IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0068 OF 2016
ABU 0006 OF 2020
[High Court at Lautoka Case No. Civil Action 165 of 2014]

BETWEEN : **JAGDISH KUMAR**

Appellant

AND : **RAM KRISHNA**
PREM KRISHNA

Respondents

Coram : **Lecamwasam, JA**
Jameel, JA
Gunawansa, JA

Counsel : **Mr. S. Nandan for the Appellant**
: **Mr. R.Singh for 1st & 2nd Respondents**

Date of Hearing : **5th September, 2022**

Date of Judgment : **30th September 2022**

JUDGMENT

Lecamwasam, JA

[1] I agree with the reasons given, the conclusions reached and the proposed Orders by Jameel JA.

Jameel, JA

Introduction

[2] This is an appeal from the judgment of the High Court dated 2 May 2016, whereby the court dismissed with costs summarily assessed at $2000.00, the Appellant's claim for damages in a case of personal injury and losses suffered by him as a result of a road accident that occurred on 21 March 2014.

[3] By Statement of Claim filed on 14 October 2014 the Appellant pleaded that on 21 March 2014 he was driving his vehicle DU 090, when the 1st Defendant who was the servant or agent of the 2nd Respondent, drove the 2nd Respondent's vehicle No EE552, negligently and caused the said vehicle to collide with the Appellant's vehicle, causing injury to him and damage to his vehicle. He claimed that the 2nd Respondent was vicariously liable for the loss and damage caused to him and claimed general damages, special damages, and costs.

[4] In the Statement of Claim, the Appellant had set out the particulars of negligence of the 1st Respondent, the particulars of injuries suffered by him, the medical treatment he had received, the pain and suffering he had undergone and will continue to suffer, particulars of disabilities as a result of the accident, particulars of loss of income, costs of repair to his vehicle that was damaged as a result of the accident, and special damages. He pleaded that he had suffered severe personal injuries and relied on the doctrine of *res ipsa loquitur*.

[5] In their Statement of Defence, the Respondents admitted only the accident, that the 2nd Respondent was the owner of the vehicle and that the 1st Respondent was the driver and drove as the agent of the 2nd Respondent. They denied negligence, claimed that the Appellant drove at an excessive speed and failed to control the vehicle at the time of the accident. They also denied that the 1st Respondent was charged for careless driving and that the Appellant had suffered severe personal injuries, or loss of income for the period specified in the claim and costs of repair to the Appellant's vehicle. The Respondents pleaded that the Appellant's claim was an abuse of the process of court, was frivolous, vexatious and scandalous and did

not disclose a cause of action against the Respondents and moved that the action be struck out and dismissed with indemnity costs.

The Proceedings in the High Court

[6] By Order of 29 June 2015, the Pre-Trial Conference was dispensed with. Six witnesses testified for the Appellant, and two witnesses testified for the Respondents. Several medical Reports, photographs and other documents produced in evidence were admitted. Finally, the learned trial judge found that the Appellant's evidence that he sustained injuries as a result of the accident "*has little value"* and dismissed the claim in its entirety.

The Appellant's evidence

[7] The Plaintiff testified that his place of work was Tavua, on 21 March 2014 about 10 a.m. he was driving his car on a straight road when, suddenly the car driven by the 1st Respondent came into his path from the left side, in order to avoid a collision he moved towards the centre of the road, but the 1st Respondent continued to come towards his car, and then collided twice on the left side of his car. The windscreen, bumper, bonnet and rear -view mirror of his vehicle were damaged as a result of the collision. The car driven by the1st Respondent rolled down and went into the footpath, hit a post and halted there. As a result of the collision, the Appellant was thrown about and jolted inside his car injuring his forehead and right leg, but most of the injury was felt on the left side of his abdomen. He was wearing a seat belt at the time of the accident. He felt the pain after the impact of the accident, he maintained that he had never before had his stomach checked for any illness. When asked whether he could have had a problem in his stomach which he did not know about because he had never undergone a medical check-up or been checked, he responded that he had no reason to have himself medically checked, because he had never had any type of pain in his stomach before the accident occurred. His office was not far from the scene of the accident.

[8] After the accident his colleagues took him to office, but since he was suffering from pain, they took him to the Tamuva Hospital, where he was treated and released around 4.30 p.m. on the same day. Upon admission, Dr. Ilikena Malo ("***Dr. Malo"***) He was given an injection, ointment for the injury and an x-ray and an ultrasound scan were done. Dr. Malo took his medical history. His wounds were treated with ointment, bandaged, and he was discharged. Dr. Malo told him that the wounds would heal, and that the blood would be absorbed, but if it did not, they would operate on him.

[9] The wounds on his body used to bleed at night and his wife had to bandage them whenever he could not go to hospital. The wound was not sutured and had to be dressed regularly. Tavua Hospital was more than 30 kilometers one way from his home, so he had to hire a vehicle to travel. On 25 March 2014, three days after the accident, the Appellant continued to be in severe pain, and consulted Dr. Malo who ordered an x-ray and suggested that the Appellant would have to be operated. The Appellant testified that during the period of three months when he was undergoing treatment, he suffered loss of income. He testified that he also engaged in farming by cultivating rice and vegetables, his average weekly income from the farm was $1000.00. Prior to the accident he used to personally attend to work on the farm during the weekends but was unable to do so after the accident.

[10] In May 2015, that is more than one year after the accident, he was referred to Dr. Taloga's Orthopedic Clinic. He met Dr. Taloga, who told him that he had been referred to him by New India Insurance Company, Dr. Taloga did not have with him the Medical Report prepared by Dr. Malo, therefore the Appellant volunteered a copy. He asked Dr. Taloga whether he would examine him, but Dr Taloga replied that he was seeing him only for an assessment, he was not going to provide an opinion and would not examine him. He only wanted to see the place of the injury, which he did from a distance, although he never actually touched the Appellant to examine him. When he asked Dr. Taloga whether it was ethically correct to not examine him, he had responded angrily.

[11] When the Appellant was cross examined closely about his 'preference' for Dr. Malo and his travelling a long distance to consult him, instead of using the Ba Mission Hospital which

was closer to his house, he maintained that he continued to see Dr. Malo because he was the Doctor who treated him upon first admission and he was satisfied with the treatment he received. The Appellant had also been referred by Dr. Malo to Dr. Rajend Ganeshwar, an experienced doctor, at the Lautoka Hospital, and the latter had confirmed Dr. Malo's findings. The learned trial judge did not consider this evidence.

[12] Witness Fathima Nisha was the second witness for the Appellant. She had known the Appellant both as a friend and as a lawyer. When he lost the use of his vehicle due to the accident, she had lent him her vehicle for about a month, for the use of which the Appellant had given her $1000.00.

[13] The third witness for the Appellant was Police Officer Deepak Rajneel Sami, who was attached to the Traffic Branch of the Tavua Police Station when the accident occurred, and went to the scene, took measurements and drew a sketch (which was marked MF1). He testified that the Appellant had been driving from Nasivi Street, and the 1st Respondent had approached Nasivi Street, and therefore the vehicle driven by the Appellant had the right of way. There was a stop sign and road marking indicating same, therefore, the 1st Respondent was supposed to have stopped at the junction. From the extent of damage that been caused to the vehicles, it was his opinion that it was the 1st Respondent who did not stop when he had to, and that is why it was more damaged than the vehicle driven by the Appellant, who had tried to avoid a head-on collision. Due to the impact the vehicle driven by the 1st Respondent had rolled back and was on the pavement, the vehicle driven by the Appellant was parked exactly on the center line.

