Privy Council Appeal No. 7 of 1973

Santlal son of Ram Autar – – – – – – *Appellant*

v.

South Pacific Sugar Mills Limited and another – – *Respondents*

FROM

THE FIJI COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH MAY 1974

Present at the Hearing:
LORD DIPLOCK
LORD CROSS OF CHELSEA
SIR HARRY GIBBS
[*Delivered by* SIR HARRY GIBBS]

The appellant's son, Suresh Pratap, died as a result of injuries sustained when a car which he was driving collided with a locomotive owned by the first respondent, South Pacific Sugar Mills Limited, and driven by its servant, the second respondent, Veera Swamy. The appellant sued the respondents in the Supreme Court of Fiji to recover damages under the Law Reform (Miscellaneous Provisions) (Death and Interest) Ordinance and the Compensation to Relatives Ordinance. The trial judge found that the collision was caused by the negligence of the respondents and that there had been no contributory negligence on the part of the deceased, and made an award of damages. On appeal, the Fiji Court of Appeal held that a finding of contributory negligence should be made and ordered that the damages awarded to the appellant should be reduced by 50%. This appeal is brought from that decision.

The collision occurred on the Queen's Road, between Lautoka and Nadi in Fiji, at a place where a railway owned by the first respondent crossed the roadway. The Queen's Road, along which the deceased was driving in the direction of Nadi, is the main road in Fiji and carries a good deal of traffic. The first respondent is a sugar miller and the railway was used to bring cane from the farms to the mill. There was evidence that it would have been well known that the mill was crushing and that cane would be carried to the mill by rail, but there was no evidence that the deceased in fact knew that the railway lines crossed the roadway at that point. The crossing was at a dip in the road and this, as the trial judge said, may have meant that an approaching driver would not have seen the railway lines until he was very close to them. The first respondent had erected a warning sign but this was obscured by the cane and trees that grew beside the roadway, and the trial judge found that the driver of a vehicle approaching the crossing would not have been

able to see the sign. It would not have been possible for such a driver to see a train until it had emerged from behind the cane which grew at a distance of about 12 or 15 feet from the side of the road. The crossing was a dangerous one and a number of accidents had previously occurred there. It could not be contested that in these circumstances it was the duty of the respondents to give warning to those using the roadway that a train was approaching the crossing. In fact, the respondents' witnesses said that a horn was sounded as the train approached the crossing and up to the very moment of the collision, but two passengers in the car driven by the deceased swore that they did not hear the horn. The trial judge, who said that he was not impressed with the witnesses for the respondents, and that insofar as their evidence conflicted with that given on behalf of the appellant he greatly preferred the latter, found as a fact that the horn was not sounded. He accordingly found that the respondents were guilty of negligence in that they failed to give adequate warning of the fact that the train was about to cross the road and this finding, which was based entirely on the view which he had formed as to the credibility of the respective witnesses, was rightly accepted by the Fiji Court of Appeal, and was not sought to be challenged before their Lordships' Board.

The trial judge further found that the driver of the train had failed to keep a proper lookout and had failed to stop his train as he could have done to avoid a collision, but that the deceased on the other hand was not guilty of any contributory negligence. The Fiji Court of Appeal reversed these findings and it is now necessary to refer to the evidence on which they were based in order to determine whether it was right in doing so.

One of the appellant's witnesses, a passenger in the deceased's vehicle, said that the deceased drove towards the crossing at a speed of 50 to 55 miles per hour and that when the car was 1½ to 2 chains from the crossing, it was passed by another car which proceeded over the crossing. Suddenly the deceased braked and the witness saw the locomotive emerge on to the road. He said that so far as he could remember, it was travelling at more than 5 to 10 miles per hour and that it was 11 to 12 yards away when he saw it. The second witness, another passenger, said that he saw the locomotive just as the deceased braked at about 6 to 7 yards from the crossing. The second respondent said he approached the crossing at about 5 miles per hour. When he was about 6 yards from the crossing, he looked towards Lautoka and saw " a lot of cars coming ". As the trial judge explained, the driver of the locomotive could presumably see through the tops of the canes although, as has been said, his locomotive would not then have been visible from the road. When the locomotive was about a yard from the crossing, a car travelling fast from the direction of Lautoka passed in front of the train and narrowly avoided colliding with it. The second respondent said that he then heard a noise, and looked in the direction of Nadi. His locomotive was then hit by the car driven by the deceased. The impact was in the middle of the locomotive which was more than 18 ft. long. As soon as the impact occurred, he applied the brakes and stopped the locomotive in 2 to 3 feet. He said that with a full application of the brakes he could stop the train in a yard, as of course in fact he did.

