IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 111 of 2009

BETWEEN : **MITIELI SERU** of lot 80 Nanuya Street, Lautoka, Transport Officer, as the Administrator of the **ESTATE OF NETANI TIKINITABUA** also known as **NETANI TINANITABUA** late of Lot 80 Nanuya Street, Lautoka, Caretaker, Deceased, Intestate.

Plaintiff

AND : **LAUTOKA CITY COUNCIL** a body corporate duly constituted under the provisions of the Local Government Act Cap 125.

1st Defendant

AND : **FIJI ELECTRICITY AUTHORITY** a body corporate duly constituted under the provisions of the **FIJI ELECTRICITY ACT** Cap 180.

2nd Defendant

AND : **LAUTOKA CITY COUNCIL** a body corporate duly constituted under the provisions of the Local Government Act Cap 125.

Third Party

AND : **ELECTRICAL SOLUTIONS FIJI LIMITED** a limited liability company having its registered office at Lautoka, Fiji.

Fourth Party

Counsel : M/S Chaudhary & Associates for the Plaintiff
M/S Mishra Prakash for the 1st Defendant & Third Party
Haniff Tuitoga for the 2nd Defendant
Gordon & Company for the Fourth Party

DIRECTIONS

INTRODUCTION

1. These are my directions pursuant to the Plaintiff's summons dated 14 January 2013 pursuant to Order 33 Rules 4(2), 5 and 7 of the High Court Rule 1988 seeking the following Orders:

(i) that the issue of liability between the defendants, the Third Party and the Fourth Party be set down for hearing as a preliminary point.

(ii) any such further order and/or other orders as this court deems just and fit in the circumstances.

(iii) that the costs of this application be costs in the cause.

2. The. provisions of Order 34 on which the application is based provide as follows:

> **Determining the place and mode of trial** (O.33, r.4)
>
> 4.-(1) In every action begun by writ, an order made on the summons for directions shall determine the place and mode of the trial; and any such order may be varied by a subsequent order of the Court made at or before the trial.
> (2) In any such action different questions or issues may be ordered to be tried at different places or by different modes of trial and one or more questions or issues may be ordered to be tried before the others.
>
> **Split trial: offer on liability** (O.33, r.5)
>
> 5.-(1) This rule applies where an order is made under rule 4(2) for the issue of liability to be tried before any issue or question concerning the amount of damages to be awarded if liability is established.
> (2) After the making of an order to which paragraph (1) applies, any party against whom a finding of liability is sought may (without prejudice to his defence) make a written offer to the other party to accept liability up to a specified proportion.
> (3) Any offer made under the preceding paragraph maybe brought to the attention of the Judge after the issue of liability has been decided, but not before.
>
> **Dismissal of action, etc. after decision of preliminary issue** (O.33, r.7)
>
> 7. If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

3. The Plaintiff's Summons invites the Defendants and the Third and 4th Parties to concede that the only issue is: which of them is liable and/or, whether they should share in liability and quantum. In their pleadings (see discussion below), the defendants and the 3rd and 4th parties appear, merely, to be shifting the blame around. Had the defendants and the 3rd and 4th at least conceded that the "accident" in question in this case did happen, it would be easier for me to grant Order in Terms of the Summons. None of them, save for the 4th party, is amenable to a split trial.

4. Having said that, I will point out that there is a Report by the Fiji Electricity Authority (**"FEA"**) before this Court annexed to an affidavit already filed in this case, which tends to establish all the circumstances of the accident in question.

5. The statement of claim alleges that on 01 March 2008, Netani Tinanitabua (**"Netani"**, deceased) had walked up to the roundabout along Drasa Avenue in Lautoka at about 10.30 p.m. when a part of his body came in contact with a lamp post. The lamp post was in fact electrified. Netani was electrocuted and died as a result. The plaintiff, Mitieli Seru, has filed a claim seeking damages on behalf of Netani's estate under the Law Reform (Miscellaneous Provisions)(Death and Interest) Act (Cap 27) and on behalf of Netani's surviving children under the Compensation to Relatives Act (Cap 29).

