IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL APPELLATE JURISDICTION

Civil Appeal No. 13 of 2018
Consolidated with Civil Appeal No. 14 of 2018

(Nadi Magistrate's Court Civil Action No. 14 of 2015
Consolidated with Civil Action No. 15 of 2015)

BETWEEN : **FIJI ELECTRICITY AUTHORITY** a body corporate incorporated under the Electricity Act, Cap 180 and having its registered office at 2 Marlow Street, Suva and now known as Energy Fiji Limited (EFL)

(APPELLANT/DEFENDANT)

AND : **SANGEETA SHARIKA KUMAR** of Waimalika, Sabeto.

AND : HEMA WATI of Waimalika, Sabeto.

(RESPONDENTS/PLAINTIFFS)

Counsel : **(Ms) Lynette Prasad Qumivutia for the appellant. Respondents in person.**

Date of hearing : **Friday, 08th March, 2019.**
Date of Judgment : **Friday, 24th May, 2019.**

JUDGMENT

(A) INTRODUCTION

(1) This is an appeal against the judgment of the Magistrate's Court at 'Nadi' delivered by the Resident Magistrate on the 05th June, 2018 in Civil Action Nos. 14 of 2015 and 15 of 2015.

(B) BACKGROUND

(2) The action by the Respondents/Plaintiffs stems from their claims lodged in the Small Claims Tribunal (Case Nos. 14 and 15 of 2015) and was brought before

the Magistrates Court jurisdiction to establish if there was 'negligence' on the Appellant's part. Both Respondents/Plaintiffs sought compensation against the Appellant.

The first Respondent, Sangeeta Kumar, via SCT Claim No. 1088/14 brought her claim of $4,324.00 against the Appellant for damages to her appliances allegedly due to the Appellant's power surge that occurred on 29th September 2014.

The Second Respondent claimant, Hema Wati, via Small Claims Tribunal (SCT) claim No. 1089/14 brought her claim of $4898.00 against the Appellant which she also alleged were due to the Appellants power surge that occurred on 29 September 2014.

Both matters were transferred and heard together before the Magistrates Court in accordance with section 22(1) of the SCT Act.

(C) FINDINGS OF THE MAGISTRATE

(3) **Case No 14 of 2015**

(i) The defendant authority or its successor EFL should pay the sum of $3,898.00 to the plaintiff as the damages caused to her,

(ii) The defendant authority or its successor EFL should pay a summarily assessed cost of $200 within 14 days.

Case 15 of 2015

(i) The defendant authority or its successor EFL should pay a sum of $3,324.00 to the plaintiff as the damages caused to her,

(ii) The defendant authority or its successor EFL should pay a summarily assessed cost of $200.00 within 14 days.

(D) APPEAL

(4) The appellant, whom I shall call the defendant, challenges the Resident Magistrate's judgment. The defendant seeks an order from this Court that the decision of the learned Magistrate be set aside on the following grounds;

1. *THAT the Learned Magistrate erred in law and in applying the doctrine of "Res Ipsa Loquitur", and holding that the Appellant was negligent when there was no evidence of negligence on the part of the Appellant.*

2. *THAT the Learned Magistrate erred in law and in fact in not holding that the evidence of the Respondent's witnesses did not establish any negligence of the Appellant.*

3. *THAT the Learned Magistrate erred in law and in fact in not properly applying Section 44 (3) of the Electricity Act Cap 180 which the Appellant had pleaded its defence especially in view of the fact that a power surge in the area had never occurred before and was a "one-off" event due to fair wear and tear or due to an accident and the occurrence of the incident was out of the Appellant's control.*

4. *THAT the Learned Magistrate erred in law and fact in not properly applying the similar fact case of Iqbal Khan v FEA – SCT Appeal No. 13 of 2004/SCT Action No. 2889/03 delivered by the Resident Magistrate Ajmal Khan who ruled that it was an unavoidable accident.*

5. *THAT the Learned Magistrate erred in law and in fact in not properly considering the evidence of the elderly residents of Naboutini who said that power outage occurred only once in the 44 to 57 years they have resided there.*

6. *THAT the Learned Magistrate erred in law and in fact in not properly taking into consideration that the damage to the Respondent's appliances were due to them having tampered with the protection fuses inside their meter boxes by using copper wires instead of normal fuse wires.*

7. *THAT the Learned Magistrate erred in law and in fact in not holding that the Respondents by tempering with the protection fuses inside their meter boxes by using copper wires breached Section 63 (1) and (2) of the electricity Act, Cap 180 and Australia and New Zealand wiring Standards.*

8. *THAT the Learned Magistrate erred in law and in fact in not taking into consideration the evidence of Plaintiff's witnesses*

who clearly established that there was no negligence on the part of the Appellant.

