IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

C.A. 769/1997 (F)
D.C. Anuradhapura 14464/M

Yakumbuge Salma
Amanawattiya,
Kalawewa, Vijithapura.

PLAINTIFF

Vs.

1. K.A. Tissa Kasthuriarachchi
   Dagollagama, Iluppallama.

2. R. B. Gunawardena
   Driver – University Unit
   Mahailluppallama .

3. Sri Lanka Insurance Corporation
   Rakshana Mandhiraya,
   Waxshal Street,
   Colombo.

DEFENDANTS

And

Yakumbuge Salma
Amanawattiya,
Kalawewa, Vijithapura

PLAINTIFF-APPELLANT

Vs.

1. K.A. Tissa Kasthuriarachchi
   Dagollagama, Iluppallama.

2. R. B. Gunawardena
   Driver – University Unit
   Mahailluppallama .

3. Sri Lanka Insurance Corporation
   Rakshana Mandhiraya,
   Waxshal Street,
   Colombo.

DEFENDANT-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: I. L. M. Azwar with T.K. Jalal for the Appellant

Ranjan Gooneratne with Sarath Walgamage
for the 1st Defendant-Respondent

2nd & 3rd Defendant-Respondents absent and unrepresented

ARGUED ON: 25.10.2011

DECIDED ON: 13.12.2011

GOONERATNE J.

On or about 14.8.1990 Plaintiff's husband died as a result of an accident, caused by an omnibus driven by the 1st Defendant and the 2nd Defendant was the owner of the bus bearing No. 22 Sri 9150. At the trial 2

admissions were recorded viz that the 2nd Defendant was the owner and that the bus was driven by the 1st Defendant an employee of the 2nd Defendant. At the trial 11 issues were raised. 2nd & 3rd Defendants did not raise any issues. Plaintiff has claimed a sum of Rs. 200,000/- as damages. The 3rd Defendant was the Insurance Corporation. Issue Nos. 07 – 09 suggests that the accident occurred due to a mechanical defect in the bus. (වාහනයේ දුනු කැඩීමෙන්, වාහනයෙ තිරිංග ක්‍රියා විරහිත වීම). The deceased was a passenger in the bus at the time of accident and the issues suggest that the deceased at the point of impact jumped out of the bus and died as a result of the bus over turning. It suggest that death was caused due to the negligence of the deceased.

The learned District Judge dismissed the Plaintiff's case due to the fact that Plaintiff has not proved the case by direct or circumstantial evidence. I cannot dispute that position that there is an absence of direct evidence and evidence of an eye witness was not led at the trial. The bus was driven from Ehalagama towards Kalawewa. Only the Plaintiff and the Grama Sevaka gave evidence for Plaintiff party at the trial.

There is some evidence of the income of Plaintiff's deceased husband. The Defendant's version, very correctly has been considered by the trial Judge.

At the hearing before me learned counsel for Appellant sought to demonstrate and argued that this is a fit case to apply the maxim of Res Ipsa Loquitur and in the absence of proper explanation by the Defendants, they would be liable. Learned Counsel for Respondent contends that his client the 1st Defendant is not liable and in view of the mechanical defect of the bus the 2nd Defendant owner alone is liable. This is a case where the facts itself speak of negligence. The question is the liability and the District Judge's view on the defendant's version? The learned counsel for Appellant drew the attention of this court to the following items of evidence.

(1) At Pg. 63 a lorry being converted to a bus as testified by 1st Defendant in cross-examination. Usually it was used to transport goods.

