

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. HBC 28 of 2017

BETWEEN: **VARUN VISHA KUMAR** of Vunivau, Bua, Carpenter as administrator in the estate of **SUSMA WATI**, late of Vunivau, Bua, Cultivator.

PLAINTIFF

AND: **FONMANU VAMARASI** of Bua, Businessman.

DEFENDANT

AND: **CHINA RAILWAY FIRST GROUP (FIJI) Co. Ltd** a limited liability Company having its registered office at Level 2, Ra Marama House, 91 Gordon Street, Suva.

THIRD PARTY

AND

Civil Action No. HBC 29 of 2017

BETWEEN: **TOTA RAM, VARUN VISHA KUMAR and VIKASH RAM** all of Vunivau, Bua, Carpenters and Electrician respectively.

PLAINTIFFS

AND: **FONMANU VAMARASI** of Bua, Businessman.

DEFENDANT

AND: **CHINA RAILWAY FIRST GROUP (FIJI) Co. Ltd** a limited liability Company having its registered office at Level 2, Ra Marama House, 91 Gordon Street, Suva.

THIRD PARTY

BEFORE: **Hon. Justice Kamal Kumar**

COUNSEL: **Mr. A. Sen for the Plaintiff**
Mr. A. Kohli for the Defendant
Mr. J. Serulagilagi for Third Party

DATES OF HEARING: **1, 2 and 3 October 2018**

DATE OF JUDGMENT: **22 March 2019**

JUDGMENT

Introduction

1. On 12 May 2017, Plaintiffs caused Writ to be issued with Statement of Claim against the Defendant claiming for damages under Law Reform (Miscellaneous Provision) Death and Interest Act special damages, general damages, interest and costs arising out of injuries sustained by the Plaintiffs and death of Susma Wati in a motor vehicle accident on 5 November, 2015.
2. On 2 April 2017, Defendant filed Statement of Defence.
3. On 19 June 2017, Plaintiff filed Reply to Defence.
4. On 19 July 2017, Defendant filed Application for Leave to issue Third Party Notice against China Railway First Group (Fiji) Co. Ltd.
5. On 25 July 2017, Application was adjourned to 31 July 2017.
6. On 31 July 2017, Defendant was granted leave to file Supplementary Affidavit in Support of the Application and this matter was adjourned to 11 August 2017.

7. On 1 August 2017, Defendant filed Supplementary Affidavit.
8. On 11 August 2017, Proposed Third Party and Defendant were directed to file Affidavits and the Application was adjourned to 13 October 2017, for hearing.
9. On 11 September 2017, Proposed Third Party filed Affidavit in Opposition.
10. On 12 September 2017, Defendant filed Affidavit Verifying List of Documents.
11. On 21 September 2017, Defendant filed Affidavit on Reply to Proposed Third Party Affidavit in Opposition.
12. On 13 October 2017, hearing date was vacated and the Application was adjourned to 3 November 2017 for hearing.
13. On 3 November 2017, Application was heard and adjourned to 24 November 2017 for Ruling.
14. On 24 November 2017, leave was granted for Defendant issue Third Party Notice and this matter was adjourned to 12 December 2017, for mention.
15. On 5 December 2017, Minute of Pre-Trial Conference between Plaintiffs and Defendant was filed.
16. On 7 December 2017, Defendant issued Third Party Notice.
17. On 12 December 2017, Defendant and Third Party were directed to comply with the rules in respect to Third Party proceedings.
18. On 16 January 2018, Third Party filed Statement of Defence.
19. On 25 January 2018, Defendant filed Reply to Third Party's Statement of Defence.
20. On 5 February 2018, Defendant was directed to file Summons for Third Party Directions by 9 February 2018 and this matter was adjourned to 20 February 2018.

21. On 9 February 2018, Defendant filed Summons for Direction and on 20 February 2018, Order in Terms of Summons for Directions was made.
22. On 6 March 2018, Third Party filed Affidavit Verifying List of Documents (AVLD).
23. On 9 March 2018, Defendant filed AVLD.
24. On 9 April 2018, Minutes of Pre-Trial Conference between Defendant and Third party was filed
25. On 8 May 2018, Court directed Plaintiff to file Order 34 Summons and Copy Pleading by 2 May 2018, and adjourned this matter to 8 May 2018, when compliance with direction was extended to 25 May 2018.
26. On 30 May 2018, this matter was listed on 1, 2 and 3 October 2018, for trial.
27. Trial proceeded on 1 October 2018, and concluded on 3 October 2018, when parties were directed to file Submissions with Judgment to be delivered on notice.

Issues to be Determined

28. The issues that needs to be determined are as follows:
 - (i) Whether Defendant owed duty of care to the Plaintiff?
 - (ii) Whether Defendant breached duty of care owed to the Plaintiff?
 - (iii) Whether Defendant's breach caused Plaintiff injuries which resulted in Plaintiff suffering pain, special and general damages and death of Susma Wati?
 - (iv) What is the quantum of damages?
 - (v) If Defendant is held liable then whether Defendant should be identified by Third Party.

Documentary Evidence

29. Documents forming part of Agreed Bundle of Documents dated and filed on 26 September 2018, were tendered and marked as Exhibit P1 to P11 within Letter of Acceptance dated 7 June 2012, from Fiji Road Authority to Third Party, Contract No. CP 83/12 and letter dated 20 April 2016, from MWH to Third Party were tendered and marked as Exhibits TP1, TP2 and TP3.

Whether Defendant owed duty of care to Plaintiffs

30. It is well settled that driver of a vehicle owes duty of care to other road users be it another driver, passenger in vehicles, pedestrian and jay walker or joy rider.
31. The Defendant being driver by motor vehicle Registration No. HO298 (**“the vehicle”**) owed a duty of care to Plaintiffs and Susma Wati (Deceased) who at material time were passengers in the vehicle.

Whether Defendant breached duty of care owed to Plaintiff

32. Varun Vishal Kumar, Second-named and Plaintiff in Civil Action No. 27 of 2018 and Plaintiff's first witness (**PW1**).
33. PW1 during examination-in-chief gave evidence that:
- (i) He is the Administrator of the Estate of Susma Wati, his mother pursuant to Letter of Administration No. 60114 (**Exhibit P9**);
 - (ii) His mother Susma Wati (hereinafter referred to as **“Wati”**) was living in a de-facto relationship with Tota Ram;
 - (iii) Wati had three (3) children being himself, Koshal Vikash Ram and Pranil Vikash Ram (**Exhibits P1 – P2**);

- (iv) Wati died in the road accident at the age of 44 years and cause of her death was Severe Traumatic Brain Injury, Intracranial Haemorrhage due to Severe Traumatic Head Injury/Base of Skull Fracture and Multiple Traumatic Injuries (**Exhibit P6**);
- (v) He is single and him with his brothers and Tota Ram lived with his mother who was looking after 80 cattle, 30 sheep, milking 5 to 6 cows daily and would sell 10 liters of ghee in a month;
- (vi) Wati sold ghee at \$13 liters;
- (vii) She would also sell 5 or 6 cows per year at \$400 to \$500 each in addition to selling chicken/ducks amounting to around \$3,000.00 a year and sheep amounting to about \$2,000.00 per year;
- (viii) When Wati died and during her funeral he was admitted in the hospital and they had thirteen (13) days traditional sittings;
- (ix) All cost for the funeral was paid by Tota Ram and his brother;
- (x) Wati was a healthy person;
- (xi) When Wati died he was not able to do what she used to do in fact he has 10 to 20 cows now when before he used to have 90 cows;
- (xii) He knows Defendant in whose vehicle they came to do shopping;
- (xiii) When they were returning from shopping, Tota Ram (father) was sitting in front whilst him, his brother and mother were sitting at the back;
- (xiv) Road condition was good with loose gravel;
- (xv) They stopped at Lekutu and after Lekutu, there was signboard showing speed limit of 30km/hr but the vehicle was being driven at 80 to 90km/hr;
- (xvi) They were about 3km from Vunivau, Bua when the accident took place;

- (xvii) Accident happened due to driver of vehicle losing control of the vehicle and after travelling for about seven (7) chain, vehicle tumbled four (4) times and landed in a drain on side of the road;
- (xviii) After the vehicle tumbled, Wati died at scene of the accident;
- (xix) He was taken to hospital.