9. *THAT the Learned Magistrate erred in law and in fact in reversing the onus of proof on the issue of proving negligence and wrongly held that the Appellant did not give any explanation for the occurrence of the incident.*

10. *THAT the Learned Magistrate erred in law and in fact in not holding that the snapping of the disc insulator from the cross arm on the pole could only be due to fair wear and tear or accident and not due to negligence.*

11. *THAT the Learned Magistrate erred in law and in fact in not properly taking into consideration the Appellant's Electricity Incident Report tendered at the trial and also not properly taking into consideration other exhibits tendered by the Appellant.*

(E) CONSIDERATION AND THE DETERMINATION

(5) The action is based on breach of common law duty. The facts of the case are simple and can be shortly stated. The respondents, whom I shall call the plaintiffs are customers of the defendant, Fiji Electricity Authority. On 29th September, 2014 a power surge occurred at 'Naboutini' settlement, Nadi where the plaintiffs reside. As a result of the power surge certain electrical items of the plaintiffs' household got damaged. The first plaintiff, Sangeeta Kumar via Small Claims Tribunal (SCT) Claim No: 1088/14 brought her claim of $4,324.00 against the defendant for damages to her appliances (DVD, ipad, mobile phone and deck). The second plaintiff, Hema Wati via Small Claims Tribunal (SCT) Claim No: 1089/14 brought her claim of $4,898.00 against the defendant for damages to her appliances (DVD player, fridge, T.V. and washing machine). **The parties have submitted their disputes on pleadings to the court. It may be noted that the plaintiffs' pleadings were insufficient to indicate to the defendant the particulars of negligence on which the plaintiffs intended to rely at the trial. The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. There must be a fairness and an equal application of the law to both parties.**

(6) It was later found out that on the 29th of September 2014, an 11kv cross arm broke on pole #W18088 and as a result the High Voltage disc insulator became loose and caused the High Voltage conductor to sag at the middle span between pole #W18087 and W18086. The High Voltage conductor sagged and touched the Low Voltage conductor below it. This caused all Low Voltage customers connected on the same Low Voltage conductor to experience a voltage surge and as a result most of the customers had their appliances damaged.

(7) The defendant in its statement of defence pleaded that the damages to the appliances was not caused by any fault or negligence for which the defendant is liable. The defendant admitted that there was a power surge and the damages to the plaintiff's appliances was a consequence of the power surge. However, the defendant relied on Section 44(3) of the Electricity Act, Cap 180 to exempt itself from civil liability in damages. The defendant, as well as denying the allegation of negligence, took the defences that;

- The most affected houses were the ones with the **copper wire** being used for **standard fuse wire protection** on the main switchboard and therefore the accident resulted from the plaintiffs own negligence.

- The electricity meter installed at the plaintiffs residence at the material time has not been approved by the Chief Inspector of the 'Fiji Electricity Authority' (the defendant) in accordance with approved regulations under Electricity Act, Cap 180 and as a result there was no negligence on the part of the defendant because the plaintiffs electricity meter was not in conformity with the provisions of the Electricity Act, Cap 180.

(8) Bearing that in mind let me now turn to the grounds of appeal.

(9) **Ground (1):**

That the learned Magistrate erred in law and in applying the doctrine of *'Res Ipsa loquitur'* and holding that the appellant was negligent when there was no evidence of negligence on the part of the appellant.

Counsel for the appellant elaborated on this on page (04) of the written submissions filed on 20.11.2018.

> 10. *The learned Magistrate erred in stating from paragraphs 20 to 28 of the Judgment that the maxim Res Ipsa loquitur was applicable in the instant case and the circumstances of the*

alleged incident raise an inference of negligence on part of the defendant in this case ('Maxim').

11. *The learned Magistrate erred by not correctly evaluating the 2 conditions that must be satisfied by a plaintiff for the Maxim to apply as stated in the Fiji Court of Appeal Case of* ***Ali v Ali [2009] FJCA 41:***

    i) *"the occurrence* ***must be speak negligence*** *and that* ***negligence must 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."*

    (Emphasis added)

12. *In the present case, the learned Magistrate failed to consider that there was no evidence of negligence attributable to the Appellant for the Maxim to be applicable. There was no evidence adduced that the appellant caused the power surge.*

In the written judgment, the learned Magistrate referred to the doctrine of '*Res Ipsa loquitur*' in this way;

25. *The authorities suggest that, there are some requirements or conditions precedent for the maxim to be applied in a given case. They are:*

    a. *The absence of explanation,*
    b. *The harm must be of such a kind that it does not ordinarily happen if proper care is being taken, and*
    c. *The instrumentally causing the accident must be within the exclusive control of the defendant.*

