

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 3 OF 2016

BETWEEN: **ANJELINE SANJESHNI MALA**

Plaintiff

AND: **LAISENIA KORONIVACI**

First Defendant

AND: **TUFEALS TRANSPORT LIMITED**

Second Defendant

AND: **MOHAMMED TILAWAT KHAN AND FAREEN NISHA**

Third Defendants

CORAM: **The Hon. Mr. Justice David Alfred**

COUNSEL: **Mr. A. Sen for the Plaintiff**

Mr. S Sharma for the Second and Third Defendants

Date of Hearing: 6 August, 2018

Date of Judgment: 8 August, 2018

JUDGMENT

1. The Plaintiff in her Statement of Claim says as follows:

- (1) She is a widow and administratrix of the estate of Mustafa Khan (deceased) who died intestate on 18 August 2013. Letters of Administration were granted to her on 25 November 2013.
- (2) She brings this action for the benefit of the deceased's estate (estate) under the Law Reform (Miscellaneous Provisions) Death and Interest Act Cap 27 (L.R. (MP) Act) for the benefit of the dependents of the deceased pursuant to the Compensation to Relatives Act Cap 29 (C.R. Act).
- (3) At the trial the Plaintiff reserves her right to prove her claim only under the former Act (LR (MP) Act).
- (4) The First Defendant was the driver of motor vehicle No. FD154 (the vehicle). The Second Defendant was the owner of the vehicle. The Third Defendants were the Managing Director and Director of the Second Defendant and also acting in purpura persona.
- (5) At all material times the First Defendant was driving the vehicle as the servant and agent of the Second and Third Defendants.
- (6) The liabilities of the First Defendant have been taken over by the Second and Third Defendants, the employers of the First Defendant and as such they are liable for this claim and/or the First Defendant was in the course of his employment with the Second and Third Defendants and was a servant/agent of the Second and Third Defendants.
- (7) On/about 18 August 2013 the deceased was hit by the vehicle driven by the First Defendant and was killed. The collision was caused through the negligence of the First Defendant, the particulars of whose negligence are then set out.
- (8) Alternatively, the particulars of negligence of the Second and Third Defendants are:

- (a) Negligently allowing the First Defendant to drive their vehicle which they knew or ought to have known was dangerous.
 - (b) Negligently allowing the First Defendant to drive their vehicle when they knew or ought to have known he was not a qualified driver.
 - (c) The Plaintiff will rely on the doctrine of *res ipsa loquitur* as evidence of negligence.
- (9) In the premises the deceased lost his expectation of life and his estate has suffered loss and damage.
- (10) The particulars of special damages are:
- (a) Funeral expenses - \$5,000
 - (b) Loss of expectation of life - \$5,000
- (11) The dependants of the deceased have suffered loss and damages. The particulars of the widow and the four minor children are then appended.
- (12) The deceased was 33 years of age at the time of death; was earning \$23,039.90 per annum and gave the Plaintiff \$250 per month for the household expenses.
- (13) The First Defendant was charged with 4 counts and the Plaintiff will rely on any conviction as evidence in the trial.
- (14) The Plaintiff is entitled to punitive and exemplary damages.
- (15) Wherefore the Plaintiff claims:
- (a) Orders restraining the Second and Third Defendants from disposing of their assets until the final determination of this action.
 - (b) Damages under the L.R (MP) Act.
 - (c) Damages under the C.R. Act.
 - (d) General Damages.
 - (e) Punitive and exemplary damages in the sum of \$20,000.
 - (f) Indemnity costs of \$10,000.

- (g) Special Damages of \$10,000.
- (f) Interest.

2. The Second and Third Defendants in their Amended Statement of Defence state as follows:

- (1) The First Defendant was not authorised or permitted to drive the vehicle on the date the accident took place.
- (2) The Second Defendant is the owner of the vehicle No. FD154.
- (3) The Third Defendants were the Directors of the Second Defendant.
- (4) The First Defendant without any right took the vehicle without the knowledge, consent and authority of the Second and Third Defendants and drove it on his own free will and accord.

3. The Plaintiff in her Reply to the Defence says as follows:

- (1) The Plaintiff was always the servant and agent and worked under the authority of the Defendants and at the time of accident was performing his duties within the scope of his employment.

4. The Minutes of the Pre-Trial Conference dated 17 October 2017 include the following:

Agreed Facts

- (1) The Plaintiff reserves her right to prove her claim only under the L.R. (M P) Act.
- (2) At all material times the First Defendant was the driver of vehicle No. FD154.
- (3) The Second Defendant was at all material times the owner of the vehicle.
- (4) At all material times the Third Defendants were the Managing Director and Director of the Second Defendants and also acting in purpura persona.
- (5) At all material times the First Defendant was driving the vehicle as a servant and agent of the Second and Third Defendants.

Issues

These do not need to be reproduced in my judgment.

