IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
Civil Appeal No. 40 of 1977

Between:

SHRI MATI — Appellant

- and -

1. THE ATTORNEY-GENERAL
2. ISIMELI CINA — Respondents

G.P. Shankar for the Appellant
S. Matawalu and J. Flower for the Respondents

Date of Hearing : 16th November, 1977
Delivery of Judgment : 25th November, 1977

JUDGMENT OF THE COURT

MARSACK J.A.

This is an appeal against the judgment of the Supreme Court sitting at Lautoka and given on the 19th August, 1977, awarding the appellant damages amounting to $950.00 against the respondents. The original claim arose from a motor collision which occurred on the 15th December, 1975 and in which one Mani Lal, husband of the appellant, was killed. The other vehicle involved was owned by the Government of Fiji and was driven by a Government driver, Isimeli Cina. At the hearing before the Supreme Court it was conceded by the respondents that the collision had been entirely due to the negligence of their driver Cina, with the

result that the only matter in issue before that Court was the quantum of damages. That also was the only issue before this Court; the contention of the appellant being that the damages awarded were manifestly too low.

Deceased was a cane farmer at Wairuku, Rakiraki, though the cane contract under which the farm was operated was in the name of deceased's mother, who must therefore have been the owner or lessee of the lands covered by the contract. He was also employed as a lorry driver, though the extent of that employment was not fully established in the Court below. At the time of his death the deceased was 43 and the appellant, the widow, 36 years of age; and there were eight children of the deceased living on the farm, five of them aged between 3 and 15 years. The action was brought by the appellant on her own behalf and also on behalf of all eight children. The $950 awarded by the learned Judge in the Court below were made up as follows:-

Funeral expenses	-	$200
Damages for loss of expectation of life	-	$750
		$950

He awarded the appellant costs $40, and the quantum of the costs, which appellant claims to be quite inadequate, is also a subject matter of this appeal. It is to be noted that there was no award to the widow and children under the Compensation to Relatives Ordinance. In this respect the learned judge said, in his judgment:

"From evidence before me there is nothing upon which I can base an award under the Compensation to Relatives Ordinance."

The effect of the judgment is that the learned Judge has awarded to the widow and children, in respect of their claim, a sum of $200 by way of funeral expenses and no damages whatever.

Section 5 of the Compensation to Relatives Ordinance Cap. 22 provides that the Court may give to the parties for whom and for whose benefit an action is brought under the Ordinance "such damages as are considered proportioned to the injury resulting from the death." By section 6 the amount so recovered should, after deducting costs not recovered, be divided amongst the parties in such shares as the Court may determine. A long line of cases commencing from Pym v. Great Northern Rly Co. (1863) B & S 396 has determined that damages are based on the amount of actual pecuniary benefit which the parties might reasonably have expected to enjoy had the deceased not been killed: Hals. Laws of England 3rd Edition Vol. 28 para. 110 at pp 100-101. Pecuniary loss may be evidenced by proof of a reasonable expectation of some future pecuniary benefit: Taff Vale Rail Co. v. Jenkins (1913) A.C.1.

In our opinion the learned judge was not strictly entitled to say that there was no evidence upon which he could base an award. The undoubted fact was that deceased was the sole means of support

both of his wife and of their dependent children. The further fact emerged, namely, that his wife and children could reasonably expect that deceased would continue to support them - the children, of course, ceasing to be dependent upon their father as each became self-supporting. It was the duty of the Court to assess such sum as would reasonably, as a lump sum, be a proper award in the circumstances of this case. We are of opinion, therefore, that this Court ought to set aside the finding of the Court below that there was no evidence upon which an award could be made. The principle to be applied is that authoritatively stated by Lord Wright in Davies v. Powell Duffryn Associated Collieries Ltd. (1942) 1 All E.R. 657 at p.664:-

> "In effect the Court, before it interferes with an award of damages, should be satisfied that the Judge has acted on a wrong principle of law or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered."

It is perfectly true that the learned judge found that the appellant, in her evidence, was deliberately untruthful and that the evidence of the deceased's employer Hukur Chand was unreliable and in parts not worthy of belief. What the learned judge in his finding has, in our opinion, overlooked, is that deceased was undoubtedly the bread-winner who supplied all the funds required to house, clothe and feed the appellant and the children. Although, in

view of the learned Judge's criticism of the evidence of these two witnesses, it may be difficult to establish the precise amount which the deceased had to expend in order to support his wife and family as he undoubtedly did, the mere fact that the assessment of damages in such case is a difficult question does not justify the Court in refusing to make an assessment. Here it is outstandingly apparent that both appellant and the children are suffering and will suffer severe pecuniary loss by the death of their husband and father. It is conceded that the blame for his death must be accepted by the respondents, who, accordingly, must be held liable for such damages as the surviving members of the family may be held entitled to. The learned Judge in the Court below should, in our respectful opinion, have given full weight to the undoubted fact that the deceased was supporting his wife and family and should have awarded them such damages as could be considered proper on that basis.

At the hearing of this appeal this Court was invited, without objection by counsel for the respondents, to assess the damages to which the Court considered the appellant and her family would be entitled and to enter judgment accordingly. This is no easy task; but the Court must, in our view, use every effort to cope with it.

Before turning to any calculation however, reference must be made to a finding by the learned Judge that the appellant may

well continue to derive income from the cane farm which was being worked by the deceased. In the course of his judgment he said:-

> "In this case the farm belonged to the husband and he would maintain his family from its proceeds as he saw fit. On his death intestate it passes to the wife and children with the former as trustee. The source of income i.e. the farm is the same; of course that is not the same as saying that the same income is derived from that source as formerly. However, what the plaintiff received out of it formerly via the deceased and what she now receives from it are matters upon which no evidence has been tendered. Such evidence might reveal that the plaintiff is now better off."

The learned judge relied on a passage from Munkman on Damages for Personal Injuries and Death 5th Edition p.165. The passage is cited in the following manner:-

> "When a dependent receives support from the same source of income both before and after death, there is no loss and no damages except to the extent that the property is reduced by taxation on death and he continues,
>
> From this it is any easy step to say that where, in consequence of the death, the dependent loses one source of income - e.g. the earnings of her husband - and gains another --- the benefit which she had gained must be set off against the damages."

It is clear that the learned author was dealing with the type of case where, as an instance, the deceased lived entirely on investment income and the whole of his investment income passed to his widow. The passage has no application to a case where the deceased by his own efforts supported

his wife and family.

The position with regard to the farm became clear in this Court, which was informed that the mother of deceased was the holder of the relevant cane contract with the Fiji Sugar Corporation. This would mean that she was either the owner or the lessee of the land covered by the contract. In these circumstances there is no assurance whatever that appellant's mother-in-law will allow, or how long she may allow, appellant and her family to work the land and retain any profits arising under the cane contract. In any event this money would be earned by appellant or her family and would be the result of their labour on another's land, and so is irrelevant in the matter before the Court. What is relevant is that this was a source of income from which, at least in part, deceased maintained his family and from which the family might reasonably expect a pecuniary benefit had deceased not been killed.

The first task of this Court is to estimate as far as possible from a consideration of the known facts the amount of financial contribution the deceased made for the maintenance and benefit of his family in the course of his supporting them as he undoubtedly did. From these findings the Court must then determine what the reasonable expectation was for the future. A method usually adopted is to ascertain what portion of the earnings of the deceased

can be properly attributed as being for the benefit of the dependent members of his family. The Court then adopts a multiplier in a number of years consistent with the age of deceased and his probable working life, and, of course, the likelihood of the beneficiaries surviving; because benefit can accrue only during the joint lives. It has been suggested, and counsel do not disagree, that a multiplier of 15 is reasonable. With that we concur.

It is inevitable that the task of ascertaining the amount of deceased's earnings which ought to be treated as being for the benefit of his family, that is, after his own needs have been provided for, should involve a certain amount of conjecture. As was said by Lord Morris of Borth-y-Gest in Mallett v. McMonagle (1969) 1 All E.R. 178 at p.188:-

> "In cases such as that now being considered it is inevitable that in assessing damages there must be elements of estimate and to some extent of conjecture. All the chances and the changes of future must be assessed. They must be weighed not only with sympathy but with fairness for the interests of all concerned and at all times with a sense of proportion."

The presence of these "elements of estimate and to some extent conjecture" arises in great degree in the present case from the fact that the learned judge has made no

findings of fact in his judgment. His criticism of the unreliability of the evidence of the plaintiff and her witness went, as has been pointed out, to the extent that he found it impossible to make any findings of fact at all. But there is no doubt that the appellant and her children are entitled to some pecuniary compensation from the respondents in the circumstances. To determine that compensation with any degree of accuracy, it is necessary to find what was the financial position of the deceased; and in particular what income he received from his occupations.

The evidence of the appellant - plaintiff in the Court below - and her witness set out the annual earnings of the deceased as the following amounts:-

From the cane farm (approx.)	-	$9,000
From the sale of vegetables $30 a week, say	-	$1,500
Income as a lorry driver $70 to $80 per month, say	-	$ 900

It is clear that this evidence cannot be accepted <u>in toto</u> for two reasons: first that the learned Judge has held that the appellant was untruthful and her witness unreliable; and second that no particulars were given of the necessary deductions from the income derived from the cane farm to meet the costs of labour, fertilizers, seed cane, transport to the mill and other outgoings necessarily incurred by the cane farmer. In the result, although it is

reasonable to infer that the deceased had an income sufficient to enable him to enable him to support his wife and large family, it is difficult in the present case to estimate that annual income with accuracy. This is unfortunate, as in most of the cases decided on claims of a similar nature, the judgments have been based upon a calculation of the financial situation of the deceased and his future prospects.

Despite the difficulties arising from the unreliability of the evidence in the Court below and the lack of findings of fact or the drawing of reasonable inferences as to the probable future of the defendants of deceased, it must, we think be taken as established that the deceased adequately maintained his dependent family in the matter of providing a home and food, clothing and other necessities for such a family. There are other services which deceased would in all probability have provided, such as vegetables and other foodstuffs grown on the farm. The family has been wholly deprived of all these items.

In our judgment, on looking at the facts as we have approached them, it is reasonable to infer that, after providing for himself, the deceased could be expected to furnish a monthly sum of not less than $75 or its equivalent for his dependents. This is $900 per annum. Applying a multiplier of 15 years the sum of $13,500 results. Contingencies have been taken into account in the multiplier, but some

discount must be made for the present value of a sum which represents damages, considered from month to month in the future. This present value we assess at $10,000.

Of this sum we award $6,000 to the widow the appellant and $4,000 to the children under 16, the amount payable in each case depending on the age of the child concerned. We fix the amounts for the children as under:-

Children:	Sashi Devi	- $ 500
	Rakesh Lal	- $ 900
	Parveena Devi	- $1,200
	Saleshni Devi	- $1,400
		$4,000

The appellant will also be entitled to judgment for the amount of the funeral expenses fixed in the Court below at $200.

No argument was addressed to us with regard to the sum of $750 awarded in the Court below for loss of expectation of life; so this judgment must stand, the amount being payable to the administrator of the deceased's estate.

Accordingly the appeal is allowed. There will be judgment against the respondents for a total sum of $10,950 made up as follows:

For the appellant personally including funeral expenses allowed	- $6,200
for the children	- $4,000
for the deceased's estate (loss of expectation of life	- $ 750

On this sum it is ordered that $6,200 be paid to the appellant; that $4,000 awarded to the children be paid to the Public Trustee to be expended at his discretion for the upkeep and general welfare of the children; and that the sum of $750 be paid to the administrator of the deceased's estate.

With reference to the costs awarded in the Court below, we are of opinion that these were inadequate and therefore increase the costs in that Court, in favour of the appellant, to $100. It is further ordered that the respondents pay the appellant the taxed costs of this appeal.

(Sgd.) T. Gould
Vice President

" C.C. Marsack
Judge of Appeal

" T. Henry
Judge of Appeal

Suva,
25th November, 1977