

IN THE HIGH COURT OF FIJI AT LABASA

CIVIL ORIGINAL JURISDICTION

CASE NUMBER: HBC 13 of 2015

BETWEEN: AMENDRA ANAND MILAN A.K.A. ANENDRA ANAND MILAN

PLAINTIFF

AND: MUKESH CHAND

1<sup>st</sup> DEFENDANT

AND: R.C MANUBHAI & CO. LTD.

2<sup>nd</sup> DEFENDANT

Appearances: *Mr. Amrit Sen for the Plaintiff.*

*Mr. Ami Kohli for the Defendants.*

Date/Place of Judgment: *Monday 4 September 2017 at Suva.*

Coram: *The Hon. Madam Justice Anjala Wati.*

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## JUDGMENT

Catchwords:

*CIVIL LAW - PERSONAL INJURY – motor vehicle accident – Negligence – Liability – Assessment of injuries – Assessment of damages: Special and General: pain and suffering with loss of amenities of life; past and future nursing care and loss of future income – Costs.*

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*Cause*

1. The plaintiff Amendra Anand Milan ("**Milan**") was severely injured in a motor vehicle accident on 31 August 2012 along Labasa – Seqaqa Highway at Vatudova. He brings an action for damages for negligence against the driver of the motor vehicle Mr. Mukesh Chand ("**Chand**") and the owner of the same, R. C. Manubhai & Co. Ltd ("**Manubhai**").
2. It is agreed between the parties that Milan was a student of Fiji National University ("**FNU**") at the time of the accident. He was born on 2 February 1994. Out of 5 stages of his Plumbing and Sheet Metal course, he had completed 3 stages at the time of the accident.
3. At the time of the accident, Milan was a passenger in the truck CJ 620. There was a collision between this truck CJ 620 and another truck DM 720.
4. It is the position of both the defendants' that the accident happened solely or partly due to the negligence of the driver of motor vehicle CJ 620.
5. Manubhai has accepted to indemnify the driver Chand of any damages if it is found that the accident occurred wholly or partly due his negligence.
6. After the accident, Chand was charged for dangerous driving occasioning grievous bodily harm and the matter is still pending in the Magistrates' Court.

*Issues and Determination*

7. The parties require a finding on the cause of the accident: *was it wholly or partly due to the negligence of Chand or the driver of the motor vehicle CJ 620?* If the accident was caused due to the negligence of Chand, then *what are the damages that are payable to Milan?*
8. For the court to ascertain the damages payable, it is essential that the nature of Milan's injuries be ascertained.

9. Obviously the first aspect of the exercise is to determine how the accident happened.

*A. Cause of Accident*

*(i). Evidence*

10. As it is expected, there are different versions of how the accident happened. Milan has his one version substantiated by the witnesses he produced in Court and Chand has his other version. I will summarise the material evidence of all the witnesses who testified on the cause of the accident. Where there have been material contradictions in the witnesses' own statement that would be addressed as well.

11. Milan's version of the accident is that at about 7pm, he was on his way to Labasa to attend the Northern Festival. He was standing at the road trying to wait for some transport to take him.

12. Then came CJ 620, a blue coloured Toyota truck. It was laden with cane and was on its way to the Sugar Mill. He knew the driver who was living near his house. He is commonly referred to as Don. I will refer to him as **Prasad** which is his proper surname. Prasad agreed to give Milan a lift. Milan therefore boarded the truck at about 7pm.

13. An i-taukei boy also boarded the truck with him. That boy sat in the middle and Milan sat near the window. According to Milan, that was the first time for him to sit in a truck loaded with cane.

14. Milan says that Prasad was driving at a normal speed of 40 to 45 km. It was a fine day too. There were few vehicles on the road. One van and a sugarcane truck overtook CJ 620 as it crossed the Vatudova Bridge.

15. Milan further says that as CJ 620 passed the bridge and got onto the stretch, he saw one truck trying to overtake CJ 620. The truck was DM 720. Simultaneously a taxi came from the front. Milan saw the lights of the taxi. Milan said Prasad tried to apply the brake and move the truck away from the road towards the left side. The

overtaking truck swerved in the lane of CJ 620 and hit the fender of CJ 620. CJ 620 then somehow got hooked to the overtaking truck. CJ 620 then lost its balance due to the load and tumbled.

16. Police Constable Ronald Naicker (*"Naicker"*) who attended the scene of the accident and drew the rough and fair sketch plan also gave evidence. The rough, fair and the key to fair sketch plan were tendered in evidence.
17. Naicker testified that when he got to the scene of the accident, he saw one cane truck upside down. His reference was to CJ 620. The other truck, he said, was parked way ahead about 100 meters from that truck. His reference to the other truck was DM 720. He also saw a taxi and other vehicles collected around.
18. Naicker explained the sketch plan. He said that the road was 7.4 meters wide and from the middle line to the end of the right side of the road the distance was 3.4 meters. From the middle line to the end of the left side of the road was 4 meters. The accident happened in the middle of the left lane, that is, 2 meters away from the left end of the road. He could tell the point of impact due to the debris at the place.
19. The point of impact took place in a non-overtaking zone. Even where DM 720 was parked, it was a non-overtaking zone.
20. Naicker said that the cane truck CJ 620 was blue in colour and he found the blue paint marks on the left rear tray behind the tyres of DM 720.
21. The impact on CJ 620 was on the right fender which was hit. There was a big dent causing the fender to be punctured.
22. Naicker told the Court that Chand was not co-operative during the investigations but the driver of CJ 620 was very co-operative. Chand had denied that he hit the truck CJ 620. Naicker said that the rough sketch plan was explained to the two drivers and they both signed the same. No one objected to the drawings on the sketch plan.

