

TEVITA TABUA WAQABACA
a minor by next friend
JOSAIA M. WAQABACA

A

v.

DR. ETIKA VUDINIABOLA &
THE ATTORNEY-GENERAL

[HIGH COURT, 1998 (Pathik J) 20 March]

B

Civil Jurisdiction

Damages- assessment of damages for personal injuries of maximum severity:

The Plaintiff was 2 years old when he suffered spastic cerebral palsy as a result of medical negligence. As a consequence he became permanently unable to feed himself, walk, speak or control his bowel movements. He requires constant 24 hour care. The High Court assessed the Plaintiff's entitlement to damages and made a substantial award in his favour.

C

Cases cited:

Anitra Kumar Singh v. Rentokil Laboratories Ltd F.C.A. 73/91
 Cookson v Knowles [1979] AC 566
 Connolly v. Camden and Islington Area Health Authority [1981]
 3 All E.R. 250
 Croke v. Wiseman [1981] 3 All E.R. 852
 Daya Ram v. Peni Cara & Ors 29 FLR 147
 Donnelly v. Joyce [1974] Q.B. 454
 Fair v. London and North Western Rly Co. (1869) 21 LT 326
 Fuhri v. Jones (1979 C.A. unreported)
 Gammell v. Wilson [1980] 2 All E.R. 557 [1981] 1 All E.R. 578
 Griffiths v Kerkemeyer (1977) 139 CLR 161
 Harris v. Harris (1973) 1 Lloyd's L.R.
 Heaps v. Perriete Ltd (1937) 2 All E R 60
 Housecroft v. Burnett [1986] 1 All ER 332
 Iowane Salaitoga v. Kylie Jane Anderson FCA 26/94
 Jefford and Another v. Gee [1970] 2 WLR 702
 Joyce v. Yeomans [1981] 2 All E.R. 21
 Lim Poh Choo v. Camden and Islington AHA [1979] QB 196
 Madhukar Nath Sharma v. Vijendra Prasad C.A. 40/88
 Parker v. Parker (1979) Qd. R 50
 Pickett v. British Rail Engineering Ltd. [1980] A.C. 136;
 Stephens v. Doncaster HA (1996) 7 Med. L.R. 357
 The Attorney-General of Fiji v. Waisale Naicegulevu FCA 22/89
 Thomas v. Brighton Health Authority (1996) PIQR 44
 Usha Kiran v. The Attorney-General of Fiji FCA 25/89
 Van Gervan v Fenton (1992) 175 CLR

D

E

F

G

White & Anor. v. London Transport Executive [1982] 1 All E.R. 410

A *H.A. Shah* for the Plaintiff
D. Singh for the Defendants

Pathik J:

Introduction

B This is a medical negligence action instituted by Tevita Tabua Waqabaca a minor (the "Applicant") by his next friend (his father) Josaia M. Waqabaca claiming damages against the defendants for personal injuries suffered by him as a result of negligence before and after surgical operations performed on him between 11 April 1985 and 2 May 1985 developing post-operatively irreversible brain damage called 'spastic cerebral palsy' ("SCP") while a patient at the Colonial War Memorial Hospital (CWMH).

C It was the first Defendant (D1) a consultant surgeon at the CWMH who performed the operations on the Applicant. The second defendant (D2) is the Attorney-General who was sued for vicarious liability under the State Proceedings Act Cap. 24

D On 31 January 1996 the Court delivered its judgment in which it found that D2 but not D1 was liable in damages for the Applicant's medical condition, namely, (SCP) which has been brought about as a result of negligence on his part whilst the Applicant was admitted to the CWMH.

E The action against D1 was dismissed but judgment was entered against D2 with damages to be assessed unless settled with costs to be taxed if not agreed.

Assessment of damages

With that background I now turn to the assessment of damages as the parties could not agree on quantum.

F The matters on which there is agreement between the parties are:

- (a) the multiplier of 18
- (b) interest at the rate of 8% on the award of general damages from the date of accident i.e. 11 April 1985 except that the Respondent suggests that interest rate on special damages must be allowed at 4% (Madhukar Nath Sharma v. Vijendra Prasad C.A. 40/88).

G Although the parties could not agree on a final figure for damages, however, the sum of \$40,000.00 as interim payment was paid on 20 March 1996 by D2 directly to the Applicant's solicitors further to the judgment herein.

