

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 376 of 2017

BETWEEN: **PRITIKA POONAM SINGH** of Lot 23 Reba Circle, Nadera, Suva, Domestic Duties as the lawful daughter and Administratrix of the Estate of her late mother **MALTI DEVI** aka **MALTI DEVI SINGH** of 23 Reba Circle, Nadera, Machinist, Deceased.

PLAINTIFF

AND: **JAYWANTI MALA LAL** of Nasole Road, Nasinu, Senior Accounts Officer.

FIRST DEFENDANT

AND: **MOHAMMED IMTIAZ KHAN** and **JAYWANTI MALA LAL** of Nasole Road, Nasinu, occupation unknown to the Plaintiff for the First named Defendant and Senior Accounts Officer.

SECOND DEFENDANT

BEFORE: Honourable Mr. Justice Vishwa Datt Sharma

COUNSEL: Mr. Chand A. - for the Plaintiff
Ms. Qioniwasa B. - for the Defendants

DATE OF DECISION: Wednesday 9th December, 2020 @ 9.30 am

JUDGMENT

[Personal Injuries claim for Damages]

INTRODUCTION

[1] The Plaintiff in her capacity as the Administratrix of the Estate of her late mother Malti Devi aka Malti Devi Singh filed the writ of summons claiming the flowing damages under various heads from the Defendants -

- i. Special Damages
- ii. General Damages
- iii. Damages under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act for loss of prospective earnings and for loss of expectation of like;
- iv. Section 3 Law Reform (Miscellaneous Provisions) (Death and Interest) Act on the award of damages at the rate of 6% per annum from the date of service of the writ on General damages and at the rate of 3% per annum from the date of accident on special damages;
- v. The Plaintiff claims interest on Judgment sum at 4% pursuant to Law Reform (Miscellaneous Provisions) (Death and Interest) (Amendment Act 2011 until full payment.
- vi. Costs
- vii. Such other relief as the Court deems just and equitable in the circumstances.

[2] The action is brought under the law reform (Miscellaneous provisions) Death and Interest Act, Law Reform (Miscellaneous provisions) (Death and Interest) (Amendment Act 2011) and compensation to relatives Act for the death of her mother resulting from an accident on 2nd day of June, 2017.

[3] The Plaintiff pleaded the following particulars of negligence by the first Defendant;

- i. Driving at an excessive speed having regard to all the circumstances;
- ii. Failing to keep any or any proper lookout or to have any or any sufficient regard for the deceased who was crossing the road;
- iii. Failing to take reasonable control of his vehicle on the road to avoid accident.
- iv. Failing to stop or slow down or so to manage and control the said vehicle as to avoid the said accident;
- v. Driving the said vehicle at such speed and in such manner that she failed to stop it in time or to avoid he said accident;
- vi. Failing to apply the brakes in time or at all or to steer or control the said vehicle as to avoid striking the deceased;
- vii. Failing to exercise such degree of care and control over his said vehicle as was warranted having to all the circumstances;
- viii. Failing to control the vehicle within sufficient time or all to save the said accident;
- ix. Driving the said vehicle without due care and attention.

[4] The Defendant's in their statement of defence -

- admits that the accident took place on 2nd day of June, 2017.
- the defendants stated that the first Defendant was travelling with all due care and attention at the time of the accident, was keeping a proper look out, driving at an

appropriate state and generally conducting herself in confirmative with usual road rules.

- The Defendants say further, that the accident was caused by the sole negligence on the part of the deceased.
- The Defendants also allege that the deceased was crossing the road at an inappropriate time, failing to keep any proper look out while crossing the road, crossing in an area where driver's vision could be obscured and failing to check for traffic on the road before proceeding to cross.

[5] The first Defendant relies on the fact that the deceased was negligent and solely responsible for the accident.

[6] As a first affirmative Defence, the Defendant's say that the Plaintiff was guilty of contributory negligence in respect of the accident and the particulars of such contributory negligence have been enumerated at latter part of paragraph 4 hereinabove.

