

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 102 OF 2004

BETWEEN : **ASHOK CHAND** of Tauvegavega, Ba, Fiji, Farmer as the Administrator of the Estate of **SASHI SOBNA LATA** late of Tauvegavega, Ba, Fiji, Machinist **AND** in his personal capacity.

PLAINTIFF

AND : **THE PERMANENT SECRETARY FOR HEALTH**

FIRST DEFENDANT

AND : **THE MINISTRY OF HEALTH**

SECOND DEFENDANT

AND : **THE ATTORNEY GENERAL OF FIJI**

THIRD DEFENDANT

Appearances : Mr N. Padarath for the plaintiff
: Mr J. Mainavolau for the defendants
Date of Trial : 16 & 17 November 2017
Date of Submission: 16 March 2018 (defendants) & 11 May 2018 (plaintiff)
Date of Judgment : 15 May 2018

J U D G M E N T

Introduction

[01] The plaintiff brought his action seeking damages for the death of his late wife. He alleges that his late wife's death was caused by the clinical negligence of the medical officers at the Ba Mission Hospital. The relief is sought under three heads: (1). Compensation for the benefit of the dependents of his late wife (Compensation to Relatives Act Cap 29), (2) Damages suffered by the Estate of the deceased (Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27) and (3) Damages for mental distress.

- [02] In their statement of defence, the defendants state that: they have diagnosed and treated the deceased in accordance with the practices of a responsible body of medical opinion. They acted properly, professionally and with due care in the treatment of the deceased. The death was not due to the defendant's negligence.
- [03] At the trial, the plaintiff gave evidence and called 3 witnesses including an expert witness. The defendants did not call any witness in support of their defence. I am grateful for both counsel for their assistance by way of written submissions.

The Underlying Facts

- [04] The underlying facts are as follows.
- [05] Sashi Sobna Lata, the wife of the plaintiff (*'deceased'*) was eight months pregnant when she was taken to the Ba Mission Hospital with a complaint of severe abdominal pain and fever on 24 December 2000. The deceased was treated as an inpatient. On 28 December 2000, Ashok Chand, the deceased's husband (*"Plaintiff"*) was informed that the child had died in her womb. On 29 December 2000, she was transferred to Lautoka Hospital where she died. The plaintiff alleges medical negligence on the part of the doctors. The particulars of the negligence, according to plaintiff, are:
- a. Failed to diagnose or suspect that the deceased had suffered any fatal illness and failed to give or procure any treatment for the same or any investigation, which would have discovered the same.
 - b. Failing to operate the deceased and remove the dead foetus on time.
 - c. Failure to have proper working equipment at the hospital such as an x-ray machine.
 - d. Failure to warn the plaintiff that they did not carry out the required examination and/or did not have the equipment to do so.
 - e. Failure to advise the plaintiff that the deceased may need further observation and care and that the deceased may have to be referred for further treatment.
 - f. Failure to transfer the deceased to Lautoka Hospital on time.

- g. Failure to warn the plaintiff without proper examination and diagnosis that the deceased may die.
- h. Failing to take steps to prevent the death of Sashi Sobna Lata.
- i. Failing to take due and care attention in the circumstances.

[06] The plaintiff claims damages against the defendant for medical negligence.

Facts Agreed Upon

[07] The following facts were agreed to between the parties at the Pre-Trial Conference held on 9 July 2008 (*PTC*).

1. The Plaintiff is the husband of the deceased Sashi Sobna Lata daughter of Uma Dutt of Tauvegavega, Ba, Fiji, Machinist.
2. The Plaintiff brings this action for the benefits of the dependents of the deceased under the *Compensation to Relatives Act cap 29 Laws of Fiji* and for the benefit of the deceased's estate under the *Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap. 27 Laws of Fiji*.
3. The deceased Sashi Sobna Lata was pregnant at the time of her death (from here on referred to as "**deceased**").
4. The first and second defendant at all material times provided, managed and maintained Ba Hospital situated at Namosau, Ba (from hereon referred to as "**Ba Hospital**") and employed and engaged at Ba Hospital medical specialist, practitioners, nurses, and staff.
5. The third defendant is joined by virtue of section 12 of the *Crown Proceedings Act* Cap 24 Laws of Fiji and is liable for the torts committed by their servants and agents by virtue of section 3 of the said act.
6. On or about the 24th December 2000, the plaintiff took his wife to the Ba Hospital where she was admitted.