[14] Witness Hari Prasad, who testified on behalf of the Appellant was a farmer. He had worked for the Appellant and also supplied labourers to the Appellant's farm. He worked five days a week for the Appellant and was paid $15.00 per day. The Appellant used to work alongside him on weekends but could not do so after the accident.

[15] Witness Sharma Lal a Tractor driver testified that in 2014, he used his labourers to harvest rice from the Appellant's farm and he drove the tractor on the Appellant's farm and was paid $500.00 per day.

[16] The Appellant's wife Shantha Kiran testified that the time of the accident, they had been married for 31 years. The Appellant was badly hurt on the left side of his body because of the accident. After the accident, he underwent medical treatment, was on painkillers and did not go to work for three months. He had pain on the left side of his body and could sleep only on his right side. She had to clean and bandage the bleeding wounds during the daytime as well as at night, and when he was in severe pain, she took him to hospital to dress the wounds. Prior to the accident the Appellant did not suffer any illness, he had gone through a general body checkup in Suva before and was found to be normal. The witness categorically denied the suggestion that the Appellant had a pre-existing condition and stated that he had no illness until the medical reports done after this accident revealed he was ill.

Evidence of Dr. Malo

[17] Dr. Malo, who testified on behalf of the Appellant was the Medical Officer on duty at the Tavua Hospital when the Appellant was admitted. He was 27 years old at the time when he testified and had been one year in practice when he testified. He saw the Appellant on admission and recorder his history.

[18] Three days after the accident, that is on 24 March 2014, Dr. Malo examined the Appellant and observed that the x-ray that was done on 21 March 2014 at Tavua Sub-Divisional Hospital, revealed that there was a c*ystic structure* in the left lumbar region about 2.8cm by 2.6 cm with internal arcoes in the abdominal wall. The evidence in this regard was as follows:

> *"Q: Now witness can you tell the court from that report you have there in front of you what was the finding, how did you determine that, finding of your D15 of the Medical Report Form?*

A: The findings were noted by the noted *by the ultrasound technician as she had written in her report in the last two sentences of the report which I have read word by word previously.*
Q: What has she written?
A: A Cystic structure noted in the left lumbar region approximately 2.8 x 2.6 cm with internal arcos in the abdominal wall.
Q: Now what about the other scan reports you have?
A: The other scan was to follow up whether the mass was still present, or it has spontaneously resolved over the course of time.
Q: Can you tell the court what Cystic mass is?
A: A cystic mass is a radiological description of how something appears whether there are two contrasts in which one is solid and another one is in liquid form.

Q: Which form is Mr. Kumar having?
A: The cystic mass is present in both the solid as well as the liquid form in which the solid surrounds the liquid form of the mass.
Q: What can be the causes of this?
*A: With clinical cordless (*sic*) and as to what has happened one would think of trauma and another could be a hematoma formation in which there is rupture to the blood vessels around the area concerned.*
Q: Talk about hematoma, now what's the difference between hematoma and cystic mass?
A: A hematoma is a collection of blood outside the blood vessels as I mentioned before that cystic mass is how it appears on the ultra sound scan. So, upon doing an ultrasound scan over a hematoma, it would appear as a cystic mass.
Q: How long does it take to form?
A: A hematoma can be formed as soon as the injury occurs from seconds to minutes.
Q: What about cystic mass?
A: A cystic mas can depend on where the organ is affected.
Q: Now in this case where is Mr. Kumar's hematoma located?
A: It is located on the left lumbar region of the abdomen.
Q: what does it have inside?
A: The hematoma is the blood clot that forms as I have explained before outside the blood vessels and usually just form like a huge blood clot.
Q: So what would be the level of pain on a scale of 1-10 encountered by Mr. Kumar if the hematoma was..just describe the pain on a scale of 1-10, 10 being the greater 1 being the less?

A: I will have to say that the pain scale is different for difference tolerance as for different people, for the ones that he had which is the hematoma collecting within the abdominal wall they will have to be between 6 to 8 on a scale of 1 to 10."

[19] On 24 March 2014, Dr. Malo referred the Appellant so that he could attend an outreach clinic or any other clinic apart from Tavua Hospital. His testimony in this regard was as follows:

"Q: What is noted on the referral?

A: On the referral I had written my presenting complaint in which the 54 year old man was presented with a left flank pain as he was involved in a motor vehicle accident on the 21st and had developed sudden pain on the left flank area in which the ultra sound scan also showed us a cystic mass and I had also noted that my management initially on the day of initial presentation on the 21st where I had sent the patient home on pain killer and for re-scan on 25th of March."

[20] Dr. Malo testified that he prescribed Paracetamol, Ibu Profen and Dyclophenac, which is an analgesic for pain relief. He testified that scans were done on 21 March 2014, 3 April 2014 and 3 September 2014. The scans showed that the mass was getting progressively bigger.

[21] Dr. Malo testified that his attempt to aspirate and remove the mass on 14 April 2014, was unsuccessful, so he released the Appellant with pain relievers, and then reviewed him three days later. Even then the mass had not drained out on its own, so he made a cut of approximately 2 cm just beneath the skin, and he opted to leave the wound open for it to drain out. The incision was made approximately 3 cm from the surface of the skin, it was done being conscious of the need to protect the muscle under the skin. It was only necessary to incise and remove the hematoma, not to reach the muscles. He said that if the structure was still inside then it could form an infected hematoma which could lead to sepsis, and result in the patient feeling pain for months. Dr. Malo had advised the Appellant to seek a second opinion, he reviewed him after the second attempt failed, and the open wound lasted three months, and even after three months the scan showed the same result.

[22] In Dr. Malo's Medical Report dated 30 January 2015 which was tendered in evidence. Dr Malo had ordered an ultrasound scan on 6th October 2015. In this report, under the heading

of "Radiology Report", was "*previously noted cyst inferior abdominal wall measuring3.1x 3.5-well defined outline with internal arcos. no paradoxical movement.*

[23] Dr. Malo testified that the most common causes of hematoma are an injury secondary to a trauma, and the usage of certain types of medication which prevents blood from clotting, this could lead to any form of injury on any part of the body causing the collection of blood outside the blood vessels.

[24] When questioned whether the hematoma would have been present, prior to the accident he responded that if the hematoma was a pre-existing condition, the patient would have complained of pain in the area prior to the accident and would have obtained medical treatment. He testified that the hematoma was consistent with the impact suffered as a result of the motor vehicle accident. The Appellant had consulted Dr. Malo seven times, and he advised him and prescribed medication, and at the time Dr. Malo testified the Appellant was still on medication.

[25] In cross -examination Dr. Malo maintained that there were no visible injuries when he first saw the Appellant. He admitted that if the Appellant had a pre-existing cystic mass, he would not be able to detect it from just looking at the patient externally. It was his view that engaging in farming and physical activity would not contribute to the formation of a cystic mass, unless he was already on prescribed medication such as blood thinners which may contribute to the formation of a cystic mass.