5. At the commencement of the trial, Mr Sharma informed the Court that liability for the accident is admitted by the Second Defendant, and this was so recorded by me. I also recorded that both Counsel confirm that the only issues are the injuries and the special damages of the Plaintiff and whether the Third Defendants are liable to pay these damages to the Plaintiff.
6. Mr Sen applied for a default judgment against the First Defendant only to be recorded. I recorded a default judgment against the First Defendant only, with damages to be assessed.
7. The Plaintiff was the first witness (PW1). She said she is the widow of the deceased and tendered as Exhibits the birth certificates of their 4 children. She said the deceased was 33 years old at his death which occurred instantaneously in the accident. The deceased was healthy with no sickness and was a school teacher earning \$23,039.90 p.a. His salary slip was tendered as Exhibit P9. He contributed 95% of his salary to the family and spent \$4000 on himself.
8. PW1 said the vehicle was parked at the residence of the First named Third Defendant (Tilawat). She tendered as Exhibit P11 the judgment of the Magistrates' Court, Labasa dated 25 August 2017 recording the 3 convictions against the First Defendant for offences arising from the fatal accident to the deceased (There was no objection from Mr Sharma).
9. PW1 continued that the deceased was a civil servant and the retirement age was 55 years. The funeral expenses was \$5,000 but she had no receipts for these. She is claiming damages for loss of expectation of life.
10. The next witness was PC 1779, Janeshwar Singh (PW2). He knew Tilawat (identified) who was interviewed on the allegation of permitting another

person to drive the vehicle without a driving licence. PC Patrick Babu Ram gave Tilawat his rights to language, solicitor, relative, religious counsellor and to remain silent. Tilawat chose to speak in English. PW2 heard the questions read by PC Babu who recorded the answers.

11. PW2 said there were no threats, nor inducements to Tilawat who said he did not want to add anything. PW2 was only the witnessing officer.
12. There was objection by Mr Sharma to the reception of the cautioned interview on the ground that PW2 was not the maker. The Court ruled it could be tendered as it was admissible under s. 10 of the Civil Evidence Act 2002.
13. Under cross-examination PW2 said he did not know if Tilawat was charged.
14. With that the Plaintiff closed her case and the Defendants opened theirs'.
15. The First named Third Defendant (Tilawat) (DW1) gave evidence. He is a businessman. He would have to see the Memorandum and Articles of Association if he is the managing director as there are 2 directors. He said the Second Defendant owned the vehicle No. FD154. He was aware of the accident. The vehicle was in his yard and the First Defendant took it. DW1 did not give the First Defendant permission to take the vehicle. The key was inside the vehicle. The First Defendant has a licence and drove other vehicles belonging to his father. DW1 had seen his licence. If he had known the First Defendant had no licence he would not have permitted him to drive the vehicle.
16. During cross-examination DW1 said he knew the First Defendant has a valid driving licence. When he saw it, it was valid. The vehicle belonged to the Second Defendant and he, DW1, did not have any authority to give the vehicle to the First Defendant. He told the Police he was educated to Form 6 but failed. In answer to the Court, he said his answer to question 18 is correct (he was looking after and managing the Second Defendant).

17. In re-examination DW1 said the First Defendant was not working for him. DW1, nor for the Second Defendant.
18. With that the Defendants closed their case and both Counsel made their oral submissions.
19. Mr Sen said Tilawat (DW1) and his wife (the Third Defendants) were acting together both as directors and in their personal capacities and are liable.
20. With regard to the damages, he submitted that for the lost years the multiplier should be 15 years and the multiplicand \$19,000 which would give a quantum of \$285,000. For loss of expectation of life he was asking for \$5,000 and for funeral expenses the sum of \$2,500. The Plaintiff was not claiming for loss of dependency. Finally he asked for interest at 6% p.a. on the damages for the lost years from the date of the filing of this action to the date of judgment and interest on the special damages at 3% p.a. from the date of the accident to the date of judgment.
21. Mr Sharma now submitted. He said both the Third Defendants are not liable as the vehicle was owned by the Second Defendant. There was nothing in the cautioned interview which states the Third Defendants had knowledge that the First Defendant did not have a valid driving licence. The Third Defendant did not authorize the First Defendant to drive the vehicle. The Second Defendant is vicariously liable but that does not shift to the Third Defendants. There was no evidence against the wife. The claim against both Third Defendants should not be allowed because they cannot be personally liable.
22. Mr Sharma then submitted on the quantum. He said for the lost years it should 10 years at \$10,000 per year which would come up to \$100,000. For the loss of expectation of life the figure should \$2,500 and for the funeral expenses \$2,500 also. He agreed with the rates of interest and the periods stated by Mr Sen.