34. During cross-examination PW1:-

- (i) Agreed that he was working for Third Party prior to accident which company was major contractor for doing roads and at material time was fixing Nabouwalu Road which included area called Dramoka where accident took place;
- (ii) Agreed that they came to do Diwali shopping in vehicle driven by Defendant and that when coming to Labasa, Defendant's driving was normal;
- (iii) Agreed that after shopping they were returning to Vunivau with no fixed time to reach home and accident took place around 5 to 5.30pm;
- (iv) Stated that if accident did not take place, they would be home after half an hour;
- (v) Stated that he remember on that day he was sitting on back seat but does not remember cattle crossing the road when they were going to Vunivau;
- (vi) Recalled that when vehicle was driven there was loose gravel on the sides left by the Third Party with no sign saying loose gravel;
- (vii) When asked if there was any sign saying loose gravel, he stated that there was sign board saying 30km/hr;
- (viii) When it was put to him that on date of accident there was no sign board saying 30 km/hr he stated that there was sign board;

- (ix) When it was put to him that there was only cement base with no sign board, he stated that there was working sign board with picture of road works and board with speed limit of 30 km/hr;
- (x) When asked if it was grave concern to him that sign board says 30km/hr and he is driving at 80 to 90 km/hr he stated that he was driving at a speed;
- (xi) Recalled giving statement to Police on 8 January 2017, which was read over to him and signed by him and has no idea why it was recorded so late;
- (xii) Stated that he told Police Officer about 30km/hr and that Police Officer may not have recorded it;
- (xiii) When it was put to him that Police Officer may have not written when he told Police Officer that Defendant was driving at 80 to 90 km/hr when it should have been 30 km/hr he stated that he does not know;
- (xiv) When it was put to him that he was sleeping at the back seat he stated that he felt sleepy but was not sleeping;
- (xv) Denied that at time of accident cattle crossed from left to right when Defendant turned vehicle towards right;
- (xvi) When it was put to him that he did not see cattle because he was sleeping, and his father who was sitting in front gave statement to Police that he saw cattle crossing from left he stated that he does not know, because his father was sitting in front;
- (xvii) Stated that vehicle was travelling on left hand side, then swerved to right then to left when it tumbled;
- (xviii) Stated that vehicle tumbled on the road and then off the road and did not count how many times it tumbled;

- (xix) Stated that reason they did not shout when vehicle tumbled is because they were unconscious;
 - (xx) Stated that vehicle was travelling on correct side;
 - (xxi) Stated that he did not know about cattle but know vehicle swerved towards right;
 - (xxii) Agreed that gravel was left by Third Party and drain was on right hand side and that is why Defendant swerved towards left and then it landed on the drain.
35. During cross-examination by Counsel for Third Party PW1:-
- (i) Agreed that road sign of 30km/hr was placed at side of road at Dramoka and stated that sign was placed bit prior to where loose gravel was;
 - (ii) Agreed that according to his speed of vehicle was 80 to 90 km/hr;
 - (iii) Agreed that according to him Defendant drove past 30km/hr sign at speed of more than 30km/hr;
 - (iv) Agreed that he was working for Third Party;
 - (v) Agreed that he said there were workers working on the road that day;
 - (vi) Agreed that men working were part of third party.
36. In re-examination PW1 stated that speed limit where accident took place was 30km/hr and Defendant was driving at 80 to 90km/hr.
37. Plaintiffs next witness was Koshal Vikash Ram, Third-named Plaintiff in Civil Action No. 29 of 2018 (**PW2**).
38. PW2 during examination in chief gave evidence that:-
- (i) On 15 November 2015, he was a passenger, sitting in the middle of back seat in vehicle No. HO298 driven by the Defendant;

- (ii) On return journey condition of road after Dreketi was that it was being upgraded and work was being done there;
- (iii) They were about 3km away from home when accident happened;
- (iv) He was awake, could see clearly in front and speed of vehicle was about 90km/hr;
- (v) There was loose gravel on road and weather was dry;
- (vi) According to driver, he lost control of the vehicle when vehicle travelled for about 40 yards and then tumbled four to five times and then moved about ten steps;
- (vii) When the vehicle tumbled he was conscious and received injuries to collar bone, fractured arm and injury to his hip;
- (viii) They were seen at Lekutu and from there they were sent to Labasa Hospital where he was kept for whole night and was then sent home after being seen by the doctor;
- (ix) He felt pain after the accident;
- (x) His mother passed away in the accident whose funeral was held on 13 November 2017, and organized by him and his 16 year old brother;
- (xi) At time of accident he was 2nd year student at Vocational School, and his younger brother was in Form 4;
- (xii) After being discharged he went to hospital every day for more than a week by taxi and return fare was \$8.00 per trip when doctors checked him and sent him home;
- (xiii) He went to attend his mother's funeral and returned to Labasa where he stayed for about two weeks;
- (xiv) After the accident he was in severe pain for that week, could not sleep properly and had pressure/tension because of mother passing away.

- (xv) He went to hospital every day for two (2) weeks where they applied ointment and changed dressing;
- (xvi) That year he did not go back to school;
- (xvii) He felt severe pain and was in pain for about seven (7) months;
- (xviii) Medication reduced pain a little bit and he took his own medication;
- (xix) His present condition is that he had pain in shoulder as a result he cannot lift heavy items and if he does lift heavy items he has pain.

39. During cross-examination PW2:-

- (i) Agreed that on day of accident they were returning to Bua but denied that he was sleeping prior to accident;
- (ii) Stated he gave statement to Police on 18 January 2017, when Police Officers came home to take statement, which he read, understood and signed;
- (iii) Agreed that he said vehicle was travelling at about 90km/hr when accident happened and it would have stuck in his mind accident took place because vehicle was travelling at 90km/hr;
- (iv) When it was put to him that there is nothing in the Statement to say vehicle travelling at 90km/hr he stated that maybe it is not written and he does not know why it is not written;
- (v) Stated that he told Police about the speed;
- (vi) Stated that he can tell estimate speed because he saw speed meter;
- (vii) Stated that he informed police about speed meter but they did not write;
- (viii) When asked as what was the need to say to Police that "could tell vehicle was travelling fast speed because when I looked outside

everything was moving fast” he stated that when Police Officer asked him how vehicle was travelling he mentioned about the speed meter, then they asked for another reason he told them that when he saw outside everything was moving fast;

- (ix) When asked that when he said about speed meter, then there was no need to say another reason he stated that Police Officer asked him for second reason and he does not know as to why Police Officer did not put first reason;
- (x) When asked when he read the Statement, why he did not ask as to why they did not write 90km/hr he stated that he does not know and he did not ask;
- (xi) Stated that Varun is eldest in family;
- (xii) Stated vehicle was travelling on left hand side when it lost control, went in zig-zag manner, then tumbled and landed in drain;
- (xiii) Stated that vehicle went zig-zag for about 2 seconds towards centre of road, then towards left side and on left side it tumbled;
- (xiv) Stated that the vehicle fell in the drain facing Labasa side;
- (xv) Stated that there were road markings, being sign of speed limit and men working ahead;
- (xvi) Stated that men were working in front of scene of accident towards Vunivau side and not far from with estimate distance being from Court premises to New world Supermarket;
- (xvii) When it was put to him that there was no road work or 30km/hr sign he stated that sign was there;
- (xviii) When it was put to him that only base was three on which sign was to be erected he stated that sign was not on the base but was a triangular shape sign saying “temporary 30km/hr” on the side of the road;