[26] Dr. Malo rejected the suggestion that his initial history- taking of the patient indicated that the cystic mass was pre-existing. He testified that the pain felt by the patient could not indicate the existence of a cystic mass, the cystic mass was discovered only upon the ultrasound scan being done on admission, the Appellant felt pain when in the seated position, and there was no pain emanating from a cystic mass. It would have radiated pain only if the cystic mass had grown large enough to cause inflammation within the surrounding tissues that the mass had invaded, and that a cyst takes time to grow. He maintained that a cyst could

not have been formed in one day on the date of the accident, it was a hematoma, which matched the clinical symptoms, shown on admission.

[27] With a view to establishing that there was a pre-existing cyst or condition prior to and unrelated to the accident, in cross-examination it was sought to impeach Dr. Malo's credibility as a witness, and he was questioned repeatedly about the difference between a cyst and a cystic structure. I observe from the proceedings that before Dr. Malo could respond completely to the question asked, he was interrupted, and the next question was put to him.

[28] Dr. Malo was questioned as follows on the Report of Dr. Taloga, a Consultant Orthopaedic Surgeon, who had seen the Appellant in his clinic, on behalf of the 2nd Respondent's insurer, over a year after the accident. The testimony was as follows:

> *"Q: And he is considered one of the best in Fiji?*
> *A: Yes, sir.*
> *Q: And normally his findings accurate?*
> *A: Yes.*
> *Q: And when he says that the accident is pre-existing to the injury would you believe him?*
> *A: If he had examined my patient, yes.'*
> *Q: If he saw the scans and everything regarding the cyst or the medical reports, because he knows better, would you agree?*
> *A: Yes.*
> *Q: And there is no permanent impairment from the date of the accident itself?*
> *A: Yes, currently there is no permanent impact, except for the pain.*
> *Q: Which is caused by that cyst?*
> *A: Yes."*

[29] In re-examination Dr. Malo testified that the finding on the Radiology Report dated 6 October 2015, was written by the Radiographer who has stated that there was a cyst in the abdominal wall measuring 3.1 x 3.5 cm well- defined outlined with internal arcos. Dr. Malo testified that the Radiographer would not be able to identify the difference between a hematoma and a cyst, the Radiology Department of the hospital diagnosed only a hematoma which is a cystic mass, a cystic mass is different form a cyst, a cystic mass is a formation of mass which is solid on the outside and has fluid inside, the most common type of cyst would

be one next to a sweat gland. Dr. Malo maintained that the reference to '*cystic mass'* was a Radiographer's or radiological description of the *appearance* of the mass.

[30] Dr. Malo was seeking to show the difference between a Radiographer and a Radiologist's findings. However, this distinction was not considered by the court. In my view, the description given by the Radiographer was not a conclusive finding that could have in any way restricted Dr. Malo's diagnosis that a hematoma resulted from the accident. Dr. Malo clarified that in his description in the Report he wrote hematoma /cyst, to differentiate one from the other.

[31] When asked about the fact that Dr. Taloga's diagnosis differed from his in regard to whether it was a cyst or a hematoma, Dr. Malo said he would maintain his own findings since he had physically examined the patient from the first day, he reiterated that a Doctor can arrive at a conclusion only after he has taken the history, has physically examined the patient, and seen all the investigation results, as opposed to only reading a report and arriving at a conclusion or diagnosis, which is what Dr. Taloga did.

<u>The evidence of the Respondents</u>

[32] The 1st Respondent Ram Krishna testified that he was driving vehicle EE552 a Toyota Hilux, on 21 March 2014. His evidence reveals that he drove without a proper view of the road ahead of him.

> *"Q. And this is where the junction of Leka Street, did you stop at the junction?*
> *A: Yes, I overtake the rubbish truck and went and stop at the junction and on the main highway one lorry was parked there. The lorry was blocking my way I was not able to see clearly as I tried to move my vehicle with a right hand signal and first gear I move my vehicle. When I move my vehicle in front the other vehicle came from the other side and hit the face of my vehicle"."*

The evidence of Dr. Taloga

[33] Dr. Taloga testified for the Respondents. His evidence is contained in pages 402 to 410 of the copy record. The heading "*re-examination*" on page 405 of the copy record is a typographical error and must be regarded as cross-examination.

[34] Dr. Taloga testified that he is a Consultant Specialist Surgeon in charge of the Orthopedic Department of the CWM Hospital, and Suva Private Hospital. He had graduated in 1989 and had been a registered specialist for 20 years. He said he had examined the patient, prepared a Medical Report based on the Report that the Appellant gave him. The Appellant had brought copies of the Fiji Police Medical Examination form dated 24 March 2014 (completed by Dr. Malo), a Medical Report from Dr. Malo dated 30 January 2015, and copies of ultrasound scan reports dated 21 March 2014 and April 2014.

[35] In the course of the proceedings, Dr. Taloga was shown the ultrasound scan of 3 April 2014 which stated 'cyst noted approximately value of 2.9x 2.9 x 8 cm". The relevant evidence was as follows:

> "*Q: And what happened when you examined him?*
> *A: From the history and what he was giving based on the report the symptoms that his got its like the exaggerated symptoms based on what has been previously reported as a cyst and report by medical officer'*
> *Q: Sir, in your report he was showing crucial signs of pain what. Do you have to say about that?*
> *A: Basically when you try to touch him on the skin, he withdraws and says painful even touching the skin.*
> *Q: Did he show cause for his complaint?*
> *A: No, based on the cyst its actually that size the symptom and complains is very much out of proportion.*
> *Q: How much pain usually there, if you can describe?*
> *A: Cyst is only that small usually not painful.*
> *Q: The cyst which we talking about Kumar has?*
> *A: Yes*
> *Q: And in your opinion would a cyst be formed by an accident?*
> *A: You can have hematoma is a collection of fluid or blood, but not a cyst. A cyst has to have a wall and it takes time to develop.*
> *Q; A hematoma takes how. Long to heal?*
> *A: Bruise is basically blood within body, hematoma is a collection of the blood.*

Q: And when does it subside?
A: It depends on the size, it will take time;
Q" But de he show signs of hematoma?
A: No, there was no bruising. I couldn't appreciate any swelling or any lump so I couldn't appreciate any cyst."

[36] Dr. Taloga was asked whether he paid attention to of the pain relievers that had been prescribed by Dr. Malo, which was reflected in the Report of Dr. Malo, to which Dr. Taloga replied that the Appellant had told him that he was, at the time taking Brufen thrice a day, but when he asked him to show him the tablets, the Appellant did not physically have the medication with him. This was reflected in Dr. Taloga's report dated 26 June 2015. His testimony on this point was as follows: -

"Q: Now Dr. my client came to you with a report from Dr. Maland in that report it was written on the last page the pain relievers he had prescribed to Mr. Kumar.Did you take notice of the pain relievers that my client was taking at that time from that report?
A: What we get at that time patient was taking Bruefen tablets that's what he told me so I have asked him for evidence because he told me that he is taking it 3 times a day. So, I have asked for evidence to show mem the tablets taking. But he didn't have anything.
Q: How about the Doctor's report?
A: The Doctor's report at the time. So my examination is based on the time I did the examination and taking the history.
Q: Now Doctor. How did you form an opinion that it's a cyst and not a hematoma?
A; That's what's written in the ultrasound scan report. It's a cyst.
Q: Now, there is hematoma written there as well doctor the one my learned friend showed.
Defendant's Counsel: no that's the report it says here. Please don't confuse."

