jirdgment no. 11, 1974

(11)

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 (Defendant) Respondents

RECORD OF PROCEEDINGS

WILSON FREEMAN,
6/8 Westminster Palace Garden,
London SW1P 1RL

Solicitors for the Appellant

WRAY, SMITH & CO.,
1 King's Bench Walk,
Temple, London EC4Y 7DD

Solicitors for the Respondents

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 (Defendant) — Respondents

RECORD OF PROCEEDINGS

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No. 1

WRIT OF SUMMONS

In the Supreme Court

No.1

Writ of Summons

4th June 1970

IN THE SUPREME COURT OF FIJI

No. 156 of 1970

Between

SANTLAL son of Ram Autar of Lautoka, Cane Farmer, on his own behalf and as Administrator of the estate of Suresh Pratap son of Santlal, deceased Plaintiff

- and -

SOUTH PACIFIC SUGAR MILLS LIMITED an incorporated company having its registered office at Suva and carrying on business in Fiji as Sugar Millers

- and -

VEERA SWAMY son of Venkat Sami of Lautoka, Taxi Driver Defendants

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ELIZABETH II, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith.

To: SOUTH PACIFIC SUGAR MILLS LIMITED an incorporated company having its registered office at Suva and carrying on business in Fiji as Sugar Millers and VEERA SWAMY son of Venkat Sami of Lautoka, Taxi Driver.

WE COMMAND you, That within eight days after the service of this Writ on you inclusive of the day of such service you do cause an appearance to be entered for you in an action at the suit of SANTLAL son of Ram Autar of Lautoka, Cane Farmer on his own behalf, and as Administrator of the estate of Suresh Pratap son of Santlal, deceased,

In the Supreme Court

No. 1

Writ of Summons

4th June 1970

(continued)

and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

WITNESS the Honourable SIR CLIFFORD JAMES HAMMETT Chief Justice of our Supreme Court, at Suva, this 4th day of June 1970.

Sgd. D.S. Sharma
Solicitor for the Plaintiff. (L.S.)

N.B.- This writ is to be served within twelve calendar months from the date thereof, or, if renewed, with six calendar months from the date of the last renewal, including the day of such date and not afterwards.

The defendant may appear hereto by entering an appearance either personally or by Solicitor at the Supreme Court Registry at Suva.

GENERAL ENDORSEMENT OF CLAIM

The Plaintiff's claim against the defendants or either of them is for :

1. Damages and/or compensation for the death of Suresh Pratap son of Santlal caused as a result of negligent driving on the 15th day of June, 1969 by the defendant Veera Swamy who at all material times was a servant or agent of the defendant South Pacific Sugar Mills Limited under the provisions of the Law Reform (Miscellaneous Provisions) (Death & Interest) Ordinance (Cap.20) and compensation to Relatives Ordinance (Cap.22).

2. Further of other relief in the premises as to this Honourable Court seems just.

3. Costs of this action.

No. 2

Statement of Claim

28th August 1970

No. 2

STATEMENT OF CLAIM

IN THE SUPREME COURT OF FIJI

No. 156 of 1970

BETWEEN: SANTLAL son of Ram Autar of Lautoka, Cane Farmer on his own behalf, and as

Administrator of the estate of Suresh Pratap son of Santlal, deceased.

PLAINTIFF

A N D: SOUTH PACIFIC SUGAR MILLS LIMITED an incorporated company having its registered office at Suva and carrying on business in Fiji as Sugar Millers and VEERA SWAMY son of Venkat Sami of Lautoka, Taxi Driver.

DEFENDANTS

In the Supreme Court

No. 2

Statement of Claim

28th August 1970

(continued)

STATEMENT OF CLAIM

1. The Plaintiff is the Administrator of the Estate of SURESH PRATAP son of Santlal late of Vitogo, Lautoka deceased and is also the father of the deceased and brings this action as well for the benefit of himself and of the other persons named in paragraph 4 hereof.

2. That at all material times the defendant South Pacific Sugar Mills Limited was the owner of the locomotive train referred to paragraph 3 hereof and that the defendant VEERA SWAMY was the servant and/or agent of the defendant South Pacific Sugar Mills Limited.

3. That on the 15th day of June, 1969 the said Suresh Pratap was driving a car along Queens Road at Martintar, Nadi when a locomotive train negligently driven across the said road by the defendant Veera Swamy collided with the said car. As a result of injuries sustained in the said collision the said Suresh Pratap died. Particulars of the said negligence are as follows :

   (a) failing to keep any or proper look out.

   (b) failing to give any or any adequate warning of approaching the road.

   (c) driving without due care and attention.

   (d) driving at a speed which was too fast in the circumstances.

   (e) failing to stop, slow down or otherwise avoiding the said collision.

In the Supreme Court

No. 2

Statement of Claim

28th August 1970

(continued)

(f) exposing the said Suresh Pratap to danger.

4. Particulars of the persons for whom this action is brought :-

	Name & Address	Father's name	Age	Relationship to deceased
1.	Santlal, Vitogo Lautoka	Ram Autar	51	Father
2.	Indrani, Vitogo Lautoka	Murti Pillay	33	Mother
3.	~~Virendra Pratap,~~ Vitogo, Lautoka	Santlal	26	Brother
4.	Nirmala Wati, Vitogo, Lautoka	Santlal	30	Sister
5.	Ramesh Pratap, Vitogo, Lautoka	Santlal	14	Brother
6.	Lalita, Vitogo, Lautoka	Santlal	13	Sister
7.	Ambala, Vitogo, Lautoka	Santlal	12	Sister
8.	Vanita, Vitogo, Lautoka	Santlal	8	Sister
9.	Sukla, Vitogo, Lautoka	Santlal	7	Sister
10.	Nawal Pratap Vitogo, Lautoka	Santlal	10	Brother
11.	Anuj Pratap	Santlal	6	Brother

5. The nature of the claim in respect of which damages are sought :-

The deceased was immediately prior to his death a healthy young man aged 22 years. He was a farm supervisor and driver earning approximately $600.00 per annum and supported his said parents and brothers and sisters and by his death they have and each of them has suffered loss and damage

6. That the deceased lost the normal expectation of life and his estate has suffered loss and damage.

7. WHEREFORE the Plaintiff claims from the Defendants :

(i) Damages under Law Reform (Miscellaneous Provision) Death and Interest Ordinance (Cap.20) and compensation to Relatives Ordinance (Cap.22) $24,000.00

(ii) Funeral expenses 100.00

(iii) Further or other relief as this court seems just.

DELIVERED this 28th day of August 1970

Sgd. D. S. Sharma
Solicitor for the Plaintiff

In the Supreme Court

No. 2

Statement of Claim

28th August 1970

(continued)

No. 3

DEFENCE

No. 3

Defence

3rd September 1970

IN THE SUPREME COURT OF FIJI

No.156 of 1970

BETWEEN: SANTLAL son of Ram Autar of Lautoka, Cane Farmer on his own behalf, and as Administrator of the estate of Suresh Pratap son of Santlal, deceased Plaintiff

AND : SOUTH PACIFIC SUGAR MILLS LIMITED as incorporated company having its registered office at Suva and carrying on business in Fiji as Sugar Millers and VEERA SWAMY son of Venkat Sami of Lautoka, Taxi Driver. Defendants

DEFENCE

The Defendants as to the Statement of Claim filed herein state :

1. They have no knowledge of the facts stated in paragraph 1 but subject to the production of Letters of Administration are prepared to admit that the Plaintiff is the Administrator of the Estate of Suresh Pratap. Subject to this qualified admission they put the Plaintiff to the proof of the other facts stated therein and therefore deny each and every other allegation contained in paragraph 1.

In the Supreme Court

No. 3

Defence

3rd September 1970

(continued)

2. They admit paragraph 2.

3. As to paragraph 3 they have no knowledge as to who was driving the car but they admit that on the 15th day of June, 1969, there was a collision between a locomotive driven by the second-named Defendant and a car as a result of which two persons were killed. Except as admitted herein they deny each and every other allegation contained in paragraph 3.

4. As to paragraph 4 they have no knowledge of the deceased's dependants and therefore deny each and every allegation in paragraph 4.

5. They have no knowledge of the facts pleaded in paragraph 5 and therefore deny each and every allegation contained therein.

6. They do not deny the facts pleaded in paragraph 6.

7. The Defendants state further that the cause of the accident in which the said Suresh Pratap is alleged to have lost his life was caused solely by the person driving the said motor vehicle and if this said person was the said Suresh Pratap as pleaded the cause of his death was solely attributable to his own negligence particulars of such negligence being as follows :

(a) Failing to keep any or proper look-out.

(b) Failing to take heed of traffic signs indicating a railway crossing.

(c) Driving at a speed which was excessive in the circumstances.

(d) Failing to stop, slow down or otherwise avoid the collision.

(e) Failing to give way to a locomotive in the course of crossing the road.

8. In the alternative the Defendants claim that the said Suresh Pratap contributed to his own death by his negligence particulars being those referred to in the preceding paragraph hereof.

DATED the 3rd day of September 1970

MUNRO, WARREN, LEYS & KERMODE
Per: R. G. Kermode
Solicitors for the Defendants.

No. 4

PROCEEDINGS

In the Supreme Court

No. 4
Proceedings
19th April 1972

IN THE SUPREME COURT OF FIJI
Civil Jurisdiction
Action No. 156 of 1970 AT LAUTOKA

Before the Hon. Mr. Justice G. Taylor P.J.
Wednesday the 19th day of April, 1972 at 9.30 a.m.

Between: SANTLAL S/o Ram Autar Plaintiff

And : 1. SOUTH PACIFIC SUGAR MILLS LIMITED
2. VEERA SWAMY s/o Venkat Sami
Defendants

Mr. Jai Ram Reddy counsel for the Plaintiff
Mr. R. C. Kermode counsel for the Defendants

(Mr. Prasad with watching brief).

REDDY: I seek to amend para 4 by deleting names of brothers and sisters

KERMODE: I consent.

Ct: Leave granted.

No. 5

SANTLAL

No. 5
Plaintiff's Evidence
Santlal Examination

SANTLAL sworn :-

I am the Plaintiff. I live at Vitogo. The deceased Suresh Pratap was my son. He was 22 years. I produce Ex. 1 his birth certificate. I have obtained L/A which I produce Ex.2. My wife is Indrani. My deceased son's mother is dead. Indrani is his step mother. Suresh was not married. He was educated up to Form 4. At the time of his death he was supervising my 150 acre cane farm. I also have a bulldozing and lorry transport business. Suresh supervised the farm on his own. After his death I had to employ others to supervise the farm but I have been unable to get a man as good as Suresh. In his time I used to harvest about 3,000 tons of cane. Suresh was

In the Supreme Court

No. 5

Plaintiff's Evidence

Santlal Examination (continued)

in good health. He could drive and had a light goods licence. I paid Suresh $600 per year, and provided him with accommodation and food. My son died on 16.6.69 as the result of an accident. I arranged funeral. He was cremated according to Hindu rites. It cost $100.

KERMODE: I admit the quantum of $100 funeral expenses.

CT: Very well.

EX. IN CHIEF RESUMED:

My son supervised the farm and paid the labourers. He engaged labourers. Since his death I have had difficulty in running the farm. The number of people employed varies from 15-25. He would have gone on living with me and running the farm.

Cross-Examination

XXM.

I am fit and quite well-to-do. I have had someone look after the farm. Virendra is trained as a cane farmer. He drives a lorry. He is 26. He married when he was about 22. He is capable of managing the farm. He is employed with a lorry. No arrangements had been made for Suresh to be married. He was hoping to go overseas for education. He paid about $100 for admission to a school but he got that back when I told him I was old and needed him on the farm. His salary should have been $1,000 but I only paid him $600 and told him the property would be there when I died.

REEXM.

I am now 54.

No. 6

Virendra Pratap Examination

No. 6

VIRENDRA PRATAP

VIRENDRA PRATAP sworn :-

I am a driver. The deceased was my brother. He was younger than me. I was travelling with my brother in my Datsun U 656 to see a football match at Nadi. My brother was driving. There were 6 of us in the car. I was in the back. Jai Ram and Gur Mohammed were in the front. Gur Mohammed also died

as did my brother. We left Vitogo about 7.30 a.m. that morning. There was quite a lot of traffic that morning going towards Nadi. As we approached the crossing at Martintar a car passed us. This was 1½ - 2 chains from the crossing. After it passed us I saw it go over the crossing. Then suddenly our car braked and I suddenly saw an engine come on the road. I had not heard any whistle from the train. The window of our car was open. I had not seen the train before it came on the road. There are big trees and a cane farm on the side of the Queens Road on the left hand side going towards Nadi. The engine came from the left hand side. I produce Ex.3 photographs of the scene.

KERMODE: I consent to photos going in.

