IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0054 OF 1995S
(High Court Civil Action No. 489 of 1993)

BETWEEN

MAIKELI SAVOU

APPELLANT

and

HEATHER DIANE LOTHERINGTON-WOLOSZYN
as administratrix of the estate of
Jaroslaw Wlodzimierz Leon Woloszyn

RESPONDENT

Mr D. Krishna for the Appellant
Mr P. Knight for the Respondent

Date and Place or Hearing : 22 May 1996, Suva
Date of Delivery of Judgment : 31 May 1996

JUDGMENT OF THE COURT

This is an appeal from the judgment of Byrne J. in the High Court at Suva given on the 31 July 1995. There were three actions commenced arising out of the one incident, a motor accident which occurred at approximately 5 p.m. on the 12 May 1991. The respondent, Heather Dianne Lotherington - Woloszyn, her daughter Maya Woloszyn, and her husband Jaroslaw Wlodzimierz Leon Woloszyn (the deceased) were travelling together in her husbands car. The accident occurred at Nakaulevu between Deuba and Navua on Queens road and at the point where the Viwawa Road joins Queens road. The deceased was driving his car towards Suva, the appellant, Maikeli Savou, was driving his car,

accompanied by his wife, in the opposite direction. He had commenced to turn into Viwawa road and was either moving slowly or had stopped when his car was struck by the deceased's car, which had swerved to the left in an endeavour to avoid the appellants car. As a result of the collision the deceased was killed, his daughter was injured as likewise was his wife, the respondent. The appellant and his wife however were not injured. The deceaseds car was badly damaged while the appellant's car received some damage to its right front area.

As already mentioned three actions were commenced. The first was brought by the deceased's daughter by her next friend, and mother, the respondent, for damages arising from the injuries she personally suffered; the second by the respondent for damages arising from the injuries she personally suffered; and the third by the respondent as administratrix of the estate of the deceased. In the third action the respondent claimed damages under the Compensation to Relatives Act Cap. 29 and under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap. 27. Before the hearing the parties agreed that the damages for the daughter on her personal action should be $10,000 and those for the respondent personally on hers $5,000, but both subject to the determination by the Court of the question of liability. The learned trial judge noted in his judgment that Mr Krishna for the appellant (then defendant) had submitted that the respondent (then plaintiff) had chosen to make damages under the Compensation to Relatives Act Cap. 29 the

principal relief claimed and that her claim for damages under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap. 27 was merely an alternative. He went on to say he did not agree and that he had no doubt the Respondent was primarily seeking damages under the provisions of the latter Act. Nothing further was said about these two different bases to the claim for damages and a single award was made, plainly on the basis of the latter Act. We shall have something to say about this matter at the end of this judgment.

Two main issues arose on the appeal. The first was whether the learned trial judge was right in determining that both drivers had been at fault and then apportioning the degrees of negligence at 80% attributable to the appellant and 20% to the deceased. The appellant submitted his fault should not have been put at more than 50%. The respondent, on the other hand, submitted that the deceased had not been at fault at all or, if at fault, to a lesser degree than 20%, and cross appealed to that effect. The second issue related to the learned trial judge's method of assessing damages. We deal first with the question of liability.

We do not propose to canvass in detail all the evidence given on both sides on this issue. The respondent, as plaintiff, gave evidence. She was in the passenger seat of the deceased's car with her daughter sitting on her lap. The only other evidence for the plaintiff was a plan prepared by a Police

officer showing the position of the two vehicles after the accident, with a key to the letters and measurements shown on the plan. This was put in by consent. We record our view that this was an unsatisfactory procedure in two respects; first, because no witness was called there was no evidence explaining the plan and, second, because the key tendered with the plan was so poorly typed that it was indistinct and extremely difficult to read. Counsel should not have tendered such an inadequate document to the court. The appellant, as defendant, also gave evidence and in addition produced a number of photographs.

The general position was as follows: according to the respondent, Mrs Lotherington - Woloszyn, the deceased was driving in the direction of Suva on Queens road from Pacific Harbour and was travelling at about 80 kmph. There was little traffic. It was a fairly lengthy stretch of straight road. Suddenly a car coming from the opposite direction crossed half way into their lane. Her husband took evasive action by swerving to the left. She thought they had passed but there was a loud crash. The cars collided, she hurt her head and lost consciousness. She also said that she was unable to say how far the other car was away from them when she first saw it; she thought a few seconds driving time. The collision she said occurred on their lane about half way between the white line and the left hand side of the road.

