

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 132 OF 2017

BETWEEN : **TIOMOTE PASERIO** as the administrator of the Estate of Maria
Visenia Ofasiga Penjueli of Stage 5 Lautoka, Fiji, Retired.

CLAIMANT

AND : **ALVISH ANSHAL KUMAR** of Tabataba, Ba, Student.

FIRST DEFENDANT

AND : **YANESHWAR NAIDU RAM** of 1 Kama Street, Lautoka, Electrician.

SECOND DEFENDANT

Appearances : Mr M. Chand for the plaintiff
Mr N. S. Khan for the first defendant
Date of Hearing : 05-07 February 2020
Date of Submission : 05 March 2020 (1st defendant), 27 March 2020 (plaintiff) and
21 April 2020 (plaintiff's further submission)
Date of Judgment : 17 June 2020

J U D G M E N T

Introduction

[01] The plaintiff has brought this action against the defendants claiming damages. The claim arises out of the death of Maria Visenia Ofasiga Penjueli as a result of a motor vehicle accident which occurred on 29 May 2016. At the time of the accident the deceased was a passenger in the car.

The background facts

[02] The background facts as pleaded in the amended statement of claim filed on 24 July 2017 are as follows:

2.1 Tiomote Paserio, the plaintiff (*"the plaintiff"*) is the father and administrator of the estate of the deceased Maria Visenia Ofasiga Penjueli (*"the deceased"*) and brings this action for the benefit of the following persons:

- a) Pita Timote Penjueli, the son of the deceased now aged 20 and born on 21/06/1997.
- b) Viliame Alan Cox Senivau, the son of the deceased now aged 17 and born on 15/01/2000.
- c) Nicholas Kama, the son of the deceased now aged 15 and born on 11/01/2002.
- d) Grace Hefrani Penjueli, the daughter of the deceased now aged 8 and born on 03/09/2008.
- e) Tiomote Paserio, the administrator and father of the deceased now aged 78 and born on 06/06/1939.

2.2 The deceased was born on 21 February 1971 and was about 46 years old at the time of her death. Letters of Administration to her estate was granted to the plaintiff out of the High Court on 19 September 2016.

2.3 At the time of her death the deceased was employed by South Seas Cruises as Reservations Manager and was earning an annual gross salary of \$45,000.00.

2.4 On 29 May 2016, the deceased was a passenger in a motor vehicle, registration number FX 083, which was being driven by Alvish Anshal Kumar, the first defendant from Nadi to Lautoka.

2.5 Yaneshwar Naidu Ram, the second defendant was the owner of the motor vehicle.

2.6 At or about 5.45 am on 29 May 2016, the first defendant, in attempting to overtake another motor vehicle, lost control of the vehicle registration no. FX

083 causing it to skid and tumble off the road. As a result of the impact the deceased sustained injuries causing her death.

2.7 The plaintiff alleges that the accident and the death of the deceased were caused by the negligence of the first defendant by:

Particulars of Negligence

- a) failing to exercise the necessary care of a prudent driver.
- b) failing to control the motor vehicle in such manner so as to avoid the incident.
- c) failing to keep any or any proper look out.
- d) exceeding the prescribed speed limit.
- e) failing to brake, steer, or otherwise manoeuvre the motor vehicle in such a manner as to avoid skidding, tumbling or losing control thereof.
- f) in the circumstances, the first defendant failed to take any or any proper care in carrying the deceased as his passenger and exposed her to unnecessary risk.

2.8 At the time of the accident, the first defendant was on a provisional license.

2.9 After the said accident the defendant left the scene leaving the deceased on the side of the road. The first defendant was charged by the Police for the offences of:

- a) dangerous driving occasioning death, and
- b) failure to comply with requirements following an accident

2.10 The plaintiff also alleges that the second defendant was negligent in allowing the first defendant to drive the vehicle without proper supervision.