EX. IN CHIEF RESUMED:

I know this crossing well. Beyond it there is a bend. The crossing is in a dip. I cannot say exactly where the train was at the point of impact. I was injured and unconscious. I was taken from hospital to attend my brother's funeral. I did not notice any sign to say there was a railway crossing there. I am familiar with the type of engine and the whistle it makes.

XXM

Cross-Examination

My brother had a licence. The car was a Datsun 1300. I say this was a 6 seater car. There were 3 in the front and 3 in the back. The car was in good condition. The brakes were good. We were doing 50-55 before the accident. The road before the crossing is straight. It is a good tar sealed road. It was a bright sunny day. The accident was on 15.6.69 and the mill was crushing at that time. Everybody would know the mill was crushing and that the cane is mostly carried by train. My experience is that the train always sounds it horn, but I have seen it once or twice that a train has come out without sounding the horn. That happened on the day of the accident. The car that overtook us was going fast. I don't remember if the engine came front first or cab first. I first saw the engine when the car braked. The engine was then 11-12 yds. away. As far as I remember the train came out at more than 5-10 m.p.h. It had empty trucks behind it. I do not remember if the train

In the Supreme Court

was in the middle of the road when we hit it. I don't know which part of the engine we hit.

No. 6

Virendra Pratap

Cross-Examination (continued)

Re-examination

REEXM

The other car overtook us 1-1½ chains from the crossing then went over the crossing. When it went over the crossing I did not see the train.

No. 7

Jai Ram Naiker

Examination

No. 7

JAI RAM NAIKER

JAI RAM NAIKER Sworn :-

I live at Raki Raki. I am a labourer. I was employed by the Plaintiff as a labourer in 1969. On 15.6.69 I was in the car U656 with the previous witness. Suresh Pratap was driving. I was in the middle beside the driver and Gur Mohammed was beside me. There were 3 in the back. We were going to Nadi to see a football tournament. On the way to Nadi there was a collision at a railway crossing. I do not drive. I have no idea of speeds. Before we reached the crossing a car overtook us. This was about 1½ chains from the crossing. I remember Suresh braking and at the same time the accident happened. We collided with an engine. I saw the engine just as we braked. That was about 6-7yds. from the crossing. The train came from the left. I did not hear the train whistle. The windows of the car were wound down. Our car was a new car. I am familiar with the sound of a train whistle. I received injuries.

Cross-Examination

XXM

Before I saw the crossing I did not know there was a crossing there. It was my first trip for many many years. We were not talking in the car. There was not much noise from the engine.

REEXM:

Nil.

No. 8

In the Supreme Court

No. 8

Corporal Singh No.174

Examination

CORPORAL SINGH No.174

CPL.174 SINGH sworn:-

I am a Cpl. at Ba. In 1969 I was at Nadi. I was Police photographer. I attended the scene of an accident at Martintar and took the photos Ex.3. When I went to the scene on 15.6.69 I was looking for a crossing warning sign. I found it on the left hand side about 10-12' in from the road beyond a small drain. It was 80-90' from the crossing towards Lautoka. The sign was not visible as it was a little into the sugar cane and a palm tree was obstructing it. It was just on the edge of fully grown cane. The leaf of the cane was touching the top of the sign. The sign was about 18" x 18", but in the shape of a cross. Since the accident it has been moved. I have recently seen it has been moved closer to the road and is now clearly visible. I was at Nadi for several years. There have been other accidents at this crossing. I know of 2 which were reported and 2 which were not.

Cross-Examination

XXM

I took a photo of the sign but it is not here. There is a curve at the road beyond the sign. There are trees on both sides of the road. The sign was erected by S.P.S.M. The Govt. sign is an engine with smoke coming from it. There was not such a sign at this crossing. The sign I found could be 2' x 2'. I don't know if a driver would see the rails crossing the road.

REEXM

Nil.

KERMODE:

I accept that Suresh Pratap died as a result of this accident.

REDDY:

In that case I close my case.

Close of case for Plaintiff.

In the Supreme Court

No. 9

VEERA SWAMY

No.9

Defendants' Evidence

Veera Swamy

Examination

VEERA SWAMY sworn:-

I am employed by S.P.S.M. as a loco driver. At about 8.30 a.m. on Sunday 15.6.69 I was driving a loco with empty trucks, approaching the Martintar crossing. I have been a driver since 1952. On this morning as I approached the crossing I saw the whistle sign so I blew the horn and slowly crossed the road. The whistle board is about 2 chains from the crossing. The horn is sounded till we have crossed the road. I did that on this occasion. I was pulling 30-32 unladen trucks. I was going cab first. I had a pointsman Ajau Kumar with me. I approached the crossing at about 5 m.p.h. About 1 yard from the road I saw a car just avoided an accident with me. It was going fast. It missed me by about 1'. I heard a noise and looked to Nadi side. I saw a car stopped on the Nadi side. I then saw a car had collided with me on the Lautoka side. My cab was in the middle of the road when this car hit it. The impact was on my middle wheel which is about 1 yard or so from where I am sitting on the train. My engine is more than 18'. As soon as the impact happened I applied the brakes and stopped in 2-3'. As I came on the road I saw there was a lot of traffic. If I see traffic I go on. I do not stop to give way to traffic. A train cannot be stopped suddenly. There is an old S.P.S.M. sign on both sides of the crossing. They are the cross type. The one on the Lautoka side was near the palm trees, about 1 chain from the crossing. The sign was near the road. I had been along the road many times. Where the trees are the sign is not visible. In the lorry I can see it from 2 chains. I have seen it from the bus. I was delivering the trucks to a place about 1 mile from the crossing. I had one hand on the horn and one on the brake/accelerator handle. With full application of the brake I could stop in about 1 yard.

Cross-Examination

XXM

I had my hand on the brake in case there was an emergency. I did not use the brake this time till after the accident. I gave evidence at an inquest in September, 1969. I did not then say anything about the car having stopped on the Nadi side. What

I said was that as the engine was almost to reach that road 2 cars passed and I wondered what would have happened if they had collided, and I looked after them and heard a noise. That is the truth. I was wondering what would have happened if they had collided with each other. It was after that the third car came and avoided the accident. Before I reached the main road I looked towards Lautoka. I was then about 6 yds. from the crossing. I saw a lot of cars coming. The car which avoided the collision passed before I was on the road. I looked after that car. I did not look to the right. I said to the Magistrate at the Inquest I had 51 trucks. I had not counted the trucks. I consider this intersection is dangerous. A driver would not see the train till it came on to the road because of the sugar cane. The cane did not come to the edge of the road. Our instructions are to blow the whistle and go. I would not have stopped even if I had seen the car coming. If I had stopped I would have been stopped all day till all the cars go past. After the impact I applied the brake and stopped in 2-3'. I knew about the tournament at Nadi that day. I knew a lot of people would be going to Nadi. I was still sounding the horn at the time of the impact. The middle wheel was in the middle of the road at the point of impact. The cab was nearer the other side. I moved the engine off the road. I pushed the trucks back in the direction I had come from, then I moved the loco back over the crossing to the other side. I had stopped on the road, with my engine on the right hand side of the road, after the impact. Before each shift we are given instructions. I had my hand on the brake because I had to deliver trucks 2-3 chains away to the Martintar gang, and also the road was busy. I slowed down. I slowed down at the whistle board. I have heard of many accidents at this crossing. I was on a side line. I have no idea when I last saw the road sign before the accident. It could have been 10 years ago. On the day of the accident a P.C. asked me if there was a road sign. He went to look for it. I did not look at it then.

CT.: Adjourned to 2.15 p.m.

2.15 p.m. Appearances as before

In the Supreme Court

No. 9

Defendants' Evidence

Veera Swamy

Re-Examination

VEERA SWAMY resworn:-

REEXM

The cane does not come right up to the edge of the road. It is about 12'-15' back from the road. I don't know when before the accident I saw the cross sign. When I saw the sign it was close to the edge of the road.

No.10

Ajay Kumar

Examination

No.10

AJAY KUMAR

AJAY KUMAR sworn:-

I am a pointsman employed by S.P.S.M. On 15.6.69 I was riding as pointsman on loco driven by Veera Swamy. As we approached the crossing Veera Swamy sounded the horn. He started at the whistle board and kept on until the time of collision. I did not see the accident. The first I knew was when I heard the collision. I was reading at the time. The loco was travelling slow. Slower than normal.

XXM

Cross-Examination

I only started reading at the whistle board. I was reading an order. I started reading then as I had to deliver trucks a few chains beyond the crossing. The whistle board is 1½-2 chains from the road. In the Magistrates Court I said 3-3½ chains. I don't really know how far it is. The train moved for a yard or so after the impact. The train stopped when it was hit, then rolled on a bit.

REEXM

Nil.

Close of case for Defence.

No.11

ADDRESS OF DEFENDANTS' COUNSEL

In the Supreme Court

No.11

Address of Defendants' Counsel

19th April 1972

KERMODE:

The only legislation in Fiji is one Ordinance which sets out an agreement between Government and C.S.R. Under that Ordinance Regulations were made. However it only applies to the main line, and so does not apply here. Refer to Cap 155 and Vol.IX p.6018. Plaintiff alleges negligence on two matters viz. 1 Driver was not looking at direction from which car came and 2. Doubt if sign was properly visible.

Not dealing with 2 cars. This is a car and a loco. A car can steer away, and can stop in much shorter space. Deceased must have known it was in the season where one would expect to meet trains. Submit a person must drive at a speed where he can stop in an emergency. Submit on evidence clear deceased must have seen train for 25 yards. Train must, on evidence, have gone 8'-10' after clearing cane before it reached the edge of the road. The train was hit 9'-12' back from the leading edge. Submit Deceased was driving too fast in an over-crowded car. It was not put to any witness for Defence that the horn was not sounded. Refer to Lloyds Bank Ltd. v Rlwy. Exec. 1952 1AER 1253. Also Lloyds Bank v B.T.C. 1956 3AER 294. S.P.S.M. has installed signs although they have no statutory duty to do so. Refer to Regulations made under the Traffic Ordinances in 1967 dealing with signs. Two years after this Government had not erected them. It would then be not the Company which was in breach of Statutory Duty but the Government. Submit no evidence that the sign was on company land or obscured by something on company land. Submit no negligence on part of the Company. At worst, it is case of contributory negligence. On damage the ruling rate on Law Reform damages is $1,000. The Deceased having died intestate, the whole goes to the Plaintiff and I submit it must be taken into account. On Compensation to Relatives no attempt was made to prove pecuniary loss. Only evidence of inconvenience to Plaintiff, Deceased was 22. He had in mind giving up the work. If there is any loss it is minimal. No evidence called to show he gave any support to his mother or his father. What Plaintiff has lost is a good Manager. But no

In the Supreme Court

No. 11

Address of Defendants' Counsel

19th April 1972

(continued)

pecuniary loss. The Law Reform Damages of $1,000 which he must bring in would offset. Refer Kemp Chapt.8 at p.192. Submit claim should be dismissed. I do not ask for costs.

No.12

Address of Plaintiff's Counsel

19th April 1972

No. 12

ADDRESS OF PLAINTIFF'S COUNSEL

REDDY:

I agree Legislative Provisions are unsatisfactory. They refer only to passenger trains. Submit Company owes a legal duty of care to users of the main Queens Road. Submit Defendants did not take adequate steps to warn road users. This is not a private road crossing a railway, but a railway crossing a major road. Added to this there is sugar cane growing and trains can only be seen when on or very nearly on the road. The lines are in a dip and are not visible to an approaching driver. It is a heavily populated area. The loco driver knew of the football tournament. Refer 1958 1 AER 119, Distinguish Lloyds Bank case as it was a private road. It is clearly not in dispute there has been accidents at this crossing. Submit they owed an extra duty here. Police Cpl. said the sign was well in from the road and obscured. He also said that after the accident it was moved to a position nearer the road. Submit criterion is whether the Company has taken adequate precautions. Submit Veera Swamy really confirmed what was said by the Policy Cpl. Submit Company had failed in its duty to warn the public. Submit lack of whistlewas pleaded, and evidence of it was led. Submit Veera Swamy's evidence shows other cars went over in front of him so clearly nobody heard it. Submit on balance Court should find that no whistle was sounded. Submit driver under a duty to keep a look out. Submit he had to ensure that it was safe for him to cross the road. Defendant accepted as true what he said at the enquiry about 2 cars and wondering what would

happen if they had collided. Submit he was looking at those cars and not looking at the road to see if anything was coming. Submit he could have seen the car coming and could have stopped. Submit negligence has been established. Submit major part of the blame attaches to the Defendant Company. Refer to Lloyds Bank Ltd. v. Rly. Exec. 1952 1 AER p.1248. On quantum Submit evidence of pecuniary loss. Accept $1,000 as Law Reform Damages. Submit can assess pecuniary loss. Plaintiff only paying $600 instead of $1,000. Plaintiff says son would have continued to live with him. Ask for Judgment for Plaintiff with costs.

