

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 145 of 2014

BETWEEN : **SADA NAND** of Berar Place, Field Fourty, Lautoka, Retired.
As the Administrator of the ESTATE OF VIKASH CHAND late
of Field Fourty, Lautoka, Driver, Deceased, Intestate.

PLAINTIFF

AND : **PREM ARUN SINGH** of Rifle Range, Lautoka, Carpenter.

DEFENDANT

Appearances: Mr. Ronald Rajesh Gordon for the plaintiff.
(Ms) Salote Maria Veitokiyaki with Mr. Jadhav Prashneel
Prakashan for the defendant.

Date of trial ; Thursday, 21st June 2018 and 27th February 2019.

The plaintiff's written submissions on non-suit : 08th August 2018
The defendant's written submissions on non-suit : 12th July 2018
The date of ruling on non-suit : 17th September 2018
The plaintiff's closing submissions : 07th May 2019
The defendant's closing submissions. ; 18th July 2019

Date of judgment : Friday, 19th July 2019.

JUDGMENT

(A) INTRODUCTION

- (i) This is a case of motor traffic accident. By writ issued on 26th August 2014, the plaintiff, Sada Nand, claimed damages from the defendant, Prem Arun Singh,

under the Law Reform (Miscellaneous Provisions) Death and Interest Act (Cap 28) and Compensation to Relatives Act (Cap 29) for the death of his son, Vikash Chand as a result of an accident which occurred on 26th August 2011, when the vehicle driven by the defendant collided with motor vehicle No. DX 680 at Nadi Back Road, Nadi. The deceased was a passenger in motor vehicle number CC 482 which was owned and driven by the defendant. It is alleged that the collision occurred as a result of the sole negligence of the defendant.

- (ii) In the statement of defence, the defendant admitted the motor vehicle accident. The defendant denied that the collision occurred due to his negligence. The defence was (1) the accident occurred due to the negligence of the driver of vehicle number DX 680 (2) the deceased Vikash Chand received injuries resulting in his death due to his failure and/or omission on his part to wear the seat belt while travelling in the defendant's vehicle.

(B) THE FACTUAL BACKGROUND

- (i) The statement of claim which is as follows sets out sufficiently the facts surrounding this claim from the plaintiff's point of view as well as the prayers sought by the plaintiff.

1. *THAT the Plaintiff is the lawful father of VIKASH CHAND late of Field Forty, Lautoka, Deceased, Interstate hereinafter called "the deceased" and is also the administrator of the ESTATE OF VIKASH CHAND pursuant to Letters of Administration number 55041 granted by the High Court on the 26th day of March, 2014.*
2. *THE plaintiff brings this action:-*
 - i. *On behalf of the said deceased's Estate by virtue of the LAW REFORM (MISCELLANEOUS PROVISIONS) (DEATH AND INTEREST) ACT (Cap 27).*
 - ii. *On his own behalf by virtue of the COMPENSATION TO RELATIVES ACT (Cap 29).*
3. *THAT the Defendant was at all material times the driver and owner of motor vehicle registration number CC 482 travelling in the direction of Nadi along the Nadi Back Road near Meigunyah, Nadi.*
4. *THAT at all material times the deceased was a passenger in motor vehicle number CC482 owned and driven by the Defendant.*

5. THAT on or about 26th August 2011 the Defendant drove the said motor vehicle number CC482 so carelessly, negligently, recklessly and unskilfully on Nadi Back Road, Nadi that it collided with motor vehicle number DX680.

PARTICULARS OF NEGLIGENCE

- i. Failing to slow down, control or swerve or so to maneuver the said vehicle as to avoid the said accident;
 - ii. Failing to keep any or any proper lookout;
 - iii. Failing to apply the brakes on the said motor vehicle in time or at all to avoid the said accident;
 - iv. Failing so to steer or control the said motor vehicle in time as to avoid the said accident;
 - v. Driving on the incorrect side of the road;
 - vi. Driving onto the lane on the oncoming vehicle.
6. THAT as a result of the aforementioned accident the deceased suffered severe personal injuries resulting in his death on 26th day of August 2011 at Nadi Hospital.
7. THAT the deceased lost the normal expectation of life and his Estate has suffered loss and damage.
8. THAT the Plaintiff claims damages and interest on any judgment awarded to it from 26th day of August 2011 to date of judgment at the rate of ten (10) percent per annum under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act, Cap 27 of the Laws of Fiji.
9. THAT particulars pursuant to COMPENSATION TO RELATIVES ACT (Cap 29) are as follows:-
- i. The claim is brought on behalf of the Plaintiff SADA NAND, the lawful father of the deceased.
 - iii. That at the time of his death the deceased was 35 years old. He was the breadwinner of his family and he was a loving and doting father to his children. He led a happy and vigorous life.

