IN THE SUPREME COURT OF FIJI (WESTERN VIDISION)

AT LAUTOKA

CIVIL JURISDICTION

ACTION NO. 345 of 1980

BETWEEN	:	KAMLA WATI d/o Venkat Sami	Plaintiff
AND	:	MANGAIYA s/o Sarup	
AND	:	THE ATTORNEY GENERAL	Defendants

Mr V. KALYAN	Counsel for the Plaintiff
Mr ASHIK ALI	Counsel for the 1st Defendant
Mr SHARMA & DR. A. SINGH	Counsel for 2nd Defendant.

JUDGMENT

The plaintiff is the widow of Ram Sami Gounder who was killed on 28/6/79 when the motor car he was driving was involved in a collision with a police Landcruiser driven by the 1st defendant. The 1st defendant was on 30/10/79 found guilty of causing the death of Sam Sami Gounder by reason of his dangerous driving and sentenced to 18 months imprisonment, reduced to 9 months imprisonment on appeal.

The 1st question is whether the death was caused by the 1st defendant's negligent driving and whether the deceased was guilty of contributory negligence.

There was evidence by one Subarmani, who was a passenger in the deceased's vehicle that the police Landcruiser was on the wrong side of the road - or at least that the deceased was on his correct side. There was also evidence by the police officer who visited the scene, who said that the indications were that the point of impact was over the middle line of the road on to the deceased's correct side of the road.

In giving evidence the 1st defendant merely said I deny negligence. In cross-examination he said he swerved to the right to avoid dogs crossing the road. In fact he had pleaded guilty to the charge and admitted that he was on the wrong side of the road. In the

magistrate's court he never mentioned anything about dogs crossing the road.

He still admits he drove dangerously and he has produced no evidence to indicate that there was any contributory negligence by the deceased.

There is no question therefore but that the accident was caused solely by the 1st defendant's dangerous driving, and so far as the 1st defendant is concerned he is liable in damages and the sole question is the assessment of damages.

I fail to understand counsel for the 1st defendant's argument, that because he was on duty at the time therefore he is not liable for damages but that the Government represented by the Attorney General is. The 1st defendant is certainly liable but the next question is whether the Government is also vicariously liable.

At the time of the accident the 1st defendant was a police officer in uniform driving a police Landcruiser, which it was his duty to drive. Prima facie therefore it would appear that the second defendant must be vicariously liable. But, the second defendant argues that the 1st defendant was at the time on a frolic of his own.

It is not disputed that the 1st defendant was a police officer and a police driver. It was part of his duties to serve summons and subpoenas on witnesses. At about 4.00pm on the day in question he was instructed to serve a production order at Naboro prison, and also to try to locate a witness required to give evidence in court the next day. Efforts had been made previously to locate this witness, but they had been unsuccessful. The witness's normal address was Nailuva Road, but if he couldn't be found there the 1st defendant had a discretion to try to locate him. According to the 1st defendant there was a note pinned to the summons saying that the witness might be found at Navua through the service station, or if not there at Nadera.

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There was nothing to disprove this statement, and no reason not to accept it, and it was quite clear from the evidence of Sgt. Ali, the first witness for the second defendant, that the 1st defendant could use his own discretion, and to try to serve the summons if possible and make whatever arrangements were necessary to try to ensure the witness's appearance in court the next day. If the trail led to Navua and Nadera then it was within the 1st defendant's discretion to follow it and try to locate the witness. If he had succeded in tracking him down no doubt the 1st defendant would have been commended for his diligence.

He was given no time limit to return the vehicle to the station yard, and of course being a police officer, he is really on duty 24 hours a day, and there would have been no objection to his continuing to search in his own time. He would be expected ultimately to return the vehicle to the yard and fill in the necessary paper work.

There is no question that in performing his duties the 1st defendant committed a number of unauthorised acts. He picked up unauthorised passengers, he consumed liquor whilst on duty, and even whilst driving the vehicle. These acts are in violation of police standing orders, but does that mean that the second defendant thereby escapes liability? Police standing orders also say that police drivers must maintain a high standard of driving - and this the 1st defendant did not do - but it is ridiculous to say that because a police officer did not drive carefully therefore his department would escape liability. That would mean that departments would never be vicariously liable.

The question really is whether at the time of the accident the 1st defendant was entirely on a frolic of his own, or whether he was performing his duty but in an improper manner. This question was dealt with fairly extensively in Colonial Mutual Life Assurance v. Attorney General. 20 F.L.A. 102, with appropriate reference to Milton v. Thomas Burton Ltd [1961] 1 A.E.R. 74 and Canadian Pacific Raiway v. G Lockhard [1942] A.C. 591.

