SUMMARY

CASE NO.: I 2346/2005

CAROLINE LYDIA ENGELBRECHT

and

THE MOTOR VEHICLE ACCIDENT FUND OF NAMIBIA

2007 November 15

PARKER, J

Negligence - Action for damages in terms of repealed Motor Vehicle Accident Fund Act (Act 30 of 1990) – Plaintiff alleging negligence of insured driver and relying on, *inter alia*, maxim *res ipsa loquitur* – Allegation of negligence not sufficient – Where plaintiff particularizes cause of accident as ground of driver's negligence in specific respects, plaintiff confined to such particularity – Depending on nature of accident mere happening of accident may justify inference of negligence – Such inference underlying maxim *res ipsa loquitur* – Inference does not shift burden of disproving negligence on defendant but casts evidentiary burden on defendant to supply some degree of proof in rebuttal of inference – Insured driver foreseeing possibility of accident and taking certain steps – *Onus* on plaintiff to establish further steps which insured driver could and

should have reasonably taken – Plaintiff failing to discharge *onus* to prove negligence of driver – Action failing.

CASE NO.: I 2346/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between

CAROLINE LYDIA ENGELBRECHT Plaintiff

and

THE MOTOR VEHICLE ACCIDENT FUND OF NAMIBIA Defendant

CORAM: **PARKER, J**

Heard on: 2006 June 26, 27, 28; 2007 October 29, 30, 31

Delivered on: 2007 November 15

JUDGMENT:

PARKER, J:

[1] On 25 March 2001 the plaintiff was a fare-paying passenger in a Mazda pick-up (the insured vehicle), which was carrying her and 14 other passengers to Walvis Bay. The insured vehicle towed a trailer that contained the luggage of the passengers.

[2] According to Mr. Kooitjie, the only defence witness and the driver of the insured vehicle at the material time (the insured driver), between Okahandja and Karibib at between 14h00 and 16h00 as he was driving, the left, rear tyre of the insured vehicle suddenly burst, and the insured vehicle veered to its left; he then held the steering wheel tight in his hands in order to make the insured "vehicle to stay or to be on the road because it was pulling towards the left side." Thus, what he says is that he tried to keep the insured vehicle on the road "but it did not and it still continued to pull out and then it went off the

road eventually." He described the section of the road where the accident occurred that it was straight but that the shoulders of that section were in an inclined position and narrow. The insured vehicle left the road and overturned onto its left-hand side. Three passengers were killed. The plaintiff was injured.

[3] Thus, in this action the plaintiff claims damages in terms of the repealed Motor Vehicle Accident Fund Act, 1990 (Act No. 30 of 1990 (the MVA Act). By an agreement between the parties, it was ordered that the present burden of this Court is to determine liability only; the quantum of damages was to be determined at a later date. I interpose to mention here that at the close of the plaintiff's case, Mr. Hinda, for the defendant, applied for absolution from the instance. I refused the application and gave my reasons for refusing.

[4] The plaintiff alleges that the accident was caused by solely the negligent driving of the insured driver in that he lost control over the insured vehicle which caused the vehicle to leave the road and overturn. The defendant admitted this allegation and pleaded – admittedly inelegantly – that the accident occurred as a result of one of the tyres of the insured vehicle having burst. And in her amended response to request for further particulars as to what caused the insured driver to lose control of the insured vehicle, she says she does not know. For the plaintiff so stating, Mr. Hinda submitted that the plaintiff amended her "particulars of claim", asserting that the cause of the accident is unknown. I would not go as far as that: I think what has always been the plaintiff's position is that the accident was caused by solely the negligent driving of the insured driver; and the ground of negligence she alleges is that "the insured driver lost control over the (insured) vehicle, which caused the (insured) vehicle to leave the road and overturn." I do not think by so contending she was abandoning her allegation of negligent driving on the part of the

insured driver: what she is saying in her amended further particulars is that she does not know what caused the insured driver to lose control of the insured vehicle. She says she heard that the "vehicle had a burst tyre."