KERMODE: Nothing to add.

CT. Adjourn for Judgment on notice.

No. 13

JUDGMENT

IN THE SUPREME COURT OF FIJI LAUTOKA

Civil Action No.156 of 1970

Between: SANTLAL s/o Ram Autar Plaintiff

and

1. SOUTH PACIFIC SUGAR MILLS LIMITED
2. VEERA SWAMY s/o Venkat Sami Defendants

Mr. Jai Ram Reddy counsel for the Plaintiff.
Mr. R.G. Kermode counsel for the Defendants.

JUDGMENT

This is a claim for damages arising out of a fatal accident involving a locomotive and another vehicle which took place on the 15th of June, 1969. In the Statement of Claim the following matters are pleaded -

1. That the plaintiff is the administrator of the estate of Suresh Pratap, the deceased in this action, and that the plaintiff is the father of the deceased and brings the action for his

In the Supreme Court

No.13

Judgment

30th June 1972 (continued)

own benefit and for the benefit of persons named in paragraph 4 of the Statement of Claim.

2. That the South Pacific Sugar Mills Limited, the first named defendants, are the owners of the locomotive train, and that the second named defendant, Veera Swamy, was the agent and/or servant of the first defendants.

3. That on the 15th of June, 1969 the deceased was driving a car along Queen's Road at Martintar, Nadi, when a loco train was negligently driven across the road by the second named defendant and there was a collision, as a result of which the deceased sustained injuries from which he died.

The particulars of negligence pleaded are these:

(a) failing to keep any or any proper look out;

(b) failing to give any or any adequate warning of approaching the road;

(c) driving without due care and attention;

(d) driving at a speed which was too fast in the circumstances;

(e) failing to stop, slow down or otherwise avoid the said collision; and

(f) exposing the said Suresh Pratap to danger.

4. Particulars are given of the persons for whom this action is brought. At the beginning of the hearing Counsel for the plaintiff sought leave to amend that paragraph and leave was granted and all the names were deleted with the exception of the stepmother of the deceased and the plaintiff, who was the father of the deceased.

5. That the deceased was immediately prior to his death a healthy young man aged 22 years; that he was a farm supervisor and driver earning approximately $600 per annum and supported his parents and by his death they have suffered loss and damage.

6. That the deceased lost the normal expectation of life and his estate has suffered loss and damage.

7. The Plaintiff claims damages under the Law Reform (Miscellaneous Provision) Death and Interest Ordinance Cap.20 and Compensation to Relatives Ordinance Cap.22 and the plaintiff also claims funeral expenses in the sum of $100.

In the Defence, apart from formal admissions and denials the following matters are pleaded -

1. That the accident in which the deceased lost his life was caused solely by his negligent driving. The particulars of the negligence alleged are given as these -

   (a) failing to keep any or any proper lookout;

   (b) failing to take heed of traffic signs indicating a railway crossing;

   (c) driving at a speed which was excessive in the circumstances;

   (d) failing to stop, slow down or otherwise avoid the collision; and

   (e) failing to give way to a locomotive in the course of crossing the road.

2. In the alternative that if the accident was not caused solely by the negligence of the deceased, it was contributed to by his alleged negligence.

The evidence which was given was this. The plaintiff gave evidence and said that the deceased was his son and was 22 years of age. He produced the deceased's birth certificate and the letters of administration. He said that the deceased's mother had died and the person named in paragraph 4 of the Statement of Claim is the deceased's step-mother. He said that his son was not married and at the time of his death he was supervising the plaintiff's 150 acre cane farm. The plaintiff said that he has, in addition to the farm, a bulldozing and lorry transport business. He said that his deceased son

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supervised the farm on his own, and after the death he had to employ others to supervise the farm for him, but he has been unable to find a man as good as his deceased son. He said that when his son was alive, the farm used to produce about 3,000 tons of cane. He said that his son was in good health and could drive and had a "light goods" licence. He said that he paid his son $600 per year and provided him with food and accommodation. He said that his son died on 16th of June, 1969. The plaintiff then said that his son supervised the farm entirely on his own and engaged the labourers and paid them, and since the death he has had difficulty in running the farm upon which there are normally employed somewhere between 15 and 25 labourers. He said that his son would have gone on living with him and running the farm. In cross-examination, he said that he himself is fit and quite well-to-do. He said that he has had someone look after the farm, and his other son is trained as a cane farmer, but that son, who is 26 and married, drives a lorry as part of the transport business. He agreed that that son is capable of managing the farm. He said that no arrangements had been made for the deceased to be married, and that the deceased at one time was hoping to go overseas for education and had paid about $100 for admission to a school but had got that sum back when the plaintiff told him that he was old and needed his son on the farm. The plaintiff said that the salary should have been about $1,000 per year but he only paid his son $600 and told him that the property would be there when he, the plaintiff, died. He said that he himself is 54 years of age.

The next witness to be called was Virendra Pratap who is the brother of the deceased. He said that he is a driver. He said that on the day in question he was travelling with his brother in his Datsun car U656 and they were on their way to see a football match at Nadi when there was a collision. He said that the deceased was driving and there were six of them in the car. He said that he himself was in the back of the car and in addition to the driver, his brother, who was killed, two men were in front, one of whom also died as a result of the accident. He said that they had left Vitogo at about 7.30 a.m. that morning and there was quite a lot of traffic going towards Nadi. He said that as they approached the crossing at Martintar a car

passed them about one and a half to two chains from the crossing. He said that after that car passed them, he saw it go over the crossing and then suddenly saw an engine come onto the road. He said that he had not heard any whistle from the train and that the windows of the car were open. He said that he did not see the train before it came onto the road and he also said that there are big trees and a cane farm on the lefthand side of Queen's Road going towards Nadi. He said that the engine came from that lefthand side. He produced by consent some photographs of the scene of the accident. He said that he knew this crossing well and that beyond this there is a bend. He said that the crossing is in a dip. He was unable to say exactly where the train was at the point of impact. He said that he himself was injured and was unconscious, and was taken to hospital. He said that he did not notice any sign to say that there was a railway crossing at this point. In cross-examination, he said that the car was a Datsun 1300 which he said is a six-seater car. He said that before the accident the car was travelling at 50 to 55 miles per hour and that the road before the crossing is a good tarsealed road and is straight. He said that the weather was bright and sunny. He said that he knew the Mill was crushing at that time. He said that in his experience the train always sounds its horn but he has known occasions once or twice when a train has come out without sounding the horn and said that that is what happened on the day of the accident. He said that the car which overtook them before the crossing was going fast. He could not remember whether the engine came out front first or cab first and said that he first saw the engine when the car braked. He said that at that point, the engine was eleven to twelve yards away and as far as he could remember the train came out at a speed of more than 5 to 10 miles per hour. He said that it had empty trucks behind it. He did not remember if it was in the middle of the road when the car hit it. He did not know which part of the engine was hit by the car. In re-examination, he said again that the car which overtook them did so one to one and half chains before the crossing, and that car went over the crossing. He said that when that car went over the crossing, he did not see the train.

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The next witness to be called was Jai Ram Naiker. He said that he is a labourer and was employed by the plaintiff as a labourer in 1969. He said that on the 15th of June 1969, he was in the car U656 with the previous witness and the deceased, who was driving. He said that he was in the middle of the front seat beside the driver, and another man was also beside him in the front. There were three men, he said, in the back. He said that they were going to Nadi to see a football tournament and that on the way to Nadi, there was a collision at a railway crossing. He said that he himself did not drive and has no idea of speeds. He said that before they reached the crossing a car overtook them about one and half chains from the crossing. He said that he remembered the deceased braking and that at the same time the accident happened and they collided with an engine. He said that he saw the engine just as they braked and the car was then six to seven yards from the crossing. He said that the train came from the left and he did not hear the train whistle. He said that the windows of the car were wound down. In cross-examination, he said that before he saw the crossing, he did not know that there was a crossing there. He said that this was the first time he had been on this road for many years.

The next witness to be called was Corporal 174 Singh. He said that in 1969 he was stationed at Nadi and was Police Photographer. He said that he attended the scene of this accident at Martintar and took the photographs which had been exhibited. He said that at the scene, he was looking for a crossing warning sign and he found one on the lefthand side of the road going towards Nadi about 10 to 12 feet in from the edge of the road beyond a small drain. He said this sign was 80 to 90 feet from the crossing back in the direction of Lautoka. He said that the sign was not visible from the road as it was a little way into a sugar cane field and also a tree was obstructing it. He said that it was just on the edge of fully grown cane and the leaf of the cane was touching the top of the sign. He said the sign was the cross type of sign. He said that there have been other accidents at this crossing of which he knew. In cross-examination he said that there is a curve on the road beyond the crossing and there are trees on both sides of the road. He said that this sign had been erected by the S.P.S.M. and the Government sign, an engine with smoke coming from

it, was not at the scene at the time of the accident.

Mr. Kermode then said that he accepted that the deceased died as a result of injuries sustained in the accident and Mr. Reddy therefore did not have to prove that matter and closed the case for the plaintiff.

For the defence, the first witness to be called was the second defendant, Veera Swamy, and he said that he is employed by the S.P.S.M. as a loco driver. He said that at about 8.30 a.m. on Sunday the 15th of June, 1969, he was driving a loco with empty trucks, approaching the Martintar crossing. He said that he has been a driver since 1952. He said that on this morning as he approached the crossing he saw the whistle sign so he blew the horn and slowly crossed the road. He said that the whistle board was about two chains from the crossing and the horn is normally sounded until the loco has crossed the road. He said that that is what he did on this day. He said that he was pulling some 30 to 32 unladen trucks and he was proceeding cab first. He said that a pointsman was with him and he approached the crossing at about 5 miles per hour. He said that when he was about 1 yard from the road he saw a car which just avoided an accident with the loco and this car was going fast. He said that that car missed him by about 1 foot. He said that he then heard a noise and looked to the Nadi side and he then saw a car which had stopped on the Nadi side. He said that he then realised that a car had collided with him on the Lautoka side of the loco. He said that his cab was on the middle of the road, and when the car hit it, the impact was on the middle wheel which is about 1 yard or so from where he was sitting on the train, and that the engine is more than 18 feet long. He said that as soon as the impact happened he applied the brakes and stopped in two to three feet. He said that as he came on to the road this morning he saw that there was a lot of traffic. He said that if he sees traffic on the road he still goes on and does not stop to give way to the traffic. He said that a train cannot be stopped suddenly. He said that there is an S.P.S.M. sign on both sides of this crossing and that these signs are the cross type. He said that the one on the Lautoka side was near the palm trees about 1 chain from the crossing and that the sign was near the road. He said that he had been along the road many

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times. He said that where these trees are the sign is not visible but in a lorry it can be seen from 2 chains away. He said that he had seen it from a bus. He said that on this day, he was delivering trucks to a place about 1 mile from the crossing, and that, as he was driving the engine, he had one hand on the horn and one on the brake/accelerator handle. He said that on full application of the brakes he could stop in about 1 yard. In cross-examination, he said that he had his hand on the brakes in case there was an emergency. He said that he did not use the brakes on this occasion till after the accident. He said that he recalled giving evidence at an inquest in September, 1969 and he did not then say anything about the car having stopped on the Nadi side of the crossing. He said that what he said then was that as the engine was almost reaching the road, two cars passed and he wondered what would have happened if they had collided and he looked after them and heard a noise. He said that, in fact, that is the truth and that he was wondering what would have happened if they had collided with each other, and it was after that that the third car came and almost had an accident with him. He said that before he reached the main road he looked towards Lautoka and he was then about 6 yards from the crossing. He said that he saw a lot of cars coming and that the car which just avoided the collision passed before he was on the road. He said that he looked after that car and did not look to the right again. He said that in his opinion, this intersection is dangerous and the driver could not see the train till it came onto the road because of the sugar cane. He said that the cane did not come to the edge of the road. He said that the instructions given to drivers are to blow the whistle and keep going. He said he would not have stopped even if he had seen this car coming because if he had stopped, he would have been stopped all day till all the cars had gone past. He said that after the impact, he applied the brakes and stopped in two to three feet. He agreed that he knew about the football tournament at Nadi that day and knew that a lot of people would be going to Nadi. He said that he was still sounding the horn at the time of the impact and the middle wheel of the loco was in the middle of the road at the point of impact. He said that the cat was nearer the other side of the road. After the accident, he said, he moved the engine off the road, in the first place pushing the trucks back in the direction he had come from, and he then

left them and moved the loco back over the crossing to the position in which it is shown in the photographs. He said that he had stopped on the road with his engine on the right hand side of the road immediately after the impact. He said that on this day he had his hand on the brake because he had to deliver trucks two to three chains away to the Martintar gang and also because the road was busy. He said that he slowed down at the whistle board. He agreed that he had heard of accidents at this crossing. He said that the line he was on was a side line. He said that he had no idea when he last saw the road sign before the accident and that it could have been ten years ago. In re-eaxmination, he said that the cane does not come right up to the edge of the road but is back 12 to 15 feet. He said that he did not know when before the accident he had seen the sign on the road but when he saw it it was close to the edge of the road.

