IN THE FIJI COURT OF APPEAL

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CIVIL JURISDICTION

CIVIL APPEAL NO. 72 OF 1991
(High Court Civil Action No. 88 of 1989)

BETWEEN:

KANTA MANI — APPELLANT

-and-

WESTERN MINING CORPORATION (FIJI) LTD — RESPONDENT

Mr. Ram Krishna for the Appellant
Mr. G.P. Shankar for the Respondent

Date of Hearing : 14th May, 1993
Date of Delivery of Judgment : 24th December, 1993

JUDGMENT OF THE COURT

This is an appeal from an award of damages assessed by the Honourable Mr Justice Saunders on 1 October 1991. After having found that the deceased husband contributed to his own death, His Lordship assessed responsibility therefor, 70% against the respondent employer and 30% against the deceased. The incident causing death occurred on 14 December 1988 at the respondent's mine at Vatukoula, Tavua where the deceased was employed as an underground miner.

Action was brought by the appellant as administratrix of the Estate of the deceased under the Compensation to Relatives Act and on behalf of the Estate under the Law Reform (Miscellaneous Provisions) Death and Interest Act.

The Statement of Claim issued with the Writ of Summons on 8th March, 1989 specified the dependants as his mother aged 45 years, his wife 22 and son aged 1 year. No attempt was made to divide the sum assessed for dependency between these three.

This Court has had occasion recently (see Pratap v A.G of Fiji Civ. App. No. 14 of 1992) to comment upon the difficulties facing a trial Judge (and where appropriate an appeal Court), who has before him a paucity of evidence on each of the issues in an action such as this. The problems thus facing an appeal Court are compounded by the absence of any evidence recording system save that of the Trial Judge and such notes of the evidence as he records. This puts a heavy burden on the Judge who is thus also greatly restricted in his customary and important role of "surveying the scene" as the trial progresses. If he is compelled to reserve his decision for sometime, his problems due to the absence of a full transcript of evidence are compounded. I am by no means unmindful of costs. This could be controlled by requiring a transcript only of that part of the evidence to which the Judge needs to refer for the purposes of his judgment. If the judgment is appealed, then different considerations will apply.

Since "years" and "time" are significant factors in this type of case, some of the relevant events are here chronologically listed:-

| | |
|---|---|
| 5.8.63 | Deceased born |
| 18.9.66 | Widow born |
| January 1983 | Deceased commenced his employment as an underground miner with the respondent. |
| 30.8.86 | Marriage of Widow and Deceased |
| 8.12.87 | Son, Kunal Krishnul Prasad born |
| 14.12.88 | Accident and death of deceased |
| 16.2.89 | Letters of Administration granted to widow. |
| 8.3.89 | Writ and Statement of Claim filed |
| 7.4.89 | F.N.P. Fund advises no nomination made and all monies due to the deceased will be paid to Supreme Court. |
| 8.6.89 | Public Trustee pays proceeds F.N.P.F. ($4399.77 to solicitors for widow. |
| 10.7.91 | Trial |
| 3.10.91 | Judgment (signed 1.10.91) delivered |
| 29.10.91 | Notice of appeal |

At the trial a considerable body of documentary evidence was tendered. Much of that related to the issue of contributory negligence. The only witnesses called were the assistant Personnel Officer of the respondent and the widow. The notes of

their evidence occupy approximately one half page and one page respectively of the record.

His Lordship assessed the pre-trial loss at $5738 on which he allowed interest at 4% per annum "half the prevailing rate" giving a figure of $230 interest and thus a total pre-trial loss of $5968. He assessed the post-trial loss at $30,975.00 using a multiplier of 12.5. The total figure of $36,943 was reduced to $25,860 applying his finding of 30% fault on the part of deceased.

His Lordship then went on to say, "From this is deducted $3,999.77 being benefit already received from the fund less $1000 estimated funeral benefit leaving $21,860. She is entitled to funeral expenses agreed at $600 making the total damages payable under the Compensation to Relatives Act to be $22,460.

She is entitled to 70% of $1250; the undisputed figure for loss of expectation of life. She claims this under the Law Reform (Miscellaneous Provisions) Death and Interest Act. This amounts to $875 and I award her interest on that amount for 2 1/2 years at 8% from the date of death to judgment.

