

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 266 of 2011

BETWEEN: **GABRIEL PARIWAL SINGH** of 25 Namena Road, Nabua,
Suva, Fiji, Information Technology Manager.

PLAINTIFF

AND: **NITIN RONESE MISHRA** of Veiwawa, Nakaulevu, Navua,
Fiji, Salesman.

FIRST DEFENDANT

AND: **PRITISHNA LATA BHAN** of Verata, Tailevu, Nausori, Fiji.

SECOND DEFENDANT

BEFORE: **Hon. Justice Kamal Kumar**

COUNSEL: Mr R. Prakash and Mr R. Dayal for the Plaintiff

Mr S. Kumar for the Defendants

DATE OF HEARING: 24, 25, 26 & 27 May 2016

DATE OF JUDGMENT: 31 August 2018

JUDGMENT

Introduction

1. On 30 August 2011, Plaintiff caused Writ to be issued with Statement of Claim claiming for special damages, general damages, interest and costs arising out of alleged injuries sustained by him in a road accident on 7 September 2008.
2. On 5 September 2011, and 22 September 2011, Defendants filed Acknowledgement of Service and Statement of Defence respectively.
3. On 1 November 2011, Plaintiff filed Reply to Statement of Defence.
4. On 13 September 2012 and 28 March 2013, Plaintiff and Defendants filed their Affidavit Verifying List of Documents respectively.
5. On 25 July 2013, Plaintiff filed Minutes of Pre-Trial Conference.
6. On 8 April 2015, this matter was called before Master when Plaintiff was directed to file Copy Pleadings and this matter was adjourned to 29 April 2015.
7. On 8 April 2015, Plaintiff filed Copy Pleadings and Summons to Enter Action for Trial which was returnable on 29 April 2015.
8. On 29 April 2015, Order in terms of Summons was made and this matter was referred to a Judge.
9. This matter was called in this Court on 2nd October 2015 and adjourned to 24, 25, 26 & 27 May 2016, for trial.
10. Trial concluded on 27 May 2016, when parties were directed to file submissions, which directions they complied with.

Background/Agreed Facts

11. The following are agreed facts as stated in the PTC Minutes dated 5 April 2013:-
 - (i) On 7 September 2008, Plaintiff was a passenger in motor vehicle Registration No. FC690 (“**the vehicle**”) driven by First Defendant;

- (ii) On that day the car was involved in an accident on Queens Road at Nakaulevu.

Documentary Evidence as Exhibits

12. Following documents were tendered in evidence by consent of the parties:-

- P1 Copy of Certificate of Court Proceedings dated 17 May 2016, in the matter of **State v. Nitin R. Sharma**, Navua Traffic Case No. 3369/08;
- P2 Photocopy of Fiji Police Medical Examination Form;
- P3 Photocopy of Medical Report dated 5 November 2008;
- P4 Photocopy of Supplementary Medical Report dated 24 February 2009, in respect to Gabriel Singh from CWM Hospital;
- P5 Copy of Return Electronic Tickets for Pratap Singh from Nadi to Auckland (Price: \$488.00; Date of Issues: 24 April 2007);
- P6 Photocopy of Return Airline Ticket issued on 27 October 2010, for Plaintiff and Pratap Singh from Nadi to Delhi and Return (via Hong Kong; Price: \$3,515 each);
- P7 Photocopy of Return Airline Ticket issued on 24 March 2011, for Pratap Singh from Nadi to Hyderabad (via South Korea);
- P8 Photocopy of Tax Invoice/Receipt dated 8 March 2010, from Nick McIvor Surgical Services to Plaintiff for \$320.00;
- P9 Photocopy of Tax Invoice 26207 dated 8 March 2010, from Diagnostic MedLab, Auckland for \$44.00;
- P10 Photocopy of Receipt dated 11 November 2010, from Auckland Radiology Group to Plaintiff for \$700.00;

- P11 Photocopy of Receipt dated 10 November 2010, from Auckland District Health Board to Plaintiff for \$365.70;
- P12 Photocopy of Tax Invoice dated 11 March 2010, from Auckland District Health Board to Plaintiff for \$365.63;
- P13 Photocopy of Application for Colonial National Bank Telegraph Transfer dated 27 October 2010, by Pratap Singh for payment of FJD15,851.80 (US\$8,400) to Apollo Hospitals Enterprise, Hyderabad, India;
- P14 Photocopy of Application for Colonial National Bank Telegraph Transfer dated 23 March 2011, by Pratap Singh for payment of FJD7,177.92 (US\$3,920) to Apollo Hospitals Enterprise, Hyderabad, India;
- P15 Photocopy of Interim Bill from Apollo Hospital Enterprise [INT 43936 dated 14 December 2010] to Plaintiff for 635,996.00 Rupees;
- P16 Refund Receipt No. 1161111 dated 6 April 2011, from Apollo Hospital to Plaintiff for 45,272.00 Rupees;
- P17 In Patient Bill No. IP43811 dated 6 April 2011, from Apollo Hospital to Plaintiff for 128,167.00 Rupees;
- P18 Receipt No. P907980 dated 14 December 2010, from Apollo Hospital to Plaintiff for 233,176.00 Rupees;
- P19 Receipt No. P907957 dated 14 December 2010, from Apollo Hospital to Plaintiff for 369,600.00 Rupees;
- P20 In Patient Bill No. JBH-ICS-12567 dated 15 December 2010, from Apollo Hospital to Plaintiff for 602,776.00 Rupees;
- P21 Application to Reserve Bank of Fiji (RBF) for Travel Funds by Pratap Singh and Approved by RBF dated 22 October 2010, for \$50,000.00;
- P22 Photocopy of Letter of Approval dated 12 October 2010, from Colonial National Bank to Pratap Singh for Home Loan for \$50,000.00 plus fees;

- P23 Copy of Medical Report dated 22 January 2010, from Dr Su Hong Consultant ENT Surgeon, CWM Hospital was in respect to Plaintiff;
- P24 Copy of Medical Report dated 8 July 2010, from Dr Su Hong, Consultant ENT Surgeon, CWM Hospital in respect to Plaintiff;
- P25 Birth Certificate of Plaintiff;
- P26 Photocopy of Medical Report dated 12 March 2009, by Suren Krsihan Re: Plaintiff;
- P27 Photocopy of Medical Report dated 24 March 2010, by Nick McIvor, Re: Plaintiff;
- P28 Discharge Summary by Apollo Hospital, Re: Plaintiff;
- P29 Photocopy of Digicel Samoa Ltd pay slip dated 16 June 2007, Re: Plaintiff;
- P30 Letter dated 25 August 2011, from Land Transport Authority Re: Motor Vehicle No. FC690 (4MYLOVE);
- P31 Photocopy of Rough Sketch Plan of accident on Queens Road, Nakaulevu, Navua on 7 September 2008, drawn by PC3633 Naicker;
- P32 Photocopy of Statement of Pritishna Lala Bhan dated 8 September 2008, given to Fiji Police Force (**"FP"**);
- P33 Photocopy of Statement of Melvina Bhan dated 11 September 2008, given to Fiji Police Force;
- P34 Photocopy of Record of Interview of Nitin Ramesh Mishra on 9 September 2008, by PC3677 Nitesh;
- P35 Photocopy of Charge Sheet in respect to Navua Traffic case No. 3369/08;
- D1 Photocopy of Statement of Pratap Singh dated 13 September 2008 given to Fiji Police Force;

D2 Copy of Plaintiff's Facebook message.

Plaintiff's Case

13. Plaintiff gave evidence himself and called following witnesses:-
- (i) Talei Colati of Naitonitoni, Navua, Officer in Charge - Magistrates Court, Navua (PW1);
 - (ii) Molomi Bulanauca of Qtr 37 Labasa Hospital Compound, General Surgeon (PW2);
 - (iii) Semi Seduadua of Naitata, Navua, Farmer (PW3);
 - (iv) Satish Chand of Wadradra, Navua, Police Officer (PW4);
 - (v) Satrugan Sen Sinha of Nakaulevu, Navua, Chef (PW5)
 - (vi) Pratap Singh of Wainivaidio Road, Navua, Retired Insurance Consultant (PW6);
 - (vii) Ravin Naicker of Naitata, Navua, Police Officer (PW7).
14. Plaintiff's Counsel after his opening address called Talei Colati of Naitonitoni, Navua, Officer in Charge, Magistrates Court, Navua as Plaintiff's first witness (hereinafter referred to as "**PW1**").
15. PW1 during examination in chief gave evidence that:-
- (i) She supervises staff at Magistrates Court, Navua and checks documents;
 - (ii) In reference to Certificate of Court Proceedings (Exhibit P1) she agreed that case was in Magistrates Court, Navua which was in relation to charge of dangerous driving causing occasional bodily harm;
 - (iii) Read the Sentence of Magistrate Court, Navua as from Exhibit P1 as follows:-

"Fined \$500.00 in default 50 days imprisonment. Further disqualified from driving for 6 months. Also to pay compensation as follows:-

1. Pritishna L Bhan - \$300.00 in default 30 days imprisonment.

2. Melvina Bhan - \$300.00 in default 30 days imprisonment.
3. Gabriel Singh - \$1000.00 in default 100 days imprisonment.”

16. PW1 during cross-examination:-

- (i) Stated that the words “Criminal Case” instead of Traffic case in Exhibit P1 is a typing error and;
- (ii) Stated the compensation ordered has been paid and that she did not have the voucher;
- (iii) In relation to error in Exhibit P1 [“Criminal Case” written instead of Traffic Case] she stated that it was typing error and she overlooked it when she signed the Certificate.

17. PW3 during examination in chief gave evidence that:-

- (i) In 2008, he was residing at Nakaulevu, Navua and had been residing there for four (4) years;
- (ii) He could recall on 7 September 2008, at around 1.30pm he was standing on road side being drive-way next to his house and was waiting for his children to come back from church as it was Sunday;
- (iii) His house was around ten meters away from main road;
- (iv) On 7 September 2008, while standing next to highway he saw a blue car coming from Suva side travelling towards Lautoka and he saw that car hit the lamp post, fly and run off the drain which is approximately two meters from the highway;
- (v) The car fell on the left side of the road;
- (vi) He then ran to the car when he saw two (2) girls standing beside the car and saying to each other “what happened”;
- (vii) He took the girls to the Hospital;
- (viii) At that time he could see only two girls and one man ran away and all he knows is it was the driver who ran away who he could not recognise;

- (ix) When he reached the scene he saw another man lying under the front side of the car with face down and he pulled him out and carried him to the roadside where he stopped car going towards Suva. He recognised the Plaintiff and pointed at him in Court and said his name is Gabriel;
- (x) Plaintiff could hardly breathe and blood was coming out from his head;
- (xi) He came to know Plaintiff after the accident and he gave Statement to Police at Navua Police Station.

18. During cross-examination PW3:-

- (i) Stated that he stayed at Nakaulevu, Navua from 1986 to 1984 and after that he moved to Navua Town and stated there for two years, then moved to Vunibau where he stayed for two years as Caretaker and then moved to Nakaulevu, Navua;
- (ii) Stated that he did not go to Church on 7 September 2008, and all his four children had gone to Church on that day;
- (iii) Church service finished at 12.30pm and the distance between Church and his house was about same as distance between Court premises and Holiday Inn;
- (iv) His house was 10meters from the main road and around midday at about 1.30pm he was waiting for his children;
- (v) His children were near the driveway when he saw blue car travelling from Suva towards Lautoka hit a lamp post;
- (vi) When it was put to him by Defendants Counsel that his instruction was blue car was travelling from Navua to Suva he stated that it was from Suva towards Lautoka;
- (vii) Stated that he saw one white car overtake the blue car;
- (viii) When it was put to him that there was truck in front of the blue car, he stated that he could not remember;

- (ix) When it was put to him that there was a truck in front of blue car when white car was overtaking he stated that only white car passed the blue car;
- (x) When it was put to him that he was concentrating on his children and did not see anything he stated that he was concentrating on his children and saw white car overtake blue car and blue car hitting the lamp post;
- (xi) Stated that the Church fell on right hand side if travelling from Suva to Lautoka and he was standing on the right hand side of the road (Suva to Lautoka);
- (xii) Stated that he was about 2 or 2½ chains away from the lamp post that the vehicle hit;
- (xiii) Stated that only he went to scene of accident and could not remember who else was there;
- (xiv) Stated that he saw 2 ladies beside the car and the Plaintiff lying under the front side of the car with face down;
- (xv) Stated that it was not difficult to pull Plaintiff out from under the car and he did not require anyone to lift the car;
- (xvi) Stated that drain was five feet deep;
- (xvii) When asked on what was the position of the car and was it a four wheel he stated that he could not remember;
- (xviii) When he was asked again if vehicle was on its four wheel he stated "Yes";
- (xix) Stated that he carried Plaintiff on his shoulders to the private car;
- (xx) When it was put to him that if it occurred to him that if he carried him on his shoulder he would cause more injury he stated that all he was doing was trying to help;
- (xxi) Stated that another vehicle came at the same time he was carrying Plaintiff and that he carried Plaintiff and stopped the car;
- (xxii) Stated that he could not remember how far he carried Plaintiff;

- (xxiii) When it was put to him that he was not present at site of the accident and that is why he was not able to exactly say what happened he stated that he was there;
- (xxiv) When asked if he was looking at the blue car he stated that he was looking at his children;
- (xxv) Stated that he was standing next to the main road;
- (xxvi) Stated that he could not remember what colour of clothing Plaintiff was wearing;
- (xxvii) Stated that he could smell blood and was not able to smell liquor on him.

