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

CIVIL APPEAL NO.ABU0055 OF 1997S
(High Court Civil Action No.HBA001 of 1997)

BETWEEN: THE ATTORNEY-GENERAL OF FIJI

Appellant

AND: SAMISONI NAISUA

Respondent

Coram: **The Hon. Sir Moti Tikaram, President**
The Rt. Hon. Sir Maurice Casey, Justice of Appeal
The Hon. Mr. Justice D. Dillon, Justice of Appeal

Hearing: **19 May 1998**

Counsel: **Mr. S. Kumar for the Appellant**
Mr. S. Valenitabua for the Respondent

Date of Judgment: **29 May 1998**

JUDGMENT OF THE COURT

This appeal on a question of law is against a judgment of Scott J. in the High Court at Suva, rejecting an appeal from a judgment of the Magistrates' Court dismissing the appellant's action for damages for negligence arising out of a traffic accident at Lami on 14 April 1992. His Lordship upheld the learned Magistrate's conclusion that there was no evidence implicating the Respondent.

The Appellant (on behalf of the Department of Mineral Resources) issued a writ in the prescribed form in the Magistrates' Court stating his claim, alleging that the Respondent was the owner of the other vehicle and that on 14 April 1992 at Marine Drive, Lami, he drove it so negligently that it collided with and damaged the Department's vehicle. Particulars of negligence were set out. He also alleged that the Respondent was charged and convicted of careless driving in the Suva Magistrates' Court and fined $45 and that such conviction was relevant to the issue of negligence. Damages totalling $4,598.40 were also alleged and claimed.

No notice of intention to defend was given by the Defendant, who took no other steps. The action was called on 22 August 1996, being the hearing date specified in the writ. In the record it was noted that the Defendant was absent and the case was adjourned to 24 September for formal proof. There was a further adjournment, and it proceeded on 1 October, again in the Defendant's absence.

Evidence was given by the Department's driver which clearly established negligence by the driver of the other vehicle, although he could not recall its registration number. He said he pointed out the driver to the Police Officer attending the scene, and that he was later charged. The Police Officer was also called, but he could not recall the registration numbers of the vehicles. He said he charged Samisoni Naisua. Evidence was also given of the pre-accident and post accident values of the Department's vehicle, the difference being the amount of $4,598.40 claimed as damages.

The learned Magistrate found that there was no evidence that the Defendant's vehicle was involved in the accident with the Department's vehicle, since neither of the latter's witnesses knew its registration number. He held that in the absence of evidence against the Defendant the plaintiff's case had not been proved and he dismissed the action.

In his judgment dismissing the appeal to the High Court Scott J. said that as there was no evidence led before the learned Magistrate directly connecting the Respondent with the accident, he had no option but to dismiss the suit. He also rejected the Appellant's submission that the Respondent should be deemed to have admitted the claim by reason of his failure to advance any defence or attend the hearing. After a consideration of the relevant Magistrates' Courts' Rules he concluded that judgment could be given in this case only on evidence, and not on any deemed admissions.

The Appellant's main submission in this Court was that His Lordship erred in law in dismissing the appeal when there was no defence filed by the Respondent. This calls for a consideration of the relevant Magistrates' Courts' Rules (Cap.14), starting with Ord. VI r.2 requiring there to be endorsed on the writ signed particulars of claim stating briefly and clearly the subject matter of the claim and the relief sought. As noted above, this was done. Ord VI r.6 states that if the party served delivers and serves a notice that he intends to defend the suit not less than 3 days before the date fixed for hearing, it shall be entered for hearing on that date. No such notice was given. Rule 7 provides for the defendant to be let in to defend outside that time, but it was not availed of. Ord VI r.8 states

that in the case of a liquidated demand only, the plaintiff may enter final judgment if notice of defence is not given within the prescribed time, or the defendant is not let in to defend. The plaintiff did not seek judgment under this rule; nor was it open to him to do so. The damages claimed could not be classed as 'liquidated': "... the essence of liquidated damages is a genuine covenanted pre-estimate of damage" per *Lord Dunedin* in Dunlop Pneumatic Tyre Company Limited v. New Garage and Motor Company Limited [1915] AC 79 at p.86. They are appropriate in breach of contract, but the damages claimed here are special damages for negligence.

Ord XVI r.1 states that suits shall ordinarily be heard and determined in a summary manner without pleadings, but the Court may order the plaintiff to file a written statement of his claim, and may order the defendant to file a written statement of defence. (No such orders were made here). Rule 3 sets out requirements for such pleadings where ordered, para (e) stipulating that the defendant must deny all such material allegations in the statement of claim as he intends to deny at the hearing; and that every allegation of fact, if not denied specifically or by necessary implication, or stated to be not admitted, shall be taken as admitted at the hearing. There is also provision in para (h) for admission by the defendant of material allegations in the statement of claim, and the defendant may admit the truth of the whole or part of the case under Ord XV r.1, and of the whole or part of the amount claimed under r.4.

Order XXX r.3 states that if the defendant does not appear at the hearing, the Court on proof of service may proceed to hear the cause and give judgment on the evidence adduced by the plaintiff.

