RATIONALITY OR INTUITION? - THE ASSESSMENT OF THE QUANTUM OF DAMAGES FOR PERSONAL INJURIES IN SOLOMON ISLANDS

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The development of a Pacific islands jurisprudence is considered in this paper in the specific context of six recent judgments of Solomon Islands' courts which dealt with the rules relating to the assessment of damages for personal injury. The discussion of the issues and the rules enunciated by courts is of social and economic interest not only as a matter of Solomon Islands' law but also for its value for other small Pacific states where similar issues are having to be resolved.

I INTRODUCTION

A Assessment by Comparison with English Decisions

The assessment of quantum of damages in Solomon Islands has, in the past, been a most difficult task, both for lawyers advising clients and for the courts faced with making an award. The dearth of authority made assessment by comparison with other domestic awards impossible. Whilst the common law of England is part of the law of Solomon Islands, at least in so far as it is not inconsistent with the Constitution or any Act of Solomon Islands Parliament or customary law, it is to apply only in so far as it is applicable and appropriate to the circumstances prevailing in Solomon Islands from time to time.[1] In relation to quantum it is arguable that decisions of English courts will often be inapplicable and inappropriate, as such decisions are made in an entirely different social and economic climate. This was expressly recognised in *Sukumia v Solomon Islands*

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1 Schedule 3 to the Constitution of Solomon Islands, Schedule to the Solomon Islands Independence Order 1978 LN43/78.

Plantation Limited,[2] where the High Court of Solomon Islands was presented with argument on quantum, based on the ratio between awards in Solomon Islands and awards for similar injuries in England. Daly CJ said that the danger in accepting this argument was that Solomon Islands' courts would be merely applying a scaled down version of damages awarded in the United Kingdom,[3] where the standard of living and way of life was vastly different. Notwithstanding, the courts continue to make reference to English cases.[4]

It should also be mentioned that the effect of English common law in Solomon Islands is also restricted by the fact that decisions made after 7 July 1978 are not binding.[5]

B Assessment by Comparison with Decisions from Countries other than England

Other overseas decisions can be met with similar objections. Decisions of nearby Pacific island nations' courts, however, whilst not binding in any way, may provide more relevant examples. This is, no doubt, why the High Court of Solomon Islands has shown enthusiasm for cases from Papua New Guinea cited by counsel.[6] Whilst there may be some common factors between Pacific island nations, the diversity of those societies and the circumstances of individual plaintiffs must not be ignored. Thus, to be of most value, a precedent must not only come from a similar jurisdiction with similar economic and social conditions, but it must also involve a similarly placed plaintiff in that society. For example, to compare a Solomon Islands plaintiff living in Honiara and managing a large company with a Papua New Guinea plaintiff living in a remote Highland village might be of less assistance than comparing the former with his counterpart in Australia.

Since independence Solomon Islands has been gradually building up its own jurisprudence. Included in this is a small body of law on damages, both for personal injuries and in the case of fatal accidents.[7] This article examines the existing awards which may have been made for personal injuries claims, and the factors that appear to have influenced the level of damages, with a view to gleaning some indication of the range of awards which

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2 [1982] SILR 142.

3 The Constitution of Solomon Islands adopts the "Acts of Parliament of the United Kingdom of general application", rather than the laws of England. Schedule 3, Constitution of Solomon Islands, schedule to the Solomon Islands Independence Order 1978, LN43/78.

4 See eg the reference to *Lee v Mayor of Manchester* [1953] CA No 277 in *Teioli v Teioli*, Unreported, 12 October 1995, High Court of Solomon Islands, cc 5/95.

5 The Constitution, Schedule 3, s 2(1).

6 See for example the remarks of Muria J in *Teioli v Teioli*, Unreported, 12 October 1995, High Court of Solomon Islands, where counsel cited *Kirai v State* (1990) National Court No 321 and *Korrolly v Motor Vehicle Insurance* (1994) National Court No 941.

7 It is proposed to follow this article with a companion article dealing with these cases.

might be expected in future cases, and the factors which the court is likely to take into account when making its assessment.

C Statutory Provisions

Before looking at the existing case law, mention should be made of the statutory provisions which, whilst not applying directly to the assessment of quantum, may effect the amount of the ultimate award, in circumstances where the Acts apply.

1 The Workmen's Compensation Act[8]

The Workmen's Compensation Act provides compensation for both male and female employees without proof of negligence on the part of a third party. Compensation, however is only available where the accident causing the personal injury arose out of and in the course of employment, and the level of compensation, which is very low, takes no account of the circumstances of the victim or the pain and suffering endured. Although the type of injury is taken into account in calculating the percentage loss of earning capacity, the base figure to which that percentage is applied is calculated by reference to pre-accident earnings. The maximum payable in the event of death or permanent total incapacity is $60,000.[9]

The main section which is relevant to common law claims is s 27. This preserves the right to make a civil claim, but specifies that any damages award should take into account compensation already paid under the Act. A civil judgment will be a bar to a subsequent statutory claim. Finally, if an employer is found not liable in proceedings taken outside the Act[10] the court is expressly empowered to proceed to determine whether Workmen's Compensation is payable and, if so, to assess the amount. The penalty for taking this route is that any extra costs incurred by virtue of proceeding outside the Act may be deducted from the compensation.

Section 25 provides for the position where a third party is also liable in respect of an accident covered by the Act. The injured employee may seek damages at common law from the third party and compensation under the Act. However if damages are awarded after compensation has been paid under the Act, the latter must be deducted from those damages.

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8 Cap 77.

