

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 59 OF 2012

BETWEEN : **PUSHPA WATI** of Lajonia, Labasa Cultivator
PLAINTIFF

AND : **NARDEEP KARAN KUMAR** of Koronivia, Nausori, Driver
1ST DEFENDANT

AND : **HEMANT KUMAR** of Koronivia, Nausori, Taxi Driver
2ND DEFENDANT

AND : **JABBAR HUSSAIN** of Korowiri, Labasa, Truck Driver
3RD DEFENDANT

AND : **VALEBASOGA TROPIK BOARD LTD** a limited liability company having its registered office at Nayaca Sub-Division, Labasa
4TH DEFENDANT

Counsel : Mr. Padayachi K for Plaintiff
Mr. Sharma S for 1st and 2nd Defendants
Mr. Ratule K for 3rd and 4th Defendants

Date of Hearing : 10th September 2015

Date of Judgment : 29th January, 2016

J U D G M E N T

INTRODUCTION

1. The Plaintiff in this case was a passenger in vehicle registration No DO 252, and the vehicle developed a mechanical fault and stopped on the way and it was towed by the

vehicle bearing registration No DO 574. While being towed the vehicle No DO 252 veered off the road fell in to a side drain. According to the statement of claim the Plaintiff was in doubt as to the person or persons liable for the negligence that caused the accident. The Plaintiff has stated particulars of negligence for both 1st and 3rd Defendants separately. The negligence alleged against the 3rd Defendant was that the material used for towing was unsafe for the purpose and it was not in compliance with the Land Transport (Traffic) Regulation. The negligence of the 1st Defendant according to the statement of claim were allowing and ordering the passengers inside the vehicle when it was being towed when it was unsafe to do so. There was no evidence as to what resulted accident.

FACTS

2. The Plaintiff and her husband (the Plaintiff in HBC 60 of 2012) were returning home after a wedding on the day of the accident. They were seated on a single cab vehicle, with a canopy and seats on the back so that people could be seated while traveling.
3. The Plaintiff in this case and case No HBC 60 of 2012 were wife and husband respectively, and Defendants in the both cases are the same. All the parties to these actions agreed to abide by the decision of this case relating to the liability and also for apportionment of liability between the parties if both 1st and 3rd Defendants are found joint wrongdoers, as the facts of the two cases are identical and witnesses are the same.
4. The only the Plaintiff and the 3rd Defendant gave evidence at the hearing.
5. The following facts were admitted in the pre-trial conference
 - a. 1st Defendant was at all material times the driver of motor vehicle registration number DO252.
 - b. 2nd Defendant was at all material time the registered proprietor of the vehicle registration number DO 252.
 - c. 3rd Defendant was at all material time the driver of the truck bearing registration DD574.

- d. 4th Defendant was at all material times the registered proprietor of the truck registration number DD574.
 - e. On 10th October, 2009 the Plaintiff was travelling in vehicle registration number DO 252 from Seaqaqa, towards Labasa town when the said vehicle broke down at Korosomosomo Hill and whilst being towed by the 3rd Defendant using DO 574 truck, the DO 252 veered off the road and ended in a drain.
 - f. The 3rd Defendant was charged with the offence of incorrect towing, namely towing of disabled vehicle and failure to comply with requirements following an accident and has paid a fine.
6. The Plaintiff in the statement of claim state that she was uncertain as to the person or persons responsible for negligence that caused the accident.
 7. According to the statement of claim particulars of the negligence of the 1st Defendant are
 - a. Allowing the vehicle to be towed when it was unsafe to do so.
 - b. Carrying passengers when the vehicle was being towed.
 - c. Ordering the Plaintiff to board the vehicle when it was being towed.
 8. According to the statement of claim particulars of the negligence of the 3rd Defendant were

'Towing the vehicle when it was unsafe to do so using towing material that was unsafe and in contravention of Regulation of (1)(a)(6) and (c) of the Land Transport (Traffic) Regulation, 2000'

ANALYSIS

9. The Plaintiff gave evidence and described the circumstances in which she and her family got in to the vehicle Registration No D252. Before the said vehicle reached its final destination some mechanical problem developed and it stopped. When it stopped the passengers had alighted from it. The Plaintiff had requested their luggage which were stored inside the vehicle from the 1st Defendant so that they could proceed by way of alternate method, but the 1st Defendant had told that it could be repaired, hence the

Plaintiff and her family remained. The 1st Defendant did not give evidence so this evidence can be accepted on the balance of probability.

