YANUCA ISLAND LTD v PETER ELSWORTH

COURT OF APPEAL — APPELLATE JURISDICTION

REDDY P, SIR KAPI and SMELLIE, JJA

7, 16 August 2002

[2002] FJCA 65

Negligence — contributory negligence — appeal against judgment — liability — amount of damages — Occupiers Liability Act 1968.

The litigation concerned a claim by Peter Elsworth (Plaintiff) against Yanuca Island Ltd (Defendant) arising from his fall from a window ledge in the Black Marlin Bar at the Fijian Hotel owned by the Defendant. The Plaintiff suffered a permanent impairment. The High Court found the Defendant liable and there were no findings of contributory negligence against the Plaintiff. Defendant appealed as to the findings on liability, contributory negligence and quantum of damages.

Held — (1) The judgment under appeal does not refer to the issues of expense, difficulty and inconvenience of taking alleviating action. Pertinent factors are that it was a hot night, crowded, it was getting late and there were no seats and none were offered. It was a foreseeable possibility that an accident might happen. There was no difficulty or inconvenience about either putting up a notice warning of the danger or alternatively fitting guard rails across the outside of the window to save someone from falling off. Had there been a notice warning of the height above ground level and the risk of using the ledge as of a seat, there would have been little difficulty about finding the Plaintiff had assumed the risk voluntarily.

(2) The Defendant was negligent in not warning of the danger of sitting on the window sill and not taking any elementary steps to prevent the kind of accident that the Plaintiff suffered. As the bar was crowded, seats should have been provided or the Plaintiff and his party denied access. The Plaintiff's action in sitting on the window ledge after an energetic day when he was feeling tired was a significant contributing factor to the accident. When he became sleepy and began having difficulty keeping his eyes open, knowing of his own propensity to fall off to sleep quickly, the Plaintiff clearly should have got up roused himself and moved away from the window. The fact that he did not take that action was a very significant contribution to what happened. In all the circumstances, any damages to which the Plaintiff is otherwise entitled should be reduced by 70 per cent.

Appeal allowed.

Cases referred to

Attorney-General (Dr Herbett Elliot) v D Sharma [1994] FCA No 41/1993; *Attorney-General v Tevita Tabua Waqabaca* Civil Appeal 18/1998; *Iowane Salaitoga v Kylie Jane Anderson* Civ App ABU0026/1994; *Jovesa Robutabutaki and Attorney-General v Lusiana Rokodove* Civ App HBC0088/1998; *Mateo Raisalawake Jovilisi Kamea v Attorney-General* Civ App HBC281/1996; *Wyong Shire Council v Shirt* (1980) 146 CLR 40; 29 ALR 217; [1980] HCA 12, considered.

B. Sweetman for the Appellant

V.M. Mishra with *R. Prakash* for the Respondent

Judgment

Reddy P, Sir Kapi and Smellie JJA.

Introduction

This is an appeal against a judgment delivered in the High Court at Lautoka on 6th of October 2000. Unfortunately the judgment appealed from could not be delivered until 2 years after the close of the hearing and the hearing itself was

drawn out with two or three adjournments over a lengthy period. In addition however, the accident suffered by the respondent (Plaintiff) occurred early in 1990 so that resolution of the matter has taken an unacceptably long time. It will be convenient to refer to the Appellant as "defendant" and the Respondent as "plaintiff".

The litigation concerns a claim by the Plaintiff against the Respondent (Defendant) arising from a fall from a window ledge in the Black Marlin Bar at the Fijian Hotel which is owned by the Defendant. The Plaintiff suffered extensive bruising and a serious head injury which caused him to be unconscious for sometime and left him with a permanent impairment.

In the High Court the Defendant resisted the Plaintiff's claim on the basis that the Defendant had not been guilty of any negligence as occupier of the premises and the Plaintiff was the author of his own misfortune. Alternatively the Defendant pleaded contributory negligence and that the injuries suffered were not as severe as the Plaintiff contended.

The end result in the High Court, however, was that the Defendant was found liable and there were and no findings of contributory negligence against the Plaintiff. The general damages are awarded to the Plaintiff were as follows:

Pain and suffering, loss of amenities $120,000,00–$20,000.00 =	$100,000.00
Interest on past pain & suffering of $60,000 at 6% pa (From 8 July 1992 to 6 October 2000)	29,700.00
Loss of Earnings A$100,000.00 x 5 years (A$1=F$1.22)	610,000.00
Total	739,700.00
Special damages in full	117,548.98
Total of damages plus Special damages in full	$857,248.98

In addition the sum of $30,000 was assessed as costs recoverable by the Plaintiff.

