IN THE HIGH COURT OF FIJIAT LABASA
CIVIL JURISDICTION

CASE NUMBER: HBC 07 of 2012

BETWEEN : **SEVESA DAUNIVALU** also known as **SEPESA DAUNIVALU** of Wailevu, Labasa as administrator in the estate of Melaia Qaranivalu of Wailevu, Labasa, Deceased.

Plaintiff

AND : **RAMODHARAN NAIR** of Wailevu, Labasa, Driver.

1st Defendant

AND : **DALIP CHAND AND SONS LIMITED** – a limited liability company having its registered office at Ritova Street, Labasa.

2nd Defendant

AND : **MOHAMMED NASIR** of Soisoi, Tabia, Labasa.

3rd Defendant

Appearances: Mr. A. Sen for the Plaintiff

Mr. A. Kohli for the Defendant

Date of Hearing: 20th February 2014

Date of Judgment: 7th March, 2014

JUDGMENT

Introduction

1. The Plaintiff is suing the 1st and 2nd Defendants for negligence, causing death to his wife under Compensation to Relatives Act (Cap 29) for the benefit of the estate under Law

Reform (Miscellaneous Provision) Death and Interest Act (Cap27). The 1st Defendant is a driver of bus bearing registration no DCSL03 that collided with a single cab bearing no DC 43, where deceased was travelling. It is alleged that while this cab was stationary the bus had come at an excessive speed from the behind and collided with it that resulted one death and injury to several others who were inside the said cab. There were serious damage to the said cab, too. The driver of the bus alleges that the said cab, was not stationary when the accident happened, but suddenly moved towards the side of the main road where the bus was approaching, and since there was a taxi approaching from the front the collision was unavoidable. The 1st Defendant also pleaded contributory negligence of the driver of the said cab. Due to the impact of the collision, the said cab was thrown away for a distance of 12.1 meters and the bus had stopped 56 meters from the point of impact.

2. The following are agreed Facts in terms of the Pre Trial Conference minutes:-

   a. The Plaintiff was the husband of Melaia Qaranivalu late of Wailevu, Labasa, deceased and the administrator of the Estate of the said deceased. Probate in the said estate has been granted to Sevesa Daunivlua a.k.a Sepesa Daunivalu.

   b. The Plaintiff brings this action for the benefit of the deceased's estate under the Law Reform (miscellaneous provision) Death and Interest Act, and for the benefit of the dependents of the deceased pursuant to Compensation to Relatives Act.

   c. That all material times the 2nd Defendant was the owner of omnibus registration no DCSL 03.

   d. On 24th January, 2010, the 1st defendant was driving omnibus registration no DCSL 03 as servant and agent of the 2nd Defendant where the deceased was a passenger.

   e. On 24th January, 2010, omnibus registration no DCSL03 while being driven by the 1st Defendant as servant and agent of the 2ndDefenant collided with motor vehicle registration no LC 43 along Vatudova, Labasa along the Labasa/Nabouwalu highway causing the death of the deceased Melaia Qaranivalu.

f. The deceased was 28 years of age at the time of her death. She was born on 22nd June, 1982.

g. The 1st Defendant has been charged for the offence of Dangerous Driving Occasioning Death, and the said action is not concluded.

h. As the result of the accident, the deceased died.

i. Funeral expense $3,000

j. Special Damages S1,000

Analysis

Issue of Liability for Negligence

3. First the court has to decide the issue of negligence and in determination of the said issue invariably has to ascertain the alleged contributory negligence of the 3rd Defendant. According to the version of the 1st Defendant, the sudden and unexpected movement of the cab bearing registered Number DC 43, to the main road from its parked position caused the accident. He also stated that there was a taxi approaching from the front and he could not have avoided the accident without collision of the Taxi. This version is not supported by any of the eye witnesses of the event including the passenger of the bus, namely Pranil. So in the analysis of the evidence of the 1st Defendant's contention which is not supported by any independent evidence, needs to be verify as to the truthfulness. He is already charged for driving dangerously and causing death to a person. So the outcome of this case will have a bearing on his career as a driver and he is an interested party to this action, in the application of accepted yardstick for analysis of evidence.

4. The Plaintiff, his deceased wife and the three children were all travelling in the hired cab bearing registered licence LC43, towards Labasa, from Yalava to Tabia on Labasa Nabouwalu high way, on 24/01/2010. He had hired the said single cab for the journey and in the front seat there was a female who was carrying his 6 month old infant, while the wife and other two children were at the back of the said vehicle. The back of the

single cab is covered with a tall canopy and seating was on the two sides of the cab. The Plaintiff was seated at the left corner that was near to the entrance and the wife was seated at the left corner that was closer to the front part of the vehicle and other two children were seated between the two parents, while the infant was in the front part of the single cab with a female. There were two other passengers seated on the opposite side of Plaintiff's family, an old man and a woman named Merioni, who also gave evidence at trial.

