IN THE COURT OF APPEAL
FIJI ISLANDS
CIVIL JURISDICTION

Civil Appeal No: ABU 29 of 2006
(On appeal from HBC 236 of 2000L)

BETWEEN : **SHAHEED IMROZ ALI**

Appellant (Original Plaintiff)

AND : **MUKTAR ALI**

First Respondent (Original 1st Defendant)

AND : **SHARIDA BANU**

Second Respondent (Original 2nd Defendant)

JUDGMENT

Court of Appeal: **J. Byrne, PA**
D. Goundar, JA
S. Inoke, JA.

Counsel Appearing: **Mr S Ram for the Appellant**
Mr T Tuitoga for the Respondents

Solicitors: **Samuel K Ram for the Appellant**
Munro Leys for the Respondents

Date of Hearing: **4 November 2009**
Date of Judgment: **3 December 2009**

JUDGMENT OF INOKE, JA:

INTRODUCTION

[1] The Appellant claimed that he was struck by a log which was not properly secured on to a Toyota Hilux carrier owned by the Second Respondent and driven by the First Respondent. He was 16 years old at the

time of the incident, 3 May 1998. He suffered serious personal injuries and sued the Respondents in the High Court at Lautoka.

[2] In a Judgment delivered on **17 February 2006**, Connors J dismissed the Appellant's claim. The Appellant now appeals against that Judgment to this Court.

THE GROUNDS OF APPEAL

[3] The Notice of Appeal sets out the Grounds of Appeal as follows:

> **1. The Learned Trial Judge erred in law and in fact in holding that the plaintiff had failed to prove their case on the balance of probabilities as pleaded when there was evidence before the Court proving negligence against the defendant.**
>
> **2. The Learned Trial Judge erred in law in placing heavy and/or all emphasis on the pleadings and failed to take into account and properly assess all the evidence adduced at the trial of the matter.**
>
> **3. The Learned Trial Judge erred in law in holding that the doctrine of *res ipsa loquitur* was not pleaded in the statement of claim when the said doctrine had been specifically pleaded under paragraph 4(f) of the statement of claim.**
>
> **4. The Learned Trial Judge erred in fact and failed to draw the proper inferences when he concluded that he was satisfied with the version of the accident given by the first defendant. In doing so the learned trial Judge erred in not taking into account the contradictions made by the first defendant in evidence.**

[4] Mr Samuel Ram, Counsel for the Appellant, condensed the 4 grounds of appeal into two in his written submissions. Grounds 1, 2 and 4 are essentially that the learned trial Judge misinterpreted the evidence and came to the wrong conclusion. Ground 3 is that His Lordship failed to consider the principle of **res ipsa loquitur**.

POWERS OF THE COURT ON HEARING APPEALS ON FINDINGS OF FACT BY THE TRIAL JUDGE

[5] As to the powers of the Court of Appeal in hearing appeals in civil cases, s 13 of the **Court of Appeal Act** provides:

Powers of Court of Appeal in civil appeals

For all the purposes of and incidental to the hearing and determination of any appeal under this Part and the amendment, execution and enforcement of any order, judgment or decision made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the [High] Court and such power and authority as may be prescribed by rules of Court.

[6] The **Court of Appeal Rules** provide as follows:

General powers of the Court

22.-(1) ...

(2) The Court of Appeal shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner:

Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds.

(3) The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require.

(4) The powers of the Court of Appeal under the foregoing provisions of this rule may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the Court below or by any particular party to the proceedings in that Court, or that any ground for allowing the appeal or for affirming or varying the decision of that Court is not specified in such a notice; and the Court of Appeal may make any order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the parties.

(5) The powers of the Court of Appeal in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal.

Evidence on appeal

24. Where any question of fact is involved in an appeal, the evidence taken in the Court below bearing on the question shall, subject to any direction of the Court of Appeal, be brought before that Court as follows:-

(a) in the case of evidence taken by affidavit, by the production of copies thereof;

(b) in the case of evidence given orally, by a copy of the judge's note, or, where an official shorthand note of the evidence was taken, by a copy of the transcript thereof, or by such other means as the Court of Appeal may direct.

[7] These provisions on their face, give the Court a very wide discretion indeed as to its approach in determining appeals against the trial Judge's assessment and interpretation of the facts.

