IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 37 of 2014

BETWEEN : **ULAMILA UTONIVESI aka ULAMILA UTONIVESI VISAWAQA** of Nabalebale, Savusavu, Student

PLAINTIFF

A N D : **UBHAY CHAND** of Labasa, Driver

1st DEFENDANT

A N D : **DALIP CHAND & SONS LIMITED** a limited liability Company having its registered office at Ritova Street, Labasa

2nd DEFENDANT

BEFORE : Justice Riyaz Hamza

COUNSEL : Mr. Sarju Prasad for the Plaintiff
Mr. Ami Kohli for the 1st & 2nd Defendants

JUDGMENT

[1] This is an application made by the Plaintiff, by way of Writ of Summons.

[2] At the time the Writ of Summons was issued, on 15 July 2014, the Plaintiff was still a minor. As such, the Writ was filed on her behalf by her next of kin/ next friend and father Tukoli Visawaqa.

[3] In the Statement of Claim attached to the Writ the Plaintiff submits as follows:

1. The Plaintiff is a minor and sues by her father and next kin/friend Tukoli Visawaqa of Nabalebale, Savusavu, a Cultivator.

2. The First Defendant was the Driver of the Motor Vehicle Registered No. FH 914 and was driving the said vehicle in the course of employment for the Second Defendant as his servant and/or agent.

3. That the Second Defendant is a limited liability company having its registered office at Ritova Street, Labasa.

4. At all material times the Second Defendant was the owner of Motor Vehicle Registered No. FH 914 which was a Public Service Vehicle (Bus).

5. On the 27th day of April 2012, the Plaintiff was a fare paying passenger in the Vehicle Registered No. FH 914 travelling from Savusavu to Labasa driven by the First Defendant and at the Urata Hill, the said vehicle caught fire and the entrance of the said bus was engulfed in fire and all the passengers had to jump out to safety through the windows.

6. The Plaintiff also had to jump out from the window and in so doing she landed on the hard surface of the tarseal road and was seriously injured.

7. The said injury was caused solely due to the negligence of the Defendants.

PARTICULARS OF NEGLIGENCE OF FIRST DEFENDANT

a) Driving a defective Public Service Vehicle for conveyance of passengers in that:-

(i) Driving the bus which had defective electrical system.

(ii) Driving the bus which did not have proper electrical wiring.

(iii) Driving the bus which had problems with insulation of electric wires.

(iv) Driving the bus which had problems with electrical short circuiting.

(v) Driving the bus which had problems with alternator main wire sticking to the speed rod and thus causing the fire.

b) Driving at excessive speed which was too fast under the circumstances.

c) Failing to take heed of P.S. V. regulations.

d) Failing to slow down or manage or control or stop the said vehicle in good time so as to attend to the fire and putting it out instantly thus allowing it to get out of control.

e) Driving the vehicle without due care and attention.

f) Being reckless/negligent/careless under all circumstances of the case.

PARTICULARS OF NEGLIGENCE OF SECOND DEFENDANT

a) Permitting the First Defendant to drive a defective PSV (bus).

b) Being reckless/negligent/careless under all circumstances of the case.

c) Failing to keep and maintain the bus in proper repair and maintenance of the bus.

d) Permitting the First Defendant to drive a vehicle which was not mechanically sound for conveyance of passengers for hire and reward.

e) Employing the First Defendant to drive the bus when the First Defendant was not competent to do so.

8. The Plaintiff will rely upon the doctrine of *res ipsa loquitur*.

9. The Second Defendant is vicariously liable for the action of the First Defendant and is also liable for its own negligence.

10. Due to the Defendant's negligence, the Plaintiff suffered serious injuries, loss and damage.

PARTICULARS OF INJURY

a) Painful Right Knee with swelling
b) Abrasion
c) Restriction of motion due to pain
d) Tenderness along front line and medial aspect of right knee
e) Ligament and soft tissue injury to the whole body due to fall.

11. As a result of the accident the Plaintiff was admitted for over two weeks at the Labasa Hospital and then referred to Savusavu Hospital where she was admitted for 4 to 6 weeks (with the permission of Court this was amended to read 4 to 6 days during the hearing) for her full recovery.

12. By the reasons of the said accident, the Plaintiff suffered expenses, pain and suffering, loss of blood, loss of amenities of life and continues to suffer loss and damages.

13. Prior to the accident the Plaintiff was a healthy child with no disabilities and took keen interest in her school work and extra curriculum activities, but after the accident she has faced lots of problem including problem with the right knee and continuous swelling and pain.

