IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

Action No. 6 of 1961

Between:

RAM DEVI, d/o BECHU PRASAD — Plaintiff

v.

BHAN PRATAP, s/o KALAP NATH — Defendant

Law Reform (Miscellaneous Provisions) Ordinance, Cap. 17—*res ipsa loquitur*—quantum of damage for loss of expectation of life.

This was a claim by the personal representative of one Durga Prasad, a small shopkeeper, aged 23, married but with no children, who had been killed while riding in a motor car driven by one Subramani, the servant of the defendant. The motor car had run over the side of a bridge into a river, killing all the occupants, including Subramani, the driver. There were no other witnesses. The plaintiff relied on the doctrine of *res ipsa loquitur*. The death of Subramani made it virtually impossible for the defendant to establish how the accident happened.

Held.—(1) There was a prima facie presumption of negligence on the part of the defendant's driver raised by the doctrine *res ipsa loquitur*, which the defendant was unable to negative.

(2) Damages for loss of expectation of life in respect of Durga Prasad were assessed at £300.

Judgment for the plaintiff.

Cases cited:

Laurie v. Raglan Building Co. Ltd. (1942) 1 K.B. 152.

Halliwell v. Venables 1930 A.E.R. (Reprint) 284.

Liffen v. Watson, 161 L.T.R. 351.

Barking v. South Wales Transport Co. Ltd. (1950) 1 A.E.R. 392.

Kamla Wati v. Mahipal & Anor. (Supreme Court Civil Action 290 of 1957).

K. P. Mishra for the Plaintiff.

J. N. Falvey for the Defendant.

HAMMETT, Ag. C.J. (9th November, 1961).

The plaintiff claims in her capacity as the Personal Representative of the Estate of Durga Prasad (decd.) damages for the negligence of the defendant's servant which led to the death of her husband Durga Prasad arising out of a motor accident that occurred on the night of the 3rd April, 1959. The claim is brought under the provisions of the Law Reform (Miscellaneous Provisions) Ordinance, Cap. 17, and the plaintiff relies on the doctrine of *res ipsa loquitur*.

The defendant did not give any evidence and did not call any witnesses and did not seriously challenge the evidence called to support the plaintiff's claim, and I have no hesitation in arriving at the following findings of fact.

The defendant is the owner of motor car No. 9272 which is licensed to ply for hire as a taxi. This taxi was driven at the material time by Subramani, who was the servant of the defendant. Not only did the defendant authorise Subramani to drive the vehicle and to carry passengers in it for hire but he was also authorised to carry friends in the vehicle as non-paying passengers up to a limit of five persons.

On the 3rd April, 1959, at about 7.30 p.m. one Ram Rattan hired the defendant's taxi driven by Subramani to carry him and two of his workmen from Rakiraki to Ba. He took the deceased, Durga Prasad, with him as a friend, for the ride and by arrangement with Subramani, Durga Prasad was to accompany Subramani back from Ba to Rakiraki that night for company.

On arrival at Ba at about 10.00 p.m. Ram Rattan left the taxi at his house after paying the agreed fare. Subramani then drove off in the taxi with the intention of first dropping Radhe Prasad, another passenger, at his home in Ba and then returning to Rakiraki with Durga Prasad. At this time one Hari Prasad was also in the car as a passenger.

At about 8·30 on the morning of 4th April, 1959, one Chandra Lok, a farmer living at Natawa, found the taxi upside down submerged in a stream beside a bridge, of about 6 or 7 feet in length, on the road between Ba and Rakiraki. The car was facing the direction of Rakiraki. It had apparently failed to enter squarely on to the bridge from the road and had run off one side of it and turned completely over as it fell into the water some time during the previous night. The vehicle was turned on to its wheels and inside were found the bodies of three men, namely Durga Prasad, Hari Prasad and Subramani. The body of Subramani was in the driver's seat. Medical evidence showed that the cause of Durga Prasad's death was drowning. Multiple fractures of the skull were found on him which would have caused unconsciousness.