5. At the trial Plaintiff and Mereoni gave evidence as passengers of LC 43 and stated that the vehicle they were traveling was stationary when the accident happened. An independent witness, who can be considered as a disinterested party to this action, who was seated on the third row of the bus also gave evidence. All of them said that at the time of accident the bus was travelling at an excessive speed and the collision happened, with the parked cab. All the witnesses denied the 1st Defendant's version that the cab was moving towards the right side at the time of the accident. The driver of the said cab no LC 43, said he stopped the vehicle and also switched off the engine since he was told at the beginning of the journey that the person who was getting out at that place had lot of belongings to unload, including a puppy. This position was corroborated by the Plaintiff as well as the person who got off from the said place, namely Merioni.

6. Merioni , who got off the vehicle was unloading her items when the accident happened. She said that apart from her hand carrying bag, she had a bag of cassava, a bag of clothes, and also a bag of fish and also a puppy, to be unloaded from the vehicle. According to her evidence she could not unload any of her belongings except the hand bag. She said when she got off the infant who was at the front seat of the single cab was crying and she had advised the deceased to feed the child and the deceased was about to descend from the vehicle upon her request when the tragic accident happened. The bus bearing no DCSL3 collided with the right side of the cab LC 43 from behind. Evidence of Merioni can be accepted as true and in cross examination her testimony was unshaken. So, the version that cab moved cannot be accepted.

7. Merioni who had already alighted from the vehicle was trying to unload her bags one by one when the accident happened. According to her first she had heard a loud noise from behind and she turned back to the side of sound and had seen the bus driven by the 1st Defendant racing directly towards the side of the parked cab, where she was standing on the ground and had immediately jumped from the place she was standing to save her life. At that time the deceased was about to get out from the vehicle, presumably to feed her child who was on the front seat. Merioni said if she did not jumped she would have been no more to give evidence as she would have hit first before colliding with the parked vehicle. She also said how she was close to the death at that instance, when she reflexively jumped.

8. Sevesa who lost his wife as the result of this accident also stated that he was talking with Merioni and was involved in the handing over of her bags when this accident happened. He explained how he first heard a bus approaching making a loud noise from behind in the main road, and suddenly started to veered to the side of the cab and collided with the vehicle that was parked.

9. None of the eye witnesses said about a sound of application of breaks. This is consistent with the sketch of the accident since there were no marks of the tyres on the road. The absence of any tyre marks on the road also supports the evidence that LC43 was not entering the main road. If the wheels of the said vehicle were on the main road they would have been dragged along the main road for some distance and the marks should be visible on the tar sealed road. So the absence of tyre marks on the road substantiate that no brakes were applied by the driver of the bus DCSL 03 either before or after the accident and the cab DC 43 was not on the main road when the accident happened. The driver of the bus never said that he applied breaks either prior or after the accident.

10. The passenger, Pranil who was in the said bus DCSL03 gave evidence. He said he was seated close to the front of the bus. Though initially he said he was seated about 5 seats away from the front, when he was confronted with his statement he refreshed his memory and confirmed that he was only 3 seats away from the front. This inconsistency can be understood and in fact strengthen the position that he is a disinterested party who had

even forgotten some finer details as he was disinterested, but evidence is truthful and can be considered as independent witness. He said that he was very close to the driver so that he could see the eyes of the driver through the mirror that was placed above the driver's head, inside the bus. The driver of the bus confirmed that one of the purposes of the said mirror was to see the passengers inside the bus and their movements, specially when they get down from the bus and also sitting inside the bus. Pranil, said he saw the 1st Defendant's eyes getting closed at times and according to what he saw the driver was feeling sleepy though he was driving at that moment at an excessive speed.

11. In the cross examination the counsel suggested that the said witness was sleeping, but he rejected that and stated that he was carrying a child who was sleeping and he never slept during the journey, but in contrast saw the 1st Defendant who was the driver of the vehicle, was feeling sleepy and eyes got closed at times for brief periods. He said he had even indicated this to his wife, but could not do anything as the bus was travelling at an excessive speed. He said that he could not get up and talk to the driver about the condition of the driver before the accident as he was carrying an infant in his arms and the bus was also travelling at a very high speed and was concerned of the safety of the child as well as himself. He said that he had travelled by buses and from that experience he could estimate the speed of the bus was excessive. He also confirmed that the cab LC43 was stationery when the accident happened. The evidence of all the eye witnesses confirmed that the cab LC43 was stationary and also that it was parked by the side of the road, except the 1st Defendant. Apart from the testimony of the bus driver, the absence of any marks on the main road of the collision also confirms that that the said cab was not moving on the main road when the collision happened. The bus driver's version does not support in the correct analysis of the evidence. The driver of the cab said after collision with the bus, the cab moved forward and collided with a culvert before it was thrown away. This corroborates that vehicle was not on main road and the bus was travelling at an excessive speed.

