IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION No HBC 129/2016

BETWEEN **NANDINI DEVI** of Togo Lavusa, Nadi, Accountant

FIRST PLAINTIFF

AND **AJNESH VINESH VARMA** of Togo Lavusa, Nadi as next friend of **NIDESH ANSH & ANITHI NAIYA** (both minors)

SECOND PLAINTIFF

AND **AJNESH VINESH VARMA**

THIRD PLAINTIFF

AND **SURYA NAND** of Nadi

FIRST DEFENDANT

AND **MOHAMMED SAIYAZ** of Koriciri, Nadi

SECOND DEFENDANT

APPEARANCES:
Ms Swamy & Ms Vreetika for the First, Second & Third Plaintiffs
Mr S Nand for the First Defendant
Ms Durutalo & Ms Takali for the Second Defendant

DATE OF HEARING: 29 & 30 January 2020

DATE OF JUDGMENT: 6th July 2020

DECISION

1. In a claim filed in the High Court of Lautoka on 30 June 2016 the first and second plaintiffs claimed (in the case of the second plaintiff as next friend on behalf of his infant children) damages from the (now) first defendant and his insurer for personal injuries suffered by the plaintiffs in a motor vehicle accident on the Nadi Back Road, at approximately 2.35pm on the 17th May 2015.

2. The vehicles involved in the accident were a Toyota vehicle (registration DH360) said to be owned by the first defendant Surya Nand, and driven by Ulaiasi Sauvocia, and another Toyota vehicle (registered FJ273) owned and driven by the third plaintiff.

3. Mr Sauvocia was killed in the accident, and no claim is made against his estate. The plaintiffs have claimed compensation for their losses (injuries, and the loss of the third plaintiff's vehicle) against the first defendant as owner of the other vehicle alleging vicarious liability for the actions of the driver.

4. The first defendant denies that he was the owner of the vehicle, and says that he had sold the vehicle before the accident to the (now) second defendant Mohammed Saiyaz, whom the first defendant joined as a third party to the proceedings, seeking indemnity from him for any liability that he (the first defendant) was found to have. In the course of the trial the plaintiffs sought (after I had pointed out some gaps in the pleadings) to amend their claim by adding Mr Saiyaz as a defendant, and making an alternative claim against him as owner of the vehicle in the same terms as are set out in the claim against the first defendant. Counsel for Mr Saiyaz consented to this amendment.

5. Evidence was led by the plaintiffs in support of their claims and to prove negligence on the part of the other driver, and this was challenged by the defendants in the usual way. But the main contest in the proceedings was whether the first defendant had sold his vehicle to the second defendant before the accident, such that Mr Saiyaz rather than he was vicariously liable for the injuries and damage claimed by the plaintiffs.

Facts/Evidence of the plaintiffs

6. The first and third plaintiffs are married to each other, and have two children, who are the children represented by their father as second plaintiffs. At the time of the accident in May 2015 Mr Varma was aged 32 years, and worked as a wholesale salesman at the Nadi Post Office. Ms Devi was also 32 years old, and worked as an accountant. Their daughter Anithi was then aged 4 years and their son Nidish was 2 years old. They lived together at Togo, Nadi.

7. When the collision occurred the plaintiffs were on their way to visit family in Sabeto. They had left home at around 1.00pm, and were driving (Mr Varma was the driver, with Ms Devi in the middle of the back seat, with the children on either side of her) North along the Nadi Back Road. Mr Varma says that as he slowed down for a railway crossing, a vehicle coming in the opposite direction crossed onto his side of the road, and collided with his vehicle. Although Mr Varma says he had slowed down for the railway crossing, he says that when he inspected the other vehicle after the accident he noticed that the speedometer of the other vehicle was still locked on 80kph.

8. Mr Varma's evidence of how the accident occurred was not seriously challenged in cross-examination by counsel for the other parties (who of course were not present at the time of the collision). Mr Varma was not charged with any driving offence as a result of the accident, and says he was told by the police that Mr Sauvocia was at fault.

9. The collision was clearly serious. Mr Sauvocia was killed, and Mr Varma and his wife and children were all injured to a greater or lesser extent, as discussed further below. Both cars were too badly damaged for economic repair, and so were written off. Mr Varma has claimed damages for the value of his car at the time of the collision. He gave evidence to the effect that the vehicle was worth $15,000 at the date of the collision, based on the fact that he had been offered $18,000 for the vehicle shortly before it was damaged in the collision. At the time of the collision the plaintiffs' car was seven years old (first registered in 2008). Mr Varma had bought it in 2010, and had therefore owned it for five years. The odometer reading was only 48,000kms. There was no independent evidence from either the plaintiff or the defendants as to the value of the vehicle.

