IN THE SUPREME COURT OF FIJI
[CIVIL APPELLATE JURISDICTION]

Civil Petition No: CBV 0005 OF 2023
[On Appeal from the Court of Appeal No: ABU0003/21]

BETWEEN 1. **THE PERMANENT SECRETARY FOR HEALTH**
2. **THE ATTORNEY-GENERAL OF FIJI**

Petitioners

KITIONE WAQA WILKINSON

Respondent

Civil Petition No: CBV 0015 OF 2023
[On Appeal from the Court of Appeal No: ABU0003/21]

KITIONE WAQA WILKINSON

Petitioner

BETWEEN 1. **THE PERMANENT SECRETARY FOR HEALTH**
2. **THE ATTORNEY-GENERAL OF FIJI**

Respondents

Coram The Hon. Mr Justice Anthony Gates, Judge of the Supreme Court
The Hon. Mr Justice Brian Keith, Judge of the Supreme Court
The Hon. Mr. Justice Terence Arnold, Judge of the Supreme Court

Counsel: Mr J. Mainavolau for the Petitioners (CBV 5/2023)
Mr. K. Maisamoa for the Respondent (CBV 5/2023)

Mr. K. Maisamoa for the Petitioner (CBV 15/2023)
Mr J. Mainavolau for the Respondents (CBV 15/2023)

Date of Hearing: 12th October, 2023

Date of Judgment: 27th October, 2023

JUDGMENT

Gates, J

[1] At the outset of the hearing of both petitions, Mr Mainavolau for the Attorney General, informed the court that those grounds of his petition relating to liability were no longer being pursued. He accepted that liability had been established. The only issue remaining in Petition CBV 5/2023 was the award to the Respondent under the Compensation to Relatives Act 1920 [as amended], for the loss of earnings or prospective earnings of the deceased child.

[2] The action was brought in the name of Kitione, a 2 year old child. His father, Viliame Tiko, sued as Kitione's next friend, the Ministry of Health, for negligence in the handling of his son's treatment at the Ba Health Centre and at the Lautoka Hospital, which had resulted in Kitione's death.

Facts

[3] On the 13th April 2015 Viliame took his son to the Ba Health Centre. Kitione had had a fall and injured the underside of his tongue. Subsequently, when Kitione was operated on at the Lautoka Hospital, it was found the injury had been caused by wood splinters. These were removed under anesthetic and the infected injury drained.

[4] But before father and child went to the Lautoka Hospital, the staff nurse on duty at Ba Health Centre had not referred the child to the doctor on duty. As a result, when Viliame brought the child to her, there was no investigation carried out, or preliminary diagnosis made, as to what was giving rise to the pain and the swelling. The father was told to go home, mix the salt given with warm water, and to give it to the child to gargle. This was the account of the first visit to the Ba Health Centre which the trial Judge accepted.

[5] Naturally the 2 year old child could not gargle. Indeed Dr Renita, the doctor on duty at the time, admitted in evidence that it was not the practice in Fiji to give a two year old child salt water to gargle. The father said he used a syringe to apply the mix given. The child deteriorated and was in pain. The father took him back to the Health Centre two days later on 15th April 2015.

[6] The staff nurse admitted in evidence that the Health Centre file had gone missing. There were no notes available therefore of any examination, diagnosis, or treatment before the court.

[7] On the return to the Health Centre Dr Renita did see the patient. She realized the situation was grave, and immediately went with the father and child by ambulance to Lautoka Hospital. The trial judge found the handling of the child patient at the Health Centre to have been inadequate. There had been a lack of care and no proper examination, a failure to diagnose, and a failure to treat competently. The doctor and staff nurse had been negligent.

[8] At the Lautoka Hospital Dr Losalini had advised Dr Renita first to take the child to have a scan. The scan room was busy. But Dr Renita failed to explain to the radiographer the urgency of her case prior to emergency surgery. Instead she skipped this procedure and took the child to the mini-operating theatre.

[9] Apart from the infected injury under the tongue, the child's pre-operative condition was considered stable. All of the witnesses in the case confirmed that Kitione was a healthy infant according to his weight and age as noted in the hospital medical notes [PEX5]. He had no obvious respiratory distress or problem with his breathing at that stage.

[10] The trial judge concluded that at the hospital after the operation the child was administered an overdose of drugs "*by frequent injections without the doctor's advice*." On 16th April 2015, the day after the operation, the father noticed the child was active. The nurses asked him to leave whilst they sponged the child. He was outside for a few minutes. Upon his return he saw the baby lying down with no movement with the ventilating machine beeping slowly to indicate that there was no pulse. The staff nurse came running. Nurses tried to give oxygen for the baby to revive. The doctor eventually arrived. The father was asked to step outside again. Later he asked the doctor what had happened to the tube. Dr. Joseph said "*it was not the right size, and right size was out of stock*."

[11] The judge found the father's observation was consistent with the notes recorded by the nurses. Dr. Koroivueta [PW2] a very experienced doctor with expertise in forensic pathology, testified that it was an unusual procedure for a doctor to give instructions for the ordering of the administration of the drug vecuronium over the phone because it was a dangerous drug.

[12] From the time of the incident, the loss of pulse and the coma, the child was kept alive on life support equipment. That support was finally withdrawn after two brain tests confirmed that the child was indeed brain dead.