PARTICULARS OF SPECIAL DAMAGES

Medical Expenses	-	$300.00
Transport	-	$550.00
Total	-	$850.00

PARTICULARS OF GENERAL DAMAGES

a) Pain and suffering

b) Loss of amenities of life

c) Aggravated Damages

d) Pecuniary Damage

e) Retardation of advancement in life.

f) Scarring

g) Cost of Future Care

14. The Plaintiff claims interest under the Law Reform (Miscellaneous Provision) (Death and Interest) Act, Cap 27 on the award of damages at the rate of 6% per annum on General Damages and at the rate of 3% per annum on Special Damages from the date of accident to the date of Judgment.

[4] Wherefore the Plaintiff claims the following reliefs:

a) Special Damages - $850.00

b) General Damages

i) Pain and Suffering

ii) Loss of amenities of life

iii) Aggravated Damages

iv) Pecuniary Damage

v) Costs

c) Interest under the Law Reform (Miscellaneous Provision) (Death and Interest) Act, Cap 27 on the award of damages at the rate of 6% per annum on General Damages and at the rate of 3% per annum on Special Damages.

d) Cost of this action on indemnity basis.

e) Any other and further relief that this Honourable Court would deem fit and proper.

[5] Subsequent to the issuance of the Writ of Summons, the Writ had been duly served on both the 1st and 2nd Defendants (The Affidavits of Service have been filed of record). However, since no Statement of Defence had been filed and served by the Defendants, a Judgment in Default for Unliquidated Damages was entered, on 30 September 2014. Thereby the Defendants were ordered to pay the Plaintiff the damages to be assessed with costs.

[6] On the same day, a Notice of Assessment of Damages and Interest was filed by the Plaintiff. The said Notice, together with the Judgment in Default for Unliquidated Damages, was served on the 1st and 2nd Defendants.

[7] On 11 March 2015, the Master of the High Court, Labasa, made a Ruling on the Assessment of Damages and ordered the Defendants to pay the Plaintiff the sum of $48,275, inclusive of costs.

[8] On 30 March 2015, a Notice of Motion was filed on behalf of the 1st and 2nd Defendants for setting aside the Judgment in Default and the Order made on the Assessment of Damages. This application was made pursuant to Order 19, Rule 9 of the High Court Rules 1988.

[9] The said Notice of Motion was taken up for hearing before Justice Brito Mutunayagam. On 7 October 2015, His Lordship made Order setting aside the Judgment entered by the Master on 11 March 2015 and allowing the Defendants to file Statement of Defence. This Order was made on the condition that the sum of $48,275 awarded together with interest of 6% per annum from the date of the Judgment of the Master, until the determination of this case, is deposited in the interest bearing account of the Chief Registrar. The Defendants were further ordered to pay the Plaintiff summarily assessed costs in the sum of $2000.

[10] Accordingly, the 1st and 2nd Defendants filed their Statement of Defence on 27 October 2015. They only admit that on the 27 April 2012, Motor Vehicle Registered

No. FH 914 was driven by the First Defendant from Savusavu to Labasa and that the said vehicle caught fire at Urata Hill. They deny all the allegations of negligence made out against them in the Statement of Claim and put the Plaintiff to strict proof of the said matters. The Defendants allege that even if any injuries were suffered by the Plaintiff, that the same had nothing to do with the accident that was caused to the bus.

[11] On 1 December 2015, a Summons to Substitute a Party was filed by the Solicitors for the Plaintiff. Therein it was stated that, at the time this action was instituted (on 15 July 2014) on her behalf by her father, Ulamila Utonivesi aka Ulamila Utonivesi Visawaqa, was a minor. She was born on 12 January 1997. Since she had now reached the age of majority, she was seeking leave to have her name substituted in this action as the Plaintiff.

[12] On 4 December 2015, the Master of the High Court made Order in terms of the Summons by consent. Accordingly, Ulamila Utonivesi aka Ulamila Utonivesi Visawaqa was granted leave to have her name substituted in this action as the Plaintiff.

[13] The Minutes of the Pre-Trial Conference record the following:

Agreed Facts

1. The Plaintiff is a student and lives at Nabalebale, Savusavu.
2. The 1st Defendant was at all material times the driver of Motor Vehicle Registration No. FH 914.
3. The 2nd Defendant was at all times the owner of the Motor Vehicle Registration No. FH 914.
4. On the 27th day of April 2012, Motor Vehicle Registered No. FH 914 was driven by the First Defendant from Savusavu to Labasa and the said vehicle caught fire at Urata Hill.

