

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 41 of 2018**

**BETWEEN:**      **SHIWAANI PRAKASH** of Lot 4, Kabutri Drive, Koronivia, Nausori, Credit Clerk.

**PLAINTIFF**

**AND:**            **ASERI VAKATAWA** of Cunningham, Suva, Loans Officer.

**DEFENDANT**

**BEFORE:**            **Hon. Mr. Justice Vishwa Datt Sharma**

**COUNSEL:**            **Mr. Singh D.**      - For the Plaintiff  
**Mr. Narayan E.**    - For the Defendant

**DATE OF DECISION:**    **Wednesday 27<sup>th</sup> October, 2021 @ 10am**

**JUDGMENT**

*[Personal Injuries claim for Damages]*

**INTRODUCTION**

[1] On 19<sup>th</sup> February 2018, the Plaintiff instituted this action against the Defendant for driving Vehicle Registration No. II 814 unskillfully and negligently bumping the Plaintiff who was crossing at Koronivia Junction on 13<sup>th</sup> April, 2017 at 7.30pm due to which the Plaintiff suffered personal injuries and seeks the following relief: -

- i. General Damages;
- ii. Special Damages;
- iii. Interest under the Law Reform (Miscellaneous Provision) (Death and Interest) Act [Cap 27] on general damages at the rate of 6% per annum from date of service of Writ and on special damages at the rate of 3% per annum;
- iv. Loss of future earnings;
- v. Past gratuitous care;
- vi. Costs for future care;
- vii. Costs; and
- viii. Interest under the Law Reform (Miscellaneous Provision) (Death and Interest) Act [Cap 27] on the Judgment sum at the rate of 4% per annum.

[2] On 22<sup>nd</sup> May 2018, the Defendant filed his Statement of Defence denying each and every allegation of fact in the Plaintiff's Statement of Claim. However, alternatively and by way of further defence, the Defendant says in answer to each and every paragraph relied upon in the Claim that the injuries to the Plaintiff, if any, was caused solely or alternatively contributed by the negligence of the Plaintiff. The Defendant denied liability absolutely.

[3] The Substantive hearing was conducted on 12<sup>th</sup> March 2020 and 07<sup>th</sup> May 2020.

[4] Both parties to the proceedings filed simultaneous written submissions citing case authorities which was perused and taken into consideration before making a determination on the substantive claim accordingly.

**THE EVIDENCE**

[5] On the outset this Court notes that there were two eyewitnesses available who had in fact witnessed the scene of the accident according to the Private Investigating Officer DW2. However, they were not called in the proceedings to give evidence in terms of the accident that occurred on 13<sup>th</sup> April 2017 at the Koronivia Road Junction.

[6] The Plaintiff gave evidence and thereafter called one witness namely Doctor Enoch Koilinibaravi.

**[PW1] Shiwaani Prakash**

[7] The Plaintiff [PW1] gave oral evidence and in summary told the Court that she was involved in an accident near the Koronivia Road Junction on 13<sup>th</sup> April 2017 at 7.30pm upon her returning home from work. She was crossing the road following two others and was one step away from the footpath

when she was bumped on her left side by a car coming from Nausori heading to Suva. As a result of the impact, she came onto the windscreen of the car and fell off. She saw the car ten to fifteen metres away. There was no pedestrian crossing from where she crossed the road. Further, there was no warning sign given by the Defendant driver. Her evidence was that after the accident she was conveyed to the Nausori Health Centre and subsequently to CWM Hospital by an ambulance where she was admitted for two weeks. She was in pain and after the accident she thought she would die. Her injuries were an open fracture on her left arm and bruises on the left leg. A metal plate and screw were inserted in her left arm. PW1 showed her scar in the shape of a crescent and the mark where the plate and screw were inserted. She was in plaster for three months with very serious injuries and admitted for two weeks. She remained in bed for six months. After the accident the Defendant visited her and told her what had happened on the day of the accident and prayed for her.

**[PW2] Doctor Enoch Kolinibaravi**

[8] He stated in his evidence that he was the Surgical Registrar at the CWM Hospital and had conducted the medical examination on the Plaintiff [PW1]. He was referred to the medical report dated 27<sup>th</sup> June 2017 which was tendered into evidence as "Exhibit P2". He reported that the Plaintiff's [PW1] left humerus/arm was broken and had an open wound with a bone sticking out. Her elbow was fractured. He confirmed it was not a permanent disability and the injury heals within 8 months or longer. He carried out (ORIF) meaning Open Reduction Internal Fixation Surgery and screws were inserted to hold the bones together. PW1 was admitted on 14<sup>th</sup> April 2017 and discharged on 27<sup>th</sup> April 2017. She could not do things like before. PW2 was also referred to the medical report dated 14<sup>th</sup> June 2018 prepared by Dr Buadromo. He told Court that Dr Buadromo assigned 11% Whole Permanent Impairment (WPI) to PW1's injuries. PW1 could not agree with Dr Buadromo's assessment as he was not trained or qualified like him. He confirmed there was one year gap between his medical report and Dr Buadromo's medical report and there were improvements to PW1's injuries. He added that PW1's disability was permanent in nature and her earning capacity was reduced.

[9] The Defendant Aseri Vakatawa [DW1] gave evidence and called one witness namely, Anirudh Kumar.

**[DW1] Aseri Vakatawa**

[10] DW1 Aseri Vakatawa told Court that he recalled 13<sup>th</sup> April 2017 at 7.30pm wherein his vehicle registration number II814 was involved in a traffic accident at the Koronivia Road Junction. The Plaintiff [PW1] was involved in the accident. He was driving the vehicle registration number II814 owned by him and his wife and was insured with New India Insurance. He was driving from Nausori to Cunningham. It was during Easter.