According there will be judgment for the plaintiff against the defendant for $23,335 plus interest at 8% on $875 from 16.12.88(sic) to today".

The appeal was brought to us against the following findings:-

(a) the 12.5 multiplier post-trial;

(b) the amount of plaintiff's dependency at $42 per week;

(c) the finding of $30,975 damages which was said to be inadequate;

(d) .....in not allowing the plaintiff the Fiji National Provident Fund loss and in particular erred in distinguishing the case of Singapore Bus Service (1970) Ltd v Lim Soon Young (1985) 1 WLR 1075 from the present case.

In the plaintiff's submissions dated 1/8/91, made post trial and obviously after His Lordship had indicated his view on percentage fault, the solicitor for the Plaintiff sought only $1250 for loss of expectation of life and $600 for funeral expenses. These and the rates of interest and their periods of application are therefore not issues before us.

Leaving aside for the moment the questions arising from the involvement with the National Fiji Provident Fund, the sole issues for us are the findings of $42 per week dependency of the widow and the child (nothing apparently turning upon the pleaded dependency of the deceased's mother), and the multiplier of 12.5. In each case the appellant contends for a larger figure.

In recent decisions of this Court we have adverted to principles that should guide us in an appeal from a lower Court where it has exercised its discretion and arrived at a particular multiplier or has viewed the evidence of the case in a certain light. We cannot substitute our views of the facts or the issues, unless we are of the view that His Lordship was wrong, that he erred on one of the bases suggested and that this affected the judgment he should have given. In this case $42 per week, the allowance for the dependency, seems to us to be on the low side of the range available on the evidence. We may guess at the "deduction for groceries" and the use to which they, the groceries were put. But then we, like His Lordship, are faced with the notes of the widow's evidence:-

> *"He would give me $60 for groceries. Balance for himself. $60 for everything. $40 spent on groceries. Balance in clothes for self, child and mother in law."*

On the state of this somewhat confusing evidence, we are not entitled to upset the trial Judge's assessment of $42.

The multiplier of 12.5 adopted by the learned Judge for post-trial loss is a matter of some concern. It is certainly at the bottom of any range that one may forsee in cases such as these. (See e.g. the decisions of this Court in Raj Kumar and Mohan Prasad v. Dharma Reddy C.A. No. 62 of 1983 delivered 24 November 1984 and that of Sigavolavola and Ranitu v. Gyan Mati C.A. No. 85 of 1985 delivered 21 March 1986) Indeed the submission of counsel for the defendant, that 13 could be a

suitable multiplier (See pages 32 and 35 of record) encourages further investigation.

With one exception, the factors that may influence a Court in fixing an appropriate multiplier have been well canvassed in decisions of this and other appeal Courts. In Fiji there remains some doubts as to the use that might be made of the possibility of future benefits to the beneficiaries of a deceased, accruing from the notional 7 cents in the $ payment to the Provident Fund by the deceased and a like sum by his employers. It should not be overlooked that these deductions and payments are mandatory (see F.N.P.F. Act). Assuming it has relevance (and this will be dealt with later in this judgment). I am of the opinion that the 12 1/2 multiplier should be set aside is inadequate.

A confusing factor emerges from the learned trial Judge's statement at page 6 of his judgment ("my multiplier is based not on the age of the deceased but on the current rate of Bank interest payable on short term deposit 8%, and the expectations of a widow in a country when there are different standards of dependency of living, and of expectations of life from England".

This statement would seem to me on the evidence to involve possible questions of judicial notice, judicial evidence, and local knowledge. If he is to be taken as saying age of the deceased is immaterial (despite his earlier quoted reference to the speech of Lord Fraser) then I think he is patently wrong. Whatever the approach for fixing an appropriate multiplier (see

eg. the discussion at paras 1298 et seq. in McGregor on Damages, 14th Ed. 1980), since Cookson v Knowles 1978 2 WLR 978, whatever worth inflation or value of money in the future may or may not have, the age and expectations of the deceased at death are preeminently important considerations. A further relevant matter, not adverted to apparently, by either party was the possibility of further incremental allowances and the possibility of advancement in his trade.

