IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO.1505/2000

Plaintiffs	:	Mst. Safiq Begum, through M/S Farrukh Usman and Aamir Maqsood, advocates.
Defendants	:	District Municipal Corporation and two others. through Mr. Salahuddin, Advocate for defendants No.1 and 2.

Date of hearing	:	29.03.2016.
Date of announcement	:	22.04.2016.

JUDGMENT

SALAHUDDIN PANHWAR, J: Succinctly, facts set out in the plaint are that plaintiffs filed instant suit for recovery of Rs.50,00,000/- under Fatal Accidents Act, 1855 pleading that plaintiff is widow of deceased Tabraiz aged 49 years (deceased) who died on 03rd October, 2000 on account of receiving fatal injuries in a traffic accident within the territorial jurisdiction of PS Gulbahar; leaving behind Mst. Safia Bano, Widow (42 years), Muhammad Tanveer, Son(23 years), Surraya Bano, Daughter(20 years), Hina Bano, Daughter(17 years) and Imran, Son(05 years) as legal heirs; that according to FIR No.88/2000, under Section 320PPC, on 3rd October, 2000 at about 1130 hours, the defendant No.2 during the course of employment of defendant No.1 and 3 while driving the Garbage Truck bearing registration No.03242in

a rash, negligent and careless manner on main Nawab Siddique Ali Khan Road on its way from Nazimabad Bridge towards Chowrangi when reached opposite Enquiry Office, Nazimabad No.2 dashed the motor cycle bearing No.KAG-8373 in an excessively high speed from the wrong side. Consequently the motor cyclist Muhammad Tabraiz fell down alongwith his motor cycle and the aforesaid offending Garbage Truck dragged the motor cyclist Muhammad Tabraiz got fatal injuries and he died on the spot. The motor cycle also got completely damaged. The deceased was evacuated to Abbasi Shaheed Hospital where the Medicolegal Officer confirmed his death owing to the traumatic injuries caused in the road traffic accident. The defendant No.2 was booked for the offence of rash and negligence driving resulting into death of Muhammad Tabraiz vide FIR No.88/2000 under Section 302 PPC dated 03.10.2000. The offending Garbage Truck belonging to defendant No.1 and 3 was impounded by the Gulbahar Police Station which was subsequently released in favour of the defendants on Superdaginama. The defendant No.2 was also arrested consequent upon the investigation by the Police who was also enlarged on bail. The incident was widely reported in the newspapers alleging rash and negligent driving on the part of the driver/defendant No.2 causing instantaneous death of motor cyclist Muhammad Tabraiz; that the death of deceased Muhammad Tabraiz was caused on account of negligence, wrongful act and default on the part of defendant No.2 during the course of employment of defendant No.1 and 3 and as such the defendant No.1 and 3 are vicariously liable for payment of compensation to the plaintiff and other legal heirs. Besides, the defendants are liable jointly and severally to pay the compensation to the plaintiff and other statutory beneficiaries; that the deceased was aged 49 years and he was

very healthy; was having robust health; used to care much for the plaintiff and other legal heirs and wanted to see them in a prosperous status. The deceased could have survived upto the age of 70 years in view of the long life span in his family pedigree, advancement in medical facilities, availability of medical treatment and good climate of the area where he belonged. The father of the deceased Muhammad Yousuf died at the age of 80 years; that in view of the ages of the plaintiff, the deceased and the present and expected earning capacity of the deceased, the plaintiff and other legal heirs have been deprived of the present and expected pecuniary benefits to an extent of rs.50,00,000/- as the deceased was a very skilled and perfect Auto-Motor Mechanic of diesel/petrol vehicle (both light and heavy) and was running the motor workshop in this own name in the area of Nazimabad and owing to his expertise and fine dealing, the deceased Muhammad Tabraiz used to command quite a good number of client/customers for his services. The deceased always used to remain over booked with the orders and job assignments. The deceased conveniently was earning a sum of Rs.350/- to 400/- per day and used to contribute Rs.10,000/- per month to the plaintiff for household expenses. All the children in view of the losses of their career separately claim a sum of Rs.50,00,000/- each in addition to the claimed loss of pecuniary benefits owing to present and prospective loss of earning. In addition to that, the plaintiff also claims a sum of Rs.50,00,000/- for loss of association of spouse under the head of “consortium” owing to the feelings loneliness which she will be undergoing for the whole life. The plaintiff also claims a sum of Rs.10,000/- on account of funeral expenses; that the plaintiff claims a sum of Rs.50,00,000/- against the defendants who are liable to pay the said amount

to the plaintiff jointly and severally and as such the amount claimed is reasonable and just in consonance; thus plaintiffs prayed to :-

a. A decree in the sum of Rs.50,00,000/- against the defendants jointly and severally to pay the said sum of damages/compensation to the plaintiff or any other amount this Honourable Court may deed fit in circumstances of the case.

b. Profit/mark up at the rate of 15%per annum on the amount claimed in Clause (a) above from the date of the filing of the suit till the date of realization of the decretal amount which the plaintiff would have earned had the defendants paid the said amount.

c. Cost of the suit may be awarded to the plaintiff.

d. Any other relief or reliefs that this Honourable Court may deem just and proper under the circumstances of the case be granted.

2. The defendants No.1 and 2 filed written statement, admitted to the extent that the defendants No.1 and 2 are working under the control and management of defendant No.3; the vehicle in question was owned by the defendant No.1 and the defendant No.2 was an employee of the defendant No.1 in the capacity of driver, it was denied that accident took placed by any rash act or negligence while driving the said vehicle on the part of defendant No.2, it was also denied that the alleged death of the husband of plaintiff was the result of any act of rash driving of defendant No.2, on the contrary the Motor vehicle Inspector of DMC (South) has reported that Motor cycle rider the deceased namely Mr. Tabraiz tried to overtake the van from wrong side, meanwhile another wagon which was also coming from the back side hit the motorcycle the deceased Mr. Tabraiz who was riding the Motorcycle was dis-balanced and touched with refuse van from its wrong side and rear tyres, which is crystal clear from the sketch which was prepared by the police at

the site where accident took place; that the deceased did not get fatal injuries and was not died on spot, the deceased was expired in the hospital and if the proper medical facilities provided to the deceased, he would not have expired and could have been saved, therefore, his death can not be attributed to the accident, it is pure by due to lack of medical facilities/treatment sand therefore, the defendants can not be held liable or responsible even for this reason. It was admitted that the defendant No.2 was arrested by the police, vide FIR No.88/2000, and was subsequently released by the police, the contents of FIR are denied, as regard the newspapers clipping is concerned the same appeared being based on one-sided, result of misunderstanding or of alleged FIR and the statements of the relatives of the deceased; it was denied that death of the deceased caused by actionable wrong, negligence, default, and wrongful act of defendant No.2 during the course of employment, and as such the defendants No.1, 2 and 3 are not liable to pay compensation to the plaintiff and the legal heirs of the deceased jointly and severally as claimed by the plaintiff; that the plaintiff has highly inflated her claim nor she has produced any concrete evidence, as such the plaintiffs are not entitled for any compensation nor the defendants are liable to pay the said amount jointly and severally.

3. On 07.10.2002 following issues were framed:

1. Whether the death of the deceased Muhammad Tabraiz was caused on 3rd October, 2000 due to rash and negligent driving of defendant No.2, if so, its effect?

2. Whether the defendants are liable jointly and severally to pay compensation to the plaintiff and other legal heirs of the deceased, if so to what extent?

3. What should the decree be?

4. Commissioner was appointed to record evidence; parties filed their affidavits in evidence and their evidence was recorded and commission was returned duly completed.

5. Learned counsel for plaintiff *inter alia* contends that plaintiff successfully discharged the onus *probandi* according to issues; accident is undisputed; it is settled proposition of law that in cases of law of torts when accident is not disputed burden lies upon defendants who have failed to discharge the same.