He had knocked off from work and was heading home on his usual main route during traffic. The area was dark, dusty since the road construction work was ongoing. There was traffic on the road from Suva side heading to Nausori. Lights were opposing his eyes. The Plaintiff [PW1] suddenly came through between two cars to cross to the other side of the road. The front middle part of his car bumped the Plaintiff PW1 on her left side and the Plaintiff [PW1] landed on top of the bonnet of his

car. The accident occurred on the middle of the road. He disagreed that he failed to have a proper lookout and/or have sufficient regard for the Plaintiff PW1 when she was crossing the road. He stated that he was cautious and driving straight at a speed of 60KMPH and not driving at an excessive speed. He did not expect the accident to occur nor expected someone to cross between two cars. He reiterated that he did not see the Plaintiff [PW1] as he was fully concentrating on the road ahead.

After the accident, he admitted visiting the Plaintiff [PW1] at the hospital a couple of times since he felt sorry for the Plaintiff [PW1] as she was the victim of the accident. He pointed out to the sketch plan drawn by police and gave a statement to the police.

DW1 agreed in cross-examination that if he drove his vehicle a bit slower as a prudent driver, then the accident may not have happened. He confirmed that the Plaintiff [PW1] was 10 metres away from his car when he first saw her and it took 10 seconds to collide with her. He further said that he could not see the Plaintiff [PW1] cross the road between two cars and the lights. He also said that he could not make out whether it was his or her fault.

**[DW2] Anirudh Kumar**

[11] This Defence Witness told the Court that he was appointed by the New India Assurance to investigate the circumstances leading to the accident where the Plaintiff [PW1] was involved in an accident at Koronivia Road Junction on the Kings Road. The driver of the vehicle in question was Aseri Vakatawa [DW1].

He interviewed the Plaintiff [PW1] and obtained a written statement with photographs of her injuries sustained during the accident. He interviewed the Defendant [DW1] and obtained his written statement. He also interviewed two other eye witnesses who gave an oral statement to [DW2] but refused to give written statements. He compiled his report and submitted to the New India Assurance which was tendered into evidence as "Exhibit D2".

He told Court that the point of impact was towards the middle of the lane with a 16.4 metres brake mark. Legal speed in that area was 60KMPH. The road was under construction and had no footpaths or pedestrian crossings. It was dark at 7.30pm. The police sketch plan of the accident scene was tendered into evidence as part of his report as "Exhibit D2". He confirmed that the investigation report was written thirteen weeks after the accident. He agreed that the Plaintiff [PW1] suffered serious injuries. He also agreed that the driver [DW1] would have seen the Plaintiff [PW1] ten seconds before the impact. The accident was forceful since the Defendant's [DW1] car windscreen was smashed. However, he could not confirm if the Defendant's [DW1] speed was excessive since he was not an eyewitness.

**EXHIBITS TENDERED**

[12] The following Exhibits were tendered at the Hearing: -

- Plaintiff's Wage Slip - P1

- Fiji Police Medical Examination Form - P2
- Medical Report dated 27<sup>th</sup> June 2017 - P3
- Medical Report dated 14<sup>th</sup> June 2018 - P4
- Draft paper with Plaintiff's writing during Hearing - D1
- Private Investigation Report dated 15<sup>th</sup> May 2018 - D2

### ANALYSIS AND DETERMINATION

[13] In terms of the Pre-Trial Conference Minutes and the evidence together with the exhibits tendered in the proceedings, this Court now needs to determine the following issues in order to make a determination on the impending substantive claim made by the Plaintiff against the Defendant: -

- a. Whether the Defendant is liable for the injuries sustained by the Plaintiff?
- b. Whether the accident was caused solely or alternatively contributed to by the Plaintiff? If so, by what percentage?
- c. What quantum of damages and awards is the Plaintiff entitled to, if any?

[14] The Plaintiff's contention is that the Defendant drove his vehicle Registration No. II 814 unskilfully and negligently bumping the Plaintiff on 13<sup>th</sup> April 2017 as a result of which the Plaintiff suffered personal injuries as particularised and enumerated in the Plaintiff's Statement of Claim filed on 19<sup>th</sup> February 2018. The Counsel submitted that liability was a non-issue nor is Contributory Negligence as it was not pursued fully nor relevant questions were put to the Plaintiff specifically on contributory negligence. He cited the Rule *Browne -v- Dunn (1893) 6.R.67 (H.L.)*. He further submitted that Contributory Negligence would only suffice if someone ran onto the road.

[15] The Defendant denies the allegation made therein by the Plaintiff. The Defendant's contention is that the injuries to the Plaintiff, if any, was caused, solely or alternatively contributed by the negligence of the Plaintiff. Hence, the defence of Contributory Negligence is raised by the Defendant herein.

The Defendant contended that the evidence fails to support the Plaintiff's claim as the same is inadequate, unreliable and inconsistent. The Plaintiff has not proven the allegations made in the Statement of Claim on the balance of probabilities. He added that it is well settled that road users owe one another a duty of care, whether they are pedestrians or motorists. The Defendant's [DW1] argument is that he did not breach his duty to the Plaintiff [PW1].

The Defendant further submitted that the Plaintiff in her evidence through her witnesses whether circumstantial or direct in nature, failed to successfully substantiate that although the Defendant had a Duty of Care to the Plaintiff, the Defendant breached that duty and there being no breach, the Defendant is not liable for the injuries sustained by the Plaintiff.

[16] On the contrary, the Defendant's Counsel submitted that the evidence substantiates that the Plaintiff was solely liable for the injuries she has sustained.

