IN THE FIJI COURT OF APPEAL AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU 0016 OF 1997
(High Court Civil Action No.HBC 401 of 1995)

BETWEEN: BASANT

First Appellant

AND: NAREND

Second Appellant

AND QUEENSLAND INSURANCE CO. LTD.

Third Appellant

AND: **ZAIBUN NISHA (as Executrix and Trustee of Ismail Dean Deceased)**

Respondent

Coram: **The Hon. Sir Moti Tikaram, President**
The Hon. Mr. Justice R. Savage, Justice of Appeal
The Hon. Mr. Justice J.D. Dillon, Justice of Appeal

Hearing: **19 May 1998**

Counsel: **Mr. R. Krishna for the Appellants**
Mr. V. Maharaj for the Respondent

Date of Judgment: **29 May 1998**

JUDGMENT OF THE COURT

This appeal by the three Appellants is against a Judgment of the High Court (Pathik J.) which however was limited to the first and second Appellants only. No Judgment was entered against the Third Appellant. Mr Krishna, Counsel appearing for the Appellants conceded that the appeal should be limited to the first and second Appellants only. Consequently he withdrew ground 7 of his notice of appeal.

The claim was for general and special damages said to have been sustained by Ismail Dean as the result of a motor accident on 15 October 1991. While Mr Dean gave

evidence in the course of the hearing in 1995 he died on 20 March 1996 before the case had been concluded. The Respondent Zaibun Nisha is Mr Dean's widow and the sole Executrix and Trustee of his estate.

The facts may be briefly summarized as follows. Late in the evening of 15 October 1991 Mr Dean was driving along the Kings Road at Sarava in the direction of Ba when he was forced to pull off the sealed roadway onto the left hand grass verge in order to carry out repairs to his punctured right-front tyre. A Mr Ashik Ali who was travelling along the same road stopped to assist. He manouvered his car so that the head lights of his vehicle were facing at and close to the disabled front tyre, the better to effect the necessary repairs. This meant that Mr Ali's car was protruding out towards the centre white line and so across that half of the sealed roadway that would be used by vehicles travelling in the same direction as Mr Dean. The other half of the sealed roadway was not obstructed and so was available for traffic travelling in the opposite direction i.e. from Ba and in the direction of Lika.

Mr Dean took up a position beside the driver's door of Mr Ali's car in order to signal approaching vehicles to reduce speed. In fact several vehicles including a loaded logging truck had already passed these two stationary vehicles prior to the accident.

The second Appellant was driving a motor car owned by the first Appellant and travelling from Ba in the opposite direction to that of Mr Dean. While driving at a speed of between 70-80 kmph he first sighted the two stationary cars about 100 yards ahead. He reduced his speed to 50-60 kmph but nevertheless collided with Mr Ali's diagonally parked car

which was then propelled into Mr Dean's car parked on the grass verge. The point of impact was the driver's door on Mr Ali's car beside which Mr Dean had been standing. He was knocked unconscious, hospitalised for 2 weeks and had his right leg in plaster for 18 months.

The trial judge having heard all the evidence and seen all the witnesses in a trial that spanned 8 days accepted the evidence of Mr Dean in total and described him "... as a witness of truth (who) was not shaken at all in cross-examination".

On the other hand His Lordship rejected the evidence of the second Appellant and found that he was ".....definitely lying when he said that he did not go on the wrong side of the road or that the accident happened on his section of the road, for his statements do not tally with the evidence before me and which I have accepted as fact." He held that the accident was solely due to the negligence of the second Defendant i.e. the second Appellant before us.

Mr Krishna's carefully prepared submissions concluded with -

> ***"It is submitted that it was the sole negligence of the deceased Plaintiff and that it was not the sole negligence of the second appellant that caused the subject accident. It is further submitted that if this Honourable Court is of the opinion that there is contributory negligence then the same be apportioned."***

When questioned by the Court as to whether he was serious in contending that the accident was due to the sole negligence of Mr Dean, Mr Krishna conceded he was not.