2.11 As a result of the accident the deceased suffered substantial injuries.

Particulars of injuries causing death

- i. Severe traumatic brain injury
- ii. Multiple skull fracture
- iii. Severe traumatic chest injury

The first defendant's defence

[03] The first defendant in his amended statement of defence states that:

- a) At all material times the first defendant did not require any supervision to drive.
- b) The first defendant is unaware of what injuries was suffered by the said deceased and states that any injury to the said deceased and her resultant death was not caused as a result of the said accident and/or the driving of the first defendant but her own carelessness and/or recklessness and/or negligence by opening the door of a travelling car, jumping out of the said car and not wearing a seat belt at the time of the accident.
- c) Any injury and resultant death of the deceased was as a result of the fault of the said deceased for the following reasons:
 - i) That the said deceased had opened the door of a moving car and jumped out therefrom when she should not have to;
 - ii) The said deceased caused the vehicle to veer off the road by hitting the back of the driver's seat violently causing the first Defendant to lose control of the said vehicle; and
 - iii) The said deceased was not wearing a seat belt at the time of the accident.
- d) The claimant is not entitled to claim or be awarded any loss and/or damages referred to therein in any manner whatsoever.

- e) The claimant is not entitled to claim damages as the death of the said deceased was not caused by the first defendant in any manner whatsoever.
- f) Any injury and resultant death of the said deceased was not cause by the first defendant but by the carelessness and/or recklessness and/or negligence of the said deceased, therefore the dependents of the said deceased are not entitled to claim and be awarded any loss and/or damages in any manner whatsoever.

Agreed facts

[04] At the pre-trial conference ("*PTC*"), the parties agreed to the following facts:

- 1. The Plaintiff is the administrator of the Estate of Maria Visenia Ofasiga Penjueli ("*Deceased*") who died in a car accident.
- 2. The first defendant, Alvish Anshal Kumar, was the driver of car registration FX 083, which was involved in the accident.
- 3. On 29 May 2016 the deceased was a passenger in a car accident which was driven by the first defendant.
- 4. The second defendant was the owner of the car registration No. FX 083.
- 5. Default judgment was obtained against the second defendant on 14 February 2019.
- 6. At the time of the accident, the first defendant was on a provisional licence.
- 7. After the said accident the defendants left the scene leaving the deceased on the side of the road. The first defendant was charged by the Police for the offence of:
 - (a) Dangerous driving occasioning death, and
 - (b) Failure to comply with requirement following an accident.

The evidence

Plaintiff's evidence

- [05] The plaintiff called witnesses and tendered some documents marked "PE1-PE 4" in support of his claim. His witnesses include: 1. Faizal Ali ("PW1"), 2. Bhomik Chand ("PW2"), 3. Adrian Simmons ("PW3"), 4. Rajendra Kumar ("PW4"), 5. Kemueli Musunamasi, vehicle examiner ("PW 5"), 6. Viliame Allan Cox Senivau, Reporter and Writer ("PW6") and 7. Shereen Buksh, Human Resources Manager ("PW7").
- [06] The documents tendered on behalf of the plaintiff include: Rough Sketch Map drawn by Adrian Simmons for the Road accident (PEX 1), Vehicle Accident Report by Kemueli Musunamasi for vehicle registration No. FX 083 (PEX2), Original Birth Certificates of the dependents (PEX 3), Copy of the payslip of Maria Visinia Ofasiga Penjueli (PEX4).

First defendant's evidence

- [07] The first defendant called 2 witnesses namely Bijendra Kumar Senior Court Officer (DW1) and Alvish Anshal Kumar, Application Support Engineer, the first defendant (DW2). The documents tendered on behalf of the first defendant were that: 1. Copy of the Judgment (Traffic Case No. 956/2016) *State v Alvish Anshal Kumar* dated 1 October 2019 (DEX 1) and Copy of the Magistrate's Minute dated 19 September 2016 (DEX 2).
- [08] I will, where necessary, narrate what each witness stated in their evidence in my discussion section of this judgment.

The issues

- [09] The primary issue was whether or not the accident that occurred on 29 May 2016 and the death of the deceased was caused as a result of the carelessness and/or recklessness and/or negligence of Alvish Anshal Kumar as pleaded in the amended Statement of Claim (liability issue).
- [10] Secondly, if the primary issue was answered affirmatively whether the defendants are liable to pay loss and damages to the plaintiff and in what quantum.