The next witness to be called was Ajay Kumar, who said that he is a pointsman employed by S.P.S.M. He said that on the 15th of June, 1969, he was riding as pointsman on the loco driven by the second named defendant, Veera Swamy. He said that as they approached the crossing, Veera Swamy sounded the horn and he started this at the whistle board and kept on until the time of the collision. He said that he did not see the accident and the first he knew was when he heard the collision. He said that he was reading at the time and he also said that the loco was travelling slower than normal. In cross-examination he said that he started reading at the whistle board and he was reading an order. He said he started reading then as he had to deliver trucks a few chains beyond the crossing. He said that the whistle board is 1½-2 chains from the road. He then said that he did not really know how far the whistle board is from the crossing. He said that the train stopped when it was hit, then rolled on a bit and moved a yard or so after the impact. That was the whole of the evidence given in this case.

Mr. Kermode, in his closing address on behalf of the defendants, said that the only legislation in Fiji does not apply to this case. These regulations only apply to the main line. Counsel submitted that in this case, we are not dealing with two cars but a car and a loco. He said that a car can steer away and can stop in much shorter space. He submitted

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that the deceased must have known that it was the season where one would expect to meet trains and submitted that a person must drive at a speed where he can stop in an emergency. He submitted that on the evidence it was clear that the deceased must have seen the train for about 25 yards. He said that on the evidence the train must have gone 8 to 10 feet after clearing the cane, the growing cane that is, before it reached the edge of the road. He said that the train was hit 9 to 12 feet back from the leading edge. He submitted that the deceased was driving too fast in an overcrowded car. Counsel referred me to some authorities and submitted that S.P.S.M. has installed signs although they have no statutory duty to do so. Counsel pointed out that regulations were made under the Traffic Ordinance in 1967 and two years after that the Government had still not erected at this crossing the sign which should have been erected. He submitted that there was no evidence that the sign was on company land or obscured by something on company land. He submitted that there was no negligence on the part of the defendants and at worst from his point of view it was a case of contributory negligence. Counsel submitted on the question quantum that the ruling rate on Law Reform Damages in Fiji is $1,000. Counsel further submitted that the deceased having died intestate, the whole of that $1,000 would go to the plaintiff, and must, therefore, be taken into account when assessing damages under the Compensation to Relatives Ordinance, and indeed, must be deducted therefrom. Counsel submitted that no attempt had been made to produce evidence of pecuniary loss and the only evidence was the evidence of inconvenience to the plaintiff. Counsel submitted that the deceased who was 22 had in mind giving up the work and that if there was any loss at all, it was nuisance. Counsel said that there was no evidence called to show that the deceased gave any support to his father or to his step-mother. Counsel finally submitted that what the plaintiff lost was a good manager, but there was no pecuniary loss, and the Law Reform Damages of $1,000 which must be brought in, would offset any compensation. Counsel, therefore, submitted that the claim should be dismissed and said that he was not asking for costs.

Mr. Reddy in his closing address on behalf of the Plaintiff agreed that the legislative provisions are unsatisfactory and said that they only refer to passenger trains. Counsel submitted that the company

had a legal duty of care to the users of the main Queen's Road. He submitted that the defendants did not take adequate steps towards road users and pointed out that this is not a private road crossing a railway but a railway crossing a major road. Counsel also submitted that there was sugar cane growing and trains could only be seen when on, or very nearly on, the road. He submitted that the lines are in a dip and are not visible to an approaching car driver. Counsel submitted that the driver of the loco knew of the football tournament. Counsel then referred to the authorities which had been placed before me by Mr. Kermode. Counsel submitted that it was clearly not in dispute that there had been other accidents at this crossing and submitted that the defendants owed an extra duty of care. Counsel said that the police officer said that the sign was well in from the road and obscured. Counsel submitted that the criterion is whether the company had taken adequate precautions. Mr.Reddy then submitted that the second defendant's evidence showed that other cars went over in front of the loco so that clearly nobody had heard the loco approaching. He submitted that on balance the Court should find that no whistle was sounded and submitted that the driver was under a duty to keep a look out and that he had to ensure that it was safe for the loco to cross the road. Counsel submitted that the driver should have seen the car coming and could have stopped and submitted that negligence had been established. On quantum, Counsel agreed that $1,000 is an appropriate sum for the Law Reform Damages and submitted that the Court could assess pecuniary loss. Counsel said that the plaintiff was only paying $600 instead of $1,000 and that his son would have continued to work for and live with the plaintiff. He therefore asked for judgment for the plaintiff with costs.

I turn now to consider the law relating to this matter. Unfortunately, there is not any statutory provision in Fiji relating to this case. Both Counsel submit, and I agree with them, that the only legislation, Cap.155, does not apply to this case. Accordingly the ordinary common law principles of negligence will apply. As Brereton J. said in Petropoulos v. Commissioner for Railways 1963 N.S.W. Reports p.286.

" There is no statutory law relating to the right of way at level crossings and

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the ordinary principles of the law of negligence apply. "

I therefore now proceed to consider the common law duty owed by the Defendants towards users of motor vehicles at a crossing such as this. The basic concept of duty was defined by Lord Atkin in Donoghue v. Stevenson 1932 A.C. p.562 in these words :

> " The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. "

Unfortunately, I do not know of any decision in Fiji concerning cases of the type, nor have learned Counsel, to whom I am greatly indebted for their assistance in this case, been able to refer me to one. I must, therefore, accept the onerous task of deciding how far English and Australian authorities should be followed in assessing the duties and responsibilities of the Defendants in this case, operating as they do a vastly different type of railway in entirely different conditions. As I have already said there is no local law applicable. I will, however, bear in mind, although they do not strictly apply in this case, Regulations made under Cap.155 and in particular regulation 5 which says this -

> " (1) The engine driver of every train shall at all times travel at a reasonable rate of speed, and when approaching a level crossing or bridge used for public traffic, shall, when the nearest point of the train is at a distance as near to 100 yards as may be therefrom, blow a blast of his whistle for a duration of five seconds. He shall not suffer his train to travel at a greater

speed than 12 miles per hour when crossing such level crossing or bridge.

(2) No vehicle or person shall cross or attempt to cross any bridge or level crossing when a train is approaching and within a distance of 100 yards from such bridge or level crossing. "

Since there is no law applicable, one must look to English authorities for guisance and in considering how far to follow those authorities one must extract the principles underlying the authorities, rather than blindly follow decisions on facts which must inevitably be abased on circumstances totally different to those before me. The English authorities are based on old statutory duties, but the Courts have not hesitated to keep the law up to date to meet the changing circumstances with the passage of time. In Lloyds Bank Ltd. v Railway Executive 1952 1 A.E.R. 1248 Denning L.J. as he then was said this -

" If the statute has stood still, however, the common law has not. It is, I think, now clearly established that the defendants must take reasonable care to prevent danger at these crossings and this is an obligation which keeps pace with the times. As the danger increases so must their precautions increase. The defendants cannot stand by while accidents happen and say 'this increased traffic on the road is no concern of ours'. It is their concern. It is their trains which help to cause the accidents and it is often the increased number of trains which increases the danger as well as the increased traffic on the road. The Defendants must therefore do whatever is reasonable on their part to prevent the accidents. They need not at common law go so far as to turn the crossings into a public level crossing with all the statutory obligations incident thereto, but they must do all that may be reasonably required of them in the shape of warnings, whistles and so forth so as to reduce the danger to people using the crossing. In the present case, the judge has found that the defendants did not use reasonable care at this crossing and I agree with him. The history of accidents was such

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as to demand extra precautions of them and they took none. "

Lord Denning there refers to a history of accidents. In another case reference has been made to previous accidents. In Lloyds Bank Ltd. v British Transport Commission 1956 3 A.E.R. 291 Morris L.J. said -

" Next I think that it is of great significance that there is no history of any accident having taken place at this crossing. "

Morris L.J. also said this -

" I think that there was a duty not to expose users of this crossing to any perils beyond those ordinarily inherent in the user of an accommodation crossing. "

And later he said -

" There was clearly a duty on the part of the railway company to do what was reasonably necessary in the particular circumstances to provide against danger to those using the crossing. Those persons who operate the system must take reasonable care not to expose people crossing to perils beyond those which are ordinarily incident to the user. For example, those responsible for the railway should consider whether the line is straight for a reasonable distance from the crossing or whether there is a curve at such a distance as may create a danger to those who are using the crossing. If there is a curve nearby then those using the crossing may not see the approach of a train and the railway authority must do what in the particular circumstances is reasonable in order to minimise or not to add to the risk. So the authority should consider whether there are any unusual circumstances relating to a crossing which add to the danger of those who use it. If there have been accidents and if there is a history of any troubles or disasters, it would be reasonable to make enquiry how and why they had come about, and if, in the light of such enquiry, steps ought reasonably to be taken which could minimise the perils, then doubtless such steps would have to be taken. "

These authorities seem to indicate that if there is a history of accidents at a crossing the standard of care is higher on those responsible for the trains. In the case before me, there is evidence, which I accept, of previous accidents and I find as a fact that there have been previous accidents at this crossing.

I turn next to consider the authorities with regard to the duty and standard of care and to consider also how far the circumstances existing at a particular crossing are relevant and what precautions are, in principle, required of those responsible for the trains.

In the passage I have just read, Morris L.J. made reference to the question of unusual circumstances existing at a particular crossing.

In Commissioner for Railways v. Dowle 99 C.L.R. 353, which was an appeal in a case arising from an accident at a level crossing in which there was evidence that the train had sounded its whistle, Dixon C.J. said this -

> " The duty of the Commissioners is to do everything which in the circumstances is reasonably necessary to secure the safety of the persons using the crossing. This must include a duty to give reasonable warning of the approach of a train where the commissioner does not provide gates which are closed when a train is approaching. That duty is not fulfilled by providing means which would enable persons of acute vision and hearing exercising the most anxious care to avoid injury. The fact that all sorts and conditions of people use the highway must be taken into account and whilst the commissioner is not required to protect against their own carelessness people who proceed without any regard to their own safety, it is his duty to take every reasonable precaution to ensure that the leval crossing will be safe for the members of the public generally who act with due care while exercising their rights of passing over it. "

Later the C.J. said this -

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" Audibility is another question. It has to be remembered that in modern conditions there are many occasions of which it may be said either that the vehicles make so much noise themselves or that there is so much noise surrounding them that is not by any means certain that a person inside one of them will be able to hear the whistle of an engine."

Dixon C.J. also said this -

" We should have thought for ourselves that the more general way of looking at it would have been to ask, were the precautions adequate, having regard to the character of the site, the open level crossing, the growth of population, the amount of traffic upon the railways. "

Knight v. Great Western Railway Co. 1942 2 A.E.R. 286 was another case arising from an accident at a railway crossing. Many of the English Authorities refer to accommodation crossings and public crossings. For the purposes of the case before me the difference may be put this way. An accommodation crossing is one where, to accommodate owners of property adjoining the railway, a road is allowed to cross the railway line, which is never closed to rail traffic, and a public crossing is one where the railway crosses a public road which is never closed to road traffic save when the crossing gates are closed to allow a train to pass. In Knight's case, Tucker J., as he then was, quoted the words of Scrutton L.J. in Burrows v. The Southern Railway Company where Scrutton L.J. said this :-

" The first question, therefore, in our view, and the only question we are going to decide, is this: Was there evidence upon which the jury could find that the railway company had not taken reasonable precautions to prevent danger at this crossing? Now I should be very reluctant to lay down a rule that at any private crossing the railway company is bound to use special precautions of some kind. I can quite conceive of cases where owing to a sharp turn in the railways or the presence of large numbers of trees in a cutting obstructing the view, a jury may find: we think some reasonable precautions

should be taken at a private crossing. But I ask myself, and I have considered the evidence very carefully, whether at this crossing as we see it and on the facts we know, there was anything to distinguish it from any other private crossing where the railway company has for some reasons granted rights to particular people in the locality, but not to the whole public, because obviously there are great differences between cases where any member of the public, not having seen the crossing before, may come to a crossing and cases where the crossing is only used by people who are always using it because they are in the locality and using it for the purposes of their business."

