IN THE SUPREME COURT OF FIJI
Civil Jurisdiction
Civil Action No. 437 of 1979

Between:

HENRY PATTERSON & ORS. Plaintiffs

and

IKA CORPORATION Defendants

Mr. R.W. Mitchell for the Plaintiffs.
Mr. P. Knight for the Defendants.

ASSESSMENT OF DAMAGES

On 27th July 1979 a collision occurred between a vessel 'Ika No.1' owned by the defendants and two other vessels, the 'Jubilee' and the 'Yatu Lau' owned by the plaintiffs.

On 3.9.80 judgment for the plaintiffs was entered by consent with damages to be assessed.

On 6.1.81 the plaintiffs and defendants further agreed damages to the 'Yatu Lau' at $333.68 with costs in respect of that claim at $700. The only question which therefore remains to be decided is the quantum of damages recoverable by the plaintiffs in respect of the damage to the 'Jubilee' and its lifeboat.

It is not in issue that the 'Jubilee' was a write-off as a result of the collision. It was an old vessel and suffered extensively. It would be completely impracticable to repair it.

The issues between the parties are the basis for the calculations of damages and the actual amount recoverable.

Plaintiffs' counsel began by submitting that the basic principle is that a plaintiff is entitled to restitutio in integrum, in other words that the amount of damages awarded should place the plaintiffs in the same position that they would have been had they suffered no wrong. Counsel submitted that the way to achieve this was for the plaintiffs to be awarded the cost of repairing the vessel, even if they chose not actually to have the repairs carried out.

Defence counsel for his part submitted that as it had been agreed that it would be impracticable to repair the ship the measure of damages should be the cost of replacement of the vessel in an available market.

Both the plaintiffs and the defendants called expert evidence as to the pre-accident value of the boat, the cost of repairs and the cost of replacement. But unfortunately there was little common ground between the two sets of valuation provided.

The plaintiffs' witnesses variously maintained that the vessel was worth about $30,000 and about $35,000 before the collision but that that valuation was inclusive of the engine. The engine itself was valued at between $5,000 and $7,000. The nett worth of the vessel without the engine, which was not damaged, was therefore according to the plaintiffs' witnesses, between $23,000 and $30,000, a very wide diversion of value in itself.

Defence witness No. 1 was a consultant marine engineer and he expressed a very different view. In his estimation the pre-accident value of the boat was only $11,750 (exclusive of the engine).

On the question of the cost of repairing the boat the experts were also divided. PW.1 told me that the estimated cost

of repairs (in 1980) would be $35,220 after which the boat (without an engine) would be worth about $35,000 i.e. less than the cost of the repairs. That it would cost more to repair the vessel than it would end up being worth was not disputed by the defence. The defence expert did not give a figure for the cost of repairing the boat although he did claim that plaintiffs' estimates were exaggerated, but in his view the cost of replacement would only be $29,400, a much lower figure than that claimed by the plaintiffs.

The problem of the conflicting evidence of experts is not a new one. It has been observed (Phipson on Evidence, 12th Edn. para. 1227) that the testimony of experts "is often considered to be of slight value since they are proverbially, though perhaps unwittingly, biased in favour of the side that calls them". Be that as it may, a court in a case such as this cannot do without their evidence and must endeavour to arrive at a valuation which accurately reflects the balance of probabilities.

Shortly after the accident the plaintiffs bought a vessel the 'Ramada'. Although it was 112 ft. long (the 'Jubilee' was only 42.17 ft. long) they only paid $10,000 for the 'Ramada' which it was admitted by the plaintiffs was extremely cheap. The 'Ramada', like the 'Jubilee' is a wooden passenger and cargo vessel. It was much newer at the time of purchase than the 'Jubilee' was at the time of the collision. It seems to me that the price paid for the 'Ramada' must affect my opinion of the worth of the 'Jubilee' before the collision. On the other hand, the defence expert founded his estimation of the value of the 'Jubilee' on a calculation of $11,750 which he termed "the sound market value". This valuation seems to me to be on the low side. While the insurance value of similar vessel may be a helpful indicator of value, it is by no means conclusive. Although the defence

witness had given a detailed account of how he had arrived at his calculations I do not consider that sufficient attention had been given by him to the scarcity of vessels of this type on the open market in Fiji and the consequent effect and the resale value of even quite ancient vessels. Furthermore, the experts' evidence was heavily dependent on hear-say and although that is no reason of excluding it, it nevertheless affects the weight which I put upon it.