(ii) The plaintiff claims from the defendant;

- (1) DAMAGES under the LAW REFORM (MISCELLANEOUS PROVISIONS) (DEATH AND INTEREST) ACT CAP 27.
- (2) DAMAGES under COMPENSATION TO RELATIVE ACT CAP 29.
- (3) FUNERAL expenses.
- (4) INTEREST on any monetary award.
- (5) ANY other and further relief that the Court deems just.
- (6) COSTS of this action.

(iii) The defendant in his statement of defence pleaded, *inter alia*;

1. THE Defendant has no knowledge of the contents of paragraphs 1 and 2 and therefore puts the Plaintiff to strict proof of the same.
2. THE contents of paragraphs 3 and 4 are admitted except that the deceased took a ride in the Defendant's vehicle of his own volition.
3. THAT the Defendant denies and disputes the contents of paragraph 5 and the subparagraphs and states that the accident was caused due to the negligence of the driver of vehicle number DX680.
4. THAT as to the contents of paragraphs 6 and 7 the Defendant denies and disputes the same and states that the deceased Vikash Chand received injuries resulting in his death due to failure and/or omission on his part to wear the seat belt whilst travelling in the Defendant's vehicle.
5. THAT the Defendant denies that the Plaintiff is entitled to damages or interest as the injuries received by the deceased was due to his negligence in not wearing the seat belt and furthermore the accident occurred due to the negligence of the driver of vehicle number DX 680.
6. THAT the Defendant has no knowledge of the matters stated in paragraph 9 and the subparagraphs and puts the plaintiff to strict proof of the same.

- (iv) The minutes of the pre-trial conference record, *inter-alia*, the following;

Agreed Facts

1. *THAT the Plaintiff is the father of VIKASH CHAND late of Field Forty, Lautoka, Deceased, Interstate hereinafter called "the deceased" and is also the administrator of the ESTATE OF VIKASH CHAND pursuant to Letters of Administration number 55041 granted by the High Court on the 26th day of March, 2014.*
2. *THAT the Defendant was at all material times the driver and owner of motor vehicle registration number CC-482 travelling in the direction of Nadi along the Nadi Back Road near Meigunyah, Nadi.*
3. *THAT at all material times the deceased was a passenger in motor vehicle number CC 482 owned and driven by the Defendant.*
4. *THAT on or about 26th August 2011 the Defendant drove the said motor vehicle number CC 482 on Nadi Back Road, Nadi.*

AGREED ISSUES

1. *WHETHER on or about 26th August 2011 the Defendant whilst driving motor vehicle number CC 482 on Nadi Back Road, Nadi collided with motor vehicle number DX680.*
2. *WHETHER as a result of vehicle number CC482 colliding with motor vehicle number DX680 the deceased suffered severe personal injuries resulting in his death on 26th day of August 2011 at Nadi Hospital.*
3. *WHETHER the said accident occurred as a result of the Defendant's negligence.*
4. *WHETHER the said accident occurred as a result of the Defendant's carelessness.*
5. *WHETHER the said accident occurred as a result of the Defendant's recklessness and unskilful driving.*
6. *WHETHER the accident was caused due to the negligence of the driver of vehicle number DX 680.*
7. *WHETHER the deceased received injuries resulting in his death due to failure and/or omission on his part to wear the seat belt whilst travelling in the Defendant's vehicle.*

8. *The quantum of damages, if any, payable to the Plaintiff.*
9. *Costs, if any, payable to the Defendant.*

(C) THE WITNESSES

<u>The plaintiff's case:</u>	P.W. (1)	Mr. Doneel A.Chandra (A taxi driver)
	P.W. (2)	Police Constable 672 Ajay Kumar (The Investigating Officer)
	P.W. (3)	Mr. Sada Nand (The plaintiff/the father of the deceased)
	P.W. (4)	Mr. Salesh Chand (The brother of the deceased)

The defendant's case: The defendant

(D) THE DOCUMENTARY EVIDENCE

The plaintiff's exhibits

PE - 1	→	The sketch plan
PE - 2	→	The charge sheet in Nadi Magistrates Court Case No: 108/12
PE - 3	→	The Summary of Facts
PE - 4	→	The medical cause of death certificate
PE - 5	→	The letter of administration.