23. Naicker said that he also spoke to the taxi driver. The taxi driver stated to him that he saw DM 720 coming with the truck's head lights on and trying to overtake CJ 620. The taxi driver said he tried to avoid the collision head on so he slowed down and went onto the grass because it was not safe to stay on the road. The driver of DM 720 suddenly swerved toward CJ 620 and due to the carelessness of DM 720, CJ 620 overturned.
24. The driver of CJ 620 was Avinesh Nilesh Prasad to whom I have been referring to as Prasad all this time. His evidence was that the truck which he was driving belongs to his father. It was used to cart sugarcane to the Mill. He has been carting sugarcane for 7 years and he is familiar with the road he was driving on.
25. At Tabia he gave lift to two boys, Milan, whom he knows from before and an i-taukei boy whom he does not know at all and has never seen before. He helped them because they wanted a lift in the truck to Labasa Town.
26. Prasad said he was driving towards Labasa Town at a speed of 40 to 45 km. At Vatudova Bridge a van and a cane truck overtook his truck. He kept driving. He saw a taxi approaching from the opposite direction. He then suddenly saw a Manubhai truck trying to overtake him. The registration number was DM 720. He only saw this Manubhai truck when it was beside his truck. That truck was half beside his truck. He therefore tapped the brake and moved towards left side. He tapped the brake to slow down. He was on his side of the lane.
27. Prasad said that DM 720 then hit his truck, dragged it for a while and when that truck left this truck, his truck tumbled. He thought the two passengers were dead and when the truck stopped he tried to come out of it. He could not locate the seat belt's buckle. He slipped the belt off and got out of the vehicle. He went to the other side, saw Milan and tried to help him.
28. The i-taukei boy had basically fled the scene by then. He picked his fallen phone and went to Chand. To him, Chand denied bumping. Prasad said he showed Chand where his truck was hit by Chand's truck. Prasad said he showed him the blue paint

mark. Chand then asked Prasad what he was going to do next. Prasad said he told Chand that he would call the police.

29. Hemjeet Kumar (**"Kumar"**) was another eye witness to the accident. He was a passenger in the taxi travelling towards Tabia. This is the same taxi that everyone says was approaching from the opposite direction. Kumar said that he was sitting at the right hand side behind the driver. Kumar said from the opposite direction, a sugar cane truck was approaching and the Manubhai truck tried to overtake. It could not and went behind the sugarcane truck. It tried to overtake again and came to the lane on which the taxi was. The taxi driver slowed down and went to the grass. The Manubhai truck then cut inside sharply. The sugarcane truck slowed down. By then the taxi had gone past when he heard a loud bang. The taxi stopped. They put the glass down and saw the sugarcane truck upside down on the grass side towards its lane. After hitting the sugarcane truck, DM 720 went towards the left side.
30. In cross-examination, Kumar gave inconsistent evidence. His initial statement that the taxi had gone past CJ 620 and DM 720 when the accident happened was not maintained. Kumar said that he saw the accident actually. He said he saw R.C Manubhai truck's back part hit the front part of CJ 620 which he saw tumbled.
31. Kumar told the court that he had told the police what was written in the statement which was to the effect that *"as we reached Vatudova stretch near the bend, two cane trucks were coming from the opposite side. As the first truck passed us, the R.C. Manubhai truck overtook the blue cane truck and was coming head on to us. The driver of my taxi, Ravinesh, swerved to the left on the grass and the R. C. Manubhai truck swerved in front of the cane truck suddenly and hit the front of it. We were continuing on our journey and I saw the cane truck tumble, drag and then stop upside-down..."*
32. After Kumar was told what he had told the police at the time of the accident, he admitted he did and said that it has been a long time and he cannot remember but finally confirmed that he saw the accident.

33. The defendant Chand's version of the accident is very different from the rest of the witnesses' evidence that I have narrated above. According to Chand, he was initially following two cane trucks. The first one was CJ 620 and there was another truck behind. The one immediately ahead of him overtook CJ 620 leaving him directly behind CJ 620.
34. Chand said he then started overtaking CJ 620 from the temple. Before overtaking, he tooted the horn and Prasad from CJ 620 gave right traffic indicator for him to go. CJ620 at that time was on the left lane towards the middle line.
35. Chand testified that the road was clear so he tried to overtake. From where he started overtaking, it was an overtaking zone. When he was three quarter way having overtaken, he saw the oncoming taxi lights so he had to move in to the left side. He travelled parallel to CJ 620 for about 250m.
36. Chand says that when CJ 620 saw the taxi lights, it started speeding. Had CJ 620 slowed down, he would have been able to overtake completely but it sped. He overtook and went past and then had a sound. He told the boy sitting with him that maybe the tyre of his truck had blasted. He did not know that the two vehicles had collided at any point. He then stopped at a distance. He came out and saw that CJ 620 had tumbled.
37. The point of impact as shown in the rough sketch plan was denied by Chand. He stated that the point of impact is after the tyre marks and in the middle of the lane.
38. Chand refuted that his 3 ton truck could lift CJ 620 which was a 7 ton truck excluding the load it had on it. He admitted that there was blue paint at the back of his left tray but it was not his fault due to which the accident happened but due to Prasad's negligence.
39. In cross-examination, Chand said that he had stated in his statement to the police that before overtaking, he had tooted the horn and that the driver of CJ 620 gave him way by giving right indicator. When he was asked to show where it was written in his statement, Chand said that that is the reason why he refused to sign the

statement. He did not know what the police wrote in there. He also stated that the police did not write everything that he told them.

40. He was further questioned on whether he told the police in his statement that he started overtaking from the Mandir and he said yes he told that but it was not written. He testified that his statement is not correct and that the police made up the entire story. He said that he did not lodge any complain against the police for making the entire story up. He did not know that he could complain.

41. He also stated that he could not understand the sketch plan and where he previously said was the point of impact was where CJ 620 had tumbled.

