IN THE FIJI COURT OF APPEAL
Civil Appeal No. 85 of 1985

Between: JOSEFA SIGAVOLAVOLA
VATEMO RANITU — Appellants

- and -

GYAN MATI — Respondent

H.K. Patel for the Appellants
A. Singh for the Respondent

DATE OF HEARING : 19th March, 1986.

DELIVERY OF JUDGMENT: 21st March, 1986.

JUDGMENT OF THE COURT

Roper, J.A.

This is an appeal and cross appeal against the judgment of Kearsley J. in an action by the Respondent for damages following the death of her husband in a motor accident on the 18th July 1980. The clam was brought under the provisions of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap. 20), and the Compensation to Relatives Act (Cap. 22) for the benefit of the deceased's estate, and the Plaintiff and her three infant children.

Liability was admitted with judgment being entered by consent on the 12th November 1982, so the only issue

before Kearsley J. was the assessment of damages.

At the time of the fatal accident both the deceased and the Respondent were 30 years of age and their three children 8, 7 and 4. It was common ground that the deceased had been a healthy man who did not drink or smoke, and that at his death he was earning $35 per week as a carpenter with the Popular Furniture Company, and that had he survived his wages would have increased to $40 per week from the 20th November 1984. There was evidence that the deceased had supplemented the family income by milking six cows and selling the milk, and working part time on his brother in law's cane farm.

After considering the evidence Kearsley J. awarded damages of $1500 to the estate under the Law Reform Act, and that award is not challenged and $38,053.28 (including $10,000 paid on account) under the Compensation to Relatives Act calculated as follows:-

"226 weeks @ $69.00 x $\frac{17}{24}$	11,045.75
554 weeks @ $74.00 x $\frac{17}{24}$	29,038.83
Total for 15 year multiplier	40,084.58
Less proceeds of sale of cows	445.00
	39,639.58
Less received from F.N.P.F.	336.30
	39,303.28
Less sum awarded for loss of expectation of life under Law Reform etc. Act (Cap. 27)	1,250.00
	38,053.28
Less paid	10,000.00
	$28,053.28

"

The Appellants grounds of appeal, including supplementary grounds presented by consent at the hearing, are as follows:-

"1. That the learned trial Judge erred in his assessment of the deceased's income from the sale of milk and cane harvesting work, the rate of dependency and the multiplier and consequently, the amount of pre-trial and post trial damages awarded is unreasonable and excessive having regard to the evidence and the weight of evidence.

2. That the learned trial Judge erred in law in fact in that he did not take into account the Respondent's duty to mitigate her loss when he found that the respondent's loss in respect of milk sales amount to $24.00 (TWENTY FOUR DOLLARS) per week.

3. That the learned trial Judge erred in law and in fact in not taking into account the incidence of income tax on the income that would have been earned by the deceased during his lifetime from milk sales and cane harvesting work in making his final findings as to the amount of loss therefrom."

(The complaint in ground 1 concerning the rate of dependency was not pursued).

The only matters raised on the cross appeal were that the Trial Judge erred in not awarding interest on the pre-trial damages of $11,045.75, and in failing to award costs.

We shall deal first with the submission that the assessment of the income from milk sales and cane farming was excessive and that the widow failed to mitigate her loss from milk sales.

The Respondent gave evidence that her husband milked six cows, five of his own and one belonging to the Respondent's brother and sold the milk, apart from that used for family use, to a local shop. She said that the shop was supplied with 18 pints a day, seven days a week, for a weekly return of $24 which was set off against the family's purchases from the shop. Her evidence was confirmed in every respect by that of the shop keeper, Mr. Raman Nair, who also said that the milk had been supplied since 1978. There was no real challenge to the evidence of either witness. In submissions made to Kearsley J. Counsel for the Appellant (not Mr. Patel) complained of Mr. Nair's inability to produce records of the milk purchases, and submitted that having regard for times when one or more of the cows would not give milk the figure of $24 should be reduced. He also sought a reduction on the basis that the Respondent herself would have contributed to the work associated with the cows. The Respondent had denied that. She did not know how to milk and in any event a permanently disabled hand made it impossible. Kearsley J. accepted the figure of $24 per week as supplementary income from this source.

Mr. Patel submitted that there had been no real evaluation by Kearsley J. of the evidence relating to milk sales, but in truth there was very little evidence to evaluate, and it was all one way. The question of the cost of producing the milk and delivering it to the

shop were never considered said Mr. Patel. That is true, but there was no evidence adduced in chief, or in cross-examination on those issues, and no submissions were made upon them by Appellants Counsel in the Court below. If they were not important enough to raise then we are not prepared to consider them now.