All of this said, on the state of the evidence in this case, and on a review of some recent decisions of the High Court and of this Court, I am of the opinion as presently advised, that however arrived at, the 12.5 as the post trial multiplier is not within range for this case and should be disturbed. I leave for consideration later in this judgment what I think is the appropriate figure. Definitive judgments on this issue must await later opportunities based on solid grounds with cogent evidence and arguments fully addressed on each or most of the relevant grounds. I might add that the introduction elsewhere of statistical tables at varying rates, producing a "present value" sum, (to be used, so the cases say as a mere guide to a Judge's discretion) have not helped greatly to give stability to the present range of the multipliers being used. It is to be hoped that the use of both methods will yield comparable results. For the moment the Fijian cases indicate that this country is presently wedded to the arithmetical multiplier approach.

This brings me then to a consideration of the F.N.P.F. question. The respondent has contended that this issue, either in whole or part, should have been specially pleaded. It seems to us that two distinct questions arise in relation to this fund:-

(a) on what, basis was the $3999.77, being the benefit already received from the Fund less $1000 estimated funeral benefit, deducted from the total dependency figure?;

(b) what, if any sum, should have been added to the post trial dependency for the loss of the continuing benefits from the national payments to the Fund. Whilst the deceased worked for the respondent, the deceased would have made his contributions to the Fund and these would have been deducted from his assumed future wages.

The question whether a claim under the F.N.P.F. should have been pleaded as special damages was but faintly raised before this Court. Sufficient is it to say, that at the trial the matter was very much in issue, resulting in an order by the learned Judge to deduct from the dependency loss a substantial part of the sum paid from the Funds. Certainly any claim for diminished benefits in the future, arising on the premature termination by death, of payments both from employer and employee, would sound in general damages. Clearly the matter should have been so pleaded as to appraise the defendant what issues it had to meet. Failure to do so could result in an adjournment. I see nothing in Singapore Bus Service (1978) Ltd v. Lim Soon Yong 1985 3 All E R 437 to support the suggestion of

special damages. What did happen there was that the pleading was amended to add after the words "suffered loss damage amounting to $800 a month", the words "in addition to the C.P.F. (read F.N.P.F.) contributions."

Exh. A.1. shows that from his weekly gross pay of $118.56 on 3 May 1988, an amount of $8.26 was deducted (7c in the $) and paid to the Provident Fund. The employer made a like contribution and similar deductions and payments would have been made until death from the weekly wages.

It is worthy of note at this stage that there were two incremental payments to workers in the category in which the deceased was employed at death, namely 6% in 1989 and 7% in 1991. The learned trial Judge, in rounding off months worked or notionally worked, estimated that at death dependency was $2184 per annum for 1989, $2315 for 1990 and for the six months to trial up to (say) 30 June 1991, $1239, all of which sums would notionally have attracted the two amounts of 7c in the $. Further, the learned Judge, gave the credit for the increments referred to up to trial and based his post-trial assessment on the $2478 annual figure ($1239 for 6 months).

There is a further regrettable dearth of evidence on this issue of the N.F.P.F funds. The Assistant Personal Officer from the defendant company gave evidence that the deceased was a member of the N.F.P.F. - KT797 and that from his gross pay of

$118.56 for week ending 3/5/88, $8.26 was deducted for "Provident Fund".

Further, a letter from the General Manager of F.N.P.F. dated 7 April 1989 to the solicitor for the appellant (Exh. A.8) records that "the deceased did not make a nomination under Section 35(1) of the F.N.P.F. Act all monies due to the deceased will be paid to the Supreme Court".

A later letter dated 8.6.89 to the solicitor for the appellant (being part of Exh. A.8) from the Public Trustee of Fiji, states that he encloses his cheque for $4999.77 being F.N.P.F. proceeds of the deceased payable to the Widow Mrs. Kanta Mani in full settlement.

Exh. A.5 records that on 16 February 1989, the deceased having died intestate, letters of administration of his estate were granted by the High Court to the lawful widow and relict, the appellant in these proceedings. The value of the Esate was sworn at $1000. S.6(1)(a) of the Succession, Probate and Administration Act, Cap.60. Rev. 1985 provides that where the net value of the residuary estate of an intestate does not exceed $2000, the widow left with or without issue takes the personal chattels and residuary estate absolutely.