26. *In the instant cases, as stated above, the installation and the maintenance of the poles and the network are within the exclusive control and the management of the defendant authority and the plaintiffs have nothing to do with them. The evidence established the alleged incident, that happened, is not the one that frequently occurs. Though the first defence witness said that, it was fair wear and tear, the second*

witness, who is responsible for networking stated that, they have been doing annual maintenance, though he could not confirm the last maintenance they did in the area where the alleged incident occurred. ***If they were doing annual maintenance, there could not have been a fair wear and tear. Thus the defendant did not give any explanation for the occurrence of the incident.***

27. *The defendant might argue that, the plaintiffs never took up the application of this maxim during the trial or in their claim. In fact, both the defendants were appearing in person and they did not have any legal background to take up the same. In any event, it is not necessary to plead this maxim for the court to consider the same. This is the position in English jurisdiction and other several jurisdictions, including Fiji. In Bennett v. Chemical Construction Ltd [1971] 1. W.L.R. 1571 the English courts held that, the maxim does not need to be pleaded. Following the position of English courts, the Fiji Court of Appeal in Ali v Ali [2009] FJCA 41; ABU0029.2006 (3 December 2009) held that, the maxim needs not to be pleaded.*

28. *It follows from the above analysis and reasoning that, the maxim Res Ipsa loquitur is applicable in the instant cases and the circumstances of the alleged incident raise an inference of negligence on part of the defendant in this case. Accordingly, the issue (b) above is affirmatively answered in favour of the plaintiffs and the defendants were negligent and failed to take proper care of the network. This further proves that, the plaintiffs were not responsible for alleged incident and in return it rebuts the argument of the defendant that, the plaintiffs were the authors of the incident. Thus, the issue (f) on behalf of the defendant is negatively answered. Therefore, the next issues are the quantum of damages and the alleged contributory negligence on part of the plaintiffs.*

(Emphasis added)

I cannot agree with this conclusion. I regret to say that the learned Magistrate has misapplied the maxim' *res ipsa loquitur*'. I will return to this later.

The maxim is not a rule of law. Kennedy L.J. in **Russell v L& S.W. Ry (1908) 24 T.L.R. 548, 581** explains the meaning of *res ipsa loquitur* as follows:

"The meaning, as I understand, of that phrase ..... is this, that there is, in the circumstances of the particular case, some evidence which, viewed not as a matter of conjecture, but of reasonable argument, makes it more probable that there was some negligence, upon the facts as shown and undisputed, than that the occurrence took place without negligence. The res speaks because the facts stand unexplained, and therefore the natural and reasonable, not conjectural, inference from the facts shows that what has happened is reasonably to be attributed to some act of negligence on the part of somebody; that is, some want of reasonable care under the circumstances. Res ipsa loquitur does not mean, as I understand it, that merely because at the end of a journey a horse is found hurt, or somebody is hurt in the streets, the mere fact that he is hurt implies negligence. That is absurd. It means that the circumstances are, so to speak, eloquent of the negligence of somebody who brought about the state of things which is complained of"

Later, his Lordship adds;

"Res ipsa loquitur in this sense; the circumstances are more consistent, reasonably interpreted without further explanation, with your negligence than with any other cause of the accident happening."

The maxim comes into operation (1) on proof of the happening of an unexplained occurrence; (2) when the occurrence is one which would not have happened in the ordinary course of things without negligence on the part of somebody other than the Plaintiff; and (3) the circumstances point to the negligence in question being that of the defendant rather than that of any other person. The third requirement is usually fulfilled by showing that the instrument causing the damage was in the management and control of the defendant at the time of the occurrence, but this is not essential.

The case of **Byrne v. Boadle 2 H. & C.722, 159 ER** (Eng. Rep.) 299 (Exch. 1863); is regarded as the English tort law case that first applied *res ipsa loquitur*. In that case the Plaintiff (Byrne) was struck by a barrel of flour falling from a window as he walked past the Defendant's (Boadley) flour shop and sustained serious personal injuries. A witness testified that he saw the barrel but had not seen the cause. Byrne did not present any other evidence of negligence by Boadle or his employees.

It was held that,

"A presumption of negligence can arise from an accident. A party needs not present direct evidence of negligence when the mere manner

and facts of the accident show that it could not have happened without negligence on someone's part. A barrel could not roll out of a warehouse window without negligence. This is an example of a case in which res ipsa loquitur ("the thing speaks for itself") applies. It is evidence that the barrel was in the custody of the Defendant and its falling is prima facie evidence of negligence. A Plaintiff who is injured in such a fashion should not be required to show that the barrel could not fall without negligence. A rebuttable presumption is created that Defendant was negligent and he has the burden to prove that he was not. The Defendant had a duty to ensure that those passing by his shop are not injured by objects under his control. In this case there was a scintilla of evidence with respect to negligence. The Defendant failed to show he was not negligent and the Plaintiff was to the verdict."

