IN THE HIGH COURT OF FIJI AT LABASA

CIVIL JURISDICTION

Action No. HBC 23 of 2017

BETWEEN

JONE SOKIA of Vunivau, Labasa, **RAKESH KUMAR LAL** of Wailevu, Labasa, **SURYA DEO** of Mani Road, Bulileka, Labasa, **PENAIA TUIDRAVU** of Vunivutu, Wainikoro and **INDRA VIR KUMAR** of Bulileka, Labasa.

PLAINTIFFS

AND

MOHAMMED JAMAL of Korokadi, Lekutu, Bua, P.O. Box 3057, Labasa.

FIRST DEFENDANT

AND

THE PERMENANT SECRETARY FOR MINISTRY OF INFRASTRUCTURE AND TRANSPORT, Nasilivata House, 87 Ratu Mara Road, Samabula.

SECOND DEFENDANT

AND

ATTORNEY GENERAL OF FIJI

THIRD DEFENDANT

Counsel	:	Mr. A. Sen for the plaintiffs. Mr. A Kohli for the 1st Defendant. Mr. J. Pickering for the 2nd & 3rd Defendants.
Date of Hearing	:	23rd April 2018
Date of Judgment	:	09th May, 2018

JUDGMENT

[1] The plaintiffs instituted these proceedings claiming damages for the injuries caused to them due to the negligent driving of the 1st defendant. The vehicle which was being driven by the 1st defendant at the time of the accident was a vehicle hired by the 2nd defendant and the plaintiffs were employees of the 2nd defendant. The 3rd defendant was made a party to these proceedings pursuant to State proceedings Act 1951.

[2] When this matter came up for hearing on 23rd April, 2018 the plaintiff filed notice of discontinuance and discontinued proceedings against the 2nd and 3rd defendants. The learned counsel for the plaintiffs informed court that since the 2nd defendant has agreed

to pay compensation the plaintiff do not wish to proceed against the 2nd and 3rd defendants. The plaintiff filed notice of discontinuance and the matter against the 2nd and 3rd defendants was accordingly discontinued. The matter proceeded thereafter against the 1st defendant to determine whether the accident was due to the negligence of the 1st defendant and the parties moved that the assessment of damages if any can be done subsequently depending on the amount of compensation the 2nd defendant agrees to pay. HBC 22 of 2017 is a connected matter. The plaintiff in that case also suffered injuries in the same accident and the parties to that action agreed that they would be bound by the decision in this case.

[3] At the pre-trial conference the parties agreed on the following facts:

1. The plaintiffs whilst in their course of employment with the 2nd defendant on the 31st of December, 2014 being passengers in the vehicle registration No. RSL 008 driven by the 1st defendant, were involved in an accident at Lomaloma on Seaqaqa/Savusavu highway.
2. At all material times the 1st defendant was the driver and the owner of vehicle registration No. RSL 008.
3. At all material times, the 2nd defendant was/is a Ministry which is directly responsible for policy formulation, planning, designing, coordination and implementation of programs, projects and services relating to engineering works, meteorology, transportation and public utilities which are parts of the Government infrastructure sector in Fiji.
4. At all material times, the 3rd defendant was the representative of the Government of the Republic of Fiji and is liable for this claim under these proceedings pursuant to State Proceedings Act 1951.
5. At all material times the plaintiffs were employees of the 2nd defendant and were employed at Waininu Bua Infant School.
6. The plaintiffs were paid as follows:

A sum of $4.72 rate per hour with gross wages of $207.68 and FNPF deduction of $16.56 together with allowance of $126.00.

Rakesh Kumar Lal

A sum of $4.80 rate per hour with gross wages of $211.20 and FNPF deduction of $16.88 together with allowance of $126.00.

Surya Deo

A sum of $5.11rate per hour with gross wages of $224.84and FNPF deduction of $17.92 together with allowance of $126.00.

Penaia Tuidravu

A sum of $5.25 rate per hour with gross wages of $231.00 and FNPF deduction of $18.48 together with allowance of $126.00.

Indar Vir Kumar

A sum of $5.11rate per hour with gross wages of $224.84 and FNPF deduction of $17.92 together with allowance of $126.00.

7. On the said day being 31st day of December, 2014, in accordance with their contract of employment, the plaintiffs were returning to Labasa from Wainunu camp at 9 am when they were still in the cause of their employment to spend their Christmas break.
8. On the said day being 31st day of December, 2014 the plaintiffs were passengers in motor vehicle registration No. RSL 008 which was driven by the 1st defendant along Seaqaqa Savusavu highway when it was involved in an accident.

[4] At the trial three of the passengers who were travelling in the truck testified. All they could tell court was that while they were travelling in the truck it suddenly went zigzagging and toppled. The plaintiffs relied on the maxim *res ipsa loquitur*.