9 "Total incapacity" is defined by s 3 as meaning "such incapacity, whether of a temporary or permanent nature, as incapacitates a workman for any employment which he was capable of undertaking at the time of the accident resulting in such capacity."

10 This would not appear to be wide enough to include criminal proceedings, as the word "plaintiff" is used, but would include both common law and statutory proceedings.

On the other hand if damages are recovered before compensation is awarded, the compensation award must be abated by the amount of damages.

By virtue of s 25(2) the employer[11] is entitled to an indemnity, in respect of any compensation and costs paid pursuant to the Act, from any person found liable to pay damages in the independent proceedings.

2 *The Motor Vehicle (Third Party) Insurance Act*[12]

The Motor Vehicle (Third Party) Insurance Act is also relevant in relation to personal injury claims arising from motor vehicle accidents. The Act provides for compulsory insurance against liability for death or personal injuries caused by or arising out of the use of a motor vehicle.[13] It also prevents avoidance of a policy by the insurer for non-disclosure, breach of the policy or the Act, or failure to comply with post-accident requirements of the policy.[14] However, in such circumstances the insurer has a joint and several right of recovery against the owner of the vehicle and any other person liable for the death or personal injury.[15] The insurer also has a right of recovery against unauthorised or intoxicated drivers.[16]

Recovery from the owner may be limited by s 10(5) if the owner requests the insurer to settle or compromise, up to a specified sum, or to pay or contest the claim, and the insurer unreasonably refuses to do so. In such case, the insurers can only recover what they would have had to pay if they had not acted unreasonably.

If the owner of the vehicle is dead or cannot be found the insurer may recover from the driver, if the latter has breached the Act.[17] The maximum compensation payable is the same as under the Workmen's Compensation Act, that is, $60,000.[18]

It has been suggested in argument before the High Court that the maximum figures set down by Parliament under this Act, should have some bearing on the level of compensation awarded at common law. Although this has not been expressly endorsed by the courts, it

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11 Or any contractor liable under the Act (see s 24).

12 No 16 of 1972.

13 Section 8(1) read with s 5(1)(b).

14 Section 10(3).

15 Section 10(4).

16 Section 11.

17 Section 10(7).

18 The limit was increased by the Motor Vehicle (Third Party) Insurance Amendment Act, No 8 of 1991.

would appear from the level of the award in *Teiolo v Teioli*,[19] which is discussed below, that this may be a limiting factor.

II CASES AWARDING DAMAGES FOR PERSONAL INJURIES

A Six Cases

1 Longa v Solomon Taiyo Limited[20]

The first reported case where damages were awarded for personal injuries by the High Court was *Longa v Solomon Taiyo Limited*.[21] In that case the plaintiff was injured whilst fishing on a catcher boat. The hook had been taken by a shark, and flew out of its mouth and caught the plaintiff in the eye, causing virtual loss of sight in that eye. Liability and quantum were in issue.

Having found for the plaintiff on liability, the court moved on to consider the measure of damages. Chief Justice Daly, appreciating the importance of establishing the approach to the assessment of damages in Solomon Islands on a proper footing, set out the basis for his award in detail. His Lordship commenced by stressing the "impossibility" of putting a monetary value on personal injuries.

His summary of this difficulty, incorporating the well known words of Diplock LJ is worth citing in full:[22]

> In earlier days the assessment was left to the common sense of a jury who were really invited to make an intuitive assessment after being directed by a judge in rolling phrases that have now become embedded in the law. But does it help if I direct myself with what has been called the platitude "that the purpose of compensatory damages in the action for personal injuries is to put the victim in the same position as he would have been if he had not sustained those injuries, so far as money can do this". The learned Lord Justice (as he then was) went on to say "But money can never do this". I respectfully agree, as there is nothing that can be brought with the money awarded that can ever take the place, as in this case, of an human eye.

Having made clear the difficulty of the task, his Lordship proceeded to clarify the best way of going about it. Explaining that there were various ways of classifying damages, including the basis division into special damages on the one hand (heads (1) and (2) below)

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19 Unreported, 12 October 1995, High Court of Solomon Islands, cc 5/95.

20 [1980/81] SILR 239.

21 Above n 20, 249.

22 Diplock LJ in *Fletcher v Autocar & Transporters Ltd* [1968] 1 All ER 726, 736.

and general damages on the other (heads (3) to (6) below), as he set out the heads of damages which he proposed to consider as:[23]

(1) The out of pocket expenses

(2) Economic loss in the past

(3) Economic loss in the future

(4) Inability to enjoy the usual amenities of life

(5) Pain and suffering and general inconvenience

(6) Disfigurement

Number (1) consists of the expenses to which the plaintiff has been put as a result of the injury, such as medical bills, and (2) refers to loss of earnings and other gains which the plaintiff would have made had s/he not been injured. Thus they are both heads of pecuniary damages and are not quantifiable in monetary terms. Heads (3) to (6) were classified by Daly CJ as non-pecuniary, and not directly quantifiable in monetary terms. With regard to head (3) his Lordship pointed out that this was perhaps an oversimplification. To some extent, it fell between the two categories of special and general damages, as although the loss could be actuarially computed in some cases, the resulting calculation was based on informed guesses as to the future.

The Chief Justice pointed out that the heads were not mutually exclusive, and that (4) and (5) were inseparable. Similarly (3) and (4) are often intertwined. However, the relationship between heads (2) and (3) was not explained. It would perhaps have been useful to point out that these equated with loss of earnings and other gains, head (2) being loss of earnings to the date of trial and head (3) being prospective loss of earnings, and that the two are often grouped together under the heading of "loss of earning capacity".[24] As discussed below, there appears to have been confusion about these heads of damages in *Sukumia v Solomon Islands Plantations Limited*,[25] which might have been avoided by further clarification at this early stage.[26]

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23 This list was acknowledged to be an adaptation of the heads used in Papua New Guinea, for example in the case of *Gudi Kidu v Port Moresby Freezing Co* (1967) 68 PNGLR 466.