AGREED FACTS

[7] The following facts are agreed upon between the parties to the proceedings in the pre-trial conference minutes-

- a. THAT the Plaintiff is the legal daughter and the next of kin of the deceased namely late Ms. Malti Devi aka Malti Devi Singh and is also the Administratrix in the Estate of Malti Devi aka Malti Devi Singh pursuant to letters of Administrative Numbers 61173.
- b. THAT the deceased at all material time was a resident of Reba Circles Nadera and was 56 years of age.
- c. THAT the 1st Defendant at all material time was driving a station Wagon Toyota Prius registration number as IO 131.
- d. THAT the Defendants at all material times were the registered owners of the vehicle registration number IO 131.
- e. THAT on or about 02nd June, 2017 at 0810 hours the 1st defendant and the deceased, Malti Devi were involved in an accident at Ratu Dovi road, Nadera (near Reba circles junction) with the vehicle registration Number IO 131.
- f. THAT the first Defendant had been charged for Dangerous Driving Occasioning Death and the case is currently on foot at the Nasinu Magistrate Court.

THE HEARING

[8] It will be noted that the Plaintiff has commenced this proceedings in her capacity as the Administratrix of the Estate of the deceased/ victim, Malti Devi.

[9] There are no eye witnesses if any called to give evidence in this case with the exception of the first defendant who was the driver of the said motor vehicle registration number IO 131 involved in the accident.

[10] The Plaintiff's First witness (PW1) was Doctor Arveen Nilesh Maharaj who gave evidence as follows:

- i. In November, 2017 he was working in the emergency department at CWM hospital.
- ii. He was Senior Emergency Doctor.
- iii. On 2nd June, 2017, at 8.10 am attended to lots of patients not any in particular.
- iv. Witness shown the medical report dated 23.11.2017 of Malti Devi, signed and written by him.

[11] (PW1) confirmed that these kinds of injuries can be sustained through by fast/ speed mechanism. In common terms, injuries sustained by moving mechanism. He added that the injuries cannot be caused by falling.

[12] The medical report of 23rd November, 2017 was tendered into evidence as "Exhibit P1".

[13] Upon cross-examination by the Defence, (PW1) agreed that the accident took place on 2nd June, 2017, and the report was prepared some five (5) months later.

[14] The Plaintiff (PW2) was a formal witness and the administratrix of her mother's Estate of Malti Devi claiming for damages.

She was sickly, unemployed and dependant on the mother's/ deceased's income to survive.

In her evidence she stated that someone came to her home and informed her of her mother's accident. She went to the scene of the accident and later took the CWM hospital where she saw the mother's body covered with white cloth. Her family member told her that Jaywanti Mala caused her mother's accident. Jaywanti was later charged with a traffic offence of causing death by dangerous driving.

[15] The Defence called the first Defendant (DW1) Jaywanti Mala Lal as the only witness for the defence in this matter.

She stated that on 2nd of June, 2017, she drove on Ratu Dovi road on the left lane heading towards Sports City, Suva at a speed of 50kmph. She left her Nasole home at 7 am. All of a sudden from the footpath the Deceased came onto her left side front of the vehicle. She saw the deceased literally walking on the footpath some distance away prior to the accident. The deceased came and bumped on the front side of her car and lay in front of her car. (DW1) said that the way the deceased crossed the road, she came all of a sudden in front of her car and she stopped the car.

In cross examination, (DW1) admitted that she was the owner of the vehicle IO 131 together with her ex-husband Mohammed Imtiaz Khan (Second Defendant). (DW1) admits that the accident was caused, but she was not negligent although she was charged with Dangerous Driving Causing Death and the matter remains impending in court for hearing and determination. She said she did not drive the motor vehicle IO 131 dangerously and was neither at fault. (DW1) saw the victim (deceased) walking on the footpath and not on the verge to cross the road. She could not have avoided the accident. She admits the deceased did not come suddenly onto the road.

In re-examination, (DW1) stated that she would not be able to stop her vehicle when the deceased came in front of her vehicle. She would have gone and/or run over her in front, but she stopped the vehicle.

THE DETERMINATION

[16] This is a third party claim arising from a motor vehicle accident on Ratu Dovi road, Nadera (near Reba circle) on the morning of 2nd June, 2017 which caused the death of the late Matli Devi.

