IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P: 224/92

BETWEEN: LUMANAI MATAUTIA of Vaivase-uta, Mechanic

PLAINTIFF

A N D: MATA SCHUSTER of Alamagoto, Public Servant

DEFENDANT

Counsel: Mr P. Fepuleai for Plaintiff
Mr L. Kamu for Defendant

Date of Hearing: 30th June 1993

Date of Judgment: 12th July 1993

JUDGMENT OF SAPOLU, CJ

This is an action in negligence by the plaintiff claiming damages from the defendant. It arises out of a collision between two(2) private pick up vehicles, one owned and driven by the plaintiff, the other driven by the defendant. The collision occurred on 6 June 1991 between 7.45pm and 8.45pm at Vaimea, a short distance from the centre of Apia, at the intersection of Vaitele Street, Moamoa Road and the road from Fugalei. Vaitele Street is the main road at this intersection. Travelling on the plaintiff's vehicle were the plaintiff and another boy at the front and two(2) boys at the back. Inside the defendant's vehicle were the defendant and her children. As a consequence of the collision, the plaintiff's vehicle was badly damaged and the defendant's vehicle according to her evidence was a write off. As a further consequence of the collision, some of the passengers on the plaintiff's vehicle also sustained injuries.

The plaintiff's and the defendant's versions as to how the collision happened are conflicting. According to the plaintiff he was driving his vehicle along Vaitele Street at about 25mph heading towards Taufusi on his way to Vaivase-uta where he lives. There was no vehicle infront of his vehicle going in the same direction as he was travelling along Vaitele Street, but there was traffic going in the opposite direction on the other side of the road. When his vehicle was about 5 yards from the intersection of Vaitele street, Moamoa Road and the road from Fugalei, he saw the defendant's vehicle to his left at the point of the intersection and the road from Fugalei. At that time the defendant's vehicle had entered onto the intersection by about 2 yards. The defendant's vehicle then stopped but then continued on again to cross the intersection. The plaintiff then slowed down his vehicle and swerved away to the opposite direction from where the defendant's vehicle was coming from. However, the defendant's vehicle was still coming and it was then hit by the plaintiff's vehicle. The two vehicles moved slightly forward. The left front side of the plaintiff's vehicle was badly damaged. The defendant's vehicle is bigger in size than his vehicle. The plaintiff also says he had not been drinking prior to this callision and he denies he was driving at excessive speed. He also denies that the defendant's vehicle was a write off. That is the plaintiff's evidence about the collision that occurred. The Court will later refer to his evidence concerning damages.

The defendant on the other hand says that on the night in question she was driving her vehicle along the road from Fugalei to return to her home at Alamagoto. When she reached the junction of the road from Fugalei and the intersection with Vaitele Street and Moamoa Road, she stopped her vehicle and looked out to see if the intersection was safe for her vehicle to cross. Now Moamoa Road is not directly opposite the road from Fugalei but slightly to the

right if one is travelling from the road from Fugalei. To her right, the defendant says she thinks she saw 3 sets of lights and at that time she thought that was a line of three vehicles advancing from her right along Vaitele Street towards the aforesaid intersection. The car at the front of this line of vehicles was in front of Lober's place which is at the corner of the junction of Vaitele Street and Moamoa Road. The defendant thought, in the circumstances, it was safe for her vehicle to cross the intersection towards Moamoa Road and it did so. While her vehicle was crossing the intersection, all of a sudden the plaintiff's vehicle appeared. It seems to the Court from the defendant's evidence, that the plaintiff's vehicle was at that time overtaking the car at the front of the line of vehicles travelling along Vaitele Street towards the intersection. The plaintiff's vehicle then ran into the defendant's vehicle causing the latter vehicle to be pushed forward with its front facing Taufusi. The defendant says in her estimation the plaintiff's vehicle must have been travelling at 35 to 40mph which is excessive speed and her vehicle was a total loss as a result of the collision. The defendant pleaded guilty on 8 May 1992 to the charge of negligent driving causing injuries in the Magistrates Court and was fined $200.

