IN THE HIGH COURT OF LESOTHO

CIV/T/56/10

HELD AT MASERU

In the matter between:-

`MARETSEPILE MAJALLE **PLAINTIFF**

VS

LESOTHO NATIONAL GENERAL INSURANCE CO. LTD **DEFENDANT**

JUDGEMENT

DELIVERED BY	**:**	**HON. T. E. MONAPATHI**
DATE OF HEARING	**:**	**09 AUGUST, 2017**
DATE OF JUDGEMENT	**:**	**3rd JULY, 2020**

SUMMARY

Motor vehicle accident – Negligence – Res ipsa loquitor – Application of – Res inter alios actae – Application of – Subrogation of Claim – Contigencies – calculations.

[1] This is an action in which Plaintiff compensation against the Defendant for loss incurred as a result of her husband`s death pursuant to his involvement in a motor vehicle accident. The plaintiff has claimed:

a. Payment of a sum of M1, 328, 055.63 for loss of support, medical expenses and funeral expenses;

b. Interest at the rate of 18.5% per annum, calculated from 14 days from the date of judgment to date of payment;

c. Costs of suit

d. Further and/or alternative relief

[2] The issues for determination are liability and quantum. To ascertain liability, it is important for the court to consider whether there was negligence on the side of the insured driver. It is common cause that the accident occurred at 2200 hrs and that the insured driver died at the spot whilst the defendant`s husband died some two months later. It is also common cause that the insured driver veered off his lane into the opposite lane thereby colliding head-on with the Plaintiff`s husband.

[3] PW2 testified that the insured driver veered off his lane into the opposite lane where he collided head-on with the Plaintiff`s husband. He based this conclusion on the fact that the insured driver`s vehicle was found in the opposite lane and drew the point of impact based on the mud, the oil, broken glasses, broken parts of the grill and bumpers. He handed in the Police Map as Exhibit "**B**".

[4] The Plaintiff has relied on the maxim of *res ipsa loquitor* to urge the Court to find that the insured driver was negligent. The Defendant

however, argues that this is not a situation suitable for the application of *res ipsa loquitor* and cites the cases of **Sardi v Standard and General Insurance Company Limited**[1] and **Hamilton v MacKinnon**[2] to support the notion that something might have caused the insured driver to cross over the opposite lane. In fact, the Defendant`s main bone of contention is that PW2 could not testify as to what caused the insured driver to cross over into the opposite lane.

[5] The court in the above cited case of **Sardi** stated:

> *"The maxim res ipsa loquitor is invoked where the only known facts, relating to negligence, consist of the occurrence itself. The occurrence may be of such a nature as to warrant an inference of negligence. The person, against whom the inference of negligence is sought to be drawn, may give or adduce evidence seeking to explain that the occurrence was unrelated to any negligence on his part. The Court will test the explanation by considerations such as probability and credibility. At the end of the case, the Court has to decide whether, on all the evidence and the probabilities and the inferences, the Plaintiff has discharged the onus of proof on the pleadings on a preponderance of probability, just as the Court would do in any other case concerning negligence."*

[6] On the facts, it is clear that an inference of negligence can be drawn against the insured driver *prima facie.* It is then on the Defendant to produce evidence seeking to explain the occurrence and to show that the occurrence was not related to any negligence on the part of the insured driver. This was well understood in the above case of **Sardi** wherein the driver of the truck plus tanker had also veered into the opposite lane. He

provided an explanation that he was trying to avoid colliding into another car that was on his side which had caused a sudden emergency for him.[1]

[7] In the present case, although the Defendant argues that *res ipsa loquitor* should not apply, he has not provided the Court with an explanation as to what could have caused the insured driver to veer off the road. Instead, this question was put to the Police officer who could not provide an explanation, understandably so, a Police officer merely testifies as to what he saw when he arrived at the scene as well as conclusions he drew based on what he saw. He therefore would not be able to give an explanation on why the insured driver had veered off into the opposite lane. In my opinion, the facts speak for themselves; the insured driver was negligent in that he failed to travel in his lane of the road, failed to keep a proper look out and to exercise reasonable care and skill to avoid the accident.

