IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 62 of 1983

Between:

1. RAJ KUMAR
   s/o Man Dodh
2. MOHAN PRASAD
   s/o Kewal Prasad

Appellants

and

DHARMA REDDY
s/o Munsami Reddy

Respondent

D.C. Manaraj for the Appellants
V. Kalyan for the Respondent

Date of Hearing: 26th July, 1984
Delivery of Judgment: 24th November, 1984

JUDGMENT OF THE COURT

O'Regan, J.A.

The respondent is both father and administrator of the estate of the late Suresh Kumar ("the deceased") who was killed in a motor accident on 5th September, 1980. The appellants were respectively the driver and owner of the vehicle.

The appeal is from the judgment of Dyke J. delivered on 16th September, 1983. The judgment was concerned solely with the assessment of damages. The special damages (funeral expenses) and damages for loss of expectation of life had been agreed to at $200 and $1,250 respectively and the sole question was the quantum of the damages to be paid pursuant to the Law

Reform (Miscellaneous Provisions) (Death and Interest) Act. The contested award was $38,400.

At the date of his death the deceased was 20 years of age and in good health. He was a first year student at the University of South Pacific where he was reading for a diploma in Industrial Art. He was a bright and industrious student and the probability is that he would have completed the diploma course in the minimum time, that is at the end of the academic year in 1982. He would then have been bonded to the Government for three years. The learned Judge held that it was virtually certain that he would have been given a position in the public service at a nett monthly salary of $300 or $3,500 per annum. The salary would be subject to an annual cost of living increment of about $200 and would rise to a maximum of $9,000 per annum gross or about $6,500 after tax and other deductions.

It would have been open to the deceased to have continued his University studies and taken a degree. In that event, he would in all likelihood have entered the teaching profession. Had he done so his commencing salary would have been $8,000 per annum gross or about $6,000 after tax and deductions for his contributions to the National Provident Fund. What increments there would have been to this salary was not disclosed.

If the deceased were not to have chosen to do the degree course he would have commenced earning some two years after his death. If, on the other hand, he took the degree he would not have commenced earning until about 5 years after his death.

The learned Judge took a multiplier of 16 for the lost years. In our view no exception can possibly be taken to that. In Furness v. B.&S. Massey Ltd. (1982) A.C. 27, which had to do with a claim under section 1 of the Law Reform (Miscellaneous Provisions) Act, 1934 - the United Kingdom counterpart of the Law Reform (Miscellaneous

Provisions) Death and Interest Act (Cap.27) in force in this country - on behalf of the estate of a person aged 22 years and in good health. The trial Judge took a multiplier of 16. The case was considered by three Judges in the Court of Appeal and five in the House of Lords and, although a close examination and indeed some criticism was made of the award of damages, there was no criticism of the multiplier. And indeed, there are many instances both in this jurisdiction and in the United Kingdom where such a multiplier was adopted where the deceased was in the immediate age group as the deceased in this case. A recent instance is Adsett v. West (1983) 3 W.L.R. 439 which had to do with a person who was 26 at the date of his death.

And the learned Judge applied the multiplier as from the date of death and not from the date of trial, a course which has the imprimatur of the House of Lords - see Graham v. Dodds (1983) 1 W.L.R. 808.

The award of $38,400 for "the lost years" was reached by the learned Judge applying the multiplier of 16 years' purchase to a multiplicand of $2,400 being 40% of $6,000. The figure of $6,000 represented the average annual nett salary of the deceased which he held the deceased would probably have received during the 16 years following his death, had he survived. The learned Judge held also that 60% of that amount would have been expended in payment of his personal living expenses and that accordingly the 40% thereof remaining was the surplus which, of course, is the relevant figure for calculating the damages.

The appeal is essentially concerned with these two assessments - that is first the calculation of his probable earnings and secondly the surplus available over and above the cost of maintaining himself and, if he during the period married and had a family, the cost of maintaining the family.