[8] In **Mahadeo Singh** v **Chandar Singh** [1970] 16 FLR 155, this Court said:[1]

> **Much has been written as to the position of an appeal court which is invited to reverse on a question of fact the judgment of a Judge, sitting without a jury, who has had the advantage of seeing and hearing witnesses. Where he has based his opinion in whole or in part on their demeanour it is only in the rarest of cases that an appeal court will do so: *Yuill v. Yuill* [1945] P.15. When, however, the question at issue is the proper inference to be drawn from facts which are not in doubt the appellate court is in as good a position to decide as the Judge at the trial: *Powell v. Streatham Manor Nursing Home* [1935] A.C.243.; *Benmax v. Austin Motor Co. Ltd.* [1955] A.C.370. The first rule stated by Lord Thankerton in *Watt (or Thomas) v. Thomas* [1947] A.C. 484 at 487-8 is "Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion".**
>
> **The present case is a composite one. The evidence was partly oral and partly documentary. The trial Judge did not appear to emphasize the demeanour of the appellant but rather disbelieved his evidence on account of its confused nature. He finally used the word "fabricated" in regard to the allegations which the appellant made. There was, on the other hand, documentary evidence which the trial Judge, for no stated reason, treated with scant respect. The weight to be given to his evidence, unlike the oral evidence of the appellant, is a matter of inference, and if this Court found it to be of substantial cogency, it would, I think, be justified in giving effect to its own conviction, upon the basis that the trial Judge had misdirected himself as to its weight.**

[9] The English case of **Watt (or Thomas)** v **Thomas** [1947] 1 All E R 582, involved an application by the husband for divorce on the grounds of his wife's cruelty. The husband's application was refused at first instance. On appeal the decision at first instance was reversed. The wife then appealed to

[1] Gould VP, Marsack and Tompkins JJA at p 159E-160A

the House of Lords. The main question on appeal was whether there was sufficient justification for reversing the decision at first instance. The House of Lords in a majority[2] decision held that there was no justification for reversing the decision at first instance because the trial Judge had not misdirected himself on the evidence, misconceived or disregarded evidence.

[10] Lord Thankerton, with whom Lord Simons and Lord Du Parcq were in complete agreement,[3] explained the applicable principles as follows:[4]

> **My Lords, I am of opinion that Lord Mackay whose opinion formed the judgment of the Second Division, has misconceived or disregarded the duty of an appellate court in regard to the decision of a judge, sitting without a jury, on a question of fact (when there is no misdirection), which has so repeatedly been laid down in your Lordships' House in cases from England and Scotland alike. The only suggestion by Lord Mackay of the Lord Ordinary having misdirected himself was as to onus of proof, but the Lord Ordinary, quite rightly, makes no reference to onus of proof, for, as has often been pointed out, no question of burden of proof as a determining factor of the case arises on a concluded proof, except in so far as the court is ultimately unable to come to a definite conclusion on the evidence, or some part of it, and the question will arise as to which party has to suffer thereby. The Lord Ordinary came to a definite conclusion on the evidence, and no question of onus did, or could, arise: *Robins v. National Trust Co.* (14) ([1927] A.C. per Lord Dunedin, 520). I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: -**
>
> **I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.**
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> **II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.**
>
> **III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.**
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> **It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the**

[2] Viscount Simon dissenting.
[3] At p 590G and 591D, respectively
[4] At p 586G-588A

individual case in question. It will hardly be disputed that consistorial cases form a class in which it is generally most important to see and hear the witnesses, and particularly the spouses themselves, and, further, within that class, cases of alleged cruelty will afford an even stronger example of such advantage. Normally, the cruelty will afford an even stronger example of such an advantage. Normally, the cruelty, is alleged to have occurred within the family establishment, and the physique, temperament, standard of culture, habits of verbal expression and of action, and the interaction between the spouses in their daily life, cannot be adequately judged except by seeing and hearing them in the witness box. The law has no footrule by which to measure the personalities of the spouses. In cases such as the present it will be almost invariably found that a divided household promotes partisanship, and it is difficult to get unbiased evidence.

It may be well to quote the passage from the opinion of Lord Shaw in *Clarke v. Edinburgh & District Tramways Co.* (15) (1919 S.C. (H.L), 37, which was quoted with approval by Lord Sankey, L.C., in *Powell v. Streatham Manor Nursing Home* ([1935]A.C.250). Lord Shaw said:

> In my opinion, the duty of an appellate court in those circumstances is for each judge to put it himself, as I now do in this case, the questions, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

Lord Shaw had already pointed out that these privileges involved more than questions of credibility. He said (ibid., 36):

> ...witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced on the printed page.

I may add that, after it became usual to have the printed transcript of the evidence in place of the judge's notes, it was argued in at least one case that, having the verbatim transcript of the evidence, the matter was more at large for the appellate court, but it is undoubted that the principle has not been relaxed – if, indeed, it has not been tightened – by the later decisions. I am aware that this contention was put forward in *Kilpatrick v. Dunlop* 1916 S.C. 631n. In reference to this contention Lord Halsbury says (1916 S.C. 632 n):

> I am unable to determine one thing or the other, namely, whether the appellant or respondent was worthy of credit. It is a question of credit, where each gives a perfectly coherent account of what he has done and said, and contradicts the other. Under these circumstances it is impossible that the Court of Appeal should take upon itself to say, by simply reading printed and written evidence, which is right, when it has not had that decisive test of hearing the verbal evidence and seeing the witnesses, which the judge had who had to determine the question of fact, and to determine which story to believe.

