IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0040 OF 2004
(High Court Civil Action N0.156 of 1999S)

BETWEEN:

SHAN MUGA VELLU (f/n Saga Dwan) and DIAMOND EXPRESS

APPELLANT

A N D:

SHILA WATI PRASAD (f/n Alak Narain)

RESPONDENT

Coram: Ward, P
Tompkins, JA
Smellie, JA

Counsel: Mr. H.K. Nagin for the Appellant
Mr. D. Singh for the Respondent

Hearing: Friday 11th March, 2005

Date of Judgment: Friday 18th March 2005

J U D G M E N T

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[1] On 21 June 1996 there was a collision on the Queens Road at Korovisilou between a taxi and truck. The driver of the taxi and one of his passengers, the husband of the respondent, died as a result of injuries they received. The present appellants are the driver and owner respectively of the truck.

[2] By a writ dated 22 March 1999, the respondent, as the widow and administratrix of the deceased passenger, sought damages under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act, Cap 27 and, on behalf of herself and her three infant children, under the Compensation to Relatives Act, Cap 29. She originally brought the action also against the Public Trustee as administrator of the estate of the deceased driver and the owner of the taxi as the first and second defendants respectively. However the Public Trustee, as a nominal defendant, did not defend the action and the claim was withdrawn against the second defendant because he could not be traced.

[3] The trial did not commence until 24 June 2002. The length of that delay was no doubt at least partly the result of the hostage taking at Parliament in 2000 and the consequent disruption to court lists at the time.

[4] Despite the considerable delay which had already occurred since the accident, the learned trial judge agreed, on the application of counsel for the appellants, to hear evidence only on liability. Separate trials of liability and quantum should only be ordered if there is some compelling reason and no reason is apparent in the record. On the contrary, after the delays which had already occurred, there were strong reasons why the trial should have been completed as soon as possible. Separation of the trials would inevitably cause further delay, duplication of evidence and unnecessary increase in costs.

[5] It is not apparent why the respondent had taken so long to bring the action but the fact was that, by the time the hearing on liability was completed, she and her family had been waiting more than six years for any compensation to which they might be entitled and the defendants had equally had to wait to know their position. It is hard to envisage a stronger reason for the trial judge to deliver judgment promptly. It was a straight forward case. The whole hearing had only taken one and a half days. The judgment, when it was delivered, comprised six pages of which the actual evaluation of the evidence takes less than two and was delivered 19 months later on 30 March 2004.

His decision was:

> "In the outcome, on the evidence before me and on the authorities I find that in all the circumstances of this case both drivers were equally negligent in the manner of their driving resulting in the death of the Plaintiff's husband who was a passenger in the taxi.
>
> I therefore find liability established against the third and fourth defendants and they are 50% to be blamed for the accident. The plaintiff should now within 14 days apply for a date of assessment of compensation and damages under chapters 27 and 29 respectively (sic)".

The sealed order dated 7 April 2004 states:

> "... that both drivers were negligent in the manner of their driving resulting in the death of the plaintiff's husband and accordingly Judgment is entered for the plaintiff against the 1st, 3rd and 4th defendants for damages to be assessed, the 3rd and 4th defendants being 50% to be blamed for the accident ..."

[6] Notice of appeal was filed the next month and now, nearly nine years after the accident and six years after the writ was issued, the appeal is heard. We will return to the significance of the delay.

[7] The appellants have filed lengthy grounds of appeal against the finding of liability which can be summarised:

1. that the trial judge was wrong in his finding of various aspects of the evidence in the trial
2. that he erred in finding the drivers were both equally negligent and that he should have found the deceased taxi driver was solely responsible
3. that he erred in 'not holding that the appellants were wrongly sued just because recoverability of much money against the first and second defendants was not possible".

[8] At the hearing counsel confined his submissions to the learned judge's findings of

fact. The evidence called in the High Court was brief and effectively uncontested. Much was circumstantial and counsels' submissions were directed principally to the inferences to be drawn. Although there were references to statements which had apparently been made to the police by other passengers in the taxi, the only witness called who was present at the time of the accident was the truck driver. As will be seen, he did not see the actual accident.

[9] It was dark, the road was unlit and was wet from recent rain. The accident occurred as the truck, which was fully loaded with chicken feed, was climbing a hill around a bend to its left. The first appellant estimated his vehicle was only managing 10kph. The taxi was driving in the opposite direction, down the hill and into a right hand bend. The truck driver described it "coming at a high speed". There was no other witness to the speed but the distance and the direction in which the debris from the impact was spread along the road gives some support to that suggestion.