There is substantial conflict in the opposing versions given by the plaintiff and the defendant as to how the collision occurred. It would have greatly assisted this case if the passengers in the plaintiff's vehicle, or at least the person who was in the front seat with the plaintiff, were also called to testify as to how the collision occurred. The police officers, if any, who prepared reports on this accident and any other relevant witness the police had interviewed in relation to this matter for the purposes of a traffic prosecution, could also have been called to testify in this case. As it is, the Court is left to decide this case principally on the word of the plaintiff as against the word of the defendant.

The issues in this case are three fold, namely, negligence, contributory negligence and damages. The Court will deal with those issues in that order. As it was held in the recent case of Tunoa Tanoai v Tagaloa Mika Ah Kam and Another (1993) (unreported), the plaintiff in order to succeed in action in negligence must prove four things. Firstly, that the defendant owed a legal duty to the plaintiff to take care; secondly, that the defendant acted in breach of that duty; thirdly, that the plaintiff suffered damage as a consequence of that breach; and, fourthly, that the damage suffered by the plaintiff was not too remote but a sufficiently proximate consequence of the defendant's breach of duty. The Court finds that in the circumstances of this case, the defendant owed a legal duty of care to the plaintiff. As to the second element of negligence, the Court finds that the failure of the defendant to stop her vehicle in order to give way to approaching traffic from her right along Vaitele street, but continuing to cross the intersection amounts to a breach of her legal duty to the plaintiff to take care. As to the third element of negligence, there is no dispute that the plaintiff's vehicle suffered substantial damage when it collided with the defendant's vehicle whilst the latter vehicle was crossing the intersection. Thus the plaintiff suffered damage as a consequence of the defendant's breach of his duty of care. Coming to the fourth element of negligence, it is clear that the damage sustained by the plaintiff's vehicle was not too remote but a sufficiently proximate consequence of the defendant's breach of duty. In all then, the Court finds that the plaintiff has proved negligence on the part of the defendant. The Court is reinforced in this finding by the fact that the defendant had pleaded guilty in the Magistrates Court on 8 May 1992 to a charge of negligent driving causing bodily injuries which arose out of the present incident.

As to the question of contributory negligence, the Court has not found a reported Western Samoa decision where the doctrine of contributory negligence has been applied in an action in negligence arising out of a road accident.

A defendant who relies on contributory negligence as a defence must plead it. In this case the defendant has done so. The burden of proving that the plaintiff was contributorily negligent is on the defendant who asserts it: Samoan Public Trustee v Pila Patu [1970 - 1979] WSLR 35 at p.41.

Now counsel for the defendant referred in his submission to the position under the old English common law with regard to contributory negligence, and the "last opportunity" rule, and then to the enactment of legislations on contributory negligence in England and New Zealand. I need not traverse in detail what counsel said on this point. Suffice to say that under the old English common law, once contributory negligence on the part of a plaintiff was established, that was a complete bar to recovery by the plaintiff: Butterfield v Forrester (1809) 11 East 60; 103 E.R 926. The injustice of this position was that even if the defendant was guilty of gross negligence, if the plaintiff was also found to have been slightly negligent, then that was a complete bar to any recovery by the plaintiff for the loss he had sustained. The English Courts then came up with what has been known as the "last opportunity" rule to remove the harshness of the common law. The origin of this rule is the case of Davies v Maun (1842) 10 M & W 546. However the last opportunity rule also led to injustice. As pointed out by Professor Fleming in his book The Law of Torts, 6th edition, p.243 :

> "It permitted full recovery to a plaintiff notwithstanding his "own negligence if the defendant had the last opportunity of "avoiding the accident but negligently failed to avail himself "of it.... This exception however suffered from the same flaw "as the rule it qualified. Committed to the all-or-nothing "solution, the law threw the whole blame - this time - on the "defendant, willing to overlook completely the plaintiff's "share of responsibility for the accident".