> **In other words, whereas you might formerly find in the judge's notes some indication of the impression made on his mind by the witnesses, no trace of any such impression is to be found in the cold, mechanical, record of the evidence.**

[11] Lord Thankerton came to the conclusion that this was a type II case in which His Lordship was not in a position, without enjoying the advantage of seeing and hearing the witnesses, of coming to a satisfactory conclusion on the printed evidence.[5]

[12] Viscount Simon, although coming to a different conclusion from the other law Lords because of His Lordship's interpretation of the facts, made these observations about the principles that apply in such a case:[6]

> **Before entering on an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court Appeal are limited to deciding a question of law (e.g. on a Case Stated or on an appeal under the Country Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached on that evidence should stand, but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide, but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given. What I have just said reproduces in effect the view previously expressed in this House, e.g., by Viscount Sankey in *Powell and Wife v. Streatham Manor Nursing Home* ([1935] A.C.250), and in earlier cases there quoted. Lord Greene, M.R, admirably stated the limitations to be observed in the course of this judgment in *Yuill v. Yuill* (2) ([1945] 1 All E. R. 184). Lord President Clyde, in *Dunn v. Dunn* (1930) S.C. 144) summarized the scope of appellate correction, with copious citation of earlier authority and I agree with him that the true rule is that expounded by Lord *President***

[5] At p 588C
[6] At p 583G-584D

> ***Inglis*** **in** ***Kinnell v. Peebles*** **(4) (R. (Ct. of Sess.) 423), that a court of appeal should "attach the greatest weight to the opinion of the Judge who saw the witnesses and heard their evidence," and, consequently, should not disturb a judgment of fact unless they are satisfied that it is unsound. It not infrequently happens that a preference for As' evidence over the contrasted, evidence of B is due to inferences from other conclusions reached in the judge's mind rather than from an unfavourable view of B's veracity as such. In such cases it is legitimate for an appellate tribunal to examine the grounds of these other conclusions and the inferences drawn from them, if the materials admit of this, and, if the appellate tribunal is convinced that these inferences are erroneous and that the rejection of B's evidence was due to the error, it will be justified in taking a different view of the value of B's evidence. I would, only add that the decision of an appellate court whether or not to reverse conclusions of fact reached by the judge at the trial must naturally be affected by the nature and circumstances of the case under consideration.**

[13] In the later decision of **Benmax** v **Austin Motor Co Ltd** [1955] 1 All E.R. 326, the House of Lords had to consider whether the findings of fact by the trial Judge should be overturned on appeal when the trial Judge did not doubt the credibility of any witness, and formed his view by inference from the evidence as a whole.[7] Viscount Simonds, with whom all the other Law Lords[8] agreed, explained the principles as follows:

> **Fifty years ago in Montgomerie & Co v Wallace-James [1904] AC 73, Lord Halsbury, L.C., said at (p 75):**
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> > **'But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate court.'**
>
> **And in Mersey Docks & Harbour Board v Proctor [1923] AC 253, Viscount Cave LC said (at p 258):**
>
> > **'The procedure on appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly.'**
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> **It appears to me that these statements are consonant with R.S.C., Ord. 58. r. 1, which prescribes that**
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> > **'All appeals to the Court of Appeal shall be by way of re-hearing'**
>
> **and r.4:**

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[7] At p 328G
[8] Ld Morton of Henryton, Ld Reid, Ld Tucker and Ld Somervell of Harrow.

> **'The Court of Appeal shall have power to draw inferences of fact and to give any statement and make any order which ought to have been made...'**
>
> **This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness. (my emphasis).**

[14] Viscount Simonds in **Benmax** (supra) acknowledged that there could be difficulties in ascertaining when the appellate court should intervene but thought that such difficulties should have no bearing on the function of the court:[9]

> **But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts. An example of this distinction may be seen in any case in which a plaintiff alleges negligence on the part of the defendant. Here, it must first be determined what the defendant, in fact, did, and secondly, whether what he did amounted in the circumstances (which must also, so far as relevant, be found as specific facts) to negligence...A judge sitting without a jury would fall short of his duty if he did not first find the facts and then draw from them the inference of fact whether or not the defendant had been negligent. This is a simple illustration of a process in which it may often be difficult to say what is simple fact and what is inference from fact, or, to repeat what I have said, what is perception, what evaluation. Nor is it of any importance to do so except to explain why, as I think, different views have been expressed as to the duty of an appellate tribunal in relation to a finding by a trial judge. For I have found on the one hand universal reluctance to reject a finding of specific fact, particularly where the finding could be founded on the credibility or bearing of a witness, and, on the other hand, no less a willingness to form an independent opinion about the proper inference of fact, subject only to the weight which should, as a matter of course, be given to the opinion of the learned judge. But the statement of the proper function of the appellate court will be influenced by the extent to which the mind of the speaker is directed to the one or the other of the two aspects of the problem.**

