Karnataka High Court H.V. Narayana Rao vs A.R. Ravi And Ors. on 15 September, 2003 Equivalent citations: 2004 ACJ 271 Author: Nayak Bench: S Nayak, S Majage JUDGMENT Nayak, J. 1. A small man's problems would quite often throw greater challenges to the Judge and legal system if they were to do justice to him. The challenge brought before the court in this case relates to the question whether technicalities should be allowed to overtake the commands of justice and the dictates of good conscience of the Judge? The basic jurisprudential question throughout the ages is how can we improve the quality of justice for individual parties; how can we reduce injustice? Over the centuries, it can be seen, the main answer has been to build a system of rules and principles, precepts and concepts to guide decisions in individual cases. That is a good answer, as good for the future as for the past', if we can borrow the phrase from Kenneth, Culp Davis. Therefore, the continued development of rules and principles, innovations of precepts and concepts are both desirable and inevitable. We thought hitherto that technicality is the unfailing resource of an Indian litigant, but we also find now that the technicality has become very handy and convenient tool both for the lawyer and the judge to deny justice to crying men and women particularly those who are on the streets! If a judge tends to apply technicality at the cost of justice, termination of a legal action brought before him would be a quite easy and time-saving device; mind-boggling exercise in the decision-making can be avoided. That is the trend in dispensation of justice. The judgment impugned in this appeal reflects that trend. Therefore, it is a time to sacrifice orthodoxy in legal reasoning to secure legal justice to an aggrieved individual. Here is an attempt; undoubtedly an attempt which cannot be said to be free from criticisms. 2. The father of the deceased being aggrieved by the judgment and award dated 18.9.1999 passed in M.V.C. No. 819 of 1991 on the file of the Motor Accidents Claims Tribunal-IV, Bangalore Rural District, Bangalore, for short, 'the M.A.C.T.' dismissing the claim petition filed under Section 166 of the Motor Vehicles Act, 1988, for short, 'the Act' has preferred this appeal under Section 173 of the Act. 3. The facts of the case in brief are as follows: The appellant is the father of the deceased, H.N. Suresh by name. The deceased was unmarried. The deceased was an L.I.C. agent and was doing other works also. On 30.6.1991, the respondent No. 1 who is the Development Officer in L.I.C. under whom the deceased was working took the deceased on his motor cycle in the morning hours stating that there was some insurance work to be attended. At about 6.45 p.m. on the same day they met with an accident within the jurisdiction of the Bidadi Police Station and in the accident, Suresh died and this was informed to the appellant in the night. The deceased was aged 26 years on the date of accident and he was earning income of Rs. 5,000 per month. So alleging the appellant had filed M.V.C. No. 819 of 1991 before M.A.C.T. under Section 166 of the Act, claiming total compensation of Rs. 5,00,000. The vehicle involved in the accident is owned by the Senior Divisional Manager, L.I.C., the respondent No. 2 and the same was insured by the respondent No. 3. 4. The claim petition was opposed by the respondent Nos. 1 and 2 by filing statements of objections. In the statement of objections filed by respondent No. 1, the respondent No. 1 stated that the

deceased was his classmate in the college and they were good friends; the deceased used to come to the house of the respondent No. 1 during college days and subsequently also quite often. After the respondent No. 1 was appointed as Development Officer in L.I.C. at the request of the deceased, he appointed him as an agent on 28.6.1990 and he was attached to the respondent No. 1. Both of them used to go together on the vehicle involved in the accident to canvass for business. On 30.6.1991, the deceased persuaded the respondent No. 1 to go to Kanwa Dam and both of them went to Kanwa Dam. 5. According to the respondent No. 1 during the entire journey to Kanwa Dam he himself drove the vehicle. While returning also, up to Maddur the respondent No. 1 drove the vehicle and only after taking tiffin at Maddur, the deceased took the key of the vehicle and expressed his desire to drive the vehicle stating that he would drive the vehicle only till sunset. Despite the respondent No. 1 advising the deceased to drive the vehicle slowly, the deceased did not adhere to his advice and on the other hand, he started driving the vehicle very fast, recklessly and negligently. The repeated pleas of the respondent No. 1 to the deceased to drive vehicle cautiously and at moderate speed went in vain. At Ramanagaram, they stopped the vehicle to fill petrol and continued the journey. 