6. Does the maxim *res ipsa loquitur* apply in this case?

7. In **Fiji Electricity Authority v Ganilau** [1999] FJCA 34; Abu0050u.97s (14 May 1999)), where a man died by electrocution when he touched a live brace wire outside his house, the Fiji Court of Appeal said *obita* that this was a classic case of res ipsa loquitur (see further discussion below).

8. In Fiji, as in most (if not all) common law countries, the maxim need not be pleaded (**Ali v Ali** [2009] FJCA 41; ABU0029.2006 (3 December 2009).

SPLIT TRIALS

9. The general rule is that all questions of law and fact in any given case must be tried together at the trial. However, Order 33 Rules 4 and 5 give the

High Court a judicial discretion to direct a split trial in **"exceptional and extraordinary cases"** or where the Judge has serious reason to believe that the trial of the issue will put an end to the action.

10. In **Bidesi v Public Trustee of Fiji** [1975] FJCA 6; [1975] 21 FLR 65 (25 July 1975), the Fiji Court of Appeal said:

> An order for the trial of some issues before others should, however, only be made in "exceptional and extraordinary cases" or where the Judge has serious reason to believe that the trial of the issue will put an end to the action - per Jessel M.R. in *Piercy v. Young* 15 Ch. D 475 at 480.

11. In **Bidesi v Public Trustee of Fiji** (supra), the Fiji Court of Appeal commented on the judge at first instance order in favour of a split trial thus:

> With respect, I have considerable doubts as to whether such an order should have been made in the present case. Whatever was to be said of the defences of estoppel, acquiescence and laches, and whatever evidence might have been directed to them, it seems to me that in the forefront of this case there was the question of testator's understanding of the contents of the will. That was raised by appellants in the original pleadings when revocation of the grant of probate in common form was sought. Respondent raised it in his pleadings seeking a grant of probate in solemn form on which it was accepted that the burden of proof fell upon him. As it appears to me, the pith and substance of the action and counter-claim was testator's knowledge and approval of the contents of the will. While in some circumstances defences of estoppel, acquiescence and laches might themselves, collectively or individually, have been rocks upon which appellants' case could founder, an order for the trial of those issues before the issue of knowledge and approval of the will, does not seem to have been likely to accomplish any real purpose when order itself contemplated that the evidence given and tendered upon trial of the substantive defences was to be treated as evidence given and tendered in respect of the other issue. As it happened, however, the trial took substantially the same form as it would have taken had the order not been made. The parties adduced evidence on all the issues and counsel addressed the Court at length upon them all. In particular, the issue of testator's knowledge of the contents of the will was canvassed in the evidence and the submissions made upon it. Although he dealt first in his judgment with defences of estoppel, acquiescence and laches the learned trial Judge considered the other issue and reviewed the evidence upon it at considerable length.

12. Madam Justice Phillips in **Buanasolo & Anor v Khan** Civil Action No. HBC 355/2001, summarises the general approach of the courts whenever asked to exercise the Order 33 Rule 3 discretion:

> .....the question I have been asked to determine is not one to which recourse to the Order 33 jurisdiction can properly apply in the circumstances of this case. It is apparent from the pleadings and the respective submissions of counsel that many relevant facts are clearly in dispute. In addition, the averments contained in paragraphs 14 and 15 of the statement of claim cannot be determined in isolation to other allegations raised in the plaintiffs claim, in particular those relating to fraud. The courts have warned against the lack of wisdom, save in very exceptional cases, of adopting this procedure of preliminary points of law, on the grounds that the shortest cut so attempted inevitably turns out to be the longest way round, and that it is highly undesirable that the court should be constrained to tie itself in so many knots.[2] This is the case at hand.

13. There is in fact a policy which militates against split trials. In **Attorney-General of Fiji v Pacoil Fiji Ltd** [2000] FJCA 3; ABU0014U.99S (7 January 2000), the Fiji Court of Appeal said at the outset:

> This case affords another example of the disadvantages of split trials. Almost invariably they end up taking far more time and involving greater expense than if all issues had been determined at a single hearing. We cannot emphasise too strongly that only in the most exceptional cases will separate trials on liability and damages be warranted.

14. Whether or not a split trial is suitable in this case will depend on whether or not the maxim res ipsa loquitur applies.