Eventually statutory reform was called for. The Law Reform (Contributory Negligence) Act 1945 was enacted and New Zealand followed suit with the enact-

ment of their Contributory Negligence Act 1947 based on the English model. In 1964 our Parliament enacted our own Contributory Negligence Act 1964 based on the New Zealand legislaion. Thus English and New Zealand cases on the application of their respective legislations are helpful and useful guides to questions of contributory negligence arising ouf of our own legislation.

As to whether the last opportunity rule still existed in England after the enactment of the Law Reform (Contributory Negligence) Act 1945, it is clear from the authorities that it did not. In the House of Lords decision in Boy Andrew (Ownders) v St Rognvald (Owners) [1948] AC 140, Viscount Simon in his judgment said:

> "The suggested test of 'last opportunity' seems to me inaptly "phrased and likely in some cases to lead to error, as the "Law Revision Committee said in their report (Cmd 6032 of "1939, p.16): 'In truth there is no such rule - the "'question, as in all questions of liability for a tortious "'act, is, not who had the last opportunity of avoiding the "'mischief, but whose act caused the wrong'".

In the subsequent decision of the English Court of Appeal decision in Davies v Swan Motor Co (Swansea) Ltd [1949] 2 KB 291, Evershed L.J in his judgment said of the last opportunity rule as follows:

> "Now that as a doctrine I venture to think has suffered a "demise independently altogether of the Act of 1945. I "need not refer again to the passage in Lord Simon's "opinion in the Boy Andrew case.... No doubt, in practice, "such a rule was found useful by judges who were anxious "in the interests of justice to avoid comming to a conclu- "sion wholly adverse to a plaintiff merely because, at "the material time, the plaintiff was still a negligent "actor to some perhaps, trivial extent. Now the Law "Reform (Contributory Negligence) Act 1945, has rendered

"it no longer necessary to resort to devices of that
"kind".

In the same case, Denning LJ also said of the last opportunity rule as follows:

"In order to resove the question of causation the courts
"used to apply the so-called doctrine of 'last opportunity'.
"That was not a principle of law, but a test of causation.
"It was a fallacious test, because the efficiency of causes
"does not depend on their proximity in point of time; but
"it held sway for many years because it enabled the courts
"to mitigate the harshness of the doctrine of contributory
"negligence. After the decisions of the House of Lords in
"The Volute [1922] 1 AC 129 and Swadling v Cooper [1931]
"AC 1, it fell into disrepute and was superseded by the
"simple test: What was the cause, or what were the causes,
"of the damage?.... Since the recent speeches of Lord Simon
"in The Boy Andrew [1948] AC 140, and of Lord du Parcq in
"Grant v Sun Shipping Co. Ltd, 1948, AC 549, it has no place
"even as a test of causation".

The Court has dealt with the last opportunity rule because it was raised by counsel for the defendant. However, it is clear from the authorities cited that the last opportunity rule has been buried in England. It is best that it remains buried in England and not allowed to find a resurrection in this country. I am of the clear view that the last opportunity rule does not form part of the law of this country.

Coming back to contributory negligence, Section 3(1) of the Contributory Negligence Act 1964 provides :

"Where any person suffers damage as the result partly of his
"own fault and partly of the fault of any other person or
"persons, a claim in respect of that damage shall not be

"defeated by reason of the fault of the person suffering the
"damage, but the damages recoverable in respect thereof shall
"be reduced to such extent as the Court thinks just and
"equitable having regard to the claimant's share in the
"responsibility for the damages".

The word "fault" is defined in section 2 of the Act which provides :

"'Fault', means negligence, breach of statutory duty, or
"other act or omission which gives rise to a liability
"in tort or would, apart from this Act, give rise to
"the defence of contributory negligence".