- (xix) Stated he told Police about sign and does not know why it is not recorded.
40. In answering questions by Counsel for Third Party PW2:-
- (i) Stated that according to him vehicle travelled at 90km/hr before it lost control and he knew the speed because he saw the speed meter;
 - (ii) Confirmed that he said there was speed limit sign of 30km/hr and road work sign on side of the road;
 - (iii) Stated that speed limit sign was before the accident;
 - (iv) Agreed that according to him Defendant drove vehicle at 90km/hr when sign said 30km/hr.
41. Plaintiff next witness was Tota Ram, First named Plaintiff in Civil Action No. 29 of 2017 (**PW3**).
42. During examination-in-chief PW3 gave evidence that:-
- (i) He was born on 25 August 1963;
 - (ii) In 2015, he was working as a carpenter and was not working on day of accident;
 - (iii) He worked for Defendant when Defendant returned from overseas;
 - (iv) Prior to accident he was working for Defendant for about two (2) years on full-time basis at a salary of \$270 per month with no FNPF;
 - (v) He worked for 8 hours a day for 6 days in a week, building Defendant's double storey house;
 - (vi) When Defendant was away overseas he did part-time work and did work for school;
 - (vii) When he worked outside he charged \$50 per day and had been doing carpentry work since he was 17 years old;

- (viii) He was living with Susma Wati and has three (3) children;
- (ix) On 5 November 2015, day of accident he was travelling home from Labasa in Twin Cab No. HO298 when accident happened;
- (x) Weather was good and it was gravel road as it was being upgraded by Third Party;
- (xi) When you go from Labasa to Dramoka, you go up a hill and then there is a bend, after which you go down a long steepy slope;
- (xii) Defendant was driving fast and he was sitting on front passenger seat;
- (xiii) At the bend, there was loose gravel where vehicle went out of control, driver applied brake and the vehicle tumbled;
- (xiv) Defendant was driving vehicle at 90km/hr when Defendant failed to negotiate the bend and as a result vehicle tumbled;
- (xv) Before vehicle tumbled it travelled for about 40m and then got out of control;
- (xvi) After vehicle tumbled and once he got hit on the head he became unconscious;
- (xvii) He gained consciousness at Lekutu Health Centre.

43. During cross-examination PW3:-

- (i) Stated that accident took place when Defendant applied brake on loose gravel and lost control;
- (ii) Recalled giving Statement to Police on 5 April 2016, and signing the Statement;
- (iii) Stated that prior to day of accident he knows two vehicles lost control at the place of accident;

- (iv) Confirmed in his statement to Police, he stated that he was sitting on front passenger seat, his boss was driving, his wife was sitting behind him, his son Koshal was sitting in the middle of back seat, his son Varun was sitting at rear right hand side and at Lekutu, his wife told him to buy water. When they stopped, his elder son went to buy water and juice;
- (v) Confirmed that in his Statement to Police, he stated that after they bought water and juice they left towards Vunivau, they were talking with his boss was driving and when they reached Nawailevu junction he looked at back seat and saw his wife and elder son really wanted to sleep and other son was awake;
- (vi) When he read part of his statement (lines 41, 42) where it is stated that he kept on talking to his boss and as they went up the hill again he looked back and saw his wife and elder son sleeping he stated that they were not sleeping;
- (vii) When it was put to him that after passing the bend some cows were coming towards the road he stated that they were not on the road but beside the road and on other side of the drain;
- (viii) When part of his statement where it is stated "...some cows coming from towards the road side from any side where my boss applied brake and due to the loose gravel the vehicle slide sideways" he stated "No";
- (ix) Confirmed that signature of 2 pages of his Statement has his and the statement was read back to him and then he signed;
- (x) When it was put to him that in his statement to Police he stated he saw his wife and elder son sleeping he stated he did not have it written and his wife and elder son were drinking juice;
- (xi) Agreed that he told Police that at night time it is not a good place to stop, it is haunted place which he could tell that to his boss because they were on different topic;

- (xii) Agreed that he said Defendant was driving at 90km/hr;
- (xiii) When it was put to him that he did not mention about speed to Police he stated that he did inform but Police Officer was writing;
- (xiv) When asked if he looked at the speed he stated that his face was towards driver;
- (xv) Stated that Police Officer did not ask as why he thought Defendant was driving at 90km/hr;
- (xvi) Stated that he told Police that he saw the speed meter and Defendant was driving at 90km/hr;
- (xvii) Stated that he was saying 30km/hr and he told Police about that all beside road there were two boards with one saying workmen ahead the other with speed limit of 30km/hr;
- (xviii) Stated that when he came to Labasa he saw 4 or 5 people working at about five chains away from where accident took place;
- (xix) When asked if came to find that any of the workmen came to scene of accident, he stated that they stop work at 5.00pm and must have gone home;
- (xx) Stated that he knew the Police Officer who recorded his statement from the time the Police Officer came to Nabouwalu;
- (xxi) Denied that for two (2) weeks Defendant gave him \$100 per week;
- (xxii) Stated that he gave statement to police on 5 April 2016, because he had injury to his head and was unable to think well;
- (xxiii) When it was put to him that his children gave statement in 2017, after his intention to file civil claim, he stated he does not know about them and only know about himself;

(xxiv) When asked if he could continue his wife's cattle business, he stated that he cannot work in hot sunshine and has to cook for children.

44. In answering questions by Counsel for Third party PW3:-

- (i) Confirmed that he said Third Party's workers were working on the road and Defendant was driving very fast and when approaching Dramoka he was driving 90km/hr;
- (ii) Confirmed that he said there was sign saying 30km/hr and stated that the sign was before the place of accident.

45. During re-examination PW3:

- (i) Stated he cannot read English and his Police Statement was read back to him in Hindi;
- (ii) Stated that there was no cow on the road and he did not say anywhere in his statement that there was cow on the carriage way;
- (iii) Stated that cows were on the other side of drain and road was clear to drive;
- (iv) Stated that vehicle went out of control and the Defendant applied the brake;
- (v) Stated that Defendant came to hospital, was not at wife's funeral and did not give anything for wife's funeral;
- (vi) Stated that after he went home Defendant did not give any money.

46. Plaintiff's fifth witness Rajneet Nand of Salusalu Street Labasa, Police Officer (**PW5**) during examination-in-chief gave evidence that:-

- (i) Recalled attending a road accident on 5 November 2015, with PC Naidu when it was dark;

- (ii) Rough sketch plan was drawn by PC Naidu who was Traffic Officer at Nabouwalu at that time and he assisted in taking measurements with measuring tape;
- (iii) Vehicle was travelling towards Nabouwalu and the road was newly tarsealed with crushed metal spread over road;
- (iv) From tyre marks, vehicle would be travelling on left hand side and tyre marks start from right hand side;
- (v) 39.5m on rough sketch plan is not tyre mark but distance between 1st tyre marks and distance vehicle travelled;
- (vi) He cannot tell exactly how area was with all things scattered but there were things scattered both on and off the road;
- (vii) He cannot recall how deep drain is but stated that it is normal drain;
- (viii) He cannot recall the drain was neat and tidy and agreed that road was 10m wide;
- (ix) He cannot tell the speed vehicle was travelling by looking at items and tyre marks.

47. During cross-examination PW5:-

- (i) Stated that he had been in Police Force for ten (10) years and in Traffic Department for four (4) years;
- (ii) Agreed that whenever you draw sketch plan, at first you find a fixed point of impact;
- (iii) Stated he did not see any road sign, it was dark.

48. In answering questions by Counsel for Third Party PW5 confirmed that the said road was tarsealed with crushed metal on top.

49. During re-examination PW5:-

- (i) Stated that road was in process of re-construction;
- (ii) When asked if they went around looking for a road signs he stated that their concentration was more on accident;
- (iii) Stated when travelling along that road during day then he saw road sign placed but cannot say exact place;
- (iv) Stated that he saw road sign when construction work was being undertaken.

