ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 197 of 2019

Date	Order with Signature of Judge

Ghulam Yaseen and others……..……..……...Plaintiffs

Versus

Hussainullah and another…….…….....Defendants

Dates of hearing :04.02.2025

Date of announcement of judgment :06.02.2025

Mr. Saifullah Abbasi, Advocate for the Plaintiffs.
None present for the Defendants.

JUDGMENT

MR. JUSTICE MUHAMMAD JAFFER RAZA: Instant suit has been filed under Fatal Accident Act 1855 **("Act")**. Brief facts of the case are that on 13.10.2018 about 10:00 p.m. Defendant No.1 **("Driver")** was driving Dumper bearing registration No.TAJ-327, near Toachko Traffic Chowki, Hub River Road, Karachi. It is contended that the Driver was driving the dumper in a manner which can only be described as negligent. Resultantly he collided with two persons on motorcycle namely Muhammad Sarfaraz, aged 33 years **("Victim No.1")** and Abu Bakar, aged 13 years **("Victim No.2")**. It is important to note that Victim No.1 is the ascendant of Victim No.2. The instant suit has been filed by the legal heirs of the said victims for recovery of Rs.50,400,000/-. It is further contended that the Driver managed to escape from the scene of accident and soon after the Plaintiff No.1 (father of victim No.1 and grandfather of victim No.2) lodged FIR bearing No.418/2018 **("FIR")** at P.S. Saeedabad under Sections 320/337-G/427 PPC. Subsequent to the lodging of the FIR, Defendant No.1 was arrested on 21.10.2018. However, he was extended the concession of bail vide

order dated 18.12.2018. It is further contended that the Driver only had an LTV license and therefore was not allowed to drive the vehicle which was in his possession on the date of incident. The Defendant No.2 has been impleaded by the Plaintiffs as he was the owner of the said vehicle and it is contended by the learned counsel for the Plaintiff that there is negligence on the part of the Defendant No.2 because it was the said Defendant who permitted the Driver to drive the vehicle which was beyond the scope of his license. It was further contended by the learned counsel for the Plaintiff that the victim No.1 who was doing business of spare-parts prior to his untimely demise had a monthly income of approximately Rs.50,000/- per month. Moreover victim No.2 being the son of victim No.1 was only 13 years of age and had an earning potential which cannot be quantified. However, for the purposes of the instant suit the potential earning of victim No.2 has been computed from the age of 13 at the same rate as applicable to victim No.1, by the Plaintiff. It is also contended by the learned counsel for the Plaintiff that the FIR/criminal proceedings are still pending before the relevant Court and evidence is to be recorded.

2. Diary sheet of the Additional Registrar (OS) **("AR")** reveals that on 18.10.2022, the Defendants were debarred from filing written statement. Subsequently, an application was filed bearing CMA No.16693/2022 for recalling the order passed by the AR. Interestingly the application was only filed by the Defendant No.2 (owner) and not by Defendant No.1 (Driver). The application for recalling the order of AR dated 18.10.2022 bearing CMA No.16693/2022 was dismissed by this Court vide order dated 14.11.2023. The said order was impugned in High Court Appeal No.449/2023 and interestingly the said HCA was also dismissed for non-prosecution on 17.01.2025. Therefore, there is no impediment in hearing and disposing of the instant case today.

3. Subsequent to the Defendants being debarred, a learned Commissioner was appointed to record the deposition of the Plaintiffs and this was done by the Plaintiff by filing his affidavit in ex-parte proof. The learned

Commissioner recorded the evidence on 23.12.2023 and the matter was concluded with a note by the learned Commissioner that no one affected appearance on behalf of the Defendants. Needless to mention that, despite the fact that the Defendants had been debarred from filing written statement (as noted above), they could have legally examined the Plaintiff witness and subjected him to cross examination. However, as has been the case, the Defendants chose to remain absent from the said proceedings. During the examination-in-chief the following documents were exhibited before the learned Commissioner:

S.No.	Description of document	Marked as Annexure
1.	General Power of Attorney	PW.1/2
2.	Certified copy of FIR No.418/2018	PW.1/3 & 1/4
3.	Driving license LTV of defendant No.1	Article X-1/
4.	Copy of registration book of vehicle No.TAJ-327	PW.1/5
5	Copy of charge sheet	PW.1/6
6	Order dated 18.12.2018 in Bail application No.2781/2018	PW.1/7
7	Copy of order dated 27.10.2018 in Misc. Application No.119/2018	PW.1/8
8	Verification of documents by Excise and Taxation Department	PW.1/9
9	Copy of indemnity bond dated 08.10.2018	PW.1/10
10	Copy of application u/s 114 PPC by the Plaintiff	PW.1/11
11	Copy of business card of victim No.1	PW.1/12
12	Copy of undertaking by surety of the Defendant	PW.1/13
13	Copy of indemnity bond/PR bond	PW.1/14
14	Certified copy of the undertaking given by the Defendant's surety	PW.1/15
15	Surety bond	PW.1/16

4. This incident as stated in the plaint and affidavit in ex-parte proof filed by the legal heirs of the victims is tragic to say the least. Loss of life cannot be

quantified in monetary terms. However, a scheme has been envisaged under the Act to compensate the legal heirs for the negligence and default of the wrong doer who should in essence pay damages for the injuries so caused by him. The entire scheme of this special law shall be elucidated in the paragraphs below.

5. The burden of proof in a case of fatal accident is unlike the burden which a Plaintiff ought to discharge under an ordinary civil suit and drastically different than the burden the complainant is expected to discharge in criminal proceedings. Considering the fact that the criminal proceedings in relation to the same proceedings are pending, no further deliberation on the same is warranted. Generally, in a suit for damages the burden is upon the Plaintiff to prove negligence. In cases of fatal accident this may cause hardship to the Plaintiff who in any event is bereaved. To add this additional burden to prove negligence would therefore be unconscionable and unwarranted. The honorable superior courts have over the years adjudicated that the maxim of “res ipsa loquitur” (thing speaks for itself) is applicable in cases of fatal accidents. In other words, in such a case once the Plaintiff establishes the factum of accident the burden to show the absence of negligence shifts upon the Defendant. Moreover, the Defendants in such circumstances have the onus to disprove and break the chain of causation between the accident and the ultimate death. Reliance in this regard is placed upon:

i. *Najma Parveen versus Karachi Transport Corporation*[1].

ii. *Ehteshamuddin Qureshi versus Pakistan Steel Mills Corporation*[2].

iii. *Pakistan Steel Mills Corporation Limited and another versus Malik abdul Habib*[3].

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[1] 2004 MLD 518
[2] 2004 MLD 361
[3] 1993 SCMR 848.

iv. *Punjab Road Transport Corporation versus Zahid Afzal and others*[4].

v. *Mushtari versus Islamic republic of Pakistan through Secretary Ministry of Planning and Development, Islamabad and 2 others*[5].

6. In the present case the factum of the accident is well established. The Plaintiff/s in their plaint and their affidavit of ex-parte proof have reiterated the incident and have not been cross examined by the Defendants. Moreover, the factum of the accident is not denied and it is a matter or record that criminal proceedings are already underway regarding the same incident. It is therefore held that the Plaintiffs have successfully discharged their burden (factum of accident) and there is nothing to refute the same on behalf of the Defendants.

7. The next point which requires determination is the effect of the absence of the Defendants from the proceedings. It is a well settled proposition of law that failure to examine the driver of the vehicle can only lead to an adverse presumption against him. Reliance in this regard is placed on:-

i. *Rahim Ali Palari and 2 others versus Government of Sindh through secretary, ministry of transport*[6].

ii. *Aijaz and 6 others versus Karachi Transport Corporation*[7].

8. Moreover, under Article 129 of the Qanun-e-Shahadat Order 1984 the court has the power to presume the existence of any fact it thinks likely to have happened, having regard to common course of natural events, human conduct, public and private business. In the present case the absence of the driver and the owner lead to an irresistible conclusion that an adverse presumption ought

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[4] 2006 SCMR 207
[5] 2006 MLD 19
[6] 2020 MLD 1393
[7] 2004 MLD 491

to be drawn against them. It is astonishing to note that the said Defendants, more particularly Defendant No.1, have been appearing in Criminal proceedings mentioned above and for reasons best known to them have not appeared before this Court. It is further astonishing to note that Defendant No.2 (though not arrayed as an accused in the criminal proceedings) has successfully filed an application for release of the vehicle involved in the tragic accident.

