

**IN THE HIGH COURT OF FIJI AT LABASA**

**CIVIL JURISDICTION**

**CASE NUMBER:** HBC 66 of 2016

**BETWEEN:** MOHAMMED SHALIL

**PLAINTIFF**

**AND:** MANASA SALACAKAU

**1<sup>st</sup> DEFENDANT**

**AND:** NADEEM SHAH

**2<sup>nd</sup> DEFENDANT**

**AND:** FARZEEM SHAH

**3<sup>rd</sup> DEFENDANT**

**Appearances:** Mr. Ami Kohli for the Plaintiff.

Mr. Adrian Ram for the 1<sup>st</sup> Defendant.

2<sup>nd</sup> Defendant in Person.

No Appearance for the 3<sup>rd</sup> Defendant.

**Date/Place of Judgment:** Friday 11 August 2023 at Suva.

**Coram:** The Hon. Madam Justice Anjala Wati.

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**JUDGMENT**

**A. Catchwords:**

**CIVIL LAW - Motor Vehicle Accident - Negligence - Plaintiff brings a claim for compensation against the 1<sup>st</sup> defendant on the grounds that he sustained personal injuries as a result of the motor vehicle accident caused by the negligence of the 1<sup>st</sup> defendant - 1<sup>st</sup> defendant joins 2<sup>nd</sup> and 3<sup>rd</sup> defendant as parties to the cause on the basis that the accident was caused by the negligence of the 2<sup>nd</sup> defendant whom the plaintiff refused to sue although the vehicle he was travelling in**

was driven by the 2<sup>nd</sup> defendant – determination of the issue of negligence: whose negligence caused the accident in which the plaintiff claims he suffered personal injuries – if the 2<sup>nd</sup> defendant is liable, can damages be entered against him and the owner of the vehicle, the 3<sup>rd</sup> defendant, when the plaintiff has clearly expressed to the court that despite being added as 2<sup>nd</sup> and 3<sup>rd</sup> defendants, he does not wish to pursue with the claim against them and consequently calls the 2<sup>nd</sup> defendant as his witness.

**B. Legislation:**

1. Civil Evidence Act 2002: s. 17.
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**Cause**

1. The plaintiff Mohammed Shalil [*“Shalil”*] has brought this claim against the 1<sup>st</sup> defendant Manasa Salacakau [*“Manasa”*] for compensation for personal injuries that he suffered as a result of the motor vehicle accident on 29 August 2015.
2. The plaintiff was a passenger in the motor vehicle DQ215, a Nissan March, driven by his cousin Nadeem Shah [*“Nadeem”*], the 2<sup>nd</sup> defendant. The vehicle is owned by Farzeem Shah.
3. Nadeem was driving on Labasa/Bulileka Road proceeding towards Labasa Town. Manasa was driving along Labasa/Bulileka Road too but going from town to Labasa Hospital when the two vehicles collided at the Labasa Hospital junction.
4. Shalil claims that the accident happened due to the negligence of Manasa. He claims that as a result of the negligence of Manasa, he suffered personal injuries making him semi-conscious for which he was later admitted. He claims that he remained in the Labasa Hospital under the care of the surgical service and thereafter was called for follow-ups at the surgical department.
5. The plaintiff describes his injuries as follows:

*(a) Mild head injury secondary to trauma from the motor vehicle accident.*

*(b) Being accorded neuro-trauma precautions (c-collar, neuro-observations, phenytoin, trauma series x-rays and CT scan imaging).*

*(c) Enduring prolonged pain for which he was given Panadol, Ibuprofen and Morphine.*

*(d) Attending regular clinics at Labasa Hospital.*

*(e) Now suffering from post-concussion like disorientation and lack of alertness earlier in his recovery period.*

*(f) Now suffering permanent impairment computed to 6.5%.*

6. Shalil claims that as a result of the accident, Manasa was charged and convicted for Careless Driving to pay a fine of \$300 with 3 demerit points.

***Defence***

7. Manasa denies that the accident happened due to his negligence. He contends that the accident solely happened due to the negligence of Nadeem.
8. He therefore, joined Nadeem as the 2<sup>nd</sup> Defendant and the owner of the vehicle Farzeem Shah as the 3<sup>rd</sup> defendant.

***Joinder of Parties - The Controversy***

9. Mr. A. Kohli expressed concern that he did not intend to sue Nadeem and it was Mr. A. Ram who joined the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants. He argues that this has put him in a precarious position as he wishes to call Nadeem as his witness.
10. I do not find that the High Court Rules 1988 precluded Mr. A. Ram from seeking to join the driver and owner of the motor vehicle in which Shalil was travelling as defendants to the proceedings.
11. Manasa is denying that the accident happened due to his negligence. He is saying that Nadeem was totally negligent in the way he drove the vehicle causing the accident.