[17] The law of negligence requires the proof of the undermentioned four (4) factors to impose liability in the Tort of Negligence on the Defendant. The same was observed in the case of *Alani V. Shankar* [2011] FJHC 499; Action Number HBC 80 of 2007 -

- i. The duty of care owed by the Defendant to the Plaintiff.
- ii. The breach of that duty of care by the Defendant in the sense that he failed to measure up to the standard set by law.
- iii. A casual connection between the Defendant's careless conduct and the damage complained of; and
- iv. That the particular damage to the Plaintiff is not so unforeseeable or too remote.

The same was observed in the case of *Alani v Shankar [2011]*

- [18] Further, in the case of *Alani v Shankar FJHC 499 Civil Action No. HBC 80 of 2007*, the Court observed "that the burden entirely lay on the Plaintiff to establish that the Defendant had been negligent or careless in his conduct in bringing about the situation of causing injuries, loss and damage to the Plaintiff. If the evidence of the Plaintiff does not show the presence of such negligent or careless conduct on the part of the Defendant, then the case for the Plaintiff fails. See *Bonnington Castings Ltd v Wardlaw [1956] A.C.613; Jones v Great Western Railway. H.L. [1930] 47 TLR 39.*"
- [19] The Defendant also submitted that although the maxim of *res ipsa loquitur* has not been pleaded but if the Plaintiff is subtly attempting to invoke the same then he submitted that the maxim does not apply to the current case. He cited the case of *Fiji Electricity Authority v Kumar FJHC 480; Civil Appeal 13 of 2018* - "...there has been a tendency to elevate *res ipsa loquitur* to the status of a principle of substantive law or at least a doctrine.....a common sense approach...it means that a Claimant *prima facie* establishes Negligence where (i) it is not possible for him to prove precisely what was the relevant act or omission...leading to the accident, but (ii) on the evidence as it stands... it is more likely... effective cause of the accident was some act or omission of the Defendant or of someone for whom the Defendant is responsible, which act or omission constitutes a failure to take proper care for the Claimant's safety."
- [20] It is not in dispute that the Defendant was at all material times the registered owner and the driver of the said motor vehicle Registration No. II 814. However, the Private Investigator's [DW2] report in summary states that the registered owners of the vehicle No. II 814 are Aseri Vakatawa [DW1] and his wife Mereadini Wasigitoni. The wife, Mereadini Wasigitoni has not been made a party to the proceedings.
- [21] Further, there was a collision between the vehicle driver, by the Defendant and the Plaintiff on 13<sup>th</sup> April 2017 at Koronivia Junction on Kings Road. These facts are also agreed upon within the parties' Pre-Trial Conference Minutes filed herein.
- [22] The burden of proof is squarely on the Plaintiff to prove on the preponderance of evidence that the accident in question occurred and the resultant injuries to the Plaintiff [PW1] was caused by the negligence of the Defendant and the Defendant's failure to act in the manner as particularised in the "particulars of negligence" of the Defendant (a-j) in the Plaintiff's Statement of Claim dated 19<sup>th</sup> February 2018.

- [23] It is well settled that road users owe one another a duty of care whether they are pedestrians or motorists. The Defendant [DW1] does not dispute this, however, the Defendant's argument is that he did not breach his duty to the Plaintiff [PW1].
- [24] The Plaintiff's [PW1] evidence before this Court substantiates that the Defendant's [DW1] duty of care owed to the Plaintiff was breached. The Defendant should have been more careful with his driving and kept a lookout especially when the Defendant [DW1] in his cross examination confirms that he actually saw the Plaintiff [PW1] when she came between the two cars. Further, in re-examination, the Defendant confirmed that he would not have expected pedestrians or students to cross close to the junction at that time where there was no crossing.
- [25] The Plaintiff, Shiwaani Prakash [PW1] stated in her evidence that she saw the car 10-15 metres away coming from Nausori. She was crossing the road and was one step away from the footpath when she was bumped by a car coming from Nausori. She was bumped on the left side and flew in the air, landed on the car windscreen and fell off onto the road.
- She confirmed in her evidence that there was no pedestrian crossing at the scene of the accident. The driver did not give any warning sign. She was seriously injured and in pain, subsequently admitted at the hospital.
- In cross examination, the Plaintiff [PW1] admitted that Koronivia Road junction was a dangerous place for her to cross and that she had put herself at risk.
- [26] The Plaintiff's witness, Dr. Enoch Kolinibaravi [PW2] testified that the Plaintiff [PW1] was examined by him on 14<sup>th</sup> of April 2017. He reported that the injuries the Plaintiff [PW1] received was an ***Open Comminuted Fracture of her left Distal Third Humerus with associated Medial Epicondyle Fracture and Radial Nerve Neuropraxia*** sustained from a motor vehicle crash. The Plaintiff was admitted to the hospital on 14<sup>th</sup> April 2017 and was treated accordingly. She was discharged on 27<sup>th</sup> of April 2017.
- [27] The Defendant [DW1] in his evidence told the court that the area was dark, since there was no street lights and it was dusty since the construction work was on ongoing. There were traffic from Suva to Nausori. Lights were opposing his eyes. The Plaintiff [PW1] suddenly came through between two cars to cross to the other side of the road.
- [28] The Defendant, Aseri Vakatawa [DW1] in his evidence in cross examination stated that he had been driving on that road for a number of years and was well aware that pedestrians and students suddenly cross onto the road. He further agreed in cross examination that if he drove his vehicle at a lower speed as a reasonable and prudent driver would have done so, then this accident might not have happened. He added, that he saw the Plaintiff [PW1] when she was in front of his vehicle and when she had crossed the road between two cars. However, the Defendant stated that he did not see the Plaintiff crossing from the other side of the road. The Defendant [DW1] could not make out whether it was the Defendant's or the Plaintiff's fault.
- [29] The Private Investigator, Mr Anirudh Kumar [DW2] gave evidence and referred to his investigation report tendered into evidence as [Exhibit D2] and confirmed that the point of impact was towards the middle of the lane with a 16.4 metres brake mark. He could only establish that the accident

occurred at the middle of the lane. He could not throw any light as to the speed the Defendant was traveling at rather considered that the accident was forceful since the windscreen of the Defendant's car was smashed.