7. The Doctors, Practitioners, and Nurses at Ba Hospital attended to the plaintiff and the deceased.
8. The Doctors, Practitioners, Nurses, and staff at the Ba Hospital undertook to provide and did provide for the deceased medical treatment, attendance and advice and held themselves out to properly diagnose and treat the deceased and also to give proper and sound advice to the plaintiff for the welfare of the deceased.
9. They therefore owed the plaintiff and the deceased a duty of care to act properly and professionally and with due care and skill.
10. The deceased died on or about the 29 December 2000.
11. Particulars of relationship pursuant to the *Compensation to Relatives Act Cap 29* Laws of Fiji are as follows:
 - a) The names of the person for whose benefit this action is brought are as follows:

| <u>Name</u> | <u>Relationship</u> | <u>Date of Birth</u> | <u>Residence</u> |
|-------------|---------------------|----------------------|------------------|
| Ashok Chand | Husband | 24/12/65 | Tauvegavega, Ba |

The Issues

[08] The principal issue to be decided by the court is whether the deceased died as a result of the negligence of the doctors at Ba Hospital while treating and diagnosing the deceased and in advising the plaintiff acted in breach of their duty of care and acted negligently and without a proper care towards the plaintiff's late wife, Sashi.

The Evidence

[09] The plaintiff called 4 witnesses to prove his case namely Ashok Chand, the plaintiff ('PW1'), Dr Jimmy Taria ('PW2'), Dr Tui Taoi ('PW3') and Dr Kiran Gaikwad ('PW4').

[10] The defendant closed their case without calling any witness.

Plaintiff's Evidence

[11] The plaintiff ('PW1') in his evidence states:

- a) He got married to Sashi, the deceased in 1999 and resided with her in Ba. The deceased was working at Meenos factory as a machinist and earning \$80.00 per week.
- b) On 24 December 2000, Sashi was complaining of stomach pain. She was pregnant at that time.
- c) She was taken to the Ba Mission Hospital on 24 December 2000. A doctor in attendance saw her for 10 minutes. Thereafter, at about 10am she was admitted. He asked the doctor the reason for admission but the doctor did not tell anything.
- d) He stayed with Sashi till 5 pm and was not permitted to stay with her after that. His sister stayed overnight.
- e) On 25 December 2000, at around 7am he visited Sashi at the hospital. He made cocoa for her. An attending doctor examined Sashi for 5 minutes but, despite his request, the doctor did not tell him anything and went to the next ward. Sashi was in extreme pain. The doctor returned after one hour to do another check-up. He (PW1) was comforting Sashi holding her hands while she was suffering from extreme pain and distress. He stayed with Sashi until 5pm on 25 December 2000. No doctors explained what the problem was.
- f) On 26 December 2000, he came to the Hospital at 7am. His sister told him Sashi was in extreme pain on the previous night. Sashi also told his sister that she was having weakness in her hands and legs. He complained this to the doctor. Then he was told that it was a delivery pain. He stayed in the hospital until 5pm when his sister came to take over.

- g) On 27 December 2000, he again came to Ba Mission Hospital at 7am when his sister told him that Sashi's condition did not improve. The doctor came at 8am and he requested the doctor that Sashi be transferred to Lautoka Hospital.
- h) On 28 December 2000, the Doctor spoke to him privately and told him that the child (the foetus) had passed away. He requested a C section to save his late wife. The doctors advised him that a woman can only go through 3 C-Section and every time it's done, it decreased the chance of life for the mother. The doctors told him that a C-Section would not be done but a normal delivery. This was the first time the doctor advised him. The doctor did not tell him how a normal delivery will happen. The doctor only told him that a normal delivery would take about 5-6 days.
- i) On 29 December 2000, Sashi was transferred from Ba Hospital to Lautoka Hospital. He cannot forget what he saw that day. He was taken to the recovery ward to the bed of Sashi. He recalls the bed was surrounded by green curtains. He saw Sashi was lying in bed and she had died. A doctor told him that they could not save her. The doctor did not explain why Sashi had passed away. He got shocked and felt dizzy. His sister helped him go to a chair nearby.
- j) When he came to normalcy, he arranged the funeral for Sashi.
- k) He said Sashi and him were happily married and used to go for picnics, visit family members and sometimes play cards together. They both earned \$50.00 per week. After Sashi's death, he felt alone. He started to have bad dreams. He was not able to eat and had suicidal thoughts. He saw a doctor at Suva Hospital who prescribed him pills as he was mentally affected. He is remarried now as a suggestion by his parents but still cannot forget the day Sashi left him forever.

