequate (as I have found it is in respect of at least one area of injury claimed). But such reliance is not otherwise objectionable, as the defendant seems to suggest, and does not disqualify the plaintiffs from a remedy that they have proved with their evidence, on the balance of probabilities, that they are entitled to.

DAMAGES

42. Having found the defendant (but not the third party) negligent, and that his negligence caused the accident in which Prashantika and Swastika Devi were injured, the next question is what compensation, if any, are the plaintiffs entitled to from him?.

43. Counsel for all parties provided written submissions covering both liability and damage. We then had a short hearing on 4 December to enable counsel to make any oral submissions in reply, and for me to ask questions. At my

request counsel provided me with lists of previous court decisions dealing with the issue of damages in cases such as this.

44. The evidence of loss and damage in this case has been sparse indeed, but to be fair, that is understandable, at least with regard to the claims for future economic loss because of the circumstances of both plaintiffs prior to the accident. Both Prashantika and Swastika were young women who were still involved in education, and had not started work. Prashantika was studying to be a nurse, and of course died before she qualified and got a job, so there is no evidence of pre-accident earnings that can be used as a foundation for a claim by her estate for loss of future earnings. Swastika had only just left school, and although her injuries were no doubt painful and disabling until she recovered, they were relatively minor, and there is no evidence that they have had an impact on her earning ability. Even if there was evidence of pre-accident earnings, the relevance of earnings from work in Fiji would be much reduced because of Swastika's subsequent move to New Zealand where, as she has acknowledged, she has full time work at a kindergarten.

Future Economic Loss/Loss Of Earnings

45. In its very recent decision in **Narayan v Roshan** [2019] FJCA 211 the Fiji Court of Appeal addressed the issue of awards for damages in the case of death, in particular how to deal with an absence of evidence of pre-accident earnings, and with the impact of death and unconsciousness on an award of damages for pain and suffering. That case involved a claim by the estate of a young man (18 years and still at school) who was crushed between two buses and died almost immediately. In her decision Jameel JA (concurred with by Basnayake and Guneratne JJA) commented on the plaintiff estate's claim for damages for future economic loss of $100.00 per week (effectively the current minimum wage) for 15 years. The High Court had awarded $3000 although the reasoning for this amount is not explained by the Judge in his original decision. Referring to the decision of the House of Lords in **British Transport Commission v Gourlay** [1956] AC 185, at 206 which outlines the basis on which damages are awarded in personal injuries claims (per Lord Goddard) as follows:

> *In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage, which has to be specially pleaded and proved. This consists of out of pocket expenses and loss of earnings incurred down to the date of the trial, and is generally capable of substantially exact calculation. Secondly, there is general damages which the law implies and is not specifically pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such as to lead*

to continuing or permanent disability, compensation for loss of earning power in the future. The basic principle so far as loss of earnings and out of pocket expenses are concerned is that the injured person should be placed in the same financial position, so far as can be done by an award of money, as he would have been had the accident not happened, …

Jameel JA said (at paragraph 47 of her judgment):

[47] When assessing future economic loss, the court will be required to predict as best as possible, future prospects, as well as what the future would have been like, without the injury. The court will have to consider the vicissitudes and uncertainties of life. In this case the deceased was a young man of 18 years, attending Form VI, and his ambition was to become an Agricultural Officer. Although the Appellant did not produce academic records of the deceased to establish his academic standing, it is reasonable to assume that the deceased could have been employed in some occupation, and he would have had a reasonable chance of employment. Even assuming he did not obtain a Tertiary level education, it is not unreasonable to assume that the deceased was capable of being employed. There was no evidence led that it would be impossible or unlikely that the deceased would have been able to secure employment. Accordingly, I find that in all the circumstances of this case it would not be just to exclude damages for future economic loss purely on the basis that the Appellant failed to produce specific evidence of income generation.
[48] Therefore, although there was also no evidence led to show that the deceased would have been precluded from gaining some form of income, I do not see a legal impediment to making an informed guess, based on general presumptions that are reasonably permissible for this court to make.