Having quoted these words, Tucker J. went on to say this -

" Now, I think there is a duty cast upon the railway company to take reasonable precautions in regard to the approach of their trains at a crossing of this kind. I am satisfied, however, that the nature of the precuations and the degree of care which is required may vary very considerably according to whether the crossing which is being approached is one over which the public have a right to go or whether it is merely a private crossing for the use of the adjoining occupier. But I think the difference is merely a difference in the degree of care which is required in the particular circumstances. "

In James v. Commissioner of Transport 1958 East African Law Reports 313 Goudie J. said this -

" The degree of care required of a railway authority at accommodation crossings depend to a large extent on whether the crossing is a normal crossing or whether there are circumstances of exceptional danger relating to the particular crossing which require the use of special precautions of some kind. This distinction has been clearly recognized for many years in the English decisions. "

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Later he said -

> " I, therefore, find not only that there are circumstances of exceptional danger at the crossing but also that the defendant's servants have very appreciably added to the risk of the users of the road by failure to make the necessary improvements to the crossing to meet the demands of the increased traffic. "

Again in Commissioner for Railways v. McDermott 1966 2 A.E.R. 162 Lord Gardner quoted the Judgment of Lord Cooper in Smith v. L.M.S. where Lord Cooper said this -

> " I deduce from the decisions that the railway company has a duty at every level crossing where members of the public have a right to be, and where there is reason to expect them to be, to take all reasonable precautions in train operations (and perhaps in other respects) to reduce the danger to a minimum, the nature of the precautions which are required and the question whether the duty has been fulfilled depending upon the circumstances of each case. There is all the difference in the world between an accommodation crossing which carries public vehicular traffic along a made road, and an accommodation crossing which consists of a gate in a railway fence in a remote rural area to enable a farm labourer or a shepherd to pass at rare intervals from one field to another. "

Lord Gardner in his Judgment went on to hold -

> " That the carrying on of the inherently dangerous activity of running express trains through a level crossing, which was lawfully and necessarily used by local inhabitants, their guests and persons visiting on business imposed on the appellant a general duty of care towards those who were lawfully on the level crossing. "

In Lloyds Bank Ltd. v. British Transport Commissioner reported at 1956 3 A.E.R. 291 and to which I have already referred Morris L.J. quoted these words of Lord Russell in Smith v. L.M.S. Railway Co. :-

" It appears to me that the duty of a railway company whose line travels over that is called an accommodation crossing is to use all reasonable precautions, care and skill to protect members of the public who may be using that crossing. The result accordingly is that every case requires its own formulation of the particular duty devolving upon the company, dependent upon the special features which are present, physically and otherwise, in relation to the particular crossing. "

Lord Morris himself said -

" I think that there was a duty not to expose users of this crossing to any perils beyond those ordinarily inherent in the user of an accommodation crossing. "

Finally, while considering the legal principles involved in the duty of care required of an operator of railways, I would refer to Alchin v. Commissioner for Railways 1935 N.S.W. reports 498 where Jordon C.J. said this -

" There is no universal standard of care applicable to all level crossings. What precautions are to be taken depends upon the circumstances of the particular crossing and the conditions prevailing at the time when the train was driven across it. Precautions which would be reasonable at an unfrequented country road across which a train passes two or three times a week would not necessarily be reasonable at the crossing of a busy thoroughfare. Speaking generally it is the positive duty of those responsible for the train to give reasonable warning of the existence of crossing, or of the approach of the train or of both as the circumstances of the particular crossing may require. "

Having considered these authorities, the principle of law which I understand to underlie these decisions is this: there is clear duty of care on operators of railways towards persons using a level crossing. The standard of care required will vary depending on the circumstances existing at the particular crossing and where a crossing is one which has

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circumstances of unusual danger, or if there is a history of accidents, a higher standard of care will be owed by the operator of the trains. I turn now to consider the circumstances which existed at the Martintar crossing on the 15th of June, 1969. Having carefully considered the whole of the evidence, 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 number2 exhibited is such that the engine would not be visible by a person on the roadway approaching the 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. I find as a fact, that on this day there was no sign post which was reasonably visible to the driver of an on-coming motor-car. I accept the evidence of the police officer that the sign which existed was some distance in from the roadway and in 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 the visibility of the sign post 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 proceeding towards Nadi, therewas 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. I turn now to consider whether or not the defendants discharged the burden on them of taking a high standard of care in relation to the deceased. Two of the passengers in the deceased's car gave evidence and said that the windows of the car were open and that they did not hear the train whistle. The second named defendant, Veera Swamy, and his pointsman, who were on the engine, both said that the whistle was sounded from the whistle board and was still being sounded at the point of impact.

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 that 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. I have already cited authorities on this point and will later refer to South Australian Railway Commissioner v. Thomas. In this case, the deceased's car had just been overtaken by another vehicle. There would be the noise from the deceased's own vehicle and from the vehicle which had just passed. And for these reasons, I do not consider that the mere sounding of the whistle by itself is, in this case, a sufficient warning. The matter may have been different if there had been nothing to obstruct a driver's view of the approaching train and if adequate and sufficient notice of the railway crossing had been given, but in the circumstances existing at this crossing where there was, in my view, insufficient warning of the crossing and very little opportunity of seeing the approaching train, in my view, more would be required of the defendants than the mere blowing of the whistle.

I turn now to consider whether there was any duty on the two crew members of this train on this day, to keep a look-out for traffic and if necessary to take any action with regard to an oncoming car.

The duty of train drivers has been considered in previous decisions. In Lloyds Bank Ltd. v. British Transport Commission reported at 1956 3 A.E.R.291 and to which I had already referred Denning L.J., as he then was, said this :-

> " You cannot treat a train going along a railway as you can a motor car going along a road. The driver and fireman on an engine must keep a good look-out ahead of them. They must, of course, keep a

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good look-out for signals and for the track ahead but they cannot be expected to keep the same look-out for the side roads or lanes coming up to the railway. They might quite reasonably assume that people who approach the crossing will look out for the trains. After all, a train cannot be brought to a stand still in much less than half a mile whereas a car can be brought to a stand still in a few feet. "

However, in James v. Commissioner of Transport 1958 E.A.L.R. 313 Goudie J. said this :-

" It has,however, so far as I am aware never been decided that there is no obligation to keep a lookout at abnormal crossings when there are circumstances of exceptional danger. It may be argued that the driver would have no knowledge of the exceptional danger. I think that the simple answer to that is that either the knowledge must be imputed to him if in fact anyone in the railway's employ was cognisant of the danger and if nobody was aware of the danger there is negligence in having failed to appreciate the danger which again must be imputed vicariously to the engine driver. I consider it is reasonably possible but by no means certain that if the fireman or driver had looked out they might have seen the vehicle and avoided the collision. "

And in Petropoulos v. Commissioner of Railways 1963 N.S.W.R. 286 to which I have already referred Brereton J. said this :-

" To put it shortly, as I understand the matter, the driver of a train is entitled to proceed at speed provided he gives adequate warning of the trains approach on the assumption that all users of the highway will keep clear of the crossing. If, however, it becomes clear that a vehicle is not giving way then he must slow down or stop. Bearing in mind, of course, that the distance within which a train can stop is very much greater than that in which a motor vehicle travelling at ordinary speeds can do so. It may well be that it can rarely become apparent to the driver of a train

that a vehicle is not stopping at a point of time early enough for him to stop his train before reaching the crossing. Even though this be so, I think, that in such circumstances the duty remains on him at least to minimise the impact if it cannot be avoided by the reduction of speed as soon as the emergency becomes apparent. "

Later the same Judge went on to say this :-

" In my opinion, it was open to the jury to find that, in relation to this crossing, reasonable prudence required that a train driver should not merely have given an adequate warning of the trains approach, but should have continued to maintain a vigilant look-out so that if notwithstanding the warning, an emergency arose he could reduce speed. "

Counsel for the defendants relies greatly on the words of Denning L.J. which I have just quoted. However, what was said there is in my view easily distinguished from this case. Here, we do not have an express train travelling at speed, nor do we have a driver who had to look out for railway signals. This was a train which was travelling at a slow speed and which the driver himself admitted he was able to stop when an emergency arose within two or three feet. The driver of the train, the second defendant, in his evidence said that he knew that there was a football tournament at Nadi that day and he also said that as he came onto the road he saw that there was a lot of traffic. He said that if he sees traffic on the road, he still goes on and does not stop to give way to the traffic. He said that a train cannot be stopped suddenly, but he also said that he stopped this train in two or three feet. In the course of the cross-examination, he said that he had his hand on the brake this day in case there was an emergency, but said also that he did not use the brakes on this occasion till after the accident. Also in his cross-examination, he spoke of other vehicles crossing the crossing ahead of him, one of them apparently missing him by only about one foot and he also said that he looked towards Lautoka when he was about six yards from the crossing and saw a lot of cars coming.

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He said that he did not look to the right any more and that, in his opinion, this intersection is dangerous. He said that even if he had looked to his right again and had seen the deceased's car coming, he would not have stopped because if he had stopped he would have been stopped all day till all the cars had gone past. In my view, bearing in mind, as I do, all the circumstances which existed at this crossing and bearing in mind indeed all the circumstances of the case, I am satisfied that the driver of this train had a duty to keep a careful lookout for vehicles approaching on what is, after all, the main road in Fiji. I do not accept that if he had had to stop, he would have been stopped all day waiting for cars to go past. He would have been in no different position from a vehicle coming out of a side road to cross the main Queen's Road. I am completely satisfied that if the driver had looked again to his right he would have seen the deceased's car coming very close to the crossing and he would then have had ample time to apply his brakes and stop within the two or three feet in which he eventually stopped and thereby he would have avoided this collision. I bear in mind that the driver himself admitted that he knew that this was a dangerous crossing and that a vehicle would not see the engine until it came out from beyond the sugar cane which was growing in the field. I bear in mind also that this train was travelling with the cab first, which would mean that the driver would see along the roadway the moment he emerged from the sugar cane, a matter of some ten to fifteen feet from the edge of the roadway. He was able to stop in two to three feet. A vehicle travelling on the main Queen's Road, particularly one which had not been given any warning of the crossing which it was approaching, would not be able to stop in that short distance travelling at a reasonable and proper speed.

The driver of the train admitted that he could see cars coming along the road when he was still 6 yards from the crossing. He would, presumably, be able to see through the top of the sugar cane, particularly knowing, as he appeared to know, that he was approaching the main Queen's Road. But the driver of a car, having been given no sufficient warning that he was approaching the crossing,would have very much less, if any, opportunity of seeing the train. He has to keep a careful lookout on this busy main road, with a

bend ahead of him and the train itself would be barely visible as it travelled through the sugar cane, with the colour of the top of the engine tending to merge into the background as is shown in photo 2. I am satisfied that the train driver by keeping a proper lookout and by taking the appropriate action, could have avoided this collision by stopping.

Bearing in mind all the authorities to which I have referred and the principles of law involved, I find that the defendants in this case owed to the deceased a duty of care and that they failed in that duty of care. I find also that in the circumstances which existed at this particular crossing the defendants owed a duty to take greater precautions for the safety of the deceased.

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

1. the failure of the driver to keep a proper lookout;

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.

I turn now to consider whether or not there was any contributory negligence on the part of the deceased.

I bear in mind the suggestion of Counsel for the defendants that the deceased was driving a car which contained 6 men, and Counsel's submission that that car was overcrowded. One of the witnesses for the plaintiff said that this was a six-seater car. The deceased was driving at a speed which was given as between 50 and 55 miles per hour. In my view, that is not an unreasonable speed for a car to travel on that stretch of road. I bear in mind that I have already found as a fact that no adequate notice was given of this crossing. I bear in mind also that I

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have already found as a fact that at the earliest point at which this train could reasonably be seen, it would then be somewhere between 10 and 15 feet from the edge of the nearside of the road in relation to the car. On the question of contributory negligence, I wish to refer to two authorities.

The general principles involved were very well and clearly set out by Viscount Simon in Nance v. British Columbia Electric Railway Co. Ltd. 1951 A.C.601 where he said -

" When contributory negligence is set up as a defence its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full. This, however, is not to say that in all cases the plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully. Generally speaking when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care and this is true whether they are both in control of vehicles or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle. "

Finally, I refer to South Australian Railway Commissioner v. Thomas 84 C.L.R.84. In that case, the Court of Appeal held that the appellant had provided insufficient means of giving warning of the approach of trains and accordingly had failed to do everything that was reasonably necessary to secure the safety of persons using the crossing. In that case, the trial Judge found as a fact that the engine whistle was sounded. There was a curve in the railway line approaching the crossing. The Judge found as a fact that the plaintiff had not heard the sound of the whistle

as the train approached. In their judgment, the Court of Appeal said this -

> " We find ourselves in agreement with the opinion of the learned Judge that in the conditions prevailing at the time of the accident the level crossing was dangerous and that the appellant provided insufficient means of warning persons intending to cross of the approach of such a train as injured the plaintiff. We think that the lighting of the train and the whistle were quite insufficient reasonably to ensure that those about to pass over the crossing were aware of the approach of the train. The noise of the train could not necessarily be heard nor could the train always be clearly seen as it approached. In those circumstances, the failure on the part of the plaintiff to see or hear the approaching train does not in our opinion imply contributory negligence on his part. "

This is not a case of the deceased being caught both ways. By that, I mean, this is not a case where it must be said that either he was negligent in failing to see the train coming or, if he saw it, negligent in failing to stop. I am satisfied on a careful review of the evidence that the deceased had no reasonable opportunity of being aware either of the crossing or of the approaching train before he did. The evidence of the witnesses called on behalf of the plaintiff showed that the deceased braked. I do not consider that he was in any way responsible for this accident or for failing to see the train sooner and to stop. He collided with a train whose driver admits that he failed to keep a look-out on the road and who admits that even if he had seen the car coming, he would not have stopped. The train driver having been hit by deceased's car, stopped within two or three feet. The deceased having seen the train at the last moment, which was the first time he could reasonably be expected to have seen it, braked hard but was, nevertheless, unable to avoid colliding with the train. In all those circumstances. I am completely satisfied that no blame and no contributory negligence attaches to the deceased in this case.