10. Mr Varma says that he was briefly unconscious as a result of the collision (he says from hitting his head on the windscreen), but then woke up and was able to get out of the car by himself via one of the rear doors. From medical reports made at the time and produced to the Court it appears that Mr Varma was conscious and coherent when he and his family were all taken to hospital immediately after the accident. He had no visible bruises or lacerations or fractures, and he was not admitted to hospital. He says that he received a call from the hospital at around 7.00pm that evening wanting him to come back for a further check on his condition, but because he was alone with the children he opted not to do so. He still occasionally feels pain in his head and leg, for which he takes tablets when the situation requires it. He has not made a claim for personal injury on his own account.

11. Ms Devi and the two children were thrown out of the car. Ms Devi was unconscious until after they reached hospital and remained so until later the same evening. She does not recall what happened in the collision. All she remembers of it was crying out to her husband 'save us' as the cars collided.

12. She was kept in hospital for observation for three days before being allowed to return home. Copies of medical reports on her condition at the time she was admitted to hospital show that she was semi-conscious, incoherent in her speech, and confused. There were no fractures or abrasions, but it was noted that she complained of a painful right arm, and had some swelling in her neck/shoulder/upper chest/upper arm. Ms Devi's evidence (supported by various medical reports) is that this is still present and causes her constant pain, for which she is receiving pain medication consisting of periodic injections which last 6-8 months before she needs another. She also has fluid on her knee as a result of the collision.

13. Evidence relating to Ms Devi's injuries was also given by Dr Semi Baroi, an orthopaedic registrar at Lautoka Hospital. Dr Baroi is familiar with Ms Devi's case. He was treating her for ongoing pain. He last saw her in August 2018, and he was aware that she was also seeking private medical assistance to manage the pain she has. Dr Baroi confirms that Ms Devi has been diagnosed as having a haematoma on her right shoulder and upper back and arm. Although a haematoma can be caused by any impact, the overwhelming likelihood is that what Ms Devi suffers from is a result of the collision in which she was thrown out of the car. The only way that it can be ascertained with certainty that Ms Devi is suffering from a haematoma is to operate, but – as Dr Baroi explained – an operation in that area can be tricky, and there could be devastating and permanent side effects if nerve damage occurs in the course of the operation. On the other hand, Ms Devi points out that she has young children, and for the time being at least has chosen to live with the condition she has (and the pain that accompanies it) rather than risk an operation. If she does decide to have an operation Dr Baroi says that the cost could exceed US$5,000.

14. While the haematoma remains as it is, Dr Baroi explained, Ms Devi will continue to suffer the weakness, restricted movement and pain that has affected her home life (including intimacy with her husband, inability to prepare meals for the family as she used to, and her inability to carry and cuddle the children), and her work. Because she works more slowly than she did she can no longer complete her work in five days, and now has to work on Saturday mornings as well.

15. The two children were also injured in the collision. Anithi (then aged 4 years) suffered bruising and minor abrasions, but no fractures. She was still inside the car after the collision. Her brother Nidish (then aged 2 years) suffered from a minor fracture of his right arm, and a cut to his left eyebrow (which is still scarred).

16. Their parents' evidence is that both children continue to show the effects of the crash in their behaviour. They are reluctant to participate in activities with other children, are nervous about driving in the car, and sitting in the back seat, and were afraid of being driven on the Nadi Back Road for 18 months after the collision.

17. None of the evidence given by or on behalf of the plaintiffs, either about the collision or the consequences of it, was seriously challenged in cross-examination, and no contradictory evidence was put forward by the defendants.

18. Following the collision the plaintiffs instructed solicitors, who investigated the ownership of the vehicle driven by Mr Sauvocia, and as a result of what they found they commenced these proceedings in June 2016 against Mr Nand and the New India Assurance Company Ltd (which was apparently the issuer of the compulsory third party policy applicable to the vehicle – this claim against the insurer has since

been abandoned). In response to these proceedings the plaintiffs' solicitors received a letter dated 11 July 2016 from solicitors acting for the insurance company, denying liability under the cover because the driver of the vehicle was not, the letter said, a licenced driver, and was intoxicated at the time of the collision.

Facts/evidence of the first and second defendants

19. The first defendant, Surya Nand gave evidence on his own account, and a number of other witnesses were called to corroborate his story. He denied knowing (either by face or name) the now deceased driver of the vehicle of which he was recorded as owner. While he acknowledges that the Land Transport Authority records showed him, at the time of the collision, as the owner of the car DH360 that was being driven by Mr Sauvocia, he says that he had sold the vehicle to the second defendant Mohammed Saiyaz in June 2014 (almost a year before the collision occurred). He did not authorise Mr Sauvocia to drive the vehicle.

