IN THE PRIVY COUNCIL No. 7 of 1973

ON APPEAL
FROM THE FIJI COURT OF APPEAL

BETWEEN :

SANTLAL son of Ram Autar (Plaintiff) Appellant

- and -

1. SOUTH PACIFIC SUGAR MILLS LIMITED
2. VEERA SWAMY son of VENKAT SAMI
(Defendants) Respondents

CASE FOR THE APPELLANT

RECORD

1. This is an Appeal from a Judgment and Order of the Fiji Court of Appeal (Marsack, J.A. Gould, V.P. and Spring, J.A.) dated and entered on the 3rd November 1972, allowing the Respondents' Appeal from an Order of the Supreme Court of Fiji (Gordon Taylor,J.) dated 30th June 1972, whereby Judgment was entered for the Appellant against the Respondents on the Appellant's claim for damages arising out of a fatal accident. An Order granting leave to appeal was made on 5th February 1973. p. 58/66 p. 67 p. 68

2. The Appellant in his Statement of Claim sued as the Administrator of the estate of Suresp Pratap, the deceased in the Action, and as the father of the deceased, for his own benefit and for the benefit of the deceased's step mother. The Appellant claimed damages under the Law Reform (Miscellaneous Provisions) Death and Interest Ordinance Cap. 20 and Compensation to Relatives Ordinance Cap. 22, and funeral expenses, arising out of the negligent driving of a loco train by the First Respondents' driver, the Second Respondent, acting as their servant or agent, which collided with a motor car being driven by the deceased along a major road, Queen's Road at Martintar. By their Defence the Respondents denied negligence and alleged that the deceased was negligent alternatively that he had been contributorily negligent. p. 3 p. 5

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3. The Plaintiff gave evidence as to the age, status and occupation of the deceased and stated that the deceased was a driver who had held a light goods licence. The deceased's younger brother, Virendra Pratap, gave evidence and in

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particular stated that he was a passenger sitting in the back of the vehicle which was a 6 seater containing 6 people. He said that they were travelling towards Nadi at about 50-55 m.p.h. and as they approached the Martintar crossing and were about 1½-2 chains away they were overtaken by a fast moving car which went over the crossing. He said he heard no whistle and did not see the train before it came onto the road, that it came from the left hand side and that on that side there were big trees and a cane farm. He said the crossing was in a dip and he saw no sign giving warning of the crossing. In cross-examination he stated that the train came out at more than

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5-10 m.p.h.

4. Another passenger, Jai Ram Naiker, gave evidence to the effect that he was a passenger sitting next to the deceased and that they were going to a football tournament. He said a car overtook them when they were about 1½ chains from the crossing. He saw the engine just as the deceased braked when they were about 6-7 yards from the crossing. He heard no whistle from the engine.

5. The last witness for the Plaintiff was a police photographer who went to the scene on the day of the accident. He found a crossing sign about 80'-90' the Lautoka side (the direction the deceased approached) of the crossing. It was 10'-12' in and obscured by sugar cane, a palm tree and the leaf of a cane. It was not visible. After the accident he stated it had been moved. He was aware of at least 4 accidents which had

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occurred there. In cross-examination he stated that the sign was the Respondents' sign and that no government one had been put there.

6. Evidence for the Defendants was given by

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Veera Swamy, the train driver, and Ajay Kamar, the pointsman, travelling with him in the cab.

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The driver's evidence was to the effect that he had sounded his horn continuously for 2 chains before the crossing and that he approached the

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crossing at about 5 m.p.h. When he was about 1 yard from the junction a car passed missing him by about 1 foot. That he did not see the deceased's vehicle before the collision but that upon impact he stopped in 2 to 3 feet. He said that if he saw traffic he went on, that he did not stop to give way to traffic and that a train cannot be stopped suddenly, although he repeated that he could stop in 1 yard. In cross-examination he agreed that a driver on the road would not see the train until it came onto the road and added that he would not have stopped even if he had seen the car coming. He agreed that it was a dangerous crossing and that he knew many people would be going to Nadi to the football. He had heard of many accidents at the crossing. The pointsman stated that the horn had been sounded. p. 13

7. Gordon Taylor J. dealt with the pleadings and all the evidence in his Judgment and having done so turned to the law. Having stated that there was no statutory provision relating to the use of the crossing involved he examined numerous authorities and stated the following principle of law to be applicable, namely, that there was a clear duty of care on operators of railways towards persons using a level crossing. But the standard of care required will vary according to the circumstances existing at a particular crossing and where the crossing in one where circumstances of unusual danger, or history of accidents existed a higher standard is owed by the operator of the trains. He then made the following finds of fact: p. 17/55 p.35 L.40 p.36 L.8

> "I am satisfied that this crossing was a dangerous crossing. I have already found as a fact that there have been previous accidents at this crossing. It is clear from the evidence and I find as a fact that very tall sugar cane was growing almost up to the road. According to the evidence, the sugar cane was somewhere from 10 to 15 feet in from the roadway. The height of the cane shown in photograph number 2 exhibited is such that the engine would not be visible by a person on the roadway approaching a crossing until the engine emerged from beyond the sugar cane. As a road driver approaches the crossing there is a dip in the road and it may be that he would not see the railway lines until he was very close to them.