As can be seen above, the Public Trustee paid to the Solicitor for the appellant widow, the sum of $4999.77 "payable to the widow Mrs Kanta Mani in full settlement".

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S.35(1) of the Fiji National Provident Fund (Amendment) (No.2) - 29 of 1986, provides that where (as here) there is no person nominated, the Board is to pay the money standing to the credit of the member, into Court "for disposal in accordance with the law".

S.35(4) provides that where a person other than a spouse is entitled by virtue of s.s.1 or 2 to receive all or part of the amount standing to the credit of a deceased member of the Fund and the person entitled is under the age of 16 at the time of payment out, the amount to be paid shall be paid to The Public Trustee for the benefit of the person so entitled.

All Courts should be concerned to protect the interests of infants however loving and caring the remaining parent may be. To that end the Public Trustee has been entrusted with power to safeguard those interests during minority.

S.43 (as amended by Act 9 of 1974, s.16) provides that "notwithstanding the provisions of any other written law, all monies paid out of the Fund on the death of any member shall be deemed to be impressed with a trust in favour of the person nominated.....or if no such person has been nominated, the person or persons determined by the Court (the underlining is mine) in accordance with the provisions of subsection (1) of section 35 to be entitled thereto and shall be deemed not to form part of the deceased's estate nor to be subject to his debts (again the underlining is mine).

It is clear that the amount paid out in this case (however made up) is not part of the deceased's estate -- it is "deemed" not to be. The final division of the amount (if any) between the widow and the child is not relevant to this decision. The Court was supplied by counsel for the respondent in his written submission on the Funds, with a series of decisions of this Court and of the High Court dealing with the meaning of the words "for disposal in accordance with the law" to the facts of each case before it.

In the view I take of the relevant law to the facts of this action it is not appropriate to here decide any issue that may arise out of the above conclusions, since the sum in question is by law an amount set apart from the deceased's estate and in my opinion; also from the claim of the dependants under the Compensation to Relatives Act Cap.29 Ed. 1978.

The earliest forerunner of this class of legislation was Lord Campbells Act (now in the U.K., the Fatal Accidents Act). As Luntz's Assessment of Damages 3rd Ed. (1990) at pg 386 records "the basic provisions have mostly remained uniform, but amendments relating to persons for whose benefit the action may be brought, deductions of benefits received and the time within which the action must be brought have varied from place to place". In the circumstances of this action it is worth stating that while only one action lies for the benefit of all dependants, the claim of each is an individual one and the damages must be assessed according to the loss of each. Again,

although somewhat trite, it is worth recording that the scheme of the Act is to obtain compensation to the families of persons killed by accidents, and that the estate via the executor or administrator is merely a convenient method of achieving that aim. Indeed as s.10 of the local Act indicates, an action by the executor or administrator is not essential and the action may be brought in the circumstances stated in the name of the beneficiaries. It is therefore not an "estate" action which is the province of the Law Reform (Miscellaneous Provisions (Death and Interest) Act) Cap. 27 Ed. 1978. The claim for loss of expectation of life is in a different category and falls under the last mentioned Act.

If apology is necessary for stating these self evident facts, it is humbly offered. I have recited them because of the paucity of evidence dealing with the sum of $4999.77, its final destination and the rights and benefits to which the child of the marriage may be entitled.

After rejecting the claim which he refers to as the "Fiji National Provident Fund loss", the learned trial Judge dealt with the Fund payments of $4999.77 in these terms:-

> *"From this is deducted $3999.77 being benefit already received from the Fund less $1000 estimated funeral benefit leaving $21,860. She is entitled to funeral expenses agreed at $600 making the total damages payable under the Compensation to Relatives Act to be $22,460."*

If any deduction is to be made, I am at a loss to understand why a bonus or a boon was given by His Lordship in the form of the $1000 "estimated funeral benefit" when the funeral had long ago taken place at a cost of $600 which sum was rightly allowed pursuant to s.11 of the Compensation to Relatives Act. Perhaps the $1000 had its origins in s.9 of Fiji National Provident Act 1985 Cap.219 which reads:-

> *"as soon as possible after the end of each financial year the Board shall, having considered the recommendation of the Manager, declare the maximum sum to be added to an entitled member's credit on his death for the purposes of section 36, provided that the amount so declared shall be not less than $1000."*

