judgment no. 11, 1974

IN THE PRIVY COUNCIL No.7 of 1973

ON APPEAL

FROM THE FIJI COURT OF APPEAL

B E T W E E N

SANTLAL (Son of Ram Autar) (Plaintiff) Appellant

- and -

SOUTH PACIFIC SUGAR MILLS LIMITED

- and -

VEERA SWAMY (Son of Venkat Swami) (Defendants) Respondents

C A S E FOR THE R E S P O N D E N T S

Record

1. This is an Appeal brought by leave of the Fiji Court of Appeal dated the 5th May 1973 from the judgment of the Fiji Court of Appeal (Gould, V.P., Marsack J.A., Spring J.A.) dated the 3rd November 1972 allowing (in part) an appeal from the judgment of Gordon Taylor J. in the Supreme Court of Fiji (Western Division) at Lautoka dated the 30th June 1972 whereby it was ordered that the Respondents pay the Appellant $1300 damages and costs. On appeal in the Fiji Court of Appeal the said judgment was varied and it was ordered that the Respondents pay the Appellant $650 damages and costs, and that the Appellant pay the Respondents one-half of the costs of the appeal. — 68, 67, 55, 67

2. The substantial question raised by the Appeal concerns the entitlement of an appeal court to vary the findings of a trial judge as to liability in a traffic accident case and whether on the facts of the present case the Fiji Court of Appeal was entitled to vary such findings.

3. The circumstances out of which the appeal arises are that on the 15th June 1969 the Appellant's 22 year old son Suresh Pratap was killed when a Datsun motor-car which he was driving along Queen's Road at Martintar, Nadi collided with a locomotive train belonging to the First Respondents and being driven by their servant the Second Respondent — 7, 8-9, 12

4. By a Writ of Summons dated the 4th June 1970 the Appellant, who sued on his own behalf and as — 1

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Administrator of the estate of Suresh Pratap son of Santlal, deceased ("the deceased") claimed damages and/or compensation for the death of the deceased caused by the negligence of the Respondents under the provisions of the Law Reform (Miscellaneous Provisions) (Death and Interest) Ordinance (Cap.20) and the
2 Compensation to Relatives Ordinance (Cap.22)

5. By the Statement of Claim dated the 28th August 1970 the following particulars of negligence were alleged against the Respondents :-

(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 avoiding the collision.

3-5 (f) Exposing the said Suresh Pratap to danger.

6. By the Defence dated the 3rd September 1970 the Respondents denied the allegations of negligence and alleged that the deceased caused or contributed to the accident by his own negligence, which was particularised as follows :-

(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.

5-6 (e) Failing to give way to a locomotive in the course of crossing the road.

7. The action came on for hearing before Gordon Taylor J. on the 19th April 1972. Oral evidence was given on behalf of the Appellant by the Appellant himself, his son Virendra Pratap who was a passenger in the deceased's car, Jai Ram Naiker, who was another passenger in the car, and Corporal Singh, who was a
7-11 Police Photographer who took the photographs of the locus which are Exhibit 3. Oral evidence was given on behalf of the Respondents by the Second Respondent, who was the
12-14 driver of the locomotive and by Ajar Kumar who was riding as pointsman on the locomotive.

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8. Gordon Taylor J. delivered his reserved judgment on the 30th June 1972. The learned judge first summarised the evidence, which so far as is material to the issues in this appeal was to the following effect. The evidence given on behalf of the Appellant was that the deceased was driving himself and 5 passengers in a Datsun 1300 car at a speed of 50-55 mph along the good, straight, tarsealed road to Nadi to see a football match. As they approached the crossing which is in a dip, a car overtook them at speed about 1½-2 chains before the crossing and proceeded across the crossing. After it had crossed, the engine suddenly emerged from the lefthand side where there are big trees and a cane farm. The witness Virendra Pratap said that the engine was 11 to 12 yards away, coming out at a speed of more than 5 to 10 miles per hour, and that the deceased's car braked as soon as he, the witness, first saw the engine. Neither he nor the Plaintiff's other witness Jai Ram Naiker heard the engine's horn, although the car window was down. Jai Ram Naiker said that he saw the engine just as they braked and that the car was then 6 to 7 yards from the crossing. Corporal Singh said that he knew that there had been other accidents at the crossing which had no Government sign giving warning of its existence. The Second Respondents' sign, which was 80 to 90 feet back from the crossing, was not visible from the road because of obstructions.