6. Even after Ramanagaram, the deceased drove the vehicle most recklessly and negligently and against the repeated warnings of the respondent No. 1. When the deceased was driving the vehicle in negligent manner and when the vehicle was moving in front of the gate of the premises of the Karnataka State Small Scale Industries Development Corporation, situated in Kumbalgod, a K.S.R.T.C. bus was going ahead towards Bangalore. The deceased in order to overtake the said bus increased the speed of the vehicle despite the protest from respondent No. 1. After overtaking the hind portion of the said bus, he noticed a van coming from the opposite direction going towards Mysore in the downgradient. Realising that he could not overtake the bus and in order to avoid collision with the said van, the deceased suddenly changed the gear and applied the brakes fully. As a result, the vehicle skidded and the respondent No. 1 was thrown out of the vehicle which had fallen a few yards ahead and sustained injuries and with difficulty when he got up and looked at the deceased, he found the deceased lying on the right side of the road bleeding profusely from the ears and he also found the deceased sustaining a serious head injury. Immediately, the respondent No. 1 stopped a jeep going towards Bangalore and took the deceased to Kengeri where a private doctor declared that the deceased had already died. Respondent No. 1 was directed to take the corpse of the deceased to Bidadi at the place where the accident occurred, i.e., within the jurisdiction of Bidadi Police. The respondent No. 1 took the corpse of the deceased to the mortuary of the Bidadi Primary Health Centre and lodged a complaint with the Bidadi Police Station with regard to occurrence of the accident and death of the deceased alleging that the accident took place due to rash and negligent driving of the vehicle by the deceased himself. The Bidadi Police after the necessary investigation submitted the report to the court of the Chief Judicial Magistrate, Bangalore Rural District, Bangalore stating that as the accused himself had died, the case has abated. The respondent No. 1 also denied the age and income of the deceased

as stated by the claimant in the claim petition. 7. In the statement of objections filed by the respondent No. 2, it is contended that the motor cycle, Hero Honda CD-100, bearing registration No. KA 03-E 9799 involved in accident is the vehicle owned by L.I.C. and insured with the respondent No. 3 insurance company and it was given to the respondent No. 1 for the purpose of business of the Corporation in terms of an agreement dated 18.12.1990 produced as Annexure B. It was contended that the respondent No. 1 ought not to have parted with the possession of the vehicle to any one else in terms of the agreement dated 18.12.1990. Without prejudice to the above contention, the respondent No. 2 also contended that the compensation claimed by the claimant is highly imaginary, exorbitant and most unreasonable and that the deceased was not contributing anything for the maintenance of the claimant. 8. Although respondent No. 3 insurance company was served with notice it did not file any statement of objection and did not oppose the claim petition. 9. The M.A.C.T., in the premise of the pleadings of the parties, framed the following issues: "(1) Whether the petitioner proves that the deceased Suresh met with accident on 30.6.1991 at about 6.45 p.m. while riding motor cycle bearing registration No. KA 03-E 9799 near Kumbalagodu on Bangalore-Mysore Road and has made out actionable negligence? (2) Whether respondent No. 1 proves that the accident occurred on account of rash and negligent driving and the motor cycle was skidded as a result, the deceased succumbed to injuries? (3) Whether the petitioner is entitled for any compensation? If so, for what amount and from whom? (4) Whether respondent No. 2 proves that he is not liable for any actionable claims in terms of the agreement Annexure B? (5) What order?" 10. In support of the claim petition, the claimant himself got examined as PW 1 and examined two more witnesses as PW 2 and PW 3 and marked 9 documents as Exhs. P-1 to P-9. The respondent No. 1 got himself examined as RW 1 and marked one document as Exh. R-1. The respondent No. 2 got himself examined as RW 2 and marked a document as Exh. R-2. The M.A.C.T. having appreciated the evidence, oral and documentary, answered the issue No. 1 partly in affirmative and partly in negative, issue No. 2 in the affirmative and issue No. 3 in the negative. The M.A.C.T. in view of its findings on issue Nos. 1 to 3 did not find it necessary to record any finding on issue No. 4. Accordingly, it dismissed the claim petition by the impugned judgment and award. Hence this appeal by the aggrieved claimant. 11. We have heard Mr. K.P. Sachidananda Murthy, the learned counsel for the appellant; Mr. S.V. Subbanna, the learned counsel for the respondent No. 1; Mr. K. Srinivasa Upadhyaya, learned counsel for respondent No. 2 and Mr. D.S. Sridhar, learned counsel for respondent No. 3. 12. Mr. K.P. Sachidananda Murthy would contend that the finding recorded by the M.A.C.T. on issue Nos. 1 to 3 are totally perverse and untenable and against the law. Mr. K.P. Sachidananda Murthy would contend that the evidence on record would clearly go to show that when the accident occurred resulting in the death of the deceased, the respondent No. 1 was driving the vehicle and on account of his rash and negligent driving accident took place. The learned counsel would maintain that the M.A.C.T. is not justified in rejecting the claim petition only on the ground that in the claim petition the claimant has not

