PARMEND SINGH v MEI BUI (ABU0112 of 2005S)

COURT OF APPEAL — CIVIL JURISDICTION

WARD P, BARKER and ELLIS JJA

28 February, 9 March 2007

Damages — assessment — contributory negligence — whether deceased acted lawfully throughout — riding a carrier without seatbelts — Compensation to Relatives Act (Cap 29) — Land Transport (Traffic) Regulations 2000 regs 27, 40 — Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap 27).

Damages — assessment — damages with consequential interest adjustments — no documentary proof of earnings — informed guess on deceased's income — Evidence Act 2002 s 3.

Filipe Bui (the deceased) rode a canopied vehicle illegally adapted to carry passengers on two rows of seats at the back. The deceased was then sitting above the right rear wheel. The only support for the passengers was the railings of the canopy. The Appellant, driving a taxi at a high speed, tried to overtake on a part of the roadway marked with double yellow lines but crashed at the back of the carrier, which was then turning right and duly signaled its intention to turn. The deceased sustained head injuries which caused his death. The Appellant was convicted of dangerous driving causing death.

The Respondent widow brought a claim in the High Court against the Appellant. The High Court ruled that the Appellant was completely to be blamed for such fatal accident and did not accept the Appellant's argument of contributory negligence on the contention that death resulted from the danger of riding a carrier without seatbelts. The Appellant contended that the award of damages was excessive and that the deceased's contributory negligence should have been considered.

Held — (1) There was no obligation on the part of the deceased to wear a seatbelt when none was provided. There was also no part of the deceased's body that was projecting out of the carrier at the time of the incident. Therefore, the deceased had acted lawfully throughout. Hence the appeal against the High Court's finding on absence of contributory negligence was rejected.

(2) The High Court was entitled to make what was essentially an informed guess as to the income of the deceased after hearing the witnesses. The High Court judge did not err in making assessments but he could have stated his reasons for fixing the loss in greater detail.

(3) The High Court should have deducted the $2500 for loss of expectation of life under Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap 27) from the damages awarded under Compensation to Relatives Act (Cap 29).

Appeal allowed in part.

Cases referred to

Jai Kissun and Gyan Chand v Maciu Valala and Anor Civ App 61/1979, discussed.

D. Sharma for the Appellant

D. Singh for the Respondent

Ward P, Barker and Ellis JJA.

Introduction

[1] On 4 November 2000, Filipe Bui (the deceased) a self-employed farmer and fisherman was one of several fare-paying passengers in a canopied vehicle, illegally adapted to carry passengers on two rows of seats at the back. The

deceased had been seated above the right rear wheel. The railings of the canopy provided the only support for a passenger.

[2] As the carrier was turning right into a driveway at Waidradra, Navua, a taxi, driven by the Appellant while attempting at high speed to overtake the carrier, crashed into the back of the carrier. The carrier had dully signaled its intention to turn. The Appellant was attempting to overtake on a part of the roadway marked with double yellow lines. He was later convicted of dangerous driving causing death.

[3] Upon the heavy impact, the deceased was projected 9.3 m on to the tarseal. He died from head injuries in hospital shortly afterwards.

[4] The Respondent is the widow of the deceased, who was 48 at the time of his death and in good health. She brought a claim in the High Court under both the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap 27) and the Compensation to Relatives Act (Cap 29). She brought the latter claim as administratrix of the estate of the deceased. She had four children who were aged between 18 and 22 at the time of the hearing in the High Court. She herself was born in 1964.

[5] The action came before Pathik J in the High Court on 19 and 20 July 2004. After considering post-hearing written submissions which were completed in August 2004, the judge delivered a written decision on 25 November 2005. We are at a loss to understand why judgment was so delayed on a fairly straight forward case.

[6] Pathik J found the Appellant completely to blame for the fatal accident and rejected a defence of contributory negligence, based on the contention that he should not have placed himself in a position of danger by riding in a carrier which had no seatbelts.

