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

CIVIL APPEAL NO.ABU0088 OF 1998S
(High Court Civil Action No. 1 of 1997)

BETWEEN:

JOVESA ROKOBUTABUTAKI
THE ATTORNEY GENERAL OF FIJI

Appellants

AND:

LUSIANA ROKODOVU

Respondent

Coram: **The Rt. Hon. Sir Maurice Casey, Presiding Judge**
The Rt. Hon. Sir Thomas Eichelbaum, Justice of Appeal
The Hon. Sir Ian Barker, Justice of Appeal

Hearing: **Thursday, 3 February 2000, Suva**

Counsel: Mr. D. Singh for the Appellants
Mr. R.I. Kapadia and Mr D. Prasad for the Respondent

Date of Judgment: **Friday, 11 February 2000**

JUDGMENT OF THE COURT

This appeal is against the amount of damages awarded by Pathik J. to the respondent in the High Court at Suva on 19 November 1998 for injuries she suffered on 17 July 1994 when an army truck in which she was a passenger left the road. Liability for the accident had been admitted by the appellants and judgment entered accordingly, with damages to be assessed. The respondent was a healthy woman of 26 at the time, and as a result of the accident she is now permanently paralysed from the breast down. She had been living with a man she expected to marry when his divorce was finalised, and helped with the cultivation of dalo and yaqona on his farm property. She had no children. He left her some three weeks after the accident.

She was taken to CWM Hospital in Suva and her injuries are summarised in the following extract from its report of 7 November 1996 cited in the judgment.

"Before the accident she was fit and able bodied.

After the accident she could not move her legs or feel any sensation from the level of the breast down. Other injuries included bruising around the neck region, most of the left ear had been torn off, and there were numerous abrasions over other parts of her body.

Examination and investigations revealed a complete paraplegia at the T4 level due to a dislocation of T4 or T5 vertebrae.

She was nursed at CWM Hospital until the ear injury and the superficial abrasions had healed. She was then transferred to Tamavua Rehabilitation Unit to help her deal with the paraplegia. Her time at CWM Hospital was from 18 July 1994 to 6 September 1994.

The paraplegia is permanent. She will remain without leg movement and without sensation from the mid-chest downwards for the rest of her life. She will not have any control of bowel or bladder function. She will thus need constant assistance for daily activities."

A report from the Rehabilitation Unit confirms these findings and she was there for about 10 months learning to cope with her disability, which was assessed at 100%.

His Lordship awarded damages and interest totalling $493,208 under the following broad headings:

		$
1.	*General damages for pain and suffering and loss of amenities of life*	*200,000.00*
2.	*Loss of prospective earnings*	*104,000.00*
3.	*Future accommodation costs*	*38,400.00*
4.	*Cost of future nursing care*	*49,920.00*
5.	*Future cost of appliances (wheel chairs ($3,200.00); special wheel chair for bathroom and toilet ($4,000.00); nursing aids (urine containers) $768.00; future transport costs ($1,600.00)*	*9,568.00*
6.	*Special damages*	*51,772.00*
7.	*Interest at 4% on special and general damages from the date of accident to date of assessment judgment*	*39,548.00*
		$493,208.00

Ground 1 - Excessive General Damages

The award was $200,000 to cover pain and suffering and the loss of amenity or enjoyment of life. The bare recital in the medical reports of her injuries and their consequences demonstrates the shattering effect of the accident upon this young woman. The following summary of her evidence sets out the salient points. When the truck left the road at about 2 pm on Sunday 17 July 1999 she remembered it tumbling down a cliff and people pulling her out. She then lost consciousness and did not regain it until 7 am the next morning in CWM hospital, finding she could barely open her eyes, and had no feeling over the rest of her body. This came back to her head after some days, firstly with awareness that her ear had been torn off in the accident. (It is now gone, with only a little bit of the entrance remaining). She also recovered some movement with her head and after 3 weeks she could move her hands, but the rest of her body from the chest downwards felt dead. Then she noticed injuries to her left leg and right arm and shoulder with tearing of the muscles which have left her with numerous scars, photographs of which were produced to His Lordship.