Issues

1. Was the entrance of the bus Registration No. FH 914 engulfed in fire and the passengers had to jump to safety through the windows?
2. Was the Plaintiff a fare paying passenger in Motor Vehicle Registration No. FH 914 and travelling from Savusavu to Labasa on 27th April 2012?
3. Did the Plaintiff jump out from the window of Motor Vehicle FH 914 when the said bus caught fire and in the process she received serious injuries when she landed on hard surface on the tarseal road?
4. Was the Plaintiff a healthy person prior to the accident with no disabilities whatsoever and was she living a normal healthy life prior to the accident?
5. Was the accident caused as a result of the negligence of the Defendants?
6. Has the Plaintiff suffered set back in life as a result of the accident? If so to what extent?
7. Has the Plaintiff suffered pain and suffering, loss of amenities of life and loss and damages as the result of the accident? If so, what is the quantum of special and general damages payable to the Plaintiff?
8. Does the Plaintiff, continue to suffer severe pain and will she need special care and attention in the future.
9. Can the Plaintiff rely on the doctrine of *res ipsa loquitur* to prove the negligence of the Defendants?
10. Is the Plaintiff entitled to special and general damages and cost of future care? If so, what is the quantum thereof?
11. Is the Plaintiff entitled to interest and costs? If so, what is the quantum thereof?

THE PLAINTIFF'S CASE

[14] During the hearing the following witnesses gave evidence on behalf of the Plaintiff:

1.	Ulamila Utonivesi	-	The Plaintiff (PW1)
2.	Ditya Nand	-	Police Officer attached to the Savusavu Police Station (PW2)
3.	Tukoli Visawaqa	-	The father of the Plaintiff (PW3)
4.	Mosese Matakece	-	Principal of Savusavu Secondary School (PW4)
5.	Dr. Tiko K. Saumalua	-	Medical Officer (PW5)
6.	Epeli Tukania	-	Vehicle Inspector (PW6)

[15] The following documents were also tendered to Court as Exhibits by the Plaintiff:

- **P1-**The Birth Certificate of the Plaintiff
- **P2-**Letter from the Principal of Savusavu Secondary School
- **P3-**Medical Examination Form (Relating to the Plaintiff)
- **P4-**Referral Summary Form (Issued by the Savusavu Hospital)
- **P5-**Medical Report (Issued by Dr. Tiko K. Saumalua, on 23 May 2012)
- **P6-**Vehicle Fire Investigation Report

[16] The Plaintiff (PW1) testified that on 27 April 2012 (she was 15 years of age at the time) she went to school. It was a Friday. After school closed for the day she caught a bus to the Savusavu town. At the Savusavu town she got into another bus registration No. FH 914 to go to her home on Nabalebale. The bus was driven by the 1st Defendant. The bus left the Savusavu town at around 3.30 p.m. heading towards Labasa (Nabalebale is on the way to Labasa).

[17] On the way, on top of the Urata Hill, the front portion of the bus had caught fire. The driver stopped the bus and asked everyone to leave. All the passengers left their belongings and left the bus. Some passengers left through the doors, while others jumped out of the windows. Since, she was sitting in the middle of the bus, and since the entrance of the bus was engulfed in flames, she felt scared to leave through the front door. Thus, she left all her belongings in the bus and jumped through the window.

[18] Upon jumping out of the window she landed on the hard surface of the road. She had landed on her right knee. She was in extreme pain and as a result could not move further away from the burning bus. Other passengers had then carried her away from the bus. She was lying down all the time because she could not stand up on her own. It had taken nearly two hours for the medics to arrive. She was then taken by ambulance to the Savusavu hospital.

[19] At the Savusavu hospital the Plaintiff had been given cold compression treatment and pain killers and was kept under observation. She was in the hospital for several hours and then was taken to her home in a police vehicle. Since she was still in pain the doctors had given her pain killers and sleeping tablets to take while at home.

[20] However, that night she had felt intense pain on her knee. She continued to suffer from the pain throughout the weekend as well. She could not stand up on her own.

[21] Thus on Monday morning (30 April 2012), she was taken to the Savusavu hospital once again. At the Savusavu hospital the doctors advised that she will have to be taken to the Labasa hospital. She came to the Labasa hospital with her mother. Her father had already reached the Labasa hospital when they got there.

[22] X-rays were done at the Labasa hospital. The doctors had said that there was a problem with her knee and that surgery would be required. However, she and her

parents had objected to the surgery as they thought that surgery could have serious consequences.

[23] She remained at the Labasa hospital for nearly two weeks. During this period the doctors removed fluids from her knee joint. However, she still felt pain in her leg, and was given tablets and daily injections to reduce the pain.

[24] Upon been discharged from the Labasa hospital the Plaintiff was taken back to the Savusavu hospital by ambulance. Even during this journey she was having pain on her knee. She was admitted at the Savusavu hospital for 4-6 days. At the Savusavu hospital too she had been given tablets and injections to reduce the pain. Upon discharge from the Savusavu hospital she regularly attended clinics.

[25] The Plaintiff had gone back to school after about three weeks. She had to walk with the help of crutches. While at school she could not take part in any physical activity due to the injury. Even at home she is now unable to do any rigorous physical work she previously was able to do.

