IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 165 of 2016

BETWEEN: **KUAR DATT SHARMA,** also known as **KUAR DUTT SHARMA** of Nadi Back Road, Nadi, Farmer, suing on behalf of his late son, **KAVNIT KANT SHARMA** and his Estate, there being no Executor or Administrator pursuant to section 10 of Compensation to Relatives Act Cap 29, Laws of Fiji.

Plaintiff

AND: **SAMISONI TOGANIVALU** of Pacific Harbour, Deuba, Driver.

1st Defendant

AND: **OFFSHORE FISHING COMPANY LIMITED,** a limited liability company having its registered office at HLB Crossbie & Associates, 3 Cruickshank Road, Air Port, Nadi.

2nd Defendant

Before : Master U.L. Mohamed Azhar

Counsels: Mr. R. Charan for the Plaintiff
Ms. V. Buli and Ms. Besetimoala for the Defendants

Date of Ruling: 22nd June 2018

RULING

01. This is the summons filed by the defendants pursuant to Order 18 rule 18 (1) (a) of the High Court Rules and the inherent jurisdiction of this court, seeking an order to strike out the statement of claim filed by the plaintiff against the defendant on the ground it does not disclose reasonable cause of action against the defendant. Since no evidence is required for a summons under the above rule, the matter was fixed for hearing. At the hearing, counsels for both the plaintiff and the defendants made oral submission and tendered the written submissions.

02. The plaintiff, who is the biological father of the deceased Kavnit Kant Sharma died in a road traffic accident, sued the defendants, on behalf of himself, his wife and two children,

whose names are mentioned in the statement of claim, claiming damages for negligently causing death to his late son. At all material time, the first defendant was the driver of the vehicle bearing registration number HB 253, acting as an agent and/or servant of the second defendant and had the full care, control and possession of the said vehicle with the express and/or implied consent of the second defendant. As per the statement of claim, the late son of the plaintiff, on the mid-day of 04.08.2013, was riding his bicycle along Nadi Back Road and heading towards Nadi Airport. The plaintiff claims that, due to the negligent and careless driving of the first defendant, his vehicle collided with the bicycle of the deceased. The deceased sustained injuries due to the said accident and finally succumbed to them. The plaintiff, therefore, claimed special damages, damages under the Compensation to Relative Act, damages for the estate of the deceased and interest at the rate of 10% per annum under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act.

03. Both defendants filed their statement of defence through their solicitors and admitted that, the second defendant was the owner of the vehicle bearing number HB 253 and the first defendant was the agent and/or servant of the second defendant. They also admitted that, deceased Kavnit Kant Sharma received injuries caused by the said collision between the said vehicle and the bicycle, and died due to the said injuries. However, they claimed that, the said accident took place due to the negligence of the deceased and in any event, plaintiff does not have any cause of action to sue them. Therefore, the defendant prayed the court to dismiss plaintiff's action. The plaintiff did not file the reply to the defence, but took out the summons for directions. In the meantime, the defendants filed the instant summons seeking to strike out plaintiff's action for disclosing no cause of action.

04. At the hearing of the summons, the counsels for the defendants argued that, the plaintiff brought this action under section 10 of the Compensation to Relatives Act, as no Executor or Administrator was appointed, and sought damages for the estate of his late son, under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act. However, an action under the said Law Reform (Miscellaneous Provisions) (Death and Interest) Act could, only, be brought by an Executor or Administrator. Since the plaintiff is not the Executor of the Estate, he has no reasonable cause of action to sue the defendants under the said Law Reform (Miscellaneous Provisions) (Death and Interest) Act. In support of their argument, the counsels for the defendants relied on the section 2 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act and cited the English authority, **Ingall -v- Moran** (1944) 1 All ER 97 and few local authorities, namely **Tanuku v Attorney-General** [2000] FJHC 13; Hbc0134d.95s (26 January 2000) and **Veilave v Naicker** [2017] FJHC 297; HBC159.2013 (21 April 2017). **Jamieson v Dominion Insurance Ltd** [2012] FJHC 15; HBC132.2009 (20 January 2012). The argument of the counsels for the defendants is to strike out part of the claim namely, paragraphs 1, 10, 11, 13 (a) and (c). In fact, in all these paragraphs, a reference is made to the Law Reform (Miscellaneous Provisions) (Death and Interest) Act and the *Estate* of the deceased, whereas no Executor was appointed.