[37] I observe that Dr. Taloga did not respond directly to the question asked, and it is inconceivable that he wanted to have physical proof of the medication that the Appellant was taking at the time, when he had before him Dr. Malo's Report which contained the medication prescribed.

The Judgment of the High Court

[38] In paragraph 6 of the judgment the learned trial judge said the primary issue that needs to be decided by the court is whether the accident caused injuries to the plaintiff. There is no doubt that the Appellant did suffer injuries and received medical attention. However, the learned trial judge appears to have concluded that the Appellant did not suffer any injuries, because he considered his evidence to be unreliable. This was because the Respondent's defence proceeded on the basis that the pre-existing condition was the main ground on which the case rested, and that therefore the learned trial judge disregarded all other evidence medical and non-medical. In the process, the learned trial judge overlooked was the thin skull plaintiff principle under which the defendant is held liable for the aggravation of a pre-existing condition. Therefore, establishing that the plaintiff had a pre-existing condition was not an extenuating factor or a defence. Even a person with an underlying condition, is entitled to the guarantee that he will not be harmed by the negligence of another. Reproduced below are some portions of the judgment for which must be considered:

> "*20. The plaintiff was wearing seat belt. If he had worn seatbelt he does not have (sic) thrown inside the vehicle. Further, he should have received severe injuries if he was thrown inside of the vehicle after the accident. The plaintiff did not have any injuries and there was no sign of pain. After the accident the plaintiff went to his office. Later was taken to the hospital. He was treated and discharged. He was not admitted to the hospital."*

[39] The finding of the learned trial judge is contrary to the admitted medical evidence relating to the symptoms recorded upon admission. The learned trial judge reproduced in the judgment the reports of both doctors. Malo's Medical Report dated 30 January 2015 was as follows:

> ***"RE: JAGDISH KUMAR***
>
> *The above-named patient presented to Tavua Hospital initially on 21/3/2014 with the history of involvement in a Motor Vehicle Accident.*

History noted that he was a driver in a vehicle and he was restrained with a seat belt when he was hit by another vehicle. He complained of headache, abdominal pain in his Left Upper Quadrant and pain on his left foot.

Examination of the head and left foot showed no open injury or obvious deformity. Abdominal examination showed slight tenderness in his Left Upper Quadrant.

X-ray of the skull and Left foot was done, showed no abnormality. ***Ultrasound done revealed a cystic structure in the Left Lumber region*** *measuring about 2.8 x 2.6cm. He was sent home on Paracetamol and Ibuprofen for pain relief. (Emphasis provided)*

The patient was then booked for Surgical Outreach Clinic which was held on 25/03/2014 where he was reviewed by the Surgical Registrar who advised for conservative treatment and the possibility hospital review should it not resolve.

The patient presented again to Tavua Hospital on the 03/04/2014 with complaints of Left Loin pain. Pertinent findings from the examination noted that there was tenderness in the left loin on deep palpation. There was no rebound tenderness or rigidity in the abdomen. He was then ordered for Ultrasound scan which revealed a cystic mass exist within his abdominal wall measuring 2.9x2.9x2.8cm. ***He was advised that it was a hematoma and was sent home on conservative treatment.*** *(Emphasis provided)*

He then returned on 14/04/2014 with the history of pain from the area where the cystic mass existed. A repeat scan was ordered and it was noted that the mass persisted. An ultrasound guided aspiration was attempted but it was unsuccessful.

Another excision was attempted on Friday 17/04/14 and a small amount of hematoma was evacuated. A repeat scan was done and it noted that the hematoma still existed. He was put on pain relief and referred to Lautoka Hospital for Surgical Clinic on 02/05/14.

The patient continued to experience pain the area months after that and had presented on several occasion and was treated with Pain Relievers (Brufen/Voltaren) and Paracetamol. The cyst is yet to absorb and still and Mr Jagdish Kumar is still experiencing pain in this area to date. Pain usually require constant tactile pressure to temporary relieve the pain.

For your information and assistance.

Kind regards.
Signed

Dr. Ilikena Malo (Medical Officer – MP1069)
Tavua Subdivisional Hospital'

[40] The learned trial judge observed as follows:

> *22. Dr Malo was adamant that cyst could develop immediately. He had just one year experience at the time when he examined the plaintiff. Most significantly, he admitted that with his one year experience he did not have much knowledge about cyst and hematoma. He was evasive to cross examination question. However, he finally agreed, when he was referred to Dr Taloga's Medical Report, to the finding of Dr Taloga.*
>
> *23. The defendant called Dr Taloga who also examined the plaintiff. Dr Taloga is a Specialist Orthopedic Surgeon with 20 year experience in the field. His medical report dated 26 June 2015 (D/EX-2) given in respect of the plaintiff runs:*

[41] The learned trial judge then considered the Medical Report of Dr. Taloga who he found had examined the Appellant. He reproduced the report in the judgement. It was as follows:

> *"26 June 2015*
>
> ***MEDICAL REPORT***
> ***Mr Jagdish Kumar***
>
> *I had reviewed Mr Kumar in my clinic on 16/06/2015 for the purpose of this medical report. Copies of his Fiji Police Medical Examination Form (24/03/2014) and medical report (30/01/2015) by Dr Ilikena Malo were made available to them. The copies of ultrasound scan reports on 03/04/2014 and 21/03/2014 were also provided.*
>
> *Mr Kumar was a restrained driver involved in a motor vehicle crash on 21/03/2014. He had complained of headache, left upper quadrant abdominal and left foot pain. Initial examination was unremarkable and ultrasound showing a cystic structure measuring 2.8cm x 2.6cm in the left lumber region. The dimensions of the cyst basically remained the same two weeks later. After an attempted ultrasound guided aspiration and excision, Mr Kumar symptom has not resolved.*
>
> *He continues to complain of constant pain to the area as a daily occurrence. He tells me that he takes Brufen three times a day for his pain since the accident. However, he was not able to produce any physical evidence of his medication on the day of the examination.*
>
> *The examination did not show any distress. He does not have any abnormality of his gait or posture while standing or sitting. A 2cm transverse flat scar was evident over the left lower lumbar region. Slight contact of the examining finger on the scar resulted in excruciating pain. I could not appreciate underlying mass, as he did not*

allow palpation due to severe pain. Even the examination for motion of the lumbar spine was abandoned due to complaints of pain.

