

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO.46 OF 1995

(High Court Civil Case NO. 294 of 1992)

BETWEEN :

RATU ISEI TURAGAKULA

APPELLANT

- and -

HELEN NINA WORK

RESPONDENT

Mr. V. Mishra for R. Krishna for the Appellant

Mr. H.A. Shah for the Respondent

Date and Place of Hearing : 8 August, 1996, Suva

Date of Delivery of Judgment : 16 August, 1996

JUDGMENT OF THE COURT

On 7 July 1995 Sadal J. gave judgment in the High Court at Lautoka awarding the respondent a total of \$186,112.24 in respect of the death of her husband ("the deceased") as the result of a motor accident on Kings Road Tuvu, Ba around

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midnight on 26 April 1990. He found it had been caused solely by the appellant's negligence. The latter appeals against that finding and against the amount of the damages.

#### The Accident

The deceased was driving his car on a straight tarsealed section of the road where the speed limit was 80 KPH. There was no street lighting; the weather was fine and the road surface dry. He collided with the rear of an unlit logging truck parked on the carriageway about 1 metre in from the centre-line and facing the direction in which he was travelling. It had broken down some time before and had been left there by its driver (the appellant), who subsequently pleaded guilty in the Magistrates' Court at Ba to charges of failing to have appropriate lights on the vehicle. It was loaded with logs which projected some 4 metres over the back.

A police officer who attended the scene gave evidence of the absence of lights on the truck and described the car as a wreck, being tangled in the logs with its roof torn off. He saw no brake marks and from his plan of the position of the vehicles it would appear that the deceased drove straight into the overhanging logs.

Issues of Negligence

The Judge had no difficulty in concluding that the appellant was negligent in leaving the unlighted truck in this position on the road. Although Mr. Mishra attempted to persuade us otherwise, the facts lead inevitably to that conclusion, and the appellant did not give or call any evidence.

His plea of contributory negligence by the deceased was dismissed, the judge holding that there was no evidence to support it. With respect we cannot agree. There was material relevant to this issue in the evidence about the state of the road and other surrounding circumstances, and about the position of the vehicles after impact, and in the lack of any indication of braking or other evasive action. From those facts common-sense inferences about the existence of contributory negligence could be drawn. This Court is in as good a position as the trial Judge to undertake this exercise and to make any necessary apportionment.

We are satisfied that the evidence referred to establishes on the balance of probability that the deceased was negligent in a way contributing to the accident, in that

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he failed to keep a proper look-out and/or drove at a speed which was excessive in the circumstances for the following reasons:

- (i) The accident happened on a clear night on a straight section of a tar-sealed road through generally level country (so we were informed by counsel) and in good driving conditions.
- (ii) The deceased should have been driving at around the speed limit of 80 KPH with headlights on full beam, enabling him to see the bulk of the laden truck ahead in time to stop or take evasive action.
- (iii) If there had been approaching traffic requiring him to dip his headlights, it is a reasonable assumption that the truck would have been silhouetted in the glare of their lights. With dipped headlights the deceased should have slowed down to be able to stop within their range.

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- (iv) His car apparently ran straight into the logs at the back of the truck, with no evidence of any braking or avoiding action.

Accordingly there must be such a reduction in the damages as is "just and equitable" to reflect his share of responsibility. In its assessment two components must be considered. The first is causative potency, and it could be said that here the drivers were equally responsible in the sense that each could have avoided the accident by the exercise of due care. But with the other component - relative blameworthiness - the scales come down heavily against the appellant in leaving the unlighted truck effectively blocking the carriageway and constituting a serious danger to all road-users travelling in that direction.

We make an allowance of 30% for contributory negligent as appropriate in these circumstances.

#### Damages

The deceased was 36 at the time of the accident and left a widow (the respondent) and 5 children under 14 dependent

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upon him. He was employed as a Terminal Manager for an oil company at an annual salary after tax of some \$13,800 and in addition enjoyed rent-free furnished housing, a car and other benefits. He had an expectancy of 18 years further employment with good prospects of promotion to higher salaried posts.