*(ii). Liability*

42. It is necessary that a proper cause for the accident be ascertained. I find from the analysis of my evidence below that the accident happened wholly due to the negligent driving of Chand, the driver of DM 720. I accept the evidence of the plaintiff and his witnesses that Chand tried to overtake CJ 620 in a non-overtaking zone and in the process of overtaking, a taxi approached from the other side. Upon seeing that Chand was trying to overtake and seeing the taxi approach, Prasad tried to slow down and swerve to the left. Chand tried to quickly complete the overtaking and he cut in into CJ 620 which caused the tray of DM 720 to hook onto CJ 620. The hooking and the speed of DM 720 lifted CJ 620. The hooking naturally went off freeing both the vehicles and since CJ 620 was with the load it went off balance and tumbled.

43. The presence of the taxi is not denied and this shows that the road was not clear to overtake at all. The reason why there is a non-overtaking zone is that visibility of oncoming traffic is not clear. That would have and should have indicated to Chand that the zone was not safe to overtake at all. Chand took a risk by overtaking and he caused the accident due to the risk he took and the inability to manage the driving at such a high risk.



44. I must now say why I accept the evidence of the plaintiff and the witnesses who described how the accident happened and not the evidence of Chand. I shall start from the evidence of Naicker who had attended the accident scene and drawn the plans. I will start from the point of impact which is unreliably challenged by the evidence of Chand. I say unreliably because Chand's cross-examination evidence clearly reveals that he does not understand the sketch plan. He had told the court that the impact was in the middle of the road and I had marked the place in ink in Exhibit 24. Then upon cross-examination, he said that that was not the point of impact but where the truck CJ 620 had tumbled. If that is so then the point of impact should be before where CJ 620 tumbled and that directly substantiates the evidence of Naicker as to the point of impact. The evidence of Chand on the point of impact is therefore unreliable evidence.
45. I accept that Naicker's evidence on the point of impact has not been successfully challenged and the point of impact was on the mid of the left lane and not the middle line.
46. If the point of impact is in the mid of left lane, that is a non-overtaking zone. The sketch plan clearly shows that the impact took place on a non-overtaking zone. If that is the case, then Chand should not have overtaken CJ 620 at all. The time was 7pm and the road was dark. If it was not, the drivers would not be putting the vehicles' head lights on. To add to that hazard was a cane truck in front. Those circumstances definitely must warn any driver that one must not overtake because anyone of such conditions can cause an accident.
47. Even if I accept that Chand was allowed to overtake at the place, the road was certainly not clear to overtake as the evidence of all witnesses is that as Chand was overtaking, a taxi was approaching from the opposite direction. Chand should have seen the presence of this taxi from a distance or in other words seen that there was nothing approaching from the other side for him to safely overtake. If he saw a taxi approaching, the best recourse for Chand was to slow down and go behind CJ 620 which according to Chand had also started speeding.

48. If I accept that Chand had started overtaking from an overtaking zone but ended up overtaking in a non-overtaking zone as per the plan, it was Chand's duty to allow CJ620 to go ahead without overtaking it as Chand realized that CJ 620 was not going to give it way to overtake because according to Chand, their vehicle travelled for about 250 to 300 km parallel to each other. This should have then given Chand indication that CJ 620 was not going to give it way to overtake. When a driver finds himself in such a situation like DM 720, prudence requires that he quits the idea of overtaking and pursue the vehicle ahead unless he finds a very clear path to overtake.
49. Chand says that before he overtook, he tooted the horn indicating that he wanted to overtake and that CJ 620 gave him way to overtake. Chand says that CJ 620 gave right traffic signal indicating that he can go. I find that Chand is not truthful about this aspect that he tooted the horn and he was allowed to go. If that was the case, he would have told the police in his statement about this tooting and the signal by CJ620 to overtake. This I find is a concocted story by Chand.
50. Chand says that he saw CJ 620 give him way and the procedure was the right traffic signal. That in no way means that DM 720 can proceed to overtake. This evidence was also not put to Prasad for Prasad to contradict that he gave way to Chand and then sped. I find the reason it was not put to Prasad was because Chand made it as he went along during the trial to escape the blame.
51. Chand makes allegations against the police officer for not writing what he told and for making the entire story up. In the re-examination he then contradicted himself by saying that only some of the things he said has not been written. I do not accept the evidence of Chand. He appeared to find a way to blame the driver of CJ 620 for the accident. There is no reason why Chand's evidence would not be recorded.
52. There are some places in the statements where Chand refused to answer the question of the police officer and Chand said that he would "*see in court*". If the police officer was so vindictive, he would not write that and make a story of his own

to support the version of the driver of CJ 620. This shows that the police recorded what was told to them and said by Chand at the time.

53. Chand's blame shifting attitude is also apparent from his statement when he said that as he was overtaking CJ 620, it also sped and swerved towards right resulting in an accident. At the same time he states in the statement that he does not know when the accident happened. If he does not know when the accident happened, how can he describe the way it happened? According to Chand, he only stopped because he had a bang sound and he thought his tyre had burst.
54. Chand was not honest in his statement to the police then nor was he honest to the court during the trial about how the accident happened. At the trial, he did not even mention that CJ 620 swerved to the right after speeding and that caused the accident.
55. At the trial, Chand said he did not see what happened and how CJ 620 tumbled. He said he only stopped because of the bang sound. If that is the situation then how can he conveniently say that CJ 620 bumped DM 720? He has to say that because he has to explain the blue coloured paint which was seen on his truck's left rear tray. That is evidence of collision and for Chand to say he only stopped because the tyre was burst shows that he was so dangerous in the manner of his driving that he did not even realize that he was either hit or he hit someone. I find that he is now speculating that CJ 620 hit DM 720 only to explain the blue coloured paint on his truck's tray.
56. Chand also denied that his truck hooked CJ 620. He however does not deny that his truck has a hook. With the evidence of a hook present and the evidence of Milan and Prasad, I find that the vehicle CJ 620 got hooked to DM 720 that is why it dragged and tumbled. Even Kumar, back in September 2012, at the time of the accident said that the vehicle CJ 620 got dragged. I find that the drag was due to the hooking and not just an impact by DM 720.

