

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. HBC 13 of 2019

BETWEEN: AMI CHAND of Matasawalevu, Dreketi, Labasa, Farmer.

1st PLAINTIFF

AND: KAMLESH CHAND of Matasawalevu, Dreketi, Labasa, Farmer

2nd PLAINTIFF

AND: KRISHNEEL RAUL DEO of Malawai Dreketi, Labasa, School Teacher.

DEFENDANT

BEFORE: Hon. Mr. Justice Vishwa Datt Sharma

COUNSEL: Mr. Sen A. - For the 1st and 2nd Plaintiffs
Mr. Robinson with Ms. Sumer A - for the Defendant

DATE OF JUDGMENT: 27th February, 2024 @ 9-30am.

JUDGMENT

[Personal Injuries claim for Damages]

INTRODUCTION

1. The **First and Second Plaintiff's** filed their Statement of Claim seeking for **General and Special Damages together with interests and costs for personal injuries** that they had suffered as a result of an **accident and damages caused to the First Plaintiff's Motor Vehicle Registration No. HB 608** by a Motor Vehicle Registration No. EQ 335 driven by the Defendant.
2. The Plaintiffs claims that said collision was caused solely by the **negligence of the Defendant**.
3. The Plaintiff's pleaded the following particulars of negligence:
 - i) Driving at a speed which was excessive in the circumstances.
 - ii) Failing to keep any or any proper lookout or to have any or any sufficient regard to other vehicle along the said Highway.
 - iii) Failing to see the second Plaintiff sufficiently to avoid colliding with him or at all.
 - iv) Failing to give any or any adequate warning of his approach.
 - v) Failing to heed the presence of the second Plaintiff on the road.
 - vi) Failing to stop, to slow down, to swerve or in other way so to manage or control his said motor vehicle as to avoid colliding with the second plaintiff.
 - vii) Turning/driving on to the path of the second plaintiff when it is unsafe and dangerous to do so.
 - viii) Failing to stop or to wait on the said highway until the second plaintiff had passed him in safety before turning or attempting to turn to his right.
 - ix) Failing to see the second plaintiff in sufficient time to avoid crossing or attempt to cross his path or at all.
4. The First Plaintiff's Motor vehicle was extensively damaged and the Second Plaintiff sustained severe injuries and he has suffered loss and damages. The Second Plaintiff brings the Action against the Defendant for damages.
5. The Defendant was convicted of Dangerous Driving causing grievous bodily harm and sentenced to a fine of \$500 and disqualified from driving for 2 months. He filed an appeal

against both conviction and sentence. The Applicants conviction and sentence were set aside by the Appellate court and an order was made **acquitting the defendant** of the charged offence and the fine to be reimbursed to the Defendant forthwith.

Statement of Defence and Counter-Claim

6. The Defendants in the Statement of Defence stated that the Land Transport Authority records shows the owner of vehicle registration No. HB 608 as the 1st Plaintiff, Ami Chand.
7. The Defendant admits that the **Second Plaintiff was the driver of Motor Vehicle Registration No. HB608** and the **Defendant was the owner/driver of Motor Vehicle Registration No. EQ335**.
8. That the **collision between vehicle HB608 and EQ335 occurred solely through the negligent of the Second Plaintiff**. The **Defendant was not negligent** in anyway whatsoever.
9. **Particulars of Negligence of the 2nd Plaintiff:**
 - (a) Failing to keep any or any proper look out or to have any or any sufficient regard to other vehicles using the road
 - (b) Driving at an excessive speed which was too fast under the circumstances.
 - (c) Failing to heed the presence of the Defendant's vehicle on the road
 - (d) Failing to stop, to slow down or manage or control the said motor vehicle as to avoid the accident.
 - (e) Failing to see the Defendant's vehicle in sufficient time or at all so as to avoid the accident.
 - (f) Driving the vehicle at such speed and in such manner that he failed to stop it or avoid the accident.
 - (g) Driving the said vehicle without due care or attention.
 - (h) Driving vehicle on the wrong side of the road.
 - (i) Failing to heed the Defendant's stationary vehicle on the road

10. **Alternatively, the 2nd Plaintiff's negligence contributed wholly and/or substantially to the accident and the resulting injuries,** particulars of such negligence appear hereinabove at paragraph 9 (a) to (i) inclusive.

