IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 17 of 1978

Between:

KRISHNA TANDRAIYA s/o Tandraiya — Appellant

- and -

DHARAM SINGH s/o Pratap Singh — Respondent

R.D. Patel for the Appellant
S.D. Sahu Khan for the Respondent

Hearing: 18th July, 1978
Judgment: 3rd August, 1978

## JUDGMENT OF THE COURT

Henry J.A.

This is an appeal by a plaintiff (now the appellant) in respect of the quantum of damages awarded in an action brought by appellant on behalf of himself and his wife Dewaniamma for loss resulting from the death of their son Balram who was killed in a road accident. Balram was run down whilst on the roadway. Two cars were involved and both drivers were joined as defendants. Respondent was held solely responsible. Damages were awarded in the sum of $1,200 together with costs on the lower scale. Respondent was ordered to pay the costs of the other defendant

The action was brought under the Compensation for Relatives Ordinance Cap. 20 and the Law Reform (Miscellaneous Provisions) Ordinance Cap.22. The learned Judge refused to make an award under the former Ordinance (Cap.20) but awarded $1,000 plus funeral expenses $200 under the latter Ordinance (Cap.27).

Balram was not quite 10 years old at the time of his death. Appellant said his son was a student but he helped on the farm and looked after the goats and cattle. His conduct at home and at school was good. Appellant said he expected his son to look after him in his old age. In cross-examination appellant said:

> "I have 4 sons and 6 daughters. My eldest son is Maslamani 25-26. He is not married and stays at home. Then there is Sadasiwan who is married and living in Lautoka. He is 18-20. Then Ganesh Kumar who is about 15. Then youngest Dharam is 13-14 now: he is younger than Balram. Ganesh and Ganga Dharan do not earn anything. I work for my eldest son who has a native lease."

Appellant is 47 years of age and his wife 39 years of age.

The learned Judge appeared to reject the claim that the son would support appellant in his old age. The reason appears to be that appellant now works for his elder son as a labourer on a ten-acre native lease. The sum of $1,000 was based on an award for the death of a girl aged 5 years where the award, in 1966, was $800 (£400). The learned Judge

said the present case should be treated on the same basis "making a slight allowance for the decreasing value of money". The learned Judge found that any amount which the parents have lost by their son's death was a mere speculative possibility and therefore made no award. This finding was attacked on the ground that the speculative nature of the damages sought should not prevent the Court from making an assessment. This, we think, is not what the judgment meant.

The learned Judge was referring to the establishment of a basis for the award of damages and not to the assessment of damages, although there appears to be some confusion because the learned Judge speaks of "any amount" when, as will be seen later, the first question is not amount. The position is clearly set out in Barnett v. Cohen (1921) 2 K.B. 461, 469-470 where the following passage appears:

> "Now at one time it was thought that a father would fail in his action unless he gave proof of pecuniary advantage in actual existence prior to or at the time of the death of the child: see e.g. Holleran v. Bagnell. (2) In that case the child was seven years of age. She rendered some slight household services. Morris C.J. said that there was no instance of an action for loss caused to a plaintiff by the death of a person of such a tender age. He added: "There should be distinct evidence of pecuniary advantage in existence prior to or at the time of the death." This latter remark of Lord Morris (then Morris C.J.) has, however, been nullified by the

opinion of the House of Lords in Taff Vale Ry. Co. v. Jenkins (3), where the dead child was a girl aged sixteen. There Lord Haldane said (4): "The basis is not what has been called solatium, that is to say, damages given for injured feelings or on the ground of sentiment, but damages based on compensation for a pecuniary loss. But then loss may be prospective, and it is quite clear that prospective loss may be taken into account. It has been said that this is qualified by the proposition that the child must be shown to have been earning something before any damages can be assessed. I know of no foundation in principle for that proposition either in the statute or in any doctrine of law which is applicable; nor do I think it is really established by the authorities when you examine them". Later Lord Haldane said (1): "I have already indicated that in my view the real question is that which Willes J. defines in one of the cases quoted to us, Dalton v. South Eastern Ry. Co. (2): 'Aye or No, was there a reasonable expectation of pecuniary advantage?'"."

The Judge in Barnett v. Cohen went on to say at p.470:

> "Now this question of reasonable expectation of pecuniary advantage seems to me to be a mixed question of fact and law. Mere difficulty in assessing damages should not bar a plaintiff from recovering: see the principle involved in Chaplin v. Hicks. (3) But, on the other hand, I think that the plaintiff must adduce such evidence as affords the judge a reasonable basis on which to infer that pecuniary damage has been inflicted on the plaintiff."

It was said later after reviewing the cases, at p.471,:

> "I think that the only way to distinguish between the cases where the plaintiff has failed from the cases where he has succeeded is to say that in the former there is a mere speculative possibility of benefit, whereas in the latter there is a reasonable probability of pecuniary advantage. The latter is assessable. The former is non-assessable. This test, though necessarily loose, seems to be the only one to apply."

