
(1990) ACJ 840 : AIR 1991 HP 73 : (1990) 1 ShimLC 290

High Court of Himachal Pradesh

Case No: FAO (MVA) No. 47 of 1983

Kumari Rachna

APPELLANT

Vs

Himachal Road
Transport Corporation
and Others

RESPONDENT

Date of Decision: Jan. 8, 1990

Acts Referred:

Evidence Act, 1872 & Section 114#Motor Vehicles Act, 1939 & Section 110B

Citation: (1990) ACJ 840 : AIR 1991 HP 73 : (1990) 1 ShimLC 290

Hon'ble Judges: V.K. Mehrotra, J

Bench: Single Bench

Advocate: Devinder Gupta, for the Appellant;

Final Decision: Allowed

Judgement

V.K. Mehrotra, J.

These are appeals u/s 110-D of the Motor Vehicles Act, 1939 (hereinafter, "the Act") and are directed against a

common Award dated December 29, 1982, of the Motor Accident Claims Tribunal, Shimla.

2. Various claim petitions, resulting in the Award under challenge, arose out of the same accident. They were tried together, after consolidation,

and by consent of parties evidence was recorded in the claim petition of claimant Nand Kishore (Claim Petition No. 17-8/2 of 1980). The

accident took place on June 14, 1980, at about 5-00 p.m. when bus No. HPS 1667 belonging to the Himachal Road Transport Corporation

(Local Unit, Shimla) went down the Circular Road just below Hotel Holiday Home. As a result, a number of persons travelling in the bus received

injuries and some of them succumbed to the injuries sustained by them. Baldev Singh, the third respondent, was driving the bus.

3. In the claim petitions it was said that the bus was being driven by the driver rashly and negligently and while it crossed the Forest Office of the

Municipal Corporation, Shimla, near the lift and was descending just below the Holiday Home Hotel, Shimla, it first struck against a stationary jeep

bearing registration No. HIM 13 and then rolled into the khud along with the jeep. The vehicle was being driven by the driver in the course of his

duty while he was in the employment of the HRTC. The driver was not in a fit condition to drive the vehicle because he was suffering from

epilepsy. The HRTC entrusted the bus for being driven by him in spite of knowledge about the ailment of the driver and it was liable to compensate

the claimants on account of its negligent act of not taking due care and caution in the matter.

4. In its written statement the HRTC said that the driver was not driving the bus rashly or negligently and that the accident took place because of

unavoidable and inevitable circumstances beyond human control which could not be foreseen and amounts to an act of God"" and, therefore, the

respondents are not responsible for the same and the compensation claimed against the respondents was not admissible. The driver (Baldev

Singh), in the written statement filed by him, said, amongst other things, that he was driving the bus carefully and that the accident took place on

account of fault in the vehicle itself. He disclaimed any liability for payment of compensation.

5. In the rejoinder, to the written statement filed on behalf of the HRTC, it was reiterated on behalf of the petitioners that the accident took place

due to rash and negligent driving of the driver. It was denied that the accident was the result of circumstances beyond human control or that it

occurred due to an act of God. Also, that there was a specific allegation that the HRTC knowingly employed the third respondent to drive the

vehicle which itself was an act of negligence. In other words, it was stressed that the driver was suffering from epilepsy and the HRTC could not

escape liability for payment of compensation as it did not take due care in employing the third respondent as the driver of the vehicle.

6. After the accident, the Deputy Commissioner, Shimla, directed an enquiry into the cause of accident and entrusted it to the City Magistrate,

Shimla. One Shri D. R. Tanwar was the City Magistrate, Shimla, at that time. He made an enquiry and submitted a detailed report. Shri Tanwar

appeared as PW 11 before the Tribunal during the trial of these claim petitions. He stated that during the course of enquiry he recorded statements

of a number of persons and on consideration thereof came to the conclusion that ""the accident was result of the fact that the driver of the bus had

an attack of epilepsy with the result that he could not control the vehicle which rolled down the road"". Shri Tanwar also stated in his cross-

examination that he had come to the conclusion that the driver was suffering from epilepsy after recording the statement of Dr. R. R. Gupta,

Professor and Head of Department of Surgery, in the Medical College. The enquiry report was proved by him on the record as Ex.P8 which was

then placed on the record.

7. Statements of several witnesses were recorded by the Tribunal. These witnesses were PW 1, (Shri Nand Lal Gupta) brother of claimant

Rachna's father; PW 2 (Smt. Dam-yanti) who was also travelling in the bus and is the mother of Rachna; PW3 (Shri D. D. Gupta) father of

Rachna and husband of Smt. Damyanti; PW 4 (Smt. Naresh Bhardwaj), a teacher in the school where claimant Rachna was studying; PW 5 (Shri

Bhupinder Singh), Station House Officer, Police Station, Sadar, Shimla; PW6 (Shri R. L. Chauhan), an Accountant in the local unit of the HRTC,

Shimla; PW7 (Shri Nand Kishore) who was travelling in the bus along with his wife and daughter Kiran Bala; PW 8 (Smt. Kanta Rani) wife of Shri

Nand Kishore, who was also travelling in the bus; PW9 (Dr. R. L. Gupta), Associate Professor in the Medical College; PW 10 (Shri Rakesh

Kumar), Reader to the City Magistrate; PW 11 (Shri D. R. Tanwar), the City Magistrate; PW 12 (Dr. P. N. Sharma) who was travelling in the

bus when the accident took place and PW 13 (Dr. Sukh Ram Thakur), Assistant Professor, Orthopaedics.

8. The Tribunal considered the evidence and concluded that the accident took place on account of the sudden fit of epilepsy with which the driver

suffered at the time of the accident and was, thus, a result of factors which were beyond the control of the driver or the owners of the vehicle. As

such, no act of rashness or negligence could be imputed to them. They were, therefore, not liable for payment of any compensation.

9. The observations which the Tribunal made (in paragraphs 10 and 12 of the Award) in material part are these :

10.....the petitioners have tried to prove the fact that when the driver Baldev Singh was driving this vehicle at the time of accident, he suffered

a sudden fit of epilepsy as a result of which, he could not control the vehicle and it thus rolled down the road ... In my opinion, in order to attract

the liability of the owner of the vehicle in a case like this, it is not sufficient merely to prove that the driver of the vehicle had a sudden attack of

epilepsy. It has further to be proved that at the time when the driver.... was deputed to drive this vehicle, the owners of the vehicle had the

knowledge that the driver was a patient of epilepsy, and has been getting those fits even earlier.... the evidence on record shows that this driver had

been appointed in the local unit only on 25-5-1980, that is hardly about 19 or 20 days earlier and at that time he had produced a physical fitness

certificate from the CMO, Nahan Under these circumstances, no knowledge could be imputed even remotely to the HRTC that this driver was

having the serious ailment of epilepsy. Thus, it is difficult to hold that the HRTC had deployed him on this bus despite the fact that he was a patient

of epilepsy to the knowledge of HRTC even if this driver was having this ailment of epilepsy prior to the accident, it is clear that he had kept it

as well guarded secret and was even now not ready to admit as in his reply, he has stoutly denied that he ever suffered from any such ailment.... It

is an : admitted fact that the HRTC dispensed with his services after this accident for the reasons that he was found to be suffering from this ailment

of epilepsy and under these circumstances it must be held that this accident was a result of factors which were beyond the control of the owners of

the vehicle and no act of rashness or negligence could be imputed to them.

12 it has to be established by the petitioners that this person had suffered such fits even prior to the date of the accident, but there is no iota of

evidence and the possibility cannot be ruled out that he had this fit for the first time at the time of accident.... naturally even the driver of the

vehicle cannot be held even individually liable.

10. In *Minu B. Mehta and Another Vs. Balkrishna Ramchandra Nayan and Another*, the Supreme Court ruled that:

the liability of the owner of the cars to compensate the victim in a car accident due to the negligent driving of his servant is based on the law of

tort. Regarding the negligence of the servant the owner is made liable on the basis of vicarious liability. Before the master could be made liable it is

necessary to prove that the servant was acting during the course of his employment and that he was negligent, (paragraph 22)..... In order to

succeed in an action for negligence the plaintiff must prove (1) that the defendant had in the circumstances a duty to take care and that duty was

owed by him to the plaintiff, and that (2) there was a breach of that duty and that as a result of the breach damage was suffered by the plaintiff.

The master also becomes liable for the conduct of the servant when the servant is proved to have acted negligently in the course of his

employment. Apart from it in common law the master is not liable for as it is often said that owner of a motor car does not become liable because

of his owning a motor car. (paragraph 23) The mere fact that a party received an injury arising out of the use of a vehicle in public place cannot

justify fastening liability on the owner. The proof of negligence remains the lynch pin to recover compensation..... (paragraph 29)..... A person is

not liable unless he contravenes any of the duties imposed on him by common law or by the statute. In the case of a motor accident the owner is

only liable for negligence and on proof of vicarious liability for the acts of his servant..
..(paragraph 31).... We conclude by stating..... and hold that

proof of negligence is necessary before the owner or the insurance company could be held to be liable for the payment of compensation in a motor

accident claim case.

11. In Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, decided a few months after the above

case, the Supreme Court said (in paragraph 6) that:

The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true

cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but

cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle

of res ipsa loquitur. The general purport of the words res ipsa loquitur is that the accident ""speaks for itself or tells its own story..... Where the

maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might more probably have

happened in a manner which did not connote negligence on his part. For the application of the principle it must be shown that the car was under the

management of the defendant and that the accident is such as in ordinary course of things does not happen if those who had the management used

proper care.

12. The Supreme Court also said (in paragraph 5) in the same case that:

.... though the opposite parties had pleaded that this is a case of inevitable accident they have not led any evidence to establish their plea. The

burden rests on the opposite party to prove the inevitable accident. To succeed in such a defence the opposite party will have to establish that the

cause of the accident could not have been avoided by exercise of ordinary care and caution. ""To establish a defence of inevitable accident the

defendant must either show what caused the accident and that the result was inevitable, or he must show all possible causes, one or more which

produced the effect, and with regard to each of such possible causes he must show that the result could not have been avoided."" (Halsbury's Laws

of England, Third Edn., Vol. 28, p. 81).

13. In the context of an accident of a motor vehicle, the doctrine of *res ipsa loquitur* relates to the domain of evidence in the sense that it postulates

that ""events speak for themselves"" and that, in the absence of proof to the contrary, it would be accepted that the accident occurred due to the

negligence of the driver of the vehicle making the owner vicariously liable. As such, where this doctrine applies, the burden is basically upon the

defendant to rule out any negligence on his part. The burden of proof is upon the defendant. This position of law is hardly in doubt. One has only to

refer to two decisions of this Court in *Himachal Road Transport Corporation v. Himi Devi* ILR 1981 HP 23 : (AIR 1981 NOC 87) and *The*

Himachal Road Transport Corporation, Shimla v. Mohinder Lal ILR 1981 HP 630.

14. When does the doctrine of *res ipsa loquitur* apply may now to be considered.

15. In *Barkway v. South Wales Transport Co. Ltd.* (1948) 2 All ER 460 Asquith Lord Justice was dealing with a case where an omnibus loaded

with passengers was passing through a village when the off-side front tyre burst, the omnibus went over to the off-side of the road, mounted the

pavement and crashed into some rail lines and fell down an embankment, killing four of the passengers, including the husband of the plaintiff. On

these facts he said that:

.... If the defendants' omnibus leave the road and falls down an embankment and this without more is proved, then *res ipsa loquitur*, there is a

presumption that the event is caused by negligence on the part of the defendants, and the plaintiff succeeds unless the defendants can rebut this

presumption.

These observations were quoted with approval by the Supreme Court in *The Krishna Bus Service Ltd. Vs. Smt. Mangli and Others*, .

16. As observed by Lord Guest, in *Col-villes Ltd. v. Devine*, (1969) 2 All ER 53 (at page 56):

. . . . The doctrine emanates from the all-known passage of Erle, Chief Justice, in *Scott v. London and St. Katherine Docks Co.*, ((1861) All ER

246) which is to the following effect:

There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and

the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable

evidence in the absence of explanation by the defendants, that the accident arose for want of care.

And, by Lord Dunovan (in the same case) that:

.... the basic duty of the appellants was to provide plant and machinery which was as safe for their servant to use as reasonable care could make

it.....

They received no warning from the makers that such an accident as here occurred was likely.... it is a fair inference that the accident was something

which did not happen in the ordinary course of things if due care were taken. The plant was obviously under the management of the appellant.

In this state of affairs the respondent was, in my opinion, entitled in law to say that somebody for whom the appellants were responsible could not

have exercised proper care. In other words *res ipsa loquitur*. That means that it was for the appellants to show that the accident was just as

consistent with their having exercised due diligence as with their having been negligent. In that way the scales which had been tipped in the

respondent's favour by the doctrine of *res ipsa loquitur* would be once more in balance, and the respondent would have to begin again and prove

negligence in the usual way.

17. The facts in the present case as found by the Tribunal itself, are that when driver, Baldev Singh was driving the vehicle at the time of accident

he suffered a sudden fit of epilepsy as a result of which he could not control the vehicle and it rolled down the road. In other words, but for the

sudden fit of epilepsy suffered by the driver, the bus would not have rolled down the road resulting in injuries to its passengers.

18. In the normal course a bus does not roll down the road. If the claimants had only rest content by placing facts before the Tribunal to the effect

that while they were travelling in it, the bus rolled down the road, the doctrine of *res ipsa loquitur* would be immediately attracted and burden

would have been upon the respondents to show that it did not roll down on account of any negligence on their part. The burden cannot be said to

have remained on the claimants to establish negligence on the part of the respondents merely because the material on the record before the

Tribunal showed that the driver had suffered sudden fit of epilepsy.

19. Respondent-HRTC has founded its plea of "inevitable accident" upon the aforesaid fact. Before it can escape liability for compensating the

claimants on this account, it had also to prove that it had taken all reasonable care to exclude an accident of the nature which took place on June

14, 1980, by taking due care that the driver, whom it has employed was in fit condition to be entrusted with the duty of driving the vehicle. It

should have brought on record circumstances showing that it took good care to avoid the possibility of an accident to the vehicle, when it was

being driven by its servant, driver Baldev Singh.

20. A defendant cannot plead that the plaintiff is not entitled to rely upon the doctrine of *res ipsa loquitur* merely because the plaintiff is able to

present partial account of how an accident happened. The plaintiff can rely upon it for further inferences essential to the winning of his case; the

partial explanation may make it more obvious that an inference of negligence on the part of the defendant can be drawn. This view is found stated

in paragraph 58 of Halsbury's Laws of England (Fourth Edition) on the basis of observations of Lord Dunedin in *Ballard v. North British Ry. Co.*,

1923 SC (HL) 43 .

21. If the defence of "inevitable accident" casts a burden upon the defendant to show that the cause of accident could not have been avoided by

exercise of ordinary care and caution, it follows, as a corollary, that the fact that the plaintiff is able to bring on record some reason for the accident

would not resolve the defendant from discharging the burden which is cast upon him.

22. *Balbinder Singh Vs. The Secretary to Government, Punjab and Others*, upon which great reliance has been placed on behalf of the

defendants- respondents, does not lay down any different rule. In that case, the appellant had stopped his car, which had developed some mecha

nical trouble, on the road and was in the process of getting down from it in order to remove the defect when he was hit by a bus belonging to the

Punjab Roadways. The Tribunal had come to the conclusion, on evidence, that the appellant had failed to establish that the particular bus was

involved in the accident which resulted in injuries on his person. In appeal, this Court went into the evidence afresh and came to the conclusion that

the version given by the appellant and his witnesses was unworthy of credence. The Court also felt that they had intentionally concealed the truth

from the Court and tried to project a concocted version. It was in these circumstances that the learned single Judge, who decided the case,

observed that:

.... In the instant case admittedly this maxim "*res ipsa loquitur*" cannot be attracted inasmuch as the appellant and his witnesses claim to be in the

full know of the facts and circumstances leading to the accident.

23. That judgment of this Court cannot be read to mean, as was attempted by Shri D. K. Khanna, appearing for the H.R.T.C., that whenever the

claimants bring before the Tribunal circumstances disclosing, albeit partially, the reason for the accident, the doctrine of "res ipsa loquitur" becomes

inapplicable and the entire burden for establishing the negligence of the defendants remains on the claimants.

24. True, it may be, as found by the Tribunal, that the driver suffered an attack of epilepsy just before the accident took place, will it absolve the

respondent-Corporation from the obligation of establishing that the accident was not occasioned on account of any lack of care on their part is the

real question to be seen.

25. Chapter II of the Motor Vehicles Act, 1939, (then in force) provided in Section 3(1) that no person shall drive a motor vehicle in any public

place unless he holds an effective driving licence entitling him to do so as a paid employee. Section 5 cast an obligation upon the owner or person

incharge of a motor vehicle not to permit a person who did not satisfy the above condition to drive the vehicle.

26. Section 7, dealing with the grant of driving licences, contemplated an application to the licensing authority for the grant of licence which had to

be in Form A as set forth in the First Schedule of the Act. It also provided, in Sub-section (3), that the application was to be accompanied by-a

medical certificate in Form C, as set forth in the First Schedule, where the application was for the grant of a driving licence to drive as a paid

employee or to drive a transport vehicle. Subsection (5) of Section 7 provided that if it appeared from the application or from the medical

certificate that the applicant was suffering from any disease or disability specified in the Second Schedule which was likely to cause the driving by

him of a motor vehicle to be a source of danger to the public or to the passengers, the licensing authority was to refuse the issue of a licence.

Epilepsy/ attacks of loss of consciousness was one of the diseases and disability mentioned in the Second Schedule which absolutely disqualified a

person from obtaining a licence to drive a motor vehicle.

27. Section 11, dealing with the renewal of the driving licence, contemplated that an application for renewal would be made in Form B as set forth

in the First Schedule and would contain a declaration required by that Form.

28. A look at the forms contained in the First Schedule would show that in the application in Form A the applicant had to make a declaration

whether he suffered from attacks of loss of consciousness from any cause and also whether he suffered from any other disease or disability likely

to cause his driving of a motor vehicle to be a source of danger. A similar declaration was to be made by the applicant while applying for renewal

in Form B. The medical certificate issued in Form C was to contain a specific mention in column 2 whether the applicant was, to the best of the

judgment of the registered medical practitioner issuing it, subject to epilepsy, vertigo or any mental ailment likely to affect his efficiency.

29. These statutory provisions make one thing abundantly clear. And, it is that the owner of a motor vehicle, who plies for hire or reward, was, in

particular, under an obligation to ensure that the vehicle is driven by a person who is in an absolutely fit state to drive it. This is what it should be, for

the safety of a large number of passengers is at stake.

30. Where the doctrine of "res ipsa loquitur" applies or where the plea of "inevitable accident" is raised by the owner of a vehicle, like a bus, the

mere fact that some reason for the accident appears from the evidence on record would not absolve the owner from the necessity of establishing

that he had taken due care to ensure that such a reason does not occur or result in the accident. Unless he does so, he cannot escape the

presumption of negligence leading to his vicarious liability for the action of the driver. In the present case, admittedly, no evidence has been led

either by the HRTC or by the driver. Whatever circumstances are known are those appearing from the evidence brought on the record by the

claimants themselves. The Tribunal has drawn its inferences on the basis of the material so brought on the record. The relevant observations of the

Tribunal have been extracted earlier in this judgment. They show that the Tribunal was impressed by the fact that the HRTC had employed the

driver in the local unit hardly about 19 or 20 days prior to the accident and the driver had, at that time, produced a medical certificate from the

C.M.O. Nahan. The Tribunal also felt that the knowledge that the driver was suffering from epilepsy could not be attributed to the HRTC nor

could it be said that the HRTC had employed him to drive the ill-fated bus despite the fact that the driver was a patient of epilepsy to the

knowledge of HRTC. Further, that the HRTC dispensed with the services of the driver for the reason that he was found suffering from the ailment

of epilepsy. The Tribunal also held that even the driver could not be saddled with any liability because there was no evidence to show that he ever

suffered fits of epilepsy prior to the accident.