[15] Lord Reid referred to the speech of Lord Thankerton in **Watt** (supra) as the leading authority in cases where the credibility or reliability of one or more witnesses has been in dispute and where a decision on these matters has led the trial judge to come to his decision on the case as a whole.[10] But Lord Reid distinguished the case where no question of credibility arises:

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[9] Per Viscount Simonds at p 3271-328C
[10] At p 329C

But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course to give weight to his opinion. In Rickmann v Thierry (1896), 14 RPC 105, Lord Halsbury, L.C., said (at p116):

> **"The hearing upon appeal is a re-hearing, and I do not think there is any presumption that the judgment in the court below is right."**

And later in the same speech he said (ibid):

> **"Upon appeal from a judge where both fact and law are open to appeal it seems to me that the appellate tribunal is bound to pronounce such judgment as in their view ought to have been pronounced in the court from which the appeal proceeds, and that it is not within their competence to say that they would have given a different judgment if they had been the judge at first instance, but that because he has pronounced a different judgment they will adhere to his decision."**

My Lords, there may be a difference of emphasis between this view and that expressed in the quotation given by my noble and learned friend, Lord Simonds, on the one hand, and the view expressed by Lord Thankerton and by other noble Lords and learned judges to the same effect on the other hand, but I can find no essential difference between the two views, and, plainly, the present case is not one in which any question of credibility, even in its widest sense, can be said to arise.

[16] Lord Somervell, also, in **Benmax** (supra) explained the approach in this way:[11]

> **The difficult cases are those where there are circumstances on which appellant and respondent can each rely. The judge has based his decision on the way in which witnesses give their evidence. Unless there is no dispute at all he always does this. On the other hand, there are sentences in his judgment which indicate very probably, but not certainly, that he did not have present to his mind an answer or document which plainly affects the accuracy of a witness he has relied on, or his general conclusion. I only refer to this in order to emphasise the impossibility, in my opinion, of laying down anything in the nature of a code as to the circumstances in which an appellate court should interfere by reversing the trial judge or ordering a new trial.**

[11] At p 330E

[17] It is true that our **Court of Appeal Act** or the **Rules** do not expressly say that an appeal is by way of re-hearing but their provisions, in my view, are wide enough to allow such an approach. For example, all the evidence taken before the court below is available for consideration by this Court on an appeal and the Court has all the powers that the High Court possesses.

[18] It is also my opinion, that the following general principles can be gleaned from the case authorities that I have considered above:

1. There is no general rule that the Court of Appeal must not overturn a decision of the High Court based on the trial judge's findings of fact alone.

2. Where the trial Judge has misdirected himself as to the facts, the Court of Appeal should consider the evidence given at the trial and come to its own conclusions.

3. Where the trial judge's findings of fact are not dependent on the credibility or reliability of witnesses, the Court of Appeal is obliged to draw its own inferences from those facts and come to its own decision.

4. Where the trial judge's findings of fact are based on the credibility or reliability of the witnesses, the Court of Appeal is obliged to consider the evidence given at the trial and draw its own inferences from the facts but it must give due weight to the findings of the trial judge.

5. Where the trial judge's findings of fact are based **solely** on the credibility or reliability of the witnesses, it would be difficult for the Court of Appeal to overturn the trial Judge's findings.

THE FACTS AS FOUND BY THE TRIAL JUDGE

[19] His Lordship's findings of fact as appear in the judgment are as follows:

The plaintiff by writ of summons filed on the 20th July 2000 claims damages from the defendants for injuries sustained by him due to the negligence of the 1st defendant (driver) and the 2nd defendant (owner).

The statement of claim pleads that the plaintiff on the 3rd May 1998 was walking along Navau Road, Ba when motor vehicle registration E2932 which was loaded with logs drove alongside him and the log which was insecurely kept on the vehicle struck him.

It is not in issue that the 1st defendant was the driver of the vehicle and the 2nd defendant, the owner.

The statement of claim further pleads that the 1st defendant was negligent in the management and control of the vehicle and breached his duty of care to the plaintiff.

The negligence alleged is particularised in 6 paragraphs, 5 of which plead that the logs were insecure, the remaining paragraph pleads a failure to take into consideration the safety of other road users and give the due care and attention required in the circumstances. By virtue of paragraph 1 of the statement of claim this paragraph must also relate to a log which was insecurely kept on the said vehicle.

The plaintiff in his evidence said that he was walking along the Navau Road and that it was dark. He further says that a carrier came towards him and as the carrier passed him he was struck in the stomach by a log. He grabbed his stomach and moved towards the carrier which stopped. He then gives evidence of having been taken by the driver of the carrier, the 1st defendant, to his home then to the Ba Mission Hospital where he was admitted.

Evidence was also given on behalf of the plaintiff on the issue of liability by Shareen Ahmed was staying at the plaintiff's home as the plaintiff's parents were away in Nadi. The plaintiff was at the time only 16 years of age. He was the uncle of the plaintiff.

