IN THE SUPREME COURT OF FIJI
Appellate Jurisdiction
CIVIL APPEAL NO. 11 OF 1980

Between:

VENKAT RAMANI s/o Krishna Murti APPELLANT

- and -

MOHAMMED ISMAIL s/o Mohammed Ishak RESPONDENT

Mr. K. Chauhan with Mr. J. Bagia for the Appellant.
Mr. F.M.K. Sherani for the Respondent.

J U D G M E N T

Both parties herein appeal against the judgment of the Magistrate's Court Suva delivered on the 22nd of August, 1980.

The action arose out of an accident between a vehicle driven by the plaintiff and a vehicle driven by the defendant's servant which occurred at Tagi Tagi near Tavua on the 26th February, 1979. Both vehicles were damaged.

The Magistrate found both drivers negligent and it is in respect of his apportionment of the responsibility for the accident that both parties now appeal. The defendant, the respondent in the main appeal also appeals against the Magistrate's assessment of his damages.

Mr. Bagia appeared with Mr. Chauhan for the plaintiff/appellant and took objection to the cross-appeal by the defendant/respondent. He argued that the respondent had not complied with the provisions of Order XXXVII, Rule 1. His objection was overruled.

Order XXXVII, Rule 1 makes no provision for a cross-appeal. Where there is no provision in the rules, under Order III Rule 8 the Court must be guided by the relevant provision contained in the Rules of the Supreme Court.

At the time the Magistrates' Courts Rules were made Order 59 R.S.C. was in force. This order was deleted in the Supreme Court Rules 1968. Rules 14 to 32 of the Court of Appeal Rules were substituted by Rules dated 24th March 1966 based on Order 59 R.S.C.

The Supreme Court now has no specific rules covering civil appeals to the Court of Appeal in the Rules of the Supreme Court. It is the Court of Appeal Rules that the Supreme Court now follows.

Order III, Rule 8 of the Magistrates' Courts Rules probably should have been amended when Order 59 Rules of the Supreme Court was deleted. However, the intent is clear that the Supreme Court procedure should be followed if the Magistrates' Courts Rules has no provision to meet a cross-appeal by a party. A respondent who wishes to cross-appeal should follow Rule 19 of the Court of Appeal Rules by filing a Respondent's notice specifying his grounds for seeking variation of the decision of the Magistrate's Court.

In referring to the appellant in this appeal I will be referring to the original plaintiff and the respondent, the original defendant.

The main facts were not in dispute.

Vehicle No. AS940, a truck, was being driven by the respondent's servant along King's Road. Following this vehicle was vehicle No. Z754 driven by the appellant.

The Magistrate found as a fact that the collision occurred when the truck stopped just before it turned right and the car went into the back of it. The Magistrate found the lorry driver negligent because he began to

turn right into a feeder road without taking sufficient care to ensure it was safe to do so. He found that the car was in its early stages of overtaking the lorry when it began to turn right.

On the other hand he found the car was being badly driven when the plaintiff attempted to overtake the lorry on the inside having abandoned his attempt to overtake it on the outside.

He found the appellant 60% to blame and the driver of the lorry 40% to blame.

I accept the findings of fact by the learned Magistrate. That being so and there being no exceptional circumstances calling for variation of the Magistrate's assessment this Court cannot interfere.

In Northwest Transport Co. Ltd. v. Iferemi Kubukawa and Anor. 14 F.L.R. p. 207 the Court of Appeal stated that only in exceptional cases would an appellate tribunal be justified in varying the allocation of blame made by the Judge.

In The Karamea (1921) P.76 Warrington L.J. said at pp. 83, 84 :

> "It may well be and probably is the case that if the Court arrives at the same conclusion both of the facts and in law it would not interfere merely because the learned judge in his discretion has given proportions which this Court thinks it would not have given".

Both parties admitted negligence but accepting only 10% of the blame. Mr. Bagia presented a well reasoned argument which, however, was more appropriate for a trial judge than an appellate court which cannot interfere in a case such as this where it has not been established that this is an exceptional case where it should interfere.

Neither party can successfuly complain about the Magistrate's assessment of blame.

That leaves only the respondent's appeal against the findings of the Magistrate as to the damage suffered by the respondent. The Magistrate found the evidence of the respondent's actual damage "very unsatisfactory". Doing the best he could be found the total damage to be $317.65.

It is true that the Magistrate has been somewhat arbitrary in rejecting items from the respondent's claim and in assessing damage but that has arisen because the respondent did not properly establish the damage he suffered. In fact the respondent was not called as a witness and left it to his son, the driver, to endeavour to establish loss of which he had no first hand knowledge.

While the appellant also complains about the Magistrate's assessment and findings of damage, I see no reason to interfere with the Magistrate's findings.

The appeal and cross-appeal are both dismissed with no order as to costs.

(R.G. KERMODE)
J U D G E

SUVA,

27 FEBRUARY, 1981.