[13] When the emergency occurred Dr. Joseph should have attended immediately, not 2 hours 15 mins later. By that time there was nothing more to be done. It was too late.

[14] Dr. James Auto (DW4), the Consultant Pediatrician at the Lautoka Hospital, stated during his cross-examination that the reason the post-operative team found it difficult to insert the endotracheal tube down the trachea of the baby was because the submandibular abscess had not been incised properly by the surgeon. In effect he blamed the surgeon for the child's lack of oxygen in the lungs. It began from the operating theatre. There were other difficulties. The ETT was inserted beyond the required mark and the ETT itself was leaking, denying a sufficiency of oxygen to the child patient.

[15] At the end of the day, the judge concluded at para [77]:

(i) Whether the Staff Nurse Biudole was correct in not referring Kitione to the doctor on the first presentation? No.

(ii) Whether Kitione was correctly diagnosed with suspected Ludwig Angina by Dr Renita? No.

(iii) Whether Kitione's blood count was done at Ba Health Centre? Not proved.

(iv) Whether Kitione needed a scan/x-ray upon his arrival at Lautoka Hospital from Ba Health Centre? Yes.

(v) Whether consent was properly given for the conduct of surgery on Kitione? No.

(vi) Whether Kitione was given proper treatment and care when in PICU? No.

(vii) Whether Kitione was given the correct dose of drugs/medication during his administration at PICU? No.

(viii) Whether it was appropriate to have Kitione's IV drip leaking? No.

[16] The judge found the doctors and nurses at the Ba Health Centre and at the Lautoka Hospital to have been negligent:

> *"[84] . . . . . in diagnosing and in treatment of the plaintiff (child), resulting in the death of the child, and thereby breached their duty of care owed to the plaintiff. This follows that the first defendant is vicariously liable to the death of the child and is also liable to pay damages to the plaintiff."*

Application for enlargement of time

[17] The Attorney General as petitioner lodged his petition [CBV5/2023] on 4th April 2023. The Court of Appeal had handed down its decision on 24th February, 2023. The respondent, not having yet received the damages he had been awarded as compensation, thereafter decided to bring a petition himself. His solicitors filed an application for enlargement of time [CBV 15/2023]. The time for lodging a petition against the decision of the Court of Appeal expired on 7th April 2023. This summons is marked "*fees paid*" on 30th June 2023. He was therefore late by 8 weeks.

Length of Delay

[18] In examining the usual points for consideration in such applications, it can be said that whilst this is not a delay of a mere few days, nonetheless it is one that is less than 2 months: **Native Land Trust Board v Khan & Another** [2013] FJSC 1; CBV0002.2013 (15 March 2013). It was conceded that the delay was not inordinate.

Reasons for delay

[19] Had the State paid out the damages awarded, it is likely there would not have been a petition prepared by the plaintiff. This much can be gathered from the affidavit filed with his summons. Since the Attorney General lodged its petition so close to the end of the 42 day appeal period, any response from the plaintiff would take some time to prepare. Once late, several documents would have to be prepared and filed with the petition. The plaintiff was informed by his solicitor that his solicitor was engaged in two other trials and another matter. This partially explains the delay.

Whether meritorious?

[20] Had the length of delay been as much as 7 or 8 months as in **Vunimoli Sawmill Ltd v Sen** [2013] FJCA 140; ABU28.2013 (20 December 2013), the petitioner would have had to show that the appeal was both meritorious, and that it would probably succeed. Being less than two months late, the grounds here can be viewed as meritorious without going further. They deal with live issues also involving a consideration of the Attorney

General's petition, compensation in relation to deceased minors, and the use of multiplicands in infant deaths for assessing loss of earnings awards.

Extent of prejudice to opponent

[21] If the application is allowed, would the other party be prejudiced? The result of enlargement would be that the petitions would be heard together. In view of the concessions by the Attorney General on liability, and the petitioner's sole focus on loss of earnings, the ability to respond to such arguments has not resulted in significant prejudice.

[22] The Attorney General opposed the application. No affidavit was filed in opposition. The application has some merit. It would be just in the circumstances to grant leave for enlargement. The late petition can be dealt with in this judgment based on the relevant arguments which were advanced by both sides during the hearing.

The High Court

[23] The trial Judge awarded the following damages as compensation:

1.	General damages for pain and suffering		$25,000
2.	Loss of earnings or prospective earnings		$132,600
3.	Exemplary damages		$10,000
4.	Special damages		$660
5.	Costs		$3,000
	TOTAL	=	**$171,260**

The Court of Appeal

[24] On 24th February 2023 the Court of Appeal delivered its judgment. It dismissed the Attorney General's appeal on liability and reduced the total damages to $110,660. It ordered costs of the appeal in addition to the $3,000 costs in the High Court, of $5,000.

[25] The court sought to interfere, only with regard to the compensation for loss of earnings. It accepted the Attorney General's argument that this was *"not a fit case to follow the multiplicand method."* Applying common law, and finding the child as a 2 year old was not an economic contributor to the family, the court reduced the loss of earnings to $75,000.

