

IN THE SUPREME COURT OF FIJI
Civil Jurisdiction
ACTION NO. 853 OF 1981.

Between:

SHASHI RAJ BHUSAN s/o Ram Hith PLAINTIFF

- and -

VILIAME N. 1ST DEFENDANT

MINISTER FOR WORKS AND
COMMUNICATIONS 2ND DEFENDANT

THE ATTORNEY-GENERAL 3RD DEFENDANT

Mr. A.H. Rasheed for the plaintiff.
Mr. A.R. Matebalavu with
Mr. J.K.L. Maharaj for 1st, 2nd and
3rd defendants.

J U D G M E N T

The plaintiff's claim was originally for damages for injuries sustained by him arising out of the alleged negligent driving by the first defendant of a Public Works Department (P.W.D.) truck on the 1st day of September, 1980.

The plaintiff on that day was a passenger in a motor car Registered Number AC327 which was being driven by Lorraine Usha Dhani a typist also employed by the P.W.D. at the office where the plaintiff was employed as an Assistant Chief Clerk.

The motor car was involved in a collision with

2.

the P.W.D. truck at Walu Bay, Suva, at about 10 a.m. on the day in question. Lorraine Usha Dhani died as a result of the accident and the plaintiff received injuries.

It was agreed by counsel that the issue of liability should be tried first because Mr. Rasheed was unable at the time to obtain an up to date medical report on the plaintiff and the doctor was not available because of short service of a subpoena. During the hearing Mr. Rasheed applied to amend paragraph 8 of the Statement of Claim. He did not hand up written particulars of the amendment he asked for but verbally indicated that the amendment was to paragraph 8 by adding "and/or the said Lorraine Usha Dhani during the course of her employment and/or contributed by the said Lorraine Usha Dhani after the word "employment" in the second line of paragraph 8.

Leave to amend was granted on terms and the plaintiff was ordered to file an amended Statement of Claim before the date of the adjourned hearing.

The plaintiff purported to file amended pleadings but paragraph 8 of the Statement of Claim was not amended.

Despite the plaintiff's failure to file an amended Statement of Claim the defendants filed a further amended Defence.

The plaintiff's story is that he was working for the P.W.D. at Walu Bay, Suva, on the 1st September, 1980. His duties included looking after accounts which necessitated his having to travel on occasions to the P.W.D. headquarters in Ganilau House in central Suva.

About 10 a.m. that day he said he had to go to Ganilau House. Transport was normally available from a Government transport pool at Walu Bay. He said he asked as inspector for transport but no car was available. He said he was told to find his own way to Ganilau House.

Lorraine Usha Dhani was a typist who worked in the same department as the plaintiff. She owned a car.

The plaintiff's superior he said was absent at the time and the plaintiff was in charge. He said he instructed Mrs. Dhani to drive him to Ganilau House, drop him there and return to Walu Bay.

Mrs. Dhani drove her car and the plaintiff sat in front. She drove along Moala Street to its junction with the main road, Queen's Road, but at Walu Bay also known as Foster Road.

The plaintiff says that as soon as they passed the Moala Street junction he saw a P.W.D. truck coming from the direction of Suva. His description of what happened next is as follows :

"We were coming out of side road onto main road. Mrs. Dhani was crossing junction. I could not say how much of car came out of Moala Street. It was a head on collision. I was injured on head and face. Vehicles collided face to face. I remembered nothing after the accident".

A little later he said :

"P.W.D. did not attempt to turn into Moala Street. Accident occurred about 15 or 20 yards from Moala Street junction".

This second statement indicates that the plaintiff has no clear recollection as to what happened and led Mr. Rasheed later to amend the Statement of Claim alleging that Mrs. Dhani in the course of her employment was negligent or contributed to the accident.

Mr. Rasheed called no witness other than the plaintiff and on the issue of liability closed his case after re-examining the plaintiff.

At the close of the plaintiff's case there was no clear evidence before the Court to indicate how and where exactly the accident happened.

Mr. Maharaj called a police photographer as a witness. On the day of the accident he took photographs of the car and the P.W.D. truck. The visible damage on the vehicles indicate that the collision was virtually a head-on collision with the major portion of the damage to the truck being from the centre out to the right in the front.

The first defendant was the driver of the truck on the day in question. His story was a straight forward one and provided the only detailed evidence as to what happened that day.

He said it was a fine day and that at about 10 a.m. he was driving the P.W.D. truck on Queen's Road at Walu Bay and was returning to the P.W.D. yard at Walu Bay.

At a bus stop near Pacific Transport premises an accident happened. He was on his left and correct side of the road. He said a car came from the opposite direction and came onto his side of the road. He stopped and as he did so the accident happened. He said the car was travelling on its correct side of the road and when near him the car crossed the white line and he was unable to avoid the accident.

Under cross examination he said he first saw the car about 15 yards away. There was a bend in the road where accident happened - a left hand bend for the witness. Photographs put in by the police photographer show a slight curve in the road not obstructing vision. He said he was travelling at about 20 to 25 miles per hour. When car was about 5 yards from him it cut in towards him and hit his truck on its right front bumper.

