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

CIVIL APPEAL NO. ABU0012 of 2019
(Lautoka High Court Civil Action No: HBC 67 of 2016)

BETWEEN : **1. SUSHILA DEVI SINGH**
2. Al JAMEER ALI

Appellants

AND : **BHAGWATI** of Varavu, Ba, Domestic Duties as the Executrix and Trustee of the **ESTATE OF JAI RAM SHARMA** late of Varavu, Ba

Respondent

Coram : **Almeida Guneratne, JA**
Lecamwasam, JA
Gunawansa, JA

Counsel : **Ms K. Baleiwai for the Appellants**

Mr V.S. Sharma for the Respondent

Date of Hearing : **13th September, 2022**

Date of Judgment : **30th September, 2022**

JUDGMENT

Almeida Guneratne, JA

[1] This is an appeal against the Judgment of the High Court by the Defendant – Appellant (hereafter referred to as the Appellant). By that judgment the High Court held that, the Second Appellant whilst driving negligently the bus in question owned by the 1st Appellant collided with the deceased causing his death.

[2] The action was filed by the Plaintiff – Respondent (hereafter referred to as the Respondent) as the Executrix and Trustee of the Estate of the said deceased.

[3] The judgment is at pages 9 to 39 of the Copy Record (CR) and the grounds of appeal are contained in pages 1 to 3 (CR). The Respondent has also urged a cross notice and grounds of appeal.

[4] Before I test the judgment against the grounds of appeal and consider the submissions made by Counsel, I wish to make a brief observation on one of the Orders made by the learned Judge in his judgment.

[5] In Order [G] learned Judge ordered that, "*the plaintiff shall pay unto the 3rd defendant $1,500.00 being the summarily assessed costs."*

[6] However, in Order [B] it was ordered that, *the "action against the 3rd Defendant fails and stands dismissed."*

[7] The 3rd Defendant was the Ba Town Council at the trial and has not been made a party respondent to this appeal.

[8] Consequently, upon this Court seeking the views of both Counsel on the said Order, learned Counsel for the Respondent submitted that, he was not supporting the said order [G].

[9] Accordingly, we strike off the said order.

Consideration of the grounds of appeal, the submissions made by Counsel (both written and oral), the impugned judgment and the discussion thereon.

[10] The Appellants have urged eleven (11) grounds of appeal. They fall into three main parts namely, (a) on liability (b) alternatively on liability (subject to contributory negligence) and (c) on quantum.

[11] The submissions and counter submissions were also made according to that classification which made the task of this Court that much easier.

[12] Consequently, I do not propose to consider and discuss each ground of appeal raised by the Appellants seriatim but cumulatively in the ensuing discussion under the said "*three main parts"* (supra, para.[10])

On liability – Primary finding by the High Court on negligence

[13] Learned Counsel for the Appellant argued, (which she identified as the key issue on appeal), that, the learned Judge failed to consider the evidence of DW2 and DW3 at all on how the accident was caused and in doing so, the Judge erred.

What the learned Judge noted on the evidence of DW2 at pages 19 to 20 of the Copy Record

> *"According to DW-2 she was one of the passengers in the bus in question. When she was asked to describe as to what she saw and as to how the accident occurred, she said the victim was in front of Moto Road; already crossed and standing on the mark carrying one sack. The bus was far away and the driver having seen him beeped the horn but the victim seemed like didn't hear. Victim was looking on his opposite side; and he didn't look at the bus and was trying to go to the other side of the road. She further stated victim did not look at the driver of the bus, that the driver tried to (swerve sic.) and also veered the bus on his right side, but the victim still kept on crossing.*
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> *In her further evidence, she went on to say that the deceased was already standing on the white mark in the middle of the road when she first saw him from the bus. Then under cross examination, she was referred to her statement (Exhibit DE4) wherein she had stated that the deceased was just taking steps from the left hand side footpath to cross the road when the driver first beeped its horn. She could not confirm how long the bus took to stop after hitting the*

deceased. However, she emphasized that the bus stopped same time and later in cross examination stated that it only moved "a little bit" further. DW-2 in cross-examination stated further that the driver applied the brakes and whilst applying the brakes it went to the oncoming vehicle lane. She also advised the Court that the speed limit of the bus was 60-70 km/hr. She advised the court that she did not see the deceased's body after the accident; however in her statement to the police she has said she saw "the man was lying in front of the bus." When put to her that her statements are contradictory, she said "I am not sure if I saw." In view of the contradictions DW2's evidence should be treated with caution."