05. On the other hand the counsel for the plaintiff argued that, the plaintiff brought this action within the limitation period and applied for the Letter of Administration. He further stated that, the plaintiff had obtained the Letter of Administration on 8th August 2016 and was at the stage of applying for amendment of the Writ, but the defendant filed

this application for striking out before he files the same. He further argued that, the Writ could be amended without prejudice to the defendants. In support of his argument, the counsel for the plaintiff relied on section 10 of the Compensation to Relatives Act and some authorities, namely, **Austin v. Hart** (1983) 2 ALL E.R. 341, **Railala v Yuen Yin Hum** [2001] FJHC 44; Hbc0528D.1992s (13 July 2001) and **Veilave v Naicker** [2017] FJHC 297; HBC159.2013 (21 April 2017). The counsel for the plaintiff further argued that, it causes no prejudice to the defendants, if the writ is amended to include the capacity of the plaintiff as the Administrator of the Estate, since the Letter of Administration has, now, been issued to the plaintiff.

06. The sole issue is that, who has the cause action in case of death of a person. In order to come to a conclusion on this issue, a brief note should be made on these two small pieces of legislations, namely Compensation to Relatives Act No 17 of 1920 (hereinafter referred to as **"CTR"**) and Law Reform (Miscellaneous Provisions) (Death and Interest) Act No 07 of 1935 (hereinafter referred to as **"LRM"**), on which both counsels relied for their respective arguments. Both CTR and LRM were enacted for different purposes; however, their application is, sometimes, confused. The CTR relates to payment of compensation to the families of persons killed by accidents, as per the plain meaning of its long title. Containing 12 sections, the CTR provides how the action is maintainable where the death is caused by neglect etc. Accordingly, where the death of a person is caused by wrongful act or neglect or default, an action can be brought for the benefit of the wife, husband, parent and child of the person, whose death has been so caused. This action can be brought by the Executor or Administrator of the deceased and the court may grant such damages to such parties, for whose benefit the action was brought. In every such action the plaintiff on the record shall be required to deliver to the defendant or his barrister and solicitor, together with the statement of claim, full particulars of the person or persons for whom and on whose behalf the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered.

07. In case where, there is no executor or administrator of the deceased person, or that there being such executor or administrator, and no action is brought by executor or administrator within six months after the death of the deceased person, then such action may be brought by and in the name or names of all or any of the persons, who are beneficially interested and for whose benefit such action would have been, if it had been brought by and in the name of the executor or administrator (section 10 of CTR). The person or the persons, who bring the action, should follow the procedure that is ordinarily followed by an Executor or Administrator as provided in section 9 of CTR. Whether the action is filed by the Executor or administrator or by the any person beneficially interested, only one action shall lie and such action shall be commenced within 3 years after the death of a person. To put in simple words, if a person dies due the negligence act of another, the Administrator or Executor of deceased has cause of action to sue the person caused the death. If there is no Administrator or Executor or there being Administrator or Executor, and no action is brought by them within 06 months of death, the relatives mentioned in section 10 of CTR have cause of action to sue the person caused the death.

08. On the other hand, the purpose of the LRM was to amend the law as to the effect of death in relation to the causes of action and to awarding interest in civil proceedings. The LRM,

which contains only four sections, provides in its section 2 for the effect of death on certain causes of action, whilst the section 3 and 4 deal with awarding interest in civil suits with the certain limitations therein. In short, the section 2 provides as to how all causes of action, that were subsisting against or vested in a person, shall survive against or, as the case may be, for the benefit of, his or her estate after his or her death. The main difference between these two pieces of legislation is that, CTR gives the cause of action to the Administrator or Executor or to the relative of a person upon his or her death and the LRM provides for the survival of cause of action that was subsisting against or vested in a person for the benefit of the estate upon the death of such person.

