

**IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI**

CIVIL APPEAL NO. ABU0018 OF 1998S
(High Court Civil Action No.23 of 1991 & 60 OF 1993)

BETWEEN:

THE ATTORNEY-GENERAL OF FIJI

Appellant

AND:

TEVITA TABUA WAQABACA

Respondent

Coram:

**The Hon. Sir Moti Tikaram, President
The Hon. Justice I. F. Sheppard, Justice of Appeal
The Hon. Justice D. L. Tompkins, Justice of Appeal**

Hearing:

Thursday, 5th November 1998, Suva

Counsel:

**Mr. D. Singh for the Appellant
Mr. H. A. Shah & Ms. F Munam for the Respondent**

Date of Judgment:

Friday, 13th November 1998

JUDGMENT OF THE COURT

This appeal is brought by the appellant on the ground that the amount of damages awarded to the respondent in an action for personal injury was excessive. Originally two defendants were joined in the action but the learned primary Judge (Pathik J) found that the first defendant, Doctor Etika Vudiniabola, was not negligent. The second defendant, the Attorney General, was found liable on the basis of his vicarious responsibility for acts and omissions of the staff of the Colonial War Memorial Hospital where the respondent, the plaintiff in the action, had been admitted for treatment. He was diagnosed as having a blockage of the intestine and underwent surgery at the hospital on 11 April 1985. In his judgment on liability delivered on 31 January 1996 against which there was no appeal, Pathik J found that before the operation the respondent was suffering from convulsions and needed oxygen. The oxygen

bottle in the hospital ward where he was, was found to be empty. Three minutes elapsed before another bottle was found . By this time the plaintiff had suffered irreversible brain damage and was left with a condition known as spastic cerebral palsy which is permanent and which has had a shocking effect on him both physically and mentally. The disaster which befell the respondent was of a most tragic kind. Its effects on him and his family have been appalling. Over a period of years one sees many dreadful injuries as a consequence of accidents which take place in the community, but we do not ourselves remember ever encountering directly, or hearing about, a case more tragic than the present.

The respondent was born on 24 January 1983 and was thus 2 years old at the time of his admission to the hospital. The judgment on damages was delivered on 20 March 1998. The respondent was then 15 years of age. The evidence given at the trial was thus of the condition of the respondent from the time of his discharge from the hospital through to the time of the hearing. The award of damages against which this appeal is brought totalled \$386,504.00. That sum included interest awarded on the component of the award intended to compensate the respondent for general damages.

* The amount of the award was made up as follows:

General Damages:	\$85,000.00
Interest thereon from 11.4.85 to the date of judgment :	\$77,800.00
Loss of earnings (\$80 per week) x 18yrs	
(936 wks)-multiplier (18) agreed:	\$74,880.00
Hired nurses (2) 936 wks x \$30:	\$56,160.00

Clothing (nappies etc):	\$37,440.00
Food (936 x \$60 per wk):	\$46,800.00
Medication	<u>\$ 8,424.00</u>
Total of award and interest	<u>\$386,504.00</u>

Of this amount \$100,000.00 has been paid, the first instalment of \$40,000.00 having been paid on 20 March 1996 and the second of \$60,000.00 on 6 February 1997.

The first ground of appeal is dependant upon some evidence concerning the prior medical condition of the respondent. In his judgment on liability, Pathik J referred to an admission to hospital of the respondent in 1983 when he was said to have suffered from 'convulsion' and to have gone through a 'lumbar puncture'. His Lordship said that it was noted that the respondent was a 'macro sephallic' (big head) child but that the size of the head had not been recorded on first admission. On the second admission on 10 September 1983 it was recorded as 49 cm and on the third admission as 52.5 cm. The last measurement was on 1 April 1985 shortly before the incident which led to the injury complained of by the respondent in this case. His Lordship said that Doctor Okoji had said that, because of excess fluid, the head was large which was one of the commonest causes of large heads. He said it was difficult to say that the convulsion was due 'to big head'. On the respondent's third admission to hospital on 10 April 1985 the respondent was said to have 'herpes simplex' (a viral infection). The doctor said that this could affect the brain and that subsequently the child had had a series of convulsions. The doctor said that the respondent was admitted on 10th April 1985 and had a convulsion on the 11th when at 2 p.m. he 'fitted' for 15 minutes. He was very dehydrated. On 17th April the condition had improved but on 24th and 25th April there was "twitching ... had a fit - and bit

lower lip - twitching, first all round convulsion." The doctor referred to the fact that on the third admission, which had taken place on 10 April 1985, the surgery to relieve an obstruction in the bowel was undertaken apparently after the first of the fits and the late arrival of the oxygen.