[14] Whatever red-herrings DW2 may have drawn in the said evidence, in view of the last response (found at the bottom of that evidence when she said "*I am not sure if I saw,"* could the Judge have been faulted when he said DW2's evidence should be treated with caution? I think not.

Re: the evidence of DW3 and what the learned Judge noted – page 20 to 21 of the Copy Record

"……his car approached the scene of accident; the deceased was standing on the mark to cross the road and looking at him. He said that the bus was a bit far when it first beeped its horn to the deceased. He then stated that the deceased was hit by the left hand side of the bus when he tried to cross the road. He said the deceased's leg go stuck in the tyre of the bus and he was going along the tyre as the bus was moving.

Under cross-examination, he stated that the police statement was read over to him and translated to him as well. He admitted that the deceased was is in the middle of the road and that he felt that he would cross the road. He stated further that he would have done the same thing as the bus driver if he was in that place. However, he admitted that after he saw the deceased on the middle of the road looking at him he slowed down his car to 20 km/hour. He also admitted that there was nothing blocking his view and that both he and the driver had a clear view of the road. In examination in chief he said the deceased was crossing, while in cross-examination he said the deceased was running.

He was referred to his Police Statement on 18th October, 2013 in which he stated that the bus was 40 meters away from the deceased when it first tooted the horn. He then informed the court that the speed limit was between 50 – 60 km/hr. He did not see any cones on the road. He agreed that the bus was far from the deceased when it tooted the horn. DW3 could not confirm when and where the bus had stopped after hitting the deceased since he had already past the bus by then. He confirmed that the deceased was hit by the front left side in line with front head light of the bus."

[15] The learned Judge after recounting the said evidence, finally noted that, DW3 could not confirm (the emphasis is mine) when and where the bus had stopped after hitting the deceased since "*he had already passed (sic) the bus by then (and he) confirmed that the deceased was hit by the front left side in line with the front head light of the bus*."

[16] Against those demonstrable infirmities in the Appellant's defence, the learned Judge, having gone through the Plaintiff – Respondent's evidence (oral re: PW1 to PW6 and the documentary re: PE1 to PE6) and the Defendant – Appellant's aforesaid oral evidence and documentary evidence (DE1 to DE5) vide: at page 21 of the Copy Record), in his ensuing analysis, noted the following at page 23 of the Copy Record.

> *"Learned counsel for the defendants takes up the main defence through his argument about the plaintiff's failure to adduce any evidence to demonstrate as to how the accident occurred and to produce a single eye witness to the collision.*
>
> *The above arguments of the learned counsel for the defendants, in my view, holds no water in the light of the unequivocal admission of the defendants about the collision in paragraph 2 of the Statement of Defence and in the agreed fact number 6 found in the minutes of pre-trial conference.*
>
> *The above admission in the statement of defence and in the agreed issue number 6, as to the occurrence of collision, will, undoubtedly, absolve the plaintiff from adducing evidence of any eye witness to prove the very act of collision. It is to be noted that the evidence of the defence's main witness, Pundit Atish Sharma (DW-3), who testified to the effect that he saw the very act of collision, seems to have escaped the attention of the learned defence counsel. This witness, in his examination in chief, under cross examination and re-examination, has clearly stated that he saw for his own eyes the very act of collision and how the victim struggled at that moment. (vide pages 124, 133)."*

[17] Having noted so, he recounted DW3's evidence which was to the following effect.

> *"Judge:* *You did see the actual impact?*
> *Witness:* *Yes, My Lord. I saw, that's why I am telling My Lord; whatever I have seen with my own eyes. I can't forget that scene, my Lord; it is still clear in my mind after 5 years.*
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> *Vide page 141:*

Q: One last question Mr. Sharma; you said you were the only eye witness. What makes you think that you were the only eye witness?

A: My Lord, I was going from in front, and I saw a clear view of what had happened. It's only me who can see it clearly. Even the driver couldn't have seen where he got bumped, bumper or light. It's only me who saw it clearly."

[18] The learned Judge consequently concluded that, *"In view of the above, the learned defence counsel's argument, that there was no eye witness to the collision fails and this need not necessarily debilitate the plaintiff's case.*" (<u>*vide*</u>: at page 24 of the Copy Record).