50. Defendant during examination-in-chief gave evidence that:-

- (i) He recalled driving the vehicle on 5 November 2015, from Nabouwalu to Labasa and return with Tota Ram and his family;
- (ii) He is used to travelling on that road and when he was coming in the morning on day of accident, day was perfect and when he passed Dramoka Road was clear and tarsealed;
- (iii) Third Party was doing road mark;
- (iv) On his way back to Vunivau, Bua, Tota Ram was sitting in front with Tota Ram's wife and two sons sitting at the back when at Dramoka Road they met an accident;
- (v) Prior to accident he was driving at 60km/hr when speed limit was 80km/hr and there was no road sign;
- (vi) There was no sign saying workmen working on the road;
- (vii) He could negotiate the bend at 80km/hr;
- (viii) As they were approaching the bend cows were on the road when he applied the brake to avoid hitting the cows and since it was loose gravel, vehicle slid to right and this how he lost control;

- (ix) He moved vehicle to middle of the road and then it tumbled at the drain;
- (x) First to arrive at the scene of accident after vehicle tumbled was Pau who helped elder son and Tota Ram;
- (xi) After that van full of Chinese people came with Police Officers last one to come;
- (xii) He did not notice loose gravel when travelling from Bua to Labasa and road was clear;
- (xiii) There was no sign in the vicinity of the accident to say loose gravel ahead;
- (xiv) To void accident, he applied brake when vehicle moved towards right hand side somewhere around middle portion;
- (xv) He could have stopped vehicle from going into the drain by moving further on right hand side in which case vehicle would not have gone into the drain;
- (xvi) When it was put to him that witness said he was driving at 90km/hr, there were road signs and he was speeding he stated that it is incorrect;
- (xvii) After the accident he attended Tota Ram's wife's funeral, visited his house and gave him money;
- (xviii) Prior to accident they were like his family, was talking to him immediately after accident, Tota Ram promised him that case is finished and there would nothing but later he made statement and gave him Writ of Summons;
- (xix) On 10 November 2015, he gave Statement to Police, was given right to chose language with other rights and he answered questions correctly;

(xxi) When doctor asked him how accident happened he told doctor that vehicle skidded on gravel and tumbled three (3) times.

51. During cross-examination Defendant:

- (i) Agreed that day of accident was fine clear day;
- (ii) When it was put to him that Labasa/Nabouwalu road is very busy road he stated that not really busy and that there are some vehicles but not really busy;
- (iii) Stated that he cannot remember last vehicle he saw;
- (iv) Stated that he was looking for road signs and as a driver that is your responsibility to look at signs to avoid fines and know what is ahead and the speed limits;
- (v) When it was put to him that he said he did not see single road sign he stated that no sign at where accident happened at Dramoka to illustrate speed limit or men working ahead and there was only sign at the back which is 80km/hr;
- (vi) When asked where did he say in his interview that there was no sign he stated that in answer to question 63: he said "Do wish to say that people in charge of the road upgrading is to put up road signs loose gravel on bend";
- (vii) When asked if it is not true that signs are placed prior to construction of road he stated that he did not agree;
- (viii) Stated that he was not sure if road from Dreketi to Nabouwalu was being upgraded in 2015 but some portion of road was;
- (ix) Stated that he has been traveling on that road since 2011;
- (x) When asked if he does not know when they started upgrading and when they finished he stated that it is not his job to know;

- (xi) Stated that when road is being upgraded it is for drivers to drive within speed limit and watch for road sign like speed limit, gravel etc;
- (xii) Agreed that in 2015, that road was being upgraded from gravel to tarseal;
- (xiii) When asked if he does not agree that, that road is busy and hundreds of vehicle travel everyday he stated that at times it is busy and at times it is not busy;
- (xiv) Stated that he only know about his vehicle being tumbled on the drain;
- (xv) When it was put to him because of gravel he stated he said cows were there;
- (xvi) Stated he saw the cows on that road for the first time;
- (xvii) When it was put to him that there is 3 meter drain on both side of road and there were no cow on the road and were grazing next to the drain he stated that cows were on the road;
- (xviii) When asked if he is telling vehicle tumbled for 39.5 metres he stated vehicle tumbled three (3) times and fourth time it was in drain;
- (xix) Stated that he cannot explain why grill is at 7.2 metres and bonnet as at 1.8 metres away;
- (xxi) Agreed that on left hand side there is a steep ridge and stated that there is drain then ridge;
- (xxii) Stated that he cannot recall how deep is drain;
- (xxiii) Stated that vehicle tumbled and then swung towards Labasa;
- (xxiv) Agreed that prior to accident, one Tota Ram worked for him and he paid him \$270 per month and Tota Ram worked for him for two (2) years;

- (xxv) Stated that he cannot recall how long after being interviewed Police charged him;
- (xxvi) When it was put to him that he was charged after Police took statement from Tota Ram and other witnesses he stated that he cannot recall;
- (xxvii) Agreed that he was charged with dangerous driving occasioning death;
- (xxviii) When it was put to him that he did not want these family members to give statement, he stated it to be not true;
- (xxix) When it was put to him that because of statement he got charged which upset him about Tota Ram, he stated it to be not true and further stated that Tota Ram gave word that there will be nothing;
- (xxx) When it was put to him that he told Tota Ram not to give statement as obedient worker, he stated that it is not true;
- (xxxi) When it was put to him that on that day he did not see road sign because he was not concentrating, he stated that to be not true and there was absolutely no sign and nobody was working and have witness who will say same thing;
- (xxxii) When asked if he took witness to Police to say no sign, he stated “no” and further stated that when Plaintiff said yesterday there were signs, it really upset him because it was all total lies;
- (xxxiii) Stated that he lost control of the vehicle because of loose gravel;
- (xxxiv) When asked if he does not think he owed duty of care to other road users, he stated that his duty as driver is to drive safely;
- (xxxv) When it was put to him that accident was caused by his recklessness and his over speeding, he stated that to be not true.

52. During cross-examination by Counsel for Third Party, Defendant:-

- (i) Stated that when going on day of accident to Labasa he saw men conducting road works along highway but not place where accident happened;
- (ii) Stated that according to him no man was conducting work at place of accident;
- (iii) When asked as to how does he suppose loose gravel when no one was working, he stated that Third Party working and saw truck taking gravel;
- (iv) Agreed that he said no man was working on that portion of the road;
- (v) When it was put to him that despite him saying that no man working on that part of road he still says there was gravel on that part of the road, he stated that to be correct;
- (vi) Agreed Third Party's workers arrived at scene of accident;
- (vii) When asked if he would agree that they came second meant they would have been close by, he stated that he does not agree;
- (viii) When it was put to him that he says Third Party's workers were not close by but were second to arrive at scene of accident;
- (ix) When it was put to him that men were working along that stretch of road on that day, he stated he cannot confirm as he passed in the morning and came back in the afternoon;
- (x) When it was put to him that men not working, but there was loose gravel, he stated could be from truck;
- (xi) Stated that he is familiar with Labasa to Nabouwalu Road, you pass Dreketi before you reach Nabouwalu and coming from Labasa side Dramoka falls after Dreketi;

- (xii) When asked as to how long it takes to travel from Dreketi to Dramoka, he stated that he cannot say;
- (xiii) Read question 49 and answer in Interview which is in following terms:-

“Q49: What was the road condition like along Labasa and Nabouwalu highway?”

A: There was a lot of tarseal gravel when started to approach along Dreketi and Nabouwalu road.”
- (xiv) When it was put to him that in his Police Statement, he said there was loose gravel from Dreketi to Dramoka, he stated “No”;
- (xv) Agreed that first place he encountered loose gravel was at Dreketi and he did not encounter loose gravel at Dramoka;
- (xvi) Agreed that he won't be surprised to see loose gravel at Dramoka;
- (xvii) When it was put to him that despite not being surprised he still chose to drive at 60km/hr, he stated that he drove at 30km/hr.

53. During re-examination Defendant:

- (i) Stated that loose gravel was not continuously to Nabouwalu;
- (ii) Stated that he was 30m away from Dramoka when he saw loose gravel for first time;
- (iii) When asked how far from Dreketi towards Dramoka he last saw loose gravel on that road, he stated soon after accident;
- (iv) Stated that distance between that and when he saw gravel 30m away from scene of accident was approximately 25km;
- (v) Stated that when approaching Dramoka road was tarsealed;
- (vi) When asked what distance before Dramoka was tarsealed, he stated probably from court premises to Seaqaqa.