Preliminary issues

On the appeal counsel for the Plaintiff contended that the Defendant should be estopped from arguing the adequacy or otherwise of the damages award because, it was alleged, unfair advantage had been taken of an order to file written submissions at the end of the taking of the evidence. The short point was that the Plaintiff contended that the Defendant, simultaneously with himself, was obliged to file submissions on both liability and quantum, whereas the Defendant filed submissions on liability only and announced that it would await the Plaintiff's reply before making submissions on quantum. As a consequence the Plaintiff complained he was prejudiced, in that he did not have an opportunity to respond to the submissions made on behalf of the Defendant in relation to the quantum. Counsel for the Plaintiff, however, was obliged to acknowledge to this court that he did not make an application to the trial judge for leave to file a supplementary reply to the Defendants submission on quantum. There can be little doubt that if such leave had been applied for it would have been granted.

Be that as it may, however, the issue of a quantum of damages was very clearly heralded in the pleadings and was the subject of extensive evidence in chief and cross-examination at the trial. The view of the court was that to deny the Defendant the opportunity to argue quantum of damages would have amounted

to an injustice. In the circumstances therefore the Plaintiff's application was dismissed. We indicated we would provide reasons in this judgment which we have now done.

There was a further complaint that the grounds of appeal were inadequate and failed to sufficiently inform the Plaintiff of the points to be taken by the Defendant. The court's view is that the grounds of appeal are adequate. They clearly announced that the Defendant intended to challenge the findings on liability, contributory negligence and quantum of damages. All those issues have been argued fully in the submissions and we are unable to see that in any way the Plaintiff was prejudiced.

Reasons

This judgment provides the reasons for court's decision which was announced at the conclusion of the hearing that the appeal would be allowed. We propose to provide those before addressing the question of what should happen as a result of the appeal being allowed.

Unfortunately either because of a delay of some 2 years from close of the hearing to issue of the judgment or alternatively because, as we understand it, the trial judge may have been unwell, a number of matters which were either agreed or thoroughly argued and in respect of which rulings together with reasons were required, have either been overlooked or ignored.

Right at the beginning of the trial it was announced that the original second Plaintiff Parkanson Pty Ltd was not proceeding with its claim. Despite that, in his judgment, the judge ruled against Parkanson as though it was still a Plaintiff. On p 14 of the record the judgment reads:

> *The court will not allow any damages for financial loss of the second plaintiff because it is not persuaded that its business misfortunes were attributable to the unfortunate fall the plaintiff sustained at the Fijian Hotel.*

Also at the end of the trial on the issue of special damages an item in respect of which counsel sought recovery was a cost of $40,000 involved in a doctor coming from Australia to Fiji to attend to the Plaintiff as a consequence of his injury, seeing him safely transported by air back to Melbourne and having him admitted to the hospital for a special treatment. In respect of that amount counsel for the Defendant drew attention to the fact that it had already been paid pursuant to the provision of a travel insurance policy. The record shows that at point the Plaintiff abandoned that amount and yet the judge awarded it in his judgment. Furthermore it is again apparent from the record that the items of special damage allowed were not in fact formally proved and nor were they acknowledged by the Defendant. It follows that the special damages of a $117,548.98 should not have been awarded. Furthermore within that global sum there are travelling and accommodation expenses which in the court's view should more properly have been the subject of a costs award and which presumably would have been in addition to the $30,000 for costs which the judge allowed.

There are other defects in the judgment which are of greater significance.

Even though contributory negligence was clearly pleaded and argued the judge has not mentioned it at all. Counsel for the Plaintiff endeavoured to persuade us that the judge had considered the issue and decided that there was no contributory negligence. This, however, is a case which clearly calls for consideration of the provisions of the contributory negligence legislation. Quite apart from the view we take of that matter, it is significant that when a stay was granted after the judgment had been entered another High Court judge ordered a payment to be

made to the Plaintiff and arrived at the figure by reducing all the amounts awarded by 40% on the account of contributory negligence.