57. DM 720 stopped 100 meters ahead of the place where CJ 620 tumbled. CJ 620 tumbled 9.8 meters after the point of impact. The tyre marks of CJ 620 are 9.8 meters. This substantiates the version of Milan and his witnesses that CJ 620 was being dragged before it tumbled. If DM 720 did not hook and drag CJ 620 it would stop before where it finally ended up, that is, either at the point of impact or before the place where CJ 620 tumbled. For it to go 100 meters past the place where CJ 620 tumbled, shows that the two vehicles were physically attached from the point of impact.
58. Chand says that Prasad, after having allowed him to overtake, sped up. This is unbelievable as Chand's own evidence indicates that Prasad had allowed other vehicles to overtake. If that is so, there is no reason why Prasad would prefer to race with Chand.
59. Chand ought to have realized that the cane truck was laden with cane. Cane protrudes out of the truck. In such cases, the vehicles which are following must always keep a distance and make the cane truck drivers aware of the need to overtake. The overtaking vehicles must be utmost careful which I find Chand was not.
60. I find that since the accident happened due to the negligence of Chand, he and his employer, the second defendant are both liable for damages for the injuries that is sustained by Milan. That then takes me to ascertain the injuries Chand has sustained in the accident. That would enable me to work out the damages claimed by Milan and the appropriate amount that should be awarded.

### ***B. Milan's Injuries***

61. On the nature of Milan's injuries, the evidence of Doctor Talonga is relevant. Talonga's evidence was not impeached in cross-examination or contradicted by any other medical evidence. Mr. Kohli also agreed after cross-examination that he accepts the assessment of doctor Talonga in regards the assessment of permanent

disability of Milan. I accept Talonga's evidence on the nature of the injuries sustained by Milan.

62. Evidence reveals that after the accident, Milan was initially admitted to Labasa Hospital. He was noted to have extensive injuries. He was noted to have an open fracture of left elbow, radial nerve injury, mild head injury and facial laceration. The left hand motor radial joint was exposed and had debris from the motor vehicle accident. Milan was noted to be unable to extend his hand.
63. At Labasa Hospital, Milan underwent general anesthesia for a wound wash and debridement. A discussion was held with doctor Talonga and it was decided that Milan be transferred to CWM Hospital.
64. Milan was admitted to CWM Hospital on 2 September 2012. The treatment that Milan received in CWM Hospital is outlined in the report of Dr. Savenaca Rusaqoli, the Orthopaedic Consultant at CWM Hospital.
65. Rusaqoli's report indicates that upon admission on 2 September 2012, Milan was taken to the theatre on 3 September 2012 for a repeat wound washout and a formal exploration of the injury. The report says that intra operatively, in addition to the open avulsion fracture of the lateral epicondyle (meaning a bone from the outside part of the distal has been pulled out and the skin and flesh is opened up) of the left humerus (arm bone), Milan also severed his radial nerve, brochi-radialis, ECRL, ECRB, and a radial head fracture. There were also extensive soft tissue and skin loss.
66. Talonga explained that when one does not have radial nerve the wrist will hang. In Milan's case the radial nerve was completely severed.
67. At CWM, Milan was treated with Intravenous antibiotics and had frequent change of dressings.
68. On 20 September 2012, Milan's wound was covered with skin graft. He was followed up in clinic awaiting review by visiting hand surgeons for definitive surgeries. Milan was discharged from hospital on 21 September 2012.

69. Doctor Talonga said that skin grafting is a painful process. The site from where skin is taken is painful. It is like being dragged through cement. There would be burning sensation.

70. Dr. Talonga also tendered his report in evidence and explained it. Doctor Talonga testified that the combined value of the injury sustained by Milan has resulted in 38% of permanent impairment. He bases his assessment on two references. The first is the *American Medical Association – Guides to the Evaluation of Permanent Impairment ; 5 Edition* and the second is *Workcare Guides for the Evaluation of Permanent Impairment – Fiji Workcare Authority – 1<sup>st</sup> Edition*.

71. The 38 % total permanent impairment is based as follows:

**Elbow**

<b>Flexion 75 degrees (Fig 16 – 34)</b>	<b>12 % Upper Extremity</b>
<b>Extension lag – 30 degrees</b>	<u>3 %</u>
	<b>15 %</b>
<b>Pronation 60 degrees (Fig 16 – 37)</b>	<b>1 %</b>
<b>Supination 0 degrees</b>	<u>12 %</u>
	<b>13%</b>
<b>Total Elbow Unit</b>	<b>28 %</b>

**Radial Nerve lesion below elbow**

**Combine Motor and Sensory** **38% Upper Extremity**

**(Table 16 -15)**

**Ulna nerve superficial palmar branch** **7 %**

**(Table 16-15)**

**Combined Value of Upper Extremity** **58 % Upper Extremity**

(38 % + 28 % + 7 %)

<b>Upper extremity Impairment</b>	<b>35 % Whole Person</b>
<b>Skin Impairment from scar</b>	<u>4 %</u>
<b>Combined Value</b>	<b>38 %</b>