[12] In cross-examination, PW1 states:

- a) He was excluded from the conversation the doctors had with Sashi. He had every right to know what treatment they had given to Sashi because he is her husband.
- b) Sashi did not have a caesarean operation before.
- c) He admitted Sashi was known case of asthma but denied that she was having diarrhoea and asthma at the time.
- d) The doctor did not tell the reason for her death. They did not tell about liver problems can be discovered only after death. They did not tell about the fatty liver disease. He denied that he was given the advice.
- e) When asked: You felt very depressed after the death? He said: Yes. You totally withdrew yourself from the world? He said: Yes. You are married after her death and had a child? He said: Yes. Suicidal affect? He said: Yes.
- f) He is not physically disabled. He's 50 years old and employed. He said the mental and emotional effect has affected his work but he did not get any other medical report.

[13] PW2's evidence was that:

- a) Currently, he is at Lautoka Hospital. He is the Head of Department of Obstetrics and Gynaecology. He has seen the Medical folder from 2000. He identified: Tab 8 ante natal clinical record in the hospital ('EX 4 & 5'). Treatment chart used in 2000 in Fiji ('EX 6'). Tab 9 – part of the folder, Convert to PMR ('EX 7') Blood test – general form and in 2000 part of the medical folder ('EX 8'). Tab 11 – maternity file – delivery process - urgent form in 2000 which is part of the maternity file ('EX 9'). Tab 12 – death document part of the maternity file ('EX. 10'). Tab 15 – Surgical report after PMR, part of the medical folder ('EX. 11') and Tab 21 – Letter by S.K. Ram, solicitor ('EX 12').

[14] Under cross-examination PW2 states:

- b) He read autopsy report page (2). I did not refer the documents before coming to court. This report was prepared by a Doctor at Lautoka Hospital. He is bound on the records. He said acute fatty liver is a rare condition that occurs during pregnancy. It can be very tricky. It occurs later part of pregnancy. Liver biopsy could be diagnosed fatty liver. He cannot say whether it was available in 2000. HBP also affects the liver. Intensive care support is needed for a patient who has an acute fatty liver. It contributes to pre mature births. He has been to Ba Mission Hospital. In 2000, Ba Hospital did not have the facility to diagnose fatty liver. Diarrhoea occurs when something is wrong with your bowel.

[15] PW3 (Dr Tui) is a Specialist Obstetrician and Gynaecologist. She has been in practice for 30 years. She has a Bachelor of Medicine and Surgery Degree (MBBS), 4 years training and a Master's Degree. She has 2 years of internship. She currently operates a private practice. Prior to this, she was working for the Ministry of Health. She was based in Lautoka as a consultant. She mentioned that she was familiar with the case of the deceased (Sashi). She gave expert evidence on behalf of the plaintiff. In her evidence she states:

- c) Sashi had a raising heart and she came in with abdominal pain and fever, which was abnormal. In these circumstances, the attending doctor should have ordered a blood test including liver test. Despite the complaint and symptoms from the first day of admission, no tests were done until 28 December 2000.
- d) She said with the symptoms and conditions recorded, the doctors should have done a series of tests and to diagnose by elimination. This means that for every symptom showed, the Doctor would need to conduct various tests to eliminate other diagnosis and arrive at a conclusion.
- e) She confirmed that the Doctors in Ba Hospital did not do any test to diagnose the problem. It is obvious that they did not give the due care needed in the circumstances.

f) In her professional opinion, she said Sashi should have been transferred to Lautoka prior to the 28 December 2000. If Sashi was transferred to Lautoka Hospital prior to 28 December 2000, then the chance of her surviving would have been able to do the correct procedure and diagnose the condition and state the correct treatment.

[16] In cross examination Dr Taoi said at that time (the Year 2000) all the specialists in the field were in Lautoka. The doctors in Ba should have transferred the patient to the specialist in Lautoka when they were unable to diagnose the patient. She also said it is plainly obvious that the doctors attending to Sashi were negligent. There is no record that they sought any specialist intervention from Lautoka Hospital. This was despite the request from the plaintiff as well.