The examination of Mr Kumar did not show cause for his complaint. The level of his pain is not consistent with the examination and investigative findings. ***In the true medical sense, a cyst has to have a wall and this takes time and does not develop within minutes or hours after an injury.***

In my opinion this cyst was an incidental finding on the day of the accident and is pre-existent before the injury*. Therefore there is no ratable permanent impairment resulting from the said injury.*(My emphasis)

Signed

Mr E.D.Taloga
BSc., MBBS, AOA Dip Orthopedics (Fiji)
Specialist Orthopedic Surgeon
Suva Private Hospital
Consultant Orthopedic Surgeon
CWM Hospital
Registration Number MP0438'*"*

[42] The learned trial judge then went on to consider the effects of the two medical reports and arrived at the following findings:

> *24. Dr.Taloga in evidence confirmed that the plaintiff has a cyst. He further explained that a cyst has to have a wall and this takes time and does not develop within minutes or hours after an injury. Based on the radiologist report and ultrasound Dr Taloga's opinion is that this cyst was an incidental finding on the day of the accident and is pre-existent before the injury.*
>
> *25. The plaintiff has preferred Dr. Malo. He travelled from Ba to Tavua to get treatment in Tavua Hospital where Dr Malo is a Medical Officer. Whereas, the same facility was available in the Ba Hospital. It seems that the plaintiff has preferred Dr Malo because he has given a favourable medical report for him.*
>
> *26. Dr Malo is a general medical practitioner. He has not specialised in any area of medicine. He had just one year experience at the time when he examined the plaintiff. Therefore, he is not an expert to give an opinion on the subject*
> .
> *27. On the other hand, Dr Taloga is a Specialist Orthopedic Surgeon. He has 20 years of experience in the field. In cross examination Dr. Malo himself admitted that Dr. Taloga's findings are accurate. The defendants were able to establish that Dr. Taloga is an expert on the subject. I would therefore accept his opinion*

that the plaintiff has a cyst which was an incidental finding on the day of the accident and is pre-existent before the injury.

28. The plaintiff's evidence that he sustained injuries as a result of the accident has little or no value. I therefore reject his evidence as unreliable.

[43] The learned High Court Judge considered the oral testimony of only the Appellant, the Police Officer, Dr. Malo and Dr. Taloga. The learned High Court judge did not consider the evidence of the other witnesses in respect of special damages, pain and suffering.

[44] The learned judge found that Dr. Taloga confirmed that the Appellant has a cyst, it was an "*incidental finding*" on the day of the accident and was pre-existent "before *the injury".* (Emphasis added)

[45] The learned trial Judge found that Respondents were able to establish that Dr. Taloga is an expert on the subject, Dr. Malo admitted in cross -examination that Dr. Taloga's findings are accurate and therefore, he accepted his opinion that the Appellant has a cyst, which was an incidental finding on the day of the accident and is pre-existent before the injury. The learned trial judge found that the Appellant's evidence of the injuries he sustained as a result of the accident, was unreliable. Finally, because Dr. Taloga is a Specialist Orthopedic Surgeon and had 20 years of experience "*in the field*", the learned Judge accepted the entirety of Dr. Taloga's evidence, completely excluded from consideration, the evidence of Dr. Malo. On this basis he found that the Appellant had not established that the injuries were caused by the 1st Respondent and dismissed his entire claim with costs summarily assessed at $2000.00.

[46] Even if Dr. Taloga's conclusion that the Appellant had a pre-existing cyst is assumed to be clinically correct, that did not negate the legal liability of the Respondents for causing the accident, which fact was unequivocally admitted by them. Therefore, I hold that the learned trial judge fell into error twice over, firstly when he concluded that the cyst was pre-existing, and secondly when he concluded that it disentitled him to damages.

[47] Being aggrieved by the judgment of the High Court the Appellant has filed this appeal on the following grounds.

*"**GROUNDS OF APPEAL***

1. *THAT the learned trial Judge erred in Law and in Fact by not considering that there was damages done to the Appellant/Plaintiff vehicle in the accident caused by the negligence and actions of the 1st Defendant for which the 2nd Defendant is vicariously liable and that the Appellant/Plaintiff was entitled to damages.*

2. *THAT the learned trial Judge erred in law and in fact by not considering the payment of fine paid by the First Defendant to Land Transport Authority as an acceptance of his guilt.*

3. *THAT the learned trial Judge erred in law And in fact by not considering the fact that there was in evidence in Police Medical Form filed by doctor Marlow who was General practitioner at the relevant time at the taboo hospital who attended to the Appellant/Plaintiff just after the accident and entered the medical findings and marked the same on the police medical form of the injuries seen and noted.*

4. *THAT the learned trial judge erred in law and in fact by not considering the fact the Appellant/Plaintiffs vehicle was damaged in that accident and that injuries caused to the Appellant/Plaintiff and bulging of the stomach caused to the Appellant/Plaintiff's abdomen occurred just after the accident*

5. *THAT the learned trial Judge erred in law and in fact when he stated that Dr Taloga is an expert on the subject and that the Appellant/Plaintiff having the Cyst/Hematoma was an incidental finding on the day of the accident and was pre-existent before the injury when no such evidence to that effect was presented to court by the Defendants.*

6. *THAT the learned trial Judge erred in law and in fact when he considered the fact that the Appellant/Plaintiff has failed to show that the injuries to the Appellant/Plaintiff were caused by the first Defendant when in fact the first defendant was charged for careless driving and pleaded guilty to the said offence by paying the fine.*

7. *THAT the learned trial Judge erred in law and in fact by not considering the testimony of the Dr Malo who actually operated the Appellant/Plaintiff and removed bad c*lotted *bloods from the region and place of injury at the abdomen just after the accident.*

8. *THAT the learned trial Judge erred in law and in fact by not considering the evidence of the Appellant/Plaintiff's other witnesses who assisted the Appellant/Plaintiff and have looked after the Appellant/Plaintiff just after the accident and after the operation done at Tavua Hospital just after the accident.*

9. *THAT the learned trial Judge erred in law and in fact by not considering that damage to Appellant/Plaintiff's vehicle, his Block making work and Farming evidence was not disputed by the Defendants and several documents were tendered and accepted by consent by the Defendant which was in favour of the Appellant/Plaintiff.*

10. *THAT the learned trial Judge erred in law and in fact by not considering the objections of the Appellant/Plaintiff on biasness of Doctor Taloga on the grounds as follows:-*

    i. *That he never examined the Appellant/Plaintiff in an independent manner.*
    ii. *That the learned trial Judge erred in law and in fact in failing to consider the fact that Doctor Taloga did not carry out his own investigation, findings and/or did any x ray and/or any radiologist ultra sound scan on Appellant/Plaintiff to determine what was in the Appellant's abdomen and gave an opinion which was contradictory and a hearsay in a sense being a professional Doctor and has shown biasness in his report.*
    iii. *That the learned trial Judge erred in law and in fact not accepting the objection of the Appellant/Plaintiff's that Dr Taloga is a paid witness by the Defendants whereas Dr Malo is an independent Doctor who was at the Tavua Hospital being the Doctor on duty at the relevant time of the accident.*
    iv. *That the learned trial Judge erred in law and in fact in not considering the fact that Doctor Taloga although having 20 years of experience is not an expert witness to give an opinion on abdominal injuries when he is qualified as an Orthopedic Surgeon.*
    v. *That the learned trial Judge erred in law and fact when he did not believe the testimony and professional medical findings of Dr Malo as an accurate Medical Report as he was also the person who actually conducted the operation and seen (sic) the Appellant/Plaintiff at arrival at the Tavua Hospital just after the accident.*

    vi. *That the learned trial Judge erred in law and in fact in not holding the objections of biasness (sic) against Dr Taloga giving an expert opinion wherein in fact he is not actually qualified enough to give such a opinion being Orthopedic Surgeon as his duties are different*

from Gastroenterologist and said objections where overruled by the Honourable Judge despite the Plaintiffs numerous objections.