The Applicant applied for assessment of damages and I heard evidence from the Applicant's mother. Mr. Singh did not adduce any evidence. Both counsel

made written submissions for my consideration.

Whilst awaiting decision on assessment an application was made by the Applicant for a further payment (as interim payment) to which I acceded by making an order on 23 December 1996 for payment out to the Applicant the sum of \$60,000.00 by payment of the said sum into Court (which was paid on 6 February 1997) and which said sum the Court will pay out to the Public Trustee of Fiji in trust for the care and maintenance of the Applicant with a direction to the Public Trustee to invest on interest bearing account such sum as is not immediately required for the Applicant. And it was further ordered that the Public Trustee shall disburse in his absolute discretion such sums of money to the Applicant's parents for the Applicant's care and maintenance and matters incidental thereto which the Public Trustee in his absolute discretion shall deem fit until further Order of this Court; liberty was reserved to all parties including the Public Trustee to apply generally.

Applicant's medical history

My findings of fact are contained on pages 16-20 of the said judgment of 31 January 1996 wherein I set out the history of the Applicant as a patient and his medical condition as stated by Dr. Lisi Vesikula Tikoduadua in her Medical Report (exhibit 2). For convenience I set out hereunder some of the salient features of the case in so far as it is relevant to the assessment of damages.

After his birth on 24 January 1983 the Applicant had to be admitted to hospital on 14 April 1983 for an abdominal complaint. The operation was successful and he was discharged on 26 April 1983. Then on 10 September 1983 he was admitted for the second time with high fever but there was no operation and he was discharged on 12 September 1983. The last time when he was admitted on 10 April 1985 and operated upon on 11 April 1985, he suffered he said tragic consequences from which he is never likely to recover.

This normal healthy child came to hospital with a stomach problem. There was no complaint about his head or brain. There is no entry in the Applicant's folder that there is anything wrong with his head size or brain which could be contributory factors giving rise to the Applicant's present condition.

Dr. Lesi's report states:

"This child was first admitted to the CWM Hospital on 14.4.83 at age approximately three months with signs of intestinal obstruction. This was investigated and turned out to be intussusception which required reduction by laparotomy. He recovered well from the operation and was discharged on 26.4.83. Tevita was admitted a second time to CWM Hospital on 10.9.83 with convulsions due to fever brought on by chest infection. He was discharged on antibiotics on 12.9.83. On this admission it was noted that he was breastfed and was developing normally, creeping on tummy at seven months of age, and his immunisation

was up to date. He weighed 12.06 kg and his head circumference was 49 cm. Both these measurements were on the 97th percentile for age so he was a child big for his age.

A

Tevita's third admission to CWM Hospital was on 10.4.85 at 11.30 a.m. in the morning. This time he was flown from Lakeba Hospital. His presenting complaints were:

B

Vomiting and Constipation for 3 days

Abdominal distension for 2 days

Fever for 2/7

He had also vomited out a worm approximately nine inches in length.

C

His milestone development as recorded on this admission was normal. He stood at age one year and walked alone at age one year three months. He could say a few words.

His immunisation had all been given and he was still breastfed and on family diet.

D

Examination on admission revealed a pale, mild to moderately dehydrated child sleeping comfortably.

Temp 38 C Pulse 132/mm regular

E

Resp rate 28/min

Pupils = RTL. There was no lymphadenopathy.

His pulmonary and cardiovascular systems were found normal and neurologically he had no signs of meningitis and his power was normal.

F

Abdomen - Moderately distended

Scar over the right iliac fossa

Tender on palpation

No organ enlargement

Bowel sounds scarce

G

Rectal Exam - Good and/tone

Empty rectum

No blood on examining finger

He passed urine while being examined. A provisional diagnosis of intestinal obstruction was made.

His initial investigations included a

FBC Hb 9.46%

Urea + Electrolytes U30 Na 148 K4.5
CXR
Abdo X-ray

A

He was put on a drip and such regime and was stated on IV Benzyl Penicillin.

The next morning on 11.4.85 his antibiotic was changed to ampicillin and he was given a Dulcolax suppository.

B

At 2.00 p.m. the same day the child had convulsions lasting fifteen minutes. Child was noted to be very dehydrated.

