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IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
Civil Appeal No. 61 of 1979

Between:

1. JAI KISSUN (s/o Batohi)
2. GYAN CHAND (s/o Ram Rattan)

Appellants

and

1. MACIU UALALA
2. OVETI TUNAVUGA

Respondents

Date of Hearing: 12 June 1980
Date of Judgment: 27 June 1980

JUDGMENT

Marsack, J.A.

This is an appeal against an award of damages made in favour of the respondents against the appellants in the judgment of the Supreme Court at Lautoka on the 27th July, 1979.

The action arose from an accident when a truck loaded with sugarcane capsized on a rough track near Nausori Village, Rakiraki. A cane-cutter named Naiyawa Naituku was travelling on top of the cane load on the truck. He was killed in the fall. An action was brought by the respondents as administrators of the deceased's estate against the appellants, alleging negligence under several heads.

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Judgment was given in the Supreme Court holding that the negligence of the appellants had resulted in the death of the deceased, but that the latter was guilty of contributory negligence in placing himself in a dangerous position on top of the cane. The learned Trial Judge assessed the contributory negligence of the deceased at 40%. He fixed the total damages at $5600. After making a deduction in respect of the contributory negligence found against the deceased, he gave judgment for the sum of $3733. It is against that award that the appeal is brought.

Three grounds of appeal were filed, but at the hearing before this Court counsel for the appellants abandoned grounds 1 and 2 and stated that he would rely on grounds 3(a) & (b) which read as follows:

> "3. THAT the Learned Trial Judge erred in principle in assessing the damages in that:
>
> (a) he assessed the Respondent's contributory negligence at 40% but apportioned the damages on 2/3/1/3 basis and
>
> (b) he added the amount awarded under the Law Reform (Miscellaneous Provisions) (Death and Interest) Ordinance to the amount awarded under Compensation to Relatives Ordinance when it should have been subtracted."

With regard to first of these: it is common ground that though the learned Trial Judge assessed the contributory negligence of the deceased at 40% the deduction made by him on this

ground was at the rate of 33⅓. Consequently there must be an adjustment to a figure of three-fifths of the total sum awarded instead of two-thirds as set out in the judgment.

With regard to ground 3(b): it is clear that there are two statutory provisions upon which a claim for damages in the circumstances of the present case can be based. These are the Law Reform (Miscellaneous Provisions)(Death and Interest) Ordinance, Cap20 and the Compensation to Relatives Ordinance, Cap.22.

The Law Reform Ordinance deals with claims for damages by relatives of the estate of deceased persons, whereas the Compensation to Relatives Ordinance provides that actions for damages arising from the death of a person shall be for the benefit of the wife, husband, parent and child of the person whose death has been so caused. Section 2(5) of the Law Reform Ordinance contains a provision in these words:

> "The rights conferred by this Ordinance for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of deceased persons by the Compensation to Relatives Ordinance..."

The present appeal was brought by the respondents "as administrators of the estate of deceased" in accordance with the Law Reform Ordinance. But they are also the next-of-kin of the deceased, and thus the persons who would be legally entitled to such sum as should be awarded under the Compensation to Relatives Ordinance. The learned

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Judge does not indicate in his judgment under which Ordinance each item of the damages is awarded. The total of $5,600 is set out as under:

Special damages	$ 200
Loss of expectation of life	$1500
Compensation to parents	$3900
	$5600

The special damages of $200 were for funeral expenses actually paid by the respondents. Of the remaining $5400, $3900 must be taken as an award under the Compensation to Relatives Ordinance and $1500 under the Law Reform Ordinance.

The question for determination of this appeal is whether the provision that the rights conferred by the Law Reform Ordinance "shall be in addition to and not in derogation of any rights conferred on the dependants by the Compensation to Relatives Ordinance" gives the respondents in this case a right to recover damages under both Ordinances, without taking into account one award when assessing the other; in other words, whether an award under the Law Reform Ordinance can properly here be added to an award under the Compensation to Relatives Ordinance. It was argued by counsel for respondents that the provision in section 2(5) of the Law Reform Ordinance quoted above means that the two claims are entirely separate and that it would be wrong to set one off against the other.

In England the relevant legislation contains a somewhat similar provision to that which is found in the Fiji Ordinances. Damages payable under the Fatal Accidents Act are for the benefit of the dependants of the deceased. Damages awarded under the Law Reform (Miscellaneous Provisions) Act 1934, which include damages for loss of expectation of life, are awarded for

the benefit of the deceased's estate. Section 1(5) of the Law Reform Act 1934 is worded in precisely the same terms as those quoted from section 2(5) of the Law Reform Ordinance in Fiji.

What we have to determine in the present appeal is whether that particular saving clause in the Law Reform Ordinance enables the respondents to recover damages from the appellants under each of the relevant Ordinances without any deduction being made in respect of the damages payable under the other.

The point in issue was fully considered by the House of Lords in Davies v. Powell Duffryn Associated Collieries, Ltd. reported in 1942 1 All E.R. 657. It was held in that case that, nothwithstanding the enactment that rights conferred for the benefit of the estate of the deceased persons by the Law Reform Act were in addition to and not in derogation of the rights conferred on the dependants of the deceased persons by another Act,

> "it is appropriate that any benefit taken indirectly by a dependant by way of participation in an award under the Law Reform Act should be taken into account in estimating the damages awarded to that dependant under the Fatal Accidents Act"

(per Lord MacMillan at page 661).

The basic reasoning would appear to be this. In a claim under the Compensation to Relatives Ordinance what the relatives are entitled to get is the present value of the financial assistances they could have expected to receive from the deceased during his lifetime. Damages payable for loss of expectation of life would be payable to the injured person himself if he survive the accident, and not to his dependants.

If he failed to survive then the dependants would not receive from him any proportion of his earnings, as there would be no earnings. As was said by Lord Wright at page 662:

> "The actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing on the one hand the loss to him of the future pecuniary benefit, and on the other any pecuniary advantage which from whatever source comes to him by reason of the death...Damages are to be proportioned to the injury resulting from the death to the individual. The injury suffered by the individual from the death cannot be computed without reference to the benefit also accruing from the death of the same individual from whatever source."

It is to be observed that in rejecting a submission by counsel for the Respondents, similar to that advanced in this Court, their Lordships were particularly influenced by the specific exemption from deduction provided by express statutory words in respect of proceeds of life assurance or from pensions. The same provisions are found in section 12(1) of the Compensation to Relatives Ordinance and with respect we think their Lordships' reasoning is equally applicable.

In the present case there is benefit accruing to the respondents from the death in that the amount of $1500 payable to them under the Law Reform Ordinance for loss of expectation of life is a benefit accruing from the death of the deceased; and must, if the principle of Davies v. Powell Duffryn be applied, be deducted from the sum computed to be the loss suffered by the dependants from the share of earnings they would have received had the deceased continued to live. A deduction on this principle was made by Mills-Owen C.J. in the case of Public Trustee v. Parmamand 10 FLR 187. In Charlesworth

on Negligence 6th Ed. page 1382 it is stated:

> "...where any dependant is also beneficially entitled to a share of the deceased's estate, since section 1(5) quoted above has not altered at all the general rule for the assessment of damages under the Fatal Accidents Acts, viz: that any pecuniary benefit which accrues to the dependants as a result of the death must be set against their pecuniary losses suffered, this deduction must be made pound to the extent of such entitlement."

As a result we are of the opinion that we must, as this Court has so ordered in the past, apply the principle laid down in Davies v. Powell Duffryn, and hold that the sum awarded as damages for loss of expectation of life under the Law Reform Ordinance must be deducted from the sum awarded under the Compensation to Relatives Ordinance.

There was no dispute as to the quantum of damages awarded under each head, so the figures fixed by the learned trial Judge will be accepted.

Accordingly the judment of the Court below will be varied and judgment entered in favour of the respondents for the following sums:

Special damages	$ 200
Compensation to parents	$2400
Loss of expectation of life	$1500
	$4100
Less 40%	$1640
	$2460

Of this sum of $2460, $1500 less 40% that is $900, should go to the respondents jointly as adminstrators of the deceased's estate, and the balance which is $1560 should be divided between the respondents, father and mother of the deceased, in the proportions assessed by the trial Judge, viz: $1160 to the father and $400

to the mother. Respondents to have their costs in the Supreme Court as in the judgment of that Court.

With regard to costs of the appeal: the point on which this appeal has partially succeeded does not appear, from the Record, to have been raised in the Court below. In all the circumstances of the case we think it right that each party should pay their own costs of the appeal. There will therefore be no order as to costs.

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

(sgd.) G.D. Speight
JUDGE OF APPEAL

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