24 *McGregor on Damages* (15 ed, 1988) points out that there is no substantive difference between the two, "the dividing line depends purely on the accident of the time when the case comes before the court", para 1451.

25 [1982] SILR 142.

26 For a further explanation of the heads of damages applied in England see *McGregor on Damages* (15 ed, 1988) paras 1447 to 1449.

Returning to the facts of the case his Lordship considered a claim for future economic loss under head (3), but concluded that there was no evidence on this as the plaintiff had returned to employment as a crew member at the same rate of pay as prior to his accident. It appears that there was no evidence of any other special damages.

As for the remaining non-pecuniary damages the Chief Justice pointed out that a firm basis of principle was required to found the assessment of the measure of damages in Solomon Islands. An empirical approach was not possible as there was not an existing body of cases to establish the norm for that country.

His Lordship laid down the following basic considerations, to be taken into account when assessing non-pecuniary damages:

1 the need to be fair to the plaintiff as an individual,

2 the need to be fair in the eyes of the community, and

3 the need to be fair to plaintiffs generally.

His Lordship's expansion on these principles merits examination.

(a) The need to be fair to the plaintiff as an individual

His Lordship thought the need to be fair to the plaintiff as an individual was the most obvious principle. Given that the object of damages is to compensate with money for personal injuries the effect of the loss on the individual has to be taken into account. He gave the example of the loss of a left hand by a carver, which was a very different matter to loss of a left hand by a lawyer. If the lawyer was a guitarist in his spare time, that would have to be taken into account.

Further, his Lordship dismissed counsel's argument that damages should be sufficient to enable the plaintiff to obtain solace in respect of his losses and injuries in the following words:[27]

> In my view the court would be presented with an impossible task if it had to assess what was necessary to provide comfort or solace in the future. Would, for example, money to buy a truck be enough or would an outboard also be required? Would a person of miserable disposition be entitled to more than a person who bore his disabilities cheerfully and so on? In this respect, then, I prefer to put myself in the company with Lord Pearce and decline to concern myself with how the money is to be spent.

Chief Justice Daly also pointed out that one had to be careful not to allow this principle to give rise to a position where different scales of damages applied to the rich and the poor.

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27 Above n 20, 253.

It was particularly difficult to reconcile the avoidance of such double standards with the need to be fair to the plaintiff as an individual in a country such as Solomon Islands where there were vast divergences between wealth and living conditions in different sections of the community: "subsistence agriculture on the one hand to be contrasted with wealthy international business on the other".[28]

However, he thought that this could be avoided by regarding his three principles as cumulative.

(b) The need to be fair in the eyes of the community

His Lordship's inspiration for this principle would appear to have been the following words of Lord Devlin from *H West & Son Ltd v Shepherd*:[29]

> What is meant by compensation that is fair and yet not full? I think it means this. What would a fairminded man, not a millionaire, but one with a sufficiency of means to discharge all his moral obligations, feel called on to do for a plaintiff whom by his careless act he had reduced to so pitiable a condition? Let me assume for this purpose that there is normal consciousness and all the mental suffering that would go with it. It will not be a sum to plumb the depths of his contrition, but one that will enable him to say that he had done whatever money can do. He has ex hypothesis already provided for all the expenses to which the plaintiff has been put and he has replaced all the income which she has lost. What more should he do so that he can hold his head among his neighbours and say with their approval that he has done the fair thing?

His Lordship regarded this as a useful approach which required the case to be looked at from the different angle of fairness as seen by the defendant in a particular community. He warned however that this principle should not be elevated so as to make an assessment based on the financial position of the defendant:[30]

> There can be no reason in logic or in law for saying that because a defendant is ill-insured or financially embarrassed a plaintiff should be awarded a lesser sum as against that defendant in contrast to that which would be awarded as against a wealthy defendant.

Under this heading the Chief Justice also discussed the effect of the fact that plaintiffs in Solomon Islands are claiming against the background of a developing country. This issue had already been raised in Papua New Guinea in *Carroll's*[31] case; *Dillingham Corporation*

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28 Above n 20, 252.

29 [1963] 2 All ER 625.

30 Above n 20, 254.

31 Below n 89.

of New Guinea v Diaz;[32] and *Kerr v Motor Vehicles Insurance (PNG) Trust*.[33] In the former the majority of the court accepted the argument that in the light of economic conditions in Papua New Guinea, and particularly the low level of wages, the level of damages should be substantially lower than elsewhere. The ratio between Australian damages and those in Papua New Guinea was said to be 4:3 or 5:4.

That case was severely criticised in *Dillingham Corporation of New Guinea v Diaz*[34] and *Kerr v Motor Vehicles Insurance (PNG) Trust*,[35] both of which concerned expatriates who were, on the evidence, due to return to Australia. In both cases the court reaffirmed that the tortfeasor must take the plaintiff as he finds him, and refused to allow a deduction on the basis of conditions of the country.

