IN THE FIJI COURT OF APPEAL
Appellate Jurisdiction
Civil Appeal No. 41 of 1978

Between:

JASUMATI BEN d/o Ranchodbhai Bhikabhai Mistry — Appellant

and

1. MOIDEAN s/o Hassan
2. RAM PADARATH HOLDINGS LIMITED — Respondents

B.C. Patel with V.K.B. Kalyan for the Appellants
M.S. Sahu Khan and S.R. Shankar for the Respondents

Date of Hearing: 23rd November, 1978
Delivery of Judgment: 30-11-78

JUDGMENT OF THE COURT

Gould V.P.

There is an appeal and cross appeal before the court, but we will refer to the plaintiff in the original civil action as "the appellant" and to the first and second defendants in that action as the "first respondent" and "second respondent" respectively. In that action the appellant, who is the widow and administratrix of Amratlal f/n Naranbhai, sought damages on behalf of herself and four infant children in respect of her husband's death. He was killed in a collision between two cars, one driven by the deceased and one by the first respondent (who was admittedly the servant or agent of the second respondent) on the Queens Road near Saweni. A small counterclaim by the respondents for damages to their vehicle was abandoned and dismissed. On the main action the learned judge found that the deceased was

25% to blame for the collision and the first respondent 75%: he assessed damages in the appellant's favour in the net sum of $23,825, arrived at as follows :

Damages (general) $33,000 : 75% thereof	$24,750
Add funeral expenses	200
	$24,950

Damages awarded under Law Reform (Miscellaneous Provisions) Act $1,500 : 75% thereof $1,125.

General damages reduced by Law Reform Award $23,825.

It will be convenient to take first the cross appeal so far as it challenges the learned judge's findings on liability. The grounds are expressed :

"1. THAT the learned trial Judge erred in law and in fact in putting forth theories which were not canvassed or put forward by either party.

2. THAT the learned trial Judge erred in law and in fact in rejecting the evidence regarding the plan.

3. THAT the learned trial Judge erred in law and in fact in accepting the evidence of the plaintiff and her witnesses inasmuch as they were very unreliable and contradictory."

The argument that the learned judge had put forward his own theories was reduced to a submission, that whereas the witnesses for the opposing parties each testified that their respective vehicles were well over on their own sides of the road (each claiming that the other had encroached on its wrong side) the learned judge found that the collision occurred near the centre of the road. The answer is that the learned judge based his finding on evidence. The respondents' vehicle stopped very near the middle of the road, though turned to face the opposite direction, and leading to a point

quite close to it was a tyre mark which could only have been made by the respondents' vehicle. There was also glass nearby. It is impossible to say that the learned judge theorised without evidence.

Ground 2 is badly expressed but as argued, it related to the fact that the learned judge preferred to be guided by the plan (which had been put in by consent) rather than by the memory of its author. In his judgment he deals with the matter thus -

> "The sergeant's evidence that the tyre marks were to the left of the covers on the road is hard to reconcile with his plan, and I prefer the plan drawn on the night of the accident to his oral evidence given almost three years later, particularly as he did not have his notebook and had not seen it for a year."

We do not think the learned judge's approach was unreasonable, and the important thing about the tyre mark is that it extends backwards from near the vehicle for 106' and indicates that the vehicle had been well on its wrong side of the road, coming round the slight curve. The position of that particular part of the mark was not made the subject of controversy by counsel.

The main point of counsel for the respondents on Ground 3 was that the two ladies who were in the car with the deceased, described the approach of the respondents' car as a "zig zag" approach, and the learned judge believed their evidence on this, though he rejected their version of the position of their car when it was hit. The learned judge saw and observed these witnesses closely, as is apparent from his very painstaking judgment. We are certainly not in such an advantageous position and not in the least able to say that the learned judge did not avail himself of the advantage of having seen and heard the witnesses.

For example he observed that the defendant (i.e. the first respondent) did not impress him as a truthful witness.

Counsel for the respondents also criticised the learned judge's apportionment of the blame 75% - 25% on the ground that no specific reason had been given to support it. The learned judge found that the first respondent had cut the corner and this was the primary cause of the accident. He found that the deceased probably held a position in the middle of the road until too late and must bear part of the responsibility. We see no reason to differ from his apportionment of 75% - 25%.

There is no merit, in our opinion, in this aspect of the cross appeal and it fails. The "damages" aspect of the cross appeal, an allegation merely that they were excessive, can be dealt with in connection with the appeal, to the consideration of which we will now proceed.

There is only one ground, which reads :-

> "1. THE learned trial Judge erred in law in reducing the damages payable to the Appellant by deducting a sum of $37,065.05 being the nett value of the estate of Amratlal father's name Naranbhai which the Appellant inherited by law on his death."