19. In re-examination PW3:-

- (i) Agreed that in Examination in Chief he stated he was staying at Nakaulevu;
- (ii) Agreed that Nakaulevu Navua is beside the highway;
- (iii) Agreed that when he carried Plaintiff on his shoulder he was only helping;
- (iv) Agreed that he had no training as to how to carry injured person and stated that he was helping.

20. PW4 during evidence in chief gave evidence that:-

- (i) He has been employed by Fiji Police Force for twenty-eight years and is currently holding the position of Sergeant;
- (ii) In year 2008, he was based at Navua Police Station as Traffic Officer and Traffic Officer's duties included supervising, keeping account of traffic investigation files, giving instructions for investigation and visiting scene of accident;
- (iii) He could recall accident on 7 September 2008, and was not directly involved in the investigation;

- (iv) Confirmed receiving request for report from Plaintiffs Solicitors and preparing the report dated 23 August 2010, as part of his duty and signing the report;
 - (v) He disclosed charge sheet to Plaintiffs Solicitor;
 - (vi) He was not involved in the accident and had very little information;
 - (vii) He could not recall who was the Investigating Officer;
 - (viii) Agreed that he included the sketch plan with the Report and stated that according to the sketch plan it was prepared by PC3633 Naicker.
21. It must be noted that at this stage Plaintiff's Counsel attempted to tender the Report and when Court enquired as where is Plaintiff's Statement being an enclosure Plaintiff's Senior Counsel informed Court that that Statement is missing and withdrew application to tender the Report.
22. During cross-examination PW4:-
- (i) When it was put to him that it took more than a year to respond to request for a report he stated that he was not involved in the accident and when he was transferred as Traffic Officer then he prepared the Report;
 - (ii) When asked if there was Statement by Gabriel Singh he stated that it was 2008 case, he could not recall and he only signed the documents on request.
23. PW5 during examination in chief gave evidence that:-
- (i) He has been residing at Nakaulevu, Navua for twelve years;
 - (ii) He could recall that on 7 September 2008, at about 1.30pm when he was returning from Church located just before Nakaulevu and walking on right hand side, when after he was about ten to twenty meters from the Church, he heard sound of speeding vehicle;
 - (iii) Church is located beside the road with one hundred meter driveway;

- (iv) When he heard the speeding sound he turned around, he saw blue car overtaking a vehicle which missed him by few inches, made huge turn to the left, hit white post, went into the drain flew in the air and landed few meters off the road;
- (v) Blue car was travelling from Suva towards Nadi;
- (vi) Drain is normal drain which can be seen from the road and is one to two meters deep;
- (v) Position of car when it landed was that it was on its wheels;
- (vi) When the car landed he saw the 2nd Defendant at the back (points to her in Court) and one lady badly hurt at the back;
- (vii) He also saw gentleman being First Defendant (points to him in Court) come out of the car when he asked First Defendant if there were other people in the car but First Defendant did not say anything;
- (viii) He knows the First Defendant from before as they are from the same area;
- (ix) After accident he went near the car and saw Second Defendant and then saw lady in the car whom he pulled out and carried to a vehicle;
- (x) Other person he saw was First Defendant who took off and he saw Second Defendant;
- (xi) He found out the fourth passenger who he believe was Plaintiff;
- (xii) He did know Plaintiff before the accident and met him after the accident who was badly injured;
- (xiii) After he took out the lady passenger lots of people gathered around the car and he did not see Plaintiff;
- (xiv) He gave statement to Police at Navua Police Station but could not remember after how long.

24. During cross-examination PW5:-

- (i) Stated that he gave Statement to Police and he did not know if he mentioned anything about Plaintiff;

- (ii) Stated that colour of vehicle was dark blue;
- (iii) After his Statement was given to Police on 14 September 2008, was shown to him he confirmed giving the Statement;
- (iv) Stated Plaintiff's name does not appear in his Statement because he did not know Plaintiff.

25. PW6 during examination in chief gave evidence that:-

- (i) He is seventy-one (71) years old, lives in Navua, does farming and Plaintiff is his son;
- (ii) Apart from Plaintiff he has two daughters who reside in Melbourne, Australia;
- (iii) Previously he was living at 25 Namena Road, Suva and in 2013, he sold that property and moved permanently to Navua;
- (iv) In 2008, he was looking after a farm in Navua and he heard about accident in September on a Sunday which supposedly was 7 September;
- (v) In 2008, he was living at Namena Road and Navua, both;
- (vi) On day of accident, which was fathers day and was Sunday he was at the farm in Navua when around 12.30pm Nitin Mishra and two girls went to his place and after spending fifteen (15) minutes or so Nitin decided to go and see his father and take Plaintiff with him;
- (vii) Nitin is the Defendant in this action;
- (viii) He only knew Nitin prior to the accident;
- (ix) He could not say exactly how long he knew Nitin and stated Nitin was from Navua, his father was a bus driver and Nitin's sister rented his property and Nitin was Plaintiff's acquaintance;
- (x) Guessed that Nitin, came from Suva because Nitin was staying in Suva;
- (xi) After they left he went to Kingdom Hall of Jehovah's Witness Church, Navua for Sunday Church Service which started at 1.00pm and he has been a member of the Church for sixty (60) years;

- (xii) While in Church he received call from someone at around 3.00pm (he could not recall exactly as he did not give much thought) to inform him that his son was involved in an accident. When he rushed back home and rang hospital he was told that he has been taken to Suva;
- (xiii) He then rushed to Suva Hospital with his wife and by that time Plaintiff was admitted in ICU Department and they could not see him physically because of Plaintiff's critical condition they were not allowed to see him;
- (xiv) They left for home after waiting for 3 to 4 hours realizing he was okay and he could not remember if he saw Plaintiff on that particular day;
- (xv) Saw Plaintiff the next day in ICU when he was still in coma and his body was all wrapped up;
- (xvi) He spoke to Dr McCaig who informed him that he was concerned and there was no hope that Plaintiff will survive and they were waiting for Plaintiff to show some sign of recovery;
- (xvii) His first reaction was for him to prepare for Plaintiff's funeral as it seemed Plaintiff will never live again;
- (xviii) Plaintiff came out of coma after about a week when he was taken to Ward that was for patients like Plaintiff and was looked after by specialists by the name of Dr Su and Dr Maloni;
- (xix) Tube was fitted through Plaintiff's nose to feed Plaintiff;
- (xx) It was his responsibility to feed Plaintiff and they would go to CWM Hospital in the morning and in the afternoon;
- (xxi) Tube was not removed at any stage because Plaintiffs throat was badly damaged and when he realized that they could not remove the tube he decided to take Plaintiff to New Zealand which was on advise of hospital;
- (xxii) He made arrangements to take Plaintiff to Auckland Hospital but unfortunately they could not remove that tube and they did not give any other treatment because the whole purpose of taking him there was to have tube removed which they said they could not do;

- (xxiii) After that he brought him back to CWMH when he was admitted and he had to go to hospital to feed him through the tube;
- (xxiv) Tube was not removed at any stage in Fiji and Plaintiff was not able to feed himself normally but appeared to be breathing;
- (xxv) Whole objective of treatment was to have tube removed so Plaintiff could start talking so they decided to take Plaintiff to Apollo Hospital in Southern India;
- (xxvi) He went to India with Plaintiff and he arranged the hospital and travel and when he tried to get assistance from CWMH he was told that if he wanted he could take Plaintiff at his own cost;
- (xxvii) He got Plaintiff admitted at Apollo Hospital for three (3) months and during this period he stayed at the Hospital in India;
- (xxviii) They started extensive treatment to get rid of the tube for Plaintiff to start speaking normally;
- (xxix) They could not remove the tube altogether and assured him that if he could bring Plaintiff back after three (3) months then they could remove it;
- (xxx) When they came back to Fiji Plaintiff was admitted at CWMH and everything came back to square one with him going to hospital to feed Plaintiff;
- (xxxi) Plaintiff received further treatment by Dr Su in ENT Department and because Plaintiff could not coordinate he was sent to Tamavua Hospital for three (3) months;
- (xxxii) Plaintiff's other injuries have been healed but affects him time and again;
- (xxxiii) Plaintiff used to go for check-ups at first every fortnightly, then monthly and then when he needs to go to hospital and since Plaintiff started talking his visits to hospital stopped;
- (xxxiv) Plaintiff stayed with him since birth and the injuries he received will be for his lifetime;

- (xxxv) Because Plaintiff broke his backbone it is always giving him trouble; he is not able to lift heavy objects, sometimes he had difficulty getting off the bed;
- (xxxvi) Because Plaintiff's head is severely damaged and his brain has been damaged, Plaintiff cannot control his temper;
- (xxxvii) Plaintiff is not totally different from before and it is like they are dealing with a different person;
- (xxxviii) Before accident, Plaintiff was physically fit and now he is overweight and he cannot do lot of things like working on the farm;
- (xxxix) Prior to accident, Plaintiff:-
 - (a) Plaintiff did Computer IT Course through correspondence;
 - (b) Plaintiff worked as IT Manager for Digicel; and
 - (c) Because he had to go to Samoa, he came and worked for another company and he does not know name of this company;
- (xl) Plaintiff could not get job after accident because he was not talking and is trying very hard to get a job;
- (xli) His speech appears to have progressed but is almost nil and no doctor has given any assurance about possibility of improvement;
- (xlii) After coming back from India, Plaintiff was seeing Dr Su Hong;
- (xliii) Dr Paul Singh, a neuro-surgeon and an independent consultant is treating Plaintiff as far as Plaintiff's brain is concerned;
- (xliv) He cannot see any result and Dr Paul Singh advised that it is life long problem and Plaintiff has to live with it;
- (xlv) Prior to accident Plaintiff was married and has a son who is twelve (12) years old and they were staying as strong family and they went to Samoa together;
- (xlvi) Soon after the accident Plaintiff's wife separated from Plaintiff mainly because she did not want to get involved in treatment;

- (xlvii) Plaintiff's son is living with Plaintiff and they are very attached to each other;
- (xlviii) Plaintiff is renting in Samabula and has been living separately from his parents from time of marriage;
- (xlix) Plaintiff is able to drive a car but does not have a car;
- (l) Plaintiff helped in farm which changed after accident and is not able to work on the farm;
- (li) Before the accident Plaintiff had own exercise machine, played soccer and swam on regular basis which he is not able to do now;
- (lii) Plaintiff maintains his and his son's upkeep from that money he gave to Plaintiff and he got the money from sale of his 25 Namena Road Property;
- (liii) He hired care-giver by the name of Urmila for three years at cost of \$100.00 per week whose duties included feeding Plaintiff, change Plaintiff's clothes;
- (liv) Other expenses were:-
 - (a) Buying diapers and medication for three (3) years amounting to about \$10,000.00;
 - (b) Travelling from Navua (Mani's place of residence) to CWMH by car or taxi for three (3) years amounting to about \$10,000.00;
 - (c) Overseas Travel expenses:-
 - (i) To NZ (Return) - \$488.00 each for him and Plaintiff (Exhibit P5); Plaintiff's ticket has been misplaced; (Total - \$976.00)
 - (ii) To India (2 Trips) - \$ 7,030.00 (Exhibits P6 & P7)
 - (d) Medical Expenses:-
 - (i) Diagnostic Medlab - NZD\$44.00 (Exhibit P9)
 - (ii) Auckland District Radiology Group - NZ\$700.00 (Exhibit P10)
 - (iii) Auckland District Health Board - NZD365.70 (Exhibit P11)

- (iv) Apollo Hospital Enterprise: FJD15,551.80 (USD8,400.00) (Exhibit P13)
 - (v) Apollo Hospital Enterprise: FJD7177.92 (USD3920.00) (Exhibit P14)
 - (vi) Refund 45,272 Rupees (Total 635,996 Rupees) (Exhibit P15 & P16)
- (lv) All expenses were paid by him and he took fifty thousand dollars (\$50,000.00) from Colonial National Bank to pay for the expenses;
 - (lvi) He could not produce all receipts or original documents because of the time lapse and he was more concerned about Plaintiff's treatment;
 - (lvii) No receipts were given by care-giver as it was based on mutual agreement.