PE - 6 → The wage advice slip of the deceased

The defendants exhibits - Nil

(E) THE SUMMARY OF EVIDENCE OF THE PLAINTIFF'S CASE

Plaintiff's witness No. 01 – Doneel Chandra

He stated that he is a taxi driver and is 38 years of age. He had been driving and held a driving licence since the age of 22. During the time of the accident, he was employed as a salesman at the 'Motibhai Group of Companies.' He recalled that there was an accident and Arvin Prasad, an employee of 'Motibhai' was driving vehicle DX 680 (truck) belongs to 'Motibhai'. He was seated in the passenger seat. Their vehicle was travelling at a speed of 40 – 50 kmph. He stated that around 6.00 – 7.00 pm, they were travelling on the Nadi back road towards Nadi from the direction of Sigatoka. He recalled that they were few meters away from the 'Total Service Station' at "Meigunyah" when a van suddenly turned in front of their vehicle. He stated that their vehicle (DX 680) collided with the van and one person died in the van. He could not recall the registration number of the other vehicle.

Plaintiff's witness No.2 – P.C. 672 Ajay Kumar

He stated that he had investigated a motor traffic accident which took place in front of 'Total Service Station' at "Meigunyah". He stated that he drew a rough sketch plan which was tendered in as PEX -1.

Further he stated that the driver of vehicle CC 482 was charged for dangerous driving causing death and that the traffic case is still pending in the Nadi Magistrates' Court. Plaintiff's Counsel then tendered the charge sheet (PEX 2) and the summary of facts (PEX 3). PW2 also stated that there was no action taken against the driver of the vehicle DX 680 and the post mortem examination was done and also tendered as part of plaintiff's exhibits.

Plaintiffs Witness 3 – Sada Nand

In examination in chief, he stated that the deceased was his son, who was involved in the accident and had passed away. He further stated that his son

(Deceased) was working with Arun Singh and when asked if he knew, who Arun Singh was, PW3 did not know who he was but was able to point him (the defendant) in court. PW 3 confirmed that his son was earning weekly \$120.00 to \$150.00. The deceased used to buy groceries worth \$20.00 to \$50.00 which was only done when the deceased would visit him.

In cross examination, PW3 confirmed that the deceased was staying with the other son, and the wife had left the deceased.

Plaintiff's Witness 4 – Salesh Chand

In examination in chief, he said that the deceased was his brother and that his brother died in 2011 in an accident. He was called by the Nadi Hospital police to identify his brother's body at the Nadi Hospital. He said that his brother (deceased) was working for Prem Arun Singh (the defendant) doing some maintenance work and was also staying with his parents.

PW4 was shown a pay slip. He stated that it was his brother's pay slip. Defence Counsel then objected to the admissibility of the pay slip, since the maker was not present to tender the same. The parties were advised to address the issue on submissions.

In cross examination, PW4 said that the deceased was staying with him and that he bought groceries and gave money to his parents whenever he could.

(F) THE CONSIDERATION AND THE DETERMINATION

- (1) Counsel for the plaintiff and the defendant have tendered extensive written submissions in support of their respective cases.

I am grateful to Counsel for those lucid and relevant submissions and the authorities therein collected, which have made my task less difficult than it otherwise might have been.

If I do not refer to any particular submission that has been made, it is not that I have not noted that submission or that that submission is not relevant; it is simply that, in the time available, I am not able to cover in this decision every point that has been made before me.