[17] The action has been brought against the first and the second Defendants since both are the owners of the motor vehicle registration number IO 131 which was involved in the accident on 2nd June, 2017.

[18] The Plaintiff in her statement of claim states that on or about 2nd June, 2017 at 0810 hours, the deceased was crossing the road at Ratu Dovi road, Nadera (near Reba Circle junction), where the vehicle registration number IO 131 driven by the 1st Defendant travelling towards Nausori bumped the deceased who was crossing the road to go onto the opposite side of the road resulting in the Deceased sustaining massive injuries and eventually losing her life.

However, the evidence before the court reveals otherwise. The first Defendant was travelling from her home at Nasole to Sports City, Suva.

[19] According to the Plaintiff, the said accident took place as a result of negligence and/ or breach of statutory duty on the part on the first defendant for whose negligence the second defendant is vicariously liable.

[20] However, The first Defendant relies on the fact that the deceased was negligent and solely responsible for the accident. Further, the defendant are raising defence of contributory negligence on the part of the deceased.

[21] The main issues for this court to determine at this stage are the following-

1st issue -Whether the accident was caused due to the negligent driving of the 1st defendant? ; and

2nd issue -Whether there was any contributory negligence on the part of the deceased/ victim, Malti Devi?

[22] Remaining issues as set out hereunder within the pre-trial conference minutes will arise for determination only if the court finds that it was the negligence of the first defendant that the accident happened-

3rd issue - Whether the Plaintiff was dependant on the deceased for her livelihood?

4th issue - whether the deceased was enjoying good health prior to the accident and death?

5th issue- whether the Plaintiff is entitled to any Special damages, General damages, Interest, Damages under Law Reform (Miscellaneous provision) (Death and Interest) Act for prospective earnings and for loss of expectation of life, Section 3 Law Reform (Miscellaneous provisions) (Death and Interest) Act 27 on the award of damages and the rate of 6% per annum from the date of service of the Writ on general damages and the rate of 3% per annum from the date of accident on special damages and cost?

[23] (PW1) gave evidence and made reference to the medical report dated 23rd November, 2017 and tendered into evidence as "Exhibit P1".

[24] The medical report stated that the cause of the death was as follows-

"Haemorrhage, Skull fractures, Traumatic head injury, Rib fractures, Fatal road traffic accident".

[25] A careful perusal of the medical report, Exhibit P1, in terms of the injuries received by the deceased/ victim confirms that the injuries sustained were abdominal in nature and head injuries i.e. the injuries sustained on the upper part of the body and above the hip.

[26] There is no evidence led by the Plaintiff that the Defendant's vehicle in question, IO 131 hit the upper part of the deceased's body.

[27] It is evident that the Deceased/ victim was walking along the footpath on Ratu Dovi road. There is no evidence that the vehicle at any stage went onto the footpath and hit the Deceased/ victim.

There are no eye witnesses subpoenaed to evidence in this proceedings to the current proceedings. The Investigating officer who visited the scene of the accident on the day in question was also not called to testify in this proceedings nor any sketch plans of the scene of the accident was tendered into evidence to assist the court.

Further, there is no clear evidence before this court as to how the accident actually happened.

[28] From the perusal of the evidence available before this court, the only reasonable conclusion the court can arrive at is that the Deceased/ victim had suddenly come onto the road hitting the front left side of the first Defendant's motor vehicle IO 131 and eventually lay on the road in front of the said motor vehicle onto the road.

[29] Therefore, these injuries as reported by (PW1) on the medical report tendered into evidence as Exhibit P1 cannot be caused directly by the impact rather resulted from the fall of the deceased/ victim after the accident onto the road.

[30] (PW2) as the Administratrix of the deceased Estate was at home at the time of the accident of her mother, Malti Devi. She was informed of the accident by someone and she visited the scene and later CWM hospital thereafter where she saw her mother had already taken demise. She said that she was dependant on her mother's income as she was unemployed and sickly.

[31] The Defence called only witness (DW1) Jaywanti Mala Lal who is the first defendant named in his proceedings. She was the driver of the said vehicle IO 131 whom the Plaintiff alleged has caused the accident and the death of the deceased/ victim on 2nd June, 2017.