- [30] I have thoroughly perused the investigation report tendered into evidence by the Private Investigator, Anirudh Kumar [DW2]. He was not the eye witness to the scene of the accident. However, he carried out an investigation to ascertain what transpired and compiled a report accordingly.
- [31] The report reveals that the Private Investigator [DW2] had verbally interviewed the Plaintiff [PW1], the Defendant [DW1], Ravinesh Ram and David Lal accordingly.
- [32] The Plaintiff [PW1] mentioned that she crossed to the other side of the road at Koronivia road junction, and one step away to reach the footpath when the vehicle bumped her. She was thrown onto the bonnet on the Defendant's [DW1's] vehicle and then fell onto the road.
- [33] The Defendant Aseri Vakatawa [DW1] stated that he was driving from Nausori to Suva near the Koronivia road junction. Suddenly, Ms. Shiwaani Prakash [PW1] crossed from his right where a busy traffic was held up. She came in between two vehicles to cross to the left side of the road when the Defendant [DW1] accidentally bumped her.
- [34] The Investigating Police Officer Samuela was also verbally spoken to by the Private Investigator, Anirudh Kumar [DW2]. He said that he attended the scene of the accident and drew a sketch plan not to scale which was tendered into evidence as (Exhibit D2). The Defendant Driver [DW1] only pointed out to the point of impact. According to the Sketch Plan tendered into evidence, the Defendant's [DW1's] vehicle stopped 16.4 meters away from the point of impact at an angle on the side of the footpath towards the Koronivia Road Junction, facing towards Suva.
- [35] It can be ascertained from the Private Investigator's Report [DW2] that Ravinesh Ram and David Lal were the eye witnesses to the scene of the accident. These two came with the Plaintiff [PW1] in the same bus and got off at the Koronivia Road junction at 7.30pm.
- [36] According to Private Investigator's, Anirudh Kumar [DW2's] report, Ravinesh Ram saw the accident and he had already crossed the road, but the Plaintiff [PW1] had crossed the road and was about to step the footpath when the Plaintiff [PW1] was bumped by the car coming from Nausori.

David Lal told the Private Investigator [DW2] that he saw the accident and that he had already crossed the road with Ravinesh but the Plaintiff [PW1] who had crossed the road and about to step the end of the road, when she was bumped by the speeding car coming from Nausori side.

- [37] In summary, the Investigating Officer [DW2] in his report stated the Plaintiff [PW1] said that the point of impact was on the side of the road just a step away and before PW1 could reach the other end of the road. However, according to the driver [DW1], the collision occurred while the victim was in front of his vehicle in the middle of the road. He reported that during the time of the accident the road was under construction, there was no pedestrian crossing and the time of the accident was dark at 7.30pm.



[38] According to the Private Investigator's [DW2] report, Ravinesh Ram and David Lal, I reiterate that they were eye witnesses to the scene of the accident.

However, they were not called or rather subpoenaed by the Plaintiff [PW1] to give evidence in Court for some reason or the other best known to the Plaintiff. Their evidence would have been relevant to this particular case in any event and would have further assisted this Court.

[39] I also refer to the Sketch Plan tendered into evidence as Exhibit D2 which according to the Defendant [DW1] confirms that the accident on the day in question occurred in the middle of the Defendant's [DW1] lane and his vehicle came to a halt on the left edge of the footpath on Koronivia side of the road facing Suva. However, according to the Plaintiff [PW1], she was one step away from the footpath when she was hit by the car.

[40] The Sketch Plan also reveals that Aseri Vakatawa's [DW1] vehicle veered off towards an angle to his left near the footpath and stopped 16.4 metres after the accident and/or point of impact. The Defendant, Aseri Vakatawa [DW1] did not offer any explanation to the Court and/or substantiate any evidence as to how come his vehicle had veered off after the accident and/or impact and came to a halt after 16.4 metres.

[41] If the Defendant was driving at a moderate and/or reasonable speed, then as a prudent driver he would have been able to stop his vehicle and avoid the accident.

[42] Even if the Court accepts the point of impact as shown on the Sketch Plan, the Defendant [DW1] has to explain the 16.4 metre brake marks and/or how come his vehicle came to a halt at that distance of 16.4 metres from the point of impact. In absence of the Defendant's [DW1] explanation, the only conclusion that can be drawn is his negligence on the day in question.

[43] However, I need to make a determination and a finding on the impending issues on the evidence and exhibits tendered before this Court.

[44] I have to disregard the Private Investigator's report in part wherein he recorded what Ravinesh Ram and David Lal told the Private Investigator since these two were not subpoenaed to Court to give evidence in this case. Further, the Defence would not have an opportunity to challenge whatever they told the Private Investigator [DW2] as recorded in his report.

[45] Bearing in mind the totality of the evidence of the witnesses together with the exhibits tendered into evidence hereinabove in my Judgment establishes that the Defendant, Aseri Vakatawa [DW1] drove his vehicle registration number II 814 negligently bumping the Plaintiff [PW1] who was crossing the road at the Koronivia Road junction on 13<sup>th</sup> April 2017 at 7.30pm due to which the Plaintiff Shiwaani Prakash [PW1] suffered personal injuries as per the medical reports at Annexures 2, 3 and 4 within the Plaintiff's Bundle of Documents tendered into evidence as "Exhibit P2".

