

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

Civil Action No. 236 of 2023

BETWEEN: **SUSHILA WATI** also known as **SUSHILA WATI PRASAD** of 35 Cornelian Avenue, Eagle Vale, NSW, 2558, Australia, Domestic Duties as the Administratrix of the Estate of Chandrika Prasad also known as Babu also known as Bob.

PLAINTIFF

AND: **DOCTOR AMI CHANDRA** and **RITA KIRAN CHANDRA** both of 39 Levuka Street, off Bureta Street, Samabula, Suva, Fiji Islands, Medical Doctor and Company Director respectively.

DEFENDANTS

Representation

Plaintiff: Mr. T. Tuitoga (Haniff Tuitoga).

Defendants: Mr. D. Singh (Daniel Singh Lawyer).

Date of Hearing: 25th November 2024.

Judgment

A. Introduction

- [1] This action is brought on behalf of the beneficiaries of the Estate of Chandrika Prasad. Sushila Wati is the wife of Chandrika Prasad. The claim against the Defendants is that they breached a duty of care owed to Chandrika Prasad by failing to restrain and/or confine their dog and not to permit the dog to run loose contrary to the Dogs Act 1968.
- [2] The Plaintiff's claim is that on 9th August 2020 at approximately 7.15pm, Chandrika Prasad was walking along Levuka Street, off Bureta Street, Samabula, Suva when a dog owned by Defendants exited the property and attacked/startled Chandrika Prasad causing him to fall over, inflicting severe injuries to his head. Mr. Prasad was hospitalized at CWM Hospital. On 16th August 2020 he was airlifted to Liverpool Hospital (Sydney). He passed away in Minto, New South Wales, Australia on 18th October 2020.
- [3] Prior to the commencement of the trial Mr. Tuitoga sought to amend the statement of claim. The Defence did not object to the amendment. The claim was amended accordingly.
- [4] Writ of summons was filed on 2nd August 2023. A Statement of Defence was filed on 23rd August 2023. A reply to Statement of Defence was filed on 6th September 2023. A Pre-trial Conference was convened and the minutes were filed on 14th February 2024.

B. Agreed Facts

- [5] The parties agreed upon the follow: Plaintiff's locus, her relationship to Chandrika Prasad, the birthdate and date of demise of Chandrika Prasad, the occupational status of the first Defendant, relationship of 2nd Defendant to the 1st Defendant and the residential address of the Defendants.

C. Issues for Determination

The issues for determination can be briefly summarized as follows:

Dog -

- [6] (i) Did a dog attack/startle Chandrika Prasad on 9th August 2020 causing him to fall over – inflicting severe injuries to his head?
(ii) Did the dog exit the property immediately before the attack/startling of Chandrika Prasad?
(iii) Was the dog provoked by Chandrika Prasad?

Defendants –

- [7] (i) Did the Defendants own the dog that attacked/startled Chandrika Prasad?
(ii) Is it an offence under the Dog's Act 1968 for the owner to permit a dog to be at large which he/she knows to be dangerous or to have injured any person without being properly muzzled?
(iii) Is it an offence under the Dog's Act 1968 if a dog on any street or public road or public pathway rushes or attacks any person whereby the person is injured?
(iv) Did the Defendants muzzle the dog on 9th August 2020, just prior to the attack/startling of Chandrika Prasad? Is so, was it a failure clear violation of Dogs Act 1968?
(v) Did the Defendants owe a duty to Chandrika Prasad, to properly restrain and/or confine the dog?
(vi) Did the Defendants have knowledge, actual and/or constructive, of the vicious propensity of the dog and failed to remedy the same, thereby causing the ensuing incident?
(vii) Did the Defendants (having control of the dog that is responsible for the aforesaid incident) owed a duty to the Deceased to keep him safe from dangerous conditions by properly constraining ad/or confining the dangerous and vicious dog, and not permitting the dog to run loose on any street or public road or public pathway rushes?

(viii) Did the Defendants breach the duty owed to Chandrika Prasad by failing to properly restrain and/or confine the dog and permit the dog to run loose contrary to the Dogs Act 1968?

Res ipsa loquitur

[8] Can the Plaintiff rely on the doctrine of res ipsa loquitur?