Special damages

[26] The writ, indorsed with a Statement of Claim, had sought special damages for transportation $500, and 2 weeks of expenses as care provider during the time of admission at Lautoka Hospital until the infant was taken out of the mortuary for burial.

[27] Normally special damages of this nature, if reasonable, are agreed before trial. At the Order 34 stage, that position could be made clear. Sometimes some clarification is sought so that this issue can be settled before trial. Lawyers in Fiji will well comprehend whether such expenses are likely and reasonable. Here the claimant, an indigent security guard, lived in a village in Rakiraki and would require transportation to the Ba Health Centre and for the longer journeys to the Lautoka Hospital.

[28] $80 per week for attendance at the Lautoka Hospital till the body was taken to the village for burial was a reasonable and proper claim.

[29] Yet in this case, special damages were not agreed. This was an unnecessary and insensitive stance to have adopted by the Attorney General's office. It was right for the trial judge, as judges often do, to exercise a discretion, and though the plaintiff did not provide receipts, to order special damages. His lordship observed *"it is rare that people get receipts for this sort of expenses."*

[30] One way for solicitors preparing cases to deal with this inadequacy, is for the plaintiff to make a statutory declaration listing the frequency of journeys, the type of transport used,

and to give the total sum claimed. The purpose of the journeys would appear to be obvious. That declaration could be shown to the other side so as to clarify the purpose and the cost involved so that reasonableness could be assessed early and that the special damages claimed be accepted by the other side.

Were funeral expenses in issue?

[31] The prayer in the Statement of Claim did not refer specifically to a claim for compensation for funeral expenses under special damages. Funeral expenses were not referred to by the judge in his judgment, or in the award of special damages, or under the Compensation to Relatives Head. Was it a litigation issue?

[32] The following exchange took place (High Court record pages 232 – 233):

"Q: And witness you don't have documentary information with you attesting that you had incurred expenses for funeral rites and things like that for your child?
A: Yes my Lord.

Q: You don't have it there with you?
A: No.

Crt: No receipts for special damages?
A: No.

Q: Nor do you have any documentary evidence before the court that you had incurred expenses for transport? It's not in my bundle of documents correct, it's in your bag but not in your evidence, correct?
A: No my Lord.

Q: We can only work according to the documents that is before the court.
PC: I think with respect to the expenses that is a case law which
Crt: At the moment there is no document produced in court in respect of negligence.

DC: Just one or two more questions.

Q: *Do you think that this information that I am telling you about do you think they were important information that you should have produced in court witness?*
A: *Is it regarding receipts my Lord?*

Q: *Receipts and financial information supporting funeral expenses and transport expenses.*
A: *Yes.*

Q: *Do you think your lawyer should have advised you about this?*
A: *Yes.*

Q: *You claiming for all these damages, all these amount of money I can sustain and you have not submitted these important documents in your bundle of documents.*

[33] In his closing address at the trial dealing with special damages defence counsel first said that nothing should be awarded for funeral expenses, and then concluded:

> *"otherwise, as to claim for funeral expenses, we concede that an appropriate amount of $500 would suffice."*

[34] I consider funeral expenses were in issue, though not presented to the court with clarity and thoroughness. The child had died. Evidence was given that he had been buried, that there had been a funeral, and that the plaintiff had incurred expenses. It is well known in the community that *itaukei* Christian funerals, even in villages, cost a great deal more than $500. I will refer to this matter further on under the Compensation to Relatives Head of claim.

Observations on missing file

[35] All the doctors and nurses notes at the Lautoka Hospital were available to the High Court. Not so the medical notes at the Ba Health Centre. The judge made some unfavourable comments on this absence. The doctor said she had handed the file over to (OT) [surgical room]. This was denied by Viliame. But the judge did not believe the doctor or the nurse at Ba Health Centre when it was said the file was missing.

[36] All too often in medical negligence cases courts are told the medical file has gone missing. It might be thought that its loss will make it more difficult for the party complaining to succeed in establishing negligence. But generally it makes it much more difficult for the medical witnesses to tell their side of the story with accuracy. A doctor or a nurse handles many patients everyday of duty. They cannot be expected to remember the volume of detail of the symptoms they found upon examination, the chronology of events before, during, or post operation, and the drugs administered, and what had caused alterations in treatment in response to improvement or deterioration of the patient. Without the hospital notes a medical witness will find it much more difficult to mount a defence. One can but hope that this practice will cease.

Remaining grounds of appeal

[37] The Attorney's counsel relied on grounds which in summary were:

1. The loss of earnings sum of $75,000 was excessive.
2. The Court of Appeal failed to cite authority for its award or albeit reduced award.
3. A 2 year old minor was not entitled to such exorbitant damages under common law.
4. The child was not entitled to damages for loss of earnings, or alternatively he was only entitled to minimal compensation under this head.

[38] Reliance was placed on ***Moli v Bingwor*** [2003] FJHC 279; HBC0335.1998 (4 April 2003). The deceased was a 10½ year old girl who died from a misdiagnosed appendicitis. Under the Compensation to Relatives Head the judge awarded $26,000 for loss of earnings. Petitioner's Counsel before us said this amount had been correctly awarded.

[39] Ground 3 that there was no entitlement under Common Law must fail. Common Law authority had provided interpretation for claims under the Compensation to Relatives Act, and many cases were cited in **Moli**. A plaintiff must bring himself or herself within the provisions of the statute, which the plaintiff has done.