26. During cross-examination PW6:-

- (i) Stated that he gave his Statement to Police a week after the accident (13/9/08) which was very close to the date of accident and agreed that whatever he told would represent the truth;
- (ii) Stated that his wife prepared food and spread on the table;
- (iii) When it was put to him that in his statement he stated that he prepared and spread lunch for them he stated that it is not his handwriting;
- (iv) Agreed that his signature appears on the Statement to Police and stated that at that particular moment he was in a very confused state;
- (v) Agreed that when Plaintiff wished him happy father's day he could smell liquor on his son and told Police Officer that he saw 1st Defendant sitting in his sitting room and drinking beer;
- (vi) Denied that 1st Defendant took beer from the freezer;
- (vii) When it was put to him that he told Police and his Tenant informed him that 1st Defendant and them were drinking since morning he stated that he was not sure;

- (viii) Agreed that that is all he knew before the accident;
- (ix) When it was put to him that he said in examination in chief that he heard 1st Defendant asking Plaintiff to accompany him to see his father's place he stated that he answered question by Police and 1st Defendant and them came for a very short time and purpose was for 1st Defendant to go to his father's place and 1st Defendant thought it was good idea to take Plaintiff with him;
- (x) When asked as to whether what he said in Court or what he said in his Statement to Police is correct he stated that Police Statement is correct;
- (xi) Agreed that the air ticket to New Zealand (Exhibit P5) is dated 24 April 2007, was wrongfully tendered and has no relevance to this case;
- (xii) Stated that at time of accident Plaintiff and daughter-in-law was staying together and he was sure about that;
- (xiii) When it was put to him that Plaintiff and daughter-in-law separated three (3) years prior to accident he stated that he does not remember;
- (xiv) When it was put to him that Plaintiff was involved in another accident prior to accident subject to this case, vehicle was driven by Plaintiff's uncle Manoj Kuar, Plaintiff suffered injuries to his hand and back; and in one of Plaintiff's hand an iron rod was inserted to straighten it he stated that he was not aware;
- (xv) Stated that Plaintiff came to assist on the farm frequently and could not say how often but was there to assist him when need arose;
- (xvi) When asked as to when Plaintiff went to assist how long Plaintiff stayed with him he stated that it depended on the task involved and spent time with them;
- (xvii) Denied that CWMH suggested to take Plaintiff to Dr. Krishan in Melbourne Hospital;
- (xviii) When it was put to him that he said he stayed in India for three (3) months he stated that he said approximately three (3) months;

- (xix) In reference to Exhibit P20 agreed that Plaintiff was admitted on 30 October 2010, and discharged on 14 December 2010, which is not approximately three (3) months but barely one and half months;
- (xx) Agreed that second admission in India was lesser than first admission which was about two (2) weeks;
- (xxi) When it was put to him that he said three (3) months he stated that he took into account time they prepared to go and time they came back;
- (xxii) Agreed that Plaintiff goes to gym and carries weights;
- (xxiii) When it was put to him that he said Plaintiff cannot lift weights he stated that Plaintiff is still not perfect but he lifts weights and goes to gym to keep himself fit;
- (xxiv) When it was put to him that he is not living with Plaintiff he stated that he virtually sees Plaintiff everyday, talks to him and provides whatever he can from their house;
- (xxv) Stated that he was not aware of Plaintiff's employment after the accident;
- (xxvi) Stated that he has to agree if it was put to him that Plaintiff is employed by Dell Computers;
- (xxvii) Stated that he is not aware if Plaintiff does private job at home fixing computers and when it was put to him that Plaintiff does he did not respond;
- (xxviii) Stated that he cannot remember if his daughter-in-law came to visit Plaintiff in hospital;
- (xxix) Stated that when he visited Hospital with his wife and could not remember if anybody else went with him;
- (xxx) Stated that he cannot remember if he saw his daughter-in-law visiting Plaintiff;
- (xxxi) Stated that \$50,000.00 approval he sought from RBF was treatment of Plaintiff in New Zealand and he had to surrender his FNPf Pension Scheme which was around \$90,000.00 to pay for Plaintiff's treatment;

- (xxxii) Stated that he did not use all of \$90,000 for Plaintiff's treatment and he cannot remember how much money he took to India;
- (xxxiii) Stated that total amount he sent to India was about \$23,000.00;
- (xxxiv) Stated that apart from swift transfer of monies he took money for their expenses;
- (xxxv) Disagreed with the suggestion that he was not telling the truth and that claim is exaggerated.

27. During re-examination PW6:-

- (i) Stated that he is not aware about Plaintiff's employment because Plaintiff is staying in a flat in Suva and that he does not know if Plaintiff is getting any money from anywhere;
- (ii) Stated that after Plaintiff was discharged from hospital in India he stayed for about one extra week as Plaintiff was still in Hospital for those extra days;
- (iii) Plaintiff was admitted at Hospital in India on the same day they arrived;
- (iv) All amount was paid by him from loan and funds received after surrender of FNPF Pension Scheme.

28. PW7 during examination in chief gave evidence that:-

- (i) He has been employed for Ministry of Health for 20 years and from 2009 has been employed in the Records Department at CWMH which department is headed by Joana Lesuma, who instructed him to give evidence as she is attending a workshop;
- (ii) His duties included looking after medical reports requested by patients and record keeping;
- (iii) Su Huang was employed by CWMH as Specialist in ENT;
- (iv) Medical Reports dated 22 January 2010 (Exhibit P23) and 8 July 2010 (Exhibit P24) were prepared for Plaintiff by Su Huang;
- (v) Su Huang resigned in February 2017 and is now in American Samoa.

29. During cross-examination PW7 stated that in 2nd line of the Report date of account is stated as 2 September 2008.
30. PW8 during examination in chief gave evidence that:-
- (i) He has been a Police Officer from 2005, is stationed at Navua Police Station (NPS) as Detective Constable and has been involved in investigation traffic cases;
 - (ii) On 7 September 2008, he was stationed at NPS and was appointed as Investigation Officer in respect to accident on 7 September 2008, involving MV Reg. No. FC690 ("**the vehicle**");
 - (iii) On 7 September 2008, while they were on the road just before Pacific Harbour doing booking at about 1.30pm they received information from NPS about an accident at Nakaulevu, Navua along Queens Road and after receiving the information they rushed to scene of accident and reached there within 10 minutes when he saw vehicle parked along roadside and people gathered at scene of accident;
 - (iv) First thing they asked was if anyone was injured and was told that passengers were taken to Navua Hospital;
 - (v) They were told that driver of vehicle was Nitin Mishra who was not there;
 - (vi) They then saw the tyre marks of the vehicle which was from right side towards the left and that there was a drain alongside the road and after the drain where it struck;
 - (vii) The vehicle landed ahead without damaging the grass and the vehicle was parked on the side of the road, neither facing Suva nor facing Lautoka but facing Navua;
 - (viii) After they saw tyre marks he prepared rough sketch plan of scene of accident and signed it on 7 September 2008, at 1.50pm;
 - (ix) The vehicle sustained damages but he cannot recall type of damages;
 - (x) He saw broken glasses on the road which he marked in yellow on the rough sketch plan;

- (xi) They carried on with the investigation and took statements from witnesses;
- (xii) Passengers Pritishna Bhan and Melvina Bhan, Students were recorded by Sergeant Luke Ravula on 8 September 2008, and 11 September 2008 (Exhibits P32 and P33);
- (xiii) He discovered that there was another passenger in the vehicle namely Gabriel Singh of Rokatoka Road, Navua and cannot recall if any statement was taken from him;
- (xiv) He went to CWMH with Traffic Officer Luke Ravula to see Plaintiff and could not talk to him because they were informed by the Warden that Plaintiff is not able to talk and was unconscious;
- (xv) Driver of the vehicle came voluntarily to NPS on 9 September 2008, and was caution interviewed by Police Constable 3177 Nitesh Prakash on 9 September 2008 (Exhibit P34);
- (xvi) Identified the First Defendant in Court as the driver of the vehicle;
- (xvii) After investigation was completed driver of the vehicle was charged with offence of dangerous driving causing bodily harm (Exhibit P35) who was convicted and sentenced whereby his driving licence was suspended for 6months, fined \$500.00 and ordered to pay compensation to 3 passengers in the vehicle;
- (xviii) He could not bring Police file because after the case was completed the file was burnt under the supervision of OCPD Serua/Namosi/Lami SP Ilikini Tauvosi;
- (xix) He only managed to retrieve Traffic Officers Register which notes his name as Investigation Officer; complainants address as unknown caller; name of offender as Nitin Mishra of Viwawa Road, Navua aged 23 years, Register No. 205 of 2008 and Traffic Docket No. 1009 of 2008.

31. During cross-examination PW7:-

- (i) Stated that he was Investigation Officer and accused surrendered on 9 September 2008;

- (ii) When it was put to him that accused went to NPS at 9.00am on 8 September 2008, and was in custody from 8 September 2008 to 3.00pm on 9 September 2008, he stated that he could not recall;
 - (iii) Stated that he cannot remember time 1st Defendant was taken for interview;
 - (iv) Stated he remembered details of the accident because he attended scene of accident and he can recall that accused was interviewed by another officer;
 - (v) Stated that he investigated several cases and is aware of about details of these investigations;
 - (vi) Stated that accident took place at about 1.30pm;
 - (vii) The key to sketch plan was in the original which was destroyed;
 - (viii) When it was put to him that he did not have keys and was guessing he stated that he drew the plan and attended scene of accident and without keys he can tell what alphabets represent;
 - (ix) Stated that after drawing rough sketch plan he draws fair sketch plan which is more specific and is used for court purposes and the accused;
 - (x) Stated that 2nd Defendant and Melvina Bhan's statements were taken in Suva but does not know the exact place;
 - (xi) When it was put to him that Statements were recorded while they were admitted he stated that he cannot say because it was taken by Traffic Officer and he was not present;
 - (xii) Stated that since he was Investigating Officer he was directed by Traffic Officer to stay in the Station on standby and the Traffic Officer went to Suva with driver to record the Statement.
32. During re-examination PW7 stated that apart from 2 passengers Statements other statements were recorded and he recorded the statement of witness at scene of the accident.
33. Plaintiff during examination in chief gave evidence:-

- (i) Both Defendants are known to him;
- (ii) He is 37 years old being born on 6 October 1977;
- (iii) He was involved in an accident on 7 September 2008, and is sure about that date;
- (iv) When referred to date of accident in Medical report which says 2 September 2008, he stated that his date is correct;
- (v) Accident happened at Queens Road, Nakaulevu, Navua between 1pm to 2pm;
- (vi) Prior to accident he was at 25 Namena Road, Suva which is his father's property and he travelled to Navua with Defendants and Melvina Bhan (2nd Defendant's cousin) in 2nd Defendant's blue vehicle No. FC690 who came and picked them up;
- (vii) 2nd Defendant was driving the car and she drove from Suva to his house at Wainividio, Navua;
- (viii) They reached his place at around 12.30pm and his parents and sister were home;
- (ix) Actually they were going to Nitin's place for father's day and on the way went to his place and from there they had to go to Nitin's place;
- (x) They stayed at his parents place for less than an hour and he had lunch prepared by his mother and had two (2) bottles of Tribe;
- (xi) Others did not have it;
- (xii) First Defendant drove vehicle from his place to go to 1st Defendant's place;
- (xiii) Second Defendant, Melvina Bhan and him sat in car to go to 1st Defendant's place and he was invited by 1st Defendant to go with him which was the plan when they left Suva;
- (xiv) He was seated at the back, behind passenger seat, 2nd Defendant was sitting on the front passenger seat and Melvina was sitting next to him;

- (xv) When First Defendant started to drive Second Defendant and him told First Defendant not to drive;
- (xvi) When he was asked as to who gave keys to First Defendant he stated it was between First and Second Defendants;
- (xvii) On their way to First Defendant's place, First Defendant overtook one vehicle when he was telling him to slow down and then their vehicle was involved in an accident;
- (xviii) First Defendant went towards right and when he was coming on his side that accident happened;
- (xix) He cannot recall what happened after that because he lost his memory due to brain injury;
- (xx) First time he could recall something about accident is last week of October 2008, at Tamavua Rehabilitation Centre;
- (xxi) He could not speak, was paralysed in bed;
- (xxii) He was at Tamavua Rehabilitation Centre where they keep spinal injury patients for around 4 to 5 months;
- (xxiii) He was brought back to CWMH and was in Plastic Ward;
- (xxiv) He went to New Zealand to see Dr. Nick and confirmed Dr. Nick prepared report dated 24 March 2010 (Exhibit P27);
- (xxv) When he came from New Zealand he was admitted at CWMH again and was seen by Dr. Krishna ENT Specialist from Adelaide, Australia who prepared report dated 12 March 2009 (Exhibit P26);
- (xxvi) He went to Apollo Hospital in Hyderabad India accompanied by his father, Pratap Singh as it was a requirement he should go with one attendant;
- (xxvii) Agreed that Discharge Summary from Apollo Hospital (Exhibit P28) relates to him;