Proximity and Demise –

[9] Did Chandrika Prasad as a direct and proximate result of the incident, which was caused by the negligence of the Defendants suffer severe pain and permanent injuries to his head? Did he sustain severe and protracted shock to his nervous system? Did it all cause him great pain, suffering and mental anguish and eventually led to his death on 18th October 2020? (as particularized in the statement of claim)

Expenses – Damages & Costs

[10] Was the Plaintiff forced to expend money for Chandrika Prasad's evacuation and funeral as a direct result of the negligence of the Defendant as follows:

<u>Date</u>	<u>Particulars</u>	<u>Sum (Aud)</u>
13/08/2020	Aeromedical Solutions -Air Ambulance Doctor/Nurse escort from Suva to Sydney	\$91,000.00
22/10/2020	Sahara Funeral Services – Cremation	\$ 9,745.00
	Total -	\$100,745.00

[11] Is the Plaintiff entitled to pre and post judgment interest on the sum awarded pursuant to the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935.

[12] Whether the Plaintiff is entitled to damages, interest, amounts claimed and costs sought in the statement of claim? Is so, how much?

D. The Witnesses and the Evidence

[13] The Plaintiff's called 9 witnesses. They were: (i) Mr. Vinesh Daniel Prasad, (ii) Dr. Alan Biribo, (iii) Dr. Shem Bavou, (iv) Mr. Jitendra Lal, (v) Mr. Vijay Prasad, (vi) Ms. Jotishma Devi, (vii) Ms. Aruna Prasad, (viii) Mr. Mukesh Prasad, and (ix) Mr. David Iron Dave.

[14] The 1st Defendant, Dr. Ami Chandra gave evidence for the Defendants.

E. Determination

[15] I have before me the evidence of the witnesses, documents tendered and CCTV footage.

- [16] The 1st Defendant (Dr. Ami Chandra) exhibited 3 videos from a CCTV. It is marked as Defendant's Exhibit #1. It is contained in a USB. I would start by analyzing the footage. In one of the videos (which is saved as Ch06-20200809-190101-190447-003000000000) as it is played, I note after a short while two people walking. One is holding a torch. One person is in front of the other. The one at the back is a step behind the person in front. As they are about to reach the gate. The gate opens. A dog runs out of the gate. The dog stops and lurches toward the people near the gate. Both of them step backwards. The one at the back falls. The dog after lurching towards them runs in the opposite direction. A person from inside the gate then goes out to where the person fell. I note at the start the date and the time on the footage as "9/08/2020 19:01".
- [17] The Plaintiff's eighth witness was Mr. Vijay Prasad. He informed me that on 9th August 2020 at around 7 to 7.30pm Chandrika Prasad picked him up. They got off at the roundabout and were walking towards the temple. They were walking along Levuka Street. Someone opened a remote-controlled gate. A big dog came out. Mr. Vijay Prasad then said that he shouted loudly. Chandrika was with him. Vijay was holding a pen torch. It was bit dark. As the dog came towards them. Vijay shouted. Chandrika dropped.
- [18] The evidence of Mr. Vijay Prasad is similar that what I noted from the CCTV footage. Vijay's evidence provided me the details. The details that he provided me was that the two men who were approaching in the footage were Vijay and Chandrika. That Vijay held the torch. Chandrika was behind Vijay. That it was Chandrika who fell. Chandrika fell after the dog exited the gate and went towards Vijay and Chandrika.
- [19] Having seen the footage and noting the evidence of Vijay I have no doubt in my mind that the cause of Chandrika falling to the ground was the sudden accosting by the dog. The exiting of the dog, the dog startling Chandrika Prasad and Chandrika Prasad falling are all sequential.
- [20] The evidence of Dr. Ami Chandra confirmed that the house and the gate from which the dog exited from was his. Dr. Chandra confirmed that the dog belonged to him. Dr. Chandra also confirmed attending to Chandrika Prasad. He saw the injuries to the head.
- [21] There is no evidence that Chandrika Prasad or Vijay Prasad provoked the dog.
- [22] The Dog Act 1968 is the law pertaining to dogs licensing, penalties for failing to muzzle dangerous dogs and dogs attacking persons or animals, destruction of dogs, liability of owners, etc. Sections 4 and 5, respectively, provide for the penalty for owners of dog for not muzzling dangerous dog and dogs attacking person or animal on public road.
- [23] Section 9 of the Dog Act 1968 provides for owner's liability for injury by a dog, as follows:

"The owner of every dog shall be liable in damages for any unprovoked injury done by his or her dog and it shall not be necessary for the party seeking damages to show a previous mischievous propensity in such dog or the owner's knowledge of such mischievous propensity or that the injury was attributed to neglect on the part of the owner of the dog."