Later in his judgment on liability Pathik J came to his findings. He referred to the fact that there had been three admissions to the hospital. The first was on 14th April 1983 when the respondent was admitted for an intestinal obstruction. An operation was successful and he was discharged on 26 April 1983. On 10 September 1983 he was admitted with convulsions due to a high fever. He was treated with antibiotics and discharged on 12 September 1983. The last time he was admitted was on 10 April 1985. It was during this admission that he suffered the tragic consequences earlier referred to brought about by the absence of oxygen for some three minutes. His Lordship said:

"I find as fact on the evidence before me that 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 patient's folder that there is anything wrong with his head, eyes or brain which could be contributory factors giving rise to the patient's present condition."

This finding makes it plain that, in his Lordship's view, there was no reason to conclude that the respondent had developed some pre-existing condition as a consequence of which he had a big head prior to his admission on 10 April 1985. He confirmed this in his judgment on damages when he said:

"that there was no entry in the respondent's folder that there was anything wrong with his [the respondent's] head size or brain which could be contributory factors giving rise to his present condition."

The case should be approached upon the basis that the respondent was a normal healthy child on admission to hospital and came out suffering from cerebral palsy. His Lordship found this occurred because of the lack of oxygen for the critical period of 3 minutes and there was no challenge to that finding. It is perhaps unnecessary to add that even if there were a finding concerning the respondent having a big head, there was no medical evidence warranting the conclusion that his being deprived of oxygen for this period was other than the sole cause of his resultant condition.

The first ground of appeal is accordingly rejected.

The second ground of appeal challenges the amount awarded in respect of general damages. It was submitted that the amount of \$85,000.00 was far too high. It was suggested that the amount should be reduced to \$60,000.00. We are quite unable to conclude that the amount awarded for general damages was outside the range of what might be regarded as reasonable compensation for the shocking consequences of the insult to the respondent's body which he had suffered. As his Lordship said, the respondent, as a result of the injury he sustained, has suffered enormous disabilities which have resulted in his 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. He is liable to fall. The respondent needs to be watched 24 hours a day. It is difficult for one person to attend to him. When the respondent is being fed two people are needed because of his involuntary movements. One has to pin him down while the other feeds him. His Lordship also found that the respondent had "multiple

dependant ulcers" on his back, elbows and shoulder blades. He cannot look after himself. He is completely dependant on someone to look after him. He has no voice pattern and no control over his bowel or urine movements.

There was discussion in his Lordship's reasons of awards made in other cases, many of them in cases outside this jurisdiction. There were attempts made to compare this case with cases in which injuries, although serious were quite different. In one case decided in Fiji an amount of \$85,000.00 for general damages was awarded in respect of serious scarring and disfigurement. That was said to be the highest award made for general damages in Fiji's history. That was the amount which his Lordship in fact selected in the present case.

In the end the learned primary Judge had to make a value judgment about the appropriate amount to award for general damages. He took into account the whole of the evidence and reached the figure of \$85,000.00. As we have said, we are not persuaded that it is so high as to warrant the interference of this court. It needs to be emphasised, however, that the case is a very special one. One would hope that one would not encounter injuries of this magnitude in any other case. It would be unwise of those charged with the task of assessing damages in other cases or in advising victims of other accidents to take any guidance from this case unless the facts and circumstances with which they are concerned have a substantial similarity to those of this one. In the result, the second ground of appeal is rejected.

The third ground raises the question of interest. His Lordship awarded interest at the rate of 8% on the amount of general damages. The rate is not challenged. It is the date from which interest was ordered to be paid which is the subject of this ground of appeal. His

Lordship ordered that interest run from the date of the accident, 11 April 1985. It is the submission of counsel for the appellant that interest should have run only from the date of service of the writ. He relied on *Jefford v. Gee* [1970] 2QB 130 at 147.