The phrase has also been succinctly expounded by Lord Justice Morris in **Roe v. Ministry of Health (1954) 2 QB 66 at page 88**:

"..... this convenient and succinct formula possesses no magic qualities; nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin. When used on behalf of a Plaintiff it is generally a short way of saying "I submit that the facts and circumstances which I have proved established a prima facie case of negligence against the Defendant." It must depend upon all the individual facts and the circumstances of the particular case whether this is so. There are certain happenings that do not normally occur in the absence of negligence, and upon proof of these a court will probably hold that there is a case to answer."

In the case of **Lloyd v. West Midlands Gas Board [1971] 1 WLR 749; Lord Justice Megaw explained (at page 755)**;

"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 Plaintiff prima facie established 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 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 Plaintiff's safety."

"I have used the words "evidence as it stands at the relevant time". I think that this can most conveniently be taken as being at the close of the Plaintiff's case. On the assumption that a submission of no case is then made, would the evidence, as it then stands, enable the Plaintiff to succeed because, although proper inference on balance of probability is that cause, whatever it may have been, involved a failure by the Defendant to take due care for the Plaintiff's safety? If so, res ipsa loquitur."

In **Franklin v. Victorian Railways Commissioner (1959) 101 CLR 197; Dixon CJ** said;

"The three Latin words [*res ipsa loquitur*] merely describe a well-known form of reasoning in matters of proof. Convenient as it is sometimes to us to direct the mind along that channel of reasoning they must not be allowed to obscure the fact that it is a form of reasoning about proof leading to an affirmative conclusion of fact and that whenever the question is whether the proofs adduced suffice to establish an issue affirmatively, all the circumstances must be taken into account and the evidence considered as a whole."

The High Court of Australia in **Schellenberg v. Tunnel Holdings Pty Ltd. [2000]** HCA 18 held (Gleeson CJ and McHugh J);

"Res ipsa loquitur is concerned with negligence arising from an unknown or unspecified cause. It is concerned with an external event whose cause is under the control of the defendant. It is a principal that is as much, perhaps more, concerned with proof that the defendant was causally responsible for the occurrence as it is with proof of a breach of duty."

"While Res ipsa loquitur may ameliorate the difficulties that arise from a lack of evidence as to the specific cause of an accident, the inference to which it gives rise is merely a conclusion that is derived by the trier of fact from all the circumstances of the occurrence. When it applies, the trier of fact may conclude that the defendant has been negligent although the plaintiff has not particularized a specific claim in

negligence or adduced evidence of the cause of the accident. But if does nothing more."

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."

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 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.*

Flemming on Torts 9th edition describes the maxim Res Ipsa Loquitur 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 observations and experience in life that sometimes a thing tells its own story.

With the above considerations in mind, let me now pause here to consider whether the doctrine of '*res ipsa loquitur*' arises to the case at hand.

The essential elements of ***'res ipsa loquitur'*** were restated by Gleecon C.J. and Mcvugh J in their Lordships joint judgment in **"Schellenberg v Tunnel Holding Pty Ltd", (2000) HCA 18, (2000) 200 CLR 121,** in the following terms;

(a) there must be an absence of explanation of the occurrence that caused the injury.

(b) the occurrence must have been of such a kind that it does not ordinarily occur without negligence, and

(c) the instrument or agency that caused the injury must have been under the control of the defendant.

All three necessary conditions must be satisfied if the ***'res ipsa loquitur'*** principle is to apply to the instant case. At the trial, Counsel for the defendant conceded that the third necessary condition was satisfied. That is, the transformer T 2410, the pole and the disc insulator were under the sole management and control of the defendant. The first and second conditions were not conceded. In the present case, there is evidence of the facts surrounding the power surge and its cause. The **'Electrical Incident Report'** (defence exhibit No.12) contains the following;

"Conclusion

The overvoltage occurred when the high voltage conductor came loose and touched the low voltage lines below it. ***We conclude that the incident was not intentional or due to negligent, but was the result of wear and tear on the authority infrastructure."***

(Emphasis added)