A taxi driver, Abdul Gani was travelling right behind the first defendant. He confirmed that day was fine, and truck

travelling at about 20 to 25 miles per hour. He said a car coming from the opposite direction turned all of a sudden and hit the centre of the truck and bounced back. He confirmed truck was on its correct side of the road and that car was on its correct side up to the point where it suddenly veered across the road. He said accident near the Pacific Transport Office about two chains from Moala Street. He said accident did not happen on the bend but on a straight stretch of road.

Under cross examination he said car was travelling at a high speed but I doubt whether he saw car long enough to judge its speed.

I accept the evidence of the first defendant. There was no negligence on his part.

There is no evidence at all to explain why Mrs. Dhani's car suddenly veered across the road into the path of the P.W.D. truck.

Mr. Maharaj stated that the doctrine of res ipso loquitur was not pleaded by the plaintiff. The maxim does not have to be pleaded and the plaintiff is not precluded from relying on the doctrine. Anchor Products v. Hedges (1966) 115 C.L.R. 493. In my view, however, the doctrine has no application in the instant case. The plaintiff established the two vehicles were involved in a head on collision. There was an explanation for the collision provided by the evidence of the first defendant. The cause of the accident is known.

The car veered across the road into the path of the truck and in the absence of any explanation as to why that happened it must be held that that fact was more consistent with negligence on the part of Mrs. Dhani than any other cause.

I hold that Mrs. Dhani was negligent.

The next issue to decide is whether the Crown is liable for the negligence of its servant Mrs. Dhani.

The defendants called a number of witnesses whose evidence I prefer to that of the plaintiff.

The plaintiff had stated that on the day in question he was in charge because his superior was away.

Mr. M. Joseph gave evidence that on the day in question he was the plaintiff's superior. He said that the plaintiff asked for leave saying "we want to go to the Registrar General's Office". "We" referred to the plaintiff and Mrs. Dhani. Mr. Joseph spoke to the plaintiff as he and Mrs. Dhani were leaving the P.W.D. Office

As regards transport Mr. Joseph said Government transport was available from the Central Pool. If no transport was available when requested, a person had to wait for it. Staff were not authorised to use private vehicles.

Mr. Tara Chand, a clerk, who worked with the plaintiff confirmed Mr. Joseph's story. He said that that day as he was leaving the office the plaintiff said "If anybody wants to know I am going to the Registrar General's Office".

The plaintiff denied any personal involvement with Mrs. Dhani but he admitted that his wife had come to the office on a Friday and quarrelled with Mrs. Dhani. His wife wanted to know why Mrs. Dhani was travelling with her husband.

I am satisfied that the plaintiff and Mrs. Dhani both left the P.W.D. Office that day not on official

business but for private reasons. I do not accept the plaintiff's story that he was going to Ganilau House that day on official business and ordered Mrs. Dhani to drive him in her private car because official transport was not available. She was employed as a typist. The legal position is that a master is liable for the negligence of the servant if committed in the course of his employment but is not liable for negligence committed outside the scope of his employment.

In Hilton v. Thomas Burton (Rhodes) Ltd. 1 W.L.R.705 where the facts were similar to the facts in the instant case it was held that the employers were not vicariously liable for the negligent driving of their servant where the servant when driving his employer's van with permission was not at the time doing that which he was employed to do.

Diplock J. (as he was then) said at p. 707:

"The question remains, and it is probably the most important practical question in this case: are the first defendants liable, vicariously, for the second defendant's negligence? I think that the true test can best be expressed in these words: was the second defendant doing something that he was employed to do? If so, however improper the manner in which he was doing it, whether negligent as in Century Insurance Co. Ltd. v. Northern Ireland Road Transport Board, or even fraudulently, as in Lloyd v. Grace Smith & Co. or contrary to express orders, as in Canadian Pacific Railway v. Lockhart, the master is liable. If, however, the servant is not doing what he is employed to do, the master does not become liable merely because the act of the servant is done with the master's knowledge, acquiescence, or permission."

Mr. Rasheed relies on the case of Irwin v. Waterloo Taxi Cab Co. Ltd. /1912/ 3 K.B. 588 where a superior servant gave orders to an inferior servant of the same employer to drive a vehicle for the superior servant's private business and the inferior servant was negligent the employer was held to be vicariously liable.

This case involved a servant who was employed

8.

to drive and he drove on orders from a superior. He was acting in the course of his employment.

In the instant case Mrs. Dhani was not employed to drive for the P.W.D. and she was not bound to obey the plaintiff's orders to use her private car to transport him.

The plaintiff asked for leave which was apparently granted. The request for leave appears to have been for the plaintiff and Mrs. Dhani to go to the Registrar General's Office for a purpose which I have held was private. Neither of them were performing any official duties and Government cannot be held responsible for Mrs. Dhani's apparent negligence.

The plaintiff's claim is dismissed with costs to the defendants.

R. G. Kermod
(R.G. KERMODE)
J U D G E

S U V A,

14 JUNE, 1984.