History of the Statute

[40] In ***McCarthy v Palmer*** (1957) NZLR 442 McGregor J considered the origins and history of the cause of action under the New Zealand statute *Deaths by Accidents Compensation Act 1952. Lord Campbell's Act* [Fatal Accidents Act 1846] was also considered. It was described as a new and anomalous kind of right by way of exception. It did not apply to Scotland. Scotland had its own statute which recognized the action for assythment. The English and Scottish Acts had different provisions. The English Act provided for compensation to be limited to pecuniary loss only, whereas the Scottish law provided for damages for indemnification and also for solatium. This Latin word connoted "*consolation*" or "*solace for wounded feelings*."

[41] From an early date after the passing of Lord Campbell's Act it was authoritatively accepted that the plaintiff must show that he or she had lost a reasonable probability of pecuniary advantage to found a claim under the statute. Coleridge J in ***Blake v The Midland Railway*** (1852) 18 QB 93 said the Act was not for solacing their wounded feelings. Amendments in 1936 made it clear the statute provided for awards of damages for actual pecuniary loss and medical and funeral expenses incurred by the deceased relatives.

[42] The Fiji Act is much wider in scope and is not so limited. It provides for actions to be brought where death has been caused by negligence [Section 3]. Significantly the action can be brought for the benefit of the wife, husband, parent, and child of the person whose death has been so caused [Section 4]. Solatium is not excluded and funeral expenses are specifically included.

[43] The English cases referred to in the Attorney's submission are interpreting legislation that is more restricted.

Changing Values

[44] Professor Jill Wieber Lens writing in the Boston University Law Review [2020] Vol.100 – 437 to 500 said:

> *"Child labor gradually came to an end in the United States sometime after 1910 and before the 1930s. The end of child labor spelled trouble for the pecuniary measure of damages for wrongful death. If children did not work, they did not contribute to the house economically. The Michigan Supreme Court explained that the pecuniary measure of damages "reflect[s] the philosophy of the times, its ideals, and its social conditions . . . It was an era when ample work could be found for the agile bodies and nimble fingers of small children" and "a day when employment of children of tender years was the accepted practice and the[i]r pecuniary contributions to the family both substantial and provable." But "[w]hatever the situation may have been in 1846, as the children brought home their wages from plant, mine, and mill, today their gainful employment is an arrant fiction and we know it."*

[45] In the 19th century children from necessity worked in child labour situations in order to assist poor families. The loss of such a child was often a severe blow to the child's family. They helped on a farm or small holding, in shops, factory, or to help parents some of whom could not work for reason of disability or previous factory accident. Those times have largely gone.

[46] Attitudes towards children have changed. There has been less change in the approach towards what is to be compensated. More focus is now to be placed on loss of relation damages. It has to be understood that a parent does not expect to bury his or her child. In ***Winner v Sharp*** 43 So.2d 634, 637 (Fla 1949) (en banc) the Florida Supreme Court observed that those who have not lost a child "*can hardly have an adequate idea of the mental pain and anguish that one undergoes for such a tragedy.*" The parents have suffered a moral injury.

What is the methodology for calculating the compensation?

[47] It has to be accepted that the award of compensation for the relatives can never provide a just and sufficient replacement for the lost child. Whatever system of assessment is

arrived at will be a blunt instrument and a mere speculative calculation. But the courts are always urged to do their best and to carry out the duty imposed on them.

[48] The Attorney's counsel accepted that **Moli's** case was rightly decided. Pathik J's award of $26,000 was correct. His Lordship had stated that the right of action under the act had conferred on the near relative "*a right which is an independent right and not a continuation of the cause of action vested in the deceased*." The award was made on the basis that there was no entitlement to consideration of solatium for mental distress. This was the grief, and the loss of relationship injury suffered.

[49] Imprecise and unscientific it might be, but in making the assessment of loss, resort could properly be had to the multiplicand and multiplier system to calculate the loss under this head. It deals with the pecuniary part of the relatives loss. I see no obvious injustice in its use and it is the better for being a transparent method. There is no logical reason why it should be shied away from, which had been the view of the Court of Appeal. Nor should it be thought that if a deceased child was only of tender years that the relatives loss should be regarded as less than that for a young person of 17 or 22 years of age. Of course the court making the award for a 17 or 22 year old would have more information at its finger tips in order to assess likely career or earning potential.

[50] It is now 20 years on from the decision in **Moli**, when Pathik J considered other awards made only 10 years previous to his decision to have been too low to be followed in current awards. Many of the cases resulted in derisory sums being awarded, even by money values at the time.

[51] It is reasonable to start with a multiplicand of $200pw [wages] x 52 weeks = $10,400pa. Applying a multiplier of 20 we arrive at a figure of $208,000. Taking 40% from that figure for his own reasonable living expenses that would have been incurred = $124,800. A further deduction of 10% for the fact that advance payment is being made in a lump sum, leaves a figure of $112,320.00.

[52] I believe that figure could have included an additional figure of solatium for the loss of relationship of $20,000. However we did not invite specific submissions on this approach and so we make no order for solatium. This issue could well feature in argument in a later case with similar facts.