Counter - Claim

11. That on or about 25th November 2016, the Defendant was driving the said Motor vehicle registration no. EQ 335 along Labasa/Nabouwalu Highway at Dreketi when the 2nd Plaintiff so negligently, recklessly, dangerously and unskillfully drove the vehicle registration no. HB 608 along the Highway at Malawai Junction that the 1st Plaintiff caused or permitted the same to violently collide with the Defendants said Motor Vehicle causing damages and injuries to the defendant.
12. **The said collision was caused solely by the negligence of the 2nd Plaintiff.**
13. Particulars of the negligence of the 2nd Plaintiff are enumerated at paragraph 9 (a) to (i) hereinabove.
14. **The accident resulted in loss and damages to the Defendants' Motor Vehicle EQ 335 and loss of use of the vehicle for one (1) year.**

Oral Evidence

15. The Plaintiff called 6 witnesses and whereas the Defendant called 4 witnesses, altogether a total of 10 witnesses testified at the hearing.

Analysis and Determination

16. Upon a careful hearing and perusal of the evidence given by both the Plaintiff and Defendant together with their witnesses and Exhibits, it gives this Court a clear picture and tells this Court what transpired on the day of the accident on 25th November 2016 and how the accident took place and who was at fault.
17. This is a Motor vehicle accident claim for **General and Special damages, interests and costs.**
18. It is an agreed fact that there was an accident on 25th November 2016 along the Labasa-Nabouwalu Highway, Dreketi at Malawai Junction between the 2nd Plaintiff's Vehicle Registration No. HB 608 and the Defendant's vehicle registration No. EQ 335

19. The 2nd Plaintiff was the driver of Motor Vehicle HB608 whilst the Defendant was the Driver and owner of vehicle EQ335.
20. Both parties to the proceedings cannot deny the fact that apart from the two drivers, there were no independent witnesses present at the scene of the accident.
21. It is not in dispute that the vehicle HB608 is registered in the name of the 1st Plaintiff. The same has been established and is evident by the Land Transport Authority [LTA] 'search' [Exhibit - 4] within the Defendants Bundle of Documents [BOD] at page 19 that the 1st Plaintiff was the registered owner of HB 608 from 31/1/13 - 4/7/17 during the time of the accident on 25th November 2016.
22. The point of Contention at the trial is '**who caused the accident and who was at fault and where was the point of impact?**'
23. ***The 2nd Plaintiff's evidence*** if scrutinised properly was that; on 25th November 2016 he was driving his vehicle registration no. HB608 towards Labasa from Nabouwalu carrying 350kg of fresh fish in a freezer on ice when the Defendant suddenly drove onto his lane in order to make a right turn without giving any indication. He was descending the hill driving at a speed of 75 km/hr before the accident occurred. In order to avoid the accident which he endeavoured to do so, he applied his brakes. However, his vehicle HB608 slid and collided with a concrete Bus Shelter on his side of the road. His vehicle was damaged and he sustained injuries such as abrasion and laceration, receive a cut on his stomach due to the seat belt, ribs damaged x 3 and had chest pains. He further told Court that the Defendant before turning his vehicle had stopped his vehicle EQ 335 after passing the middle lane. If the Defendant had not moved 1.5 meters on his pathway, then he would have saved the accident. It was the Defendant who had caused the accident on the day in question. Further, he told Court that the rough sketch plan drawn by PC 3031 Dupendra Prasad marked the point of Impact and single tyre mark of his right tyre on the metal. His vehicle was severely damaged after the accident.
24. ***[PW1] 3031 -Dupendra Prasad, the Investigating Officer***, attended to the scene of the accident and drew a sketch plan. He could not recall if both the drivers of vehicle involved in the accident were present at the scene when he drew the sketch plan. The point of impact was on vehicle HB608's pathway. EQ335 was about to turn into Malawai junction and should have stopped, but it rather moved on the carriage way of HB608. The 2nd Plaintiff's vehicle HB608 was on its side and had not crossed on the other part of the Road. The 2nd Plaintiff's vehicle HB608 collided with the Bus shelter and sustained damages to the vehicle. He did not know who had crossed the direction of Nabouwalu and inserted Labasa on the sketch plan tendered into evidence. By crossing the same, it turns the road direction the other way around. The accident happened on 2nd Plaintiff's, vehicle HB608's side of the Road.