31. The fact whether he was suffering from epilepsy can be presumed to be one in the special knowledge of the driver. It could not be reasonably

expected from the claimants to collect evidence in regard to it for a period prior to the accident. The evidence shows that they came to know

about it when the epileptic fit was suffered by the driver at the time of the accident. As a prudent employer, and bound by the statutory obligations

emanating from the provisions of the Motor Vehicles Act, 1939, it was incumbent upon the HRTC to have ensured that it was entrusting the bus

for being driven to a person who was fit, in all respects, to drive it. The mere fact that the driver had produced a medical certificate of physical

fitness from C.M.O. Nahan and that the driver had a valid licence, could not absolve the HRTC from the need for making further enquiry about the

state of fitness of the driver at the time of entrusting the bus to him for driving. These two documents are not on the record. We are left in the dark

about their contents. In the absence of any evidence about the state of health of the driver, at the time when he was entrusted with the task of

driving the ill-fated bus and about the medical history of the driver, in terms of the requirements of the Act noticed above, it cannot be said that the

HRTC has succeeded in displacing the presumption of negligence arising both from the doctrine of "res ipsa loquitur" as also the defence of

"inevitable accident" raised by it in the case. The burden upon it was heavy, inasmuch as, it was under an obligation to bring on record material

showing that it had taken all due care, as a prudent employer, to ensure that it was entrusting the bus to be driven by a person who was capable in

all respects to do so. It has clearly failed to discharge this burden. More so, when driver Baldev Singh was attributing the accident to the defective

condition of the bus and the fact that he was being overworked by the HRTC and was disclaiming that he was suffering from fits of epilepsy.

32. In the present case the HRTC should have led evidence to show that it had made proper enquiry about the fact that the driver of the bus was

not suffering from an ailment or the deficiency of a nature which disentitled him from being entrusted with driving of the bus. It should have obtained

and placed on record the medical certificate from the C. M. O. Nahan as also the necessary material to show that the doctor had satisfied himself

about the fact that driver Baldev Singh was not suffering from any disability of any nature, including the fact of his being an epileptic, before issuing

a certificate in the proper form. It should also have brought on record material to show that the driving licence had been issued or renewed in

favour of the driver after proper enquiry about his suitability for being entrusted with the driving of a motor vehicle, like a bus, in which a number

of passengers are to travel.

33. The mere fact that there is a presumption of regularity in performance of official acts, which could be available to the HRTC on account of the

issuance of the driving licence and the medical certificate to driver Baldev Singh, would not be enough, in a case like the present, for absolving it of

liability where the burden of proving that due care was taken by the HRTC as a prudent employer was heavy. More so, because even the driving

licence and the medical certificate were not brought on the record of the proceedings before the Tribunal.

34. In conclusion it must be held that the HRTC has failed to discharge the burden which lay upon it of establishing that it had taken all due care in

the matter of entrusting the Bus No. HPS 1667 to its employee, driver Baldev Singh. It has, thus, not been able to rebut the presumption of

negligence rendering it vicariously liable for compensating the victims of the accident. The view of the Tribunal, to the contrary, appearing in its

finding under issue No. 1, is unsustainable in law. The finding cannot be upheld and is set aside. It is held that the driver, as also the HRTC, was

negligent on account whereof the accident took place resulting in injuries to the claimants. As the employer of Baldev Singh, the HRTC is liable for

payment of compensation to the claimants.

35. The appeals are allowed. With the finding aforesaid, the cases are sent back to the Motor Accident Claims Tribunal, Shimla, for determining

the other issues in accordance with law.

36. The appellants shall be entitled to their costs from the defendants-respondents.