12. I find that Nadeem's presence before the court is necessary to ensure that all matters in dispute in this cause be effectually and completely determined. It is another matter that Mr. A. Kohli chooses to call Nadeem as his witness and does not wish to proceed against him.

**Issues**

13. The primary issue before the court is that of negligence: *whose negligence caused the accident between the two vehicles occur?*
14. If the accident occurred due to the negligence of Manasa, wholly or partly, then what is the extent of the injuries suffered by the plaintiff and what damages should be paid to him.
15. If the accident occurred due to the negligence of Nadeem, wholly or partly, should he pay any damages for the personal injuries sustained by Shalil as he does not wish to seek any damages from him?

**Evidence, Law and Analysis**

16. I will first have to deal with the question of Negligence: How did the accident happen? Like any other accident claim, Manasa and Nadeem are blaming each other for their negligence. They are asserting that the other was so wholly negligent that led to the accident.

**A. Liability**

**(i) Evidence**

17. I will first of all reflect on each driver and his witnesses' version of how the accident happened. Nadeem said that he was driving towards Labasa Town. Inside the vehicle were his wife, his 2 year old son and two cousin brothers. His wife was sitting in front. His 2 cousin brothers, one of whom was the plaintiff, were sitting at the back.

18. Just before the hospital junction, Nadeem said, he saw one vehicle made a sudden turn towards Labasa hospital and hit his vehicle. Nadeem said that he was driving slowly below 30km/hour. He may have been driving at a speed of 25 km/hour.
19. When the accident happened, Nadeem said it was dark. He said that when he first saw the vehicle and its light, the vehicle was before the junction. This vehicle which bumped him was initially on the left hand side and he did not see this vehicle giving any signal.
20. Nadeem said that there is a mark for those turning on the right. That vehicles middle bonnet hit his vehicle in the front right side. His vehicle is small so after the impact, he stopped after about 1 meter.
21. When the hit occurred, the other vehicle was moving. Nadeem said that he was driving with alertness. He said he was in the middle of his lane. He applied the brakes when he saw the vehicle turn. If he did not slow down, it would have been a serious accident.
22. When the collision happened, the vehicles were in his lane. Nadeem said that the driver of the taxi Manasa was charged for careless driving and convicted. He was sentenced to pay a fine of \$300.00 and 3 demerit points were also issued against the driver.
23. In cross examination Nadeem denied that Shalil did not take any action against him because he was related to him. He said it was Shalil's right to decide whom he wanted to sue.
24. Nadeem agreed in evidence that although it was 9pm there was ample lighting around the place. There was street light, lights from the bridge and lights from the court house. A car coming from the town would be clearly visible.
25. Nadeem said that Manasa had turned suddenly and hit him without stopping or giving any indicator. He clarified that Manasa had turned towards hospital road. Nadeem said

that he did not know that Manasa was going to turn into the hospital road. He re-confirmed that it was not him who hit Manasa but that Manasa had hit him.

26. Nadeem said that he was going straight and Manasa came and hit him all of a sudden. He hit at the driver's right hand side, headlight, bonnet and right side panel. He said that panel is the plastic bumper and the fender (part over the wheel).
27. Further in cross examination Nadeem agreed that the rough sketch plan shows that before the accident happened, there is a 5 meter brake mark by his vehicle and from the point of impact to where the taxi was, there was 4 meters tyre marks.
28. Mr. Adrian Ram put to Nadeem in cross-examination that if he was driving at 25km/hour, he could brake and stop within 1 meter and Nadeem agreed. He then disagreed that he was travelling faster than 25km/hour. Nadeem said that he was within the speed limit because if he was faster, he would have taken more than 5 meters to stop which means that 5 meters tyre mark would exceed.
29. Nadeem also agreed in cross-examination that if the taxi hit him, his vehicle would go sideways towards the hospital and that the police did not find any tyre marks of his vehicle towards hospital. He agreed that police found 4 meters tyre mark from point of impact going towards the taxi.
30. Nadeem also clearly agreed in his cross-examination that the taxi was at the point of impact and got dragged towards the hospital.
31. Nadeem said that in the Magistrates Court when the traffic case for careless driving was being heard against Manasa, he did not agree to the rough sketch plan on page 7 of the plaintiff's bundle of documents which was tendered in evidence and marked as Plaintiff's Exhibit 4A, although he had signed it. He says that the fair sketch plan is different to that of the rough sketch plan. The fair sketch plan appears on page 6 of the Plaintiff's Bundle of Documents and when tendered in evidence was marked as

Plaintiff's Exhibit 4B. Nadeem started refuting the rough sketch plan when asked in cross-examination again that if the taxi hit him, he would be dragged towards hospital.

