

IN THE COURT OF APPEAL

FIJI ISLANDS

CIVIL JURISDICTION

Civil Appeal No: ABU 29 of 2006

(On appeal from HBC 236 of 2000L)

BETWEEN : SHAHEED IMROZ ALI

Appellant (Original Plaintiff)

AND : MUKTAR ALI

First Respondent (Original 1st Defendant)

AND : SHARIDA BANU

Second Respondent (Original 2nd Defendant)

JUDGMENT

Court of Appeal: J. Byrne, P.

D. Goundar, JA

S. Inoke, JA.

Counsel Appearing: Mr S Ram for the Appellant

Mr T Tuitoga for the Respondents

Solicitors: Samuel K Ram for the Appellant

Munro Leys for the Respondents

Date of Hearing: 4 November 2009

Date of Judgment: 3 December 2009

JUDGMENT OF BYRNE, President

- [1] I have read the judgment of Inoke, JA and the orders he proposes in granting this appeal and agree with him. In view of the approach taken by the learned trial Judge to the facts of this case, I desire to say a few words of my own on the maxim *res ipsa loquitur* and the conduct of the Judge in this case.
- [2] In my view this case is a classical example of the way in which the maxim *res ipsa loquitur* should be applied.
- [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 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 commonsense, since it is a matter of ordinary observation and experience in life that sometimes a thing tells its own story.
- [4] Contrary to the view apparently held by the Learned Trial Judge the maxim does not have to be pleaded before a claimant may rely on it – *Bennett v. Chemical Construction Ltd [1971]1.W.L.R 1571* In my judgment, like that of Inoke, JA, the appellant's pleadings were sufficient to indicate to the defendants the particulars of negligence on which the appellant intended to rely at the trial. I fail to see, like my learned brother, how the respondents can complain that they were surprised or were not given an opportunity to rebut the evidence given at the trial on behalf of the appellant/plaintiff. In fact, as Inoke J.A, says, no such objection was raised either at the trial or in this appeal.
- [5] So much importance does the learned author of the ***LAW OF TORTS***, John G. Fleming attach to the maxim in the 9th edition of his book (1998) that he devotes 11 pages to it. At 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. 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.

[6] A few examples of how the maxim has been applied are then given by the author at pp 353-354 where he says that experience suggests that a stone is not imbedded in a bun – *Chaproniere v. Mason* [1905] 21 T.L.R 633, A Crane does not collapse – *Swan v. Salisbury Construction* [1966]1 W.L.R 204 (PC) or a bale from a passing lorry – *Bellizia v. Meares* [1971] V.R. 641. The latter case provides some guidance to the way in which, in my view the Learned Judge should have applied the maxim in the present case.

[7] In that case the plaintiff suffered personal injuries when a bale of wool fell from a truck then being driven by the defendant and struck the plaintiff who was then upon or near the adjacent footpath. The trial judge failed to direct the jury that the doctrine of *res ipsa loquitur* was applicable in the circumstances. The jury returned a verdict for the defendant. On appeal the Full Court of Victoria held:

(1) in the absence of evidence explanatory of the fall of the bale from the truck, it was open to the jury to infer that the fall was due to some negligent act or omission of the defendant, and, in the circumstances, it called for a clear direction to the jury to that effect.

(2) In the absence of such a direction there was no sufficient presentation to the jury of the plaintiff's case and there was a real danger of exposing him to a verdict that might not otherwise have been found, and a new trial should be ordered.


- [8] In my judgment by his failure to apply the maxim to the facts of this case, the learned judge deprived the appellant of a verdict to which in my view also, he was entitled.
- [9] Neither of the defendants saw the appellant prior to hearing a bang when they immediately stopped the vehicle and saw the appellant in the middle of the road holding his stomach.

THE FUNCTION OF A JUDGE

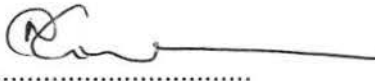
- [10] A Judge may put all such questions to a witness as the interests of justice may require, and these questions may be based not only on matters arising in the case but on his own local or scientific knowledge. *R v. Antrim [1895] 2 Ir. R. 603* mentioned in **Phipson on Evidence** (16th Edition) paragraph 12-43.
- [11] The Learned author states in that paragraph that it is not only permissible, but the Judge's duty, to ask questions which clarify ambiguities in answers given by a witness or which identify the nature of the defence if this is unclear.
- [12] Here, in my view there were no ambiguities. The appellant's explanation was quite clear: he said the van went past him and then something hit him, throwing him to the ground. The learned judge in effect put words into the first respondent's mouth when he asked, "So he jumped?". Ans: "Yes he jumped".
Court: "He jumped".
- [13] In my opinion that answer would probably not have been given by the first respondent, had he not been asked a leading question by the learned judge. I consider the judge's intervention was unwarranted and was unfair to the appellant.

- [14] Apart from these observations, as I have said I agree with the reasoning of Inoke, JA and the orders he proposes.

Dated at Suva this third day of December 2009.


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JOHN E. BYRNE, President

I agree with the judgments of the President and Inoke, J.A.


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GROUNDAR, J.A.