Here, in my view there is no 'ambiguity'. The conclusion of the "Electrical Incident Report" is quite clear. The words are unequivocal. I read the words; "…. ***the incident was not intentional, or due to negligent, but was the result of wear and tear on the authority infrastructure***". The most important witness for the defence was witness No-2, Mr. Manueli Maloca Bai, the Installation Inspection Co-Ordinator, who has prepared "Electrical incident Report" (defence exhibit -12). The Magistrate Court had admitted the report and the contents, evidence therein as admissible evidence. Therefore, the defendant is entitled to rely on the report. There is explanation in the report as to how the incident occurred and the cause of the power surge. There is no evidence whatsoever in the report or plaintiffs oral testimony that it was any want of care on the part of the defendant that caused the power surge. The report contains an opinion as to what caused or contributed to the power surge. No suggestion was made to the witness, Mr. Manueli Maloca Bai, in cross-examination by the plaintiffs that his conclusion in the report is not the case and all the contents and his conclusion in the report had been let go unchallenged so far as the conduct of the plaintiff's case is concerned. By itself it does prove that the plaintiffs do not have issues with the contents and the conclusion of the report and the plaintiffs did not have reasonable grounds to suspect the contents and the conclusion of the defence report.

See; **Cross on evidence (2nd Australian ed, 1979) at para 10.50 and Phipson on evidence (12th Edition, 1976) at para 1593.**

A defendant is entitled to expect that a claim of liability brought against it will be decided by the same rules of evidence and substantive law whether the plaintiff is represented by counsel or self-represented. The self-represented litigants are bound the same way as any litigant to the rules of the court, rules of evidence and substantive law. There must be fairness and an equal application of the law to both parties. The contents and conclusion of the "Electrical Incident Report" was not challenged in cross examination when the defence witness No.1, Mr.Manueli Maloca Bai, the maker of the report, testified before the Court. Not a one word was put to Mr. Manueli Maloca Bai to challenge the contents and the conclusion of the report. By itself it does prove that the plaintiffs did not have reasonable grounds to suspect the contents and the conclusion of the "Electrical Incident Report". In other words, the absence of any grounds for suspicion has been provided by the plaintiffs. It must be accorded weight. I say, by the absence of cross-examination on the contents and conclusion of the report showing that "***the incident was not intentional, or due to negligent, but was the result of wear and tear on the authority infrastructure***", the plaintiffs do admit that the contents and conclusion of the report is true. Then, what is there for the Court? Therefore, it is wrong to say "*If they were doing annual maintenance,*

there could not have been a fair wear and tear". As Lord Thankerton pointed out in **"Glasgow Corpn v Muir"(1943) 2 ALL.E.R. 44**, one must be careful not to impute negligence from '**ex *post facto***' events.

That being so, the first and second of the three necessary conditions for the application of principle *'Res Ipsa loquitur'* are not satisfied, and the principle therefore cannot apply to the present case. Where the circumstances giving rise to the cause of the incident are unknown, that doctrine may be of great assistance, but where, as in the present case, all the facts are revealed by the Electrical incident report and known, it cannot have any application. It is known exactly how the incident happened and the cause of the incident. Therefore, it was not open for the learned Magistrate to apply the maxim. It is known exactly how the incident happened, and it is unnecessary to ask whether this incident would have happened had there been no negligence.The learned Magistrate has misapplied the maxim and this has resulted in substantive miscarriage of justice. The Magistrate was wrong in saying that "*.....the defendant did not give any explanation for the occurrence of the incident*" (paragraph 26 of the judgment). In my opinion, the maxim cannot be expressed in any such absolute or simplified terms as the Magistrate suggested in paragraph (26) of the judgment. **He failed to appreciate the importance of the report which strongly negates the application of the maxim and supports the defendant's case against the plaintiffs case. Substantial wrong or miscarriage of justice have been occasioned thereby.**

(10) **Ground (02)**

That the learned Magistrate erred in law and in fact in not holding that the evidence of the respondent's witnesses did not establish any negligence of the appellant.

Counsel for the appellant submitted that the only evidence before the learned Magistrate was that the snapping of the disc insulator caused the High Voltage Line to touch the Low Voltage Line which caused power outage and according to the Respondents/Plaintiffs, this incident caused damage to their electrical appliances. The plaintiffs failed to adduce evidence that the incident was caused by the negligence of the Appellant.

Counsel for the appellant cited the following cases in argument;

- **Potts or Riddell v Reid**
  (1943) AC 1

❖ **Qualcast (Wolverhampton) Ltd v Hoynes**
(1959) 2 All.E.R. 38

I do not see an allegation of negligence pleaded in the plaintiff's statement of claim. The evidence before the Court by the plaintiffs was damage was caused due to overvoltage which occurred as a result of conductor from the high voltage cross arm above came off and touched the low voltage conductor below. This was a one off occasion which happened once in 57 years. The transcript of plaintiff's witness No-2 Mr. Shiu Baran's, (57 years old) cross-examination contains this; (page 56 of the transcript)

Q: So was this the first time this thing ever happened to you when the appliances blew up?
A: Yes, Sir this is the first time.