The fits were controlled with diazepam and child was rehydrated and transferred to the Recovery Ward for closer observation.

C

Neurologically he was semi-comatosed and his pupils were reacting sluggishly. Fundi normal. His muscle tone was increased on the left side.

Reflexes were present and normal.

Gentamicin was added to Amicillin.

D

He went into surgery at 7.50 p.m. the same evening. The main findings on laparotomy were adhesions. There was an adhesion band obstructing the terminal ileum with dilated proximal gut right upto the duodenajejunal junction. There was also marked enlargement of the mesenteric nodes. The adhesions were freed and perforation at loop closed. Wound was closed and a corrugated drain left in situ.

E

Post-operatively the child continued to have problems of electrolyte imbalance and fever.

He had infection of the incision wound which grew E. Coli so antibiotic was changed to Septrin and Gentamicin.

F

He had a few short episodes of convulsions, 12 days and 14 days after operation. He started to vomit also and this led to a second laparotomy on 2.5.85. More adhesion were freed. There was no pus collection seen.

G

He recovered slowly and was started on feeds on 6.5.85.

He was only able to feed by spoon and he needed intensive physiotherapy. He went home on 17.5.85 and was seen in clinic on 28.5.85 where it was noted that he failed to open his mouth on 21.5.85. He was seen again in clinic and was reported to have had Convulsions and was seen by General

Practitioner who started him on Phenobarb.

A Later on Dilantin was added to Phenobarb to bring fits under control. He was now recorded to have spastic cerebral palsy.

His last clinic was on 27.9.85. His father had a job in Lautoka and the whole family was moving there.

B (Sgd) Dr. Lisi Vesikula Tikoduadua
Chief Medical Officer,
Paediatric Unit, CWM Hospital"

C I further found as fact that upon admission to CWMH he was attended to by nurses, Dr. Welby and a paediatrician Dr. Mudaliar. It was the paediatrician and his staff in the Childrens' Ward who were responsible for getting the Applicant ready for operation. The first Defendant was to do the operation and he was made aware of the Applicant's condition after the Applicant suffered from convulsion prior to the first operation. Dr. Etika (D1) told Dr. Welby that he will perform the operation once the Applicant's condition improves.

D The Applicant was operated upon. However, at the time of convulsion before the operation the Applicant needed oxygen. It is not in dispute, and I found as fact, and it is also abundantly clear from the evidence of Applicant's mother which I accepted, that there was no oxygen available in the ward the Applicant was in, and those attending him had to frantically rush around in an attempt to find an oxygen cylinder with oxygen in it which they found in about three minutes. It was evident from all the evidence particularly the evidence of the doctors and I so found as fact that the non-availability of oxygen at the crucial moment led to the onset of damage to the brain before the Applicant was taken to the theatre. No doubt a grave calamity befell the Applicant. It does raise an evidentiary inference to explain the disaster that it was the negligence of the staff in the paediatric section in treating the Applicant.

F Applicant's present condition

G Because of SCP the Applicant is unable to eat by himself and he cannot walk. The doctor who examined him in 1991 said that the Applicant suffers from SCP which means that due to "damage to cerebral cortex he has gone into spasm. It is a permanent feature and remain with him till he dies." He said that "the child is not a normal child - spasticity of the limb, had multiple dependant ulcers in back, elbows, shoulder blade, could not look after himself, completely dependent on someone who could look after him. He had difficulty in articulation - no voice pattern - no control over bowel or urine".

I have before me the evidence of the Applicant's mother whose evidence I accept in regard to the Applicant's present condition which I briefly state below.

The Applicant has no control over bowel or urine; he keeps on moving his arms and legs on "involuntary basis"; he has to be checked "on a 24 hour period" several times and in that time change 8 to 10 nappies. The mother has 6 other children to look after of whom the eldest is 17 years old and the youngest is aged 4 years. She lives at home with husband doing domestic duties.

A

She said that she needs two housemaids to look after the Applicant. One needs two people when feeding him because of his involuntary movements for one has to pin him down while another feeds him. The applicant needs special clothing as legs and arms are stiff. She uses 8-10 diapers a day which is a permanent feature to use throughout life. She cooks separately for him as his food has to be low in salt and fat; he is given more fruit and cereal; his food has to be mashed so that he does not choke.

B

He has to be given medical treatment from time to time and special cream is used which is applied on his sores.

