

**IN THE COURT OF APPEAL, FIJI**  
**[CIVIL APPELLATE JURISDICTION]**

**CIVIL APPEAL NO. ABU 0028.2015**  
**(High Court No. HBC 272.2011)**

**BETWEEN** : **TYCO FIJI LIMITED**  
**CARPENTERS FIJI LIMITED**

*Appellants*

**AND** : **SAMANTHA JULIA WISE**

*Respondent*

**Coram** : **Lecamwasam, JA**  
**Prematilaka, JA**  
**Wati, JA**

**Counsel** : **Mr. A. K. Narayan for the 1<sup>st</sup> Appellant**  
**Mr. P. I. Knight for the 2<sup>nd</sup> Appellant**  
**Mr. D. Singh for the Respondent**

**Date of Hearing** : **4 May 2017**

**Date of Judgment** : **26 May 2017**

**JUDGMENT**

**Lecamwasam, JA**

[1] This is an appeal by the appellants against the judgment of the learned High Court Judge at Suva dated 20<sup>th</sup> March 2015. The facts are lucidly and succinctly stated by the learned High Court Judge in his judgment I can do no better than to repeat them in verbatim below:

*“The plaintiff is the widow of the deceased had instituted this action against the defendant for damages due to a fatal electrocution of her husband while being engaged in his work as a **Sprinkler Fitter** with the first defendant. The second defendant was the owner of the premises where the 2<sup>nd</sup> defendant (sic) was working when he got electrocuted. The 1<sup>st</sup> and 2<sup>nd</sup> defendants alleged contributory negligence of the deceased. The ladder on which the deceased was working had got contacted with live wire on the ground which supplied temporary electricity to the persons who were in the room, including the deceased. The contact with the live wire happened as one of the legs of the ladder was placed over a part of live wire since the insulated covering of the leg of the ladder was damaged, the aluminum part of the ladder was exposed and it had pierced through the covering of the live wire, and the electrical current passed on to the aluminum ladder. There were four (4) persons working in the room, including electricians employed by Top Energy engaging in electrical installation in the room, and none of them knew how to disconnect the temporary electricity supply and it was not protected by Residual Current Device (RCD) which automatically disconnects the current in case of the drop of current (eg. Electrocution, Leakage, Heating, etc. that create imbalance of incoming current and outgoing current from the power point). Even after the fatal electrocution, the current supply was neither disconnected automatically to circuit breakers of the premises where the power was obtained. (circuit breakers of the MHCC building), nor was it possible to be disconnected manually by the persons who were working in the site (including Electricians who were working on the site)... “There is no dispute between the parties as to the cause of the electrocution of the deceased and there is no dispute as to the apportionment of the liability. So the first issue is whether the defendants are liable for the electrocution of the deceased....”*

However when the deceased was taken to hospital, he was found dead on admission.

[2] The appellants filed this appeal on the following grounds of appeal:

1. *The learned Trial Judge failed to properly and/or adequately evaluate all the evidence whereby his Lordship fell into the error of attributing nearly 5% contributing negligence on the part of the deceased.*

2. *The learned Trial Judge failed to consider or to give any or any sufficient weight and/or to provide any/or any sufficient reasons for not dealing with an evaluating or not accepting the evidence of the independent plaintiff witness, Mr. Sumit Kapoor which was supported and corroborated by the other witnesses of the plaintiff (respondents) and the first defendant (1<sup>st</sup> appellant) and thereby failing to the error of attributing merely 5% contributing negligence on the part of the deceased.*
3. *The learned Trial Judge failed to properly and/or adequately direct himself on the onus and standard of proof in relation to the deceased income.*
4. *The learned Trial Judge failed to consider at all or failed to give any or any sufficient weight to the contradictory evidence of the Respondent (Samantha Julia Wise) as to the degree of financial contribution of the deceased to his family, whereby the learned Trial Judge fell into the error of uncritically, without proper evaluation of the evidence and her credibility accepting the evidence of the Respondent (Samantha Julia Wise).*
5. *The Learned Trial Judge erred in law and in awarding overtime pay o \$100.00 a week to the deceased, when this was neither pleaded nor an issue to be determined at trial, whereby his Justice fell into the error of awarding compensation which was unreasonable, excessive and manifestly unjust.*
6. *The Learned Trial Judge erred in law and in fact in awarding overtime pay of \$100.00 a week to the deceased contrary to the agreement of the parties and concession by the Respondent as to the weekly gross pay of the deceased whereby his Justice fell into the error of awarding compensation which was harsh, excessive and manifestly unjust.*
7. *The learned Trial Judge erred in law and in fact in not allowing a deduction for lump payment and contingencies/vicissitudes of life and thereby fell into the error of awarding compensation which was unreasonable, excessive and manifestly unjust.*
8. *The Learned Trial Judges award of damages in unreasonable and excessive.*
9. *The Appellants reserves their right to file amended and/or additional grounds of appeal upon receipt of the certified copy of the records.*