pleaded who was responsible for causing the accident. The M.A.C.T. ought to have seen that even if one goes by what is stated by the respondent No. 1 himself in his statement of objections and evidence, it would clearly lead to an irresistible inference that the respondent No. 1 himself was driving the vehicle and on account of his rash and negligent driving, the accident took place resulting in the death of the deceased and that with the connivance of the local police he hushed up the matter and did not inform the claimant in time. 13. Mr. S.V. Subbanna, learned counsel for the respondent No. 1, on the other hand, would contend that the claim petition filed by the appellant was liable to be dismissed in limine inasmuch as in the claim petition he did not attribute actionable negligence to the respondent No. 1 or any one else. Mr. Subbanna would next contend that the evidence on record would clinchingly establish that the deceased died in the accident caused due to his rash and negligent driving of the vehicle. The learned counsel for the respondent No. 2 would support the contention of learned counsel for the respondent No. 1. 14. Having heard the learned counsel for the parties, the following points arise for our consideration and decision: (1) Whether the failure of the claimant to plead actionable negligence specifically on the part of the respondent No. 1 in the claim petition filed by him is fatal and only on that count the claim petition is liable to be dismissed in limine?; (2) Whether the findings of M.A.C.T. on issue Nos. 1 and 2 are perverse and based on no evidence?; (3) If answer to point No. (2) is in the negative and actionable negligence on the part of respondent No. 1 is held to have been proved, whether appellant-claimant is entitled to compensation? If so, what will be the 'just' compensation? 15. Before dealing with the above questions, it needs to be noticed that the M.A.C.T. has dismissed the claim petition of the appellant on the ground that the claimant has not pleaded 'actionable negligence' against the respondent No. 1. The M.A.C.T. has not decided the issues relating to entitlement and quantification of compensation, etc. Point No. 1: 16. It is true that the liability to compensate in respect of an accident involving the death of or bodily injury to, a person arising out of the use of motor vehicle, or damages to any property of a third party so arising, or both arises only on a finding of negligence, when the compensation is not claimed on 'no fault liability'. In other words, the proof of negligence is a condition precedent for making the owner and the insurance company liable to pay the amount of compensation to the accident victim. Therefore, claimant should prove that the driver of the vehicle involved in the accident was guilty of rash and negligent driving. 17. A claim for compensation, whether under Section 140 or under Section 166 of the Act, shall be made by an application. The application shall be in such form and shall contain such particulars as may be prescribed. The form of application for payment of compensation prescribed by the State of Karnataka in exercise of its rule making power under Section 176 contains 22 columns. None of the columns to be filled in by an applicant deals with 'actionable negligence' specifically. Column No. 22 is residuary in nature for under that column the claimant can furnish any information that may be necessary or helpful in the disposal of the claim petition. Of course, a claimant may give the particulars of the accident constituting 'actionable negligence' on

the part of the driver of the motor vehicle involved in the accident in column No. 22. Quite often, the claimants should annex a separate statement as part of column 22 setting out the manner in which the accident occurred. We have perused the original records. In column 22 of the claim petition dated 16.8.1991 the claimant has stated thus: "The concerned officials have twisted the facts alleged in the F.I.R. to protect someone guilty. Further the deceased is an agent of L.I.C. and respondent No. 1 his Field Officer. The respondent No. 2 is the superior of the deceased and respondent No. 1 also. The records concerning the ownership and the insurer of the vehicle involved in accident are not produced by the police to the claimant. But it is confirmed orally. Hence this petition. Any more information and documents the claimant set in due course will be produced later. The claimant also prays this Hon'ble court to award no fault claim available in law also in the interest of law and justice." 18. It is true that in column No. 22, the claimant did not specifically attribute 'actionable negligence' to the respondent No. 1 but, undoubtedly, the claimant has contested the correctness of the F.I.R. filed by the respondent No. 1 by contending that the facts are twisted to protect the person who is guilty of causing the accident. The form prescribed under Karnataka Motor Vehicles Rules for the claim for compensation to the Tribunal does not require the claimant to state 'actionable negligence' against the person who caused the accident. The prescribed form is undoubtedly a poor substitute for a plaint and there could be no reason for insistence on the pleadings through its columns. In other words, the prescribed form should not be treated like a plaint and if any claim for compensation has been made it is