VOLUME (2)

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 14 OF 1992
(High Court Civil Case No. 951 of 1986)

BETWEEN:

HARI PRATAP — APPELLANT

-and-

THE ATTORNEY-GENERAL OF FIJI — RESPONDENTS
OM PRAKASH

Mr Nagin for the Appellant
Mr N. Nand for the Respondents

Date of Hearing : 12th May, 1993
Date of Delivery of Judgment : 20th August, 1993.

JUDGMENT OF THE COURT

This is an appeal by the plaintiff administrator from the assessment of damages and judgement of His Lordship Mr Justice Fatiaki given at Suva on 28th February 1992.

Essentially the proceedings on 7 August 1991 before the learned Judge were an assessment of damages due to the estate of the deceased who is referred to in the Statement of Claim as Prahalad alias Daya Ram. The deceased was injured in a road accident on 6 September 1983 and eventually succumbed on 10 September 1983. Any other questions which might arise in the action were disposed of by the concession of liability by the defendant. This occurred in appearances before His Lordship on 4 June 1992.

It is unnecessary for this Court to do more than acknowledge the very careful and full summary of the matters which transpired between the date of the incident causing death and the assessment of damages. For the reasons detailed by His Lordship, the assessment of damages by him was one solely under the Law Reform Act (Miscellaneous Provisions) (Death and Interest) Cap. 27, for damages to the estate consequent on the death of the deceased. At the hearing of the assessment of damages he was greatly assisted by carefully researched and well presented arguments by counsel on behalf of their respective clients. This Court was similarly treated.

We feel it appropriate to say here that had the same efforts been made in the preparations for trial by collecting all available relevant evidence, His Lordship's task would have been much simpler. We refer particularly to that part of the assessment referred to in the judgment as the "multiplicand" of the loss. His Lordship had occasion to refer to another case involving the assessment of damages in which the circumstances of the evidence presented, led the Court to act on "little more than speculation". The present case is an excellent example of the type of case where, in the state of the evidence, the trial Judge must "do the best he can."

The only witness called was the son of the deceased. His evidence (including cross examination) occupied about 4 pages of the record.

No useful records or books of account could be produced. No attempt was made to elicit evidence of any comparable earnings from like businesses in the general area.

When one turns to the other issues determined by His Lordship he had little to guide him. No attempt was made to produce some form of statistical evidence from a Governmental, professional or semi professional source to assist the Court to arrive at a more accurate assessment of the life expectancy of the Plaintiff. If a Judge has before him some reasonably credible evidence of the life expectancy of the local population as a whole at varying ages, then he would be more likely to arrive at a reasoned estimate of the life expectancy or length of working life of the particular plaintiff - allowing for the local and personal vicissitudes of life, rather than as at the present, where he must almost guess, such is the paucity of the evidence put before him.

If something akin to this suggested form of information is available within Fiji then perhaps it could be presented to the Court in the least costly method - perhaps by a document prepared and verified which could be agreed between counsel in advance of trial.

The grounds of appeal state:

1. *THE Learned Judge erred in law and in fact in fixing the multiplicand at $3,160.00.*

2. *THE Learned Judge erred in law and in fact in applying a multiplier of three.*

3. *THE Learned Judge erred in law and in fact in awarding only $1,500.00 for loss of expectation of life.*

4. *THE Learned Judge erred in law and in fact in taking into account the deceased's smoking habit in assessing loss of expectation of life.*

5. *THE Learned Judge erred in law and in fact in fixing interest at the rate of 3% when the prevailing interest rate is 13.5%.*

6. *THE Learned Judge erred in law and in fact in ordering interest to be effective from the date of issuance of the writ rather than from the date of death.*

The hearing of the action took place on 7 August 1991. Both parties were represented by counsel. The learned trial Judge reserved his decision. Judgment was given on 28 February 1992 for the plaintiff in the sum of $11,730.00 plus interest at 3% from the date of issue of the Writ with costs to be taxed.

His Lordship gave a detailed and carefully reasoned decision. The facts and issues are very clearly set out. We do not feel it necessary to do other than to draw attention to the careful summary on each ground of appeal.

As to ground 1, this Court has no problem in accepting the figure of $3,160.00 used by His Honour as the multiplicand. It would be true to say that he did "the best he could" with the evidence to the advantage of the appellant. In a case such as this one should never overlook where the onus of proof lies.

Ground 2 of the Notice of Appeal alleged that His Lordship erred in choosing a multiplier of three.

In dealing with this ground, it is worth summarising that the deceased died on 10 September 1983, the Writ was issued on 5 September 1986, the case was heard on 7 August 1991 and judgment was given on 28 February 1992. After finding the nett annual loss to the estate by the death of the deceased was $3,160.00 for the year of his death, his Lordship used a multiplier of 3 and so calculated "damages for loss of earnings in the lost years" as $9,480.00. If the multiplier is regarded as the number of years which he might reasonably have expected the deceased to have so earned, then a simple multiplication gives the above result. Given that almost three years had expired from the death to the issue of the Writ and almost eight years to the date of trial, the customary multiplier approach based on prospective "lost years" with appropriate discounting for receiving money in advance and allowing for other contingencies, is not really apposite.

Whatever the approach, in three years from the date of death, the deceased would have been 57.

The only witness gave evidence that "at time of father's death he was in good health he suffered no ailment such as diabetes blood. He was a strong man and worked on the farm".

The learned trial Judge's note shows the following occurred in cross examination.