25. However, the **[DW1] Defendant's** evidence was that the collision took place when he stopped his vehicle at the middle lane to make a right turn. He said the vehicle registration no. HB608 driven by the 2nd Plaintiff at a high speed came from front in the middle of the road and hit his vehicle EQ335 on the right hand side. The 2nd Plaintiff did not toot his horn. The 2nd Plaintiff's vehicle HB608 never applied the brakes at any time and finally ended up hitting the concrete Bus Shelter.
26. **[PW3] Ami Chand [1st Plaintiff]** told Court that he was the owner of the Hilux twin cab vehicle driven by the 2nd Plaintiff. The vehicle chassis was broken and cannot be repaired, it was purchased from Asco Motors for \$62,500 and had a customer for \$47,000 and sold for \$15,000 after accident. He was claiming \$32,100 for total cost.
27. **(PW4) Dharmend Prasad** in his capacity as the General Manager of Asco's Motors told the Court that he recalled that HB608 was purchased by the 1st Plaintiff, brand new in February 2013. It got involved in an accident. The current valuation is at \$47,000, after accident - not repairable, wreck value \$10,000. The Right hand side of the vehicle sustained damages, chassis was crumbled, it was beyond repair and looks like head on collision vehicle.
28. **(PW5) Amena Takayawa** told Court that he knew the 2nd Plaintiff as a friend and neighbour. He had an accident in 2016. Admitted to the hospital and spent a night therein. He was in pain. He was discharged and the witness spent 1 month, 1 week and 2 days and massaged him and gave shower. He paid him \$1,000.
29. **(PW6) Ravuama Raqisi's** evidence was that he was the **Principal Medical Officer, Surgical Department at Labasa Hospital**. He read the **Medical Report (Exhibit - P7)** dated 13th April 2017 prepared by Dr. Maloni Bulanaica (General Surgeon - Labasa Hospital) The Report states:

'Kamlesh Chand was referred from Dreketi Health Centre on 25/11/2016 having been involved in a vehicle road traffic accident along the Dreketi to Nabouwalu highway prior to review in A & E (Labasa Hospital at 1.50pm).

His admission diagnosis was head injuries for Neuro-observation. 6th - 8th left rib fractures (undisplaced without pneumothorax) and musculoskeletal injuries (tender abrasions to left chest wall, left shoulder and bilateral knees). Treatment included neuro- observation, IVF, analgesia (Morphine, Ibuprofen and Paracetamol) and Cloxacillin. He was again reviewed on 15/12/2016 when he did not show signs of residual head injury.

His last review was on 23/02/2017 where he presented with continuing left chest wall pain attributed to the fracture ribs that showed healing without pneumothorax. No surgical intervention was required and he daily advised on conservative treatment."