C

The Applicant is going through a lot of pain and suffering. He cannot talk and makes a whining and guttural sound. When in discomfort the sound gets higher.

When cross-examined the mother said that the husband is the only source of income. He earns \$22,000.00 per year working for Public Rental Board but then they have other children to maintain and educate and most of them attend school. She said that she is 38 years old and has no health problem.

D

When re-examined she said that she is a virtual prisoner in the house which causes her a mental anguish.

E

Consideration of the issue

It is with the above background and facts that I now turn to consider the various heads of damage. Both counsel have prepared useful submissions to assist me and I have given due consideration to them.

F

As stated earlier, there is an agreement between the parties on two matters, firstly, multiplier agreed to is 18 years and secondly, interest as already stated hereabove.

HEADS OF DAMAGE

The Plaintiff claims damages under the following heads and I shall now consider the assessment of the appropriate damages and in doing so I have considered counsels' submissions in writing: (a) General damages, (b) Loss of Earnings and Loss of Expectation of Life and loss of earning capacity, (c) Cost of future care, clothing, food and medication and (d) interest.

G

GENERAL DAMAGES

A I have already stated hereabove the facts relating to the Applicant and his present condition including the pain and suffering he went through before and after admission to the hospital. The Applicant will continue to suffer with SCP for the rest of his life. He is now 15 years old and was 2 years old (in 1985) when he suffered SCP. In general damages are included pain and suffering, cost of future nursing and attendance and medical expenses, loss of amenities and loss of future earnings. It is a convenient list but not conclusive.

B The basic principle in awarding damages is to put the Plaintiff in the position he would have been had the accident not occurred. Assessing damages for non-pecuniary loss is fraught with difficulties. This problem has been stated by Earl of Halsbury LC in The Mediana [1900] AC at 116 thus:

C "You very often cannot even lay down any principle upon which you can give damages..... Take the most familiar and ordinary case: how is anybody to measure pain and suffering in moneys counted? Nobody can suggest that you can by any arithmetical calculation establish what is the exact sum of money which would represent such a thing as the pain and suffering which a person has undergone by reason of an accident..... But nevertheless the law recognises that as a topic upon which damages may be given."

D

E When liability is established or admitted, the Court applies the principle of 'restitutio in integrum' and it must award damages. There is no discretion. The injured person is entitled to compensation and the Court does its best and this process is described by Megaw LJ in Fuhri v. Jones (1979 C.A. unreported) in the manner following:

F "It will be appreciated, of course, though it is not always fully understood by persons who are not directly concerned with the law, that the law cannot attempt to attribute any particular figure of damages to any particular physical injury, serious or trivial. There is no way in which it can be said that such-and-such an injury is worth so much in terms of money. Indeed, in most cases for most injuries, anybody would say 'I would rather have avoided this injury than have any amount of money whatever in compensation'. But the court has to do the best it can by way of what are really conventional figures in relation to injuries, the court assessing, of course, on the individual facts of the case, what is sometimes called the tariff, making adjustments for particular facts of the particular case."

G

In making awards which are fair and reasonable the Court has to fall back on previous amounts so that the figure arrived at are in proportion to awards in other cases of those who have suffered injuries of comparable severity [Bristow

J in Lim Poh Choo v. Camden and Islington Area Health Authority [1979] Q.B. 196 at 201 C.A.].

Pain and suffering

Pain and suffering form part of the general damages award and the Applicant is entitled to damages for it. As stated in *Kemp & Kemp* (Vol 1 p200, 2-010):

"...the court must take into account, in making its assessment in the case of any particular plaintiff, the pain which he actually suffered and will suffer and the suffering which he has undergone and will undergo. Pain and suffering are not measurable by any absolute standard and it is not easy, if indeed possible other than in the most general way to compare the degree of pain and suffering experienced by different people, however, the individual circumstances of particular plaintiffs clearly have a significant effect upon the assessment of damages".

Prospective as well as past suffering must be allowed for. In Heaps v. Perriete Ltd (1937) 2 All E R 60 Greer L.J. said:

"We have to take into account not the suffering which he had immediately after the accident but the suffering that he will have throughout his life in future."