(2) At Pg. 72 refer to the evidence of the owner of the so called bus the 2nd Defendant. In evidence it is admitted by the 2nd defendant the bus in question was not in good mechanical condition. The evidence reads thus (එම වාහනයේ අයිති කරු මා වෙමි. වාහනයක් පාරේ දමා පැදවීමට හැකි තත්ත්වයට පත් කර පාරට දැමීමට ඉඩ සලසා දීම අයිතිකරුගේ යුතුකමක් බව මා දනිමි. වාහනයක් රියදුරෙකුට භාර දීමේ දී එම වාහනය පාරේ පැදවීමට පුළුවන් තත්වයේ තිබෙනවා නම් පමණයි රියදුරෙකුට දිය

යුත්තේ කියා මා පිළි ගනිමි. මම පිළි ගන්නවා වාහනය එම තත්ත්වයේ තිබුනේ නැති නිසා)

It was the position of the learned counsel for Appellant that the Plaintiff only need to provide prima facie evidence in a case of this nature and the burden of proof would shift to the Defendant. In this way the learned counsel for Appellant refer to the above items of evidence and contest the judgment of the District Court. The learned District Judge also agree, based on evidence that the vehicle in question was not road worthy or in a fit condition to be used for passenger transport. I would not fault the District Judge's analysis of the facts of this case especially where the Judge directs his mind to fault of the 2nd Defendant, of the vehicle being in a state of unfit condition to be used as a vehicle. But I would reject his conclusion as contained in the last paragraph of the judgment at pg. 81/82 of the original record.

At this point of my judgment before I conclude and set aside the judgment of the original court I would prefer to fortify my views to be applied to the facts of the case in hand by considering the maxim of Res Ipsa Loquitur.

Res Ipsa Loquitur

Two views. (i) it is not a rule of law on its own. Ultimate burden of proof rests on the plaintiff.

(ii) It represents a rule of law. But the 2nd view is more practical and fair. Take increasing road accidents for example. The accidents occurs and some times you may find it difficult to identify the person actually negligent. In such situations, depending on the facts and circumstances, this rule may be useful as a rule of law.

The Rationale for a rule of this nature to emerge or to be adopted, was because the plaintiff is unable to give details of the true cause of accident and provide with precise details. In other words the knowledge of the true cause of accident lies with the Defendant. As such plaintiff only need to prove a prima facie case of negligence. It permits court to infer negligence. It is more or less a rule of evidence.

> The Catherine Docks 159 ER 665. Defendant was in possession of warehouse and crane for lowering goods from warehouse to ground. Plaintiff passing the warehouse was injured by the fall of some bags of sugar that were being lowered by the crane. Held, accident itself was prima facie evidence of negligence.
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> Byrne vs. Boadle 1863 2 H & C 722 – a barrel rolled out of the upper floor of the defendants premises and fell on the plaintiff, a passer by in the street below. The defendant called no evidence. Held, this fact alone without any evidence as to how the accident happened was sufficient to enter judgment for the plaintiff.

Roe vs. Minister of Health 1954 2 WLR 915 at 922(C.A.) - A patient at a hospital became permanently paralysed from the waist downwards after the administering of a spinal anesthetic injection by an Anesthetist who was the servant of the hospital authority Mottis L.J of the view that it was for the defendant hospital to explain how the accident occurred.

Saffena Umma vs. Siddek 37 NLR 25. - The defendant's bus suddenly left the road, mounted the pavement, and knocked down a boy seated on the steps of a house adjoining the pavement. The only explanation given by the defendant's driver was that the steering rod of the bus broke. It was held that the defendant has no discharged the burden of giving a reasonable explanation.

Cabral vs. Alberatne 57 NLR 368. - A motor truck belonging to the defendant ran off the road into the plaintiff's house on the side of the road. Defendant merely stated that the steering rod got out of its place. He did not say how and why the steering rod came out of its place. He did not say that the vehicle was serviced regularly or serviced at all. It was held he had not discharged the burden of giving a reasonable explanation.

More often than not the defendant is as much in the dark as the plaintiff as to how the accident happened. He may, instead of giving an explanation, show that he took all reasonable precautions to prevent the occurrence of the accident.

