

IN THE COURT OF APPEAL, FIJI
[Civil Appellate Jurisdiction]

Civil Appeal No: ABU 0040 of 2014
(High Court Case No. HBC 088.2009)

BETWEEN : **THE PERMANENT SECRETARY FOR HEALTH**
THE ATTORNEY GENERAL OF FIJI

Appellants

AND : **SEMI VOLITI**

Respondent

Coram : **Calanchini, P**
Lecamwasam, JA
Amaratunga, JA

Counsel : **Ms. S. Ali and Ms R. Chand for the Appellants**
Mr. A. Sen for the Respondent

Date of Hearing : **9 September 2016**

Date of Ruling : **30 September 2016**

JUDGMENT

Calanchini, P

- [1] I have read the draft judgment of Lecamwasam JA and agree that, apart from the issue of post judgment interest, the appeal should be dismissed.
- [2] I venture to add some comments on the first ground of appeal concerning the issue of contributory negligence.

- [3] The facts of the case have been discussed by Lecomwasam JA in his judgment and I intend to refer only to those matters that are directly relevant to the issue that is under consideration.
- [4] In 2007 the Respondent Semi Voliti (Voliti) was a student at Ratu Kadavulevu School (RKS). On 20 October of that year during the course of what might be described as a school boy prank, he suffered a cut to his right lower arm as a result of breaking a glass window. Some time afterwards he reported to the school nurse as his injury was still bleeding. It would appear that some form of bandaging was applied before Voliti was taken to the Korovou Health Centre where he waited for some time before he was attended to. He was treated and kept overnight at the Centre. The next day he was moved to the Colonial War Memorial Hospital (CWM). He was admitted as an in-patient at CWM where eventually on 24 October 2007 Voliti's right arm above the elbow was amputated as a result of infection.
- [5] Voliti by his next friend sued the Permanent Secretary for Health and the Attorney-General claiming damages for loss and damage suffered as a result of the negligence of the employees of the Ministry of Health at the Korovou Health Centre.
- [6] The High Court concluded that the employees were negligent in both the diagnosis and treatment of Voliti's injury and as a result the Appellants were held to be liable in negligence. This finding has not been challenged on appeal.
- [7] In its Defence at paragraph 10 the Appellants pleaded that "*the claimant's injury was caused or contributed by his own negligence.*" The learned trial Judge dealt with the issue of contributory negligence in paragraph 15 of his judgment as follows:

"15. *The Defendants' counsel pleaded contributory negligence. In limine this position of the Defendants does not carry any merits. The issue is as to whether the Defendants' servants/agents were negligent in the process of treating the Plaintiff medically and as to whether such negligence resulted in amputation of the Plaintiff's forearm and not to find how the injury caused. If so as to whether the Defendants are liable for the negligence of the servants and/or agents. The Plaintiff who was admitted to the hospital after the injury was caused and the claim by the*

Plaintiff was that the 1st Defendant was negligent of the treatment. There is no evidence before this court that the Plaintiff was negligent, subsequent to the admission to the hospital and when he was under the case of the servants and/or agents of the 1st Defendant. The Plaintiff had not done any act to contribute to aggravate his injury. The Defendants' claim that the Plaintiff's contributory negligence fails."

- [8] On 15 January 2016 the Appellants filed an Amended notice of appeal. Ground 1 of the amended grounds of appeal relates to the learned trial Judge's comments in paragraph 15 of the judgment and states:

"That the learned Judge erred in fact and in law in not making a finding of contributory negligence as a defence in accordance with paragraph 15 of his judgment on the basis that –

(1) The evidence by the school nurse confirmed that the Respondent had delayed a number of hours in reporting the injury to the school nurse during which time he had covered the wound with a dirty cloth which led to the infection of the wound."

- [9] The other two issues raised in ground 1 are related to the findings by the Judge that the delay had not caused infection and that "*stopping the flow of blood with a dirty bed sheet*" had not "*contributed to the infection settling into the wound.*"
- [10] Putting aside the factual basis upon which it is claimed by the Appellants that there was contributory negligence on the part of Voliti, the defence and ground 1 of the appeal are misconceived. The duty that the Appellants owed to Voliti was to ensure that Voliti's injury as he presented at the Korovou Health Centre was diagnosed and treated to the standard of prudent nurses and doctors exercising reasonable care. So far as the Appellants were concerned the manner in which the injury had either occurred or been treated prior to his presenting at the Korovou Health Centre were matters that needed to be determined as part of the diagnosis. The duty included taking a detailed history of what had occurred prior to presentation and then to diagnose and treat.
- [11] The defence of contributory negligence had no application to the facts. The principle involved is that a tortfeasor is required to take "*the victim*" as he finds him. Voliti presented at the Korovou Health Centre with a cut right arm which may or may not have

appeared to be infected. The consequences for Voliti that flowed from a negligent diagnosis and/or treatment were necessarily more severe in this case, resulting in amputation of the right arm above the elbow.