"In actions for personal injuries, the court is constantly required to form an estimate of chances and risks which cannot be determined with anything like precision; for example, the possibility that the injury will improve, or deteriorate, or the possibility of improved earnings if the accident had not occurred: see Fair v. London and North Western Rly Co. (1869) 21 LT 326". (*Munkman: Damages for Personal Injuries and Death* 8th Ed. at p.10).

The Applicant still suffers from pain and discomfort which he is not able to communicate so that one could alleviate complaints of this nature. There is hardly anything which he can do himself. The State does not provide any facilities for the care and maintenance of such victims. Hence the Applicant has to be looked after every minute of the day by the parents and hired nurses.

Mr. Singh submits that the "nature and degree of pain and suffering can only be speculated upon. The child is oblivious to his condition". Counsel suggests a figure of \$35,000.00 after allowing appropriate allowances for inflation and diminishing value of money in the light of Lim Poh Choo (supra) 1972 2 All E.R. 910.

Mr. Shah suggests a figure of \$85,000.00 under the head general damage and loss of amenities of life. He has referred the court to two cases in support, viz., Iowane Salaitoga v. Kylie Jane Anderson FCA 26/94 (where the female plaintiff was awarded \$85,000.00 general damages for pain and suffering)

and Anitra Kumar Singh v. Rentokil Laboratories Ltd FCA 73/91 (where a male security business owner was awarded \$60,000.00 as general damages).

- A In considering general damage I have taken into account the statements in the various judgments to which I refer hereunder bearing upon the nature of the case before me.

- B In the case of Cassel v. Hammersmith and Fulham Health Authority (unreported December 1990 - taken from Appendix A of *Damages for Personal Injury and Death* by David Kemp 5th Ed. p.183 et seq.) dealing with general damages for pain, suffering and loss of amenities Rose J awarded £110,000.00. His judgment was upheld, almost substantially, by the Court of Appeal.

- C Cassel was a case similar to this where Hugo Cassel born on 3 September 1982 suffered cerebral palsy before and during his birth. There was a grave and irreparable brain damage. Liability was admitted by the defendants.

There, as in this case, doctors stressed the importance of continuity and consistency in his care. Dealing with pain, suffering and loss of amenity Rose J said:

- D "In my judgment no useful purpose is served by a point by point comparison between different cases. The question is what is fair compensation in the instant case, having regard to the general level of roughly comparable awards."

- E There was also the case of Thomas v. Brighton Health Authority (1996) PIQR Q44 (quoting from NLJ Digest 2 August 1996 p 1154) involving a newly-born infant after an induced labour resulting in cerebral palsy where there was an award of £110,000.00 general damages.

- F In a case which is on all fours with the one before me, Higgins J of the Supreme Court of the Australian Capital Territory heard the case and assessed damages under various heads and awarded damages in the sum of A\$7,583,768.55 and costs. The case is Tomislav Lipovac b/nf Maria Lipovac v. Hamilton Holdings Pty Ltd, Peter Black, Tom Gavranic and The Australian Capital Territory (No. SC501 of 1993 Sup. Ct. of ACT). The Order on Assessment of Damages was made on 17 January 1997. I am grateful to Higgins J for making available to me at short notice a copy of his judgment which I found very useful.

- G In Lipovac (supra) the infant was 14 months old when the events which led to his brain damage occurred on 5 August 1977. He was taken to hospital and oxygen was administered but then while there the infant failed to respond as he had previously. After his release he exhibited and continued to exhibit, most distressing disabilities. He has "profound brain damage The plaintiff will require constant care and attention both medical and otherwise for the remainder of his life".

The general damages there awarded was A\$359,246.00 which included numerous items of expenditure not appropriate in the instant case. However it does indicate that the Applicant is entitled to a very substantial amount by way of general damages.

A

In the instant case the Applicant has as a result of the injury, suffered enormous disabilities which has resulted in him being kept under constant care and supervision. He has no control over his muscles and suffers from a combination of involuntary, unwanted and uncontrolled movements and is liable to fall.

B

I am of the view that the Applicant's injuries are on a par with a quadriplegic injury. Mr. Shah referred the Court to the case of Willett v. North Bedfordshire Health Authority (Nov 13, 1992 – Hobhouse J. High Court, Reported in *Kemp & Kemp, The Quantum of Damages Vol 2*) which was a case of spastic quadriplegia and cerebral palsy involving infant plaintiff aged six at time of trial. General damages of £105,000.00, apart from other damage, was awarded.

