IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 40 of 1982

BETWEEN:

SUBAMMA d/o YANKANNA   Appellant

\- and -

CHANDAR s/o MUKTA   Respondent

Date of Hearing: 4 November, 1982
Delivery of Judgment: 26th November, 1982

N. Dean for appellant
W.D. Morgan for respondent

JUDGMENT OF THE COURT

Marsack, J.A.

This is an appeal from a judgment of the Supreme Court sitting at Suva on 15 January, 1982 awarding the appellant $20,533 as damages in respect of the death of her husband Uday Singh. The appellant asks for an increase to $24,235. There is also a cross-appeal from the respondent asking that the Supreme Court judgment be set aside.

Briefly, the facts are that deceased was found by a police patrol, at 1.00 a.m., 8 October, 1978, lying dead on a road known as Visama Feeder Road. His body showed multiple injuries including a broken tibia, fractured skull and ribs, which the medical evidence described as consistent with having been received in a motor accident. Samples of blood and urine taken at the post-mortem examination showed a very high reading of alcohol. Respondent had been driving a car at Visama Road on the evening of 7 October. He was prosecuted for causing the death of Uday Singh by dangerous driving, for failing to stop after an accident, and for failing to report it. On 25 January, 1979 he was convicted on all 3 charges in the Nausori Magistrate Court.

Appellant took action against respondent, claiming damages in the Supreme Court, Suva in respect of the death of her husband. After hearing evidence on both sides the learned trial Judge gave judgment in the course of which he said:

> "I am in no doubt at all and find as a fact that Uday Singh's death was caused by the negligent manner in which the defendant drove his vehicle that night. The onus was on the defendant to establish negligence by the deceased, if such was the case, but he failed to discharge that burden.
>
> The defendant according to his evidence did not see the deceased at all before he ran into him. He clearly was not keeping a proper lookout at the time."

The learned Judge assessed the total damages, payable under the Compensation to Relatives Act, at $24,000. From this he deducted

(a) $3702 received by the widow from the National Provident Fund;

(b) $1250 representing damages payable under the Law Reform (Miscellaneous Provisions) Death and Interest Act;

(c) $15 received by the widow from sale of tools belonging to deceased,

$4967

leaving his judgment against respondent under the Compensation to Relatives Act at $19,033. He further allowed $1250 under the Law Reform (Miscellaneous Provisions) Death and Interest Act and $250, the agreed funeral expenses, making a total judgment of $20,533 plus costs.

Appellant appeals against his judgment on the ground that there should have been no deductions from the amount of $24,000 fixed by the learned trial Judge as the total damages payable. In his cross-appeal respondent asks that the judgment be set aside in toto.

It will be convenient to deal first with the cross-appeal, as in the event of that succeeding there will be left no matter for determination on the appeal itself. Respondent submitted 2 grounds of cross-appeal, but abandoned one and argued only the other, which was in these terms:

> "The learned trial Judge erred in law and in fact in failing to take into consideration Uday Singh's state of intoxication and in failing to hold that such state of intoxication in the circumstances was the indirect cause of his death or alternatively largely contributed to his death."

Counsel for respondent pointed out that there was substantial evidence of deceased's intoxication; and this is clear from the evidence of the pathologist, Dr. Karam Singh. He further submitted that though there was no direct evidence that anything deceased did contributed to the accident, deceased was definitely negligent in walking out on to the road when drunk; and he was thus the author of his own misfortune. He should at least have been found guilty of contributory negligence.

Two witnesses gave evidence that they had seen deceased walking along the Visama Road on the evening in question. Manoj Kumar, a 16-year-old student, said that at about 10.00 p.m. or 10.30 p.m. on the night in question he had seen deceased on Visama Feeder Road. He stated:

> "Saw deceased about 1½ chains away. He was drunk and was walking zig-zag on the road."

The other witness was Visikara Dosi, a security officer at Nausori Airport. On his way home after work he drove his van along Visama Road shortly after 10.30 p.m. He said:

> "He (deceased) was walking on my right side of the road. I did not bump him. There was nothing unusual about the manner of his walking."

