IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 21 OF 2018
(High Court Civil Action HBC No: 207 of 2012)

BETWEEN	**:**	**JAN MOHAMMED SAKUR**
		Appellant
AND	**:**	**SAVENACA TABILAI & SINATE TABILAI**
		1st Respondent
AND	**:**	**SAVENACA (JNR) TABILAI**
		2nd Respondent
Coram	**:**	**Basnayake JA** **Lecamwasam JA** **Dayaratne JA**
Counsel	**:**	**Mr. D. Singh for the Appellant** **Ms. P. L. Narayan for the Respondents**
Date of Hearing	**:**	**16 May 2019**
Date of Judgment	**:**	**7 June 2019**

JUDGMENT

Basnayake, JA

[1] I agree that this appeal should be dismissed without costs.

Lecamwasam, JA

[2] This appeal is filed by the Appellant being aggrieved by the judgment of the learned High Court Judge at Suva, dated 9th March 2018. As the learned High Court Judge has provided a lucid description of the factual background I prefer to adopt the same which is as follows:-

> ***BACKGROUND***
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> *"1. The Plaintiff instituted action for damages due to motor accident. The Plaintiff is presently 81 years old and he had met with an accident while crossing a wide road before a busy intersection of road at Samabula after 8 am on a week day. According to the Plaintiff he collided with a vehicle as soon as he got to the road from the pedestrian walkway. The Plaintiff was not able to explain how the accident happened, to impute negligence to the 2nd Defendant. The witness called by the Plaintiff said that he had seen the accident, but his evidence not only contradicts with the facts of the case, and also with Plaintiff's evidence materially. According to him the Plaintiff had collided with the driver's side of the vehicle. The manner in which accident happened and, place of the accident and other material evidence for the proof of the Defendant's negligence are not proved on balance of probability. The Defendant in his evidence stated that Plaintiff had collided on the side of the vehicle near the mirror of the passenger side in the middle of the road on the inner lane of four lane road. The burden of proof is with the Plaintiff to prove negligence of the Plaintiff on balance of probability".*
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> ***FACTS***
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> *2. Following facts are admitted in the Pre-trial Conference Minutes.*
> *Plaintiff*
> - *a. The Plaintiff was born on 20th December, 1936.*
> - *b. He was 74 years old at the time of the accident.*
> - *c. The Plaintiff has been a shareholder and Director of two commercial establishments dealing with motor parts and sale of used cars.*
> - *d. The location of said commercial entities are situated at Samabula.*
> - *e. 2nd Defendant is the son of 1st Defendant.*
> - *f. 1st Defendant is the registered owner of vehicle Registration No. EG 491.*
> - *g. On 10th September, 2010 the 2nd Defendant was driving the 1st Defendant's vehicle along Ratu Mara Road, heading towards Suva.*
> - *h. On 10.9.2010 the vehicle driven by the 2nd Defendant and Plaintiff collided and Plaintiff was injured.*

[3] Having heard the case, the learned Judge dismissed the action which gave rise to the instant appeal. Following grounds of appeal have been preferred by the Appellant:-

"That the Learned Trial Judge erred in law and in fact in holding that:-

1. *Negligence on the part of the Appellant/Plaintiff is more considering that he was already 74 years old and had also gone through a major operation in heart and had already developed weakness in sight and also hearing. These are vital senses for protection of a person and when they are weak, such a person should always take special care of himself"; when there was clear evidence to the contrary adduced at the Trial.*

2. *The Learned Trial Judge erred in law and in fact in emphasizing the negative aspects of the Appellant/Plaintiff's 2nd witness when this particular witness corrected his earlier evidence on how the accident happened when answering specific question by the Trial Judge at the end of his evidence in Court.*

3. *The Learned Trial Judge erred in Law and in fact in holding the Appellant/Plaintiff's evidence that he collided with the driver's side of the vehicle contrary to evidence and interference adduced at trial.*