These calculations - if the exercise which must need be embarked upon can be dignified with such a term - are notoriously difficult. They have provoked strong comment in high places. In Gammell v. Wilson and Furness v. B. & S. Massey Ltd. (1982) A.C. 27 - the two cases heard together - Lord Fraser of Tullybelton said at pp. 71-72:

> " It is particularly difficult to justify the law in cases such as the present, in each of which the deceased was a young man with no established earning capacity or settled pattern of life. In such cases it is hardly possible to make a reasonable estimate of his probable earnings during the 'lost years' and it is, I think, quite impossible to take the further step of making a reasonable estimate of the free balance that would have been available above the cost of maintaining himself throughout 'the lost years'. The amount of that free balance is the relevant figure for calculating damages. The process of assessing damages in such cases is so extremely uncertain that it can hardly be dignified with the name of calculation; it is little more than speculation. Yet that is the process which the courts are obliged to carry out at present. "

And, in the same case, Lord Diplock, at p.65, said :

> " ..... in cases where there is no settled pattern - and this must be so in a high proportion of cases of fatal injuries - the judge is faced with a task that is so purely one of guesswork that it is not susceptible of solution by judicial process. Guesses by different judges are likely to differ widely - yet no-one can say that one is right and another wrong. "

The basis upon which appellate courts should consider appeals as to the quantum of damages was stated by Lord Wright in Davies v. Powell Duffyrn Associated Collieries Ltd. (1942) A.C. 601 :

> " Where the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like the exercise of

> discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer L.J. in Flint v. Lovell. In effect the court, before it interferes with an award of damages, should be 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 damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency. "

Bearing in mind these principles and the observations of Lord Diplock, to which we have just referred, we proceed to consider the award made by the learned Judge.

If the deceased had merely taken the diploma and followed it up with a position in the public service he would probably have earned a gross sum of $96,274 in the 14 years of his working life which fell within the lost years. We reach this figure by starting with the gross annual salary paid in his first year at work to the witness, Mr. A.K. Dass, who had completed the diploma and commenced work in the public service. We interpolate that it was from his evidence that the learned Judge derived his basic figures. We have added an increment of $200 per annum for 13 years and totalled the annual salaries. The pay slip produced showed that the witness received just on $150 a fortnight. However, the learned Judge overlooked that his pay was subject to a deduction of $23.25 per fortnight to cover repayment of loan granted him to assist him during his student days. The deceased also had a similar loan. His was for $3,150 and he would have been obliged to repay it by instalments after he commenced earning.

Unfortunately, we have not before us the rates of income tax payable on the various yearly amounts likely to be earned. However, the pay slip of Mr. Dass, which is

in evidence, reveals that the actual tax paid on his gross fortnightly salary of $232.96 was $44.17 and the deduction for National Provident Fund contributions were $16.24 making the total deductions for those purposes $60.41, or a yearly deduction of $1,570.66, which we have calculated to be 28.27% of his annual salary.

We do not know what higher tax rate, if any, would have applied to the higher salaries he would have earned in subsequent years. Assuming, however, for present purposes that it remained constant, the deductions from his total earnings of $96,274 would have been $27,263.54 leaving a total nett figure (in the round) of $69,010. From that must be deducted the amount of the government loan $3,150, reducing the nett figure to $65,860. The average annual salary over the 16 years would be, again in round figures, $4,116.

If he had pursued the degree course and commenced work, over the 11 of the lost years in which he worked, he would have earned to the order of $98,750. We reach this figure by taking the initial year's salary of $8,000 and assuming an annual increment of $250. In this case the figures would likely be :

Gross salary		$98,750.00
Less deductions for tax and National Provident Fund at nett 30%	32,916.66	
Loan repayment	3,150.00	36,066.66
		62,683.34
Average per year for the "lost years"		$3,917.70

The learned Judge took the deduction from the first year's salary for tax and Provident Fund to be 25%. That is too low a figure. It is over 3% less than the rate of deduction on the lesser salaries to be earned in

the lower paid position.

We conclude that the average annual nett salary would have been to the order of $4,000.

The learned Judge assessed his average expenses at not less than 60% of his earnings. That, however, was 60% of $6,000 or $3,600 per annum. In our view that figure is too high. We accept that it would be likely that the deceased would have lived in his father's house for several years and that factor would have occasioned a material reduction of the average yearly expenses. We are disposed to assess the average at $3,000, leaving an annual surplus of $1,000. Accordingly in our view the damages for the lost years should be $16,000 making a total award of $17,450.

We allow the appeal and direct that judgment be entered in the court below for $17,450 plus costs and we order that the respondent pay the appellants' costs in this Court.

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Vice President

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Judge of Appeal

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Judge of Appeal