[46] The evidence hereinabove in my Judgment establishes that the Defendant, Aseri Vakatawa [DW1] drove his vehicle registration number II 814 on 13<sup>th</sup> April 2017 negligently. I am satisfied that the Defendant, Aseri Vakatawa [DW1] -

- failed to keep any or any proper lookout or to have any or any sufficient regard for the Plaintiff [PW1] who was crossing the road at the Koronivia Junction;
- drove at an excessive speed in all the circumstances bearing in mind the point of impact was in the middle lane of the Defendant [DW1], after the impact the Defendant's [DW1] vehicle screen was smashed, there was a 16.4 metre drag mark when the Defendant's vehicle came to a halt as per the sketch plan tendered into evidence as "Exhibit D2". Further, there is no explanation given to the Court by the Defendant [DW1] as to why the Defendant's [DW1] vehicle ended up there as per the sketch plan and could only come to a halt after 16.4 metre drag marks. The Defendant [DW1] confirmed in his evidence that he was driving at a speed of 60KMPH at the scene of the accident;
- failed to see the Plaintiff, Shiwaani Prakash [PW1] in sufficient time or at all to avoid the said accident. In cross examination, the Defendant, Aseri Vakatawa [DW1] confirmed to Court that he saw the Plaintiff [PW1] when she came between two cars and was 10 metres away from him. However, he reconfirmed that he did not see the Plaintiff [PW1] as he was fully concentrating ahead.

[47] I find that the Defendant [DW1], Aseri Vakatawa [DW1] was negligent and that his negligence caused the accident on 13<sup>th</sup> April 2017 accordingly.

[48] Therefore, this entitles the Plaintiff, Shiwaani Prakash [PW1] to recover damages from the Defendant, Aseri Vakatawa [DW1] accordingly.

#### Contributory Negligence

[49] The Defence in its closing written submissions submitted that the accident and the injuries caused to the Plaintiff [PW1] was solely or alternatively contributed to by the negligence of the Plaintiff [PW1] where the Plaintiff [PW1]:-

- a. Failed to keep any or proper lookout or to have any or sufficient regard for her own safety when crossing the road;
- b. Failed to pay any sufficient heed of any oncoming vehicle;
- c. Exposed herself to risks despite knowing the probability of catastrophic results;
- d. Emerged into the vehicle's path without first ascertaining or ensuring that it was safe to cross;
- e. Failed to give adequate or any warning at all of her approach;
- f. Negligently crossed close to a junction where there was no pedestrian crossing; and
- g. Crossed after seeing two other persons crossing and assuming it was safe to do so.

[50] The Defence further submitted that in the event this honourable court finds the Defendant [DW1] liable to the Plaintiff, the Plaintiff is no less than 50% liable for her own injuries.

[51] The accident occurred on the middle of the road. The defendant [DW1] further said the front middle part of the car bumped the left side of the Plaintiff. The Defendant [DW1] added that he

never expected anyone to cross between two cars and would not expect pedestrians or students to cross close to the Koronivia road junction at that time where there was no pedestrian crossing.

[52] However, upon cross examination, the Defendant [DW1] said he saw the Plaintiff [PW1] when she was in front of his vehicle and when she had crossed between two cars. PW1 was 10-15 meters away when the Defendant [DW1] first saw her. It took 10 seconds to collide with Plaintiff [PW1].

[53] The Defendant [DW1] was aware that pedestrians and students suddenly crossed onto the road since he has been driving on that road for a number of years before the accident occurred.

[54] The Defendant [DW1] admitted that if he had driven his vehicle a bit slower as a reasonable and prudent driver, then this accident might not have happened. The defendant [DW] said he was driving in low beam and agreed in Re-examination that the statements were given to the Police for Police investigations, the same were also furnished to the Private Investigator [DW2], Anirudh Kumar.

[55] The Defendant cited the following case authorities-

- i. *Reddy v Saulekaleka FJHC 312; HBC 43.2007* wherein the Judge found the evidence of the police officer evasive and cynical.
- ii. *Singh v Riyaz FJHC 23; HBC 47.2007* the Court could not accept the Plaintiff's evidence.
- iii. *Sakur v Tabilai FJHC 159; HBC 207.2012* wherein the Court found no proof of evidence on the balance of probability.
- iv. *Fiji Electricity Authority v Kumar FJHC 480; Civil Appeal 13 of 2018* wherein the Court observed that in the past there has been a tendency to elevate *res ipsa loquitur* to the status of a principle of substantive law or at least a doctrine.

However, the Court notes that the Plaintiff did not plead the maxim of *res ipsa loquitur* in his Statement of Claim and therefore has no bearing on the current case.

- v. *Chand v Waiqele Sawmills Ltd FJHC 505; HBC 71.2014* wherein the Court summarised the principles on contributory negligence.

[56] However, the Plaintiff in its closing written submissions contended otherwise that liability was a non-issue nor is contributory negligence as it was not pursued fully nor relevant questions put to the Plaintiff [PW1] specifically on the issue of contributory negligence. He quoted the rule in *Brown -v- Dunn (1893) 6.R.67 (HL)*. He added that it was obvious that in the current case the Defendant driver [DW1] drove too fast and failed to keep a proper lookout. Had the Defendant driver been driving at a low speed and kept an eye out on the centre lane, this accident would not have happened.

It is now an afterthought of the Defence to heap contributory negligence on the Plaintiff when two other people walking and crossing the road with the Plaintiff did not get run over. Crossing or no pedestrian crossing, it is incumbent on vehicle drivers to keep a proper lookout and drive at a reasonable speed to stop in time to avoid an accident.

The Defendant [DW1] travelled on that road everyday and knew well that people always crossed at the Koronivia Junction. The Defendant [DW1] was rushing to get home after work for Easter Weekend and admitted he was not keeping a proper lookout as a prudent and reasonable driver would do in the circumstances. Contributory negligence would only suffice if someone ran onto the road.