The power of the High Court to award interest on damages is conferred by s.3 of the *Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1978* (cap 27). The discretion conferred by s.3 is expressed in wide terms. It provides that, 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 for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

Jefford v. Gee does not lay down any hard and fast rule that interest will only run from the date of the service of the writ or the date of service of a letter of demand. Nevertheless, in the course of his judgment in that case, Lord Denning M.R said(at 147) that interest should be awarded on general damages as from the time when the defendant ought to have paid it, for it was only from that time that the plaintiff could be said to have been kept out of the money. His Lordship said that this time might in some cases be taken to be the date of letter before action 'but at the latest it should be the date when the writ was served.' He referred to the speech of Lord Herschell in *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.* [1893] AC 429 where his Lordship said (at 437) that interest should be awarded "from the time of action brought at all events." Lord Denning concluded his remarks on this matter by saying that speaking generally, the court thought that interest on general damages should run from the date of service of the writ to the date of trial.

The question has been the subject of some consideration by this court. In *Rothmans Pall Mall (Fiji) Limited v. Narayan* (unreported, 28 February 1997 no. ABU0065 of 1995S), the court said (at 8):

“The final point was the date when the interest at 4% should start. His Lordship awarded it from the date of the accident but Mr. Sweetman informed us that Fiji practice is to take the date the proceedings were issued as the starting date, and we did not understand Mr. Shah to disagree, although he said there were cases when by agreement it ran from the accident date. Mr. Sweetman referred us to the decision of the House of Lords in Wright v. British Railway Board [1983] 2 All ER 698, in which the date of commencement of the proceedings was taken. There are arguments for selecting either date. Counsel did not dispute that interest was a matter in the discretion of the trial judge and we are not disposed to interfere with his decision that it should run from the date of injury to the date of trial.”

In *Metropolitan Meat Industry Board v. Williams* (1991) 24 NSWLR 54 the New South Wales Court of Appeal discussed at length the appropriate rate of interest to award for damages for non-economic loss. The date from which interest was to be payable was apparently not the subject of contention but the court concluded its consideration of the matter by saying (at 58-59) that for the reasons given, courts in New South Wales should award interest on damages on non-economic loss accrued from injury to trial at the rate of 4% per annum. For present purposes, the important part of this passage is the statement that the award should be from injury*to trial, not from the date of the writ to trial. That is the practice in New South Wales. It may be compared with the apparent practice in the United Kingdom as evidenced by the decision in *Jefford v. Gee*. But the matter is discretionary. The statute conferring power to award interest on the Supreme Court of New South Wales, the *Supreme Court Act 1970 (NSW)*, is not in terms different from section 3 of the legislation here.

We were not referred to any other authority in relation to the matter. The difficulty with the submission is that, in the course of his submissions at the trial, counsel for the appellant stated in writing that an interest rate of 8% on the award of general damages from the date of the accident, 11 April 1985 was agreed. Counsel, in pursuing the submission, is seeking to go behind the agreement made at the trial. The fact that there was that agreement that interest would run from the date of injury and what was said about a similar matter by this court in the *Rothmans* case lead us to conclude that we should not disturb the decision of the trial Judge. After all his Lordship was but giving effect to the agreement of the parties. In doing so he committed no error. Accordingly ground 3 is rejected.

In relation to ground 4, it was originally submitted that the award made for loss of earnings was too high. That submission was withdrawn. What is said however is that Pathik J was in error in providing in his award for two nurses rather than one. It was also submitted that the allowances made for food and clothing were too high particularly as a substantial award had been made for loss of earnings. If the respondent had not been injured, he would have been expected to feed and clothe himself from his earnings. There was thus, so counsel submitted, an element of double counting involved.