<u>Determination on the aspect of primary liability (on negligence)</u>

[19] I have no hesitation in rejecting the Appellant's arguments on that primary issue. Indeed, I could not see any error, misdirection (non-direction), leave alone anything perverse in the learned Judge's analysis of the evidence and facts and the application of legal principles thereto.

<u>Re: The Appellant's alternative cause on liability based on contributory negligence</u>

[20] The learned Judge dealt with the matter thus:

"59. DW-2, who was a passenger in the 3rd front seat of the ill-fated bus, stated that she saw the deceased, having already crossed the lane that leads to Moto Road, was standing on the mark(line) that separated that lane and the bus lane toward Lautoka. She said "He was carrying one sack in his right hand. When the bus was bit away, the driver saw him and beeped the horn but the victim seemed like he didn't hear, kept crossing the road and the driver veered the bus to his right hand side." She further confirmed that the victim was looking on his opposite side and he didn't look at the bus.

60. DW-2 in his cross examination was contradicted with her statement to the police, where she had told the police that the victim was taking steps to the road from the foot path on the left side of the road. In deciding the contributory negligence, this need not be considered as a major contradiction since it was still wrong on the part of the victim to cross the road irrespective of the fact whether he crossed from the foot path (extreme left) or from the

line that divided the bus lane and the lane that leads to the Moto Road. However, it has to be borne in mind that for the victim to stand on the line, he should have first stepped in to the Moto lane from the foot path.

61. The DW-3, who was in his car on the right lane driving towards Ba around 70 meters ahead from the bus, has in his evidence confirmed this position that the victim was standing on the line and looking at him and not at the bus that was coming toward the victim. DW-3 also confirmed that the victim was carrying the sack on his right shoulder. From this, an inference can be drawn that since the sack was on the right shoulder, the victim could not have been in a position to turn his head towards his right side from where the bus was approaching towards him at a high speed.

62. It is also in evidence that the victim, when crossing the road, did not follow the basic rule of looking at both sides of the road. The plaintiff has not led any contrary evidence to show that the victim had taken sufficient precaution for his own safety in order to avoid any contribution on his part. Accordingly, on the evidence adduced by the defence, I am satisfied that the victim did contribute at a certain degree for the accident that claimed his life as a result."

[21] I could not find any error or misdirection in the learned Judge's discussion on the issue. He has carefully analysed the evidence and arrived at his conclusion in holding that the victim contributed 10% to the accident. I affirm the learned Judge's finding on that and reject the Respondent's ground of appeal 2 contained in his Notice of Appeal dated 21st March, 2019.

Re: The Quantum of damages awarded by the Judge

[22] The Appellant has put in issue the quantum awarded for

(a) loss of earnings from the date of death until the date of judgment;

(b) on the award of general damages.

[23] In that regard first, on (a) above, I paid regard to what Appellant's Counsel submitted which I shall re-cap as follows:-

"96. The Learned trial Judge almost verbatim applied the submissions of the Respondent on quantum of damages contained at pages 172 to 176 of

the Record. The Learned Judge's judgment on quantum at pages 35 to 39 of the Record are almost a mirror image, however with slightly lower numbers. Unfortunately, the Respondent made errors in law and in fact in her submissions on quantum (as it did on liability) and the Learned Judge adopted it without critical analyses.

97. Remarkably the Respondent in its submissions before the High Court relies on seeking special damages for loss of earnings from date of the accident until the date of trial. This head of damages is used in personal injury cases. Ours was not a personal injury case. At page 172 of the Record, the Respondent relies on the case of British Transport Commission v Gourley [1956] AC 185.

98. Mysteriously using the same case precedent of British Transport Commission, the Learned trial Judge in his Judgment at page 35 of the Record verbatim deals with the damages in the present case as though it was a personal injury case.

99. Sadly the late Mr Jai Ram had instantly died after the accident. His estate cannot claim and be awarded damages for loss of earnings from date of his death until the date of trial.

100. Following on, Ground 6 of the Appeal Ground is that the Learned Judge failed to assess damages under the heads of damages in the Compensation to Relatives Act and the Law Reform (Miscellaneous Provisions), (Deaths & Interest) Act. The Learned Judge awarded the Plaintiff 252 weeks for loss of earnings, that is about 4.85 years or rounded off to 5 years. This 252 weeks or 5 years was derived based on the date of death until the date of judgment. There is no such award under the Law Reform (Miscellaneous Provisions) (Death and Interest Act) from the date of death until the date of judgment, when a person dies.