(2) The following facts were admitted at the pre-trial conference;

1. *THAT the Plaintiff is the father of VIKASH CHAND late of Field Forty, Lautoka, Deceased, Interstate hereinafter called "the deceased" and is also the administrator of the ESTATE OF VIKASH CHAND pursuant to Letters of Administration number 55041 granted by the High Court on the 26th day of March, 2014.*
2. *THAT the Defendant was at all material times the driver and owner of motor vehicle registration number CC-482 travelling in the direction of Nadi along the Nadi Back Road near Meigunyah, Nadi.*
3. *THAT at all material times the deceased was a passenger in motor vehicle number CC 482 owned and driven by the Defendant.*
4. *THAT on or about 26th August 2011 the Defendant drive the said motor vehicle number CC 482 on Nadi Back Road, Nadi.*

(3) The court makes the following findings of facts based on credibility, manner and the demeanour of witnesses testified before me.

- (A) An accident between the vehicle registration CC 482 (**van**) driven by the defendant and the vehicle registration DX 680 (**truck**) took place at 'Meigunyah' on Nadi Back Road, Nadi on the 26th August 2011.
- (B) The accident took place between 6.00 to 7.00 pm on the 26th August 2011.
- (C) The vehicle registration No. DX 680 was travelling in the direction of Nadi coming from Sigatoka along the Nadi Back Road.
- (D) The vehicle registration No: CC 482, driven by the defendant (in which the deceased was a passenger) was travelling in the direction of Solovi coming from Sabeto.
- (E) The accident took place when vehicle registration No. CC 482 driven by the defendant was making a right turn to enter the driveway of "Total Service Station" at "Meigunyah".
- (F) The deceased was not wearing the seat belt while he was travelling in the front passenger seat in vehicle No: CC 482.
- (G) As a result of the motor vehicle accident, the deceased who was travelling in the front passenger seat of vehicle registration No: CC 482

driven by the defendant, sustained personal injuries resulting in his death on 26th August 2011 at Nadi Hospital.

- (H) The width of the road is 8 meters. The distance from the point of impact to the driveway to 'Total Service Station' is 2.7 meters (PE-1 - sketch plan).
 - (I) The vehicle number CC 482 was pushed forward 14.2 meters away from the point of impact as a result of the collision. (PE-1 – sketch plan).
 - (J) The vehicle number DX 680 came to a halt 14 meters away from the point of impact after the collision. (PE-1, sketch plan).
 - (K) There were no brake marks seen on the road. There were no signs of skidding wheels.
 - (L) The vehicle number CC 482 was damaged on the front left corner.
 - (M) The point of impact is on the right hand side of the half road from Nadi.
 - (N) The place where the accident occurred is a long straight stretch road and both sides could be seen clearly.
 - (O) The point of impact is 1.3 meters away from the extreme right hand side edge of the half road from Sigatoka.
 - (P) The vehicle number CC 482 was 1.3 meters away from the extreme right hand side edge of the half road from 'Sigatoka', **immediately before the collision.**
- (4) The vehicle driven by the defendant CC 482 is a van. The vehicle DX 680 is a truck owned by 'Motibhai Group of Companies'. At the time of the accident, the vehicle DX 680 was driven by an employee of 'Motibhai', Mr. Arvin Prasad. He is now in overseas. The plaintiff called Mr Doneel Chandra to describe how the accident occurred. Mr. Chandra is the one and only eye witness called to support the plaintiff's case. During the period in question, he was a Salesman at "Motibhai". Therefore, he is not an independent eye witness. Mr. Chandra was travelling in the front passenger seat of the truck DX 680 driven by his co-employee of "Motibhai". Mr. Chandra's version of the accident is that while they were travelling in the direction of Nadi Airport

from the direction of 'Sigatoka', along the 'Nadi Back Road' the vehicle CC 482 which was coming from the opposite direction made a sudden right turn across the road immediately before the collision.

(5) The transcript of Mr. Chandra's evidence in chief contains this; (page 08 of the transcript)

Q: *Now, you said that as the vehicle you were travelling in DX 680, he was travelling on Nadi back road towards Nadi Airport and you said that another vehicle turned and you collided?*

A: *Yes.*

Q: *Were you able to see from where, which direction that vehicle was coming from?*

A: *It was coming from, like oncoming, in front of us. It was coming towards Nadi Airport, going towards Sigatoka.*

Q: *Opposite direction?*

A: *Opposite direction. **Suddenly, he tried to turn.***

(Emphasis Added)

Further down at page (10) he deposed;

Q: *Which part of the other vehicle did your vehicle, DX 680 collide with?*

A: *On the left, in front, like corner, fender, near somewhere fender and headlight. Left corner.*

Crt: Left?