From this summary of the rules it is clear that in the Magistrates' Courts' jurisdiction the only situation in which the absence of a denial will be taken as an admission of facts alleged in the statement of claim is where pleadings have been ordered. Otherwise, if the defendant does not appear, the case will ordinarily be heard and judgment given on the evidence adduced by the plaintiff. It is only where the claim is for liquidated damages that judgment may be entered against a defendant who has not given a notice of intention to defend. The High Court has a similar rule relating to claims for liquidated demands (Ord 13 r.1), but there is also in r.2 a provision that in a claim for unliquidated damages the plaintiff may enter interlocutory judgment for damages to be assessed against a defendant who fails to file a defence within the prescribed time. Ord.III r.8 of the Magistrates' Courts' Rules directs that the Court shall be guided by any relevant provision in the High Court rules where there is no provision to meet the circumstances arising in any particular case. Mr. Kumar submitted that the learned Magistrate should have used this rule to apply the High Court rule relating to cases involving unliquidated damages.

On principle there is much to be said for such an approach. Where a defendant has not seen fit to offer any objection to a claim, it seems only common sense to assume it is usually because he or she cannot dispute liability for the events causing the damage. Assessment of damages is another matter because in most cases the defendant will not know how they are made up, so that proof of them can fairly be required, except in the case of liquidated damages where they have been agreed in advance.

In Dibble Bros Ltd v. Tamanui [1971] NZLR 1144, *Perry J.* was dealing with an appeal against a Magistrates' Court judgment dismissing a claim for damages for negligence in a traffic accident where the plaintiff had left the country at the time of hearing, and the defendant had taken no steps and did not appear. The New Zealand rules provided that in these circumstances, upon proof of service and of facts entitling the plaintiff to relief, the Magistrate might give such judgment or make such order as may be just. *Perry J.* accepted that while there had to be a hearing, the rule did not specify the method of proving the facts entitling the plaintiff to relief. It was therefore open to the Magistrates' Court to adopt the Supreme Court procedure relating to proof of an unliquidated damages claim by virtue of the rule corresponding to our Ord III r.8, so that all that is required under those rules in a claim for damages for negligence where the action is undefended is proof of the assessment of damages.

The different wording of Ord XXX r.3 of our Magistrates' Courts' Rules precludes such an approach in Fiji. It stipulates that at the hearing of such a claim the Court may give judgment on the evidence adduced by the plaintiff, the inference clearly being that no other form of proof is contemplated unless it comes within the specific rules governing admissions discussed earlier in this judgment.

The overall effect of these rules relating to pleading and proof, coupled with the omission to include a provision in the Magistrates' Courts' Rules corresponding with the High Court rule on claims for unliquidated damages, demonstrates an intention that such claims in the Magistrates' Court must be proved by evidence. This enables that Court to

exercise a supervisory role, presumably because it is recognised that defendants may not have the same ability to look after their own interests there as those in the High Court, with its more formal procedures.

"Deemed" admissions may only be recognised in the Magistrates' Court if pleadings have been ordered. As we understand it, this has always been the practice in Fiji and it was followed in this case, where the matter was adjourned for formal proof after its first call. The special provision in the rules enabling judgment to be entered without proof in liquidated damages claims must be regarded as exceptional. Accordingly, the Appellant's first ground of appeal is rejected, as is his fourth ground based on non-appearance by the defendant, which is effectively the same.

The third ground alleged error of law by the learned judge in ruling that the Respondent's conviction for careless driving could not establish negligence, but as there was no satisfactory evidence of a relevant conviction, it could not be taken into account. The failure to deny it could not be treated as an admission for the reasons discussed above.

This brings us to the second ground, in which it is claimed that his Lordship erred in law in holding that the evidence adduced by the plaintiff was insufficient to prove negligence. But he did not find there was no evidence of negligence; he held there was

no evidence directly connecting the Respondent with the accident. However, there was evidence from which the inference could be drawn that he was the driver of the other vehicle. As noted above, the plaintiff's driver said he pointed out the other driver to the police and that he was charged, while the Police Officer said he charged a person of the same name as the Respondent. The latter's failure to appear or to give evidence should have enabled the Court to draw "more confidently" the inference from the evidence that he was in fact the driver – see Jones v. Dunkel and Anor (1958) 101 CLR 298.

With respect, we see two errors in the way the issue of the driver's identity was determined. The learned Magistrate concluded there was no evidence that the defendant's vehicle was involved, as neither the plaintiff nor the police witness knew the number of the other vehicle. Accordingly "in the absence of evidence against the plaintiff" he found the case not proved. But for the reasons given above we are satisfied that there was evidence, from which it could be inferred that the Respondent was the other driver. The learned judge on appeal spoke of there being no evidence "directly" connecting the Respondent, but again appears to have overlooked the ability to draw an appropriate inference.

There was error of law in these failures to recognise the existence of evidence giving rise to the inference that the Respondent was the driver of the other vehicle, and we are satisfied on balance of probability that he should have been held liable for the accident. There was adequate evidence of his negligence and of the quantum of damage.

The appeal is allowed and the judgment of the Magistrates' Court dismissing the action is set aside. In its place there will be judgment for the plaintiff/appellant against the defendant/respondent for the sum of $4,598.40 together with costs, disbursements and solicitor's costs on the undefended scale, and costs in this Court of $250 together with disbursements as fixed by the Registrar if not agreed.

.....
Sir Moti Tikaram
President

.....
Sir Maurice Casey
Justice of Appeal

.....
Justice J. Dillon
Justice of Appeal

Solicitors:

Office of the Attorney-General's Chambers, Suva for the Appellant
Messrs. Q.B. Bale & Associates, Suva, for the Respondent

C:\OFFICE\WPWIN\WPDOCS\USHA\ABU0055U.97S