[5] The people who were travelling in the vehicle are not in a position to say the reason of the accident they can only say what they experienced. The reason for the accident, in this case, is entirely within the exclusive knowledge of the 1st defendant who was admittedly, the driver of the truck at the time of the accident.

[6] The learned counsel for the plaintiffs submitted that the doctrine *res ipsa loquitur* can be applied to the facts of this case and cited the decision in **Barkway v South Wales Transport Company Limited** in support of his argument. It is important to note that a previous decision is cited by counsel to assist in arriving at the correct conclusion on a particular question of law. It is always helpful if the counsel can mention the correct reference of the decision or decisions he is relying on. The correct reference of the above decision is **[1950] AC 185 or [1950] 1 All ER 392**. In that case Lord Normand made the following observations:

> 'the fact that an omnibus leaves the roadway and so causes injury to a passenger or to someone on the pavement is evidence relevant to infer that the injury was caused by the negligence of the owner, so that, if nothing more were proved, it would be a sufficient finding of liability against him.'
>
> As to the doctrine of *res ipsa loquitur*: 'The maxim is no more than a rule of evidence affecting onus. It is based on common sense, and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant.'

[7] In the case of **Ng Chun Pui v Lee Chuen Tat** [1988] RTR 298, [1988] UKPC 7 Lord Griffiths made the following observations:

So in an appropriate case the claimant establishes a prima facie case by relying upon the fact of the accident. If the defendant adduces no evidence, there is nothing to rebut the inference of negligence and the claimant will have proved his case. But if the defendant does adduce evidence that evidence must be evaluated to see if it is still reasonable to draw the inference of negligence from the mere fact of the accident. Loosely speaking this may be referred to as a burden on the defendant to show he was not negligent, but that only means that faced with a prima facie case of negligence the defendant will be found negligent unless he produces evidence that is capable of rebutting the *prima facie* case.

[8] The learned counsel in cross-examination confronted the two plaintiffs who testified at the trial with their respective statements made to the police. The learned counsel's attempt was to discredit the witnesses on the evidence as to the speed of the vehicle. He submitted that the evidence of the plaintiffs was that the vehicle went off the road because of the speed but in their statements to the police they haven't mentioned anything about the speed. Driving a vehicle negligently is not the only way a driver can be negligent. A person who drives a vehicle on the road with mechanical defects cannot be said to have any respect for the lives of the people who uses the road and the passengers travelling in his own vehicle. Driving a vehicle which is not road worthy is also an act of negligence on the part of the driver.

[9] For the reasons set out above the court is of the view that this is a suitable case to apply the maxim *res ipsa loquitur* and draw the presumption that the accident was due the negligence of the 1st defendant.

[10] The 1st defendant in his evidence said that before the accident he applied breaks to change the gear but the brakes did not work and he applied hand-breaks and even that did not work. He testified further that to avoid the accident he took the vehicle to his right side but it went off the road and toppled.

[11] It is also his evidence that every two weeks he used check the vehicle and every year he used to get the vehicle tested. When he was asked in cross-examination whether he has any receipts to show that he in fact serviced and got the vehicle tested the 1st defendant answered in the negative.

[12] The learned counsel for the 1st defendant submitted that the 1st defendant whilst on journey from Wainunu to Labasa stopped twice before stopping at the waterfall and there is not an iota of evidence that he had encountered any problems with the breaks. The plaintiffs who were the passengers of the vehicle cannot be expected to testify as to the mechanical condition of the vehicle. Whether the brake failure was sudden or whether he was driving the vehicle with defective brakes is an important question to which the court should address its mind. If the vehicle was a well maintained one and the brake failure was sudden the driver cannot be said to have been negligent. Since this is a fact within his personal knowledge the 1st defendant must adduce sufficient evidence to establish that the vehicle was maintained well and when it was put on the road it did not have any defects. The 1st defendant did not adduce any such evidence. The plaintiff tendered the report, which was in fact disclosed by the 1st defendant, of the Land Transport Authority in evidence marked as "P1" where it is stated as follows;

> "... when tested it was found that the brake was inoperative, that is brake fluid leak on the wheels which indicate that brake washer was defective or worn out."

The officer who examined the vehicle after the accident has made the following comments in his report (P1);

> Also a test carried out with other associated mechanism, of which I found that it the cause of accident was the brake system.

[13] This report corroborates the position of the 1st defendant that the accident was due to the failure of the brakes. The question then arises whether the failure of brakes was due to some reason beyond the control of the 1st defendant who was, at the time of the accident, owner and the driver of the vehicle.

[14] As I have stated earlier in this judgment the 1st defendant failed to explain the cause for the failure of the brakes. From the report "P1" it is absolutely clear that the 1st defendant has been driving the vehicle with defective brakes.

[15] For the above reasons the court makes the following orders:

1. The accident was due to the negligence of the 1st defendant and he is liable in damages.
2. The 1st defendant is ordered to pay each of the plaintiffs in both matters $1000.00 as costs.

Lyone Seneviratne

JUDGE

09th May, 2018