This is not the place for attempting a full scale analysis of these statutory provisions although they must be borne in mind in dealing with the question of contributory negligence. However, it may be said that from section 3(1) of the Act, where the defendant is found to be negligent and the plaintiff contributorily negligent, the plaintiff will not be completely barred from recovery in a claim for damages. What will happen is that the claim for damages will be reduced to the extent of the plaintiff's contributory negligence. Questions of causation as it appears from the use of the word 'result' and questions of apportionment of damages on what 'the Court thinks just and equitable' having regard to the plaintiff's share in the responsibility for the damage are important considerations to be borne in mind when applying this provision of the Act.

Counsel for the defendant referred to the "seat belt" case of Froom v Butcher [1976] Q.B 286 where Lord Denning MR in discussions contributory negligence said :

"Negligence depends on a breach of duty, whereas contributory
"negligence does not. Negligence is a man's carelessness in
"breach of duty to others. Contributory is a man's carelessness
"in looking after his own safety. He is guilty of contributory
"negligence if he ought reasonably to have foreseen that, if
"he did not act as a reasonable prudent man, he might be hurt
"himself: See Jones v Linox Quarries Ltd [1952] 2 Q.B 608".

In the case of Jones v Linox Quarries Ltd, Denning LJ had also said:

"Although contributory negligence does not depend on a duty of "care, it does depend on foreseeability. Just as actionable "negligence requires the foreseeability of harm to others, so "contributory negligence requires the foreseeability of harm "to oneself. A person is guilty of contributory negligence "if he ought reasonably to have foreseen that, if he did not "act as a reasonable, prudent man, he might be hurt himself; "and in his reckonings he must take into account the possi- "bility of others being careless".

Now Froom v Butcher and Jones v Linox Quarries were cases where the injuries sustained mere injuries to the person. However what Lord Denning MR said in those two cases are equally applicable to cases, like the present case, where the damage is not to the person but to property. As it was said by Gresson J in the decision of the New Zealand Court of Appeal in Helson v Mc Kenzies Ltd [1950] NZLR 878:

"In Charlesworth's Law of Negligence, 2nd Ed., 464, it is "stated that the word 'negligence' as used in the expres- "sion 'contributory negligence' does not mean breach of "duty, but means a failure by a person to use reasonable "care for the safety of himself or his property".

From all this, it appears that for a defendant to succeed with the defence of contributory negligence, he must prove two(2) matters. Firstly that the plaintiff failed to use reasonable care for the safety of himself or his property; and secondly, that failure contributed to the plaintiff's loss. The test to be applied here is that of reasonable foreseeability.

As to the circumstances of this case, I do not accept the defendant's evidence that when her vehicle was at the junction of the road from Fugalei and the intersection, she thinks she saw a line of three(3) vehicles to her right approaching towards the intersection with the front vehicle infront of Lober's place. So she crossed the intersection. The plaintiff's vehicle then overtook the two(2) front vehicles. The collision then occurred as her vehicle was crossing the intersection heading towards Moamoa Road. If that were so, the front vehicle was only a few feet, about 30 feet from the intersection. So when the defendant's vehicle crossed the intersection, that distance between the defendant's vehicle and the on-coming front vehicle must have been reduced below 30 feet. If the plaintiff's vehicle at that time then started to overtake the other vehicles, then I would have expected that either both the front vehicle and the plaintiff's vehicle would have hit the defendant's vehicle at the same time, or the front vehicle would have crashed into the rear of the plaintiff's vehicle when the latter vehicle hit the defendant's vehicle. However nothing of that kind happened. Thus the defendant must have been mistaken in her observation of the traffic approaching the intersection from her right. I prefer the evidence of the plaintiff on this aspect of the evidence that there was no other vehicle, apart from his own, approaching the intersection at close proximity when the collision occurred. The plaintiff then says that his vehicle was about 5 yards from the intersection and travelling at 25mph when he saw the defendant's vehicle emerging from the road from Fugalei and came 2 yards onto the intersection and then stopped and then carried on as he slowed down and swerved his own vehicle away from the direction the defendant's vehicle was coming from.