[10] The vehicles passed each other on the bend but, before the taxi had cleared the rear of the truck, it was in collision with the rear offside of the tray of the truck. The driver of the truck said he stopped because he though something had broken on his vehicle. Only then did he realise the taxi had hit his truck.

[11] The police attended the scene, took measurements and prepared a sketch plan on which the position of the debris from the impact is marked. It is spread in a broad band from what must have been the point of impact to the point where the taxi came to rest; a distance of 16.8 metres.

[12] The road there is 8 metres wide and the nearest part of the debris from the taxi's side of the road at the point of impact is 4.8 metres. The equivalent distance from the truck's side of the road is 3 metres. The first appellant gave evidence that his truck was 8 feet wide (2.4 metres)

[13] The first appellant's evidence was that the taxi passed him and he saw no more until after he had stopped to check what was wrong with his vehicle.

[14] Many other matters were adverted to in the hearing but none of them added to the evidence stated above. There were attempts to adduce hearsay which should not have been allowed but were unfortunately successful more than once and witnesses who were not experts were allowed to give their purely speculative opinion of culpability. The trial would undoubtedly have been considerably shorter if that had not been permitted.

The learned judge summarised the evidence in his judgment:

> "The truck driver says that he saw the taxi 4 chains away from where he first saw it but he took no evasive action although he did not say that the taxi was on the incorrect side of the road, but then he admitted in cross-examination that both of them were driving in their own lanes.
>
> It appears from [the police officer's] evidence that the point of impact was in the centre of the road as all the debris, i.e. broken glass and vehicle parts of the taxi were in the centre of the road. [The officer] was the one who drew the sketch plan of the scene of the accident and has given the necessary measurements."

[15] He did not analyse or refer to the possible significance of those measurements in relation to the suggestion the debris was in the middle of the road and passed straight to his conclusions:

> "The evidence reveals than both drivers were at one stage on their correct side and they were attempting to pass each other when the truck driver went too close to the centre of the road when the tray of his truck hit the right hand side of the taxi causing damage to it. The front of both the vehicles passed each other safely.
>
> It is in evidence that the [truck driver] should have been more careful particularly when negotiating a bend. [He] could not have been keeping a proper look out when he said in evidence that he does not know what

> happened particularly when he saw the other driver coming from the opposite direction 4 chains away."

[16] We sought counsels' assistance to identify any evidence upon which the learned judge could have based his conclusions that the truck driver went too close to the centre line and that the tray of his truck hit the taxi. They were unable to show any evidential basis for them. On the contrary, every part of the evidence clearly points the opposite way.

[17] The most important and uncontested evidence was the plan drawn by the police. It shows that, at the moment of impact, the rear of the truck was at least 0.8 metres from its side of the centre line. As the truck was 2.4 metres wide, that would suggest it was driving exactly in the middle of its correct carriageway. It is equally incontrovertible that the taxi at the point of impact was at least 0.8 metres over the centre line.

[18] It is also hard to understand the judge's finding that the truck driver was not keeping a proper look out. He was clearly driving in the centre of the carriageway on his side of the road and, at the moment the taxi passed his driver's cab, the vehicles could pass without contact. He described nothing unusual about the manner in which the taxi was being driven save for the speed and there is no evidence to suggest he was not keeping a proper lookout. The learned judge referred to the comments of Denning LJ in ***Baker v Market Harborough Industrial Co-operative Society*** [1953] 1 WLR 1472 at 1477:

> "Even assuming that one of the vehicles was over the centre line, and thus to blame, the absence of any avoiding action by the other vehicle made that vehicle also to blame. Once both were to blame and there was no means of distinguishing between them, the blame should be cast equally on each."

The trial judge then concluded:

> "The truck driver while negotiating the bend came obliquely across the path of the car. Adopting Lord Denning's views in such a situation 'blame should be cast equally on each".

[19] Baker's case, and the other cases cited by the learned judge, involved accidents between two vehicles where both drivers had been killed, there were no other witnesses of the accident and the position of the vehicles gave no indication of how the accident occurred. That is not the situation in this case. There was no evidence that the truck driver should or, indeed, could have taken any avoiding action.