10. After a while the truck driven by 3rd Defendant had arrived and offered help to tow. With the help of that vehicle No D 252 was towed. The towing consisted of two parts. First part of the towing ended when there was a downward slope and after that vehicle No D252 was disconnected and travelled downwards unaided by 3rd Defendant's truck.
11. It had travelled along the slope downwards without towing. The vehicle driven by the 3rd Defendant followed it on the downward slope. 1st Defendant drove the vehicle downward slope and stopped on flat road surface after the slope. The second part of the towing was on a flat road. Again the vehicle No D252 was towed on the flat surface till it met with the accident.
12. It is admitted that throughout towing all the passengers were inside the vehicle No D 252. The only witness who gave evidence was the 3rd Defendant, the driver of the truck said that he had requested the driver of the D252 not to have any passengers inside the vehicle when towing. This cannot be accepted as correct position as he had seen passengers inside the vehicle when first part of towing was over and would have refused to tow for the second part of the journey or would have examined the vehicle on the flat road before the start of second part of the towing. Though the 1st Defendant did not give evidence the refusal to tow with passengers, cannot be accepted on the test of probability.
13. The towing with passengers was a negligent acts of the 1st and or 3rd Defendants as well as the Plaintiff who remained seated when she had opportunity to get out from the vehicle at least after first part of towing. Though the 3rd Defendant denied having knowledge of passengers inside he admitted seeing passengers inside the vehicle when he drove behind the vehicle No 252 along the downward slope. But what caused the

accident? Is it the negligence of carrying passengers that caused the accident? This needs to be proved on balance of probability.

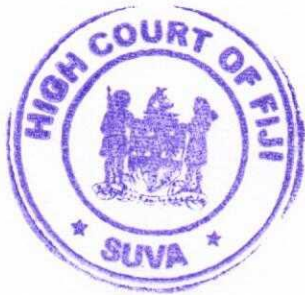
14. The particulars of the negligence needs to be proved by the Plaintiff. In her evidence there was nothing to indicate cause of accident. What caused the vehicle to go off the road and fall in to a drain was not proved in the evidence. Before the accident Vehicle No 252 travelled a considerable distance and what caused the accident is not clear to attribute negligence to 1st and or 3rd Defendant, for the causing the accident.
15. The vehicle No D252 had veered off the road before crossing a train line. According the 3rd Defendant he had changed the gear of the truck to first gear position before crossing the said level crossing and had seen the vehicle behind veered off the road. That does not explain the cause of the accident. The Plaintiff does not state the anything about the cause of the accident.
16. In the circumstances it is not clear as to what caused the vehicle No D252 to travel off the road and end up in the drain from the evidence presented to the court. The Plaintiff had pleaded three specific negligence acts and they are towing when it was unsafe to do, carrying passengers when towing and ordering the Plaintiff to board the vehicle when it was being towed.
17. The vehicle No D252 was towed for some time before the accident. There was no evidence to prove that the vehicle No. D 252 going off the road was result of having passengers inside it or towing was unsafe and that caused the accident. If that was the reason vehicle could not have ascended and descended a fairly steep and long slope for considerable distance without any accident, hence the act of negligence that caused the accident was not towing with the passengers inside said vehicle though it was a negligent act of all the parties. No doubt both the 1st and 3rd Defendants were negligent in towing in that manner but on the balance of probability it was not proved as the cause of the accident. It is important to prove the cause of the accident in order to ascertain


negligence of the parties and apportionment of negligence to each party. In this case travelling inside a towing vehicle was a negligent act of Plaintiff as well.

18. According to the statement of claim the particulars of negligence alleged against the 1st Defendant was caused by carrying passengers while it was towed. This was not proved as the cause of accident, by the Plaintiff. What caused the accident was not proved and Plaintiff has not pleaded *res ipsa loquitur*. There was no obligation on the part of Defendants for explanation. So, in this instance court cannot attribute the liability on one or more parties.
19. The only negligence alleged against the 3rd Defendant relate to the towing material. Again the Plaintiff did not give any evidence relating towing material. When the 3rd Defendant gave evidence he was not cross examined as to the cause of the accident to the said towing material. Whether the length of the towing material contributed the accident cannot be decided from the evidence before me.
20. It is admitted fact that he had used a material longer than that was legally permissible, but how it had caused the accident was not presented through evidence. A mere contravention of rule alone cannot be considered as negligence that caused the accident unless reason for the accident is linked to the said negligence. The same rope was used to tow the vehicle for considerable distance without an accident. So, suddenly the length of towing material caused the accident needs to be elicited in evidence.
21. The statement of claim did not plead *res ipsa loquitur*, hence there was no mandatory requirement for the 1st Defendant to give an explanation as to how the accident happened and he had decided not to give evidence. 3rd Defendant in his evidence did not elaborate the reason for the accident and he was not cross examined on that fact.

22. In the circumstances the Plaintiff has not proved the particulars of negligence that caused the accident. The statement of claim is struck off. Considering the facts of this case I would not award any cost.
23. The reasons for this judgment apply to the HBC 60 of 2012 with necessary changes.
- a. The statement of claim is struck off and action is dismissed
 - b. No costs.

Dated at Suva this 29th day of January 2016




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Justice Deepthi Amaratunga
High Court, Suva