IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 013 of 2021
[In the High Court at Suva Case No. HBC 376 of 2017]

BETWEEN : **PRITIKA POONAM SINGH**

Appellant

AND : **1. JAY WANTI MALA**
2. MOHAMMED IMITIAZ KHAN

Respondents

Coram : **Jitoko, P**
Clark, JA
Winter, JA

Counsel : **Mr. A. Chand for the Appellant**
Mr. G. O'Driscoll for the Respondents

Date of Hearing : **12 February 2024**

Date of Judgment : **29 February 2024**

JUDGMENT

Jitoko, P

1. I am in complete agreement with the judgment of His Lordship Justice Winter.

Clark, JA

2. I have read the judgment of Winter, JA. I agree with the conclusion and orders.

Winter, JA

Introduction

3. It is generally taken as a starting point that a plaintiff, in a civil action claim for damages, must prove that the defendant has caused the harm for which compensation is sought. If the plaintiff does not show this, the defendant has a right to have the action dismissed: we have not yet adopted a theory that plaintiffs should always win only by virtue of strict liability or sole use of the *'but for'* test. Evidence that proves causation is required. This requirement of causation is not a trivial matter. Causation is the absolutely essential element in linking an actionable wrong and loss[1]. It goes to the heart of the nature and purpose of the civil litigation system.

4. His Honour the trial Judge, in the absence of evidence from the plaintiff as to cause beyond the mere fact of collision, relied on the defendant's explanation of the event. His Honour found the plaintiff's mother, the deceased, failed to take reasonable care of herself when she bumped into the defendant's car during morning rush-hour traffic on Ratu Dovi Road, Nadera, near the Reba circle. The deceased so significantly contributed to the collision His Honour, in effect, ruled she caused it, and her death shortly thereafter was a sad but inevitable consequence. The claim in negligence was dismissed. From this decision the deceased's daughter and administrator of her estate now appeals.

5. The pleadings, pretrial discovery, case management and agreed facts followed a usual pathway and chronology for claims of this sort and need not be rehearsed here in detail. The plaintiff, now appellant, pleaded the collision was caused by the defendant, now 1st respondent, driver who along with the second defendant, now 2nd respondent, owner of the car was then liable/vicariously liable in negligence and should pay the losses claimed.

6. The defence, accepting the collision happened denied causation, fault and negligence claiming the collision was caused by the *'sole negligence of the deceased.'* The defence

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[1] Principled approaches to causation have been addressed by Lord Hoffman in *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 LRC 674. It goes to the heart of the nature and purpose of the civil litigation system.

also raised the affirmative defence of contributory negligence. Both the deceased's causation and contributory negligence were then denied in the respondents reply to the statement of defence.

The facts about the collision

The appellant's evidence

7. The basic facts about the collision, agreed pretrial, and led from the 1st respondent and in part supported by the appellant can be shortly stated.

8. The deceased a local resident was, as usual, walking from her home around 0730 to catch a bus to go to her work with United Apparel[2]. The appellant accepted in evidence to do so her mother, as she had done many times before, had to walk from home along the footpath toward this busy Reba Circle. Then, to reach her transport, there being no safe pedestrian crossing for this busy road, her mother had to cross this 'dangerous place' and that, according to her daughter, was 'a bit' risky.[3]

9. The appellant called no other evidence from eyewitnesses. Did not introduce evidence from police reports mutually discovered pretrial to describe the scene. There were no maps, plans or photographs. The only other respondent's witness the CWM emergency medic added nothing of relevance to causation. The Doctor merely confirmed the injuries to the deceased were from a high velocity impact.

10. The majority of the appellant's evidence then focussed upon her losses and claim for damages. As this evidence will only need to be traversed after a finding on appeal over causation, negligence, and contribution it is for present purposes laid to one side.

The 1st respondent's evidence

11. The 1st respondent driver told the court, as was usual, this morning she was heading to Suva in heavy traffic carefully driving at 50 kmh obeying the road rules. After the Reba

[2] NOE p278 xxm
[3] NOE p 277 and 278 xxm

circle she saw many pedestrians standing by the roadside, including the deceased, as these commuters waited until it was safe to cross the busy road to get to a bus pulled up on the opposite side of the road. This was around 0810. Suddenly from that footpath the deceased came in front of her vehicle and *'bumped'* into the left corner of her car. This was such a surprise the collision on the road was unavoidable. Her modest speed and instant braking allowed her to stop straight after the collision. The driver went immediately to the injured lady's aid as she lay on the road directly in front of the car. The deceased had not been run over but fell to the ground as a result of her collision with the 1st respondent's car. Very soon others gathered around and two of them helped the driver place the injured person into her car and the driver immediately drove her to CWM. The driver was unshaken in her evidence under cross examination which no doubt influenced the High Court to accept her narrative as credible.