23. Mr Sen in his reply said the Third Defendants are liable because the vehicle was under their control. The Plaintiff is only claiming under the L.R. (M.P.) Act.
24. At the conclusion of the arguments I informed that I would take time for consideration. Having done so I shall now deliver my judgment on the issues remaining for my decision. I shall start with the issue whether both the Third Defendants are personally liable to pay damages to the Plaintiff for the negligence of the First Defendant. In other words are they vicariously liable for his negligence. Mr Sen stated he would provide an authority for his proposition that the Third Defendants were liable "in purpura persona".
25. I have been provided with an unsigned and unsealed copy of the decision of the Court of Appeal in *Prasad v Attorney General of Fiji and Ors* [2008] FJCA 58, dated 27 October 2008. After carefully perusing the judgment I was unable to detect any reference to "in purpura persona". However as I consider the factual situation therein is quite different from that herein based on the evidence before this Court, it will therefore not be expedient to refer to the judgment.
26. So I must now turn to the Minutes of the Pre-Trial Conference. Under the Agreed Facts is 6. "That at all material times the 1st Defendant was driving the said vehicle as a servant and agent of the 2nd and 3rd Defendants".
27. Agreed Fact No. 5 is "That at all material times, the 3rd Defendants were the Managing Director and Director of the 2nd Defendant and also acting in purpura persona".
28. This phrase appears to be non-existent. In any event, it cannot detract from what Counsel on both sides have accepted as an Agreed Fact that the First Defendant was driving the vehicle as a servant and agent of the Second and Third Defendants. I consider that it is a red herring whether the First Defendant had a valid or any driving licence at the time of the accident.

29. Further under "Issues" I cannot see anywhere that the Court is required to determine the issue of whether the Third Defendants are vicariously liable for the negligence of the First Defendant.
30. To bring closure to this issue I only need to turn to Order 34 rule 2 (4) of the High Court Rules (HCR). This provides quite unequivocally that "At the conclusion of any such conference the Solicitors attending it shall draw up and sign a minute containing a succinct statement of:
- (a) The matters, if any, upon which they are agreed, and
 - (b) The issues whether of fact, law or procedure remaining for determination by the Court." As the Minutes of the Pre-Trial Conference have been signed by both Mr Sen and Mr Sharma I am bound by the HCR to hold that the issue of the vicarious liability of the First and Second Third Defendants does not remain for the Court to determine, the Second Defendant already having admitted liability.
31. In the event I find and I so hold that the Second Defendant and both the Third Defendants are vicariously liable for the negligence of the First Defendant driving the vehicle as their servant and agent. As this is a civil action the parties are free to make binding admissions which the Court will take cognisance of and put into effect.
32. I shall now consider the claim for the lost years. Lord Wilberforce in *Pickett v British Rail Engineering* [1980] A.C. 136 said the amount to be recovered in respect of earnings in the "lost years" should be after deduction of an estimated sum to represent the victim's probable living expenses during these years.
33. In *Ashok Chand v The Permanent Secretary for Health, The Ministry of Health and The Attorney General of Fiji*; Lautoka Civil Action No. HBC 102 of 2004, Ajmeer J in his judgment of 15 May 2018 awarded the estate of a deceased wife, aged 26 at her death, damages based on a 50% deduction from her earnings for her living expenses and for a period of 16 years.

34. In Halsbury's Laws of England, Fourth Edition Volume 12, it is stated in para 1156 that for a Plaintiff in his thirties, having a normal expectation of working life, a multiplier of fourteen or fifteen has often been taken.
35. Based on the foregoing I think it would appropriate and just if I were to take a multiplier here of 15. This would result in the damages for the lost years being calculated as follows:
- (1) The multiplicand reduced by the living expenses of the deceased is \$1,000 per month (\$2,000 - \$1,000).
 - (2) The multiplier is 15 (years).
 - (3) The resultant total is \$180,000 ($\$1,000 \times 12 \times 15$).
 - (4) From this is deducted the damages for loss of expectation of life (\$2,500 which I shall be awarding) to prevent double counting and the resultant quantum is \$177,500.
36. I shall award \$2,500 as damages for loss of expectation of life and a further \$2,500 for the funeral expenses.
37. In the result I enter judgment for the Plaintiff against the First Defendant, the Second Defendant and the First named and the Second named Third Defendants and make the following orders:
- (1) The First, Second and First named and Second named Third Defendants are jointly and severally to pay the Plaintiff the damages, interest thereon and costs appended below:
 - (a) The sum of \$177,500 as damages for the lost years with interest thereon at the rate of 4% p.a. from the date of service of the writ to the date of payment.
 - (b) The sum of \$2,500 as damages for loss of expectation of life with interest thereon at the rate of 3% p.a. from the date of the accident to

the date of judgment and thereafter at the rate of 4% p.a. to the date of payment.

- (c) The sum of \$2,500 as funeral expenses with interest thereon at the rate of 3% p.a. from the date of the accident to the date of judgment and thereafter at the rate of 4% p.a. to the date of payment.
- (d) Costs summarily assed at \$2,000.

Delivered at Labasa, this 8th day of August, 2018.



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DAVID ALFRED
JUDGE
HIGH COURT OF FIJI