09. Accordingly, under the provisions of LRM, only the Executor or the Administrator has the cause of action for the benefit of the estate of deceased, if such causes of action were subsisting against or vested in the person at the time of his her death. If an Executor or an Administrator files an action, he can do so only after the grant of administration. However, under the CTR, both the Executor or Administrator and the beneficially interested persons have cause of action for the benefit of family members mentioned in section 4 (see: **Railala v Yuen Yin Hum** [2001] FJHC 44; Hbc0528D.1992s (13 July 2001). In other words, the plaintiff under the provisions of LRM should be an Executor or an Administrator. However, the plaintiff under the provisions of CTR should not necessarily be an Executor of an Administrator, but can be a person mentioned in section 10. This was the view of the court in **Tanuku v Attorney-General** [2000] FJHC 13; Hbc0134d.95s (26 January 2000) and **Jamieson v Dominion Insurance Ltd** [2012] FJHC 15; HBC132.2009 (20 January 2012).

10. The above analysis on the provisions of both CTR and LRM reveals that, the plaintiff in this case, who is the father of the deceased, and who had not obtained Letter of Administration at the time of filling this action, had cause of action only under section 10 of CTR and did not have any cause of action under LRM. The question, therefore, is whether the particular paragraphs, which have reference to the estate of deceased Kavnit Kant Sharma, should be struck out as claimed by the defendants?

11. The law on striking out the pleadings is well settled. The Order 18 rule 18 of the High Court Rule gives the discretionary power to strike out the proceedings for the reasons mentioned therein. The said rule reads:

> *18 (1) The Court **may** at any stage of the proceedings **order to be struck out** or **amend** any pleading or the indorsement of any writ in the action, or **anything in any pleading** or in the indorsement, on the ground that-*
>
> *(a) It discloses no reasonable cause of action or defence, as the case may be; or*
>
> *(b) It is scandalous, frivolous or vexatious; or*
>
> *(c) It may prejudice, embarrass or delay the fair trial of the action; or*

(d) It is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading (emphasis added)

12. At a glance, this rule gives two basic messages, which are salutary for the interest of justice and, it encourages the access to justice which should not be denied by the glib use of summery procedure of pre-emptory striking out. Firstly, the power given under this rule is *permissive* which is indicated in the word *"may"* used at the beginning of this rule as opposed to *mandatory*. It is a *"may do"* provision contrary to *"must do"* provision. Secondly, even though the court is satisfied on any of those grounds mentioned in that rule, the proceedings should not ***necessarily*** be struck out, as the court can, still, order for amendment. In **Carl Zeiss Stiftung v Rayner & Keeler Ltd** (No 3) [1970] Ch. 506, it was held that, the power given to strike out any pleading or any part of a pleading under this rule is not mandatory but permissive, and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea. **Marsack J.A.** giving concurring judgment of the Court of Appeal in **Attorney General v Halka [1972] FJLawRp 35; [1972] 18 FLR 210 (3 November 1972)** held that:

"Following the decisions cited in the judgments of the Vice President and of the Judge of the Court below I think it is definitely established that the jurisdiction to strike out proceedings under Order 18 Rule 19 should be very sparingly exercised, and only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised".

13. Accordingly, the rule provides for the permissive discretion to the courts to strike out the claim or proceedings for the above grounds as opposed to the mandatory power. Even though the court finds four grounds mentioned in the above rule, the court still has the discretion to allow the amendment of anything in any pleading as highlighted above in the rule. Therefore, the power to strike out on those grounds should, sparingly, be exercised and, only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised. It would always be preferable to allow the amendment instead of striking out, unless the interest of justice requires striking out.

14. In **Ingall -v- Moran** (1944) 1 All ER 97, on which the defendants placed much reliance, the court held that, an administrator has no cause of action vested in him before he had obtained letters of administration and therefore, the writ was in truth incurably a nullity; it was born dead and could not be revived. This was followed by several decisions thereafter namely, **Hilton v Sutton Steam Laundry** (a firm) [1945] 2 All ER 425, [1946] KB 65, **Burns v Campbell** [1951] 2 All ER 965, [1952] 1 KB 15, **Finnegan v Cementation Co Ltd**[1953] 1 All ER 1130, [1953] 1 QB 688. However, UK Rules of

Supreme Court were amended on the recommendation of the Law Reforms Committee to remove the injustice caused by the said decision of **Ingall -v- Moran** (supra). This development was well described by Lord Collings SCJ in **Roberts v Gill & Co and Others** - [2010] 4 All ER 367. His Lordship held at 378 that,