In its original form, this type of legislation did not require that any benefits be excluded from consideration and the Courts tended to take all types of benefit into account. "This statement of Dixon J in Public Trustee v Zoanetti 1945 70 CLR 266 @277 appears to indicate that only benefits that were reasonably probable at the time of death are to be taken into account" (see Luntz supra @ pg 412). In the result while the Court purported to assess dependency by taking all such benefits "into account" in what were usually "jury assessments", the legislatures progressively added exclusions of benefits that were to be ignored. So in Fiji at the time of this death the relevant legislation (s.12) provided:-

> *"12.-(1) In assessing damages in any action under the provisions of this Act, there*

*shall not be taken into account-*

*(a) any sum paid or payable on the death of the deceased under any contract of assurance or insurance;*

*(b) any widow's or orphan's pension or allowance payable under any contributory pension scheme declared by the Minister, by notice in the Gazette, to be a scheme for the purpose of this paragraph.*

*(2) The provisions of this section shall bind the Crown in right of the Government in Fiji."*

This section demonstrates how the Fijian legislature has moved to exclude certain payments in assessment of damages. In England and in many other places, the legislatures have moved to excluded the remarriage or possible remarriage as a factor in diminution of the widow's claim.

This is not the place to discuss the reason or reasons which prompts legislatures to so act. Suffice to say that the judgments of the Courts must have played a part.

We have heard no argument on whether s.12(1)(b) of the Compensation to Relatives Act has any relevance to this decision. Can it be argued that the widow's share of the $4999.77 from the Fund falls within "any widow's pension or allowance payable under any contributory pension scheme declared by the Minister, by notice in the Gazette, to be a scheme for the purposes of this paragraph?". Allied to this, is the question, did the Minister so declare in respect of the Fund monies and when??

Leaving aside further consideration on this aspect, we pass then to s.36 of the F.N.P.F. Act Cap. 219 Rev. 1985 which is set out hereunder:-

> *"36.-(1) On the death of an entitled member after 1 January 1971, the amount standing to his credit int he Fund shall be increased by such proportion of the maximum sum as may be prescribed in accordance with subsection (2) and the amount of such increase shall be paid from the general revenues of the Fund.*
>
> *(2) The amount to be added to the deceased member's credit for the purpose of subsection (1) shall be related to the member's period of membership of the Fund and to the number and amount of contributions paid on his behalf and standing to his credit in such manner as may be prescribed.*
>
> *(3) The amount payable under subsection (1) shall not be taken into consideration in the assessment of compensation or damages payable to the dependants or beneficiaries of the deceased member under the provisions of the Compensation to Relatives Act."*

It is arguable that the amount to which ss.(3) refers as not to be taken into account in the assessment of damages includes not only the "special death benefit" but also the amount standing to the credit of the member. However, guided by the decision of this Court in Subamma to which I refer hereafter in greater detail, and having regard to other provisions of the legislation and particularly s.32, I do not regard this question of interpretation to be attended by sufficient doubt to warrant a departure from the established principle that the amount standing to the member's credit must be taken into account.

Clearly the F.N.P.F. payment of the member's credit is not a sum paid under a contract of assurance or insurance (s.12(1)(a) Compensation to Relatives Act), nor has the scheme established by the F.N.P.F. Act received the declaration of the Minister pursuant to s.12(1)(b) of that Act.

The extent to which the F.N.P.F. payment to which I have referred ought to be brought to account in a dependant's action is a matter which requires consideration. In Subamma the Court deducted that sum in full, not recognising that the dependants had a contingent interest in that sum which ultimately may have flowed to them in full on the deceased's natural death, or partly on his retirement. The fund comprised both the deceased's compulsory savings and the employer's compulsory contributions, the total of which with interest stood to the deceased's credit at $3999.77.

In my opinion the amount standing to the credit of the deceased in the F.N.P.F. may be taken into account in a damages assessment as an accelerated benefit only. In determining the value to be attached to that accelerated benefit it is proper to take account of the contingencies facing the dependants, and the uncertainties associated with the final, disposition of the deceased's credit had he survived the accident. See Kassam v Kampala Aerated Water Co. Ltd. (1965) 2 All E.R. 875 at 879; Luntz, "Assessment of Damages", 3rd Ed., paras 9.5.28; 9.5.31; Public Trustee (W.A.) v Nickisson (1964) 111 C.L.R. 500. The provisions of s.12 of the Compensation to Relatives Act (and the

heading to that Section "Exclusion of certain payments in assessment of damages") does not, by implication, require other payments to be taken into account in full. In my opinion the deceased's savings and his employer's contributions are not, as a matter of principle, to be brought to account directly in relief of the wrongdoer.