[49] In regard to difficulties arising in assessing damages the court in ***Attorney General of Fiji v Broadbridge*** *[2005] FJSC 4; (CBV 0005 of 2003S (8 April 2005) said:*

> *[69] Once the court accepts that the plaintiff has suffered a loss for which the defendant is liable, it will not allow difficulties in assessing the value of the loss to deprive the plaintiff of an award of damages. A plaintiff who has been deprived of earning capacity, whether in whole or in part, has lost the chance of exploiting that capacity to the full. Professor Luntz, in the text to which we earlier referred, observes that in most instances, the chance of so exploiting the capacity is high and this is reflected in the approach taken by the courts, which is usually to assume that it would have been exploited to the full, at least to the normal retirement age. That one hundred per cent probability is then*

discounted by the chances of its not being exploited due to the normal contingencies of life.

[70.] In other cases, where there is greater uncertainty as to whether the plaintiff would have gained a benefit had the injury not been sustained, it is necessary to evaluate the chance as best the court can. Courts typically allow damages for the possibility that the plaintiff will develop a particular condition in the future, which will require medical treatment, nursing or loss of income. In addition, courts are required to have regard to the benefits that might have been gained through additional qualifications, or promotions that are now no longer available."

and concluded:

[51] In my view, despite the paucity of specific evidence reflecting with mathematical accuracy of future economic loss, it is open to this court to make an assessment or as realistic a prediction as possible, of potential earning capacity of the injured or deceased, had the negligence of the defendant not intervened. What the court must do is to compensate the victim or his estate for the loss of chance in earning what he could have, had he not become incapacitated by the negligence of the defendant, or met with death as a result of the negligence of the defendant

46. Applying these principles to the case before it the Court of Appeal went on to say:

[53] … There was no evidence that any particular factor would have prevented the deceased from being gainfully employed in the future. Thus, even assuming, that the deceased did not achieve his ambition of becoming an Agricultural Officer, it can safely be assumed that he would have been able to secure some form of employment, from which he could have earned $100.00 a week.

[54] For the reasons set out above, and in all the circumstances of this case, in my judgment, the sum of $3000.00 awarded as damages under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act, for future economic loss, or loss of expectation of life, must be varied. On the basis of the reasoning I have set out above, in my judgment a sum based on the expectation of earning $100.00 per week, even if the deceased could not have become an Agricultural Officer, as the Appellant claimed was his ambition, it is reasonable to estimate that the deceased could have earned $100.00 a week for 15 years grounds 3 and 4 of the appeal are allowed. I therefore award a sum of $78,000.00 for future economic loss.

47. In the present case in relation to Prashantika the evidence is that she was studying to be a nurse. The fact that she had been accepted for such study suggests that even if she was not to remain in nursing throughout her working life, she could have expected to earn something more than the minimum wage. It is not fair to the defendant to assess damages (at least without evidence to support the finding) on the assumption that Prashantika would have been supremely successful and wealthy. But it is equally unfair to her and her estate to assume, without evidence, that she would have dropped out of nursing training and become a beggar. Taking into account what we know, and what it is reasonable to assume, I intend to follow the lead provided by the Court of Appeal in **Narayan v Roshan** (supra) and award $78,000 for future economic loss for Prashantika's estate, with interest on this amount at 4% for 12 years (i.e. from approximately 30 months after the date of service of the writ of summons (4 August 2005) to the date of this judgement. The delayed start for interest is because of the long delays in this matte getting to trial, through no fault of the defendant. In awarding this amount I am conscious of the fact that using the current minimum wage (in 2020) as a guide for what earnings the deceased may have lost as a result of her injury in 2002 already compensates for the passage of time (I assume that the minimum wage, if there was one, in 2002 would have been substantially less than it is now), and adding interest may be seen as compensating her twice. But taking into account the reduced interest rate I have allowed, and the reduced period of interest, and that because of her training to be a nurse, Prashantika's earning s would likely have been higher than the minimum wage, I believe that the result fairly compensates the deceased's estate under this aspect of the claim.

48. With regard to the claim by Swastika, I am not satisfied - on the evidence that has been presented - that there has been any future economic loss to her resulting from the accident, and the injuries that she suffered, and accordingly no award of such damages is made in favour of Swastika.