[32] The first Defendant (DW1) in her evidence stated that she saw the deceased walking on the footpath some distance away from her prior to the accident. She was driving within the speed limit of 50kmph.

In cross examination she denied travelling at a speed of over 50kmph.

The Deceased was not on the verge of crossing the road. However, all of a sudden she came from the footpath and bumped her car on the front left side of her car and eventually lay in the front of her car after the accident.

Thereafter, (DW1) stopped her car and sought for help in order to convey the Deceased to the hospital.

[33] The first defendant (DW1) admits that the accident was caused, but she was neither negligent nor at fault and or drove the vehicle dangerously.

[34] She admitted being charged for dangerous driving causing death and the case remains impending hearing and determination in the Magistrates Court.

[35] The first Defendant (DW1) further added that she could not have avoided the accident.

[36] However, she succeeded in stopping her vehicle after the accident rather than running the vehicle over the deceased who lay in front of her motor vehicle if she was over speeding.

[37] The only evidence before the court so far is PW1 medical report tendered into evidence as Exhibit P1 and the first Defendant's testimony.

[38] The accident took place in the early morning of 2nd June, 2017, which was on a Friday of the week.

[39] It has been confirmed in evidence that there was no foot or zebra crossing on the road where the accident took place.

- [40] The Plaintiffs writ of summons at paragraph 5 lines 3, 4 and 5 pleaded that the Deceased was crossing the road to go onto the opposite side of the road resulting in the Deceased sustaining massive injuries and losing her life. This pleading by the Plaintiff in itself confirms that the Deceased intended to cross the road to go onto the opposite side of the road which had resulted in the accident and the Deceased losing her life.
- [41] The Deceased/ victim should have taken precaution and should have been more careful if she had the intention to cross the road where there was no pedestrian crossing.
- The Deceased/ victim was very familiar with the road since she had used that road frequently, at least 5 days a week to go to work at United Apparel and return. The Deceased therefore, was well aware that the road stays busy with lots of traffic and pedestrians. The Deceased should not have put herself at a risk in the circumstances.
- As a reasonable person, the Deceased should have foreseen and realised the danger of crossing a busy road where there was no pedestrian crossing.
- [42] The evidence before this court reveals that the Plaintiff did not put his case in terms of all the particulars of the alleged negligence on the part of the first Defendant as pleaded in the Plaintiffs Writ of summons at paragraph 6 (i) - (x) inclusive except for the fact that the first Defendant drove her vehicle at an excessive speed, which was denied by the first Defendant in cross-examination.
- [43] It is also evident that the first Defendant was charged with the traffic offence of Causing Death by Dangerous Driving.
- [44] The Investigating Officer who had visited the scene of the accident would have inspected the scene of the accident and drawn a sketch plan, took measurements, shown brake marks on the sketch plan left after the accident if any, and would have definitely marked the point of impact as well as the position of the first Defendant's vehicle after the accident.
- [45] The Plaintiff made a decision not to call the Investigating Officer for some reason or the other best known to the Plaintiff.
- Further, I reiterate if the Plaintiff had decided to call the Investigating Officer as the witness then the sketch plan drawn at the scene of the accident together with other facts would have been tendered into evidence to assist the court in this proceedings.
- [46] The court also notes that the Plaintiff did not endeavour to call any eye witnesses (if any) that had witnessed how the accident had taken place at the scene of the incident.
- [47] The Plaintiff relied on the medical evidence tendered into evidence before this court together with (PW2's) evidence.

[48] The system of administration of justice in this jurisdiction is adversarial. The burden is on the defendant's to prove that the Deceased was contributory negligent and that it was such negligence that was the real and effective cause of the damage.

Thus, the burden of prove lies on the Defendant's to establish that the Deceased failed to take reasonable care of her own safety and thereby contributed to the damage or injury.

[49] In the result, bearing in mind the evidence before this court and for all the foresaid rational, I find that the first Defendant (**DW1**) was not negligent.

[50] The Defence contended that the Plaintiff was guilty of contributory negligence.