A: *Left corner.*

Crt: Left corner?

A: *Left corner of the in front.*

Crt: Left corner of whose vehicle?

A: *Opposite vehicle.*

Crt: Opposite vehicle's left corner?

A: *Yeah, on the headlight and on the fender.*

Q: *So, if I use this as the vehicle, right, that's the back of the vehicle, that's the front of the vehicle, that's the right of the vehicle and that's the left of the vehicle, where did it collided? Your vehicle collided with this other vehicle?*

A: *Left corner, that's right.*

Q: *This part here?*

A: *Yeah, yeah, that part.*

Q: *Had the other vehicle, did it complete its turn and into the driveway?*

A: *No, it was not a complete turn, it was just on our way, on our path, Sir. When it turn, collided on our part.*

Q: *Were you able to see whether or not that vehicle had stopped before turning or did it just simply keep travelling along and turn?*

A: *It was just keep travelling and suddenly turned.*

(Emphasis Added)

In re-examination, Mr. Chandra was asked the distance between the two vehicles when the vehicle CC 482 turned right. He stated that the distance was from the witness box to the Court Clerk. The distance was about 3 feet.

- (6) According to the sketch plan (PE-1) the width of the road is 8 meters. The court takes note of the fact that the width of the half road is 4 meters. According to the sketch plan, the point of impact is on the left hand side of the half road from "Sigatoka". According to the sketch plan the accident occurred in front of the driveway to "Total Service Station". As I mentioned, the width of the half road is 4 meters. According to the sketch plan, the width from the point of impact to the driveway to "Total Service Station" is 2.7 meters. The width from the point of impact to the extreme right hand edge of the half road is 1.3 meters. The point of impact is 1.3 meters away from the extreme right hand side edge of the half road from Sigatoka. Therefore, it is reasonable to infer that the vehicle CC 482, driven by the defendant has almost turned 1.3 meters across the road (approximately has turned 40% of the width of the half road) and was partially on the road towards the middle of the road and almost 2.7 meters away from the driveway to the "Total Service Station".
- (7) Thus, vehicle CC 482 was almost near the middle of the half road immediately before the collision. The presence of vehicle CC 482 would have been noticeable from a far distance. This clearly indicates how negligently the vehicle DX 680 failed to observe and or notice vehicle CC 482 across the road,

adhere to its presence and control the vehicle which resulted in the collision. The plain and simple conclusion is that DX 680 should have noticed CC 482 half way across the road and the fact that it did not, is strange and overwhelming evidence of negligence against the driver of DX 680.

- (8) If CC 482 made a sudden turn across the road, the point of impact cannot be 1.3 meters away from the extreme right hand edge of the half road from Sigatoka. If CC 482 suddenly turned across the road then the collision would not occur 1.3 meters away from the extreme right hand edge of the half road from Sigatoka.
- (9) What is more damaging is that Mr. Chandra's description of how the accident happened is totally inconsistent with ;
 - ❖ The positioning of two vehicles after the accident.
 - ❖ The damages sustained by CC 482.
- (10) After the accident, the two vehicles were found at the complex of Digicel at the extreme right hand side edge of the half road from Nandi. It is inconceivable as to how both vehicles went to the extreme right. The hit on the front left side of vehicle CC 482 indicates that CC 482 did not make a sudden right turn from its place or else the impact would have been on the driver's right hand side.
- (11) The sketch plan shows that vehicle CC 482 was pushed forward for 14.2 meters from the point of impact indicating that DX 680 hit the defendant's vehicle and not vice versa. This does not fit in with Mr. Chandra's evidence that vehicle CC 482 made a sudden right turn across the road.
- (12) I have numerous difficulties in accepting the evidence of Mr. Chandra as to how the accident happened. Mr. Chandra lied about as to how the accident occurred. He in fact has not witnessed the accident. His evidence is cynical.
- (13) Mr. Chandra has also lied about the speed of vehicle DX 680. He said DX 680 was driven at 40 – 50 kmph at the time of the accident. That speed would have been reduced substantially if the brakes were being applied. At a speed of 40 – 50 kmph or reduced speed, DX 680 would not have carried forward CC 482, a distance of 14.2 meters from the point of impact after the collision. This clearly indicates the force vehicle CC 482 was hit by the vehicle DX 680. According to the sketch plan, vehicle DX 680 came to a halt 14 meters away from the point of impact after the collision. Because the driver of vehicle DX 680 was speeding at a pace which prevented him from bringing the vehicle to

a halt in a timely manner. All of these can only indicate one thing. The excessive speed of driving on the part of the driver of vehicle DX 680. I do not accept the evidence of Mr. Chandra that vehicle DX 680 was driven at a speed of 40 – 50 km/ph.

