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IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0050 OF 2000S
(High Court Civil Action No. HBC 310 of 1998)

BETWEEN:

- (1) THE MEDICAL SUPERINTENDENT *First Appellant/Original*
- (2) THE ATTORNEY-GENERAL OF FIJI *Second Appellant/Original*

AND:

ABDUL HAFEEZ ISMAIL *Respondent/Original*

Coram:

The Rt. Hon. Sir Thomas Eichelbaum, Presiding Judge
The Rt. Hon. John Steele Henry, Justice of Appeal
The Hon. Sir Rodney Gallen, Justice of Appeal

Hearing:

Tuesday, 16 October 2001, Suva

Counsel:

Messrs. J. Udit and K. Keteca for the Appellants
Mr. D. Sharma for the Respondent

Date of Judgment: Thursday, 18 October 2001

JUDGMENT OF THE COURT

This appeal is from a judgment of Shameem J. delivered on 25 July 2000 under which the respondent was awarded the sum of \$128,714.00 plus interest of \$25,742.80 in proceedings brought under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap. 27, and the Compensation to Relatives Act Cap. 29. The claims were consequent upon the death of Rita Yashmin on 11 October 1996.

The deceased complained of severe abdominal pain and on 9 October 1996 was taken by her husband to the Nausori Hospital. From there she was transferred to the Wainibokasi Hospital and at 2:30 p.m. transferred to the Colonial War Memorial Hospital. She died at 1:50a.m. on 11 October. The cause of death was established as having been

infarction of the small bowel, associated with erosive gastritis and pulmonary congestion. The claims were brought in negligence which was denied by the appellants, and following trial, the Judge held that liability had been established. She found that there had been inadequate monitoring of the deceased's condition, inadequate care, a failure properly to diagnose, and a delay in proper treatment, particularly by way of surgical operation to clear a bowel obstruction. The award of damages was as follows:

"1. Compensation to Relatives Act	\$94,224.00
2. Law Reform (Miscellaneous Provisions) (Death & Interest) Act:	
<i>Funeral Expenses</i>	1,000.00
<i>Pain and suffering</i>	25,000.00
<i>Loss of consortium</i>	5,000.00
<i>Loss of expectation of life</i>	2,500.00
<i>Medical evidence</i>	990.00
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	\$128,714.00
+ Interest at 5% per annum from the date Date of the filing of writ, for 2 years	25,742.80
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TOTAL	\$154,456.80"
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The finding on liability is not under challenge, and as matters emerged at the hearing in this Court four issues fall for consideration.

Damages for Pain and Suffering

Mr. Udit for the appellants submitted that the sum of \$25,000 under this head was excessive. Mr. Sharma for the respondent responsibly accepted that the award could not be sustained in the circumstances. It should be noted at this stage, that the Judge received no help from counsel (not Mr. Udit) for the trial defendants, the present appellants, who appears to have concentrated in his final submissions on liability without addressing damages. The Judge clearly took an adverse view of the way in which the deceased had been treated while

in hospital, and justifiably so. It left much to be desired. Despite that, care must be taken not to let the element of punishment come into play, there being no claim for exemplary damages. The period of time during which the deceased suffered unnecessary pain, discomfort and general lack of care would seem to be of the order of 18 hours maximum.

The deceased's condition was deteriorating over this time, and there was undue delay in administering medication to alleviate her pain. She had been denied drinking water, and she was suffering from diarrhoea and had to be cleaned by relatives who were attending the hospital. The inference from the evidence is that the deceased's suffering increased unnecessarily as time went and could have been alleviated initially by treatment and then by surgery which was called for at a comparatively early stage. The Judge obviously took a strong view on this aspect of the claim, and being an appeal we should recognize she had the benefit of hearing the evidence and evaluating it. In those circumstances, although the result was excessive, the reduction should be at the higher end of the range which was available. We fix the amount at \$2500, but stress that as in all cases this assessment relates to the particular circumstances of the case. Awards such as these are not capable of mathematical analysis, and are not to be made by applying some hourly or daily rate following a comparison with other cases. It is the particular end result which is important.