Non-pecuniary loss

49. The Supreme Court in **The Permanent Secretary for Health and Another v Kumar** CBV 6 of 2008 – 3 May 2012) set out the principles to be applied by courts when assessing damages for non-pecuniary losses 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.*

(I have taken the liberty of reformatting this passage slightly by adding bullet points to the three factors referred to by the Court).

50. This passage from the Supreme Court was relied on by Chandra JA in **Kumar v Kumar** [2018] FJCA 106 in dealing with the issue of pain and suffering, with the following comments:

> *[40] In claiming damages for pain and suffering it would have been useful if the Appellant had led evidence as to the permanent nature of the disability that he had suffered, and in terms of a time period to establish for how long such discomfort would have to be endured, the period for which he would have to use crutches before being able to walk normally without such aids, the psychological effect that such discomfort had on him. Unfortunately, such evidence is not available in this case, although three doctors had given evidence on behalf of the Appellant.*

and this passage was relied on by Jameel JA in **Narayan v Roshan** (supra) as showing that the Court of Appeal in **Kumar** (supra) did not consider a lack of evidence alone as a reason not to award damages. Jameel JA went on to say (at paragraph 58):

> *I am of the view that whilst claims and awards, for pain and suffering ought not to be exaggeratedly high, in view of the admittedly subjective nature of the decision to eventually be made by the court, denying damages for pain and suffering, must be premised on the presumption that the medical evidence is not the only factor to be considered. In my view, a subsequent medical report, cannot, in reality measure with accuracy, actual pain and suffering. This*

cannot by itself be a ground for denying damages for pain and suffering altogether.

51. In relation to pain and suffering the Court of Appeal in **Narayan** awarded $30,000 to the estate of the young victim, who died within hours after the accident. The Court was not prepared to accept (medical evidence not having dealt with the issue) that simply because the deceased was 'unresponsive' after the accident in which he was crushed meant that he was rendered unconscious, and thus did not suffer pain or from knowing of his imminent death. In the High Court the trial judge had ruled that because the deceased was unconscious, he was not aware of any pain and did not suffer, and so no award was justified for this category of damages. The Court of Appeal disagreed and awarded the estate $30,000 for pain and suffering, in addition to the award to the estate for loss of earnings (as referred to above).

52. I have been troubled by the significance of Prashantika's post- accident awareness (or lack thereof) of her situation. There are series of cases in the United Kingdom and Australia[1] dealing with the impact on awards for damages of the fact that a plaintiff was unconscious and therefore not aware of their plight. The tension seems to have been between those decisions in which the Courts have taken an 'objective' view of the plaintiff's situation, and those in which there is more focus on the injured person's appreciation of their injuries, and of the impact of those injuries on what might have otherwise been the victim's expectations of life. Under the former approach the award of damages is made on the basis of an objective assessment of the victim's circumstances measured against what they might have been had the injury not occurred. The victim's own understanding and appreciation of their situation would be taken into account, but not as a major factor in this assessment. The alternative approach explained in the High Court of Australia in **Skelton v Collins** was:

> *Where … the injured person has at no time been conscious and will never be conscious of the fact that his life has been shortened so that no question of pain and suffering arises, it seems to me that* ***Benham v Gambling*** *clearly pointed to the conclusion that no more than a moderate sum should be awarded for the diminution of the expectancy of life …*[2]

53. The dilemma was eloquently expressed (and this is only one of many anguished expressions of the issue) in the decision of Windeyer J (in support

[1] Including **Benham v Gambling** [1941] AC 157, **Oliver v Ashman** [1962] 2 QB 210, **Wise v Kaye** [1962] 1 QB 638, **H West & Son Ltd v Shephard** [1964] AC 326

[2] **Skelton v Collins** (1966) 115 CLR 94, per Owens J at p.137.

of the majority opinion) in the High Court of Australia in **Skelton v Collins** (supra at p.133):

> *In my view his Honour (in the Court below), having thus held that on the evidence there was not even a chance that the additional sum (for general damages) could be used for the advantage of the plaintiff, ought not to have awarded it. Consolation presupposes consciousness and some capacity of intellectual appreciation. If money were given to the plaintiff he could never know that he had it. He could not use it or dispose of it. It would simply go to his legal personal representative on his death. It would be of no more benefit to him personally than sending the defendant to goal would be. He is not … aware and able to bemoan his fate 'to live a life half dead, a living death'. His existence is in very truth a living death*