RES IPSA LOQUITUR

15. As I have said above, the Fiji Court of Appeal has already expressed an obita view that it is a classic case of res ipsa loquitur where a man died when he touched a live brace wire outside his house.

16. As all lawyers know, the leading case on *res ipsa loquitur* was **Scott v London and St Katherine's Docks Co** (1865). The plaintiff in that case was injured when some sugar bags fell on him near the door of the defendant's warehouse. At trial, he could not establish negligence, and the defendant chose not to call any evidence. The plaintiff lost his case as a result. On appeal, a new trial was directed. That direction was made on a reasoning which has since become known as *res ipsa loquitur*.

> There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, 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 defendant, that the accident arose from want of care.

17. The law books caution that *res ipsa loquitur* is simply an aid in the evaluation of evidence. When applicable, it entitles a court to draw inferences of facts upon proof of certain other basic facts. It (*res ipsa loquitur*) is not a doctrine or a special rule of law.

18. **Flemming on Torts 9th** edition at page 353 says as follows:

> Unfortunately, the use of a Latin phrase to describe this simple notion has become a source of confusion by giving the impression that it represents a special rule of substantive law instead of being only **an aid in the evaluation of evidence**, an application merely of "the general method of inferring one or more facts in issue from circumstances proved in evidence.

19. **Street on Torts 14th ed** at page 139 says as follows:

> In the past, there has been a tendency to elevate res ipsa loquitur to the status of a principle of substantive law or at least a doctrine. In the 1970s, however, the Court of Appeal decisively swung away from that approach. In **Lloyde v West Midlands Gas Board**, Megaw LJ stated that res ipsa loquitur simply describes a method of reasoning:
>
> > 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 claimant prima facie establishes 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 the 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 claimant's safety.

20. **Flemming on Torts 9th edition** describes the maxim *Res Ipsa Loquitur* thus at page 352:

> In some circumstances, the mere fact that an accident has occurred raises an inference of negligence against the defendant. A plaintiff is never obliged to prove his case by direct evidence. Circumstantial evidence is just as probative, if, from proof of certain facts, other facts may reasonably be inferred. *Res ipsa loquitur* is no more than a convenient label to describe situations where, notwithstanding the

> plaintiff's inability to establish the exact cause of the accident, the fact of the accident by itself is sufficient in the absence of an explanation to justify the conclusion that most probably the defendant was negligent and that his negligence caused the injury. The maxim contains nothing exceptional; it is based on common sense, since it is a matter of ordinary observation and experience in life that sometimes a thing tells its own story.

21. In **Ali v Ali** (supra), the statement of claim in the High Court[1] had pleaded that the plaintiff, on 03 May 1998 was walking along Navau Road, Ba when motor vehicle registration E2932 which was loaded with logs drove alongside him and a log which was not properly secured on the vehicle struck him.

22. In the High Court, Mr. Justice Connors had noted that there was no evidence of the load being unsecure and that all evidence described the plaintiff coming into contact with a log secured to the vehicle at the side or at the rear. He then noted that the plaintiff's counsel had made submissions on res ipsa loquitur but had not pleaded it. Connors J relied heavily on **Schellenberg v Tunnel Holdings Pty Ltd** [2000] HCA 18; [2000] 200 CLR 121 and held that res ipsa loquitur did not apply.

23. In **Schellenberg**, Gleeson CJ and McHugh J said at paragraph 22 that:

> "[re ipsa loquitur] is not a distinct, substantive rule of law, but an application of an inferential reasoning process, and that the plaintiff bears the onus of proof of negligence even when the principle is applicable."

24. On appeal (of **Ali v Ali**), the Fiji Court of Appeal (as per Byrnes JA) said thus:

> [2] In my view this case is a classical example of the way in which the maxim res ipsa loquitur should be applied.

25. Byrnes JA then went on to say that

> [3] Res ipsa Loquitur is no more than a convenient label to describe situations where, notwithstanding the Plaintiff's inability to establish the exact cause of an accident, the fact of the accident by itself is sufficient in the absence of an explanation to

[1] See Ali v Ali [2006] FJHC 98; HBC 236.2000L (17 February 2006).

justify the conclusion that most probably the defendant was negligent and that his negligence caused the injury. There is nothing arcane about the maxim because it is based on common sense, since it is a matter of ordinary observation and experience in life that sometimes a thing tells its own story.