- (xxviii) After coming back from India he continued attending treatment by going for check-up in clinics at CWMH which initially was weekly, then fortnightly and then monthly;
- (xxix) He does not go for check-ups at the moment and he can go anytime when he needs them;
- (xxx) He still takes painkiller Brufen and Indosine for pain in ribs and spine pain to enable him to walk;
- (xxxi) Currently, he sees Dr Paul Singh, Psychologist for his vocal and brain injury;
- (xxxii) Prior to accident, he could do anything physically and worked on his father's farm when need arose;
- (xxxiii) He used to swim, took part in running from Navua to Pacific Harbour and played soccer at club level which he is not able to do after the injuries;
- (xxxiv) He is trying his best to train himself as part of rehabilitation training;
- (xxxv) He obtained Diploma in Information Technology from Fiji Institute of Technology in 1997, and did next level up course by correspondent through Western Sydney Institute of TAFE;
- (xxxvi) He started work whilst he was studying and his work experience is as follows:-
- (a) 2002: Pro System as System Engineer;
 - (b) 2003 - 2004: Logical System as Country Manager for Apple (Fiji);
 - (c) 2005: Ba Provincial Holdings Ltd as IT Manager;
 - (d) 2005 - 2007: Digicel, worked in Samoa. Left employment in 2007 because of his son who was in Fiji. Pay was \$50,000.00 per annum (Exhibit P29 - Payslip);
- (xxxvii) Prior to and at time of accident he was employed by Pacific Agencies permanently as IT Manager with annual salary of \$18,000.00 and his responsibilities included managing all services, e-mail systems,

shipping software linked to counter-parts in New Zealand, networking and upgrading of telephone system from PABX to VOIP;

- (xxxviii) He stopped working after the accident and did not work for three (3) years when he was in hospital;
- (xxxix) After rehab he did casual work like on call job for companies who knew him;
- (xl) Currently he is not permanently employed and is currently earning between \$800.00 to \$1,000.00 per month;
- (xli) He did try and is still trying to get permanent job and he applied for all types of job including that of a driver;
- (xlii) All medical expenses was paid by his father Pratap Singh and he is happy with his father's evidence in respect to amount he paid;
- (xliii) When asked if it was too high or exorbitant he stated that his father paid the bills he was given to pay;
- (xliv) He has to reimburse the amount paid by his father to him;
- (xlv) He conducted vehicle search at LTA in respect to vehicle No. FC690 (Exhibit P30);
- (xlvi) He is claiming for special damages, general damages and interest on damages;
- (xlvii) Police officers visited him in January or February 2009, when he came to Plastic Ward for statement but was told by Dr Su that he cannot give statement because he is not able to speak and he cannot remember signing anything;
- (xlviii) He had no knowledge if compensation ordered by Navua Court was paid to him or anyone collected it on his behalf;
- (xlix) He instructed his Solicitor to obtain accident report from NPS and confirmed Exhibit P30 as rough sketch plan of the accident.

34. During cross-examination Plaintiff:-

- (i) Stated that he knew Defendants because First Defendant and his sisters were renting flat at his father's house at 25 Namena Road, Suva and Second Defendant is First Defendant's girlfriend;
- (ii) Stated that on 7 September 2008, his friends came to see him around 11.00am when they started drinking liquor;
- (iii) When it was put to him that he was drinking from morning and not 11.00am he stated that it was not correct as his friends came around 11.00am;
- (iv) Stated that they left for Navua at 12.00noon and reached Navua at about 1.00pm and is not sure about exact time;
- (v) Stated that he cannot recall if he bought beer on way or was drinking in the vehicle on their way to Navua;
- (vi) Stated that he knew Second Defendant through First Defendant;
- (vii) Stated Defendants invited him to go with them;
- (viii) Stated that is a lie and not true when it was put to him that no one invited him, he forced himself into the vehicle and Defendants waited outside the car for him to get out;
- (ix) Stated that when he reached Navua he did not go down at your place because First Defendant asked him to come;
- (x) When it was put to him that in examination in chief he told Court that him and Second Defendant told First Defendant not to drive he stated that, that must be right;
- (xi) Confirmed, that he said on their way to First Defendant's home he overtook a vehicle;
- (xii) When it was put to him that First Defendant had to go to extreme right to overtake he stated that he thought so;
- (xiii) When he was asked if he would agree that in the process of going to extreme right vehicle tyre went on ground (off tarseal road) he stated not on that side;

- (xiv) When it was put to him that while vehicle was on extreme right because of gravel First Defendant lost control of the vehicle he stated he does not know;
- (xv) Stated that he cannot remember if he received \$1,000.00 compensation as he was in hospital in 2010 and came out in April 2011 and also the signature on the voucher is not his;
- (xvi) When it was put to him that he pushed First Defendant's head for him to slow down he stated he did not do so and just told him to slow down;
- (xvii) Stated that he was married in 2001, separated in May 2008 because of personal differences and divorced in 2011 and prior to accident there was pending application for custody of child;
- (xviii) Stated that prior to accident he was staying at 25 Namena Road, Suva independent of his father from May 2000, when he started work and he stayed with his father whenever he was needed there;
- (xix) Stated that he was not aware about treatment given to him in Fiji while he was unconscious and in coma and he came to know when he gained consciousness at Tamavua Rehabilitation Centre which was sometimes in last week of October 2008;
- (xx) Stated that he went to see Dr Nick in New Zealand but is not sure about treatment given and cannot remember how long he was in New Zealand;
- (xxi) Stated that he is not sure for how long he was admitted at Apollo Hospital and that it is in the medical report;
- (xxii) Denied that he was drinking liquor when he had pipe in his throat;
- (xxiii) Stated that his wife visited him with his son when he was admitted in hospital and he did not know if his father saw her or was on his bedside when she came;
- (xxiv) Stated that custody case was dissolved and his son who is twelve years old and is staying with him from 2015 and prior to that he was staying with his mother;

- (xxv) Stated that he was employed by Digicel Samoa and earning \$50,000.00 per annum and he came to Fiji his wife and son did not want him to go to Samoa and he was waiting for Digicel to start business in Fiji;
 - (xxvi) When asked if he joined Digicel (Fiji) then he stated that they were not in operation at time of accident;
 - (xxvii) Stated that he worked for Pacific Agencies for eight (8) months but was not sure;
 - (xxviii) Stated that he is doing work on contract basis;
 - (xxix) When it was put to him that he is earning sufficient to keep himself going he stated that it depends on the job he gets and when he gets contract he gets paid and sometimes he does not get any job;
 - (xxx) Stated that he is looking for full-time job because he needs to survive and he cannot get full time job because his voice is not good.
35. In re-examination Plaintiff stated that he asked First Defendant not to drive the vehicle because it was not First Defendant's vehicle and he has not seen First Defendant drive that vehicle as person who owns the vehicle is the best person to drive other than somebody else.
36. First Defendant during examination in chief gave evidence that:-
- (i) On 7 September 2008, he was at Namena Road, Suva on top flat of building owned by Plaintiff's father and rented by his sister, who he visited occasionally;
 - (ii) He called Second Defendant at 10.45am who came around 11.00am with her cousin Melvina Bhan when he went outside to meet her outside and asked if she could take him to Navua because it was fathers day;
 - (iii) At first she refused to go and after he kept on asking she agreed and then he went back to lock his flat;

- (iv) When he was going back to the car Plaintiff came and asked him as where he was going and he told Plaintiff that he was going to Navua to see his father when Plaintiff insisted that he wants to join him;
- (v) He saw Plaintiff with some of Plaintiffs friends who were drinking liquor and Plaintiff was drinking Tribe;
- (vi) Plaintiff insisted that he also wants to go to Navua to see his father when he said to Plaintiff that he cannot go because he has requested a person to take him who does not know Plaintiff;
- (vii) After than he went outside when Plaintiff followed him and while Plaintiff was talking to him Plaintiff had a bottle of Tribe in his hand and was drunk because he could smell liquor on Plaintiff and the way Plaintiff was talking;
- (viii) He then went and sat in the car when Plaintiff followed him and started knocking on the window and then Plaintiff opened the door and sat in the vehicle;
- (ix) He asked Plaintiff to leave because Second Defendant said she does not know him and she does not want to take him but Plaintiff did not get out of the car;
- (x) After waiting for few minutes they left for Navua at almost 11.30am;
- (xi) At Veisari, Lami, Plaintiff asked to stop the vehicle when he went and bought few bottles of Tribe which he was drinking on the way to Navua;
- (xii) When they reached Plaintiff's place they got off the vehicle on Plaintiff's invitation and Plaintiff's parents and sister were there;
- (xiii) They were at Plaintiffs place for about half an hour when Plaintiff was still drinking Tribe;
- (xiv) He said to the Second Defendant and Melvina that they should leave for his place and when they came out the key was in the ignition of the vehicle and he sat on drivers seat and started the vehicle;

- (xv) Second Defendant said to him that she will drive since it was her vehicle but he refused and they had no choice but to sit in the car as they had to return to Suva after dropping him;
- (xvi) When Plaintiff came out of his house and sat in the vehicle without any invitation from him, they asked Plaintiff to get out because Second Defendant and Melvina had to return to Suva after dropping him but Plaintiff did not get out;
- (xvii) They waited for a while then started driving to his place and Plaintiff did not say anything to him;
- (xviii) When they were almost reaching his place there was a white carrier in front driving very slowly which he tried to overtake and when his vehicle was on the side of the carrier, the carrier came towards his vehicle by crossing the white lane;
- (xix) To save the carrier hitting his vehicle, he turned his vehicle towards right by which time the front and rear tyres were touching the carrier and because of that he lost control and heard Plaintiff saying to stop the vehicle and due to that he applied the brake suddenly and vehicle was out of control;
- (xx) The vehicle then hit a small white post by the road side, hit the drain;
- (xxi) Next thing he can remember is vehicle was on its four wheels far inside the grass area;
- (xxii) He asked if everyone was okay and heard voices saying “we are okay”;
- (xxiii) He opened driver side door and rushed to highway to seek help and by that time taxi came and driver asked him if he was injured;
- (xxiv) He had injuries on his forehead and back which was visible and the taxi driver said he will take him to the hospital and by that time lots of people had gathered around the vehicle
- (xxv) On the way he lost consciousness and regained consciousness in Lami when he asked driver to drop him at his brother’s place at Rewa Street;

- (xxvi) He went to Samabula Health Centre with his brother where he got injection to kill pain and then he went to his brothers place and slept there;
- (xxvii) Next day which was Monday 8 September 2008, at around 8.30am he went to NPS and admitted that accident was caused by him, when they put him in the cell;
- (xxviii) He was taken out of the cell on 9 September 2008, at around 10.00am and interviewed and released;
- (xxix) He came to know about traffic case against him when Police gave him Summons which was almost one (1) year after the accident.

37. During cross-examination First Defendant:-

- (i) Agreed that he gave interview to Police on 9 September 2008, and the Interviewing Officer cautioned him (Exhibit P34);
- (ii) Denied that he was given an opportunity to add, correct or alter answers given during interview;
- (iii) Agreed that evidence given in Court is substantively different to what is in Caution Interview and that when he gave Interview he was in a shock and to his knowledge, evidence he gave in Court is correct;
- (iv) When asked if he agreed that he gave wrong version to Police in the interview he stated it was doubtful version as he was in shock and in cell for a day;
- (v) Agreed that he gave wrong version to Police;
- (vi) Stated that he did not have knowledge that if he gave false information to Police he was committing an offence;
- (vii) Agreed that he understood his duty to give true information to Police and to tell the truth and yet he gave that version in the Interview;
- (viii) Agreed that Plaintiff is claiming for compensation against him and he is seeking to avoid any liability for compensation claimed by Plaintiff;
- (ix) Denied that that is reason he gave evidence as given to this Court;

- (x) Stated that he gave different version to Police because he was shocked, he suffered injury on his head, was in cell for more than twenty-four (24) hours and got some mental torture from Police Officers;
- (xi) Denied that he fabricated his evidence given in the Court;
- (xii) On 7 September 2008, he and his sister were residing on the top last flat at 25 Namena Road and Plaintiff was residing at bottom flat, which cannot be seen from his flat;
- (xiii) Stated when he was downstairs to see Second Defendant who was outside the gate he saw through the window in Gabriel's flat and determined that they were drinking;
- (xiv) Stated that Plaintiff was drinking alcohol because he had Tribe in his hand and he could smell liquor on Plaintiff;
- (xv) Stated that he met Plaintiff when he came down after locking the flat;
- (xvi) Denied that Second Defendant and her cousin came and waited downstairs in Plaintiff's flat and he went upstairs to have shower;
- (xvii) Denied that it was plan between him, Plaintiff, Second Defendant and Melvina on 7 September 2008, to go to Navua in Second Defendant's car;
- (xviii) Denied, that his evidence that Plaintiff forced himself into the vehicle is wrong;
- (xix) Stated that he has known Plaintiff from 2000 and he did ask Plaintiff to come out of the vehicle but he was drunk and did not come out;
- (xx) Denied that he took Plaintiff voluntarily and stated that he did not call Police and Second Defendant did not do that either;
- (xxi) Stated that he knew Plaintiff from 2000, knew his family, Plaintiff forced himself into the car, he was tenant at that time and would not have thought to call the Police;
- (xxii) Stated that Plaintiff's behavior was aggressive and he moved the car because he knew Plaintiff will not leave;