- [24] Section 9 of the Dog Act 1968 imposes upon the owner of a dog, liability, without fault for damage done by his or her dog. The opening words of Section 9 expresses liability without conditions or qualifications. Our law is modeled on the UK Dogs Act 1865. The legislative provisions in the United Kingdom, various Australian States, and New Zealand were similar. Overtime those laws were reformed. The reform that was undertaken in those countries to address a mischief, as they called it, which imposed liability in situations which the legislature considered unfairly penalized dog owners. For instance, there should be no liability if a dog indirectly wounded a person while chasing a cat or where a person suffered injury from falling in consequences of tripping over a sleeping dog. The changes imposed in those jurisdictions by the legislature was that the wounding must occur in the course of an attack by the dog on the injured person. Our law has not changed.
- [25] The language in Section 9 of the Dog Act 1968 has a broad scope. The words "injury done ... by his dog" have been judicially interpreted. In *Martignoni v Harris* [1971] 2 NSWLR 102 the New South Wales Court of Appeal upheld a finding of liability in favour of the owner of a car which was damaged when a dog ran across the road and collided with it. Moffitt JA described the conduct of the dog as involving "*no more than the failure of the animal, in pursuing its desire as a living creature to move from one place to another, to pay sufficient attention to the presence of other users of the highway*": p 108C. He noted that "*[t]his deficiency in the days of fast-moving traffic is one which animal share with human beings in varying degrees according to their respective ages, experience, training, intelligence, agility and distractions.*" He concluded - that the words "injury done ... by his dog" "*suggests some active participation by the dog, but not limited to an attack, in bringing about the injury*": at 110-111. I agree with this interpretation and adopt it.
- [26] The dog of the Defendants was confined within a gated compound. Once the gate opened it ran out. It was not muzzled. It lurched towards/startled Chandrika Prasad. As a result of that lurching Chandrika Prasad fell down and his head hit the ground. The cause of death of Chandrika Prasad was traumatic brain injury. Section 9 of the Dog Act provides for the liability of the owner of a dog for any unprovoked injury that is caused by his or her dog. The Defendants being the owners of the dog that lurched onto Chandrika Prasad causing him to fall, injuring him and later leading to his demise owed a duty to Chandrika Prasad. The duty owed was to restrain and confine their dog. They had their dog within a confined area. They were responsible for that dog. Any injury caused by the dog or any injury as a result of a dog's actions are the owner's responsibility. Their dog ran and caused alarm which resulted in Chandrika Prasad falling and receiving injuries. He succumbed to those injuries. I accept that the dog never collided with Mr. Prasad, however, the dog, owned by the Defendants caused Chandrika Prasad to fall over and sustain serious head injuries. The injuries led to his death.
- [27] I have heard evidence from witnesses who attested to the fact being attacked and bitten by a dog of Defendant. The witnesses were David Iron Dave, Jotishma Devi, and Aruna Devi. All their evidence was that a dog belonging to the Defendants bit them. The witnesses were thoroughly cross-examined. I found them credible. Based on these evidences I find that the Defendants had knowledge, actual and constructive of the vicious propensity of the dog and failed to remedy the same. I would add here the

Defendants had a few dogs. The identity of the dog that caused this incident and the others could not be ascertained. The fact remains that the Defendants were the owners of the dog that caused this incident and that bit the other witnesses. In this matter the Plaintiff does not need to prove or show a previous mischievous propensity in the dog or the owner's knowledge of such mischievous propensity.

- [28] I find that the Defendants (having control of the dog that is responsible for the aforesaid incident) owed a duty to Chandrika Prasad to keep him safe from dangerous conditions by properly constraining and/or confining the dangerous and vicious dog, and not permitting the dog to run loose on any street or public road or public pathway. The Defendants breached the duty owed to Chandrika Prasad by failing to properly restrain and/or confine their dog and permit the dog to run loose contrary to the Dogs Act 1968.
- [29] I note that in Eddie v. Groombridge (1992) 16 MVR 263, A German Shepherd escaped from the defendant's yard. The dog chased a motorcycle, causing a collision whereby the cyclist suffered serious injuries while the dog was killed. The dog had escaped through a gate, which was left partly open. The owner was found to be negligent because he did not have a self-closing mechanism such as a spring hinge to ensure the gate remained closed. Meagher JA (at 264) said that the fact, accepted by the trial judge, that the dog came at the rider, proved attack and the breaking of the plaintiff's skin proved wounding, even if the dog did not lacerate the rider's flesh. His Lordship's view was that a wounding that was an indirect result of an attack by a dog fell within the section.
- [30] I also note that in Zappia v. Allsop [1994] NSWCA 355, a dog ran at two bicycles, ultimately crashing into the rear of one. The rider was thrown to the ground and knocked unconscious. The Court held that the charging of the dog at the bicyclist, growling and barking, established attack. The majority rejected the submission that the element of wounding required direct contact between the dog and the person. The majority saw no reason, in principle, why an owner should be liable if his or her dog directly wounded a person, but not liable if a person evaded a direct wound and thereby sustained another and more serious injury.
- [31] The Plaintiff has submitted *res ipsa loquitur*. It means that "*the event speaks for itself*". The maxim allows the court to draw inference of negligence from the mere fact that an event has happened, without the benefit of detailed testimony about exactly how it happened. Scott v London and St Katherine Docks Co [1861-73] All ER Rep 246 is the leading authority laying down the conditions for application of *res ipsa loquitur*. The plaintiff was standing near the door of the defendant's warehouse and was injured when some bags of sugar fell on him. The Plaintiff was unable to prove any specific acts of negligence by the defendants, who themselves called no evidence. The trial judge directed the jury to find for the defendants but on appeal the direction was overturned and a new trial ordered. Erle CJ explained:

"There must be reasonable evidence of negligence.

"But where the thing is shewn 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 defendants, that the accident arose from want of care.”

[32] The three elements that are embodied in Erle CJ’s formulation are:

- (a) *There should be damage that does not ordinarily occur without negligence,*
- (b) *the defendant’s control over the thing in question should point to some breach of duty on the defendant’s part, and*
- (c) *there should be an absence of explanation.*

If the accident is fully explained there is no room for the drawing of inferences.

[33] The evidence given in this matter is not such as directly conflicting and that which I cannot decide who to believe. I am making a determination and do not need to take refuge behind the incidence of the burden of proof. I will reach a conclusion in this matter one way or the other. There is evidence as to what happened. The maxim of *res ipsa loquitur* is not in play. I support the view that “*if the phrase had not been in Latin, nobody would have called it a principle*”: ***Ballard v. North British Railway Co [1923] SC43 (HL at 201 per Lord Shaw of Dunfermline.***

[34] The value *res ipsa loquitur* had once provided has gone and that attempts to apply the so-called doctrine has been more confusing than helpful: ***Fontaine v. Loewen Estate [1998] 1 SCR 424 at 435.*** In Australia and England, it has been suggested that the expression *res ipsa loquitur* should be dropped from the litigator’s vocabulary: ***Schellenberg v. Tunnel Holdings Pty Ltd [2000] HCA 18, (2000) 200 CLR 121 at [88]*** – Justice Kirby, and ***Ratcliffe v. Plymouth & Torbay Health Authority [1998] Lloyd’s Rep Med 162 (CA) at 172-173*** – Hobhouse LJ. We should follow suit.

[35] Following the fall, Chandrika Prasad was seen immediately by the 1st Defendant, a doctor himself. He saw the injuries to his head. Mr. Prasad was taken to Valelevu Hospital. Dr. Alan Biribo, a neurosurgeon was the Plaintiff’s first witness. Dr. Biribo had examined Mr. Prasad. He produced a written report. It was tendered as Plaintiff’s Exhibit No. 1.

[36] The report shows that Mr. Prasad was admitted at CWM Hospital on 9th August 2020. He was initially treated at Valelevu Health Center. It is clear from the evidence that Mr. Prasad was taken to Valelevu and then to CWM following his fall, after a dog belonging to the Defendants lurched onto him. The injuries that Mr. Prasad received were a direct and proximate result of that incident. I have already found that the Defendants were negligent. The negligence of the Defendants caused the injuries, the pain, suffering of Mr. Prasad. The diagnosis by Doctor Biribo in his report dated 12th August 2020 is of traumatic brain injury. It is detailed as follows:

- “- *Bi-frontal contusions and intracerebral haemorrhage.*
- *Bi-frontal and parafalcine shallow subdural haemorrhage.*
- *Right temporal Intracerebral.*
- *Subarachnoid haemorrhage with intraventricular extension.*
- *Base of skull fracture with CSF leak.”*