The appellant, Mr Savou, the driver of the other car, gave a somewhat different account. He said he had stopped his car at the side of Queens road some three chains short of the Viwawa road turn off. The Viwawa road turnoff was on the opposite side of the road to that on which he was travelling. He stopped there to decide whether to leave the main road and turn into Viwawa road. He decided to do so. He could see the deceased's car approaching from the opposite direction but a distance away. He moved forward but just as he was turning to go into Viwawa road he realised the deceased's car was near to him and he instantly applied his brakes. He said when he saw the deceased's car it could have been 10 yards from him. He said it was travelling at a very high speed even though the limit was 60 kmph. He said an impact occurred. He also maintained that his car was only about 1 foot over the white line on to the incorrect side of the road. In cross-examination he said that his estimate was that the deceased's car was 300 to 500 yards away when he first saw it. He thought he had sufficient time to cross Queens road and enter Viwawa road. He moved forward and stopped his vehicle in the middle of the road; he then saw the other vehicle 300 to 500 yards away. He moved forward about 1 yard so that he would be right opposite Viwawa road. He looked ahead again as he started his turn. Saw the deceased's car was very close to him so he applied his brakes.

The learned trial judge in the course of his judgment considered all this oral evidence and also the plan and

photographs. He discussed fully the matter of the measurements of the road, the vehicles and their positions as shown on the plan. We accept wholly that he was correct in his view that the appellant's car was considerably further over the white line than 1 foot when the collision occurred; further that when the appellant started to move across the centre white line he believed the deceased's vehicle was further away than in fact it was, and that when he stopped with the front part of his vehicle extending over to the incorrect side of the road and into the path of the plaintiff's vehicle, it was too late for the accident to be avoided.

The only matter on these factual issues where we have difficulty with the learned judge's findings is in relation to his final conclusions where he holds that the deceased was 20% to blame for this accident. Ordinarily, in the light of the learned judge's findings one would conclude that the deceased, who was driving on his correct side of the road, was entitled to expect that the appellant would keep on his correct side until the deceased had passed him. Indeed His Lordship says exactly that but he also said that in his view the deceased was driving too close to the centre of the road, which he said was borne out by the Police diagram which showed the appellants vehicle to be approximately 4 feet on its wrong side of the road. We do not think that indicates the deceased was driving too close to the centre of the road. In our view, broadly speaking, so long as a person drives on his correct side of the white

line he is not at fault. His Lordship then said he failed to understand why the deceased could not have seen the appellant's vehicle earlier with the consequence that, as His Lordship put it, "had the deceased been driving further to the left it is just possible in my view that the accident might have been avoided."

We do not think this can amount to negligence on the deceased's part. In the first place we do not think a mere possibility is sufficient and, in the second, the evidence of both witnesses indicates that there was not sufficient time for the deceased to do other than he did. The respondent, Mrs Lotherington - Woloszyn, said as already stated that "suddenly a car crossed more than half way into our lane", and the appellant said that when he realised the deceased's vehicle was close and applied his brakes "it could have been 10 yards from me."

Appellate Courts are reluctant to interfere with the findings of the trial judge on matters of fact and particularly so in respect of his findings as to the degree of blame to be attributed to particular tortfeasors. Both counsel referred to and relied upon the judgments of the House of Lords in British Fame v. MacGregor (1943) 1 All ER 33 and the Court of Appeal in Kerry v. Carter (1969) 3 All ER 723. We are satisfied, however, that the learned trial judge went wrong within the principles expressed in those cases and accordingly we determine

that the deceased was not at fault and that the attribution to him of 20% of the blame was wrong. In our view the whole of the fault for this accident was that of the appellant. Accordingly the appellant's appeal on the question of liability fails and respondent's cross appeal succeeds.

We turn now to the question of damages. Mr Krishna for the appellant had in his written submissions urged two grounds. The first was that the learned trial judge had been wrong in the figure he had used for the purpose of calculating the proper amount to award for loss of earnings for "lost years" in terms of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap. 27. At the hearing, however, Mr Krishna indicated that he did not pursue that ground. His second ground was that the learned judge had been wrong in adopting a multiplier of 16 in respect of the figure he had reached for the loss of earnings. Mr Krishna submitted the multiplier should be 8. We reject that submission and are satisfied that there is no reason for differing from the view taken by the trial judge. It is clear he took into account the appropriate matters, such as the age, health and economic prospects of the deceased and weighed them in relation to multipliers used in other cases. In result this part of the appellant's appeal fails also.

Earlier in this judgment we noted that there had been two bases to the claim by the estate for damages. The first under the Compensation to Relatives Act Cap. 29 and the second

under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap. 27 but that there had been only a single award, plainly made under the latter Act. Ordinarily we would have been content to deal with the matter on the basis that Counsel had not raised any issue in relation to the single award, but since one of the relatives who might have been entitled to an award under the Compensation to Relatives Act was a young child we considered we should raise it with Counsel after argument had been completed. After hearing Counsel, and in particular Mr Knight for the respondent, we are satisfied that the interests of the child have been taken into account and we need not pursue the matter further. It is the responsibility of the Administratrix of the estate.

Accordingly the appellant's appeal is dismissed and the respondent's cross-appeal is allowed. The respondent is entitled to the full amounts awarded by the learned trial judge in all three actions without deduction of the 20% contribution that he had allowed.

The respondent is allowed costs.

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Sir Mari Kapi
Judge of Appeal

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Mr Justice Savage
Judge of Appeal

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Mr Justice Hillyer
Judge of Appeal