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IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
Civil Appeal No. 26 of 1980

Between:

SOMARI (s/o Goverdhan)

Appellant

and

THE ATTORNEY-GENERAL OF FIJI
MOHAMMED (s/o Ali)

Respondents

G.P. Shankar for the Appellant
C. Grimmett with Miss Fong for the Respondents

Date of Hearing: 3 September 1980
Date of Judgment: 30 September 1980

JUDGMENT OF MARSACK, J.A.

This is an appeal against a judgment of the Supreme Court sitting at Lautoka awarding the appellant the sum of $3223 as damages arising from the death of appellant's son in a motor accident, in respect of which liability for negligence was admitted by the respondents. The appellant claims that the damages awarded were unreasonably low. There is also a cross-appeal by the respondents submitting that the damages awarded were excessive and should be reduced.

As liability was accepted by the respondents, the only facts requiring consideration by this Court are those relating to the domestic life and work of the deceased and the extent to which his death has caused financial loss to the appellant.

The appellant is a widow; of her four children living with her deceased was the eldest who, at the time of his death on 12th April 1977, was 22 years of age. The motor collision from which he received the injuries resulting in his death took place on 5th April 1977, and for the period of seven days until his death the deceased did not recover consciousness.

The appellant is the owner of a 17-acre cane farm in respect of which there are two cane contracts, one covering 12 acres and the other acres. This cane farm was substantially managed by the deceased, who also earned money as a member of the cane-cutting gang. According to the appellant the deceased paid her $50 every three weeks from his earnings as a member of that gang.

The learned trial Judge accepted this evidence to the extent of holding that the deceased, under this head, paid the appellant $50 a month during the crushing season, which he fixed at seven months per annum; in all $350 per year. The learned trial Judge further held that these payments would continue until deceased married; which in the Judge's opinion he would do at the age of 26. This would involve a payment of $350 a year for 4 years, a total of $1400.

The learned trial Judge further found that if a farmer could not join the cane-cutting gang he must provide a substitute and pay that substitute a bonus over and above the wages he would receive from the cane cutting. He found that the appellant had to provide a substitute for her son in the gang for the years 1977 and 1978, and for those years she paid out bonuses of $362 and $471, a total of $833.

The learned trial Judge further found that the death of deceased would necessitate the employment of another labourer for one year until deceased's brothers were of an age to do the work required. The wages of this labourer were fixed at $450.

In the result the sum of $3223 awarded was made up as follows:

Loss of earnings	$1400
Bonus payments	833
Day labour - one year	450
Funeral expenses and fares	540
	$3223

The hearing of the action in the Supreme Court was conspicuous by a lack of cogent evidence on the points in issue. The appellant produced no definite statements or other independent evidence setting out accurately the different items comprising her claim; there was no appearance for the defence, with the result that not only was no evidence called for that party but there was no cross-examination of the witnesses for the plaintiff in the case. Such questions as were asked to clarify the evidence given were asked by the Court.

The question for determination by this Court is whether this Court - to quote from the judgment in Davies v. Powell Duffryn Associated Collieries Ltd. (1942) at p. 616 - is

> "....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 damages suffered."

It is not necessary, in my opinion, to set out the grounds of appeal and of cross-appeal in detail. Summarised the grounds of appeal are that the amount awarded in the Court below does not adequately compensate the appellant for the loss sufferred by her, and that the learned trial Judge had erred in making no award for the loss of expectation of life and the loss of amenities suffered by the deceased.

Some confusion arises from the fact that the appellant is claiming in two capacities: under the Law Reform Ordinance, Cap.20 as administratrix of the estate of the deceased, and under the Compensation to Relatives Ordinance, Cap.22 in her personal capacity. It is clearly established that she is not entitled to recover damages amounting to a total of what could be claimed under each of the Ordinances. If, for example, she is held entitled to a sum under the Law Reform Ordinance then that sum must be taken into account in assessing her entitlement under the Compensation to Relatives Ordinance.