Before we approach this specific ground it will be helpful to consider the learned judge's approach to the whole question. The deceased was 33 years old at the time of his death: the appellant was 27: two daughters had been born in 1966 and 1968 respectively, followed by two sons in 1970 and 1972. The deceased had two shops and a flourishing business. Not long before his death he bought two properties in Lautoka, which seemed to be in the nature of investment, for the family lived

above one of the shops. The appellant found it impossible to carry on the businesses, which have been closed down since the death of the deceased, and the appellant and her family moved into one of the properties above mentioned. Each, incidentally was mortgaged.

Having considered the evidence, the learned judge fixed the probable income which the deceased might have been expected to earn in the future at $9,000 per annum, and in doing so took into consideration the effect that the world recession and oil situation might be expected to have in Fiji. An allowance for taxation would reduce this amount to $7,000 a year. The learned judge next attributed to the deceased a life expectation of 15 to 22 years. On the evidence, he found that the deceased gave his wife $125 a month for housekeeping and that the family grocery bill (paid by the deceased) was about $250 per month: this would total $4,500 a year, to which the learned judge added an allowance for taxation of $500, making a figure of $5,000 per annum. His reason for not making these amounts higher was that the deceased held the purse strings and spent quite a large amount on things he was interested in.

The learned judge then said that he had to make allowances as indicated by Viscount Simon in Nance v. British Columbia Electric Railway Company [1951] A.C. 601, for various matters. One was "the additional amount he (the husband) would probably have saved" during the rest of his life and "what part (if any) of those additional savings his family would have been likely to inherit". Under this head the learned judge clearly had in mind the two properties purchased. The second matter considered was the prospects of re-marriage by the appellant, which the learned judge considered good. The point of these references is that the learned judge took them both into consideration in fixing his multiplier. He decided on 14, which, when applied to the dependency of $5,000, produced $70,000.

Then in the judgment comes the passage which gives rise to the appeal :

> "From the result would normally be deducted the value of the estate which the plaintiff received by acceleration of her husband's death, which amounted at the date of his death to $37,065.05. I have given consideration to the question as to whether the whole of this capital should be deducted, as one would expect that some at least of the capital was money of which plaintiff would in the ordinary course of events have received the benefit. I do not think that any allowance should be made, and that the whole of the capital should be deducted. The capital in deceased's account at the date of his death corresponds nearly enough with the net value allowing for encumbrances of the two properties from which the plaintiff derives an income of $240 a month. I regard these two properties as income producing assets in respect of which normally the deduction is made in full: see Bishop v. Cunard White Star Company Limited (1950) pages 240, 248. The result, then, will be that plaintiff would get $32,935.95."

Shortly after that the learned judge said -

> "I was given no information about the incidence of estate duty, so that no allowance is made for that."

Counsel for the appellant complained of this failure to deduct estate duty. In fact the rough and ready treatment given to the assessment of the value of the estate, as expressed in the first of the passages quoted, as well as the refusal to deduct estate duty, is clearly due to the complete failure of the appellant or her legal representatives to provide any evidence on the subject. When the learned judge, towards the end of the case, went out of his way to request that (inter alia) estate accounts be provided, and this was not done, the party responsible must accept the consequences.

We must accept the estate, as the learned judge did, as consisting of the two properties (less the amount of the encumbrances) one of which was occupied by the

appellant and her family as a residence, and beyond that, producing an income of $240 a month. We disregard any question of interest, rates etc. as they have not been mentioned. The appellant has already, we understand from the record, gone to Canada, but we do not think that makes any difference in principle, as any additional income from the premises vacated will be offset by the cost of those acquired in substitution. Overall the position is that in the lifetime of the deceased the appellant and her family had living premises over the shop, without cost to them. They have lost these as a result of the death, but have gained others instead plus an income of $240 a month. The net estate value of $37,065.05 accepted by the judge represents the value of the occupied premises and the rent-producing premises.

The position at common law was that in assessing such damages as these, there had to be taken into account any pecuniary benefit accruing to the defendant by reason of the death of the deceased - it was to be set against the pecuniary loss suffered. There are numerous statutory exceptions, but in the case of an estate, where the defendant might well have ultimately received some or all of the property in question by inheritance, it was the value of the accelerated receipt of the money which was in some cases considered as forming an appropriate valuation of the deduction to be made from the compensation awarded for the loss. Each case however, depends on its own circumstances. In Kassam v. Kampala Aerated Water Co. Ltd /1965/ 2 All E.R. 875 the Privy Council said at pp. 879-80 -

> " The Court of Appeal have made a deduction in respect of the acceleration of the benefit of the deceased's estate to his children. Their lordships' view is that this is a highly speculative matter, and having regard to the anticipated savings which might reasonably

> have been expected to have been made by the deceased if he had lived, no deduction ought to be made on the score of accelerated benefit, as these two figures very largely cancel out. Warnings against the propriety of this type of deduction were given in Daniels v. Jones."