[26] The Plaintiff testified that she now walks with a gait. Every time when she walks her focus is on her knee, as sometimes while walking her legs get locked and it gets twisted and due to the pain she has to sit down immediately. Then she has to ask someone to help her to pull and twist her knee back into place. She stated that sometimes due to the acute pain she used to get unconscious (have blackouts).

[27] Tukoli Visawaqa (PW3), the father of the Plaintiff, corroborated the Plaintiff's testimony in all material particulars. He and his wife were reluctant to go ahead with the knee surgery, which the doctors have recommended on the Plaintiff, as they fear that if the surgery was not successful their daughter could suffer more serious consequences. They feared that her condition could get aggravated.

[28] Ditya Nand (PW2), a Police Officer attached to the Savusavu Police Station, testified that he was appointed as the investigating officer into the incident where a bus bearing registration No. FH 914 caught fire. On 27 April 2012, the incident had been reported to the Savusavu Police Station. When he reached the site of the incident, about half an hour later, the bus was being towed away from the scene.

[29] The next witness called by the Plaintiff was Mosese Matakece (PW4), the Principal of Savusavu Secondary School, from 2010 to early 2015. The Plaintiff had been admitted to the school in 2012. PW4 testified that the Plaintiff was a good student. However, subsequent to the injury suffered by her it had affected her performance and attendance. He had observed that she has difficulty in walking and was limping in pain. She walks, then stops and walks again.

[30] Exhibit P2 was a letter given by PW4 on 14 August 2012. Therein it is stated that the Plaintiff was badly injured in a bus accident and is not capable to play or do any physical activity. She has difficulty in walking from home to the bus stop to catch the school bus. This incident has really affected her education at Savusavu Secondary School.

[31] Dr. Tiko K. Saumalua (PW5) was the Medical Officer who examined the Plaintiff when she was brought to the Savusavu hospital. He had examined the Plaintiff at about 5.30 p.m. on 27 April 2012. As per the medical reports tendered as Exhibits, the Plaintiff had difficulty in mobilizing and was in distress. She complained of a painful right knee and swelling. He had observed mild abrasion and that the range of motion was restricted due to pain. There was tenderness along the joint line and medial aspect of the right knee. As per his initial professional opinion the doctor reports probable ligament and soft tissue strain due to impact of her jump (fall).

[32] PW5 testified that the Plaintiff had been given cold compression treatment and pain killers to ease the pain. He had ordered an x-ray to be done to determine the extent

of the injury. However, the x-ray had been inconclusive. He had also recommended physiotherapy treatment.

[33] On 30 April 2012, the PW5 had prepared referrals for a bone specialist to examine the Plaintiff at the Labasa hospital and she had then been taken to the Labasa hospital. The x-rays done at Labasa did not indicate any bone damage. However, since the Plaintiff was still complaining of pain, she was taken to the operating theatre and a procedure referred to as knee aspiration was done by Dr. Alipate. This procedure was for the extraction of fluids from her knee joint. The Plaintiff had been obtaining treatment at the Labasa hospital from 10 May 2012-19 May 2012.

[34] Upon been discharged from the Labasa hospital the Plaintiff was referred back to the Savusavu hospital where she had been further treated for about 6 days.

[35] The PW5 further testified that the level of pain experienced by the Plaintiff at the time of her injury would be in the range of 9-10 on a scale of 1-10. Therefore, she would have suffered extreme pain.

[36] Since the Plaintiff is still complaining of pain and discomfort, in his opinion, a knee repair/replacement surgery would be necessitated.

[37] The final witness called on behalf of the Plaintiff was Epeli Tukania (PW6), a Vehicle Inspector attached to the National Fire Authority. He had conducted the investigation to determine the cause of the fire. The Vehicle Fire Investigation Report prepared by him was also tendered in evidence (Exhibit P6).

[38] The bus bearing registration No. FH 914 was a Mercedes Benz. The PW6 testified that the driver of the bus (the 1st Defendant) had told him that he was ascending the hill in gear number 3 and wanted to change to gear number 2 when he had discovered fire at the side of the engine.

[39] Upon investigation the PW6 found that there was an oil leak in the engine of the bus and this could have been caused due to the head gasket being worn out. He said that oil leakage in a heated engine could ignite fire if there is enough heat and an ignition source (a spark).

[40] As per Exhibit P6, he explained that the origin of the fire is where the alternator wire runs across the speed rod. The alternator is a generator which charges the battery while the engine is running. It converts mechanical energy from the engine into electrical energy to charge the battery. The suspected cause of the fire was due to an electrical short circuit of the alternator wire. The alternator wire had rubbed against the speed rod thus causing a short circuit. When the short circuit occurred, the wire insulation cover burned and spread to the side of the engine and on to the engine cover.