26. Byrne JA said that it is impossible to catalogue res ipsa loquitur cases. Every case must turn on its own facts.

> [5] So much importance does the learned author of the **LAW OF TORTS, John G. Fleming** .....[a]t page 353 the learned author says that it is impossible to catalogue res ipsa loquitur cases: "every accident is in some respects singular and proof of facts by facts incapable of reduction to a formula.

27. However, two conditions must be satisfied by the plaintiff before res ipsa loquitur can apply:

> Nevertheless before the maxim can apply two conditions must be satisfied by a plaintiff:
>
> > i) the occurrence must bespeak negligence and that negligence be the defendants; ii) it must also be such as to raise two inferences: (i) that the accident was caused by a breach by somebody of a duty of care to the plaintiff, (ii) that the defendant was that somebody – Mahon v. Osborne [1939] 2.K.B 14 at 21.

28. In **Kumar v Commissioner of Police** [2006] FJSC 13; CBV0003U.2006S (19 October 2006), the Fiji Supreme Court accepted that, while proof of an escape from custody of a prisoner, normally, would establish a *prima facie* case of negligence on the part of the Prison Service, this is not necessarily so in the case of an escape during a time of widespread breakdown of law and order.

> Mr Cameron also invoked the principle enshrined or obscured by the Latin maxim *Res Ipsa Loquitur* (proof of an escape, without more, speaks for itself, and is evidence of negligence).
> [14] We cannot accept these arguments. Proof of the means of escape from prison in normal times might establish a ***prime facie*** case of negligence on the part of the Prison Service. In ***Scott v. London and St Katherine Docks Co*** [1865] EngR 220; (1865) 159 ER 665, 667 Erle CJ delivering the judgment of the Court of Exchequer Chamber said that the maxim applied "where... the accident is such as in the ordinary course of things does not happen if those who have the management use proper care." However, the situation which prevailed following the breakdown of law and order after George Speight and his confederates seized the Parliament were not "the ordinary course of things." In that situation proof of an escape without more cannot possibly establish a ***prima facie*** case of negligence by the Prison Service.

[15] The breakdown of law and order may have extended to the prisons and prison officers may have refused to do their duty. If so, they may, as result, have acted outside the scope of their employment so as to exclude the vicarious liability of the Prison Service for their acts and omissions. There may have been absolutely nothing that the Commissioner and his senior officers could have done to prevent the escape.

29. In **Fiji Forest Industries Ltd v Naidu** [2017] FJCA 106; ABU0019.2014 (14 September 2017), the Fiji Court of Appeal rejected the High Court's application of the principle in a case where a labourer working on a sanding machine, had all fingers of his right-hand cut as a result of an accident, because there was ample evidence that the accident occurred due to lack of effective maintenance of the machine by the employer. The Fiji Court of Appeal said thus:

Res Ipsa Loquitor

[35] The tenth ground of appeal is whether *res ipsa loquitor* applies in the circumstance of this case. The Appellant contends that the High Court was in error in holding that it applied in this case. *Res ipsa loquitor* is an evidentiary rule that enables the court to infer negligence from the circumstances in which the accident occurred, if there is no explanation for it. However, for the reasons set out below, the rule did not apply to the facts of this appeal. This ground of appeal is therefore dismissed.

[36] .....

[37] In this case, the evidence revealed that the accident occurred due to lack of effective maintenance by the Appellant. Therefore, it was not open to the High Court to have held that "the Appellant had not disproved negligence". In view of the availability of evidence which established that it was the presence of dust in the machine that caused it to reject the board which injured the Respondent, the High Court erred in arriving at the finding that res ***ipsa loquitur*** applied. This ground of appeal is therefore dismissed.

