

IN THE COURT OF APPEAL FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0078 OF 2006S
CIVIL APPEAL NO. ABU0086 OF 2006S
(High Court Civil Action No. HBC003 of 2002L)

CIVIL APPEAL NO. ABU0078 OF 2006S

<u>BETWEEN:</u>	<u>KALA WATI</u>	<u>1st Appellant</u>
<u>AND:</u>	<u>SMITA RAM AND SANT RAM</u>	<u>2nd Appellants</u>
<u>AND:</u>	<u>S.L. SHANKAR LIMITED</u>	<u>1st Respondent</u>
<u>AND</u>	<u>RAM CHANDAR</u>	<u>2nd Respondent</u>

AND

CIVIL APPEAL NO. ABU0086 OF 2006S

<u>AND:</u>	<u>S.L. SHANKAR LIMITED</u>	<u>1st Appellant</u>
<u>AND:</u>	<u>RAM CHANDAR</u>	<u>2nd Appellant</u>
<u>AND:</u>	<u>KALA WATI</u>	<u>1st Respondent</u>
<u>AND:</u>	<u>SMITA RAM AND SANT RAM</u>	<u>2nd Respondents</u>

Coram: Pathik, JA
Datt, JA
Powell, JA

Hearing: Wednesday, 16 April 2008, Suva

Counsel: A K Narayan for the Appellant
S Maharaj for the Respondent

Date of Judgment: Friday, 18 April 2008, Suva

JUDGMENT OF THE COURT

- [1] These appeals are from a judgment of Finnigan J, who on 7 July 2006, following a hearing on 1, 2 and 17 May 2006, awarded damages for personal injuries suffered in a motor vehicle accident to Kala Wati (the first appellant in the first appeal, and first respondent in the second appeal), her daughter Smita Ram (the first appellant in the first appeal, and second respondent in the second appeal) and Sant Ram (the husband of Kala Wati and father of Smita Ram, and third respondent in the second appeal).
- [2] Kala Wati, Smita Ram and Sant Ram had suffered injuries when the vehicle being driven by Sant Ram was involved in an accident on 2 March 1999 with Ram Chandar, the driver of a truck. Ram Chandar is the second respondent in the first appeal and second appellant in the second appeal. S.L. Shankar Ltd is Ram Chandar's insurer and first respondent and first appellant in the respective proceedings.
- [3] The general damages awarded by Finnigan J were \$40,000 for Kala Wati, \$60,000 for Smita Ram and \$2,500 for Sant Ram, but those figures were reduced to \$20,000, \$30,000 and \$1,250 respectively following the trial judge's finding 50% contributory negligence by the driver, Sant Ram.
- [4] In the first appeal Kala Wati and Smita Ram challenge the 50% reduction in their awards of general damages. In the second appeal Ram Chandar and his insurer challenge the trial judge's finding of liability and further contend that the damages awarded were excessive.
- [5] The appeals were heard together but it is convenient to deal with the second appeal proceedings first.

Appeal ABU0086 of 2006

- [6] Sant Ram was convicted of careless driving and fined \$50.
- [7] On a later occasion the respondents were involved in another accident in the same vehicle. Each respondent was in the same position in the vehicle when the second accident occurred and each again received injuries. The second accident, and the injuries received from it, were not part of the proceedings before Finnigan J.
- [8] The trial judge approached the matter by holding that Sant Ram bore the onus of establishing not only that Ram Chandar was negligent but, in light of his conviction for careless driving, another heavier onus of establishing that he, Sant Ram, was not negligent.
- [9] The accident occurred at 11 pm at night when Sant Ram's vehicle collided with a stationary unlit truck. Sant Ram's evidence, which the trial judge accepted, was that shortly before the collision a vehicle coming from the opposite direction failed to dip its lights despite Sant Ram signalling to it by dipping his own lights, that he slowed to 50 km hour with the headlights of the other vehicle in his eyes and that he first saw Ram Chandar's truck when it was about twenty metres away. He tried to navigate between the two vehicles but struck the stationary vehicle. The approaching vehicle stopped and its occupants, a group of men who had been drinking, got out and began to call out "*where is the driver (of the truck) ?*" Sant Ram, in both his statement to the police the next day and in his evidence before the trial judge, said that the truck driver then appeared from somewhere, turned on his truck's engine and turned on the light.
- [10] Sant Ram also said that Ram Chandar's 8 wheeler unlit truck was parked diagonally, with its front off the road and with its rear projecting towards the road. It was completely dark.

- [11] Ram Chandar's evidence was that he was stopping to relieve himself and that he was bumped from behind at which point he switched off the truck ignition and its lights. He said that the colliding vehicle had blocked his driver's door so he exited by the passenger door. He helped Sant Ram driver from his vehicle, saw that the accident was very bad so went back into his truck and turned the hazard lights on. He was aware of other people around him but was not able to agree that there had been another vehicle approaching.
- [12] The trial judge found that both Sant Ram and Ram Chandar were credible witnesses who gave their evidence honestly. He concluded that on the balance of probabilities that Ram Chandar's account in relation to the lighting of the truck (on, off, on) was the true one.
- [13] The trial judge also took into account the evidence of the only other witness, the police officer who attended the scene and drew a sketch, said that the truck was at an angle with its nose pointing to the left of the road and actually on the shoulder of the road.
- [14] The trial judge found that Sant Ram had not succeeded in overturning the presumption that he was negligent, the presumption having arisen from his conviction for careless driving.
- [15] The trial judge found that there was an element of negligence in Sant Ram's driving because, dazzled by the oncoming headlights, he chose to drive on, albeit at a slower speed.
- [16] At paragraph 20 of the judgment the trial judge, however, found that Ram Chandar was also negligent, in slowing and pulling off the road in the dark. *"In my opinion, by pulling off the roadway at night time for no reason obvious to other road users, he was doing something unexpected. He therefore had a duty to be careful that he*

did not endanger others. From his account I conclude that he was no more aware of the plaintiffs' vehicle than they were of his. By slowing and pulling off the road he was creating a hazard for them.... In my considered opinion, he contributed to the negligence to the collision just as much as did the third (respondent). I find both drivers equally to blame."

- [17] The trial judge entered judgment for the respondents against the appellants in liability at 50% by reason of the contributory negligence of Sant Ram.
- [18] Following a detailed review of the medical evidence from a number of doctors including a doctor retained by the appellants, for personal injuries the trial judge awarded Sant Ram damages of \$2,500 plus interest, Smita Ram \$60,000 plus interest and Kala Wati \$40,000 plus interest.
- [19] The trial judge then reduced each of those amounts by 50% for the contributory negligence of Sant Ram so that the final award was: Sant Ram damages of \$1,250 plus interest of \$337.50, Smita Ram \$30,000 plus interest of \$4,050 and Kala Wati \$20,000 plus interest of \$5,400.
- [20] In addition the trial judge awarded special damages of \$2,865 plus interest of \$515.70 being 50% of the repair costs of the vehicle.
- [21] Finally the trial judge awarded costs of \$3,000..
- [22] The Notice of Appeal in these proceedings contains six grounds of appeal but in essence they amount to two, firstly that the trial judge erred in finding that Ram Chandar was negligent and that his assessment of quantum was excessive.

Ground 1 – That the trial judge erred in finding that Ram Chandar was equally liable with Sant Ram for the accident when he had found that his lights were on, he was still moving and that Sant Ram had been negligent and has not disproved otherwise

Ground 2 – That the trial judge failed to take into account the onus placed on a proceeding vehicle

Ground 3 – That the trial judge misapplied the law as to onus of proof in negligence and erred in placing the onus on the appellants

Ground 5 – That the trial judge erred in law and in fact in holding the appellants liable in view of the findings of facts made by him and in the absence of any evidence of negligence in the circumstances of the appellants

Ground 6 – That the trial judge erred in law and in fact in not holding that it was the sole negligence of Sant Ram that caused the accident

[23] The appellants say that this is a case where findings of fact by the trial judge can, on proper principles, be reviewed by an appellate court. The appellants' counsel referred the Court to the statements of principle set out in *Benmax v Austin Motor Co. Ltd* [1955] 1 All ER 326 at 327 namely:

".. where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate court."

"... with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly."

[24] The appellants' counsel referred to a number of cases involving vehicles running into the back of other vehicles and submitted that on the facts found by the trial judge, the trial judge was not entitled to make the finding he made in paragraph 19 of the judgment. Counsel says that to find a driver negligent for pulling off the road at night would place an intolerable burden on drivers of proceeding vehicles.