- (xxiii) Stated Second Defendant did not want Plaintiff to come;
- (xxiv) Stated that he did not know if Melvina protested and she said it is Second Defendant's car;
- (xxv) When it was put to him that neither him nor Second Defendant or Melvina protested he stated they did;
- (xxvi) Stated that he did not know if Plaintiff knew Melvina and that Second Defendant and Melvina are cousins;
- (xxvii) Stated that he knows Second Defendant for six (6) months and at that stage they are just friends and denied that they are in a relationship;
- (xxviii) Stated that he was not sure where Second Defendant lived at that stage but when it was put to him that he knew Second Defendant for six (6) months at that stage he stated Second Defendant lived in Nausori;
- (xxix) Denied that he invited Plaintiff to go with them because he knew Plaintiff for sometime;
- (xxx) Stated that he did not state to anyone and in the Interview with Police that Plaintiff forced himself into the car and agreed that he should have;
- (xxxi) Stated that from Suva to Navua, Second Defendant drove the vehicle and she was the owner of that vehicle;
- (xxxii) Stated that they went along Queens Road and he cannot remember the route as he was not driving;
- (xxxiii) Stated that there was no aggressive behaviour in the vehicle and him, Second Defendant and Melvina did not protest to Plaintiff's presence in the vehicle;
- (xxxiv) Stated that when Plaintiff came back with beer in Veisari, Lami, he objected when Plaintiff started to open the beer and told him that he can drink at home;
- (xxxv) Stated that Plaintiff and him were sitting at the back seat;

- (xxxvi) Agreed that Plaintiff's house fell on the way to his place and they diverted to go to Plaintiff's place and when they got off the vehicle on Plaintiff's invitation;
- (xxxvii) Denied that he had refreshment and meal at Plaintiff's place and did not know if others had it;
- (xxxviii) At Plaintiff's place he got the drinks out from the car and left in the fridge;
- (xxxix) Stated that they stayed at Plaintiff's place for around half an hour and then he told Second Defendant and Melvina that they had to go and as for Plaintiff he was supposed to go to Plaintiff's place from Suva;
- (xl) Stated that Plaintiff sat in the car and him and Second Defendant protested and denied that they did not do so and Plaintiff sat in car according to plan made in Suva to go to his parents place;
- (xli) Stated that Plaintiff used force and aggression in form of opening the door and sitting in the car;
- (xlii) Stated that he told him that him, Second Defendant and Melvina are going to his place and Plaintiff is to stay home because he wanted to come to his place in Navua and told him to get out as the ladies had to go to Suva after dropping him;
- (xliii) Stated that he did not do anything else because he was drunk and did not tell his father because he thought not to disturb them and they were going to church;
- (xliv) Denied, that nothing as such happened and because the reason is that it was planned thing;
- (xlv) Stated that he got into drivers seat and denied that Second Defendant authorised him to drive;
- (xlvi) Denied that Second Defendant authorised him to drive;
- (xlvii) Agreed that he was in his senses and was not behaving aggressively and respects Second Defendant;

- (xlvi) Agreed that he said without permission he got into the car to start to drive and denied that he does that to other peoples car;
- (xlix) Stated that he did it this time because he wanted to drive;
- (l) Denied that he is fabricating the evidence;
- (li) In respect to question 16 in Caution Interview (Exhibit P34) he confirmed P. Bhan and Second Defendant are same person;
- (lii) When asked why different story he stated that evidence he gave in this Court is correct;
- (liii) Denied that Second Defendant authorised him to drive and he was fabricating his evidence;
- (liv) When it was put to him that the evidence that key was left in the ignition is incorrect he stated that it is correct and denied that he is fabricating this evidence;
- (lv) Agreed that when they went to Plaintiff's place, Second Defendant was driving, they were invited inside;
- (lvi) Stated that Second Defendant left key in ignition for half an hour and stated that vehicle was inside the gate;
- (lvii) Denied that Second Defendant gave the keys to him for the reason that he knows Navua better and he knows his parents place;
- (lviii) Agreed that he knows Navua well;
- (lix) Agreed that he was overtaking and went on extreme right hand side of the road, his tyres hit gravel on the side of tarseal;
- (lx) When it was put to him that then he lost control and went on left side he stated that Plaintiff told him to stop the car and he applied the brake;
- (lxi) When he was overtaking he was driving at 50km/hr and denied that it is high speed and stated that high speed would be 90 to 100 km/hr;
- (lxii) Agreed that he was charged for traffic offence, pleaded guilty and was convicted which he accepts;

- (lxiii) When he pleaded he had a lawyer and received advise from his lawyer;
 - (lxiv) He hold his Solicitor in this case about him being charged and convicted;
 - (lxv) In reference to Q19 in Caution Interview (Exhibit P34) he understood it to mean if all of them in car taken any liquor and the answer he gave was “No” and that answer is different to evidence he gave in this Court;
 - (lxvi) When it was put to him that he did not tell anybody that there were passengers in the car he stated that he told the taxi driver;
 - (lxvii) Stated that he has valid driving licence and he knows that you have to report accident to Police;
 - (lxviii) Stated that he did not report accident to Police because his mobile was lost, was in shock and had injuries;
 - (lxix) In reference to answer to Q42 in Caution Interview he denied that, that is what happened and stated that he asked passengers if they are okay;
 - (lxx) When asked as why he did not say that in Police Interview he stated that Statement he gave to Police is not true;
 - (lxxi) Agreed that Interview was not on same day (date of accident) and when he gave Interview he was not shocked;
 - (lxxii) When it was put to him that he either lied to Police or to this Court he stated that he lied to Police.
38. In re-examination First Defendant stated that he did not take action to remove Plaintiff was because he knew Plaintiff and his parents and his sister was tenant and was afraid that they would ask her to leave;
39. Second Defendant during examination in chief gave evidence that:-
- (i) She could recall on 7 September 2008, she was doing research at USP Library for an assignment that was due when she received a call from First Defendant saying that he wanted to meet her;

- (ii) Around 10.30 or 11.30am she went to Namena Road to meet First Defendant;
- (iii) She was supposed to go inside but then called First Defendant to say she would not go inside because some boys were drinking liquor in the bottom flat, when First Defendant said he will come outside;
- (iv) When First Defendant came to her car he asked her if she could take him to his Navua house when she got angry because she did not know that he called her for the reason and refused to take him but First Defendant kept on asking and she refused few times when her cousin said not to worry, she was there and we could come back to Suva on time;
- (v) She agreed to go and come back to Suva as it was a Sunday and she is not supposed to be out late on Sundays;
- (vi) First Defendant then went to his flat and when he was coming back she saw Plaintiff was running behind him acting weird and talking loudly and that is when she learnt that Plaintiff wanted to go with them as well;
- (vii) She told First Defendant quietly that Plaintiff cannot go with them since she does not even know him;
- (viii) Next thing she saw Plaintiff sitting in her car when she got angry on First Defendant and said what sort of friends he has;
- (ix) First Defendant then told her not to worry as Plaintiff's home is in Navua and he can get off there;
- (x) She drove the vehicle from Namena Road to Plaintiff's house and past Lami, Plaintiff got her to stop the car and went to buy something from a shop;
- (xi) Plaintiff returned with a carton, the contents of which she did not see and as she drove Plaintiff opened a bottle and started drinking beer or tribe;
- (xii) Once they reached Plaintiffs house Plaintiff and First Defendant got out of the car and she was in the car;

- (xiii) After a while, Plaintiff and she thinks his parents came out and insisted that she go in when she just grabbed her phone and went inside the house;
- (xiv) She could not remember if the engine was still running and she left her bag in the car and just took the phone;
- (xv) They sat in the sitting room very angry and not talking to anyone and after few minutes she gestured to First Defendant that they needed to leave;
- (xvi) She did not have any refreshments but First Defendant had a glass of juice and something to eat;
- (xvii) After sometimes First Defendant said to go and quickly ran to the car and sat on drivers seat and was acting all naughty and said he wanted to drive;
- (xviii) She told him to get up and do not drive when he taunted her and said you lady drivers do not know how to drive;
- (xix) She had no choice but to sit beside First Defendant then Melvina was also sitting in the car;
- (xx) Plaintiff then came and sat in the car and she did not say anything but got angry on First Defendant and said why is Plaintiff coming again with them;
- (xxi) First Defendant asked Plaintiff to get down but he did not and insisted that he wants to come along when First Defendant said okay and he will take Plaintiff to his place;
- (xxii) When they reached Nakaulevu along Queens Road, there was a carrier in front of her car which First Defendant was overtaking and when her car was halfway of carrier she saw the carrier coming towards their car trying to overtake car in front of the carrier;
- (xxiii) At same time she told First Defendant that carrier is coming on their side when First Defendant swerved the vehicle further away from carrier to avoid it hitting her car;

- (xxiv) From there she does not know what happened and the accident took place;
- (xxv) She was conscious after the accident but was in shock;
- (xxvi) She remembers seeing her father at Navua Hospital and she does not know how she was brought to hospital.

40. During cross-examination Second Defendant:-

- (i) Stated that she met First Defendant sometime in March 2008 which was probably five (5) to six (6) months;
- (ii) When it was put to her that First Defendant and her were in a relationship she stated that they were friends, he is still her friend and he is married now;
- (iii) When it was put to her that on 7 September 2008, she went to Namena Road to pick Plaintiff and First Defendant to go to Navua she stated that she never knew Plaintiff;
- (iv) Stated that according to her knowledge Melvina did not meet Plaintiff before but saw them getting along well together;
- (v) Stated that she had no knowledge that Plaintiff assisted Melvina with her University work like assignment and stated that her and Melvina were doing Management Course and she believed Plaintiff is an IT Engineer so she does not know why this thing came up;
- (vi) When it was put to her that it was planned visit she stated that she had no knowledge and did not expect First Defendant wanted to go to Navua;
- (vii) When it was put to her that plan was to take First Defendant and Plaintiff to Navua she stated only First Defendant;
- (viii) Stated that Plaintiff did not enter car by force but opened door and sat without her knowledge as she was not expecting Plaintiff to come and she did not know he was coming;

- (ix) When asked why she did not ask Plaintiff to get off she stated that he was First Defendant's friend and she got angry on First Defendant;
- (x) She did not do anything because she did not feel threatened;
- (xi) Stated that they went to Plaintiff's place and stayed there for say 10 minutes;
- (xii) When it was put to her that First Defendant said they were at Plaintiff's place for half an hour she stated she cannot confirm what is right and she believed it was 10 minutes;
- (xiii) As for Plaintiff's behaviour from Suva to Navua she stated that his conduct was not bad but was talking loudly and laughing and she did not have any problem;
- (xiv) Stated she cannot remember if her car engine was still on when she got off car at Plaintiff's place;
- (xv) Stated that when she is in a secured place she leaves key in the car and if she stops for a while she lets the engine run;
- (xvi) When it was put to her that evidence about key is not correct she stated she does not remember;
- (xvii) When it was put to her that she gave keys to First Defendant and authorised him to drive she stated that he was sitting in the car so she had no choice;
- (xviii) Denied that on this aspect she is fabricating the evidence;
- (xix) Stated that on 8 September 2008, she gave Statement to Police whilst in hospital (Exhibit P32) and signed the Statement at four places;
- (xx) In reference to line 10 of her Statement she stated that she understood what she said and agreed that that statement is difference from what she said in this Court;
- (xxi) Stated that she appreciates that when you give statement to Police you are required to give truthful information;

- (xxii) Agreed that her evidence was that she did not authorise First Defendant to drive her car;
- (xxiii) Agreed that if you drive without anyone's permission it is an offence;
- (xxiv) Stated that she did not make complaint that First Defendant drove her car without her permission;
- (xxv) Read line 35 in her Police Statement;
- (xxvi) Stated that she did not know speed her car but First Defendant was overtaking a car and if it was at high speed she would have asked him to slow down or stopped him;
- (xxvii) Stated high speed would mean when you cannot control the vehicle and you drive vehicle above the speed limit;
- (xxviii) Stated that if First Defendant was driving at 80 km/hour then it would not be high speed;
- (xxix) Stated that high speed in that area would mean 85 or 90 km/hour;
- (xxx) When it was put to her that First Defendant's evidence was that he went to extreme right and if she would agree as to how accident happened she stated she does not remember.