- [12] In my judgment the evidence supports the conclusion that the negligence of the medical staff employed by the Appellants was the sole cause of the amputation. If the injury had been properly diagnosed and treated there would have been no need to amputate the arm. The evidence does not indicate that the cut itself nor any subsequent infection prior to presenting at the Korovou Health Centre would have required the arm to be amputated even if the required standard of diagnoses and treatment had been provided by the Korovou Medical Centre.
- [13] For the above reasons and for the reasons stated by Lecomwasam JA ground 1 should not succeed.

Lecomwasam, JA

- [14] This is an appeal by the first and second appellants against the decision of the High Court in Suva dated 25th April 2014. The facts of the case are recounted in detail in the judgment of the High Court. However, relevant facts may be shortly stated.
- [15] At the relevant time the respondent was a 19 year old student studying at Ratu Kadavulevu School (RKS) as a boarder. On the 20th October 2007, while he was playing with other boarders, having punched a glass window he sustained injuries to his right hand and on incident being reported to the school nurse, she took steps to take the respondent to Korovou Hospital.
- [16] It is alleged that at Korovou Hospital, his right hand was heavily bandaged. The heavy and tight bandage has resulted in the respondent developing compartment syndrome and cyanosis. As there had been no proper medical care at the Korovou Hospital and the following day the respondent was transferred to the Colonial War Memorial hospital

(CWMH) and on admission the respondent was noted to be in severe distress with heavily bandaged right forearm with blood stained and foul smelling.

[17] On 24th October, the respondent underwent a right arm, above elbow amputation. This prompted the respondent (original plaintiff) to move the High Court seeking relief as urged in the statement of claim of the plaintiff.

[18] The learned High Court Judge decided in favour of the plaintiff and awarded damages as set out in his Judgment. The appellants appealed against the said judgment on the following grounds of appeal (as stated in their submissions in verbatim):

“2.1 That the Learned Judge erred in fact and in law in not making a finding of contributory negligence as a defense in accordance with paragraph 15 of his judgment on the basis that:

- a. The evidence by the school nurse confirmed that the Respondent had delayed a number of hours in reporting the injury to the school nurse during time he had covered the wound with a dirty cloth which led to the infection of the wound.*
- b. Delay caused by the respondent in reporting his injury to the school nurse immediately after the injury had not contributed to the infection of the wound;*
- c. Delay by the respondent combined by stopping the flow of blood with a dirty bed sheet for a number of hours did contribute to the infection setting into the wound.*

2.2 That the learned Judge erred in fact and in law in applying Paul Praveen Sharma v The Attorney General [1993] HBJ 728 of 1984 (27 August 1993) but fail to distinguish Paul Praveen Sharma against the local circumstances and lack of evidence on the Plaintiff's potential earning sin arriving at a multiplier of 20 x

\$7,500.00, making the multiplier unjustifiable, excessive and unreasonable when in comparison to Paul Praveen Sharma, the plaintiff was a resident of Australia and was enrolled as a Pathology student at the University of New South Wales pursuing a Bachelor of Science Degree.

- 2.3 *That the learned Judge erred in fact in failing to assess the actual cost of a prosthesis by accepting the respondent's submission that a replacement arm would cost \$70,00.00 with no conclusive evidence.*
- 2.4 *That the Learned Judge erred in fact in accepting the Plaintiff's evidence that he could be potentially employed as an aircraft engineer when medical records show the Plaintiff suffers from corneal abrasion in the right eye rendering him partially blind.*
- 2.5 *That the Learned Judge erred in fact in awarding nursing care at \$10,000 when no calculation was give as to how the figure was reached whereas in Attorney General v Waqabaca [1998] ABU 0018 of 1998 (13 November 1998), the Court of Appeal explained in detail the extent of nursing care which would be required.*
- 2.6 *That the Learned Judge erred in law in awarding interest at the rate of 4% on the judgment sum from the date of judgment until paid, which is contrary to the provisions of the Law Reform (Miscellaneous Provisions) (Death and Interest) (Amendment) Decree 2011.*

[19] On the question of contributory negligence, the facts in the decision cited by the appellant, Elsworth v Yanuca Island are distinctly different from the facts of the case at hand. In the present case the injury was caused by the respondent punching a glass panel. No doubt the respondent punching a glass panel was not the most prudent of moves on

the part of the respondent. However, the manner in which the injury occurred has no bearing on the cause of action on negligence since question of negligence comes into play only after the occurrence of the injury.