[25] The trial judge found, as a fact, that Ram Chandar's conduct of his vehicle, namely in slowing down and pulling to the side of the road on a dark night taking no account of those who might be driving behind, was negligent. In other words, it

was unsafe to pull off the road when there was a vehicle close behind him and Ram Chandar paid no regard to whether there was such a vehicle.

- [26] It is not a finding of general application that appellants' counsel fears, but was made by the judge in light of the facts of this particular case including the fact the driver had not pulled completely off the road but had allowed the rear right corner of the tray to protrude almost a metre (900mm) onto the road at an angle (judgment paragraph 14).
- [27] The finding of negligence by the trial judge was, in the opinion of this Court, open to the trial judge on the facts of this case. Moreover this Court cannot make a proper assessment of all the evidence that was before the trial judge and therefore cannot interfere with the finding of fact at paragraph 20 of the judgment. The Court finds no demonstrable error in the trial judge coming to this finding.
- [28] In relation to Ground 1, it was open to the trial judge to find that Ram Chandar was equally liable with Sant Ram. If Ram Chandar had been travelling within a normal speed range, or if Ram Chandar had taken his truck completely off the roadway, then the accident could not have occurred. It needs to be emphasised that the trial judge accepted that Sant Ram had slowed down to 50 km/hr at the time of the accident. The discussion by the Court of Appeal of Fiji in Turagakula v Work [1996] FJCA 4 of matters which point to negligence by a driver who runs into a truck abandoned on the roadway is instructive, but that Court also found that the truck driver was negligent for abandoning the truck on the road without lights. It did not find that there would have been no negligence if the truck driver had abandoned the vehicle with the lights on.
- [29] Re Ground 2, there is nothing in the judgment to suggest that the trial judge failed to take into account the said "onus" placed on a proceeding vehicle. On the contrary, his finding that Sant Ram should have stopped when blinded by the

oncoming lights, demonstrates that the trial judge did consider this. Sant Ram did, the trial judge found, slow down to 50 km/hr, but whether he could have stopped completely before striking Ram Chandar's vehicle which was only 60-70 metres away, is an unanswered question. The trial judge doesn't elaborate on whether Sant Ram should have come to a complete halt within 60-70 metres. Presumably it would have been possible if he had braked hard but that would depend on the speed he was travelling at that point (and the trial judge makes no finding as to what that speed was). In any event it would be an odd finding that a driver who was blinded by on-coming lights was negligent for not braking hard to stop. But these are matters which this appellate Court is in no position to explore.

[30] Re Ground 3, the trial judge did not place the onus on the appellants. Instead he put the onus on the respondents to establish negligence by the appellants and on Sant Ram to prove that he, Sant Ram, was not negligent.

[31] Re Ground 5, as discussed above there was evidence that Ram Chandar was negligent and in paragraph 20 of the judgment, reproduced in part at paragraph 16 of this judgment, the trial judge so found.

[32] Re Ground 6, the trial judge made no such error for the reasons discussed above.

Ground 4 – That the trial judge erred in his assessment of quantum for the respondent in light of the oral and documentary evidence. Such assessment was excessive in the circumstances

[33] The judgment addresses quantum of damages at considerable length and the trial judge carefully assessed all the medical evidence. He did not accept all of the respondents' claims and, in assessing damages in respect of each of them, he was careful to confine the award for damages to those injuries attributable to the first accident.

Sant Ram

[34] In relation to Sant Ram, he suffered injuries including shock from seeing his wife and daughter seriously injured. The trial judge's assessment of the medical evidence in relation to this respondent is at paragraphs 32 to 37 of the judgment and of the damages at \$2,500 (reduced to \$1,250 because of his finding that Ram Chandar was only 50% responsible) was not excessive

Smita Ram

[35] In relation to Smita Ram child, she claimed for serious injuries including removal of her spleen, fractured ribs, left clavicle and left arm, a punctured lung and an unsightly stomach scar. The trial judge considered the medical evidence in relation to her at paragraphs 32 to 36, and at paragraph 48 of the judgment he made findings as the extent of her injuries.