That, by comparison, was not a very big estate, and the Privy Council made a point of anticipated savings as a set off against the accelerated benefit. As we have indicated, in the present case the learned judge appears to have taken that factor into consideration when he was fixing his multiplier. At the same time, we are inclined to the view that his view of the future prospects of the deceased may have been over cautious having regard to the rapid progress the deceased had made in business and into the investment market. There is, however, another and more directly relevant factor to be considered.

The learned judge based himself on the case of Bishop v. Cunard White Star Co. Ltd [1950] 2 All E.R. 22, in which the whole family income was derived from the husband's investments and the widow took the whole estate. She had no claim to damages. Here the learned judge equated the two house properties to those income producing investments. That case is regarded in Charlesworth on Negligence (6th Edn.) para. 1372 as an extreme one.

At the other end of the scale is Heatley v. Steel Company of Wales Ltd. [1953] 1 All E.R. 489, 490, where a widow had inherited the equity of redemption of a house in which the family had lived with the deceased, Lord Goddard, C.J. said, :-

> "This is not a case where, by the death of the father, the widow will come into some large sum of money of which she never before had the handling. She will simply continue to live in this house and provide a home there for the children until it is sold, and if and when it

> is sold she will have to get another house. At any rate, her two younger children are likely to be living with her in this house or elsewhere for a long time, and her two older children are still dependent on her. The court cannot see that there is really any sum to be deducted for the value of the house at all."

The present case is somewhere between these two. It differs from Bishop's case in that the family income did not arise exclusively from the rents of the two houses - far from it: the rents were a comparatively minor matter. It differs from Heatley's case in that the property inherited was not entirely residential: it produced income.

On full consideration of this matter we think, with respect, that the learned judge's approach to this particular matter was erroneous in that it overlooked that the estate assets in question replaced the free accommodation the appellant and the children had enjoyed during the lifetime of the deceased, and to that extent did not have to be set against the pecuniary loss suffered.

As the learned judge found, evidence to guide the court to the assessment of a fair deduction, is lacking. Apart from the accommodation factor which we have mentioned, the parties were so comparatively young that an inheritance benefit could not have been expected for a very long time, if at all. Therefore the present receipt of the assets was of definite value.

In our opinion, instead of deducting the whole $37,065.05 from the damages, as the learned judge decided, we think it is reasonable to deduct three-quarters of that amount and the resultant damages award will be increased accordingly.

We return now to certain arguments addressed to the court by counsel for the respondents whether as part of his cross appeal or in reply to the appellant.

In the first place he submitted that the sum of $2,000 per annum deducted by the learned judge from the deceased's estimated earnings of $9,000, was inadequate. He sought to show from copies of assessments that the tax on a chargeable income of $9,000 would be rather more than $3,000. We do not understand that in fixing $9,000 as the probable income the learned judge was thinking in terms of chargeable income but of total income from which appreciable allowances would be due. The judge was necessarily dealing in round figures. The second submission also related to taxation. It was said that the learned judge was wrong in adding $500 per annum as an allowance for taxation to the valuation of the theoretical benefit of $4,500 per annum to the appellant. But the tax element is something which would not have had to be met by the appellant in the lifetime of the deceased, whereas after his death it will be. In Taylor v. O'Connor [1970] 1 All E.R. 365 Viscount Dilhorne said, at p.375 - "On the other hand, the £3050 must be a sum free of tax. If it is not then the respondent will not be receiving full compensation for her loss." We do not consider there is merit in either of these two points. A further submission in relation to the cessation of life insurance premiums is not sufficiently germane to the total issue of damages to need discussion.

In the result the appeal is allowed with costs. In lieu of the deduction of $37,065.05 in relation to the estate made by the learned judge the deduction will be three-quarters of that amount viz. $27,798.78. Rounding the figures off, the resultant operative figure is $42,200 in lieu of $33,000. The net entitlement will be 75% of $42,200 which is $31,650. There are the further adjustments mentioned by the learned judge, an addition of $200 for funeral expenses and a deduction of $1,125 in respect of

damages awarded under the Compensation to Relatives Act. The resultant net damages award is $30,725 in lieu of $23,825, to be divided between the dependants in the same proportion as that fixed by the learned judge.

The cross appeal is dismissed with costs.

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VICE PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL