

# OSEA GATA

v.

## FILIFE BABA & ANOTHER

[HIGH COURT, 1993 (Pathik CR), 28 June]

### Civil Jurisdiction

*Damages- death of young man- assessment.*

The deceased was a 28 year old bachelor with no issue who lived at home with his parents. The Court assessed the liability for damages under the two relevant statutes on the basis of the established dependency.

Cases cited:

*Austin London Transport Executive* (1951) C.A. NO. 293

*Barnett v Cohen* [1921] 2 KB 461.

*Blake v Midland Rly Co.* (1852) 18 Q.B. 93

*Brennan v Johnson and Nephew Ltd.* [1952] 1 WLR 582.,

*Davies Powell Duffryn Associated Collieries Ltd* [1942] A.C. 601.

*Dolbey v Goodwin* 1955.

*Franklin v South Eastern Rly Co.* (1858) 3 H & N 211

*Hetherington v North Eastern Rly Co.* (1882) 9 QBD 160

*Morgan v Scoulding* [1938] 1 All ER 30

*Piggot v Fancy Wood Products Ltd* (January 31, 1958 Leeds Assizes)

*Taff Vale Rly Co. v Jenkins* [1913] AC 1

*Wathen v. Vernon* (1990) RTR 471

*J. Flower* for the Plaintiff

*J. Semisi* for the Defendant.

Assessment of damages by the High Court.

**Pathik CR:**

In this case the Plaintiff sues as Administrator of the Estate of his son the deceased Sunia Uluiviti Cagiliwaliwa under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27 and under the Compensation to Relatives Act Cap. 29.

The claim arises from an accident on 25th February, 1988 on Reservoir Road, Tamavua, Suva. The facts of the case are set out in the Statement of Claim and suffice it to say that the First Defendant was the registered owner of a Daihatsu carrier Registered Number BZ394 and the Second Defendant was employed as his driver.

A On the 25th February 1988 Sunia Uluiviti Cagiliwaliwa (hereinafter referred to as "the deceased") then aged about 28 years was a passenger in the said carrier driven by the Second Defendant.

As a result of negligent driving on the part of the driver the said carrier went off the road and overturned as a result whereof the deceased was thrown off the carrier thus receiving injuries; the deceased died instantly.

B The second defendant was charged with the offence of causing death by dangerous driving on 8th February, 1990 in the Suva Magistrates Court (Traffic Case No. 1464/88) and was on his own plea of guilty convicted and fined \$75.00 in default 75 days for dangerous driving and \$20.00 in default 20 days for driving without a valid driving licence.

C The Writ of Summons is dated 30th May, 1991 and was issued on 4th June, 1991. Judgment in Default of Defence was entered on 4th December, 1991 for special damages in the sum of \$1115.00 being for damage to "clothing and other belongings" \$100.00 funeral expenses \$915.00 and costs of obtaining Letters of Administration \$100.00 with further damages to be assessed.

D Neither party adduced any evidence. The Plaintiff relied on the Statement of Claim except that at the request of the Court Mr. Flower informed the Court in writing that if the deceased was alive he would have earned a salary of \$10,400 per annum in 1988 initially and would have been earning \$13,684 as per annum today.

E The deceased was at the time of his death a Medical Assistant Graduate from the Fiji School of Medicine having completed a Dental Course and was to take up his first appointment at Lautoka Hospital shortly that year.

The deceased was a bachelor and had no children. He lived at home with his parents.

F Mr. Semisi said that the only thing we have as far as facts are concerned is what is contained in the Statement of Claim in the Writ Summons. He said that one should not be permitted to speculate outside that perimeter.

The issue before me is assessment of damages and I shall now deal with it.

G I have already stated hereabove that judgment in Default of Defence was obtained as special damages in the sum of \$1115.00. Although there is no definition of funeral expenses in Cap 27 it provides in s. 11 that damages may be awarded in respect of the funeral expenses of the deceased person if such expenses have been incurred by the parties for whose benefit the action is brought; it would appear that the test of reasonableness would apply. I allow the said sum of \$915 for funeral expenses as part of the assessment under the head special damages, I also allow the sum of \$100 for damage to clothing and \$100 for expenses in obtaining Letters of Administration.



The right of action under the Compensation to Relatives Act (Cap 29) confers on the near relatives a right which is an independent right, not a continuation of the cause of action vested in the deceased.

A

Section 3 of the Act reads as follows:-

“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 or persons or body of persons, incorporated or unincorporated, 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.”

B

I find that under s.4 of Compensation to Relatives Act Cap 29 the Plaintiff is entitled to the claim as a dependant. In practice, most claims are brought by,, among others, the parents of an unnamed son or daughter who is contributing to their support.

C

The action is based upon financial loss or loss of support and nothing else (Blake v Midland Rly Co. (1852) 18 Q.B. 93). In the case before me the deceased's death was instantaneous after the carrier overturned. Hence there can be no claim for pain and suffering.

D

Under Cap 29 the questions I have to decide are the amount of dependency of the father and the multiplier. The undisputed facts are that the deceased was about 28 years of age and in good health at the time of his death on 25th February, 1988; he lived with his parents; he was a Dental Graduate of the Fiji School of Medicine and was to commence work in his field in 1988 shortly before he died. He would no doubt have contributed substantially part of his future earning to his father for the upkeep of the household. I have evidence before me of the age of the Plaintiff and the amount he would have earned had he been living. The deceased would no doubt have married in due course and his contribution to his father would have reduced as a result.

E

F

On the basis of his potential earning capacity based on the authorities to which I refer to hereafter, the Plaintiff is entitled to damages under the Compensation to Relatives Act as a dependant although the deceased had not commenced employment at the time of his death on 25th February, 1988.

G

The Plaintiff cannot succeed unless he can prove actual dependence on the deceased at or before his death, or a probability that he would have received some support from him in the future if he had lived (Barnett v Cohen [1921] 2 KB 461. A reasonable expectation of pecuniary benefit, as where a child has become an apprentice and may soon be earning wages, is sufficient (Taff Vale

A Rly Co. v Jenkins [1913] AC 1; in one case, where a 17 years old apprentice was killed and his father's health was precarious \$500 was given to the mother for chances of maintenances by the son in the 5 years or so before he would be likely to marry. (Wathen v. Vernon (1990) RTR 471). Total dependence is not necessary and partial dependence, even if it is of a slight and uncertain kind, will be sufficient to sustain an action. Occasional financial assistance by a son to his crippled father has been held to be sufficient (Hetherington v North Eastern Rly Co. (1882) 9 QBD 160).

B It is not necessary for the Plaintiff to prove that he had a right to support by the deceased: what he must establish, as was said in Fanklin v South Eastern Rly Co. (1858) 3 H & N 211, is a reasonable expectation of benefit as of right, or otherwise, from the continuance of the life.

C Assessment of damages under Cap 29 is often difficult and complicated particularly in cases of severe personal injury. In Kemp & Kemp Vol. 1 it is stated that in such cases there are some important heads of damage which defy arithmetical calculation, such as pain and suffering or the loss of amenities. There are so many uncertain and imponderable elements that an accurate arithmetical approach is quite impossible. In Austin London Transport Executive [1951] AC 293 Birkett L.J. referred to this problem in the following words:

E “if some of the matters that the learned judge is asked to take into account seem beyond the wit or wisdom of men to take into account in any sure or certain way what is the learned judge to do? Whatever wisdom he may have he cannot lift the veil of the future and see among the seeds of time which will grow and which will not. He cannot do that. He can only do the best he can.”

F Having determined the dependency the next question is the multiplier. We have the case of a healthy young man with many fruitful years ahead of him. The deceased in all probability have married at the age of 35 years. I would therefore fix the multiplier at 7 years. In Piggot v Fancy Wood Pproducts Ltd (January 31, 1958 Leeds Assizes) where the deceased was aged 21 and who had not completed his University course in teacher training and had not started earning but would have earned the initial salary of about \$650 a year the prima facie award was assessed at \$1200.

G In this case on the basis of salary of \$10,400 per annum in 1988 from the time of his death the deceased would have earned about \$220 per week gross and from that certain deductions for provisional tax etc. would have been made. In my estimation, out of the sum he received by way of salary he would have contributed to his father the sum of \$35 per week. This sum would no doubt have seen reduced or even ceased if the deceased eventually got married. The deceased would in all probability some day have married and would be under



no legal liability to support his father, although in the future, from a sense of moral obligation, he might continue to give his father something, but probably less than he would have contributed in the past Dolbey v Goodwin 1955.

In the circumstances of the case before me one has to speculate as to how long the contribution would be coming into the household. On the facts one has to try to arrive at some figure for the loss which the father had suffered (Morgan v Scoulding [1938] 1 All ER 30). I find that there would have been a weekly dependency of \$35 which comes to \$1,820 annually. Bearing in mind the decision in Brennan v Johnson and Nephew Ltd. (1952) 1 WLR 582., I fix the multiplier at 7.

I therefore give judgment in favour of the Plaintiff in the sum of \$12740 under this head.

As I stated earlier, no question of pain and suffering arises in this case.

As for the loss of expectation of life I assess damages at \$1000 following the decision in Davies Powell Duffryn Associated Collieries Ltd [1942] A.C. 601. This sum will have to be deducted from the claim under the Compensation to Relatives Act.

In the result I allow the sum of \$1000 under Law Reform (Miscellaneous Provisions Act) (Death and Interest) Act Cap 27 and the sum of \$12,740 under Compensation to Relatives Act Cap 29. The sum of \$1000 merges into the latter amount making a total of \$11,740; to this is to be added the sum of \$1115 as special damages. I therefore give judgment in the sum of \$12,855 in favour of the Plaintiff against the defendants. The costs are to be taxed if not agreed.

*(Damages assessed)*