30. For the Defence Case, *(DW1) Ashwin Kumar, Deputy Registrar, High Court, Labasa* gave evidence and tendered into evidence copy Court Records as Exhibit - D. He said **Sketch Plan was altered** referring to pages 91 and 104 of the Court Record.
31. *[DW2] Josua Dimuri, Land Transport Vehicle Examiner Officer* testified and stated that vehicle EQ335 was owned by Defendant Krishneel Raul Deo. **His Vehicle was damaged to his Right hand side**, vehicle brake was operative - no defects. Defendant's vehicle EQ335 had damages mostly on right hand front side. He couldn't recall if a report was prepared for vehicle HB 608.
32. *(DW3) Krishneel Raul Deo [Defendant]* gave evidence and told Court that on 24/11/2016 there was an accident. He is a teacher by profession and it was the last day of school. He forgot the keys at home and drove in his vehicle to get the keys. Upon his return, an accident occurred at 9am between his vehicle EQ335 and vehicle HB 608. The driver of the vehicle HB608, 2nd Plaintiff was driving in the middle of the road at a high speed. **The Defendant did not make a turn towards Malawai Junction nor did the Defendant cross the double middle lane of the road.** The vehicle registration No. HB608 came and hit him. He could not open the driver's door. **If he made a right turn, then the damages obviously would have been sustained on the left hand side of his vehicle.** The right hand side of the Defendant's vehicle was fine. HB 608 came from front in the middle of the road and hit his vehicle on the right hand side. Before the accident, the Defendant had stopped his vehicle and was stationary at the middle lane. **The 2nd Plaintiff's Vehicle HB608 did not apply his brakes at any time, no brake marks, his vehicle eventually hit the Bus Shelter.**
33. The Second Plaintiff's contention is that he would have saved the accident on the day in question if the Defendant had not stopped his vehicle EQ335 after passing the middle lane by 1.5 metres on to his carriageway.
34. The Defendant said he did not make a turn towards Malawai junction nor did he cross the double lane in the second plaintiff's pathway.
35. *(PW1) 3031, Dupendra Prasad* told Court that he visited the scene of the accident on 25th November 2016 and drew a sketch plan. The direction of Labasa- Nabouwalu was changed on the sketch plan. **The point of impact was on the 2nd Plaintiff's side of the road.** The Defendant's vehicle EQ335 should have stopped, however, it moved onto the pathway of 2nd Plaintiff - HB608, The Brake marks and particles of vehicle HB608 was found at the point of Impact. **HB608 stopped 54.3m after the accident and hit the Bus Shelter sustaining damages to the vehicle.** The Defendant's vehicle EQ335 was 8.7m from the point of impact. Both vehicles were at the scene of the accident but there is no evidence to establish whether both drivers were also present at the scene at the time the Investigating Officer drew the sketch plan. Further, no eye and/or any independent witnesses were present at the scene of the accident who witnesses the Accident.

36. It is noted that when the sketch plan [Exhibit P1] was drawn, the two drivers of the vehicles HB608 and EQ335 involved in the accident were not present at the scene of the accident. This piece of evidence has not been challenged by any of the parties to the proceedings. It is only been mentioned to Court by the Defendant [DW1] in his evidence that the Directions of Nabouwalu has been changed to that of Labasa in order to establish that the impact took place on 2nd Plaintiff's vehicle HB608's pathway or side. This piece of evidence was left at that and therefore, this court cannot make a concrete determination as to who had changed the direction on the sketch plan and whether the two drivers were present at the scene of the accident when PW1-Dupendra Prasad had drawn the sketch plan. However, the Defendant in his evidence did not agree with the direction of the sketch plan and the point of impact. During his caution interview with the Police, the Defendant denied the sketch plan. The 2nd Plaintiff and the Investigating Officer also admitted in their evidence that the directions shown on the sketch plan was wrong. The Question then it arises in mind is -"**How does the change in directions of Nabouwalu-Labasa on the sketch plan affect both, the 2nd Plaintiff's and the Defendant's case?**"

This change in directions on the sketch plan was not perused to show court as to what implications it will have on the point of impact of the accident, who caused the accident and who was at fault? However, the change of direction in its current status establish that the impact took place on the 2nd Plaintiff's vehicle HB608's pathway or side- establishing that the Defendant was at fault; whereas, if there was no change in direction, then it establishes that the accident took place around the double white lane where the Defendant was stationary.