101. This is particularly so when the court is separately applying a multiplier based on the age of the deceased when he dies – as the court did in this instance. The Learned Judge applied a separate multiplier of 10 under general damages. Effectively the Learned Judge gave the Plaintiff a multiplier of 14.85 (10 plus 4.85) rounded off to 15."

(vide: Appellant's Counsel's written submissions dated 8th November, 2019)

[24] I gave my mind to what the Appellant has submitted at para.98 referred to above – drawing a distinction between "*a personal injury case*" where damages are claimed in consequence thereof (the injured person, living – at a time of the accident – therefore

claiming compensation for loss of earnings for his dependents) in contrast with someone whose life is snuffed out (thus, not being able to earn any longer).

[25] I see that as a distinction without a difference.

[26] Consequently, I condone the learned Judge's approach on the said issue and reject the Appellant's submissions.

In Re: (b) referred to in paragraph 22 (b) above - the award of general damages

[27] As Appellant's Counsel has submitted thus:-

> *"107. Ground 9 of the Appeal Grounds is based on the Learned Judge using a multiplier of 10 for general damages (or 14.85 circa 15 if general damages is combined with loss of earning from date of accident to date of trial); when case precedents establish that an appropriate multiplier to be applied at the age of 45 old is between 7 and 8:*
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> *a) Wati –v- Buliruarua [2005] FJHC 128; HBC 0070.2004 – 42 years – multiplier of 10.*
> *b) Silatolu –v- Prasad [2014] FJHC 899; HBC 20.2013 – 48 years – multiplier of 6.*
> *c) Singh –v- Bui [2007] FJCA 2; ABU 0122.2005S – 36 years – multiplier of 8.*
>
> *Deduction of $24,000 from any award by Court – this amount is already paid to the Respondent*
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> *108. Ground 7 of the Appeal Grounds appeals against the awarding of damages without deducting a sum $24,000.00 being paid to the Deceased's Estate pursuant to Section 24 (2) of the Workmen's Compensation Act. Counsel for the Respondent/Plaintiff referred to Section 25 of the Workmen's Compensation Act and stated in Court that Section 25 applies. The Appellant submits that Section 25 has got no applicability in this situation. The Learned Judge found that the Employer of the Deceased was not liable. However, Section 24(2) clearly applies. Section 24(2) says:*
>
> > *"(2) A court on the application of any person specified in subsection (1) or any court awarding compensation or damages, with or without the application of any such person, may make such order*

as to it seems just to ensure that the workman does not receive both compensation and damages in respect of the same accident and to implement the provisions of subsection (1)."

(vide: paragraphs 107 to 108 of the Appellant's written submissions dated 8th November, 2019)

[28] Having paid regard to this Court's decision in **Fiji Forest Industries Ltd –v- Naidu** [2017] FJCA 106, I agree with the Respondent's counter submission thereto that, the learned High Court Judge was justified in using a multiplier of 10 based on the evidence before it. In that regard I also took into consideration the submissions made at paragraph 20.3 of the Respondent's written submissions dated 3rd January, 2020.

[29] In so far as the contention contained in paragraph 108 of the Appellant's written submissions is concerned, I accept the Respondent's submissions which I reproduce as follows:-

"21.1 As to paragraph 108 of the Appellant's submission we submit that Section 24 of the Workmen's Compensation Act ("Act") is discretionary and primarily for the protection of the Employer. Where the employer has paid compensation to the worker in respect of the alleged injury, the employer may seek a refund from either the person against whom the award for damages were made or the worker.

21.2 However, in this case Ba Town Counsel has not sought any refund of the compensation amount paid from the Respondent or the Appellants. It is to be noted that the appeal is filed only by the First and Second Defendant.

21.3 In the premises, the Appellants cannot now under the guise of Section 24 avoid paying the full judgment sum to the Respondent. Section 24 is clearly for the benefit of the employer and not for the persons against whom the award for damages is made.

21.4 There is no relevance of the Appellant's counsel referring to the submission on Section 25 when it is has not been appealed for raised as an issue by the Respondent in this appeal. Section 25 was addressed in the Respondent's submissions filed at the High Court to show that the Act allows for independent proceedings to be brought apart from

under the workmen's compensation act. Section 25 has no relevance to this appeal."