32. Nadeem also agreed in cross-examination that if he was going straight and Manasa suddenly cut in and hit him than he would not put his brakes on. He would go straight. He agreed that he applied the brakes when he saw the vehicle turning.

33. Mr. Ram stated that the nature of damage to both the vehicles does not correlate with Nadeem's version of how the accident happened. Nadeem insisted that his version is correct.

34. Nadeem agreed that the damage that occurred to the taxi was as noted by the Land Transport Authority on 31 August 2015. The nature of damage sustained to the taxi was front bumper bar, bonnet, front grill, front upper panel, and front right side fender. Mr. Ram then put to Nadeem that if his version of the accident was correct then the taxi would have damages on its front and left fender. Nadeem responded that the middle of the taxi hit his vehicle and since middle is plastic bumper, left and right would be both damaged.

35. Mr. Ram then brought Nadeem's attention to the LTA report and said that the damage noted is on front right fender and said that if the taxi hit him, then the middle and left of the taxi would be damaged to which Nadeem responded that right fender got damaged because taxi hit his right and since middle bonnet got damaged the impact caused the damage on the right fender. Nadeem agreed in cross-examination that the taxi did not have any damages on left fender.

36. Mr. Ram questioned Nadeem whether both the plans show that the point of impact is in the middle of the road towards right side of his lane and Nadeem agreed to it.

37. Mr. Ram put to Mr. Nadeem that he knew that the taxi was there at the turning point that is why he put the brakes on and since his vehicle was travelling too far to the right,

it hit the taxi, Nadeem did not give any specific answers but became evasive by saying that he has done defensive driving course and is taught to save accidents. He also said that Mr. Ram's line of questioning indicated that the taxi was not there at all.

38. Mr. Ram also put it in cross-examination that if the taxi hit him at a speed, he as the driver would have got hurt too. Nadeem said that he got minor injuries and did not complain.
39. The next material witness in the proceedings on the issue of how the accident happened was PC 3517 Ratu Meli. He was at Labasa Police Station in Traffic Department at the time the accident happened.
40. He said he attended the accident. At the scene of the accident he saw two vehicles LT5837 and DQ215. LT5837 was facing towards hospital junction and DQ215 was facing towards court house at an angle. He took the measurement with a fixed point, FEA Post, which was on the other side of the road.
41. PC 3517 continued that he drew a rough sketch plan at the site and took both vehicles to the police station. He then made the fair sketch plan.
42. He said he drew the rough sketch plan first. PC 3517 continued that the positioning of the vehicles is on the fair sketch plan. The Officer said that the fair sketch plan shows point of impact at point C. He testified that it is on DQ215 vehicle's side of the road where the point of impact is. Prior to the point of impact there is 5 meters tyre mark of vehicle DQ215.
43. The police officer testified that there is also tyre mark at an angle of 3.8 meters which belongs to DQ215. After the point of impact, DQ215 travelled 4.6 meters before it came to a stop. The 4.6 is measured from the 5 meters tyre mark before the impact. To stop after 4.6 meters, it is his view that the vehicle would not be travelling too fast.



44. At the junction of the hospital is a center median and the taxi was at the center median. He was to turn only if the road ahead was clear.
45. The police officer stated that in his investigation on the first sketch, after point of impact, DQ215 swerved to its left. Damage to the taxi was on its right side. So the accident may have happened when the taxi was turning. From the positioning of the vehicle it does not look like the taxi was on the median line before the impact. It was more towards the right side of the road. DQ215 had the right of way. No matter how fast DQ215 was, the taxi should have stopped. If the road was clear then the taxi should have turned.
46. In cross-examination, the police officer testified that he made the rough sketch plan at the scene of the accident. He was present there. He looked at the accident scene and did the markings. Both the drivers had signed the plan.
47. The police officer agreed in cross-examination that he altered the fair sketch plan. He said that he did not refer the fair sketch plan to the two drivers.
48. When Mr. Ram asked him whether he altered the document without the consent of the two parties the police officer replied that there is no difference in the two documents. Mr. Ram then referred him to the rough sketch plan and pointed to the central median and asked that if the line is extrapolated towards court house one would come to the point of impact, the police officer agreed.
49. The police officer agreed that in the fair sketch plan, the point of impact was shown on a different place. He was asked to justify how he moved the point of impact, the police officer said that he measured the accident on the right.
50. The police officer further stated in cross-examination that on the rough sketch plan the 4 meters is the distance between the point of impact to the right of the taxi and that 4 meters distance is not the tyre mark. It is the point of impact to the right of the taxi.