for the Tribunal to find out whether the accident occurred on account of negligence of the driver of the vehicle involved and what compensation should be awarded on all heads for which opposite party is responsible. Application prescribed under Section 166 is not a plaint governed by the Civil Procedure Code. Column No. 8 refers to the place, date and time of accident and column No. 22 refers to information that may be necessary or helpful in the disposal of a claim. In this context useful reference may be made to the following observation of the Bombay High Court in the case of Bessarlal Laxmi Chand Chirawala v. Motor Accidents Claims Tribunal, 1970 ACJ 334 (Bombay): "Provision of Section 110-A (2) of the Motor Vehicles Act, 1939 and Rule 291 of the Rules made under Section 111-A (Bombay) in connection with application for claims for compensation and the prescribed form No. Comp. A do not require any party to be mentioned as opposite parties in the title of the application for claims for compensation. All the relevant facts are in this connection left to be ascertained by the Claims Tribunal which has been entrusted with the very serious duties of finding out all the parties who may be liable to pay compensation by recording evidence to be produced by the parties concerned. Formal defect of failure to mention appropriate names of the parties who would be liable to pay ultimately compensation to the claimant was never intended to defeat the claims filed under the Act." 19. Further, in Bhuban Chandra Dutta Gupta v. General Manager, Orissa State Road Transport Corporation, 1985 ACJ 228 (Orissa), it was held that the application for compensation under the Act cannot be dismissed only on the ground of absence of specific plea of

negligence when details of the accident are given, because, the question of rashness and negligence is an inference to be drawn from the circumstances leading to the accident, the manner in which the accident occurred and other relevant facts. 20. In this context, it is also useful to refer to the judgment of the Apex Court in Bhagawati Prasad v. Chandramaul, , where the Apex Court even in the context of Order 6, Rule 2, Civil Procedure Code has observed that if a plea is not specifically made and yet it is covered by an issue by an implication and the parties knew that the said plea was involved in the trial, then, the mere fact that the plea was not expressly taken in the pleadings would not disentitle a party from relying upon it if it is satisfactorily proved by evidence. To the same effect is the judgment of Bombay High Court in Maharashtra State Road Trans. Corporation v. Ramchandra Ganpatrao Chincholkar, 1993 ACJ 165 (Bombay). A Division Bench of this court in Basappa v. K.H. Sreenivasa Reddy, 1982 ACJ (Supp) 585 (Karnataka), held that it is for the Tribunal to find out the names of the relevant parties and issue notices to them and that the proceeding before the Tribunal cannot be treated as a suit before a regularly constituted civil court and that the Tribunal was not justified in applying the strict procedure and rules or pleadings applicable to a suit in considering the claim petitions. In Bhagawati Prasad v. Chandramaul (supra), the Apex Court has observed that it is a well established rule that where parties have gone to trial after understanding the whole case and have led evidence they cannot be permitted to deny the liability on the pretext that a particular fact was not pleaded. Above all, the Division Bench of this court in Nacharamma v. Motor Accidents Claims Tribunal, Bangalore, 1972 ACJ 360 (Mysore), held that if an application for compensation is made in the prescribed form, the Tribunal is bound to enquire into the claim and cannot dismiss it on the ground that there is no allegation that the accident was caused as a result of rash and negligent act of the respondent. In the premise of the law governing pleading for claiming compensation under the Act, we are satisfied that what the claimant has stated in column Nos. 8 and 22 cumulatively charged the respondents with 'actionable negligence'. 21. As per the F.I.R. filed by the respondent No. 1 the accident occurred on account of rash and negligent driving of the deceased himself. The correctness of the F.I.R. is specifically contested and stoutly denied by the claimant by what he has stated in column No. 22, In other words, the claimant impliedly denied the say of the respondent No. 1 and asserted that accident was not due to the deceased's rash and negligent driving. That is the only reasonable and natural way of understanding from what the claimant has stated in column No. 22 and column No. 8 if we consider them conjointly. Be that as it may, after the claimant instituted claim petition under Section 166 of the Act, the respondents fully understanding that the claimant has laid a claim for compensation against them attributing negligence on the part of the respondent No. 1 in driving the vehicle involved in the accident have gone to trial and led the evidence and, therefore, they cannot now be permitted to deny the liability on the pretext that 'actionable negligence' is not specifically attributed to the respondent No. 1 in the prescribed application. In conclusion, we hold that the claimant has impliedly attributed 'actionable negligence' to the respondent No.

