IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 63 of 1983

Between:

RAJ KUMAR
s/o Man Bodh — Appellant

and

PUSHPA WATI
d/o Kamal Prasad — Respondent

D.C. Maharaj for the Appellant
V. Kalyan for the Respondent

Date of Hearing: 26th July, 1984
Delivery of Judgment: 27TH July, 1984

JUDGMENT OF THE COURT

O'Regan, J.A.

This appeal has to do with a motor accident in which the husband of the respondent was killed. The only child of the marriage was also killed in the accident and the widow was the only dependant.

Liability in negligence was admitted and therefore the Judge had only to assess the damages. In the circumstances of the case that involved decisions :

(a) As to the husband's earnings as at the date of death and his notional earnings at the date of trial;

(b) The proportion of his notional earnings as at the date of trial to be attributed to the widow's dependency;

(c) What multiplicand should be used in estimating her future loss;

(d) What multiplier should be applied to the multiplicand on assessing future losses.

As to the last matter, the learned Judge applied a multiplier of 16 as from the date of death - which was, in the round, 3 years before the date of trial. Having adopted that approach he went on first to assess special loss up to the date of trial and then assessed the post-trial loss by using the multiplier of 13.

One of the grounds of appeal was that the learned Judge erred in fixing the multiplier at 16. Counsel submitted that the Judge failed to take due account of the remarriage prospects of the widow and pointed to the fact that she was a young and attractive woman with no dependent children. A similar submission made in the Court below had been rejected by the learned Judge in these words :

> " I cannot, as defendant's counsel argued, take into account any prospect of remarriage of the plaintiff. It is to be noted that in the United Kingdom this factor is by statute to be disregarded and in Fiji it must also be remembered that the prospects for remarriage of an Indian widow are very poor indeed. "

If the learned Judge took account of the change in the law in England he was in error. It is not entirely clear whether he did so but we are inclined to think it would have been unlikely that he would have gone to the trouble to mention it, had he not done so. His observation as to the prospects of Indian widows

for remarriage, in the absence of evidence on the topic, from other than the plaintiff was in our view, unwarranted. It went beyond the limits within which judicial notice can be taken of facts.

In Holland v. Jones (1917) 23 C.L.R. 149, 153 Isaacs J. (as he then was) dealing with this topic, said :

> " The only guiding principle ..... appears to be that wherever a fact is so generally known that every ordinary person may be reasonably presume to be aware of it, the Court 'notices' it, either simpliciter if it is at once satisfied of the fact without more, or after such information or investigation as it considers reliable and necessary in order to eliminate any reasonable doubt. "

See also Auckland City Council v. Hapimana (1976) 1 N.Z.L.R. 731 in which is to be found a useful collection of the authorities.

It is, we think, clear that before the alteration in the law in the United Kingdom (Section 4 of the Law Reform (Miscellaneous Provisions) Act, 1971) the prospects of remarriage for widows generally, were taken account of and in Mallett v. McMonagle (1970) A.C. 166, 176-7 Lord Diplock, after adverting to the matter, confirmed a multiplier of 16 where the deceased husband and the widow were both 25 years of age. Dealing with assessment the factors to be considered in assessing damages, he said :

> " There is also the chance that the widow may die before the deceased would have reached the normal retirement age ..... or that she might remarry and thus replace her dependency from some other source which would not have been available had her husband lived. The prospects of remarriage may be affected by the amount of the award of damages ....."

And later:

> " ..... even in the case of a young widow, the prospect of remarriage may be thought to be reduced by the existence of several young children .....
>
> In cases such as the present where the deceased was aged 25 and his widow about the same age, the courts have not infrequently awarded 16 years' purchase of the dependency."

When that case was decided it was lawful in the United Kingdom, as it still is in Fiji, to take account of the remarriage prospects of a claimant widow. We think that the general consideration as to remarriage prospects referred by Diplock L.J. in that case, were taken account of in this case when the multiplier was fixed. If the appellant wished to have those considerations, which were said to be special to Indian widows in Fiji, it behoved him to adduce acceptable evidence from experts in the field of statistics and in the sources from which their basic materials, germane to the subject, are drawn. He did not do so.

Before leaving the topic there was evidence from the widow of countervailing circumstances. She was badly injured in the same accident as her husband was killed. She was on crutches thereafter for over a year; she has had operations in Canada, and is to return for further surgery on her knee; at the time of hearing, she was unable to bend the injured knee properly; she was then unable to stand for long periods; she cannot do much domestic work. She deposed that her father had made a marriage offer to someone but it was not accepted because of her inability to do domestic work.

All in all, we do not think that it has been shown that this factor was given less consideration than was warranted by the material before the learned Judge.

We note, also, that the learned Judge resolved the various matters we have earlier set out in accordance

with the principles laid down by the House of Lords in Cookson v. Knowles (1979) A.C. 557 and recently confirmed in Graham v. Dodds (1983) 2 All E.R. 953 at page 958 et. seq.

Mr. Maharaj submitted also that the learned Judge erred in his calculations of the notional earnings of the husband subsequent to his death and that, as a consequence, he also erred in his assessment of the capital sum which would produce in each year the amount of the dependency over the period during which he would have provided for the widow, had he not been killed.

We have considered all the relevant evidence and have taken the view that it has not been demonstrated that his findings were not warranted by the evidence. Indeed, we go further and say that the evidence supports the findings.

We remind ourselves that when, as here, the tribunal of first instance, is a Judge sitting alone, then "before an appellate court can properly intervene, it must be satisfied either the Judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one) or, short of this, the amount is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate" - Nance v. British Columbia Electric Railway Company Ltd. (1951) A.C. 601, at 613 per Lord Simon delivering the judgment of the Privy Council.

Such of those considerations as are apposite to the present case, have not been made out. Accordingly

we must dismiss the appeal. And it is dismissed accordingly, with costs.

Vice President

Judge of Appeal

Judge of Appeal