We are also persuaded that the initial starting point for pain and suffering and loss of amenities (enjoyment of life) at $120,000 was too high and out of touch with the amounts usually awarded in Fiji for personal injuries. We return to this matter later but in broad terms our view is that awards beyond $100,000 are rare and only occur in cases of the most serious nature. Even without the other problems already referred to we would have allowed the appeal on this issue of quantum of general damages.

Unfortunately the award for the loss of earnings is also defective. Leaving aside for the moment whether or not the Plaintiff was in fact earning A$100,000 per annum at that time he suffered the accident, as acknowledged by Mr Mishra the judge seems to have "rolled together" (Mr Mishra's expression) loss of earnings from accident to the date of judgment and loss of future earning capacity. The absence of reasons in the judgment regarding the calculation of the loss of earnings leaves the court in a quandary. It appears the judge did not make the necessary distinction between the loss of earnings up to date of the trial and future loss of earning capacity.

For all the reasons set out above we were able to conclude at the end the hearing that the appeal would have to be allowed. We mention in passing also, that there was a cross appeal suggesting that the general damages were not high enough. It was, in fact, our intention at the time of indicating the appeal would be allowed to also dismiss the cross appeal. In case there is any uncertainty on that point and out of an abundance of caution we do so now.

What course should the court follow

Having decided that the appeal should be allowed for the reasons indicated the question then becomes whether we should send this matter back to the High Court for a new trial or whether this court should do the best it can on the information before and bring the matter to a conclusion. Sending the case back for a new trial 12 years after the accident occurred and 4 years after the hearing in the High Court completed would prejudice both parties. It would particularly prejudice the Plaintiff because of the high cost of travel, accommodation and witness expenses to be incurred in running the trial in Fiji a second time. Furthermore as earlier indicated the case has already suffered a very chequered career and taken far too long to reach this point. We are conscious we have not had the advantage of seeing and hearing the witnesses and must rely upon the record and the submissions of counsel, none the less we have reached the conclusion that the only appropriate course is for us to assess afresh the Plaintiff's claim and proceed to a final judgment. After reaching the above conclusion and when this judgment was already in draft we received advice through the registrar from counsel for the parties that the course we have elected to follow is the one they prefer.

The circumstances of the accident

How the accident happened and where it happened was not really in dispute. Nor was the nature of the injury initially suffered by the Plaintiff as a result. Everything else, however, is in contention.

The common ground appears to be as follows:

> The plaintiff was on holiday with his family at the Fijian Hotel. He had had an active day playing nine holes of golf, some tennis, swimming and then in the evening walking

across the causeway to a Chinese restaurant for an evening meal where he shared a bottle of wine with his wife and two adult sons. Thereafter the party, which included his daughter and a friend of hers, returned to the Fijian and entered the Black Marlin Bar. The time of the return is a little uncertain, the plaintiff puts it in the region of 10 ‘0 clock the defendant that it was after 11. Either way upon arrival the bar was crowded. There were no seats available at any of the tables. The dance floor was spot lit and there was a revolving light which sent a beam around the room at regular intervals, but otherwise it was the typical dim light appropriate for a night club in full swing in the middle of the Christmas holiday season.

Finding no seats available and none being offered or requested the plaintiff and his party elected to sit on the ledge of a large window that was open on the side of the bar. The window was some five feet in width and four to six feet high. It was open the sliding panes having been completely slide back. The ledge itself was between 10 inches to a foot wide. There was foliage outside and the judge found there were no exterior lights which would enable one to gauge the height of the window above ground level. There were no notices of any kind warning patrons not to sit on the sill. The plaintiff was served a beer while sitting there and for a time watched his wife and one of his sons dancing on the dance floor. While he was sitting there with his daughter and her friend he began to feel sleepy. Employees of the hotel apparently noticed that he was sleepy and closing his eyes occasionally, (that information was provided through the interrogatories which became part of the evidence in the trial). There appears to be no doubt that the plaintiff fell asleep and having done so fell out of the window.

The Plaintiff himself stated in cross examination Page 398 of the record:

If I hadn’t gone to sleep, accident would not have happened.

There was also evidence from more than one source that the Plaintiff is a person who can drop off to sleep fairly readily. Outside the window there was a drop of 6–7 feet to the ground. Whether the Plaintiff fell directly to the ground or became wedged in the fork of a tree close to ground level is not entirely clear. Helped reached him almost immediately, he was deeply unconscious and as he recovered it became apparent that one side of his body was massively bruised.