20. Mr Nand says he sold the vehicle for $2400 which was paid in cash in two instalments - $2000.00 on the date of the agreement (at which time he gave the vehicle to the purchaser), and a further $400.00 some weeks later. He says that Mr Saiyaz was introduced to him by his son-in-law, Ajay Chand (who also gave evidence). Mr Chand had a car body repair business, and had the vehicle at his business for repainting. Mr Saiyaz apparently saw it there and expressed interest in buying it. When asked why the ownership of the vehicle was not changed to the name of Mr Saiyaz, the evidence of Mr Nand and Mr Chand was that the necessary papers were signed by Mr Nand and given by Mr Chand to Mr Saiyaz for processing. It seems that he never submitted the forms to the LTA to record the change of ownership, hence when the collision occurred, Mr Nand was still appearing in the ownership records as the owner of the vehicle.

21. Mr Nand produced in support of this evidence, a copy of a handwritten note, which he said was a page from a notebook that he kept. Mr Nand said in evidence that this note was written on the same day that Mohammed Saiyaz took the vehicle. The note read:

- *Sold my car on 25th June 2014 for $2,400*
  $2000 in cash and $400 later after paying $400 I gave him the transfer form. After some time I asked him whether he transferred the viekle (sic) he said yes
- *the money was given in front of his father, my wife and my son-in-law*

22. Neither Mr Nand nor his solicitors (to whom he said he had given it) were able – when given the opportunity - to produce the original notebook containing this note. This may have shown that Mr Nand was in the habit of recording such events, and if

so would have provided some authenticity to his evidence, and verified the genuineness of the note as evidence of the sale. Clearly – and contradicting Mr Nand's evidence - the note was not written contemporaneously with the sale (*'some time after I asked him …'*) and I am not convinced that it was not written for the purpose of the court proceeding when the absence of documentary evidence of the sale was pointed out to Mr Nand.

23. I mention this in the context of other aspects of the evidence on the issue of the sale of the car. These include the following observations:

    i. Although these proceedings were commenced against the (now) first defendant in June 2016 it was not until November 2018 that the now second defendant was joined as a third party, and there was, for the first time, mention of the 'fact' that the vehicle had been sold by the first defendant prior to the accident. The original and second statements of defence filed by the first defendant make no mention of this sale. One would have thought that it was the most obvious thing to rely on by way of defence.

    ii. There is every reason for the first defendant to try to escape liability for the collision. It appears from the letter from the solicitors for the insurer produced by the plaintiff (see paragraph 18 above) that Mr Sauvocia did not have a licence to drive, and was intoxicated at the time of the collision. Accordingly, any owner of the vehicle who is held liable to the plaintiffs will – even if the vehicle was insured - have to meet any damages awarded from his own resources, without the benefit of insurance cover.

    iii. the failure of the solicitors for the insurer (see paragraph 18 above) to mention, as a further reason for them not being liable for any claim arising from the collision, that the vehicle was no longer owned by their insured. I would have expected this to be referred to in a letter such as this, enumerating the reasons why the insurer was not liable.

    iv. As the case progressed and new witnesses as to the sale were called by the first defendant, the evidence about the sale became less, rather than more convincing. For example:

        - it appeared that all the witnesses were close relatives of the first defendant. This is not surprising or sinister in itself, but the fact that this was not acknowledged from the start, but only emerged from questioning suggests that there was an attempt to present these witnesses as more independent than they were.
        - The final defence witness, Mr Shavnil Nand, a taxi-driver, seemed to say that both the first, and the second defendants were using the vehicle DH360 as an unlicensed taxi, employing other drivers for that purpose. As a licensed taxi operator Shavnil Nand - who admitted when asked to being a nephew of the first defendant - had an interest in identifying and accosting unlicensed operators. He said that he

spoke to an indo-Fijian driver of the car, and an iTaukei driver whom he saw driving the car in Nadi and operating the vehicle as an unlicensed taxi (he didn't know their names, and there is no evidence at all that one of these people was Mr Sauvocia). Both drivers told him they were driving for 'Saiyaz'.

24. Although the second defendant was represented throughout the trial by counsel, who – as recorded above, and somewhat to my surprise – consented to the inclusion of their client as a defendant, rather than third party, and to the amendment of the plaintiffs' claim to include a claim against him, the second defendant did not appear at all during the trial, and did not present any evidence. These of course are choices that the second defendant is entitled to make, but they do have consequences in terms of the inferences that the court can make from the fact that he has not taken the opportunity to respond to the allegations and evidence.