12. The evidence of the 1st Defendant cannot be considered as independent evidence from a disinterested party. His criminal action in relation to this accident where he is charged for dangerous driving causing death of a person, has not concluded and presumed innocent till proven guilty. It is clear that there is no evidence to support that LC 43 cab suddenly

entered the main road. On balance of probability this has not been proved by the 1st Defendant.

13. The driver of the bus DCSL03 also stated that there was a taxi that came from the front and he could not have avoided this accident. This was not a position that was not confronted with any of the eye witnesses when they gave evidence. The time of the accident and the day of the accident and the place of the accident make such an event less probable, too. It was a Sunday and all the witnesses stated that there were extremely low movement of vehicles on this road. Specially in a rural area where the accident happened, this can be accepted. So, the evidence of the 1st Defendant cannot be relied on the test of spontaneity as well as on the balance of probability as well as on consistency. The version of the taxi approaching from the front also needs to be rejected on preponderance of evidence as all other eye witnesses said there were no other vehicles visible on the road at that time.

14. Pranil, who was a disinterested party, explained to the court how the 1st Defendant fled the scene of the carnage even leaving the passengers of the bus high and dry. The passengers of the bus that met with the accident, were left to themselves, even to get out of the bus, as the front part of the bus had got damaged and the passengers had a difficulty in getting down from the steps of the bus as that part had got disfigured making it hard to get out of the bus. Despite such a serious accident, the 1st Defendant who was the person in charge of the bus as well as the passengers at that moment had abandoned both bus and passengers and fled the scene in a car that he had requested using his mobile phone. The explanation to fleeing the scene was that he felt thirsty and went home to drink some water.

15. The bus driver's home was about 4-5km away from the scene of the accident and requesting a vehicle using mobile phone for such a trivial thing like a glass of water, cannot be accepted. The conduct of the 1st Defendant after the accident also indicate fault in his part. In the cross-examination he admitted that he had carried drinking water, but said that it was hot and could not drink it. If so, first he would have asked for some water

from the passengers in the bus, since the journey of the bus was fairly a long one and there was a strong possibility of obtaining water from a passenger of the bus and if not even from a house nearby. There was no need to request for a vehicle to take him home for a glass of water and this explanation has to be rejected as improbable, in the analysis.

16. Taken as a whole the evidence of the 1st Defendant cannot be relied upon and should be rejected as false in the proper analysis. He also said that the bus could not travel beyond 65km per hour as speed was locked, this again came up for the first time in his evidence in court and not confronted with any of the witnesses, specially the police officer who did the investigation. This locking of speed is again nothing but a fabrication of the 1st Defendant and should be rejected in the proper analysis of the evidence. It lacks spontaneity as there was no evidence of such locking of speed of the bus before me apart from the mere statement of the 1st Defendant. If such locking was done there would have been evidence from the bus company where he worked for more than 13 years and this was easily obtainable to the 1st Defendant as he is still employed by the said company. He did not obtain it and not even stated of such locking device till the conclusion of the case.

17. His evidence as a whole is unreliable and containing falsehood on many relevant issues. As regards to the mirror above him inside the bus, he was evasive. First he said the purpose of the said mirror was to see the vehicles coming from behind, but at the end stated that it was used to see the movements of the passengers, and also admitted reversibility of the light on a plane mirror. So, as much as he could see the passengers inside the bus, the close passengers could have easily seen his eyes through the mirror because of the closeness as well as the lighting condition at that time. The passenger who gave evidence was on the aisle seat on the third row from the front on the left hand side of the vehicle and so he could easily seen the eyes of the Driver. The 1st Defendant even tried to hide this fact in his evidence and his demeanor was visible from the beginning.

18. The first Defendant in his examination in chief said that after the accident he drove the bus to the front and parked in front of the cab! But in the cross-examination said after the

collision he could not control the bus. It is unbelievable to drive a vehicle to the front and parking it after an accident. As an experienced driver who had driven vehicles for more than 30 years he should have known that after an accident vehicle should not be deliberately moved from the scene of accident. There is inconsistency *per se* in his evidence. This happens when a person tries to lie or hide an obvious fact.

19. In the cross examination the 1st Defendant who had driven buses for last 13 years in the same route could not state the distance of the journey and avoided the question saying that the distance is irrelevant to his job as a driver. It is highly improbable for a driver of a bus not to know the distance of his journey. This again indicate the evasive nature of the answers given by the 1st Defendant. This was deliberate action in order to hide the speed of the bus as the distance travelled, with time would have determined the average speed of the journey.