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9. The evidence for the Respondents had been that the Second Respondent, who had been a driver since 1952, blew his horn continuously after passing the whistle-board about 2 chains from the crossing. He emerged from the sugar cane, which is 12-15 feet back from the road at about 5 mph, cab first, pulling 30-32 trucks. He had heard that there had been accidents at this crossing, and had one hand on the brake/accelerator and one hand on the horn. On full application of the brake he could stop within one yard. When he was about a yard from the road, he saw a car going fast which just avoided an accident with the locomotive. His attention was then drawn to the Nadi side of the crossing, when he realised that a car had collided with him on the Lautoka side. He applied the brakes and stopped within 2-3 feet. The middle wheel of the locomotive, which is more than 18 feet long, was in the middle of the road at the point of impact. The pointsman confirmed that the horn had been sounding continuously from the time they passed the whistleboard. He was reading orders at the time of the collision but he felt the impact, and said the train stopped when it was hit, then rolled on a bit and then stopped within a yard or so.

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27 10. The learned judge said that there were no statutory provisions in Fiji relevant to the facts of this case, though he should bear in mind the obligations of engine drivers and road users on main line crossings which are set out in the Regulations made under Cap.155. He then reviewed the following English and Australian authorities:-

Petropoulos v. Commissioner for Railways (1963) N.S.W.Reports 286

28 Donaghue v. Stevenson (1932) AC 562

Lloyds Bank Ltd. v. Railway Executive (1952) 1
29 All E.R.1248

Lloyds Bank Ltd. v. British Transport Commission
30 (1956) 3 All E.R.291

He concluded that if, as here, there is a history of accidents at the crossing the standard of care is higher on those responsible for the trains. He proceeded to consider the following further English and Commonwealth authorities :-

Commissioner for Railways v. Dowle 99 C.L.R.353

Knight v. Great Western Railway Co. (1942)
32 2 All E.R. 286

James v. Commissioner of Transport (1958) East
33 African L.R.313

34 Commission for Railways v. McDermott (1966) 2 All E.R.162

Lloyds Bank Ltd. v. British Transport Commission (1956) 3 All E.R.291.

Alchin v. Commissioner for Railways (1935) N.S.W.
35 Reports 498.

He extracted from this line of cases the principle that there is a clear duty of care on operators of railways towards persons using a level crossing, although the standard of care required would vary depending on the circumstances existing at the particular crossing, being higher where the crossing is one which has circumstances of unusual danger or where there is a history of accidents.

36 11. The learned judge then turned to examine the facts of the case. He said he was not impressed
37 with the Respondents' witnesses and greatly preferred the evidence of the Appellants' witnesses where there was a conflict. He found, inter alia, the following facts :-

(1) There was very tall sugar cane which grew up to a distance of 10-15 feet from the roadway 36

(2) There was insufficient warning of this crossing by sign, and in view of the sugar cane, insufficient visibility to enable the crossing to be seen.

(3) The occupants of the car did not hear the train whistle which was not sounded in the way described by the Respondent's witnesses. 37

He then considered 3 of the authorities which he has already cited, as to the duty of train drivers in circumstances of this kind, and held that the driver had a duty to keep a careful lookout for vehicles approaching on what was, after all, the main road in Fiji and that he was in no different position from a vehicle coming out of a side road to cross the main Queen's Road, and that if the Second Respondent had kept a proper lookout and taken the appropriate action he could have avoided the collision by stopping 37-39 40

12. Accordingly, he held that the Respondents were negligent on the following 4 counts :- 41

(1) Failure of the driver to keep a proper lookout;

(2) Failure of the driver to see the deceased's car approaching the crossing;

(3) Failure to give an adequate warning of the fact that the train was about to cross;

(4) Failure of the driver to stop the train as he could have done to avoid the collision.

13. The learned judge then considered whether there had been any contributory negligence on the part of the deceased. He considered that the car's speed of 50-55 mph was not unreasonable on that stretch of road, and took into account the facts that he had found, namely that there was no adequate notice of the crossing, and that the earliest part at which this train could reasonably be seen was somewhere between 10 and 15 feet from the end of the nearside of the road in relation to the car. He considered 2 authorities on this issue of contributory negligence:- 41 42

Nance v. British Columbia Electric Railway Co.Ltd. (1951) A.C.601

South Australian Railway Commissioner v. Thomas 84 C.L.R.84 43

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He said that he was satisfied that the deceased had no reasonable opportunity of being aware of the crossing or of the approaching train before he did. The deceased saw the train at the last moment, which was the first time he could reasonably be expected to have seen it and braked hard, but was nevertheless unable to avoid the collision. In the circumstances the learned judge held that no blame and no contributory negligence attached to the deceased.

