

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APLA

C.P. 139/96

IN THE MATTER

of The Electric Power Corporation Act 1980:

A N D:

SATUI ALOVAO NONU of Vailele, Father:

Plaintiff

A N D:

ELECTRIC POWER CORPORATION established pursuant to Section 4 of the Electric Power Corporation Act 1980:

Defendant

Counsel: K Sapolu for defendant  
T Malifa for plaintiff

Hearing: 31 January 1997

Judgment: 5 February 1997

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JUDGMENT OF SAPOLU, CJ

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This is an application made on behalf of the defendant to strike out the statement of claim filed on behalf of the plaintiff as disclosing no cause of action.

The facts as pleaded in the statement of claim may be briefly stated as follows. The deceased was a 12 year old boy. On or about 17 November 1995 in

the evening, he went with his little sister to collect firewood inland of Vaitele. Along the roadside they came across a fallen tamaligi tree which was partly dried. The deceased then climbed the tamaligi tree to get firewood. Unknown to him there were electric lines from the nearby power poles which touched the tamaligi tree. He was electrocuted by those electric lines and died instantly. His body turned black and was seen hanging from the tamaligi tree.

On those facts, the deceased's father has brought the present action in negligence against the defendant, the Electric Power Corporation. However the way the claim for damages is framed shows that the deceased is claiming for loss of life, loss of family, loss of companionship and loss to society. It is also complained that the defendant did not help with the deceased's death or with the plaintiff and his family up to now.

Counsel for the defendant submitted that on the facts as pleaded in the statement of claim, the action by the plaintiff cannot be maintained either at common law or under the provisions of the Fatal Accidents Act 1974 or the Law Reform Act 1964. She also pointed out that the plaintiff's action does not plead or refer to the Fatal Accidents Act 1974 or the Law Reform Act 1964 but seems to be founded purely on the common law tort of negligence. She also submitted that the heads of damage claimed, namely, loss of life, loss of companionship, loss of family and loss to society are not recoverable.

Counsel for the plaintiff, on the other hand, did not refer to the Fatal Accidents Act 1974 or the Law Reform Act 1964 but maintained that the plaintiff's action is founded on the common law tort of negligence. He did not dispute the

heads of damage expressed or implied in the statement of claim as articulated by counsel for the defendant. His position was that the jurisdiction to strike out must be sparingly exercised, and only in a clear case where the plaintiff's claim is so clearly untenable that it cannot possibly succeed should it be struck out.

I refer now to the two common law rules which are relevant in this case. The first is expressed in the Latin maxim : *actio personalis moritur cum persona*. That means a personal action dies with the person. In *Rose v Ford* [1937] AC 826 at 841 Lord Wright refers to the maxim *actio personalis moritur cum persona* as being :

"the rule preventing the prosecution of a claim in tort for personal injuries where the person who would otherwise be plaintiff or defendant in an action has died".

And in *Woolworths Ltd v Crotty* (1942) 66 CLR 603 at 613 Latham CJ in the High Court of Australia stated :

"The effect of the maxim *actio personalis* in relation to actions of tort was that the personal representatives of the deceased victim of a tort had no remedy in respect of the pain and suffering on the death of the deceased".

So the general position at common law, at least with regard to actions in tort a deceased plaintiff could have brought, is that any personal action dies with the deceased and does not survive for the benefit of his estate. So the personal representatives of the deceased cannot sue for a personal cause of action which was vested in the deceased before his death for the cause of action, if it was

still alive at the death of the deceased, has gone to the grave with the deceased.

There are exceptions to this common law rule, for instance, actions in contract : see for example *Quirk v Thomas* [1916] 1 KB 516; *Woolworths Ltd v Crotty* (1942) 66 CLR 603. But we need not concern ourselves with the exceptions as none applies here.

The second common law rule was that laid down in the case of *Baker v Bolton* (1808) 1 Camp 493. In that case a husband sued the proprietors of a stage coach in negligence for damages caused him by the death of his wife which resulted from the negligent driving of the driver of the coach. Lord Ellenborough CJ in directing the jury laid down the rule in these terms :

"In a civil Court, the death of a human being cannot be complained of as "an injury; and in this case the damages, as to her [the wife], must stop "with the period of her existence".

That rule was subsequently reaffirmed by the House of Lords in *Admiralty Commissioners v SS Amerika* [1917] AC 38. In that case a steamship ran into and sunk a submarine resulting in the crew of the submarine being drowned. A third party, the Admiralty Commissioners, then unsuccessfully brought an action claiming damages for moneys to be paid to the relatives of the drowned crew. On appeal to the House of Lords, the appeal was dismissed because of the common law rule as stated in *Baker v Bolton*.

The effect of that rule was that the death of the deceased did not give

rise to a cause of action in another person. It means that if the deceased had any dependents at the time of his death, those dependents could not sue for any loss to them arising from the death of the deceased. In relation to tort, Latham CJ in *Woolworths Ltd v Crotty* explained the position in these terms :

"The rule in *Baker v Bolton* applies to prevent an action by A against B for damages for the death of C, caused by the tortious act of B. In other words, the rule dealt (so far as the subject of tort was concerned) with the question of the right of a third party to recover compensation for loss incurred by him as the result of the death of a person killed by the defendant's tortious act : see *Pollock on Torts*, 14th ed (1939) "p.63".

Thus at common law, the present action in the tort of negligence for damages cannot be maintained. Firstly, the present plaintiff cannot sue the defendant as personal representative of his deceased son because of the rule expressed in the maxim *actio personalis moritur cum persona*, which means a personal action dies with a person. And secondly, he cannot sue as a third party for any loss occasioned to him by his son's death because of the rule in *Baker v Bolton*. I therefore accept the submission from counsel for the defendant, that the present action cannot be maintained at common law and reject the implied assertion to the contrary from counsel for the plaintiff.

That brings me to the Fatal Accidents Act 1974 and the Law Reform Act 1964. These two legislations have reformed the common law in this area. The provisions of the Fatal Accidents Act 1974 changed the common law rule in *Baker v Bolton* by giving a new right of action to a limited class of third persons to claim for damages in circumstances where if the deceased had survived and not killed, he, himself, could have sued for his injury. Section 3 of the Fatal Accidents Act

1974 provides :

"Where the death of a person is caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured, and although the death was caused under such circumstances as to amount in law to a crime".

An action provided in section 3 of the Act shall be brought in the name of the executor or administrator of the deceased as required by section 5 for the benefit of the wife, husband, parent and child of the deceased as provided in section 4. But where there is no executor or administrator, or if he fails to bring an action within one year after the death of the deceased, then an action may be brought by and in the name or names of all or any of the persons for whose benefit such action could have been brought.

The effect of these provisions of the Fatal Accidents Act 1974 is thus to change the rule in *Baker v Bolton* by creating a new right of action whereby third parties may bring an action for damages for loss incurred through the killing of the deceased. In other words a dependant of the deceased may now bring an action for loss incurred as a result of the killing of the deceased. Damages which are recoverable are to be based on the amount of pecuniary benefit which a party might reasonably have expected to derive if the deceased had not died as provided in section 5. In other words pecuniary loss for which a party has a reasonable expectation of deriving if the deceased had not died are recoverable.

On the facts as pleaded in the statement of claim in this case, it cannot

be said that the plaintiff has been deprived of any pecuniary benefit which he had a reasonable expectation of receiving if the deceased had not died. The facts do not show that he has incurred any pecuniary loss through the killing of his son. Given that the son was 12 years of age at the time of his death, it can hardly be said that the plaintiff was a dependant of his son: the reverse would be the more realistic situation. The present action, therefore, cannot be maintained under the provisions of the Fatal Accidents Act 1974.

The damages claimed such as the deceased's loss of companionship, loss of family and loss to society are clearly non-pecuniary losses, that is, assuming all those losses are recognised by law. But the deceased cannot himself claim for those losses under the Fatal Accidents Act 1974 because he is dead. It also appears that the only kind of loss whose recovery is contemplated by section 5 of the Act is pecuniary loss. In other words non-pecuniary losses are not recoverable under the Fatal Accidents Act 1974 as the sole question under section 5 appears to be whether the plaintiff had a reasonable expectation of deriving a pecuniary benefit or benefit reducible to money if the deceased had not died.

I turn now to the Law Reform Act 1964. It must be pointed out that this Act does not create a new right or cause of action for death itself. In respect of tort, what the Act has done is to provide for the survival of causes of action which were vested in the deceased before he died. Defamation and other actions which are specified in the proviso of section 3(1) are exempted from the application of the Act. Section 3(1) of the Act provides :

"Subject to the provisions of this Part of this Act, on the death of any person after the passing of this Act all causes of action subsisting

"against or vested in him shall survive against or, as the case may be, for the benefit of his estate.

"Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims under the Divorce and Matrimonial Causes Ordinance 1961 for damages on the ground of adultery".

As it would be seen from the wording of section 3(1), that provision is a substantial modification rather than a complete repeal of the common law rule expressed in the maxim *actio personalis moritur cum persona*. Section 3(2)(a) then excludes recovery of exemplary damages in a survival action. And section 3(2)(c) provides that where the death of the deceased has been caused by an act or omission which gives rise to the cause of action, damages must be calculated without reference to any loss or gain to his estate consequent on his death, except a sum for funeral expenses. This must mean that reasonable funeral expenses are recoverable.

On the facts as pleaded in the statement of claim it is clear that the deceased child died when he was electrocuted. So there was no cause of action in tort, be it negligence, which was vested in him before his death and which could survive for the benefit of his estate. The child died upon electrocution and the defendant has brought this action in negligence for the death of his son by that electrocution. But there is no common law action for death and the provisions of the Law Reform Act 1964 have not altered the common law position in that regard. For the plaintiff's action to succeed it must come within the terms of the Act which requires the cause of action to have been vested in the deceased prior to his death. That is not the position here.



As to the damages claimed, the statement of claim says that the deceased claims for loss of life, loss of companionship, loss of family and loss to society. This part of the claim should be made by the plaintiff as personal representative and not by the deceased for he is dead. In any event there is no action for death at common law. And the Law Reform Act 1964 has not altered that position. So the claim for loss of life cannot be maintained. The other losses claimed must have occurred at the point in time of the deceased's death. So even if it is assumed that there is a cause of action for the damages claimed, that cause of action must have only arisen when the deceased ceased to exist, that is, dead. But section 3(1) of the Law Reform Act 1964 only preserves causes of action which were vested in the deceased, which means while the deceased was alive and before his death occurred. It must also be noted that section 4 of the Act provides :

"Where by virtue of this Part of this Act a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person shall not include any damages for his pain or suffering, or for any bodily or mental harm suffered by him, or for the curtailment of his expectation of life".

The damages whose recovery is excluded by section 4 are clearly non-pecuniary. In a sense they are losses personal to the deceased and do not represent losses to the estate for which a personal representative may sue for the benefit of the estate.

There is also no claim for reasonable funeral expenses, even though section 3(2)(c) permits such a claim. There are no facts pleaded in respect of funeral expenses. So it is not known whether there were any such expenses. I therefore

cannot deal with a claim which is not before the Court. Whether there should be a fresh claim for reasonable funeral expenses is a matter for counsel for the plaintiff to consider. In the circumstances I consider that it would not be right to allow the plaintiff to amend his statement of claim so that he can plead a fresh cause of action. See *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316, at 323-324 per Tipping J.

In all then, I am of the clear view that the cause of action in negligence, as pleaded in the statement of claim, is so clearly untenable that it cannot possibly succeed. The claim is therefore struck out.

Counsel for defendant to submit memorandum as to costs within 7 days if she wishes to do so.

*TEM Sapala*  
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CHIEF JUSTICE