[3] In addition to the above grounds of appeal, the respondent (ie. original plaintiff) also preferred a cross appeal on the following grounds of appeal:-

1. *The learned trial Judge erred in fact and/or in law in awarding 5% contributory negligence on the part of the deceased whereas based on evidence and legal submission filed on behalf of the plaintiff/respondent there should not have been any contributory negligence attributed to the deceased at all.*
2. *The learned trial Judge erred in fact and/or in law in not awarding any damages with interest for pain and suffering based on evidence and legal submission filed on behalf of the plaintiff/respondent*

[4] Although the appellants filed 9 grounds of appeal, at the stage of argument before the Court of Appeal they mainly and heavily relied only on grounds based on contributory negligence, the quantum of the award based on weekly salary, and the overtime pay and the claim on vicissitudes of life. Some of the grounds of appeal overlap when consolidated, and in essence there are only three grounds of appeal. The grounds of appeal contained in the plaintiffs-appellants' cross appeal can be dealt with simultaneously when dealing with the defendants-appellants' grounds of appeal.

[5] I have carefully considered the written submissions and the oral submissions of the appellants and the respondent. In dealing with the aspect of contributory negligence, the learned High Court Judge commenced his views in paragraph 7 of his judgment and thereafter strayed into, not so relevant issues such as the provisions of the electricity Act, breach of some of the provisions therein and various other matters before suddenly allowing in paragraph 41, a 5% contributory negligence on the part of the deceased.

[6] As per the evidence unfolded in this case, I do not see any reason to impose a 5% contributory negligence on the deceased. The appellants seek a 20% increase under this head whereas the appellant respondent (the plaintiff) in her cross appeal pleads for a reversal of the order of 5% contributory negligence on the part of the deceased. Not even Sumit Kapoor, the person who was identified as an "eye-witness" ; perhaps the only 'eye witness' had seen the exact events happening at the time of the electrocution. According to his evidence, it was Luke, who shouted at Kapoor and told him "Hey, Sumit, see what has happened to Donald". Then only Kapoor had gone to the place where Donald was. Though the distance between Kapoor and the deceased had been only a matter of 4 to 5

meters he had not seen anything until told by Luke. Hence it is clear that Sumit Kapoor had not seen the actual unfolding of events.

[7] He has not anywhere in his evidence said what exactly happened before the electrocution. There is no evidence to the effect that Donald had shifted or adjusted or meddled with the ladder before electrocution. The defendants attempted to say that the deceased was wet at the time of electrocution and such wetness contributed to the electrocution. Witness, Kapoor on this story of the deceased being wet, emphatically said that such wetness could be due to fire sprinkles or due to sweating and further he said "*It was not that wet but a little wet...*" Therefore defendants-appellants cannot derive a benefit out of the fact of the deceased body being wet. Sweating is an involuntary natural reaction due to heat, physical exertion, etc. the nature of the work the deceased was employed in, and was such that sweating, even profusely could not be avoided under ordinary circumstances.

[8] Under these circumstances one cannot attribute contributory negligence to the deceased on the ground that he was wet. Therefore there is not an iota of evidence on contributory negligence on the part of the deceased. Hence the order of 5% for contributory negligence is set aside. There is no reason at all to increase the percentage of contributory negligence as claimed by the defendants/appellants.

[9] The learned High Court Judge has calculated the damages, on the premise that the gross salary was \$300.00 and not \$193.20c. Given the fact that parties had agreed at the pre trial conference to treat the salary as \$193.20 in their agreed facts the learned High Court Judge ought not have calculated on the basis of \$300.00 disregarding the agreement between the parties to consider the weekly salary as \$193.20c. Hence I would set aside this fanciful and arbitrary calculation of \$300.00 and order the calculation under this head to be based on \$193.20c and in view of the agreement at the pre-trial conference, I exclude the overtime payment of \$100.00 too. From the weekly salary of \$193.20c a sum of \$75.00 has to be excluded as is per the trial judge's findings on money being spent on the deceased himself. This was not challenged at the argument stage before the Court of Appeal.

[10] At the time of this unfortunate incident, the deceased was an active young man of 36 years, therefore given the general life expectancy of a person he had the prospects of working at least till 60 years or more. His employment was a skilled job which he could have continued even after the statutory age of retirement which allows a person for the continuation of skilled jobs provided a person is in good health. Evidence does not reveal any ailment or disability which the deceased was inflicted with. He had even travelled overseas for temporary employment of short durations. Considering all these facts, the learned High Court Judge has correctly applied a multiplier of 14, with which I do not wish to interfere. The learned High Court Judge calculated the damage only for the loss of 14 years of his skilled work, which would put the age at 50 years. As the statutory age of retirement is 55 years, an additional uncalculated period of 5 years could also technically accrue to the benefit of the defendants/appellants.