The learned trial Judge in his judgment makes it clear that he had well in his mind throughout that deceased had been drinking heavily.

Counsel in his submission before this Court drew attention to various possibilities which may have caused or contributed to what took place; that deceased may have been so drunk that he lay down on the road, or may in his walk have been so unsteady that he lurched into the way of the car. But as the learned trial Judge rightly pointed out, the onus lay on the respondent to establish that deceased had been negligent in such a way; and that that onus had not been discharged by respondent. With this finding we agree.

In the result we are satisfied that the learned trial Judge's finding that respondent's negligence was solely responsible for the death of deceased was fully justified on the evidence. Accordingly the cross-appeal is dismissed.

Turning now to the appeal itself, we note that the additional sum sought by the appellant is that received by the widow from the National Provident Fund, $3702. In his argument that there was no justification for that deduction from the damages to which the learned trial Judge found appellant was entitled, counsel relied on Section 36 of the Fiji National Provident Fund Act, the relative subsections of which read:

> "Payment of special death benefit
>
> (1) On the death of an entitled member after the 1st day of January, 1971, the amount standing to his credit in the Fund shall be increased by such proportion of the maximum sum as may be prescribed in accordance with subsection (2) and the amount of such increase shall be paid from the general revenues of the Fund.
>
> (3) The amount payable under subsection (1) shall not be taken into consideration in the assessment of compensation or damages payable to the dependents or beneficiaries of the deceased member under the provisions of the Compensation to Relatives Act."

In counsel's contention, "the amount payable under subsection 1" is the amount standing to deceased's credit in the Fund plus the increase from the general revenue of the Fund. Accordingly, in counsel's submission, no part of such amount should be taken into consideration when damages are assessed. It is true that the wording of Section 36 could have been somewhat more clearly expressed. In England the rule, before the passing of the Fatal Accidents Act 1959, was that:

> "Every pecuniary advantage which the dependent had received as a result of the deceased's death had to be deducted."

12 Halsbury, Fourth Edition, paragraph 1150(ii)

The Fatal Accidents Act provided that moneys received from insurance policies, friendly societies, pensions and th. like, should not be deducted; these are provisions somewhat similar to those in the Fiji National Provident

Fund Act. Working on the same principle, as we think we should do, we should hold that all moneys received by appellant as a result of deceased's death should be deducted, except moneys that have come from such a society or fund as those mentioned in the English Act.

As we read it, Section 36(3) provides that the additional amount added under subsection 2 shall not be taken into account in the assessment of damages under the Compensation to Relatives Act; but it has not affected the ordinary rule of law that any other benefit received by dependent as a result of deceased's death should be deducted from the damages awarded. Applying this principle the amount received from deceased's contribution to the Fund, thus forms part of his estate, and could properly be deducted from damages awarded; but the increase calculated under subsection 2 should not be taken into account.

At the hearing of the action in the Supreme Court no evidence was produced showing how the amount of $3702 was made up between the two factors concerned. As it was necessary to ascertain these figures, counsel were consulted, and they agreed to apply to the offices of the National Provident Fund for the required information. They encountered some difficulty in the matter and when finally a reply was received from the Manager of the Fund it was not entirely clear as to what had been added from the general revenues of the Fund in this case. Counsel could not reach agreement on the point. On consideration we have decided to assess the increase from the general revenues at the minimum sum prescribed in Section 9 of the Fiji National Provident Fund Act. This would mean that $1000 should not have been included in the sum of $3702 deducted from the damages awarded. Accordingly we find that the amount deducted from the damages found by the learned trial Judge should be reduced by $1000. The appeal therefore partly succeeds and total damages awarded in the

court below will be increased by $1000 to $21,533.

As to the costs: appellant has succeeded in part in the appeal and in toto on the cross-appeal. She is therefore entitled to some costs, which we fix at $50 plus disbursements to be paid by respondent to appellant.

Judge of Appeal

Judge of Appeal

Judge of Appeal