

IN THE FIJI COURT OF APPEAL

Civil Appeal No. 87 of 1985

Between:

DAYA WATI

Appellant

- and -

FIJI INTERNATIONAL COMMUNICATIONS LTD.

Respondent

Mr. S.M. Koya for the Appellant

Mr. B. Sweetman for the Respondent

Date of Hearing: 10th November, 1986

Delivery of Judgment: 14<sup>th</sup> November, 1986

JUDGMENT OF THE COURT

Roper, J.A.

This is an appeal against the decision of Kearsley J. in a claim for damages by the widow of the late Suruj Nath who died on the 6th July, 1980 in the course of his employment with the Respondent (Fintel).

On the 4th July, 1980 Suruj Nath, who was then Fintel's Traffic Manager, left Fiji by air to attend meetings on behalf of Fintel at Washington and Trinidad. On his arrival at Honolulu Airport he was met in the transit lounge by his son Prem Nath, who was then working in Hawaii. Prem Nath said that his father looked tired and in some distress but had declined to break his trip and stay overnight in Honolulu. Some hours later Suruj Nath arrived in San Francisco where he

was met by his nephew Dinesh Prasad with whom he had planned to stay for a few days before continuing the flight to Washington. On the 5th July, Suruj Nath complained that he was not feeling well. He was taken to hospital by Dinesh Prasad and admitted immediately. He died on the 6th July from acute myocardial infarction - or in other words a heart attack.

Suruj Nath had been in the employ of Fintel (or its predecessor Cable and Wireless Limited) since 1952. It is apparent from company records produced at the trial that he was well thought of and his promotion was steady.

In 1972 he was sent to England for management and administration instruction and eight years later was appointed Traffic Manager.

On the 9th January, 1975 an important event occurred in the life of Suruj Nath. He was admitted to hospital in Suva after chest pains had developed some hours earlier. He was found to be suffering from moderately high blood pressure and it was thought that he may have suffered a heart attack. He was discharged on the 16th January and resumed work on the 10th February.

Between the 5th November, 1978 and the 3rd January, 1979 Suruj Nath, accompanied by his wife, went on a business trip which took him round the world; and between the 1st and 8th November 1979 he flew to New Zealand for a business meeting. On that occasion he was accompanied by Mr. John Manikam, General Manager of Fintel. The intended trip to Washington and Trinidad on which Suruj Nath met his death was therefore his third overseas trip following his admission to hospital.

The basis of the appellant's claim was that Fintel knew, or ought to have known that Suruj Nath was a potential candidate for a heart attack and was negligent in requiring him to travel overseas by air. Negligence is alleged in respect of all overseas trips but as there was not a scrap of evidence to suggest that the 1978 and 1979 trips had any effect on Suruj Nath's condition their only real relevance appears to be their bearing on Fintel's knowledge of Suruj Nath's condition.

Kearsley J. found against the appellant on all counts. He held that it had not been established on balance that the air travel had caused or contributed to the death; and that it had not been shown that Fintel knew, or ought to have known that Suruj Nath's condition was such that air travel might endanger him.

There was no complaint concerning Kearsley J.'s exposition of the law, nor could there be. He referred to such cases as Wilson and Clyde Coal Co. Ltd. v. English /1938/ A.C. 84, and Cavanagh v. Ulsher Weaving Co. Ltd. /1960/ A.C. 145 which establish that it is the duty of an employer to take reasonable care for the safety of his employees in all the circumstances of the case. Of particular relevance is the case of Paris v. Stepney Borough Council /1951/ A.C. 367 where it was held by the House of Lords that in the case of a worker who suffers, to the employer's knowledge, from a disability which might not increase the risk of an accident occurring but did increase the risk of serious injury, then the special risk of injury was a relevant consideration in determining the precautions to be taken in the fulfilment of the duty of care owed to the worker. In other words the duty owed is one personal to each employee, and the greater the risk the greater the need to ensure the risk is assessed and reasonably covered.

The appellant's first ground of appeal reads :-

"THAT having accepted that there was a duty of care on the part of the Respondent to the deceased Suruj Nath, the Learned Trial Judge erred in concluding:-

- (a) that the air travel did not in fact cause or materially contribute to the death of Suruj Nath or to any injury whatsoever suffered by him and;
- (b) that the Appellant had failed to discharge the onus of proof on this point."

There was certainly nothing to suggest that the 1978/79 world trip had any adverse effects on Suruj Nath. On that occasion he was accompanied by his wife and her evidence was that apart from an attack of influenza and a sore throat at one stage of the trip there were no problems. As for the 1979 trip to New Zealand Mr. Manikam, who accompanied him, said he saw nothing in Suruj Nath's condition to concern him and had no reason to suspect that he was not fit to travel by air. Then there was the evidence of Dr. Tarak who had been Suruj Nath's practitioner from the time he left hospital in 1975 until his death. Throughout that time Suruj Nath had been under medication prescribed by Dr. Tarak. The Doctor gave evidence of the many visits Suruj Nath had made to him over the years when his blood pressure was checked and his medication reviewed. Although his opinion had not been sought on the advisability of Suruj Nath leaving on the 1980 trip (nor presumably in respect of the earlier ones) he saw no cause for concern in Suruj Nath flying. At one point he said "I did not think his blood pressure was so high as to cause concern over his travel overseas". It is also relevant that Suruj Nath lost no time off work because of a heart condition from 1975, when he was hospitalised, until his death. Indeed Dr. Tarak said his absences were unusually low,

and amounted to two days off for a tooth extraction in 1978 and three days because of influenza in 1979 which suggests that the earlier trips caused no problem. Further, there was no evidence that Suruj Nath had ever complained that air travel caused problems.