[41] The PW6 further testified that the rubbing of the wires could have been avoided if the alternator wire was separated from the speed rod by proper clamping. It could have also been avoided by insulating the wire with thick insulation. If the wires had not rubbed against the speed rod the fire could have been avoided. The spark created due to the short circuit had ignited the hot oil that had spilled onto the engine and caused the fire.

[42] It was his opinion that this incident was not an accident. A fire cannot take place without a cause. It was not a matter of one day that the alternator wire could have been rubbing against the speed rod, but would have been over a period of time. According to PW6 the fire could have been avoided if proper electrical wiring checks were carried out on a regular basis.

[43] With that the case for the Plaintiff was closed.

THE DEFENDANTS' CASE

[44] The 1st Defendant, Ubhay Chand, and Rajend Chand, a mechanic, gave evidence on behalf of the defence during the hearing.

[45] The defence also tendered the following Exhibits:

- **D1**-Medical Report of the Plaintiff (Issued by Dr. Tiko K. Saumalua, on 7 August 2012)
- **D2-**Copy of Vehicle Registration Notice Issued by the Land Transport Authority (Registration No. FH 914)
- **D3-** Vehicle Registration Certificate and Vehicle Owner History Extract Issued by the Land Transport Authority (Registration No. DCSL 30)
- **D4-**Photographs of a Mercedes Benz engine

[46] The 1st Defendant, Ubhay Chand (DW1), testified that he had been driving buses for 47 years, which included driving 10 wheeler trucks. He had been working for the 2nd Defendant Company from 1969-2014 (For 45 years).

[47] He agreed that he was the driver of the bus bearing registration No. FH 914 during the time of the incident, on 27 April 2012. He said that he had checked the oil, water and tires of the bus before starting the bus. The garage mechanics had checked the bus and advised him that the bus was in proper condition. He took the bus to the Labasa bus stand from where he left for Savusavu at 9.30 in the morning. He had reached Savusavu at 12.30 p.m.

[48] At 3.30 in the afternoon, the bus had begun the return journey to Labasa from the Savusavu bus stand. The DW1 said that while climbing up the Urata Hill he smelt smoke like rubber burning. Since he was on a bend he drove on a little further until he came to a straight stretch. He stopped the vehicle when he saw the fire. He then told all the passengers to go out of the bus. He tried to extinguish the fire with a gallon of water, while another driver tried to put out the fire with a fire extinguisher.

[49] The DW1 said that if there is any short circuiting the lights located on the dash board (the indicator lights) would turn from green to red.

[50] The 1st Defendant admitted that although he had been driving busses for 47 years he has not done any mechanical work or electrical work. If there was any problem in the bus he would report same to his boss who would then get the problem sorted out.

[51] The next witness called by the defence was Rajend Chand (DW2), a mechanic by profession. He testified that he was a senior mechanic working for the 2nd Defendant Company. His work includes checking of tires, engines, gear box and any loose nuts and bolts on the drive shaft and gear box of the vehicles. These checks are carried out on a daily basis when the vehicle goes on top of a ramp. The buses are usually checked 30-45 minutes before the bus leaves on a trip.

[52] On 27 April 2012, the bus bearing registration No. FH 914 was checked by himself at around 7.30-7.45 in the morning. He said that there were no complaints received from the bus driver before he checked the bus. He had confirmed that the bus was in good working condition.

[53] The DW2 testified that in a Mercedes Benz bus the engine is besides the driver and the radiator is in the middle and in front of the engine. The alternator is located towards the steps (the left hand side of the bus) and the speed rod/cable is on the right hand side of the bus and thus on the opposite side of the alternator. The fuel tank is on the same side as the speed rod.

[54] The alternator has electric wires which go from the battery to the junction box. The battery is on the opposite side of the fuel tank. The electric wires go through the harness and fire proof insulation. If the wire breaks then the fuse will blow and the amp meter, which is on the dashboard, will not read.

[55] The DW2 was of the opinion that the alternator wire cannot stick to the speed cable because they are on the opposite side of each other and separated by the engine. They are 3-4 feet apart. The fuel pump and the electric wires cannot run on the same side as it can cause fire.

[56] However, the DW2 agreed that nothing can happen without a cause, including a fire on board a bus.

[57] With that the 1st and 2nd Defendants rested their case.

[58] At the conclusion of the hearing both Counsel for the Plaintiff and Counsel for the 1st and 2nd Defendants were granted time to file written submissions. Accordingly, the parties filed detailed written submissions, and referred to several case authorities, which I have had the benefit of perusing.

ANALYSIS AND DETERMINATION

[59] From the facts of this case the primary issues for determination can be summarized as follows:

(1) Did the fire on board the bus occur due to the negligence of the Defendants?

(2) Were the injuries to the Plaintiff caused as a direct result of that negligence?

(3) If the answers to (1) and (2) above are answered in the affirmative, what are the consequences that flow?

