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

CIVIL APPEAL NO. ABU117 OF 2005
(High Court Civil Case No. 88 of 2002L)

BETWEEN:		ABDUL GANI	*Appellant*
A N D	:	RAMESH CHAND	*1st Respondent*
A N D	:	CO-OPERATIVE DEPARTMENT (NORTHERN)	*2nd Respondent*
A N D	:	ATTORNEY GENERAL OF FIJI	*3rd Respondent*

Coram: **Ward, President**
Penlington, JA
Scott, JA

Hearing: **3 November 2006**

Counsel: **A Sen for the appellant**
L Draunivalu for second and third respondents
No appearance first respondent

Date of Judgment: **Friday 10 November 2006**

JUDGMENT OF THE COURT

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[1] In the evening of 30 May 2001, the appellant was repairing a punctured tyre when his vehicle was struck by a vehicle driven by the first respondent and he was injured. The first respondent was employed by and driving a vehicle

belonging to the second respondent. The appellant brought a claim in negligence in the High Court in Labasa. On 25 October 2005, the learned trial judge found the first and second respondents liable and assessed damages at a total of $83,030.69. However, he found the plaintiff had negligently contributed to his injuries and reduced the total award by 25%.

[2] This appeal is confined to the finding in relation to contributory negligence.

[3] The facts may be summarised from the findings of the learned judge.

[4] In the evening of 30 May 2001, the appellant was driving on the Labasa to Nabouwalu road in the direction of Nabouwalu. The front offside tyre of his vehicle was punctured and so he pulled to the side of the road in order to deal with it. He pulled some way onto the nearside hard shoulder but stopped in such a position that part of his vehicle was still on the carriageway. The vehicle was parked parallel to the road and facing in the direction of travel. It was dark by this time and, whilst he worked on the tyre, the parking lights of his vehicle were on. He did not turn on his hazard lights.

[5] The first respondent was driving his vehicle in the opposite direction. He drove onto the wrong side of the road and his vehicle struck the plaintiff's vehicle a glancing blow. The plaintiff was also injured and the judge found that his injuries were caused by the first respondent driving to the wrong side of the road although he was unable to determine whether they were the result of direct contact with the first respondent's vehicle or of the first respondent's vehicle causing the tyre to fly and hit the appellant.

[6] A sketch plan was tendered in the hearing showing the position of the appellant's vehicle after the accident. It had not been moved. It shows that the road is 6.5 metres wide at that point with two carriageways of equal width i.e. 3.25 metres each. The hard shoulder on the appellant's side was 1.9 metres wide and, it would appear, the shoulder on the other side was a little narrower at 1.2 metres.

[7] The sketch is drawn with approximately two thirds of the appellant's vehicle on the hard shoulder and the police officer who drew the sketch testified that the vehicle was parked as shown. However, as no measurements are given either for the size of the vehicle or the proportion still on the road, the actual position cannot be determined with any accuracy.

[8] Having found the facts as stated above, the learned judge dealt with the issue of contributory negligence:

> "The plan speaks for itself. It shows the plaintiff's vehicle parked partly on the road and partly outside. He could easily have gone completely off the road as the shoulder of the road was 1.98 (sic) metres wide. His park lights were on but all that means to others is that a vehicle is parked. It does not indicate that something is amiss. The hazard lights are meant to indicate such danger. It takes no great effort to put them on. It was dark and therefore imperative that such lights be put on. There were no street lights and it was a highway on which the plaintiff should have expected vehicles to pass in both directions. A reasonable driver must not expect that others will always observe due care in their conduct. A reasonable man will guard against possible negligence of others. I hold that the plaintiff by failing to take a few extra precautions failed to take care of his own safety and thereby contributed to the accident. I apportion his contribution at 25%."

[9] The grounds of appeal are that the learned trial judge erred in fact and in law:

1. in holding or in finding that the plaintiff had contributed towards the accident when in fact he was parked on the correct side of the road;

2. in holding and/or finding the plaintiff to be 25% contributory negligent;

3. in reducing the total award of the plaintiff by 25%;

4. in finding the plaintiff to be 25% contributory negligent when the facts of the accident disclosed otherwise.

[10] It does not assist the court when counsel draft such repetitive grounds. There are only two issues; namely that the judge was wrong to find there was contributory negligence and that, having so found, he was wrong to fix it at 25%.

[11] Mr Sen for the appellant firmly bases his submission on the suggestion that the facts in this case demonstrate that the finding of contributory negligence was wrong. Contributory negligence was pleaded in the defence but no evidence was called by the defendant. As the burden of proving contributory negligence is on the defendant, Mr Sen also suggests that precludes the court from such a finding.

[12] We can deal with the second point shortly. Contributory negligence is proved by the facts as revealed in the evidence. If there is nothing in the plaintiff's evidence to support the claim, the defendant will need to call his own but where, as in the present case, the plaintiff's evidence has revealed the circumstances upon which the defence relies, it will be considered by the court in relation to the defence. The facts upon which the learned judge based his finding of contributory negligence, namely the failure to park entirely off the road and omitting to turn on the hazard lights were not disputed and the judge was entitled to base his determination on them.

[13] The basic principle of contributory negligence is that, when a court is awarding damages to the plaintiff for injuries caused by the defendant, it may reduce the award if the plaintiff can be shown to have contributed to the injury by some negligence on his part. However, whilst the liability of the defendant arises from a duty towards the plaintiff, the assessment of contributory negligence is not based on a similar duty on the plaintiff towards the defendant. It was explained by Lord Simons in *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601, 611:

> *"The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the plaintiff to take due care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any*

duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.

...this, however, is not to say that in all cases a plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully. Indeed it would appear to their lordships that in running-down accidents like the present such a duty exists. The position can be put even more broadly. Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot or whether one is on foot and the other controlling a moving vehicle."

[14] The question of whether contributory negligence has been proved depends on the facts in the case. The appellants suggest that the failure of the plaintiff to pull off the road or to use his hazard lights showed a failure to take reasonable care of himself. That was the test applied by the learned judge.

[15] Whilst those features may demonstrate contributory negligence in some cases, we cannot agree it is appropriate to apply that test on the facts of the present case. The defence was a total denial of any collision between the defendant's vehicle and the plaintiff or his vehicle. His evidence was, "I saw a white vehicle parked on the right hand side of the main road facing Nabouwalu. When I was going past it, all of a sudden I could see a man jump beside the parked white van. I swung more to my left hand side. I proceeded on my way to Labasa. I did not feel that I had hit something or someone."

[16] The judge found that he had struck the plaintiff's vehicle. The first defendant's evidence makes it clear that the collision was not the result of a failure to see the parked vehicle or of the fact it was partly on the road. The only conclusion must be that its sole cause was that the defendant drove off his carriageway onto the other carriageway. He must have maintained that course until he had encroached

on the other carriageway by at least two metres. Neither of the features found by the learned judge to demonstrate negligence by the plaintiff can, therefore, have had any effect on the accident.

[17] The plaintiff may have been careless of his duty to take care of himself by working where he did and relying only on his parking lights. Had that resulted in a vehicle travelling on his side of the road hitting him, the court may well have found contributory negligence. Equally, it is no answer to the defence of contributory negligence simply to say the defendant had not driven with due care or regard for the traffic rules.

[18] However, the plaintiff's failure to take care must include some element which contributes to the injury he received. In this case, his conduct had no effect on the accident at all apart from the mere fact that he happened to be in the way of the defendant when he drove on to the wrong side of the road for no apparent reason. That was the sole cause of the accident and the conduct of the plaintiff had nothing to do with it apart from, coincidentally, being in the wrong place at the wrong time.

[19] The appeal is allowed. The finding of contributory negligence is quashed and there shall be judgment to the plaintiff in the full sum of damages ordered. The respondents shall pay $500 for the costs of this appeal

Result

The appeal is allowed.

Ward, President

Penlington, JA

Scott, JA

Solicitors:

Maqbool & Company, Labasa for the appellant
Kohli & Singh, Labasa for the 1st respondent
Office of the Attorney-General's Chambers for the 2nd & 3rd respondents