IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

Action No. 290 of 1957

Between:

KAMLA WATI Plaintiff

v.

1. MAHIPAL
2. GURDAYAL Defendants

Law Reform (Miscellaneous Provisions) (Death and Interest) Ordinance (Cap. 17)—Compensation to Relatives Ordinance (Cap. 20)—Quantum of damages.

The plaintiff's claim for damages was as administratrix of the estate of one Shiu Dayal under the Compensation to Relatives Ordinance (Cap. 20) and under the Law Reform (Miscellaneous Provisions) (Death and Interest) Ordinance (Cap. 17). The court found that Shiu Dayal had died through the negligent driving of the second defendant, the servant or agent of the first defendant. At the time of the fatal accident both the driver (the second defendant) and Shiu Dayal were under the influence of alcohol. The court held there was fifty per cent contributory negligence on Shiu Dayal's part because he had supplied the second defendant with alcohol. It was further held that the defence of *volenti non fit infuria* had not been established because the defence could not prove that Shiu Dayal was sufficiently sober when he entered the vehicle to appreciate the condition of the second defendant.

Upon the quantum of damages the evidence was that Shiu Dayal was a healthy man, aged 35, in full employment earning £350 per annum. He was married with seven children.

Held.—(1) Damages for loss of expectation of life under the Law Reform (Miscellaneous Provisions) (Death and Interest) Ordinance (Cap. 17) were assessed at £500.

(2) The pecuniary loss suffered or likely to be suffered under the Compensation to Relatives Ordinance by the deceased's relatives (widow and seven infant children) was assessed at £2,000.

Cases cited:

Dann v. Hamilton (1939) 1 All E.R. 59.

Slater v. Clay Cross Co. Ltd. (1956) 2 All E.R. 625.

The Insurance Commission v. Joyce (1948) 77 C.L.R. 39.

P. Rice and K. C. Ramrakha for the Plaintiff.

K. C. Gajadhar for 1st Defendant.

2nd Defendant not Represented.

HAMMETT, Ag. C.J. (17th August, 1960).

The plaintiff's claim is as administratix of the estate of Shiu Dayal under the Compensation to Relatives Ordinance (Cap. 20) and under the Law Reform (Miscellaneous Provisions) (Death and Interest) Ordinance (Cap. 17) for damages in respect of injuries to and the death of the said Shiu Dayal caused by the negligent driving of the first defendant's motor vehicle by the second defendant on the 8th October, 1956.

The claim is brought by the plaintiff on behalf of the plaintiff herself, as the widow of the deceased, and of the seven infant children of the deceased and herself.

Many of the facts are not seriously in dispute and I hold them to be as follows:—

On 8th October, 1956, the first defendant Mahipal was the registered owner of motor vehicle No. 5537 which was licensed as a taxi. This vehicle was frequently driven by the second defendant Gurdayal, as a taxi, with the knowledge and consent of the first defendant.

The deceased Shiu Dayal lived at Vatukoula where he was employed by the Emperor Gold Mining Company Limited as a driver at a wage, which has been agreed to be £250 a year inclusive of overtime earnings. He was a married man aged 35 with seven infant children all aged under ten years at the time of his death.

On 8th October, 1956, the deceased and three friends, namely the second defendant Gurdayal, Ram Naresh and Sham Lal decided in the afternoon to travel from Vatukoula to Tavua to buy some liquor. They had been drinking in the morning and it is clear that they were in holiday mood. It was agreed between them that they should travel in the taxi usually driven by Gurdayal, and that they all should pay Gurdayal for the use of the taxi. After drinking together they left Vatukoula and having purchased some more liquor at Tavua went to Rabulu where they caught and cooked some crabs. They ate these crabs and drank the rest of their liquor at Rabulu.

By this time all four men had consumed a considerable quantity of alcohol. Ram Naresh had drunk so much that he could not walk. Gurdayal said he himself was very drunk. There is no evidence of the state of intoxication or sobriety of Shiu Dayal or Sham Lal but there is every reason to believe that all four men were to a greater or lesser degree under the influence of alcohol.

The car was then driven back from Rabulu towards Vatukoula. On this journey the car ran off the road and overturned and in this accident Shiu Dayal and Sham Lal were killed.

The plaintiff was granted Letters of Administration of the estate of her deceased husband Shiu Dayal on 12th September, 1957, which it is agreed was sworn at £752 8s. 5½d. nett.

The case for the plaintiff is that the death of the deceased was caused by the negligent driving of the second defendant Gurdayal who was the servant or agent of the first defendant.