6. Conversely, learned counsel for defendants argued that though accident is not disputed yet plaintiff failed in establishing that it was negligence of defendants which resulted into accident. He, *concluded,* in absence thereof suit merits dismissal.

FINDINGS.

Issue No.1	In affirmative.
Issue No.2	In affirmative.
Issue No.3	Suit is decreed; defendants are liable to pay Rs.46,20,000/- to the legal heirs of deceased Tabraiz.

ISSUE NO.1

7. Needless to add while opening discussion that in *fatal accident* matter the *onus probandi* stands shifted upon the defendants, in *either* situation where defendants deny *negligence* or take specific plea of *not causing*

accident. Reference can be made to the case of Anisur Rehman v. Govt. of Sindh (1997 CLC 615) and Mst. Sakina v. National Logistic Cell (1995 MLD 633) wherein it was held that:

> *'The defendants having given a different version of the accident were burdened with to discharge the same and to….."*

In another case of Pakistan Steel Mills Corporation v. Malik Abdul Habib (1993 SCMR 848), it was held that:

> *'If defendant in the suit for damages took the plea that accident had occurred on account of negligence of deceased himself it was his duty to produce evidence to show that machine was in perfect order and there was no defect in the same and* ***deceased died on account of his own negligence"***

In the instant matter, happening of the unfortunate incident, costing life of deceased Tabraiz in road accident is not disputed. The plaintiff claims the accident a result of negligent and rash driving of the defendant No.2 while the defendants have come forward with a specific plea that it *(accident)* did happen because of wrong over-taking of deceased Tabraiz, as is evident from para-2 of the written statement of defendant Nos.1 and 2 which is:

> *'That the contents of para No.2……..it is vehemently denied that accident took place by any rash act or negligence while driving the said vehicle on the part of defendant No.2 it is also vehemently denied that the alleged death of the husband of the plaintiff is the result of any act of rash driving of defendant No.2, on the contrary the* Motor vehicle Inspector of DMC (South) has reported that Motor cycle rider the deceased namely MR. Tabriz tried to over take the refuse van from the wrong side, meanwhile another Wagon which was also coming from the back side hit the motorcycle, the deceased MR. Tabriz who…
>
> *(Emphasis supplied)*

From the above, it also becomes quite obvious that defendant Nos.1 & 2 *least* acknowledged the *accident.* Though, as per settled principle of law in such like situation, the *onus probandi* stands shifted upon defendants, *however,* on demands of equity and good conscious I would *first* see what the plaintiff has produced in order to establish *the incident only* because regarding manner thereof defendants have taken specific stand.

8. The plaintiff *Safia Begum* (PW-1), the widow of deceased, produced number of documents, including the FIR No.88 of 2000 of PS Gulbahar Karachi so as to prove that death of deceased was result of negligence and rash *driving*. She had also claimed in her *affidavit-in-evidence* that:

> '5. That, I say that on 3rd October 2000 at about 1130 hours, the defendant No.2 during the course of employment of defendant No.1 and 3 while driving the Garbage Truck No.03242 in a rash, negligent and careless manner ….

Such specific claims and assertions of the plaintiff *even* with reference to documents were required to be denied or *least* disputed but a reference to *cross-examination* would show that defendants did not deny or *even* dispute a single claim of the plaintiff :

> *'I have the original I.D Card of mine. (The witness has shown her original I.D. Card). After seeing this card, the advocate for the defendants raises the objection that it is an expired card. The witness says that she has applied for its renewal.'*

The above leaves nothing ambiguous that the defendants did not bother to deny the claims and specific assertions of the plaintiff which bring into play the settled principle that *'what is not denied is to be taken as admitted'* .