[53] The last consideration is the compensation for the funeral for which the plaintiff had incurred expenses.

[54] In **Moli**, Pathik J had this to say on the subject:

> "On the claim for '**funeral expenses**' I have dealt with this aspect in my judgments in **Rupeni Navunisaravi v Pradeep Kumar** and **Raja Ram** (40 FLR 58 at 65-66, 1994) and in **Bibi Nanson d/o Mohammed Hussein v Ramesh Chand & Dateline Truckers Limited** (C.A. No. 40/96 – judgment 31.10.02).
>
> For ease of reference, I repeat hereunder what I said in those cases and I still hold the same views as I stated there.
> **Although there is no definition of 'funeral expenses' in Cap. 29 it provides in s.11 that "damages may be awarded in respect of the funeral expenses of the deceased person if such expenses have been incurred by the parties for whose benefit the action is brought".**
>
> It would appear therefore that the test of reasonableness would apply.
>
> Some indication of what the word "*funeral*" is usually taken to comprehend has been stated by Mayo J. in **Public Trustee v Bednarezyk** (1959) SASR 178 at 180 (quoting from book by Luntz on Assessment of Damages 3rd Ed. p.439) as follows:-

"The word 'funeral' is usually taken to comprehend the disposal of human remains including accompanying rites and ceremonies, that is to say, the procedure of, and appertaining to burial or cremation, in the course of which the body is prepared for burial and conveyed by cortege to the necropolis. Such initial stages as acquisition of burial plot, public notice, obtaining a certificate of death, permission to cremate or bury, will form part of the procedure and the cost will be funeral expenses".

According to custom there are certain expenses, such as in this case, for the "*reguregu*" that one cannot avoid and it certainly is part of the expenses relating to the funeral of the deceased. In the Fiji context, bearing in mind the traditional Fijian ceremony associated with the funeral I will allow a reasonable sum under this head. In **Kesi Ganikeli Liva v Mahendra Pal Chaudhary** (Supreme Court C.A. 391/79) the then Chief Registrar (now Scott J) awarded the sum of $1500 for funeral expenses; and in **Shiu Shankar s/o Madhwan & Anor** (Sup. Ct. Ltk. Ca.A. 31/74) Dyke J stated that "**religious rites following the death of a Hindu person are reasonable and the claim under this head is allowed**".

I have noted Mr. Udit's comments on this item opposing the claim for $3000.00 and he suggests $1500.00. No doubt $1500.00 has been awarded in the past like in the two abovementioned cases. It is about ten years ago that that award was made. We are all familiar with the customs of the various races in Fiji and in the context of funerals there are certain expectations and obligations which have to be fulfilled. It is only right that reasonable expenses ought to be allowed without requiring the plaintiff to produce receipts and proof of each item of expenditure as is required for the purposes of proving special damages.

In this case on the facts of this case for the reasons I have given the sum of $3000.00 is reasonable for funeral expenses and I award this sum."

[55] Section 11 of the Act allows for compensation to be awarded for funeral expenses. Ample authority is available in Fiji for funeral expenses, usually put forward in special damages but clearly available under the Compensation to Relatives Act. Awards in this regard are to be reasonable. Pathik J mentions many of the expenses likely to be covered by the relatives. There is an acceptance of these and of what a Fiji funeral in context will cost. It is well established that persons, when in such stress and grief, are not expected to maintain neat records of all their expenditure at this fraught time.

[56] In the circumstances I would add to the award under this head a sum of $4000 for funeral expenses.

[57] I would grant leave for the Attorney General's petition, but the petition is to be dismissed. The indigent plaintiff has been brought again to the higher court. These expenses should not detract from the award to which he has in part succeeded. He should have costs in this court summarily assessed of $8000.

The plaintiff's petition

[58] Mr Maisamoa in his petition [Grounds (i), (iii) and (iv)] succeeds in establishing that the Court of Appeal had been an error in not following the assessment methodology of the multiplicand and multiplier: ***Daya Ram v Peni Cara*** [1983] 29 Fiji LR 147 and 149G.

[59] I would grant leave to appeal to the plaintiff petitioner, who succeeds on those grounds.

Keith, J

Introduction

[60] I agree entirely with the orders proposed by Gates J, and I add a few words of my own in view of the lack of methodology over the years in the calculation of the loss of prospective earnings in a case where a child dies as a result of someone else's negligence. The issue remains an important one despite the enactment of the no fault compensation scheme in

the Accident Compensation Act 2017 as the scheme only applies to certain kinds of accidents, and an accident as a result of clinical negligence is not one of them. I begin, though, with two points of procedure which do not affect the outcome of the appeal.

Procedural points

[61] *The parties to the action.* Kitione was named as the plaintiff when the action was commenced. That was inappropriate. He had regrettably died by then, and could not commence proceedings. An action brought on behalf of someone who has died has to be brought by the executor of the deceased's estate – or the administrator of the estate if, as here, the deceased died intestate. Indeed, that is expressly provided for in claims for the payment of compensation to the families of persons killed by accidents: see section 5 of the Compensation to Relatives Act 1920. The judgments given in the courts below should therefore be treated as having been given in favour of the administrator of Kitione's estate. I assume that person to have been Kitione's father, Viliame.