72. Doctor Talonga testified that when Milan was reviewed in his clinic on 5 October 2015, he complained of the scar over the front of the elbow. He also complained of limited motion of the joint and the inability to extend the wrist joint. His little and ring fingers were numb.
73. On examination, scarring was seen with loss of tissue bulk over the anterior (front) and lateral (outside) surface of the left elbow. Active flexion of the elbow was measured at 30 to 75 degrees, pronation at 60 degrees, and supination at 0 degrees, no active extension of the wrist was possible with loss of sensation to the little and the ulna-half of the ring finger. The X-ray showed a malunited intra-articular fracture of the distal left humerus, non-union of the lateral condyle and subluxation of the head of the radius.
74. The doctor explained that pronation means moving the hands from a neutral position towards the body and supination is outside. He further stated that intra-articular involves joints. A non-union fracture is one that does not unite. Subluxation means that the articulating bones are partially out of position. A malunited fracture is healed but not in its position. Lateral condyle means that the evulsion fracture is not united.
75. The doctor further testified that there is scarring on the face of the patient and he is conscious of that. It is a different expertise to assess the facial disability. He only gave 4% which is given for other parts. Normally facial scarring is given higher percentage. If he assessed that, the disability would be higher.

76. The actual X-Ray report prepared by a specialist radiologist Dr. Jonetani Kama states that there was a suspicion of left supracondylar fracture and that a proper AP view of the LT elbow joint was needed. Talonga said that he did not rely on this report because the orthopedic surgeons rely on their own report.
77. No other witnesses gave any comprehensive evidence of the nature of Milan's injuries. I will therefore rely on Doctor Talonga's evidence alone where it is essential.

*C. Damages*

*(i). Special Damages*

78. The uncontradicted evidence of Milan is that he had to be taken to Suva CWM Hospital as Labasa Hospital could not manage his injuries. If it was for Labasa to manage, his arm would be amputated by now. To save his arm he had to come to Suva and that by no means is an error on his part causing him to incur expenses by coming to Suva. I allow this expense.
79. A plane had to be chartered from Savusavu because the airport in Labasa was closed for renovation. He is from a poor background so his uncle helped in paying the costs. The plane charter cost them \$5,000.
80. He also had to pay for the ambulance from Labasa Hospital to Savusavu which cost \$150.00. From Nausori airport the ambulance again charged \$100 to CWM Hospital.
81. After Milan was discharged on 21 September 2012, he attended clinics at CWM Hospital and Valalevu Health Centre as well. Milan also had to pay for taxi fare to and from his brother's home to go to the clinic. He gave evidence that the taxi fare from his brother's place in Laucala Beach to CWM is \$7.00 one way. He spent on the taxi in the following manner (*as derived from the evidence of Milan*):

<i>21.09.2012</i>	<i>CWM Hospital to Home</i>	<i>\$7.00</i>
<i>26.09.2012</i>	<i>Home to CWM and Back</i>	<i>\$14.00.</i>



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<i>27.09.2012 to 25. 10. 2012</i>	<i>Valalevu Health Centre (@ \$6 per day)</i>	<i>\$174.00</i>
<i>25.10.2012</i>	<i>Home to CWM and back</i>	<i>\$14.00</i>
<i>25.11.2012</i>	<i>Home to CWM and back</i>	<i>\$14.00</i>
<i>20.01.2012</i>	<i>Home to CWM and back</i>	<i>\$14.00</i>
<i>February 2012</i>	<i>Boat Fare to Labasa</i>	<i>\$65.00</i>

82. Milan had said that when he went to Valalevu Health Centre, he spent about \$180.00 in taxi. I allow him only \$174.00 because he only attended Valalevu clinic for 29 days and at a rate of \$6.00 per day, the cost comes to \$174.00

83. Milan produced evidence of the charter plane in the sum of only \$3,000. He had finally accepted in his submissions that an allowance should be made for \$3000 since that is the amount of the receipt. Mr. Kohli's client does not dispute the special damages.

84. I therefore allow special damages for the charter plane, the ambulance cost, and the taxi fare which calculates to \$3,552.

85. I will allow interest on special damages from the date of the writ to the date of the trial. The reason why I pick the date of the writ is that not all expenses were incurred at once and at the date of the accident. The expenses were incurred over a period of 5 months from the date of accident. The writ was filed on 13 May 2015 and the trial was completed on 13 May 2016. The interest should be awarded for one whole year for 365 days.

86. I do not have any special reason to depart from the precedent of awarding interest on special damages at the rate of 3%. The interest in this case would therefore calculate to \$106.56 ( $3/100 \times 3,552$ ).

87. I find that the plaintiff is entitled to special damages inclusive of interest at the rate of 3% per annum in the sum of **\$3,658.56**.

*(ii). General Damages*

*(a). Pain and Suffering and loss of amenities of life*

88. Milan has precisely described the pain he went through after the accident. He stated that when the accident happened, some people took him out of the truck. He could see his hand bleeding. He could see the bones too. It took 15 minutes for him to go to the hospital and he was attended to within 2 to 3 minutes. When the doctors saw him, he started losing memory. He could not remember anything. He gained consciousness the next day.
89. The next day his pain was immense He could not move at all. So much so that he could not recognize his family members. The tubes were inserted for pan bed for urination. After that he fell unconscious again and regained consciousness in the evening. He again had extreme pain.
90. Milan says that he does not remember getting any pain killers for his pain. Milan said that the hospital used to give some injection through the line and pain would go away then but when the effect of the injection was over, the pain would start.
91. On 1 September he had a painful and sleepless night. The pain was unbearable. He did not sleep the whole night. Medication was given for pain relief which helped a bit.
92. Milan said that he was told by doctors that they may consider amputation of the arm because it was getting poisonous and his family did not agree so it was decided by the doctors that he be transferred to CWM Hospital in Suva.
93. He chartered a plan and was accompanied by Doctor Richard. He was full time on stretcher and was unable to move. He was in so much pain that he does not remember his journey from Savusavu to Suva. When the ambulance shook, he had pain again.
94. In CWM hospital, he suffered pain as well. In CWM, he again had tubes fitted for his urination. He used to be wheeled to the theatre. His wound was dressed daily and he

would be under anesthesia before the dressing. After that, when he was conscious he had lots of pain.