In my view the hull of the 'Jubilee' was worth more than the figure provided by the defendants but rather less than that claimed by the plaintiffs. I find that the price it could have reasonably be expected to fetch had it been offered for sale prior to the collision would have been $17,000 and that is the value I fix upon it. It was not disputed that the scrap value of the 'Jubilee' was in the region $2,000 - $3,000.

Having decided the market value of the hull prior to the collision I return to the question of the basis of estimation of damages. A useful authority in this context is the case of Darbishire v. Warren (1963) 1 WLR 1067 and I deduce therefrom the following principles:

(a) The starting point is restitutio in integrum;

(b) normally this is achieved by awarding the cost of repairs to the damaged article;

(c) but where the cost of repairs exceeds the value of the article to be repaired;

(d) then the measure of damages is the market value;

(e) except where the plaintiff can prove that there is no available market since the article damaged was unique and irreplaceable;

(f) in which case plaintiff is entitled to the full cost of repairs even if they exceed the value of the article itself.

In the present case it is agreed, as I have already pointed out that the cost of the repairs would exceed the value of the repaired boat. Repairing the boat is simply not a sensible business proposition.

Although the 'Jubilee' was a vessel of some charm and history the plaintiffs' counsel did not attempt to argue that it was unique in that sense of uniqueness found proved in O'Grady v. Westminster Scaffolding Ltd, (1962) 2 Lloyd's Rep. 238. Applying the principles set out above it is therefore clear that the plaintiff is entitled to recover the market value of the vessel prior to the collision, less of course, its scrap value. $17,000 minus $2,500 is $14,500 and that is the sum that I award under this head.

The two remaining issues to be decided are the value of the lifeboat which was also destroyed and the question of the loss of operating profit.

As to the lifeboat, plaintiffs evidence was that its replacement cost would be $1,500. Again, it was agreed that the lifeboat was a write-off but again the evidence of the defence expert was quite different from that of the plaintiffs. The defence expert valued the boat prior to its destruction at $280 with its replacement cost put at $700. In view of the principles of assessment already set out above I find that the market value of the boat prior to its destruction is the relevant figure I have to consider. Although the evidence was somewhat scanty, I accept the only evidence of pre-accident value given to me namely, $280 and fix that sum as the damages recoverable by the plaintiffs under this head.

The next matter for consideration is the question of loss of earnings. The only evidence on this score was set out in Exhibit B lodged by the plaintiffs. Defence counsel pointed

out that the plaintiffs did not attempt to buy a replacement vessel and that the vessels hired in its place were, it was conceded, run at a profit. Furthermore, counsel submits that the 'Ramada' could have been used in the place of the 'Jubilee' since the plaintiffs admitted that it was suitable for the Levuka/Natovi run. In my view, the cost of hiring the replacement vessels is an additional cost which the plaintiffs have been forced to bear because of the loss of the 'Jubilee'. However, I had no evidence on this point. I can find no authority for the proposition that the plaintiffs are automatically entitled to claim the profit on 6 months loss of operations. As defence counsel pointed out, loss which is recoverable, if it is proved, is that unavoidable loss which resulted despite all reasonable efforts to mitigate on the part of the plaintiffs. I do not find any evidence of attempted or successful mitigation before me at all. On the other hand, it seems reasonable to allow the plaintiffs some time to arrange a replacement for their lost vessel. I was told that the 'Ramada' was purchased one month after the collision. I take the view that although it was not a precise replacement, being a rather larger vessel, nevertheless it effectively took the place of the 'Jubilee'. I see nothing wrong with the basis of the calculations of profits set out in Exhibit B. I therefore allow loss of operating profits for one month at the rate of $25.50 per day, and award the sum of $730.50 under this head.

Finally, as was pointed out by defence counsel, loss of profits are subject to the deduction of taxation following the rule in BTC v. Gourley (1956) A.C. 185. It was not contested that the applicable rate of tax was 30%. The only question was whether the plaintiffs would have had this tax liability on the profits from the 'Jubilee' or whether the incidence of taxation might have been avoided, for example by offsetting the profits against other operating losses. It is clear that the onus of proof in this matter lies upon the

plaintiffs (see West Suffolk County Council v. W. Rought Ltd. (1957) A.C. 403). In the absence of any evidence on this score I deduct 30% from the $730.50 allowed i.e. $219.15 and in the result I award $511.35 under this head.

In the outcome therefore I award $14,500 for the loss of the 'Jubilee' $280 for the loss of the lifeboat and $511.35 for the loss of operating profits making a total award of damages of $15,291.35. The plaintiffs will have their costs (over and above the award of $700) to be taxed if not agreed.

(M.D. Scott)
Chief Registrar

SUVA,
25th February, 1981.