The most serious injury, however, was the head injury which caused him to remain unconscious for number of hours. Once he regained consciousness he drifted in an out of consciousness for 2 or 3 days until he was taken back to Australia by air in a stretcher accompanied by a doctor. He had been hospitalised in Fiji for 4 or 5 days and upon return to Victoria he went first to the Epworth Hospital where he stayed for a week before being transferred to the Royal Talbot hospital for 2 weeks after which he attended the hospital on the daily basis for the next 2 months.

Liability

Plaintiff claimed that the accident was caused by the breach by the Defendant of the duty of care owed to him pursuant to the Occupiers Liability Act 1968, Fiji. Particulars pleaded are as follows:

(a) creating or alternatively permitting the continuance of situation of danger;
(b) failing to take any or any adequate steps to avoid the risk of injury to the plaintiff;
(c) failing to render the premises safe for use by the plaintiff;
(d) failing to guard the said window adequately or at all;
(e) Failing to implement and/or enforce any or any adequate system of inspecting the said window so as to ensure that persons did not use it as a seat;
(f) failing to install any or any adequate locks or latches on the said window;
(g) permitting over crowding in the said bar;

(h) failing to provide adequate sitting in the bar;
(i) failing to give to the plaintiff any or any adequate warning as to his height above ground level when located in the said window.
(j) "Permitting the continuance of the hidden trap in the vegetation created in the illusion that the said window was at the ground level".

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Although there is also an allegation of common law negligence the case was argued at first instance and on appeal in relation to the Occupiers Liability Act 1968.

The defence raised against the claim made by the Plaintiff was a denial of 10 negligence and a further pleading, that without prejudice to the denial, the Plaintiff had been guilty of contributory negligence particulars of which were as follows:

(a) Sitting on a window ledge instead of sitting on a chair which was provided for the guests at the defendant's premises; and
15 *(b) Sitting on the window ledge when it was not meant for seating people; and*
(c) Failing to appreciate that the fall from the window ledge could result in injuries; and
(d) Failing to assess of the height of the ledge before sitting on it; and
(e) Leaning back without securing his body or person to safe guard against falling to the ground; and
20 *(f) Failing to hold the ledge or balance his body in order that he may not fall from the window ledge; and*
(g) Sitting on the window ledge when he knew or ought to have known he was not sufficiently composed in body and strength to sit there.

25 Finally there was a pleading that the Plaintiff by his actions had voluntarily consented to accept such risk as was involved and to waive any claim for the loss arising from his conduct.

The judge found that the lighting inside the bar and the darkness outside "created in an illusion of lack of height" and that there was no light in the pit area into which the Plaintiff fell. Concluding that the Defendant was liable the judge 30 said this on pp 12 and 13 of the record:

> *In the court's respectful opinion there is little doubt that the defendant has breached the duty of care it owed the plaintiff under section 4 of the Act. It operated a bar as part of the services it provided as a hotelier. The window ledge was at such a level and in such a position as to attract guests in the Black Marlin Bar. The issue is not that chairs* 35 *were available on request. It is whether someone in the plaintiff's position would be reasonably safe in using the defendant's facilities. The latter did not see fit to secure the window ledge. It ought to have reasonably foreseen given the behaviour of patrons that the ledge would be used for such a purpose whether or not the black Marlin Bar was crowded. At no stage were the plaintiff or his charges told by the hotel authorities that* 40 *sitting in that particular spot was proscribed. There was no warning of the apparent danger and the lighting was poor. In those circumstances, the defendant was clearly in breach of its duties and the court finds that the particulars set out in paragraphs (a) to (j) of paragraph 5 have been made out.*

We have considered the question of a liability carefully. A number of authorities 45 were cited to us by Mr Sweetman discussing comparable legislation in the United Kingdom, Australia and New Zealand. There were also authorities from this jurisdiction. The most helpful in our view is *Wyong Shire Council v Shirt* (1980) 146 CLR 40; 29 ALR 217; [1980] HCA 12. At 47 of that decision Mason J said:

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> *In deciding whether there has been a breach of duty of care the tribunal of fact must first asked itself whether a reasonable man in the defendant position could have foreseen*

that his conduct involved a risk of injury to the plaintiff or to a class of person including the plaintiff. If the answer be in the affirmative, it is than for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurance, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities that the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response as to be ascribed to the reasonable man placed in the defendant's position.