Mr. Patel further submitted that cows, for one reason or another, are not always in milk and that was not considered by the Trial Judge. That was a matter raised before Kearsley J. He did not specifically deal with it, but we are not satisfied that a reduction in the supplementary income should be made on that account, and for two reasons. Mr. Nair said there had been no variation in the quantity of milk supplied, and it is to be remembered that half of the milk was retained for family use. When the milk supply fell off the family's consumption could be reduced.

As for the widow mitigating her loss Mr. Patel did not press too hard the submission that she could have milked one handed.

On the question of the deceased's farm work the evidence of the Respondent was that her husband worked on her brother's farm during the weekends and after his normal work earning a minimum of $10 per week, and more during the harvesting season. In the off season he worked

at fertilising, weeding and other tasks. The brother did his own harvesting and did not hire an outside gang.

Through an oversight the brother was not called to give evidence and Appellants Counsel objected successfully to his being called after the Respondent had closed her case.

The only submission Mr. Patel made on the allowance made for farm work was that the widow's evidence was uncorroborated. In the circumstances we see no merit in that submission.

Mr. Patel's next submission concerned the Trial Judge's failure to take into account the income tax that would have been payable on the deceased's milk sales, which would have the effect of reducing the supplementary income derived from that source. This was not a matter raised at the trial. There is no evidence that the deceased had ever paid tax on his milk sales income, and indeed it would be surprising if he had ever declared it. The rule appears to be that if a source of income has not been taxed in the past, damages will not be reduced on the basis that it may be taxed in the future. We reject that submission.

We come now to what is probably the most important issue in this appeal and that is the matter of the

multiplier. In the Lower Court Appellants Counsel suggested a multiplier of 11, and Respondent's Counsel 17. Kearsley J. settled on a multiplier of 15. At this stage Mr. Singh does not challenge that conclusion but Mr. Patel argued that a multiplier of 13 was appropriate in the circumstances of the case.

In assessing damages the Court is required to evaluate future possibilities and chances, and assess what will happen in the future, or would have happened but for something which happened in the past. The result can only be an estimate which, as Mr. Patel agreed, should fall within a permissible range. It is only if it does not do so that it can be challenged.

In Davies v. Powell Duffryn Associated Colleries Ltd [1942] A.C. 601, a case relied on by both Counsel, Lord Wright said at page 616 :-

> " An appellate court is always reluctant to interfere with a finding of the trial judge on any question of fact, but it is particularly reluctant to interfere with a finding on damages which differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate."

and further on that same page:-

> " Where, however, 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

> assessment of damages is more like an 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 Fling v. Lovell (1). 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.

In the present case we have a healthy man of 30 who neither drank nor smoked and was obviously a hard worker with many fruitful years ahead of him. Kearsley J. concluded that the Respondent's prospects of remarriage were not bright and that she seemed in good health. There are of course other factors to be taken into account in determining the multiplier. But there has been no suggestion that there is any particular factor which would justify treating this case as outside the norm. The decided cases show that a multiplier of 16 is commonly used in cases where a deceased was in his 20's and in Halsbury 4th Edition Vol. 12 at para. 1156 is the observation that:-

> " for a plaintiff in his thirties having a normal expectation of working life a multiplier of 14 or 15 has often been taken."

In our opinion a multiplier of 14, 15 or 16 could have been used in the present case. It follows that we are not satisfied that the Trial Judge erred.

Turning now to the cross appeal, the question of interest on the pre trial damages was raised in the Court below but Kearsley J. made no order. The widow had been paid $10,000 in two sums of $5000 before the trial, although some time after the issue of proceedings. We are not satisfied that Kearsley J. erred in not awarding interest and that ground of appeal is rejected.

As for Kearsley J's failure to award the Respondent costs we agree that the omission was by oversight. Mr. Patel very fairly conceded that the Respondent was entitled to her costs.

The Court drew attention to what appeared to be an error in the Trial Judge's apportionment of the damages between the widow and her children. He proceeded on the basis that the damages awarded amounted to $28,053.28 and so overlooked the $10,000 paid before trial. Mr. Singh agreed that an adjustment was required.

The appeal is therefore dismissed. On the cross appeal the Respondent is awarded costs and disbursements on the hearing in the Lower Court as fixed by the Registrar if agreement cannot be reached.

There will be an order varying the order of apportionment with effect that the damages of $38,053.28 are to be divided as follows:-

The Plaintiff	$26,053.28
Umlesh Lata	2,700.00
Vinesh Kumar	3,300.00
Vimlesh Lata	6,000.00
	$38,053.28

The Respondent is awarded costs on the appeal to be fixed by the Registrar if agreement cannot be reached.

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Judge of Appeal

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Judge of Appeal

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Judge of Appeal