95. He could not eat. His eye and mouth was not opening. His face was swollen. His injured lip had blood on it. There was a lot of blood in the eye. His head and face pained when it stretched.

96. He could only drink fun flavor and he did that for almost 10 days. He ate on the 10<sup>th</sup> day. He ate bread and porridge. He could only open his mouth after 5 to 6 days.

97. The first time he could get up was on the 14<sup>th</sup> day. He tried to sit with the help of physiotherapy. He did not feel healthy so he again lied down. On the 15<sup>th</sup> day he was asked to walk and he tried. He started shivering. He stood up and sat on bed again. Then he slowly walked in the room and sat again. After 2 or 3 days of repeated physiotherapy he gained strength.

98. When he could walk, he visited the washroom on his own. The tubes were pulled out in the theatre.

99. During his stay in the hospital, the antibiotics were administered through IV and since the medication was powerful, he felt the pain. If he was sleeping and they injected the antibiotics in the line, he would not be able to sleep for hours.

100. He was discharged on 21 September 2012 and that is the first time he saw his face in the mirror. He was discharged on 21 September and he could not walk because of the skin grafting. The skin was taken from the middle part of one of his thighs. The skin removed was about 6x3 inches. The skin was taken under general anesthesia. The hand wound, the head and the eye injury were grafted.

101. After the skin was removed, a bandage was put on the place from where the skin was removed. It was very painful. The bandage pressed against the wound. He suffered because of that too.

102. Upon discharge, his brother took him to the taxi in a wheelchair. He was given some medications being the antibiotics.

103. He was not able to walk at home and he was lifted by his brother to the bathroom, washroom and to the bed. He could not put his leg down. His elbow had a half POP plaster at the back of his elbow. He had a sling too and could not lift his hand.
104. He was to return to CWM on 26 September 2012, after 5 days, which he did. Upon arrival at the hospital he had to wait for some time. He was nil by mouth. He thought the dressing would be removed. The nurse started pulling out the bandage in the leg without the anesthesia. Initially the nurse pulled the plaster slowly then towards the end she instantly pulled it hard. He was crying when the bandage was being removed but when it was pulled hard he screamed loudly. Everyone in the hospital heard him shout. It was extremely painful.
105. On 26 September, the POP was not removed. It was still there. He was sent home and was asked to go to Valalevu Health Centre for eye and arm dressing. He went there until all the wounds dried off. He went there until 25 October 2012 for daily dressing. He used to go in a taxi.
106. The bandage in the eye was removed by 10 October 2012. He saw the reddish scar. He was very scared.
107. He was asked to attend CWM Hospital again on 25 October 2012, 25 November 2012 and 20 January 2013. He did attend. In between, he stayed home in Suva. He did not do anything. He still had pain. When he used his left hand, pain would come. He then stayed calm until the pain went away.
108. For a month after discharge he was not normal. He would forget about the injury and when the pain came, it would disturb his sleep. He would just wear a vest and shorts with elastic.
109. On 20 January 2013, the grafting pins and POP were removed in CWM Hospital. That period was very different from his normal life. He was very upset and could not imagine what would happen to his future. He got very depressed. He remained idle.

His brother counselled him. He was also worried for his brother who was suffering because of him.

110. His sister was at home and helped him as he could not do any housework even after the pin and dressing was removed, he could not use his arms.
111. He came to Labasa after 1 February 2012, a day or 2 before his birthday in a boat. He did not attend any clinics thereafter 20 January 2013.
112. Milan says that now the pain comes in cold weather and not hot weather. He uses his right hand often to dress and even right hand pains due to use of one hand. His eye injury now is at times itchy.
113. Milan further testified that he comes from a farming background. He used to tie bullocks, cows and goats and work the farm too. He did the farm work initially with his brother but when his brother went to Suva he was working it alone. Everyone was dependent on him but after the accident there was no one for them. He sold all the farm equipment.
114. Milan's evidence is that he also used to help his mother in the kitchen and housework. He was also a very good dholak player. People used to take him around to play dholak for bhajans and kirtans. They used to pay him for playing dholak. He now cannot help his mother anymore or play the musical instruments which he used to do.
115. Milan was a good soccer player. He participated in Under 15 and Under 17 School Cup in Northern Division. A Fiji Times Cutting showing Milan having taken part in Under 17 Soccer for Tabia College was tendered in evidence. He says he cannot play soccer anymore because there is a risk of the ball hitting his hands and him falling as well.
116. Milan now is not able to climb trees, fish, swim, drive a tractor or ride a bicycle. He used to do all that before. He used to use the bicycle as a transport to the rice

mill. All the enjoyment that he used to get from fun, sports and daily activities has gone or minimized.

117. Doctor Talonga testified that Milan would have suffered pain. Although it is difficult to assess pain because it is a subjective matter, on a scale of 1 to 10 his pain would be 7 or 8. Milan also went through IV. Talonga said that it can cause pain because veins can get inflamed.
118. On arrival to the hospital, he had substantial injuries and he would have undergone pain. That would have been managed by painkillers. In hospital there would be an attempt to alleviate his pain but if he still complains of pain after pain killers, nurses would not give him further drugs. That is the practice. Hospital is not an idealistic place as it is normally thought of.
119. The doctor said that he does not have access to the files of Milan to talk about what in fact was the nature of the pain that was endured by Milan which he complained off.
120. The evidence of Milan on the pain and suffering and the loss of amenities of life have not been successfully contradicted. I find that with an injury of an open fracture in the left elbow which was exposed and bleeding and could cause sepsis caused Milan immense pain. He also had facial and head injuries which added to the pain he was undergoing as a result of the fracture in the elbow. He was not able to bear the pain and would be unconscious at times.
121. To treat that injury he again had to go through the pain of getting medications, treating the wound and dressing the same. He was bedridden for 14 days and was living with the help of the nursing care provided to him by the hospital and his family.
122. Even his immobility caused him pain. He had to be fitted with tubes and be administered drugs most of the time. All that caused him pain in addition to the injuries.