[36] The trial judge found that Smita Ram has post-traumatic occasional headache and giddiness, linear scars on the left side (face, shoulder, posterior chest and abdomen), post-operative scar from splenectomy, loss of her spleen and ongoing need for immunization, punctured lung and drainage required at the time, four fractured ribs, physiological trauma from a life threatening injury and incapacity overall limited to about 6 months.

[37] The trial judge discussed five Fiji High Court and Court of Appeal authorities, and, at paragraph 54 of the judgment, taking into account the awards of damages for the injuries in those cases, he assessed of damages at \$60,000 (reduced to \$30,000 because of his finding of Sant Ram's 50% contributory negligence).

[38] In the opinion of this Court an award of general damages to Smita Ram in the sum of \$60,000 has not been shown to be excessive.

Kala Wati

[39] In relation to Kala Wati wife, the trial judge assessed the medical evidence at paragraphs 30 and 31 of the judgment, and found, at paragraph 39 of the judgment, that she suffered from a recurrent painful left knee during cold periods, an unsightly scar thereon, slightly increased possibility of arthritis in this knee, an unsightly scar across her throat, a dislocated left shoulder though now fully recovered and psychological trauma caused partly by this accident but mostly by the cumulative effect of the second accident. He found that there was no measurable functional permanent incapacity. He found that damage to her right knee was not part of the cause of action, it having occurred during the second accident.

[40] The trial judge assessed damages at \$40,000 (reduced to \$20,000 because of his finding of Sant Ram's 50% contributory negligence) at paragraph 47 of the judgment was within the range of damages for such injuries. Before arriving at that figure the trial judge discussed six broadly comparable cases.

[41] In the opinion of this Court an award of general damages to Smita Ram in the sum of \$40,000 has not been shown to be excessive. It was within in the range of damages that could have been awarded, albeit towards the top of the range.

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[42] There is one ground in this appeal, namely that the trial judge erred in reducing their awards of damages by 50% on account of contributory negligence when they were not negligent at all.

[43] It is a long established principle that a defendant cannot excuse himself for the consequences of his misconduct by proving that the negligence of a third person contributed to the plaintiff's injury: Grant v Sun Shipping Co Ltd [1948] AC 549

[44] The issue has arisen before in this jurisdiction and in *Ambika Nand s/o Leki v Tevita Senico* [1996] ABU0025, the Court of Appeal, in a motor vehicle matter on all fours with the instant case, confirmed this principle.

[45] This appeal is allowed

Counter-Claim for Contribution

[46] The respondents (Ram Chandar and his insurer) in their written submissions of 18 March 2008 accept that appeal ABU0078 of 2006 must be allowed but submit that the trial judge ought to have ordered Sant Ram to pay Ram Chandar 50% of the damages he must pay to Kala Wati and Smita Ram.

[47] The respondents in their submissions of 18 March 2008 say that if a counter-claim is formally required they seek leave to amend to claim such contribution and a proposed Amended Defence containing such a Counter-Claim was handed to the Court a day or so before the hearing.

[48] It is the law that any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage, whether jointly with him or otherwise. See *Halsbury's Laws of England* 4th Ed, Vol 45, para 1235

[49] Accordingly if the respondents had asked the the trial judge to make the order for contribution now sought, the trial judge, having found Ram Chandar and Sant Ram equally liable for the accident, would have been obliged to make an order for 50% contribution. It may be that that is what the trial judge thought he was doing in a short-hand way when he, erroneously as this Court has found, reduced the general damages by 50%. However this is speculation.

- [50] If the respondents are permitted to file the Amended Defence and Cross-Claim they will, therefore, be successful in obtaining an order for 50% contribution against Sant Ram. The question is whether or not the respondents should be allowed to amend at this late stage.
- [51] The respondents say that there is no prejudice to the appellants caused by the delay in making the application because if the matter had been pleaded at trial nothing could have been said against such an order, such an order following automatically once the trial judge apportioned liability between the two drivers.
- [52] It follows that the amendment has overwhelming merit. Allowing the amendment does not require any fresh evidence or further hearing.
- [53] The respondents say that the oversight in raising the matter at trial, whether by pleading or submission, must be seen in the context that the respondents denied liability completely. Be that as it may, delay in not raising the issue earlier in the appeal process, until 18 March 2008, is not explained.
- [54] The appellants oppose the amendment, which they say is made at the 11th hour. They say that they would be prejudiced because the appellants, Kala Wati and Smita Ram, would, by virtue of their family relationship with Sant Ram, would effectively have their damages halved.
- [55] The prejudice referred to by the appellants is not prejudice in the relevant sense which has to be prejudice due to the delay in bringing the amendment, not just prejudice from the making of the orders sought in the amendment.
- [56] The Court has a discretion as to whether or not to allow such an amendment and it can allow an amendment at any time. The question is whether the Court should.