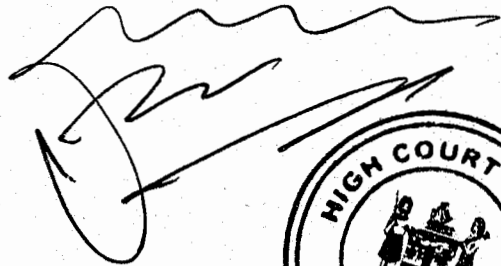
- [37] Dr. Shem Bavou was the 2nd witness for the Plaintiff. He examined Mr. Prasad on 16th August 2020. His report was tendered as Plaintiff's Exhibit No. 2. This report was addressed to the Consultant on-call at the Concord Hospital in Sydney.
- [38] Mr. Vinesh Prasad, eldest son of Chandrika Prasad gave evidence. He arranged for the airlift to Sydney. Vinesh tendered a report (PE# 9 - dated 14th September 2020) of Dr. Chen, a neurosurgeon at the Concord Hospital. The report stated that Mr. Chandrika Prasad was a patient at the hospital since 16th August 2020. He was undergoing treatment and care for traumatic brain injury. It stated that Mr. Chandrika Prasad required "*24-hour nursing care and full substitute decision making by his next of kin.*"
- [39] Plaintiff's 11th exhibit is the Health Professional Report Form filled in by Dr Andrew Chen, a Senior Resident Medical Officer at the Concord Hospital. The Report is dated 12th October 2020. The specific diagnosis is brain injury. It is described as a severe condition and static.
- [40] Mr. Chandrika Prasad passed away on 18th October 2020. His death certificate reveals that his cause of death is traumatic brain injury. The evidence before me is that Chandrika Prasad as a direct and proximate result of the incident, which was caused by the negligence of the Defendants suffered severe pain and permanent injuries to his head. He sustained severe and protracted shock to his nervous system. It all caused him great pain, suffering and mental anguish and eventually led to his death on 18th October 2020.
- [41] As a direct and proximate result of the negligence of the Defendants, the Plaintiff expended large sums of money for Mr. Chandrika Prasad's evacuation and funeral. They paid **AUD \$91,000.00** for the airlift by Aeromedical Solutions. It was for the air ambulance, Doctor/Nurse escort from Suva, Fiji to Sydney, Australia (Liverpool Hospital) and the road ambulance cost. Sahara Funerals Pty Ltd was paid **AUD \$9745.00** for cremation services. The Plaintiff is to be paid by the Defendants a total sum of **AUD \$100,745.00** for Mr. Chandrika Prasad's evacuation and funeral costs.
- [42] The Plaintiff is entitled to pre and post judgment interest on the sum awarded pursuant to the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935. A **prejudgment interest of 6% per annum from 10th August 2020** to date of judgment pursuant to Section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935. **Post judgment interest of 4 % per annum from the date of judgment to date of full payment** pursuant to Section 4 the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935.
- [43] Mr. Chandrika Prasad was 76 years old at the time of his death. He was married and had 4 children. There is no evidence before me of any illness or him having any other medical condition. Mr. Prasad was injured on 9th August 2020. He passed away on 18th October 2020. That is 71 days. Mr. Prasad's medical history is before me. I note the injuries, the diagnosis, the treatment, care provided and the cause of death.

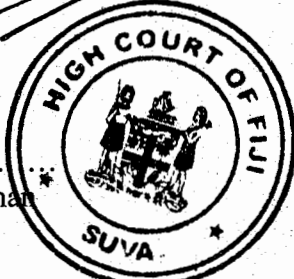
- [44] I award FJD \$20,000.00 as damages under the Law Reform (Miscellaneous Provisions Act (Death and Interest) Act 1935. FJD \$20,000.00 as damages under Compensation to Relatives Act 1920.
- [45] Having noted relevant case laws on the award of damages for general damages for pain and suffering I award FJD \$50,000.00.
- [46] I summarily assess costs. The Defendants are to pay the Plaintiff FJD \$5000.00 as costs with 21 days.

F. Court Orders

I hereby order as follows:

- (a) The Defendants are to pay the Plaintiff a total sum of AUD \$100,745.00 for Mr. Chandrika Prasad's evacuation and funeral costs.
- (b) The Defendants are to pay the Plaintiff, FJD \$20,000.00 as damages under the Law Reform (Miscellaneous Provisions Act (Death and Interest) Act 1935.
- (c) The Defendants are to pay the Plaintiff, FJD \$20,000.00 as damages under Compensation to Relatives Act 1920.
- (d) The Defendants are to pay the Plaintiff, FJD \$50,000.00 as general damages for pain and suffering.
- (e) The Plaintiff is entitled to pre and post judgment interest on the sum awarded pursuant to the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935. A **pre-judgment interest of 6% per annum from 10th August 2020** to date of judgment pursuant to Section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935. **Post judgment interest of 4 % per annum from the date of judgment to date of full payment** pursuant to Section 4 the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935.
- (f) The Defendants are to pay the Plaintiff FJD \$5000.00 as costs (summarily assessed) within 21 days.


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Chaitanya S. C. A Lakshman
Puisne Judge



31st January 2025