In the course of her evidence given at the trial on the question of damages, the respondent's mother said that at least two housemaids were required to look after the respondent. She herself had six other children to look after. The eldest of them, at the time the evidence was given, was 17 and the youngest 4. She lives at home and looks after the family. She cannot manage this without a substantial amount of additional assistance. She said that, at meal times,

she needed assistance to feed the respondent. She said he had involuntary movement. Someone had to pin him down while another fed him. Assistance was required to bath him and she said, that to take him anywhere within the house, assistance was also needed. She said the problem of looking after the respondent affected her life style very much. Her time had been taken away from her husband and other children. Participating in recreational activities with the other children was greatly diminished. She said the respondent needed attention on a 24 hour basis. He did not function like a normal child. He had no awareness of night and day.

The respondent's mother also said that she provided the respondent with special clothing. She used a mixture of both diapers and disposable nappies. She said that the disposable nappies cost \$30 for a pack of 12. In 7 days 4 packs were used, resulting in an amount of \$120. This was something which would have to go on throughout the remainder of the respondent's life. She bought diapers in bulk. She pays \$50 for 10 metres of material. Additionally the respondent needs soap, water and bins to wash the diapers that are not disposable.

The respondent's mother also said that she has to cook separate food for the respondent. He must have a diet which is low in salt and fat. She cannot give him normal food. He has to have more fruit and cereal - more fibre food - and has to have separate food which has to be mashed to ensure that he does not choke.

The learned trial Judge did not expressly say that he accepted every word of the evidence given by the respondent's mother but, upon a proper reading of his judgment, it should be inferred that he did. The mother's evidence demonstrates, in our opinion, that it was perfectly

appropriate for his Lordship to conclude that it would have been quite inadequate to provide for one nurse alone. The respondent needs 24 hour care. At times he needs two particularly when he is being fed. He also requires care from his mother notwithstanding her commitments to the remainder of the family. In this respect it may be observed that his Lordship said that the respondent had been cared for by his parents "by way of gratuitous services" from the time of the incident.

The evidence to which reference has been made demonstrates that his Lordship's conclusion that the respondent required full time care was amply justified. There is a suggestion in the passage from the judgment that some allowance has been made in the damages for the provision of care by the parents, particularly by the mother. It is not clear that this is what has occurred but it looks as though it may be. In case that is so, we wish to emphasise that no error would have been involved in his Lordship making an allowance for the services provided by the mother. There is ample authority for this. This is not the occasion to go into a detailed discussion of the authorities. There was no reference to them in counsel's submissions but reference may be made to *Donnelly v. Joyce* [1974] QB 454, a decision of the Court of Appeal in England, and to *Griffiths v. Kerkemeyer* (1977) 139 CLR 161, a decision of the High Court of Australia.

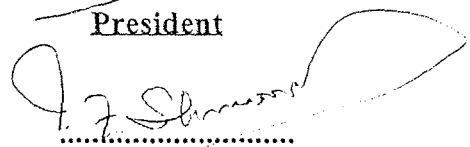
That matter aside, it is our opinion that the mother's evidence and the findings made by his Lordship justify the provision of the cost of two nurses made in the award of damages. This is an extreme case and there is no way in which the services of one nurse could only be regarded as sufficient.

Then the allowances made by his Lordship for clothing, really nappies, and food are challenged particularly on the basis that a substantial sum has been included in the award for economic loss and, in the normal course, the respondent would have been expected to feed and clothe himself from his earnings for the loss of which he has been separately compensated. But the mother's evidence shows that the allowances made for clothing and food were not for ordinary clothing or ordinary food. The amounts were awarded for the special needs of the respondent particularly in relation to nappies and in relation to the more expensive food he requires as a consequence of his disabilities. For that reason there has not been the double counting which counsel for the appellant claims has taken place.

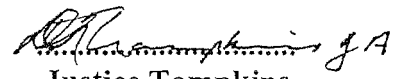
We have now dealt with each of the submissions relied upon by counsel for the appellant. We have decided that each should be rejected. It follows that the appeal must be dismissed. The appellant is to pay the respondent's costs of the appeal which we fix at \$1,750 inclusive of disbursements.



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 Sir Moti Tikaram
 President



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 Justice Sheppard
 Justice of Appeal



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 Justice Tompkins
 Justice of Appeal

Solicitors:

Office of the Attorney-General Chambers, Suva for the Appellant
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