The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with the other relevant factors.

The judgment under appeal does not refer to the issues of expense, difficulty and inconvenience of taking alleviating action. Pertinent factors that weigh with this court are that it was a hot night, the bar was crowded, it was getting late there were no seats and none were offered. We consider that it was a foreseeable possibility that patrons in those circumstances would sit on the window ledge. The likelihood that one of them might then fall off the ledge was a possibility and in our view something which should have been taken into account. It also weighs significantly with us that there was no great expense, difficulty or inconvenience about either putting up a notice warning of the danger or alternatively fitting guard rails across the outside of the window so that if someone did over balance or was pushed or jostled the rails could save them. We observe in passing that had there been a notice warning of the height above ground level and the risk of using the ledge as of a seat, there would have been little difficulty about finding the Plaintiff had assumed the risk voluntarily.

The other matter to be taken into account is the issue of causation. Mr Sweetman argued strongly that the cause of the accident was not any failure on the part of the Defendant but simply the admitted fact that the Defendant became sleepy and fell off. It is inescapable, however, that given those circumstances had there been guard rails this unfortunate accident would not have happened. While the factors which Mr Sweetman relied upon to avoid liability are undoubtedly highly significant on the issue of contributory negligence we are not persuaded they are sufficient to justify interfering with the trial judge's conclusion that liability had been made out.

Contributory negligence

There really can be no argument but that this is a case calling for a substantial percentage of contributory negligence.

We start by observing that the Defendant was negligent in not warning of the danger of sitting on the window sill and not taking any elementary steps to prevent the kind of accident that the Plaintiff suffered. Furthermore as the bar was crowded seats should have been provided or the Plaintiff and his party denied access. Nonetheless the Plaintiff's action in sitting on the window ledge after an energetic day when he was feeling tired was in our view a significant contributing factor to the accident. Moreover when he became sleepy and began having difficulty keeping his eyes open, knowing of his own propensity to fall off to sleep quickly, the Plaintiff clearly should have got up roused himself and moved away from the window. The fact that he did not take that action was a further very

significant contribution to what happen. Doing the best we can in all circumstances we have reached the conclusion that any damages to which the Plaintiff is otherwise entitled should be reduced by 70 per cent.

Pain and suffering: Loss of enjoyment of life

There is no dispute that the Plaintiff suffered severe injury as a result of the fall. We recorded his treatment in Fiji earlier.

At the Royal Melbourne Hospital he was assessed by Mr David Wallace, neurosurgeon, whose qualifications are impressive and whose practice is largely concerned with the management of the head injuries.

Initially the Plaintiff had what Mr Wallace described as "fairly striking neurological abnormalities." His speech was slurred, his eyes oscillated in an horizontal fashion and he had impaired co-ordination on the right side of his body especially in the right lower arm and right lower leg. Initially he made good progress. His speech improved and he was able to walk. The bruising from the fall, although very extensive cleared quickly. The Plaintiff was clearly determined to rehabilitate as soon as possible and adopted a positive and optimistic approach to his treatment and recovery. Eventually he reached something of a plateau — the point from which further improvement on the balance of probabilities would not occur. After observation and reporting over a period of years (reports on 23/4/91, 4/5/92, 28/5/93, 14/7/93 and 23/6/98) Mr Wallace was able to express at trial a fairly firm opinion. His conclusion was that the Plaintiff had suffered defuse axonal injury — ie sheer injury disconnecting nerve cells which send messages from the brain and from one part of the brain to another. In the most severe cases the patient never wakes up. Whereas with minor damage the patient recovers completely. The Plaintiff's condition fell somewhere in the middle and was described by Mr Wallace as medically severe.