1 in driving the motor vehicle involved in the accident. Alternatively, we also hold that even in the event of a claimant's failure to plead 'actionable negligence' on the part of the driver of the vehicle involved in the accident, the claim application filed by such applicant cannot be dismissed by the Tribunal. In the result, we answer point No. 1 in favour of the claimant-appellant and against the respondents. Point No. 2: 22. Point No. 2 relates to the correctness of the findings recorded by the M.A.C.T. on issue Nos. 1 and 2. At the threshold, it needs to be noticed that the facts that on 30.6.1991 at about 6.45 p.m. an accident occurred on Bangalore-Mysore Highway near Kumbalagodu and in that accident, the motor cycle bearing registration No. KA 03-E 9799 was involved and due to the accident, the deceased Suresh died, are not in dispute. Both the parties admit these facts. The only fact with regard to which controversy lies between the parties is as to whether at the time of the accident the deceased Suresh was riding the vehicle as contended by the respondent No. 1 or the respondent No. 1 himself was driving the vehicle. Unfortunately, the eyewitness to the accident were none other than respondent No. 1 and the deceased Suresh. One is not available and the other available being the respondent No. 1 is a vitally interested party in the whole episode and, therefore, no credence could be given to his self-serving testimony. It will be totally unsafe and undependable to record any finding on the basis of the oral testimony of respondent No. 1 on issue Nos. 1 and 2. Therefore, it becomes absolutely necessary for the court to take a decision on issue Nos. 1 and 2 on the basis of attendant facts and circumstances of the case and circumstantial evidence, if any, available on record. 23. Admittedly, the motor cycle involved in the accident was owned by Life Insurance Corporation of India by virtue of a hypothecation agreement entered into between the respondent Nos. 1 and 2 and the same was given to the respondent No. 1 as an officer of L.I.C. to use only for the business purpose of L.I.C. It also needs to be noticed that on 30.6.1991, the vehicle involved in the accident was in the custody and exclusive management of the respondent No. 1 himself. Therefore, it was expected of him to take care of the vehicle and drive the vehicle himself in terms of the agreement entered into between the management of L.I.C. and himself. The respondent No. 1 being a responsible and relatively a highly placed officer of L.I.C., was never expected to allow misuse or abuse of the vehicle by himself or through someone else. That was what a normal human conduct of an officer of the status of respondent No. 1 should be. If this normal conduct of the officer of L.I.C. to whom the management and custody of the vehicle was entrusted, is kept in mind and if his self-serving pleading and oral testimony is eschewed, the attendant circumstances leading to the accident speak volumes and speak loudly towards the guilt and failure of the respondent No. 1 in managing the vehicle on 30.6.1991 when the same was driven on Bangalore-Mysore Highway, resulting in the accident and the consequential death of Suresh. 24. The say of the respondent No. 1 in his pleading and testimony that at the relevant point of time the deceased himself was driving the vehicle recklessly and negligently is highly incredible and does not stand to reason and common sense. It is incredible because no normal and prudent human being would allow the deceased to drive the vehicle despite noticing his

reckless and negligent driving throughout the journey from Maddur and despite repeated warnings and cautions administered by the custodian of the vehicle. Even accepting that as a friend the respondent No. 1 allowed the deceased to drive the vehicle, after having refreshment at Maddur at the request of the latter, if the version of the respondent No. 1 were to be believed that from the beginning itself, the deceased started driving the vehicle most recklessly and negligently and with high speed, the respondent No. 1 as a prudent man would not have allowed the deceased to drive the vehicle any further. It is stated that despite the respondent No. 1 noticing most reckless and negligent driving of the vehicle by the deceased between Maddur and Ramanagaram and despite his warnings, quite curiously, allowed the deceased to drive the vehicle even after filling the fuel at Ramanagaram. These versions of the respondent No. 1 are ex facie highly incredible and seem to have been made to suit the convenience of respondent No. 1 in order to save his employment with L.I.C. and to avoid liability for causing accident taking the advantage of the situation that there was no other eyewitness to the accident. 25. Although 3 witnesses on behalf of the claimant and 2 witnesses on behalf of the respondents are examined in the trial, their testimony is totally useless to decide on the question of 'actionable negligence'. It is obviously because none of them were eyewitness to the accident. PW 1 is claimant himself, PW 2 is the brother of the deceased and PW 3 B.R. Krishna claims to be a customer of the deceased when the latter was running the stationery shop. RW 1 is the respondent No. 1 and RW 2 is the respondent No. 2. RW 1, as pointed out supra, is a vitally interested witness and, therefore, understandably his testimony has to be eschewed from the decision making. RW 2 does not say even a word with regard to 'actionable negligence' attributable either to the deceased or to the respondent No. 1 except stating that as per the agreement Exh. R-2, the respondent No. 1 was expected to use the vehicle only for business of the Corporation. In the cross-examination of PW 1 by respondent No. 2, a suggestion was made that the deceased was responsible for the accident and that suggestion was stoutly denied by the witness. Therefore, the oral evidence adduced in this case is no way helpful to decide the question whether the accident took place on account of rash and negligent driving of the vehicle by the deceased, or, rash and negligent driving of the vehicle by the respondent No. 1. In the circumstances, the court is left with no other alternative but to decide the issue relating to 'actionable negligence' after taking into account the attendant facts and circumstances of the case and the circumstantial evidence, if any, available on record. 26. The precept of 'negligence' means failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance, which the circumstances justly demand, whereby such other person suffers injury. The test of negligence lies in default to exercise the ordinary care and caution which is expected of a prudent man in the circumstances of a given case. The duty to exercise such a care and caution including reasonable use of his faculties of sight and intelligence to observe and appreciate danger or threatened danger of injury is undoubtedly on the driver of an automobile. If he fails to do so and such failure is the proximate cause of the injury or death, he is guilty of