54. Third Party called Devina Chand of Rewa Street, Suva, Legal officer as it's only witness (**TPW**).
55. TPW during examination-in-chief gave evidence that:-
- (i) She has been employed by Third party as its Legal Officer from May 2017, and has been with Third Party since 2017;
 - (ii) She manages legal department and handle all cases Third Party is a party to which cases she briefs out;
 - (iii) She became familiar with Dreketi to Nabouwalu Project after the Third Party proceeding papers were served on Third Party;
 - (iv) The project was about upgrading of road and laying of asphalts from Dreketi to Nabouwalu and the parties to the project were Fiji Road Authority (**FRA**) as Employer and third Party as Contractor;
 - (v) Third Party tendered for the project and tender was accepted as per letter of Acceptance dated 7 June 2017, from FRA to Third Party (**Exhibit TP1**);
 - (vi) Exhibit TP1 meant Third Party tendered for the Project and its tender was successful;
 - (vii) FRA and Third Party entered into contract dated 18 June 2012, for Dreketi to Nabouwalu Project (Exhibit TP2);
 - (viii) In reference to letter dated 20 April 2015 from MWH to Third Party (Exhibit TP2), she stated that second paragraph says when certificate will apply;
 - (ix) As at 30 November 2015, Third Party was still employed for the Project;
 - (x) MWH were consultant engineer engaged by FRA.
56. During cross-examination by Counsel for Defendant TPW:-

- (i) Agreed that as per documents road was being constructed from Dreketi to Nabouwalu;
- (ii) Stated that in term of Certificate of Completion work was to be completed on 30 November 2015, when constructor would give property to employer;
- (iii) Stated that Dramoka is somewhere between Nabouwalu and Labasa and she does not know where accident took place.
- (iv) Agreed that it would be right to say that she would have no idea about the condition of road where accident took place at time of accident;
- (v) Stated that she cannot recall when work on that road was completed;
- (vi) Agreed that she would not know that where accident took place there was gravel;
- (vii) When it was put to her that she would not know if signs were placed, she stated that she saw picture with sign stating “drive slowly” which picture were taken by one of engineer who went back to China;
- (viii) Stated that she does not know when pictures were taken;
- (ix) Stated that she would not know if there was loose gravel on road from Dreketi to Nabouwalu on 5 November 2015;
- (x) When paragraph 8 (i) of her Affidavit sworn on 8 September 2017, which was in following terms referred to:

“The company did conduct work on the said stretch of road as stated by the Defendant but sates that by 05 November, 2015 the road work which had been conducted by the company near the bend at Dramoka Road, Bua along the Nabouwalu/Labasa Highway had already been completed and there was no current road work being conducted by the company or its employees at the material date and time as alleged by the Defendant nor was

there any loose gravel left along the said road at such date and time.”

she stated that what she said was as per information given to her by the people (engineers) who were working there and she could not say why she did not say engineer gave information;

- (x) When read paragraph 8 (iv) of the Affidavit which was in following terms:

“Regarding paragraph 7(iv) of the Defendant’s supporting affidavit, the company denies the same and states that there was no loose gravel, the company did not have to erect any signs indicating otherwise. However in spite of this, the company did erect a sign at the material location along the bend at Dramoka Road, Bua along the Labasa/Nabouwalu highway to warn motorists to “Drive Slowly” given the approaching bend; and (Annexed herewith and marked as “DCI” is a photograph of the said warning sign at the material location).”

she stated that she remembers picture then;

- (xii) Stated that she does not know date picture was taken and when she spoke to engineer he said it was taken at time of project;
- (xiii) When asked if it is not important to put date when you taking pictures she stated that she does not know as it was entirely upto project team/project manager and she does not know which camera they were using;
- (xiv) Agreed that takeover by Owner was on 30 November 2015;
- (xv) When it was put to her that picture could have been taken on 30 November 2011, she stated she does not know;
- (xvi) Stated that she does not know if there was any sign saying at what speed you drive at the bend;

- (xvii) In referred to Exhibit TP3, she stated that her understanding is that they saying they happy with it and taking over Certificate from 30 November 2015;
- (xviii) Agreed that Third Party was the only contractor working on the road by itself;
- (xix) When asked if in course of work, Third Party was earthing gravel, she stated she was not privy to actual work;
- (xx) When it was put to her that Third Party left gravel at place of accident, she stated she was not aware.

57. In answering questions by Counsel for Plaintiff, TPW:-

- (i) When it was put to her that scope of work was to put road sign, she stated that under normal works, you have to put signs like speed limit etc.
- (ii) Agreed that Labasa to Nabouwalu is busy highway.
- (iii) Stated that no one complained about road marking and signs.
- (iv) Stated that FRA did not complain about no correct sign being placed.
- (v) Stated that they did not receive any complains about any vehicle going on gravel road and then going off the road into the drain apart from Defendant in this case.

58. After analyzing the evidence of witnesses and submissions this Court makes following findings:-

- (i) On 5 November 2015, whilst returning from Labasa the vehicle driven by Defendant went out of control at Dramoka;
- (ii) Plaintiff and Susma Wati were passengers in the vehicle with Tota Ram sitting in front passenger seat, Susma Wati sitting behind Tota Ram,

Koshal Vikash Ram sitting in the middle and Varun Vishal Kumar sitting behind the driver;

- (iii) The vehicle as a result of getting out of control tumbled four times and landed in the drain on the left side of the road;
- (iv) Plaintiffs in Civil Action No. 29 of 2017 suffered injuries whilst Susma Wati, de-facto of Tota and mother of Varun Kumar and Koshal Ram died as a result of injuries sustained in the accident;
- (v) The highway between Dreketi to Nabouwalu was being upgraded from gravel road to tarsealed road from 2012;
- (vi) Third Party was contracted to carry out the upgrading works by Fiji Road Authority;
- (vii) The upgrading of the road was on the verge of completion at the time of accident with loose gravel or crushed metals lying on the road or side of the road;
- (viii) This Court does not accept PW1, PW2 and PW3's evidence that there were road signs with speed limit of 30km/hr or workmen ahead just at the scene of accident but accepts that such signs were placed at certain places in the stretch of Road from Dreketi to Nabouwalu;
- (ix) The employees of third Party were working on the road not from scene of accident and those places had road signs regarding speed limit and men working;
- (x) Court accepts PW4's evidence that there was crushed metal at the scene of accident which shows that the contracted road was just completed or about to be completed;
- (xii) The loose gravel or crushed metal was on the road or side of road when Defendant and Plaintiffs went to Labasa in the morning of day of accident;

- (xiii) Defendant knows and ought to have known at all times about loose gravel or crushed metal at place of accident and along Dreketi/ Nabouwalu stretch;
- (xiv) Court finds it hard to accept that Defendant only saw loose gravel or crushed metal on certain part of the road prior to accident and not at place of accident;
- (xv) This Court accept PW1, PW2, PW3's evidence that Defendant was driving the vehicle very fast and at high speed as a result of which Defendant lost control whilst the vehicle whilst attempting to negotiate the bend before going down the hill;
- (xvi) In order to control the vehicle, Defendant had to turn the vehicle towards middle of the road when vehicle went in zig-zag manner and tumbled after Defendant applied the brake;
- (xvii) This Court does not accept Defendant's evidence that he lost control of vehicle because he attempted to save cows that were on the road and considers this evidence as an afterthought on part of the Defendant;
- (xviii) Tota Ram and his children did not give statement soon after the accident because of the fact that Defendant employed Tots Ram prior to accident;
- (xix) It was Defendant's evidence that after accident, Tota Ram said to him that all is over but later he was served with the Writ of Summons;
- (xx) Defendant whilst driving was talking to Tota Ram which meant that he was not paying full attention to his driving especially in a situation where you have to go up a hill, then negotiate a bend and go down on long steep hill and road having loose gravel or crushed metal either on the road or side of the road.

59. After analyzing the evidence and facts stated above, this Court finds that the accident took place due to the sole negligence of the Defendant as he failed to

exercise duty of care required of a reasonable and prudent driver under circumstances of the case.

Whether Defendants breach caused injury to Plaintiff and Susma Wati's Death

60. There is no dispute that injury sustained by Tota Ram, Varun Ram and Kushal Ram was caused by the accident.
61. It is also not disputed that Susma Wati passed away as a result of injuries sustained in the accident.

Special Damages

Estate of Susma Wati

62. Plaintiff claims \$5,000.00 for funeral expenses.
63. After funeral of Susma Wati, they have thirteen (13) days traditional ceremony/rituals.
64. Even though no receipt or evidence is adduced to prove funeral expenses this Court is of the view that \$5,000.00 is just and reasonable expenses to conduct funeral and traditional ceremonies.
65. Estate of Susma Wati is awarded \$5,000.00 as special damages.