- [20] In **Grayson v Ellerman Lines Ltd** (1920) AC 466 at 477 according to Lord Parmour observed the test of contributory negligence in the following words:

"I do not think that the question of contributory negligence depends upon any breach of duty as between the plaintiff and a negligent defendant; it depends entirely on the question whether the plaintiff could reasonably have avoided the consequences of the defendant's negligence."

In this case it is manifestly clear as the plaintiff was in the custody of Korovou hospital authorities. He could not have possibly avoided the consequences of the doctor's negligence.

- [21] In **Hatcher v Black** (The Times, July 2, 1954) in dealing with duty to exercise reasonable skill and care, Denning L J had observed that:

"You must not, therefore, find him negligent simply because something happens to go wrong; ... You should only find him guilty of negligence when he falls short of the standard of a reasonably skilful medical man..."

In the instant case, by not releasing the bandage until the patient was sent to CWM hospital on the following day at 7 pm, negligence of the doctor at Korovou hospital is amply demonstrated.

- [22] A strict duty cast on the hospital authorities to exercise due care in treating patients. There is no evidence to the effect that the respondent conducted himself against the advice of the doctors or had done anything injurious to himself whilst in the care of hospital authorities. Evidence before court is to the effect that the wound was wrapped with a used bed sheet and nowhere does it say it was a dirty bed sheet. It was on this bed sheet that the appellants are relying for contributory negligence saying, as the wound was wrapped with a 'dirty bed sheet', respondent's condition was deteriorated leading to the alleged amputation of the dominant hand.

- [23] According to the [2.1] ground of appeal, the appellants attempt to allege that there was a delay of a number of hours in reporting the injury to the school nurse during which time the respondent had covered the wound with a dirty cloth which led to the infection of the wound. The appellants rely solely on this bed sheet to allege contributory negligence on the basis that the 'dirty bed sheet' resulted in the respondent's condition deteriorating, leading to the alleged amputation of the dominant hand. Evidence before court is to the effect that the wound was wrapped in a used bed sheet. However, no evidence suggest that it was a dirty bedsheet. Nowhere in the evidence of the school nurse does she state that the wound was covered with a dirty cloth or there was delay in reporting the injury to the nurse. In verbatim her evidence is as follows; *"There was a bandage on the arm. Some clothes were used. He came with some friends. It was bleeding when he came to see me. I do not know what time the cut happen"*. Answering the cross examination *"after information I was not sure at what time the plaintiff refer to. Doctor attended to patient before the report. At that time wound was not infected."*

What transpires from this evidence is that the wound was not infected when the patient was admitted to Korovou Hospital. In view of this evidence, the position taken up by the appellant of contributory negligence of the respondent should fail. Therefore it is clear that the wound had got infected after the admission of the patient to Korovou Hospital and not any time prior to admission.

- [24] Andrew Fulton Philips in his book on medical negligence law at page 13 states *"very generally a doctor owes a legally recognized obligation – duty – to the patient, to take reasonable care. The existence of this duty of care is rarely a matter of dispute in medical cases"*.

And the author further states at pages 14 – 15 that *"generally speaking, the duty of care owed by a doctor arises by virtue of the legal concepts of 'holding out' – if the medical practitioner allows or encourages the patient to believe that he is a doctor, then the duty of care is applied which measurers that person against the standard of the reasonable doctor in that situation"*.

As far as the hospital doctors are concerned, which is the case here, they will usually owe a duty to those admitted to hospital for treatment by them. At pages 16 -17, he further states:

“The test for medical negligence is essentially objective, and does not therefore take formal account of a doctor’s experience, level of qualifications, the resources available within that doctor’s practice or hospital, or even how many hours may have been worked prior to the incident. It therefore concentrates upon the relationship between the doctor and patient and generally excludes other considerations. Unsurprisingly, the test is retrospective, but although deterrence of negligent conduct is one aim claimed for the law, there is no formal mechanism for improving the standard of care as a result of any lessons learned in litigation. Nor does it consider a doctor’s record or the standards to which she or he may have practiced in the past: where negligence is alleged, it is only the incident(s) in question which is (are) examined. Indeed, the most blatant cases of negligence, being indefensible, are likely to be settled out of court”.