She was transferred to Tamavua Rehabilitation Unit where she stayed from 6 September 1994 to July 1995, so that the total period in hospital was about one year. While there she had almost daily visits by her mother who brought her food and helped by feeding and keeping her clean as she learned to manage these tasks. Initially she could do nothing, but after about one month in the Unit she was gradually starting to care for herself. Evidence from a nurse confirmed that they prepared patients and their relatives to cope with the affairs of daily living when discharged. While in hospital the respondent required treatment for infected pressure sores involving skin grafts, as for some months she had to lie on her back and was unable to turn. She has to guard against similar problems in her wheelchair, to which she is confined all day because

she is unable to walk. She is fitted with a catheter to pass urine which is collected in a container she carries. She attends hospital about twice a month to have the catheter changed and to clear up any infection. The urine container requires replacement once or twice a month. She had no control over her bowel movements, but is now able to exercise some. She described problems with sleeping because of pain and discomfort, getting only 4 or 5 hours a night and spends time awake reading her bible.

Of apparently heavy build, she described herself as slim and tall before the accident, enjoying basketball and netball, going to dances and taking part in social activities, and attending church. She was travelling as a member of a church choir when she was injured. Now she lives in her father's house with her parents and four sisters who look after her. She needs help to go anywhere outside. She has, of course, no prospect of marriage or of children and said she feels sadness when she sees other girls who went to school with her. Even her normal wish to wear attractive clothes is beyond her.

Her father's house is of 2 storeys with the bathroom and toilet on the upper floor, and to accommodate the respondent he added similar facilities to the ground floor at an estimated cost of $12,000, and made other changes to assist her movements in the wheelchair, including the laying of a concrete access path. However, her parents will not be around all her life; furthermore, she not unnaturally wishes to be independent of her family, notwithstanding their generosity. She acknowledges that her sisters have their own responsibilities, and she hopes to rent a suitable flat and employ someone to do the things for her which she cannot do herself.

It is obvious from this catalogue of the injuries and disability suffered by the

respondent that the general damages for pain, suffering and loss of amenities (excluding any element of economic loss which was separately claimed) must be substantial. However, Mr Singh submitted that $200,000 under this heading is so far beyond recent awards in Fiji for serious injuries as to lead to the conclusion that the learned Judge erred, and that this Court should fix these damages at a more realistic level. It is obvious from his judgment that Pathik J. gave earnest consideration to this question, and he quoted at length from various authorities prescribing how the Court should approach the task. His difficulty was compounded by the surprising fact that neither he nor counsel could find any other case in Fiji where damages for paraplegia have been assessed by the Court; and, more surprisingly, by the failure of counsel then acting for the defendants to make any closing submissions.

Each case must depend on its own circumstances, but pain and suffering and loss of amenities of life are not susceptible of measurement in terms of money and a conventional figure derived from experience and awards in comparable cases must be assessed. This Court said in Attorney-General v. Jainendra Prasad Singh (CA 1/98; 21 May 1999) that the Judge's task is to fix general damages for personal injury at a proper figure in current Fiji dollars, referring to other awards as no more than broad guidelines to ensure that he or she is on the right track. The use of such guidelines is encouraged as tending to secure fairness and consistency between awards. However, as there are no reports of damages awarded in Fiji for paraplegia, the Court should aim at a level which bears a reasonable proportion to awards made in other cases, in the light of the relative severity of the injuries and of the pain, suffering and loss of amentities. The assessement should also be made in the light of local experience: Marika Lawanisavi v. Pesamino Kapieni (CA 49/98;13 August 1999), adopting the warning by the Judicial Committee against paying regard to awards in other jurisdictions unless similar social and economic

conditions exist (Li Ping Sun v. Chan Nai Tong [1985] 1 Loyd's Rep.87). Inflation should be taken into account when considering the present worth of past awards used for comparison.