51. The police officer clarified that at the time of the accident the taxi was at the point of impact. It had moved from the point of impact to where it was found and that something would have moved it.
52. The police officer also clarified that the vehicle DQ215 driven by Nadeem has to come to the point of impact for the accident to happen and if he does that he is at the extreme right of his lane. There is space there on the left of the taxi.
53. He reconfirmed that the vehicle DQ215 must have been at the point of impact and if DQ215 hits the taxi, the taxi will move in the manner as shown in the rough sketch plan.
54. The police officer stated that he saw the right of the taxi damaged. He also said that he saw the report by the LTA officer. Mr. Ram then questioned that if the taxi came in the path of DQ215 then the taxi's front and left hand side would be damaged. The police officer said "*I do not know that*".
55. Mr. Ram then asked whether DQ215 was on the extreme left of his lane, the police officer said that he was in the middle.
56. When asked whether DQ215 was on its extreme right to come to the point of impact the police officer answered that DQ215 was in his lane.
57. Mr. Ram then put to the police officer that if DQ215 came to the point of impact as agreed by the police officer and if the point of impact is on the extreme right of Nadeem's lane then DQ215 must have travelled to extreme right to get to the point of impact, the police officer then changed his answer and said that the taxi went to the point of impact.
58. Mr. Ram questioned why there was tyre marks of DQ215 if he was not speeding and if he slowed down to a point of stop, the police officer stated that the taxi had gone past

the marking. It did a right turn and hit the vehicle DQ215. If DQ215 applied the brake then there would be tyre marks going towards the town.

59. Mr. Ram asked the police officer where the taxi was when the impact happened, the police officer said that he was on the edge of the central median towards the center and that's when DQ215 saw the taxi and applied. He said that 5 meters mark is not a long distance to apply the brake and come to a stop.

60. Mr. Ram then asked the police officer whether the driver of DQ215 should have gone left to avoid the accident, the police officer said that DQ215 was in his lane. The police officer's explanation caused Mr. Ram to question whether he has a driver's license and he said he did not have one. Mr. Ram then reiterated that DQ215 should have gone to the left to avoid the accident, the police officer said that he does not have any answer.

61. Mr. Ram put to the police officer that he changed the point of impact in the fair sketch plan to suit his story, the witness agreed he did that. When asked why, he said to show accuracy of road, linings and markings.

62. The police officer was then asked why the vehicle DQ215 did not move sideways if the taxi had hit him, the answer was that the right side of two vehicles had collided.

63. Mr. Ram asked the police officer whose statement was taken first and the police officer said that Nadeem's statement was taken first and that at the site he was not confident that it was Manasa's fault but Manasa's statement was later taken on the instructions of his supervisors. He said he does not know the justification for that.

64. Manasa also gave his version of how the accident happened. In his evidence in chief, he said that he was a police officer before he started driving the taxi.

65. He said that on the day in question, he was driving taxi LT5837. He was travelling from town to FSC side. He approached the hospital junction and saw the vehicle DQ215

coming from mill side towards town at a high speed. He stopped in front of the central median marking towards his side of the road to allow the vehicle to go past. He then heard the sound of the tyres as it approached his vehicle. That vehicle bumped and collided on the right hand side of his vehicle.

66. He said that he had parked in front of the center median. His vehicle was little bit in an angle towards hospital road. There were sufficient lights in the area to have a look of what was going on. There were street lights on both sides of the road. The road was visible from 100 meters. He said he wanted to go to the hospital road.
67. When he stopped, he indicated that he wanted to go to the hospital road. DQ215 came straight and collided with his vehicle. Both vehicles came to a stop and his vehicle was in the position shown in the rough sketch plan.
68. Manasa says that the rough sketch plan correctly shows the point of impact. The fair sketch plan showing point C as point of impact is not correct. Manasa clarified that due to the force of impact by DQ215, his vehicle moved to face towards the hospital as shown in the rough sketch plan. DQ215 had hit him and moved his vehicle.
69. He testified that his taxi's front panel and right fender was damaged. He said he was called in October to the police station regarding his statement.
70. In cross-examination Manasa testified that he was stationary when the other vehicle came in at a high speed and hit him. It was entirely the fault of the other vehicle and not him due to which the accident occurred.
71. Mr. Kohli asked Manasa why he paid \$2,300.00 to the driver of DQ215 then he replied that he was taken to Small Claims Tribunal where based on the traffic case the Referee ordered him to pay that amount. He respected the decision and moved on so did not appeal. Manasa testified that the Referee had said that he cannot do much and that the Referee said he felt sorry for Manasa.