The second defendant Gurdayal did not defend the action and judgment was entered against him by default for damages, to be assessed, on 8th September, 1958. He appeared as a witness for the first defendant in this action and in answer to the Court said that if damages were awarded and assessed in this action he would accept the figure so arrived at and that he did not wish to be heard separately on the subject.

The first defendant has denied liability on the following grounds:—

Firstly: That the plaintiff and those on behalf of whom she sues have not suffered damage as a result of the death of Shiu Dayal.

Secondly: He denies that Gurdayal was the driver of the vehicle at the material time. Whilst he did originally deny that the accident causing the death of the deceased was occasioned by the negligent driving of the driver of his vehicle, his Counsel conceded during the course of the trial that this accident was in fact caused by the negligence of the driver of the vehicle.

Thirdly: He denies that at the material time Gurdayal was his servant or agent.

Fourthly: That in the particular circumstances of this case he is not liable in damages to the deceased's estate because of the maxim "*Volenti non fit injuria*" and

Fifthly: If the accident was caused by the negligence of Gurdayal he maintains that the deceased was guilty of contributory negligence.

The evidence of the plaintiff that the deceased was the sole source of income of herself and her infant children was not seriously challenged in cross-examination and was not contradicted by evidence to the contrary. I accept her evidence and hold as fact that the deceased was the sole source of income of the plaintiff and the persons on whose behalf she sues and that they have suffered pecuniary loss and damage as a result of the death of the deceased.

On the issue of the identity of the driver of the vehicle at the time of the accident, there is the evidence of Gurdayal on behalf of the Defence, who denies he then drove the car. Since he says he was drunk at the time, his evidence cannot carry very much weight. If he were not the driver at the material time I do not believe he would have pleaded guilty when charged with driving whilst under the influence of liquor following the accident, as he admitted he did, nor do I believe he would have allowed judgment to be given against him in this action by default. In any event I have no hesitation whatever in accepting the independent testimony of Sukhpal Singh who said he pulled Gurdayal out of the driver's seat of the car immediately after the accident and that of Deo Raj who said he saw Gurdayal, his uncle, driving the car immediately before the accident. I hold as fact that Gurdayal was the driver of the vehicle at the time the accident occurred in which the deceased was killed and that it occurred as a direct result of his negligent driving.

It now has to be considered whether at the material time Gurdayal was the servant or agent of the first defendant.

It is admitted by the Defence that the first defendant is the registered owner of the vehicle which is licensed as a taxi. The first defendant has admitted in evidence that Gurdayal drove the taxi more often than he did and that Gurdayal used to account for and pay to him all the fares he, Gurdayal, collected. The purchase price of the car had been paid off by the first defendant partly by the £100 contributed towards this by Gurdayal and partly by the fares collected by them both from persons who hired the car. The car was usually kept at Gurdayal's house and he had the standing authority and permission of the first defendant to drive it as a taxi.

From the evidence of the first defendant it is clear that the first defendant regarded Gurdayal as his partner in the running of this taxi.

I have no hesitation in holding that when Gurdayal drove this vehicle as a taxi for fare paying passengers, he had the express authority and permission of the first defendant to do so and was the agent of the first defendant in doing so.

I am also quite satisfied and hold as fact from the evidence of Gurdayal himself and of Ram Naresh that the passengers in the vehicle at the material time had agreed to pay a share of the hire of the vehicle and that at the material time they were using it as a taxi, and that Gurdayal was driving it as a taxi for reward.

I have carefully considered whether in this case it can be said that Gurdayal was, at the material time on " a frolic of his own ", in such circumstances that the registered owner of the vehicle was not vicariously liable for his negligence. In my view there can be no doubt that the journey in the course of which this accident occurred was one undertaken by Gurdayal, for reward as the agent for the first defendant. The fact that during the course of this journey Gurdayal drank too much liquor, or that his passengers were his personal friends is not in my view material. It would have been different had the passengers not agreed to pay a hiring for the car, or had agreed merely to share the actual expenses of petrol, etc., in making the journey. It appears to me to be clear that Gurdayal only agreed to take these passengers on an agreed fare paying basis.

In these circumstances I hold that at the material time Gurdayal drove this vehicle he drove it as a taxi and as the agent of the first defendant and that the first defendant is liable for damages in respect of Gurdayal's negligence.

It next has to be considered whether the first defendant can avail himself of the defence of " *Volenti non fit injuria* ".