25. In her closing submissions for the second defendant his counsel was critical of the plaintiffs' failure to include claims against Mr Sauvocia's estate which – it was suggested – is a 'critical' party in the action. It is a decision for the parties who should be joined, either initially or in the course of the proceedings. The second defendant /third party could if he wished have applied to join Mr Sauvocia's estate. Of course this would have required him to give evidence as to their relationship which the second defendant obviously preferred not to do.

26. It was also suggested in submissions for the second defendant that *both defendants acknowledge that the driver was not a servant of theirs therefore his estate should have been present to clarify why he was driving the vehicle on [the day of the accident].* The first part of this submission is certainly something that the first defendant can say, having given evidence that he did not own the vehicle, did not know Mr Sauvocia and had not authorised him to drive the vehicle. But in the absence of evidence from him or someone else to similar effect, this is not something that the second defendant can argue for himself.

Analysis

27. I am satisfied from the largely unchallenged evidence on behalf of the plaintiffs that:
    - On the 17th May 2015 the plaintiffs' vehicle was involved in a head-on collision on the Nadi Back Road with a Toyota vehicle registered number DH360 driven by Ulaiasi Sauvocia.
    - The collision was caused by the negligence of Mr Sauvocia.
    - The plaintiffs' vehicle was damaged in the collision to such an extent that it was uneconomic to repair it. It was worth $15,000 at the time of the collision.

- The first plaintiff Nandini Devi and her two children Anithi and Nidish were injured in the collision. In the case of Ms Devi those injuries have caused, and are continuing to cause, her considerable pain and suffering, and have had a significant impact on her quality of life. There is no likely prospect of this changing.

28. The real issue in contention in this claim is who, if anyone, is responsible for the plaintiffs' loss and injury. Obviously Mr Sauvocia was responsible, but his fault and liability is not the subject of this claim. In the absence of Mr Sauvocia, the plaintiffs seek to attribute responsibility to the owner of the vehicle, who it is alleged has vicarious liability for the fault of the driver who – as owner – he authorised to drive the vehicle on the day in question. But who is the owner of the vehicle, and is there any or sufficient evidence that the owner authorised Mr Sauvocia to drive the vehicle?

29. The plaintiffs have understandably claimed against the first defendant, Surya Nand. He is/was shown in the motor vehicle register as the owner of the vehicle. He acknowledges this. In the absence of evidence to the contrary, the plaintiffs and the Court are entitled to conclude from this:
    i. that Mr Nand is the owner of DH360,
    ii. that – as owner – Mr Nand authorised Mr Sauvocia to drive the vehicle
    iii. that this authorisation occurred in circumstances whereby the owner is vicariously liable for the acts of the driver.

30. It is clear that the register of motor vehicles is evidence, but not conclusive evidence, of ownership. The register is not, unlike the Land Registry, a record or document of title. The Court of Appeal in **Nand v Indra** [1993] FJCA 41 says on this issue:

> *Finally, we might say a word about whether registration of a vehicle under the provisions of the Traffic Act establishes (i) ownership, (ii) is necessary to establish ownership, (iii) is conclusive evidence of ownership, (iv) is merely evidence of ownership. Whilst it is unnecessary for the purposes of this appeal to do so, we nevertheless point out that (iv) above is clearly the situation. Section 19(1)(a) and (b) are as follows:*
>
> *19(1)(a)* *No motor vehicle the ownership of which has been transferred by the registered owner shall be used on a road for more than 7 days after the date of such transfer unless the new owner is registered as the owner thereof.*
>
> *(b)* *Upon the transfer of ownership of a motor vehicle, the registered owner thereof shall, within 7 days from the date of such transfer, inform the licensing authority of the area in which the vehicle is registered in writing of the name and address of the new owner, and the date of change of ownership of the motor vehicle.*

It quite clearly assumes or requires ownership before doing whatever has to be done in relation to registration. In particular it only appears to require registration of goods being a motor vehicle if it is to be used on a road

Regulation 14 of the current Land Transport (Vehicles Registration and Construction) Regulations 2000 (under the Land Transport Act 1998) are to similar effect as the Traffic Act referred to by the Court of Appeal. The fact that someone's name appears in the register of motor vehicles as owner may be prima facie evidence of ownership, but that evidence can be contradicted by other evidence, as the first defendant seeks to do in this case.

31. Having reviewed the evidence I have concluded that the plaintiffs cannot succeed in their claim against the first defendant, Surya Nand. I have reached this view for two reasons. First because I accept on the balance of probabilities that the first defendant sold the vehicle in question to the second defendant as he says. Although this is by no means free from doubt, for the reasons referred to previously, there is no evidence to contradict the first defendant's story. The failure of the solicitors for the insurer to refer to the sale of the vehicle is explicable for other reasons (they may simply have thought to mention the most important exclusions, or they may also be the insurer for the second defendant, so the change of ownership was immaterial from the insurer's perspective), and although I am not persuaded that the note is a genuinely contemporaneous record of the sale, the fact that it was made does not mean that the sale did not take place.