37. Further, the Plaintiff's Bundle of Documents includes the Judgment delivered in **Traffic Case No. 03/17 in State - v - Krishneel Rahul Deo**. At paragraph 5.4, the Resident Magistrate in her Judgment states that **PW2 [Dupendra Prasad] in his evidence stated that the point of the impact of the Motor Vehicle was at the double lane marking**. At paragraph 5.5, **the witness admitted that the Defendant's vehicle sustained damages on the front side. The point of impact occurred around the double white lane**. The second Plaintiff was driving at 80kmph and stopped after brake marks of 50 meters. The vehicle was loaded with a freezer and fish. Hence, the load pushed the vehicle to roll down the slope.
38. The **Defendant** was charged and later acquitted for traffic charges on Appeal. His vehicle EQ335 sustained damages amounting to \$8,000 and sold his vehicle for \$800 after the accident. He filed a Counter -Claim for \$7,200 for loss of vehicle and \$2,600 for usage. The Defendant's vehicle was written off. The Police put the point of impact on the other side of the road on the 2nd Plaintiff's vehicle, HB608's side.
39. **DW4 Krishneel Raul Deo** is the brother of the Defendant. After the accident he came to the scene of the accident and took pictures of damages sustained to both vehicles HB608

and EQ335. Pictures are marked and tendered into evidence as **Exhibit D6 and clearly shows the damages sustained by the vehicles.**

40. This court notes that only the two (2) drivers, the **2nd Plaintiff** and the **Defendant** involved in the motor vehicle accident on the day in question were present at the scene of the accident at the time of the accident. There is no evidence and/or mention of other **independent witnesses [if any] were present or not who may have witnessed this accident and could have testified in court as to how the accident happened.** Therefore, only the **two drivers evidence together with (PW1) PC 3031 Dupendra Prasad's evidence is crucial in determining the fault.**
41. This Court reiterates and has borne in mind that there were no eye and/or any independent witnesses present at the scene of the accident. If there was any, then, obviously they would have been subpoenaed to the court to give evidence as to what transpired at the scene of the accident.
42. **The Defendant's Contention was that he did not cause the accident. The point of impact was on his side of the Road at the median lane and not on the 2nd Plaintiff's side or pathway as claimed by the 2nd Plaintiff. That he did not drive his vehicle EQ335 to the opposite lane onto the 2nd Plaintiff's path.**
43. However, the **2nd Plaintiff's** contention was that the Defendant came onto his lane when trying to make a right turn. The sketch plan of the scene of the accident tendered into evidence as Exhibit- P1, clearly reveals and confirms that the point of impact was on the **2nd Plaintiff's** lane. Therefore, it can be considered that the evidence of the **2nd Plaintiff** before this Court supports his version of how the collision occurred on the day in question.
44. However, the Defendant's contention is that the driver of vehicle registration No. HB608 (**2nd Plaintiff**) was driving in the middle of the road at a high speed and did not slow down. He did not make a turn towards Malawai Junction nor did the defendant cross the double middle lane. The vehicle registration No. HB608 came and hit him. **If the Defendant made a right turn, then the damages sustained would have been sustained on the left hand side of his vehicle EQ335. The 2nd Plaintiff's Vehicle HB 608 came from the front driving in the middle of the road to the extreme right side of the road and hit the Defendant's vehicle on the right hand side.** The Defendant had stopped his vehicle at the middle lane of the road. The **2nd Plaintiff's** Vehicle HB608 did not apply his brakes at any time and has stated in his evidence that if he applied the brakes, then his vehicle HB 608 would have tumbled instead. There were no brake marks, the **2nd Plaintiff's** vehicle eventually hit the Bus Shelter and sustained the substantive damages.
45. According to PW1 3031 Dupendra Prasad in his capacity as the investigating Officer, his observation was that the Accident occurred at Malawai Junction in Dreketi. He prepared

