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

CIVIL APPEAL NO. ABU0112 OF 2005S
(High Court Civil Action No. HBC 266 of 2003L)

BETWEEN: PARMEND SINGH

Appellant

AND: MEIBUI

Respondent

Coram: Ward, President
Barker, JA
Ellis, JA

Hearing: Wednesday, 28th February 2007, Suva

Counsel: D. Sharma for the Appellant
D. Singh for the Respondent

Date of Judgment: Friday, 9th March 2007, Suva

JUDGMENT OF THE COURT

Introduction

[1] On 4 November 2000, Filipe Bui ('the deceased') a self-employed farmer and fisherman was of one of several fare-paying passengers in a canopied vehicle, illegally adapted to carry passengers on two rows of seats at the back. The deceased had been seated above the right rear wheel. The railings of the canopy provided the only support for a passenger.

[2] As the carrier was turning right into a driveway at Waidradra, Navua, a taxi, driven by the appellant whilst attempting at high speed to overtake the carrier, crashed into the back of the carrier. The carrier had duly signaled its intention to turn. The appellant was attempting to overtake on a part of the roadway marked with double yellow lines. He was later convicted of dangerous driving causing death.

[3] Upon the heavy impact, the deceased was projected 9.3 meters on to the tarseal. He died from head injuries in hospital shortly afterwards.

[4] The respondent is the widow of the deceased, who was 48 at the time of his death and in good health. She brought a claim in the High Court under both the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap.27) and the Compensation to Relatives Act (Cap.29). She brought the latter claim as administratrix of the estate of the deceased. She had 4 children who were aged between 18 and 22 at the time of the hearing in the High Court. She herself was born in 1964.

[5] The action came before Pathik J in the High Court on 19 and 20 July 2004. After considering post-hearing written submissions which were completed in August 2004, the Judge delivered a written decision on 25 November 2005. We are at a loss to understand why judgment was so delayed on a fairly straight forward case.

[6] Pathik J found the appellant completely to blame for the fatal accident and rejected a defence of contributory negligence, based on the contention that he should not have placed himself in a position of danger by riding in a carrier which had no seatbelts.

[7] The Judge awarded $55,774 plus interest under Cap.29 and $2,500 for loss of expectation of life and $1,500 funeral expenses under Cap.27. Despite criticising the appellant for "fighting a losing battle in negligence" and saying that "the Plaintiff is entitled to costs on a higher scale," the Judge awarded only $800 costs to the

respondent. Although not filing any cross-appeal, the respondent made submissions that Pathik J's award of costs had to be increased substantially. The Judge declined to make an award for loss of consortium.

[8] The appellant's two contentions at the hearing of the appeal were:

(a) There should have been a deduction from the damages awarded for the deceased's contributory negligence and

(b) The award of damages was excessive in that

(i) it was based on insufficient evidence of earnings and dependency and

(ii) the Judge made arbitrary and unduly favourable assessments of the respondent's loss.

[9] The respondent conceded correctly that the Judge should have deducted the $2,500 for loss of expectation of life under Cap.27 from the damages awarded under Cap.29. The appellant did not pursue an appeal against the award, rate and duration of interest awarded by the Judge.

Contributory Negligence

[10] Pathik J in his judgment roundly rejected the appellant's claim for a deduction of 30% for contributory negligence on the part of the deceased. The basis for this claim, both in the High Court and in this Court, was that the deceased had contributed to his injuries by voluntary travelling in a dangerous conveyance with illegally modified seats and no seat belts fitted.

[11] The Judge distinguished the decision of this Court in ***Jai Kissun and Gyan Chand v Maciu Valala and Anor*** (Civil Appeal 61 of 1979). There, a 33 1/3% deduction was made from the damages awarded to a person who had been injured when riding on top of a cane-truck which capsized on a rough track. The judgment contains no discussion of the basis for the finding of contributory negligence. The only contention was that the trial Judge had assessed contribution at 40% but had apportioned the damages 2/3: 1/3 . There appears to have been no contest over a deduction of one-third for contributory negligence on the facts of that case

[12] Counsel for the appellant submitted that passengers in the situation of the deceased must obey the law and not assume risks of this sort.

[13] The normal criteria for assessing contributory negligence are causative potency and blameworthiness. We agree with Pathik J that the deceased's action in sitting in the back of a carrier in where no seat belts were provided was not contributory negligence.

[14] We think that the Judge was entitled, in effect, to take judicial notice of the fact that the type of carrier on which the deceased and others were travelling is a form of transport used by many citizens of Fiji of limited means.

[15] Regulation 40 of the Land Transport (Traffic) Regulations 2000 ('the Regulations') forbids riding on an external step, footboard or the roof or bonnet of any vehicle. It also proscribes having any part of the body or limbs extending or protruding through any door, window or other opening or over the side, front or rear of a vehicle. Clearly, the deceased was not infringing this Regulation.

[16] Regulation 27 of the Regulations provides:

> *"27 A person who is 8 years or over seated in a motor vehicle that is in motion must wear the seat belt provided; and*

(b) the seat belt must be properly adjusted and securely fastened.

(2) A person 8 years or and over must not be seated as a passenger in a motor vehicle that is in motion in seat which is not fitted with a seat belt unless –

(a) each seat for which a seat belt is provided is occupied by another person; or

(b) the person is seated in a position behind the front seat of the vehicle and there is no available rear seating position fitted with a seat belt.

(3) Sub-regulations (1) and (2) do not apply to –

(a) a person driving a motor vehicle backwards; or

(b) a person carrying a certificate issued by the Authority certifying that sub-regulation (1) does not apply to the person because –

(i) the person is exempted by the Authority for reasons and conditions stated in the certificate; or

(ii) the Authority is satisfied, on a certificate of a registered medical practitioner, that because of medical unfitness or physical disability it is impracticable, undesirable, or inexpedient that that person wears a seat belt.

(4) It is a defence for the driver of a taxi to establish that he or she had reasonable cause to believe that he or she was at risk of physical injury from a passenger and that complying with this regulation may have contributed to the risk.

(d) Any other vehicle when used to preserve human life.

(2) A driver of a vehicle specified in sub-regulation (1) must –

(a) ensure that all warning devices are in operation; and

(b) exercise caution at all times in order to avoid collision with other vehicles or pedestrians.

[17] Clearly, there was no obligation on the deceased to wear a seat belt when there was not one provided. Nor was any part of his body projecting out of the vehicle. Therefore, he acted lawfully throughout. It would not have occurred to him, as a villager reliant on this sort of transport, to have wondered whether the provider of this transport service was using an illegally modified and unlicensed vehicle and whether it had seatbelts fitted. There were probably economic imperatives for him to have used this form of transport Accordingly, we reject the appeal against the finding of the Judge on contributory negligence.

Damages

[18] The Judge accepted that the deceased had led a happy and vigorous life. He had been head of Tokatoka Naduru of Mataqali Dravuni in his village. He planted yagona, dalo, cassava, coconuts and vegetables. He caught seafood of various sorts. He raised bullocks and sold bullocks, coconut palm trees and seedlings. The respondent said that he had told her he earned about $20,000 net per year.

[19] Pathik J, acting under sections 3 and 6 of the Evidence Act (27 of 2002), accepted the respondent's hearsay evidence. He noted that there was no documentary proof of earnings. He felt that the figures produced by the respondent and another witness had been blown "out of all proportions." He rather arbitrarily assessed the deceased's income at $200 per week. He deducted $66 for the deceased's own expenses, leaving a balance of $134 to support his family i.e. $6,968 per annum which the Judge took as the multiplicand. He then chose a multiplier of 8 after taking into account factors such as the deceased's good health, the respondent's ability to earn and her lack of total dependency. He considered the deceased would have worked until age 55.

[20] The criticism of this section of the judgment by counsel for the appellant was directed at the Judge's findings on the deceased's earnings at $200 per week. Counsel pointed out that, after the death of the deceased, the respondent and her

family were farming the same property. No records had been produced of the deceased's earnings before and after the death.

[21] The Judge was faced with a difficult situation in the absence of records. He was entitled, as the trier of fact, to have considered the evidence of the appellant and to have found that the deceased had been earning and that she had been partially dependent on him. Whilst considering her hearsay figure of annual income inflated, he did his best to assess the quantum of loss. This experienced Judge was entitled to take into account that the failure to keep proper accounts might not be unusual for many indigenous farmers who might not earn sufficient to attract income tax. The Judge's choice of multiplier was made after a consideration of other cases to which he had been referred in submissions.

[22] We are of the view that Pathik J was entitled to make what was essentially an informed guess as to the deceased's income, after he had seen and heard the witnesses. We do not wish to be seen as encouraging failure to produce the business records of deceased persons in cases in this category. However, the reality of the situation seems to be that for self-employed traditional farmers, growers and fishers, in a lower socio-economic group, niceties of commerce, such as accurate bookkeeping, are often not observed.

[23] Although there are unsatisfactory aspects about the proof of loss of income, we are not persuaded that Pathik J erred in his assessment of damages. Rather he did the best he could in circumstances. He could however have stated his reasons for fixing the loss in greater detail.

[24] The appeal as regards quantum must be dismissed. However, as noted earlier, there must be deducted $2,500 from the Cap.29 damages with consequential interest adjustments.

Costs

[25] We are prepared to treat the respondent's detailed submissions on the costs awarded to her in the High Court, as if a cross-appeal had been filed in that regard. Counsel for the appellant did not make submissions on the quantum but protested at Pathik J's criticism of the contest over liability.

[26] We consider that the appellant was entitled to pursue his contention of contributory negligence. His opposition to the quantum claimed was even more justified. However, we consider that the costs award of $800 after a 2-day hearing plus written submissions in a claim of this dimension was unjustifiably niggardly. We think a sum of $3,000 more appropriate.

Result

[27] (a) The appeal is allowed in part.

(b) The damages awarded to the respondent under Cap.29 are reduced by $2,500 to $53,274 with consequential adjustment in the interest awarded in the High Court.

(c) The costs award in favour of the respondent in the High Court is increased from $800 to $3,000 plus disbursements and witnesses' expenses as fixed by the Registrar.

(d) The respondent is allowed costs of $1,500 in this Court plus disbursements as fixed by the Registrar.

Ward, President

Barker, JA

Ellis, JA

Solicitors:

R Patel and Company, Suva for the Appellant
Daniel Singh Lawyer, Suva for the Respondent

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