Chief Justice Daly expressed the view that these cases placed too great an emphasis on the future place of residence of the plaintiff, thus supplanting the consideration of fairness in the eyes of the community with ideas of fairness in another jurisdiction. It also meant that a person who chose to leave the jurisdiction for a more prosperous country would obtain higher damages than a person who chose to remain. His Lordship was of the view that those who chose to live in a particular country must be prepared to accept the level of damages applicable there:[36]

> There must be a point in consideration of damages when a court must say to itself that a plaintiff must accept that by coming to a country where the overall economy and development has not progressed as far as it has elsewhere he is running a number of risks one of which is that if he suffers injuries from negligence he may receive less in damages to that which he might receive in his own country with its greater wealth and development.

However, the Chief Justice made it clear that this did not mean that he favoured the approach in *Carroll's* case and went on to say:[37]

> I should add that this is not to say that there is to be any automatic deduction from damages likely to be awarded elsewhere. Clearly one would then have the ludicrous situation of having to decide whose damages were the starting point. What one must do is to take into

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32 [1975] PNGLR 262.

33 [1979] PNGLR 251.

34 Above n 32.

35 Above n 33.

36 Above n 20, 256.

37 Above n 20, 256.

account what is fair and reasonable within this jurisdiction as well as what is fair to the plaintiff in his individual circumstances.

(c) The need to be fair to plaintiffs generally

This consideration places emphasis on making comparable awards for comparable injuries. Chief Justice Daly disapproved of the Australian approach, expressed in the High Court case of *Arthur Robinson (Grafton) Pty Ltd v Carter*,[38] which stressed the first principle discussed above — fairness to the individual — and rejected the notion of a conventional range for particular classes of injuries.

Whilst recognising that no two awards were alike, his Lordship considered other awards helpful as a starting point, and helpful to avoid inconsistencies, which would result in a sense of injustice when a plaintiff hears of other awards which s/he considers more generous.

Bearing those considerations in mind his Lordship turned to the actual assessment of non-pecuniary damages under his heads (4), (5), and (6). In the absence of evidence as to any adverse effect caused by the obvious disfigurement constituted by a sightless eye, his Lordship did not give great weight to this factor.

In relation to (5) the evidence showed that the plaintiff remained with his ship until some six days after the accident, when he was admitted to hospital for two weeks while an infection was treated. There was no evidence of any particular loss of amenities, but his Lordship obviously did not think that this precluded an award under head (4); some loss of amenity would naturally follow when a twenty-two year old lost the sight of one eye. Lack of evidence merely ruled out aggravating factors.

His Lordship considered the awards made in cases from Papua New Guinea, Australia, and the United Kingdom to which he had been referred. He also commented that awards of custom compensation would not assist as the basis of such compensation was often the value of restoring the peace, rather than an attempt to compensate the victim. He concluded that the proper award for general damages was $5,000.00, together with interest at 5% from the date of issue of the writ[39] and costs. Compensation of $1,670, paid pursuant to the Act was deducted from the award.

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38 (1968) 122 CLR 649.

39 Pursuant to s 3 Law Reform (Miscellaneous Provisions) Act 1934.

2 *Sukumia v Solomon Islands Plantations Limited*[40]

The second reported case awarding damages for personal injuries was *Sukumia v Solomon Islands Plantations Limited*.[41] This was an appeal from the Principal Magistrate, Honiara on quantum only. The plaintiff, who was in his mid-twenties, suffered a closed fracture of his left tibia when a vehicle onto which he had been loading ngali nuts ran over him. The accident occurred on 19 March 1981. No permanent disability ensued. A finding of 75% contributory negligence was not being appealed.

The court, after granting leave to submit further evidence,[42] took into account the fact that the plaintiff had spent two months in hospital, the first with his leg in plaster and confined to a bed; the second when he could walk around with sticks. For a further two months he was still in plaster and could not work. There was no evidence of any loss of earnings or loss of amenity, and therefore the only head of damages considered was pain and suffering and general inconvenience. Counsel for the plaintiff put forward an argument that, taking *Longa's* case as a starting point, it was possible to assess quantum for all types of injuries in Solomon Islands by a mathematical process: the proper award for the loss of an eye in Solomon Islands was $5,000. The ratio of awards for loss of an eye as compared with a similar type of fracture in England and Wales was 6:1. Therefore the damages in this case should be 1/6 of $5,000, multiplied by 12^1/2% to take account of inflation between the date of *Longa's* Case (18 January 1982) and the date of this trial (16 September 1982). This resulted in a figure of $900.

As mentioned above, Chief Justice Daly was unable to accept this approach. Stressing the need to establish assessment of quantum on a firm footing in Solomon Islands, he said:[43]

> There is however lurking in the argument the danger that by accepting it, we would be merely applying in Solomon Islands a scaled down version of damages awarded in the United Kingdom with its vastly different standard of living and way of life to Solomon Islands. It may be that Solomon Islanders would put a different ratio upon loss of an eye as compared to a broken leg and if they would do so one would not be observing consideration 2 ("the need to be fair in the eyes of the community") if one applied the ratio developed in the English Courts.

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40 [1982] SILR 142.

41 Above n 40.

42 Application was granted under 0 60, R15, High Court (Civil Procedure) Rules 1964.

43 Above n 40, 145.

The Chief Justice found that his estimation of damages under head (5) would have been $800.00. He therefore felt justified in setting aside the trial judge's award. Given the contributory negligence the award was $200.00 (25%) together with costs in both courts.

3 *Liliau v Trading Company (Solomons) Limited (No 1)*[44]

In *Liliau v Trading Company (Solomons) Limited (No 1)*[45] the plaintiff was employed as a bus driver. Whilst driving the bus he lost his right arm. He spent fourteen days in hospital, and had an operation to place a skin flap over the wound. Liability and quantum were in issue. At trial liability was established, and allegations of contributory negligence dismissed. There was no evidence of any special damages and the court proceeded to assess damages under heads (3) to (6), as set out in *Longa's* case, that is:

(a) economic loss in the future,

(b) inability to enjoy the usual amenities of life,

(c) pain and suffering and general inconvenience, and

(d) disfigurement.