The point now under consideration was not argued before the Court in Subamma. It was raised in the parties' further written submissions before us. I do not regard the decision of treating the F.N.P.F. credit as an accelerated benefit only as a departure from any previous decision of the Court of Appeal. In any event, on the authorities the point is clear beyond argument and if necessary I would have no hesitation in departing from any such earlier decision to the contrary.

I assess the value of the accelerated benefit to be brought to account at $2000.00. Further, it is clear on the legislation (s.36(3)) and the authorities that the special death benetit is not to be taken into account.

The decision referred to was Subamma d/o Yankanna and Chandar s/o Muktar C/A No. 40 of 1982 decided on 26 November 1982. The judgment of the Court of Appeal was read by Marsack J.A. The relevant portion is short and I quote it in full:-

> *"The learned Judge assessed the total damages, payable under the Compensation to Relatives Act, at $24,000. From this he deducted*

(a) $3702 received by the widow from the National Provident Fund;

(b) $1250 representing damages payable under the Law Reform (Miscellaneous Provisions) Death and Interest Act;

(c) $ 15 received by the widow from sale of tools belonging to deceased,

$4967

leaving his judgment against respondent under the Compensation to Relatives Act at $19,033. He further allowed $1250 under the Law Reform (Miscellaneous Provisions) Death and Interest Act and $250, the agreed funeral expenses, making a total judgment of $20,533 plus costs.

Appellant appeals against his judgment on the ground that there should have been no deductions from the amount of $24,000 fixed by the learned trial Judge as the total damages payable.

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Turning now to the appeal itself, we note that the additional sum sought by the appellant is that received by argument that there was no justification for that deduction from the damages to which the learned trial Judge found appellant was entitled, counsel relied on Section 36 of the Fiji National Provident Fund Act, the relative subsections of which read:

"Payment of special death benefit

(1) On the death of an entitled member after the 1st day of January, 1971, the amount standing to his credit in the Fund shall be increased by such proportion of the maximum sum as may be prescribed in accordance with subsection (2) and the amount of such increase shall be paid from the general revenues of the Fund.

(3) The amount payable under subsection (1) shall not be taken into consideration in the assessment of compensation or

*damages payable to the dependents or beneficiaries of the deceased member under the provisions of the Compensation to Relatives Act."*

*(The underlining is mine)*

*In counsel's contention, "the amount payable under subsection 1" is the amount standing to deceased's credit in the Fund plus the increase from the general revenue of the Fund. Accordingly, the counsel's submission, no part of such amount should be taken into consideration when damages are assessed. It is true that the wording of Section 36 could have been somewhat more clearly expressed. In England the rule, before the passing of the Fatal Accidents Act 1959, was that:*

*"Every pecuniary advantage which the dependent had received as a result of the deceased's death had to be deducted."*

*12 Halsbury, Fourth Edition, paragraph 1150(ii)*

*The Fatal Accidents Act provided that moneys received from insurance policies, friendly societies, pensions and the like, should not be deducted; these are provisions somewhat similar to those in the Fiji National Provident Fund Act. Working on the same principle, as we think we should do, we should hold that all moneys received by appellant as a result of deceased's death should be deducted, except moneys that have come from such a society or fund as those mentioned in the English Act.*

*As we read it, Section 36(3) provides that the additional amount added under subsection 2 shall not be taken into account in the assessment of damages under the Compensation to Relatives Act; but it has not affected the ordinary rule of law that any other benefit received by dependent as a result of deceased's death should be deducted from the damages awarded. Applying this principle the amount received from deceased's contribution to the Fund, thus forms part of his estate, and could properly be deducted from damages awarded; but the increase calculated under subsection 2 should not be taken into account.*