In the light of all the authorities and in

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the light of the evidence given in this case, I make the following findings of fact -

1. That the deceased who was born on the 16th of September 1946 died on the 16th of June 1969 as a result of injuries sustained in a collision between a car driven by him and a locomotive engine owned by the first named defendant and driven by their servant, the second named defendant, on the 15th of June 1969.

2. That the collision was caused by the negligence of the defendants.

3. That there was no contributory negligence on the part of the deceased.

4. That the plaintiff is the administrator of the estate of the deceased Suresh Pratap, who was his son, and

5. That this action is brought on behalf of the plaintiff and the stepmother of the deceased.

I turn now to consider the question of quantum of damages. As I have already said these proceedings are brought under two separate ordinances, namely the Compensation to Relatives Ordinance, Cap.22, and the Law Reform (Miscellaneous Provisions) (Death and Interest) Ordinance, Cap.20. Neither Counsel was able to refer me to any decision in Fiji on the question of damage and I have no doubt that if there had been one, they would have done so. It will be necessary, therefore, for me to refer to English authorities. It must, therefore, be noted that the relevant wording of Cap.22 is identical to the wording of the relevant parts of the Fatal Accidents Act in England, and the relevant wording of Cap.20 is identical to the relevant wording of the Law Reform Miscellaneous Provisions Act in England, these two English Statutes being the Statutory provisions giving rise to the decisions to which I will refer. Any principles which can be found in those authorities can, therefore, be applied to the statutory provisions in Fiji. I will deal with the damages under the Law Reform Ordinance first.

In this case, the deceased was a young man of some 22 years 9 months at the date of his death.

He was employed by his father, who, I am told, is a quite well-to-do business-man. The deceased was a young man enjoying excellent health and considering his position carefully, I can, but, conclude that he was a healthy young man with a most favourable future.

The leading case in England on this point is Benham v. Gambling 1941 Appeal Cases, 157. This was a decision of the House of Lords. In that case Viscount Simon, the Lord Chancellor said this :-

" The House is now set the difficult task of indicating what are the main considerations to be borne in mind in assessing damages under this head. In the first place, I am of the opinion that the right conclusion is not to be reached by applying what may be called the statistical or actuarial test. Figures calculated to represent the expectation of human life at various ages are averages arrived at from a vast mass of vital statistics. The figure is not necessarily one which can be properly attributed to a given individual. In any case, the thing to be valued is not the prospect of a predominately happy life. The age of the individual may, in some cases be a relevant factor. For example, in extreme old age the brevity of what life may be left may be relevant. But, as it seems to me, arithmetical calculations are to be avoided, if only, for the reason that it is of no assistance to know how many years may have been left unless one knows how to put a value on the years. It would be fallacious to assume, for this purpose, that all human life is continuously an enjoyable thing so that the shortening of it calls for compensation, to be paid to the deceased's estate, on a quantitative basis. The ups and downs of life, its pains and sorrows as well as its joys and pleasures, all that makes up 'life's fitful fever', have to be allowed for in the estimate. In assessing damages for shortening of life, therefore, such damages should not be calculated solely, or even mainly, on the basis of the length of life that is lost. The question thus resolves

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itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness. "

Lord Simon also said -

" I would further lay it down that in assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness. The test is not subjective and the right sum to award depends on an objective estimate of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gain during the period of which the victim has been deprived. The damages are in respect of loss of life, not of loss of future pecuniary prospects. "

Later Lord Simon said -

" The truth, of course, is that, in putting a money value on the prospective balance of happiness in years that the deceased might otherwise have lived, the judge of fact is attempting to equate incommensurables. Damages which would be proper for a disabling injury may well be much greater than for deprivation of life. These considerations lead me to the conclusion that, in assessing damages under this head, whether in the case of a child or an adult, very moderate figures should be chosen. "

In making an assessment under this head, I do so in the light of my own experience in dealing with cases of this type. Over the years, the damages assessed under this head have slightly increased. In Benham v. Gambling, to which I have referred, a sum of £200 was assessed in respect of a child. In Benham v. Gambling, the House of Lords, as I understand it, recognized that the figure in respect of a child should be somewhat reduced. Gradually, the figure under this head increased and for sometime the usual amount was in the region of £350 - £400. Then, in West & Son Ltd. v. Shepherd 1964 Appeal Cases, 326 the sum was allowed at £500.

The matter again came before the House of Lords in the Yorkshire Electricity Board v. Naylor 1967 2 A.E.R. page 1. In that case, Ashworth J. was dealing with a young man of twenty years and four months who had a good future ahead of him and who was in good health. The Learned Judge assessed the damages at £500. The matter went on appeal to the Court of Appeal who increased the sum of £1,000. Subsequently, there was a further appeal to the House of Lords. The House of Lords upheld Ashworth J. and put the figure at £500, and reaffirmed the principles stated in Benham v. Gambling.

In my view, in this case, the sum of $1,000 may possibly just tend to be a little on the high side. However, having taken all factors into consideration, I, nevertheless, consider that $1,000 is the appropriate sum. I am fortified in that view by the fact that both Mr. Kermode on behalf of the defendants, and Mr. Reddy on behalf of the plaintiffs, accept that the sum of $1,000 is the appropriate sum. I understood from Mr. Kermode that the figure had been in that region in Suva but somewhat lesser in Lautoka. In my view, there is no reason for any such distinction. I, therefore, award the sum of $1,000 under the Law Reform (Miscellaneous Provisions) (Death and Interest) Ordinance.

It is clear also, and both counsel concede this, that since the deceased in this case died intestate the benefit of that sum will pass to the plaintiffs in this case. The damages under the Law Reform Ordinance form part of the estate of the deceased, and since the benefit of the estate passes to the persons claiming under the Compensation to Relatives Ordinance, the amount of damages awarded, that is $1,000, must be deducted from any sum awarded under the Compensation to Relatives Ordinance. This was decided in Davies v. Powell Duffryn Associated Colleries Ltd. 1942 Appeal Cases 601.

I turn next to consider the claim for damages under the Compensation to Relatives Ordinance Cap.22. Section 4 of that Ordinance provides this -

> " Every action shall be for the benefit of the wife, husband, parent and child of the person whose death has been so caused. "

In this case, the deceased died unmarried and this

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action is therefore brought on behalf of and for the benefit of his parents namely his father, who is named as the plaintiff and his stepmother. Section 2 of the Ordinance, in defining 'parent', includes father and stepmother. Section 5 of the Ordinance says this -

> " Every such action shall be brought by and in the name of the executor or administrator of the deceased person, and the Court may give to the parties respectively for whom and for whose benefit the action was brought such damages as are considered proportioned to the injury resulting from the death. "

It is necessary, therefore, to consider the authorities to ascertain whether or not in this case the plaintiff has proved an entitlement to damages, and if so, the yardstick to be employed in assessing those damages.

As long ago as 1852 in Blake v. The Midland Rail Company, 18 Queens Bench page 93 it was held that the action is based upon financial loss, or loss of support and nothing else. Nothing is allowed for mental distress, or for the loss of the society of a husband or parent. In Davies v. Powell Duffryn Associated Colleries Ltd. to which I have already referred Lord Wright said this -

> " The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value. "

And later he said -

> " It is a hard matter of pounds, shillings and pence, subject to element of reasonable future probabilities, The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties. "

In Taff Vale Rail Company v. Jenkins reported in 1913 Appeal cases page 1, it was held that a reasonable expectation of pecuniary benefit was sufficient, but on the other hand in Barnett v. Cohen 1921 2 K.B., page 461, it was held that the mere possibility that a child, when grown up, may contribute to the support of his parents was not enough.

In Hetherington v. The North Eastern Rail Company 1882, 9 Q.B.D. 160, it was held that occasional financial assistance by a son to a crippled father was sufficient. Equally, it has been held that presents of food may be enough to show dependency. See Dalton v. South Eastern Rail Co. In Franklin v. The South Eastern Rail Company decided in 1858, it was held that an action could be sustained where a son has voluntarily given help with his father's work which the father was unable to do owing to old age or illness.

However, it must be proved that the person on whose behalf the claim is made either had a right to support by the deceased, or a reasonable expectation of pecuniary benefit as of right, or otherwise, from the continuance of the life of the deceased. No action will lie successfully if the plaintiff can only show that his financial loss results from a dependency in some capacity other than as a parent. In Sykes v. The North Eastern Rail Company in 1875 it was decided that where a son was working for his father and receiving full wages the father had no claim arising on the death of the son, because he had merely lost the benefit of fully paid services in his capacity as an employer, as opposed to losing a right to support in his capacity as a parent.

In Best v. Samuel Fox and Co. Ltd. 1952 2 A.E.R.394, which was a House of Lords decision, Lord Goddard said this -

" It may often happen that an injury to one person may affect another. A servant whose master is killed or permanently injured may lose his employment, it may be of long standing and the misfortune may come when he is of an age when it would be very difficult for him to obtain other work, but no one would suggest that he thereby acquires a right of action against the

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wrongdoer. Damages for personal injury can seldom be a perfect compensation, but where injury has been caused to a husband or a father, it has never been the case that his wife or children, whose style of living or education may have radically to be curtailed, have on that account a right of action other than that which in the case of death the Act has given. "

In the same case, Lord Morton said -

" With one exception to which I shall later return, it has never been the law of England that an invitor who has negligently but unintentionally injured an invitee, is liable to compensate other persons who have suffered, in one way or another, as a result of the injury to the invitee. If the injured man was engaged in a business and the injury is a serious one, the business may have to close down and the employees be dismissed. A daughter of the injured man may have to give up work which she enjoys and stay at home to nurse a father who has been transformed into an irritable invalid as a result of the injury Such examples could easily be multiplied. Yet the invitor is under no liability to compensate such persons for he owes them no duty and may not even know of their existence."

A similar problem came before the court in Burgess v. The Florence Nightingale Hospital 1955, 1 A.E.R. page 511. In this case Devlin J. said this -

" Let me take for example the case of a man in the prime of life who takes into partnership a young man and within two or three years, the senior partner is killed. The junior partner's prospects may be grievouslyinjured. He may not have had time to establish himself in the good graces of the clients of the firm and the result may be that a lot of work goes elsewhere. At common law there would be no claim by the junior partner. Can it make any difference that the senior partner is a father who has taken a son into the family business? Plainly, in the mind of the law, no. "

Later the Judge said -

" I think that is clear that the authorities do establish that, if the benefit arises out of the relationship, it need not be a monetary benefit but it can be services rendered which can then be translated into money. I think that it is clear also from the authorities that, if a relation, out of filial duty or any other motive that arises from relationship, renders services to the plaintiff, either free services or services at less than the market rate, the loss of those services is something which can be translated into cash and is recoverable under the Act. "

Devlin J. then goes on to consider Franklin v. South Eastern Railway Company, to which I have already referred, where a son was rendering services free to his father and the father could recover. Later in his judgment the Judge deals with Sykes v. The North Eastern Railway Company, to which I have also already referred, and the Judge quotes from the Judgment of Brett J. who said -

" The Plaintiff gave no evidence of a pecuniary benefit accruing to him from relationship. The son worked for his father who appears to have paid him a full amount of wages. "

The Judge then quotes from Grove J., in the same case, who said this -

" The plaintiff was bound to prove a benefit accruing to him from his relationship with the deceased. But he merely showed that he had derived an advantage from a contract with his son. Franklin v. South Eastern Railway is plainly distinguishable. The facts were very different. In that case, the son worked for nothing. Here the father paid wages, the son was servant when he assisted the plaintiff. There was no evidence that the son was paid less than the usual wages for a skilled workman. The plaintiff appears to have paid him the wages which a skilled workman ought to receive. The pecuniary advantage to the plaintiff did not depend upon the relationship. The

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deceased at any time might have left the employ of the plaintiff, who possibly might have succeeded in hiring a better workman than his son. "

Devlin J. goes on to say, referring to another case -

" All that he is pointing out is this, that that relationship may take effect in two ways. It may induce the relation to give services free or it may induce the relation to give her services at less than the market rate, and, if she gives them at less than the market rate, it is a benefit just as it is if she gave them free. "

Finally, in his Judgment, Devlin J. said this -

" The benefit to qualify must be a benefit which arises from the relationship between the parties. Therefore, the question that I have to determine in this case is whether the benefit so arose. It is important to note that here the wife's services were fully paid for, that is to say, she took her full half share of the joint earnings. It was, in effect, the market rate, so far as there is any evidence. It is what one would expect would happen, and, therefore, she was not rendering any services to the plaintiff which he got either free or at anything less than the market rate. "

So, the law as I understand it is that in order to succeed it must be shown that the person on whose behalf the claim is made has suffered either some pecuniary loss, or has lost a reasonable expectation of pecuniary benefit, or a benefit arising from the relationship of the claimant to the deceased.