32. Also relevant to this issue is the absence of any evidence from the third party/second defendant, who has an obvious interest in denying the first defendant's evidence of sale, if he can. In the course of closing submissions counsel for the second defendant questioned the credibility of the first defendant's evidence of sale, referring to many of the points I have referred to above in reaching the conclusion I have, including the authenticity of the note, the relationship the witnesses had to the first defendant, and some inconsistencies about how and when the first defendant learned of the collision. But all of these factors individually and together pale into insignificance against the second defendant's failure to give evidence and contradict the evidence of sale, and the implication that Mr Sauvocia was driving with his knowledge and authority.

33. The second reason for my conclusion that Surya Nand cannot be held vicariously liable for the negligence of Mr Sauvocia is that, as noted previously, he has denied any knowledge of Mr Sauvocia and has denied that he authorised Mr Sauvocia to drive the vehicle, and there is no evidence to contradict that denial. Vicarious liability for the negligent actions of another person arises from an actual or imputed responsibility for those actions. The responsibility an employer has for the acts of its

employee in the course of the employee's work is an obvious and clear example; the employer has the ability, the opportunity and the interest to manage the way an employee performs his or her job, and ensure that there is no damage causing negligence. So if an employer fails to do that effectively it is reasonable for the employer to be responsible for the damage. Of course the principle has been extended beyond employer/employee relationships to encompass any relationship where the person held to be vicariously liable has a sufficient interest and control (whether through ownership of property used in the task, or through business or personal relationships, or both) in the way that the task is done to make it reasonable to hold that person responsible for the actions of the person actually carrying out that task.

34. Hence the key to holding some person or organisation vicariously responsible for the actions of someone else is to have evidence of a relationship between them that leads to the finding of vicarious liability.

35. Here, leaving aside for the moment the evidence of the first defendant, the only evidence of a relationship between Mr Sauvocia and the first defendant is the fact that Mr Sauvocia was driving a vehicle apparently owned by the first defendant. In the absence of evidence to the contrary, courts - in particular in personal injury claims arising from motor vehicle accidents - have been prepared to accept evidence of ownership as sufficient to raise a presumption of authority. The reasons for this are partly social (the importance of making people accountable for their often unthinking actions, the difference in scale between thoughtless action or momentary in advertence and the sometimes horrendous consequences), and partly pragmatic (the ability of owners of vehicles to insure themselves and those they permit to use their property against the consequences of that use). The Court of Appeal of Fiji in **Chandra v Narain** [1997] FJCA 42 has provided a comprehensive analysis of the law of vicarious liability in relation to the use of motor vehicles, including the following passage:

> *The law on fixing vicarious liability for a driver's negligence on the owner of a motor vehicle has been frequently considered by the Courts. The decision of the New Zealand Court of Appeal in* ***Manawatu County, v. Rowe*** *[1956] NZLR 78, approved by the Privy Council* ***Rambarran v. Gurrucharran*** *[1970] 1 WLR 556, 560, establishes the following propositions:*
>
> 1 *The onus of proving agency rests on the party alleging it.*
>
> 2. *The fact of ownership of a vehicle gives rise to an inference that the driver was the agent of the owner; in other words, that fact alone in the absence of anything else, provides some evidence to go to a jury;*
>
> 3. *This inference can be drawn in the absence of other evidence bearing on the issue or where such other evidence as there is, fails to counter- balance it.*

4 *For the plaintiff to make the owner liable, the plaintiff must establish that the driver was driving the car as a servant or agent of the owner and not for the driver's own benefit and for his own concerns.*

36. Given these assumptions or inferences, silence or the absence of an explanation pointing to a different conclusion is often taken as an indication that there is no response that would contradict them. In its decision in **Jones v Dunkel** (1959) 101 CLR 298 the High Court of Australia (per Windeyer J) made the following comment on the significance of failing to call evidence:

> *... silence may amount to much more than an acquiescence in the primary facts. It may be eloquent in support of an inference to be drawn from those facts.*

and further on in the same judgment, quoting from Wigmore on Evidence:

> *The failure to bring before the tribunal some circumstance, document or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party.*

37. These principles do not assist the plaintiff in this case against the first defendant. The first defendant has given evidence to the effect that although it was still registered in his name, the vehicle that was being driven by Mr Sauvocia at the time of the collision no longer belonged to him, he did not know Mr Sauvocia, and he had not authorised him to drive the car. This evidence, which I accept for the reasons set out above, negates any assumptions that the Court might have made in the absence of evidence from the first defendant. Given this finding, the plaintiff's claim against the first defendant cannot succeed.