Both counsel had submitted to the trial Judge that a conventional multiplier of 12 should be applied to reflect the value of the post-trial loss to the dependants. Sadal J noted this in his judgment, but preferred a multiplier of 14 from the date of death. We think he was justified in this view, having regard to the delay of nearly 4 years between the accident and the trial, with another year to judgment to accommodate the extensive written submissions from both sides. Although initially maintaining to us that the 12-year multiplier should have been applied, Mr. Mishra (who was not counsel at the trial) accepted that the 14-year figure was not unfair. During the course of argument he did not pursue other criticisms of the award (criticisms which we considered were unsupportable), leaving only one disputed item comprising the loss of the employer's continued contributions to the Fiji National Provident Fund for the deceased's benefit. The Judge assessed this at \$26,112.24.

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This heading of loss had not been mentioned in the statement of claim, which contained only a general claim for damages under the Law Reform and Compensation to Relatives Acts, and for funeral expenses. The record shows that on the morning of the trial plaintiff's counsel applied to amend the pleadings by adding a paragraph claiming loss of the Provident Fund contributions, but this was opposed by defendant's counsel who objected to the late notification and sought an adjournment. Plaintiff's counsel said he would withdraw the application and the Judge noted he was not proceeding with it. Nevertheless, evidence for the plaintiff was given on behalf of deceased's employer about its contributions to the fund, among other details of his earnings and benefits, and it was neither objected to nor challenged.

In the written submissions put in after the hearing plaintiff's counsel included a calculation of these lost contributions as part of the total claim. Defendant's counsel did not object to or contest this in his submissions in reply. Dealing with this topic in his judgment, Sadal J said he agreed with the defendant's contention that it should have been specially pleaded to apprise him of what issue he had to meet, adding "However the submissions were made regarding this

issue," and he proceeded to include them in the calculation of loss. Mr. Mishra submitted that following the abandonment of the application to amend, the Judge should have ignored these contributions.

We do not see this as a case of defective pleading requiring amendment to enable a claim for the lost contributions to be properly brought. It was no more than a failure to give particulars of their existence as part of the general unquantified loss pleaded in the statement of claim. The Judge clearly thought the plaintiff's subsequent written submissions dealt with this issue in a way that was fair to the defendant and we agree, being fortified in this view by the lack of any protest or adverse submission by his counsel in the High Court. Although invited by us to do so, Mr. Mishra could not put forward any convincing suggestion of prejudice to his client in the manner this genuine claim was recognised by the Judge.

### Conclusion

The appeal is allowed to the extent of reducing the damages awarded to the plaintiff by 30%, leaving a balance of

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\$130,278-55. In his judgment Sadal J directed that of the \$186,112-24 he awarded, \$102,250 be paid to the plaintiff for her sole use. The balance of \$83,862-24 he ordered to be paid to the Public Trustee for the benefit of the children. (The terms of this apportionment were not included in the sealed order of 21 July 1995).

In view of the reduction we have made to the original award, we think the appropriate course is to refer the question of its division back to the High Court. The plaintiff can be expected to provide and maintain the family home for herself and the children, and in the nature of things she is also likely to use some of her own resources for their general welfare. Such considerations would seem to justify a relatively generous apportionment in her favour, but this is entirely a matter for the High Court in the exercise of the discretion under S.6 of the Compensation to Relatives Act (Cap.29). The amounts will, of course, bear interest from the date of judgment (no further interest having been awarded by the trial Judge) and in terms of S.6 will be subject to the deduction of costs not recovered from the defendant.

The judgment referred to a mortgage of some \$51,000 over the house previously purchased by the plaintiff and the deceased, and intended to be their future matrimonial home. It was said to be rented out. In the circumstances, and in view of the delays to date in disposing of the claims, we think the plaintiff should have an immediate payment of \$51,000 on account of whatever amount the High Court may apportion to her, and we make an order accordingly. She may see fit to use this if it is needed to repay the abovementioned mortgage.

Costs

As the appellant has succeeded on only the contributory negligence issue, and the respondent on the others, we make no order as to costs in this court.

*M. Casey*

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 Sir Maurice Casey  
Judge of Appeal

*Gordon Ward*

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 Justice Gordon Ward  
Judge of Appeal

*Ken Handley*

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 Justice Ken Handley  
Judge of Appeal