9. She (*plaintiff)* also examined PWs namely Muhammad Nawaz Khan (*DSP)* and Ashique Hussain *(head constable)* i.e Investigating officer of Crime and *eye-witness* respectively who also affirmed the factum of *accident;* surprisingly not a single question was put to these witnesses in line of the claim of the defendants i.e *accident happened due to wrong over-taking by motorcyclist* (deceased Tabriz) which again bring the settled principle of appreciation of evidence that *what is not denied/disputed is to be taken as* admitted. The defendants did not put a single question regarding the FIR *(narration of accident)*, Medical Certificate of *Cause of Death,* death certificate and news-clipping whereby incident was specifically claimed as a result of *negligent & rash* driving by defendant no.2. In existence of such *undisputed* documents and facts, mere denial of the defendants was never sufficient particularly when the defendants brought nothing on record nor even disputed such claims of plaintiff while enjoying the opportunity of *cross-examination*.

10. Albeit, the moment the defendants took specific pleas regarding manner of accident, the plaintiff was not required to prove her case in a manner as *normally* a plaintiff is required however, the manner in which the specific claims and assertions of the plaintiff and her witnesses have not been denied allow *legal presumption* against defendants.

11. Now, let's see what the defendants have produced to prove *specific claims / pleas.* The defendants examined only defendant No.2 *Ghazi Shah* who produced his *affidavit-in-evidence* wherein taking specific pleas which are:

> *'3. That I vehemently denied that the alleged death of the husband of the plaintiff is the result of any act of rash driving of defendant No.2.'*

> *'4. That, I say my Garbage Truck was standing on the signal, the motorcycle rider the deceased namely Mr. Tabriz tried to overtake the refuse van from the* wrong side, *meanwhile another wagon which was also coming from the back side and hit the motorcycle and ran away, the deceased Mr. Tabriz who was ridding the motorcycle was dis-balanced and touched with the refuse van from its wrong side near tyres,* which is crystal clear from the sketch *which was prepared by the police at the site where accident took place.*
>
> *'5. That, I say that deceased did not get fatal injuries and was not died on spot, the deceased was expired in the hospital and if the proper medical facilities provided to the deceased, he would not have expired and could have been saved, therefore, his death cannot be attributed to the accident, it is pure by due to lack of medical facilities / treatment and therefore, the defendants be held liable or responsible even for this reason.'*

From above, it is quite evident that the defendants took specific *pleas* but neither produced the **sketch** , which was claimed to be indicating negligence of deceased nor signatory of such document (*sketch)* was examined and even not a single witness was examined to strengthen the claim that **truck** of defendants was not moving at relevant time. In absence thereof, mere words / claims of the defendants cannot be given weight over the evidence of plaintiff, particularly when it (evidence) is based on words of *eye-witness* and documentary evidence. It is worth to mention here that PW-3 Ashique Hussain (constable) categorically stated in his examination in chief as:

> *'On 03.10.2000, I and PC Kamran of PS Gulbahar, were on duty at Inquiry Petrol Pump, Nazimabad.* At about 11:30

> a.m a truck coming from the Nazimabad bridge side, hit the side of a motorcycle ahead of it, near the said petrol pump.'

Such specific words were *even* not denied or disputed by the defendants. The said witness further stated in his *examination-in-chief* that:

> *'The motorcyclist, as a result of this collision, fell on the road, whereas the motorcycle came under the truck.* **The motorcycle was dragged by the truck upto a distance of about 10 feet.** *We saw the motorcyclist. He had serious injuries from which he was profusedly bleeding. He was unconscious. I sent the injured motorcyclist to the Abbasi Shaheed Hospital through constable Kamran. I……. Inspector Nawaz came to the place of the incident.* **I handed over to him accused Ghazi Shah along with truck and the motorcycle in question.** *..*

Had the accident been caused by *wagon* (as claimed by defendants), the motorcycle of deceased would not have gone under the ***truck ;*** nor would have been dragged by it *(truck)*. Thus, *legally* simple assertion without any support thereto cannot be taken sufficient to believe the story of the defendants for *accident*. There can be no denial to the legal position that every single person, using or plying a vehicle on road, must exercise all senses to avoid any *unfortunate* incident however, care is proportionate to size of vehicle. A reference in this regard can well be made to the case of *Pakistan Steel Mills Corporation Ltd. Karachi & ors V Ehteshamuddin Qureshi (*2005 SCMR 1392) wherein it is held that:

> "The general rule is that driver of heavy vehicle on busy roads must take **extra care** and must not act in a manner which may be dangerous to the life of others. **The slightest carelessness of a driver of a heavy vehicle may badly disturb the traffic on the road and bring the serious consequence of a fatal**

> **accident**. The high speed or fast driving is not only rash and negligent driving rather carelessness even at low speed may also constitute an act of negligence to hold the driver responsible for the damages."
> *(Emphasis supplied)*

Further, the defendants have admitted the fact :-

i) *Truck in question was belonging to them;*
ii) *Defendant No.2 was driver of the truck;*
iii) *accident, resulting into death of Tabriz;*

The deliberate failure or omission to produce any evidence and *specific* witnesses and documents shall result in drawing adverse inference against the defendants. An acquittal from *criminal charge* shall not be of any help in a civil matter because the parameters of both are entirely different and even consequences thereof are not similar to each other. Criminal Administration of justice revolves round *'benefit of doubt'* while Civil Administration of Justice revolves round the determination of *rights & liabilities*. In *former* the Courts keep a principle in view *'better to acquit hundred guilty but not convict an* innocent' , however, in *later* it is only upon *discharge of* **onus probandi.** Accordingly, in result of what has been discussed above, I answer the issue No.1 as affirmative'

ISSUE NO.2.

12. The burden to prove this issue was upon the plaintiffs. In this regard the plaintiffs claimed the defendant No.2 was the employee/ driver of defendant No.1. It was claimed; pleaded and asserted in evidence that:

> *'4. That, I say that the defendant No.1 working under the control, management, supervision and at the finance of defendant No.3, was the owner of the Garbage Truck bearing No.03242 and the defendant*

> *No.2 was servant / employee / driver of the defendant No.1 and 3 who caused the traffic accident on 3rd October 2000 on main Nawab Siddque Ali Khan Road by rashly driving the aforesaid Garbage Truck resulting into the death of my husband namely Muhammad Tabraiz.'*
>
> *5. That, I say that on 3rd October 2000 at about 1130 hours, the defendant no.2 during the course of employment of defendant No.1 and 3 while driving the Garbage Truck No.03242 in a rash, negligent and careless manner…*
>
> *6. That, I say that the death of deceased Muhammad Tabraiz was caused on account of negligence , wrongful act and default on the part of defendant No.2 during the course of employment of defendant No.1 & 3 and as such the defendant No.1 & 3* are vicariously liable for payment of compensation to me and other legal heirs. Besides, the defendants are liable jointly and severally to pay the compensation to me and other statutory beneficiaries.

The defendants *nowhere* denied such assertion/claim of the plaintiff in their pleading (written statement) nor during course of *trial*. It is the defendant No.1 who is ultimate beneficiary of its vehicles. The defendant No.1, being the controlling and beneficiary, cannot claim any exception of its own negligence even coming on surface through its servant/driver because the driver/employee would be deemed to be carrying/plying the bus *in question* under direction and *implied* control of its employer. Without diving into much debate and to make question of *vicarious liability* clear, Reference can be made to the case *(2013 SCMR 787*) wherein it is held:

> *'35. The relationship that gives rise to vicarious liability is in the vast majority of cases that of employer and employee under a contract of employment. The employer will be vicarious liable when the employee commits a tort in the course of his employment. There is no difficulty in identifying a number of policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied:*
>
> *(i). the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;*

(ii). The tort will have been committed as a result of activity being taken by the employee on behalf of the employer;

(iii). The employee's activity is likely to be part of the business activity of the employer;

(iv). The employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;

(v). The employee will, to a greater or lesser degree, have been under the control of employer.'