72. Manasa was asked whether it is his version that the driver of DQ215 had lost control of the motor vehicle. Manasa responded "yes". He was then confronted on the basis he says that the driver of DQ215 lost control, Manasa said that there was ample space on left to avoid the collision and DQ215 did not know what to do and that is what happens to a driver when he loses control.
73. Manasa was asked on which lane the driver of DQ215 was, he said that the driver of DQ215 was on the right side of his lane. DQ215 then encroached on Manasa's lane. Manasa said that DQ215 had come out of his lane about 6 inches and although he did not tell about this 6 inches exactly to the police because he was not asked, he did say to the police that DQ215 came to his side of the lane and hit him and that was sufficient.
74. He again clarified that he was in front of the center median line so that it is easier to turn to the hospital road. He had stopped there waiting for other vehicles to go past especially DQ215. DQ215 did not go past but came and hit the taxi.
75. He clarified that he could not stop at the center median lane as it is behind the junction and that the rough sketch plan is a correct reflection on where the center median is. He continued that the drawing on rough sketch plan is correct. Manasa refuted the fair sketch plan as correct and stated that the rough sketch plan is more accurate than the fair sketch plan.
76. Mr. Kohli asked Manasa whether the fair sketch plan has the center median aligning with the hospital road specifically the front of the center median line, Manasa said that the fair sketch plan shows the front of the center median line too far inside. It should be further behind.
77. Mr. Kohli asked if one has to travel to Labasa Hospital, does he have to stop at center median, Manasa Salacakau said that one has to stop a little bit in front of the center median. When asked why he did not stop where he was supposed to stop, Manasa

answered that he stopped directly opposite hospital road. The other vehicle DQ215 was still at a distance approaching.

78. Mr. Kohli questioned whether Manasa knew where vehicle DQ215 was going, Manasa said wherever it was going, he had to stop and let him go but he presumed by his speed that he was going to town. He said he did not proceed further after stopping in front of the center median as he had already made a decision to stop.
79. When asked why his vehicle was facing towards Labasa Hospital, Manasa Salacakau answered that it was due to the impact. He refuted that his vehicle was moving when DQ215 collided with him. He agreed that his vehicle was in an angle when he was hit in front.
80. Mr. Kohli put to Manasa that after he hit DQ215, it moved towards left hand side and started facing towards court house. Manasa responded by saying that DQ 215 was facing towards town side after impact.
81. Mr. Kohli then said that after the impact, DQ215 will naturally move left and Manasa said both of their vehicles came to a stop.
82. Mr. Kohli asked Manasa which one of the plans was correct and Manasa responded that the rough sketch plan was correct and not the fair sketch plan which shows that DQ215 has moved left after the impact. Manasa said that DQ215 did not swerve either before or after the accident. When questioned that the rough sketch plan also shows tyre mark, Manasa stated that the 4 meters tyre mark after the impact is at slight angle because DQ215 is a small vehicle and due to the impact, the tyre mark shows that angle.
83. Manasa said that there was enough space at left for DQ215 to avoid the collision and when asked that he too could have stopped at center median to avoid the collision, Manasa responded that where he had stopped there was enough room for DQ215 to go past.

84. Mr. Manasa was asked where he was when he first saw DQ215 he said he was a few meters behind before he came to a stop. He denied that he suddenly turned to the junction. He refuted he ever turned to the hospital road. He refuted that the accident was due to his fault.
85. Manasa was re-called to give evidence after the trial transcript of the traffic case in which he gave evidence was tendered in court.
86. I will reflect on Manasa's upon being re-called. In evidence in chief, he stated what he meant when he said he stopped near the hospital junction at a slight 90 degrees angle. Manasa clarified that slight 90 degrees meant that it would be 30 degrees to 40 degrees in his lane. He had not moved from his lane.
87. In cross-examination Mr. Kohli almost repeated what I have summarized earlier with emphasis on why he told the court that he had stopped at a 90 degrees angle. Manasa kept repeating that he said slight 90 degrees angle which meant he was between 30 degrees to 40 degrees.
88. Another crucial witness for the 1<sup>st</sup> defendant was Josua Dimuri, a Senior Vehicle Examiner from Land Transport Authority. In his evidence in chief he stated that as part of his duties, he was instructed to inspect vehicle LT5837. He therefore did a report noting the damage caused to the taxi. His report was tendered as Plaintiff's Exhibit 7.
89. Josua Dimuri clarified that there was no damage on the left side of the taxi. Since the damage occurred on the right side, it indicates that the accident happened on the right side.
90. In cross-examination, Joshua Dimuri clarified that the taxi sustained damages on the right hand side. Bumper was also damaged. Right side bonnet was damaged. He said

he had taken pictures of the vehicle but later deleted it as it is the practice to reproduce findings in writing only.