> *At the hearing of the action in the Supreme Court no evidence was produced showing how the amount of $3702 was made up between the two factors concerned. As it was necessary to ascertain these figures, counsel were consulted, and they agreed to apply to the offices of the National Provident Fund for the required information. They encountered some difficulty in the matter and when finally a reply was received from the Manager of the Fund it was not entirely clear as to what had been added from the general revenues of the Fund in this case. Counsel could not reach agreement on the point. On consideration we have decided to assess the increase from the general revenues at the minimum sum prescribed in Section 9 of the Fiji National Provident Fund Act. This would mean that $1000 should not have been included in the sum of $3702 deducted from the damages awarded. Accordingly we find that the amount deducted from the damages found by the learned trial Judge should be reduced by $1000. The appeal therefore partly succeeds and total damages awarded in the court below will be increased by $1000 to $21,533."*

The deduction of $1000 in this decision as in the present appeal, for quite different reasons is something of a coincidence.

Whether or if so, when, a subsequent Court of Appeal can reverse or alter a previous decision of this Court, did not come in issue in the proceedings before us. For a recent consideration of the relevant principles, see Nguyen v Nguyen (1990) 64 A.L.J.R. 222 at 232, 233; 169 C.L.R. 245 at 268 - 270. See also, Davis v Johnson (1978) 1 All E.R. 841, 1132.

The effect therefore will be to vary the judgment appealed from under the Compensation to Relatives Act claim without deductions based on the F.N.P.F. payment beyond an amount for the accelerated benefit.

The F.N.P.F. credit would have increased in time had the deceased survived by the amount of his wages, his employer's contributions, and interest. In my view the prospective payments by the employer to the F.N.P.F. ought to be considered when the multiplier is fixed. Those payments are an income substitute and would otherwise be available immediately for the benefit of the dependants. As already discussed the dependants had a contingent interest in those future payments premised upon considerations of the disposition of the F.N.P.F. credit on retirement or earlier natural death. Those contingencies must be brought to account.

Like the whole question of remarriage, increases in wages, premature deaths from another cause or losing his job due to any number of reasons and so on, the question seems to me one to be dealt with in fixing the multiplier for post trial losses. It is for that and other reasons that I have felt comfortable with the multiplier of 16 which I have adopted. See, further, Halsbury's Laws of England, 4th Ed., Vol. 12, para 1156; Mallet v McMonagle (1970) A.C. 166 at 177 per Lord Diplock.

In the result then the judgment appealed from is varied as follows. Adopting the trial Judge's figure of annual wage loss

at trial ($1239 for 6 months x 2), future loss of dependency is $39648.00.

Accordingly adding the pre-trial loss (including interest) at $5968, a total dependency loss of $45616.00 results. From that sum is deducted the accelerated benefits figure of $2000.00. Funeral expenses are agreed in the sum of $600. Those funeral expenses should be allowed in the dependant's action. See s.11 of Compensation to Relatives Act. 30% must be deducted for contributory negligence, resulting in a final figure of $30941.20 payable under the claim made under the Compensation to Relatives Act.

As the figure for loss of expectation of life was agreed on and no argument addressed in relation to its amount nor its quantination, this part of the order under the Law Reform (Miscellaneous Provisions) Death and Interest Act will stand in the sum of $875 plus interest at 5% from 16.12.88 until payment. The judgment in favour of the Plaintiff is in her capacity as administratrix of the estate of the deceased.

The Court must apportion damages between the widow and the dependant. (S.6, Compensation to Relatives Act). There was no evidence advanced to enable any attempt at precision in that exercise.

The proceeds of the action on behalf of the estate of the deceased must be distributed according to the intestacy provisions of the Succession, Probate and Administrative Act.

As to the damages payable under the Compensation to Relatives Act assessed at $30951.20, I apportion $15500.00 to the infant and $15451.20 to the widow, subject to any further argument this Court may entertain on that apportionment. The award in favour of the infant must be paid to the Public Trustee on the usual terms of Order.

The appellant should have her costs of and incidental to the appeal.

E. D. Williams

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Sir Edward Williams
Justice of Appeal

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Date of Delivery of Judgment : 24th December, 1993.

JUDGMENT OF THE COURT

We have read the reasons for judgment prepared by Sir Edward Williams.

We agree with those reasons and with the orders he proposes.

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

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Sir Mari Kapi
Justice of Appeal