In his submissions for the appellants Mr Singh referred to a number of cases involving damages for pain, suffering and loss of amenities of life for severe injuries and their consequences. Iowani Salaitoga v. Kylie Jane Anderson (CA 26/94; 17 October 1995) was one where $85,000 was awarded for serious fractures and other injuries suffered by a woman of 22 requiring lengthy treatment, leaving her with substantial disability of the right knee and elbow, assessed at 55% of total. There was a similar award in Peniasi Dobui v. Pioneer Machinery (HC Suva 220/91; 30 September 1992) for a 29 year old man for amputation of both legs below the knee. It was expected he would be fitted with artificial limbs in Australia. Mateo Raisalawake v. Jovilisi Kamea and Attorney-General (H/C Suva 284/96; 30 August 1999) involved an accident to a 9 year old schoolboy who was 13 at the date of trial. He sustained head injuries involving permanent brain damage, resulting in serious mental and emotional instability, and his condition is likely to worsen. General damages for pain suffering etc. were assessed at $70,000 (we were informed that this is subject to appeal).

The Judge in the last mentioned case was influenced by this Court's remarks in Attorney-General v. Tevita Tabua Waqabaca (CA 18/98; 13 November 1998), where there was an appeal by the defendant against the award of $85,000 to a boy of 15 suffering from permanent spastic cerebral palsy due to brain damage from oxygen deprivation while undergoing an operation at the age of two. The effect on him and his family was described as appalling; he had to be kept under constant care and supervision, having no control over his muscles and suffering from a combination of involuntary, unwanted and uncontrolled movements. To feed him one

person had to hold him down while another fed him. He had no voice pattern and no control over his bowel and urine movements. This Court noted that the sum of $85,000 assessed in an earlier case (presumably for Kylie Jane Anderson cited above) was said to be the highest award for such damages in Fiji. It found no reason to interfere with the similar award made by the Judge in the case under consideration, but emphasised that it was a very special one and that the amount should not be taken for guidance in other cases unless their facts and circumstances were substantially similar.

It is clear from the account of that young boy's life (or what was left of it) that Tevita's case demonstrates virtually the worst possible loss of the normal amenities and enjoyment of life. The present respondent, shattered though her life has been , cannot be put into the same class. She has all her mental and communication facilities and has learned to cope with many of the incidents of daily living. In one respect however, she is worse than that boy; she is fully aware of her pre-accident situation and must experience great anguish when comparing what she was with what she is now. It would be wrong to read into the note of caution sounded in Tevita's case any suggestion that $85,000 should be regarded as a general upper limit for damages for pain suffering and loss of amenity. While the Court has expressed the view that awards of this magnitude should be limited to very serious cases, there can be no freezing of damages at a particular level, even if it might be a record for Fiji.

The level of damages for personal injuries in Fiji has traditionally been markedly below that of its more prosperous common-law associates, reflecting the differences in their socio-economic conditions along the lines recognised in Ping Sun v. Chan Nai Tong above. Prevailing conventional awards were seen by this Court to be well below appropriate figures in

Anitra Kumar Singh v. Rentokil Laboratories Ltd.(1993) 39 FLR 220, which increased a general damages award from $25,000 to $60,000 for multiple injuries leaving the plaintiff with disabilities to his arms and leg and with a defective hip. The amount included an unspecified allowance potential loss of future earnings. The Court said that the figure must be one appropriate for Fiji and the conditions which apply here.

