

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0025 OF 1996S
(High Court Civil Action No. 163 of 1990)

BETWEEN AMBIKA NAND S/O LEKI

APPELLANT

-AND-

TEVITA SENICO

RESPONDENT

Mr. G.P. Shankar for the Appellant
Mr. R.P. Chaudhary for the Respondent

Date and Place of Hearing: 22 May 1997, Suva
Date and Delivery of Judgment: 29 May 1997

JUDGMENT OF THE COURT

This is an appeal from the judgment of Lyons J. given in the High Court at Lautoka on 31 May, 1996. The respondent, Tevita Senico, had commenced an action against the appellant, Ambika Nand, for damages arising out of the injuries he suffered in a motor vehicle collision on Tavakubu Road, Lautoka, on the 3rd November 1988. He had been a passenger in a Daihatsu van, driven by a man named Vuli Kasi, which was involved in a collision with a Corolla Taxi Cab driven by the appellant Ambika Nand. Lyons J. found that both drivers had been equally at fault and assessed damages at \$40,500.00. He then gave judgment to the respondent in the sum of \$20,250 on the basis that having assessed both drivers as having been equally at fault the respondent's award would be reduced by half.

The appellant appealed against this judgment on the grounds, in effect, that there was no evidence, or no sufficient evidence to prove fault on his part and that the accident was wholly attributable to the fault of the driver of the vehicle in which the respondent was travelling. There was also a ground in the notice of appeal relating to damages but that was abandoned at the hearing. There is thus now no challenge to quantum.

The respondent, on the other hand, cross-appealed against the determination that the damages should be reduced by half on the ground that no contributory negligence should be attributed to the driver of vehicle in which he travelled.

Before turning to the grounds raised in both the appeal and the cross appeal we propose to deal with what appears to us to have been an oversight on the part of the learned trial judge in relation to the application of the law relating to contributory negligence. Perhaps this arose from the way the parties conducted the case. It is quite clear that the respondent was a passenger in the Daihatsu van involved in the collision and so far as the evidence shows was not in any way involved in its control or manner of being driven. That was the sole responsibility of the driver, Vuli Kasi. The respondent cannot, therefore, have any contributory negligence attributed to him and it follows that he would be entitled to 100% of any damages properly assessed provided the learned trial judge was correct in holding the appellant had been to some material extent negligent. So long as the appellant had been to some material extent negligent in relation to the respondent it does not matter whether it was 10% or 100%; he is wholly liable to the respondent.

It is, perhaps, helpful to cite at this point a passage from the judgment of Lord Du Parcq in the House of Lords in Grant v. Sun Shipping Co. Ltd. (1948) AC 540 at 563 where he said:

“My Lords, I regard it as a well settled principle that when separate and independent acts of negligence on the part of two or more persons have directly contributed to cause injury and damage to another, the person injured may recover damages from any one of the wrong doers or from all of them.”

See also Halsbury's Laws of England 4th Edn. Vol. 34 para. 77 and vol. 45 para. 1 2 3 5.

There may be circumstances in which a passenger may be held to have been guilty of contributory negligence, such as, for example, in cases where he has chosen to travel as a passenger in a vehicle which he knows is being driven by an intoxicated driver. There may be other cases but if such contributory negligence was relied upon there would need to be clear and cogent evidence to establish it. None was offered, and it is quite clear that merely to be a passenger does not raise any question of contributory negligence.

The main issue that arises on the appeal in the light of the above discussion is whether the learned trial judge was right in determining that the appellant was partly at fault; if so, then as stated above he becomes liable for all the damages properly assessed. The question of whether the respondents cross-appeal should be allowed, and the amount of the judgment in his favour increased, is discussed later.

