

IN THE HIGH COURT OF FIJI AT LAUTOKA

CIVIL JURISDICTION

HBC No. 99 of 2012L

BETWEEN : **YU-E-LI** also known as **LI YU-E** also known as **LEI LOK NGO** of Ravouvou Street, Lautoka, Businesswoman as Administratrix of the **ESTATE OF CHO TAT LAM** late of Ravouvou Street, Lautoka, Businessman.

Plaintiff

AND : **MERVIN FAZLEEN ALI** of Vesi Crescent, Lautoka, Student.

First Defendant

AND : **VINOD KUMAR MUDALIAR** of Lovu, Lautoka, Businessman.

Second Defendant

Counsel : Ms. V. Lidise for the Plaintiff
: Ms. U. Baleilevuka for the Defendants

Date of Hearing : 12 & 13 May 2016

Date of Judgment : 14 November 2016

J U D G M E N T

Introduction

[01] The plaintiff claims damages against the defendants. The claim includes damages under the Law Reform (Miscellaneous Provisions) (Death & Interest Act (Cap. 27) and the Compensation to Relatives Act (Cap. 29). The plaintiff's claim arising out of a vehicle accident in which her husband died.

[02] The defendants filed his statement of defence and denied the claim generally.

[03] At the trial, only the first defendant gave evidence. The second defendant did not offer any evidence.

The Facts

[04] The statement of claim states: On 1 August 2010, Cho Tat Lam, deceased, died as a result of the injuries he sustained when motor vehicle registration No FC 386 (“the vehicle”) driven by the first Defendant, the agent and servant of the second Defendant, struck the deceased as he was opening the padlock of the gate to the New Star Aluminium City Limited Workshop along Ravouvou Street, Lautoka. Yu-E-Li (“the Plaintiff”) is the widow and administratrix of the Estate of Cho Tat Lam. The first Defendant, Mervin Fazleen Ali was at all material times the driver and in control of the vehicle and was driving with the permission and/or the authority of the second Defendant or if not, as an agent of the second Defendant. The second Defendant, Vinod Kumar Mudaliar was the owner of the vehicle at the time. On the day in question, the first Defendant drove the vehicle on the said road so negligently that he lost control of the vehicle as he navigated a right hand bend along the said road, and cause the vehicle to veer off the road onto the pavement and driveway to the New Star Aluminium City Limited Workshop and struck the deceased (“the accident”) killing him instantly or soon thereafter.

The Issue

[05] The issue that emerged at the trial was whether the defendants are liable to pay damages to the plaintiff for causing the death of her husband, Cho Tat Lam.

The Evidence

Plaintiff's Evidence

[06] At the trial, the plaintiff called three witnesses in support of her claim namely Yu-E-Li, the widow of the deceased (PW-1), Wai Ip Lam, the son of the deceased (PW-2) and Asif Ismail (PW-3).

[07] PW 1 - states that in the morning of 1 February 2010 her husband went to the factory when he was hit by a vehicle. She rushed to the scene and saw her husband was unconscious with his face badly damaged. He was taken to the hospital. She also went to the hospital. About half an hour later the doctor told her, "He has died". Her evidence stands unchallenged because the defendants did not cross examine her.

[08] PW 2 was the deceased son. He in evidence stated that his father assisted him in his studies in NZ. He tendered in his and his siblings birth certificates. After his father's death, he took charge of the business.

[09] Plaintiff witness 3 in his evidence stated that he had known Lam since 1990 as his neighbour. On 1 August 2010 he saw Lam underneath between the gate and the vehicle when he was driving to his factory. Lam was bleeding from his head. He identified the defendant as the driver who drove CRV. He saw the defendant driving fast.

Defendants' Evidence

[10] The only evidence Defence witness gave was that he has denied all the statement of claim in his statement of defence.

Under cross examination defence witness stated that he had no driver's licence on 1/8/2010 when put that he lied in court, he said 'yes'. He also admitted that he knew that he may be prosecuted for perjury. (Defence witness had been charged for perjury in the Magistrate's court).

Analysis

- [11] Counsel appearing for the plaintiff has made an application to firstly determine the liability issue. I will accordingly decide on that issue.
- [12] The issue to be determined by the court is whether the first defendant is liable to pay damages for causing death of Lam, the deceased.
- [13] The plaintiff claims damages, including damages under the Law Reform (Miscellaneous provisions) (Death and interest) Act (Cap 27) and to compensation to Relatives Act (Cap. 29).
- [14] PW 3 is an eye witness who in his evidence states he saw the deceased underneath between the gate and the vehicle. He also saw the first defendant driving the vehicle very fast. He identified the first defendant as the one who drove the vehicle on the day in question.
- [15] The first defendant filed a statement of defence denying all the averment of the statement of claim and putting the plaintiff to the struck proof thereof. However, under cross examination he admitted that he drove the vehicle without a driver's licence on 1 August 2010. He gave entirely different evidence to that of his statement of defence. He also admitted that he had lied in court.
- [16] PW 3 gave straightforward evidence. His evidence was not denied in the cross examination. He answered cross examination questions quickly and without any hesitation. I, therefore, accept him as truthful witness.
- [17] There is evidence before me that the first defendant drove the vehicle so fast along the road and let the vehicle veered off and hit the deceased who was locking his factory gate. The deceased was on the pavement at the time.
- [18] The first defendant had a duty of care towards the deceased as he was a road user. The first defendant breached this duty by driving the

vehicle recklessly and by failing to control the vehicle. As a result hit the deceased causing his death instantly if not soon thereafter.

[19] I would, therefore, hold that the first defendant is liable for causing the death of the deceased through his negligent driving without a valid driver's licence.

[20] As to the second defendant, he admits that at that time he was the owner of the vehicle and the first defendant drove the vehicle. However, in his statement of defence, he states that he was unaware the first defendant was the driver of the vehicle and that he gave the vehicle to the first defendant's mother for her use.

[21] The second defendant did not give evidence. He did not call witnesses either. This leads to the rejection of the statement he has made in this evidence.

[22] The first defendant drove the vehicle of which the second defendant was the owner. The first defendant should be driving the vehicle with the authority and the permission of the second defendant or he should be driving as an agent of the second defendant. Therefore, the second defendant is vicariously liable for the acts of the first defendant.

Conclusion

[23] The first and the second defendants are jointly and severally liable for causing the death of the deceased. They are liable to pay damages to the plaintiff for causing the death of her husband. The defendants are also liable to pay costs of these proceedings.

[24] Damages and costs are to be assessed before the Master of the High Court.

Final outcome

1. Judgment for the plaintiff.

2. The defendants are jointly and severally liable for causing the death of the Deceased.
3. The defendants are jointly and severally liable to pay compensation and costs of these proceedings to be assessed before the Master of the High Court.

M H Mohamed Ajmeer
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14/11/16

M H Mohamed Ajmeer

JUDGE

At Lautoka

14 November 2016