We reject completely the submission that the accident was due to "... the sole negligence of the deceased plaintiff ... " (i.e. Mr Dean) The second Appellant was clearly negligent -

a) by failing to keep a proper look out in that he saw or ought to have seen the parked vehicles from a distance of 100 yards but failed to avoid colliding with Mr Ali's car;

b) by colliding with - Mr Ali's car at "..... the driver's door - red car ....." which was parked on the right hand side i.e. the incorrect side of the road;

c) by driving at an excessive speed in the circumstances then existing.

It is not without significance that he was convicted of careless driving on his own admission in connection with the accident.

We are satisfied that the only issue for determination is whether there was some degree of contributory negligence on the part of Mr Dean and if so what is the appropriate apportionment. Mr Krishna conceded as much and suggested that the facts and circumstances of this case justified an apportionment as to 75% against Mr Dean and 25% against the first and second appellants.

The former senior Police Superintendent called by the defence established the width of the sealed section of roadway as 24'9". In addition there was a further hard unsealed section of 5'5" available to traffice travelling from Ba. That is a total of 17'9" available to the second Appellant on his correct side of the road. He confirmed however that he collided with the driver's door of Mr Ali's car. This would mean that the point of impact was approximately 6' on his incorrect side of the roadway. This evidence His Honour concluded proved that the second Appellant "... was driving too fast and not keeping a proper look out".

While we agree with that inevitable conclusion we turn now to consider the action of Mr Ali in placing his car across portion of the sealed roadway the better able to repair the punctured front tyre of Mr Dean's car. With respect to this issue the trial judge observed -

> ***"It is pertinent to note here that it was Ashik's car and not plaintiff's car which was parked across the road. He is not a party to the action. It is Ashik who should shoulder all the blame if any blame is to be attached to anyone by his manner of parking. However, I have found otherwise in any case. When other cars were able to pass why could he not pass?"***

There was no evidence of any difficulties likely to be caused to traffic travelling in the opposite direction to that of Mr Dean. Indeed the evidence was that several cars and a loaded logging truck had already passed the stationary vehicles. The finding of the trial Judge in so far as negligence is concerned was in our opinion correctly decided in favour of the respondent. Whether the positioning of Mr Ali's car could be regarded as an actionable nuisance is another issue.

A somewhat similar set of circumstances to the present was considered by the English Court of Appeal in Dymond v. Pearce [1972] 1 All E.R. 1142 at 1147. That case involved a parked lorry with which the first defendant collided. The Court held that-

> ***"It (the lorry) thus constituted an actionable nuisance at the time when the first defendant drove into it. But the mere fact that a lorry was a nuisance does not render its driver or owner liable to the plaintiff in damages unless its being in that position was a cause of the accident."***

The trial Judge in that case had stated -

> ***"I am quite satisfied on the evidence that this accident happened for one reason only, namely that the (first defendant) simply was not looking where he was going."***

His Honour in this present case came to the same conclusions viz -

> ***"He admitted he was driving at 70-80 Kmph and reduced it to 50-60 Kmph before the accident. Why could he not have stopped in time to avoid colliding with another vehicle which was not even on his section of the road? The answer is that he was driving too fast and not keeping a proper look out."***

We are satisfied that even if the parking of Mr.Ali's vehicle in the manner described could be classified as an obstruction and we note in passing that no such issue was raised on the pleadings, nevertheless it could not in the circumstances be regarded as causative of the resultant accident. In our view the accident was wholy attributable to the second Appellant's speed and failure to keep a proper look out,. It follows therefore that if there was a

nuisance or obstruction created by Mr.Ali's vehicle it was not a cause of the accident, nor can the Respondent be held accountable, or liable to any claim for contributory negligence.

For those reasons the appeal is dismissed with costs to the Respondent. This case is remitted to the High Court for assessment of damages.

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Sir Moti Tikaram
President

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Mr. Justice Savage
Justice of Appeal

.....
Mr. Justice Dillon
Justice of Appeal

Solicitors:

Messrs. Krishna and Company, Lautoka for the Appellants
Messrs. Maharaj and Associaties, Suva for the Respondent