IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 19 of 1984

Between:

THE ATTORNEY-GENERAL OF FIJI — Appellant

and

KAMLA WATI
d/o Venkat Sami — First Respondent

and

MANGAIYA
s/o Sarup — Second Respondent

Dr. A. Singh, J. Madraiwiwi & Ratu F. Mara
for the Appellant
V. Kalyan for the First Respondent
A.K. Singh for the Second Respondent

Date of Hearing: 22nd November, 1984
Delivery of Judgment: 24th November, 1984

JUDGMENT OF THE COURT

O'Regan, J.A.

The first respondent is the widow of Ram Sami Gounder late of Dreketi, Lautoka, who died on the 28th June, 1979 as the result of a motor accident in which a car he was driving came into collision with a landcruiser owned by the Police Department and driven by the second respondent. She is also the administratrix of her late husband's estate.

She instituted an action for damages under both the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap. 20) and the Compensation to Relatives Act (Cap. 22) on behalf of herself and her infant son Rakeshwaran Sachida Gounder who was born on the 20th January, 1979. We were informed from the bar that the child died subsequent to the death of his father. That, no doubt, accounts for there being no reference to him in the record of the proceedings in the court below. Those proceedings were limited to the claim under the Compensation to Relatives Act, no doubt, because the claims under both gave rise to a duplication of damages in the manner illustrated in Harris v. Empress Motors (1983) 3 All E.R. 561 at page 564.

The second respondent was sued in his personal capacity, it being alleged that the collision and the consequential death of the deceased was occasioned by his negligence. He was employed by the Police Department and, it being alleged that his employer was vicariously liable for his tortious act, the appellant was named as a defendant pursuant to subsection (2) of section 12 of the Crown Proceedings Act.

The action came on for trial before Dyke J. at Lautoka on 21st March, 1983 and continued on the two succeeding days and finally concluded on a date in early 1984 not disclosed in the papers. On 15th March, 1984 the learned Judge delivered judgment in which he found for the first respondent against both the appellant and the second respondent and awarded damages in the sum of $60,000 with costs.

The appellant's appeal was based on two grounds which read :

> "1. That the learned trial Judge erred in law and in fact in holding that the appellant is vicariously liable for the acts of the First Defendant, that is, that at all

material times the First Defendant was acting in the course of his employment with the Government of Fiji.

2. That the learned trial Judge erred in his assessment of the deceased's wages, the rate of dependency and the multiplier and consequently, the amount of the pre-trial and post-trial damages awarded is unreasonable and excessive having regard to the evidence and the weight of evidence. "

On 13th November, 1984 the second respondent applied for leave to appeal on a ground identical in terms with the appellant's second ground of appeal. Such leave was granted at the commencement of the hearing of the appeal. In the event, Mr. Singh was content to adopt the argument advanced on behalf of the appellant.

There was thus no challenge to the finding of the learned Judge as to the accident having been caused by the negligence of the second respondent.

The vicarious liability question

To deal with this question it is necessary to set out the facts pertinent to the issue.

Sergeant Aisat Ali was the non-commissioned officer who was the second respondent's immediate superior. He deposed that on the late afternoon of 28th June, 1979 he gave instructions to second respondent to go forth and serve a production order on the Superintendent of Naboro Prison for the production of a prisoner at Court on the following morning and then to serve a subpoena on one Alumita Rokowati to appear at the Magistrate's Court at Suva at 9 O'clock also on the following morning. The address of the witness was shown in the subpoena to be 48 Nailuva Road, Suva. We interpolate that the second respondent deposed that with the subpoena was a hand-written note from someone in the prosecutions office at

the Police Department which said that the witness could be traced through the service station at Navua or if not there then at Nadera. Sergeant Ali said that he told second respondent to serve the subpoena at the address shown but he went on to say :

> " Someone had tried to serve witness before at Nailuva Road. He was unsuccessful and on the 28th as a last resort, Mangaiya was told by me to make a final attempt. It is quite common that witnesses are not at the address on the summons and have to be looked for. It would be up to the server to follow information and try to locate witness. The address on the summons was the last known address. "

And later :

> " He would have to use his discretion. If information sent him to Navua, I would have approved that. He would be expected to serve witness wherever he could find her. I told him previous summons' server had gone to Nailuva Road and could not find the witness."

And Sergeant Ali also said that when the instructions had been carried out the second respondent had to return the police vehicle to the Central Police Station and park it there. Accordingly, in summary, it was the second respondent's duty to proceed first to Naboro Prison. Then, knowing as he did that Alumita has not been located at the address given in the subpoena, it was reasonable and sensible for him to proceed from Naboro to Navua in an endeavour to locate her - provided, of course, that he had, as he had deposed, been given information that she might well be located there. And if she were not to be located there - to proceed to Nadera and pursue inquiries there - again if he had been given information that she may be located there. And finally, when inquiries had been completed there, to return to the Central Police Station.