Mr Ahmed did not see the accident but attended the scene when called by the plaintiff immediately after the accident occurred. The accident occurred only about 10 and 11 metres from the plaintiff's home according to Mr Ahmed. He gave evidence describing a piece of timber being placed across the defendant's vehicle which he says struck out 3 to 4 feet each side of the vehicle.

It is not in dispute that the defendant's vehicle was a Toyota Hilux carrier with a canopy on the back. It also appears to be undisputed that the carrier was at the time carrying mangrove logs which were between 6 and 8 feet in length.

There was no evidence from either plaintiff or Mr Ahmed that any of the logs on the 'defendants' vehicle came loose or that they were in any way insecure.

The 1st defendant, the driver of the motor vehicle had seated in front of the vehicle with him, his father and a friend, Sarwar Ali. They all gave evidence of travelling slowly and that the logs were placed in the vehicle, in the same direction as the vehicle and with the tail gate in its upright position.

They said that they did not see the plaintiff prior to hearing a bang at which time the vehicle was immediately stopped and the plaintiff was seen in the middle of the road holding his stomach.

There is some dispute as to whether or not there was a warning light affixed to the rear of the logs. The 1st defendant said that there was an orange light however it was later said there was an ordinary light globe. The plaintiff says there was in fact no light affixed to the rear of the timber.

The 1st defendant contends that the plaintiff collided with the carrier or with timber at the rear of the carrier after he had run onto the road in the vicinity of the tamarind trees and denies that the plaintiff was walking down the road in the opposite direction to the direction of travel of the carrier.

Evidence was given and was not disputed that the tail gate when in its locked position was about 1 metre above the ground and that the vehicle tray length was about 5 feet which would have resulted in about 3 feet maximum hanging over the rear of the vehicle.

The only evidence of a log being placed across the vehicle is that of Shareen Ahmed who says that there was such a log and that it protruded 3 to 4 feet.

There is no evidence of the load being insecure and all evidence describes the plaintiff coming into contact with a log secured to the vehicle at the side or at the rear.

I have had the benefit of written submissions filed on behalf of the plaintiff and on behalf of the defendants. The plaintiff's written submissions in addition to referring to relevant parts of the evidence makes a submission based upon res ipsa loquitur. Res ipsa loquitur is however not pleaded in the statement of claim. Notwithstanding the submission relies upon the English authorities and is based upon Swan v. Salisbury Construction Co. Ltd [1966] 2 All E R 138 at 142.

[20] The relevant parts of the trial transcript of the First Defendant's (the driver) explanation of how the Plaintiff was injured are at pages 608 to 617 of the Appeal Record where he gave his evidence in chief:

Q: As you were travelling down to the Navau jetty, what were the sitting arrangements in the vehicle?
A: All three of you were sitting in the front?
A: Yes in the front.
Q: So you reached Navau jetty, what time that would have been?
A: About 6.30 pm.
Q: How long would it take to travel from your house to Navau jetty?
A: Takes about 15 minutes.
Q: One way?
A: Yes
Q: Now you reached Navau jetty you told this Court that you went there to load logs. Did you load these logs?
A: Yes
Q: And where did you get these logs from?
A: From Mangrove posts.
Q: And how many logs in total?
A: 15 logs.
Q: Could you explain to this Court how the logs were loaded into the vehicle?
A: All loaded long ways because the canopy at the back.
Q: How did you load them?
A: Just put the things at the back, just only 8' long.
Q: What was 8' long?
A: Posts.
Q: When you loaded them, did you secure?
A: I tied the things with the rope.
Q: Where exactly did you tie them?
A: At the front and at the back. In the front there is a rope there and at the back there are hooks there. There is a long rope and all tied in a bundle.
Q: Just go back a bit, you said you tied in a bundle. Did you tie them first when they were on the ground or did you tie them when you loaded?
A: Loaded the things and we tied the front first and at the back.
Q: So how they sitting on the vehicle, these logs? They sitting sideways or they sitting?
A: Not sideways. Length ways.
Q: How they protruding?
A: Protruding out of the tail gate at the back. The tray is 5' long so 3' it was sticking out.
Q: When you say protruding out was it on the side?
A: No. No. It was length ways, to the back.
Q: You heard evidence from the plaintiff. His evidence was that a piece of log. Let me show you Exhibit 1(a). The plaintiff's evidence was that a log was lying along the tail gate.
A: No, there is no log on the sideways.
Q: No would you have any reason to put the log that way?
A: No there is no reason because only posts on the tailgate and the tailgate is very strong and there is a tarpaulin at the back. Can't put anything in it sideways.
Q: If I refer you again to the picture, it was sitting outside.
A: There is no gap there.
COURT: No gap in what?
A: The back part of the tail gate. When this thing is closed there is no gap there.
Q: Now is there anything else you did before you headed back home after loading the logs.
A: No.
Q: Can you tell this Court what is the sitting arrangements when you left Navau jetty?