[11] According to the facts of this case, however a multiplier of 14 is reasonable in every manner and selection of 14 years as multiplier is fortified by decisions of this court in **Ratu Isei Turaga v Helen Nina Work**, Civil Appeal No. ABU 0046.1995S (16 August 1996) FJCA 4 ; **Mano Lata v Janla Prasad**, HBC 0407.1997L (5 April 2004); a multiplier of 14 was adopted in circumstances where the age in question was 36 years. Therefore I hold that the learned High Court Judge has applied the correct multiplier and any variation will result in injustice. The defendants/appellants also relied on the decisions of **Attorney General v Broadbridge** [2005] FJSC 4; CBV 0005/2003, wherein by implication they have moved court to give a deduction of 1/3 of the amount for contingencies and vicissitudes of life however in the same judgment, their Lordships at paragraph 92 cautioned thus:

*“...we should make it clear that Mr. Broadbridge’s case should not be regarded as setting in a practical benchmark for the amount to be awarded for future economic loss.”*

[12] Hence I do not wish to follow the above case in regard to awards under vicissitudes of life. It is noteworthy here to mention that the learned High Court Judge in his judgment at paragraph 51 stated that he had considered contingencies also in considering the

multiplier. As the learned High Court Judge had already considered the contingency factor, it becomes redundant to reduce any further sum under the head of contingencies and vicissitudes of life.

- [13] Although the respondent-appellant (plaintiff), by way of cross appeal, claimed damages with interest for pain and suffering, relying on the authorities cited by the learned High Court Judge in *Hicks v Chief Constable South Yorkshire Police* [1992] 2 All ER 65[3], the House of Lords opines as follows:-

*“In this case the deceased died the same day, hence no claim for pain and suffering arises as no damage is given for pain and suffering when unconsciousness and death followed the injury within a very short time.”*

On the strength of the above judgment, I decline to order any damages as it is apparent that the death of the deceased was almost instantaneous and therefore no claim for pain and suffering arises.

- [14] Plaintiff-Appellant adverted the attention of this Court to the post mortem report marked exhibit ‘5’ in order to prove that the death was not instantaneous and hence she is entitled to damages under pain and suffering. The relevant medical officer had stated the date and time of death as 07.08.10 at 1500 hours, based on the strength of the information passed to her by witnesses, it is hence obvious that it is not a medical opinion pursuant to a post mortem examination. Therefore, I decline to accept the time of death as stated by the relevant doctor who prepared exhibit ‘5’ to be a medical opinion, which, if it were, would give rise to a legitimate claim for pain and suffering. Therefore the ground of appeal of the plaintiff-appellant in regard to pain and suffering is dismissed.

- [15] As per reasons given above, I amend (wherever necessary) the table of calculations given by the learned High Court Judge at the end of paragraph 53 of his judgment in the following manner:

Calculation (approx. to FJD)

Special Damage	- \$3,325.00 (as per para 46 of the High Court judgment)
Interest	- \$ 437.00
Lost years – Damage	-\$86,049.60(118.00 x 52 x 14)
Loss of expectation of life	-\$ 2,500.00
Total Damages	-\$92,311.60 (86049.60 + 3325 +2,500 + 437)
Apportionment as Agreed	
62% for 1 <sup>st</sup> Appellant	- \$57,233.20c (approximate)
38% for 2 <sup>nd</sup> Appellant	- \$35,078.40c

I would order that the defendants-appellants to pay the respective amounts to the original plaintiff.

[16] In the final analysis the defendants-appellants have succeeded on grounds 5 and 6 related to salary and income of the deceased and the plaintiff-appellant succeeded on ground 2 of his appeal, therefore it can be concluded that both parties have to some extent been successful. As a result I propose that each party should pay its own cost in this Court and

I do not wish to interfere with the order of costs in the lower court.

**Prematilaka, JA**

[17] I agree with the reasoning and conclusions of Lecamwasam JA.

**Wati, JA**

[18] I too agree with the judgment of Lecamwasam JA.



**The Orders of the Court are:**

1. Both appeals partly allowed.
  - 1<sup>st</sup> Appellant to pay to the plaintiff \$57,233.20c
  - 2<sup>nd</sup> Appellant to pay to the plaintiff \$35,078.40c
  
2. Parties to bear their own costs.



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**Hon. Mr. Justice S. Lecamwasam**  
**JUSTICE OF APPEAL**

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**Hon. Mr. Justice C. Prematilaka**  
**JUSTICE OF APPEAL**

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**Hon. Madam Justice A. Wati**  
**JUSTICE OF APPEAL**