20. The 1st Defendant had caused to collide the bus he was driving with the cab and on the preponderance of evidence the bus was driven at an excessive speed. This can be deduced from the massive impact that had not only killed one person instantaneously, but also caused a stationary vehicle to airborne and thrown away for a distance of 12.1 meters. The carnage at the scene and the damage to the cab and injuries to the passengers of the cab, all corroborate the excessive speed of the bus.

21. After such a collision the bus had also moved for more than 56 m from the point of impact, also indicating the excessive speed of the bus. 3rd Defendant who was the driver of the cab said after collision of the bus the cab moved forward and collided with a culvert in front and then the cab was thrown away. Taken all this evidence in totality the bus no DCSL 03 driven by the 1st Defendant was driven at an excessive speed and also it had veered off from the main road and collided with the parked cab DC43 on the right side from behind. There was no application of brakes by 1st Defendant. When these facts are taken as a whole it can be safely deduced that the 1st Defendant was either sleeping or not under proper lookout for the users of the road indicating negligence on his part. He

had tried to cover it up his negligence with falsehood and deception, while he was giving evidence in this court. The road was clear and weather was fine and if the driver of the bus was making a proper lookout he would have avoided this accident and this collision had happened due to sole negligence of the 1st Defendant. There was no negligence proved on the 3rd Defendant's part, who had not only parked and stopped the engine of the cab and waiting for unloading of all the belongings of the passenger namely Merioni who had got off from the said place. At the same time deceased was also trying to get down in order to feed the infant. In the circumstances 1st and 2nd Defendants are liable for damages resulting from this accident.

Assessment of Damages

22. The only evidence regarding the assessment of damages came from the husband of the deceased who was also an eyewitness of this accident. According to him they had got married in 2005 and the wife was involved in the farming while he was fulltime employed in the Public Works Department. The Plaintiff had 10 acres of land for cultivation and the wife used to engage in the farming of cash crops including vegetables in the said 10 acres. He said after consumption of the produce the remaining harvest used to be sold to shop at the village. The wife of the deceased also used to catch fish and crab for consumption. The plaintiff estimated the contribution of his wife at $60-70 per week. This evidence was cross-examined but the fact of having a farm and selling the crops for shop was established from the evidence of the Plaintiff.

23. In order to prove a fact there need not be a particular number of witnesses, but the quality of the evidence is more important than mere number. The Plaintiff's evidence on the assessment was not corroborated by any documentary or independent oral evidence. The Plaintiff was unaware of the finer details of the income from the farm, and this can be understood in a unit of a family where both partners support each other and would not go into the finer details of all the earnings as in a books of accounts in a company. Every detail will not be available and also not known, but that does not necessarily mean that the claim for damages should be rejected.

24. In the circumstances I would consider a more conservative approach considering there were no corroborating evidence for the amount of earning and the Plaintiff was also not in a position to provide details of the income. When the income is stated there is inherent likelihood of exaggeration, too. The deceased was a mother of 3 children including an infant of 6 months. Her engagement in farming would have limited in the circumstances, specially considering her obligation towards them.

25. Considering all the above factors, in my judgment the weekly contribution from the wife is assessed at $60.00. So the annual income is $60X52=$3120. The deceased was 32 years of age and considering age and the multipliers applied in cases provided to me the multiplier of 15 would be reasonable. So the loss due to future earnings is $60X52X15=$46800. For loss of expectation of life both parties in their respective submissions allocated $3,000 and I allow that in the absence of any dispute. The cost of this action is summarily assessed at $5,000. Interest of 6% per annum is granted for special damages 3% per annum is given from the date of incident to the date of trial.

Conclusion

There is no evidence of any contributory negligence on the part of 3rd Defendant. 1st and 2nd Defendants are jointly and severally liable for the damages of the negligence of the 1st Defendant.

The damages are assessed as follows:-

Special Damages	$ 1,000.00
Funeral Expenses	$ 3,000.00
Loss of Expectation of life	$ 3,000.00
Interest from 24.01.2010 to 20.02.2014 at 3% (Approximately round off to the dollar)	$ 872.00
Loss of Future earnings	$46,800.00
Total	$54,672.00

Final Orders

a. The Plaintiff is granted damage in the sum of $54,672.00 against the 1st and 2nd Defendants jointly and or severally.

b. The Plaintiff is also granted a cost of $4000 assessed summarily to be paid by the 1st and or 2nd Defendant, jointly and severally.

Deepthi Amaratunga

Judge

High Court Labasa

07.03.2014