41. In re-examination Second Defendant:-

- (i) Stated that because she did not say anything meant that she agreed and she was helpless;
- (ii) Stated that First Defendant said Plaintiff's house is on the way so they can drop him;
- (iii) Stated that she did not permit Plaintiff to ride in the car at Plaintiff's place and got angry on First Defendant;
- (iv) Stated that when she gave Police Statement she was in hospital bed and still on medication and was not fit to give evidence.

Issues For Determination

42. Issues that need to be determined are:-
- (i) Whether First Defendant owed duty of care to the Plaintiff;
 - (ii) If so, Whether First Defendant breached duty of care owed to the Plaintiff;
 - (iii) Whether Second Defendant is vicariously liable for First Defendant's negligence;
 - (iv) Whether Plaintiff was contributory negligence?
 - (v) Whether Plaintiff suffered loss and damage as a result of the injuries sustained in the accident? If so, then what is the quantum of Damages?

Whether First Defendant owed duty of care to the Plaintiff?

43. It is trite law and it is apparent from submissions filed by the parties that a road user owes a duty to other road users whether it be other drivers, passengers, pedestrians, joy riders and he/she is not to be negligent.
44. After analysing the evidence and Statement of Second Defendant and Melvina Bhan given to Police (Exhibit P32 and P33) this Court finds that the vehicle at the time of the accident was driven by the First Defendant. In fact it is an agreed fact that First Defendant was the driver at the time of accident and Plaintiff was a passenger in the vehicle.
45. First Defendant as driver of the vehicle owed duty of care to the Plaintiff who was a passenger in the vehicle.

Whether First Defendant Breached The Duty Of Care Owed To The Plaintiff?

46. After carefully analysing the evidence and the documentary evidence in the form of Interview Record, Statements of Second Defendant, Melvina Bhan and PW7 and rough sketch plan of the accident this Court makes following findings:-

- (i) The accident took place on 7 September 2008, between 1.00pm and 1.30pm;
 - (ii) At the time of accident First Defendant was driving the vehicle and whilst overtaking a carrier with another car in front of the carrier, First Defendant lost control of the vehicle and as result the vehicle went off the road;
 - (iii) Accident took place due to negligence of the First Defendant.
47. This Court takes note of the fact that much has been said by Defendants about Plaintiff forcing them to take him to Navua which evidence Court does not consider credible due to inconsistency in First and Second Defendants evidence and Caution Interview of First Defendant and Statement given to Police by Second Defendant.
48. Even if Plaintiff forced himself into the vehicle this Court fails to understand how it is relevant to First Defendant's negligent driving of the vehicle.
49. I therefore find that First Defendant breached his duty of care owed to the Plaintiff and that is required of a prudent driver under the circumstances of the case.

Whether Plaintiff Contributed To His Injuries?

50. On this issue I accept the following statement from **Gani v. Chand** [2006] FJCA 65; ABU 0117.2005 (10 November 2006) which reproduced in Defendants Submission with approval:-

“The basic principle of contributory negligence is that, when a court is awarding damages to the plaintiff for injuries caused by the defendant, it may reduce the award if the plaintiff can be shown to have contributed to the injury by some negligence on his part. However, whilst the liability of the defendant arises from a duty towards the plaintiff, the assessment of contributory negligence is not based on a similar duty on

the plaintiff towards the defendant. It was explained by Lord Simons in Nance v. British Columbia Electric Railway Co Ltd [1951 AC 601, 611:

“The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the plaintiff to take due care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff’s claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.

...this, however, is not to say that in all cases a plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully. Indeed it would appear to their lordships that in running-down accidents like the present such a duty exists. The position can be put even more broadly. Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot or whether one is on foot and the other controlling a moving vehicle.”

51. At paragraphs 8 and 9 of the Statement of Defence, Defendants pleaded as follows:-

“8. THAT the Defendants paragraph 7, 8, 9 & 10 of the Statement of Claim and further say in addition to paragraph 1 of the Statement of Defence the Plaintiff failed to wear seat belt which was provided for in

the said car, thus contributed to the negligence of the Plaintiff and if and only if the Plaintiff wore seatbelt the injuries would have been avoided.

9. THAT by way of further contributory negligence of the Plaintiff that he was drinking since morning and also in the vehicle with the 1st Defendant on their way to Navua and the Plaintiff knew or should have known, being a well educated person, that the Defendant had too much to drink to drive safely and also the Plaintiff himself had too much to drink and was so reckless as to obvious drunken conduct of the driver and his own safety.”

- 52. No evidence was led to establish that Plaintiff was not wearing seat belt or that seat belt was available.
- 53. As for First Defendant being drunk, it was both Defendants evidence as appears at paragraph 36(xiii), (xiv) and 39(iii) of this Judgment that it was the Plaintiff who was drinking liquor prior to them leaving Suva for Navua and in the vehicle on their way to Navua.
- 54. No evidence was led except for Statement from Melvina Bhan to Police (Exhibit P33) that First Defendant was drunk. On what basis she gave that Statement is not clear and this Court does not give any weight to that Statement.
- 55. In fact Melvina Bhan was supposed to testify as Defendants witness but left Court premises when she was to be called as Defendants witness.
- 56. This Court finds that Plaintiff in no way contributed to his injury from the accident.

Whether Second Defendant is Vicariously liable for First Defendant’s negligence?

- 57. There is no dispute as per Second Defendants evidence and LTA search (Exhibit P30) that at time of accident Second Defendant was the owner of the vehicle.
- 58. Counsel for Plaintiff and Defendants referred to various case authorities in support of their Submissions.

59. The leading authority on this issue of vicarious liability in Fiji is **Ganesh v. Ali** (1978) 24 FLR 147.

60. Court of Appeal referred to relevant case authorities and stated as follows:-

“It is necessary to consider firstly the legal principles which render an owner vicariously liable for the negligent driving of his vehicle by another. In Morgans v Launchbury [1972] 2 All ER 606 at p. 620 Lord Salmon says:

“As I understand the authorities the law at present makes the owner or bailee of a car vicariously responsible for the negligence of the person driving it, if, but only if, that person is (a) his servant and driving the car in the course of his employment or (b) his authorised agent driving the car for and on his behalf... .. Thus, mere permission to drive is not enough to create various responsibility for negligence So far as I know, until the present case, du Parcq LJ’s statement of the law in Hewitt v Bonvin [1940] 1 KB at 194, 195, has never been questioned:

‘The driver of a car may not be the owner’s servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner’s behalf. Such liability depends not on ownership, but on the delegation of a task or duty.’

Lord Wilberforce in Morgans’ case (supra) at p.609 says:

“It is said, against this, that there are authorities which warrant a wider and vaguer test of vicarious liability for the negligence of another; a test of ‘interest or concern’

On the general law, no authority was cited to us which would test vicarious liability on so vague a test, but it was said that special principles applied to motor cars. I should be surprised if this were so, and I should wish to be convinced of the reason for a special rule. But in fact there is no authority for it. The decisions will be examined by others of your Lordships and I do not find it necessary to make my own

review. For I regard it as clear that in order to fix vicarious liability on the owner of a car in such a case as the present, it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty. The substitution for this clear conception of a vague test based on 'interest' or 'concern' has nothing in reason or authority to commend it. Every man who gives permission for the use of his chattel may be said to have an interest or concern in its being carefully used, and, in most cases if it is a car, to have an interest or concern in the safety of the driver, but it has never been held that mere permission is enough to establish vicarious liability."

We respectfully agree with the statement made by Lord Donovan in Rambarran v Gurrucharran [1970] 1 All E.R. 749 at 751 when he said:

"Where no more is known of the facts, therefore, than that at the time of an accident the car was owned but not driven by A it can be said that A's ownership affords some evidence that it was being driven by his servant or agent. But when the facts bearing on the question of service or agency are known, or sufficiently known, the clearly the problem must be decided on the totality of the evidence."

However, once the facts are known such an inference and presumption may be rebutted. In Rambarran's case (supra) Lord Donovan said further:

"A case raising an issue similar to that in the instant case arose in New Zealand in 1955 - Manawatu County v. Rowe [1956] N.Z.L.R. 78. There the wife of Mr Rowe, while driving her husband's car with his consent, was in collision with a vehicle driven by one of the appellant country's servants. Mr Rowe brought an action against the country claiming damages. The trial judge held that both drivers were guilty of negligence, Mr Rowe's wife being 75 percent to blame. The question then arose whether her negligence could operate to reduce the damages otherwise recoverable by her husband; and this depended on whether at the time of the accident the wife was driving as the servant or agent of her husband. It was held both by the trial judge and a majority of the New Zealand Court of Appeal that she was not; and that

Mr Rowe was entitled therefore to recover the damages awarded against the county in full.

After considering the English cases of Barnard v Sully (1931) 47 TLR 557 and Hewitt v Bonvin [1940] 1 K.B. 188 and certain New Zealand and Australian cases dealing with the same problem, the Court of Appeal stated the principles which it deduced therefrom thus: 1 The onus of proof of agency rests on the party who alleges it. 2 An inference can be drawn from the ownership that the driver was the servant or agent of the owner, or in other words, that this facts some evidence fit to go to a jury. This inference may be drawn in the absence of all other evidence bearing on the issue, or if such other evidence as there is fails to counterbalance it. 3 It must be established by the plaintiff, if he is to make the owner liable, that the driver was driving the car as the servant or agent of the owner and not merely for the driver's own benefit and on his own concerns. It is also interesting to observe that Hutchinson J, one of the majority who gave judgment for Mr Rowe, remarked in the course of his judgment that the fact that his wife had the right to use the car whenever she pleased went a long way to destroy any presumption of agency on her part."

61. In view of what has been said in the case authorities referred to in **Ganesh's** case, Plaintiff needs to prove that First Defendant was driving the vehicle as agent of the Second Defendant on delegation of Second Defendant's responsibility or duty.
62. Brief facts of **Ganesh** case is that:-
 - (i) Appellant owned and operated a business in Tavua and employed several assistants and owned van;
 - (ii) His father Ram Asre assisted him in and about the shop and also drove the said van for son's business and on his own account;

- (iii) Appellant's father had a general approval to drive the van for whatever purpose his father needed it for unless the van was required by the Appellant for his own use;
 - (iv) On 15 May 1977, Ram Asre drove his wife, daughter and other members of Ram Asre's family to a wedding in Lautoka;
 - (v) On their way back to Tavua the van was involved in an accident between Ba and Tavua;
 - (vi) The victims filed claim against Appellant (son) as 1st Defendant and Ram Asre (father) as 2nd Defendant in Magistrates Court and Court awarded them damages and held Appellant to be vicariously liable for his father's negligence;
 - (vii) Appeal to High Court was dismissed and Appellant appealed to Court of Appeal;
 - (viii) The ground of appeal Court of Appeal was to determine whether "the Learned trial Magistrate erred in Law and in fact holding that the 2nd Defendant was the servant/or agent of the 1st Defendant".
63. The principle adopted in **Ganesh v. Ali** was adopted with approval in **Ram v. Ram** [1985] FJSC: Civil Appeal No. 12 of 1984 (20 January 1985) (Justice Kermode); **Saratavuke v. Tagicakibau** [1999] FJHC 135; HBC 298.94 (19 May 1999) (Justice D. Pathik); **Kumar v. Prasad** [2017] FJHC 762; HBC 216.2009
64. In this instance the Plaintiff during examination in chief gave evidence that:-
- (i) First Defendant drove vehicle from his place to go to 1st Defendant's place;
 - (ii) Second Defendant, Melvina Bhan and him sat in car to go to 1st Defendant's place and he was invited by 1st Defendant to go with him which was the plan when they left Suva;
 - (iii) He was seated at the back, behind passenger seat, 2nd Defendant was sitting on the front passenger seat and Melvina was sitting next to him;

- (iv) When First Defendant started to drive Second Defendant and him told First Defendant not to drive;
 - (v) When he was asked as to who gave keys to First Defendant he stated it was between First and Second Defendants.
65. Plaintiff confirmed his evidence during cross-examination.
66. First Defendant during examination in chief gave evidence that:-
- (i) He said to the Second Defendant and Melvina that they should leave for his place and when they came out the key was in the ignition of the vehicle and he sat on driver's seat and started the vehicle;
 - (ii) Second Defendant said to him that she will drive since it was her vehicle but he refused and they had no choice but to sit in the car as they had to return to Suva after dropping him;
 - (iii) When Plaintiff came out of his house and sat in the vehicle without any invitation from him, they asked Plaintiff to get out because Second Defendant and Melvina had to return to Suva after dropping him but Plaintiff did not get out;
 - (iv) They waited for a while then started driving to his place and Plaintiff did not say anything to him.
67. First Defendant during cross-examination:-
- (i) When it was put to him that the evidence that key was left in the ignition is incorrect he stated that it is correct and denied that he is fabricating this evidence;
 - (ii) Agreed that when they went to Plaintiff's place, Second Defendant was driving, and they were invited inside;
 - (iii) Stated that Second Defendant left key in ignition for half an hour and stated that vehicle was inside the gate;
 - (iv) Denied that Second Defendant gave the keys to him for the reason that he knows Navua better and he knows his parents place;

(v) Agreed that he knows Navua well.