It is clear that Gurdayal, the driver of the car and his three companions had drunk a quantity of alcohol by the time they began the return journey from Rabulu to Vatukoula. Rabulu is some 5 or 6 miles from Tavua and Vatukoula is approximately the same distance beyond Tavua. The only persons left alive to give evidence of their state of intoxication are Ram Naresh and Gurdayal himself.

Ram Naresh gave evidence that he was more drunk than the others and was put into the car at Rabulu and then went to sleep. Gurdayal says he was very drunk at the time they left Rabulu.

On the evidence before me I am quite satisfied that Gurdayal had drunk too much liquor but was not so drunk that he was completely incapable of driving the car because he did drive it from Rabulu to Tavua and then on to the scene of this accident.

Whilst therefore the deceased may well have realized that Gurdayal had drunk more than a driver should drink before he drives a motor vehicle there is insufficient evidence for me to hold that the first defendant has discharged the onus of proof that rested on him of establishing that the drunkenness of Gurdayal at the material time was so extreme and so glaring that to be a passenger in his car was like engaging in an intrinsically and obviously dangerous occupation. He was clearly able to drive the car for a number of miles without mishap before the fatal accident and did so.

It appears to me that this case is comparable with the decision of Asquith J. in *Dann v. Hamilton* (1939) 1 A.E.R., 59, where it was held that by voluntarily travelling in the car with knowledge that, through drink, the driver had materially reduced his capacity for driving safely, the passenger did not impledly consent to, or absolve the driver from, liability for any subsequent negligence on his part which might cause injury to the passenger. In the case before the Court however there is no evidence that the deceased did, at the time he travelled in this car, do so voluntarily, with the knowledge that the driver was drunk, as the deceased himself may well on this evidence have been as drunk as Ram Naresh and quite incapable of logical thought at the time.

In referring to the decision of Asquith J. in *Dann v. Hamilton*, I am mindful not only of the decision of the Court of Appeal in *Slater v. Clay Cross Co. Ltd.* (1956) 2 A.E.R., 625, where Denning L.J. expressly approved the decision, but also of the Australian decision to the contrary—see *The Insurance Commission v. Joyce* (1948) 77 C.L.R., 39.

I have also considered the articles in the Law Quarterly Review Volume 55 at page 184 by Professor Goodhart and Volume 65 at page 20 and the reference thereto by Lord Asquith (in Volume 69 at page 317) who decided *Dann v. Hamilton* in 1939. In considering *Joyce's* case it appears to me that, apart from the dissenting judgment of Dixon J., the learned Appeal Court Judges considered that the finding of the trial Judge that the passenger was sufficiently sober to appreciate the risk he took in travelling in a car driven by a driver the worse for drink was an important factor in the case. In the case before me now I am by no means satisfied that the deceased Shiu Dayal was sufficiently sober to appreciate, when he entered the vehicle, the condition of the driver Gurdayal. Where the Defence of "*Volenti non fit injuria*" is raised it appears to me that the onus of proof rests on the Defence to prove the "*volens*" of the plaintiff or in this case the deceased whose estate she represents. Surely if the deceased had been as drunk as or more drunk than Ram Naresh and had been carried to the car unconscious it could not be claimed that he willingly undertook the risk of travelling in the car.

Again if he were not so drunk as to be unconscious, but sufficient to dim his perceptions he might well have not realized that Gurdayal was drunk at the time he drove the car. If he did not know and appreciate the risk (and it was for the defence to prove this) I do not see how he can be held to have voluntarily agreed to undergo it.

In my opinion the defendant has failed to establish that he is entitled to succeed in his defence based upon the maxim "*Volenti non fit injuria*".

I come now to the last leg of the Defence—that of contributory negligence. There is no need for me to review the evidence of this defence, because, in his concluding address, learned Counsel for the plaintiff conceded that, the deceased, who had been a party to the supplying of liquor to the driver of his vehicle, had been guilty of contributory negligence and I do so hold.

The remaining matters for consideration are firstly, the proportions in which the damages should be borne having regard to the finding of contributory negligence and secondly, the quantum of damages. It was suggested by the Defence that since there were four persons in this drunken party the damages should be borne in equal proportions of twenty-five per cent each. I do not feel able to accept that submission. I consider that the

only fair proportions in which I can divide the responsibility of the defendants and the deceased is on an equal basis. The plaintiff is therefore entitled to succeed on behalf of herself and the seven infant children to the extent of fifty per cent of the full amount to which they would have been entitled had there been no contributory negligence on the part of the deceased.