[17] The plaintiff called PW4, Dr Kiran Gaikwad who produced the medical report prepared by Dr S. Narayan in respect of the plaintiff's psychiatric well-being as a result of the incidences ('EX 15').

[18] In cross examination PW4 stated that he didn't prepare this report. He attended the patient. He is not a specialist but Dr Narayan was.

Discussion

[19] The claim is based on the clinical negligence. The plaintiff alleges that the doctors at the Ba Mission Hospital were clinically negligence in diagnosing and treating his late wife, Sashi while she was in the hospital. Sashi was in the Ba Hospital for 5 days with the complaint of abdominal pain and fever. She was admitted to the Ba Hospital on 24 December 2000 and transferred to the Lautoka Hospital on 28 December 2000, where she died.

[20] The primary issue that arises is whether the Ba Mission Hospital was clinically negligent and failed to use reasonable care, skill and diligence and exercise proper judgment in caring and treating Sashi for abdominal pain and fever.

[21] As I said, the defendant did not call any witnesses in support of their defence. Rather, they rely on the cross-examination of the plaintiff's witnesses. In their statement of defence, the defendant states that they acted professionally and

diagnosed and treated the patient, Sashi in accordance with the practices of a responsible body of medical opinion.

Duty of Care

- [22] The doctor-patient relationship has long been assumed to be a straightforward association and encounter between an expert in medicine and a person in need of medical care.
- [23] Counsel for the plaintiff refers to me cases that dealt with the duty of care of doctors. The cases the plaintiff referred include *Airedale NIIS Trust Board v Bland* (1993 AC 789, *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 583 and *Moli v Bingwar* (2003) FJHC 279 HBC 0335.1998 (3 April 2003).
- [24] On the duty of care of doctors towards the patient, in *Airedale* (above), the House of Lord stated:

“a doctor owes a duty of care towards his patient and in the case of a patient unable to give instructions or consent to treatment, a duty to treat him in the patient’s best interest, see in re F (1990) 2 AC 1. The general duty of a doctor is to act in accordance with a responsible and competent body of relevant professional opinion based upon the principles laid down in Bolan v Friern Hospital Management committee (1975) 1 WR 382”

- [25] In *Bolam’case* (above), McNair J set out the test for determining the standard of care owed by medical professionals to their patients (sometimes referred to as the ‘Bolam test’). The professional will not be in breach of their duty of care if they acted in a manner which was in accordance with practices accepted as proper by a responsible body of other medical professionals with expertise in that particular area. If this is established, it does not matter that there are others with expertise who would disagree with the practice.

[26] A passage from Medical Negligence Law by Andrew Fulton Phillip (pages 16 & 17) was cited with approval in *Moli* (supra) Pathik J (as he then was), where at it 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 practised 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”.
(Emphasis added)

[27] In the present case, Sashi presented to the defendant for treatment with a complaint of abdominal pain and fever. The defendant undertook to provide professional medical services to her. Undoubtedly, there was a doctor-patient relationship between Sashi and the defendants. This follows that the defendant owed a duty of care towards Sashi to treat her in her best interest.

Negligence of duty of care

[28] I now turn to the question of negligence of duty of care on the part of the defendants.

[29] Sashi was 8 month-pregnant lady at the time when she went to the Ba Mission Hospital with stomach pain and fever on 24 December 2000. She had been getting treatment as an inpatient until she was transferred to the Lautoka Hospital on 29 December 2000. The treatments given to Sashi at the Ba Hospital for 5 days are as follows (see the patient record- document 6 in the Agreed Bundle of Documents ('ABD')):

24 December 2000:

1. *The deceased was admitted. She had lower abdominal pain and wheezing together with loose motion.*
2. *Her vitals were checked, and it was noted that there were no contractions. For her lower abdomen pain, she was given panadol tablets.*

25 December 2000:

1. *The deceased was vomiting.*
2. *She had abdominal pains.*
3. *She was given pethedine (pain relief) and phenegen (sedative).*

26 December 2000:

1. *At 10pm the previous night, the deceased was unable to empty her bladder and she vomited.*
2. *At 6.10am, she was seen by a Doctor (Dr Jane) and was started on antibiotics.*
3. *No one saw her for the rest of the day and at 5.30 pm some further treatment was given to her.*
4. *The doctor notes that the deceased was 34 weeks and 5 days pregnant. She had vomited, had cough, fever, lower abdominal pain and yellow sputum.*

