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BENJAMIN CHARLES BERWICK

v.

RAM SINGH & ANOTHER

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[COURT OF APPEAL, 1977 (Gould V. P., Marsack J. A., Henry J. A.)
21st 25th March]

Civil Jurisdiction

Costs—in discretion of trial judge—discretion must be exercised judicially—whether partially successful party entitled to costs as of right.

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A partly successful plaintiff was entitled to his full costs on the usual rule of practice that costs follow the event, but when the plaintiff and defendant claimed against each other and it was held that both have been to blame, the award of costs was dicretionary.

Cases referred to:

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Cooper v. Whittingham (1880) 15 Ch. D. 501.
McCarthy v. Raylton Productions Ltd. [1951] W.N. 376; 95 S.J. 381.
Smith v. L. M. S. Ry [1948] S.C. 125; [1948] S.L.J. 235.
Howitt v. Alexander [1948] S.C. 154; (1947) 97 L.J. 705.

Appeal against the judgment of the Supreme Court awarding the appellant damages limited to one-fifth of his claim and the order that each party bear its own costs.

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G. P. Shankar for the appellant.
C. Gordon for the respondent.

Judgment of the Court (read by Gould V. P.)—[25 March 1977]

This is an appeal from a judgment of the Supreme Court at Lautoka in an action wherein the appellant was awarded damages against the respondents in the sum of $1,367. The action arose out of a collision between motor vehicles and the actual assessment of damages suffered by the appellant was $6,837. The learned judge however found that the respondents had only to bear one-fifth of the damages as he apportioned the negligence involved as to one-fifth to the respondents and four-fifths to the appellant.

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In the Supreme Court the respondents, although they pleaded contributory negligence as a defence, had not filed any counter-claim in relation to their own damage. The action therefore was concerned only with the issue whether the appellant could recover damages for his loss and if so the amount thereof. The result was as we have stated above, and, with regard to costs, the learned judge said that he felt in all the circumstances that each side should pay its own costs.

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On the appeal Mr Shankar for the appellant argued only two matters. He first submitted that the apportionment of only one-fifth of the negligence to the

respondents was insufficient. In the second place he argued that the appellant as
A **the successful party was entitled to his costs in the ordinary way.**

The question of the apportionment of negligence as arrived at by the learned trial judge is one with which an appellate court will very seldom interfere. We do not propose to do so here. The learned trial judge fully considered the evidence and arrived at findings and conclusions of fact which we consider to be unassailable, and this applies also to his apportionment of blame. We do not therefore find it
B necessary to go into the details of the evidence and on this question the appeal fails.

As to the question of the award of costs, this is of course a matter for the exercise of the discretion of a trial judge, but it is a discretion which must be exercised judicially; it is clearly a principle that where a party successfully enforces a legal right, and in no way misconducts himself, that he is entitled to costs as of rights;
C *Cooper v. Whittingham* (1880) 15 Ch. D. 501 and other cases cited in the *Supreme Court Practice,* 1967, at page 789. The question for consideration here is whether in view of the fact that a plaintiff has had his damages reduced in an action based on negligence by reason of his own share in that negligence, he should be deprived of all or any of the costs of his action. The answer appears to be that he should not be, though this is not necessarily the case where an action has been the subject of claim
D and counter-claim and both parties have been held to have been negligent. In *Clerk and Lindsell* or *Torts* (14th Edition) paragraph 1009 the position is so stated:

> "A partially successful plaintiff is entitled to full costs on the usual rule of practice that costs follow the event. But where plaintiff and defendant claim against each other and it is held that both have been to blame, the award of costs is discretionary."

E **The authorities quoted are *McCarthy v. Raylton Productions Ltd.* [1951] W.N. 376; *Smith v. L.M.S. Ry.*, [1948] S.C. 125 at 142; *Howitt v. Alexander,* [1948] S.C. 154.**

The sessions cases quoted are not available here but the case of *McCarthy v. Raylton Productions Ltd.*, was decided by the Court of Appeal and appears to bear out what is said in the text book. We think it is likely that in view of the high degree
F **of negligence which was apportioned to the appellant in the present case the** learned judge was misled into treating the case as one of claim and counter-claim. On the principle stated, in our opinion the appellant's claim should have been allowed with costs.

The appeal therefore fails on the first submission i.e. the one touching the merits of the case; it is allowed on the second submission, and the order of the Court below
G is varied to include an order for the plaintiff's costs to be paid by the respondents. As to the costs of the appeal the appellant has failed on the major issue and succeeded on a comparatively minor matter. The respondents are in our opinion entitled to the cost of the appeal reduced by a proportion because of the success of the appellant on the minor issue. It is so ordered and allowing for that reduction we fix the costs payable by the appellant at $75.00.

H *Appeal allowed in part; Order of Supreme Court varied for plaintiff's costs to be paid by respondents.*