The learned members of the Fiji Court of Appeal considered that the findings that the second respondent was negligent in failing to keep a proper lookout and to stop his train in time to avoid a collision were not supportable. In their opinion, the attention of the second respondent was necessarily distracted by the car which passed close in front of him and the collision with the car driven by the deceased must have taken

place in so short an interval afterwards that the second respondent could not be said to have been at fault in failing to observe that car in time to avoid a collision. They further held that the evidence led to the conclusion that the deceased had failed to keep a proper lookout. This conclusion was reached on the basis of an arithmetical calculation. It was said that the train travelled about 12 to 15 feet from the cane to the edge of the roadway and a further 9 feet across the road to the point of impact. Therefore, it was said, the train had travelled some 20 feet or more " at an admitted speed of 5 miles per hour " after it should have become visible to the driver of an on-coming car. Then it was said that as the car was " admittedly travelling at some ten times the speed of the train ", the car must have been at a distance of 200 feet or more at the time when the train first became visible and should have been seen by an on-coming driver, and that the deceased therefore would have had ample time to avoid the collision if he had been keeping a proper lookout.

Their Lordships do not find it necessary to review the many authorities which have discussed the functions of an appellate court on the hearing of an appeal from the decision of a judge which involves only questions of fact, or to restate the principles laid down in those authorities. No doubt, the Fiji Court of Appeal had a duty to make up its own mind as to the facts, and if no question of credibility had been involved, and all that had been necessary was to draw an inference from established facts, it might have been in as good a position to do so as was the trial judge, although it would still have been required to give weight to his opinion. However, it is one thing to draw an inference from proven facts and quite another to set against the opinion of the judge who has seen and heard the witnesses a view based on an arithmetical calculation which itself rests merely on estimates of speed and distance. The making of calculations of that kind by an appellate court is always fraught with danger. The decision of the trial judge in the present case was founded in part on the view that he had formed as to the reliability of the witnesses, whose evidence was in conflict not only in relation to the question whether the horn was sounded, but also as to the speed of the train when it approached the crossing. The finding of the Fiji Court of Appeal that the deceased driver had himself been negligent depended on the conclusion that he was 200 feet from the train when it first became visible. If the Court had taken the speed of the train as 10 rather than 5 miles per hour, the product of its calculation would have been reduced by half, and this is enough to demonstrate its unreliability. On any view the deceased had no more than a few seconds in which to recognise and attempt to avoid the danger caused by the failure of the respondents to give proper warning of the approach of the train. It was not possible on the evidence for the Fiji Court of Appeal to reach, contrary to the finding of the trial judge, a conclusion that the deceased driver had time to avoid the collision had he been keeping a proper lookout.

The reversal by the Fiji Court of Appeal of some of the findings of negligence on the part of the second respondent was of importance only in relation to the apportionment of responsibility for the collision and cannot affect the result, once it is held that the deceased was not guilty of contributory negligence. However, in their Lordships' view, the Fiji Court of Appeal was in error in interfering with the finding of the trial judge on these matters. Having regard to the evidence that the second respondent saw cars coming down the roadway when the train was about six yards from the crossing, and could have stopped his train within a yard, it could not be held that the trial judge was wrong in taking the view that if the second respondent had been keeping a proper lookout, he could not have failed to see the car driven by the deceased, and would have had ample time to stop the train before a collision had occurred.

For these reasons, their Lordships consider that the judgment of the trial judge should not have been varied on appeal.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed, the judgment and order of the Fiji Court of Appeal set aside and the judgment of the trial judge restored. The respondents must pay the costs of this appeal and of the appeal to the Fiji Court of Appeal.

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