the sketch plan and stated that 2nd Plaintiff's vehicle HB608 was travelling from Nabouwalu to Labasa and the Defendant's vehicle EQ335 had to stop and allowed HB608 to pass, then the Defendant to make a turn. Another observation that PW1 made was that there were brake marks and the vehicle parts were in the 2nd Plaintiff's, HB608 lane of the road. But that could have been due to the impact whereby the parts could have flown to any side as a result of the impact. He did not take into consideration the high speed the 2nd Plaintiff drove his vehicle at 75 KMPH according to him. He said, he was surprised to see the direction that was changed in the rough sketch plan which was tendered into evidence during the Magistrate's Court hearing and the same sketch plan used to charge the Defendant. The officer also told court that the 2nd Plaintiff's vehicle HB608 was not in a good condition after it collided with the bus shelter sustaining damages. This court notes that the investigating officer (PW1) was not present at the scene of the accident at the time of the Accident. The rough sketch plan was made of his own visualisation and opinion without any witnesses. Further, whether the officer drew the plan in the presence of the two drivers or not has not been established?

46. Therefore, PW1's Dupendra Prasad's evidence cannot be relied upon since he did not question the two drivers on the manner the accident took place and that how the impact was caused on the day in question. Further, there is no explanation who had, how, when and the purpose for crossing and changing the directions on the sketch plan.
47. DW1 Josua Dumuri of Land Transport officer, conducted the vehicle examination of the Defendants vehicle, EQ335. The vehicle had sustained damages to the front right, tire was damaged, front windscreen, front bonnet. Both front fenders, front grills, front lower panels, radiator, both front light assembly front bumper bar. Front right side suspension, assembly and the body was twisted. The vehicle EQ335 had no defects.
48. Accordingly, the vehicle EQ335 must have been hit on the right hand side.
49. However, the 2nd Plaintiff. Kamlesh Chand claimed that the Defendant's vehicle EQ335 would have been damaged on the left side mostly and not on the right hand side. The left side was completely fine as the Defendant had used the other side door to go out of his car after the accident as the Right side was damaged.
50. Upon a careful perusal of the sketch plan tendered into evidence as Exhibit - P1, the 54 meters brake marks run from the middle of the road to the bus shelter. There is no evidence before the court that there was any attempt made to manoeuvre the 2nd Plaintiffs vehicle HB608 to its left in order to avoid the accident. The Accident occurs where the white lane to stop and turn into Malawai junction is located. The Defendant stated in his evidence that the 2nd Plaintiff's vehicle HB608 came and hit him causing damage to his vehicle whilst he was stationary on the road at the median lane and whereas the 2nd Plaintiff's evidence is otherwise, that the Defendant turned into his path and hit his vehicle HB608.