68. This Court after assessing the demeanour of the witnesses and their previous statements given to Police, finds the evidence given by First Defendant and Second Defendant are not credible and has been fabricated to suit their cause for the following reasons:-

(i) First Defendant during his Caution Interview which he gave in presence of his mother said nothing in his Interview about him getting in the vehicle with the ignition key being left in the vehicle by Second Defendant;

(ii) Second Defendant in her Statement to Police which was given on 8 September 2008 (Exhibit P32), one day after the accident stated that:-
“We went direct to Gabriel’s home and stopped there for some time. From Gabriel’s house I gave key to drive the car to Nitin Mishra because he knows the area very well”;

(iii) Melvina Bhan, Second Defendant’s cousin who was a passenger in the vehicle at time of accident also gave Statement to Police on September 2008 (Exhibit P33) in which she stated that First Defendant drove the vehicle from Plaintiff’s place to Navua and there was no mention of Plaintiff driving the vehicle forcefully.

69. This Court finds that:-

(i) Visit to First Defendant’s house in Navua was all planned by Plaintiff, First Defendant and Second Defendant;

(ii) The arrangement was for **Second Defendant to drive the vehicle to First Defendant’s place and then return to Nausori** and Second Defendant did drive the vehicle from Suva to Plaintiff’s place in Navua.

70. No evidence has been produced to show that First Defendant has driven the car at any time prior to date of accident and had full use of car which is inconsistent with the fact in **Ganesh v. Ali** (Supra).

71. The Court after analysing all the evidence and Statements given to Police finds that Second Defendant took the responsibility to drive Plaintiff and First Defendant to First Defendant's place and then return to Nausori with Melvina Bhan and at **Plaintiff's place she delegated her duty to drive to First Defendant's place to the First Defendant because First Defendant knew Navua well.**
72. Also Second Defendant did not lose control of the vehicle as she was sitting at the front passenger seat whereas when they left Suva for Navua, Melvina Bhan was sitting on front passenger seat and she was driving with Plaintiff and First Defendant sitting at the back.
73. In **Ganesh v. Ali** (Supra) the Appellant being owner of the car was not in the vehicle and had no control over the vehicle.
74. After analysing the whole of the evidence this Court finds that First Defendant drove the vehicle at time of accident with the permission of Second Defendant who delegated her duty and responsibility to First Defendant.
75. Hence, Court finds Second Defendant vicariously liable for First Defendant's negligence.

Whether Plaintiff suffered injuries as a result of the accident and if so, then what is extent of such injuries?

76. PW2 during examination in chief gave evidence that:-
- (i) Currently he is General Surgeon at Labasa Hospital and in 2008, was working as Surgical Registrar at CWMH;
 - (ii) He obtained his MBBS Degree from University of the South Pacific, did Masters in Medical Specialty in General Surgery and is registered member of Fiji Medical Council;
 - (iii) After his internship in 2002, he worked as Medical Officer in Lau Medical Area & CWMH, Labasa Hospital, Christchurch Public Hospital and Palmerston North;

- (iv) He received the subpoena and has Plaintiff's file with him;
- (v) On 7 September 2008, he was on call Surgical Registrar at CWMH when he was referred to a gentleman by the name of Gabriel Singh by Navua Hospital, who was involved in a motor vehicle accident on that day;
- (vi) Plaintiff received following injuries:-
 - (a) severe head injury;
 - (b) multiple rib fracture;
 - (c) Bilateral lung contusions;
 - (d) Hemothorax;
 - (e) Fracture to his right thoracic (collar bone);
 - (f) Compression Fracture to Thoracic Spine;
 - (g) Fractures to Clavicle Spine
- (vii) He recognised that Plaintiff could not breathe on his own and needed airway protection when he had to intubate Plaintiff;
- (viii) Intubate means when an individual is not able to protect his own airway meaning if they do not get stimulation center from the brain or mechanically they are not able to ventilate themselves then they need to place them on advanced life support machine ventilator;
- (ix) Plaintiff did not maintain good enough level of consciousness so they had to intubate him and for multiple injuries they needed to put him on chest drain with tubes into both lungs which helped them to give Plaintiff best chance to ventilate himself because he had lot of blood in both lung cavities;
- (x) They also had to make sure that his final precautions were instituted and he had to be kept in Intensive Care Unit (ICU);
- (xi) Plaintiff did gain consciousness but he does not know particular date Plaintiff gained consciousness;
- (xii) Other treatments given to Plaintiff over a period of time were:-

- (a) Deprivation of pressure because when patient lying or sitting or applying pressure particularly to bony areas of our body, pressure alone can cause erosion through skin and go far down to bone;
 - (b) ENT Unit helped Plaintiff in his care, specially Tracheostomy Tube was inserted which is required if patient needs ventilator support for more than seven (7) days;
 - (c) For first seven (7) days tube was through mouth which is called Endotracheal Tube and reason for change is after seven (7) days had lot of complication that are associated with prolonged incubation. They are related to pressure source which one can get internally;
 - (d) Problem with inserting tube is that it can get narrow, can get lot of repair tissue, can enter narrow or block voice box and if complication is abnormal it would block the vessel;
- (xiii) At that time Dr Su Hong was in charge of ENT Unit, who is no longer at CWMH and is in American Samoa and he has seen her report;
 - (xiv) Agreed that he completed Fiji Police Medical Examination Form dated 23 September 2008, and he signed the Form (Exhibit P2);
 - (xv) He also prepared two (2) medical reports dated 5 November 2008 (Exhibit P4) and 24 February 2009 (Exhibit P3) and he signed those reports;
 - (xvi) First Report (Exhibit P3) states Plaintiff was admitted over the period 7/9/06 to 13/10/08 at ICU and Acute Surgical Ward and lists the injuries sustained by Plaintiff which are as follows:-
 - “1. Severe Head Injury (Basal Skull Fracture - anterior and posterior wall of maxillary sinus) secondary to motor vehicle accident (MVA)
 - 2. Multiple Rib Fractures (Right side - #'s 4 and 5; Left Side - #'s 2, 4 through to 9) with bilateral lung contusions and hemothoraces secondary to MVA
 - 3. Fracture right clavicle secondary to MVA
 - 4. Compression fracture to Thoracic spine #9 - stable
 - 5. Spinous process fracture to Cervical Spine #6 - Stable”

- (xvii) Second Report (Exhibit P4) stated that:-
- (a) Plaintiff was admitted at Tamavua Rehabilitation Centre from 13/10/08 to 17/12/08;
 - (b) “The patient was readmitted over the periods 28/12/08 - 1/1/09 and 21/1/09 - 26/1/09 with the ENT Unit at the Plastic ward. The principal complaint for admission being stridor of which upon investigation revealed left vocal cord paralysis probable to be secondary from prolonged tracheal intubation. Accorded was repeat tracheostomy on 23/1/09 under general anaesthesia”;
 - (c) Report also mentioned that they wanted Plaintiff to be seen by visiting ENT Specialists in mid-March 2009;
 - (d) Noted that Plaintiffs family wanted to have Plaintiff treated overseas earlier than mid-March 2009;
- (xviii) Need for treatment overseas was that at that stage, ENT Unit which is separate from his stream of work and can only say that they were technically limited to treat this kind of injury.

77. During cross-examination PW2:-

- (i) Stated that there is one extra file and he does not have any information on that extra file;
- (ii) Sated that he does not have exact time of accident and when Plaintiff was seen at Navua Hospital but he treated him at 3.30pm on 7 September 2008 at CWMH;
- (iii) Stated that when Plaintiff was presented to him Plaintiff was conscious enough to maintain his normal human physiology which in laymans terms means semi-conscious to minimum;
- (iv) Stated they have score card which announces to give them number of out of 15 on highest degree of consciousness Plaintiff was not 15/15 and they may talk to you but will be disoriented or incomprehensive;
- (v) Stated in this case Plaintiff was not oriented;

- (vi) Stated that he was not able to understand what Plaintiff was saying and his brief history was given by Navua Hospital personnel who accompanied Plaintiff to CWMH;
- (vii) Stated that he examined Plaintiff with assistance of Anaesthetic Doctor, nurses from afternoon shift, staff nurses from Acute and Emergency Unit and nurses from Navua Hospital who accompanied Plaintiff;
- (viii) Stated he cannot remember if Plaintiff was accompanied by any of his relatives;
- (ix) Stated that any form of blunt force trauma can cause type of injuries suffered by Plaintiff and could be caused by person being thrown on tarsealed road;
- (x) When asked if CWMH has facilities available locally to treat that type of injury he stated that they now doing lot better than 2008;
- (xi) In 2008, CWMH had sufficient clinical expertise to help people like Plaintiff who are able to provide treatment at certain level.

78. In re-examination PW2:-

- (i) Explained treatment at certain level to man in case of Plaintiff's specific vocal cord paralysis, treatment is a super specialty technical field within sub-specialty within ENT which is not available in Fiji now and was not available in 2008;
- (ii) Stated that treatment is available elsewhere overseas.

Clarification

79. Court sought clarification on issue of level of consciousness.

80. PW2 clarified that if patient can relate to where pain is coming from, there is higher level of consciousness and if patient cannot feel that then there is lower level of consciousness.

81. Counsel for Defendants then asked PW2 if he even came across a situation where patient does not feel pain even if patient is conscious.
82. PW2 stated that if case of head injuries his earlier statement remains same and if one particular nerve is uninjured, patient can be still conscious in respect to function of a particular limb.

Damages

Special Damages

83. Plaintiff has claimed for Medical Expenses, Travelling expenses, Accommodation, Wheelchair in the Statement of Claim.
84. Plaintiff has also stated that amount of special damages claimed by him.
85. This Court states in no uncertain terms that special damages in respect to personal injury claim is not liquidated amount and needs assessment by Court after considering the evidence produced at trial. Hence, even if Plaintiff stated specific amount for each special damages claimed it is up to Court to assess the amount of special damages.

Loss of Income and Caregiver Expense

86. It is noted that Plaintiff's Counsel in the Submission have claimed for special damages for loss of income for up to trial and money spent on caregiver.
87. Claim for loss of income and money spent on caregiver have not been pleaded and particularised in the Statement of Claim.
88. In fact in prayers sought in the Statement of Claim following is claimed as Special Damages:-
 - (i) \$27,453.00 FJ Dollars pursuant to paragraph 10A of the Statement of Claim;

- (ii) \$12,400 New Zealand Dollars pursuant to paragraph 10B of Statement of Claim;
 - (iii) 894,943.47 Indian Rupees pursuant to paragraph 10C of the Statement of Claim.
89. It is well established and all legal practitioners should be aware that, parties have to plead and particularise their claim for special damages in the Statement of Claim.
90. At paragraph 18/12/32 of Supreme Court Practice 1993 (Vol. 1) it is stated as follows:-
- “...Special damage in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularized, otherwise it cannot be recovered...”*
91. Since, no particular of loss of income and monies spent on caregiver was pleaded or particularised in Statement of Claim this Court cannot award such damages under special damages.
92. This is so even if it is stated as an issue in the Minute of PTC or evidence is called because Minutes of PTC, evidence and Submission cannot be relied to cure defects in the pleadings.

Medical Expenses

93. During examination in chief PW6 gave evidence that medical expenses incurred were as follows:-
- “(i) Diagnostic Medlab - NZD\$44.00 (Exhibit P9)
 - (ii) Auckland District Radiology Group - NZ\$700.00 (Exhibit P10)
 - (iii) Auckland District Health Board - NZD365.70 (Exhibit P11)
 - (iv) Apollo Hospital Enterprise: FJD15,551.80 (USD8,400.00) (Exhibit P13)
 - (v) Apollo Hospital Enterprise: FJD7177.92 (USD3920.00) (Exhibit P14)

(vi) Refund 45,272 Rupees (Total 635,996 Rupees) (Exhibit P15 & P16)”

94. This Court has no hesitation to allow for the medical expenses claimed as appears in the preceding paragraph.

95. Plaintiff in the Statement of Claim claimed \$5,500.00 as medical cost in Fiji and \$2,500 for wheelchair.

96. Even though no documentary evidence has been provided for each claim this Court is of the view \$5,500.00 as medical cost in Fiji is bit high due to the fact that Plaintiff received treatment in Fiji at CWMH and Tamavua Rehabilitation Centre which are managed and run by Ministry of Health and are not private institution. This Court awards a sum of \$2,500.00 as medical costs in Fiji and \$2,500.00 for wheelchair.

97. Medical expenses in New Zealand are awarded as follows:-

\$1109.70 NZD ÷ 0.67295 = \$1,650.00. Exchange Rate as at 21 August 2016, is utilised due to the amount being quite minimal.