30. In **Bank of Baroda v Lal** [2006] FJCA 64; ABU0078U.2005S (10 November 2006), the Fiji Court of Appeal had to consider whether the High Court was correct in applying res ipsa loquitur in a case where the plaintiff, who was a passenger in a car, was injured as a result of an accident caused by the rear left tyre blowing out. The Fiji Court of Appeal agreed that the maxim applied on the reasoning that, while there was no

explanation and no evidence as to the cause of the accident, the accident in question (i.e. van tumbling and running off the road due to a burst tyre), would not normally occur unless someone had been negligent:

> [5] Then after citing some authorities, the Judge stated his conclusions:
>
> There is no evidence before the court as to the ultimate cause of the accident. The only evidence is that the tyre blew out and the vehicle hit a pothole and then overturned. Why did the tyre blow out? This question is not answered. There is an absence of an explanation and a lack of evidence as to the specific cause of the accident.
>
> In the circumstances, I am not satisfied as to the cause of the accident and in particular as to the cause of the tyre bursting. In these circumstances, it is appropriate to apply the principle of res ipsa loquitur and accordingly, I find for the plaintiff on liability.
>
> **Liability**
>
> [6] .....
>
> [7] This leaves the grounds, in effect, that the Judge misapplied res ipsa loquitur and should have held the plaintiff's injuries were caused through inevitable accident.
>
> [8] The appellant relied on the decision of this Court in **Ramzan v Jagdish Chand Gosai** (1968) 14 FLR 136. That however was a straightforward application of the principle in cases such as **Barkway v South Wales Transport Co. Ltd** [1950] AC 185. Where the facts become sufficiently known, res ipsa loquitur has no application. Here, the Judge accurately summarised the relevant evidence in the first of the passages set out above. There was no evidence whatever as to the cause of the tyre burst. The Judge was left with the fact that a tyre burst, and the van tumbled and ran off the road, an event that does not normally happen if a vehicle is properly maintained and operated. He was entitled say that on an application of res ipsa loquitur there was sufficient evidence to justify a finding of negligence. There are no grounds for interfering with his conclusion on liability, with which we entirely agree.

31. In **Manu v McCaig** [2006] FJCA 8; ABU0048.2005S (24 March 2006), the Fiji Court of Appeal had to consider whether res ipsa loquitur applied in a medical negligence case where the sacral nerve was cut or damaged during a medical procedure. The Court said that, notwithstanding the absence of direct evidence that the respondent did cut or damage the said nerve, negligence and liability were established on inferential evidence and therefore, res ipsa loquitur did not apply.

> [31] There is of course no direct evidence that the respondent cut or damaged the sacral nerve. Indeed, he denied it although he gave no explanation as to how the nerve became damaged. However, we must consider what inferences can properly be drawn. Can the appellant rely on inferential reasoning to prove negligence?

> Negligence in the respondent may be proved inferentially if there is no explanation of how the nerve was damaged in the operation other than under the hand of the surgeon not displaying reasonable care. Here there is no other possibility on the evidence other then want of care on the part of the respondent. On the probabilities it is likely that there was "a cut too far" by the respondent which damaged the nerve causing the appellant's condition. There is no evidence that the nerve was damaged by some rare or unavoidable misadventure. Indeed, the respondent gave no explanation of what might constitute a rare or unavoidable misadventure.
>
> [32] In these circumstances it is not necessary to invoke the doctrine of ***res ipsa loquitur.***
>
> [33] We find liability in negligence established on the evidence. The parties are agreed that the action should be remitted to the High Court to assess the damages to be awarded.

FEA v GANILAU

32. I have already introduced this case in the preceding paragraphs. The case is noteworthy for some *obita* comments of the Fiji Court of Appeal and for its facts which are somewhat similar to the one before me now.

33. The late Inoke Raiwalui was a Prison Officer. He occupied Quarters 43B at Korovou Prison Compound. On 30 April 1989, Raiwalui stepped out of his house to fetch pawpaws from outside. At some point, he held on to a brace-wire in the grounds. The wire was in fact live. Raiwalui was electrocuted and died instantly. The administrator of his estate sued under both the Law Reform (Miscellaneous Provisions) (Death and Interest) Act [Cap 27] claiming damages and the Compensation to Relatives Act [Cap 29]. The Writ of Summons was issued on 19 November 1992, which was more than three years after the date of death.