negligence. In other words, the test is whether the driver could, by exercising normal diligence and caution, avert the accident. 'Negligence' is the omission to do which a reasonable man, guided upon the considerations, which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do. It is trite, the negligence is not a question of evidence; it is an inference to be drawn from the proved facts. Negligence is not an absolute term, but is a relative one; it is rather a comparative term. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions, which could be reasonably foreseen to be likely to cause physical injury to persons. The degree of care required, of course, depends upon the facts in each case. The tort of negligence is spread over more and more areas of tortious liability, keeping in tune with the hazards brought about by the automobile explosions and ever-increasing casualties and human pain and suffering arising out of road accidents. 27. In the tort of negligence, breach of 'duty' is the chief ingredient of the tort. In Clerk and Lindsell on Torts, 15th Edn., it is stated thus: "Carelessness on the highway. A common cause of action in negligence arises out of user of the highway. Three types of cases are involved: a duty by one user to another or his property; a duty by users of the highway to persons and property not on the highway; and a duty of occupiers or users of adjacent property to users of the highway." 28. It is not for every careless act that a man may be held responsible in law, nor even for every careless act that causes damage. He will only be liable in negligence if he is under a legal duty to take care. Therefore, it becomes imperative for the court to determine whether this crucial element of the tort exists in this case or not. Although Brett M.R. in 1883 in Heaven v. Pender, (1883) 11 QBD 503, 509, made an attempt to formulate a general principle, the most important generalisation is that of Lord Atkin in Donoghue v. Stevenson, (1932) AC 562. Lord Atkin in the said case held as follows: "In English law there must be, and is, some general conception of relation giving rise to a duty of care, of which the particular cases found in the books are instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa', is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a particular world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? Receives a restructed reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be–persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." 29. The court, therefore, in deciding whether there is a duty of care, should first ask itself whether there was sufficient 'proximity' between plaintiff and defendant. If the answer to this is in the affirmative then

the court will find a duty of care unless it is satisfied that there are considerations which ought to negate, or reduce or limit that duty. In ruling on 'sufficient proximity', the test is that of the foresight of a reasonable man. Was injury to the plaintiff, the reasonable foreseeable consequence of the defendant's act or omissions? This is what is meant when it is asked whether the duty was 'owed to' the claimant. It also needs to be noticed that the test is not one of physical proximity but of foresight. 30. In Palsgraf v. Long Island Railroad, 24B NY 339: 162 NE 99 (1928), Cardozo, C.J., observed thus: "If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be wrong, though apparently not one involving the risk of bodily insecurity, with reference to someone else. The orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty." 31. It is true, generally speaking, the burden to prove negligence lies on the claimant who alleges the negligence. But, barring exceptional cases, it may not be possible for the claimant to know what precisely led to the accident. It may peculiarly be within the means of knowledge of the driver. This hardship to the claimant can be avoided by the application of the maxim 'res ipsa loquitur' which is not a principle of liability but rule of evidence. The principle is that there are certain happenings which do not occur normally, unless there is negligence. Therefore, in the case of such happenings, claimant is entitled to rely, as evidence of negligence, upon the mere happening of such accident. 32. In this case, having regard to the kind of evidence on record and attendant facts and circumstances of the case, we are of the considered opinion that the court will be justified in applying 'res ipsa loquitur' doctrine. Negligence as a state of mind has two connotations. The first is blameworthy inadvertence to the consequences of conduct insofar as reasonable man would have adverted to them. This meaning is indirectly relevant whenever liability requires intention or recklessness in its subjective sense, for where there is so, an advertent or negligent state of mind is sufficient to found liability. The second subjective use of 'negligence' occurs in cases where the defendant adverted to the consequences and either decided to take the risk or ignored them. In the treatise of Clerk and Lindsell on Torts, 15th Edn., the learned authors speaking about different shades on the concept of negligence state thus: "In the sense of conduct, too, the term 'negligence' has different shades of meaning. In the first place, it refers to the behaviour of a person who, although innocent of an intention to bring about the result in question, has failed nevertheless to act up to the standard set by law, which is usually that of a reasonable man. This is the sense in which the term is used in the tort of negligence. It is not irreconcilable with the conception of negligence as a state of mind: they represent differences in emphasis. For, in order to visualise how the reasonable man would have behaved in a given situation it is necessary to gauge what consequences he would have foreseen in that situation and then how he would have regulated his conduct in the light of them. The pattern of behaviour thus conceived becomes the yardstick by which to measure the defendant's actual behaviour as proved in evidence. If he fails to come up to this standard, then (cases of intention