27 December 2000:

- 1) *Patient was seen by a Doctor at 10am. Nefidipine was recommended 8 hourly.*

28 December 2000:

1. *The deceased was not passing urine well and had five loose motions the previous night.*
2. *She was given treatment for pain.*
3. *At 10am, a scan was done, and it was noted that the foetus had died.*
4. *From the medical records, this appears to be the first time that the scan was done.*
5. *At 10.50pm that night a call was made to Lautoka to discuss the patient.*

29 December 2000 (Lautoka Hospital)

1. *At about 12:15 am, the deceased was at Lautoka Hospital.*
2. *At 1:20 am, she was seen by a medical doctor.*
3. *At 2:40 am, there was consultation over the phone about the patient's results.*
4. *At 4:15 am, there was no chest movement shown. She was unconscious, and CPR was done.*

5. *At 4:40 am, she was declared dead.*

- [30] The diagnose card shows that there was no preliminary test or investigation done at the Ba Hospital to diagnose despite the constant complaint of acute pain by the patient. The doctors noted the pregnancy 2 days after admission. Sashi was 8 month-pregnant when she was admitted to the hospital with stomach pain and fever. The first day the doctors failed to note Sashi's pregnancy and to monitor the child movement. The doctors at the Ba Hospital had only administered some pain killers and antibiotics for five days without any improvement in the patient's health.
- [31] Dr Taoi is a specialist obstetrician and gynaecologist. She has an MBBS as well as a Master's degree. She has done 2 years internship and has got 4 year-training in the field. Overall she has been in the practice for 30 years. Previously, she was working for the Ministry of Health and she was based in Lautoka as a consultant. I accept Dr Taoi as an expert witness. With her expertise and a wide range of experience she gave expert evidence on behalf of the plaintiff. In her expert evidence, she states that: "Sashi had a raising heart and she came in with abdominal pain and fever. In these circumstances, the attending doctor should have ordered a blood test including liver test. Despite the complaint and symptoms from the first day of admission, no tests were done until 28 December 2000. She also said the Doctors in Ba Hospital did not do any test to diagnose the problem. It is obvious that they did not give the due care needed in the circumstances.
- [32] It was Dr Taoi's opinion that Sashi should have been transferred to Lautoka prior to the 28 December 2000. If Sashi was transferred to Lautoka Hospital prior to 28 December 2000, then the chance of her surviving would have been possible and specialists in Lautoka Hospital would have been able to do the correct procedure and diagnose the condition and given the correct treatment. I accept Dr Taoi's expert evidence and her opinion.
- [33] As the author of Medical Negligence Law, Andrew Fulton Phillip 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.

[34] The doctors in Ba Hospital did not do even the basic test that was available in the hospital at that time. They were merely administering panadol and antibiotics for 5 days without any improvement. When the patient complains throbbing pain despite the treatment, they should have transferred the patient to the Lautoka Hospital immediately. The baby died in Sashi's womb. To my surprise, the doctors in the Ba hospital did not even take the fact that Sashi was carrying a dead baby in her womb. They did not even mind the request made by her husband to perform a C section to remove the baby. They only decided to transfer Sashi when her condition was deteriorated.

[35] In this case, the doctor-patient relationship has been established. The test for medical negligence is essentially objective. The hospital did not have sufficient facility will not be considered when assessing a clinical negligence objectively. The fact that the autopsy revealed that Sashi had a fatty liver which is tricky and very hard to diagnose is immaterial. The doctors in the Ba Hospital had failed to exercise the ordinary skill of their specialty in Sashi's case. In the circumstances, I find that the doctors in the Ba Hospital were clinically negligence in treating and caring Sashi. Their negligence led to Sashi's and her baby's death. The doctors are liable for the death of Sashi and her baby.

Damages

[36] Turning to assess the damages payable to the plaintiff as a result of the defendant's negligence.

[37] The plaintiff claims loss of expectation of life under Law Reform (Miscellaneous Provisions) Act Cap 27. Under this head, the plaintiff seeks an award in the sum of \$6,000.00.