Grounds of Appeal

12. The appellant's main ground of appeal rejects the learned High Court Judge's finding on contributory negligence which in effect found the deceased caused the collision.[4] For the sake of brevity many of the stated grounds can otherwise be either combined or quickly disposed of. Grounds 1, 2, 3, 6, 8, 9 and to an extent 10 can be combined as they coalesce around that primary finding of the High Court Judge. As to the remaining grounds:

Ground 4

13. The fact the 1st respondent faced charges for dangerous driving as a result of the collision is irrelevant. First the driver was at the time of the civil trial merely *'charged'* with an offence. We simply note that most motor vehicle negligence cases follow on the coat tails of related criminal proceedings. Often the evidence given in that criminal trial may prove useful for proof of causation in any subsequent civil action. This claim did not follow that usual course. Secondly, while the detail of related criminal trial must be independently reintroduced as evidence in any related civil proceeding[5] any verdict,

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[4] Appellant's submissions page 6 paragraph 5
[5] See Part 5, Evidence Act 2005

summary of facts, evidence, compensation offers and sentence are, as of right available evidence in any civil case. The statutory pathway provided makes it easy for a plaintiff to mine and use this information in support of a negligence claim.[6]

This ground fails.

Ground 5

14. Putting to one side the Doctors understandable lack of any reliable memory of his examination of the deceased, his evidence adds nothing to the key issues of causation or negligence.

This ground fails.

Ground 7

15. No police officer was called. No reports or documents from any policeman's investigation were produced in evidence.

This ground is redundant and fails.

Ground 11

16. In a full decision His Honour demonstrated a good recollection of the case which compares favourably with the record. The delay in providing judgement after trial is irrelevant to the appeal and fails.

Grounds 1, 2, 3, 6, 8, 9 and 10

17. In order to determine the effective cause of the collision, the crucial event without which the 1st respondent and the deceased would have continued on their way to work during rush hour traffic without colliding, it is necessary to ask from the available

[6] See Evidence Act 2005, **Part V** - Convictions, Etc., As Evidence in Civil Proceedings

evidence: What was the event that resulted in them colliding instead of passing each other by? Whose fault was that collision? Did either or both the 1st respondent and deceased breach the standard of normal road safety conduct? Who made the mistake? In short who caused the collision?

18. It could be that the 1st respondent driver's presence at a particular time and place was necessary for the collision to occur, but if anyone driving reasonably would have sufficed, the manner of driving is not a cause. And since the deceased was also on the road in her rush to walk and find her transport for work, there is no basis for suggesting that the 1st respondent should be strictly liable by virtue only of the fact that driving is a dangerous activity. Much more is required of a plaintiff to prove the case.

19. Faced with an absence of evidence as to the cause of the collision, we apprehend the appellant in effect sought to rely on the doctrine of *res ipsa loquitur*. Commonly known as the *'but for'* test. Under that doctrine, where the collision in question is such that it would not have happened in the ordinary course of things if the defendant driver had used proper care, then the fact of its occurrence affords reasonable evidence, in the absence of any explanation by the defendant, that it arose from a want of care.[7]

20. The doctrine operates not as a distinct substantive rule of law. Rather it involves an application of an inferential reasoning process in circumstances where a plaintiff retains the onus of proving negligence. Its effect is to pass an evidential burden to the defendant to provide an explanation for the collision that does not involve a want of care on its part.[8] However, the Privy Council confirmed that the rule is one of evidence alone and does not cause the legal burden of proof to shift to the defendant.[9]

21. Here, we find the 1st respondent driver provided the only evidence explaining causation and fault and upon this was unshaken in cross examination. As such the 1st respondent never assumed any burden of proof and the High Court Judge correctly relied upon her evidence to make findings, that although following reasoning by way of a contributory

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[7] *Scott v London and St Katherine Docks Co* [1865] EngR 220; (1865) 3 H & C 596; 159 ER 665; and *Mummery v Irvings Pty Ltmited* [1956] HCA 45; (1956) 96 CLR 99.
[8] *Schellenberg v Tunnel Holdings* [2000] HCA 18; (2000) 200 CLR 121.
[9] *Ng Chun Pui v Lee Chuen Tat* [1988] 132 S.J 124

negligence assessment, nonetheless properly dismissed the appellant's claim for the simple reason that His Honour found her late mother caused the collision.