apart) he is treated as having acted negligently. Accordingly, it might be said that a person's conduct is negligent only because he has failed to foresee the consequences as a reasonable man would have done, in other words, because his state of mind was negligent." 33. In this case, we find the circumstances which prima facie point out at negligence in driving the vehicle involved in the accident at the time when the accident took place resulting in the death of the deceased. The spot sketch, Exh. P-4 and spot mahazar, Exh. P-5, themselves indicate negligence on the part of the driver of the motor vehicle involved in the accident. Since we have disbelieved the version of the respondent No. 1 that when the accident was caused, the deceased himself was driving the vehicle and held that the circumstances of the case would clearly indicate that it was the respondent No. 1 himself was driving the vehicle at the time of the accident, the only reasonable and probable inference that could be drawn is that the respondent No. 1 himself caused the accident due to his negligent driving. A presumption of law de jure assumes a fact which may or may not be true, but which probably is true. Having regard to the local conditions prevailing in this country, when 'res ipsa loquitur' doctrine is attracted, it should be given as wide an amplitude and as long a rope as possible in its application to the case of a motor accident to subserve the objectives of the Act. It is said that to maintain the integrity of law the court must suit the action to the word, the word to the action. The ingeniousness of respondent No. 1 in cleverly, carefully but, cruelly presenting a theory of accident so as to exonerate himself from the liability should be thwarted and the deprived redressed by the court, then only, the law will smile and the villain will weep. 34. The onus of proof, which lies on a party alleging negligence is, as pointed out supra, that he should establish his case by a preponderance of probabilities. This he will normally have to do by proving that the defendant acted carelessly. Such evidence is always not forthcoming in each and every case. It is possible, however, in certain cases, for him to rely on the mere fact that something happened as affording prima facie evidence of want of due care on the defendant's part by recourse to the principle of 'res ipsa loquitur'. The classic statement of Erle, C.J. in Scott v. London and St. Katherine Docks, (1865) 3 H&C 596, 601, of the circumstances in which the principle of 'res ipsa loquitur' can be applied, is quite apposite. It reads as follows: "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 from want of care." 35. The same statement was reiterated in Gee v. Metropolitan Ry., (1873) LR 8 QB 161, 175, and Southport Corporation v. Esso Petroleum Co., (1954) 2 QB 182, 201, 'res ipsa loquitur' is no more than a rule of evidence and states no principle of law. The principle 'res ipsa loquitur' is only a convenient principle to apply to a set of circumstances in which a claimant proves a case so as to call for a rebuttal from the respondent, without having to allege and prove any specific act or omission on the part of the respondent. In other words, he merely proves a result, not any particular act or omission producing the result.

If the result, in the circumstances, in which he proves it, makes it more probable than not that it was caused by the negligence of the respondent. It was said that the doctrine of 'res ipsa loquitur' is said to apply, and the claimant will be entitled to succeed unless the respondent by evidence rebuts that probability. In Benett v. Chemical Construction (G.B.) Ltd., (1971) 1 WLR 1571, it was held that it is not necessary for 'res ipsa loquitur' to be specifically pleaded. In the Treatise of Clerk and Lindsell on Torts, 15th Edn., learned authors speaking about application of the 'res ipsa loquitur' state thus: "The doctrine applies (1) when the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control; (2) the occurrence is such that it would not have happened without negligence. If these two conditions are satisfied it follows, on a balance of probability, that the defendant, or the person for whom he is responsible, must have been negligent. There is, however, a further negative condition: (3) there must be no evidence as to why or how the occurrence took place. If there is, then appeal to 'res ipsa loquitur' is inappropriate for the question of the defendant's negligence must be determined on that evidence." 36. Keeping in mind the circumstances in which the doctrine of 'res ipsa loquitur' could be applied and looking at the facts of the present case, it can be seen that the motor cycle which inflicted the damage resulting in the death of the deceased was under the sole and exclusive management and control of the defendant No. 1 in terms of Exh. R-2. The version of the respondent No. 1 that when the accident was caused, he had allowed the management of the motor cycle to the deceased, is not acceptable to us, as the same being a totally interested as well as unnatural testimony. Secondly, the respondent No. 1 ought not to have allowed the custody and management of the motor cycle to the deceased in terms of Exh. R-2 agreement. Thirdly, it is also satisfactorily established by Exh. P-4 and Exh. P-5 and the attendant circumstances that the occurrence of the accident was such that it would not have happened without the negligence on the part of the driver of the motor vehicle involved in the case. Fourthly, there is absolutely no independent evidence except the self-serving statement of the respondent No. 1 that the deceased had possessed a valid driving licence on the date of the accident. Fifthly, we find number of discrepancies and contradictions in the pleadings and the oral evidence of respondent No. 1 in narrating events preceding the accident and the steps taken by the respondent No. 1 thereafter. Truth exists or does not exist at all. 'Partial truth' is an error of expression. Since conditions (1) and (2) pointed out by Clerk and Lindsell on Torts are satisfactorily established, it follows that the respondent No. 1 must have been negligent. 37. It also needs to be noticed that in the present case, there is no acceptable evidence except the self-serving oral testimony of the respondent No. 1 as to why or how the accident took place. In the absence of such evidence the condition No. 3 mentioned by Clerk and Lindsell on Torts has no application to the facts of this case. The respondents cannot escape liability merely by preferring hypothetical explanations, however plausible, of the accident. It is trite, exclusiveness of the respondent's control depends on the probability of the outside interference. As already pointed out supra, the facts of this case show