123. He was not able to eat which made him weak and as a result feel feverish and faintish when he was asked to walk after 14 days of confinement to bed. His health in terms of being properly nourished had deteriorated.
124. His injury was such extensive that Labasa hospital was not able to manage the same. He had to be sent to Suva and in travelling to Suva he again underwent a lot of pain.
125. His injuries have left him incapacitated at the extent of 38 per cent which is substantial.
126. His arm is cosmetically not appealing and he hides that all the time. He has got scars on his arms and is not able to extend his wrist as result of which he will not be able to use both his hands which is needed for most tasks and enjoyment of life. He is a very young man and like everyone else he is enthusiastic to enjoy life. That is restricted for him in the way he described in his evidence which I accept in total. He has lost future enjoyment of life. He will continue to suffer pain and I do not overlook that fact.
127. For his past and future pain and suffering and loss of amenities of life, I award him a sum of \$80,000. I also award him interest at the rate of 6 percent per annum from the date of the writ to the date of the last day of the trial which calculates to \$4,800. The total award for pain and suffering and interest calculates to **\$84,800**.
128. I base the above sum on the facts of this case alone. There are many personal injury cases which deal with awards of such nature and in every case the facts and circumstances are different. I have seen Milan give evidence and have found that with injuries leaving him 38% disabled, he suffered excruciating pain and suffering.
129. The case I find closest to this is ***Devi v. Wati [2014] FJHC 205; Civil Action 462.2002***. The injury to one of the plaintiff's was in her left hand leaving her 35% disabled. The award for her pain and suffering was \$80,000. I find that in this case, a sum of \$80,000 is justified.

*(b). Past and Future Nursing Care*

130. Milan testified that when he was in hospital, he was nursed by his sister. The nurses were harsh so his sister did not let them do all the nursing and caring.
131. Milan says that now his mother helps him put the clothes on. He can put it himself but it is difficult. He uses his right hand to put the clothes but even that hand pains.
132. I have no doubts that since the date of accident till the date Milan returned to Labasa, he needed nursing care and his brother and sister provided that care. Had it not been for that care, he would not be able to manage by himself. He was not able to carry out the routines for himself for his daily living. The nature of his injuries brought him excruciating pain and inability to do his daily activities.
133. I find that he is entitled to past nursing care at the rate of \$15 per day for 5 months which equates to about 154 days (*31.08.2012 to 31.01.2013*) in the sum of \$2,310.00. I have picked \$15 per day because that is the minimum rate that any house maid would charge for a day. In this case the sister has been with the brother and nursing her whole day and at night when needed. I do not think that a sum of \$15.00 per day is unjustified. I therefore make an award in the sum of \$2,310. Interest for one year on this amount calculates to \$138.60 which totals the award to **\$2448.60.**
134. For future nursing care I do not make any awards because I find that Milan is able to carry out his routines for his daily living. Doctor Talonga testified to this effect that he can do light duties. He said that Milan should be able to carry out activities for daily living like eating, dressing, bathing. I find that Milan can use his right hand to dress, feed, brush and bath. He has a long way ahead of him and his early practice should make him able completely, not that he cannot do these activities completely. There is no reliable evidence on which I can base that he would need assistance all the time for his day to day living. I decline an award for future medical care.



*(c). Loss of Future Earnings*

135. At the time of the accident, Milan was studying to undertake trade work. His future plans was to go to overseas and do trade work.
136. Milan was a bright student at school. He attained 279 marks out of 400 in Form 6 in 2011. That was his Fiji School leaving Certificate Examination results.
137. In 2012, the year of the accident, Milan was studying in a tertiary Institution. He was a student at Fiji National University under School of Building and Civil engineering. The course that he took was Certificate IV in Plumbing and Sheet Metal which is a two year course. There are 5 stages to be completed. His evidence is that in 2012, he only studied for half a year before the accident. By then he had completed 3 stages. The rest of the half, he could not due to the accident. He was not very well and he was not in a condition to go out. He felt the pain. He was also shy about his condition and was worried what the friends would think about him.
138. He started studying again in the year 2013 until half of year 2014. He did the remaining 2 stages. He basically completed his 5 stages. After 5 stages, there is a requirement to do practical. He did not do practical because it would mean to use his hands and he was not in a position to do so, so he did not do the other half from the year 2014.
139. Milan said that he is currently trying to do foundation in FNU and later do something like accounting. He finds difficulty in his studies as he left school in 2011.
140. Milan demonstrated to the court his difficulty in grasping. He keeps his hands closer to his body to hide the disability. He normally keeps it attached to his body. He was not able to grasp a book or pick anything from the hand. The fingers could slightly touch the items.
141. Under cross-examination Milan testified that he does not have any problems with the right hand except that he sometimes suffers pain. He also admitted that given

him being an above average student, he is quite capable of changing the profession. He could easily do something like Bachelor of Science.