> *"Q. Fathers' excellent health any independent evidence.*
>
> *A. Not today but I can give it if you want."*

In re-examination:-

> *"Father's earnings mostly spent on the family. Apart from meals at home, he smoked and sometimes drank grog."*
>
> *To court - My father had been smoking since a long time. Since I was 10 and at the time of his death."*

The evidence of what occurred to the farm subsequent to the death, leads to the conclusion that the deceased was the driving (and the working) force in the business - certainly with the farm. The notes of evidence give the impression that despite the ages of the children, he did and would have continued to, control the finances. It seems more likely that the "ever decreasing dependency of his children on him" would have increased rather than diminished the amount which remained with the deceased from his labours.

Despite that he was a smoker and a partaker of "grog", we feel that a "lost year figure" of 3 is too low for this hardworking healthy farmer cum shopkeeper of 54 years. A

multiplier of five using the multiplicand found, would be more appropriate.

This would result in a figure for lost earnings of $15,800.00.

As to grounds 3 and 4 it should be said at the outset that His Lordship's references to the deceased's habits of smoking and drinking, should be put into proper perspective. Those references do not impute that His Lordship was necessarily foretelling a dire end for those males of 54 who smoke and drink. The subject was relevant also to the cost of living for the deceased himself.

The history of a claim for loss of expectation of life is shortly treated at paragraphs 1530 and 1531 of McGregor on Damages (1988). It is "shortly" treated because in the United Kingdom and in at least one other country, this form of claim has been abolished as a separate head of damage. In England that was effected by S1(1)(a) of the Administration of Justice Act 1982. In the same Act it was enacted that where the plaintiff's life expectancy has been reduced by the injuries (e.g. a plaintiff so rendered a quadriplegic, with his life expectation thereby reduced):-

> *"The Court, in assessing damages in respect of pain and suffering caused by the injuries, shall take account of any suffering caused or likely to be caused to him by awareness that his expectation of life has been reduced."*

As the learned author said this put the law back to the healthier position it was in before Flint -v- Lowell in 1934. "The Courts are not now restricted to awarding the conventional sum" (one might add, to a surviving plaintiff). All of this goes to demonstrate that the "conventional sum" was awarded to the estate of the deceased, (and in Fiji still is) on a standard set by the Courts. The Courts have consistently allowed a "conventional sum" which is or has been arrived at without regard for the length of years lost or for financial or social prospects. It is to represent compensation for the loss of the prospects of a predominantly happy life and the sum should be a moderate one. See Munkman on Damages for Personal Injuries Third Edition page 106. The House of Lords in Benham -v- Gambling (1941) AC 157 set L200. By 1966, according to Munkman (Supra) it had risen to L500 for an adult. Despite statements that the number of years lost was not relevant, children received less - about one half of the "adult" figure.

The House of Lords (and indeed the Superior Courts in other places where the claim lay) progressed the figure by judicial decree taking into account but not slavishly following, the decline in the value of money as generally indicated by the financial moguls of the country in question. The speed of the increase has not been typical of the change from L200 to L500 by the House of Lords from Behnam -v- Gambling to Naylor -v- Yorkshire Electricity Board (1968) AC 529. It is interesting to note the words of Lord Upjohn who, with commendable frankness, said at p 552 ibid, "over the years the conventional sum to be

awarded for such head of damage rises no doubt but by fits and starts rather than by estimation of the purchasing power of the pound". (The underlining is ours). The authorities show that by 1973 the conventional figure was L750; in 1979 L1250; in 1985 L1750 and McGregor (Supra) at paragraph 625 was predicting L2000 or more "before this head of damage finally succumbs to extinction". Extinction was of course governed by the hearing date of the last case to fall outside the prohibition or elimination, namely if the cause of action accrued before the end of 1982.

We have thought it fitting to deal at some length with the course of events in the United Kingdom. We are confident that similar stories would emerge from an examination of awards in many other countries although the conventional standard sum would doubtless vary according to local conditions.

What of Fiji? Counsel in the case before us indicated that of recent years awards have varied from $1,250 to as high as $3,000. This would seem generally to concure with the result of our independent reference to recent judgments of this Court.

One does not need authority for the proposition that awards for like causes in any Court should show as much consistency as the circumstances of the cases will permit. In dealing with this class of award there is little if any scope for variation - once

accepted as the conventional sum that should be "it" - until some superior Court activates a later "fit and start" (with thanks to Lord Upjohn).

Our recent experience leads us to conclude that at an appropriate time, this Court should review the general standard of damages for personal injuries in Fiji. In the interim, armed with the most useful information already provided to us on this type of claim, we have come to the view that the conventional sum as at the date of judgment in this present action should be $2,500. In arriving at that figure we have been to an extent guided by some more recent awards of damages which confirm our opinion that the value of money in Fiji justifies this figure. The inconstant course of inflation during the last two decades worldwide and in Fiji, supports the decision of the Courts in not varying the conventional figure with every wind of change, but only when it is perceived to be clearly "behind the times".

Accordingly the learned Judge's assessment of $1,500 will be set aside and a figure of $2,500 be inserted in lieu thereof.

As to ground 5 and 6, again we are of the view that the figure of 3% for interest from the date of the issue of the Writ is within what we conceive, on the facts before His

Lordship, was the range open to his discretion. Again, it may be somewhat on the lower end of that range but certainly not such as to justify our intervention on the material present here. A factor which must have influenced His Lordship's decision was the pace at which the action, once commenced, did proceed. Regrettably the state of that evidence makes it inappropriate for us to give a definitive judgment on the appropriate rate of interest to be used for this type of case in Fiji. We will try and take the first suitable opportunity to do so.

In the result the appeal will be allowed. Adopting the same course as used at the time, the judgment will be varied by substituting the figure ($19,050.00) for $11,730.00.

The appellant should have the costs of the appeal.

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Mr. Justice Michael M. Helsham
President Fiji Court of Appeal

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Sir Mari Kapi
Justice of Appeal

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Sir Edward Williams
Justice of Appeal