38. I acknowledge of course that had I concluded that the first defendant's story about selling the car is false, there would be no reason either to believe the evidence that Mr Sauvocia was unknown to the first defendant, and was not driving the car with the first defendant's authority. I also acknowledge the suspicion, particularly in view of the relationships that seem from the evidence to exist between the first defendant and his witnesses, and the third party/second defendant, that the whole of the defence of the first and second defendants is merely a concoction to enable the claim against the first defendant to be deflected onto the mysterious Mohammed Saiyaz. But in the absence of any evidence to support it, or of a reason why it might be worthwhile to go to this trouble, this is merely speculation.

39. This brings me to the claim against the (now) second defendant, Mohammed Saiyaz. As I have noted, Mr Saiyaz was represented, but did not attend court himself, and no evidence was given in support of his defence. The plaintiffs' claim against him is

essentially the same as their claim against the first defendant, i.e. that he was the owner of the vehicle driven by Mr Sauvocia, and as such was vicariously liable for the negligence of the driver. In response to the defendant's statement of claim against him as third party (to which the plaintiffs' statement of claim against the first defendant is annexed) the second defendant says that at all times the defendant (i.e. the first defendant) not he, was the owner of DH360, and he denies that the defendant sold him the vehicle on the 25th June 2014. He denies the first defendant's assertion that he (the first defendant) had no legal interest in the vehicle, and he denies that he, the second defendant, was the 'real owner in possession' of the vehicle.

40. Given these denials and assertions about the ownership of the vehicle (which would if established amount to a complete defence by the second defendant) the failure of the second defendant to give evidence in support of his defence is all the more significant. To adopt the reasoning from **Wigmore on Evidence** referred to in **Jones v Dunkel** (above) the failure to give evidence himself or produce a witness to prove certain facts, when doing so would establish the defence relied on, *serves to indicate, as the most natural inference, that the party fears to do so.*. While this inference can of course be rebutted by some alternative explanation for the failure to provide evidence on the issue, no such alternative explanation has been put forward in this case by or on behalf of the second defendant.

41. So as matters stand for the second defendant, there is not only no evidence to contradict the first defendant's assertions that he sold the vehicle DH360 to the second defendant, there is also no evidence to contradict the inference referred to in the Court of Appeal decision of **Chandra v Narain** (see above) that ... *the fact of ownership of a vehicle gives rise to an inference that the driver was the agent of the owner.*

42. I accordingly find that the second defendant Mohammed Saiyaz was the owner of the vehicle DH360 driven by Mr Sauvocia at the time of the collision on 17 May 2015 with the plaintiffs' vehicle, and that - there being no evidence of a lack of knowledge about, or an absence of authority for Mr Sauvocia's driving, - he is vicariously liable for Mr Sauvocia's negligence in causing the collision.

43. Again, in closing submissions (having consented to their client being joined as second defendant in the course of the trial, and not raised any pleading points at that time), counsel for the second defendant has raised the issue that nothing has been specifically pleaded by the plaintiffs with regard to the liability of the second defendant. This of course is quite true. The final amended statement of claim is dated 18th September 2018, while the defendant's Third Party Notice, which raised for the first time the issue of the sale of the vehicle, is dated 12th November 2018. In the course of making the order to join the third party as a second defendant I

proposed that the Amended Statement of claim should be read, in the alternative, as applying to the (now) second defendant in the same terms as it had referred to the first defendant. Counsel for the second defendant was happy to proceed on that basis. It is too late to raise pleading points in closing submissions that were not raised at the time of the amendments. In any case, given the manner in which the second defendant chose to conduct his case, I am satisfied that he suffered no prejudice from the amendments/changes that were made.

Damages

44. This brings me to the issue of damages. Unfortunately counsel did not focus on this issue in their submissions, and I have been given little assistance (none at all from the defendants) on what might be an appropriate award in favour of the plaintiffs for their personal injuries, which I am satisfied were caused in the collision.

45. The first point to make is that there was no assertion by the defendants of contributory negligence on the part of the plaintiffs, and no evidence that the plaintiffs were in any way at fault either in relation to the collision, or in connection with the severity of their injuries.