The absence of brake marks on the road indicates the driver of DX 680 did not apply brakes to avoid the collision.

(14) It is still clear in my mind the demeanor and deportment of Mr. Chandra in Court. I cannot resist in saying that the demeanor of Mr. Chandra in Court suggested to me that he was going to receive some monetary benefit for his concocted story. He behaved that he wanted to blame the defendant in some way or the other. It is dangerous to rely on the evidence of Mr. Chandra as to how the accident occurred and as to the speed of vehicle DX 680 at the time of the accident. I dismiss his evidence as incredible, concocted and unreliable. There is an obvious motive why Mr. Chandra has given evidence in the manner he did. He is saving both Arvin Prasad (the truck driver of Motibhai Group of Companies) and his employer (Motibhai) from the potential liability and his demeanor in court was nothing but an indication of his ulterior motive. He tried very hard to put all the blame on the defendant. My finding is that instead of giving a true account of the accident, he came to court with one and only motive and that was to put the blame on the defendant and save his employer (Motibhai) from potential liability.

(15) I now turn to the defendant. The defendant testified that; [evidence in chief, page 07 of the transcript, Vol. 2]

Q: *Now Mr Singh, you stated you reached the junction. Now, can you tell the Court what happened when you reached the junction to fill your fuel?*

A: *No, the Service Station is before the, if you see the picture, the Service Station is before the junction. There's a junction going towards Nadi Highway connecting, it's just after the Service Station. So, I was before that junction and I decided to fill in my fuel. So, I stopped my vehicle, I put my indicator on and 2, 3 vehicles passed on my right then I start to turn in. And I saw one vehicle probably it looked like a big truck from the front but I didn't could really see because if you see a vehicle from the front, you can't tell which is 7 tonne or 8 tonne. But it looks like a truck, it was a big one.*

Crt: *Slowly please, slowly.*

A: *So, it was about 5 to 6 chains away from me. Then I started turning in. My driveway, the Service Station was just about 3 meters apart from where my vehicle was parked. And I turned in. While I was turning in, the oncoming vehicle came fast and hit me inside the Service Station compound.*

Further down at page (8), Vol. 2.

Q: *And now you stated that you had seen the vehicle 5 to 6 chains away. What was it like, was there anything between you and that vehicle when you had seen it? When you had stopped at the junction?*

A: *When I stopped at the junction, when I saw in front of me, there were three (3) to four (4) vehicles coming in front of me, on my right. 3 of them passed away and this truck was very far, about 5 to 6 chains, I can't tell exactly but by the place where you stand if you measure that, it's about 5 to 6 chains away.*

(Emphasis added)

I couple that with the evidence given under cross-examination (page 15, Vol-2)

Q: *But you saw the other vehicle.*

A: *I saw four vehicles and I have already answered the question that I saw the four vehicles coming from in front. 3 of them passed and this fourth vehicle was very far away.*

Q: *But you still could see it?*

A: *Yes, I could see My Lord.*

.....
Q: *You took a risk.*

A: *I didn't take the risk* My Lord. I saw the vehicle it was about probably 5 to 6 steps away. *There is enough distance from me to turn in that's why I turned in, My Lord.*

(Emphasis Added)

(16) This is exactly how the accident had occurred. His evidence is corroborated by the circumstantial evidence **which I mentioned in paragraph 6 to 13 above, in particular;**

- ❖ The point of impact is 1.3 meters away from the extreme right hand side edge of the half road from Sigatoka.
- ❖ The width from the point of impact to the driveway to "Total Service Station is 2.7 meters.
- ❖ **The vehicle CC 482 driven by the defendant has almost turned 1.3 meters across the road (approximately has turned 40% of the width of the half road) and was partially on the road towards the middle of the road and almost 2.7 meters away from the driveway to the "Total Service Station".**
- ❖ The damage on the front left side of vehicle CC 482.
- ❖ After the collision, the two vehicles came to a standstill at the extreme right hand side edge of the road (Digicel complex) which is 14 meters ahead from the point of impact.
- ❖ Vehicle CC 482 was pushed forward by vehicle DX 680 a distance of 14.2 meters from the point of impact to the extreme right hand side edge of the road (Digicel complex).