51. According to (DW2) Josua Dumuri, Land Transport Officer, the damage to the **Defendant's vehicle EQ335 is to the right fender and front**. This happened when the Defendant stopped and was waiting for the 2nd Plaintiff's vehicle HB608 to pass. However the 2nd Plaintiff's vehicle came to his side and bumped him. This explains as to why the damage to the Defendant's vehicle EQ335 was on its right fender and front just as the Land Transport Officer (DW2) found. This further explains that the Defendant's vehicle EQ335 was facing towards Nabouwalu side whilst the 2nd (Plaintiff's) vehicle HB608 came and hit the Defendant's vehicle EQ335 at the edge of its median lane at a right angle. The 2nd Plaintiff's vehicle had in fact hit the Defendant's vehicle EQ335 and pushed the vehicle 10.7 meters back. This evidentially explains the high speed at which the 2nd Plaintiff's vehicle was driven before the accident that caused a great impact and eventually coming to a standstill after hitting the bus shelter and sustaining the substantive damages his vehicle.
52. In Traffic Case No.03 of 2017 State -v- Krishneel Raul Deo, the investigating Officer Dupendra Prasad, gave evidence and stated that the **point of impact of the motor vehicle was at the double lane marking**. The Defendant's vehicle sustained damages on the front side and that the point of impact was on the double lane. The 2nd Plaintiff drove at 80 Kmph and stopped after brake marks of 50 meters. The vehicle was loaded with freezer and fish, this load pushed the vehicle to roll down and hit the Bus Shelter. However, his evidence at the current High Court Civil Action was that the impact was on the 2nd Plaintiff's pathway. The Defendant's vehicle EQ335 should have stopped rather moved onto the carriageway of the 2nd Plaintiff's vehicle HB608. The question arises as to which version of the Investigating Officer should be accepted by the court, earlier version given at the Magistrate's Court hearing and/or the current High Court version?
53. Further, the Defendant's evidence is that the collision took place at the middle lane of the Highway. 2nd Plaintiff's vehicle HB608 came from the front and in the middle lane and hit the Defendant's vehicle EQ335 on his right hand side.
54. The Defendant's evidence is corroborated by the Investigating Officer. The accident took place where the Defendant's vehicle was stationary at the middle lane before the Defendant turned to his right. Whereas, the Land Transport Vehicle Examining Officer, Josua Dimuri's evidence corroborates with the evidence of the Investigating Officer and the Defendant's evidence that the damage on the Defendant's vehicle EQ335 was caused to his right hand front side. **This establishes the fact that the 2nd Plaintiff drove his vehicle HB 608 at the middle of the road to his extreme right, came and hit the Defendant's stationary vehicle on his right causing damage to his own and the Defendant's vehicles.**
55. It can now be concluded and I find after the above deliberation that it was the 2nd Plaintiff's Negligence in failing to exercise due care of his vehicle HB608 under his control and driven at a speed of 75 kmph (as admitted by him although he denied in cross examination that his speed was 80 kmph) heading to the Malawai junction,

descending the highway and resulted in hitting the Defendant's stationary vehicle EQ335 on his extreme right at the median lane where he was stationary, waiting for the 2nd Plaintiff's vehicle HB 608 to go pass by first before the Defendant makes his right turn. This did not eventuate and as a result the accident therefore occurred due to the 2nd Plaintiff's negligence.

56. If the 2nd Plaintiff had been careful, and drove his vehicle at a much lower speed within his control knowing that he was descending the highway with a freezer load of ice and 350 kilos of fish, would have noticed and seen the Defendant's vehicle in the front, stationary at the median lane intending to turn to his right, then he would have been able to have his vehicle under control and avoided his vehicle resulting in the collision with the Defendant's vehicle and eventually hitting and **sustaining a substantive damage to his vehicle and injuries to himself.**

Contributory Negligence - the 'but-for' test

57. **Contributory negligence is a Defence that can be raised by the Defendant in order to have the Damages claimed against him reduced. It does not negate the finding of negligence against the Defendant. The burden of proof lies on the Defendant to prove that the claimant/Plaintiff was contributorily negligent, and that it was such negligence that was the real and effective cause of the damage. Thus, the burden of proof lies on the Defendant to establish that the claimant failed to take reasonable care of his own safety and thereby contributed to the damage and/or injury. Contributory negligence thus has two (2) limbs: Causation and Foreseeability Test.**
58. **The Defendant herein has pleaded contributory negligence and therefore he is required to establish that it was the claimant's negligence that finally caused his own damage or injury, and that the cause of the injury was the contributing factor of the claimant, which was caused by the danger or risk created by the claimant's carelessness.**
59. **Causation- The Claimants Carelessness - the damage suffered.**

In *Grayson v Ellerman Lines Ltd*, (1920) Acc 466 at Parmour J described contributory negligence that:

".....it depends entirely on the question whether the Plaintiff could reasonably have avoided the consequences of the defendant's negligence."