It must first be said that if the plaintiff's vehicle was travelling at 25mph then that would be 37½ feet per second. And if the plaintiff was 5 yards from the intersection it would have taken his vehicle less than ½ a

second to reach the intersection and about another ½ a second to pass the intersection. That would have avoided a collision if the plaintiff had continued at his speed of 25mph or at least what could have happened was the defendant's vehicle running into the plaintiff's vehicle instead of the plaintiff's vehicle hitting the defendant's vehicle. The point I am trying to say here is that I cannot accept that the plaintiff was 5 yards from the intersection when the defendant's vehicle was at the junction of the intersection and the road from Fugalei.

The defendant says the plaintiff's vehicle was travelling at excessive speed and in her estimation it must have been 35 - 40mph. I prefer the evidence of the defendant that the plaintiff's vehicle was travelling at excessive speed than the evidence of the plaintiff that he was travelling at 25mph. It is clear that the plaintiff's vehicle ran into and hit the defendant's vehicle. Although the defendant's vehicle was bigger in size than the plaintiff's vehicle, the former was pushed forward so that it faced Taufusi. That means from the impact of the collision, the plaintiff's vehicle was caused to turn about 90 degrees to face Taufusi. For a smaller vehicle to be able to do that to a bigger vehicle it has run into, the smaller vehicle must have been travelling at great speed. Then the defendant says that her vehicle was a total loss but that is disputed by the plaintiff. Even if that point is in dispute, it appears that the defendant's vehicle suffered substantial damage. So was the plaintiff's vehicle. It too suffered substantial damage, its front part was pushed in. But this is not a case of a head on collision. It is the plaintiff's vehicle that ran into the defendant's vehicle. The clear inference to be drawn from the nature of the damage is that the plaintiff's vehicle was travelling at excessive speed. Even if the plaintiff slowed down his vehicle, his vehicle was not slow enough to prevent the substantial damage caused and from causing the defendant's vehicle, which was bigger in size, to turn around 90 degrees. Accordingly I find that the plaintiff was

contributorily negligent by driving at excessive speed in the circumstances of this case.

It may be argued that the plaintiff should not be held contributorily negligent for driving at excessive speed because he took avoiding action by trying to slow down and by swerving away from the direction of the defendant's vehicle. However, I find that the reason for the plaintiff's failure to slow down enough was because he was driving at excessive speed. In other words the excessive speed factor was not spent at the time the collision occurred and so the plaintiff's contributory negligence by driving at excessive speed was not spent by the time of the collision: see for instance St Claire v Greig [1936] NZLR 638. What has just been said also applies to the swerving action taken by the plaintiff. It is only to be added that the collision occurred on the Vaitele Street part, or at least substantially on the Vaitele Street part, of the intersection so that the plaintiff did not swerve his vehicle right off Vaitele Street on to Moamoa Road in order to avoid the collision.

As to the apportionment of damages in this case, the defendant, as I have found, was negligent and in the circumstances of this case she must bear a greater part of the damages. For the plaintiff who has also been found to be contributorily negligent, a reduction of 20% should be made to the damages to be awarded to him.

As to damages, the plaintiff claims $4,494 for replacement parts and $3,200 for costs of repairs. Documentary quotations from one supplier of spare parts and two(2) motor mechanic firms were produced to prove that the total cost of new parts required to repair the plaintiff's vehicle is $4,494.00. The same two(2) motor mechanic firms also produced quotations to prove that the total cost of repairs to be done to the plaintiff's vehicle is $3,200. There is no evidence to the contrary from the defendant. I allow both claims for new parts and for repairs.

The plaintiff also claims $500 for loss of use of his vehicle for a period of one year and for expenses incurred in using other arrangements for transportation. I also allow this claim.

The total amount of damages awarded to the plaintiff before contributory negligence is taken into account is therefore $8,194.00. Subtract from that amount 20% for contributory negligence and what is left is $6,555.20.

Accordingly judgment is given for the plaintiff in the sum of $6.555.20 plus costs and disbursements to be fixed by the Registrar.

T.F.M. Sapolu
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CHIEF JUSTICE