- [25] Hence applying the medical negligence test to this case, it is clear that the doctors were remiss in not treating the patient with due care. It is clear that the patient’s wound was not infected before the admission to Korovou hospital. It is in evidence to the fact that he was heavily bandaged and the bandage was tightened to a very high degree at Korovou Hospital but it was not released or loosened at two (2) hourly intervals which is accepted medical practice according to the evidence of Dr. Taloga. According to medical evidence, if tissue bandage is kept on for 30 hours everything will die. Now here it is in evidence that the bandage that was put at Korovou hospital had been removed at CWM hospital only on the following day night. Therefore it could be surmised that the compartment syndrome arose as a result of the bandage that was placed by the staff of Korovou hospital on the 20th of October 2007.
- [26] It can be safely inferred from what Dr. Taloga had said in evidence on page 10 of the supplementary record, *“when he came to CWM hospital, amputation was imminent”*. We can safely infer the negligent act of the doctor and nurse at Korovou hospital would have led to this situation.
- [27] Therefore, the learned Judge had carefully considered the medical negligence as well as contributory negligence aspects of this case and had come to a correct conclusion. Therefore ground 1 should fail.
- [28] In regard to ground 2 of the appeal, is about failure to distinguish Paul Pravin Sharma’s case, it is apparent that the learned Judge had correctly lent his mind to the prevailing

economic conditions in arriving at a multiplier of 20 x \$7,500.00. It is nothing but correct in view of observations made by Lawton LJ, in Cunningham v Harrison [1973] QB 942 at pages 956:

“ ... if Judges do not adjust their awards to changing conditions and rising standard of living, their assessments of damages will have even less contact with reality than they had in the recent past or at the present time.”

- [29] In the same vein as Pravin Sharma, the plaintiff in this case is currently pursuing a Bachelor of Science degree at the University of the South Pacific (USP) and has a reasonable potential to earn on par with the calculation. Therefore I do not see any merit in this ground of appeal also and therefore I reject this ground of appeal.

- [30] It is apparent that the learned Judge had accepted the evidence of Dr. Taloga in coming to a conclusion of the cost of prosthesis which is reflected in the evidence of Dr. Taloga at page 11 of the supplementary document of the High Court, it is therefore erroneous to state that the learned Judge has merely relied on the submission of the respondent by the appellants in their written submission. Therefore ground 3 too fails.

- [31] Ground 4 – Though the appellant stated that the plaintiff suffers from corneal abrasion in the right eye rendering him partially blind, there is no cogent evidence before court to take notice of such fact. Although the plaintiff has stated he aspired to be an Aircraft Engineer, the learned Judge had not taken that fact into consideration. In assessing the damages, the learned Judge has mentioned such fact in passing (in para 26) of the judgment. The Judge merely alluded the fact when he said; “his studies were affected due to the injury and his ambition to become an Aircraft Engineer had become impossible”. Even if he is unable to be an Aircraft Engineer, as he is a BSC student in the University, there is every possibility of him being well employed in the future and therefore Judge’s final award is reasonable. Therefore I do not see any merit in this ground of appeal and hence it fails.

- [32] Ground 5 – Even though it appears in the submissions, it was abandoned at the time of argument before us, hence requires no consideration.
- [33] Ground 6 – the final ground. I agree with the position taken up by the appellant with regard to the final ground of appeal in view of the Law Reform (Miscellaneous Provisions) (Death and Interest) (Amendment) Decree 2011 (Decree No. 46 of 2011) dated 28 October 2011, as stated in Section 4 (3), “...*no interest shall be payable on any Judgment Debt entered in any proceedings against the State, or the Attorney –General.*” In view of the above provision, the learned Judge’s award of 4% interest is hereby set aside.
- [34] Out of the 6 grounds of appeal urged by the Appellants, I have disallowed grounds 1 to 5 while ground 6 is allowed. Therefore appeal is partly allowed subject to the orders in relation to interest.
- [35] In costs, I would order the appellants to pay the costs awarded in the court below and the costs of appeal which are fixed at \$5000.00, totaling to \$7,500.00.