As is stated in McGregor on Damages 14th Ed. page 1349 citing Davies v. Powell Duffryn Associated Collieries Ltd. (1942) A.C. (supra):

> "Any benefit accruing, or likely to accrue, to a dependent from an award to deceased established under the Law Reform (Miscellaneous provisions) Act 1934 falls to be deducted from the damages under the Fatal Accidents Act claim. "

In the present context the Compensation to Relatives Ordinance can be substituted for the Fatal Accidents Act without in any way affecting the principle laid down. That being so, there would be no point in making an award under this heading to the appellant, as the amount of it would necessarily

have to be deducted from the damages payable to her under the Compensation to Relatives Ordinance.

Amended grounds of appeal were filed by the appellant six days before the hearing of the appeal. Apart from claiming damages for loss of expectation of life and loss of amenities, the grounds put forward amount to a contention that the evidence given at the Supreme Court justified a higher award under each heading than that made by the learned trial Judge. It will accordingly be convenient to consider each of those in turn.

(a) Loss of earnings, $1400. The learned Judge's assessment of the financial contributions made to the appellant by the deceased at $350 per year is fully justified by the evidence. His estimate that the deceased would have married at the age of 26, then would have ceased contributing financially to his mother's support, has no evidential basis; but in my opinion is an inference he was entitled to draw. In Brennan v. Johnson 1952 C.A. No. 18, cited by Kemp and Kemp on Quantum of Damages page 110, the probability that a young man of 23 would marry and then leave the family home was considered and made the basis of an award of damages; though there is no finding, in the judgment, of the period of time which the Court expected might have elapsed before his marriage took place. In Dolbey v. Goodwin (C.A.) 1955 2 All ER 166, Lord Goddard CJ at p. 167, while expressing the opinion that the Court is always reluctant to interfere in cases of this character, held that the strong probability of a son's marriage was a factor which must necessarily be taken into account in assessing the damages payable. The

other judges agreed, and damages were assessed on this basis. It therefore appears clear that the learned Judge was entitled to consider this aspect of the question; and nothing has been put before this Court to show that the learned Judge's estimate is wholly erroneous.

(b) Bonus Payment, $833. This figure was fixed strictly in accordance with the evidence and there was no submission that it should be increased.

(c) Day labour - one year, $450. Counsel for the appellant conceded that the figure of $450 per year for day labour was correct; and strongly contended that the learned Judge erred in allowing only one year under this head. The proper figure in the Counsel's submission would be seven years. In the course of his judgment the learned Judge says -

" I can accept the assistance of P.W.5 (the day labourer) being required during the first year after Bijendra's death in 1977 but not for a longer period; because the brothers would then be 19 years and 18 years and if Bijendra at a younger age had not needed the full-time assistance of P.W.5 then I fail to see why the two brothers would need such assistance."

The learned Judge further concludes that the full time employment of P.W.5 was not an additional expense incurred on the death of deceased, except perhaps for the first year after the death. This latter view he considers more favourable to the plaintiff and he adopts it.

Once again it must be said that the Judge's award under this head is not open to critism.

(d) Funeral expenses and fares, $540. This item was not contested in the case for the appellant.

There is one further ground of appeal, concerning the learned Judge's failure to make any award in respect of the loss of earnings from the sale of vegetables grown by the deceased. In her evidence appellant deposed that deceased

> "also sold vegetables and he gave me $10 to $15 per week approximately."

Appellant's eldest son stated in evidence

> "Deceased grew vegetables worth about $15 per week."

The learned Judge deals with this claim in his judgment in these words:

> "It is said that Bijendra earned about $15.00 per week growing and selling vegetables. However, no one has said that this is now a loss of income to the plaintiff. The vegetable plot would not die when Bijendra was killed. There would be no reason why it could not be maintained and perhaps increased by his brothers. In fact it is very probable that they greatly assisted in cultivation of vegetables before Bijendra died. I have not been told that vegetable production has ceased and that the family no longer sell produce."

This finding is in my view well justified and I can see no cogent reason for differing from it.

In the result no cause has been shown for increasing the damages under any one head and I would dismiss the appeal.

The cross-appeal is based upon four grounds which may be briefly summarised as under:

(a) The amount for funeral expenses should be reduced to $200;

(b) the amount awarded to the appellant as the sole beneficiary should be reduced, as four of the persons on whose behalf the action has been brought are not beneficiaries;

(c) in calculating the financial loss to the appellant no allowance was made for the living expenses of the deceased;

(d) the learned trial Judge should have adopted a multiplier of three and not four.