Discussion

- [11] The claim arises out of a motor vehicle accident which occurred at the early hours of 29 May 2016. The vehicle involved in the accident was driven by the first defendant in which the deceased was one of the passengers. The plaintiff has brought this claim as the administrator of the estate of the deceased.
- [12] At the time of the accident there were 3 passengers in the vehicle and they were fully drunk. The deceased and PW1 were seated at the back seat of the vehicle.
- [13] It is to be noted that at the time of the accident the first defendant was a holder of provisional driver's licence, and that there was no evidence whatsoever that the first defendant was drunk at the time of the accident. The first defendant was not charged for drunk driving, although he surrendered to Police (Lautoka Police Post) soon after the accident.
- [14] It will also be noted that there was no mechanical defect in the vehicle at the time of the accident. The vehicle accident report for FX 083 (the vehicle that was involved in the accident) tendered by the Land Transport Authority authorized examiner, PW5 confirms this (PEX2).
- [15] It was not in dispute that the second defendant was the owner of the car registration no. FX 083.
- [16] The claim against the second defendant is based on the allegation that he (second defendant) was negligent in allowing the first defendant without proper supervision. The plaintiff had entered a default judgment against the second defendant with damages, interest and costs to be assessed. The second defendant did not participate in these proceedings.
- [17] I need to determine the liability of the first defendant.

Liability issue

- [18] The issue to be determined by the court was whether or not the first defendant on 29 May 2016, drove the vehicle negligently causing the death of the deceased who was a passenger in that vehicle.

[19] The plaintiff in his amended statement of claim provides particulars of negligence of the first defendant. At paragraphs 6 and 7 of the amended statement of claim, he states:

6. *At or about 5.45 am on 29 May 2016, the first defendant, in attempting to overtake another motor vehicle, lost control of the vehicle registration no. FX 083 causing it to skid and tumble off the road. As a result of the impact the deceased sustained injuries causing her death.*

7. *The plaintiff alleges that the accident and the death of the deceased were caused by the negligence of the first defendant by:*

Particulars of Negligence

- a) failing to exercise the necessary care of a prudent driver.*
- b) failing to control the motor vehicle in such manner so as to avoid the incident.*
- c) failing to keep any or any proper look out.*
- d) exceeding the prescribed speed limit.*
- e) failing to brake, steer, or otherwise manoeuvre the motor vehicle in such a manner as to avoid skidding, tumbling or losing control thereof.*
- f) in the circumstances, the first defendant failed to take any or any proper care in carrying the deceased as his passenger and exposed her to unnecessary risk.*

[20] Since the plaintiff has particularised negligence of the first defendant, the onus is on the plaintiff to prove their allegations on the balance of probability, the civil standard of proof.

[21] In civil cases the burden of proof lies on him who affirms a fact, not on him who denies it (*Ei Qui Affirmat, Non ei Qui Negat, Incumbit probatio*) (See: *ABC of Evidence by Bartley and Brache 3rd Edn*). This ancient rule should not be deported without strong reasons (see: *Joseph Constatine Steamship Line Ltd v Interpeial Smelting Corporation Ltd*).

[22] In this case it was incumbent on the plaintiff to prove on the balance of probability that at or about 5.45 am on 29 May 2016, the first defendant; in

attempting to overtake another vehicle at Viseisei (place of accident) lost control of vehicle registration no. FX 083 causing it to skid and tumble off the road. As a result of impact the deceased sustained injuries causing her death.

Magistrates Court Proceedings

- [23] In the Magistrate's Court, the first defendant was charged with the offences of dangerous driving occasioning death and failure to comply with the requirement following an accident. After a full hearing, the Magistrate's Court acquitted the first defendant of both counts on a no case to answer submission (DEX 1). In criminal proceedings, no case to answer submission is made when the prosecution fails to adduce evidence touching each element of offence or offences. Such submission is made at the close of the prosecution case.

No case to answer in civil proceedings

- [24] Submissions of no case to answer are available in civil proceedings as well. At the conclusion of the case for the claimant, the defendant may make a submission of no case to answer. This is made on the basis that on the evidence adduced by the claimant the claim cannot succeed.
- [25] In general, the judge may require a defendant to elect to call no evidence before making a submission of no case to answer (see: *Blinkhorn v Hall* LTL 13/4/2000; *Miller v Cowley* [2002] EWCA Civ 1100).
- [26] However, there may be circumstances where a submission may be entertained without putting the defendant to an election (see: *Mullan v Birmingham City Council* (1999) *The Times*, 29 July 1999).
- [27] Where the Court allows a defendant to make submission of no case to answer without being required to elect whether to call no evidence, the test by which the submission is determined is whether the claim has no real prospect of success (*Benham Ltd v Kythire Investment Ltd* [2003] EWCA Civ 1794). On the other hand, if the defendant is put to his election and decides to call no evidence, the submission of no case to answer is decided on the basis of whether the claimant has established the case on the balance of probabilities (*Miller v Cowley* [2002] EWCA Civ 1100).
- [28] In the case at hand, the first defendant elected to call evidence.