The appellant's main evidence on the question of causation, and indeed the only evidence, was that of Dr. D.D. Sharma, who is, on any view of it, a highly qualified medical practitioner. He had never seen or examined Suruj Nath and was dependent for his opinions on the medical records available and the evidence of Dr. Tarak. He expressed the view that air travel, with its stresses could be dangerous for a person in Suruj Nath's condition, and that he would certainly have advised against it if his opinion had been sought. He was critical of Dr. Tarak's treatment, which he described as inadequate. He also challenged the 1975 hospital record which was to the effect that Suruj Nath had suffered a myocardial infarction. Dr. Sharma's opinion was that at that time Suruj Nath was suffering from heart disease and had probably been so suffering for years. He also expressed the opinion that Suruj Nath was bound to suffer a fatal heart attack sooner or later if his medical treatment had not been improved. On that score it is perhaps relevant that according to his widow Suruj Nath complained of feeling unwell before he ever left on his final overseas trip. It may be that his time had come flight or no flight.

The question is did this final flight cause or materially contribute to the death, because it seems the earlier trips can be discounted?

The Learned Trial Judge concluded that causation had not been established, and on the evidence we find ourselves unable to conclude that he was wrong.

Even if it be accepted that the final flight played a part in the death the appellant is faced with what we regard as an insurmountable hurdle when it comes to the question whether Fintel knew, or ought to have known, that air travel posed a risk to Suruj Nath which should have been avoided in the exercise of Fintel's duty of care to him.

That brings us to the second ground of appeal which is in essence a plea that the Trial Judge erred in holding that it had not been proven that Fintel knew, or ought to have known, that air travel might adversely affect Suruj Nath's health. On this ground it was submitted that the Trial Judge should have had regard for the evidence of Dr. Sharma, Dr. Parshu Ram, who cared for Suruj Nath when he was in hospital in 1975, Prem Nath, son of Suruj Nath, who met him in Honolulu, and Dinesh Prasad, the nephew who met him in San Fransisco. Not one of those witnesses gave evidence which had any bearing on Fintel's knowledge, actual or presumed, of Suruj Nath's medical condition. In so far as their evidence was relevant it concerned the question of causation. The evidence that was relevant to the question of knowledge was first the widow's, who said that her husband had no problems during the 1978/79 world tour; the evidence of Mr. Manikam that on the trip to New Zealand in 1979 Suruj Nath had no problems; Dr. Tarak's evidence that he saw no problem in Suruj Nath taking overseas trips, and indeed the clear inference is that had Fintel been concerned and consulted Suruj Nath's own Doctor he would have re-assured them that there was no problem. Apart from that there was evidence that no complaint had ever been made by Suruj Nath himself that overseas travel concerned him; and his record of absences from work, or lack of them, after his heart problem in 1975 could only have reassured his employer that there was nothing to worry about.

The appellant's further grounds of appeal also dealt with the question of Fintel's knowledge, and specific aspects of the evidence were referred to which, it was alleged, should have alerted Fintel to the danger, or which indicated that Fintel had the requisite knowledge but had elected not to recognise its duty to an employee who had a special problem. The first was the evidence of Mr. Manikam who, in cross-examination agreed that it would have been prudent to have had Suruj Nath medically examined before going overseas. That was a very fair concession, as was his evidence that Fintel had introduced a new policy after Suruj Nath's death to the effect that if there was any reason to suspect that an employee going overseas on duty was unfit for travel a medical check was required. That would not have helped in the present case if the opinion of Suruj Nath's own Doctor, Dr. Tarak, had been sought, but in any event it simply indicated a prudent, being "wise after the event" attitude which goes no way to proving "knowledge" in Suruj Nath's case.

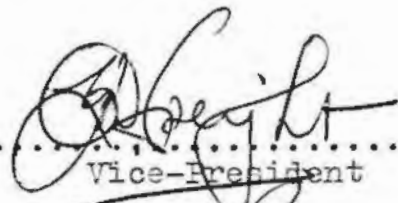
It was next submitted that the Trial Judge erred in relying on Dr. Tarak's evidence but there is just no merit in that submission. There was an attempt to take part of his evidence out of context so giving it a meaning very obviously not intended but we say no more on that.

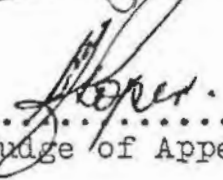
It was submitted that the Trial Judge had erred in relying on an opinion expressed by Mr. Sajjan, Head of Administration of Fintel, to the effect that he could not recall any abnormality in Suruj Nath's physical condition when Sajjan, on his own evidence, knew that Suruj Nath was taking medication for blood pressure. Mr. Sajjan and Suruj Nath were on friendly terms and had daily contact. So far as Mr. Sajjan was concerned he saw no reason why air travel should concern Suruj Nath, who made no complaint to him, and took much less sick leave than the average for staff members. So far as he was aware Suruj Nath had high blood pressure, which was controlled by medication, and that was the end of it.

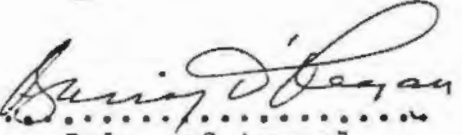
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The appellant's final point was that Fintel had taken out insurance on Suruj Nath before his departure. This was the normal travel insurance to cover personal accident and liability, baggage loss and medical expenses. According to Mr. Manikam all employees of Fintel travelling overseas were covered by such a policy and to suggest that it was taken out because Fintel knew Suruj Nath had a special problem is just nonsense.

This appeal had no prospects of success and we have no hesitation in dismissing it with costs to the Respondent to be fixed by the Registrar.

  
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 Vice-President

  
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 Judge of Appeal

  
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 Judge of Appeal