

**IN THE HIGH COURT OF FIJI AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 296 of 2014**

**BETWEEN**

**PAPALAMA** of Natawa, Tavua, Domentic Duties as the widow and  
Administratrix of the Estate of her late husband

**SADASIWAN NAICKER** aka

**SADA SIWAN NAICKER**

deceased.

**PLAINTIFF**

**AND**

**ASHOK PRASAD** of Lot 87 Vavalagi Road, Ivi Place,  
Nasinu, Diver.

**FIRST DEFENDANT**

**AND**

**VICTORIA WINES & SPIRITS LIMITED** a duly incorporated  
company having its registered office at the Office of  
G.H. Whiteside & Co. 211 Ratu Sukuna Road, Suva.

**SECOND DEFENDANT**

AND

**AVENAI MOKOBULA DAUBITU** of Ratu Dovi Road,  
Nadera, Minibus Driver.

**THIRD DEFENDANT**

AND

**SEN BROTHERS TRANSPORT LIMITED** a limited liability  
company having its registered office at Lot 1,  
Navutu Industrial Road, Lautoka.

**FOURTH DEFENDANT**

**Counsel** : Mr. D. Singh for the Plaintiff  
Mr. R. Singh for the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants.  
3<sup>rd</sup> Defendant absent and unrepresented

**Date of Hearing** : 18<sup>th</sup> October, 2018

**Date of Judgment** : 23<sup>rd</sup> November, 2018

## JUDGMENT

[1] The plaintiff filed this action seeking damages from the defendants alleging that due to the negligence of the 1<sup>st</sup> and 3<sup>rd</sup> defendants her husband sustained injuries and he instantly succumbed to his injuries. The 2<sup>nd</sup> defendant has been made parties on the basis that it is vicariously liable for the negligence of the 1<sup>st</sup> defendant. The 4<sup>th</sup> defendant was the employer of the deceased.

[2] In the statement of claim the plaintiff seeks the following orders from the court:

- a. General damages for pain and suffering;
- b. Special damages;
- c. Damages under Law Reforms (Miscellaneous Provisions)(Death and Interest) Act for loss of prospective earnings;
- d. Damages under Compensation for Relatives Act;
- e. Funeral Expenses;
- f. Loss of expectation of life;
- g. Interest under the Law Reforms (Miscellaneous Provisions)(Death and Interest) Act on the award of general damages at the rate of 6% per annum from the date of service of the writ on damages and at the rate of 3% per annum from the date of accident on special damages;
- h. Costs; and
- i. Interest on the judgment sum at 4% pursuant to Law Reforms (Miscellaneous Provisions)(Death and Interest)(Amendment) Decree 2011 until payment in full.

In the alternative from the 4<sup>th</sup> defendant:

- i) Compensation under the Workmen's Compensation Act.
- ii) Interest under Law Reforms (Miscellaneous Provisions)(Death and Interest) Act on the award of damages at the rate of 6% per annum from the date of service of the writ on general damages and at the rate of 3% per annum from the date of accident on special damages.

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

1. The 1<sup>st</sup> defendant at all material times the driver of the motor vehicle registration No. WINE 2 which was at all material times owned by the 2<sup>nd</sup> defendant.
2. The 3<sup>rd</sup> defendant was the driver and the registered owner of the motor vehicle registration No. LM 406.
3. On the 11<sup>th</sup> February, 2014 the deceased was driving a 20 ton Concrete Mixture Truck registration No. EW 803 towards Lautoka from Suva side.
4. At the junction of Wellesley Resort on Queens Road, Namaqumaqua the minivan registration No. LM 604 driven by the 3<sup>rd</sup> defendant had stopped on the bend to pick up passengers travelling towards Suva.
5. The 1<sup>st</sup> defendant driving the truck registration No. WINE 2 was also travelling towards Suva.
6. The 3<sup>rd</sup> defendant driving motor vehicle registration No. LM 406 Travelling towards Suva also pulled out while truck registration No. WINE 2 was coming from behind.

[4] October, 2017 this matter was fixed for trial for 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> April, 2018 but on that day the 3<sup>rd</sup> defendant was absent and unrepresented. On 03<sup>rd</sup> April, 2018 the trial was vacated because the witnesses were not available and it was re-fixed for trial on 30<sup>th</sup> and 31<sup>st</sup> July, 2018. On that day the 3<sup>rd</sup> defendant was represented by a counsel. On 30<sup>th</sup> July, 2018 the 3<sup>rd</sup> defendant was again absent and the trial was vacated for 18<sup>th</sup> and 19<sup>th</sup> October, 2018 and the 3<sup>rd</sup> defendant was ordered to pay \$500.00 to the plaintiff as costs. Subsequently the solicitors of the 3<sup>rd</sup> defendant with permission of the court withdrew as solicitors. Since, the 3<sup>rd</sup> defendant, although filed his statement of defence, failed to appear in court the matter was proceeded to trial in his absence. At the commencement of the trial the learned counsel for the plaintiff informed court that the plaintiff does not pursue the action against the 4<sup>th</sup> defendant.

[5] There are two eye witnesses to this accident. One is Jolame Qeruta who testified for the plaintiff and the other is the 1<sup>st</sup> defendant the driver of the one of the three vehicles involved in the accident.