[57] In support of the Plaintiff's case, the counsel representing cited the following case authorities-

- i. **Nasese Bus Co. Ltd v Chand [2013] FJCA 9, Civil Appeal ABU 40 of 2011** at paragraphs 23 to 24 inclusive. "...The Court emphasised that it was not a defence to an allegation of negligence in the form of driving too fast..." "The learned Judge was entitled to infer that the driver was not driving carefully if he was satisfied on the balance of probabilities..."
- ii. **Shankar v Fortech Construction Ltd (2005) FJHC 238. HBC 486 of 2003.** The Court stated "...contributory negligence would only suffice if someone ran onto the road..."
- iii. **Fardon v Harcourt – Rivington (1932) 146 LT 391.** The Court stated "...to take no precaution is negligence..."

[58] The Plaintiff [PW1] confirmed in her evidence that she saw the Defendant's [DW1] car 10 - 15 meters away from where she crossed the road following two others. There was no pedestrian crossing. The Defendant [DW1] did not give any warning sign. She was bumped on her left side.

[59] In cross examination, the Plaintiff [PW1] agreed that Koronivia Road junction was a dangerous place from where she crossed and that it was dangerous to stand in the middle of the road. She also agreed that she put herself at risk.

[60] The Private Investigator Anirudh Kumar [DW2] gave evidence. The Private Investigator's [DW2's] report dated 15<sup>th</sup> May 2018 with the inclusion of the sketch plan of the scene of the accident was also tendered into evidence by consent as Exhibit D2. It will be noted that the point of impact on the sketch plan (Exhibit D2) was pointed out to the Investigating Police Officer, Samuela only by the Defendant [DW1] and not by the Plaintiff [PW1].

[61] 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."*

[62] 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).

[63] It is not in dispute that there was no pedestrian or zebra crossing at the scene of the accident at the Koronivia Road junction. Therefore, crossing the road itself cannot be a contributory factor. If I may add, crossing or no pedestrian crossing, it is incumbent on the vehicle drivers to keep a proper lookout and drive at a reasonable speed to stop in time to avoid any accident.

[64] The Plaintiff, Shiwaani Prakash [PW1] stated in her evidence that she first saw the vehicle about 10-15 metres away.

[65] Considering the width of the road as per the Sketch Plan tendered into evidence by consent as Exhibit D2, the Plaintiff [PW1] had sufficient time to cross the road, if the Defendant, Aseri Vakatawa [DW1] was driving his vehicle at a moderate and/or a reasonable speed.

The Defendant's [DW1] admission of the speed of 60KMPH cannot be considered as a moderate and/or a reasonable speed in light of the evidence of the Private Investigating Officer [DW2] that the road was under construction, area was dark and that the time of the accident was 7.30pm.

[66] Upon the perusal of the police investigation sketch plan tendered into evidence as Exhibit D2, it appears that after the Defendant [DW1] applied his brakes, lost control of his vehicle as a result, the Defendant's [DW1's] car veered off towards his left edge of the Koronivia Road near the footpath, bumping the Plaintiff [PW1] on the verge of the footpath., from

[67] Considering the length of the brake marks and/or when the Defendant's [DW1's] car came to a halt at an angle towards his left after 16.4 metres from the point of impact. The conclusion that can obviously be drawn is that the Defendant [DW1] was driving his vehicle at an excessive speed and hence, lost control of his said vehicle on the day of the accident.

[68] It will be noted that there is no explanation given to Court by the Defendant [DW1] as to how come his vehicle veered off towards his left at an angle leaving behind 16.4 metres of brake marks and/or that his vehicle came to a halt after 16.4 metres from the point of the impact.

[69] The sketch plan was tendered into evidence by consent as Exhibit D2. However, this piece of evidence in terms of the Defendant's [DW1] vehicle veering off and leaving brake marks and/or came to a halt after 16.4 metres went unchallenged.

[70] For this reason, this Court cannot disregard the police sketch plan as material piece of evidence tendered by consent as Exhibit D2.

[71] For the Defendant [DW1] to succeed in the defence of contributory negligence, the Defendant [DW1] must prove that the Plaintiff [PW1] did not in her own interest take any reasonable care of herself and hence contributed, by her own want of care, to her own injury. The Defendant [DW1]

should have taken precaution and should have been more careful whilst driving when there was no pedestrian crossing at the scene of the accident. The Plaintiff was well aware that the road stays busy with lots of pedestrians. The Defendant [DW1] should have driven his vehicle at a reasonable speed so that he was in a position to immediately stop his vehicle and avoid any such accidents.

[72] I find that the evidence hereinabove does not establish contributory negligence on the part of the Plaintiff [PW1].

#### Quantum of Damages

[73] The Plaintiff claims for the relief under various heads within its Statement of Claim-

#### PAIN and SUFFERING

[74] The Plaintiff [PW1] had undergone **pain and suffering**. She was conveyed to the Nausori Health Centre and treated. Subsequently, she was rushed by an ambulance to the CWM Hospital. She was admitted at the CWM hospital for a period of two (2) weeks [14<sup>th</sup> April 2017 - 27<sup>th</sup> April 2017]. Upon her discharge from the hospital on 27<sup>th</sup> April 2017, she was confined to bed for a period of six (6) months.

[75] The Plaintiff [PW1] stated in her Evidence in Chief that after the accident she was in pain and could not move her body. She thought that she would die. She was conveyed to the Nausori Health Centre and subsequently rushed to the CWM Hospital in an ambulance. She said that she suffered an open fracture on her left arm, cuts and bruises on her leg.