C

I would award \$85,000.00 by way of general damages in this case.

SPECIAL DAMAGE

(a) Loss of earnings

D

Under this head on the aspect of multiplicand and multiplier Malcolm Khan & Anor authors of *Medical Negligence* (1997) at p.206 said:

"..... future loss of earnings and expenses are assessed at the date of trial by reference to a multiplicand and a multiplier. The multiplicand will be the plaintiff's net annual loss The Courts will then apply a multiplier - the figure is an arbitrary one calculated as from the date of trial..... The multiplier is supposed to cover the period from the date of trial up to the time when the loss of earning or expenditure would cease. What is certain is that the court will not fix the multiplier as the number of years from the trial until retirement or death as that would result in over compensation. The general principle is that the interest and capital should be exhausted at the same time as the plaintiff's need is extinguished. Additionally, the court will have to assess what is the real return after tax, national insurance and inflation, and on investment of the money. In looking at the plaintiff's life expectancy, account will be taken of the general vicissitudes of life, and the fact that the lump sum can immediately be invested. In estimating the real return of money a discount rate of 4.5%, has been adopted (see, for example, Cookson v Knowles [1979] AC 566). In other words, according to the Pearson Commission data, the court will assume that the plaintiff who receives compensation will subsequently invest it and receive a rate of return of 4.5% per annum after tax and inflation are taken into

E

F

G

account.”

A The fact that awards have been made under the head of loss of earnings (in the case of young children) there is no doubt as can be seen from the cases to which I refer to hereunder.

Difficulties do arise in assessing the future earnings of a child much more so in the case of a permanently disabled child as in the instant case.

B His potential earning has to be assessed as at the date when he starts earning. On this aspect I quote from *Damages for personal injuries and death* by Munkman 9th Ed. where at p.72 it is stated:

C “In *Connolly v. Camden and Islington Area Health Authority* [1981] 3 All E.R. 250 where the child of 5 was expected to live to about 27, a modest sum was awarded for that limited period but a claim for the “lost years” was considered too nebulous and valued at nil. In *Croke v. Wiseman* [1981] 3 All E.R. 852 C.A. (a child under 2 with brain damage who would live to be 40) a majority of the court assumed he would earn the national average wage for 22 years, valued this at just under 9 years’ purchase, but reduced this multiple to 5 to arrive at present value”.

D

In *Joyce v. Yeomans* [1981] 2 All E.R. 21 a 10 year old boy suffered brain damage with epilepsy (unlike the injury in the instant case) a broadly estimated sum of \$7500 was made to represent the detriment to his earning capacity.

E In *Lipovac* (supra) at p.117 Higgins J made an award for loss of earning capacity.

F Here is a case where the Applicant will never be able to work. I agree with Rose J in *Cassels* (supra) when he said of future earnings that “this, as it seems to me, is much the most difficult matter to resolve with fairness to both sides because of the imponderables”. Looking at the principles involved in making an award under this head, the fact remains that the Applicant is entitled to an award taking “all the various probabilities, possibilities and imponderables”.

Rose J in *Cassels* (supra) worked out the award by the use of the multiplier as follows:

G

“I turn to the multiplier. It is likely, almost to the point of certainty, that Hugo would have started earning between the ages of 18 and 23. I find it impossible to state precisely when within that bracket he would have done so, though I find that an age nearer the upper limit than the lower would have been a likelier starting point. He is now just over eight and, as I found earlier, his life expectancy is such that he will probably have a normal working life to the age of 65. Having regard to these



matters, a multiplier of 10 is, in my view, appropriate. I therefore award as damages for future loss of earnings £350,000."

Under this head Mr. Shah suggests a figure of \$74,880.00 (\$80 x 936); but Mr. Singh as I understand him to say is that he is not agreeable to any amount.