91. In his re-examination he clarified that he may have done over 1000 reports in his position as Vehicle Examiner and he does not attach photos to these kind of reports.
92. I have so far reflected on the material evidence on the question of liability as that is the first aspect that needs to be determined. I will now determine the issue of negligence.

**(ii) Negligence: Who Caused the Accident?**

93. On the question of liability I will start off with the conviction of Manasa for careless driving. S.17 of the Civil Evidence Act 2002 states:

*“17(1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in Fiji or elsewhere is, subject to subsection (3), admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that the person committed the offence, whether the person was so convicted upon a plea of guilty or otherwise and whether or not the person is a party to the civil proceedings.*

*(2) No conviction other than a subsisting one is admissible in evidence by virtue of this section.*

*(3) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in Fiji -*

*(a) the person is taken to have committed that offence unless the contrary is proved; and*

*(b) without affecting the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person was convicted, are admissible in evidence for that purpose.*



- (4) *Nothing in this section affects the operation of section 19 of this Act or any other written law whereby a conviction or a finding of fact in any criminal proceedings is for the purposes of any other proceedings made conclusive evidence of any fact.*
- (5) *If in any civil proceedings the contents of any document are admissible in evidence by virtue of subsection (3), a copy of that document or of the material part of it, purporting to be certified or otherwise authenticated by or on behalf of the court or authority having custody of that document, is admissible in evidence and must be taken to be a true copy of that document or part unless the contrary is shown."*

94. Pursuant to section 17 of the Civil Evidence Act 2002, the conviction is prima-facie evidence of Manasa being negligent in the way he drove the vehicle. I however, cannot apply that finding to my judgment. There are various reasons for it.

95. The first reason is that the Resident Magistrate, after hearing all the evidence, had incorrectly reflected on only one aspect of Manasa's evidence in 3 lines of his judgment to convict the accused. His entire findings is in this 3 lines. He said:

*"The Court finds that the action of the accused (as admitted by him) by parking at a slight 90 degree angle opposite the front of hospital road knowing that an on-coming vehicle in the opposite direction is coming is the cause of the accident".*

96. The Resident Magistrate had failed to analyse the entire evidence before him and particularly Manasa's evidence that he saw two cars travelling from the opposite end so he stopped at the white line. The first vehicle passed him. The second vehicle was travelling so fast. He heard the screeching sound of a stopping vehicle. The vehicle which made the screeching sound came and hit his taxi.

97. The court did not give any regard to Manasa's entire evidence of how fast the other vehicle was driving, the rough and fair sketch plans, the anomalies in the two plans, the point of impact, the positioning of the vehicles after the impact and the damages caused to the vehicles which would indicate how the accident happened. Manasa had also

clarified in is cross-examination evidence that when he stopped opposite the hospital junction, he was slightly at an angle.

98. I cannot allow myself to be bound by a judgment which fails to analyse all the evidence before the court to come to a finding of guilt. It would be most unfair and prejudicial to all the parties. I have heard all the evidence and I will look at all that to come to a finding on the question of negligence as opposed to what was done in the traffic case by the Resident Magistrate.

99. I will start off with the controversy surrounding the two sketch plans. The first is the rough sketch plan which Manasa accepts as proper and the second is the fair sketch plan that Nadeem accepts as proper.

100. The two sketch plans are not the same. There are so many things that are different in the fair sketch plan. The police officer who drew the rough sketch plan admitted to amending the fair sketch plan without the consent of the parties. He admitted to changing the plan to suit his version of the accident so that he can lay a charge on Manasa.

101. The specific questions and answers that I noted in the cross-examination which reflects on the amendment of the material information on the fair sketch plan is:

*“Q: Go to page 6, you would agree that you altered the plan?”*

*A: Yes.*

*Q: Did you refer it to the two drivers?”*

*A: No.*

*Q: Altering evidence without the consent of the parties?”*

*A: No difference in the two documents.*

*Q: Look at page 7. See central median. You can see the marking even at night?”*

*A: Yes, would see.*

*Q: Page 6. See the central median. See the point of impact?”*

*A: It is different.*

Q: *Justify how you moved the point of impact.*

A: *Measured the accident on the right."*

102. The purpose of a fair sketch plan is to show accuracy of the markings on the ground. The fair sketch plan would show accurate distances, accurate point of impact and accurate positioning of the vehicles, et cetera. The purpose of the fair sketch plan is not to change the crucial information in it to suit a particular party's version of how the accident happened.