[51] I make reference to the case of- In *Gani v Chand*, [2006] FJCA 65; Civil Appeal No, ABU 117 of 2005 (10 November 2006) the judgment of the Court of Appeal stated:

*The basic principle of contributory negligence is that, when a court is awarding damages to the plaintiff for injuries caused by the defendant, it may reduce the award if the plaintiff can be shown to have contributed to the injury by some negligence on his part. However, whilst the liability of the defendant arises from a duty towards the plaintiff, the assessment of contributory negligence is not based on a similar duty on the plaintiff towards the defendant. It was explained by Lord Simons in *Nance v British Columbia Electric Railway Co., Ltd* [1951 AC 601, 611:*

"The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the plaintiff to take due care is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by he injured part to the party sued, and all the is necessary to establish such a defence is to prove to the satisfaction of the injury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want care, to his own injury."

[52] The Court of Appeal in *Lautoka City Council v Ambarama Narsi Properties Limited* [2014] FJCA 25 held that-

"[168] To succeed in the Defence of Contributory Negligence, a Defendant must prove that the Plaintiff did not in his own interest take reasonable care of himself and contributed, by his own want of care, to his own injury."

The High Court in *Burfoot v Fiji Resort Ltd* [2013] FJHC 256, held on the issue of Contributory Negligence-

"A person is guilty of Contributory Negligence if he ought reasonably to have foreseen that, if he did not act as reasonable, prudent man, he might be hurt himself."

[53] Denning LJ in *Jones v Livox Quarries [1952] 2 QB 608* described the way in which the presence of contributory negligence should be examined in the following passage:

"A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless." (emphasis added).

[54] Contributory negligence is the Plaintiff's (Deceased) failure to exercise reasonable care for their safety.

[55] Negligence in its strict sense within contributory negligence implies a breach of a duty owed by the party sued to the injured party.

[56] However, when contributory negligence is setup is a Defence, as in the current case, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a Defence is to prove that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury.

[57] The Question that arises herein is whether it was the first Defendant's negligence that contributed to the negligence and or whether it was the total negligence of the Deceased's person?

[58] In the current case, the Deceased/ victim was employed by United Apparel which is further down road Ratu Dovi road.

The Deceased walked to place of work at United Apparel following Ratu Dovi road frequently and returned the same route after finishing work.

Therefore, she was very familiar with Ratu Dovi road condition in terms of the pedestrians and the traffic.

[59] I find for the aforesaid rational that on the day of the accident on 2nd June, 2017, the Deceased failed to exercise proper judgment and take proper care when endeavouring to cross the road in order to avoid the accident, eventually resulting in the death of the Deceased.

Further, the Deceased did not in her own interest take reasonable care of herself and totally contributed, by her own want of care, to her own injury that led to her death on 2nd day of June, 2017.

The Deceased herein ought to have reasonably have foreseen that, if she did not act as reasonable, prudent person, she might be hurt herself.

In this case the Deceased did not act as a reasonable prudent person whilst walking on the footpath along Ratu Dovi road and eventually hurt herself whilst intending to cross the road to go to the other side of the road and losing her life accordingly.

[60] I find that it was the Deceased's total negligence that caused the accident causing injuries as per the medical report tendered into evidence as Exhibit P1 resulting in the Deceased death.

[61] Accordingly, in terms of my finding, I have no alternative but to dismiss the Plaintiffs claim.

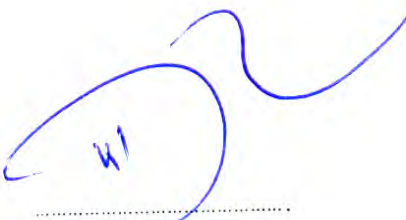
[62] It is only appropriate in such circumstances that I invoke courts discretion and not order any costs against the Plaintiff.

FINAL ORDERS:

- i. The Plaintiff's claim is hereby dismissed,
- ii. There will be no order as to cost against the Plaintiff at the courts discretion.

Dated at Suva this 09th Day of December, 2020.




Vishwa Datt Sharma
Judge

CC: Amrit Chand Lawyers, Suva.
O' Driscoll and Company, Suva.