- [57] The general principle is that parties are bound by the way they conduct the proceedings and consequently are disallowed from raising new matters on appeal: *Coulton v Holcombe* (1986) 162 CLR 1. This is because public policy favours the finality of litigation and because of broad principles requiring the just and efficient conduct of proceedings. On the other hand appeal courts have a discretion to allow new points of law to be raised, particularly where the new matter sought asserts a material error of law in the disposition of the proceedings below (for example where the alleged error of law relates to a point that is unanswerable: *Hampton Court Ltd v Crooks* (1957) 97 CLR 367).
- [58] Different principles apply when a Court is asked to exercise its discretion to bring proceedings or appeals outside the time limited by statute or the Court. In those cases where there has been significant delay and no reasonable explanation of the delay, the Court is justified in refusing such applications even if there is merit in the proposed appeal or proceeding and no prejudice to the other party: *Vimal Contraction & Joinery Works Ltd & Anor v Vinod Patel & Co Ltd* (2008) ABU0093 of 2006.
- [59] However the Court's task in exercising its discretion whether or not to allow an amendment raising a new point of law is to give effect to the demands of justice by balancing, on the one hand, the entitlement of a party to have the case determined according to law and, on the other, the public and private interest in the proper conduct of the first instance proceedings: *Burston v Melbourne & Metropolitan Tramways* (1948) 78 CLR 143
- [60] In these proceedings that balancing act requires the Court to allow the respondents' proposed amendment. The point that is being raised is unanswerable, the litigation will not be extended and there is no prejudice in the relevant sense to the appellants.

[61] The Court accordingly grants leave to the respondents to rely on the Amended Defence handed to the Court.

[62] The Court will make orders that Sant Ram pay to or contribute to Ram Chandar 50% of the damages that Ram Chandar will be ordered to pay to Kala Wati and Smita Ram.

[63] It might be argued that, taking a global view, the parties are left in exactly the same position as they were when Finnigan J delivered judgment. That may be, but whatever success Ram Chandar and his insurer have had on appeal, they have succeeded on a ground not raised at first instance and in such a case a successful appellant is not normally entitled to the costs of the appeal: Hussey v Horne-Payne (1878) 8 Ch D 670.

Orders of the Court

[64] The orders of the Court are:

1. Appeal in ABU0086 dismissed.
2. Appeal in ABU0078 allowed.
3. Order judgment for Sant Ram, Kala Wati and Smita Ram against Ram Chandar and S.L. Shankar Limited as follows:

Sant Ram

General Damages	\$1,250.00
Interest at 6% for 4 years & 6 months	\$ 337.50

Special Damages	\$2,865.00
Interest at 4% for 4 years & 6 months	\$ 515.70

Kala Wati

General Damages	\$40,000.00
Interest at 6% for 4 years & 6 months	\$10,800.00

Smita Ram

General Damages	\$60,000.00
Interest at 6% for 4 years & 6 months	\$16,200.00

Costs of \$3,000 as summarily assessed by the trial judge

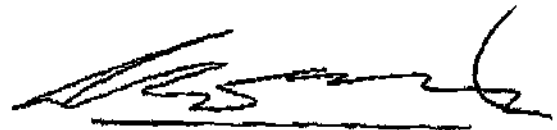
4. Order judgment for Ram Chandar against Sant Ram in the sum of \$50,000 plus interest at 6% for 4 years and 6 months namely \$13,500.

Costs of the Appeals

[63] The costs order of the Court is that Ram Chandar and S.L. Shankar Ltd are to pay the costs of Sant Ram, Kala Wati and Smita Ram in appeals ABU 0078 of 2006 and ABU 0086 of 2006, such costs to be agreed or taxed.



Pathik, JA



Datt, JA





Powell, JA

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A K Lawyers, Ba for the Respondent

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