The pain and suffering element was not great. But there was ongoing emotional distress (for which the Plaintiff took medication) for some years. In his final report of 23/6/98 Mr Wallace expressed his opinion as follows:

> *This man's condition does not appear to have altered since I last saw him in April 1993. He has ongoing problems with impaired numeracy skills, impaired memory and concentration, and has undoubtedly suffered a permanent impairment of higher intellectual function, as documented by Dr. Bernard Healey some 3 years after his accident.*
>
> *He has impaired sensation of part of the right side of the body including the lips, the tongue and lower portions of the right arm and right leg.*
>
> *He still has a balance disorder and is prone to attacks of acute vertigo with a tendency to fall over if he arises too suddenly from the seated position, or moves his head too briskly. There is also impaired balance apparent when he is put to the test with the heel-toe walking. His impaired balance has led to him having to give up tennis and has notably diminished former high level of skill at golf.*
>
> *I believe all these current disabilities are likely to be permanent. There is no doubt whatsoever that this man injury has led to a significant diminution in his former high level of skill and expertise in business, engineering, sales and retailing, and has significantly diminished his self-confidence and his level of function as an executive in a successful business.*

Dr Bernard Healey referred to in the above opinion of Mr Wallace is a clinical psychologist to whom the Plaintiff was referred by Mr Wallace. Dr Healey provided a review report which is the Exhibit 10A at p 203 of the record. He conducted a number of tests both in 1993 and 1998. The results in 1998 even

allowing for an advance in age were not as good as those in 1993. Dr Healey accepted that his conclusions in part depended upon the information supplied to him by the Plaintiff. Nonetheless the tests established declines in intellectual and memory functions and deterioration in attention concentration and delayed recall. 5 The 1998 tests also revealed the emergence of "depressive symptoms and significant anxiety with concern about personal insecurity, lassitude malaise, need for affection, and denial of social anxiety".

The Defendant did not call evidence to dispute the nature or extent of the Plaintiff's injury and consequent disability. Both Mr Wallace and Dr Healey were 10 subjected to searching cross examination, but were unshaken except perhaps to the extent that they had not fully taken into account the Plaintiff's early return to work and subsequent employment.

For all this pain and suffering and loss of enjoyment of life, (leaving aside loss of future earning capacity), the trial judge started with a figure of $120,000. He 15 then reduced it by $20,000 because of certain evidence before him to the effect that within months of the accident the Plaintiff was engaged in complex negotiations associated with the business of which he was managing director at the time of the accident. The inference we draw is that the judge had some reservations about the extent of impairment given the Plaintiff's ability to 20 perform so soon after the accident, in the manner described.

The starting point and indeed the reduced figure of the $100,000 was attacked by the Defendant as too high and out of kilter with the established levels of awards in Fiji for significantly more serious cases.

Mr Sweetman referred us first to *Attorney-General of (Dr Herbett Elliot) v D* 25 *Sharma* [1994] FCA No 41 of 1993. At 8 of the judgment the court said:

> *The third ground of appeal concerns the level of the general damages awarded in relation to the circumstances of the case and the previous decisions of the courts in Fiji. There is no doubt that in fixing the quantum of general damages a trial Judge, having calculated the amount which appeared to be appropriate under the various heads of* 30 *such damages, must than consider whether the total of those amounts is itself appropriate in all the circumstances of this case. In coming to a conclusion on that matter he should have regard to the need for consistency in the level of general damages awarded in similar cases.*

We were than referred to what may be regarded as three benchmark cases 35 (*Iowane Salaitoga v Kylie Jane Anderson* (Civil Appeal ABU0026 of 1994). Kylie Anderson's award apparently is the second highest Fiji award at $85,000 for pain and sufferring and loss of amenities of life. The injuries were described by a leading Australian orthopaedic surgeon as "some of the most horrific he had seen".

40 The second case is *Mateo Raisalawake Jovilisi Kamea v Attorney-General of Fiji* (Civil Appeal HBC281 of 1996) there the Plaintiff was awarded $70,000 when he was rendered completely brain damaged from the age of nine. That meant that he was mentally unstable, unable to respond to commands, had a permanent limp, continuing head aches and other pains, was mentally and 45 emotionally unstable and unlikely to find employment.

Finally we were referred to the case of *Jovesa Robutabutaki and Attorney-General v Lusiana Rokodove* (Civ App HBC0088 of 1998) in that case the Plaintiff was initially awarded $200,000 under the heading of general damages for pain and suffering and loss of amenities. She was a paraplegic, 50 unable to work and forever confined to a wheel chair requiring a catheter to pass urine. She had no control over her bowl movements and no prospects of marriage

or children. In that case however this Court reduced the award to $150,000 saying that Kylie Anderson was the previous highest award at $85,000 and it followed that $200,000 was too great a jump from a 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* (Civ App 18 of 1998).

In the light of those authorities the starting point taken by the trial judge of $120,000 cannot be sustained nor can the reduced figure of $100,000.