The ground of appeal *re*: the High Court Order for funeral expenses

[30] Appellant's Counsel submitted thus:

"*The Learned Judge relied on the case of **Moli v Binqwor** [2003] FJHC 279 based on submissions of the Respondent's, without regard to the Respondent's express testimony in court that the funeral expense was $500; and it was paid for by the 3rd Defendant. The general application of funeral expenses only applies in the absence of specific proof to the contrary. The Respondent's express testimony on funeral expenses of $500 plus wages given by the 3rd Defendant that covered all funeral expenses, inclusive of coffin cost of $200, is contained at pages 351, 352 and 353 of the Record."*

[31] As against that, Respondent's Counsel submitted as follows:-

"22.1 As to paragraph 109 of the Appellant's submission we submit that the Court had rightfully awarded the sum of $3,500.00 as there was evidence by Respondent that after the funeral they had a 13 days ceremony. The sum awarded by the Learned Judge was reasonable and based on relevant case authorities where similar sums have been awarded.

22.2 The Appellants is convoluting the evidence as the transcript should be read from Page 351. The question posed to her by the Learned Judge was "How the money was raised for the coffin and other items?" – Her response flowing from the questions were the answers provided to both the Appellant's counsel and the Court.

22.3 Her answers should not be taken in isolation but read in the context of the question posed. In any event the Learned Judge has correctly addressed the $500.00 that was received from Ba Town Council as:

"67. The deceased has left behind the plaintiff wife and three children, 2 males and a female, who are now grown up. Plaintiff and children have received $24,000.00 under the Workmen's Compensation Act. Though, the 3rd defendant had given $500.00 for the funeral expenses, the plaintiff would undoubtedly, have incurred a substantial amount as

expenses on the funeral and subsequent rituals. Having all the above in mind, I proceed to decide the quantum of damages as follows."

22.4 It is ludicrous for the Appellants to quote the respondent out of context to state that $500 in this day and age would have covered all funeral expense. The Learned Judge has correctly looked at the totality of the evidence whilst noting the admission by the Respondent of the receipt of the $500.00.

*22.5 This Court in the case of **Ram v Vakaloloma** had upheld a Learned Judge's finding stating as follows:*

*"**Funeral expenses***

[49] The Respondent claimed $3,000 for funeral expenses, unsupported by receipts for payment, and admitted that he did not retain receipts. The Learned Judge considered this reasonable in view of expenses normally incurred in respect of traditional Fijian funeral rites, and awarded $3,000.00. I see no reason to interfere with this award."

22.6 In the present case there was evidence before the Court that the Respondent had a 13 day funeral ritual ceremony. It would be absurd for the Respondents to submit that $500.00 plus the $81.50 would cover for all funeral expenses. The Appellants are using the Respondent's evidence out of context."

The High Court Order for Interest

[32] For the aforesaid reasons I affirm the award for funeral expenses made by the learned High Court Judge.

[33] Learned Counsel for the Appellant submitted that the Judge discounted the incorrect award on loss of earnings special damages and general damages by his 10% assessment on contributory negligence. *"Yet …(Counsel contended) that, the judge computed the interest award on his original figure of the 2 awards without deduction of the contributory negligence award"* (*vide*: paragraph 110 of the Appellant's written submission).

[34] The Respondent conceded this as "*an oversight by the learned Judge*" (Respondent's written submissions at paragraph 23.1).

[35] We have already affirmed the High Court judgment that, there was 10% contributory negligence.

[36] Accordingly, the deductions of 10% would be as follows:

(a) On special damages	=	$354.90
(b) On general damages	=	$1,248.00
TOTAL	=	$1,602.00

Re: the award of costs made by the High Court

[37] The Appellant contended that the award of $10,000.00 as costs was too high. In view of the fact that we have affirmed the High Court findings on primary (negligence) liability, I do not think the said award was excessive. I also had regard to the approach in the case of **Yanuca Island Ltd –v- Peter Ellesworth** CA No. ABU 0085 of 2000S, referred to by the Respondent in paragraph 24.1 of his written submissions.

Lecamwasam, JA

[38] I agree with the reasons given and the conclusions arrived at by Almeida Guneratne, JA.

Gunawansa, JA

[39] I agree with the proposed order, the reasoning and the conclusions reached by Guneratne JA.

Orders of Court:

1) *The Appellant's appeal on primary liability is dismissed.*

2) *The Respondent's appeal against the finding of contributory negligence by the High Court is dismissed.*

3) *The award of damages made by the High Court is varied as stated in paragraph [36] of this Judgment.*

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Justice A. Gunawansa
JUSTICE OF APPEAL