IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 19 OF 1989

Between:

WAISEA NAKOROVOU LUTU

THE ATTORNEY-GENERAL OF FIJI — Appellants

- and -

OSEA VAKALALABURE — Respondent

Mr N. Nand for the Appellants

Mr H.M. Patel for the Respondent

Date of Hearing: 16th March, 1990

Delivery of Judgment: 18th May, 1990

JUDGMENT OF THE COURT

This is an appeal from the Judgment of Mr Justice Jesuratnam given on the 26th May, 1989 wherein Judgement was ordered to be entered for the Plaintiff/Respondent with damages to be assessed by the Chief Registrar.

The sole ground of appeal is as follows:

"1. THAT the learned trial Judge erred in law and in fact in failing to properly evaluate the evidence adduced which showed that the Respondent was contributorily negligent."

It is not in dispute that the first appellant was wholly responsible for the accident which resulted in the Respondent receiving injuries to his right elbow joint.

It is not necessary to set out in detail how the accident occurred. It is sufficient to state that the first defendant, driving a police vehicle, when passing a stationary truck pulled too far over and crossed the white line on the road grazing the approaching vehicle driven by the Respondent who was driving with his right arm resting on the right hand door window of his car with his elbow projecting outside the door.

The appellant's contend that whilst the first appellant was totally to blame for the accident the Respondent contributed to the injury he received by driving with only one hand with his elbow projecting outside the door window and driving after he had been drinking.

Mr Nand drew our attention to Regulation 56(1) and (2) of the Traffic Regulations which is as follows:

> "56 - (1) No person shall ride or permit any person to ride in any insecure position on a motor vehicle while the vehicle is on a road.
>
> (2) The driver of a motor vehicle, other than a motor cycle, upon a road, or other person travelling in or upon such vehicle shall not permit any part of his body or limbs -
>
> (a) to be upon or in contact with any external step or footboard or on the roof or bonnet of the vehicle;
>
> (b) to extend or protrude beyond or through any external door, window or other opening of the vehicle:
>
> Provided that this regulation shall not operate to prevent a driver from giving any signal, nor any person from entering, or alighting from, the vehicle."

This Regulation 56(1)(2) was not drawn to the attention of the learned trial Judge by Mr Nand who informed us he had not at that time read the Regulation.

It is clear that the Respondent was driving in breach of the Regulation 56(1)(2) and had his elbow not been projecting outside the window he would not have been injured. We observe that a great many drivers drive in breach of the Regulation and accidents such as the Respondent experienced do not occur very often. Nevertheless the Regulation is designed to avoid the very type of injury the Respondent sustained.

Mr Patel argued that since the first appellant was one hundred per cent responsible for the accident the Respondent could not be held to have contributed to it.

This is true but what we are concerned with here is a claim by the Respondent for injuries suffered by him which is met by the appellants claiming that the Respondent contributed to his injuries (emphasis added) by his failure to observe Regulation 56.

We are indebted to Mr Nand for his research and his submissions in support of his ground of appeal. He has referred us to a number of interesting cases.

One such case is O'CONNEL v. JACKSON (1972) 1 Q B 270 where the plaintiff was not wearing a crash helmet contrary to the Highway Code. He received head injuries in an accident which was solely caused by the defendant. The Court of Appeal was of the view that the plaintiff would not have suffered such extensive injuries had he been wearing his helmet. The court assessed his contributory negligence at 15 per centum.

Another case is FROOM AND OTHERS v. BUTCHER (1975) 3 ALL E R 520 where the plaintiff had failed to wear a seat belt. Lord Denning at page 525 stated:

> "Negligence depends on a breach of duty, where as contributory, negligence does not. Negligence is a man's carelessness in breach of duty to others. Contributory negligence is a man's carelessness in looking after his own

safety. He is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable prudent man, he might be hurt himself....."

We do not consider that the Respondent contributed in any way to the accident by driving with one hand so as not to be able to take proper action to avoid the accident. Nor did the fact that he had a few drinks that evening.

The Respondent was driving on his correct side of the road and at a moderate speed. The accident happened so suddenly that he had no chance of taking any action to avoid it. Had he not had his arm resting on the window of the car door with his elbow projecting outside in breach of Regulation 56 he would not have been injured at all.

The Respondent has not claimed for damage caused to his car which indicates to us that there was no measurable damage worth pursuing. The police car appears only to have brushed against the Respondent's car.

In Froom's case Lord Denning considered, that if the evidence indicated that damages would have been prevented altogether if a seat belt had been worn, damages should be reduced by 25 per cent.

We would not equate failure to wear a seat belt with failure to comply with Regulation 56. The degree of exposure of the Respondent's arm could only have been minimal and in our view the degree of his contributory negligence towards his injuries should be so viewed.

We are satisfied that the Respondent contributed to his own misfortune by his failure to comply with Regulation 56 and we so hold.

We assess his liability as 5 per cent of the whole injury he suffered.

The learned Judge's Judgment is amended to give effect to our Judgement namely that while the first defendant was negligent and was solely responsible for the accident, as the learned Judge found, the Respondent was also negligent so far as his concern for his own safety was concerned.

We order that his damages when assessed are to be reduced by 5 per cent being his share of his liability for the whole of the injuries he received.

The appeal is allowed but there will be no order as to costs.

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Sir Timoci Tuivaga
President, Fiji Court of Appeal

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Sir Ronald Kermode
Justice of Appeal

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Sir Moti Tikaram
Justice of Appeal