In our judgment an award of $50,000 for pain and suffering loss of enjoyment of life is the most that can be justified in the circumstances of this case. This figure will carry interest at 6% from date of issue of writ to date of judgment.

Loss of income

In a case such as this a clear distinction must be maintained between loss of income from date of issue of the writ to trial on the one hand, and future loss of earning capacity on the other. The former falls within special damages the latter is part of general damages.

It is convenient, however, to examine first certain features of this case which are common to both heads of compensation. The learned trial judge's finding on loss of income is, with respect, unsatisfactory. We have already referred to the fact that he appears to have amalgamated both the special damages and general damages into one figure. In addition however, he seems to have made two contradictory findings. His comment regarding the non-existent claim of Parkanson Pty Ltd at p 14 of the record is as follows:

> *The court will not allow any damages for financial loss of the second plaintiff because it is not persuaded that its business misfortunes were attributable to the unfortunate fall the plaintiff sustained at the Fijian Hotel.*

Nonetheless in the very next sentence dealing with the Plaintiff loss of earnings the judge said:

> *As regards loss of earnings, the plaintiff prior to the accident was a successful chief executive and businessman earning about A$100,000.00 per annum.*

Had we elected to send the case back for a retrial in the High Court the issue of the actual level of earnings of the Plaintiff and the reasons for the decline in Parkansons fortunes would no doubt have been closely scrutinised. What is inescapable on the evidence, however is that Parkansons lost a very valuable agency shortly after the Plaintiff's accident and as the judge found, that loss was not associated with the accident. The Plaintiff also sold his interest for a modest sum within a year of the accident. There was thus no foundation for the assumption that he would have continued at the same level of remuneration either up to trial or beyond had the accident not happened.

In addition although the Plaintiff referred rather loosely to a "remuneration package" of $100,000 per annum, his own accounting witness produce a schedule (Sch B at p 261 of the record) which discloses the true position as follows:

Salary $	1990
P Elsworth	33,949
R Elsworth	21,263
Car Leases	
P Elsworth	26,200

R Elsworth	4,800
Running Costs	
Insurance	3,800
Petrol and services	5,400
Entertainment	6,000
Total	$100,457

The Plaintiff's evidence was that he always arranged his affairs so as to minimise tax. Even allowing for such an arrangement, however, we are unable to see that the Plaintiff's real income as opposed to provision of a car, running expenses and entertainment allowance could have been more than $50,000 per annum at the outside. Tax returns which were referred to by his accounting witness disclosed that in 1990 he returned an income of approximately $34,000. As we will see the Plaintiff's level of remuneration in those occupations that he took up after the accident and when he had left Parkansons never exceeded the above figure of $50,000 which of course would be subject to tax.

Loss of earnings: Special damages

Here we are concerned with the actual loss suffered between the 8th of July 1992 (the date of the issue of the writ) and the 6th of December 2000 (the date of the judgment). A period of 7 years and 6 months.

As earlier indicated the trial judge did not calculate the loss of earnings for the pre-trial period. From the Plaintiffs accounting witness we have the following post-accident earnings, (calculations in Australian dollars):

Year ended 30/6/1990 —	$33,994.00
Year ended 30/6/1991 —	$26,929.00
Year ended 30/6/1992 (Estimate) —	$28,000.00

In addition the record shows further earnings which Mr Sweetman summarised at pp 45 and 46 of his submissions as are follows:

- Earnings of $50,000 with Park Rotary Shears the Plaintiff worked 18–20 months (Page 331).
- Prior to that $30,000 per annum in a stockbrokers office — 18 months spent there (Page 331).
- 1996 Gross Income $50,000 before expenses (Page 331).
- Stock Broker position — 1993 — Income $30,000 (Page 332).
- 2 — 2 ½ years Asia Pacific — First year may be $15,000. Got a lot more second year. Third year $26,929 (Page 332).

Having carefully considered Mr Sweetman's approach the court cannot improve on his suggested average earnings of $30,000 per annum. Over the seven-and-a-half years the $20,000 difference between the pre-accident earnings of $50,000 on and average earnings of $30,000.00 pa is A$150,000. We have no evidence as to the relevant tax rate on an income of $30,000 pa in Australia but it could not have been high. A rate of 10% would reduce the recovery by $15,000. While it is admittedly a matter of impression we nominally reduce the recovery figure to $140,000 for the loss of earnings up to the date of judgment on the account of tax that would have to be deducted. This figure will be converted to Fiji dollars and will carry interest at 6% from date of issue of the writ to date of judgment.