4. *The Learned Trial Judge erred in law and in fact in not finding or drawing an inference that the fact that the accident had happened and was admitted by the 1st Respondent/1st Defendant was either attributed to or contributory negligence on the part of the 1st Respondent/1st Defendant as averred in the Statement of Defence.*

5. *The Learned Trial Judge erred in Law and in fact in holding that the behavior of the Appellant/Plaintiff and the eye witness to the accident lends credence that the 1st Respondent was not at fault contrary to evidence adduced at Trial and reasonable objective inference as to how and why the accident happened.*

6. *The Learned Trial Judge erred in Law and in fact in not applying the case of Fardon v Harcourt – Rivington (1932) 146 LT 391, at page 392 and Sun Insurance Company Ltd v Qaqanaqele [2016] FJCA 123; ABU 35 of 2013 (30 September 2016) cited in the submissions of the Plaintiff and the evidence in the 1st Respondent/1st Defendant to specific questions directed to him on cross-examination and his evidence at the Trial which were contrary to his pleaded Statement of Defence.*

[4] In view of the evidence unfolded before the Learned High Court Judge, it is incumbent for me to ascertain the presence of negligence on the part of the second respondent which

is sufficient to impute liability to him. In the alternative, it is necessary to arrive at a conclusion on the evidence available before this court as to the presence of contributory negligence on the part of the appellant, in determining whether the learned High Court Judge erred or not in his judgment.

[5] The appellant states he was on his way to the mosque at the time the accident occurred. The occurrence of the accident itself and the fact that the vehicle was driven by the second respondent are admitted facts at the pre-trial stage. As the accident had occurred around 8 a.m on a week day at Samabula junction, it can safely be presumed that it was a busy time of the day with many vehicles on the road. The only witness of the Appellant, Salato Bulisese also admitted *"that there was a queue of vehicles coming from Nausori to Suva*" which indicates that it was not possible for a vehicle to drive fast in view of the number of vehicles ahead of the vehicle of the second respondent. Under cross-examination by Mr Narayan the witness further stated that the vehicles were moving at a slow pace. (at page 101 of the HCR)

[6] Against the above background the learned High Court Judge in his analysis has exhaustively dealt with the various aspects of the incident. The Appellant called only one witness. Even in that limited evidence there were contradictions and inconsistencies in relation to vital points such as whether the appellant collided on the right or the left side of the car. The witness has taken two contradictory positions as to the collision and as to the spot at which the accident occurred. Once he said "*it was the left tyre which hit him"*. At a subsequent point he states that it was the driver's side that hit the appellant. Therefore, it is clear that he has contradicted himself on a vital point leaving the court in the dark as to whether the appellant was hit on the right or the left side. Unfortunately therefore, I have to conclude that it is not safe to rely on the evidence of the witness in deciding the side on which the appellant collided with the vehicle. This also jeopardizes the veracity of the rest of his evidence.

[7] There is no conclusive evidence to show that the second respondent was driving at an excessive speed, which would have amounted to negligence on his part. Evidence makes it apparent that the driver had stopped the vehicle on the exact spot of colliding with the appellant and had got out to take the appellant to his car. Had he been driving at an excessive speed he would have shot ahead by at least a few meters before being able to bring the vehicle to a halt. Hence, attributing negligence to the driver (the second respondent) on the basis of excessive speed cannot be sustained.

[8] Therefore, while it is admitted that the second respondent was the driver of the vehicle involved in the accident in question, the appellant has not established negligence on the part of the respondent in order to succeed in his appeal. The learned Judge in his judgment has meticulously analysed the evidence and has come to the correct conclusion.