[60] The Plaintiff attempted to rely on the maxim *res ipsa loquitur* so as to create a rebuttable presumption that the Defendants were negligent, whereby the burden would then shift to the Defendants to prove that they were not negligent. It is appropriate for this Court to deal with this issue first.

RES IPSA LOQUITUR

[61] The case of **Byrne v. Boadle** 2 H. & C.722, 159 ER (Eng. Rep.) 299 (Exch. 1863); is regarded as the English tort law case that first applied *res ipsa loquitur.* In that case the Plaintiff (Byrne) was struck by a barrel of flour falling from a window as he walked past the Defendant's (Boadle's) flour shop and sustained serious personal injuries. A witness testified that he saw the barrel fall from Boadle's window but had not seen the cause. Byrne did not present any other evidence of negligence by Boadle or his employees.

It was held that,

> *"A presumption of negligence can arise from an accident. A party need not present direct evidence of negligence when the mere manner and facts of the accident show that it could not have happened without negligence on someone's part. A barrel could not roll out of a warehouse window without negligence. This is an example of a case in which res ipsa loquitur ("the thing speaks for itself") applies. It is evidence that the barrel was in the custody of the Defendant and its falling is prima facie evidence of negligence. A Plaintiff who is injured in such a fashion should not be required to show that the barrel could not fall without negligence. A rebuttable presumption is created that Defendant was negligent and he has the burden to prove that he was not. The Defendant had a duty to ensure that those passing by his shop are not injured by objects under his control. In this case there was a scintilla of evidence with respect to negligence. The Defendant failed to show he was not negligent and the Plaintiff was to the verdict."*

[62] The phrase has also been succinctly expounded by Lord Justice Morris in **Roe v. Ministry of Health** (1954) 2 QB 66 at page 88:

".....this convenient and succinct formula possesses no magic qualities; nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin. When used on behalf of a Plaintiff it is generally a short way of saying "I submit that the facts and circumstances which I have proved established a prima facie case of negligence against the Defendant." It must depend upon all the individual facts and the circumstances of the particular case whether this is so. There are certain happenings that do not normally occur in the absence of negligence, and upon proof of these a court will probably hold that there is a case to answer."

[63] In the case of **Lloyd v. West Midlands Gas Board** [1971] 1 WLR 749; Lord Justice Megaw explained (at page 755);

"I doubt whether it is right to describe res ipsa loquitur as a 'doctrine'. I think that it is no more than an exotic, although convenient, phrase to describe what is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances."

"It means that a Plaintiff prima facie established negligence where (i) It is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of accident was some act or omission of the Defendant or of someone for whom the Defendant is responsible, which act or omission constitutes a failure to take proper care for the Plaintiff's safety."

"I have used the words "evidence as it stands at the relevant time." I think that this can most conveniently be taken as being at the close of the Plaintiff's case. On the assumption that a submission of no case is then made, would the evidence, as it then stands, enable the Plaintiff

to succeed because, although proper inference on balance of probability is that cause, whatever it may have been, involved a failure by the Defendant to take due care for the Plaintiff's safety? If so, res ipsa loquitur."

[64] There are several cases where the Australian Courts had deliberated on the legal maxim *res ipsa loquitur*.

[65] In **Franklin v. Victorian Railways Commissioner** (1959) 101 CLR 197; Dixon CJ opined:

"The three Latin words [res ipsa loquitur] merely describe a well-known form of reasoning in matters of proof. Convenient as it is sometimes to us to direct the mind along that channel of reasoning they must not be allowed to obscure the fact that it is a form of reasoning about proof leading to an affirmative conclusion of fact and that whenever the question is whether the proofs adduced suffice to establish an issue affirmatively, all the circumstances must be taken into account and the evidence considered as a whole."

[66] The High Court of Australia in **Schellenberg v. Tunnel Holdings Pty Ltd**. [2000] HCA 18 held (Gleeson CJ and McHugh J);

"Res ipsa loquitur is concerned with negligence arising from an unknown or unspecified cause. It is concerned with an external event whose cause is under the control of the defendant. It is a principal that is as much, perhaps more, concerned with proof that the defendant was causally responsible for the occurrence as it is with proof of a breach of duty."

"While Res ipsa loquitur may ameliorate the difficulties that arise from a lack of evidence as to the specific cause of an accident, the inference to which it gives 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 particularised a specific claim in negligence or adduced evidence of the cause of the accident. But it does nothing more."

[67] Their Lordships further held that the Plaintiff may rely on *res ipsa loquitur* even though he or she has also pleaded particular acts of omission of negligence on the part of the Defendant provided that the tribunal of fact concludes that:

"1. there is an absence of explanation of the occurrence that caused the injury;

2. the occurrence was of such a kind that it does not ordinarily occur without negligence; and

3. the instrument or agency that caused the injury was under the control of the defendant."