Amaratunga, JA

- [36] I had the opportunity of reading the judgment of Lecomwasm JA. The grounds of appeal are stated in the said judgment and I do not wish to reiterate the same to avoid repetition. I agree that the appeal should be dismissed subject to variation suggested in the said judgment.
- [37] The Appellants’ first ground of appeal relate to contributory negligence. The Appellants (Defendants) had not proved contributory negligence and their evidence relate to the alleged acts of the Respondent (the Plaintiff) before being examined by a medical officer at Korovou Hospital. The Plaintiff went to the said hospital with a bleeding open wound. The blood pressure was significantly low and the reading was ‘87/62’. According to the notes kept by the Doctor V. Bhindi the injury was 3 cm long and 1cm deep. The Plaintiff could move the fingers of the injured hand very slowly. He was seen by this

Doctor around 9 pm on 20.07.2010. According to the Plaintiff, the injury happened around 3-4 pm and the Matron of the hostel, said she was reported of the incident around 6.30 pm.

- [38] It should be noted that in the written submission filed in this court by the Plaintiff, in paragraph 24 stated 'According to the evidence given, the respondent was taken to the matron within minutes and taken to hospital immediately, this was never challenged.' The evidence in the court below is contrary to that.
- [39] According to the evidence of the Plaintiff he had initially covered the wound with a used bed sheet. The Matron said that she had cleaned the wound and took the Plaintiff to the Korovou Hospital. She also stated that the Doctor at Korovou Hospital also cleaned the wound. In the judgment of the court below at page 16 (page 23 of the Record of the High Court) it was held that there was no evidence that the wound was cleaned. Though the Plaintiff said that the wound was stitched without cleaning, the District Nurse who accompanied the Plaintiff stated that she cleaned the wound and the Doctor also cleaned the wound before stitching it.
- [40] In the notes Doctor at the Korovou Hospital had indicated approximate depth of the wound and this will also support that the wound was cleaned to some extent, but whether it was sufficiently cleaned or not cannot be stated from the evidence. If the wound was not adequately cleaned the negligence was with the medical officer who initially treated and sutured the wound. If a soiled wound was sutured that would indicate negligence of the person who did it, rather than the patient who administered available first-aid on the site of an injury. It is the duty of the medical officer to obtain history or methods of first aid administered since the injury, to consider the level of infection, and to treat accordingly.
- [41] There was no evidence that the wound was infected to a considerable extent when the Plaintiff was examined by the Doctor at Korovou Hospital. If it was infected the Doctor would have reported this fact and would have monitored the status of infection periodically. Any open wound would be susceptible for infection and a thorough cleaning

is essential for healing and this is the duty of the medical staff. There is no evidence of periodic monitoring for the development of any infection of the wound at all.

- [42] According to the evidence of Plaintiff the injury had happened around 3-4pm. The reporting to the nurse at duty was around 6.30 pm and the admittance to the hospital was around 9 pm. There is evidence that the wound was bleeding at the time of the report to the Matron as well as when the Doctor examined it. There is a delay of about 5-6 hours, from the time of the injury to the examination by Doctor at Korovou Hospital. Bleeding for a long time may be the result of low blood pressure recorded by the Dr. Bhindi, but apart from this there is no evidence that this delay had resulted amputation and or any serious infection to the hand. Even if there was an infection at initial stage, the Matron of the hostel said she cleaned the wound. Depending on the wound at the time of admittance a professional decision should be taken to prevent any infection to the wound. This is a required skill of a medical staff at Korovou Hospital.
- [43] The delay in reporting to the nurse for more than 2 hours cannot be considered as a contributory negligence unless there is nexes between such delay and the amputation of the arm. The delay in the reporting may also be due to the nature of the injury. Even the Doctor who initially medically examined the injury categorized it as a 'laceration'. So, the delay in reporting of such an injury to authorities by the Plaintiff under the circumstances cannot be considered as negligence. One cannot expect all lacerations incurred would be reported promptly by a 19 year old boy living in a boys' hostel.
- [44] The Doctor who first examined the wound at Korovou Hospital had categorized it as a 'Right Forearm Laceration'. There is no serious condition reported. If he suspected any serious condition he could not have noted as 'laceration' and if he was unable to treat or suspected serious infection it would have been dealt accordingly. The patient was administered an antibiotic Erythromycin. There was no direction from the Doctor to monitor any infectious condition in the wound and only direction was to monitor the blood pressure every 4 hourly. Dr. Taloga in his evidence stated that according to the notes kept, the wound was not a serious injury. Regarding the depth of the injury he had stated that 1cm depth will not reach artery and it was an injury 'bulk muscle' and 'no

threat to artillery or limb'. There is no evidence why 1cm deep uncomplicated open wound could not be cleaned, if it was already infected.