There are examples of cases in which an award, for loss of earnings was made such as:

- (a) In Thomas (supra) £200,000.00 for loss of future earnings in the case of a newly-born child after an induced labour.
- (b) In Lipovac (supra) the sum of A\$612,625.00 for loss of earning capacity to age 60 at average weekly earning less contingencies at 5%.
- (c) In Harris v. Harris [1973] Vol 1 Lloyd's L.R. (C.A.) p.445 loss of future earnings in the sum of £15,000 was awarded to the Plaintiff aged 12½ years who sustained severe brain injuries in a road accident.
- (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 (C.A.) 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".
- (e) In Parker v. Parker (1979) Qd. R 50 the Plaintiff, an 8 years old girl at the time when she suffered grave brain injuries and a severe leg disability was awarded \$94,000 for loss of earning capacity. At the date of trial she was 15 years old. There Lucas J at p.53 said:

"I have no doubt that if it had not been for the accident Jacqueline would have been able to earn a substantial income; it seems to me to be reasonable to assume that she would earn no less than \$150.00 per week. The span of years which should be applied to this amount should I think be 35; this

- A takes into account the fact that she would probably have married and been lost to the workforce either temporarily or permanently.”

For the above reasons, since the multiplier has been agreed I would award the sum of \$74,880.00 [made up of \$80 x 18 years (936 weeks)].

(b) Future Care

- B In this case the Applicant was and still is cared for at home. This cost of care is recoverable and this is applicable also where the help is provided gratuitously e.g. by a family friend [vide Donnelly v. Joyce [1974] Q.B. 454 and Housecroft v. Burnett [1986] 1 All.E.R. 332].

- C There was the case of Stephens v. Doncaster HA (1996) 7 Med. L.R. 357, Buxton J QBD (quoting from Current Law March Digest 1997) where S was born in traumatic circumstances which left him severely handicapped and suffering from quadriplegia which meant that he would be fully dependent on an adult for all his care needs throughout his life. His life expectancy was 25 years. There it was held that the correct multiplier was 12 and as far as care of him by his parents is concerned it was held, inter alia, that:

- D “a care and therapy package which removes the main burden of the physical handling and routine attention from S’s parents was reasonable. Specific night care attendance from the age of 15 was reasonable. The fact that S’s parents would spend considerable time with him did not justify any reduction in the amount of care required, and his parent’s attention should not be viewed as part of the care regime.”
- E

On the need for attendant care, Higgins J in Lipovac (supra) at p.115 of his judgment referred to authorities and stated:

- F “To date, that attendant care has been provided by the plaintiff’s parents voluntarily with the assistance of respite care for which they have paid albeit at less than commercial rates.

- G Griffiths v Kerkemeyer (1977) 139 CLR 161 decided that a plaintiff should receive damages representing the value of gratuitous services necessitated by the injury done to a plaintiff by a negligent defendant. That decision was further explained by the High Court in Van Gervan v Fenton (1992) 175 CLR 327. It is now clear that the damages are to be awarded, not by reference to the sums, if any, expended upon services rendered to the plaintiff or to the loss incurred by any carer, but by reference to the market cost of providing the services needed by the plaintiff as a result of the damage suffered.

According to Mason CJ, Toohey and McHugh JJ, the quantification of the sum to be awarded for attendant care depends on the answer to two questions, at 338:-

- “(a) What are the services required to satisfy the plaintiff’s need resulting from the defendant’s wrong?
(b) What is the value of those services?”

The Applicant was a dependant child at the time of the incident and required full-time care. He was cared for by his parents by way of gratuitous services. I consider that the value of full-time care must be allowed from the time of injury.

Mr. Singh says that there is need for one housemaid at \$33 per week but Mr. Shah says that 2 housemaids are needed at \$60-\$70 per week.

The condition that the Applicant is in, he needs to be watched 24 hours a day. It will be difficult for one person to attend to him. Hence on the facts of this case there is need for two persons to look after the Applicant on a 24 hour basis at the weekly wage of \$30.00 per week. This will come to 936 weeks (18 years x 52 weeks) x \$30 = \$28,080.00. x 2 = \$56,160.00.

(c) Clothing

I agree with Mr. Shah’s submissions on this aspect. The mother has napkins of both types (these are disposable and cloth napkins). The prices have been stated for the nappies by both counsel. One must not forget that this is going to be a life long feature. As Mr. Shah says apart from napkins there is need for soap, water, human labour, disinfectant, powder, ointment and everything else that is needed to maintain a hygienically safe child. This is a very important item of expenditure and one cannot be too frugal about it. One has to be very reasonable in this regard.