She was given the treatment. Doctors inserted metal plate and screws, which is still intact. Plaintiff [PW1] showed to Court the injury on her left arm with a half moon or crescent shape scar. She remained in plaster for three (3) months and the injuries received by her were serious. The left injured arm is her dominant hand. Her mother remained in hospital beside her bed during the period of her admission at the CWM Hospital for two (2) weeks. Upon her discharge, she was in bed at home for a period of six (6) months.

[76] In cross examination, the Plaintiff [PW1] told Court that she had put herself at risk whilst crossing the road. She was hit on her left leg, came onto the windscreen and fell off. She could not recall thereafter what happened. The Defendant [DW1] visited her and told her what happened.

[77] She was given a paper to write her name, date of the accident and mum's name. When asked that she writes pretty well? Her answer was "like class 1". She said she can do gardening and some coarse chores. She was employed by Courts Fiji Limited as a Credit Clerk. The Company did not pay her any money or wages after the accident.

[78] In June, the Plaintiff [PW1] went to Doctor Buadromo for her medical.

In re-examination, the Plaintiff [PW1] told Court that she used to write better before the accident, but the writing "looks like a class 2 student, letters going in some other directions."

- [79] Dr Enoch Kolinibaravi, Orthopaedics Registrar for Consultant Orthopaedics Surgeon CWM Hospital testified that he conducted a medical examination of the Plaintiff [PW1] Shiwaani Prakash. The Doctor was referred to the Fiji Police Medical Examination Form (Exhibit 2). He stated that the Plaintiff's [PW1] left humerus/arm was broken. She had an open wound where her bone was sticking out. Her elbow was fractured. She was taken to Nausori Health Centre, then referred to CWM Hospital. Her injured areas were washed and cleaned before the plate, bolts and screws were inserted.
- [80] He was referred to his Medical Report on the Plaintiff [PW1] Shiwaani Prakash dated 27<sup>th</sup> June 2017 (Exhibit P2).
- [81] He reported that the Plaintiff's [PW1] left humerus/arm was broken and had an open wound with a bone sticking out. Her elbow was fractured. He confirmed it was not a permanent disability and the injury heals within 8 months or longer. He carried out (ORIF) meaning Open Reduction Internal Fixation Surgery and screws were inserted to hold the bones together. PW1 was admitted on 14<sup>th</sup> April 2017 and discharged on 27<sup>th</sup> April 2017. She could not do things like before. PW2 was also referred to the medical report dated 14<sup>th</sup> June 2018 prepared by Dr Buadromo. He told Court that Dr Buadromo assigned 11% Whole Permanent Impairment (WPI) to PW1's injuries. PW1 could not agree with Dr Buadromo's assessment as he was not trained or qualified like him. He confirmed there was one year gap between his medical report and Dr Buadromo's medical report and there were improvements to PW1's injuries. He added that PW1's disability was permanent in nature and her earning capacity was reduced.
- [82] His Report dated 27<sup>th</sup> June 2017 was tendered into evidence by consent as Exhibit P2 which read as follows-

**Re: Shiwaani Prakash**

"This report serves to inform you that the above mentioned person has been seen and followed at the above health facility since the 14<sup>th</sup> of April, 2017 for an open comminuted fracture of her left distal third humerus with associated medial epicondyle fracture and radial nerve neuropraxia sustained from a motor vehicle crash, a few hours before presentation.

She was admitted on the 14<sup>th</sup> of April and was treated with tetanus prophylaxis, antibiotics, multiple wound washes in operating theater before she had left humerus midshaft ORIF on the 20<sup>th</sup> of April followed by left medial epicondyle pinning 6 days later.

The above patient was discharged from the hospital on the 27<sup>th</sup> of April and is currently being followed up at our orthopedics clinic. On her last visit, it was noted that she still has wrist drops as a result of the radial nerve palsy and has since attended regular physiotherapy clinic. She is to be reviewed again on the 1<sup>st</sup> of August, 2017."

- [83] Dr Enoch Kolinibaravi was also referred to the Report dated 14<sup>th</sup> June 2018 authored by Dr Vueta Scott Buadromo, Surgical Registrar at the CWM Hospital tendered into evidence by consent as Exhibit P2.

The Report read as follows-

**Re: Shiwaani Prakash**

"The above mentioned was admitted to CWM Hospital after being involved in a motor vehicle accident on the 27<sup>th</sup> of April, 2017. She was a pedestrian crossing the road when she got hit by a car.

She sustained multiple injury, the most significant being an open fracture of the left upper limb. She underwent an operation to bring the broken bone together again and hold it in place with surgical metal ware and screws. She also had a nerve paralysis that was identified and treated.

More than (1) year after the accident and surgery she had seen much improvement. However she continues to experience pain in her left arm. Her paralysis and sensation has returned except for a small area between the first web space. Following her surgery she had been left with a large notable Thick Scar Extending about 30cm along her Left arm.

Given that she is Left hand dominant and had needed a long recovery period. She had resigned from work and lives with family using the AMA5e Guides to the evaluation of permanent disability and "The Fiji Work Care Guide. Table 16-15 impairments due to sensory deficits 5% Whole Person Impairment, for scar deformity using the TEMSKI chart 5% whole person impairment and for pain 3% whole person impairment.

Shiwaani Prakash has reached maximum medical improvement and had a whole person impairment of 11%."

- [84] The Report of Dr. Vueta Scott Buadromo concluded that by usage of the AMA5e Guide to the evaluation of permanent disability and "The Fiji Work Care Guide. Table 16-15 impairments-
- sensory deficits - 5% whole person impairment
  - for scar deformity - 5% whole person impairment; and
  - for pain - 3% whole person impairment
  - Shiwaani Prakash has reached maximum medical improvement and had a whole person impairment of 11%.
- [85] The Plaintiff referred Court to various cases authorities in his written submissions wherein it reflected the nature of the injuries suffered and the damages awarded.
- [86] The Defendant in his written submissions also quoted and submitted case authorities in support of his case.
- [87] Personal Injuries are classified as pecuniary (Economic) and non-pecuniary (Non-Economic) on the Loss being capable of assessment in terms of money, such laws would necessarily include Loss of Earnings and actual prospective (Future) in the nature of Non-Pecuniary Loss including Loss of Amenities and/or Enjoyment of Life.
- [88] There is no relationship between pain and money. Hence, the Court must award some amount arbitrarily but reasonable in nature. The Plaintiff suffered **whole person impairment of 11%**.