Loss of future earning capacity

As a professionally qualified person with obvious ability we consider the Plaintiff would have continued to earn to the age of 65 at the rate of $50,000 per annum which we have fixed as his pre-accident level of income.

The multiplier to be adopted must recognise the contingencies of life and the advantage of receiving in one lump sum income that otherwise would have been earned between the date of judgment when the Plaintiff was 58 and retirement at 65. Obviously a multiplier of seven would be too generous but we consider one of four would be just. We accordingly allowed general damages for loss of earning capacity of A$200,000 (A$50,000 x 4 = A$200,000). That figure will also be converted to Fiji dollars.

Special damages other than loss of earnings

As earlier record special damages although the subject of discussion between counsel, were not formally proved.

None the less a schedule was handed in at the end of the trial and there are some items on it which are beyond dispute and we propose to take judicial notice of the fact that they were clearly recoverable. These special damages are the qualifying and court attendance fees for Mr Wallace and Dr Healey and we will also allow 50% of Mr Armstrong qualifying and attendance fees. The reduction of 50% in Mr Armstrong's case is because approximately half of the work related to a claim for loss by Parkanson Pty Ltd which was abandoned and is therefore not relevant.

Those amounts which we allow are as follows:

Mr David Wallace

(a) Initial examination case copy Clemant Coes Hutsons 698 $550 (b) re-examination account No 1 Page 641 $500 (c) Consultancy fee attendance HCC No 15413 $5900 (d) Attention court attendance time accident 15523, $6000 total $12,995.

Doctor Bernard Healey

(a) Initial examination 21693 $400 (b) re-examination and fee attendance in court $3444 (c) second attendance in Court, consultancy fee $2200 total $6544.

Mr David Armstrong

(a) Initial report $4294 (b) Consultancy fee second or third reports $6500 (c) (second trip) consultancy fee attended $6400 total 10794.

Reduce by 50% Recoverable $5397.

Damages in favour of Plaintiff before reduction for contributory negligence

General damages	
Pain and suffering and loss of Enjoyment of Life	$50,000
Interest at 6% for 7 ½ years	$22,500
Loss of future earning capacity	
A$50,000 x 4 = $200,000 converted (A$ = F$1.22	$244,000

Special damages	
Loss of earnings from issue of writ to date of Judgment A$140,000 converted (A$1 = F$1.22)	$170,800
Interest at 6% for 7 ½ years	$76,860
Qualifying and attendance fees for experts	$24,936
Total	$589,096

Recovery consequent upon reduction of damages on account of contributory negligence

Recovery prior to reduction on account of Contributory Negligence	$589,096
Less 70% for Contributory Negligence	$412,367
Substituted Damages award	$176,729

Costs

The judge on the court below awarded global costs of $30,000. Apparently he over looked the fact that a number of the items in the schedule of special damages properly should be regarded as disbursements incurred by the Plaintiff and therefore to be added to the costs award. It is clear that airfares and accommodation for Mr and Mrs Elsworth on the first trip would be recoverable and airfares and accommodation for Mr Elsworth only on the second trip. Similarly for other witnesses attending from Australia airfares and accommodation would be recoverable. Likewise the airfares and accommodation for Mr Wallace and Dr Healey on both his first and second trips. Similarly Mr Armstrong airfares and accommodation for both his first and second trips and the airfares and accommodation for Mr Hanley. We are unable to agree that the consultancy fee charged by Mr Hanley for attending court is justified. The airfare and accommodation for Mr Hayter would be recoverable but not his consultancy fee. All these items could have been included as disbursements in the fixing of costs by the Registrar had that been ordered. The total of the above travel and accommodation disbursements, (apparently recorded in Australian currency) is approximately $27,000.

In all the circumstances we propose to increase the global sum awarded to the Plaintiff for costs in the High Court to $60,000 to cover legal costs and all disbursements. On this appeal, the Plaintiff having succeeded in resisting the appeal to a limited extent and to a lesser extent than the amount already paid to him, pursuant to the order for stay, we conclude it is appropriate that each party bear their own costs. We order the immediate payment out of the moneys held pursuant to the stay plus any interest thereon to the Defendant's (Appellant's) solicitors.

Appeal allowed.