There are no witnesses to give evidence of how the taxi went out of control and ran off the bridge. The particulars of negligence alleged are set out in paragraph 8 of the Statement of Claim which reads as follows:—

"8. Negligence of the driver consisted in—

(1) Driving at a speed which was too fast having regard to the nature of the road.

(2) Failing to slow down to be able to negotiate the bridge safely.

(3) Failing to steer with care having regard to the nature of the road, that is to say—

(*a*) Narrow bridge

(*b*) Slippery road owing to rain

(*c*) Poor visibility at night during rain."

As to these there is no evidence of—

(*a*) the speed at which the vehicle was travelling at the material time,

(*b*) the nature of the road and whether it was wet or dry at the time,

(*c*) the visibility at the material time."

The plaintiff relies on the doctrine of *res ipsa loquitur* to support, what appears to me to be the only particulars of negligence pleaded which is supported by any evidence, namely " that the defendant's driver was negligent in failing to steer with care having regard to the nature of the road, i.e. a narrow bridge ".

It hardly needs to be stated that if a car is driven with proper care on a bridge it will not normally fall over the side of the bridge. It is the contention of the defendant that the cause of the car falling over the side of the bridge may have been due to all sorts of factors other than the negligence of the driver. For example a part of its mechanism may have failed, it may have skidded just before the accident, or another vehicle may have caused it to fall over the side of the bridge. I must concede that such possibilities are conceivable. They appear to me to be possible but unlikely causes of this accident. If however the driver of the car had not been killed but had merely been seriously injured and an action for damages for negligence had been brought against him by Durga Prasad, I still consider it would have been open to Durga Prasad to rely on the doctrine of *res ipsa loquitur*. The driver of the car could, if he had wished and had been able to do so, have given evidence rebutting the prima facie presumption of negligence raised by the doctrine of *res ipsa loquitur*, but if he failed to do so, I am of the opinion that it would be held that he was liable in damages for negligence.

It was submitted by the defence that it is possible that the defendant's car fell off this bridge due to a pure accident following a skid and without the defendant's driver being negligent in any way. Again, I agree that this is conceivable, but I do not agree that as a result the doctrine of *res ipsa loquitur* cannot be relied on by the plaintiff in this case. I do, with respect, prefer the reasoning of Lord Greene, M. R. in *Laurie v. Raglan Building Co. Ltd.* (1942) 1 K.B. 152, when he said:—

> " . . . the plaintiff gave evidence which showed that the position of the lorry over the pavement was due to a skid, and it is contended on behalf of the defendants that, assuming a prima facie case of negligence, that circumstance is sufficient to displace the prima facie case. In my opinion, that is not a sound proposition. The skid by itself is neutral. It may or may not be due to negligence. If, where a prima facie case of negligence arises, it is shown that the accident is due to a skid which happened without default of the driver, the prima facie case is clearly displaced, but merely to establish the skid does not appear to me to be sufficient for that purpose."

In *Halliwell v. Venables* 1930 A.E.R. (Reprint) 284, the car being driven by the defendant overturned which resulted in his passenger being killed. The trial Judge held that the evidence was insufficient to go before the jury and gave judgment for the defendant. On appeal, Scrutton, L.J., setting aside the judgment and ordering a new trial, said—

> " . . . In my view, where the judge went wrong was in not paying sufficient attention to the fact that the mere happening of an accident, unexplained, may be and often is in itself evidence of negligence without it being ascertained exactly why the accident happened. The case that is always cited as the leading authority for this doctrine of *res ipsa loquitur* is the case where a cask fell from the second floor of a warehouse. Erle, C.J. in the passage which is continually cited in subsequent cases, said this (*Scott v. London Dock Co.* 3 H. & C. at p. 601):

'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 defendants, that the accident arose from want of care.'