A: Sarwar Ali was sitting in the middle and father was sitting at the other end and I was driving.
Q: Was there anybody sitting at the back?
A: No, only three of us.
Q: Now by the time you left the jetty, what time was it?
A: About 6.30 pm.
Q: Was it dark?
A: Very dark.
Q: Now you had loaded the 15 logs. You were travelling back towards your home. Could you explain to this Court what happened immediately before you heard a bang near the plaintiff's house?
A: We were coming from Navau jetty. As we reached the tamarind trees we heard the bang sound. Then I stopped the carrier just watched what happened at the back. I went there and saw Imroz Ali, was standing at the back. He was holding his stomach. Then I asked him what happened? He told me that he hit the post. I told Sorab Ali to bring him in the front then we take him home.
Q: Now did anybody else come and speak to you before you left?
A: No. Nobody else spoke to us. Only three of us.
Q: There are three of you?
A: Yes.
Q: And the plaintiff?
A: Yes.
Q: When you left the place where this incident took place, what was the sitting arrangement?
A: Sarwar Ali walked down home, this boy, my father and myself took this boy home in the carrier. We put him in the middle and my father was sitting at the side, myself was driving.
Q: And Sarwar Ali walked home?
A: Yes he walked home.
Q: How far were you away from your house in that point in time?
A: Not very far. Imroz's house is near by, his my neighbour.
Q: Sarwar Ali, did he walk to his house or your house?
A: He came to my house.
Q: How fast were you travelling immediately before you heard this man?
A: It was about 20 km/h.
Q: Did you have your lights on?
A: Yes.
Q: What lights on?
A: Front head lights on and I tied one light at the back.
Q: What was this light at the back?
A: One load at the back.
Q: And when had you tied that light?
A: When I loaded the logs I tied because before plenty times I brought that type of logs. That was not the first time.
Q: How many times have you done this particular task picking up these logs from Navau jetty and returning home?
A: I've been living there for a long time.
Q: How many times in a week do you get to the jetty to get these particular logs?
A: Once a month, twice a month.
Court: I understand the logs were resting on top of the tailgate. Is that right?
A: Yes.
Court: About 3' the logs were sticking out of the tailgate, going up into the air?
A: The front part was on the floor.
Q: And how high is the top of the tailgate off the road?

A: Tailgate is 3 ½' off the road.
Court: So when the logs are sitting on the tailgate that part of the log was 3 ½' off the road?
A: Yes.
Court: Mean it's going up after that, up high?
A: yes.
Court: When you saw the plaintiff, he was holding his stomach?
A: Yes.
Q: Now Shareen Ahmed gave evidence on behalf of the plaintiff. His evidence is stated that after this particular incident, you heard the bang, he was present at the site. What do you have to say to that?
A: No. Nobody was there. When I came back from the hospital then I went and told him.
Q: So he didn't see?
A: No.
Q: Are you absolutely sure?
A: Yes.
Q: Now, you headed back to your house, what was the reason for you going back to your house?
A: I have to park the carrier home because the thing was already log and have to take my brother's carrier.
Court: Sorry?
A: I went home to park the carrier at home. And there is another carrier home, my brother's carrier then I took this boy to the hospital.
Court: In your brother's carrier?
A: Yes.
Q: Now both the plaintiff and a Mr Ahmed told this Court that a particular log was sitting at the Tail gate. What do you have to say to that?
A: No. No other logs on the sides.
Q: Now when you heard the bang, how far was the plaintiff's house from your vehicle?
A: In front of the plaintiff's house there are tamarind trees, there is a slope there then when I parked the carrier then I saw him standing at the back of the carrier then from there I just recognised myself that he has crossed that slope and hit the back of the logs which were hanging out. There is a slope from his house and the road goes up the slope, slope from his compound.
Court: Now just explain to me, how you say he hit the logs when he is holding his stomach. You mean his stomach hit the logs. How can his stomach hit the logs when the logs are more then 3 1/2' in the air?
A: He just crossed the road from the back of the carrier?
Court: But the logs are going up in the air. I thought you said that the tailgate 3 ½' in the air and they going up high and higher. How can his stomach hit the logs?
A: Load was on that height. When we come from that road, there is a slope from his compound, there is one slope from the sides there is a small hill and when he had to come down he had to walk down like this. And when the carrier was going that wood passed the level of that. His compound and the carrier load is just.
Court: So he jumped?
A: Yes he jumped.
Court: He jumped.