Barkway vs. South Wales Transport Co. Ltd. 1950 1 AER 392 (HL) - A motor bus belonging to the defendant went off the road when a tyre burst killing the plaintiff's husband. The tyre burst was caused by an impact fracture of the tyre from a severe blow which does not leave a mark on the outside of the tyre, but results in a fracture inside the tyre. The defendant led evidence to show that all its tyres were examined twice a week by an expert fitter under its employment. It did not however instruct its drivers to report heavy blows to tyres likely to cause impact fractures. The House of Lords held that it was the duty of the defendant Co. to have instructed their drivers to report such heavy blows, and

they had failed to do it. In the circumstances the defendants had not discharged the burden on showing that they had taken all reasonable steps to prevent the accident.

On the question of damages I wish to observe that traditional rules are applicable but we have to look into the modern sophisticated social environment and human behavior. The court should consider granting punitive damages whenever possible as a deterrent particularly in road accident cases etc. This kind of compensation has been available since 18th century in the English Law. Before considering damages let me also refer to another case.

Perera vs. Gamini Bus Co. Ltd. LI NLR 328...

An omnibus stopped at a halting place to enable passengers including plaintiff to alight and the plaintiff was later found run over by the rear wheel of the bus.

Held, that the maxim res ipsa loquitur applied and that in the absence of an explanation the defendant was liable.

The evidence placed before the original court by the 1st & 2nd defendants regarding the mechanical condition of the bus to be unroad worthy would permit court to infer negligence on the part of the defendants. There is no defence or an acceptable explanation put forward by the Defendant's to get themselves absolved from the case. Facts itself speak the truth of the case and make the Defendant liable in negligence. There is no

material to establish that the accident occurred due to a cause beyond the control of the Defendant. The Defendants support the defect found in the bus. In these circumstances the 1st defendant should never have driven the bus and 2nd Defendant should not have permitted the 1st Defendant to drive the bus. The 1st Defendant cannot simply blame the owner. The acquittal or discharge of 1st Defendant in the Magistrate's Court cannot have a bearing in the Civil Court. Master will be liable for negligent acts of his servant if the servant was acting within the scope of employment. Inasmuch as both master and servant would be liable. In the case in hand based on the maxim of Res Ipsa Loquitur both are liable. There need not be expert evidence to rely on liability or the condition of the vehicle, unless complications are apparent.

The next question is the question of damages. There is some evidence of income particulars placed before the original court. (uncontradicted). The deceased had 6 children and had earned about 500/- 600/- per day. Some days he did not earn anything at all (Plaintiff's evidence) The deceased was 46 years of age when he died.

It appears to court that the deceased did not have a fixed income. Nor did he have a permanent job. He may have been doing various things to keep the home fires burning. Usually precise proof of pecuniary

loss should be adduced. 55 NLR 182. In this instance there is some proof of income which had not been challenged by the Defendants. As such court would have to adopt a reasonable formula. The question of damages should be in a case of negligence be determined by pecuniary loss suffered. 69 NLR 525. The Grama Sevaka has testified that the deceased was in receipt of food stamps to the value of Rs. 500/- and another Rs. 250/-. Court need to consider such values as described by the Grama Sevaka and deduct these sums. Plaintiff has not given proper details of income and expenses incurred in a systematic way to enable a court of law to grant damages adopting a legally acceptable formula.

Plaintiff has only claimed Rs. 200,000/=. Nor can court grant the entirety in the absence of precise details.

However since the maxim of Res Ipsa Loquitur applies to this case court has to in the interest of justice award a reasonable sum. If the life expectancy of the deceased who died at the age of 46 years and his life expectancy was 70 years, and if this court accept the evidence regarding income of deceased, court after deductions would have to award a sum over an above the claim prayed for in the plaint. That would not be legally possible. Therefore a reasonable amount in the opinion of this court would be about Rs. 100,000/=.

In the above circumstances I set aside the judgment of the District Court, and enter judgment in favour of the Plaintiff in a sum of Rs. 100,000/- with legal interest from date of plaint till payment in full. In the circumstances no order is made as to costs.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL