Smt. Mithu Rani Sardar and Others Vs United India Insurance Company Ltd. and Another

F.M.A. No. 1550 of 2003 with F.M.A.T. No. 2000 of 2003

Court: Calcutta High Court

Date of Decision: Oct. 6, 2005

Acts Referred:
Motor Vehicles Act, 1988 â€" Section 140, 163A, 166

Citation: (2006) 3 ACC 544 : (2006) ACJ 2868 : (2006) 2 CALLT 241 : (2006) 2 ILR (Cal) 531

Hon'ble Judges: Prabir Kumar Samanta, J; Maharaj Sinha, J

Bench: Division Bench

Advocate: Amit Ranjan Roy, for the Appellant;Parimal Kr. Pahari, for the Respondent

Final Decision: Allowed

Judgement

Maharaj Sinha, J.
This is an appeal against this Judgment of the Motor Accidents Claims Tribunal. Additional District and Sessions Judge,

2nd Court. Bankura, dated 12th May. 2003. in Motor Accident Claim Case No. 37 of 2002/71 of 2001 u/s 166 of the Motor Vehicles Act,

1988. The wife of the deceased victim, namely the first appellant herein, Smt. Mithu Rani Sardar, her mother-in-law and her two minor sons and

one minor daughter were the claimants before the claims Tribunal who are also the appellants in this appeal. By the said Judgment the claim of the

appellants herein for compensation for the death of one Pasupati Sardar, the husband of the first appellant Smt. Mithu Rani Sardar and the son of

the second appellant and the father of the third, fourth and the fifth appellants herein was rejected by the Claims Tribunal. Being aggrieved by the

said Judgment the above appellants preferred this appeal.

2. The short facts are that the said Pasupati Sardar met with a motor accident on 3 February 2001 in the morning at about 7 A.M. on a village

road called Bamnikuli within the police station Indupur, in the District of Bankura. As appears from the evidence of the wife of the deceased victim,

the first appellant herein, the said Pasupati used to work as a daily labourer at the site of stone crasher at a place called Bamungram. On 3

February 2001 when Pasupati was going to work at. the said site he was hit by the offending vehicle as a result whereof he sustained severe

injuries. He was taken to Bankura Medical College Hospital but eventually on 12 February 2001 he died after having fought a battle for his life at

the said hospital. The offending vehicle was a tractor which was pulling a trailer. Both the tractor and the trailer were duly registered with the

registration No. W.B. 687699 (tractor) and W.B. 67/ 1506 (trailer) respectively. The offending vehicle was also covered by a valid insurance

policy at the time when the said accident took place. It is also an admitted position, however, that the insurance company, the first respondent

herein, paid a sum of Rs.50.000/- to the appellants as the insurance company was held liable to pay such compensation in a proceeding u/s 140 of

the 1988 Act on no fault principle.

3. It is to be pointed out, however, at this stage that apart from the first appellant, the wife of the deceased victim and the said Sudhangsu Roy who

claimed to be the eye-witness of the accident, neither the insurance company nor the owner of the offending vehicle nor the driver of the said

tractor gave or led any evidence whatsoever. The Claims Tribunal, therefore, had to give its Judgment on the basis of the evidence of the above

two persons, the Claim petition and the written statement or the written statements of the insurance company and the documentary evidence,

namely the FIR and one post-mortem report of the deceased victim.

4. The first appellant herein, the wife of the deceased victim in her evidence said that her husband, the said Pasupati Sardar died on 12 February

2001 at Bankura Medical College Hospital as he was hit by a tractor ""attached with a trailer"" on 3 February 2001 and thereby sustained injuries.

The said accident took place when her husband was going to his work-place at a stone crusher and that the accident took place duo to rash and

negligent driving of the driver of the vehicle. She also mentioned in her evidence the registration numbers of both tractor and the trailer (as

mentioned hereinabove). She also said that she did not see the accident but she heard about the accident. She also said that at the time of accident

her husband was aged about 45 years and his monthly income was Rs. 2.000/- and the entire family was dependent upon the said income. She

also said that because of the said accident her family including herself suffered financially and mentally for the sudden death of her husband. She

said that her sons and the daughters were all minors within the age limit of three to six years. In cross-examination she denied that she gave any

false evidence and she also denied that her husband sustained injuries ""for his own fault as he was not at stable state of mind due to his addiction of

wine"".

5. The other person who gave evidence namely, the said Sudhangsu Roy said in his evidence, that he saw Pasupati was standing on the village

road and the said tractor alongwith the trailer hit Pasupati and thereby Pasupati sustained injuries and subsequently Pasupati died on 12 February

2001 at the hospital. He also said that Pasupati had no fault but due to rash and negligent driving of the driver of the said tractor the accident took

place. The further evidence of Sudhangsu Roy was that ""Pasupati used to work as a day labourer in a Khadan"" and as a day labourer he used to

earn about Rs. 2.000/- per month and he was aged about 45 years.

6. Sudhangsu Roy also said that Pasupati''s wife Mithu Rani Sardar came to the scene of the accident after being informed and the offending

vehicle was detained at a short distance after the accident. From the evidence of Mithu Rani Sardar it is clear that she came to know about the

accident later and she arrived at the scene of the accident and found her husband was lying injured and she also found the presence of the

offending vehicle ""as it was standing thereon"".

7. The said Sudhangsu Roy in his cross-examination also denied that Pasupati was not aged 45 years. He also denied that he was not an eye-

witness of the accident or that he was not present at the relevant time when the accident took place and he also denied that the accident did not

lake place due to the fault of the driver of the offending vehicle but the accident took place due to the fault of Pasupati. He also denied that

Pasupati did not have the income to the extent of Rs. 2.000/- per month. The above, however, is the evidence of rather the only oral evidence in

the entire proceedings in support of the claim for compensation by the appellants herein. As aforesaid, apart from Mithu Rani, the wife of the

deceased victim Pasupati and the said Sudhangsu Roy (claimed to be the eye-witness) none gave any evidence in the proceeding. Apart from the

above oral evidence two exhibits namely, the FIR dated 7 February, 2003 and the said Post-Mortem Report of the deceased victim dated 12

February, 2003. It appears that the date of the FIR and one remark in the said Post-Mortem Report played a great role in the mind of the Judge

or rather in deciding that the claim of the appellants herein for compensation u/s 166 of the Motor Vehicles Act was liable to be dismissed and, in

fact, as dismissed altogether. In so dismissing the claim for compensation the learned Judge thought that it was not proved in evidence that there

was any accident at all in which the offending vehicle or vehicles were involved, (I use the expression vehicles though it should be treated as one

offending vehicle as the offending vehicle namely, the tractor was, in fact, pulling the trailer or rather the trailer was attached to the tractor but since

both the tractor and the trailer have different registration number the words offending vehicles are used herein).

8. I must say at the very outset that having considered the evidence on record as adduced in support of the claim of the appellants and the

documents disclosed in the proceedings I entirely disagree with the findings and the conclusion of the Claims Tribunal in rejecting the case for

compensation of the appellants herein. I think it necessary, at this stage, to quote the relevant portions of the findings, if they can be called the

findings at all, and the conclusion from the Judgment of the Claims Tribunal as those so-called findings are, in my opinion, utterly wrong and

erroneous. And after I have quoted the relevant portions from the Judgment of the Claims Tribunal it would be easier for me to articulate why I

think the Claims Tribunal was utterly wrong in dismissing the claim of the appellants for compensation in the first place. The relevant portions of the

Judgment of the Claims Tribunal are quoted below:

Considering all the above facts and circumstances including the materials and the evidence on record. I am convinced to hold that on the date of

incident the petitioner P.W. 1 and P.W.2 were very much aware of the fact that no accident took place and Pasupati Sardar did not sustain any

injury due to the said accident but when they found that the condition of Pasupati was deteriorating at hospital Sudhangsu Roy came forward and

prepared the written complaint and through the wife of Pasupati he lodged the FIR but fact remains that Pasupati had consumed liquor at the

relevant time and he was proceeding through the road and invariably a drunken person is not stable on the road due to his proceeding towards his

place of job and due to fall he sustained injuries but when no other evidence is forthcoming to help the opposite parties in this regard and when the

charge-sheet was also submitted on the basis of some materials it can safely be held that somehow or otherwise at the time of proceeding through

road Pasupati came into contact with the body of the vehicle and fell down and sustained injuries but, no doubt, Pasupati was not stable at the

relevant time because he was in drunken condition and the post-mortem report supports that fact. So the liability of the passer-by cannot be

overlooked when through village road any vehicle passes and practically the P.O. area i.e., the ground level of the P.O. area is based on hard

stones if any one simply falls and he may sustain different types of injury.

9. Whatever, it may be considering the conduct of the deceased and his liability as a passer by at the relevant time, I am convinced to hold that not

for the fault of the driver the accident took place but the accident took place for also for the fault of the deceased and it is also evident from the

evidence and copy of the FIR that till 7 February 2001, there was no allegation that the present offending vehicle dashed Pasupati Sardar under

any circumstances and there is no examination for what reason the matter was not reported to P.S. though the P.W. 1 and P.W.2 were present at

P.O., particularly P.W. 1 appeared at P.O. So the alleged offending vehicle was present at that time and the alleged vehicle ought to have detained

and what prompted them not to file any complaint at P.S. and to report the matter forthwith when P.W. 1 and P.W. 2 have stated that the

offending vehicle was detained at P.O. and the above facts and circumstances have created much doubt about the alleged accident and also

practically the P.W. 1 and P.W. 2 failed to search out the truth of the story of the accident by any cogent evidence and it might be in the

proceeding u/s 140 of the M.V. Act a sum of Rs. 50.000/- was awarded but fact remains that the liability of the deceased cannot be ignored.

Whatever it may be considering all the fact and circumstances of this case, I am convinced to hold that the fault of the driver in this regard in

respect of the accident has not been proved beyond any manner of doubt. On the contrary, fault of the deceased Pasupati Sardar is proved

beyond any manner of doubt and practically for that reason "no fault compensation" has already been granted to the petitioner u/s 140 of the M.V.

Act but no further compensation can be granted in favour of the petitioner on the ground that the petitioners have failed to prove that due to rash

and negligent driving of the driver of the vehicle the accident took place.

In the result, the petitioners, are not entitled to any compensation as per provision of Section 166 of the M.V. Act when ""no fault compensation

has already been awarded u/s 140 of the M.V. Act.

10. From the plain reading of the above portions of the Judgment, though plain reading of the same is very difficult as they are wholly unintelligible,

firstly, it appears that the Claims Tribunal thought that no accident, in fact, took place on 3 February 2003. Secondly, the Claims Tribunal imagined

that there might have been a conspiracy, what sort of conspiracy is not, however, spelt out, between the said Smt. Mithu Rani Sardar and the said

Sudhangsu Roy [the eye-witness of the accident) namely, P.W. 1 and P.W. 2 and because of such conspiracy the FIR was lodged, then, the

Claims Tribunal sought to proceed on a hypothesis that since the deceased victim had consumed alcohol he must have a "fall" and thereby he

sustained injuries, then again it thought that the deceased victim somehow came in contact "with the body of the vehicle" and fell down and

sustained injuries. And for this innovative approach the Claims Tribunal appears to have relied on the post-mortem report. Then, it appears, the

claims Tribunal found that the accident took place not only for the fault of the driver of the offending vehicle but for the fault of the deceased and

for the above purpose he relied on the FIR which was lodged on 7 February, 2001 by Smt. Mithu Rani Sardar, the wife of the deceased victim.

Then again the Claims Tribunal found that there was no evidence that the deceased victim was hit by the offending vehicle.

11. It further appears that the Claims Tribunal was too pre-occupied with the question as to why no FIR was lodged just after the accident and

since, there was a delay in lodging the FIR that was enough to assume that there was no accident, then the Claims Tribunal proceeded to hold that

since the fault of the driver had not been proved "beyond any manner of doubt", on the contrary, fault of the deceased victim was proved "beyond

any manner of doubt'' and since the claimants/appellants received compensation of Rs. 50,000/- in a proceeding u/s 140 on no fault principle, no

further compensation could be granted as the claimants according to the Claims Tribunal failed to prove the rash and negligent driving of the driver

of the offending vehicle when the accident took place.

12. I must admit that having read the Judgment of the Claims Tribunal more than once I am at a loss to appreciate as to what prompted the Claims

Tribunal to propound its own theory purely on the imagination of its own as to how the victim sustained injuries and that there was, in fact, no

accident at all etc. I also wonder how a Judgment of an adjudicating authority such as Motor Accident Claims Tribunal could be based on nothing

but its own imagination and sheer hypothesis or rather worst possible hypothesis.

13. Before I proceed any further I must say that the Judgment of the Claims Tribunal in the facts and circumstances of the present case and the

evidence on record has shocked my conscience immensely as a reasonable man as I am supposed to be as a Judge of this Court, the highest Court

in the State.

14. However, in my opinion, the evidence adduced in support of the claim for compensation by the first appellant herein and the said eye-wilness,

to say the least, is very consistent and in order to obtain compensation no further evidence, in my opinion, was required to satisfy the Claims

Tribunal that the victim died due to the accident which took place on 3 February, 2003 because of the rash and negligent driving of the offending

vehicle.

15. It was, as aforesaid, proved in evidence that the said accident took place because of the rash and negligent driving of the offending vehicle. The

wife of the deceased victim categorically denied the suggestion in cross-examination on behalf of the insurance company that the driver of the

offending vehicle namely, the said tractor was not at fault. She also categorically denied that her husband sustained injuries due to his own fault as

he was not ""at stable stage of mind due to his addition to wine"".

16. As aforesaid, the evidence of the said eye-witness, Sudhangsu Roy is quite clear and straight forward. He said that he was an eyewitness of

the accident and that the accident took place due to the rash and negligent driving of the offending vehicle by the driver thereof. He maintained the

same stand also in cross-examination and denied categorically that he was not an eye-witness of the accident or that the accident took place not

due to the fault of the offending vehicle or the driver thereof but because of the fault of Pasupati, the deceased victim. They both have also been

very consistent in their evidence regarding the earning of the deceased victim as well.

17. It is, however, very difficult to make out why the Claims Tribunal instead of analysing the evidence in its true perspective tried to deal with the

case on the basis of sheer hypothesis and/or imagination of his own without there being any supporting evidence therefor. No doubt, that the

Claims Tribunal to say the least committed a gross error imagination in basing its finding purely on its hypothesis and/or/ without there being any

proof of any nature far from legally acceptable proof and as such the illegality and/or the gross error committed by the Claims Tribunal vitiates its

finding and naturally the conclusion of the claims Tribunal that the claim petition of the appellants herein was liable to be dismissed and the dismissal

of the same in fact.

18. The Claims Tribunal committed the gravest error in not taking into account the stand taken by the insurance company in its defence namely, in

the written statement at all. The insurance company did not say that there was no rash and negligent driving of the driver of the offending vehicle for

which the said accident took place but the insurance company took the stand that the accident took place because Pasupati Sardar was also

responsible for the same ""due to his accomplishment and obvious contributory negligence as he was under influence of drink and violated traffic

rules.

19. Although the above stand contained in paragraph "6" of original written statement of the Insurance company is not quite intelligible but this is

how I venture to make out the said stand taken by the insurance company in its written statement regarding the cause of accident. What the

insurance company wanted to mean by this stand was, I think, that Pasupati himself also contributed to the cause of accident because of his

negligence as he was under influence of drink and as such the insurance company presumed that he violated traffic rule?

20. The insurance company, however, did not make any attempt to prove or substantiate the stand taken by it in defence by leading any evidence

in the first place. The insurance company, I quite understand, was absolutely helpless and could not prove the case pleaded in its defence as neither

the driver of the offending vehicle nor anybody else gave any evidence in support of the defence of the insurance company. The owner of the

offending vehicle, as aforesaid, never appeared and contested the proceedings nor he gave any evidence at the trial and that is why in order to

reject the claim of the petitioners the Claims Tribunal, I am certain, had to invent its own theory of accident or not accident which 1 repeat had

nothing to do with the reality.

21. It appears that a post-mortem was carried out after the said Pasupati died in the hospital on 12 February, 2003 and on the basis of the said

post-mortem report the Claims Tribunal came to the finding that Pasupati was under intoxication at the time of the accident, in fact, in the words of

the claims Tribunal Pasupati had ""consumed liquor at the relevant time"" and therefore he was drunk. It again said ""Pasupati came into contact with

body of vehicle and sustained injuries but no doubt Pasupati was not stable"" etc. It is however, impossible for anybody to even suggest, let alone

prove from the report itself that Pasupati was intoxicated on 3 February, 2003 in the morning or that he consumed alcohol on or before 3

February. 2003 meaning thereby before the accident took place. After the said accident on 3 February, 2003, Pasupati, as aforesaid, was

admitted to the hospital on 3 February, 2003 itself and he died in the hospital on 12 February, 2003 and the post-mortem was carried out a few

hours thereafter.

22. It is preposterous to even assume that a post-mortem carried out after or on the 10th day from the alleged consumption of alcohol can even

suggest that the person concerned was under influence of drink or that he consumed alcohol 10 or 11 days before his death, one does not require

any special knowledge in medical science to say with certainty as I have said above as this is part of our basic general knowledge. No other test

was, however, carried out just after Pasupati was admitted to hospital or even within 48 hours of such admission to find out whether Pasupati had

any alcohol content in his stomach. Stomach of a person or for that matter system of a human body cannot retain alcohol after 48 hours from

consumption of such alcohol and a post-mortem, in any event cannot prove any alcohol content in the stomach, if the same is not carried out within

48 hours or at the most within 72 hours from the alleged consumption of alcohol in any event. Once again does not require any special knowledge

for the above, it is by now a part of our basic general knowledge as well.

23. Therefore, the said post-mortem report could not and cannot even suggest as it did not, that Pasupati was under the influence of alcohol when

the said accident took place, let. alone proving the allegation that the said accident took place because of Pasupati''s negligence too as he was

allegedly under the influence of drink. The said post-mortem report, however, says that Pasupati died ""because of his ante-mortem injuries"". While

on the subject it should also be pointed out that none knows that sort of medicines were given to Pasupati in the hospital and by what method or

methods such medicines were given or administered for reducing his physical pain caused by such injuries or to save his life and whether the

medicines that were given to Pasupati contained alcohol as it is nobody''s case that alcohol was consumed by Pasupati either before or after he

was admitted to the hospital with his injuries on 3 February, 2003.

24. It is, however, not my purpose to embark upon an inquiry as to whether Pasupati was guilty of contributory negligence as alleged or otherwise

as no such contributory negligence was even attempted to be proved by the insurance company at all. If I were to hold as was held by the Claims

Tribunal that the post-mortem report of Pasupati proved that Pasupati was under the influence of drink or alcohol at the time of the accident on 3rd

February, 2003 and, therefore, he also contributed to the cause of the said accident on the basis of the said post-mortem report dated 12

February, 2003, then, that would, in my opinion, be a worst form of absurdity conceivable in law.

25. I must also point out that the post-mortem report of Pasupati dated 12 February 2003 does not even suggest for a minute, let alone prove that

the victim had consumed alcohol on or before 3 February. 2003 when the accident took place and that the deceased victim was under influence of

drink or he was drunk when the said accident, in fact, took place on 3 February, 2003 in the morning. The said report does not as it could not go

anywhere near it.

26. I think I have said more than enough to deal with the said postmortem report which might have been the basis on the part of the Claims

Tribunal to assume, I, however, cannot say what was and was not in fact, assumed by the Claims Tribunal in this case, that the deceased victim

might have been under influence of drink at the time when the accident took place and as such he contributed to the cause of accident.

27. An allegation of contributory negligence on the part of a person who is hit by a motor vehicle will however, remain an allegation if the alleged

contributory negligence is not proved by evidence. Even if the person concerned is found to be under influence of drink at the time of the accident

that by itself would not lead to an automatic inference that the person concerned was/is guilty of contributory negligence or that he contributed to

the cause of accident as a matter of course. Let me give an example though very many examples are possible in this regard. A person after

consuming alcohol at a place where drink is served either sits on the pavement in an inebriated condition or walks back home using the payment

and while sitting on the pavement or walking back home he is hit by a motor vehicle on the pavement itself because the driver of the vehicle drives

the same negligently and/or rashly and because of such negligent driving of the driver of the motor vehicle the parson is injured or fatally injured or

he dies. Can it be said that since the person was under influence of drink when he was hit by the motor car he was guilty of contributory negligence

or that he also contributed to the cause of the accident. The answer to that is a simple no. because even though the person was under influence of

drink but since he was sitting or walking on the pavement he could not possibly be said to have contributed to the cause of accident as a

pedestrian. A pedestrian is supposed to walk on the pavement whether under influence of drink or when he is perfectly sobar or in the normal state

of mind. There is no causal connection with the fact of being under influence of drink and contributory negligence for causing accident on the part,

of a pedestrian in the above situation. It may be a different case when a driver of a vehicle is found to be driving under influence of drink as driving

under the ""influence of drink"" is itself an illegal act and driving under"" influence of drink"" is prohibited by law as opposed to consuming alcohol in

general. If a person drives a vehicle after taking alcohol and being under its influence, he is likely to expose others to serious risk of accident. In

such a case maxim of ""res-ipsa-loquttur"" will apply with greatest force and rash and negligent driving would be presumed to be proved on the part

of the driver of the motor vehicle.

28. As I said above that there has been no evidence at all that the victim was guilty of contributory negligence. The person who could give the best

evidence in this regard namely, the driver of the offending vehicle did not come forward to give any evidence whatsoever. The insurance company

apart from mentioning the post-mortem report did not as it could not make any attempt to prove any negligence on the part of the deceased victim

for the cause of accident due to which poor Pasupati had died.

29. It is however, very difficult to make out from the Judgment as to on what ground or specific grounds the Claims Tribunal decided to dismiss the

claim petition. At least. I have not been able to make out what the Claims Tribunal was driving at by making the observations which I have quoted

in detail hereinabove in this Judgment.

30. Even in a case u/s 166 when nothing else is proved apart from the accident itself that has been held to be sufficient even when the proof of rash

and negligent driving is absent. The Supreme Court way back in the year 1977 in the case of Pushpabai Purshottam Udeshi and Others Vs. Ranjit

Ginning and Pressing Co. (P) Ltd. and Another, , held that in many cases of motor accidents it would be very difficult to prove the negligence of

the drives of the offending vehicles. Normally it is for the plaintiff to prove negligence in the usual course but in a case of motor accident the plaintiff

might prove the accident but might not be able to prove the true cause of such accident as the true cause of the accident is within the knowledge of

the driver or the defendant who caused such accident. The plaintiff in such a situation can prove the accident but cannot prove how it happened to

establish negligence on the part of the driver of the offending vehicle.

31. In such a situation Court in our country have consistently applied the maxim of res-ipsa-loquitur, the exact meaning of which I have mentioned

above, in order to give compensation in favour of the victims of the accidents or in favour of the claimants because of the deaths of the victims due

to such accidents.

32. In the said decision Pushpabai Parshattam Udeshi and Ors. (supra) there was no direct evidence as to how the accident occurred, there was

no eye-witness unlike in the present case. The brother of the deceased victim went to the spot, after the accident took place and he was examined

as an witness. He stated in his evidence that he reached the spot of the accident after the accident, in fact, had taken place.

33. The Supreme Court in the above case applied the maxim of ""res-ipsa-loquitur"" as according to the Supreme Court the accident spoke for itself

so it was sufficient for the plaintiff to prove the accident when nothing more could be proved. The onus then shifted upon the defendant to prove

that the accident took place due to some other cause than his own negligence. See also the decisions in the case of Shivaji Dayanu Patil and

another Vs. Smt. Vatschala Uttam More, and the case of Mallamma v. Balaji and Ors. reported in 2003 TAG 428(Kants.).

34. In the instant case, as I have said above, it has been consistently proved in evidence that the accident took place on 3 February, 2003 because

of the rash and negligent driving of the offending vehicle in which the said Pasupati received severe injuries. The evidence of the eye-witness was

very consistent so was the evidence of the wife of the deceased victim, the first appellant herein. The insurance company did not lead any evidence

at all. Neither the driver nor the owner of the offending vehicle gave any evidence, the owner never bothered to contest the proceeding let alone

leading any evidence.

35. The insurance company pays compensation as the offending vehicle is covered by a policy of insurance, in the absence of any valid policy of

insurance the owner of the offending vehicle would be liable to pay the compensation. I can imagine a situation that if in the present case the vehicle

was not covered by a valid insurance policy the owner of the offending vehicle would be liable straight away as it did not contest the proceeding.

Would it be wrong in saying that in any event an adverse inferrence should be drawn against the driver of the offending vehicle and/or the owner

thereof so also against the insurance company as the best, witness or evidence was withheld, I am certain, it would not.

36. Before I part I must say that the phrase ''contributory negligence'' is normally regarded as a defence to a claim of negligence, but without there

being any proof the defence of contributory negligence cannot be taken advantage of by a defendant in a case of rash negligent driving. This 1 think

is the accepted principle of law regarding proof of contributory negligence in the first place. This principle was also reiterated in the case of Asha

Tekriwal v. Bengal Engineering Works and Anr. in FMA No. 327 of 1998, the Judgment in that case was delivered by this Bench of ours, namely

his Lordship Justice P.K. Samanta and myself.

37. In support of the above principle the said decision in Asha Tekriwal (supra) is referred to and relied upon. The said case Asha Tekriwal

(supra) considered the other decisions of other High Courts including this Court in Smt. Mita Gupta and Ors. v. Oriental insurance Company

Limited 2001(3) ICC 138 (Cal.).

38. In the said Mita Gupta''s case (supra), the Division Bench of this Court was primarily concerned with a case where the driver of one of the

trucks involved in an accident died. The sole eye-witness was disbelieved by the Tribunal and the driver of another truck involved in the accident

was not produced as witness. It was in that situation the Appeal Court applied the maxim of res-ipsa-foquttur. His Lordship Justice'' Altamas

Kabir (as his Lordship then was) speaking on behalf of the Division Bench said that since the best evidence was withheld (since the driver of the

truck was not produced as witness) an adverse inference should have been drawn by the Tribunal in favour of the claimants/appellants therein.

39. In the case of Josbindar Kaur v. Richpal Singh 2003(3) TAC 375 (M.P.) the Division Bench of Madhya Pradesh High Court found that the

Tribunal committed an error in dismissing a claim of the claimants on the ground of non-availability of evidence as the Division Bench was of the

opinion that the maxim of res-ipsa-loquilur applied and the burden shifted on the respondent to prove that the accident did not occur due to rash

and negligent driving of the offending vehicle or vehicles.

40. In my opinion, the claimants/appellants herein proved by leading sufficient evidence that the said Pasupati died due to the rash and negligent

driving of the offending vehicle or vehicles and such evidence of the appellants was not or rather could not be questioned by the insurance

company who contested the said proceeding in the Claims Tribunal as none gave any evidence or rather none was produced as witness to support

the alleged defence of the insurance company in the first place.

41. It seems that the Claims Tribunal was too pre-occupied with the alleged delay in lodging the FIR or the complaint to the police authority of the

accident that took place on 3rd February, 2003 and that, as I said above, played a great role in rejecting the claim of the claimants/ appellants. It

appears that the FIR was lodged by the wife of Pasupati, the deceased victim, on 7th February, 2003 and in the said FIR itself the wife stated

clearly that because she was too pre-occupied with the treatment of her husband in the hospital she was unable to lodge the complaint earlier. The

circumstances under which there was three or four days delay in lodging the complaint can be well-understood. The said Pasupati after being

injured was taken to the hospital immediately thereafter wherein he eventually died, as I have said, having fought a battle for his life on 12th

February, 2003. In such circumstances the three or four days delay in lodging the FIR cannot, in my opinion, be regarded as any delay in the first

place.

42. It was pointed out by the Division Bench of the Punjab and Haryana High Court that in a case of a fatal accident ""it cannot be expected that

the injured or the survivors of the deceased would immediately rush to the police station for lodging the complaint"". In the present case since the

wife of the deceased victim herself explained in the FIR itself as to why there was little delay in lodging complaint that by itself was enough to hold

that there was no delay, in fact, in lodging the FIR, the Claims Tribunal ought not to have taken that point to be of any consequence at all for the

purpose of adjudicating the merits of the claim for compensation. There may be cases where no information or complaint is made to the police for

days or even for weeks or even for longer period or not at all but that will not itself disentitle a claimant to seek compensation u/s 166 of the Motor

Vehicles Act if the evidence and the facts of a particular case prove a motor accident by rash and negligent driving out of which such claim for

compensation for injury or death of the victim arises. In the instant case, however, the police authority on the basis of the above FIR charge

sheeted the driver and commenced proceedings against him under provisions of IPC.