11. *THAT the learned trial Judge erred in law and in fact by not considering the evidence of Appellant's general damages, special damages, damages to the vehicle losses and damages sustained by the Appellant in the said accident.*

12. *THAT the learned trial Judge erred in law and in fact in awarding $2,000.00 as costs is harsh and excessive in all the circumstances."*

Discussion of the Judgment of the High Court and the grounds of appeal

[48] In considering and rejecting the Appellant's claim, the learned judge held as follows:

17. *The plaintiff claims general and special damages for personal injuries allegedly sustained following the accident.*
The issue that arose was that whether the plaintiff sustained injuries in the accident. This is a liability issue. I will firstly deal with evidence led by the parties in respect of liability issue. In this regard, evidence of (i) the plaintiff, (ii) Dr Malo, (iii) Dr Taloga and (iv) the Police Officer Deepak are important.

28. *The plaintiff's evidence that he sustained injuries as a result of the accident has little or no value. I therefore reject his evidence as unreliable.*

29. *The plaintiff has failed to show that the injuries were caused by the first defendant. This results in the dismissal of his claim with costs which I summarily assess at $2000.00.*

30. *Since I have rejected the plaintiff's evidence as unreliable, whole of his claim is doomed to fail.*

[49] In view of the fact that the learned trial judge dismissed the Appellant's claim in its entirety, and the grounds urged in appeal, it becomes necessary for this court to revisit the evidence. Whilst convention dictates that it is only in the rarest of cases that an appellate court would reverse the findings of the trial judge on the facts, it remains the duty of the appellate court to determine whether the trial judge considered sufficiently, both the oral and documentary evidence that was led before him, and whether the correct conclusions of both law and fact had been drawn.

[50] To support the submission that an appellate court would rarely overrule the trial judge's findings of fact, the Respondent relied on the judgment of **Ali v Ali** [2009] FJCA 66; ABU 0029.2006 (3 December 2009) in which the following passage in a judgment of this court in Mahadeo **Singh v Chandar Singh** [1970] 16 FLR 155, was quoted. In that case, this this court said:

> *"Much has been written as to the position of an appeal court which is invited to reverse on a question of fact the judgment of a Judge, sitting without a jury, who has had the advantage of seeing and hearing witnesses. Where he has based his opinion in whole or in part on their demeanour it is only in the rarest of cases that an appeal court will do so: Yuill v. Yuill [1945] P.15. When, however, the question at issue is the proper inference to be drawn from facts which are not in doubt the appellate court is in as good a position to decide as the Judge at the trial: Powell v. Streatham Manor Nursing Home [1935] A.C.243.; Benmax v. Austin Motor Co. Ltd. [1955] A.C.370. The first rule stated by Lord Thankerton in Watt (or Thomas) v. Thomas [1947] A.C. 484 at 487-8 is "Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion"."*

[51] In grounds 1 and 2 of the grounds of appeal, the Appellant contends that the learned trial judge erred in law and in fact in not holding that the 2nd Respondent is vicariously liable for the actions of the 1st Respondent, and in failing to consider the fine paid by the 1st Respondent in respect of the charge of careless driving. The Respondents admitted the accident and that the 1st Respondent drove as the agent of the 2nd Respondent. This, taken together with the evidence of the Police Officer and the undisputed damage to the Appellant's vehicle and the repairs effected, the fact that during the time it was under repair, the Appellant had to hire and, or borrow a vehicle for transport to hospital could not have been ignored by the learned trial judge.

[52] The Respondent submitted that since the learned judge had rejected the Appellant's evidence as unreliable, he was correct in rejecting even the claim for damage to the vehicle. It is

relevant but in this regard, there was no finding by the learned trial judge that there was no damage to the Appellant's vehicle, nor was there a finding that repairs that had been effected to the Appellant's vehicle arose as a result of an accident unrelated to this accident, or that the damage caused to the vehicle was false.

[53] It was the duty of the learned trial judge to give reasons for rejecting the documentary evidence relating to special damages, which was not done. In these circumstances, I am satisfied that the Appellant has established that the damage to his vehicle was caused as a result of the accident which occurred on 21 March 2014, which was caused by the negligence of the 1st Respondent. Therefore, grounds 1 and 2 of the grounds of appeal are allowed.

Grounds 3,4, 5, 6, 7,8, and 10 of the grounds of appeal

[54] The Appellant submits that the learned trial judge failed to consider the evidence contained in the Police Medical Form which was completed by Dr. Malo when he recorded the patient's history. There is no reason to disregard the evidence containing the observations of the doctor in regard to the symptoms presented by the patient on admission. Its value lies in the fact that it contains a contemporaneous record of the observations of the doctor who examined the patient upon admission. These observations and findings of Dr. Malo were not rebutted by the Respondents, nor was the credibility of Dr. Malo impeached on this matter. The entire focus was on testing Dr. Malo's conclusions against Dr. Taloga's conclusions, by considering answers to questions in cross-examination, specifically in regard to firstly whether the ultrasound scan revealed a cyst or a hematoma, and whether it was pre-existing or not. There was no consideration whatsoever of the admitted evidence of pain and suffering, nursing care after the treatment or the injuries sustained.

[55] The Respondents submitted that Dr. Marlo admitted in cross- examination that the Medical Report of Dr. Taloga was accurate, and that the injury was pre-existing. However, for the reasons that I will set out below this submission does not in fact reflect the evidence that was before the court. The learned judge in accepting the evidence of Dr. Taloga over that of Dr. Malo, as follows:

"26. Dr. Malo is a general medical practitioner. He has not specialised in any area of medicine. He had just one year experience at the time when he examined the plaintiff. Therefore, he is not an expert to give an opinion on the subject.

27. On the other hand, Dr Taloga is a Specialist Orthopedic Surgeon. He has 20 years of experience in the field. In cross examination Dr. Malo himself admitted that Dr. Taloga's findings are accurate. The defendants were able to establish that Dr. Taloga is an expert on the subject. I would therefore accept his opinion that the plaintiff has a cyst which was an incidental finding on the day of the accident and is pre-existent before the injury."

[56] In my view, Dr. Marlo did not unequivocally concede or admit that Dr. Taloga's diagnosis or report was correct. On the contrary his answer in regard to the specific question of whether he admits that the Appellant had a pre-existing condition, Dr. Marlo's answer was as follows:

"If he had examined my patient, yes."

[57] Dr. Marlo treated the patient from the inception and continued treatment over a long period of time. His evidence reflected observations contemporaneous with the accident, revealed the follow up medical treatment and continuous management and monitoring of the patient in a more systematic manner. Dr. Taloga on the other hand, saw the Appellant only once, and that too was for the specific purpose of determining the level of impairment.