[68] **Lafaranchi v. Transport Accident Commission** [2006] VSCA 81 (12 April 2006); was a case decided by the Supreme Court of Victoria-Court of Appeal. In that case the driver of the vehicle had left the road, mounted a gutter and hit a power pole. The Court could not say that on the evidence before it could possibly be satisfied that the accident in question was of a kind that does not ordinarily occur without negligence. It was held that the Plaintiff had the burden of proving negligence despite the application of *res ipsa loquitur.*

[69] The Supreme Court of Fiji too have expounded on the legal maxim *res ipsa loquitur* in a number of cases, commencing with **Queensland Insurance Co. Ltd v. Fiji Builders Ltd** [1957] FJSC 7; [1956-1957] 5 FLR 43 (11 April 1957) and **Devi v. Pratap** [1960-1961] 7 FLR 155 (9 November 1961).

[70] Considering all the facts of the instant case in its totality, although it may be argued that the instrument or agency that caused the injury to the Plaintiff was under the control of the Defendants, it cannot be reasonably held that the occurrence of the fire on board the bus was of such a kind that it does not ordinarily occur without negligence. This can be distinguished from the case of **Byrne v. Boadle** where the Plaintiff was struck by a barrel of flour falling from a window as he walked past the Defendant's flour shop.

[71] In the circumstances, I am of the opinion that the Plaintiff cannot rely on *res ipsa loquitur* in this case and thereby shift the burden onto the Defendants to prove that they were not negligent. The burden of proving negligence of the Defendants remains with the Plaintiff.

[72] This Court will now analyse whether the Plaintiff has satisfied that burden.

LIABILITY

[73] I have already summarized the evidence of all the witnesses who gave evidence during the hearing. The Plaintiff clearly testified as to incident of fire which took place on the bus on 27 April 2012. Epeli Tukania, the Vehicle Inspector attached to the National Fire Authority had conducted the investigation to determine the cause of the fire. The Vehicle Fire Investigation Report prepared by him was also tendered in evidence (as Exhibit P6).

[74] Upon his investigation the witness found that there was an oil leak in the engine of the bus and this could have been caused due to the head gasket being worn out. He said that oil leakage in a heated engine could ignite fire if there is enough heat and an ignition source, like a spark. He explained that the origin of the fire was where the alternator wire runs across the speed rod. The suspected cause of the fire was due to an electrical short circuit of the alternator wire. The alternator wire had rubbed against the speed rod thus causing a short circuit. When the short circuit

occurred, the wire insulation cover burned and spread to the side of the engine and on to the engine cover.

[75] In the opinion of the witness this incident was not an accident. He testified that the rubbing of the wires could have been avoided if the alternator wire was separated from the speed rod by proper clamping. It could have also been avoided by insulating the wire with thick insulation. If the wires had not rubbed against the speed rod the fire could have been avoided.

[76] Considering the aforesaid evidence, I hold that the Plaintiff has established on a balance of probabilities that the fire on board the bus occurred solely due to the negligence of the Defendants. The Defendants owed a duty of care to the Plaintiff. However, they have failed to conform to the standard of care required under the law and have thereby breached that duty of care owed to the Plaintiff.

[77] In the agreed facts it has been admitted that the 1st Defendant was at all material times the driver of Motor Vehicle Registration No. FH 914 and that the 2nd Defendant was at all times the owner of the said Motor Vehicle Registration No. FH 914. It flows therefrom that the 1st Defendant was driving the said vehicle in the course of employment for the 2nd Defendant as his servant and/or agent. The 2nd Defendant is therefore vicariously liable for the actions of the 1st Defendant and is liable for his own negligence.

[78] The next issue to determine is whether the injuries to the Plaintiff were caused as a direct result of the negligence of the Defendants. This element is commonly referred to as causation under the law of torts.

[79] The Plaintiff testified that the front portion of the bus had caught fire. The driver stopped the bus and asked everyone to leave. All the passengers left their belongings and started leaving the bus. Some passengers left through the doors, while others jumped out of the windows. Since, she was sitting in the middle of the

bus, and since the entrance of the bus was engulfed in flames, she felt scared to leave through the front entrance. Thus, she left all her belongings in the bus and jumped through the window.

[80] It must be remembered that the Plaintiff was only 15 years of age at the time of this incident. When the fire started and the 1st Defendant advised all passengers to leave, there would have been a general panic on board the bus. The passengers were all trying to get to safety. The Plaintiff saw the entrance of the bus engulfed in flames. That clearly made her afraid to leave through the front entrance. She had to act fast as the bus was on fire. She saw other passengers too were jumping through the windows. She did the same and jumped through the window. Unfortunately, she had landed on the hard surface of the road injuring her right knee.