[62] The Attorney General was named as one of the defendants as a matter of form in view of section 12(2) of the State Proceedings Act 1951. The effective defendant was the Permanent Secretary for Health. For convenience, I shall refer to him as the Minister.

[63] *Extension of time.* Viliame did not intend to appeal against the judgment of the Court of Appeal. But he changed his mind after the Minister lodged a petition to the Supreme Court seeking leave to appeal. That petition was lodged only a few days before the time for lodging it was due to expire. That left Viliame and his lawyers no chance of lodging his own petition in time. He and his lawyers therefore needed an extension of time to lodge it. They sought that by a summons filed about 10 weeks after Viliame's petition needed to be filed. That application had not been heard by the time the Minister's appeal was heard. It was therefore for us to decide whether Viliame's time to lodge his petition should be extended. It was not suggested on behalf of the Minister that the delay was particularly long, or that the reason for the delay had not been adequately explained. The basis on which the application was opposed – and it was opposed vigorously – was that

Viliame's proposed appeal had little chance of success and that the Minister would suffer irreparable prejudice if Viliame's appeal was allowed to go ahead.

[64] I entirely agree with Gates J that both grounds should be rejected. The Minister says that his appeal raises important questions about how you calculate the loss of prospective earnings of a young child who died as a result of someone else's fault. Indeed, he has to say that if he is to get leave to appeal. Viliame's proposed appeal raises the same questions. So what is sauce for the goose is sauce for the gander. If the merits of the appeal are such that the Minister's appeal is allowed to proceed, so too should Viliame's appeal. As for prejudice, it was argued on behalf of the Minister that it would be a "serious injustice" to him if he had to respond to an appeal which had little chance of success. This is to misunderstand the sort of prejudice which might result in an extension of time being refused. The question is whether the Minister has been disadvantaged by having to consider Viliame's appeal 10 weeks or so later than he would have done if Viliame's petition had been lodged in time. That is the only relevant prejudice: see *Fiji Industries Ltd v National Union of Factory and Commercial Workers* [2017] FJSC 30 at para 33 (*per* Keith J). It was not possible for the Minister to allege such prejudice here. I therefore agree that Viliame's time for lodging his petition should be extended for such time as is necessary to validate it.

The relevant legislation

[65] Rather surprisingly, neither the High Court nor the Court of Appeal identified in their judgments the statutory framework relating to damages in fatal accident cases. The legislation which governs the compensation for the benefit of the deceased's *estate* is the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935. It is under this Act that compensation for things like the pain and suffering which the deceased endured before he or she died can be claimed. The legislation which governs the compensation for the benefit of the deceased's *family* is the Compensation to Relatives Act 1920. Section 4 spells that out:

> *"Every such action [ie an action where the death of a person is caused by wrongful act, neglect or default] shall be for the benefit of the wife, husband, parent and child of the person whose death has been so caused."*

The word "child" includes the children and grandchildren of the deceased, and the word "parent" includes the grandparents of the deceased. And by section 11, the award of damages can include funeral expenses if they were incurred by the members of the family for whose benefit the claim was brought. In this case they were, and I entirely agree with Gates J that (a) there should have been an award for funeral expenses in this case, and (b) the appropriate sum to award under this head of loss is $4,000.

[66] Apart from awards for funeral expenses, the Compensation to Relatives Act does not identify the various heads of loss under which compensation can be sought or how that compensation is to be calculated, though one of the heads of loss which can be claimed under the Act is a sum to compensate those members of the deceased's family who the deceased would have supported, whether wholly or in part, for the loss of that support had he or she lived. This head of loss has conventionally been called "loss of earnings" because it is the earnings which the deceased would have received had he or she lived which is assumed would have been the source of his or her support for the relevant members of his family. It is the only head of loss which is in issue on this appeal.

Should an award for loss of earnings be made at all?

[67] When the deceased is very young, calculating the deceased's loss of prospective earnings is by definition a highly speculative exercise. Would the deceased have lived to the age when he would have begun to work? Would he have been able to work, and would he have chosen to work even if he had been able to do so? How much would he have earned? For how long? And how much of his earnings would have been used to support his family? These are imponderables for which there can be no definitive answer. Occasionally, these problems have caused the courts to conclude that no award should be made at all. For example, in *Barnett v Cohen* [1921] 2 KB 461 at page 471, a claim for damages under the Fatal Accidents Act 1846 (commonly known as Lord Campbell's Act)

following the death of a boy aged four, the High Court in England (*per* McCardie J) held that it was not sufficient for the boy's father to prove that his son's death had resulted in him losing "a mere speculative possibility of benefit". He had to prove that it had resulted in him losing "a reasonable probability of pecuniary advantage". No award was made in that case.

[68] The courts in Fiji take a different view. They tend to recognise that there is a likelihood – some people would say a strong likelihood – that, but for the event which caused his death, the deceased would have lived to the age at which he would have begun to work, that he would have remained in some sort of work for at least some years, and that at least some of his earnings would have been used to support his family. There is, therefore, a reasonable probability – even in the case of a child who died at a very young age – that the deceased's family will have lost some support from the deceased which they would have enjoyed but for his death. The case which illustrates that is *Moli v Bingwor* [2003] FJHC 279. The difficulty has been in formulating a sensible methodology for assessing the extent of that loss.