[58] The fact that the Appellant's complaint of abdominal pain was corroborated by the medical evidence in the form of the ultrasound scan, was completely ignored by the learned trial judge. When the accident occurred on 21 March 2014, there was no reason or motive for Dr. Malo to order an ultrasound scan in the absence of symptoms which in his opinion required investigation. This was a professional decision made by Dr. Marlo to assist him with the diagnosis. The Appellant's evidence that he had no pre-existing medical condition was not rebutted by the Respondents, who sought to use Dr. Taloga's evidence to create a doubt with regard to the contents of Dr. Marlo's Report and establish that the Appellant had a pre-existing medical condition. However, this does not take away the duty of the court to independently consider the impact that the medical evidence had in determining whether the

injuries suffered by the Appellant was caused by the action of the 1st Respondent, which duty the court regrettably, did not fulfil.

[59] There was no evidence on the part of the Respondents that Dr. Malo's Report by itself, and all the observations he had made, were false. There was no suggestion that the appellant had made it all up and was prosecuting a claim that was baseless.

[60] The Respondents attempted to demolish the credibility of Dr. Malo specifically in regard to his findings that the impact of the collision resulted in a hematoma. As set out above, the evidence eventually evolved into determining whether the Appellant had a hematoma or a pre-existing cyst. Dr. Taloga insisted that it was a pre-existing cyst and described it as "an incidental finding" on the day of the accident. Whilst much evidence was led on whether it was a hematoma or a cyst, the failure of the learned trial judge to consider the injuries suffered as a result of the accident, the medication that was prescribed by Dr. Malo and taken by the Appellant, and the medical treatment the Appellant had undergone, had no basis in law.

[61] The symptoms and the pain that the Appellant suffered after the accident when he was examined in Tavua Hospital by Dr. Malo is consistent with trauma that would have been caused by been the most probable consequence of the Appellant having worn a seatbelt at the point of collision. On the evidence that was before the High Court, I hold that the Appellant did suffer injuries as a result of the accident.

[62] In regard to the treatment by Dr. Malo, the evidence was that as a conservative first option, Dr. Malo decided to allow the hematoma to heal on its own, it was only when it appeared to be increasing in size that Dr. Malo attempted to aspirate the contents. This was done by inserting a needle into the skin in an attempt to prepare the way for the hematoma to bleed out, however this was not successful.

[63] When Dr. Malo saw the Appellant on 30th January 2015, a little over 10 months from the date of the accident, he reported as follows:

> "*Another incision was attempted on Friday 17.04.2014. and the small amount of hematoma was it evacuated. A repeat scan was done and it noted that the hematoma still existed. he was put on pain relief and referred to Lautoka hospital for surgical clinic on 02/05/14.*
> *the patient continued to experience pain in area months after that and that presented on several occasions and was treated with pain relievers (Brufen / Voltaron) end paracetomol. the cyst is yet to absorb and still Mr Jagdish Kumar is experiencing pain in this area to date. pain usually requires constant tactile pressure to temporarily relieve the pain."*

[64] I see no reason to disbelieve this witness or disregard the value of his testimony. Therefore, I hold that the learned trial judge fell into error when he failed to consider the entirety of his evidence and confined himself to only his answers in cross-examination and erroneously regarded them admissions of Dr. Taloga's views.

Was the Appellant a thin skull Plaintiff?

[65] In view of the defence taken, it becomes necessary for this court to examine the applicability of this rule to this case. The rule in Latin is described as *Talem Qualem* rule i.e., the defendant must take the victim as he finds him. In 1939, Mackinnon LJ, pronounced the famous principle which has since become known as the "egg-shell skull rule." In the case of **Owens v Liverpool Corp.** [1939] 1 KB 394, his Lordship said:

> *"one who is guilty of negligence to another must put up with idiosyncrasies of his victim that increase the likelihood or extent of damage to him: it is no answer to a claim for a fractured skull that its owner had an unusually fragile one."*

[66] In **Paris v Stepney Borough Council** [1951] AC 367, it was held that loss of an eye is much worse for a one-eyed man than a man with full eyesight. As a result, the High Court found that "but for" the Defendant's negligence, the Plaintiff would not have suffered injuries.

[67] The thin skull plaintiff principle was established in **Smith v Leech Brain & Co.** [1952] 2 QB 405; cf **Warren v Scruttons Ltd**. [1962] 1 Lloyds Rep. 497, **Robinson v P.O**.[1974] 2

All E.R. 737, which upheld the principle that due to an existing weakness or frailty if the plaintiff suffers more harm than may be expected, then the defendant will be liable for all the damages caused.

[68] In **Dulieu v. White & Sons**, [1901] 2 K.B. 669 at 679, [the] so-called "thin skull" case, and where [the judge] said:

> *'If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.*'

[69] If a tortfeasor inflicts injury on a victim and the ultimate harm is worse than what would normally be expected because the victim was more vulnerable due to some pre-existing injury, then the tortfeasor is still responsible for the whole harm suffered. However, the Defendant may be excused from liability if he can show that the harm suffered would have happened anyway due to the pre-existing conditions, regardless of whether the tort happened or not. This threshold was not met by the Respondents in this case, and therefore in my view the dismissal of the Appellant's claim in the court below was without legal basis.

[70] The principles relating to aggravation of a pre-existing condition and the consequences that flow from it for a defendant, have been succinctly set out as follows:

> "*In **Zumeris v Testa** [1972] V.R 839, it was held that if an accelerated condition proves incapable of cure, the defendant can be held liable for the acceleration. but if the condition is capable of partial cure, the plaintiff field recover only if he can show that he has suffered direct injuries or losses as a result of the defendants act greater than those he would have suffered eventually anyway or that he is suffering ill health now whereas otherwise he would only have suffered it later all that if the condition had not been accelerated the treatment might never have been necessary either because some vicissitude of life might have intervened and insulated the plaintiff from the condition or perhaps a cure might have been found before the operation was needed. If total cure is available the plaintiff recovers nothing on account of the acceleration; Cutler v Vauxhall Motors Ltd. [1971] 1 Q.B. 418,* The Law of Torts in Australia; Francis Trinade & Peter Cane at p.364, Oxford University Press, 1985."

Leading expert evidence: Who is an expert?

[71] Even if the learned trial judge disbelieved the Appellant in regard to the extent of pain and suffering, he could not have denied the fact or ignore the fact that the accident did occur, and the appellant required medical treatment. This matter assumes significance because the learned trial judge rested his judgment on his view that Dr. Taloga was an expert, which he concluded had been "*admitted*" by Dr. Malo, and he therefore felt compelled to be guided by the opinion of Dr. Taloga.

[72] In the course of submissions before this court, learned Counsel for the Respondents submitted that to start with Dr. Taloga was not an expert on the matter that was under dispute. Dr. Taloga on his own admission, was required to only to assess the disability or impairment suffered by the Appellant. He was required to do so as the doctor of the insurance company that covered the insurance of the 2nd Respondent's vehicle. He was not called as an expert witness. He examined the Appellant almost two years after the accident.

[73] It is the duty of the court to assess the value of evidence that is admitted and to draw the necessary inferences from it. A witness is entitled to only state the facts from his observations and knowledge. An expert witness may express an opinion, however, it is the duty of the judge to be satisfied that the expert possesses the knowledge and skill in respect of the particular matter on which his opinion is sought, and the judge must then arrive at his independent opinion. There must be neither suspicion nor undue deference to expert opinion, nor an indiscriminate adoption of expert opinion. The function of the court is not to abdicate its duty to decide.