[21] Contrast that with the Plaintiff's explanation of how he was injured (at p 535 to p 540 of the Appeal Record:

Q: Can you start by telling this Court at that time (6.00pm to 7.30pm) where were you heading?
A: I was going to my neighbours.
Q: And your house is on Navau?
A: Yes Sir.
Q: And Navau road goes into the sea, right? One goes to Kings road and one goes to the sea?
A: Yes, Sir.
Q: Which way did you head?
A: Towards the sea.
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Q: Now could you tell this Court what was the lighting at that time?
A: It was dark and I could only see cars going by. I could only see cars went by.
Q: Could you see the road?
A: Not that much Sir but I could see a bit.
Q: Now as you walking along this road, could you tell this Court what happened?
A: I was walking on the road on my right side and a van was coming on the opposite direction. It was coming on the road that is towards the sea. And it went past me.
Q: So the vehicle that was coming from the sea heading towards Kings road side.
A: That is correct my Lord.
Q: The van went past then what happened?
A: And then something hit me.
Q: And what happened after it hit you?
A: I was thrown away.
Q: Then what happened after that?
A: And then when I shouted the van stopped near my house.
Q: How far away were you from your house?
A: About 30 metres.
Q: And what did you shout?
A: I shouted Mama.
Q: Could you explain what do you mean by Mama. Who's mama?
A: Sharin is my mother's brother.
Q: You yelled for your maternal uncle. What did you do after that?
A: Holding my stomach I walked very slowly. I went to the place where the van stopped.
Q: And when you went to the van, was there anybody there?
A: Yes.
Q: Who?
A: Muktar Ali was inside.
Q: And is there any body else?
A: I don't know his name but his father was there.
Q: Muktar's father?
A: That is correct my Lord.
Q: And anybody else?
A: Sarwar Ali.
Q: And what about you maternal uncle?
A: He was not there at the time.
Q: Did you see the van?
A: I came to the van that I fell down.
Q: Did you see the van before going up?
A: Yes Sir, I saw the back.

Q: Did you see anything on the van?
A: Yes Sir.
Q: What was there?
A: There was a log that was sticking out.
Q: Which side of the van was the log sticking out?
A: On the left side.
Q: Did you see anything else on the van?
A: No Sir then I fell near the van.
Q: What happened after you fell near the van?
A: Muktar Ali picked me up and he said I was hit by the wood because I was going and the van was coming from that side. And then he told my uncle Sharin you come and I am taking him to my house.
Q: Your uncle Sharin where was he?
A: Where the van was stopped near my house.
Q: Was your uncle there when Muktar Ali said that the stick hit him?
A: Yes Sir.

And later on in cross examination, at p563 to 564 of the Court Record:

Q: You said that there were no other lights except the head lights of the van?
A: Yes.
Q: I put to you that there was a hazard light at back of the van.
A: No Sir.
Q: A bright orange light that was tied to the load?
A: No Sir.
Q: Did you observe the way the logs were tied?
A: When I came I noticed that wood was sticking out of the parked vehicle.
Q: Was it just one piece of wood?
A: There was only one that was sticking out.
Q: And where was the rest of the logs?
A: Did not notice rest of logs.
Q: Now I put to you that you ran down the steep beside those tamarind trees and collided with logs....vehicle as it went past.
A: No Sir.
Q: I put to you that there was no log sticking outside the left hand side.
A: Yes it was sticking out.
Q: I put to you all logs were secured.
A: I don't know that but I just know that one was sticking out.

PARTICULARS OF NEGLIGENCE AS PLEADED

[22] The particulars of negligence as pleaded in the Statement of Claim are as follows:

a. Causing or permitting the logs which were loaded in the motor vehicle to be kept insecurely.

b. Failure to take any or an adequate precaution to ensure that the logs were kept securely such that it would not injure pedestrians and other road users.

c. Failure to secure logs by proper means when they knew or ought to have known that it was unsafe and dangerous so to do.

d. Failure to adequate measures to secure the load safely.

e. Failure to take into consideration the safety of other road users and give the due care and attention required in the circumstances.

f. The plaintiff will further rely upon the fact, as evidence of negligence on part of the defendants and/or their servants and/or their agents, that logs were being carried along a public road which were insecurely kept on a vehicle which was under the control and management of the first defendant and a log from the vehicle struck the plaintiff and caused him injuries.

SHOULD THIS COURT RECONSIDER THE FACTS AS FOUND BY THE TRIAL JUDGE

[23] This is one of those composite cases where the evidence was partly oral and partly documentary. The documents in question were two affidavits.

[24] First, I cannot find anywhere in the judgment in which Connors J said that his findings of fact were based on the demeanour or the reliability of the witnesses or their testimony, or for that matter that he disbelieved a witness for those reasons. Even if I accept that it is implicit in His Lordship's findings of fact that he disbelieved the Plaintiff because he thought he was not a credible or reliable witness, I am entitled, if not obligated, to re-look at the evidence according to general principles 2, 3 and 4 which I have referred to above and in accordance with **Mahadeo Singh** v **Chandar Singh** (supra).

CONSIDERATION OF THE TRIAL JUDGE'S FINDINGS

[25] The success of this appeal depends on whether the trial Judge was right in accepting the Respondents/Defendants explanation of how the Appellant/Plaintiff was injured. I think if this Court accepts the Plaintiff's explanation as the truth then the First Defendant in placing a log across the tray is clearly negligent.