44-45 14. The learned judge then considered the issue of damages and awarded the Appellant $1,000 under the Law Reform (Miscellaneous Provisions) (Death and Interest) Ordinance, $200 under the Compensation to Relatives Ordinance and $100 agreed funeral expenses, being a total of $1300 damages and costs.

56 15. By a Notice of Appeal dated the 1st September, 1972, the Respondents appealed on the grounds, inter alia, that the learned Trial Judge erred in not finding that the deceased driver of the vehicle involved in the collision was solely to blame for his misfortune or alternatively
58 contributed to it by his negligence. The appeal was heard by the Court of Appeal (Gould V.P., Marsack J.A. and Spring J.A.) on the 26th October 1972 and the Court delivered judgment on the 3rd November 1972.

16. In the leading judgment, with which Gould V.P. and Spring J.A. agreed, Marsack J.A. said that 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 the court of the facts found by the trial judge. He said that in view of the judge's finding that the driver of the
61 cane train failed to blow his horn in such a way as to give adequate warning of the approach of the train, the Respondents must be found to have been guilty of negligence which contributed to the collision.

The learned Judge of Appeal proceeded to express the opinion that the learned trial judge's other findings of negligence on the part of the driver, namely failure to keep a proper lookout and failure to stop his train in time to avoid the collision could not be supported on the evidence accepted by him. These findings were inferences from proved and admitted facts which the Appeal Court was in as good a position as the trial judge to draw (see Benmax v. Austin Motor Co. Ltd. (1955) 1 All E.R. 326 at p.327 and Hicks v. British
62 Transport Commission (1958) 2 All E.R. 39 at p.50) The learned Judge of Appeal was of the opinion that the Second Respondent's attention would have

necessarily been on the car which had narrowly avoided colliding with his train and that he could not therefore have been at fault in failing to observe in time the deceased's car following behind. He was further of the opinion that it was not a proper inference from the evidence that the Second Respondent would not have stopped if an emergency had arisen, in that he in fact stopped very promptly when the crash occurred.

17. On the issue of contributory negligence, the learned Judge of Appeal said that as the deceased's car was travelling at ten times the speed of the Respondent's train, which had to travel 20 feet from the edge of the cane to the point of impact in the middle of the road, the driver of the car, who would have been at a distance of 200 feet or more from the crossing when the train emerged from the cane, would have had ample time to avoid the collision if he had been keeping a proper lookout. He was of the opinion that the deceased's negligence was at least equal to that of the train driver and would therefore reduce the award of damages by 50% by reason of the deceased's contributory negligence. He would order that the present Appellant pay to the Respondents one-half of the costs of the appeal. 63 64

With that judgment and order the other two members of the Court (Gould V.P. and Spring J.A.) agreed and the order of the Court of Appeal was drawn up accordingly. 65-6 67

18. On the 5th February 1973 Sir John Nimmo C.J. sitting in chambers in the Fiji Court of Appeal granted the Appellant leave to appeal to Her Majesty in Council. 68

19. The Respondents respectfully submit that the approach of the Court of Appeal was correct and should be upheld. Whether the correct approach to the duties of an appellate court in these circumstances, when apportionment of blame is in issue, is that expressed by Lord Denning M.R. in the English case of Kerry v. Carter (1969) 1 W.L.R. 1372 or whether the more stringent approach of the House of Lords in The MacGregor (1943) A.C. 197, which was recently applied by the Privy Council in the Singapore case of Ramoo son of Erulapan v. Gan Soo Swee (1971) 1 W.L.R. 1014 is to be adopted, this was one of those exceptional cases in which the appellate court was entitled to intervene. The Respondents respectfully submit that the learned trial judge in distributing blame wholly omitted to take into consideration the matters which correctly influenced the Court of Appeal in holding the deceased 50% to blame for the accident and

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that if he had taken those matters into consideration he could not have reached the conclusion, which was nowhere supported by the evidence, that the deceased saw the train at the last moment, which was the first time he could reasonably be expected to have seen it. Since the learned judge was demonstrably wrong in reaching this conclusion, the appellate court was entitled to vary his judgment in the manner in which they did.

20. The Respondents respectfully submit that this appeal should be dismissed with costs for the following amongst other

R E A S O N S

1. Because the judgment of the Court of Appeal was right.

2. Because the learned trial judge in distributing blame demonstrably failed to take into account a vital fact bearing on the matter, namely the distance the deceased's car would still have to travel when the Respondents' locomotive emerged from the sugar cane and accordingly the Court of Appeal was entitled to intervene.

HENRY BROOKE

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Respondents

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