I agree with the figure suggested by Mr. Shah i.e. $\$40 \times 936 = \$37,440.00$

(d) Food

Having considered the submissions of both counsel under this head I consider that, bearing in mind that the Applicant is on special diet including fruits which are expensive, the sum of \$50 per week would be a reasonable figure. One cannot compare the garment workers with the Applicant as suggested by Mr. Singh that they live on \$30. He comes in a special category of his own in view of his condition. The applicant has to be fed with proper food to live and maintain his health.

The figure for this claim comes to $\$46,800.00$ ($\$50 \times 936$) = \$46,800.00)

(e) Medical Expenses

Medical expenses are recoverable provided they are reasonable and have been

and will be incurred as a result of the incident.

- A On the evidence before me I consider the sum of \$9.00 per week would be a reasonable amount to be awarded which comes to \$8424.00 (\$9 x 936).

INTEREST

- B There is a claim for interest and this has been pleaded as required [vide Usha Kiran v. The Attorney-General of Fiji (F.C.A. Civ. App. 25/89) and The Attorney-General of Fiji v. Waisale Naicegulevu (F.C.A. 22/89)]. The Plaintiff is therefore entitled to interest on general and special damages.

- C It was held in Picket v. British Rail Engineering Ltd [1980] AC 136, which was a case of personal injuries, that interest on general damages was awarded for the purpose of compensating a plaintiff for being kept out of the capital sum. As for interest on special damages it was held in Jefford and Another v. Gee [1970] 2 WLR 702 that in general interest should be allowed on special damages from the date of accident to the date of trial at half the appropriate rate. However, under section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap. 27 there is discretion in the Court to fix rate of interest which should be paid. The section provides:

- D “3. In any proceedings tried in the (High) Court for the recovery of any debt or damages the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages...”

- E In the exercise of my discretion bearing in mind the agreement parties have reached on the rate of interest I will award interest on general damages at the rate of \$8.00% per annum.

- F Although loss of earnings is a special damage the Applicant is not entitled to any interest on it for he is 15 years old at present and would not have commenced work in my estimation until he reached 21 years of age if he was not disabled.

Also, on hired nurses, clothing, food and medication being future expenses interest is not payable.

Summary of Damages assessed and interest

- G In the result, I assess and award damages and interest as hereunder:

GENERAL DAMAGES	\$85000.00
-----------------	------------

Interest (agreed) thereon at
\$8.00% p.a. from 11.4.85
(date of injury) to 20.3.98

TEVITA TABUA WAQABACA a minor by next friend
 JOSAIWA WAQABACA v. DR. ETIKA VUDINIABOLA

(date of assessment of damages i.e. 12 years 11½ months Less paid \$40,000 on 20.3.96			A
Interest thereon		\$74,800.00	
Less paid \$60,000 (6.2.97)			
Interest on balance		\$ 3,000.00	
		\$77,800.00	B
 SPECIAL DAMAGES			
Loss of earnings (\$80.00 per week x 18 years (936 weeks) - multiplier (18) agreed		\$74,880.00	C
Hired nurses (2) 936 weeks x \$30		\$56,160.00	
Clothing (napkins etc)		\$37,440.00	
Food (936 x \$60 per week)		\$46,800.00	D
Medication		\$ 8,424.00	
Total of award and interest		\$386,504.00	
Less paid 20.3.96		\$40,000.00	E
Less paid 6.2.97		\$60,000.00	
		\$100,000.00	\$100,000.00
	Balance payable	\$286,504.00	F

There will therefore be judgment for the plaintiff against the second defendant (D2) in the sum of \$308,704.00 by way of damages and the sum of \$77,800.00 interest on general damages making a total sum of \$386,504.00 with costs to be taxed if not agreed. The sum of \$100,000.00 has already been paid leaving a balance of \$286,504.00 as due an payable.

G

It is ordered that the said balance sum of \$286,504.00 be paid into Court as it is the Court's view that, as the Applicant is an infant his interest will be best looked after by the Public Trustee as far as payment out is concerned. It is ordered that the Chief Registrar upon receipt of the said sum pay out the said sum to the Public Trustee as I had already done for the interim payment in this case for the infant's benefit to be disbursed as the Public Trustee in his absolute discretion deems fit until the infant reaches the age of 21 years with

liberty reserved to the parties including the Public Trustee to apply to Court generally on any aspect of the administration of the fund.

A

(Damages assessed and awarded.)