(17) I have no reason and hesitation in accepting the evidence of the defendant and I also accept it to be true and credible account of how the accident has happened.

(18) The defendant was vigorously cross-examined. The plaintiff contends that under cross examination the defendant was not truthful and contradicted his police caution interview;

- ❖ the deceased was not working with him as his employee.
- ❖ the defendant was going to Solovi and not Malolo.
- ❖ The defendant gave the deceased a lift as he was his “hi bye” friend.

(19) The defendant said that when he gave the caution interview, he was sick, injured and was in pain. The transcript of the defendant’s evidence given under cross examination contains this; (page 17 of the transcript, Vol. 2)

Q: *And that is why in your caution interviewed like in a few months after the incident, is the correct version of what happened?*

A: *Yes, but I was still sick. I could speak then I Police statement, I couldn’t move and still on bed and they take the statement after one week.*

Q: *But Mr. Singh you were asked whether you; page 1, question number 4 “Are you mentally fit to give your interview? Yes.” You said you were not fit. You said look I am not physically fit or mentally sick so I don’t want to give this interview now. You didn’t say? Or this is your testimony that this is all a lie?*

A: *No it’s not a lie, Sir.*

Q: *And then Question 11 again you said are you physically fit and your answer is yes?*

A: *My Lord, I had a broken leg in two piece and a rib and physically I wasn’t fit and I told them I wasn’t fit but still they took my interview.*

Q: *Because you said you are fit, Q. 13 is you fit to give interview? Yes*

A: *My Lord I was lying in my bed in my home and they came and they asked me. They came twice before they took the evidence because they told me they have been pressured from upper authorities to take my interview; they had to take my interview. They said they had to take the interview and that’s why I gave my interview. And even in that time I couldn’t move.*

(Emphasis Added)

- (20) Being injured and in pain and discomfort may result in inability to relate accurately the facts to the police at the caution interview. Therefore, it would be, in my judgment, totally unreasonable to label the defendant as a “liar”.
- (21) In his evidence in chief, the defendant explained in great detail that immediately before the collision he turned his vehicle right towards the Service Station and he heard a big bang and he did not know what happened. (Para (09) of the transcript, Vol. 2)

Q: *Now, after that what had happened?*

A: *When I collided with the vehicle, and after that I didn't know. I woke up at about 1 o'clock in the night in Nadi Hospital.*

Q: *Now Mr Singh, just to take you back, when you said collided, can you please tell the Court who at the scene of the accident which vehicle hit which vehicle?*

A: *I really didn't know what it happened and how fast but when I woke up in the hospital my brother told me that three times the truck hit you and that was*

PC: *Objection. He clearly said he didn't know how it happened. That's the evidence and my learned friend has to move on.*

Q: *And you stated that he collided with you and you already drove in?*

A: *That's right.*

Q: *What do you mean that the vehicle collided with you?*

A: ***What I mean is I was driving, sitting down on driver's seat and I was looking in the front and all of a sudden I heard a big bang in my vehicle. And my vehicle was a floor sift vehicle and the thing hit my leg and broke my leg in two pieces and my rib and I fainted I didn't know what really happened. When I woke up in hospital at about 11.00 my brother said that was the vehicle.***

(Emphasis Added)

The plaintiff submitted that the defendant later changed and said that he was already inside the Service Station when the collision happened and contends that the defendant was inconsistent in his own evidence as to where the collision occurred.

I note that the alleged inconsistency was not put to the defendant to offer an explanation. Thus, there was no opportunity for the defendant to offer an explanation. Therefore, no conclusion could be drawn from the alleged inconsistency, because, it would be totally unreasonable.