> *"RSC Ord 20, r 5 was also amended in 1981, but the only relevant change was to permit amendment to a party's capacity not only to a capacity which the party had at the date of the commencement of the proceedings, but also to a change to a capacity which the party had since acquired. This gave effect to a recommendation of the Law Reform Committee, enacted as s 35(7), to deal with the anomaly that, where probate was granted to a person as executor, leave to amend to make a claim on behalf of the estate could be given because the title related back to the death, but where the plaintiff was subsequently granted letters of administration in such cases, the title related back to the date of the grant, which would have been after the issue of the writ. This had the effect of removing the grave injustice caused by such decisions as Ingall v Moran*[1944] 1 All ER 97, [1944] KB 160, *Hilton v Sutton Steam Laundry (a firm)* [1945] 2 All ER 425, [1946] KB 65, *Burns v Campbell*[1951] 2 All ER 965, [1952] 1 KB 15, *Finnegan v Cementation Co Ltd*[1953] 1 All ER 1130, [1953] 1 QB 688".

15. The Order 20 rule 5 of High Court Rules of Fiji corresponds with the UK Rules of Supreme Court as amended as above. Therefore, what transpires from the above development in UK, which is followed in Fiji, is that, the court may allow altering the capacity of a party, if the new capacity is one which that party had at the date of the commencement of the proceedings or has since acquired. I am mindful that, there is no application in the instant case under Order 20 rule 5 for amendment of pleadings, but the emphasis must be made to the rationale of amendment in the rules that, a party may be allowed to alter the new capacity. Even though there is no application for amendment by plaintiff under the said Order 20 rule 5 of the High Court Rules, the discretion that, this court has to allow such an amendment under the Order 18 rule 18 is wider than the discretion under Order 20 rule 5, because, under the former rule, the court can exercise it discretion to allow the amendment at the time of considering the application for striking out under that rule, even if it is satisfied on the four grounds, i.e. (a) to (d) of rule 18. This is evident from the wording of that rule, which provides that, the court may amend *anything in any pleadings* as emphasized above. Thus, the rules give more weight to amendment of pleadings, than striking out.

16. Furthermore, there is no dispute in relation to the collision between the deceased's bicycle and the vehicle number HB 253 belonged to the second defendant, the deceased succumbed to injuries sustained by the said collision and the relationship between the first and second defendants. The real dispute is on the alleged negligence. The defendants too pleaded that, it was the sole and/or contributory negligence of the deceased that caused the said collision. Thus, amending the writ, in relation to the capacity of the plaintiff, will not, in any event, prejudice the defendants in this matter.

17. In **Austin v. Hart** (supra), the Privy Council held that, there was no reason for the court to insist that, the irregularity nullified and invalidated the whole proceedings unless it caused substantial injustice. In that case, the plaintiffs brought the action claiming damages from the tortfeasor for wrongly and negligently causing the death of their breadwinner, before the expiry of six month period prescribe by the law, which is similar to section 10 of CTR. In facts, the plaintiffs did not have actual cause of action in that case when the writ was issued, though they were entitled to claim damages after six months of death, if the executor or administrator fails to bring the same action. The Privy Council allowed plaintiffs' action, following **Marsh v. Marsh** [1945] AC 271, where it was held that, the test is to see whether irregularity caused failure of natural justice. In the instant case, as stated above, no injustice is caused to the defendants, if the plaintiff is allowed to amend the writ and his statement of claim, as the liability to be decided based on the negligence of the parties. There is no failure of natural justice.

18. The above discussion reveals that, though the plaintiff had the cause of action under section 10 of CTR, he did not have the same under the provisions of LRM, at the time of filling this action. However, this court still has discretion to allow the amendment under Order 18 rule 18 of the High Court Rules and no injustice is caused to the defendants by such amendment of capacity of the plaintiff. For these reasons, I allow the plaintiff to amend the writ and the statement of claim. In these circumstances, the necessity for cost does not arise and therefore, I make no order for cost.

19. Accordingly, I make the following orders,

a. The summons filed by the defendant is dismissed,

b. The plaintiff is allowed to amend the writ and statement of claim and

c. The parties to bear their own cost.

HIGH COURT OF FIJI
LAUTOKA

U.L Mohamed Azhar
Master of the High Court

At Lautoka
22/06/2018