Under the first head the court took into account the fact that the defendant had given the plaintiff employment, at the same rate, as a security guard. The plaintiff left this employment on the basis that it was boring. At the time of the hearing he was managing the family plantation. Notwithstanding, the Chief Justice took the liberal view that account should be taken of the fact that a one armed man was disadvantaged on the labour market, particularly as a driver, which was his chosen trade. Accordingly, there should be an element representing this handicap in the general damages. This approach reflects that which has been applied in England since the decision in *Smith v Manchester Corporation*,[46] although it has also been stressed there that there must be a substantial risk of the plaintiff being thrown onto the labour market to make this a consideration.[47] In the present case only a notional figure of $3,000 was awarded, as no evidential basis for any higher award had been laid, even if this was justified by the facts.

Under Chief Justice Daly's fourth, fifth, and sixth heads the court considered authorities presented by counsel from England, Wales and Papua New Guinea, and specifically expressed appreciation for the latter. *Longa's* case was considered, but distinguished on the

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44 [1983] SILR 10.

45 Above n 44.

46 (1974) 17 KIR 1 (CA).

47 *Moeliker v Reyrolle & Co* [1976] ICR 253 (CA).

basis that there was no evidence there of loss of amenities, whereas in this case the plaintiff was likely to suffer considerable general inconvenience. Chief Justice Daly gave particular weight to the fact that this was a society where manual dexterity was particularly valuable, stating:[48]

> ... the Plaintiff will suffer considerable general inconvenience particularly in a society where reliance upon the ability to perform manual acts in the garden, in house building, in the plantation and in ordinary daily life is much greater than elsewhere in the world.

Accordingly the court applied a greater ratio than that applied in England and Wales between loss of an eye and loss of an arm, producing a figure of $21,000, making a total of $24,000 for general damages. After deduction of $4,487.38 which had been received by the plaintiff under the Workmen's Compensation Act, the plaintiff received $19,512.62. Submissions and judgment on interest were not reported.

4 *Jolly Hardware and Construction Company Limited v Suluburu*[49]

In 1985, in *Jolly Hardware and Construction Company Limited v Suluburu*[50] an appeal was lodged against part of the assessment of quantum by the Registrar. The plaintiff, aged thirty, fell from a ladder whilst painting the rafters and a high wall inside a workshop. He was admitted to hospital, and remained unconscious for three hours. He suffered a linear fracture of the right parietal bone causing irreversible brain damage. As a result he underwent a personality change and was both mentally and physically slower.

The Registrar made an award of $28,115.83, including $12,000 for pain and suffering and general inconvenience, and it was only that assessment under head (5) which was the subject of the appeal.

Chief Justice Woods considered Chief Justice Daly's remarks in *Longa* and *Sukumia* regarding the dangers of applying overseas cases. He made it clear however that he considered such cases to be of importance, in the following words:

> Given the almost total absence of precedents in Solomon Islands on the question of damages in personal injuries cases, I would have thought that such precedents as are available whether in England, Australia, Papua New Guinea or elsewhere at least provide a useful starting point otherwise one is indeed "grasping in the air".

His Lordship referred to four similar English cases reported in Kemp & Kemp where a range of damages from £3,000 to £7,000 had been awarded between 1968 and 1973. This

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48 Above n 44, 25.

49 [1985/6] SILR 87.

50 Above n 49.

equated with about $6,000 to $14,000 in 1985. Further, the court recognised that inflation would render this even higher. In two cases the award had been the equivalent of $11,000, and in one of those (*Hall v John Thompson (Design and Contracting) Ltd*[51]) the injuries were the closest to those in the present case. Accordingly, his Lordship declined to interfere with the award of $12,000.

5 *Simeon Paerata v Kalena Timber Company Limited*[52]

In 1993 *Simeon Paerata v Kalena Timber Company Limited*[53] another case involving head injuries came before the High Court. In this case they were caused in an accident which took place in January 1989, when the plaintiff was hit by a falling tree. The plaintiff, who was thirty-two years old at the date of trial, also injured his right arm, which was rendered virtually useless. He spent a total of seven months in hospital. His head injuries left him with a low tolerance for the sun, and a tendency to lose consciousness for 3 to 5 minutes when exposed to it. On average, this fainting occurred about three times each month.

Justice Palmer, dealing with quantum only, considered the existing authorities, and considered that *Liliau* and *Longa's* cases were of relevance to the question of future economic loss. In the former, only notional damages were awarded under this head, as the evidence was to the effect that the plaintiff had been given alternative employment at the same rate by the defendant, and had left it voluntarily. In *Longa's* case no award was made, as the plaintiff had obtained employment as a crew member, at the same rate of pay as he was getting as a fisherman. In this case, by comparison, his Lordship considered that there was clear evidence that the plaintiff had been unable to obtain employment since the accident. Nor could he work in the garden, due to his inability to withstand exposure to the sun. Consequently he was largely dependent on family members.