Tota Ram

66. Tota Ram's unchallenged evidence was that:-
 - (i) He travelled from Bua to Labasa to attend clinic in hired van at \$180.00 per return trip totaling \$540.00 (\$180 x 3);
 - (ii) He travelled from Bua to Nabouwalu Health Centre in hired van to attend clinic in hired van at \$10.00 per return trip for about 15 to 20

times. For certainty will allow for 20 trips. Total cost for travelling from Bua to Nabouwalu would be \$200 (\$10 x 20).

67. Total Special Damage comes to \$740.00.

Varun Visha Kumar

68. This Court accepts Varun Kumar's evidence that he travelled to hospital ten (10) times in carrier at cost of \$150.00 return totaling \$1500.00.

69. As such this Court awards \$1,500.00 to Varun Kumar for travelling expenses.

70. This Court also accepts he spent about \$200 to \$300 and awards \$200 for medical expenses.

Koshal Vikash Ram

71. Koshal Ram gave evidence that he was travelling to hospital for two weeks in taxi at \$8.00 return and claim \$500.00 for travelling and medical expenses.

72. At \$8.00 per return trip for two weeks travelling costs would amount to \$122.00.

73. Court also accepts that Koshal Ram was on medication to relieve his pain until such time the fracture was healed.

74. Court awards Koshal Ram \$300.00 as special damages for travelling and medical expenses.

Loss of Wages – Varun Kumar

75. Court accepts Varun Kumar's evidence that he did not work for six (6) months after the accident and prior to accident he was paid \$250.00 per week.

76. Have his loss of income from date of accident to date he stated working would \$6,000.00.

77. This Court award Varun Kumar \$5,520.00 for loss of wages which is made up as follows:

| | | |
|---------------------------|---|--------------------------|
| Total wages (\$1,000 x 6) | = | \$ 6,000.00 |
| Less 8% FNPF | = | <u>\$ 480.00</u> |
| | | <u>\$5,520-00</u> |

78. Varun Kumar lost \$600.00 FNPF contribution from his previous employer.

79. Varun Kumar is entitled to \$600.00 plus 6% interest which sum together with \$480-00 plus 6% interest thereon is to be paid to FNPF on account of Varun Kumar.

80. The total amount to be paid to FNPF is \$1,134.00 which is made up as follows:

| | | |
|--------------------------|---|--------------------------|
| Employee's contribution | = | \$ 480.00 |
| Employer's contribution | = | <u>\$ 600.00</u> |
| | | \$ 1,080.00 |
| 6% interest for 6 months | = | <u>\$ 54.00</u> |
| | | <u>\$1,134.00</u> |

General Damages

Estate of Susma Wati

81. Plaintiff claims for damages under Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935 (**LRMPDIA**) or alternatively damages under Compensation to Relatives Act 1920 ("**CRA**").

82. It is well settled that when a person dies in an accident his/her children can claim for damages under LRMPDIA or CRA with end result being the amount of damages awarded under LRMPDIA needs to be deducted from compensation payable under CRA.

83. Common sense then dictates that Plaintiff would choose to file claim under LRMPDIA or CRA depending on circumstances of the case.
84. Since Plaintiffs seek damages under LRMPDIA as main remedy, Court will assess damages under this Act.
85. Varun's unchallenged evidence was that:-
- (i) His mother Susma Wati was 44 years at time of accident and her passing away;
 - (ii) No evidence to show that she was not a fit and healthy person;
 - (iii) In fact from Varun's evidence it became apparent that Susma Wati was fit and active person;
 - (iv) Susma Wati's approximate earning for a year was \$9,060.00 which was made up of:-

| Item | Amount [\$] per Annum |
|--|----------------------------------|
| 1. 120l of Ghee (10l a month) at \$13/l | 1,560.00 |
| 2. 5 cattles/year at \$5000.00 (Evidence was 5 or 6 cattle at \$400 to \$500 each) | 2,500.00 |
| 3. Chicken/Duck at \$3,000/year (fluctuated) | 3,000.00 |
| 4. Sheep \$2,000/year | 2,000.00 |
| Total | \$9,060.00 |

86. Given that Susma Wati was a healthy and active person, this Court is of the view that she would have continued doing what she did at least until the age of 55 years.
87. Tota Ram's (PW3) unchallenged evidence was that he is not able to work in hot weather and such cannot do what Susma Wati could do.

88. Varun Ram's (PW1) evidence was that number of cattle after his mother, Susma Wati passed away reduced to 10 to 20 from around 90. Varun Ram also works as carpenter.
89. Susma Wati's other two sons Koshal Vikash Ram and Pranil Vikash Ram are students and there is no evidence that they would continue doing what their mother used to do.
90. It is not doubted that if Susma Wati had been alive she would have spent part of the income she derived as stated in paragraph 84(iv) on her that which Court assesses at forty percent (40%).
91. It is therefore just and fair that a sum of \$59,800.00 be awarded as damages under LRMPDIA for the Estate of Susma Wati which sum is made up as follows:-

$$\begin{array}{rcl}
 \$9,060 \times 11 & = & \$ 99,660.00 \\
 \text{Less 40\%} & = & \underline{\quad 39,860.00} \\
 & & \mathbf{\$59,800.00}
 \end{array}$$

92. Since the income generated by Susma Wati was based on estimate, Court will award a round figure of \$60,000.00 as damages under LRMPDIA.

Pain and Suffering

93. Tota Ram's (PW3) evidence during examination-in-chief was that:-
- (i) He became unconscious when vehicle tumbled once and regained conscious at Lekutu Health Centre;
 - (ii) After he gained conscious he found out that he fractured his right shoulder, fracture fingers and nails came off;
 - (iii) His left hand was broken and he had cast his right foot had lots of abrasion, head blood on his head and was in severe pain and at times became worse;

- (iv) He was admitted on 6 November 2015 and discharged on 11 November 2015;
- (v) On 6 November 2015, he was not able to move and was taken to hospital from the Ambulance in wheelchair;
- (vi) He stated working after being discharge but was feeling dizzy because of injury;
- (vii) After being discharge he did not go home but stayed at Wailevu for two weeks;
- (viii) He did not attend his wife's (de-facto) funeral;
- (ix) After two weeks he walked with someone assistance for about three (3) weeks and for one week he used to go to hospital daily to change bandage for head injury;
- (x) His left hand was cemented and the cast was removed after four months at Labasa Hospital;
- (xi) After cast was removed pain was still there and now in cold weather;
- (xii) Tissue and skin came back after three (3) months' work as a carpenter;
- (xiii) He is not able to do hard work and lift heavy object;
- (xiv) He sold his house and looks after cattle and has about 20 cattle and 20 to 30 sheep;
- (xv) Because of injury he is not able to milk cows.

94. Plaintiffs fourth witness, Alipate Lotoba of 48 Ritova Street, Labasa, Orthopedic Surgeon (**PW4**) during evidence in chief gave evidence that:-

- (i) Tota Ram was admitted on 5 November 2015, and discharged on 12 November 2015;

- (ii) On admission he was diagnosed with mild head injury, multiple scalp laceration, left undisplaced, humerous fracture, abrasions to the left hand and right foot;
- (iii) Abrasion meant he lost skin muscles from his left hand and mild injury to his head could have been caused by hitting blunt object;
- (iv) Laceration would be injury that involves all layers of skin whereas abrasion involves top layer of skin;
- (v) Humerous fracture was treated with Plastic – Paris;
- (vi) Initially Tota Ram would have suffered lots of pain;
- (vii) There will be pain during fracture and once it is healed there will be no pain;
- (viii) Tota Ram attended clinic on multiple occasion and there is no record of him complaining of pain when seen by doctor;
- (ix) It is possible that it is not recorded or not being asked;
- (x) He saw Tota Ram recently when Tota Ram mentioned pain in cold weather, has full fraction of his arms and good movement of joints;
- (xi) Because of trauma Tota Ram had gone through it could take him 2 or 3 months to get mobile;
- (xii) In his opinion Trauma of that nature like wife passing away and children getting injured would not affect him to go back to work and once fracture has healed and all nerves and muscles are working well one will be able to work normally and because wife passed away he needs to be assessed by a psychiatrist to see if it is a contributory factor for him not to work which can be contributory factor sometimes;
- (xiii) They have a psychiatrist at Labasa Hospital but he does not have the qualification;

- (xiv) When it was put to him that Tota Ram gets pain on head when he goes out in sunlight, he stated that he is not a neuro-surgeon;
- (xv) When asked if person with head injury will have pain, he stated "Yes" but have limited knowledge.