Mr Shankar submitted strongly that no negligence that caused the collision should be attributed to the appellant. A short account of the facts surrounding the collision will help to understand Mr Shankar's submission. They are, as follows: the respondent was a passenger in a Daihatsu van driven by a man named Vuli Kasi, the van heading along Tavakubu Street, Lautoka, in an easterly direction at about 8 p.m. The appellant was the driver of a Corolla taxi cab heading in the opposite or westerly direction. On a straight stretch of road, with no line markings but which was wide enough for two vehicles to pass, they collided. There was damage to the right hand front of the Corolla taxi and to the left hand front of the van. The respondent, the passenger, had given evidence to the effect that as the two vehicles approached each other he realised a collision was inevitable and as he turned towards his driver in the van he, the driver, suddenly turned the van to the right in an attempt to avoid the Corolla taxi. It may be noted he had already given evidence to the effect that if the van driver had turned to the left on to the verge rather than the right he would have avoided the accident.

In essence Mr Shankar's submission amounted to this; the van driver had a last opportunity to avoid the accident which he failed to take and so the whole fault for the accident was attributable to him.

We do not accept this. The learned trial judge said this:

"I am satisfied on the balance of probabilities that both vehicles were travelling towards one another on a collision course but one capable of being avoided. I am satisfied that neither the Defendant (Appellant) nor the van driver were keeping a proper look out so as to cause either or both of them to steer clear and avoid one another before it was too late.

5.

The defendant (appellant) failed to keep a proper look-out and failed to steer clear and avoid the on coming van. Had he kept a proper look-out he would have reacted sooner than he did (his evidence was that he braked but it was too late) and would have been able to move to his left and avoid the collision.

The driver of the van failed also to keep a proper look-out and thus to steer clear and avoid the on-coming Corolla. The driver of the van did try and steer clear but he took the wrong option by swerving right. If he had kept a proper look out he would have been able to have done what the Plaintiff was able to do, that is assess the situation and note the necessity to turn left and thus avoid the collision. That he did not do so is indicative of the van driver's negligence as well.

I find on the evidence before me on the balance of probabilities that both the defendant the van driver were equally responsible for the collision."

In passing and for completeness we include here the learned trial judge's findings in relation to the two primary witnesses. He said:

"I listened to the two primary witnesses and observed their conduct in the Witness Box. After assessing their respective evidence, I prefer the evidence as Plaintiff where it conflicts with that of the Defendant. I consider the Plaintiff's recollection of the accident to be more reliable and that of the Defendant who was at times I consider somewhat vague and prone to reconstruction of events rather than giving evidence of his recollection."

We see no reason to disagree with His Lordships various factual findings and in result are wholly satisfied that the appellant was negligent to a material extent and accordingly is liable to the respondent in damages.


The judgment entered in the High Court in favour of the respondent was for half the damages assessed by the Court. This was for the reason discussed earlier and which we are satisfied was by mistake. The respondent in his notice of appeal had sought judgment for the full amount but on a ground which is irrelevant. We note that R.5 of the Court of Appeal Rules provides that the appellant, (and here of course the respondent is an appellant in respect of his notice of cross appeal,) shall not without the leave of the court be heard in support of any ground that is not stated in his notice; but the court in deciding the appeal shall not be confined to the grounds provided it shall not rest its decision on any ground not stated in the notice unless the other party has sufficient opportunity of contesting the case on that ground.

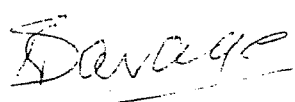
The court put to Mr Shankar the matter of the mistaken attribution of contributory negligence to the respondent several times and the matter was canvassed between Bench and bar at some length. We gave Mr Shankar the opportunity of further time to consider the point and then to make further submissions but he indicated he did not wish further time.

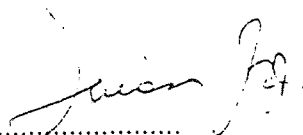
In the circumstances, though with some reluctance in the light of the failure of the respondent's counsel to raise the point as a ground in his notice of appeal, and his failure to seek leave under R.5 to urge it before us, we allow the cross-appeal and direct that judgment be entered in favour of the respondent in the full sum of \$40,500. However we do not allow the respondent any costs.

7.

The appeal is dismissed; the cross-appeal allowed and judgment given to the respondent in the sum of \$40,500. No costs to either party.


.....
Sir Maurice Casey
Judge of Appeal


.....
Mr Justice Savage
Judge of Appeal


.....
Mr Justice Dillon
Judge of Appeal