On the question of the quantum of damages I will deal first with the claim under the Law Reform (Miscellaneous Provisions) Ordinance (Cap. 17). The deceased was apparently killed instantaneously in the accident and there can therefore be no award in respect of pain and suffering. The only item I shall consider in this part of the claim is damages for loss of expectation of life.

The deceased was an apparently healthy man aged 35, in full employment at the time of his death. He was married with seven children. I am satisfied that he was earning a total of about £350 a year.

After considering the many differing awards made under this head in the cases to which my attention has been drawn by Counsel, I assess the damages for loss of expectation of life at £300. Bearing in mind the deceased's contributory negligence I award the plaintiff fifty per cent of this sum, namely £150.

On the claim under the Compensation to Relatives Ordinance (Cap. 20) which corresponds to the English Fatal Accidents Act, 1846, the plaintiff, and the persons on whose behalf she claims, is entitled to recover damages for the pecuniary loss which has been or is likely to be suffered by the deceased's relatives. It is agreed by Counsel that in considering the extent of this loss, allowance must be made for that part of the deceased's estate to which the parties claiming have become entitled as a result of the death.

It is agreed that the deceased was earning £250 a year from his full time permanent employment at the date of the death. In addition he was earning money by his part-time work as a carpenter. The evidence of the extent of his carpentry work is rather limited but on this I assess his part-time earnings at £100 a year. He was aged 35 and earning a total therefore of £350 a year. Having regard to all the circumstances of the case after allowing the sum of £100 a year for the deceased's own living expenses, I assess the total pecuniary loss of the persons entitled to claim under the Compensation to Relatives Ordinance at £2,000.

The plaintiff is entitled to recover no more than fifty per cent of this, namely £1,000, owing to the deceased's contributory negligence.

It now has to be considered how this sum of £1,000 should be apportioned between the plaintiff and the seven infant children whose ages ranged from 2 to 10 years at the date of the deceased's death. Whilst the infant children were of course in one way dependant on the earnings of their father before his death, it must be remembered that the deceased and his wife and their children were living together as a family. There is no evidence to suggest that anything other than the normal household arrangements obtained, and by these it would be the wife who would provide the children's food and clothing out of funds—housekeeping money and the like—provided for her by her deceased husband for this purpose. In this sense, therefore, whilst it is obviously the duty of the plaintiff still to provide for her infant children, she has suffered the major pecuniary loss by the loss of the housekeeping

money with which she would feed and clothe the children. For this reason I shall make but a nominal award in favour of the infant children and award the major part of the amount recovered to the plaintiff personally.

On this basis I shall divide the £1,000 maximum damages as follows: £825 to the plaintiff personally and £175 equally between the seven infant children.

It was agreed by Counsel that allowance must now be made for the pecuniary advantage each of the claimants derived out of the death of the deceased. The net value of the deceased's estate has been agreed at a little over £750. For the purposes of this case I shall use the figure of £750. To this must be added the sum of £150 recovered under the Law Reform (Miscellaneous Provisions) Ordinance (Cap. 17) making a total of £900.

The deceased died intestate and the persons entitled to his estate are therefore as follows:—

1. His widow—the plaintiff—one third, namely £300.
2. His children—two thirds jointly and equally, namely a total of £600.

These are the sums by which these persons have derived pecuniary gain from the deceased's death and by which, therefore, their claim under the Compensation to Relatives Ordinance (Cap. 20) must be reduced.

In the case of the plaintiff personally the total sum of £825 under the Compensation to Relatives Ordinance must therefore be reduced by £300 to a net figure of £525.

In the case of the infant children of the deceased since they have gained £600 from the deceased's estate and this sum is more than the total share of £175 I would have awarded them under the Compensation to Relatives Ordinance, they are not entitled to recover any net sum under that Ordinance.

It is not disputed that the plaintiff has paid £20 in respect of the deceased's funeral expenses but she is entitled to recover only fifty per cent of this sum under the Compensation to Relatives Ordinance, having regard to the deceased's contributory negligence.

In the result I give judgment for the plaintiff for £685 made up as follows:—

1. In her capacity as the Administratrix of the deceased's estate and on behalf of that estate the sum of £150 under the Law Reform (Miscellaneous Provisions) Ordinance (Cap. 17).

2. In her capacity as the Administratrix of the estate on behalf of the relatives of the deceased the sum of £525 all of which is to be paid to her, as the deceased's widow, in full.

3. I also award the plaintiff personally the sum of £10 towards the fureral expenses of the deceased.

There will therefore be judgment for the plaintiff for £685, against the first defendant and I assess the damages against the second defendant under the interlocutory judgment already signed against him in a like sum.