- [6] The witness for the plaintiff said at the time of the accident he was walking on the road and at the bend there was a minibus parked and the truck came behind was overtaking it. The cement truck driven by the deceased came from the opposite side and while trying to avoid the accident it went off the road into the ditch. He said further since the cement fell on the driver they could not take him out of the vehicle. In cross examination when Tab 12 of the agreed bundle of documents, which contains photographs of the place where accident occurred, the witness said the minibus was parked right at the corner and if the truck driver moved the vehicle more to the left the accident could have been avoided. The witness also said he thinks because the speed of the vehicle was high, the driver could not avoid the accident.
- [7] The 1<sup>st</sup> defendant's evidence is that while he was driving the truck towards Suva he saw a minibus parked by the side of the road and as he tried to go passed that vehicle it suddenly came on the road without any signal and the truck came from the opposite direction hit the right side of the rear tray and then hit the sign board and went into the ditch. The fact that the truck driven by the deceased hit the rear tray of the 1<sup>st</sup> defendant's truck has been confirmed by the accident report of Navua Police (Tab 8 of the agreed bundle of document) which was referred to in evidence at the hearing. The witness also said that he did not, while trying to go pass the parked vehicle crossed the centre line of the road and the truck driven by the deceased had enough room to go pass his vehicle.
- [8] This action was brought by the wife of the deceased in the capacity of the Administratrix of his estate on the basis that the accident was due to the negligence of the 1<sup>st</sup> and 3<sup>rd</sup> defendants. The initial burden is on the plaintiff to establish that the negligence of these two defendants.
- [9] The 1<sup>st</sup> defendant's evidence that he did not cross the centre line of the road has not been contradicted nor was his evidence was proved to be false. Even in cross-examination the 1<sup>st</sup> defendant affirmed what he said in examination-in-chief. In cross-examination he said that he saw the truck coming on to his lane and the truck was coming at quite a speed.
- [10] From the evidence adduced at the hearing it appears that the deceased had gone more towards to his right and after colliding with the rear of the truck driven by the 1<sup>st</sup> defendant went on his left, struck against the signboard and then went into the ditch and the entire load of cement that was there in the truck fell on him. The

only way the 1<sup>st</sup> defendant could have been negligent was to drive on to his right side blocking the way of the truck but if something like that happened the collusion would have been head-on or at least on the front left side of the vehicle driven by the 1<sup>st</sup> defendant. The deceased had passed the front of the truck driven by the 1<sup>st</sup> defendant before the collusion. The learned counsel suggested to the 1<sup>st</sup> defendant in cross-examination that when he overtook the parked van or minibus the rear of his truck went across the centre line but the first defendant denied.

[11] As I have stated earlier in this judgment it is the wife of the plaintiff who instituted these proceedings on behalf of the estate of her deceased husband and she had not seen the accident. However, the law is that the burden is on the plaintiff to establish the negligence of the 1<sup>st</sup> and 3<sup>rd</sup> defendants.

[12] Even to apply the maxim *res ipsa loquitur* the facts must be such that the most natural explanation what happened is that the defendant was careless. In the case of **Scott v London and St Katherine Docks Company** (1865) 3 H & C 595, 601; 159 ER 665, 667 Erle CJ. Held:

‘where the thing [which caused the accident complained of] is shewn to be under the management of the defendant .... And the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants that the accident arose from want of care.

In **Ng Chun Pui v Lee Chuen Tat** [1988] RTR 298, Lord Griffiths, speaking for the Privy Council said:

“this does not mean that the burden of proof is formally reversed. The claimant has the burden throughout of establishing his case on the balance of probabilities, and the judge must make an assessment of whether there has been a lack of due care on all the evidence presented to him. Another way of putting this is to say that the defendant does not formally have the burden of disproving lack of care on the balance of probabilities simply because *res ipsa loquitur* has been successfully raised against him.

Setting aside the decision of the original court it was noted that even though it looked at first as if the defendant had been careless



in driving the coach, he had an explanation for his driving into the claimant's lane: he was trying to avoid a car that had cut in front cut him.

[13] In this matter facts are somewhat similar to the case cited above. But in this case there is no evidence that the 1<sup>st</sup> defendant crossed the center line of the road and this is the only act of negligence complained against the 1<sup>st</sup> defendant. The 3<sup>rd</sup> defendant did not testify in court at the trial. However, there is also no evidence that his action of negligence complained of by the plaintiff that is, he suddenly took the parked vehicle on to the road has in any way contributed to the accident. For these reasons it cannot be said that the maxim *res ipsa loquitur* is applicable to the facts of this case.

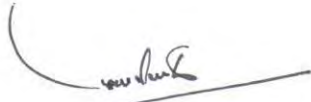
[14] From the evidence the only reasonable conclusion the court can arrive at is that the deceased was responsible for this accident. If the deceased drove the truck at moderate speed with the heavy load this accident would not have happened.

[15] For the reasons set out above the court makes the following orders.

**ORDERS:**

1. The plaintiff action is dismissed.
2. Taking all the circumstances of this case into consideration the court does not make any order as to costs of the action.



  
Lyone Seneviratne

**JUDGE**

23<sup>rd</sup> November, 2018