Besides, a distinction between “inconsistencies” in a witness’s evidence and what amounts to “lies” surely needs to be drawn. Given the vagaries a witness is exposed to in cross-examination, given the combination of an astute Counsel and tiring witness is to be expected. But, to regard such “inconsistencies” as “lies” surely would be a stricture passed on his reputation.

- (22) The plaintiff contends that the defendant breached the law and/or road regulations when turning right off the Queens road and into the one-way entrance of the service station.
- (23) I turn to the defendant’s evidence. The transcript of the defendant’s evidence given under cross examination contains this; (page 14 of the transcript, Vol. 2)

Q: *Now you said you came to the junction and you came to a stop.*

A: *Yes, My Lord.*

Q: *You said that you were going to turn right.*

A: *Yes, My Lord.*

Q: *Now, you familiar with that road and the service station?*

A: *Very well, My Lord.*

Q: *And you still drive by that road?*

A: *Yes, My Lord.*

Q: *Do you agree that at the junction that you stopped, and as you were turning right into the driveway, there is a big arrow saying that’s it only exit from the Service Station?*

A: *Not at that time my Lord. The road wasn’t marked that arrow point on that time of the road, it is lately marked. I understand, I agree with that question, I have seen it now.*

(Emphasis Added)

The defendant’s evidence that “*the road wasn’t marked that arrow point on that time of the road, it is lately marked...*” has not been challenged by the cross-examining counsel. Therefore, I cannot reject that evidence. Furthermore, a suggestions made to a witness during cross-examination is not substantive

evidence. In the absence of substantive evidence contrary to that "*the road wasn't marked that arrow point on that time of the road, it is lately marked...*", I hold that at the time of the accident, there was no exist arrow in the driveway the defendant turned into.

- (24) The plaintiff contends that "*right where the defendant turned, the lines are longer and solid. They are not short and broken. This meant both the defendant needed to give way and more importantly could not enter into the service station that way*" (paragraph 45 of the plaintiff's written submissions filed on 07/05/2019).
- (25) I cannot agree. The sketch plan shows broken short white lines on the road in front of the driveway to the service station. Thus, the defendant can cross those broken white lines and turn into the driveway of the service station.
- (26) Finally, the plaintiff contends that, '*the defendant could have called other witnesses that he says he had to say/narrate how he thought the collision occurred so as to challenge and/or negate the evidence of P.W 1.*' (Paragraph 33 of the plaintiff's written submissions filed on 07th May 2019).

The plaintiff invited the court to draw a negative inference on the failure of the defendant to call his witnesses.

- (27) The plaintiff has to prove negligence and it is not for the defendant driver to disprove it. I mentioned in paragraph 12, 13, and 14 above, that I do not accept Mr. Chandra's version as to how the accident occurred and the speed of vehicle DX 680 immediately before the collision. In paragraph 14 above I dismissed his evidence as incredible, concocted and unreliable.

I mentioned in paragraph 17 above that I accept the evidence of the defendant as to how the accident happened and I do not find any negligence on the part of the defendant at all. I find negligence on the part of the driver of vehicle DX 680.

Therefore, an adverse inference cannot be drawn merely because a witness was not called by the defendant. An adverse inference [**Jones v Dunkel, (1959) HCA 8; 101 CLR 298**] can be drawn only if there is some other evidence to support an inference, and despite that, if a party fails to rebut that inference

by not calling a witness, then can inference may, in an appropriate case be drawn that, had the witness being called, his evidence would not have assisted to rebut the evidence that already exists. Therefore, I do not use the inference contemplated in “**Jones v Dunkel** (supra).

- (28) I do not find any negligence on the part of the defendant at all. However, there is absolute and sole negligence on the part of the driver of vehicle registration number DX 680. The plaintiff’s choice of the defendant is wrong, but my duty is to determine the matter at hand and do what is just and fair in light of the evidence before the court.
- (29) I do not find the defendant negligent and as a result, the defendant is not liable for any claim in negligence against the plaintiff.

(G) ORDERS

- (1) The plaintiff’s claim is dismissed.
- (2) The plaintiff to pay costs to the defendant in the sum of \$3500.00 (summarily assessed) within 14 days from the date of the judgment.


19/07/2019
Jude Nanayakkara
Judge



At Lautoka
Friday, 19th July, 2019