Dealing first with the claim made on behalf of the stepmother of the deceased the position is this. There is no evidence that she has sustained any pecuniary loss as a result of the death, nor is there any evidence that she has lost any reasonable expectation of pecuniary benefit. I bear in mind that she is married to a husband who is older than she is, and who is, in his own words, quite well-to-do. She also has a number of other children. There is no evidence of any benefit which accrued to her by virtue of her relationship with

the deceased. Having studied the evidence in this case and having considered the law, I find that no claim has been made out on behalf of the stepmother under the Compensation to Relatives Ordinance, and I make no award in respect of her under that Ordinance.

I turn now to consider the claim of the Plaintiff, the father of the deceased.

Mr. Kermode submitted that all the plaintiff in this case had lost was a good manager. However, having considered the evidence, namely that the deceased was being paid $600 per year whereas the normal market rate would have been $1,000 per year, I am satisfied in this case that the plaintiff has lost a benefit which derived to him from the relationship of father and son, as opposed to the relationship of employer and employee, the benefit being the provision of services at less than full market rates.

There is no evidence of any payment or support being made by the deceased to the parents. There is no evidence of any likely pecuniary benefit resulting to the parents in years to come. However, to the limited extent that the father was obtaining services from his son, because of their relationship, at a price less than the market value, I am satisfied in this case that there has been proved a dependency, within the meaning of the ordinance, which can support the claim being made.

Bearing in mind the passage I have quoted from the judgment of Lord Wright in Davies v. Powell Duffryn Associated Colleries Ltd., having satisfied myself that there is a dependency, I must now proceed to work out in hard cash what that dependency was.

The evidence of the plaintiff, which is not really contested, is that he paid his son $600 per year and in addition provided him with accommodation and food. Clearly, these latter items must form part of the emoluments of the deceased. There is no evidence relating to these and, therefore, I must do the best I can to assess the value of food and accommodation given to the deceased.

In the Supreme Court

No.13

Judgment

30th June 1972 (continued)

I would estimate these matters as being equivalent to $200 per year. It follows that the plaintiff was obtaining the services of his son for $600 wages plus $200 food and accommodation per year and these services were, according to the evidence, worth $1,000 per year. It follows therefore, that the plaintiff has sustained a loss of $200 per year.

I turn now to consider the number of years purchase for which this sum should be allowed. In determining years of purchase, I must consider all such matters as the age of the deceased and the possibility of his having died a natural death from some illness in a few years time and matters of that type.

In my experience, with a healthy young man of this age, if he left a widow, in general the number of years purchase allowed is anywhere from perhaps twelve to fifteen years. However, I must take into account here that I have found no dependency on the part of stepmother and the father is a man of fifty-four. This means that he will have a shorter expectation of life than, for example, a widow of the same age as the deceased. I must also take into account the possibility that the deceased would have married and that having married, either his wage would have increased, or, as appears more probable, his wife would have joined him to live with him at the plaintiff's house and she also would have been provided with accommodation and food.

If that had happened and I bear in mind that although no arrangements had been made for the marriage of the deceased, his brother was married at the age of 22 years, then, much if not all, of the benefit accruing to the father would have ceased. I also bear in mind the evidence that the deceased had considered going abroad to continue his education.

In Dolbey v. Goodwin 1955 2 A.E.R. page 166 a son aged 29 was killed. The Court of Appeal gave an award which amounted to approximately seven years purchase. In cases of this type, that is, a claim by parents on the death of an unmarried son, usually 5-7 years is allowed. In all these circumstances, I consider that, if in this case, I allow six years' purchase, this is the correct figure.

The result of all that is that the damages under the Compensation to Relatives Ordinance would amount to $1,200. From this, as I have already said, must be deducted the Law Reform damages of $1,000. There must be added to this the agreed funeral expenses of $100. The net result is that there will be judgment for the plaintiff for the sum of $200 under Compensation to Relatives Ordinance plus $100 funeral expenses, with Law Reform Damages in the sum of $1,000. The Plaintiff will have his costs.

(sgd.) Gordon Taylor

30th June, 1972.

No. 14

ORDER

IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

AT LAUTOKA

No.156 of 1970

BETWEEN: SANTLAL son of Ram Autar of Lautoka Cane Farmer on his own behalf and as Administrator of the Estate of Suresh Pratap son of Santlal deceased Plaintiff

AND

SOUTH PACIFIC SUGAR MILLS LIMITED an incorporated company having its registered office at Suva and carrying on business in Fiji as Sugar Millers

AND

VEERA SWAMY son of Venkat Sami of Lautoka Taxi Driver Defendants

JUDGMENT AFTER TRIAL

BEFORE THE HONOURABLE MR. JUSTICE GORDON TAYLOR
FRIDAY THE 30TH DAY OF JUNE 1972

THIS ACTION having on the 19th day of April 1972 been tried before the Honourable Mr. Justice Gordon Taylor and the said Justice Gordon Taylor having

In the Supreme Court

No.14

Order

30th June 1972 (continued)

ordered that Judgment be entered for the plaintiff IT IS THIS DAY ADJUDGED that the defendants do pay to the plaintiff the sum of $1300.00 (Thirteen hundred dollars) AND IT IS ORDERED that the defendants do pay to the plaintiff his costs of this action.

BY THE COURT

(LS)

(sgd) Jay R. Singh

DEPUTY REGISTRAR

In the Court of Appeal

No.15

Notice and Grounds of Appeal

1st September 1972

No.15

NOTICE AND GROUNDS OF APPEAL

IN THE FIJI COURT OF APPEAL

Civil Appeal No. 30 of 1972
Action No. 156 of 1970.

BETWEEN : SANTLAL (Son of Ram Autar) of Lautoka, Cane Farmer on his own behalf and as administrator of the Estate of Suresh Pratap (Son of Santlal), deceased. Respondent/Plaintiff.

AND : SOUTH PACIFIC SUGAR MILLS LIMITED an incorporated Company having its registered office at Suva and carrying on business in Fiji as Sugar Millers and VEERA SWAMY (Son of Venkat Sami) of Lautoka, Taxi Driver. Appellants/Defendants.

NOTICE OF APPEAL

TAKE NOTICE that the Fiji Court of Appeal will be moved at the expiration of fourteen (14) days from the service upon you of this notice, or so soon thereafter as Counsel can be heard, by Counsel for the abovenamed Appellants/Defendants FOR AN ORDER that the Judgment delivered by the learned Trial Judge Mr. Justice Taylor after

trial of this action at Lautoka on the 30th day of June, 1970, be set aside and for an order that the action be dismissed with costs to the Defendants alternatively for an order that the damages awarded be varied AND FOR AN ORDER that the Respondent/Plaintiff pay to the Appellants/ Defendants the costs of and occasioned by this Application. AND FURTHER TAKE NOTICE that the grounds of this Application are :

1. The learned Trial Judge erred in finding on the balance of probabilities that the whistle of the locomotive was not sounded in the manner alleged by the defence witnesses.

2. The learned Trial Judge erred in not holding that as legislation existed in Fiji for the roadcrossings on the main Rarawai/Kavanagasau tramline specifying the duties of train drivers on such crossings the standard of care to be exercised by train drivers on crossings not covered by such legislation should not be of any different or higher standard.

3. That the learned Trial Judge erred in finding the train driver guilty of any negligence.

4. That the learned Trial Judge erred in not holding that the deceased driver of the vehicle involved in the collision was solely to blame for his misfortune or alternatively contributed to it by his negligence.

5. That the learned Trial Judge erred in any event in holding that the Plaintiff in propria persona had established any grounds for claiming compensation and in granting compensation which was also excessive.

DATED the 1st day of September, 1972.

MUNRO, LEYS, KERMODE & CO.

Per: R.G. Kermode

Solicitors for the Appellants/Defendants.

In the Court of Appeal

No.15
Notice and Grounds of Appeal
1st September 1972
(continued)

This Notice of Motion was taken out by Messrs. Munro, Leys, Kermode & Co., Solicitors for the Appellants/ Defendants whose address for service is at the Chambers of the said Solicitors, Victoria Parade, Suva.

To the Respondent/Plaintiff and/or his Solicitor, Mr. D.S. Sharma.

No.16(a)
Judgment of Marsack, J.A.
3rd November 1972

No.16(a)

JUDGMENT OF MARSACK, J.A.

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 30 of 1972

Between: 1. SOUTH PACIFIC SUGAR MILLS LTD.
2. VEERA SWAMY s/o Venkat Sami Appellants
(Original Defendants)

and

SANTLAL s/o Ram Autar Respondent
(Original Plaintiff)

Date of Hearing : 26th October, 1972
Date of Judgment : 3rd November, 1972

R.G. Kermode for Appellants
K.C. Ramrakha for Respondent

JUDGMENT OF MARSACK, J.A.

This is an appeal against a judgment of the Supreme Court at Lautoka given on the 30th June, 1972, awarding the respondent the sum of $1,300 against the appellants in respect of the death of respondent's son Suresh Pratap in a collision between a car being driven by Suresh Pratap, and a cane train, the property of South Pacific Sugar Mills Ltd., being driven at the time by second appellant Veera Swamy, on the 15th June, 1969. The collision took place at a point where a railway line the property of the Company crosses the main Queen's Road between Nadi Airport and

Nadi Township. The learned trial Judge held that the collision was entirely due to the negligence of the Company's driver in -

(a) failing to keep a proper look out;

(b) failing to notice the approach of the deceased's car;

(c) failure to give adequate warning of the approach of the train; and

(d) failure of the driver to stop his train as he should have done to avoid the collision.

The facts as found by the learned trial Judge were, inter alia:-

(a) that the cane train was approaching the main road at a speed of about 5 m.p.h.;

(b) that the notice warning motorists of the railway collision, which had been erected by the Company, was obscured by the presence of a tree;

(c) that the driver did not sound his klaxon horn as he was approaching the main road in such a manner as to give adequate warning to oncoming traffic; and

(d) that the deceased was driving a small car, containing 6 people, along the Queen's Road at a speed of 50 - 55 m.p.h.

At the hearing of the appeal counsel agreed that there was no substantial question of law involved, and that the fate of the appeal depended almost entirely upon the view taken by this Court of the facts found by the learned trial Judge.

At the outset I must confess to some hesitation in accepting the finding of the learned trial Judge that the driver of the cane train had not sounded his horn "in the way spoken of in the evidence of the firstnamed defendant (the driver) and the pointsman". Both the driver and the pointsman gave sworn evidence that the horn had been sounded from the time they reached the whistle notice on

In the Court of Appeal

No.16(a)

Judgment of Marsack,J.A.

3rd November 1972

(continued)

the track, some distance before the road, and had been kept sounding continuously until the time of the collision. As against this two persons who were in the car deposed that they had not heard the horn. The Judge certainly said -

> "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...." 10

Ev Even if full value is given to the evidence on this point by the witnesses called by the plaintiff it amounts to nothing more than saying that they did not hear the whistle. The fact that they did not hear it may have been due to other considerations than a failure on the part of the driver to blow the whistle in the manner stated in his evidence. In any event it seems to me a somewhat slender foundation upon which to base a finding that the driver and the pointsman had both given false 20 evidence.

The legal principle to be applied in cases where findings of fact are challenged on appeal is authoritatively expressed by Viscount Simonds in Benmax v. Austin Motor Co. Ltd. (1955) 1 A.E.R. 326 at p.327:

> "This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it 30 to do so where the finding turned solely on the credibility of a witness",

and by Lord Reid (ibid) at p.328:

> "No one would seek to minimise the advantage enjoyed by the trial judge in determining any question whether a witness is, or is not, trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong 40 decision about the credibility of a witness".

In the present case the learned trial Judge

has based his finding as to the blowing of the whistle upon the credibility of witnesses, and in these circumstances this Court should be reluctant to reverse that finding.