- [45] So there is undisputed medical evidence that the Plaintiff's wound was not a serious injury. So the manner in which first aid was given cannot be considered as a negligent act that caused amputation. The medical notes of the doctor who admitted the Plaintiff had not indicated any serious nature of the wound or that it was already infected.
- [46] Doctor Taloga had also stated that wound of the Plaintiff should not have sutured and it is 'not good practice to stick up'. He further said that if stitched it can infect. This medical evidence not challenged in the cross-examination. So, any infection it would directly relate to the conduct of the medical officer, rather than delay in the reporting and or covering the injury from a used bed sheet in the hostel.
- [47] It is admitted fact that Plaintiff developed compartment syndrome (See agreed facts in the pre-trial conference).
- [48] The Compartment Syndrome is a condition that develops if the blood supply is deprived to certain part of the body. This happened due to the pressure bandage being not loosened periodically. Dr.Taloga said that if pressure bandage is administered it should be released every 2 hourly. There is no such directions to the nurse after administering pressure bandage from the time of admittance (9pm on 20.7.2007) to time of transfer of the patient (6 pm on 21.7.2007).
- [49] So the development of Compartment Syndrome was a direct result of negligence of the medical staff at the Korovou Hospital and this along with the evidence of cyanosis resulted the amputation of the arm of the Plaintiff.
- [50] The manner in which the injury happened is also not clear from the evidence. The Plaintiff in his evidence stated that he leaned on to a glass panel, but according to the medical folder of the Korovou hospital the Plaintiff had stated that he was playing football in the corridor of the hostel and got injured from a glass door when the hand

went inside the glass accidentally. The Matron of the hostel said that plaintiff told that he punched a glass panel and they were 'drinking'. Though there is no certainty as to the manner in which that cause of accident, the fact remains that the wound was caused from a broken glass. There is no evidence that manner in which injury happened had contributed to the negligence of the Defendants, in their treatment of the 'laceration', caused from a broken glass.

- [51] So, I reject that the Defendant had established contributory negligence on the balance of probability.

Application of Sharma v Attorney-General [1993] 39 FLR 228 for calculation of future economic loss

- [52] The above case though had some similarities as to the nature of the negligence, it is not a good analogy to assess the future damages to the Plaintiff for several reasons. First in this case the use of multiplier 20 was reduced to 15 in the Fiji Court of Appeal in Attorney-General of Fiji v Sharma [1994] FJCA 27; Abu0041u.93s (decided on 12 August 1994) (unreported). At the same time, in that case the use of multiplicand of was not challenged but the Fiji Court of Appeal stated;

'We note in passing that the appellants have not challenged the quantum of the multiplicand. That surprises us as there can be no certainty that the respondent would have been successful in qualifying himself for employment as a pathologist. However, in view of the course chosen by the appellants, that is not a matter which we have to consider. (emphasis added)

- [53] In contrast in the case before us the both multiplier and multiplicand are challenged. In the court below there was no evidence presented for the basis of multiplicand for the Plaintiff and His Lordship, had used the value of \$7,500 as the multiplicand, relying on Sharma v AG [1993] 39 FLR 228, and also increasing it considering the time period since that judgment.

- [54] The Plaintiff was a child of 19 years and of his right arm below the elbow is amputated as a result of negligence. He was in form 7 and he was studying science subjects and his ambition was to become an Aircraft Engineer.
- [55] At the time he gave evidence, he was still a student of University of South Pacific studying Mathematics and Physics for a BSc degree. Before the accident he was within the top 5 of the class at his school and after the accident he had failed examinations and had even changed schools. He was struggling with his education after the accident in school as well as in the university, but slowly progressing for a degree of his choice. He will be hopefully engaged in a suitable employment after his graduation.
- [56] Unlike in the Sharma v Attorney-General (*supra*) the Plaintiffs yet to enter the employment market. There was no evidence like in the said case to calculate the loss of future economic loss. We do not know what kind of employment he will obtain in future and the actual or probable impact of his loss of dominant arm, to his future employment.
- [57] In the case of Wade and others v Allsopp and another (1976) 10 ALR 353 it was held, at p 358
- '.....plaintiff not yet embarked upon a career, what is to be compensated is the loss of a chance to earn unimpaired by the accident caused injuries, and that the evaluating that chance due regard must be had not only to all the normal external vicissitudes of life but also to the possibility that, for reasons personal to himself, a boy's future may not justify the promise of his early years. It is undeniable that consideration s such as these must play a part in any assessment of the lost earning capacity of a young plaintiff. (emphasis added)*
- [58] In the court below there was no academic history of the Plaintiff. He only stated his position in the last examination before the accident and his aggregate for four subjects in that examination. This cannot infer that he would achieve his ambition of becoming an Aircraft Engineer.