[7] The judge awarded $55,774 plus interest under Cap 29 and $2500 for loss of expectation of life and $1500 funeral expenses under Cap 27. Despite criticising the Appellant for "fighting a losing battle in negligence" and saying that "the Plaintiff is entitled to costs on a higher scale", the judge awarded only $800 costs to the Respondent. Although not filing any cross-appeal, the Respondent made submissions that Pathik J's award of costs had to be increased substantially. The judge declined to make an award for loss of consortium.

[8] The Appellant's two contentions at the hearing of the appeal were:

(a) there should have been a deduction from the damages awarded for the deceased's contributory negligence; and

(b) the award of damages was excessive in that:

(i) it was based on insufficient evidence of earnings and dependency; and

(ii) the judge made arbitrary and unduly favourable assessments of the Respondent's loss.

[9] The Respondent conceded correctly that the judge should have deducted the $2500 for loss of expectation of life under Cap 27 from the damages awarded under Cap 29. The Appellant did not pursue an appeal against the award, rate and duration of interest awarded by the judge.

Contributory negligence

[10] Pathik J in his judgment roundly rejected the Appellant's claim for a deduction of 30% for contributory negligence on the part of the deceased. The basis for this claim, both in the High Court and in this court, was that the

deceased had contributed to his injuries by voluntary travelling in a dangerous conveyance with illegally modified seats and no seatbelts fitted.

[11] The judge distinguished the decision of this court in *Jai Kissun and Gyan Chand v Maciu Valala and Anor* Civ App 61/1979. There, a 33% deduction was made from the damages awarded to a person who had been injured when riding on top of a cane-truck which capsized on a rough track. The judgment contains no discussion of the basis for the finding of contributory negligence. The only contention was that the trial judge had assessed contribution at 40% but had apportioned the damages 2/3: 1/3. There appears to have been no contest over a deduction of one-third for contributory negligence on the facts of that case.

[12] Counsel for the Appellant submitted that passengers in the situation of the deceased must obey the law and not assume risks of this sort.

[13] The normal criteria for assessing contributory negligence are causative potency and blameworthiness. We agree with Pathik J that the deceased's action in sitting in the back of a carrier in where no seatbelts were provided was not contributory negligence.

[14] We think that the judge was entitled, in effect, to take judicial notice of the fact that the type of carrier on which the deceased and others were travelling is a form of transport used by many citizens of Fiji of limited means.

[15] Regulation 40 of the Land Transport (Traffic) Regulations 2000 (the Regulations) forbids riding on an external step, footboard or the roof or bonnet of any vehicle. It also proscribes having any part of the body or limbs extending or protruding through any door, window or other opening or over the side, front or rear of a vehicle. Clearly, the deceased was not infringing this Regulation.

[16] Regulation 27 of the Regulations provides:

> 27 A person who is 8 years or over seated in a motor vehicle that is in motion must wear the seat belt provided; and
>
> (b) the seat belt must be properly adjusted and securely fastened.
>
> (2) A person 8 years or and over must not be seated as a passenger in a motor vehicle that is in motion in seat which is not fitted with a seat belt unless —
>
> (a) each seat for which a seat belt is provided is occupied by another person; or
>
> (b) the person is seated in a position behind the front seat of the vehicle and there is no available rear seating position fitted with a seat belt.
>
> (3) Sub-regulations (1) and (2) do not apply to —
>
> (a) a person driving a motor vehicle backwards; or
>
> (b) a person carrying a certificate issued by the Authority certifying that sub-regulation (1) does not apply to the person because —
>
> (i) the person is exempted by the Authority for reasons and conditions stated in the certificate; or
>
> (ii) the Authority is satisfied, on a certificate of a registered medical practitioner, that because of medical unfitness or physical disability it is impracticable, undesirable, or inexpedient that that person wears a seat belt.
>
> (4) It is a defence for the driver of a taxi to establish that he or she had reasonable cause to believe that he or she was at risk of physical injury

from a passenger and that complying with this regulation may have contributed to the risk.

(d) Any other vehicle when used to preserve human life.

(5) A driver of a vehicle specified in sub-regulation (1) must —

(a) ensure that all warning devised are in operation; and

(b) exercise caution at all times in order to avoid collision with other vehicles or pedestrians.