- [29] The plaintiff has the burden of proof on a balance of probabilities. It is for the plaintiff to prove the case.
- [30] Evidence of the five plaintiff's witnesses related to liability issue.
- [31] The party with the burden of proof fails to discharge that burden, the fact is treated as not having happened. If the burden of proof is discharged, the court treats the fact as having happened.
- [32] Cases are decided by publicity of evidence addressed at the trial, not by weight of number of witnesses on one side compared to other (see: *Gurney Consulting Engineer v Glealth and Safety Ltd* [2006] EWHC 43 (TCC) at [117]).
- [33] In this case, the plaintiff must prove that the accident resulted from the first defendant's own negligence.
- [34] PW1, one of the passengers who were in the vehicle at the time of the accident, testified that he was unaware of things because of his drunken state but admitted that Maria was also fully drunk. He also admitted that Maria would have kicked the back of the driver's seat and would have jumped out of the car.
- [35] It is important to note that not only PW1 but also the rest of the plaintiff's witnesses were able to discharge how the accident occurred, albeit he may be called "*an eye witness*".
- [36] I should say evidence of the plaintiff's witnesses who were called to establish the first defendant's negligence does not prove which act or omission constitutes a failure to take proper care for the deceased's safety.
- [37] The basic allegation was that the first defendant (driver) drove the vehicle carelessly, recklessly or negligently causing accident in which the deceased died. The amended statement of claim specifies and particularizes the manner in which the accident was caused that at or about 5.45 am on 29 May 2016, the first defendant, in attempting to overtake another motor vehicle, lost control of vehicle registration no. FX 083 causing it to skid and tumble off the road. As a result of the impact the deceased sustained injuries causing her death.
- [38] There was not a scintilla of evidence before the court that the first defendant was attempting to overtake another vehicle.

- [39] The evidence adduced on behalf of the plaintiff fails to establish that the first defendant was over speeding in an attempt to overtake another vehicle. Moreover, there was no evidence that any of the passengers in the car complained about the over speeding of the driver, the first defendant.
- [40] Under cross examination, it was suggested to the first defendant that he was over speeding. The first defendant denied it and confirmed that he was driving within speed limit and no one in the car complained about the speeding.
- [41] Having failed to prove negligence of the first defendant through direct evidence, the plaintiff attempted to rely on *res ipsa loquitur* to prove the first defendant's negligence.
- [42] The attempt by the plaintiff to invoke the assistance of the rule *res ipsa loquitur* was an ambush. The plaintiff had not pleaded the rule of *res ipsa loquitur* in his amended statement of claim. He did not even disclose this during his opening speech he made before the commencement of the trial.
- [43] At the trial, counsel for the plaintiff tried to rely on the rule of *res ipsa loquitur* by asking questions that support the application of that rule. This was vehemently objected to by counsel for the first defendant on the ground that it was not pleaded in the statement of claim and thus the first defendant had not been put on notice to counter the same. I, having heard the submissions advanced by both counsel, upheld the objection raised by counsel for the first defendant.
- [44] *Res ipsa loquitur* (the facts speaks for themselves) is a rule of evidence that allow the injured parties to bypass the usual proof of negligence in their claim to recover damages from the responsible parties. It comes to play where an accident of unknown negligence on the part of the defendant in control of the object or activity which injured the plaintiff or damages his property.
- [45] On the applicability of the rule of *res ipsa loquitur*, the High Court (Connors J) in *Ali v Ali* [2006] FJHC 98; HBC 236.2000L (17 February 2006) said [at paragraphs 19-23]:

"[19] I have had the benefit of written submissions filed on behalf of the plaintiff and on behalf of the defendants. The plaintiff's written submissions in addition to referring to relevant parts of the evidence makes a submission based upon res ipsa loquitur. Res ipsa loquitur is however not pleaded in the statement of claim.