34. In the High Court, Mr. Justice Pathik (see **Ganilau v Fiji Electricity Authority** [1997] FJHC 225; Hbc0508d.92s (7 August 1997)) extended the Limitation period after arguments on the issue. This was appealed to the Fiji Court of Appeal.

35. Notably, as Pathik J had noted in the High Court, Inquest No. 2 of 1989 had been held to inquire into the circumstances surrounding the death of Raiwalui. Its findings, with the following conclusions, were delivered on 22 December 1989, just eight months after the death of Raiwalui:

> (a) the deceased Inoke Raiwalui died by electrocution
> (b) it was the result of the negligence of the F.E.A. the first defendant 'for failing to maintain the brace-wire attached to the lamp post in question in a safe and proper manner, since it was not properly insulated'.

36. The FEA however had filed its statutory report as required under section 57 of the Electricity Act Cap. 180 on 1 October 1992, more than three years after the death of Raiwalui. As I have said above, more than a month later, on 19 November 1992, the writ of summons and statement of claim were issued.

37. The administrator of the estate named both FEA and the Attorney-General as plaintiffs. She argued before the FCA that the reason why she had delayed in filing the claim was because she could not know with any certainty who to sue until the said FEA Report of 01 October 1992.

38. The FCA (see **Fiji Electricity Authority v Ganilau** [1999] FJCA 34; Abu0050u.97s (14 May 1999)) rejected the argument. To emphasise that it had always been clear at the outset as to who were capable of being sued (either FEA who installed the electrical wirings concerned or the Government being the occupier), the FCA said *obita* that this was a classic example of res ipsa loquitur:

> The circumstances of this unfortunate accident were straight-forward and obvious. Liability prima facie rested with whoever was responsible for erection and maintenance of the stay wire and with the occupier of the property, or both. A simple enquiry at any time could have ascertained that they were respectively the Electricity Authority and the Public Works Department. **This appears to be a classic example of " res ipsa loquitur "** and we are satisfied that the action could have been commenced well before expiry of the limitation period. There was no basis for

extending the time, and the appeal by the Electricity Authority, which pleaded this defence, must succeed.

(my emphasis)

WHAT PLAINTIFF NEEDS TO PROVE IN THIS CASE

39. I agree with the defendant's submissions that the plaintiff still bears the onus of proving negligence. However, if the plaintiff can only establish that the accident occurred, but can offer no explanation as to why it happened, res ipsa loquitur may be invoked to assist a plaintiff if the following three conditions are satisfied (see **Street on Torts 14th ed** at page 139 to 141).

(i) absence of explanation of why accident occurred.

(ii) the harm must be of such a kind that it does not ordinarily happen if proper care is being taken.

(iii) the instrumentality causing the accident must be within the exclusive control of the defendant.

40. Of course, as it goes without saying, the plaintiff has to first establish that the accident itself occurred.

41. As to whether the effect of the maxim will shift the burden to a defendant, **Clerk & Lindsell on Torts** 19th ed (2006) say at paragraph 8-155 at page 499 as follows:

> **Procedural effect of doctrine.** One view of the effect of the doctrine is that it simply raises an inference of negligence which requires the defendant to provide a reasonable explanation of how the accident could have occurred without his negligence. On this view, the defendant does not have to prove on the balance of probabilities that his explanation is the correct one. If it is equally as plausible as that of the claimant, the claimant will fail as he bears the burden of proof. The alternative view is that the doctrine reverses the burden of proof so that if the defendant shows that his explanation is equally plausible but not more so, then he will lose. Lords Reid and Donovan supported this view in *Henderson*'s case. However, in *Ng Chun Pui v Lee Chuen Tai* the Privy Council stated that the burden of proof does

not shift to the defendant. A coach veered across the carriageway, crossed the central reservation and collided with a bus coming in the opposite direction. The claimant called no evidence, and the court held that these facts by themselves would have justified an inference of negligence. The defendants, however, gave the explanation that an unidentified car had suddenly cut across their coach, whose driver braked immediately and then skidded. In the light of his evidence the Privy Council held that there could be no inference of negligence, since the driver's reaction in the emergency was not negligent. Thus if the defendant provides an equally plausible explanation, this will redress the balance of probability, if it has tilted against him, and the claimant will be back.