Barnett v. Cohen (supra) was discussed in Davies v. Taylor (1972) 3 All E.R. 836 where in the House of Lords the following passages are taken from the speeches of their Lordships:

per Lord Reid at p.838:

> "To my mind the issue and the sole issue is whether that chance or probability was substantial. If it was it must be evaluated. If it was a mere possibility it must be ignored. Many different words could be and have been used to indicate the dividing line. I can think of none better than 'substantial' on the one hand, or 'speculative' on the other. It must be left to the good sense of the tribunal to decide on broad lines, without regard to legal niceties, but on a consideration of all the facts in proper perspective. 'Injury' in the Fatal Accidents Act 1846 does not and could not possibly mean loss of a certainty. It must and can only mean loss of a chance. The chance may be a probability of over 99 per cent but it is still only a chance. So I can see no merit in adopting here the test used for proving whether a fact did or did not happen. There it must be all or nothing."

per Lord Morris of Borth-y-Gest at p.839:

> "In such a case the jury had to decide what they thought would or might reasonably have happened had the daughter lived; they had to decide how they thought the daughter would have acted or might have acted in regard to her parents had she lived. There could be no certainty as to such matters nor could there be knowledge as to what the future would hold for the father and the mother. So in such a case the question was whether the parents had had (and by the death had lost) a reasonable prospect or chance of enjoying some financial benefit."

per Viscount Dilhorne at p.842:

> "In some cases, e.g. Barnett v. Cohen, it is said that there has to be a reasonable probability of pecuniary benefit. I do not think that it makes the slightest difference whether one speaks of a 'reasonable expectation' or a 'reasonable probability'."

If the above tests are applied we are of opinion that the learned Judge was wrong in his approach to the primary question. The parents might reasonably expect some pecuniary benefit from a son of the character of deceased living in an Indian community where family help is to be expected. It is irrelevant to say deceased had no better prospects than his father except on the question of how much help he might be able to give.

The claim of the mother, if she should become a widow or misfortune befall her husband has been overlooked. After weighing all the factors on the basis of the authorities cited we are of opinion that a sum of $1,500 is an appropriate award.

We turn next to deal with the appeal against the award of $1,000 under the provision of the Law Reform (Miscellaneous Provisions) Act (Cap.20). The Judge does not state the basis upon which this award has been made. The facts related just prior to the award being made are relevant to the claim under the Compensation to Relatives Ordinance Cap. 22 whereas under the Law Reform Ordinance different consideration arise. There is no evidence that deceased underwent any pain or suffering. It must be assumed he died instantly.

Lord Morris of Borth-y-Gest said in Yorkshire Electricity Board v. Naylor (1967) 2 All E.R. at p.6:

> "Though it is said that his death was instantaneous, the appellants have not sought to dispute that a valid cause of action vested in him. By reason of the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, that cause of action survived for the benefit of his estate. The judge had to decide what sum of damages should reasonably be awarded in respect of the deceased's cause of action. He lost what is usually called his expectation of life. The loss was something personal to himself. No one knows what life would in fact have held for him had he lived. No one will ever know. No one could ever know. The chances, the changes and the vicissitudes of the future are in the future. He will not know them. No surmise can with any measure of confidence be made whether by his untimely death he was denied happiness or was spared unhappiness. The task of "equating incommensurables" is one that can never be satisfactorily achieved."

It appears that the award was solely in respect of loss of expectation of life. The learned Judge took, as a norm or basis, an award in 1966 of $800 for the death of a girl aged 5 years, and then made a "slight allowance" for the decreasing value of money.

The principles which guide an appellate court on appeal from an award of damages are now well established. In Flint v. Lovell (1935) 1 K.B. 354, 360; (1934) All E.R. 200, 202-3, Greer L.J. said:

> "To justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgement of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

This aforesaid was endorsed by Lord Wright in Davies v. Powell Duffryn Associated Collieries Ltd. (1942) A.C. at p.616; (1942) 1 All E.R. at p.664:

> "In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damages suffered."

In the result, in the present case we have no guidance from the learned Judge because there is no basis in law for selecting an award and then to make a slight allowance for the decreasing value of money. In

Benham v. Gambling, Viscound Simon L.C. said that "while recognising that this head of claim is in fact incapable of being measured in coin of the realm with any approach of real accuracy" stated that courts should arrive at "very moderate figures".

Upon a full consideration of all matters we do not think we should interfere with the award. It has not been shown to be out of line with conventional awards for loss of expectation of life of a young person. We see no reason to make any distinction on the ground of sex where loss of expectation is in issue.

The learned Judge awarded costs on the lower scale. In view of the above findings we consider that normal costs should be allowed.

The appeal will be allowed in respect of the claim under the Compensation for Relatives Ordinance Cap. 20 and the sum of $1,500 is awarded - this sum to be apportioned as to $1,000 to appellant and $500 to his wife.

The award under the Law Reform (Miscellaneous Provisions) Ordinance Cap.22 is affirmed.

Costs are allowed in this Court and in the Court below. Appeal allowed accordingly. The case is remitted to the Supreme Court for judgement to be entered in terms above set forth.

(Sgd.) C.C. Marsack
JUDGE OF APPEAL

(Sgd.) T. Henry
JUDGE OF APPEAL

(Sgd.) B.C. Spring
JUDGE OF APPEAL