Since then it can be assumed that the general level of personal injuries damages has been higher, with the judges concerned applying their experience and knowledge of Fiji conditions in arriving at appropriate awards. However, not all of them have been satisfied with the resulting assessments and in Iowane Salaitoga v. Kylie Jane Anderson above, the primary Judge (Byrne J.) thought it "high time the awards of damages in Fiji for personal injuries threw off its swaddling clothes and faced the reality of the real world," and he awarded $85,000 for pain suffering and loss of amentities which this Court upheld, stating it was not inordinately high by comparison with awards for lesser injuries in other cases including Anitra Kumar Singh v. Rentokil Laboratories Ltd. The similar award in Attorney-General v. Tevita Tabua Waqabaca attracted the cautionary observations of a differently constituted Court. The plaintiff's disability in that case was so much worse than that of Kylie Jane Anderson, that a much higher award may have been warranted if consistency and a due sense of proportion with other cases were the only governing factors. But, as we have emphasised earlier in this judgment, subject to those considerations each case falls to be decided in the light of its own special circumstances. Here the circumstances are grievous.

As might be expected, awards overseas of general damages (pain suffering and loss of amenities) for paraplegia are at the upper end of the range. English awards listed in Kemp

and Kemp "The Quantum of Damages" Vol. 2 made between 1993 and 1995 run between 90,000 pounds to 115,000 pounds, probably subject to further escalation due to inflation. The figures given to us by Mr Kapadia for Australian paraplegia awards were inclusive of all damages, but we have no reason to doubt that the general damages component was also very substantial.

We do not think it appropriate at this point in Fiji's socio-economic development to countenance a rise in the upper level of general damges for personal injury to anything like those heights, but without doing violence to the principle of consistency and proportionality with other awards for severe injury, and taking into account the respondent's personal circumstances, we are satisfied that a figure well over $85,000 would be justified in her case. However, with the greatest respect to His Lordship, we think $200,000 is too great a jump from the level of $85,000 which other members of this Court clearly thought of as a high-level bench mark in Attorney-General v. Tevita Tabua Waqabaca. It is very much a matter for subjective judgment in this uncharted area, bearing in mind that the figure we fix will undoubtedly influence the general level of awards for serious injury. We think it should be $150,000 and would allow the appeal on general damages by reducing the award to this figure.

Ground 2 - Excessive award for loss of prospective earnings

Under this heading the respondent received $104,000. Before the accident she was working on her partner's farm for 3 years and His Lordship accepted that her share of their joint weekly earnings of $500 would be $125. There was no documentary evidence to support this figure, but the Court had the assistance of evidence from a trade-union official that most unskilled female manual workers could expect to earn over $100 per week. It is clear that she will never work again and the figure of $125 is reasonable. Mr. Singh submitted that the

multiplier of 16 used to arive at the total of $104,000 was too high. His Lordship referred to authorities and publications in which this matter had been discussed and it is clear that he was throughly conversant with the purpose and available range of multipliers in different situations. We think 16 may have been generous, but it was not outside the limits of his discretion in this case. Accordingly we are not disposed to interfere with the award for prospective economic loss.

Ground 3(i) - Excessive award for future accommodation costs.

Under this heading we deal with past accommodation also. His Lordship awarded $5,600 for accommodation and personal assistance provided by the respondent's parents and family, based on a figure for $200 per month for 28 months. This seems reasonable. In addition he decided that her father should be reimbursed the cost of extending and altering the house for her as described earlier in this judgment, assessed at $12,000. While there were no receipts or other independent evidence of the amount spent, he gave a detailed account of what was necessary and His Lordship was satisfied that this claim was justified. We see no reason to disagree with him. The expenditure was necessary and it is questionable whether it has added anything significant to the resale value of this house at Raiwaqa so as to benefit her father. There was no suggestion of this in cross-examination or in the appellants' submissions to us.

There was also an award for future accommodation costs of $38,400 on the basis of the respondent's evidence that it would cost $200 per month to rent a suitable ground floor flat, again using a multiplier of 16. We think this claim overlooks the fact that, whether or not she had suffered the accident, she would still need to pay for her ordinary accommodation. Because of her disability she will probably have to pay something more to get suitable premises with accessible conveniences. The additional figure can only be a broad estimate but $25 per

month in relation to her suggested monthly rental of $200 could be appropriate. In the meantime this extra rental award should give her father a return on the money he spent on the house. For the reasons already mentioned in ground 2, we accept the multiplier of 16, and calculate the figure for future accommodation at $4,800 in lieu of the $38,400 awarded under this heading.