[38] In *Yorkshire Electricity Board v Naylor* (1967) 2 All ER, it was held (at page 6):

"though it is said that his death was instantaneous the appellants have not sought to dispute that a valid cause of action vested in him. By reason of the provisions of the Law reform (miscellaneous Provisions) Act 1934, that cause of action survived for the benefit of his estate, the judge had to decide what sum of damages should reasonably be awarded in respect of the deceased's cause of action. He lost what is usually called his

expectation of life. The loss was something personal to himself. No one knows what life would in fact have held for him have he lived. No one will ever know. No one could ever know. The chances, the changes and vicissitudes of the future are in the future. He will not know them. No surmise can with any measure of confidence be made whether by his untimely death he was denied happiness or was spared unhappiness. The task of equating incommensurables in one that can never be satisfactorily achieved”

- [39] My attention is drawn to the principle laid down in *Bentham v Gambling* (1941) AC 157, where the court said the main consideration is whether a deceased enjoy a predominantly happy life rather than the length of his or her life. This assessment is rather difficult to make and as such, the court usually leaned towards awarding a moderate sum.
- [40] In Fiji, a sum of \$1, 250.00 was awarded (see *Subamma v Chandra* (FCA Vol 82 P 573 and *Daya Ram v Peni Cara & Others* (1983) 29 FLR 147). In *Hari Pratap v The Attorney General of Fiji & Anor* (Civil Appeal 14/1992), an award of \$ 2,500.00 was allowed. The plaintiff submits these cases and awards were determined more than 15 years ago and that in order to have a fair determination of this head of damage, the court should take into account inflation and in particular the circumstance of this case.
- [41] Sashi died of the negligence of the defendant. She lost not only her life but also that of her child. She was enjoying a happy family life, albeit she was a known case of the asthmatic patient. The assessment of damage for loss of life expectation is rather difficult to make. I bear in mind that the tendency to award a moderate award under this head. I consider all and award a sum of **\$5,000.00** under this head of damage.

Pain and suffering (deceased)

- [42] The plaintiff submits that a reasonable sum under this head would be an award of \$25,000.00.

[43] Sashi suffered from abdominal pain without any proper medication and attention for five days with having a dead baby in her womb. She died after 5 days of extreme pain.

[44] In *Medical Superintendent v Ismail* [2001] FJCA 29; ABU0050U.2000S (18 October 2001), where a patient died within 3 days of admission to a hospital, and the Court of Appeal awarded a sum of \$2,500.00. The court stated:

“The deceased’s condition was deteriorating over this time, and there was undue delay in administering medication to alleviate her pain. She had been denied drinking water, and she was suffering from diarrhoea and had to be cleaned by relatives who were attending the hospital. The inference from the evidence is that the deceased’s suffering increased unnecessarily as time went and could have been alleviated initially by treatment and then by surgery which was called for at a comparatively early stage. The Judge obviously took a strong view on this aspect of the claim, and being an appeal we should recognize she had the benefit of hearing the evidence and evaluating it. In those circumstances, although the result was excessive, the reduction should be at the higher end of the range which was available. We fix the amount at \$2500, but stress that as in all cases this assessment relates to the particular circumstances of the case. Awards such as these are not capable of mathematical analysis, and are not to be made by applying some hourly or daily rate following a comparison with other cases. It is the particular end result which is important.”

[45] Having considered the submission advanced by the plaintiff and the case authority, I assess damage for pain and suffering at **\$6,000.00**. In my judgement, this would be the appropriate sum under the particular circumstances of the case.

Damages under Compensation to Relatives Act (‘CR Act’)

[46] Section 3 of the CR Act provides:

“3. Where the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person or persons or body of persons, incorporated or unincorporated, who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured, and although the death was caused under such circumstances as to amount in law to a crime.”

[47] The plaintiff calculates the damages under this head at \$20,800.00 (\$50/week x 52 x 16 and divides by 2).

[48] In *Ram v Cara* [1983] FJLawRp 14; [1983] 29 FLR 147 (28 March 1983), the Court of Appeal said:

"We turn now to the larger item namely loss of earnings for what are described as "the lost years". It is essential to remember throughout one's consideration of this topic the basis upon which such an award is made. It is not an award to dependants for the loss of support which they would have been entitled to expect had there not been the death of the breadwinner. Such claims are brought in Fiji under the Compensation to Relatives Act (Cap. 29). In such cases, in this and other jurisdictions, such a claim is calculated by examining the amount of money which dependent relatives had been receiving in the past for their support and which they might legitimately have expected to have received in the future provided the deceased had had the means to make such payments and could have been expected to continue making them. This was a purely mathematical calculation of how much he would have been worth in money terms to his dependants for what ever was the expected period of dependancy..."