[81] Considering the aforesaid, I hold that the Plaintiff has succeeded in proving on a balance of probabilities that her injuries were caused as a direct result of the negligence of the Defendants.

QUANTUM

[82] The final issue for this Court to decide is the quantum of damages that should be awarded to the Plaintiff.

[83] In her statement of claim the Plaintiff claims special damages and general damages. Under the head general damages she claims damages for pain and suffering, loss of amenities of life, aggravated damages, pecuniary damage and costs. However, under 'Particulars of General Damages' she has additionally itemised retardation of advancement in life, scarring and cost of future care.

[84] It is a universally accepted principle that special damages must be specifically pleaded and proved. In the instant case, what has been pleaded is special damages in the sum of $850 (for medical expenses-$300 and for transport $550). Although,

during the hearing, evidence was led to the effect that further expenses had been incurred in respect of both medical expenses and for transport, this Court cannot grant such sums as special damages, since those expenses were not specifically pleaded. Accordingly, I make order that the Plaintiff is entitled to $850.00 as special damages.

[85] As to general damages. It is clear from all the evidence led in Court that the Plaintiff underwent much pain and suffering as a result of her injuries. She has testified that soon after her fall she was in extreme pain and as a result could not move further away from the burning bus. Other passengers had to carry her away from the bus. She was lying down all the time because she could not stand up on her own. It had taken nearly two hours for the medics to arrive.

[86] She was then taken by ambulance to the Savusavu hospital and had obtained treatment. However, the pain did not subside. The night of the incident she had felt intense pain on her knee. She continued to suffer from the pain throughout the weekend as well. She could not stand up on her own.

[87] Thus, she was taken back to the Savusavu hospital once again. From there she was transferred to Labasa hospital. She had spent nearly two weeks at the Labasa hospital. During this period the doctors removed fluids from her knee joint. Upon been discharged from the Labasa hospital the Plaintiff was taken back to the Savusavu hospital and spent a further 4-6 days there. Upon discharge from the Savusavu hospital she regularly attended clinics.

[88] The Plaintiff had been absent from school for about three weeks. Even in school, she had to walk with the aid of crutches. While at school she could not take part in any physical activity due to the injury. Even at home she was unable to do any rigorous physical work she previously was able to do.

[89] The Plaintiff has testified that she now walks with a limp. Every time when she walks her focus is on her knee, as sometimes while walking her legs get locked and it gets twisted and due to the pain she has to sit down immediately. Then she has to ask someone to help her to pull and twist her knee back into place. She stated that sometimes due to the acute pain she used to have blackouts.

[90] The injuries suffered by her have been corroborated by medical evidence. The doctor who treated the Plaintiff has testified that the level of pain experienced by her at the time of her injury would be in the range of 9-10 on a scale of 1-10. Therefore, she would have suffered extreme pain. Since the Plaintiff is still complaining of pain and discomfort, in the doctor's opinion, a knee repair/replacement surgery would be necessitated.

[91] It is in evidence that subsequent to the injury suffered by the Plaintiff it had affected her performance in her studies as well.

[92] From the aforesaid I hold that the Plaintiff has clearly established that she is entitled to general damages for pain and suffering, loss of amenities of life, retardation of advancement in life, scarring and for cost of future care. It must be reiterated that the Plaintiff was only 15 years of age at the time she suffered this unfortunate injury. In the circumstances, considering all the facts of this case, I make order that the Plaintiff is entitled to $50000.00 as general damages.

[93] The Plaintiff has also claimed aggravated damages. However, I find that the Plaintiff has not established any entitlement for aggravated damages.

[94] In terms of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act, I order that interest at 6% per annum on special damages and the general damages be paid to the Plaintiff from the date the cause of action arose to the date of this judgment.

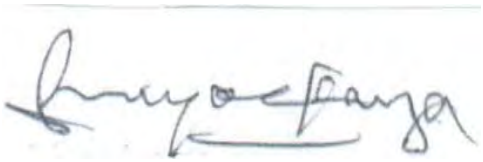
[95] Further, in terms of the Law Reform (Miscellaneous Provisions) (Death and Interest) (Amendment) Act No 46 of 2011, I order interest at 4% per annum on the judgment sum ($50850.00) from the date of judgment until the date of realization.

[96] I further order costs of $3000.00, which is summarily assessed.

FINAL ORDERS

Accordingly, I order the 1st and 2nd Defendants to pay the Plaintiff:

1. $850.00 as special damages.
2. $50000.00 as general damages.
3. Interest at 6% per annum on the special damages and the general damages to be paid to the Plaintiff from the date the cause of action arose to the date of this judgment.
4. Interest at 4% per annum on the judgment sum ($50850.00) from the date of judgment until the date of realization.
5. Costs of $3000.00, which is summarily assessed.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

Dated this 23rd day of May 2017, at Suva.