22. In cases of motor vehicle negligence claims we note the *'but for'* test is unsatisfactory and inappropriate. While a failure to meet it always negates causation where there are equally probable explanations for the claimed negligent collision, then in any event a plaintiff is back to where she started and is required to establish causation by positive evidence. Such circular reasoning seldom produces material facts for sound findings upon the key questions the court must wrestle with to find the causation, fault, and negligence necessary to secure a plaintiffs claim.

Contributory negligence

23. As the trial Judge found causation by way of a contributory negligence assessment, we suspect His Honour was led down that pathway by counsel. For completeness we now examine the principles and then application of this rule.

24. The basic principle of contributory negligence is that, when a court is awarding damages to the plaintiff for injuries caused by the defendant, it may reduce the award if the plaintiff can be shown to have contributed to the injury by some negligence on her part. However, whilst the liability of the defendant arises from a duty towards the plaintiff, the assessment of contributory negligence is not based on a similar duty on the plaintiff towards the defendant. It was explained by Lord Simons in Nance v British Columbia Electric Railway Co Ltd in this way: [10]

> *"The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the plaintiff to take due care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the respondent's claim, the principle involved is that, where a man is*

[10] *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601, 611

> *part author of his own injury, he cannot call on the other party to compensate him in full.*
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> *…this, however, is not to say that in all cases a plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully. Indeed, it would appear to their lordships that in running-down collisions like the present such a duty exists. The position can be put even more broadly. Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot or whether one is on foot and the other controlling a moving vehicle."*

Contributory negligence must be proved by the facts as revealed in the evidence. If there is nothing in a plaintiff's evidence to support such a claim, then a defendant will need to call her own. In the present case, the defendant's evidence revealed the circumstances upon which she relied.

25. In Hewitt Anor v Habib Bank Ltd[11], this court said:

> *"The initial difficulty in the first ground of appeal is that the burden of showing that the trial judge was wrong in his findings on the facts lies on the appellant. Unless an appeal court is satisfied that the judge was wrong in his assessment of the facts, the appeal will be dismissed. (Colonial Securities Co v Massy) [1896] 1 QB 38, 39. Where a primary judge's estimation of the credibility of a witness forms a substantial part of the reasons for the judgment, the conclusions of fact will almost invariably be left alone (Powell v Streatham Manor Nursing Home) [1935] AC 243."*

26. His Honour the trial Judge in the absence of evidence from the appellant as to cause found the deceased failed to take reasonable care of herself when suddenly crossing this dangerous road and so caused the collision with her death shortly thereafter a sad but inevitable consequence. We are not satisfied that the Judge was wrong in his assessment of the facts. The Appeal fails and is dismissed.

Conclusion

27. The High Court was entitled to accept and rely on the evidence of the 1st respondent. No error has been shown. The trial judgment was correct. There is no justification for this court to intervene. As the deceased was properly found to cause the collision a

[11] *Hewitt Anor v Habib Bank Ltd* [2004] FJCA 33

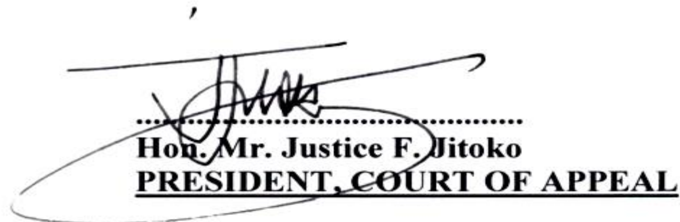
detailed examination of the damages claim by this court is unnecessary. The appellant's appeal against both the 1st and 2nd respondents is dismissed.

28. I turn to the matter of costs on the present appeal. This Court was presented with some 11 grounds of appeal, which were in many instances overlapping. The Court was also presented with a High Court Record comprising 2 volumes (326 pages). The submissions for the appellants and accompanying bundle of authorities comprised some 119 pages. Counsel for the respondent driver was required to prepare and respond to all the grounds of appeal – as was this, Court.

29. In the circumstances, the appellant must pay costs on appeal to the respondents in the sum of $1,500.

Orders of the Court:

1. *The appeal against the 1st and 2nd respondents is dismissed.*
2. *The appellant must pay costs to the respondents in the sum of $1,500.*



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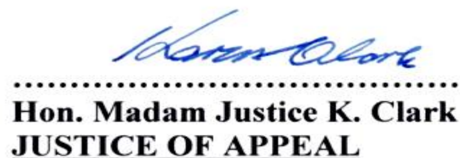
Hon. Mr. Justice F. Jitoko
PRESIDENT, COURT OF APPEAL



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Hon. Madam Justice K. Clark
JUSTICE OF APPEAL

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Hon. Mr. Justice G. Winter
JUSTICE OF APPEAL

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