[8] The second issue for consideration is quantum. Prayer (a) has been broken down as follows:

1. Loss of Support	M432, 384.46
2. Medical expenses	M863, 823.00
3. Funeral Expenses	M 31, 848.17

Funeral Expenses

[9] The plaintiff submitted funeral expenses as Exhibit **"E".** The defendant does not dispute these expenses but argues that Exhibits **"F"** and **"G",** the Plaintiff and her late husband`s pay slips, show that they made

[1] 1997 (3) SA 776
[2] 1935 AD 114

monthly contributions to their respective funeral schemes which paid out M20, 000 each on the death of her husband. This was confirmed by the Plaintiff under cross-examination. The defendant therefore submits that Plaintiff received a total amount of M40, 000 which she used to cover the funeral expenses. Counsel for Defendant argued that because the claimed amount is less than the received amount, Plaintiff did not suffer any patrimonial loss.

[10] **JJ Gauntlett Sc in Quantum of Damages**[3] discusses the principle of *res inter alios actae* and its application by the Courts. He states that the principle was first applied in regard to hospital charges and doctor`s fees which had been paid by an insurance society to which the Plaintiff had contributed. Citing the decision in **Bradbury v Great Western Railway Co,** he states that the Court held that the sum which the Plaintiff was entitled to recover as damages for bodily injury was not subject to deduction in respect of amounts paid by the Insurance society. He continues:

> "*Accordingly, the general principle is that a Defendant cannot set up in extinction or mitigation of his own liability the fact that the Plaintiff has been recouped or is entitled to be recouped, either wholly or in part, by a third party in terms of a contract of insurance."*

[11] The case in Bradbury reads;

> *"He, [the Plaintiff] does not receive the sum of money because of the accident but he has made a contract providing for that*

contingency; an accident must occur to entitle him to it, but it is not the accident but his contract, which is the cause of his receiving it."[2]

[12] Gauntlet further writes:

"A third rationale is that a wrongdoer cannot be allowed to benefit from the prudence of his victim."

[13] Recently, the Court in **Dippenaar v Shield Insurance Company Ltd**[4] stated:

"To equate the pension received by the plaintiff in the present case with an accident insurance policy, or to say that he must be 'deemed to have purchase' the benefit, is to adopt a standpoint so artificial that it must be rejected. If a person makes a decision to insure himself against loss by accident he does so voluntarily, and his decision, and the fruits thereof, are completely divorced either from his employment, or from the liability of the wrongdoer. Moreover the amount he received from the policy bears, in the normal course, no relationship to the terms of his employment or the amount of his salary, the duration of his employment, or indeed to whether he is employed at all. His payment of premiums to secure a personal indemnity against injury, hardship, or loss are payments from what he has earned, and fruits of those payments

[3] J. J. GAUTLETT SC "THE QUANTUM OF DAMAGES IN BODILY AND FATAL INJURY CASES" pg 11-12 Vol 1.4th Ed. Juta and Co. 1995

are not more the concern of the wrongdoer than would be the fruits of an investment in a building society or in the stock exchange. He would be entitled to payment of the benefits of the policy irrespective of the wrongdoer`s negligence and irrespective of the terms of his employment."

[14] The case in **Dippenaar** has laid a basis for deciding whether sums of money should be deductible or not from the claim of damages. It stated that the consideration is whether the payments were made voluntarily or as a consequence of a contract of employment. On the evidence before this Court, it is clear and common cause that Plaintiff and her husband made monthly payments for their funeral cover. There is no evidence and/or argument advanced by the Defendant that these were a consequence of their employment contracts therefore; it is presumed that these were made by the Plaintiff and her husband voluntarily. As such, the Plaintiff is entitled to recover the expenses that she incurred in buying her husband.