[26] It is very clear from the passage of the trial transcript referred to above, that the trial Judge had some serious doubts about the First Defendant's explanation. It would have been obvious to His Lordship that it was not physically possible that the Plaintiff would have been struck on his stomach because the logs were at least a metre above ground at its lowest point and well above the Plaintiff's stomach height. So the only way that the log would have struck the Plaintiff, in accordance with the First Defendant's explanation, is for the Plaintiff to have jumped up in the air when he got to the log in question if he was running across the path of the vehicle. It would not be possible, In my view, for a 16 year old to be able to chase the carrier from behind and then jump up in the air so that his stomach comes into contact with the ends of the 15 logs. In any event, the Defendant's case is that the Plaintiff ran across the path of the vehicle. Further, there was no reason given in evidence for the Plaintiff to run across the rear of the carrier or to chase it.

[27] In stark contrast, the Plaintiff's explanation was that he was walking in the opposite direction towards the Defendants' carrier when he was struck in the stomach by a log that had been placed across the back of the carrier. This log had been placed on top of 15 logs that were placed, lengthwise, in the back tray of the carrier. A logical explanation for this would have been that this log was to hold the other logs down because about half of their lengths would have been sticking out past the rear of the carrier. It was dark so he could not have seen the protruding log.

[28] Counsel for the Plaintiff cross examined the First Defendant on his prior inconsistent statement in his affidavit that the back gate was down. He was adamant in his evidence at the trial that the back gate was up. Whichever way the logs were placed, it seems more plausible that the tail gate was down so that the highest point of the pile, or if a log was placed across the pile, the height of that log, would be no higher than the Plaintiff's stomach.

[29] Even if this Court accepts that the First Defendant's explanation is the truth, there are two serious difficulties with it. First, no one saw what happened. The First Defendant driver and his other two companions were in the front of the vehicle and could not have seen what happened at the rear of the vehicle. Indeed, they did not see what happened at the back of the carrier or what happened in front despite the headlights being turned on.

[30] Secondly, and I think the more serious and fatal objection to accepting the First Defendant's explanation, is that it came from the Judge's own questioning and not from the witness voluntarily. The explanation was offered by the trial Judge and the witness of course accepted. In this respect, with the greatest of respect, the trial Judge had misdirected himself as to the weight to be given to the Defendant's explanation.

WAS THE EVIDENCE OUTSIDE THE PLEADINGS?

[31] I, with respect, disagree with the trial Judge that the Plaintiff has not proven his case as pleaded. I think the evidence clearly fell within any of the particulars of negligence as pleaded. I agree with Mr Ram, Counsel for the Plaintiff, that the trial Judge was overly technical in his interpretation of the word "secure". I would have given a more generous and wider meaning to the word as I do not think that it is not stretching that meaning too far by saying that to "safely secure" a load is to "place the load in such a way that it is safe and is not likely to injure the plaintiff". I think the circumstances of this case clearly fell within such a meaning.

[32] Further, even if I am wrong, I do not think that the Respondents/Defendants can complain that they were surprised or were not given an opportunity to rebut the evidence given at the trial by and on behalf of the Appellant/Plaintiff. In fact no such objection had been raised either at the trial or in this appeal. Indeed, the main basis for the Respondents/Defendants case is that the trial Judge accepted their

Respondents/Defendants case is that the trial Judge accepted their explanation of how the Plaintiff was injured rather than the Plaintiff's own explanation.

[33] So, for that reason, if an amendment of the particulars of negligence was asked for at the end of the Plaintiff's case, it would have been allowed, and even if not asked for, the High Court could of its own motion allow it so that the real question in controversy between the parties could be determined: **Order 20 rule 7(1)** of the **High Court Rules 1988** and **Perry v Gregory [2006] FJHC 83; HBC0064.2003L (29 November 2006)**. Similarly, such an amendment would have been granted had it been sought in this Court.

RES IPSA LOQUITUR

[34] In respect of the trial Judge's finding that *res ipsa loquitur* was not pleaded, I think, again there can be no surprises or prejudice to the defence of this basis of claim and an appropriate amendment would have been granted had it been sought.

SUMMARY

[35] For the above reasons, I think this Court is obliged to re-consider the opposing explanations given at trial. In doing so I find that the Plaintiff's explanation is the only possible explanation because the Defendants' explanation is not physically possible. Further, the Defendants' explanation, if accepted as physically possible, came about at the suggestion of the trial Judge and not through independent evidence given by the Defendant's witnesses.

[37] It is not in dispute that the Plaintiff's injuries were consistent with those that may be suffered when struck by a log in the way that the Plaintiff was struck.

ORDERS

[38] I therefore propose that this matter be referred for retrial to the High Court at Lautoka.

[39] I also propose that the Respondent pay the Appellant's costs of this appeal summarily set at $5,000 to be paid within 14 days.

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Sosefo Inoke, JA

FIJI COURT OF APPEAL