95. During cross-examination PW4:

- (i) Stated that Tota Ram suffered injuries;
- (ii) Stated that it takes laceration roughly 2 to 3 weeks to heal and when it is healed there is no pain;
- (iii) Stated that undisplaced fracture means ends have not moved out of place and is in same line;
- (iv) Stated that there will lot of pain with fracture until it is healed and it takes 6 weeks to heal;
- (v) Stated that there is no record or mention of Tota Ram's mobility when he was discharged on 12 November 2015, and if he was immobile, there will be record of that;
- (vi) Sated that if Tota Ram was given a wheelchair, there will be record of that;
- (vii) Stated that there is nothing to suggest that Tota Ram is not able to lift or fully utilize his hands and he should be able to return to work after 6 to 8 weeks from time fracture is healed and about 14 weeks from date of injury;
- (viii) Stated that he is not fully qualified to say about Tota Ram going in the sunlight;
- (ix) Stated that if people do suffer persistent pain, they would come and complain about it and there was no complain until last month (25/7/18), when he did complain of headache;

- (x) Stated that there is a psychiatrist in Labasa and agreed that a fully-fledged psychiatrist based in Suva can make assessment about effect of losing loved one;
- (xi) Stated that psychiatrist analysis was done on Tota Ram by Elizabeth Koroivula, Psychiatrist Registrar on 11 December 2015, who mentioned major depressive episode because of loss of spouse and not being able to support his children as he is stressed;
- (xii) Stated that psychiatrist may have asked question and then diagnosed and prescribed some medication, had bring counseling gave letter to Social Welfare Department with follow up in a month's time;
- (xiii) Stated that there is no record of Tota Ram coming for follow up in a month's time;
- (xiv) Stated that there is no psychiatric at Nabouwalu or Savusavu.

96. During re-examination PW4:-

- (i) Stated that folders are kept in Record Department and doctor have no control or powers with folders;
- (ii) When it was put to him commonly what happens is that there's no folder for out-patient clinics, he stated that commonly it happens but ideally there should be one;
- (iii) Stated that if they lived in Bua, they will be advised to go to nearest health centre for headaches;
- (iv) Stated that after the laceration or fracture is healed in 6 weeks period there is a rehabilitation period.

97. This Court makes following findings:

- (i) Tota Ram did receive injuries in the accident as appears at paragraph 94 (ii) of this Judgment;

- (ii) Tota Ram after gaining consciousness at Lekutu Health Centre was in severe pain because of the humerous fracture, laceration, abrasion and mild injury to his head;
- (iii) Tota Ram's injuries have been healed as stated by PW4 and noted at paragraph 95 (vii) of this Judgment;
- (iv) Tota Ram's injury had been fully healed and there was nothing stopping him from working as a carpenter after injuries were healed as was the evidence of PW4;
- (v) No psychiatric report or evidence was adduced to show that Tota Ram suffered or is suffering from any psychiatric disorder as a result of the accident;
- (vi) It is not doubted that everyone, goes through stressful moments when they lose their loved and dear one as was the case here but people get over it and move on with their lives as time goes by;
- (vii) Tota Ram gave evidence that he gets pain in cold weather when PW4 gave evidence that pain goes away when laceration, abrasion and fracture is healed;
- (viii) Court accepts that Tota Ram may have pain in fractured area in cold weather but considers that pain to be quite minimal which does not call for any award of damages for future pain and suffering;
- (ix) This Court considers it just and fair to award Tota Ram \$60,000.00 for his pain and suffering.

Varun Visha Kumar

98. Varun Kumar (**PW1**) during examination-in-chief gave evidence that:-

- (i) When accident took place he became unconscious, was taken to Lekutu Health Centre and regained consciousness when he was being taken to Labasa Hospital in the Ambulance;
- (ii) When he gained conscious he felt pain on his arms and leg was fractured;
- (iii) He reached Labasa Hospital at 7pm on day of accident, was kept in Emergency Department overnight, taken to ward on 6 November 2015, and was admitted till 10 November 2015;
- (iv) Doctors checked on him, his arm was dislocated which they settled;
- (v) He was feeling pain on his right arm, left knee which was injured and dislocated with most pain in right knee;
- (vi) He left shoulder was also injured;
- (vii) Confirm injuries stated in Exhibit P4 which read as follows:-

“The above mentioned patient (Varun Vishal Kumar) was admitted in the hospital with diagnosis of left knee dislocation, interior crucial ligament injury and left shoulder dislocation.”

- (viii) Prior to accident he was employed by China Railway and after getting healed, he started his own work as carpenter;
- (ix) After being discharged, he went home, was not normal, had injury on knees and arm, which took 6 months to settle for which period he did not work;
- (x) He still gets pain during cold season and he is not able to work properly;
- (xi) He did not play any sports before injury;
- (xii) When he was discharged he did not walk and moved around on wheelchair and after 2 to 4 months stated walking on crutches.

99. PW4 during examination-in-chief gave evidence that:-

- (i) Varun Visha Kumar came to hospital on 5 November 2015, was admitted and discharged on 10 November 2015;
- (ii) Medical Report of Sunil Harish (Exhibit P4) shows that, Varun Ram was admitted with left shoulder dislocation, left knee dislocation, interior crucial ligaments injury and abrasion;
- (iii) In references to injuries listed in Exhibit P4 the treatment Varun Kumar received was manipulation under anesthesia, reducing of dislocation in theatre and mobilized with assistance of physio and was discharged on 10 November 2015, with pain relief;
- (iv) On 22 November 2015, Varun Kumar was seen by visiting orthopedic surgeon Dr Loeffler who advised that no surgery or ongoing physiotherapy is required;
- (v) It is consistent to say it would take 3 months to mobilise the type of injury/trauma he had;
- (vi) With dislocation, there is lot of pain which settles down with reduction;
- (vii) Varun Kumar sustained crucial ligament injury which is consistent with dislocation;
- (viii) Ongoing instability would be cause of pain which Varun Kumar complains of;
- (ix) No permanent disability assessment was done on him.

100. During cross-examination PW4:-

- (i) Stated that manipulation means no surgery is done and is more sophisticated way of massage and dislocation means no contact between two bones end in a joint;

- (ii) Stated that manipulation under anesthesia means giving medication to relax muscle, relieve pain, using x-ray to gently put back joint and different technics are used for different joint;
- (iii) Agreed that to manipulate without anesthesia is very painful;
- (iv) Stated that one bone is aligned and x-ray show normal the person will not feel pain after bone is reduced;
- (v) Stated that according to his record, bone was reduced on 7 November 2015;
- (vi) Stated that accessing to the record, Varun Kumar came, was seen on 22 November 2015, and then on 25 August 2018;
- (vii) Stated that if person has instability and pains, they would normally come to hospital.

101. This court makes finding that:-

- (i) Varun Kumar was diagnosed with left knee dislocation, interior crucial ligaments injury and left shoulder dislocation with abrasion as stated in Exhibits P4 and P10;
- (ii) After gaining conscious in the Ambulance he was in severe pain which continued until his dislocation was reduced by manipulation under anesthesia;
- (iii) After being discharged from hospital he was on wheelchair for 3 to 4 months and then on crutches for 2 to 3 months;
- (iv) In view of nature of injury Varun Kumar would have been in severe pain even manipulation and some pain for at least three to four months after manipulation;
- (v) Even though Varun Kumar said that in evidence that he suffered pain in cold season, this Court considers that pain if any is quite minimal

and does not require any award of damage for future pain and suffering.

102. This Court holds that it is just and fair under the circumstances of the case to award Varun Vishwa Kumar a sum of \$40,000.00 for pain and suffering.