Notwithstanding the submission relies upon the English authorities and is based upon *Swan v Salisbury Construction Co Ltd* [1966] 2 All ER 138 at 142.

[20] The issue of *res ipsa loquitor* was considered by the High Court in *Abhimanu* where Finnigan J considered *Schellenberg v Tunnel Holdings Pty Ltd* [2000] HCA 18; [2000] 200 CLR 121.

[21] In *Schellenberg*, Gleeson CJ and McHugh J said at paragraph 22:

"Although Australian and English Courts have diverged as to the scope and effect of the principle of res ipsa loquitor, in this country its scope and effect have been decisively settled by serious of decisions of this court. Those decisions make it clear that the trial judge correct when he said that the principle is not a distinct, substantive rule of law, but an application of an inferential reasoning process, and that the plaintiff bears the onus of proof of negligence even when the principle is applicable." [Underlining provided]

[22] Their Honours later said at page 134:

"What flows from the statement of principles is that, while res ipso loquitor may ameliorate the difficulties that arise from a lack evidence as to the specific cause of an accident, the inference to which should give rise is merely a conclusion that is derived by the trier of fact from all the circumstances of the occurrence. When it applies, the trier of fact may conclude that the defendant has been negligent although the plaintiff has not particularized a specific claim in negligence or reduced evidence of the cause of the accident. But it does nothing more."

[23] *Even if res ipsa loquitor had been pleaded it would not assist the plaintiff as he would still bear the burden of establishing that the defendant was in fact negligent."* [Emphasis provided]

[46] The plaintiff, according to decided cases, bears onus of proof of negligence even when the principle of *res ipsa loquitur* is applicable.

[47] That said the plaintiff in this case seeks recourse to the rule of *res ipsa loquitur* when he failed to discharge the onus of proof of negligence of the first defendant through direct evidence.

[48] The plaintiff, in my opinion, is not entitled to invoke assistance of the rule of *res ipsa loquitur* when he failed to discharge his onus of proof of the first defendant's negligence, through direct evidence. He alleged that the first defendant lost control of the vehicle and causing the accident which claimed the life of the deceased, and failed in establishing such allegation through this witness including the eye witnesses, PW1 who was in the car with the deceased at the time of the accident.

First defendant's explanation

[49] The first defendant gave evidence on his behalf and explained the circumstances that led to the accident. He testified that the deceased who was seated at the back seat along with PW1 forcefully kicked the driver's seat from behind and the deceased jumped out of the car. He said the deceased was a sizable Fijian lady with approximately 120kg weight was heavily drunk.

[50] Even PW1 confirmed in his evidence that the deceased was heavily drunk at the time of the accident.

[51] Considering the size of the deceased it is unlikely that she would have been thrown out of the car window.

[52] It will be noted that there were 3 passengers in the car at the time of the accident and only the deceased sustained injuries as a result of the impact. This leads me to infer that the deceased sustained injuries as a result of her jumping out of the moving car. The deceased might have become violent because of her heavy intoxication.

[53] Only the first defendant provided an explanation of how the accident occurred. There was no other explanation given by any of the plaintiff's witnesses.

[54] The first defendant was extensively cross examined by counsel for the plaintiff. However, he was unshaken by the cross examination and he was firm in his explanation of how the accident occurred.

[55] The first defendant gave clear and straightforward evidence. His evidence appears to be credible. I would accept his explanation as to what caused the accident.

Conclusion

[56] For the reasons I have given above, I conclude that the plaintiff with the burden of proof had failed to discharge that burden. This simply translates that the plaintiff had not proven on the balance of probabilities that the death of the deceased was caused by the negligent act of the first defendant. The plaintiff is, therefore, not entitled to claim damages from the defendants. I would accordingly dismiss the claim with summarily assessed costs of \$2,500.00 payable to the first defendant by the plaintiff.

Assessment of damages

[57] The question of assessment of damages does not arise because the plaintiff had failed to establish the liability of the defendant to pay damages.

The outcome

1. Claim dismissed.
2. The plaintiff shall pay summarily assessed costs of \$2,500.00 to the first defendant.



H.M. Mohamed Ajmeer
27/6/20

.....
M.H. Mohamed Ajmeer
JUDGE

At Lautoka
17 June 2020

Solicitors:

Munro Leys Lawyers for the plaintiff

Nazeem Lawyers for the first defendant