Following that case in *Ellor v. Selfridge & Co.* quite recently we held that, as motor cars do not usually run on to the pavement and hit people in the back, the fact that a motor car did so, and that the man who was driving it gave no explanation with regard to why it ran on to the pavement was in itself evidence of negligence, in the absence of explanation, which entitled the plaintiff to have the case left to the jury."

Again, in *Liffen v. Watson,* 161 L.T.R. 351 it was held that where a taxi driver skidded on a wet road and injured his passenger when he collided with a street refuge, the burden of proof rested on the defendant to prove that he had not been guilty of negligence. The decision of the House of Lords in *Barking v. South Wales Transport Co. Ltd.* (1950) 1 A.E.R. 392 is also in point.

If a car is driven normally and with due care over a narrow bridge, which the driver had successfully negotiated in the other direction only a few hours previously, it will not fall over the side of the bridge and kill its occupants unless either—

(*a*) the driver has been guilty of negligence, or

(*b*) there is some other reasonable explanation of how the accident occurred.

The onus of proof in the circumstances of this case was, therefore, in my view, on the defendant to establish or offer some other reasonable explanation of how the accident occurred to show that his driver had not been guilty of negligence. The unfortunate fact that the defendant's driver was killed in the same accident is not, in my view, material to the question of where the onus of proof lay. The death of the defendant's driver may well make it difficult or even impossible for the defendant to discharge the onus of proof that rests on him, but does not, in my view, alter the fact that the onus does rest on him. The defendant in this case has made no attempt to discharge this onus of proof.

On the question of whether or not the defendant is liable for the negligence of his servant when carrying a passenger gratuitously is best answered by quoting from the judgment of Slesser, L.J. in *Halliwell v. Venables* 1930 A.E.R. (Reprint) at p. 287 where he said—

"I would only add one observation with regard to the argument of counsel for the defendant that because the deceased man had not paid to be carried in this motor car, or had been carried at his own suggestion or on the invitation of the defendant, therefore, in some way the defendant did not owe him the duty which it is said here the defendant failed to perform. I think that the position of the deceased person is covered specifically by the general principle laid down in *Coggs v. Bernard,* that, if a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it. Or, as was said in *Shillibeer v. Glyn:* The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it."

For these reasons I am of the view that the plaintiff is entitled to succeed in her claim for damages against the defendant in respect of the negligence of the defendant's servant, the driver of the defendant's vehicle. It now remains to consider the quantum of damages to which she is entitled.

The claim is brought under the provisions of the Law Reform (Miscellaneous Provisions) Ordinance, Cap. 17. There is no claim under the Compensation to Relatives Ordinance, Cap. 20, which was already statute barred when this action was begun. The plaintiff is entitled to damages under the Law Reform (Miscellaneous Provisions) Ordinance, Cap. 17, under three heads—

(1) Damages for loss of expectation of life,

(2) Damages for pain and suffering, and

(3) Funeral Expenses.

Counsel for the defendant conceded the claim for £20 in respect of funeral expenses. He submitted that there could be no award for pain and suffering since death apparently followed immediately after the accident. Counsel for the plaintiff did not challenge this submission and I accept it.

There remains therefore, simply the assessment of damages for loss of expectation of life.

The deceased was a married man, aged 23, with no children, and he was in business on his own account as a small storekeeper. The extent of his income is not material in assessing damages for loss of expectation of life.

I have studied with care all the cases which have been cited before me on the question of the quantum of damages for loss of expectation of life. In general the awards under this head in England appear to have been between £200 and £400, although there are instances of an award as low as £50 and another of £500.

I observe that in Fiji in the case of *Kamla Wati v. Mahipal and anor.* (Supreme Court Civil Action 290 of 1957) the award of damages for loss of expectation of life of a married man aged 35 was £300. Bearing in mind all the circumstances of this case and of the need for there to be some consistency in these awards, I assess the damages in this case for the deceased's loss of expectation of life at £300. I wish to make it clear that this sum does not take into account the probable pecuniary loss suffered by the deceased's relatives for which there is no claim in this action.

For these reasons there will be judgment for the plaintiff for a total of £320.