46. With regard to the claims for special damages I am satisfied on the evidence that the plaintiffs are entitled to judgment against the second defendant for the following losses:

i.	Pre-accident value of the motor vehicle written off in the collision	15,000.00
ii.	Police report	22.50
iii.	LTA search of ownership	7.00
iv.	Travelling expenses	75.00
v.	Other expenses	42.10
		$15,146.60

47. Although the plaintiffs' statement of claim refers to a claim for loss of earnings by the first plaintiff (it is pleaded that she was absent from work from 17 May 2015 until 'June 2015'), there was no evidence by the first plaintiff on this aspect of her claim, either as to when she returned to work, or how much she lost by way of earnings during the period she was absent from work because of her injuries. Her evidence was that she was discharged from hospital on the Tuesday following the accident (which took place on a Saturday). I accept that she may not have been immediately able to return to work, but in the absence of evidence from her on these matters I cannot make an award. Similarly there was evidence from Ms Devi that she is not able to work as quickly as she did before the injury, and this means that she now has to work on Saturdays to complete work that she used to do in five

days. Again though, there is no evidence as to how this affects Ms Devi's income. Does she work longer for the same salary, or is she paid for the extra hours? I don't know, and am not prepared to guess. What is perhaps more significant about such evidence as there is on this topic, is that Ms Devi is still able to do the work that she did (albeit that she is slower than she was), and she is still employed by the same employer doing the same work as she was before the injuries. In these respects at least she has been fortunate.

48. As to general damages I am satisfied from her evidence and that of Dr Baroi, and from the reports she produced, that Ms Devi continues to suffer significant pain from her injuries, and weakness and restricted movement in her arm and shoulder from the haematoma. I accept Ms Devi's evidence that these aspects of her condition have affected her job, her day to day work at home, and her ability to provide help and comfort to her children. They have also affected her relationship with her husband; intimacy causes her pain, and this is frustrating for both of them. Furthermore, the medical evidence is that unless the haematoma is operated on it is likely to cause permanent skeletal changes that will not be able to be remedied. The likely impact of these is unclear, but the advice leaves Ms Devi with a dilemma; she must either face risky and expensive surgery with the possibility of permanent disability if the outcome is not as hoped, or – if she chooses not to take that risk – she will have to live with a permanent disability of a different sort. Also relevant to the assessment of damages is that this is a once-only award. Ms Devi will not have the opportunity to come back to the Court for more should the future consequences of her injuries be worse than anticipated.

49. The same is true for the two young children. Fortunately, apart from the scar on the eyebrow of young Nidish, it seems that neither has suffered permanent physical injuries. The mental scars from being involved in the collision are more difficult to assess, both in terms of their present impact and their likely future effect on the lives of the children as they grow up. There is certainly no evidence from which the court could conclude that the collision and their injuries will have an effect on their future earning capacity, so any damages they are entitled to must be confined to general damages for pain and suffering.

50. Counsel for the plaintiffs has referred me to a number of cases which, she suggested, are comparable to this case and may be used by me as a guide to what damages are appropriate here. The cases (which I have read) are:

Anderson v Salaitoga [1994] FJHC 42
Raisalawake v Kamea [1999] FJHC 156
Yanuca Island Lt v Elsworth [2002] FJCA 65

The awards made in these cases for general damages (pain and suffering, loss of enjoyment of life etc) were, respectively, $85,000, $70,000 and $50,000.

51. However, the injuries suffered by the three plaintiffs in these cases were all vastly more serious than those suffered by Ms Devi, and even allowing for the fact that all these cases are now quite historic, and awards have increased since they were decided, I do not find them helpful as a guide to what might be awarded to Ms Devi and her children in 2020 for injuries and effects of the accident that although no doubt devastating for them, are simply not comparable. It is hard to believe that counsel could not find more readily applicable cases that would provide a useful guide to what is the appropriate level in this case for an award of damages.

52. Guidelines to be followed in determining compensation for pain and suffering and loss of amenities in cases of personal injuries, were laid down by the Supreme Court in **The Permanent Secretary for Health and Another v. Kumar** [2012] FJSC 28 where at p.37 of its judgment, the Supreme Court held as follows (which I have reformatted for clarity):

> *There are three guiding principles in measuring the quantum of compensation for pain and suffering and loss of amenities.*
>
> - *First and foremost, the amount of compensation awarded must be fair and should compensate the victim of the injury in the fullest possible manner, bearing in mind that damages for any cause of action are awarded once and for all, and cannot be varied due to subsequent eventualities, some of which could not even be anticipated at the stage a court makes an award. Hence, an award of damages should not only be fair, but also assessed with moderation, even though scientific accuracy is impossible.*
> - *The second principle is that the sum awarded must to a considerable extent be conventional and consistent.*
> - *Thirdly, regard must be had to awards made in comparable cases, in the jurisdiction in which the award is made. However, it is also open for a court to take into consideration a comparable award made in a foreign jurisdiction, particularly in cases where the type of injury is not very common, provided that the court takes into consideration differences in socio-economic and other relevant conditions that might exist between the two jurisdictions.*