[69] The upshot has been that in many cases judges have done little more than pluck a figure out of the air – and as Gates J has pointed out that figure has often been derisory. The fact that the assessment is a difficult task is no reason for abdicating responsibility for doing it properly. In this judgment, I venture to suggest what some of the guiding principles should be. In what follows, I refer to the deceased as "he" because Kitione was a boy, and what I have to say may have to be adjusted for a girl who dies young because in Fiji many girls when they grow up do not take on remunerative work. They often spend their time looking after children and the home.

The appropriate methodology for assessing the loss of support

[70] It is first necessary to identify what the deceased would have earned had he lived and worked a normal working life. That depends on whether the family from which the deceased comes is an educated one where the prospects for the children are good, or a

more humble family where the prospects of the children earning well are lower. In that context, it has to be born in mind that most children come from the less affluent families. Most websites which identify the average salary in Fiji put it in the region of about $4,800 a month, while recognising that the average salary for low paid workers in Fiji is in the region of $1,200 a month. Those figures come to $57,600 and $14,400 a year respectively. Whatever sum the court takes as the deceased's annual earnings is known as the multiplicand, but the court needs to remember that it is assessing the deceased's loss of earnings in the future, and the court will have to increase those sums by an appropriate percentage to reflect such inflation as will have occurred in the intervening years. That uplift will have to be greater the younger the deceased was when he died, because his working years will have started later than those of someone who died shortly before he was due to start work. The figures of $57,600 and $14,400 are gross figures, and they will, of course, have to be discounted to reflect the incidence of tax.

[71] The sum which the court takes as the deceased's net annual earnings will then have to be multiplied by the number of years the deceased is likely to work. In the absence of any of the events referred to later in this judgment, and therefore treating the deceased as likely to work for much of his adult life, taking a figure of 20 years is appropriate. That may sound a little conservative, but any figure in excess of that makes the whole exercise too speculative to be of any value. Whatever figure the court takes is known as the multiplier.

[72] It is here that the imponderables of life have to be taken into account. What I have said so far assumes that the deceased would have worked all his working life. There are very many reasons why that might not have happened. The deceased might not have lived to the age when he would otherwise have begun to work. He may have died in the meantime, whether by accident, disease or some other supervening event. Even if he had lived to the age when he could have started to work, he may not have started to work then. He may have been too ill to work or disinclined to work or been unable to find work which he was prepared to do. And even if he had begun to work, he may have had to stop work

early – whether as a result of his premature death or an incapacitating illness or accident. The inescapable fact is that in life anything can happen.

[73] These imponderables of life have to be reflected by discounting the sum – which has been arrived at by multiplying the appropriate multiplicand by the appropriate multiplier – by such percentage as the court thinks appropriate. Of course, if the deceased died when he was close to the age when he might have been expected to start working, the discount will be smaller: he had got to that age without dying. Again, if the deceased had been a sickly child, or if there was some genetic abnormality in the family or some other factor which affected his expectation of a long and healthy life, the discount will be greater to reflect the greater chance of him being unable to work, or being unable to work for as long as an able-bodied person.

[74] The next discount to the deceased's prospective earnings relates to what this award of compensation is for. It is to compensate the members of the deceased's family – at any rate, those members of his family who the deceased would have supported had he lived – for that loss of support. That means that it is not the whole of the deceased's prospective earnings which have to be taken into account, but only that part of his prospective earnings which he would have used to support his family. If, for example, the deceased's parents and grandparents would no longer have been alive when he would have begun to work, and if the deceased would not have married and would not have had any children, there would be no award of compensation under this head of loss at all. And even if the deceased would have had members of his family to support once he would have started to work, he would no doubt have spent some of his earnings on himself and on other things not connected to the support of his family. However, the award has to be discounted to reflect the extent to which the deceased's earnings would not have been used to support his family.

[75] The first relates to the expenses which the parents would have incurred in bringing up the deceased had he not died. Again, that very much depends on the age the deceased was when he died. The younger he was, the greater the discount.

[76] The second is that if the deceased had lived, it would have been many years before any members of his family would have had the benefit of support from him from his earnings. If an award for loss of prospective earnings is made at trial, the members of the deceased's family will be getting the equivalent of that support many years before they would have done had the deceased lived. That "accelerated receipt" of those benefits has to be reflected somehow. Again, that will depend on how close the deceased was when he died to the age when he would otherwise have started to work. If the deceased died when he was very young, that discount will be greater than if the deceased had died when he was older.

[77] In some jurisdictions, the "accelerated receipt" of those benefits is not catered for by applying such a discount. It is catered for by multiplying the multiplicand – not by the number of years during which the members of the deceased's family have been deprived of the deceased's support – but by the present value of the future contributions which the deceased would have made by way of support for his family. What should be the position in Fiji has to be left for decision to another day.