43. In view of the above, the Judgment of the Claims Tribunal is, in my opinion, liable to be set aside and is thus set aside.

44. The wife of the deceased victim, the first appellant herein, stated in her evidence that her husband used to earn a sum of Rs. 2.000/- per

month. The other eye-witness also said that the income of the deceased was Rs. 2.000/- per month as a labourer at a stone crusher though no

documentary evidence was produced in support of the earning of the deceased victim. Even then, in my opinion, the oral evidence as to the income

of the victim can certainly be relied on because there was no contrary evidence to question the evidence of earning or income of the deceased

victim. In fact, since the Claims Tribunal was of the opinion that the case of accident was not proved or the case of rash and negligent driving was

not proved it was not necessary for the Claims Tribunal to consider as to what the income or the earning of the deceased victim was in support of

the above view of mine the following decisions are referred to Bilasini Mondal v. National Insurance Co. Ltd. and Ors. 2003 (2) TAC 435,

Koushuma Bagam and Ors. v. New India Assurance Co. Ltd. and Ors. 2001(1) TAC 649 (SC).

45. Having considered the evidence on the income or the earning of the deceased victim by the wife, I am of the opinion, that the evidence of the

wife of Pasupati should be accepted on the question of income or earning of the deceased victim before the accident. The learned Advocate of the

insurance company also said that the earning of the deceased victim was not or could not be more than Rs. 1,500/- per month. Thus, I accept that

the monthly earning of Pasupati was Rs. 1,500/- per month. On that basis the yearly income of the deceased victim comes to Rs. 18.000/-. Since

it has been proved in evidence that Pasupati was 45 years of age, this age of Pasupati was also supported by the post-mortem report, a multiplier

of 15 is applied as provided in the structured formula, in the second scheduled to the Motor Vehicles Act since the formula is regarded as a safer

guidance, though the said schedule was formulated for the purpose of Section 163A of the Motor Vehicles Act. for computing compensation than

by adopting any other method in this case. But it appears, even though the wife of the deceased victim, the first appellant herein was entitled to

claim on the basis of her husband"s earning at the least a sum of Rs. 2.70,000/-annually on the basis of Rs. 1.500/- as monthly income but in the

claim petition the claimants/appellants claimed compensation to the tune of Rs. 2,00,000/- only. Thus, on the basis of the compensation claimed in

the claim petition a sum of Rs. 2,00,000/- should I think, be and is awarded as a lump-sum compensation in favour of the claimants/ appellants

herein. Since the claimants/appellants have already received a sum of Rs. 50,000/- by way of compensation u/s 140 of the Motor Vehicles Act on

no fault principle, the claimants/ appellants will be entitled to receive a sum of Rs. 1,50,000/- by way of compensation together with 9% interest

from the date of the claim petition till payment of compensation is made by the Insurance company in their favour.

46. The insurance company is accordingly directed to issue an account payee cheque or a bank draft drawn in favour of Smt. Mithu Rani Sardar,

the first appellant herein, on the above basis and deposit the same in the Claims Tribunal within a period of four weeks. The first appellant herein,

Smt. Mithu Rani Sardar shall receive the said cheque or the bank draft as the case may be upon identification and will acknowledge the receipt

thereof.

47. The above compensation will be received by the first appellant Smt. Mithu Rani Sardar for herself and for and on behalf of her minor children

and her mother-in-law, the second appellant herein. Out of the above total amount of compensation the second appellant herein, the mother of.

Pasupati will be entitled to receive a sum of Rs. 50,000/-and the first appellant and her minor children will receive the rest of the compensation

amount and since the children are still minors their mother Smt. Mithu Rani Sardar is entitled to utilise the amount of compensation for the welfare

of her minor children and for herself to the best of her Judgment.

The appeal is thus allowed.

Urgent xerox certified copy of this Judgment, if applied for, be given to the parties on the usual undertaings.

P.K. Samanta, J.

48. I agree.