Koshal Vikash Ram (PW2)

103. During examination in chief PW2 gave evidence that:-

- (i) After accident he was taken to Lekutu Health Centre and then to Labasa Hospital from where he was sent home after being seen by doctor;
- (ii) Collar bone to left arm was fractured and received injury to his hip;
- (iii) He felt pain after the accident;
- (iv) Week after accident he was in severe pain, could not sleep well and had pressure/tension because his mother passed away;
- (v) After accident he stayed in Labasa for two (2) weeks and went to hospital every day when they applied ointment and changed dressing;
- (vi) He did not go back to school for seven (7) months and was in pain;
- (vii) He took medication of his own which alleviated pain a little bit;
- (viii) Now, he has pain in shoulder and cannot lift heavy items;
- (ix) When he lift heavy items he has pain.

104. PW4 during examination-in-chief gave evidence that:-

- (i) Koshal Ram had right clavicle fracture, was given analgesia and a sling and was kept in Emergency Department and sent home the next day;

- (ii) Clavicle fracture takes 6 weeks to heal and these fractures are quite painful;
- (iii) After healing of clavicle fracture a person will have no pain and person cannot complain of pain;
- (iv) No other injury has been recorded;
- (v) When referred to Medical Officers Report in Exhibit P10 and asked if person has vehicle accident where vehicle tumble will that person had muscle pain, he stated that he can have muscle pain from fracture and soft tissue injury;
- (vi) Koshal Ram had abrasions as stated in the Report (Exhibit P10);
- (vii) Record shows Koshal Ram attended clinic on 15 November 2015, and no other;
- (viii) On occasions clinic record are kept in more than one folder and he has got only one folder with him.

105. During cross-examination PW4:

- (i) Agreed that Koshal Ram would have suffered quite a bit of pain from the accident until pain management was given;
- (ii) Stated that there is mention of what pain management was given to Koshal Ram when he came to hospital;
- (iii) Agreed that after that one fracture is healed, there should not be pain and that people who play soccer/rugby can go back and play after fracture is healed;
- (iv) Stated that it took six weeks for Koshal Ram's fracture to heal and after six (6) weeks he will not suffer pain;

- (v) Stated that after 15 November 2015, he was seen on 25 September 2018, when he complained of having pain in cold weather and nothing else;
- (vi) There is no record of Koshal Ram coming to hospital from 2015 regarding cold weather.

106. This Court finds that:

- (i) Koshal Ram suffered injuries in the form of clavicle fracture, muscle pain and abrasion which caused him severe pain;
- (ii) After he was attended to at Labasa Hospital and given pain relief his pain subsided a bit not fully;
- (iii) Clavicle fracture healed after six (6) months and medical evidence is that one such fracture is healed there will be no pain;
- (iv) Koshal Ram may have pain in cold weather but is not that significant to justify award for further pain and suffering.

107. This Court holds in it just and fair to award a sum of \$50,000.00 to Koshal Ram for pain and suffering under the circumstances of the case.

Loss of Future Earning

- 108. No evidence has been led to show that any of the Plaintiffs have permanent incapacity to any extent.
- 109. Medical evidence (PW4) has been that all Plaintiffs fracture/dislocation has been healed and there was nothing stopping Tota Ram and Varun Kumar from working.
- 110. This Court accepts the medical evidence of PW4 and awards no damages for loss of future earnings.

Whether Third Party is liable to Indemnify Defendant

111. This Court accepts Plaintiff's evidence that road from Dreketi to Nabouwalu was in the process of being upgraded and was subject to loose gravel or crushed metals either on the road or side of road.
112. This Court does not accept Defendant's evidence that gravel fell off from Third Party's truck before Defendant arrived at scene of accident as there was no evidence to prove it.
113. Defendant knew the condition of the road when he went to Labasa in the morning on date of accident and there is no evidence of any change in the road condition during that day.
114. This Court did not give much consideration to TPW's evidence in that she had no knowledge of the road condition at time of accident and her evidence was based on what she was told after Third Party was served with Court documents in this action.
115. Only evidence that could be taken into account that is as per Exhibit TP3 the upgrading of road between Dreketi and Nabouwalu was to be completed by 30 November 2015.
116. This Court after analysing the evidence of Plaintiffs, Defendant and TPW holds that Third Party was in no way negligent as alleged by Defendant and as such not liable to indemnify the Defendant.

Costs

117. This Court takes into consideration that:-
 - (i) Trial lasted to two and half days;
 - (ii) Plaintiffs gave evidence and called the medical Officer and the Interviewing Officer as witnesses;
 - (iii) Defendant gave evidence himself;

- (iv) Third Party called one witness;
- (v) All parties filed submissions.

118. Plaintiff seeks \$6000.00 total cost which this Court finds to be reasonable and justified.

Interest

119. Plaintiffs seek interest at the rate 3% per annum from date of accident to date of their submissions (5/11/2015 to 23/10/2018) and at 6% per annum from date this action commences to date of their submissions on general damages (12/5/2017 to 23/10/2018).
120. Defendant submits that interest on the special and general damages be awarded at 6% per annum date of writ to date of judgment.
121. This Court is of the view that it is just and fair to award interest at the rate of 3% per annum from date of accident to date of judgment (5/11/2015 to 21/03/2019) on special damages and at the rate of 6% per annum from date of Writ of Summons to date of judgment on general damages.

Conclusion

122. This Court holds that:

- (i) Defendants owed a duty of care to the Plaintiffs and Susma Wati (Deceased);
- (ii) Defendant breached duty of care owed to the Plaintiffs and Susma Wati;
- (iii) Plaintiffs injury and Susma Wati's death was caused as a result of the accident and breach of duty of care by Defendant;
- (iv) Third Party is not liable to identify Defendant.

123. Defendant is to pay a sum of \$248,041.00 in Special and General Damages including interest up to the date of Judgment as stipulated in the table below:

| | Estate of Susma Wati | Tota Ram | Varun Vishwa Kumar | Koshal Vikash Ram |
|--|-----------------------------|--------------------|---------------------------|--------------------------|
| Special Damages | \$5,000.00 | 740.00 | 7,220.00 | 300.00 |
| Interest at 3% p.a from 5/11/15 to 21/3/19 (1233 days) | 506.00 | 75.00 | 730.00 | 30.00 |
| General Damages | 60,000.00 | 60,000.00 | 40,000.00 | 50,000.00 |
| Interest at 6% p.a from 12/5/17 to 21/3/19 (679 days) | 6,700.00 | 6,700.00 | 4,460.00 | 5,580.00 |
| Total | \$72,206.00 | \$67,515.00 | \$52,410.00 | \$55,910.00 |

124. In addition the Defendant is to pay \$1,134.00 as stated at paragraph 80 of this judgment to Fiji National Provident Fund on account of Varun Visha Kumar.

125. This Court states that in assessing general damages, Court has taken into consideration most of cases listed in Plaintiff's and Defendant's Submissions.

Orders

126. I make following Orders:-

- (i) Defendant do pay Estate of Susma Wati \$72,206.00 as Special and General Damages inclusive of interest upto date of judgment;
- (ii) Defendant do pay Tota Ram \$67,515.00 as Special and General Damages inclusive of interest upto date of judgment;
- (iii) Defendant do pay Varun Visha Kumar \$52,410.00 as Special and General Damages inclusive of interest upto date of judgment;
- (iv) Defendant do pay Koshal Vikash Ram \$55,910.00 as Special and General Damages inclusive of interest upto date of judgment;

- (v) Defendant do pay Estate of Susma Wati, Plaintiff \$3,000.00 as cost of this action;
- (vi) Defendant do pay Tota Ram, Varun Visha Kumar and Koshal Vikash Ram jointly \$3,000.00 as costs of this action;
- (vii) Defendant do pay Fiji National Provident Fund the sum of \$1,134.00 on account of Varun Visha Kumar;
- (viii) Defendant's claim against Third Party is dismissed and struck out;
- (ix) Defendant do pay Third Party's cost of this action assessed in the sum of \$1,500.00.



K. Kumar
JUDGE

At Suva

22 March 2019

SARJU PRASAD ESQ. for the Plaintiff

KOHLI & SINGH for the Defendant