42. In my view, all that Mitieli Seru needs to prove to satisfy the above are the following:

(i) that Netani was at the Drasa Avenue Roundabout on the day in question.

(ii) his body came in contact with the lamp post located at the roundabout.

(iii) the lamp post was electrified.

(iv) Netani was electrocuted.

(v) Netani died as a result.

(vi) the said lamp post was within the exclusive control of the Lautoka City Council (a fact which the Council has already admitted in its statement of defence).

43. I quite agree with the sentiments of Mr. Chaudhary that one does not expect a lamppost situated in a public place (or in any other place for that matter) to be electrified and that if it is proved that the lamppost was in fact electrified, then there is no other possibility on the evidence other then want of care on the part of either the Lautoka City Council and/or the Fiji Electricity Authority.

44. In the circumstances of this case, assuming the above is established, it would have to be upon the entity responsible for the maintenance and

control of the lamppost to convince this court that the lamppost in question was electrified through no fault of it. In that regard, the onus would somewhat shift upon proof by the Plaintiff of the elements set out in paragraph 42 above.

DEFENCE OF DEFENDANTS & 3RD & 4TH PARTIES

45. As I have said above, the defendants and the 3rd and 4th parties, in their pleadings appear to be shifting the blame around. Lautoka City Council (**"LCC"**) already concedes in its defence that the lamppost in question was under its control and management at all material times. The FEA also appears to make some concessions in a Report written following its own investigations on the accident.

46. In paragraph 6 of its statement of defence filed on 30 August 2010, FEA admits that on 01 March 2008 Netani died. However, it then *"denies the allegations in paragraph 6 of the Claim"*.

47. The FEA also filed a Third Party Notice on 05 May 2011 against LCC. While the FEA disputes the claim, it pleads as follows at paragraphs 5,6,7, 8 and 9 of its claim:

> 5. The Third Party owns all streetlights in the Lautoka City boundary and is responsible for providing streetlight services including the installation, commissioning, maintenance and repairs of these streetlights.
> 6. On 1 March 2008, the Deceased died after he was electrocuted when his foot came into contact with a live streetlight pole (**"incident"**) located at the Drasa Avenue Roundabout, Lautoka (**"Streetlight"**)
> 7. The incident and the subsequent death of the Deceased occurred entirely due to the negligence of the Third Party:
>
> PARTICULARS OF NEGLIGENCE
>
> (a) .....
> (b) .....
> (c) Failing to ensure that the electrical contractors properly and efficiently carried out maintenance works on the Streetlight.
> (d) .....

(e) .....
(f) Failing to instruct the electrical contractors to check and ensure that the Streetlight and the column were safe.
(g) .....
(h) .....
(i) .....
(j) Failed to employ competent electrical contractors to work on the Streetlight.
(k) .....

8. As a result of the incident, the Plaintiff sustained injuries and died, particulars of which are contained in the Plaintiff's Amended Statement of Claim filed herein on 21 June 2010.
9. The incident occurred entirely due to the negligence of the Third Party and in so far as any liability in respect thereof is held to rest upon the Second Defendant, the Third Party is liable to indemnify the Second Defendant against any and all such sums as may be awarded to the Plaintiff whether by way of damages and/or costs and/or interest, together with the costs of defending this action and the costs of the Third Party proceedings.

48. Following the Third Party Notice filed against it by the FEA, the LCC filed a Statement of Defence against the said Third Party Notice ("**3rd Party Defence**"). It also filed a Fourth Party Notice ("**Claim Against 4th Party**") against Electrical Solutions Fiji Limited ("**ESFL**"), a limited liability company having its registered office in Lautoka.

49. In paragraph 3(a) of its 3rd Party Defence, the LCC admits:

> "..that it owned the street light at the Drasa Avenue Roundabout <u>where the incident occurred</u>".