that it was highly improbable to conclude that an unauthorised person like the deceased, could have taken the custody and management of the motor cycle involved in the accident, that too, at the displeasure of the lawful custodian. Therefore, the only permissible inference that can be drawn on the basis of the facts and circumstances of the case is that when the accident took place, the defendant No. 1 himself had the sole and exclusive management and control of the motor cycle. 38. In Richer v. A.J. Freiman, (1965) 52 DLR (2d) 32, on the need to show causation, where a child was injured on an escalator, which was under the defendant's control and management, it was held that there was nothing to show that the injury was in fact caused by the escalator. In Turner v. N.C.B., (1949) 65 TLR 580, where a haulage rope in a colliery broke when being used, a prima facie case of negligence against the colliery was raised. In Parish v. Judd, 1958-65 ACJ 123 (QBD, England), Edmund Davies, J., held that the presence of an unlit vehicle at night on a dark road where there was no street lighting was prima facie evidence of negligence on the part of the person responsible for the vehicle, and that if the matter stopped there that negligence would remain established. In E, Richley v. F. Faull, 1966 ACJ 17 (QBD, England), it was held that an unexplained and violent skid could well be evidence of negligence. In the case of General Assurance Society Ltd. v. Jaya Lakshmi Ammal, 1975 ACJ 159 (Madras), where the lorry which was negotiating a curve skidded, left the road and rolled into an adjacent pit and capsized, the doctrine of 'res ipsa loquitur' was applied. 39. The preponderance of probabilities of the case clearly leads us to infer and thereby conclude that the accident took place on account of recklessness and negligence on the part of the respondent No. 1. There is absolutely no rebuttal evidence on the part of the respondents to destroy the inference to be drawn from the attendant facts and circumstances of the case and by applying doctrine of 'res ipsa loquitur'. Point No. 3: 40. In the light of our findings on point Nos. 1 and 2, generally speaking, we would have remanded the proceeding to the M.A.C.T. to determine compensation payable to the appellant, but what dissuades us from such ordinary course is that the accident took place as far back as on 30.6.1991 and even after 12 years and more, the appellant has not received any compensation, not even the compensation under the head 'no fault liability'. Therefore, at this distance of time, it may not be proper for the court to remand the proceedings to the M.A.C.T. We also find relevant materials and particulars in the record on the basis of which we can determine 'just' compensation payable to the appellant. 41. On the date of the accident, that is on 30.6.1991, the deceased Suresh was 25 years of age and his father claimant was 59 years of age. We have taken the age of the claimant at 59 years on the basis of the fact that in the deposition of the claimant as PW 1 recorded on 18.8.1998, his age is shown to be 66 years and if that is so, his age on the date of accident should be about 59 years. In the evidence of PW 1, it is stated that the deceased was an L.I.C. agent and was working at Janata Wrappers and earning monthly salary of Rs. 5,000 to Rs. 6,000 and he was paying a sum of Rs. 5,000 for the family towards its maintenance. There is no direct evidence produced by the claimant that the deceased was earning monthly income of Rs. 5,000 to Rs. 6,000. But, admittedly he was working as

L.I.C. agent under the respondent No. 1 himself. The fact that the deceased was also working in Janata Wrappers is also not seriously disputed by the respondents. However, the claim put forth by the claimant that the deceased was earning Rs. 5,000 to Rs. 6,000 cannot be accepted as true in the absence of any substantive legal evidence to support that claim. However, taking into account that the deceased was working as L.I.C. agent as well as in Janata Wrappers, we think that it is just and reasonable to take the monthly income of the deceased at least at the rate of Rs. 4,000. If the income of the deceased is taken to be Rs. 4,000 per month and 50 per cent of the same is deducted towards personal expenses of the deceased, the monthly loss of the dependency would be Rs. 2,000. The claimant father was aged 59 years on the date of the death of the deceased. Therefore, the appropriate multiplier to be applied is 10. Thus the total loss of dependency will be Rs. 2,40,000 (Rs. 2,000 x 12 x 10). In addition to loss of dependency, the claimant is also entitled to compensation under conventional heads, such as, 'loss of filial love and affection', 'loss to the estate' as well as for the 'funeral expenses'. Having taken into account the facts and circumstances of the case, we award a sum of Rs. 10,000 towards loss of filial love and affection, Rs. 15,000 towards loss to the estate and Rs. 10,000 towards funeral expenses. 42. In the result and for the foregoing reasons, we allow the appeal in part and set aside the judgment and award passed by the M.A.C.T. and award total compensation of Rs. 2,75,000 with interest at 8 per cent per annum from the date of petition till realisation. The respondents are directed to deposit the compensation money within one month from the date of receipt of a copy of this judgment and award and on such deposit being made, the appellant-claimant is entitled to withdraw a sum of Rs. 1,50,000 and balance compensation money shall be kept in a fixed deposit initially for a period of three years in Vysya Bank Extension Counter, High Court Building, Bangalore and the appellant-claimant is permitted to withdraw the interest accrued thereon, once in every six months.