98. Medical expenses in India are awarded as follows:-

Paid on 27/10/10	-	FJD15,551.80
Paid on 23/03/11	-	FJD <u>7,177.92</u>
		22,733.72
Less Refund: 45,272 ÷ 27.03	=	<u>1,674.88</u>
		<u>FJD21,058.84</u>

This Court used exchange rate as at 10 September 2010 which is attached to Defendant Submissions as the transaction took place around that time.

99. The total amount of medical expenses awarded to Plaintiff is as follows:-

Medical Expenses in Fiji & Wheelchair (paragraph 98)	FJD5,000.00
Medical Expenses in New Zealand	1,650.00
Medical Expenses in India	<u>21,058.84</u>
	<u>FJD27,709.84</u>

Travelling Expenses

100. PW6 during his examination stated that he spent amount \$10,000.00 to travel to CWMH and return home to Navua during the period Plaintiff was admitted.
101. This Court notes that Plaintiff went in and out of hospital for a period of 3 years and the Statement of Claim was filed when Plaintiff was discharged from hospital. Plaintiff in the Statement of Claim claimed \$4,000.00 as travelling expenses.
102. This expense was incurred by PW6 as Plaintiff's father and as a father he was morally obliged to visit Plaintiff when he was in the hospital. Since this expense was incurred by PW6 for his travelling to see his son and not incurred by Plaintiff, it cannot be awarded.
103. To award this sum would be to award damages to a party who is not party to the proceedings.
104. On the same token this Court take note of Plaintiffs evidence that he has to reimburse whatever expenses incurred on belief of the Plaintiff.
105. There is no doubt Plaintiff can claim those expenses like medical, travelling expenses to NZ or India as those expenses would have to be incurred by Plaintiff if he had financial means to do so.
106. This Court awards a sum of \$1,000.00 for Plaintiff's travelling expenses in Fiji.
107. PW6 accepted in cross-examination that Exhibit P5 being airfare to New Zealand is not related to this matter as it was on 24 April 2007, which is well before the date of accident and stated that he could not locate the relevant tickets.
108. This Court accepts that Plaintiff did travel with his father to New Zealand from 4 March 2010 to 26 March 2010, and have no hesitation in awarding FJD\$1,986.00 as travelling expenses to New Zealand.

109. Plaintiff also claims NZ\$500.00 for pick up and drop from Auckland Airport which this Court feels justified. Using the exchange rate as at 10 September 2010, because it is closer to date expense was incurred the amount awarded in Fijian Dollars amounts to FJD\$650.00 ($\$500.00 \div 0.7691$).
110. Plaintiff claims two trips to India and this Court has no hesitation in awarding the sum of FJ\$13,212.00 as airfare to India which is made up as follows:-

28/10/10 to 16/12/10	\$ 7,030.00
25/3/11 to 7/4/11	<u>6,182.00</u>
	<u>\$13,212.00</u>

111. This Court also awards Plaintiff 6000 Rupees for travelling expenses in India which is covered into Fijian dollars using exchange rate of 10 September 2010. Hence the sum awarded is FJD220.00 ($6000 \text{ Rupees} \div 27.03$).
112. This Court awards travelling expenses in the sum of FJD\$17,068.00 which is made up as follows:-

Travelling Expenses in Fiji	\$1,000.00
Airfares to NZ	1,986.00
Travelling Expenses in NZ	650.00
Airfares to India	13,212.00
Travelling Expenses in India	<u>220.00</u>
	<u>FJD\$17,068.00</u>

113. Plaintiff claims NZ\$5,900.00 and 143,000.47 Rupees as travelling and food expenses in New Zealand and India which this Court feels is justified and should be awarded. The said amount are converted into Fijian Dollars using 10 September 2010 exchange rate for same reason as other expenses. The amount awarded is FJD\$12,960.00 which is made up as follows:-

<u>Accommodation/Food</u>	
New Zealand: $\$5,900 \div 0.7691$	= \$ 7,671.00
India: $143,000.47 \text{ R} \div 27.03$	= <u>5,290.00</u>

\$12,960.00

114. Plaintiff is awarded a sum of FJD\$57,738.00 in special damages which is made up as follows:-

Medical Expenses	\$27,709.00
Travelling Expenses	17,068.00
Accommodation/Food	<u>12,961.00</u>
	<u>\$57,738.00</u>

General Damages

115. Plaintiff claims for pain and suffering, loss of amenities of life and loss of earning capacity.

Pain and Suffering

116. This Court accepts the evidence of PW2 as to the nature of the injuries sustained by the Plaintiff in the accident which were quite severe by all means.

117. This Court also accepts Plaintiff's and PW7's evidence as to the pain and suffering Plaintiff had to go through until he had the tube removed in India.

118. Plaintiff relied on following cases:-

- (i) **Sashi Prakash v Commissioner of Police & Anor.** Civil Action No. HBC 237 of 2001L
- (ii) **Yanuca Island Ltd v Elsworth** [2002] FJCA 65; ABU0085U.2000S (16 August 2002)
- (iii) **Iowane Salaitoga v. Kylie Jane Anderson** Civil Appeal No. ABU0026 of 1994
- (iv) **Subarmani Reddy v A.K. Naicker & Sons Ltd** Civil Action No. HBC0298.94L (31 March 2000)

119. In **Salaitoga's** case, the Appellant/Plaintiff suffered following injuries:-

- (i) Fracture right cavicle.
- (ii) Ten centimeter long laceration on the forehead; deep, soiled with debris.
- (iii) Compound injury to left elbow - a ten centimeter laceration on left elbow, with comminuted fractures of lower left humerus and olecranon.
- (iv) Compound injury to right knee. A twenty centimeter laceration across the right patella exposing the kneejoint and fragmenting the articular surface of lower femur.
- (v) Laceration of the upper lip.
- (vi) Fractures of tarsal bones of left ankle.
- (vii) Pott's fracture of right ankle.
- (viii) Fractured right upper first incisor and left second lower incisor teeth.
- (ix) Concussion secondary to head injury.

Appellant/Plaintiff was found to be semi-conscious; not responding to verbal commands but responding to painful stimuli.

Trial judges awarded \$85,000.00 for pain and suffering which was upheld on appeal.

120. In **Subarmani Reddy** case Plaintiff's right leg had suffered a degloving injury to lower half and foot and had fracture on the distal phalanges of the 2nd toe of the left foot for which there a risk of amputation. The Medical Officer who gave evidence considered the injury as quite severe.

Court awarded Plaintiff \$65,000.00 for pain and suffering.

121. In **Elsworth** case Respondent/Plaintiff's medical condition which was accepted by the trial judge was stated in Mr Wallaces medical report as follows:-

"This man's condition does not appear to have altered since I last saw him in April 1993. He has ongoing problems with impaired numeracy

skills, impaired memory and concentration, and has undoubtedly suffered a permanent impairment of higher intellectual function, as documented by Dr Bernard Healey some three years after his accident.

He has impaired sensation of part of the right side of the body involving the lips, tongue and lower portion of the right arm and leg.

He still has a balance disorder and is prone to attacks of acute vertigo with a tendency to fall over if he arises too suddenly from the seated position, or moves his head too briskly. There is also impaired balance apparent when he is put to the test with heel-toe walking. His impaired balance has led him having to give up tennis and has notably diminished his high level of skill at golf.

I believe all of his current disabilities are likely to be permanent. There is no doubt whatsoever that this man's injury has led to a significant diminution in his former high level of skill and expertise in business, engineering, sales and retailing, and has significantly diminished his self confidence and his level of function as an executive in a successful business."

Trial Judge awarded **Elsworth** \$100,000.00 for pain and suffering which was reduced to \$50,000.00 by Court of Appeal.

122. This Court takes note that cases referred to by the Plaintiff were decided in about 1994 (Reddy) and 2002.
123. The Courts when awarding damages for pain and suffering must take into consideration recent judgments and the inflation rate over the years.
124. It is also noted that that case referred to in the table in Defendant's Submission relates to judgments delivered more than twelve years ago. It would be advisable for Counsel for Defendants to update his table to reflect current awards made by the Court for certain injuries.

125. After analysing the evidence, the Submissions and case authorities, authorities referred to by Plaintiff and Defendants which are almost more than twelve years old this Court awards a sum of \$100,000.00 (one hundred thousand dollars) for pain and suffering.
126. This Court needs to make it clear that in awarding damages for pain and suffering it has taken into consideration the fact that Plaintiff was unconscious or semi-conscious for at least more than a month.

Loss of Amenities of Life

127. This Court finds that PW6, Plaintiff's father exaggerated Plaintiff's inability to do certain things and his demeanour after he stated he did not know whether Plaintiff was working or when Plaintiff separated from his wife when his evidence during examination in chief was that he had daily contact with Plaintiff. This Court fails to find for what reason Plaintiff's father had to fabricate such evidence.
128. If he had daily contact with Plaintiff then he should have known that Plaintiff and his wife separated in May 2008, which is well before the date of accident.
129. On the same token, Court finds the Plaintiff to be a truthful witness who did not in any way exaggerate his injuries, his loss of amenities and his attempt to get better quickly and get back to normal life.
130. After analysing the evidence this Court finds that:-
- (i) Plaintiff was very active person prior to accident;
 - (ii) Prior to accident Plaintiff was able to play soccer, and do all other physical work;
 - (iii) After accident Plaintiff could not do anything for three (3) years when he was going through treatment;

- (iv) Plaintiff is trying his very best to get back to normalcy but this will take time or may never happen;
- (v) Plaintiff is not able to enjoy his family life the way he would have if he did not get severely injured in the accident;
- (vi) This Court accepts that Plaintiff's marriage breakdown has nothing to do with the accident;
- (vii) Plaintiff because of his vocal and brain damage will have difficulty in maintaining a decent relationship with his family.

131. This Court awards a sum of \$15,000.00 (fifteen thousand dollars) to Plaintiff as loss of amenities of life.

Loss of Earning Capacity

132. Plaintiff gave evidence that he is not able to get permanent employment because of his voice and does contract work which is not permanent.

133. Plaintiff at time of trial was 37 years old.

134. This Court accepts Plaintiffs submission that a multiplier of thirteen (13) should apply in this instance.

135. This Court makes following finding:-

- (i) Plaintiff was earning approximately \$50,000.00 per annum when employed by Digicel Samoa Ltd which included commission as is evident in Exhibit P29;
- (ii) Plaintiff left his job at Digicel Samoa Ltd almost a year prior to accident because his son and wife did not want him to go to Samoa and as such had nothing to do with the accident;
- (iii) Prior to accident Plaintiff was employed by Pacific Agencies at salary of \$18,000.00 per annum;

(iv) No evidence was produced and there was no guarantee that Plaintiff would be employed by Digicel (Fiji) Ltd at same wages paid by Digicel Samoa Ltd when it opened its business in Fiji.

136. This Court has no alternative but to accept that Plaintiff's salary at time of accident was \$18,000.00 and will use this figure to assess loss of future earning capacity.

137. This Court awards Plaintiff \$234,000.00 as loss of future earning capacity which is made up as follows:-

$$\$18,000.00 \times 13 = \$234,000.00$$

Interest

138. In exercise of Court's discretion pursuant to Section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27, I award interest on general damages at the rate of six percent (6%) per annum and three percent (3%) on special damages.

Costs

139. In awarding costs I have taken into consideration the fact that trial lasted for four days, both parties filed Submissions.

140. I award costs in favour of the Plaintiff in the sum of five thousand dollars (\$5,000.00).

Conclusion

141. The damages and interest I award to Plaintiff is as follows:-

Special Damages (paragraph 114)	\$ 57,738.00
Interest at 3% per annum from 7/9/08 (date of accident to 31/8/2018 (date of judgment)	<u>17,302.00</u>

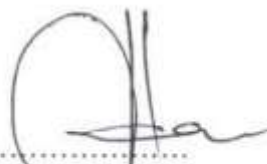
(3646 days)		\$ 75,040.00
Pain and Suffering	\$100,000.00	
Loss of Amenities of Life	<u>15,000.00</u>	
	\$115,000.00	
Interest at 6% per annum from 30/8/11 (date of Writ of Summons) to 31/8/18 (date of Judgment [2559 days])	<u>48,375.00</u>	163,375.00
Prospect/Future Earning Capacity		<u>234,000.00</u>
TOTAL		<u>\$472,415.00</u>

Orders

144. I make following Orders:-

- (i) Defendants jointly and severally do pay Plaintiff a sum of \$472,415.00 (four hundred and seventy-two thousand four hundred fifteen dollars) including interest upto date of judgment;
- (ii) Defendants do pay jointly and severally Plaintiff's cost assessed in the sum of \$5,000.00 within thirty (30) days from date of this Judgment.




K. Kumar
JUDGE

At Suva

31 August 2018

MISHRA PRAKASH & ASSOCIATES FOR THE PLAINTIFF

S. KUMAR ESQUIRE FOR THE DEFENDANTS