103. In this case the fair sketch plan is different in showing the point of impact, it shows the positioning of the vehicle differently from the rough sketch plan and it also shows the center median at a totally different place.

104. On specific questions that the fair sketch plan was changed to suit the police officer to charge Manasa, my trial note reads as follows:

"Q: *You changed point of impact on page 6 then you were happy to charge because it suits your story?*

A: *Yes.*

Q: *Why?*

A: *Accuracy of road, lining, marking."*

105. The rough sketch plan was drawn on the accident site as and when the accident was seen. There then was no motive or pressure from anyone to make the accident look a certain way. The police officer therefore, at that time, proceeded to reflect on the rough sketch plan, matters fairly. He admitted that he did not see Manasa at fault when he visited the scene. He later changes the fair sketch plan in its material information. Although he says that he changed it only to show accuracy of road, linings and markings, that is not true. The truth is that the material information in the fair sketch plan is changed.

106. The Police Officer agreed that he was directed by his Superiors to charge Manasa. He said he does not know the justification for that. I find that the direction's from the

superiors to charge Manasa caused the Police Officer to change the fair sketch plan. The Police Officer had to change it to show Manasa as having committed the accident. That amendment therefore was made without the consent of the parties as it reflected something that was not seen or noted during the accident.

107. If Manasa was to be charged, he could not have been, given the rough sketch plan. I therefore find that the fair sketch plan cannot be relied on in evidence. The document is tainted for being tempered with for an ulterior motive. I can only express my admonishment in the way the fair sketch plan came about reflecting what was not there in the rough sketch plan.
108. Nadeem will obviously reject the rough sketch plan. It does not suit his version of how the accident happened. He signed the rough sketch plan. He need not have, if it did not correctly depict what happened on that night of the accident. He did so because the plan reflected the truth about the accident.
109. I can understand why he accepts the fair sketch plan. He did not even consent to the amendment of the plan. Manasa even did not consent to it, why should he then be bound by the same when he agreed to what was reflected in the rough sketch plan? I will therefore rely on the rough sketch plan to analyse how the accident happened. That is the initial document that came about without any undue pressure from anyone.
110. The point of impact on the rough sketch plan shows that Manasa had stopped in front of the center median line opposite the Labasa Hospital junction. It also shows that he was on the right of the center median line. The rough sketch plan depicts that DQ215 was driving on the extreme right of his lane. The point of impact is on the extreme right of the lane of DQ215 which confirms Manasa's version of how the accident happened.
111. If Manasa had hit DQ215, DQ215 would not be facing towards the town after the impact as shown in the rough sketch plan. DQ215 admittedly is a small vehicle. If Manasa

suddenly turned and hit DQ215, DQ215 would definitely be facing sideways, towards court house.

112. Further, if Manasa, as the Resident Magistrate found in the careless driving judgment was at 90 degrees angle facing the hospital junction, then he would be hit on the left side of his vehicle and not the right. If Manasa turned suddenly and hit DQ215 then the hit would be on the right hand side of DQ 215. His sudden turn would have seriously injured the driver of DQ215 and the passenger sitting behind the driver (if any). The driver did not suffer any injuries for which he had to visit the hospital. It is inconceivable that he escaped injury free when an oncoming taxi suddenly bumps him on the right hand side.
  
113. The rough sketch plan shows that Manasa's taxi is at a 90 degrees angle. I find that this is the positioning after the impact which supports Manasa's version that he was stopped opposite the junction at a slight angle and DQ215 came and bumped his vehicle. I find that it is the bump by DQ215 that moved the taxi from the slight angle to 90 degrees.
  
114. Nadeem said that he was driving when Manasa suddenly turned and hit him. His version cannot be true. If Manasa had turned suddenly, then why did Nadeem start braking from 5 meters before the junction? I find that Manasa was already in front of the center median at a slight angle and he saw DQ215 speeding. He did not turn to allow the vehicle DQ215 to pass as it was speeding. In its speed, I find that Nadeem suddenly saw a taxi in the center and he tried to slow down but since he was already driving at the extreme right and was at a speed, he came and bumped the taxi. If Nadeem was driving at 25 km/hour and he saw the taxi suddenly turn, he would be able to stop his vehicle within 2 meters. 25 km/hour is very slow driving. It will take any driver to stop within 2 meters. I cannot accept Nadeem's evidence that he was driving at 25 km/hour. He was, as Manasa says, speeding. He started applying his brakes form 5 meters because he saw the taxi suddenly which was stationed opposite

the hospital junction. Nadeem tried to stop his vehicle but he could not and he came and hit the taxi.