[9] Hence I find that the learned Judge has not erred. Although the appellant has cited two authorities under Ground 6 of the grounds of appeal, the first case cited, that is *Fardon – v- Harcourt – Rivington* (1932) 146 LT 391 has no bearing to the instant case. However, the *Sun Insurance Company Ltd v Qaqanaqele [2016] FJCA 123; ABU 35 of 2013 (30 September 2016),* which was at my disposal to peruse through other means, considers an accident involving a child of five years. The case at hand involves a mature adult of the age of 74 and the Managing Director of a company still engaged in his day to day work. It is therefore not possible to grant a similar concession as which was granted to a child.

[10] Although the learned High Court Judge attributed the accident to the appellant's old age, weak eye sight, and hearing, I cannot agree with that proposition. The evidence suggests the appellant continues to be engaged in business activities and takes part in a game of tennis once in a while. Hence it is prudent to consider him an active man, whose own carelessness caused the accident and cannot be imputed to his advanced age or any associated physical impairment.

[11] The appellant's carelessness has been aptly revealed in the available evidence which have not been disputed. In his haste to reach the mosque, he has unheeded basic pedestrian safety precautions, opting to take a short cut through one row of vehicles to enter the second lane ignoring the well traversed pedestrian crossing in the vicinity. It could therefore safely be concluded that the appellant had rushed in to the path of the second defendant causing the accident.

[12] Although the appellant states in evidence that he was thrown in the air, his only witness does not corroborate this fact. His only witness's evidence is contradictory to the evidence of the appellant especially in regard to the spot of the impact on the road as well as regards the vehicle. The appellant states he was able to walk only a few steps before colliding with the car. On the contrary, the witness had stated that the appellant had walked across the first lane of traffic and was waiting on the middle of the road at the time of collision. Had he been waiting at the middle of the road, the impact could not have been on the driver's side but certainly on the left side of the vehicle. These contradictory versions of evidence do not lend credence to the appellant's version of the unfolding of events.

[13] In this regard, the evidence of the appellant's witness is per se inconsistent and contradictory. Therefore, it is not safe to attribute liability to the second defendant on the weak evidence available.

[14] In his submissions, the learned counsel for the appellant referred to jay walking as commonplace in Fiji. If the blatant disregard for pedestrian safety measures is condoned by this court by allowing the appeal of the appellant, it will be a free pass for other individuals to flout the law. The authorities in this case need not waste public resources and their energy in facilitating safe pedestrian crossings and promulgating laws akin to thoroughfare and highway laws.

[15] The learned High Court Judge had judiciously analysed the evidence before him in arriving at his conclusion. Therefore, I find little reason to interfere with his findings. I affirm the judgment of the learned High Court judge and reject the grounds of appeal for the following reasons:

Ground 1:

I have dealt with this aspect and disregarded the age of the appellant and other alleged witnesses for the reasons stated above.

Ground 2:

As no evidence is available to support this contention, the learned judge's comments remain relevant and for such reason I reject this ground of appeal.

Ground 3:

I reject this ground for the reasons I have stated elsewhere in this judgment.

Ground 4:

I reject this ground as it was the negligence of the appellant which contributed towards the accident.

Ground 5:

The learned Judge was well within reason to arrive at the said conclusion on the evidence available before him. Therefore I reject this ground of appeal.

Ground 6:

While ***Fardon v Harcourt – Rivington*** *(1932) 146 LT 391* was not available for perusal I have distinguished between ***Sun Insurance Company Ltd v Qaqanaqele*** *[2016] FJCA 123; ABU 35 of 2013 (30 September 2016)* and the case at hand above. I do not find the judgments related to the matter of damages cited by the appellant in his written

submissions relevant to the case at hand, as the question of damages would only have arisen if the defendant was found to be liable. I reject ground 6 on this basis.

Dayaratne, JA

[16] I agree with the reasons given and the conclusions arrived at by Lecamwasam JA.

Orders of the Court:

1) *Appeal dismissed.*
2) *No costs.*

Hon. Justice E Basnayake
JUSTICE OF APPEAL

Hon. Justice S Lecamwasam
JUSTICE OF APPEAL

Hon. Justice V Dayaratne
JUSTICE OF APPEAL