As therefore it must be accepted that the driver of the cane train failed to blow his horn in such a way as to give adequate warning of the approach of the train, this must amount to a finding of negligence on the part of the driver; negligence which must be taken to have contributed to the collision.

With regard to the learned trial Judge's other findings of negligence on the part of the driver, namely failure to keep a proper look-out and failure to stop his train in time to avoid the collision, I do not think these findings can be supported on the evidence accepted by the learned trial Judge. Here the findings are rather inferences from the proved and admitted facts than findings of fact. As is pointed out in Benmax v. Austin Motor Co. Ltd. (supra) by Viscount Simonds at p.327:

> "But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts".

The principle to be applied in such cases is clearly set out by Parker, L.J. in Hicks v.British Transport Commission (1958) 2 All E.R. 39 at p.50:

> "This court is loath to interfere with an inference drawn by a trial judge who has seen and heard the witnesses. With that, of course, I entirely agree; but at the same time, if this court is satisfied that the inference drawn is the wrong inference then not only has it the power but it is its duty to substitute its own inference for that found by the learned judge."

An Appeal Court is in as good a position to draw inferences as was the Court before whom the hearing took place. Here the evidence shows clearly that when the car was approaching the crossing

In the Court of Appeal

No.16(a)

Judgment of Marsack, J.A.

3rd November 1972

(continued)

it was overtaken by another car driving at very high speed; and the overtaking car narrowly avoided collision with the oncoming train by what was deposed to as a matter of inches. The train then must have been on the road itself, or at least on the edge of it. The driver's attention would necessarily for the moment be on the car just passing in front of the train; and the collision with the car driven by the deceased must have taken place in so short an interval afterwards that the train driver could not in my view be said to be at fault in failing to observe the deceased's car in time before the collision occurred.

In the course of the argument some emphasis was placed on the driver's statement, made in cross-examination:

> "Our instructions are to blow the whistle and go. I would not have stopped even I had seen the car coming. If I had stopped I would have been stopped all day till all the cars go past."

In his judgment the learned trial Judge commented on this evidence to the effect that the driver would have been in no different position from a vehicle coming out of a side road to cross the main Queen's Road.

In my view, the driver of a cane train proceeding along a railway line which crosses the main road is quite in a different position from the driver of a car entering the main road from a side road. In any event I think it would be wrong to make too much of the driver's evidence quoted above. He was clearly thinking of his general instructions. The evidence showed that he had his hand on the brake at all times; and one of the reasons he gave for this was that the road was busy. It is not in my opinion a proper inference from his evidence that he would not have stopped if an emergency had arisen; and he in fact stopped very promptly when the crash with the oncoming car occurred.

The further finding by the learned trial Judge on the question of negligence was in these words -

"In all those circumstances I am completely

satisfied that no blame and no contributory negligence attaches to the deceased in this case".

Here again, I think that it is competent for this Court to examine the facts as found by the learned trial Judge and to draw other inferences from those facts if this Court feels that those drawn by the learned trial Judge were not justified. In the first place it may well be thought that an admitted speed of 50 - 55 m.p.h. in that particular locality would be a dangerous speed, unless the driver was vigilant to keep a proper look-out and alert to take whatever steps were required in the event of emergency. It is quite clear that the train would become visible as soon as it emerged from a cane-growing area by the side of the track. The cane did not grow up to the edge of the road; the evidence on this point, which is not disputed, was that the cane ceased about twelve feet to fifteen feet from the road at this point. Therefore very shortly after it emerged from the growing cane the approach of the train must have been visible to a driver on the main road keeping a proper look-out. The train travelled some nine feet across the road to the point of impact. Consequently, the train had travelled some twenty feet or more, at an admitted speed of 5 m.p.h., after it should have become visible to the driver of an oncoming car.

In my view there is merit in Mr. Kermode's arithmetical calculation that, as the car was admittedly travelling at some ten times the speed of the train, then at the time when the train became visible and should have been seen by the oncoming driver, the car was at a distance of two hundred feet or more. This would have given the driver ample time to avoid the collision if he had been keeping a proper lookout, and had taken the steps open to him to safeguard his car and its passengers. I am firmly of opinion that on the facts accepted by the learned trial Judge the inference is irresistible that there was negligence on the part of the deceased.

In arriving at this conclusion I have not taken into account the fact that the deceased had a light goods licence and therefore in all probability had a good knowledge of the roads in that area; or that his brother Virendra, who was

In the Court of Appeal

No.16(a)

Judgment of Marsack, J.A.

3rd November 1972

(continued)

a passenger in the car, stated that everybody would know that the mills were crushing and that the cane is mostly carried by train. The evidence as to the visibility of the railway line across the main road was not sufficiently definite to enable a finding as to the distance from which it could be clearly seen.

The evidence as to the deceased's failure to keep a proper look-out and to take all available steps to avoid the collision is in my view compelling, and entails a finding that the deceased was guilty of negligence which contributed to the collision. That being so, the damages awarded must be reduced in my opinion by an appropriate proportion. The fixing of this figure is always a matter of considerable difficulty; but as in my view deceased's negligence was at least equal to that which the learned trial Judge found against the driver of the cane train, I would fix the proportion by which damages should be reduced at 50%.

The quantum of damages is also in issue. Appellant contended strongly that the evidence of the dependence of the respondent on the deceased was insufficient to entitle him to damages under this head. In my view, however, this Court should not interfere with the judge's finding on this point. For the reasons given, I would reduce the judgment in the Court below by 50% in respect of the contributory negligence of the respondent, that is from $1,300 to $650, together with costs on that amount. I would order that respondent pay to the appellant one-half of the costs of this appeal.

(Sgd.) Charles C. Marsack

JUDGE OF APPEAL

Suva,

3rd November, 1972.

No.16(b)

JUDGMENT OF GOULD, V.P.

In the Court of Appeal

No.16(b)

Judgment of Gould, V.P.

3rd November 1972

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 30 of 1972

Between:

1. SOUTH PACIFIC SUGAR MILLS LTD.
2. VEERA SWAMY s/o Venkat Sami Appellants (Original Defendants)

and

SANTLAL s/o Ram Autar Respondent (Original Plaintiff)

R.G. Kermode for the appellants
K.C. Ramrakha for the respondent

Date of Hearing: 26th October, 1972
Delivery of Judgment: 3rd November, 1972.

JUDGMENT OF GOULD, V.P.

I have had the advantage of reading the judgment of Marsack J.A. and am in agreement with it.

All members of the court being of the like opinion the appeal is allowed to the extent indicated in that judgment and there will be the orders for costs proposed therein.

(Sgd.) T.J. Gould

VICE PRESIDENT

3rd November, 1972.

In the Court of Appeal

No.16(c)

Judgment of Spring, J.A.

3rd November 1972

No.16(c)

JUDGMENT OF SPRING, J.A.

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 30 of 1972

Between: 1. SOUTH PACIFIC SUGAR MILLS LTD.
2. VEERA SWAMY s/o VENKAT SAMI Appellants
(Original Defendants)

and

SANTLAL s/o RAM AUTAR Respondent
(Original Plaintiff)

Date of Hearing : 26th October, 1972

Date of Judgment: 3rd November, 1972

R.G. Kermode for Appellants
K.C. Ramrakha for Respondent

JUDGMENT OF SPRING, J.A.

I have read the Judgment of my learned brother, Marsack, J.A. and I agree with his reasoning and conclusions.

I have nothing to add.

(Sgd.) B.C. Spring
JUDGE OF APPEAL

SUVA,
3rd November, 1972.

No.17

ORDER

In the Court of Appeal

No. 17

Order

3rd November 1972

IN THE FIJI COURT OF APPEAL

Civil Appeal No.30 of 1972

Supreme Court Action No.156 of 1970

BETWEEN: 1. SOUTH PACIFIC SUGAR MILLS LIMITED
2. VEERA SWAMY son of Venkat Sami
Appellants
(Original Defendants)

AND : SANTLAL son of Ram Autar Respondent
(Original Plaintiff)

DATED AND ENTERED THE 3RD DAY OF NOVEMBER 1972

UPON READING the Notice of Motion on behalf of the abovenamed Appellants dated the 1st day of September 1972 and the judgment hereinafter mentioned.

AND UPON READING the Judge's notes herein

AND UPON HEARING Mr. R.G.KERMODE of Counsel for the Appellants and Mr.K.C.Ramrakha of Counsel for the Respondent

AND MATURE DELIBERATION thereupon had

IT IS ORDERED that this Appeal be allowed (in part) and that the judgment of the Honourable Mr. Justice Gordon Taylor dated the 30th day of June 1972 whereby it was adjudged that judgment be entered in favour of the said Respondent/Plaintiff for THIRTEEN HUNDRED DOLLARS ($1300.00) and his costs be varied by directing that judgment be entered in favour of the Respondent/Plaintiff for the sum of Six hundred and fifty dollars ($650.00) and his costs on that amount to be taxed.

AND IT IS FURTHER ORDERED that the respondent pay to the appellant one-half of the costs of this appeal.

BY THE COURT

Sgd. Illegible

REGISTRAR

No.18

Order granting Leave to Appeal to Her Majesty in Council

5th February 1973

No.18

ORDER GRANTING LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

Civil Appeal No.30 of 1972

BETWEEN: SANTLAL son of Ram Autar — Appellant (original Plaintiff)

A N D : 1. SOUTH PACIFIC SUGAR MILLS LIMITED

2. VEERA SWAMY son of Venkat Sami — Respondents (original Defendants)

BEFORE THE HONOURABLE THE CHIEF JUSTICE SIR JOHN ANGUS NIMMO IN CHAMBERS

MONDAY THE 5TH DAY OF FEBRUARY, 1973

UPON READING the Notice of Motion for Leave to Appeal to Her Majesty in Council herein dated the 16th day of January 1973 AND UPON HEARING MR.K.C. RAMRAKHA of Counsel for the Appellant, and MR. DENNIS WILLIAMS of Counsel for the Respondents IT IS THIS DAY ORDERED BY CONSENT that the Appellant be granted leave to appeal to Her Majesty in Council by the 5th day of May 1973 and that the execution of the judgment of the Supreme Court as varied by the Fiji Court of Appeal on the 3rd day of November 1973 be stayed pending the decision of Her Majesty in Council
AND that the Appellant do provide security for costs by way of bond in the sum of $500.00 And the cost of this application be costs in the cause.

BY ORDER

Sgd. Illegible

EXHIBIT "1"

Exhibits

"1"

Birth Certificate of Suresh Pratap

BIRTH CERTIFICATE OF SURESH PRATAP

FIJI

94937

Extract of ENTRY OF BIRTH

SUVA 2. 12. 1971.

APPLICATION No. I. 1203.

1. NAME SURESH PRATAP.

2. SEX MALE.

3. FATHER'S NAME SANT LAL.

4. MOTHER'S NAME HANS RAJI.

5. PLACE OF BIRTH VITOGO LAUTOKA

6. DATE OF BIRTH 16TH SEPT. 1946.

7. OFFICIAL NUMBER OF ENTRY 3624/46.

I CERTIFY THAT THE FOREGOING IS AN EXTRACT FROM THE REGISTER OF BIRTHS KEPT AT THE OFFICE OF THE REGISTRAR GENERAL.

Sgd. Illegible

ASST.REGISTRAR BIRTHS,DEATHS & MARRIAGES

Registrar General

N.B. Alterations and/or erasures automatically invalidate this document.

Exhibits

"2"

Letters of Administration Suresh Pratap deceased

30th April 1970

EXHIBIT "2"

LETTERS OF ADMINISTRATION

SURESH PRATAP DECEASED

IN THE SUPREME COURT OF FIJI

PROBATE JURISDICTION No. 10882

In the Estate of SURESH PRATAP son of Santlal late of Vitogo, Lautoka in the Colony of Fiji, Farm Supervisor, deceased, intestate.

BE IT KNOWN that on the 30th day of April 1970 letters of administration of all the estate which by law devolves to and vests in the personal representative of SURESH PRATAP son of Santlal late of Vitogo, Lautoka in the Colony of Fiji, Farm Supervisor, deceased who died on the 15th day of June 1969 at Lautoka in the Colony aforesaid intestate were granted by Her Majesty's Supreme Court of Fiji to SANTLAL son of Ram Autar of Vitogo, Lautoka in the Colony aforesaid, the lawful father of the said deceased he having been first sworn well and faithfully to administer the same.

(Sgd.) V.H.Vivian

(V.H.Vivian)
Chief Registrar.

Extracted by SHARMA & MISHRA
SOLICITORS
LAUTOKA.

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 (Defendant) Respondents

RECORD OF PROCEEDINGS

WILSON FREEMAN,
6/8 Westminster Palace Garden,
London SW1P 1RL

Solicitors for the Appellant

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1 King's Bench Walk,
Temple, London EC4Y 7DD

Solicitors for the Respondents