[59] There was no evidence presented in court below for guidance or calculation of probable economic loss. It is evident that the Plaintiff was on the verge of entering tertiary education and due to the injury his completion of secondary education was delayed. Though he would find a place in the employment market his defect had seriously restricted his employability. The probability is high that loss of dominant hand would cause future economic loss.

[60] In Martin v Howard [1983] Tas R 188 (FC) at p201- 202 Nettlefold J held

'A category of cases which has distinct bearing on this case is exemplified by such decisions in the High Court as Hutchison v Sward [1966] A.L.R 1021, 39 ALJR 500, and Wade v Allsopp (1976) 10 A.L.R. 353, 50 A.L.R.J. 643. The essential feature in that category of cases is that a young plaintiff has been seriously injured but, being young, his pre-accident capacity cannot be ascertained as the capacity of an established mature worker can be ascertained. You must endeavour to ascertain what his potential was as best you can and compare that with his potential in his injured state. The critical point is that what he is entitled to be compensated for is the loss of the chance of achieving a greater level of reward during his working life than he is capable of achieving in his injured state. But there is substantial difference between compensating for the loss of a chance and compensating for destruction or impairment of a proven capacity.' (emphasis is mine)

[61] The Plaintiff was unemployed at the time of giving evidence and that was a main difference with the case of Sharma v AG [1993] 39 FLR 228. This fact was not considered in the court below. In my judgment applying the said case for determination of multiplicand was an error.

[62] Martin v Howard [1983] Tas R 188 (FC) at p203 Nettlefold J further held,

'On that material all the Court can do is make a broad estimation of the significance of the loss. In reaching a final stage it should bear in mind that the decision in Todorvic v Walter (1981) 37 A.L.R. 481, 150 C.L.R. 401, has had the effect of increasing awards of damages under this head. In consequence of that decision the standard which one must keep in mind is one which indicates awards higher than those which were prevailing before decision. The appropriate figure in my opinion falls somewhere within the range of \$35,000-40,000.'

[63] In the *Martin v Howard*(supra) the Cosgrove J held at page 212

'...This was an occasion for arriving at a round sum which gave to an experienced man of the law the most satisfaction and appearance of justice. It that process is criticised as "intuitive", so be it. At the trial level there is often there is often no available alternative.'

[64] The little evidence that was presented to the court below what the court has to consider in the determination of the future economic loss. The Plaintiff cannot complain about the award for future economic loss as the court is left with nothing but to be 'intuitive'.

[65] The Plaintiff who was excelling in studies would have entered the tertiary education and would have completed his studies by this time, and possibility of entering the employment market by this time cannot be rejected. The amputation at right hand had delayed this, and will remain as a factor reducing his future earnings.

[66] In the circumstances the court needs to find out the best multiplicand and I agree with the amount of \$7500 being the multiplicand considering the little evidence presented in this regard in the court below. The Plaintiff left the issue 'open' for the court without leading any evidence regarding future loss. In the Respondent's Notice he seeks enhancement of this value but there is no evidence that warrant for such enhancement in the court below. The Plaintiff has not produced any evidence to support enhancement of this value. The only evidence in this regard was the Plaintiff's ambition to become an Aircraft Engineer, and aggregate marks he obtained in one examination and his rank in the class in the said examination. I do not attach much weight to that evidence in calculation of multiplicand.

[67] It should also be noted that the value of \$7,500 as the multiplicand can be justified considering the economic circumstances and the field of study the Plaintiff was engaged and proximity to his entering tertiary education and the impediment from the injury to his prospective employment in the field of science. The probable employment for the Plaintiff is not certain and even without any injury there was no evidence to support that he would become an Aircraft Engineer. In the evidence Plaintiff said that his ambition was to become an Aircraft Engineer and it was a distant hope and could be one of the many possibilities. It is wrong to assume that Plaintiff would become an aircraft engineer

and to make any calculation accordingly. This is again a one striking difference from Sharmav AG[1993] 39 FLR 228. The Plaintiff had not progressed sufficiently to infer that his ambition would have fulfilled if not for the injury. In the Sharma v AG[1993] 39 FLR 228 there was sufficient evidence that claimant had progressed and also employed in a related field to infer the possibility of achieving his ambition.