50. At paragraph 4(b) and (c), LCC asserts as follows:

b. The supply of electricity and other matters stated in the Electricity Act is in the control of the Second Defendant authority and is its responsibility under statute and/or under contract. It is a Government cooperate (sic) body set up under the Electricity Act (sic).
c. The subject area at Drasa Avenue Roundabout where the incident occurred is a public area. The accident and the injury to the deceased and his death is due to the negligence (wholly or in part) of the Second Defendant particulars of which are as follows:

(i) Letting the live wire neutral joint tape near the base of the electrical column of the relevant street light get work out so that it made contact with the metallic column which causing (sic) it to be live which created a danger.

(ii) Installing electrical connections so that the main active cable feeding the relevant street light column was connected to the neutral cable and the main neutral vice versa.
(iii) Not carrying out regularly (sic) inspection or supervision. Not properly supervising or controlling the installation of the cabling/wiring from the source of electrical supply to the lamp post.
(iv) Failure to carry out its functions as defined in the Electricity Act.

51. At paragraph 4 of the Fourth Party Notice, Lautoka City Council claims as follows:

> 4. The Third Party claims against you a full indemnity **by virtue of your agreement with the Third Party for repair of lamp posts in Lautoka City which was current when the deceased was electrocuted on or about the 1st day of March 2008**.

(my emphasis).

52. ESFL pleads as follows at paragraphs 8,9,10,11 and 12 of its defence.

> 8. THAT the 4th Party further says that its contract with the 3rd Party only deals with basic rudimentary street light maintenance.
> 9. THAT the 4th party changed one 70att bulb and one 70 watt ballast on the street light on 8th of March 2007 and that the Plaintiff was electrocuted on 1st of March 2008 one year and therefore the 4th Party's works on the streetlight could not have caused the Plaintiff's death.
> 10. THAT the 2nd Defendant's own Investigation Report of 16th April 2008 on the death of the Plaintiff found that the main active cable feeding the street light was connected to the neutral cable and the main neutral cable vice versa. That this connection was carried out by the 2nd Defendant a few meters away from the street light and was carried out twenty years back when the 2nd Defendant Network Division was still carrying out streetlight installation, commissioning and maintenance work. That the live neutral joint tape near the base of the street light had been worn out and was touching the metallic column causing it to be live.
> 11. THAT the said 2nd Defendant's Investigation Report concluded that had the 2nd Defendant carried out proper work at the first instance the electrocution of the Plaintiff would not have happened and in doing so the 2nd defendant had breached section 63 of the Electricity Act Cap 180.
> 12. THAT the 4th Party will rely on 2nd Defendant's Investigation Report of 16th April 2008 at the full trial of this action as proof that the 2nd Defendant is solely liable for the death of the Plaintiff.

COMMENTS

53. The Plaintiff's application was not an unreasonable one. However, in the absence of any concession to liability from any of the defendants or 3rd/4th

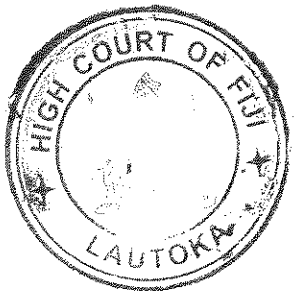
parties, the plaintiff will still have to establish, although as a matter of mere formality it seems, the facts set out in paragraph 42 above. If the plaintiff is able to prove these, res ipsa loquitur will then apply to shift the onus firstly to Lautoka City Council which has already conceded in its pleadings that it had management and control of the lamppost in question.

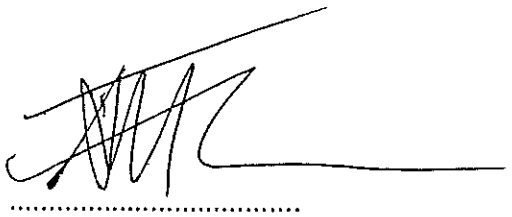
54. Of course, as anticipated, LCC will attempt to then shift the blame to FEA on the basis of a report which is already before this Court, or to the 4th party, on the basis of works that the 4th party did to the lamppost in question pursuant to a contract.

55. I anticipate that most of the time taken in this case will be between the defendants and the 3rd and 4th parties.

ORDERS

56. Summons dismissed. Parties to bear their own costs. Matter to take normal course. Case is adjourned to **29 March 2018 at 10.30 a.m.** for mention.





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Anare Tuilevuka
JUDGE

09 March 2018