Medical Expenses

[15] Closely related to the issue of funeral expenses is whether the Plaintiff is entitled to the medical expenses incurred which were paid for by medical aid. Following the reasoning in the **Dippenaar** case, the Defendant has clearly established that the Plaintiff contributed to the medical aid scheme as a direct consequence of her employment contract and that her employer also made a contribution to the scheme. The Plaintiff`s

membership was not voluntary therefore, the sum for medical expenses is deductible from Plaintiff`s claim. [3]

[16] However, the Plaintiff has established that she is claiming this amount on behalf of the medical scheme based on the principle of subrogation. To this end, she submitted Exhibit **"B"** and **"J"**, which establish that she is expressly permitted to recover these expenses by Medical Scheme on its behalf. The court in **Rand Mutual Assurance Co. Ltd v Road Accident Fund**[5] quoting **Joubert 'The Law of Contract',** defined subrogation thus:

> *"In its literal sense the word 'subrogation' means the substitution of one party for another as creditor. In the context of insurance, however, the word is used in a metaphorical sense. Subrogation as a doctrine of insurance law embraces a set of rules providing for the reimbursement of an insurer which has indemnified its insured under a contract of indemnity insurance. The gist of the doctrine is the insurer`s personal right of recourse against its insured, in terms of which it is entitled to reimburse itself out of the proceeds of any claims that the insured may have against third parties in respect of the loss."*

[17] The medical expenses incurred by the Plaintiff are due to the Medical Scheme which has permitted her to recover the said sum on its behalf.

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[6] Supra note 3 at page 65

[7] Case No: 2012/10855 South Gauteng High Court, Johannesburg

Loss of Support

[18] According to exhibit **"O"**, the Plaintiff has computed loss of support at M432, 384.46 based on the Plaintiff`s husband`s salary of M4, 775.75 which is the Plaintiff`s net income.[6] Based on this assessment, the Plaintiff`s loss of support amounts to **M217, 357.04.**

[19] The Defendants argues that this amount is deductible by 25% for contingencies and 10% for prospects of remarriage of the Plaintiff. I raise issue with the 25% suggested by the Defendants based on the case of **Radebe v Road Accident Fund**[7]. The facts of that case are briefly that the Plaintiff testified that her deceased husband used to run a tuck shop and he would give her M15, 000 per month. The Court in that case had difficulty accepting this evidence but because the Defendant had not proved otherwise, the Court had to accept it.

The court then stated:

"28. I also feel some unease about accepting the contingency deductions recommended by Mr. Jacobson particularly in the view of the fact that the projections for future income are based entirely in the Plaintiff`s evidence of the support she received from the deceased. I accordingly consider it appropriate to increase the percentage as I do below to reduce the amount estimated for the loss of future earnings."

[20] In my opinion, the **Radebe** case falls under exceptional circumstances. In this matter, the Defendant has not justified why the percentage should be as high as in the Radebe case. I consider that the Plaintiff`s husband was a civil servant holding a steady job with a steady income. Therefore, I

adjust the contingencies at 10%. The final amount for loss of support is **M176, 059.20.**

[21] The Defendant, during closing arguments, sought to introduce a document indicating that the Plaintiff had received compensation from her deceased husband`s employer which ought to be deducted from her claim of loss of support. This Court however will not condone the Defendant`s behavior by considering that document because of the manner in which it was introduced. The Defendant stated that it did not know of this document beforehand but it had the opportunity to request the Court to recall the Plaintiff to put that document to her and test its veracity. As it stands, the document is not tested and it is not properly before Court.

[22] In conclusion, it is held:

1. The Defendant is liable to compensate the Plaintiff for the death of her husband as a result of the negligence of the insured driver.

2. The Defendant is hereby ordered to pay the Plaintiff`s funeral expenses in amount of M31, 848.17

3. The Defendant is hereby ordered to pay the Plaintiff`s medical expenses, Plaintiff acting on behalf of the medical aid scheme, in the amount of M863, 823.00

4. The Defendant is hereby ordered to pay the Plaintiff`s loss of support in the amount of M176, 059.20

5. The Defendant is hereby ordered to pay the Plaintiff`s costs of suit.

6. Interest at the rate of 18.5% per annum calculated from 14 days from the date of judgment to date of payment.

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T. E. MONAPATHI

JUDGE

For Plaintiff – Mofolo, Tau-Thabane & Co.

For Defendant – Webber Newdigate