(a) As to this item Counsel's objection is based upon the fact that no evidence was produced to prove the actual amount expended, and such evidence should have been readily available. He also pointed out that in previous cases an award of $200 had been made as funeral expenses. In his judgment the learned Judge says -

" There is also a claim for $500 funeral expenses which seems to be a large sum but in the absence of assistance from the defendants, I do not propose to interfere with that figure."

The cost of the funeral would vary greatly according to the distance covered and other local circumstances. That being so, while I must not be held as expressing the opinion that in the ordinary course of events $500 would be a reasonable charge for a funeral, I can find nothing before this Court which in my view would call for a reduction of the amount allowed here.

(b) Appellant brought her claim as administratrix of her son's estate. All the amounts awarded by the learned trial Judge were based on her own personal loss and under no heading was consideration given to any possible claim by the other children. It was conceded by Counsel for the appellant that the children were not entitled to any damages in respect of the death of deceased, and no such claim was made. So there is, in my opinion, no merit in this ground.

(c) It is true that the learned trial Judge made no deduction- from a $1400 award in respect of years 1977 - 1981 - to cover the living expenses of the deceased during that period. The

learned trial Judge pointed out in his judgment that such a deduction might, it made at all, be assessed at $6 a week. If $6 per week were deducted for living expenses the total amount payable for the four years in question would be $1200; and the appellant would then receive $200 as compensation for the loss of the moneys she could have expected to receive from the deceased during that period. The learned Judge decided that as no evidence had been tendered on this point and no submissions made before him on behalf of the respondents he should make no deductions from the damages to cover the living expenses concerned. In my view this Court should not review the exercise of the Judge's discretion on this point and I would make no diminution in the amount of damages awarded on this ground.

(d) The argument of the respondents under this head amounts to a contention that deceased's marriage might well take place within three years, and not four years as estimated by the learned Judge. Counsel drew our attention to a Court judgment allowing four years in the case of a girl aged 18; and submitted that three years would then be a proper figure to adopt in the case of the deceased. Conditions, however, vary greatly in this regard. As one example, it is well accepted that girls normally marry at an earlier age than men. It cannot in my view be said that the learned trial Judge had made a wholly erroneous estimate under this heading and his finding should not in my opinion be disturbed.

In the result I would hold that respondent has not established any right to a reduction in the damages awarded in the Supreme Court.

For these reasons I would dismiss both appeal and cross-appeal; and as neither party has succeeded I would make no order as to costs.

(Sgd.) C.C. Marsack
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JUDGE OF APPEAL

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1. THE ATTORNEY-GENERAL OF FIJI
2. MOHAMMED s/o Ali

Respondents

G.P. Shankar for the Appellant.
C. Grimmett with Miss Fong for the Respondents.

Date of Hearing: 3rd September 1980
Delivery of Judgment: 30 September 1980

JUDGMENT OF GOULD V.P. AND HENRY J.A.

We have had the advantage of reading the judgment of Marsack J.A. in this appeal and agree with his reasoning and conclusions. There is one general matter upon which we would add a very brief word.

We are inclined to deplore the fact that it was found necessary by counsel to attack this comparatively small award by appeal on the one hand and respondent's notice on the other.

A learned Judge must do his best with the materials before him and as the Privy Council said in Kassam v. Kampala Aerated Water Co. Ltd. [1965] 1 W.L.R. 668, at p. 672:-

> "The aim in assessing damages in a case such as the present is to estimate the loss of reasonable expectation of pecuniary benefit. This must in most cases be a matter of speculation and may be conjecture. "

and at p. 674 -

> "The question of damages for the loss of support is essentially a jury question which must be dealt with on broad lines. "

It is considerations such as these rather than the minor details of a learned Judge's assessment which should be kept in mind when an appeal is contemplated.

All members of the Court being of the same opinion the appeal and cross-appeal are dismissed; no order for costs in either case.

(Sgd.) T. Gould
VICE PRESIDENT

(Sgd.) T. Henry
JUDGE OF APPEAL