Q: So, this means this doesn't happen all the time, does it?
A: No, this is the first time.

I couple that with the evidence of plaintiff's witness No-6, Mr. Sandeep Ram, (38 years old) (page 69 and 70 of the transcript)

Q: How long have you been a resident at Naboutini settlement?
A: I am born there.

Q: Born and raised there?
A: Yes.

Q: So, you would have resided there for the last 38 years?
A: Yes.

Q: Has this ever happened to your household before?
A: No, this is the first time.

The "**Electrical Incident Report**" reveals that the maintenance and condition monitoring of the electrical line are carried out on an annual basis and the "Electrical Incident Report" (defence exhibit No. 12) confirms that the last maintenance program before the incident for the area was carried out on 20th February, 2014, i.e., about 09 months before the incident. The plaintiffs have not gone any further to prove that the conductor from the high voltage cross arm above came off due to some fault or negligence for which the defendant is liable. It is obvious that the electrical supplier, the defendant, owes a duty to ensure a proper supply of energy to its consumers, the plaintiffs. In order to

establish liability, the court has to be satisfied that that duty was broken, and that the consumers of electricity have incurred loss in consequence of the breach. In view of the evidence explanatory of the fall of the conductor from high voltage cross arm (see the conclusion in Electrical incident report) it is not open to the court to infer that the fall was due to some fault or negligence for which the defendant is liable. **There is no a scintilla of evidence to show that the power surge was a direct consequence of the want of repair.**

As Lord Thankerton pointed out in **"Glasgow Corpn v Muir" (1943) 2 ALL.E.R. 44**, one must be careful not to impute negligence from 'ex *post facto*' events.

The '**Electrical Incident Report**' (defence exhibit 12) clearly says that;

> *"Conclusion*
>
> *The overvoltage occurred when the high voltage conductor came loose and touched the low voltage lines below it.* ***We conclude that the incident was not intentional, or due to negligent, but was the result of wear and tear on the authority infrastructure."***
>
> [Emphasis added]

I cannot say, in the absence of evidence, that this was impossible. The learned Magistrate could not be right when he said; "If they were doing annual maintenance, there could not have been a fair wear and tear". (see paragraph 26 of the judgment of the Magistrate). The page (6) of the 'Electrical Incident Report' shows the condition monitoring and maintenance program for the area. The last condition monitoring and the maintenance was carried out on 20.02.2014, i.e., about (07) months before the incident. There is no evidence to show that the power surge was a direct consequence of the want of repair. **The defendant was not shown to have been at fault in "condition monitoring and maintenance"**. It was incumbent on the learned Magistrate to refer to the 'condition monitoring'. He failed to refer to the report and condition monitoring in the course of his judgment. He failed to appreciate the importance of the condition monitoring. He has ignored the report and its contents as to condition monitoring. It was incumbent on the learned Magistrate to accept the defendant's documentary evidence (viz, Electrical Incident Report) in the absence of the evidence led by the plaintiffs to the contrary to rebut the same.

I fail to see, how the learned Magistrate could conclude: *"If they were doing annual maintenance, there could not have been a fair wear and tear"* ;

(A) Without considering the "condition monitoring and maintenance program" in the 'Electrical Incident Report'.

(B) In the absence of evidence to show that power surge was direct consequence of the want of repair.

The judgment created a substantial wrong or miscarriage of justice. The learned Magistrate is not entitled to find the defendants liable.

Section 44 (3) of the Electricity Act Cap 180 reads;

> *"The Authority or a licensee; their servants or agents, shall not be liable for* ***any damage to persons or property or for any cessation of the supply of energy which may be due to unavoidable accident, fair wear and tear and or overloading due to unauthorised connection of apparatus,*** *or to the reasonable requirements of the system, or to defects in any installation not provided by the authority .... but shall be liable only when such damage or cessation is shown to have resulted from negligence on the part of the Authority or from faulty construction of the installation."*
>
> (Emphasis added)

Therefore, the defendant can successfully exempt itself from civil liability in damages by hiding behind the protection shield of the Electricity Act provision 44 (3).

(11) **Ground (03)**

That the Learned Magistrate erred in law and in fact in not properly applying Section 44 (3) of the Electricity Act Cap 180 which the Appellant had pleaded its defence especially in view of the fact that a power surge in the area had never occurred before and was a "one-off" event due to fair wear and tear or due to an accident and the occurrence of the incident was out of the Appellant's control

I have considered this in ground (2).

Ground (04)

(12) **That the learned Magistrate erred in law and fact in not properly applying the similar fact case of Iqbal Khan v FEA – SCT Appeal No. 13 of 2004/SCT Action No. 2889/03 delivered by the Resident Magistrate Ajmal Khan who ruled that it was an unavoidable accident.**

This ground is frivolous and vexatious.

(13) Ground – (05)

That the learned Magistrate erred in law and in fact in not properly considering the evidence of the elderly residents of Naboutini who said that the power outage occurred only once in 44 to 57 years they have resided there.

There is uncontested evidence from the residents of Naboutini that the power surge occurred only once in 38 to 57 years they have resided there. This item of evidence was not considered by the learned Magistrate because it was not referred to in his judgment. Moreover, the defence witness **Mr.Manueli Maloca Bai, the Installation Inspection Co-ordinator** said as follows in his re-examination, (page 107 of the transcript)

Q: **What happened on that day does it happen normally?**
A: **No, I can confirm it doesn't happen.**

Q: **So that is one off the incident?**
A: **Yes.**

Therefore, the chance of the incident happening in the foreseeable future is infinitesimal and far-fetched. Its happening would be a very exceptional circumstance and no previous incident had occurred. Therefore, the risk of the incident occurring and the possibility and the chance of the incident occurring was so small and very slight that in the circumstances of reasonable man, the defendant in the instant case would have been justified in disregarding it and taking no steps to eliminate it. In *Fardon v Harcourt – Rivington (1932), 146 L.T. 391. LORD DUNEDIN [146 L.T.392]* said;

> *"This is such an extremely unlikely event that I do not think any reasonable man could be convicted of negligence if he did not take into account the possibility of such an occurrence and provide against it.....people must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities."*

The general principle is that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man. The learned Magistrate failed to give effect to the qualification that it is justifiable not to take steps to eliminate a risk of an incident occurring when the chance of the incident occurring is very small, slight, fantastic or far- fetched possibility and the circumstances are such that the defendant, the public energy supplier, who is careful of the safety of the electricity consumers would think it is right to neglect it. **The test whether there has been a breach of duty depends on the answer to the question whether the incident was a reasonably foreseeable risk**. It was incumbent on the learned Magistrate to form and state a precise view as to infinitesimal and far-fetched possibility of the risk. Therefore, I reach the conclusion that the Magistrate Court judgment occasioned a substantial wrong or miscarriage.

(14) **Ground – (06)**

That the learned Magistrate erred in law and in fact in not properly taking into consideration that the damage to the respondent's appliances were due to them having tampered with the protection fuses inside their meter boxes by using copper wires instead of normal fuse wires.

Counsel for the appellant elaborated on this on page (09) of the written submissions filed on 20.02.2018.

> *The learned Magistrate ought to have held that the Appellant was not liable for the damage incurred by the Plaintiffs within the provision of Section 44(3) of the Electricity Act Cap 180 which reads:*
>
> > *"The Authority or a licensee; their servants or agents, **shall not be liable for any damage to persons or property** or for any cessation of the supply of energy which may be due to unavoidable accident, fair wear and tear and or overloading **due to unauthorised connection of apparatus**, or **to the reasonable requirements of the system, or to defects in any installation not provided by the authority** – but shall be liable only when such damage or cessation is shown to have resulted from negligence on the part of the Authority or from faulty construction of the installation."*
> >
> > (Emphasis added)

The learned Magistrate wrongly apportioned the amount of contributory negligence on the part of the Respondents/Plaintiffs contributing to their damages and ought to have held that the copper wires used instead of the standard wires amounted to "unauthorised apparatus", and "defects in installation not provided by the Authority" and consequently ought to have held that the Appellant was not liable for the damages caused to the Respondents/Plaintiffs at all in accordance with ***section 44 of the Electricity Act [Cap 180]***

The 'Electrical Incident Report' (defence exhibit – 12) revealed that **most affected houses were the ones with the copper wire being used for fuse wire protection on the main switch board.** The report says that seven of the consumers affected used copper wire in their fuses and **all their appliances were damaged** due to power surge. The report further reveals that one of the affected consumer used standard wire fuse and **only some of his appliances were damaged**. The plaintiffs admitted that they had copper wires inserted in the fuse carriers. These copper wires did not act as circuit protection at all any time before and during the overvoltage. It is reasonable to infer that if the plaintiffs and the other electricity consumers who were affected by the power surge had used standard fuse wire the loss could not have incurred through the power surge. The defendant could not reasonably be expected to have known the plaintiffs insertion of copper wire for fuse protection on the plaintiffs main switch board and therefore the damage to plaintiff's electrical appliances through power surge was **unforeseeable**.

In the law of Torts, the defendant is not liable for damage unless it is of a class or kind which is reasonably foreseeable as the result of the wrongful act or omission. See, **(1) Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound) (No. 1), 1961 AC 388, 426 (2) Overseas Tankship (UK) Ltd v Miller Steamship Co Pty (The Wagon Mound) (No-2) (1967) AC 617, 636.** In light of this, it is intuitively unreasonable to find the defendant liable to indemnify the plaintiffs for the loss incurred. Therefore, I reach the conclusion that the Magistrate's Court judgment occasioned a substantial wrong or miscarriage.

One word more. The plaintiff's had not followed the wiring standard and the plaintiffs themselves knew of the danger and they were endeavouring to throw the blame on the defendant. There was lack of care on the part of the plaintiffs. There has been a failure to follow the wiring standards by the plaintiff and the learned magistrate was wrong when he apportioned an amount for contributory negligence. The defendant's liability to indemnify the plaintiffs will not extend to losses incurred when it can be said that the plaintiffs, rather than the defendant, was the author of the misfortune. The use

of copper wire in the fuses instead of standard wire amounted to 'unauthorised apparatus' and 'defects in installation not provided by the authority'. Therefore, the defendant is not liable for the plaintiff's failure to use standard wire in the fuses and the defendant can exempt itself from civil liability in damages under Section 44 (3) of the Electricity Act, Cap 180 which provides;

> *"The Authority or a licensee; their servants or agents, shall not be liable for any damage to persons or property or for any cessation of the supply of energy which may be due to unavoidable accident, fair wear and tear and or overloading due to unauthorised connection of apparatus, or to the reasonable requirements of the system, or to* ***defects in any installation not provided by the authority*** *.... but shall be liable only when such damage or cessation is shown to have resulted from negligence on the part of the Authority or from faulty construction of the installation."*
>
> (Emphasis added)

Moreover, the plaintiffs have breached Section 63 (1) and (2) of the Electricity Act by using copper wires. Section 44(3) and 63(1) and (2) have application to the present case and the Magistrate is not entitled to find the defendant liable.

Section 63 (1) and (2) of the Electricity Act, Cap 180 reads;

> *"Offences*
>
> *63. – (1) Any person who* ***wilfully so tampers*** *with or adjusts any installation or part thereof as to cause or to be likely to cause danger to human life or limb or* ***injury to any apparatus or other property*** *shall be liable to a fine not exceeding $400 or to imprisonment for a term not exceeding 5 years or to both such fine and imprisonment,*
>
> *(2) Any person who, in any manner whatsoever dishonestly –*
>
> *(a) abstracts energy; or*
>
> *(b) consumers energy; or*
> *(c) uses energy; or*
>
> *(d)* ***alters the index of any meter or other instrument used on or in connection with any Authority***

installation or any licensed installation for recording the output or consumption of energy; or

(e) prevents any such meter or instrument from duly recording the output or consumption of energy,

shall be guilty of an offence and shall be liable to a fine not exceeding $100 or to imprisonment for a term not exceeding 2 years or to both such fine and imprisonment."

(Emphasis added)

(15) Ground – (07)

That the learned Magistrate erred in law and in fact in not holding that the respondents by tempering with the protection fuses inside their meter boxes by using copper wires breached Section 63 (1) and (2) of the Electricity Act, Cap 180 and Australia and New Zealand wiring standards.

I have considered this in ground (6).

(16) Ground (08) and (09)

That the learned Magistrate erred in law and in fact in not taking into consideration the evidence of plaintiff's witnesses who clearly established that there was no negligence on the part of the appellant.

That the learned Magistrate erred in law and in fact in reversing the onus of proof on the issue of proving negligence and wrongly held that the appellant did not give any explanation for the occurrence of the incident.

I have already considered this in ground (1) and (2).

(17) Ground (10)

That the learned Magistrate erred in law and in fact in not holding that the snapping of the disc insulator from the cross arm on the pole could only be due to fair wear and tear or accident and not due to negligence.

I have considered this in ground (1) and (2).

(18) Ground (11)

That the learned Magistrate erred in law and in fact in not properly taking into consideration the appellant's Electricity Incident Report tendered at the trial and also not properly taking into consideration other exhibits tendered by the appellant.

I have already considered this in ground (1), (2) and (6).

(F) ORDER

(1) Appeal allowed.

(2) The Judgement delivered by the Resident Magistrate on 05.06.2018 is set aside.

HIGH COURT OF FIJI
LAUTOKA

.....24/05/2019.

Jude Nanayakkara
Judge

At Lautoka,
Friday, 24th May, 2019