GEORGE TRANSPORT LTD and Anor v LAISA VOSAWALE (as administratrix of the estate of NOA DOKANIVALU (dec'd)) (ABU0035 of 2004)

COURT OF APPEAL — CIVIL JURISDICTION

SCOTT, WOOD and FORD JJA

7, 11 November 2005

Damages — assessment — second Appellant caused death of deceased — Respondent "intended administratrix" of deceased — whether first Appellant vicariously liable — whether Respondent was administratrix of deceased's estate — failure to plead — whether multiplier of six excessive — contributory negligence — Compensation to Relatives Act (Cap 29) s 9 — High Court Rules O 15 r 8, O 34 r 2(2) — Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap 27) s 2(5).

The driver (second Appellant) (A2) of the bus owned by the first Appellant (A1) caused the death of the Respondent's husband (deceased). The Respondent sought damages in the High Court and was described as the intended administratrix of the deceased's estate, which included the Respondent and their daughter. The Respondent claimed under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap 27) (Miscellaneous Provisions Act) but the Compensation to Relatives Act (Cap 29) (CR Act) was not pleaded. Section 9 of the CR Act was not complied with as the full particulars of the Plaintiff's claim and the dependencies were not supplied. A1 denied owning the bus and also denied that A2 was driving the bus. A1 denied negligence on the part of A2 and claimed that the deceased's negligence contributed to the accident. There was no pre-trial held and the action commenced for hearing.

The High Court awarded damages and used a multiplier of six and a 50% contribution for negligence. The issues were: (1) A1's vicarious liability; (2) the Respondent's description as the intended administratrix; (3) the Respondent's failure to plead the CR Act and noncompliance with s 9; (4) the multiplier of six, given the deceased's age was excessive; and (5) contributory negligence.

Held — (1) A1 was vicariously liable for the negligence of A2, who was performing his duties as a servant or agent, irrespective of whether his actual identity was proved and whether or not A1 actually owned or operated the bus.

(2) Paragraphs 1 and 2 of the statement of claim both stated that the Respondent was the administratrix of her husband's estate. Neither paragraph was denied in the statement of defence. A copy of the letters of administration was produced as Ex 1 at the hearing without objection. The word "intended" was only a clerical error.

(3) The relief under the Miscellaneous Provisions Act is additional to the relief conferred by the CR Act. It was open to the court to award relief under the latter Act.

(4) There was no detailed evidence that assisted the determination of the multiplier of six. The multiplier of six was excessive. There was little likelihood that a 63-year-old man would have been able to continue harvesting crops and generating income of 6–7 tonnes per annum for more than 5 years at the most. A multiplier of three was substituted for six.

(5) Although contributory negligence was pleaded, the Appellants, upon whom the onus rested, called no evidence in support of their claim. The driver's speed and inattention caused the accident. The percentage of contribution was varied from 50% to 10 per cent.

The first three grounds of appeal failed. The fourth succeeded.

Cases referred to

Attorney-General v Aliana Kotoiwasawasa [2003] FJCA 56; *Attorney-General v Edward Broadbridge* [2005] FJSC 4; *Best v Samuel Fox & Co Ltd* [1952] AC 716; [1952] 2 All ER 394; *Cookson v Knowles* [1979] AC 556; [1978] 2 All ER 604; *Cooper v Williams* [1963] 2 QB 567; [1963] 2 All ER 282;

Hari Pratap v Attorney-General [1993] FJCA 24; *Josefa Sigavolavola v Gyan Mati* [1986] FJCA 14; *Kassam v Kampala Aerated Water Co Ltd* [1965] 1 WLR 668; [1965] 2 All ER 875, cited.

R. P. Singh for the Appellants

E. Veretawatini for the Respondent

[1] Scott, Wood and Ford JJA. On 4 September 2000 Noa Dokanivalu (the deceased) was severely injured at the Suva bus stand when he was hit by a bus driven by the second Appellant (A2), Shaukat Ali. He died the next day.

[2] On 2 May 2003 the Respondent commenced proceedings in the High Court. In the formal part of the writ she was described as "intended administratrix" of the estate of the deceased. In para 2 of the statement of claim it was stated that:

> the Plaintiff has obtained Letters of Administration No 40934 from the High Court of Fiji for the purpose of taking out these proceedings for and on behalf of the benefit of the estate of the deceased.

[3] In paras 3 and 4 of the statement of claim the Respondent stated that the first Appellant (A1) was the owner of the bus which came into collision with the deceased and that the bus was being driven by the A2 with "the consent, concurrence and authority" of the A1.

[4] In para 6 of the statement of claim the Respondent pleaded that the cause of the accident was the "negligence, carelessness and recklessness" of the A2.

[5] In para 13 of the statement of claim it was pleaded that:

> the widow and children of the deceased were wholly dependent upon him for support and by his premature death they have lost this means of support and have suffered loss and damages.

[6] The prayer of the statement of claim sought damages under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap 27) however the Compensation to Relatives Act (Cap 29) was not pleaded. Section 9 of Cap 29 was not complied with: full particulars of the Plaintiff's claim and the dependencies were not supplied.

[7] In paragraph 1 of the Defence, the A1 denied owning the bus, registration number AY 192. In paragraph 2 the claim that the A2 was driving the bus was also denied. In para 4 the Appellant denied negligence on the part of the A2. In para 3 it was claimed, in the alternative, that the deceased was himself negligent and that this negligence contributed to the accident which caused his death. The losses claimed by the Respondent were denied.

[8] Order 34, r 2 of the High Court Rules requires a pre-trial conference to be held before an action may be set down for trial. It appears that no such conference was held although we were told that draft minutes had been prepared. It does not seem that any of the matters set out in O 34 r 2(2) were properly addressed. In view of the shortcomings in the manner in which this litigation was conducted, the omission to comply with the rules was serious and cannot be condoned.

[9] On 16 March 2004 the action came on for hearing before Singh J. The first witness was the Respondent. She told the court that she had been married to the deceased for 40 years. He was aged 63 at the time of his death. He was a farmer and supplied substantial quantities of dalo and ginger to Wah Zing. She herself also sold crops from the farm at the Suva market. She did not see the accident. After the death of her husband she returned to her village. There was no one left to farm the deceased's land.

[10] The second witness was the deceased's daughter Makereta, aged 25 at the time of her father's death. She lived on the farm with her father and mother. She saw the accident occur. Her father was standing in the road talking to her brother, a bus driver, who was sitting at the wheel of another bus parked at the bus stand. Suddenly a bus AY 192 with the words "George Transport Limited" came "at speed" and hit her father. He was lifted up into the air and thrown down to the ground by the impact. Part of this evidence was corroborated by an independent witness Salote Moce who was a passenger on the George Transport bus. She said that the bus was travelling at high speed that morning. The driver thought he was late. The bus did not slow down as it approached the bus station.

[11] The sixth witness called was the deceased's son who was talking to his father at about the time the accident occurred. Strangely, he did not see the actual impact between his father and the George Transport bus. His estimate however was that the George Transport bus was travelling at about 30–40 kph in an area of the bus stand where the speed limit is 5 kph. When the George Transport bus came to a halt he left his own bus and found his father lying on the road.

[12] The fifth witness was an officer of the Land Transport Authority. His evidence was that while vehicle AY 192 was included in the George Transport road service licence, its owner was recorded as being City Transport. Further, evidence from that witness and from the sole defence witness revealed that the distinction between the two named companies was not of any great relevance: they were sister companies with the same address, postal box, telephone number and bank account.

[13] The judge's principal findings of fact were:

(a) that the A2 was the driver of AY 192 which had "George Transport Limited" painted on its side and which was driven into collision with the deceased on the day in question;

(b) that George Transport Ltd was the owner of AY 192;

(c) that the cause of the accident was the speed at which AY 192 was being driven by the A2 and the A2's inattention to the presence of the deceased on the road;

(d) that although the deceased had not stepped into the path of AY 192 his presence in a bus lane was inherently unsafe and accordingly he was 50% responsible for his own death;

(e) that the Respondent and her daughter collectively had an annual dependency amounting to $4560 or 60% of deceased's annual income which was put at $7600; and

(f) That the appropriate multiplier, given the deceased's age, occupation and state of health was six.

[14] Damages were awarded under the following heads:

(a)	Loss of expectation of life	2500
(b)	Funeral expenses	2000
(c)	Pain and suffering	1000
(d)	Pre judgment loss of earnings	12,160
(e)	Post judgment loss of earnings	5200
(f)	Loss of consortium	2500
(g)	Interest on (b) and (d) at 5% per annum for 21 months	1239

Total. *$36,599*

[15] In view of the finding of contribution, the award was reduced by 50 per cent. Judgment was therefore entered for the sum of $17,049.50 together with costs assessed at $2200.

[16] The first ground of appeal was that the trial judge erred in law and in fact in holding that bus AY 192 was owned by George Transport at the material time. Given the very close relationship between George Transport Ltd and City Transport Ltd, the inconsistency between the road service licence and the ownership register and the undisputed fact that AY 192 had the words "George Transport Limited" painted on its sides, we see no reason to question the correctness of the conclusion reached. At the same time we are of the view that the ownership of the bus AY 192 was, in reality, of little consequence in establishing liability in this case.

[17] As has been noted, the statement of defence denied that the A2 was employed by the A1. On the day of the trial, counsel for the Appellants revealed that since the writ was issued the A2 had died. Mr Veretawatini then explained to the court that he was "not going to proceed against the second [Appellant]". He was "only interested in the first [Appellant]. He is only the driver. Not seeking any reliefs against him".

[18] In view of the decision not to seek separate relief against the A2, the question of applying to the court for a change of party by reason of the A2's death did not arise and accordingly the provisions of RHC O 15 r 8 were not invoked. It is for that reason that the action is still intituled as though the A2 were still alive. What is clear from Mr Veretawatini's remarks is that the real relevance of the A2 was that he was the driver of the bus marked "George Transport" which collided with the deceased. In our view, the mere fact that the bus was driven into the bus stand as described by the witnesses gives rise, in the absence of anything to the contrary, to the inference that the bus was being driven "with the consent, concurrence and authority" by *one of* George Transport's drivers. In those circumstances, George Transport became vicariously liable for the negligence of their driver, performing his duties as their servant or agent, irrespective of whether his actual identity was proved and whether or not George Transport Ltd actually owned, as opposed to operated, the bus in question. The first ground of appeal fails.

[19] The second ground of appeal was that the judge erred in holding that the description of the Respondent as "intended administratrix" was "proper". Paragraphs 1 and 2 of the statement of claim both stated that the Respondent was the administratrix of her husband's estate. Neither paragraph was denied in the statement of defence. A copy of the letters of administration granted by the High Court on 18 February 2003, that is 22 months before the writ was issued, was produced as Ex 1 at the hearing without objection. A copy of the letters of administration was discovered by the Respondent. It is apparent that the word "intended" appeared as a result of a clerical error. In para 1 of the A1's submissions to the High Court it was conceded that the letters of administration had been granted to the Respondent. It was not suggested that the Appellants were in any way prejudiced by the clerical mistake. In our view, there is no merit whatsoever in this ground of appeal which is dismissed.

[20] The third ground of appeal arises from the failure of the Respondent to plead the Compensation to Relatives Act and the failure to comply with s 9 of its provisions.

[21] Section 2(5) of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act is relevant. It provides that:

> the rights conferred by this Act 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 Act …

[22] The trial judge took the view that the Appellants could have been left in no doubt by para 13 of the statement of claim that a claim was being advanced under the Compensation to Relatives Act. Given that relief under the Miscellaneous Provisions Act is additional to relief conferred by the Compensation to Relatives Act we agree that it was open to the court to award relief under the latter Act. The details of the award are however of some concern.

[23] As has been noted, both the deceased and his wife were elderly. Their daughter, who was then the only child of the family still living at home, was aged 25 when the accident occurred. If s 9 of the Compensation to Relatives Act had been complied with then the justification for the suggested dependency would have become apparent. It goes without saying that a dependent is a person wholly or in part dependent upon the means of another, in this case, the deceased. While there is no fixed limit to a dependency, the circumstances of each case being peculiar, there comes a point at which the courts will no longer find a dependency established. The most common example of this occurring is of course the achievement of independence by a child upon attaining adulthood.

[24] As explained by the Privy Council in *Kassam v Kampala Aerated Water Co Ltd* [1965] 1 WLR 668; [1965] 2 All ER 875, the periods of dependency of dependents of different ages are likely to vary since not all dependents will remain dependent for the same length of time. In the present case, the wife's dependency would obviously have continued until the end of the deceased's working life. She really had no realistic alternative to dependence upon him. The daughter's dependency would, however, in all probability have ended either with her marriage or employment in due course. In our view, therefore, the daughter's dependency was not the same as that of her mother and the judge erred in treating them equally.

[25] The next matter which must be considered is the multiplier. The final ground of appeal suggests that a multiplier of six was, given the age of the deceased, excessive.

[26] As explained in *Cookson v Knowles* [1979] AC 556; [1978] 2 All ER 604, the pecuniary loss of the dependents must be split into two parts, the first relating to the period before the trial and the second to the period after the trial. At the time of his death the deceased was aged 63. Some three-and-a-half years later, at the date of the trial, he would have been sixty-five-and-a-half. The Respondent's date of birth was not revealed but by the time of the trial the daughter had reached 30. Whether or not she still remained unmarried was not revealed. She said she had returned to the village.

[27] No detailed evidence was placed before the court to assist it to determine the appropriate multiplier. The judge however pointed out that the deceased was healthy, that there is no such thing as a retiring age for farmers in Fiji and that the deceased would probably have gone on working for the rest of his life.

[28] The leading Fiji authority on the general approach to the assessment of damages for personal injuries is *Attorney-General v Edward Broadbridge* [2005] FJSC 4 and three Fiji cases offer some guidance on the appropriate multiplier to be taken on the absence of actuarial evidence. In *Josefa Sigavolavola v Gyan Mati* [1986] FJCA 14 a multiplier of 15 was applied in the case of a healthy male aged 30. In *Hari Pratap v Attorney-General* [1993] FJCA 24 a multiplier of five was applied in the case of a 54-year-old male. In *Attorney-General v Aliana Kotoiwasawasa* [2003] FJCA 56 a multiplier of four was applied in the case of a 58-year-old man due to retire in 7 years time.

[29] In our view, the multiplier of six here taken was too high. As has been seen, the earnings loss flowed from the crops which the deceased harvested from his land and supplied to his wife and to Wah Zing. While the judge found the loss claimed to be exaggerated he nevertheless accepted a substantial figure of 6–7 tonnes of crops per annum. In our view, there is little likelihood that a 63-year-old man would have been able to continue harvesting crops and generating income in this quantity for more than 5 years at the most. In our view, the appropriate multiplier is three. We do not think that the daughter's dependency continued after the date of the trial, and accordingly, the consequences of the breach of s 9 of the Compensation to Relatives Act do not arise for consideration (but see *Cooper v Williams* [1963] 2 QB 567; [1963] 2 All ER 282).

[30] Two other matters, though not the subject of appeal, must also be considered. The first is the award of $2500 for loss of consortium. In *Best v Samuel Fox & Co Ltd* [1952] AC 716; [1952] 2 All ER 394 the House of Lords accepted that the ancient action *per quod consortium et servitium amisit* which provided a husband with a remedy in damages for the loss of his wife's society or services was both anomalous and outdated. Furthermore, it also clarified that the action had never been and was not open to a widow. The award made in this case cannot stand and must be set aside.

[31] The final matter is the question of contributory negligence. We approach this question with a degree of reluctance since the matter was not raised by Mr Veretawatini either on appeal or in argument. At the same time, Mr Singh did not dissent when we reminded him that it is the duty of this court "to ensure the determination on the merits of the real question in controversy between the parties" by "making any order as the court thinks just" whether or not a Respondent's notice has been given: r 22(4) of the Court of Appeal Rules.

[32] As has been noted in [13] the judge found that the cause of the accident was the driver's speed and inattention. He made a specific finding that the deceased had not stepped into the path of the oncoming bus. At the same time he found that by standing in the bus lane talking to his son he had "ignored some very basic rules of his own safety". It was for this reason that the deceased's contribution to the cause of the accident was put at 50 per cent.

[33] Although contributory negligence was pleaded, the Appellants, upon whom the onus rested, called no evidence in support of their claim. Much of the evidence called by the Respondent was undisputed, including evidence that the oncoming bus was travelling "at speed" in a 5 kph restricted area. There was also evidence, again undisputed, that several other buses had driven past the deceased without incident. We may be permitted to know that the Suva Bus Stand is a very busy place with many pedestrians and wheel barrow boys criss crossing the driveways. That is why it has a 5 kph speed limit. In our view had the A2 been

driving with due care and attention he would never have collided with the standing deceased. While the deceased by standing in the driveway was undoubtedly responsible to some extent for the misfortune which befell him we are of the view, that the proper contribution should be 10 per cent.

[34] The first three grounds of appeal fail. The fourth succeeds and a multiplier of three is substituted for six. The percentage of contribution is varied from 50% to 10 per cent. The award for loss of consortium is set aside. In the result, we make the following award:

(a)	Loss of expectation of life	2500
(b)	Funeral expenses	2000
(c)	Pain and suffering	1000
(d)	Pre-Judgment loss of earnings	7980
(e)	Post-Judgment loss of earnings	5700
(f)	Interest on (b) for 21 months	175
(g)	Interest on (d) for 21 months	698
		20,053
		less 10% 2005
		Total: $18,048

There will be no order as to costs.

Appeal dismissed.