[20] One other matter of evidence should be mentioned. The officer, who had initially investigated the case, was allowed to state his opinion that the deceased driver was at fault. The truck driver told the court he had not been charged. The judge dealt with the evidence in this way:

> "[The officer's] opinion that the deceased was at fault could not be accepted without analysing all the other evidence in this case. If either driver was prosecuted, the proof would have to be beyond all reasonable doubt. It appears the police thought that both drivers were at fault, neither was charged."

[21] The judge's apparent conclusion was that the fact neither driver, of whom one was, of course, dead, was charged demonstrates that the police thought both were at fault. That was not supported by any evidence. The officer's opinion should not have been admitted but, in any event, analysis of the other evidence points to the opposite conclusion from that reached by the judge.

[22] It is trite law that an appellate court will not lightly interfere with the trial judge's findings of fact. The primary judge has the benefit of seeing and hearing the witnesses and the other evidence as it unfolds during the trial. His findings will only be overturned

if they cannot be supported by the evidence but that is the position in the present case. The judge's finding that the first appellant had driven negligently cannot be supported on any examination of the evidence and must be set aside.

[23] The established reluctance of appellate courts to reverse a trial judge's findings of fact will not necessarily stand where the judgment was written a long time after the conclusion of the evidence. Whenever there is substantial delay between the conclusion of the trial and the judgment, even for much shorter periods than occurred in the present case, the judge will retain little if any advantage from having heard the witnesses. After a few months his memory must fade to such an extent that he cannot remember the manner in which the evidence was given or his impressions of the demeanour of the witnesses. That weakens any advantage he had. By the time he writes the judgment, he must be relying effectively on the written record. In such a situation, he is in the same position as the appellate court and his findings of fact are unlikely to deserve any special protection.

[24] This Court has referred many times to the frequency and length of delays in the delivery of judgments in the High Court. Inordinate delay carries a real risk of injustice. Parties to such litigation may have an understandable fear that the case has not been properly decided.

[25] Where a judgment has been significantly delayed, it will be incumbent on this Court to look with particular care at any findings of fact that are challenged on appeal. The longer the delay, the less the trial judge's advantage and, where the delay is significant, any advantage will be lost. In such cases, the judge will need to give far more comprehensive reasons for his findings than would normally be required to enable this Court, the parties and the public to understand that the decision has not been affected by the delay. Where the decision depends on the credibility of the witnesses, the burden on the judge becomes very much heavier. We adopt the comments of the Full Court of the Federal Court in ***Expectation Pty Ltd v. PRD Realty Pty Ltd and another*** [2004] FCAFC 189.

[26] In the present case, the learned judge's decision was not based on issues of credibility so much as analysis of circumstantial evidence. It was therefore not so susceptible to error caused by delay. Our decision in this case is that he reached the wrong conclusion on the evidence before the court. The delay was still most unfortunate because of the effect on the parties who have waited so long for a decision. That could and should have been avoided both by bringing the case on for trial in the High Court sooner and by giving judgment promptly.

[27] There is a further aspect to the delay . At the conclusion of the hearing on 25 June 2002 counsel for the appellant offered to make oral closing submissions. The Judge declined that offer and directed written submissions be filed. Submissions by the appellants were received on 20 August, by the respondent on 26 August 2002 and by the appellants in reply on 9 September 2002.

[28] This Court has previously criticised the practice that, from our observations in other cases, appears to be widespread of judges asking for written submissions at the close of the evidence. There are several reasons why, except in cases of unusual complexity, we consider this practice is inappropriate. First, it causes delay in the delivery of the judgment. Second, it deprives the judge of the considerable benefit of discussing the submissions with counsel. Third, parties and others present at the hearing do not hear, in open court, the closing submissions on behalf of the parties. Fourth, it increases the costs of the parties.

[29] We suggest that judges should require, and counsel should expect to deliver, closing submissions orally or in writing in open court at the end of the evidence or, if it seems desirable, later in the day or the following day. If counsel intend to present legal argument and cite authorities, they should be ready to do so at the hearing.

[30] The appellant has not sought leave to appeal but the respondent very properly has not objected to the appeal being heard.

Order:

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1. Leave to appeal
2. Appeal allowed
3. Finding of liability against the appellants set aside.
4. The respondent must pay the costs of this appeal which we assess at $300.

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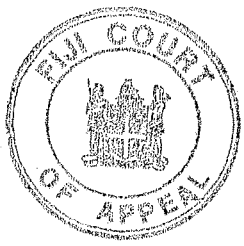
WARD, P



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TOMPKINS, JA

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SMELLIE, JA

Solicitors:

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