Applying this methodology to Kitione's case

[78] It looks as if Kitione came from a humble and less affluent family. I would therefore have taken as the appropriate multiplicand annual earnings of $14,400. This would not have reached the threshold on which tax would have been payable. I would have taken 20 years as the appropriate multiplier. This produces annual earnings over 20 years of $288,000. But since inflation would have had an impact on that sum, I would have increased the sum by 10%, making $316,800 in all. In Kitione's case I would have discounted this sum by 50% to reflect the imponderables of life. That would have brought the sum down to $158,400. I would then have discounted that sum by 25% to reflect the fact that not all of his earnings would have been used to support his family. That would have brought the figure down to $118,900. I would have deducted $10,000 from that to reflect the costs of bringing him up, bringing the sum down to $108,900. And since he

was so young when he died, I would have discounted that sum by 20% to reflect the "accelerated receipt" of payment. This would have brought the award for this head of loss down to $87,120.

[79] By a not dissimilar analysis, Gates J has arrived at a sum of $112,320 for this head of loss. His base figure for annual earnings is different from mine, he has chosen different percentages for the various discounts which need to be made, and he has made no reduction for the expense of bringing the deceased up had he lived. However, the difference between us as to the actual amount to be awarded under this head of loss is minimal. Indeed, since the exercise is such a speculative one, it is unsurprising that we end up with slightly different figures. I can see entirely where Gates J is coming from, and although my analysis produces a slightly lower figure, I am happy to go along with the figure he has arrived at.

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[80] The courts have always recognised that there is room in fatal accident cases for awards to be made for non-pecuniary losses - for example, the pain and suffering which the deceased endured between the event which caused the death and the death itself. But that award was made for the benefit of the deceased's estate. When it came to an award for the benefit of the deceased's family, the courts (leaving aside Gates J's observation about the position in Scotland) invariably eschewed awarding damages based on non-pecuniary losses. Instead, they made awards for pecuniary losses which some people might think have an air of artificiality about them. An award for the loss of support from the deceased's prospective earnings is an example of that, though as Gates J has pointed out, things were less speculative in the past when children began working at a very young age and parents could expect a significant contribution to the household from their children's work.

[81] No-one can deny what the real loss is when a child dies. It is the unimaginable grief which the parents have to endure. It will affect them for the rest of their lives. And yet

the common law awarded them nothing for that. Judges had to ask themselves instead questions about what the child would have done if he or she had lived – questions to which the answers were speculative at best. The parents' grief is plain and yet was uncompensatable in the eyes of the common law. A Martian landing on planet Earth and discovering that may well have thought us mad.

[82] There have been calls in some jurisdictions to rectify this sorry state of affairs by introducing what has been called "relationship loss". Indeed, in some jurisdictions, the legislature has moved in where the judges feared to tread. For example, section 1A of the Fatal Accidents Act 1976 in England and Wales provides, as a result of amendments made in 1982 and 2004, that an action under the Act may include a claim for damages for bereavement, albeit restricted to spouses, civil partners and parents. But there is a statutory cap on the sum which may be awarded. It is currently £15,120, and many commentators think that this sum is derisory. But initiatives such as these are to be welcomed.

[83] This is, of course, not the opportunity for the court to address that. It was not raised as a possibility by those representing Viliame. In any event, most people would say that so dramatic a change to the law should only be made by legislation, as was done in England and Wales. However, now that Gates J has highlighted the issue – for the first time in Fiji so far as I am aware – I would invite the Attorney General to give serious thought about how to take the topic further.

Arnold, J

[84] I have read the judgment of Gates J in draft and agree with the orders he proposes, for the reasons he gives. I have also read the concurring judgment of Keith J in draft, and I agree with his analysis and description of the approach to be adopted. I have a short observation of my own to add.

[85] Keith J refers to the decision of *Barnett v Cohen*,[1] where Mc Cardie J made no award to a father in respect of the death of his 4 year old son. The Judge held that there was a "*mere speculative possibility of benefit*", which was not enough – there had to be a "*reasonable probability of pecuniary advantage*".

[86] Where one country adopts legislation first enacted in another country as happened so often in the colonial era, it seems to me important that the local courts are alert to any social or cultural differences that may be relevant to the interpretation or application of the legislation. The Compensation to Relatives Act 1920 seems to me to be an example. That Act provides for "dependency" claims. But social and cultural norms and practices in Fiji – in particular, the obligations of support that flow from kinship – may justify a different approach to dependency claims than might be taken in England, at least in the context of assessing a son's (or daughter's) likely support of their parents.

[87] That said, I agree that this is an issue that could usefully be considered further by the Legislature.

Result:

Orders:

1) Leave to appeal is granted to both petitioners.

2) The AGs petition is dismissed.

3) The plaintiff's petition succeeds in part.

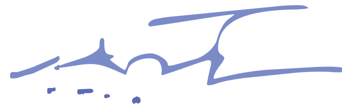
[1] *Barnett v Cohen* [1921] 2 KB 461.

4) The award under Compensation of Relatives Act, varied by the Court of Appeal, is further varied to a total award of $116,320. This is made up of:

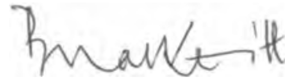
    a. Loss of earnings $112,320

    b. Funeral expenses of $4,000.

5) Costs in this court to the plaintiff petitioner of $8,000.



The Hon Mr Justice Anthony Gates
JUDGE OF THE SUPREME COURT



The Hon Mr Justice Brian Keith
JUDGE OF THE SUPREME COURT

Hon Mr Justice Terence Arnold
JUDGE OF THE SUPREME COURT