- [68] In the case of Attorney-General of Fiji v Sharma[1994] FJCA 27; Abu0041u.93s (decided on 12 August 1994)(unreported) the Fiji Court of Appeal the multiplier was reduced from 20 to 15. The person in that case was already in the employment when the action proceeded and he was in a better living condition compared with the Plaintiff. The Fiji Court of Appeal reduced the multiplier from 20 to 15. The Plaintiff was not employed and he was studying in secondary school when the accident happened. So some provision needs to be done to calculate his probable years of employment in future and then the years of employment. At the same time more than 2 decades have passed from that judgment of Fiji Court of Appeal decision of AG v Sharma(supra) and quality of life have improved significantly during that time. Considering the competing factors the selection of 20 as the multiplier is appropriate. I reject the ground in the Respondent's Notice that the in the court below failed to consider the socio economic living condition.

- [69] In Attorney General of Fiji v Broadbridge CBV0005 of 2003S (decided 8 April 2005) (unreported) Fiji Supreme Court held,

'There is no challenge to the courts'ability to approach loss of earning capacity in a manner that dispenses with the conventional multiplicand/multiplier approach. Loss of future earning capacity can be calculated on a broader basis, having regard to the evidence led in the particular case, without being constrained by the traditional requirements of the conventional multiplicand/multiplier approach.(emphasis added)

- [70] So, the court below was not obliged to follow conventional multiplicand/multiplier method in the calculation of future economic loss. In lieu of that a lump sum could be granted for future economic loss and this was done in Martin v Howard[1983] Tas R 188 (FC), Hutchison v Sward [1966] A.L.R 1021, 39 ALJR 500, and Wade v Allsopp (1976) 10 A.L.R. 353, 50 A.L.R.J. 643. When considering the evidence in the court below award of a sum of \$150,000 as a lump sum for future loss is justified, considering the

circumstances of the case. In my judgement the award of future economic loss is justified irrespective of method that was used.

[71] In the *Martin v Howard* [1983] Tas R 188 (FC) Cosgrove J at p 208 held,


'When an appellate court is asked to scrutinize an award of damages under this heading on the blunt ground that it is excessive or inadequate, it comes to its task with many disadvantages. Many of the matters which are to be taken into account in assessing damages are not susceptible of calculation of any sort, and are of uncertain weight. A judgment as to the impact of his injuries on a plaintiff's capacity to enjoy life must be, to some extent, subjective or imaginative. The trial judge no doubt formed an overall view, based on the evidence he had received and his impression of witness, of the real gravity of the complaint, and this lead to his final conclusion. It is difficult, if not impossible, for an appeal court to gather to itself the components of that view as they came to the trial judge. For that reason, it has not complete understanding of all the material upon which the trial judge acted. It should not, therefore, disturb his award unless it appears clear that some specified material was overlooked, over-emphasised, or misunderstood, or unless the size of the award is such that it, in itself, betokens error.'

[72] In the Respondent's Notice there is a general allegation, contained in ground 1, that in court below 'judge erred in Law and fact in not awarding the appropriate damages under various heads a claimed....'. Neither in the written submission nor in the oral submission such error was pointed out. The same can be said about ground 3 of Respondent's Notice. So I cannot see any merit in that grounds 1 and 3 contained in the Respondent's Notice. They are general and lack clarity and should be rejected.

[73] There was evidence that the Plaintiff's parents were cane farmers and he used to help them in farming. The Plaintiff and the parents lived in two separate islands and the Plaintiff was boarded in the school he attended prior to the accident. I have considered these facts when the multiplicand was selected. Even in the court below the judge had considered the changes of economic condition. So I reject the ground 4 stated in Respondent's Notice, for any enhancement of the award. Since I have dealt the issue of future earning capacity there is no need to deal the Ground 2 of the Respondent's Notice again. The grounds contained in Respondent's Notice should not succeed for above reasons.

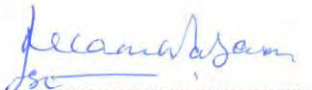
The Orders of the Court are:

1. *The appeal is partly allowed.*
2. *The High Court judgment is affirmed subject to the order in relation to post judgment interest in paragraph 33(b) which is set aside.*
3. *The appellants are ordered to pay the costs awarded in the Court below and the cost of appeal which are fixed at \$5000.00, totaling to \$7,500.00.*

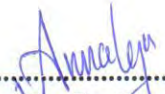


Hon. Mr. Justice W. Calanchini
PRESIDENT, COURT OF APPEAL





Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL



Hon. Mr. Justice G. Amaratunga
JUSTICE OF APPEAL