[5] On the same issue, Mr. Hinda submits that it is not sufficient for the plaintiff to allege negligence alone; the particular ground or grounds of negligence must be detailed. In support of his submission, Mr. Hinda referred to me *Honikman v Alexandra Palace Hotel (Pty) Ltd* 1962 (2) SA 404 (C). Mr. Hinda is correct in his submission on the general rule of practice but, with respect, I do not agree with him that the plaintiff has not pleaded a particular of negligence; for as Rosenow, J stated in *Honikman, supra*, at 406G,

> In a motor car case a driver can be negligent in a number of ways and where he is informed that the plaintiff intends to rely on the fact that he did not keep a proper look-out, he is informed with great particularity exactly what facet of negligence will be relied on, and the nature of facts that will have to be proved.

In casu, as Mr. Erasmus, for the plaintiff, submits, the plaintiff says she intends to rely on the fact that the insured driver lost control over the vehicle which caused it to overturn.

[6] In this connection, it has been held that where a plaintiff has alleged specific ground (or grounds) of negligence he or she is limited to that ground (or those grounds) because the function of pleadings is to define and limit the issues between the parties; and by specifying the cause the plaintiff limits his or her case and conveys that limitation to the defendant. (*Madyosi and Another v SA Eagle Insurance Co Ltd* 1989 (3) SA 178 (C) at 188A-C; *Jithoo v Booth* 1971 (4) SA 560 (N) at 562H-563B) And, as I have mentioned above, the particular of negligence alleged by the plaintiff in the present case is that the

insured driver lost control over the vehicle which caused the vehicle to leave the road and overturn.

[7] This leads me, in my view, to only one enquiry, namely, has the plaintiff, having regard to the evidence, discharged the *onus* of proving, on a balance of probabilities, the negligence she has put forward against the defendant? Granted, as Mr. Erasmus appears to argue, looking at the nature of the accident, the mere happening of the accident may justify an *inference of negligence*. Such inference underlies the maxim "res ipsa loquitur", which both counsel debated in their submissions (See *Jensen v Williams, Hunt & Clymer Ltd* 1959 (4) SA 583 (O); *Naude, NO v Transvaal Boot and Shoe Manufacturing* 1938 AD 379; *Stacey v Kent* 1995 (3) SA 344 (E); Cooper, *Dilictual Liability in Motor Law*, (Vol. 2), pp. 100-103; Klopper, *Isaacs and Leveson: The Law of Collisions in South Africa*, 7th ed., p. 78.) Whether the Court ought to draw such inference depends on the nature of the explanation given by the defendant. (*Naude, N.O., supra*, at 392) But that is not to say that an *onus* rests upon the defendant to establish the correctness of his explanation on a preponderance of probability. (*Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (A) at 576C-D) However, "[T]though the inference suggested by the nature of the accident does not shift the burden of disproving negligence on the defendant, still it does call for some degree of proof in rebuttal of that inference." (*Naude, NO, supra*, loc. cit)

[8] And what explanation does the defendant give in order to rebut the inference? In this connection, it is significant to reiterate that there was only one plaintiff witness, i.e. the plaintiff herself, and one defence witness, i.e. the insured driver. The insured driver testified that the left, rear tyre of the insured vehicle suddenly burst while the vehicle was travelling at a varying speed of not more than 110 kph. He testified further that before the journey he checked the tyres and there was nothing wrong with them. He did so when the

passengers were "buying in the shop." In my view, the insured driver testified in a satisfactory manner; I have no good reason not to accept his evidence on the relevant issues. It must be remembered that from the plaintiff's own evidence, she was asleep at the time the accident happened, so if a tyre had burst she would not have heard any noise, even if as she says, she woke up when the vehicle began to swerve. By a parity of reasoning, I also accept the driver's evidence that he struggled to retain control of the insured vehicle and to keep it on the road by holding the steering wheel tight in his grip, but the vehicle overpowered him and overturned.