142. Doctor Talonga testified that with the radial nerve injury Milan will not be able to extend his wrist. He will have difficulty with his movement.
143. Doctor's Talonga evidence on ability to do work was that Milan will not be able to do any activity that requires grip and grasp with both hands. He can only pick up light things from his left hand. However if his left hand is required for power or grip then there would be problems.
144. Talonga further stated that it would be difficult for Milan to do fishing or catch crabs. He would not be able to use one hand to plant rice. He would not be able to do trade work as it requires use of both hands. It would also be difficult for him to get on and off the bicycle.
145. In my finding Milan has never given evidence that his left hand was the dominant hand. In fact there was no evidence whether he is right handed or left handed or mixed handed. The injury is in his left hand. If he was left handed then he should have given evidence to that effect.
146. Mr. Sen in his submissions stated that his left hand was the dominant hand. I wonder on what evidence was this submission based on. If that was the case, there should have been clear evidence in this regard. I therefore reject Mr. Sen's submission that Milan was left handed.
147. Since there was no evidence that Milan was left handed I cannot make a finding on the balance of probability that he falls in the minority of the population who are left handed. The world's majority of the population is right handed and that is a fact that I take judicial notice of.
148. There is lot of difference in a person's ability to earn if his dominant hand is incapacitated as and compared to an injury in a hand which is not dominant. I will elaborate on this shortly.

149. It is true that Milan was aspiring to be a tradesman and he wanted to end up in overseas to do trade. None of that is disputed. He now cannot do any work which requires power with both hands and trade work is definitely out for Milan. Both Milan and doctor Talonga have to my satisfaction established that.
150. However, it is not impossible for Milan to change his profession for example work in a profession where he can manage with writing with his right hand: professions like accounting or teaching or being a barrister and solicitor. He is a very young boy and he has already started thinking of changing fields to accounting.
151. It is inconceivable that Milan will not be able to get into a profession where he can earn for his living or get a pay which would be equivalent to a tradesman's pay. It will take Milan sometime to change his profession. He was studying in 2012 which course would have been for 2 years. In 2014 he was expected to complete his education (practical inclusive) and start working latest by 2015 and earn for himself.
152. Now his career and earning ability has been delayed. The Plumbing and Sheet Metal studies will not assist him. He realized this very early in 2014 and that is when he should have changed his line of studies for a new profession to be able to find some work which suits him. To complete a new course for a different profession, Milan needed at least 5 years. In that 5 years he was expected to have undertaken new studies and change his career to a suitable one like an accountant or a teacher or a banker or a barrister and solicitor where he can manage with one hand.
153. I repeat that he is a very young and bright person and he should be able to manage to change his career easily when compared to a person who has already settled in a field of work. Milan had not even started work and he can easily fit in any field. He has to change his mindset to engage in another employment and earn a living. Even he agrees that he can easily change his profession and do something like Bachelor of Science.

154. I find that it is only fair that he be given loss of income for 5 years which time I find would be needed for him to undertake a new field of academics and change his profession.
155. The real cause of concern for me now is the yearly income that the court is going to work at to say that that is the loss of income per year for a tradesman. The plaintiff has not given any evidence as to what he expected to earn or what people with his qualification earned. At least there should have been some evidence of the nature of work that Milan would have been engaged in and the salary scale that is normally paid to the people undertaking such tasks either as civil servants or private employees.
156. Be that as it may, I find that in any case Milan would have earned something not less than \$10,000 a year if he was a beginner in the field. In the absence of any evidence, I pick this amount inclusive of all standard benefits like accumulation of monies in the Fiji National Provident Fund. This calculates to \$192.31 per week in salary and benefits. This is not an unexpected income for a tradesman. If they earn more, I would have expected the plaintiff to satisfy me on the evidence of that assertion, if any.
157. I take cognizance of the fact that he had no work experience and for the first 5 years of his life he would be learning on the job to become skilled to ask for a substantial pay or open up his own business of any kind in trade. It is justified that he be awarded a yearly pay of \$10,000.
158. I find that for 5 years in which he has wasted his ability to earn, a sum of \$50,000 only for loss of income is justified. Loss of earning for his entire working life is not justified on the evidence.
159. On this amount of \$50,000, I award interest at 6 % for a year from the date of the writ to the date of the last day of the trial. The amount calculates to \$3,000. The total amount for loss of future income inclusive of interest is ***\$53,000.***

***Costs***

160. The trial took four days to complete with several witnesses giving evidence on behalf of the plaintiff. This is a clear case of negligent driving by the first defendant. The plaintiff's counsel has prepared the trial and went through a painstaking and extensive exercise of proving liability and damages.

161. Pleadings and submissions were filed. There were numerous appearances in court before the matter was heard finally. It is fair that costs be summarily assessed in favour of the plaintiff. Any sum below \$5,000 will not be justified in this case.

***Final Orders***

162. In the final analysis, I find that the accident happened wholly due to the negligence of the 1<sup>st</sup> defendant and that both the 1<sup>st</sup> and 2<sup>nd</sup> defendants are jointly and severally liable to pay to the plaintiff damages inclusive of interest in the sum of **\$143,907.16**.

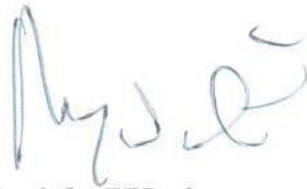
163. For clarity, I tabulate the award as follows:

DAMAGES	AWARD	INTEREST	TOTAL
A. Special	\$ 3,552	\$106.56	\$3,658.56
B. <u>General</u>			
<i>i. Pain and Suffering</i>	\$80,000	\$4,800	\$84,800
<i>ii. Past Nursing Care</i>	\$2, 310	\$138.60	\$2,448.60
<i>iii. Loss future Income</i>	\$50,000	\$3,000	\$53,000
			\$143,907.16

164. In addition to the above damages, I award the plaintiff costs in the sum of \$5,000.

165. I make final orders in terms of ***\$148,907. 16 inclusive of interests and costs*** to be paid in total to the plaintiff.

166. Parties are at general liberty to apply to this court on any slip errors on calculation of damages.



Anjala Wati

Judge

04.09.2017



To:

1. *Maqbool & Company for the Plaintiff.*
2. *Kohli & Singhs for the Defendants.*
3. *File: Labasa HBC 13 of 2015.*