Ground 3 (ii) Excessive award for future nursing care

This was accepted at $60 per week for somebody to look after the respondent and assist her with activities she could not carry out herself, and applying a multiplier of 16 His Lordship awarded $49,920. It was again submitted that this was too high and that a multiplier of 8 should have been used, but we can see no justification for such a reduction; the care will be needed for the rest of the respondent's life, whether it is given by her relatives (whom the Judge rightly held should be paid for it) or by an employee whom she wishes to engage when she moves into separate accommodation. This award will stand.

Ground 4 - Excessive and unproved special damages

A figure of $9,568.00 was assessed for the future cost of appliances such as wheelchairs and other aids and transport costs for hospital visits and there was no challenge to these items on appeal, which were properly allowed. Nor was there any real challenge to past loss of earnings once the weekly loss of $125 had been accepted, totalling $28,166 to the date of judgment; or to the cost of parental visits and care in the hospital ($2080) together with food for her, and their transport costs ($3826); or to the past cost of appliances ($100). (Her wheel chairs had been donated). The cost of accommodation and family care at home and of the extensions to the house have already been accepted totalling $17,600. Accordingly we are not prepared to disturb any of these awards.

Grounds 5 and 6 - Errors in interest awarded

His Lordship awarded interest to judgment at 4% on the general damages of $200,000 for pain, suffering and loss of amenities; and on special damages on just the loss of past earnings ($28,166), in each case from the date of the accident. The total interest came to $39,548.00 and the appellants' first complaint is about the award of the same rate of interest on general and special damages.

In Attorney-General v. Valentine (CA 19/98); 28 August 1998), delivered shortly before His Lordship's judgment of 9 November 1998 (and presumably not drawn to his attention), this Court proposed a rational approach for the award of interest which it expected Judges to heed in the exercise of their discretion under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap.27, under which His Lordship made the awards. There was no complaint about the rate of 4%, but in Valentine's case we pointed out that the loss of past earnings accrued on a day-by-day (or week-by-week) basis, and it was appropriate to take a mean average of interest for the period by awarding half the rate otherwise applicable - in this case 2%.

The general damages have been reduced to $150,000 and we agree with the appellants' submission that interest on that sum at 4% should be calculated from the date writ was served, in accordance with the approach in Valentine, and not from the date of the accident..

On 31 March 1999 the appellants were ordered to pay $250,000 to the respondent as a condition of stay of execution. The amounts so paid should be applied first in satisfaction of the general damages and interest thereon and then of the past loss of earnings and interest.

As the appellants have partly succeeded on some issues, they should have a moderate award of costs which we fix at $2,000 to include disbursements and expenses.

Result:

1. The appeal is allowed to the extent of

   (a) reducing the general damages from $200,000 to $150,000;

   (b) reducing the costs of future accommodation from $38,400 to $4,800;

   (c) reducing the rate of interest on past loss of earnings from 4% to 2%.

   (d) awarding interest on the general damages of $150,000 at 4% from the date of service of the writ.

2. In all other respects the judgment is confirmed.

   The amount payable thereunder is accordingly reduced to $368,080 as follows:

General damages	$150,000
Loss of prospective earnings	104,000
Future accommodation costs	4,800
Future nursing care	49,920
Future appliance costs	9,568
Special damages	51,772
	$368,060

together with interest on past loss of earnings from the date of the accident at 2%, and on the general damages at 4% from the date of service of the writ, in each case until the date of this judgment or earlier payment of the amount ordered by this Court on 31 March 1999. The amounts are to be settled by the Registrar failing agreement by the parties.

3. The appellants to have costs of $2,000 inclusive of disbursements and expenses.

M & Casey

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Sir Maurice Casey
Justice of Appeal

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Sir Thomas Eichelbaum
Justice of Appeal

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Sir Ian Barker
Justice of Appeal

FIJI COURT OF APPEAL

Solicitors:

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