9. Whilst the loss of life cannot be quantified in monetary terms, the scheme under the Act and the law developed by superior courts sheds ample light on the matter. It is difficult and somewhat unachievable to lay down a clear cut formula for determination of damages. It will always be, to a large extent, an approximate amount and involves a significant amount of guesswork and/or assumptions. In determining the quantum of damages the court will take into consideration, amongst other things, the age of the deceased, qualifications, earning potential and health. In the present case the monthly income of victim No.1 has been computed by the counsel for the Plaintiff in the tune of Rs.50,000 per month. The said victim was a sole proprietor of a small business and details of the same have been exhibited with the affidavit in ex parte proof. In any event, the quantum of monthly income as disclosed in the pleadings is not unfathomable or exorbitant. The quantification of damages by the Plaintiffs in case of victim No.2 is roughly the same despite the fact that the said victim was a student and could potentially have a higher earning potential. The damages sought on behalf of Victim No.2 shall be granted by this court from the age the said victim ought to have attained the age of majority. The Plaintiffs have reasonably assumed the life expectancy of the victims at 65 years. In most judgments cited supra the average life expectancy was determined between 65 and 70 years. The calculation of damages (though not presented in the same manner in the plaint) are reflected in the table below:

Victim No.1	Died at age 33.	50,000 per month	Remaining life 32 years (384 months)	50,000 * 384 = 19,200,000.
Victim No.2	Died at age 13.	50,000 per month	Remaining "working" life 47 years (564 months)	50,000 * 5644 = 282,000,000
			Total	**19,200,000 + 282,000,000 = 47,400,000.**

10. The next issue which requires deliberation is whether the owner (who was not present at the time of the accident) is liable to pay for the damages sought. In this regard the doctrine of "composite negligence" has been elaborated by the Honourable Supreme Court of Pakistan in the case of *National Logistic Cell versus Irfan Khan and others*[8]. The Honourable court at Paragraph No.19 of the judgment noted as follows:

> *"By composite negligence, it means where the wrong, damage or injury is caused by two or more persons, in such cases each of the wrongdoer is jointly and severally liable to make good the loss to the claimant who suffered at the hands of such tortfeasors. It is the prerogative of the plaintiff to proceed against any or all such wrongdoers. It is not the Plaintiff who is saddled with responsibility to establish separate liability against each of the tortfeasor nor is it considered the responsibility of the court to ordinarily determine liability of each tortfeasor separately, proportionally and or independently in absence of any such issue at trial."*

[8] 2015 SCMR 1406.

11. The Defendant No.2 in the instant case was the owner of the vehicle who handed over the said vehicle to the Driver. It is also apparent that the owner was in knowledge of the Driver not having the requisite license for the said vehicle as he has himself produced the “LTV” license in the name of the Driver before the investigation officer during the course of investigation. The Honorable Supreme Court in the case of *Pakistan Railways versus Abdul Haqique*[9] held that the words *“the party who would have been liable”* in Section 1 of the Act hold great significance. The Honorable court further held:

> *“It is well established that a master is liable for any tort committed by his servant while acting in the course of his employment. The master would, therefore appear to be “a party who would be liable” within the meaning of the section. There is nothing in the text of the Act that would militate against enforcement of vicarious liability against the master for the rash and negligent act on the part of his servant.”*

12. Therefore in light of the above it is held that both the Defendants are jointly and severally liable for the decretal amount mentioned in Paragraph No.9 of the instant judgment.

13. It will not be out of place to mention that law of tort world over is used as a means for holding tortfeasors accountable for their wrongs. If consequences of human behavior and neglect are made financially painful it ought to be a source of deterrence in society. Absence of this deterrence will only result in tortfeasors committing actionable wrong/s with impunity.

14. There is nothing to contradict the contention which has been raised by the Plaintiff and I have examined the documents exhibited before the learned Commissioner and come to the conclusion that the factum of accident is

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[9] 1991 SCMR 657

established. While this Court deeply regrets the tragic accident and cannot humanly restore the victims back to life, according to the scheme of the above Act the Court can grant damages sought for. Accordingly, the suit is decreed in the sum mentioned in Paragraph No. 9 jointly and severally against the Defendants, in addition to mark up at the rate of 15% per annum from the date of filing the suit till realization. The decretal to be distributed between the legal heirs as per their respective share according to Shariah.

15. Office is directed to prepare the decree in the terms as recorded hereinabove.

Judge

Nadeem Qureshi "PA"