*Accordingly the claim on behalf of a deceased estate for loss of earnings for lost years is now firmly established as on the same footing as the same claim by a living person, subject to the reservation as to deduction of personal living expenses. Authorities relied upon before this Court were *Pickett v. British Rail Engineering Ltd.* (1980) AC 136; *Gammell v. Wilson* (1980) 2 All ER 557 (C.A.) and (1981) 1 All ER 578 (H.L.) and *White & Anor. v. London Transport Executive* (1982) 1 All ER 410, and are not the subject of challenge. (Emphasis in bold provided)."*

[49] The plaintiff also claims damages under CR Act on behalf of his late wife's estate for loss of earning for lost years. In Fiji, such a claim may be made as on the same footing as the same claim by a living person. Sashi was earning \$50.00 a week. So is the plaintiff. The plaintiff stated in evidence that he was dependent on Sashi's income to buy household items and take care of other expenses.

[50] Sashi was 26 at the time of her death and she would have worked until 55. The plaintiff submits that the multiplier of 16 should be considered by the court.

[51] In *Sigavolavola v Mati* [1986] FJCA 14; Civil Appeal No 85 of 1985 (21 March 1986), the Court of Appeal held:

"In the present case we have a healthy man of 30 who neither drank nor smoked and was obviously a hard worker with many fruitful years ahead of him. Kearsley J. concluded that the Respondent's prospects of remarriage were not bright and that she seemed in good health. There are of course other factors to be taken into account in determining the multiplier. But there has been no suggestion that there is any particular factor which would justify treating this case as outside the norm. The decided cases show that a multiplier of 16 is commonly used in cases where a deceased was in his 20's and in Halsbury 4th Edition Vol. 12 at para. 1156 is the observation that:-

"for a plaintiff in his thirties having a normal expectation of working life a multiplier of 14 or 15 has often been taken."

In our opinion a multiplier of 14, 15 or 16 could have been used in the present case. It follows that we are not satisfied that the Trial Judge erred."

[52] Sashi was a healthy lady except for wheezing. She was 26 at the time of her death. She was in her 26 having a normal expectation of working life. I accept that she was earning \$50.00 a week as a machinist. Taking all into my account, I take a multiplier of 15 in this case. The calculation of damages under this is as follows:

| | |
|---|---------------------|
| \$50.00 per week x 52 x 16 | = \$41,600.00 |
| Less 50% (expenses Sashi would have spent on herself) = \$20,800.00 | |
| Less (sum awarded for expectation of life) = \$ <u>5,000.00</u> | \$25,800.00 |
| | ----- |
| Total | \$ 15,800.00 |
| | ===== |

[53] The sum awarded for expectation of life has been deducted in order to avoid double payment.

Funeral expenses

- [54] The plaintiff claims a sum of \$4,000.00 for funeral expenses. He argues that in light of case authorities and the usual practice in Fiji during final rites a sum of \$4,000.00 is very reasonable. He refers to me the case authority of *Naounisaravi v Kumar and Raj Ram* 40 FLR 58 on this point.
- [55] On funeral expenses, Pathik J in *Naounisaravi* (supra) said:

Although there is no definition of 'funeral expenses' in Cap. 29 it provides in s. 11 that "damages may be awarded in respect of the funeral expenses of the deceased person if such expenses have been incurred by the parties for whose benefit the action is brought"; it would appear therefore that the test of reasonableness would apply.

*Some indication of what the word "funeral" is usually taken to comprehend has been stated by Mayo J. in *Public Trustee v Bednarczyk* (1959) SASR 178 at 180 (quoting from LUNTZ on Assessment of Damages 3rd Ed. p. 439) as follows:-*

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

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

- [56] The plaintiff in the evidence said he arranged the funeral and incurred funeral expenses of the deceased. I apply the test of reasonableness and allow a sum of \$2,000.00 for funeral expenses.

Nervous Shock

- [57] The plaintiff makes a claim for nervous shock. Under this head, he claims damages for both non-economic loss and economic loss.
- [58] He claims loss of income as economic loss. He claims a sum of \$16,380.00 under this head. This claim is made on the basis of 35% of loss of income due to his disability.
- [59] There is no medical evidence to establish that the plaintiff suffered 35% disability as a result of shock. Economic loss as a result of the shock has not been proved sufficiently. I would, therefore, decline to award this claim.