[89] Taking into consideration above and the principle applicable to Assessment of Damages, I assess **General Damages for Pain and Suffering** in the current circumstances and grant a sum of **\$75,000**.

[90] Further, the Plaintiff [PW1] was left with a large noticeable thick scar shaped in a half moon or crescent deformity extending about 30cm along her left arm, which Dr. Vueti Buadromo has reported to be 5% whole person impairment. Her date of birth is 20<sup>th</sup> May 1996 and is 23 years old. For this scar, **I grant a sum of \$10,000**.

### **LOSS OF EARNINGS**

[91] Dr. Buadromo in his medical report of 14<sup>th</sup> June 2018 reported that one (1) year after the accident and surgery, the Plaintiff [PW1] has been seen with much improvement. However, he said she continues to experience pain in her left arm. Her paralysis and sensation has returned except for a small area between the first web space. He added that she is left hand dominant and had needed a long recovery period. Hence, she resigned from work and lives with the family. The accident took place on 13<sup>th</sup> April 2017 and the Plaintiff [PW1] resigned from work on 16<sup>th</sup> February 2018. The Plaintiff [PW1] earned wages at a rate of \$169.58 per week. She was admitted in hospital for two (2) weeks and upon discharge remained confined to bed for a period of six months (24 weeks). Therefore, for a total period of 26 weeks, she remained unemployed with no weekly income. Bearing above in mind, **I will grant loss of earnings in terms of her wages at 26 weeks x \$169.58 per week = \$4,409.08**.

### **SPECIAL DAMAGES**

[92] The Plaintiff [PW1] claimed medical expenses amounting to \$70, a sum of \$649 for transport expenses and a sum of \$605.49 for loss of items during the accident.

[93] The total amount of special damages claimed by the Plaintiff [PW1] adds up to a total of \$1,324.49.

[94] The Plaintiff [PW1] failed to produce any receipts in order to substantiate the claim for **Special Damages**.

[95] I make reference to the case of *Narendra Kumar v Sairusi Drawe, Minister for Home Affairs and Auxillary Army Services and the AG [1990] 36 FLR 90* at page 95, Palmer J stated:

*"Notwithstanding that not a single receipt had been produced in evidence, I am satisfied from the Plaintiff's evidence that he paid those amounts."*

[96] **Therefore, I will grant a sum of \$1,324.49 in Special Damages.**

### **GRATUITOUS CARE**

[97] The Plaintiff [PW1] testified that she was taken care of by her mother and confined to bed for a period of two (2) weeks at the CWM Hospital. Subsequent to discharge, the Plaintiff [PW1] was

confined to bed for a period of 6 months (24 weeks). She now claims \$80 for a period of 6 months. It is only appropriate that bearing in mind the medical condition and the injury caused to the Plaintiff [PW1] that **I should grant \$80 per month for a period of 6 months which adds up to a total of \$480.** The above sum is granted to the Plaintiff for Gratuitous Care since the Plaintiff [PW1] does not need any further care extended to her by her mum in light of the fact that she was able to come to Court and testified as a normal person without any difficulty.

#### COSTS FOR FUTURE CARE

[98] The Plaintiff [PW1] claims for costs for future care in her Statement of Claim. However, she claims costs of future operations in the sum of \$10,000 in her submissions. There was no issue of future operation raised either in the Plaintiff's pleadings and/or in the evidence given by Dr. Enoch Kolinibaravi [PW2]. Further, even Dr. Buadromo's report and/or Dr. Kolinibaravi's reports does not mention anything with regards to this issue of costs of future operation. Therefore, this Court refuses to grant any sum under this head as sought by the Plaintiff [PW1].

#### Interest

[99] The Plaintiff has claimed interest under the *Law Reform (Miscellaneous Provision) (Death and Interest) Act 27.*

[100] In the exercise of my discretion, I award interest at 6% per annum on General Damages awarded from the date of Service of the Writ (21<sup>st</sup> March 2018) on the Defendant to the date of trial (12<sup>th</sup> March 2020) and 3% per annum from the date of the accident (13<sup>th</sup> April 2017) on Special Damages accordingly.

#### Costs

[101] This matter proceeded to hearing. It almost took one and a half (1½) days for the matter to be heard and completed. Further, parties were directed to file simultaneous written submissions which they did.

[102] In light of the above, the Plaintiff is entitled to **costs** and it is only appropriate that I grant the sum of **\$2,000** as summarily assessed costs to the Plaintiff.

#### ORDERS

[103] The total sum awarded to the Plaintiff as damages is **\$81,398.37** made up as follows:


a.	General Damages	\$85,000
b.	Interest on General Damages	\$5,100
c.	Special Damages	\$1,324.49
d.	Interest on Special Damages	\$39.73
e.	Gratuitous Care	\$480

	<b>Total</b>	<b>\$91,944.22</b>
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[104] Hence, there will be judgment for the Plaintiff against the Defendant in the sum of **\$91,944.22** together with a sum of **\$2,000** summarily assessed costs payable by the Defendants to the Plaintiff accordingly.

Dated at Suva this 27th Day of October, 2021



  
Vishwa Datt Sharma  
Judge

CC: Daniel Singh Solicitors, Suva  
Patel Sharma Lawyers, Suva