54. In the present case Prashantika survived for nearly a year after the accident in a completely dependent and uncommunicative state. However as was the Court of Appeal in **Narayan v Roshan** in the case of the young man crushed by a bus, I am unwilling to conclude, in the absence of evidence showing this, that Prashantika was, in addition to being helpless and dependent, completely unaware of her situation, and so did not suffer, or feel pain, discomfort or misery from the circumstances in which she found herself. To first require cogent evidence in support of a proposition that damages should be limited – because an award will do the victim no good-- to the advantage of the defendant, but the possible disadvantage of the injured party and her estate, does not convert damages from being legitimate compensation for the victim to impermissible punishment of the defendant. The Compensation to Relatives Act 1920 and the Law Reform (Miscellaneous Provisions)(Death and Interest) Act 1935 make clear the philosophy that death of a victim does not negate any claim she would otherwise have arising from her injury or death.

55. In submissions for Prashantika's estate, counsel sought damages of $150,000 for pain and suffering. Guided by the award of the Court of Appeal in **Narayan v Roshan** ($30,000 to a young man who died within hours of being injured), but also taking into account the different circumstances of this case, I find that Prashantika's estate is entitled to $90,000 for her pain and suffering during the period she survived, as well as for her death.

56. Swastika was much more fortunate than her sister, but she was still badly hurt in the accident. She had to undergo a number of operations, and she still suffers pain today, seventeen years after the injury. In **Kumar** (supra) the Court of Appeal awarded $35,000 to a plaintiff who suffered a broken leg which left him permanently disabled (including having to use crutches). There was some evidence that he was exaggerating the extent of his disability,

but the Court nevertheless awarded him $35,000. Again, using that case as a guide to what might be appropriate here, I award damages of $20,000 to Swastika for pain and suffering.

57. Again, there should be interest paid on this aspect of the award in both cases. However taking into account the extraordinary delays that have occurred in this case (not particularly the fault of the plaintiffs, but not in any way contributed to by the defendant), and the fact that her award includes loss of earnings at the 2020 minimum wage (as discussed in paragraph 91 above), in Prashantika's case I will allow interest under section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935 at 4% per annum rather than the more usual 6%. Otherwise the award of damages would be even more distorted than they are by the addition of interest for 18 years. The same considerations do not apply to the award for Swastika, and that award will attract interest at 6% as usual. In both cases, for the reasons discussed in paragraph 91 interest is awarded at the rates specified for 12 years up to the date of judgment.

Special damages

58. Prashantika's funeral is said to have cost $4-5,000. No documentary evidence of this was produced. The statement of claim seeks $2500.00 and this is the amount Prashantika's father said he had to borrow to pay for the funeral. I will award that amount.

59. Swastika says that she incurred special damages of $750.00 travelling to Suva to have her eyes checked. Again there was no documentary evidence in support and the evidence is unclear how often this was necessary. I award $500.00 for this category of loss.

60. Accordingly I make the following orders:

i. In HBC 58/2005 (Prashantika's claim) judgment is entered for the plaintiff against the defendant as follows:

Pain & Suffering	90,000
Loss of earnings	78,000
Special damages (funeral)	2,500
	$170,500
Interest on damages (4% for 12 years)	81,840
	$252,340

ii. In HBC 74/2005 (Swastika Devi) judgement is entered for the plaintiff against the defendant as follow:

Pain & Suffering	20,000	
Loss of earnings		NIL
Special damages (travel)	500	
	20,500	
Interest on damages		
(6% for 12 years)	14,760	
	$35,260	

iii. In both proceedings the claim by the defendant against the third party is dismissed.

iv. The defendant is to pay costs to the plaintiff in the sum of $7,500 and to the third party $4,000.

HIGH COURT OF FIJI LAUTOKA

A.G. Stuart
Judge

At Lautoka this 30th day of January 2020

SOLICITORS:

Sunil Kumar Esq, Nausori - Plaintiff (in both matters)
Samuel K Ram, Ba – Defendant
Krishna & Co, Lautoka – Third Party.