Non-Economic Loss-Nervous Shock

- [60] A sum of \$106,250.00 is claimed for non-economic loss arising out of nervous shock. It is based on 35% disability. The plaintiff himself has assessed the disability at 35%. The plaintiff relies on *Sorbello v South Western Sydney Local Health Network; Sultan v South Western Sydney Local Health Network* [2016] NSWSC 863, where the plaintiff's non-economic loss was assessed as being 35%.
- [61] In *Lata v Kumar* [2014] FJHC 757; HBC222.2009 (21 October 2014) the Plaintiff was granted \$70,000.00 for pain and suffering for a 28% disability.
- [62] The plaintiff has obtained a Psychiatric assessment (PEX 15), where Dr S. Narayan who is the Medical Superintendent and Consultant Psychiatrist. He in his psychiatric evaluation states:

"Two weeks before the due date his wife started to experience abdominal pains and she was taken to the hospital in Ba. Mr. Chand claims that he had pleaded with the doctors in Ba to refer his wife to Lautoka Hospital but they did not. However, his wife was transferred to lautoka hospital at around midnight when her condition deteriorated. In a tragic twist of fate their child was 'still born' and a few hours later his wife died as well.

After the death of his first wife and the child Mr. Chand's life has never been the same. Soon after their death he had problem sleeping at night. He felt very lonely and sad. He thought of committing suicide but did not.

Over the years, he has become quite isolative and withdrawn. He tended to be irritable. He would sit in one place for long and stare into space. He felt that

he did not have the energy and got tired easily. His appetite was poor and he had lost some weight. He did not take interest in himself or his surroundings. He also tended to be quite forgetful and poor concentration. He did not smoke before but after the wife's death he began to smoke a lot. He saw his life being reversed. Whereas before he was confident, independent and happy man, after the death he became very sad, lacked confidence and was depending more on the family.

He pulled his life together again and got married to his current wife in 2001. He has a child from this marriage.

While he is married again and has a child, they are a constant source of reminder to his first wife and child. The child would have been 5 years old by now. He still feels sad over the whole incident. He still gets dreams of his wife. He talks about her most of the time. He still remains quiet now days. He is not suicidal any more. He has managed to keep his job.

Assessment of Mr. Chand revealed that he suffered from Depression of a mild degree. Based on the International Classification of Disease, 10th edition (ICD-10) an individual with mild depressive episode is usually distressed by the symptoms and has some difficulty in continuing with ordinary work and social activities but will probably not cease to function completely."

[63] The plaintiff testified that: After Sashi's death, he felt alone. He started to have bad dreams. He was not able to eat and had suicidal thoughts. He saw a doctor at Suva Hospital who prescribed him pills as he was mentally affected. He is remarried now as a suggestion by his parents but still cannot forget the day Sashi left him forever.

[64] Taking all into my account, I award a sum of \$25,000.00 for pain and suffering as a result of nervous shock. In my view, this would be reasonable in the circumstances of the case.

Interest

[65] The plaintiff is entitled to interest on the judgment sum. I would, therefore, allow interest on the judgment sum to be calculated at the rate of 4% pa from the date of the writ of summons until the date of this judgment.

Costs

[66] The plaintiff would be entitled to summarily assessed costs of \$2,500.00.

Conclusion

[67] For all these reasons, I conclude that the death of Sashi Sobna Lata was caused as a result of the clinical negligence of the defendant. The defendant had breached the duty of care they had towards Sashi Sobna Lata to act properly and professionally and with due care and skill. The first and the second defendants are vicariously liable to pay compensation to the plaintiff. Accordingly, I give judgment in favour of the plaintiff in the sum \$48,800.00 with summarily assessed costs of \$2,500.00. The plaintiff will also be entitled to interest on the judgment sum at the rate of 4% pa to be calculated from the date of the writ of summons until the date of this judgment.

The Outcome

1. There will be judgment in favour of the plaintiff in the sum of \$48,800.00.
2. The plaintiff will be entitled to interest on the judgment sum at the rate of 4% to be calculated from the date of the writ of summons until the date of this judgment.
3. The plaintiff will also be entitled to summarily assessed costs of \$2,500.00.

H. H. M. Mohamed Ajmeer
15/5/18

.....
M. H. Mohamed Ajmeer
JUDGE



At Lautoka
15 May 2018

Solicitors:

For the plaintiff; M/s Samuel K Ram, Barrister & Solicitor
For the defendants; Office of the Attorney General