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I find as a fact, that on this day there was no signpost which was reasonably visible to the driver of an oncoming motor car. I accept the evidence of the police officer that the sign which existed was some distance in from the roadway and on the edge of the growing cane to which I have already referred. I accept the evidence of the police officer that the growing cane reached to the top of the sign. I also accept that there are trees on the edge of the roadway which would add a further obstruction as far as visibility of the signpost is concerned. Accordingly I find as a fact that there was insufficient warning of this crossing by sign, and, in view of the cane which was growing on the left hand side of the road preceding towards Nadi, there was insufficient visibility to enable the train to be seen. For these reasons I find as a fact that this was a dangerous crossing. It follows that in my view there was, therefore, a high standard of care required of the Defendants."

The learned Judge dealt with the dispute as to the
p. 37 L.1 sounding of the horn or whistle in this way:

"I was not impressed with the Second Defendant nor the pointsman and insofar as their evidence conflicts with the evidence given on behalf of the Plaintiff, I greatly prefer the evidence given on behalf of the Plaintiff. I am completely satisfied that the occupants of the car driven by the deceased did not hear the train whistle. On the balance of probabilities, I find as a fact the whistle was not sounded in the way spoken of in this evidence by the first named Defendant and the pointsman.

In addition to that I am not satisfied that even if the whistle had been sounded that this would have been a sufficient warning by the Defendants that a train was coming."

The learned Judge then went on to consider the duty of train drivers to keep a proper look-out and if necessary take avoiding action at a crossing.
p. 41 L.18 He concluded his considerations in these terms :

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"I, therefore, find that they were negligent in the following ways -

1. the failure of the driver to keep a proper look-out;

2. the failure of the driver to see the deceased's car approaching close to the crossing;

3. the failure to give an adequate warning of the fact that the train was about to cross the road;

4. the failure of the driver to stop his train as he could have done to avoid the collision."

8. On the issue of contributory negligence raised by the Respondents the learned Judge considered 2 authorities, Nance v British Columbia Electric Railway Co. Ltd. 1951 App.Cas.601 and South Australian Railway Commissioner v Thomas 84 C.L.R.84, he found that the deceased had no reasonable opportunity of being aware either of the crossing or of the approaching train before he braked. He therefore found that no contributory negligence attached to the deceased and after considering the law and the fact relating to damage gave judgment for the Appellant in the sum of 1300 dollars and costs.

9. The Respondents appealed to the Fiji Court of Appeal and the appeal was heard on the 26th October 1972 by Marsack J.A., Gould V.P. and Spring J.A. Judgment being given on 3rd November 1972 allowing the appeal to the extent of finding the deceased 50% to blame for the collision and further by ordering damages to be reduced accordingly to 650 dollars and an order that the Appellants pay half of the Respondents' costs of the appeal. p.56 p.58/66

10. The Judgment of the Court of Appeal was given by Marsack J.A. So far as the learned trial Judge's findings in relation to the sounding of the horn was concerned, while expressing reservations about the finding, as an appellate Judge he felt unable to reverse that finding of fact. With regard to the learned trial Judge's findings that no proper lookout had been kept by the train driver, and that he had failed to stop in time to avoid the

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collision, the learned Judge felt able to draw inferences of fact from the evidence which in his view showed that the driver of the train was not
p. 62 at fault in these two respects.

The learned Judge then went on to consider the question of contributory negligence and to draw inferences from the facts different to those of the learned trial Judge, and in substance by means of an arithmetical calculation made a finding that the deceased had ample time to avoid the collision if he had been keeping a proper look-out. He
p.63 L.38 proportioned negligence on a 50/50 basis.

11. The Appellant respectfully submits that this appeal ought to be allowed and the judgment of Gordon Taylor J. was correct. In reaching the conclusion that the train driver had not failed to keep a proper look-out or stop in sufficient time to avoid the collision Marsack J.A. relied on two matters:

(a) the fact that the train driver's attention would have been properly on the car which went over the crossing just in front of the deceased,

(b) that the trial Judge had drawn the wrong inference when he stated that the train driver would not have stopped in an emergency because the train driver had in fact stopped when the crash occurred.

It is respectfully submitted that the above reasoning was erroneous for it totally failed to take account of the fact that the basis of the learned trial Judge's finding was that the train driver's duty to keep a proper look-out arose before the train came onto the crossing and the road itself where narrow misses may occur, and upon the fact that the driver himself said he could see cars when 6 yards from the crossing. Similarly, it is submitted, the fact that the driver stopped when the collision occurred is irrelevant, if he had a duty to stop or take steps to avoid a collision. And the mere fact that he stopped on collision was confirmation of the driver's own evidence in chief that if he saw traffic he just went on and did not stop, even

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when a vehicle had just missed him by inches.

12. It is respectfully submitted that the learned Judge placed too great a reliance upon the mathematical calculations and in any event drew the wrong conclusions from the same. In the first instance the speeds and distances given were only approximate, and in fact the speed of the train had never been admitted to be 5 m.p.h., but was stated by the Plaintiff's evidence (which was accepted) to be more than 5-10 m.p.h. Again even assuming the deceased had 200 feet in which to stop it is submitted that at 50-55 m.p.h. 200 feet is not ample distance.

13. The Appellant respectfully submits that the Order of the Fiji Court of Appeal was wrong and ought to be reversed, and the order of the Supreme Cout of Fiji ought to be restored, and this Appeal ought to be allowed with costs for the following (among other)

R E A S O N S

1. Because the Court of Appeal reversed the learned Judge's findings on erroneous views as to the basis upon which they had been made.

2. Because the Court of Appeal made findings upon the basis of inaccurate and unreliable data and further drew the wrong conclusions therefrom.

3. Because the findings of Gordon Taylor J. were right.

GEORGE NEWMAN

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- and -

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2. VEERA SWAMY son of Venkat Sami
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CASE FOR THE APPELLANT

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