Although he did not directly so say, the learned Judge obviously accepted the second respondent's evidence as to the note pinned to the witness' summons and its contents. Accordingly, the witness was within the scope of his duties in going, as he did, to Navua and then on being unsuccessful in locating the witness there, in next proceeding to Nadera.

But in the course of such duties he committed breaches of police instructions or standing orders. First, he picked up two friends and took them with him; secondly he drank liquor in the course of such duties. And it would seem there were some short detours from the routes he could have been expected to have taken.

The accident occurred in Rewa Street in the City. The second respondent was at the time driving from Nadera to the City and at the time his only remaining duty was to return the vehicle to the Central Police Station.

In the circumstances outlined, the learned trial Judge held that it was impossible in the circumstances to hold that at the time of the accident, the second respondent was acting beyond the scope of his duties. We agree with him.

We think that the nub of the legal issue here at stake is best put in the words of Lord Dunedin which are to be found in Plump v. Flour Mills Co. Ltd. (1914) A.C. 62 at 67 :

> " ..... there are prohibitions that limit the sphere of employment and prohibitions which only deal with conduct within the sphere of employment. "

The second respondent on the evening in question was guilty of prohibited conduct but nonetheless, he acted within the ambit of his instructions and was carrying them

out when the accident occurred./

Accordingly, this ground of appeal cannot succeed.

The quantum of damages

The evidence on the issue of damages adduced before the learned Judge was not supported or confirmed by any wage sheets or other documentary evidence, it being stated that all such records had been mislaid or lost by the employer itself, V.S. Mani Bros. Ltd., or by its accountants. The deceased was a kinsman of the directors of that company. one of whom gave evidence as to the employment, the hours worked each week and the wage rates. His evidence was that deceased worked on an average about 70 hours each week. All these factors combined evoked challenge from the appellant and the second respondent and indeed during the course of the trial doubt was cast on the evidence that deceased was in fact employed by V.S. Mani Bros. Limited. But, in the end, that was conceded. Apart from the features of the evidence we have just mentioned, the evidence adduced was such that the plaintiff, as the Judge put it, had "hardly discharged the onus put upon her". But, in the end, he accepted such evidence, but had to resort to inferring the probable range of hours worked each week.

Shortly before the hearing of the appeal Mr. Kalyan applied for leave to adduce additional evidence as to the deceased's earnings. Since trial one wage sheet had been found in a box of papers returned to the employing company by its accountants. In support of the application Mr. Kalyan intimated that because of the attack on the Judge's assessment of deceased's earnings presaged by the appellant's second ground of appeal, he wished to adduce the evidence for the purpose of confirming the hourly rate deposed to by the employer. The application was opposed

but we allowed it in the interests of justice.

In assessing the general damages the Judge chose a multiplier of 15 and that has been accepted by the appellants as appropriate to the circumstances. He accepted that for the pre-trial period his ordinary wages were $1.73 per hour or $76.12 for a normal week of 5½ days of 8 hours and held that with overtime his average weekly wages would be "not over $100 per week". There was no evidence adduced as to the rates of tax and National Provident Fund contributions on wages in that range but without such the Judge found the nett wages to be $90 per week and found that the widow's dependency to be $50 per week at the date of death and $65 per week at the date of trial - figures which Dr. Singh allowed to be not unreasonable. He assessed the damages on the basis of the average of the dependency rates at the date of death and the date of trial for the period of 246 weeks. He allowed 4% interest on the amount thus reaching a total figure of $17,022-50.

On dealing with future loss he found the rate of wages to be $2.21 per hour as at the date of trial and, with overtime, found the average salary the deceased would have earned had he been then alive to be $120 per week. Again there was no evidence as to the rate of the deductions inevitably to be made but as to amount of the dependency has been conceded not to be unreasonable that is now of no moment. For the remaining 582 weeks of the 15 year multiplier period the total damages amounted to $37,830 not $37,330 as calculated by the Judge.

There was no attack made on the award of $250 for funeral expenses and $4,300 assessed as the loss in respect of the damage to the deceased's car.

In the result the total of the various amounts of damages allowed is $59,402-50 made up as follows :

Funeral expenses	250-00
Loss re motor car	4,300-00
Pre-trial damages	17,022-50
Future loss	37,830-00
	$59,402-50

We have considered these assessments in the light of the concessions made and are of the opinion that the bases of computation of the damages under the various heads of loss were correct.

Mr. Kalyan drew our notice to the arithmetical slips which resulted in judgment being given in the court below for an amount different from the above figure. To correct those slips we allow the appeal and order that the judgment entered be vacated and replaced with a judgment for $59,402-50 together with costs, against both defendants.

Save and except the slips, for which we have thus provided, the appeal would have been dismissed. In that circumstance we think that the first respondent should have her costs of the appeal. And we so order.

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Vice President

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Judge of Appeal

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Judge of Appeal