[74] In **Langford v Reginam** [1974] FJ Law Rp 4; [1974] 20 FLR 11 (22 February 1974), the Supreme Court considered the evidentiary value of expert opinion. The court held that evidence of expert witnesses should be treated with the same careful scrutiny as, the evidence of all the other witnesses in the case. The court said:

> *"Turning to the main ground of appeal, the doctor like any other expert witness was called to assist the court on technical matters, but the court is not entitled to accept an expert's opinion blindly nor does an expert's opinion relieve the court from coming to its own conclusions based on all of the evidence, including the evidence of the expert witness. An expert gives evidence – he does not decide the issue. No one is infallible and no expert, however specialized his knowledge, would claim to be. The opinion of an expert is only as reliable as his reasons for reaching that opinion and the methods employed to establish his reasons. If the methods employed consist of tests, the court must look at the nature of the tests and the qualifications and experience of the person administering them. If the tests are themselves inadequate or the qualifications and experience of the person interpreting the results are limited, this must affect the weight to be attached to the reasons based on those tests and to the opinion reached."* (Emphasis added).
>
> *I do not suggest that the evidence of an expert witness should necessarily be viewed with distrust, but it should be treated with caution and subjected at least to the same careful scrutiny as, and compared with, the evidence of all the other witnesses in the case. Verdicts may be set aside as against the weight of evidence if insufficient medical evidence is accepted in preference to direct and convincing testimony of witnesses to facts (e.g. Aitken v McMeekan [1895] AC 310). Conversely, where there is unchallenged medical evidence in no way rebutted and there are no facts or circumstances which would justify a rejection of the opinions of medical men, a verdict contrary to their opinion would be against the weight of evidence* (vide R v Matheson (19580 42 Cr App R 145, *in which it is stressed by the Court of Criminal Appeal (at p.152) that its decision "in no way departs from what has been said in other cases, that the decision is for the jury and not for the doctors; it only emphasizes that a verdict must be supported by evidence."*

[75] The functions of the expert were elaborated by Lord President Cooper in the case of ***Davie v Edinburgh Magistrates*** (1953) S.C. 34 at 40:

> *'Their duty is to furnish the judge or the jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.'*

[76] The Respondents did not lead the evidence of an expert on their behalf to rebut the evidence of Dr. Malo. Dr. Malo was not cross-examined on hematoma; the cross-examination having been confined to the possibility of an existing cyst. The learned trial judge arrived at the

wrong conclusion when he found that Dr. Taloga's expertise as an Orthopaedic Consultant Surgeon, was sufficient to demolish the evidence of the Doctor who treated the patient upon admission and continuously thereafter purely because Dr. Taloga was an "*expert*" and Dr. Malo had "*only one year of practice*." It was not Dr. Taloga's specialization in Orthopedics versus Dr. Malo's knowledge in orthopedics. It seems, to me that the cyst was a red herring that distracted and misled the court and tipped the scales. Most significantly, Dr. Taloga himself stated in evidence that he was only repeating what was contained in the medical report under the signature of the radiologist. Dr. Malo testified that the notation on the medical report with regard to the findings of the ultrasound scan was made by the Radiographer. The Respondents did not lead evidence to rebut this so as to lend credibility to Dr. Taloga's opinion that the notation showed that there was a pre-existing cyst. A radiographer is not a radiologist. The learned trial judge overlooked this vital matter, which had a significant bearing on his final conclusion.

[77] In **Nasese Bus Company v Muni Chand** [2013] FJCA 9; ABU40.2011 (8 February 2013), this court said:

> *[18]. This aspect of assessing findings of specific facts was discussed at some length in **Faryna v Chorny** [1952] 2 D.L.R. 354, a decision of the British Columbia Court of Appeal. In that decision O'Halloran JA discussed the issue of witness credibility at pages 356 – 357:*
>
> > *"If a trial Judge's finding of credibility is to depend solely on which person, he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility _ _ _. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.*
> > *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test*

> *must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. _ _ _ Only thus can a Court satisfactorily appraise the testimony of quick – minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experiences in combining skilful exaggeration with partial suppression of the truth. Again, a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth" Is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind*
> *_ _ _ The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case"*
> *[19]. In my judgment it is essential for a trial judge not only to assess the demeanour of a particular witness but also to critically assess the evidence in the context of the whole of the evidence adduced at the trial. In respect of the second part of that obligation, the appellate Court is just as capable of assessing the consistency of the evidence of a particular witness in terms of its logical consistency and in terms of its logical place in the totality of the evidence."*

[78] Going by the criteria set by this court, in regard to the appellate court's capability of assessing the entirety of evidence, in my view the learned trial judge did not "*critically assess the evidence",* in and failed to give any value to the evidence of Dr. Malo, by simply accepting that Dr. Taloga was an 'expert' In this process, the learned trial judge overlooked fulfilling his duty, in regard to deciding the matter on the evidence before him.

[79] The learned Counsel for the appellant submitted that the undue fixation on the word cyst was erroneous. The expert evidence that the learned trial judge relied upon in any event related only to the aspect of general damages for pain and suffering. He failed to consider the other evidence. I accept this submission.

[80] The cumulative effect of the evidence that was before the court, on a balance of probability established that the existence, or the possibility of the existence of hematoma resulting from the accident, was not ruled out or rebutted in cross examination. Therefore, the Appellant's evidence that the hematoma resulted from the accident was not demolished by the

Respondents. This was not considered by the learned trial judge. By failing to consider this the learned trial judge misdirected himself on a vital fact which affected his conclusion.

[81] The Appellant's claim for special damages for loss of income from farming was not established. I therefore do not award damages under that head. Accordingly, the sum of $1725.00 claimed by the Appellant, is refused. However, there was sufficient evidence in respect of expenses incurred by the appellant on the other items under the heading of special damages. Therefore, the Appellant is entitled to special damages in respect of particulars set out in the table contained in paragraph 15, except item "*a*" of the date contained therein.

[82] For the reasons set out above, the appeal is allowed, and the High Court judgment dated 2 May 2016 is set aside. The Appellant is entitled to damages and costs.

Gunawansa, JA

[83] I agree with the findings made by Jameel JA, the reasons therefor and the proposed orders.

Orders of the Court:

1. *The judgment of the High Court dated 2 May 2016 is set aside.*
2. *The Appeal is allowed.*
3. *The Appellant is awarded a sum of $ 60,000 as general damages with interest thereon at 4% from the date of service of writ to date of judgment.*
4. *The Appellant is awarded as special damages a sum of special damages in a sum of $5781.00. with interest thereon at 4 % p.a. from the date of service of writ to date of judgment.*

5. *The Respondents will pay to the Appellant a sum of $3000.00 as costs in this court, and $ 2000.00 as costs in the court below, within 28 days of this judgment.*

.....
Hon. Justice S. Lecamwasam
Justice of Appeal

.....
Hon. Justice Farzana. Jameel
Justice of Appeal

.....
Hon. Justice A. A. Gunawansa
Justice of Appeal

COURT OF APPEAL
FIJI