115. The rough sketch plan also shows tyre marks from the point of impact. There is no evidence that it is tyre marks of the taxi. It is the tyre marks of DQ215. I therefore, find that after hitting the taxi the vehicle DQ215 braked and there were tyre marks of 4 meters until where the taxi stopped. If DQ215 had slowed down as he claims there would not be 4 meters tyre marks as shown in the rough sketch plan.
116. I now turn to the damages sustained to the taxi. The damage was to the front and right side of the taxi which means that the right side of the taxi got the impact. Even the Vehicle Examiner from the Land Transport Authority clarified that.
117. If Manasa had suddenly turned his vehicle whilst DQ215 was driving in his lane, I find that he would have hit with the front and left side of the taxi and not right side. The uncontroverted fact that the taxi sustained damages on the front and right side of the taxi indicates that Manasa's version of the accident is correct. He was standing on his side of the lane close to the right side of the center median when the driver of DQ215 came and hit him causing damages to the right side of his taxi.
118. Nadeem kept emphasizing on his defensive driving ability to save accidents. The question then that bothers my mind is that when he saw the taxi suddenly turning then he should have moved towards his left to avoid the accident. He did not because Manasa did not turn suddenly. He was stationed to allow DQ215 to pass.
119. In any event why was he driving so close to the right side of his lane? It is expected that anyone who is coming from town side and is wanting to turn to the hospital junction, will come to the right side of his lane to be able to turn easily. One cannot turn swiftly and easily by being on the extreme left side. Nadeem ought to have known that. He therefore, should have kept to his left on his lane. He should not have driven so close to the right.

120. Everyone seems to find fault with Manasa because it was Nadeem's right of way. It was, and surely Manasa gave him his right of way. What can he do if the person bumps him from his right of way? I must however make it clear that Nadeem's right of way was definitely not extremely close to the right of his lane when he came to the Labasa Hospital junction with a vehicle waiting to turn. The oncoming vehicles turning to the right will definitely use the right side of the center line to turn. It is their duty to stop before turning which I find Manasa did.
121. I find that the accident on 29 August 2015 between LT5837 and DQ215 was caused wholly due to the negligence of Nadeem Shah.

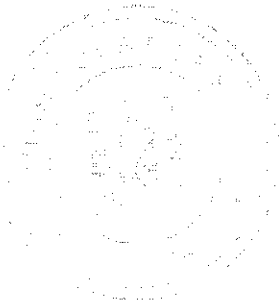
***B. Injuries Sustained and Damages***

122. Since Manasa did not cause the accident, he cannot be liable to pay the damages. The person who is liable to pay the damages is Nadeem. Shalil does not wish to pursue his claim against Nadeem for reasons best known to him. I would have thought that the purpose of the claim was to compensate Shalil irrespective of who the wrong doer is.
123. However it appears that Shalil is not interested in seeking any compensation from his cousin Nadeem and this is despite Mr. Ram's effort to find the person who is negligent and get him to pay the compensation. Shalil's instructions to his counsel went to the extent of calling Nadeem as a witness for him when he was a party to the cause. I do not think I am required to go beyond the plaintiff's claim to grant compensation against Nadeem.
124. Given the above, I do not need to address the issue of personal injuries sustained by the plaintiff and address the question of damages.

***Final Orders***

125. In the final analysis I find that the accident on 29 August 2015 between LT5837 and DQ215 was caused solely due to the negligence of the driver of DQ215 Nadeem. I therefore make the following orders:

- (a). ***The plaintiff's claim against the 1<sup>st</sup> defendant Manasa Salacakau is dismissed.***
  
- (b). ***In light of the plaintiff's desire and directions not to proceed with the claim against the 2<sup>nd</sup> defendant, I will not proceed further on the issue of injuries and damages.***
  
- (c). ***The plaintiff is to pay costs to the 1<sup>st</sup> defendant in the sum of \$5,000.00.***



*Anjala Wati*

**Hon. Madam Justice Anjala Wati**

**Judge**

**11.08.2023**

**To:**

- 1. Messrs Kohli & Singh for the Plaintiff.**
- 2. Messrs Gibson & Company for the 1<sup>st</sup> Defendant.**
- 3. 3<sup>rd</sup> and 4<sup>th</sup> Defendant.**
- 4. File: Labasa HBC 66 of 2016.**