53. The importance of making awards that are consistent with the awards in other cases is emphasised in the decision of the English House of Lords in **Wright v British Rlys Board** [1983] 2 All ER 698 as follows ,

> *My Lords, claims for damages in respect of personal injuries constitute a high proportion of civil actions that are started in the courts in this country. If all of them proceeded to trial the administration of civil justice would break down; what prevents this is that a high proportion of them are settled before*

> *they reach the expensive and time-consuming stage of trial, and an even higher proportion of claims, particularly the less serious ones, are settled before the stage is reached of issuing and serving a writ. This is only possible if there is some reasonable degree of predictability about the sum of money that would be likely to be recovered if the action proceeded to trial and the plaintiff succeeded in establishing liability. The principal characteristic of actions for personal injuries that militate against predictability as to the sum recoverable are, first, that the English legal system requires that any judgment for tort damages, not being a continuing tort, shall be for one lump sum to compensate for all loss sustained by the plaintiff in consequence of the defendant's tortious act whether such loss be economic or non-economic, and whether it has been sustained during the period prior to the judgment or is expected to be sustained thereafter. The second characteristic is that non-economic loss constitutes a major item in the damages. Such loss is not susceptible of measurement in money. Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that justice meted out to all litigants should be even-handed instead of depending on idiosyncrasies of the assessor, whether jury or judge, the figure must be "basically a conventional figure derived from experience and from awards in comparable cases".*

54. In 2016 in a decision in **Prakash v Patel** [2016] FJHC 105 Tuilevuka J held that the plaintiff policeman in that case was entitled to damages $35,000 for pain and suffering (in addition to damages for loss of earning) where his knee injury suffered in the motor vehicle collision was permanent, had resulted in him having to have reconstructive surgery and spend 18 days in hospital, and had forced him to give up recreational sports that had been an important part of his family and social life. In coming to that decision Justice Tuilevuka reviewed the award of damages in a number of similar cases. In my view the plaintiff's injuries in **Prakash** were more serious than those of Ms Devi, but that decision was four years ago.

55. In **Zhang v Gairudadhaj** [2018] FJHC 866 in September 2018 Amaratunga J awarded $35,000 (the same amount as in **Prakash**, although there was then a modest reduction for contributory negligence) in general damages to a 69 year old woman who suffered four broken ribs in a motor vehicle accident in 2013, and was in hospital for a week, but did not appear to have any permanent injuries. I think Ms Devi's injuries are more serious than those of the plaintiff in **Zhang**.

56. Taking into account all these decisions, including the factual differences, and when they were reached, I award the first plaintiff Ms Devi $38,000 for general damages, and each of the children $6,000 with interest on all these amounts at 6% per annum from the date of the issue of the writ (30 June 2016) to the date of judgment.

57. Accordingly judgment is entered for the first, second and third plaintiffs against the second defendant as follows:

i. Claim by Nandini Devi (first plaintiff):

General damages (pain & suffering)	38000.00
Police report	7.50
LTA search of ownership	7.00
Travelling expenses	75.00
Other expenses	42.10
	38131.60
Interest on damages (6% pa from 30/06/16 to 30/06/20 @ $5.77 p/d)	9151.58
	$47283.18

ii. Claim by AJ Varma on behalf of Anithi:

General damages (pain & suffering)	6000.00
Police report	7.50
	6007.50
Interest on damages (6%pa from 30/06/16 to 30/06/20 @ $0.98 p/d)	1441.80
	$7449.30

iii. Claim by AJ Varma on behalf of Nidish:

General damages (pain & suffering)	6000.00
Police report	7.50
	6007.50
Interest on damages (6%pa from 30/06/16 to 31/03/20 @ $0.98 p/d)	1441.80
	$7449.30

iv. Claim by AJ Varma (third plaintiff) for special damages:

Damage to motor vehicle	15000.00
Other special damages (see para 46)	146.60
Interest on damages (6%pa from 30/06/16 30/06/20 @ $2.46 p/d)	3635.18
	$18781.78

58. I award costs of $5,000 (assessed summarily) in favour of the plaintiffs against the second defendant, and costs of $2,000 in favour of the first defendant against the second defendant. Taking into account the late joinder of the third party/second defendant I make no award of costs in favour of the first defendant against the plaintiff.

A.G. Stuart

Judge

At Lautoka this 6th day of July 2020

SOLICITORS:
Messrs Patel & Sharma, Nadi, for the Plaintiffs
Messrs Fazilat Shah Legal, Lautoka, for the First Defendant
Messrs Sidiq Koya Lawyers, Nadi, for the Second Defendant