In the instant matter there can be no denial to the fact or *legal* presumption that:

i) defendant Nos.1 and 3 have means to compensate and not the defendant No.2 (employee);

ii) the defendant No.2 was driving the truck of defendant No.1 at time of accident being employee;

iii) the act of defendant No.2 plying / running truck was part of business activity of the defendant No.1;

iv) it was the defendant No.1 who by allowing the defendant No.2 to ply the truck on road has knowledge of creation of any *tort* by its (defendant No.1's) employee i.e defendant No.2;

v) the defendant No.2 (being employee) was under direct control of the defendant No.1.

Accordingly, it is safe to say that all above conditions stand established hence it is not difficult to conclude that the defendants are jointly and severally liable for the *tort* in question. Accordingly, the part issue is in affirmation.

13. Thus, it is pertinent to mention that the plaintiff specifically pleaded that deceased was a healthy person; was a very skilled and perfect Auto-

Motor Mechanic of diesel / petrol vehicle; was running the motor workshop in his own name in the area of Nazimabad and owing to his expertise and fine dealing was earning a sum of Rs.350/- to 400/- per day. The plaintiff *however* produced nothing on record to substantiate the average life in the family but since the defendants have also brought nothing on record to prove otherwise. In such eventuality it would be appropriate to take guidance from Honourable Apex Court hence I would like to refer the operative part of the judgment of honourable Supreme Court, reported as 2011 SCMR 1836 which reads as:

> *"Besides, the above we would like to add here, that when a person has surmounted his teenage, and the early youth and enters into his practical life by joining an employment or a business etc., it can be legitimately expected that he shall complete his inning by attaining the age of his normal retirement from such practical life, meaning thereby, that he shall remain engaged in some gainful activity, obviously till the time he in the ordinary course, is mentally and physically fit and capable. Such an age on the touchstone of 'reasonable standard' can be termed to be somewhat around sixty five to seventy years; to support the above age limit there is preponderance of judicial view in our jurisdiction, that it should be seventy years; some of the judgments in this behalf are Hassan Jehan v. Islamic Republic of Pakistan …… "*

The deceased died at the age of 49 years hence has surmounted his teenage and has joined the practical life. Therefore, following the above principle, I would also take the age of the deceased for compensation/damage as '**seventy years**'. It is pleaded that the deceased was a skilled auto-motor mechanic and was earning Rs.350/- to 400/- per day and an average thereof

can well be taken as Rs.12,000/- per month because it even matches with quantum of minimum wages (Workers Ordinance, 1969) which provides as:-

Rs.8,000 per month (w.e.f. 1st July 2012 till 30th June, 2013)
Rs.10,000 per month (w.e.f. 1st July 2013 till 30th June, 2014)
Rs.12,000 per month (w.e.f. 1st July 2014 till 30th June, 2015)
Rs.13,000 per month (w.e.f. 1st July 2015)

Hence, *average* monthly income of the deceased who was having his independent business of auto-mechanic could not be believed to be less than Rs.20,000/- in a city like Karachi. Therefore, the compensation / damage is awarded as:

Loss of pecuniary benefits to plaintiffs/LRs of deceased

21 x 12 x 20,000/-	=	Rs.50,40,000/-
ADD		
10% increase chances on the aggregate income of over all years**:**		Rs.5,04,000/-
Thus TOTAL amount comes to :		Rs.55,44,000/-
LESS:		
Personal expenses at 1/6th i.e :		Rs.9,24,000/-
Net loss of pecuniary benefits:		**Rs.46,20,000/-**

Accordingly, it is safe to say that all above conditions stand established hence it is not difficult to conclude that the defendants are jointly and severally liable for the *tort* in question. Accordingly, the part issue is in affirmation.

ISSUE NO.3.

14. In result of the discussion *made* on issue Nos.1 and 2, the suit of the plaintiff is decreed in above terms. Let such decree be drawn. However, parties are left to bear their own costs.

J U D G E

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