Unfortunately, the award made did not reflect the conclusion of fact arrived at. Justice Palmer awarded damages for future economic loss, calculated by multiplying $324.34 (presumably the plaintiff's net wages, although this is not stated) per month from the date of the accident until January 1994. As the trial took place in September 1993, this was, in effect, mainly an award under head (2) of *Longa's* case, that is for economic loss in the past. Only the additional three months salary from the date of the trial to January 1994 could be said to relate to head (3). With respect to his Lordship, it would appear that there was some misunderstanding as to this head of damages. It is easy to see how this could have arisen as Chief Justice Daly's heads (2) and (3) are often grouped together under the heading

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51 Kemp & Kemp *Quantum of Damages*, Vol 2, Personal Injuries Reports, pt 11, paras 261 to 267.

52 Unreported, 26 November 1993, High Court of Solomon Islands, cc 24/93.

53 Above n 52.

of "loss of earning capacity". Loss of earnings accrued up to the date of trial are capable of specific proof, and are classified as special damages. They should be specifically pleaded.[54] Loss of earnings claimed for the future are to some extent a matter of speculation, and are classified as general damages.

Accordingly, there is no reason why Palmer J should not have dealt with the two together. Unfortunately, however, he specifically put his award under the heading of future economic loss. Further, there is no indication of how the three months future loss was calculated, apart from a comment later in the judgment,[55] that the defendant's Administrative Manager had indicated at trial that he might be able to offer the plaintiff some sort of work, and that that possibility had been a limiting factor on his Lordship's assessment of future economic loss. As Palmer J said himself, this was "a matter that should have been addressed earlier on rather than waiting until the court convenes to raise it in the hope of perhaps getting some sympathy." At the date of trial, the defendant had had nearly five years to make such an offer to the plaintiff, and had failed to do so. Accordingly, it is submitted, this belated and uncertain offer should not have been taken into account. It is hard to avoid the suspicion that three months was chosen for ease of calculation, as it brought the total period to a round five years.

Future economic loss often forms the principal head in personal injury actions. Whereas assessment of the non-pecuniary element of general damages should be dominated by fairness, the prevailing view in relation to pecuniary loss is that compensation should be full. As stated in *Pickett v British Rail Engineering Ltd*:[56]

> ...when a judge is assessing damages for pecuniary loss, the principle of full compensation can properly be applied ... Though arithmetical precision is not always possible, though in estimating future pecuniary loss a judge must make certain assumptions (based upon evidence) and certain adjustments, he is seeking to estimate a financial compensation for a financial loss. It makes sense in this context to speak of full compensation as the object of the law.

The method of calculating such loss is to multiply annual salary (the "multiplicand") by a figure representing years during which loss will last, discounted so as to allow for the receipt of a lump sum (the "multiplier"). Contingencies of life may also result in adjustments to either figure. This method, with appropriate modifications to take account of the fact that it is not the victim who is being compensated but the estate and/or the defendants, has been

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54 *British Transport Commission v Gourley* [1956] AC 185, 206.

55 Above n 52, 4.

56 [1980] AC 136, 168 B-D, per Lord Scarman.

approved by the Court of Appeal in Solomon Islands in relation to a claim arising from a fatal accident.[57] Had damages under this head been calculated in a similar way in *Paerata's* case, there is no doubt that the award would have been significantly increased.

The court then went on to consider heads (4), (5), and (6) from *Longa's* case. His Lordship again looked to *Liliau's* case for assistance, and pointed out that even though the arm had not been severed in this case, it was nonetheless useless. His Lordship then went on to refer to the head injury, and the comparative lengths of time in hospital. He concluded that this was a much more serious case. Perhaps surprisingly, although *Jolly Hardware's* case was mentioned in the judgment,[58] no reference was made to it at this point. $26,000 was awarded, together with special damages of $100, making a total of $45,560.40. From this Workmen's Compensation of $9,000 was deducted, leaving a balance of $36,560.40. No interest was awarded.

6 *Helen Teioli v Dante Teioli*[59]

The most recent award of damages was in the case of *Helen Teioli v Dante Teioli*.[60] The plaintiff, a girl of seven and a half (ten at the date of trial) was a passenger in a truck driven by her father which he negligently drove into a bridge. The plaintiff's left leg was severed below the knee in the accident. She also fractured her left hip. She was hospitalised after the accident, and on three subsequent occasions for periods of between one and two weeks between the date of the accident (16 July 1992) and 23 July 1994. She underwent several operations in relation to the malunited fracture of the hip, which required metal implants. At the date of trial, these had yet to be removed. She was fitted with an artificial leg which would require to be changed to accommodate her growth. The judge also accepted that the physical injuries would have some psychological effect, but he thought that this should not be over-emphasised.

Taking the considerations set out in *Longa's* case as a starting point his Lordship assessed damages for loss of amenities of life, pain and suffering and general inconvenience, and disfigurement. However, no attempt was made to allocate specific amounts to any particular head.

In relation to loss of amenities of life the Chief Justice thought that the relevant considerations were the resultant disability and the age of the plaintiff. With regard to the former, he contrasted this case with *Longa's* where the plaintiff had returned to his village

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57 *Cheung v Tanda* [1984] SILR 108.

58 Above n 52, 1.

59 Unreported, 12 October 1995, High Court of Solomon Islands, cc 5/95.

60 Above n 59.

and was helping to run various business enterprises. With regard to the latter, he supported this point by reference to *Bird v Cocking*[61] where the English Court of Appeal reduced an award for damages for loss of amenities of life on the basis that the plaintiff was 63. *Lee v Mayor of Manchester*[62] was also considered relevant, in that it concerned a five year old plaintiff with similar injuries. In that case the Court of Appeal reduced the trial judge's award of damages from £7,000 to £4,000. The award of $26,000 in *Paerata's* case was also referred to in the context of a 32 year old plaintiff, but quite what emphasis was to be placed on these two cases was not explained.

Chief Justice Muria's last point in relation to loss of amenity is perhaps worth quoting in full:[63]

> ...[the plaintiff] comes from an area in society where women are expected to play an important role in their community. They are expected to participate in physical tasks in their contribution to their family commitments. For this plaintiff, her expected contributions will be limited. Even now as she is growing up, her contributions are limited. Indeed her participation in school activities would be limited. Thus for many more years to come, the plaintiff will have to bear all these limitations as a result of their physical disability.

Inability to participate fully in school activities is an accepted loss of amenity for school age children who have suffered this type of injury. It is unfortunate that the other points raised were not explained more fully. In particular, his Lordship did not explain the area in society or the community that he was referring to. The plaintiff's family was from Malita Province, and perhaps this was what was being referred to. However, the family lived in the capital city, and the father was employed as a driver by Solomon Islands Ports Authority. The plaintiff's mother was in secretarial employment. Thus, a wider inference might be drawn, that is, that physical disabilities suffered by women in Solomon Islands will be more significant than they might be in overseas societies.

As to pain and suffering and general inconvenience, his Lordship obviously considered this to be a significant factor in his award, taking into account the time immediately after the accident, and the subsequent operations. The Chief Justice specifically found that the loss of a leg below the knee was a disfigurement.

Whilst his Lordship did not appear to favour counsel for the defendant's submission that the plaintiff's career path could be tailored to her circumstances, he nevertheless refused to award damages for future economic loss. Presumably he accepted counsel's

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61 (1951) 2 TLR 1260.

62 (1953) CA No 277.

63 Above n 59.

argument that this was too speculative. He contrasted the present case with *Longa, Sukumia, Liliau, Jolly Hardware,* and *Paerata,* referred to by counsel, where all the plaintiffs were employed at the time of the accident.

The Chief Justice awarded $23,000 by way of general damages, together with interest at 5% from the date of issue of the writ.[64] Special damages were agreed, so were not considered.

B Summary of Factors which the Courts have considered Relevant to Awards for Damages for Personal Injuries in Solomon Islands

From these cases a number of factors influencing awards can be extracted. Some of these are general, and will apply in whole or in part to all claims. Others will only apply to particular types of claims or in particular circumstances. These factors are summarised as follows:

1 General Factors

General damages are at large and are awarded at the discretion of the court.[65]

The main considerations in the assessment of quantum of damages are:

(a) the need to be fair to the plaintiff as an individual;

(b) the need to be fair in the eyes of the community; and

(c) the need to be fair to plaintiffs generally.[66]

The maximum compensation payable under the Workmen's Compensation Act (Cap 77) and the Motor Vehicle (Third Party) Insurance Act may be a factor limiting quantum.[67]

2 Comparison with Other Awards

Reference to awards from other jurisdictions may be helpful, but must be taken in the light of fairness in the community of Solomon Islands.[68]

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64 An appeal and cross-appeal (on costs) was lodged, but both were withdrawn on the basis of an agreed settlement. This was embodied in a Consent Order to the effect that the sum of $40,000 paid into court (see 0 24, Western Pacific High Court (Civil (Procedure) Rules 1964) should be paid out to the plaintiff after deduction of the defendant's costs, in lieu of the original award.

65 Above n 19, 2.

66 Above n 20, 251-257.

67 Above n 19, 2.

68 Above n 20, 253-256.

It is not appropriate to assess damages on the basis of comparison with overseas awards by merely applying the ratio between awards in Solomon Islands and awards for similar injuries in England.[69]

Comparison with custom compensation would not be of assistance because it is often not to compensate the victim, but the price of restoring peace between the lives of the victim and wrongdoer.[70]

3 Non-pecuniary damages under heads (3), (4) and (5)

Solomon Islands is a society where reliance on the ability to perform manual acts in the garden, in house building, in the plantation and in ordinary daily life is much greater than elsewhere.[71]

In Solomon Islands the services and facilities which make it possible for a plaintiff to discount his or her disability are limited. In particular there are limited facilities for obtaining and maintaining an artificial limb.[72]

In some strata of Solomon Islands society women are expected to participate in physical tasks as part of their contribution to family commitments. This should be taken into account in awards for loss of amenity.[73]

In the case of a very young plaintiff or possibly any person who is not in employment damages for future economic loss will not be awarded.[74]

Loss of a leg is more serious than loss of an eye.[75]

Loss of an arm is more serious than it might be overseas, as manual ability is at a premium and there are no facilities for the disabled.[76]

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69 Above n 2, 145.

70 Above n 20, 259. His Lordship did not elaborate on his source for ascertaining custom compensation figures, had he considered them to be relevant.

71 Above n 44, 25.

72 Above n 44, 25. However, this factor will be of diminishing importance as facilities and services improve. The plaintiff in *Teioli v Teioli*, above n 19, had been successfully fitted with an artificial leg.

73 Above n 19, 4.

74 Above n 19, 5.

75 Above n 19, 4.

76 Above n 44, 25. However, this factor will be of diminishing importance as facilities and services improve. The plaintiff in *Teioli v Teioli*, above n 19 had been successfully fitted with an artificial leg.

4 Interest

Interest may be awarded on damages at the court's discretion for the whole or part of the period between the date when the cause of action arose and the date of judgment, under the Law Reform (Miscellaneous Provisions) Act 1934 (UK).[77]

Interest will not be awarded automatically,[78] but need not be pleaded.[79]

The rate of interest on damages is normally 5% from the date of issue of the writ,[80] but this may vary depending on the rate of inflation and the current short term investment rate.[81]

III CONCLUSION

In *Longa's* case, Chief Justice Daly achieved his intention of laying a firm foundation for the development of Solomon Islands' law on the assessment of damages for personal injuries. He did so by setting out the heads of damages to be considered. That is not to say that either the principles or heads of damages should always be followed blindly, but they provide a starting point from which the court can proceed to consider whether or not they are of assistance in the case before it.

Even where those principles are of assistance, there are still myriads of pitfalls and irreconcilable considerations to be negotiated by the court, particularly in the assessment of non-pecuniary loss. Application of cases appearing in overseas works such as Kemp and Kemp, while they may indeed provide some sort of starting point, involve the danger of omitting to consider particular factors relevant to Solomon Islands. For this reason it is suggested that the approach of Daly CJ in cases such as *Longa* is preferable to that of Wood CJ in *Jolly Hardware and Construction Company Limited v Suluburu*.

Further, it could fairly be said that Chief Justice Daly's three considerations raise more questions than they answer. Perhaps the most important in the context of Solomon Islands is the effect on assessment of the social grouping from which the plaintiff comes. His Lordship pointed out in *Longa's* case that his first principle should not be used to apply different scales of damages to the rich and the poor.[82] But how can this be avoided in a

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77 Applying by virtue of Schedule 3 to the Constitution of Solomon Islands, which is itself a schedule to the Solomon Islands Independence Order 1978.

78 Above n 52.

79 *Liliau v Trading Company (Solomons) Limited* (No 2) [1993] SILR 40, 45-46.

80 Above n 19.

81 Above n 79, 44-45.

82 Above n 20, 252.

country with such wide disparities in standards of living? The Chief Justice suggested that this could be done by regarding his three principles as cumulative. However, whilst his Lordship's third principle, the need to be fair to plaintiffs generally, clearly calls for uniformity, it does not say how this might be achieved. When one moves to the second, that is, the need to be fair in the eyes of the community, the problem is exacerbated by the posing of a related problem. This time the question is whether awards in Solomon Islands should be lower than overseas, as the standard of living there is generally lower.

The need to view each case on its facts is well expressed in the Papua New Guinean case of *Carroll v the Administration of Papua New Guinea*,[83] where it was said that:[84]

> ... it is not possible to talk about equality, similar yardsticks, and so on, when one comes to assess damages... It is to the point to remind myself that economic and social conditions in this country vary even more than they do in Australia, and that this is true as between native born and native born, European and European, and native born and European... As between the native born and Europeans, it is also impossible to apply yardsticks or talk about equality. There are very many natives in high positions, men of sensitivity, fond of reading or music, or their profession, whose loss and sense of loss in many cases would far exceed the loss and sense of loss of Australian clerks employed here whose interest, outside their often rather dull employment, is found in the immediate vicinity of the bar in the local clubs during the week and at weekends.

Perhaps recourse to the principle that tortfeasors must take plaintiffs as they find them might assist. Whilst the principle should not be stretched to compel the tortfeasors to be burdened with the plaintiff's future plans, should these involve leaving the jurisdiction, standards of living within Solomon Islands must be relevant. That is not to say that a plaintiff from a village environment should automatically receive a lower award than a plaintiff from the city. This will depend on the facts. The Solomon Islands courts have already shown their willingness to take into account earnings from such activities as working in the garden and producing copra,[85] and this could be more lucrative than menial jobs in the town or city.[86]

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83 Unreported, 1974, Supreme Court, no 753. The view was upheld on appeal by the Full Court, [1974] PNGLR 265.

84 Above n 83, 3-5.

85 See eg *Cheung v Tanda* [1984] SILR 109.

86 The wage in Solomon Islands was increased from 75c per hour to SBD1.50 per hour (except for employees engaged in fishing and agriculture, where it is SBD1.20), as from 1 March 1996. See the Labour (Minimum Rates of Wages) Order 1996, LN11/96.

It is suggested that future economic loss is a head of damages which might be utilised by the courts to achieve fairness in appropriate cases. As this is susceptible to some sort of mathematical calculation, and merits full compensation it might also avoid some amount of soul searching under other heads of general damages.

One claim which has yet to be made to the courts, is for the cost of attending to the plaintiff's needs, where that cost is provided by relatives. In Solomon Islands society custom would dictate the provision of this care by relatives on a gratuitous basis. At one time the right to claim in respect of such care, in the absence of evidence of a binding contract for payment between the carer and plaintiff and/or the consequent loss of paying employment, was doubted.[87] There is now clear authority in the United Kingdom that the proper and reasonable cost of attending to the plaintiff's needs can be claimed, even where they are met gratuitously by a relative who was not formerly in paid employment.[88] In a village setting, where it would not usually be possible to employ someone other than a relative this principle will hopefully be applied by the courts to ensure that plaintiffs and their carers are not disadvantaged.

Chief Justice Daly's starting point has been well utilised in subsequent cases. However, if the law is to develop further, it is imperative that the opportunity be seized to explain the basis for the level of awards, not only for the benefit of the parties, but also in order to develop the law of Solomon Islands and enable quantum to be predicted with some certainty, thus encouraging settlement. In *Carroll's* case[89] Chief Justice Minogue referred to "a vain desire to introduce rationality into what is really an intuitive process".[90] It is to be hoped that Solomon Islands courts will continue to struggle for rational and uniform solutions.

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87 See for example *Fletcher v Autocar & Transporters* [1968] 2 QB 322.

88 *Donnelly v Joyce* [1974] QB 454 (CA); *Housecroft v Burnett* [1986] 1 All ER 332 (CA).

89 [1974] PNGLR 265.

90 Above n 89, 267.