According to the 1st defendant he was at the time engaged in performing the duties required of him in going to Navua and Nadera, and at the time of the accident was on his way to the yard to return the vehicle and return files to the prosecution office. That he had been, and may be was, doing his job in an improper manner is beyond question. It is probable that to a certain extent he had been on a frolic of his own, combining business with pleasure in an improper way. But it is not possible to say that he was entirely on a frolic of his own, unconnected with his duties and in the circumstances the second defendant is vicariously liable for the acts of the 1st defendant.

The question remaining is that of the amount of damages to be a awarded.

There is a claim for $500 funeral expenses and a claim for $4,800 for the total loss of the deceased's car less a sum of $200 being the value of the wreck.

There was evidence as to the value of the car before and after the accident - the estimate being $4000 - $5000 for the car before the accident and the value of the wreck being $200.00. From this evidence the special damages awarded for the loss of the car will be $4,500 less $200 - namely $4,300.

There was no evidence whatsoever with regard to funeral expenses, though the plaintiff was put to strict proof of damages claimed. But there must have been some funeral expenses and the fairest thing I can do is to award damages of $250 under this head.

The deceased was 33 years old at the date of his death and there appears to be no reason why he should not carry on working for another 30 years. He was said to have been receiving $120 per week in wages, but there is some doubt as to this. The plaintiff was put the strict proof of damages, and has hardly discharged the onus put upon her.

The plaintiff herself was not really in a position to say what he was receiving and a general statement that he was earning $120 per week nett is not the same as proving wages strictly. His employer gave evidence as to wages and his evidence was really no more satisfactory. Surprisingly the Labour Department had no record of the deceased being employed by V S Mani Bros. Ltd, and it should have had such a record if the deceased was so employed.

Nor was the employer able to produce any records to prove the employment or the wages paid to the deceased. Nor was he able to produce any records of National Provident Fund payments. It was accepted - perhaps rather generously - by the defendants that the deceased was employed by V S Mani, though for how long he was so employed his hours of work and his renumeration were not agreed between the parties. He was said to be a driver supervisor for the firm looking after the Suva operations. What that entailed exactly was not explained. It was said that he worked 14 hours a day driving to Monosavu, working 70 hours a week, and sometimes Saturdays and Sundays also, sometimes being paid overtime depending on the hours worked. How he managed to do that and look after the Suva operation was not explained. How he managed to work 14 hours a day, driving the road to Monosavu day after day was not explained. It was also said that he was paid $50 housing allowance per month whilst in Suva. But again there was no explanation how long he was likely to be in Suva, and it seems that the $50 would only cover extra expenses of working in Suva, and was not really an effective addition to his wages.

It would cease when he left Suva anyway. Presumably when he returned to Lautoka, this payment would cease.

It was said that he was paid $1.73 per hour, (this was said to be the rate agreed with the union, the national minimum being $1.16 per hour, so for a normal days work of 8 hours that would be $13.84 per day. 5½ days per week would give $76.12 per week. With a reasonable amount of overtime that still would not bring his wages over $100 per week gross. How much of that would go for FNPF contributions was not stated.

I cannot accept the figures given by the deceased's employer without supporting proof. He seemed much too prone to pick figures out of the air without anything to support them. One would have thought that a company such as V S Mani Bros Ltd could have supplied better proof than that.

On the evidence before me I could not put the deceased's nett wages at higher than $90 per week.

The plaintiff has said that she spent $50 per week on groceries for the three of them, which seemed to include crabs every week, a rather extraordinarily expensive item at $10 per week. No receipts were produced, no documentary or other evidence to support the statement of expenses.

The $50 per month claimed as rent for Suva would not apply of course as soon as the family left Suva to return to Lautoka and I cannot take that into account.

From the evidence given by the plaintiff I could not put the rate of dependency at over $50 per week at the time of his death.

There was evidence that the agreed union rate for a driver about the time of the trial was $2.21 per hour which would give a figure of $96.24 for a normal 8 hours 5½ day week. Allowing for some overtime I think an overall weekly wage of $120, and a dependency of $65 would be appropriate figures for the date of trial.

So for the period pre-trial, which is almost exactly 4 years 9½ months the damages awarded will be $57½ $\left(\frac{65 + 50}{2}\right)$ x 246 weeks, = $14, 145 plus interest at 4% or approximately $2877.50. An overall figure of $17022.50.

From the date of trial using a multiplier of 11¼ - that is 15 less $4^{3}/_{4}$ on a dependency of $65 per week the post trial damages, will be $65 x 582 as near as can be estimated, i.e. $37330.

The total damages therefore awarded will be $4300 + $250 + $17022.50 + $37330 giving a total of $59902.50 which may be conveniently increased to $60,000. Judgment will be given for this amount against both defendants jointly and severally.

The plaintiff to have the costs of the action, to be taxed if not agreed.

LAUTOKA
15 MARCH 1984

G O L Dyke
JUDGE