[17] Clearly, there was no obligation on the deceased to wear a seatbelt when there was not one provided. Nor was any part of his body projecting out of the vehicle. Therefore, he acted lawfully throughout. It would not have occurred to him, as a villager reliant on this sort of transport, to have wondered whether the provider of this transport service was using an illegally modified and unlicensed vehicle and whether it had seatbelts fitted. There were probably economic imperatives for him to have used this form of transport. Accordingly, we reject the appeal against the finding of the judge on contributory negligence.

Damages

[18] The judge accepted that the deceased had led a happy and vigorous life. He had been head of Tokatoka Naduru of Mataqali Dravuni in his village. He planted yaqona, dalo, cassava, coconuts and vegetables. He caught seafood of various sorts. He raised bullocks and sold bullocks, coconut palm trees and seedlings. The Respondent said that he had told her he earned about $20,000 net per year.

[19] Pathik J, acting under ss 3 and 6 of the Evidence Act (27 of 2002), accepted the Respondent's hearsay evidence. He noted that there was no documentary proof of earnings. He felt that the figures produced by the Respondent and another witness had been blown "out of proportions". He rather arbitrarily assed the deceased's income at $200 per week. He deducted $66 for the deceased's own expenses, leaving a balance of $134 to support his family that is $6968 per annum which the judge took as the multiplicand. He then chose a multiplier of eight after taking into account factors such as the deceased's good health, the Respondent's ability to earn and her lack of total dependency. He considered the deceased would have worked until age 55.

[20] The criticism of this section of the judgment by counsel for the Appellant was directed at the judge's findings on the deceased's earnings at $200 per week. Counsel pointed out that, after the death of the deceased, the Respondent and her family were farming the same property. No records had been produced of the deceased's earnings before and after the death.

[21] The judge was faced with a difficult situation in the absence of records. He was entitled, as the trier of fact, to have considered the evidence of the Appellant and to have found that the deceased had been earning and that she had been partially dependent on him. While considering her hearsay figure of annual income inflated, he did his best to assess the quantum of loss. This experienced judge was entitled to take into account that the failure to keep proper accounts might not be unusual for many indigenous farmers who might not earn sufficient to attract income tax. The judge's choice of multiplier was made after a consideration of other cases to which he had been referred in submission.

[22] We are of the view that Pathik J was entitled to make what was essentially an informed guess as to the deceased's income, after he had seen and heard the witnesses. We do not wish to be seen as encouraging failure to produce the business records of deceased persons in cases in this category. However, the

reality of the situation seems to be that for self-employed traditional farmers, growers and fishers, in a lower socio-economic group, niceties of commerce, such as accurate bookkeeping, are often not observe.

[23] Although there are unsatisfactory aspects about the proof of loss of income, we are not persuaded that Pathik J erred in his assessment of damages. Rather he did the best he could in circumstances. He could however have stated his reasons for fixing the loss in greater detail.

[24] The appeal as regards quantum must be dismissed. However, as noted earlier, there must be deducted $2500 from the Cap 29 damages with consequential interest adjustments.

Costs

[25] We are prepared to treat the Respondent's detailed submissions on the costs awarded to her in the High Court, as if a cross-appeal had been filed in that regard. Counsel for the Appellant did not make submissions on the quantum but protested at Pathik J's criticism of the contest over liability.

[26] We consider that the Appellant was entitled to pursue his contention of contributory negligence. His opposition to the quantum claimed was even more justified. However, we consider that the costs award of $800 after a 2-day hearing plus written submissions in a claim of this dimension was unjustifiably niggardly. We think a sum of $3000 more appropriate.

[27] Result

(a) The appeal is allowed in part.

(b) The damages awarded to the Respondent under Cap 29 are reduced by $2500 to $53,274 with consequential adjustment in the interest awarded in the High Court.

(c) The costs award in favour of the Respondent in the High Court is increased from $800 to $3000 plus disbursements and witnesses' expenses as fixed by the Registrar.

(d) The Respondent is allowed costs of $1500 in this court plus disbursements as fixed by the registrar.

Appeal allowed in part.