Compensation To Relatives Act

The deceased was 38 years old at the time of her death. She was married, living with her husband and three children then aged 19 years, 11 years and 10 years. She ran a small business selling candy floss, ice blocks and popcorn. Stalls were set up at festivals, the last she was involved in being a month before her death at the Hibiscus Festival. The respondent deposed that the deceased was a good mother and housewife, and controlled the family finances.

The respondent was unable to produce any documentary evidence to support the claim for financial loss other than records of bank deposits for the 1995 and 1996 years.

He said that the deceased's earnings were about \$20,000 per year, although the claim was formulated at \$200 per week. The Judge, having referred to the evidence, accepted that her net income would have been the average of those 1995 and 1996 figures, which she recorded as being \$7,248. In fact it is accepted that the correct analysis shows an average figure of around \$4,500. The Judge accepted that these earnings were used to pay household expenses. We observe that being a cash business, no doubt some of the income used for those expenses did not find its way into the banking system. There was also evidence that the respondent was required to expend money on a housekeeper to assist in looking after the children following his wife's death.

The Judge having made an error in her calculation, we must necessarily make our own assessment, but in the light of the relevant trial findings. Adopting the Judge's basic approach, and taking into account all relevant circumstances, we have reached the view that a round figure of \$5000 is the appropriate multiplicand. We are not persuaded that the Judge's multiplier is wrong and should be reduced. The deceased had many years ahead as a potential family earner, and there was nothing in the evidence to suggest that her condition was such that timely medical and surgical treatment would still have resulted in a reduced earning capacity of a shorter earning life than she could otherwise have expected.

The claim under this head is therefore reduced to a sum of \$65,000.

Loss of Expectation of Life

Mr. Udit accepted that the conventional award of \$2500 under this head was appropriate. He submitted however, that applying the principle established in *Davies v. Powell Duffryn Associated Collieries Ltd.* [1942] AC 601, this was a benefit accruing to the dependants of the deceased and must therefore be deducted from the Cap.29 award. This was the approach adopted by this Court in *Jai Kissun and Anor v. Maciu Ualala and Anor* FCA

61/79. The principle was applied in Subamma v. Chandar FCA 56/81. Counsel did not refer us to any later decisions of this Court in which that principle has been overruled, and in those circumstances we have concluded that the deduction must be made, and the award under Cap.29 reduced accordingly.

Interest

Counsel are agreed that interest on the Cap.27 award is to be at the rate of 5% per annum, commencing as at the date of death 11 October, 1996. Interest at the same rate on the Cap.29 award must also accrue. The Judge ordered that was to be from the date of filing of the writ. Mr Sharma submitted that it too should run from the date of death, but was unable to point to supporting authority. In our view the principle as to interest on general damages established in Attorney-General v. Valentine FCA 19/98 is applicable, and the starting date should therefore be the date of filing of the writ. The award is effectively an assessment of the present value of the financial loss suffered of the family, and is not to be equated to special damages. As a matter of principle, it seems to us that interest should therefore run only as from the time of formulation of the claim by way of commencement of proceedings. Although not there directly in issue, that approach was adopted in Hari Pratap v. Attorney-General FCA 14/92.

Conclusion

For the above reasons, the appeal is allowed in part and the judgment of the High Court is varied as follows:

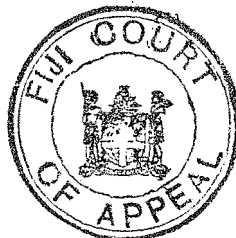
- (1) The award under the Compensation to Relatives Act is reduced to the sum of \$65,000 less \$2,500 namely \$62,500.
- (2) Interest on that sum at 5% is to be calculated from the date of filing of the writ down to the date of hearing of this appeal.

- (3) The award for pain and suffering is reduced to the sum of \$2,500.
- (4) Interest on the total award under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act of \$11,990 at 5% is to be calculated from 11 October 1996 down to the date of hearing of this appeal.

The appellant is entitled to costs in this Court which we fix it \$750 together with disbursements including the cost of the record as approved by the Registrar.

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Sir Thomas Eichelbaum
Presiding Judge



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Rt. Hon. John S. Henry
Justice of Appeal

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Sir Rodney Gallen
Justice of Appeal

Solicitors:

Office of the Attorney-General Chambers, Suva for the Appellants
Messrs. R. Patel and Company, Suva for the Respondent