[9] In the face of all this evidence, can it be seriously argued, as Mr. Erasmus appears to do, that the driver did nothing in an attempt to prevent the accident? I think not. Mr. Erasmus says the driver "simply grabs the steering wheel and allows this vehicle to run off the road, go down the slope, overturn between one to five times." Counsel further submits that the driver did not take "any aggressive action"; and he did not try some "evasive action". He also relies on the evidence of the plaintiff that when the vehicle's wheels touched the gravel, there was a sharp jerking movement.

[10] As I have said, since the plaintiff says while she was asleep the insured vehicle overturned, it is unsafe to accept her evidence that before the vehicle overturned it was swerving from side to side or that the driver was driving fast. Indeed, in her cross-examination-evidence she admits that she did not indicate to the driver of the insured vehicle that he was driving fast.

[11] The question then arises as to whether the plaintiff, on whom the *onus* rested, proved that there were further steps, which the insured driver could and should have

reasonably taken. (*Kruger v Coetzee* 1966 (2) SA 428 (A) at 431G) From the foregoing, I hold that there is no credible evidence to show that the insured driver could and should have reasonably done something different or something more than what he did, such as applying the brakes (as Mr. Erasmus submitted), or indeed, to show that he should reasonably have been able to retain control of the vehicle throughout. Besides, I do not see it obvious as to what manoeuvres a careful driver could and should reasonably execute in similar circumstances. In the absence of such evidence, it would be fair for me to find, and I do find, that the insured driver's handling of the emergency has not been shown to be unreasonable and that there were other reasonable steps.

[12] That is not the end of the matter; the insured vehicle was overloaded with 16 people, apart from the vehicle towing a trailer contained the luggage of the passengers. Did this factor, together with the vehicle travelling at a varying speed of up to 110 kph, contribute to the accident? Mr. Erasmus says it did; and Mr. Hinda says the fact that there were 16 people travelling in the vehicle did not mean that the vehicle's allowable weight was exceeded.

[13] It is my opinion that there is no credible evidence before me to substantiate Mr. Erasmus's submission that the combination of speed and load contributed to the driver being unable to control the vehicle. Maybe, it could be said that had the driver been driving at a lower speed when the tyre burst, he would have managed to retain control of the vehicle. But this is all untested speculation: above all, there was no expert evidence on this crucial and important point. (See *Madyosi and Another*, *supra*, at 184C.) I do not for a moment find it self-evident – in the absence of expert evidence – that load and speed or

both made the difference between the driver being able to keep the vehicle on the road and the vehicle overturning. To the related issue concerning the number of passengers who

rode in the front seat with the driver: the plaintiff avers that there were three passengers, while the insured driver says two. It is trite that he or she who avers must prove what he or she avers (See e.g. *Pillay v Krishna* 1946 AD 946.) In the instant case, I do not find that the plaintiff has proved, on a preponderance of probability, that there were three passengers who rode in the front seat with the driver. In any case, it is not clear to me in what manner any such number of passengers riding with the driver in the front seat of the vehicle affected the driver's ability to keep the vehicle on the road and prevent it from overturning.

[14] It follows that, in my view, the plaintiff has failed to establish, on a preponderance of probability, a causal link between the overloading of the vehicle, the speed the vehicle was travelling and the number of passengers that rode in the front seat of the vehicle on the one hand and the overturning of the vehicle on the other when the tyre burst.

[15] For the foregoing, in my judgment, the plaintiff has failed to prove, on a balance of probabilities, negligence on the part of the insured driver, and therefore the action falls to be dismissed. Doubtless, for obvious reasons, I must say I have come to this conclusion with a heavy heart.

[16] In the result, I make the following order:

The plaintiff's action is dismissed with costs, except wasted costs for the rest of the day consequent upon the adjournment of proceedings at the instance of the defendant on 28 June 2006, which are to be paid by the defendant.

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Parker, J

ON BEHALF OF THE PLAINTIFF:	Mr. F. G. Erasmus
Instructed by:	Van der Merwe-Greef Inc.
ON BEHALF OF THE DEFENDANT:	Adv. G. Hinda
Instructed by:	Ueitele Legal Practitioners