60. If the 2nd Plaintiff was not being negligent, the fact that he was driving at a high speed of 75 - 80kmph on the Highway, descending the road, loaded with a deep fridge sitting at the vehicle of his vehicle with ice and 350kg of fish, posed a risk and or danger to other road users and therefore acted unreasonably in the circumstances. This accident would have been avoided by the 2nd Plaintiff if it was not for the 2nd plaintiff's act and/or omission to exercise safety at all the time of his driving. In particular, when he was fairly aware of the fact he was not driving at the reasonable speed, rather speeding at 75-80kmph,

carrying 350kg of fish in a fridge sitting at the back of his twin cab and descending the road, and that it would be a risk to apply his brakes upon facing any danger to halt his vehicle with that load at the back since the load will be pushed forward making it difficult for him to halt his vehicle and avoid an accident. This was the reason as to why the 2nd Plaintiff's vehicle HB608 became difficult for him to get to a halt when he firstly bumped into the Defendant's stationary vehicle at the median lane and eventually the vehicle only came to a halt after hitting the concrete bus shelter.

Contributory Negligence **The Foreseeability Test**

61. Lord Denning in Jones v Livox Quarries Ltd [1952] EWCA Civ 2; (1952) 2 Q.B. 608 at 615 in which he said:

"Although contributory negligence does not depend on a duty of care, it does depend on foreseeability, just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. 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 hurt himself; and in his reckonings he must take into account the possibility of others being careless."

62. In Nance v British Columbia Railway Co. Ltd. [1951] A.C. 601, 611 which was followed with approval in Gani v Chand [2006] FJCA 65; ABU 0117.2005 (10 November 2006)

"The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the plaintiff to take due care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

63. The 2nd Plaintiff alleges that the Defendant's Vehicle EQ335 came to his lane and hit his vehicle HB608 and went to the other side.
64. However, according to the Defendant, his evidence was that when he was at Malawai junction, the 2nd Plaintiff's vehicle HB608 was coming at a high speed. The Defendant had stopped his vehicle near the Median lane on his side of the road. The Plaintiff's vehicle HB 608 did not slow down, came and hit his vehicle EQ335 on its right hand side and eventually hit the concrete bus shelter.
65. The 2nd Plaintiff driving and travelling on that road quite often between Labasa and Nabouwalu to pick his fish, should have known and been familiar with the road better and

exercise all care and attention and drive at a reasonable speed to avoid any risk, danger and/or damages to other road users.

66. If the 2nd Plaintiff was a responsible driver and had exercised due diligence on the day in question, then he would have foreseen that the Defendant's vehicle EQ335 is stopped at the median lane in the front waiting to turn right, then, the 2nd Plaintiff would have been able to avoid this accident by manoeuvring his vehicle to his left as evident from the sketch plan (Exhibit P1) tendered into evidence that there was enough space for him to manoeuvre to his left accordingly.
67. Accordingly, I find that the collision on the day in question on 25th November 2016 along the Labasa- Nabouwalu Highway, Dreketi at the Malawai Junction was caused through the substantive negligence by the Plaintiff's vehicle HB608.
68. It was the Plaintiff who should have taken all precaution to see that the road was clear and there was no danger of him ending up into an accident as it had happened on the day in question, when allegedly the 2nd plaintiff stated that the Defendants vehicle EQ335 who should have stopped his vehicle to the entry point of the Malawai Junction rather than driving up to the Middle lane of the Highway and then come to a stop.
69. However, the manner in which the accident took place, and has been described by the 2nd Plaintiff and the Defendant, pointing fingers at each other that the 2nd Plaintiff and/or the Defendant was at fault, the evidence reveals and establishes that it was the **2nd Plaintiffs negligence that caused the accident** on the day in question.

Why? Evidence reveals that the 2nd Plaintiff drove his vehicle HB608 loaded with a freezer and 350kg fresh fish on ice and drove his vehicle on his extreme right side of the road in his path and descending the hill at a High Speed of 75 -80 kmph, when as a prudent driver he should have known and understood that with a like heavy load of 350kg fish and freezer, driving at that high speed going downhill will be difficult to stop his vehicle if he was required to do so in his case. As a result of that load, he noticed the Defendant's vehicle EQ335 in front at not a far distance, on his right although he slowly applied his brakes but told the Court in his evidence that his sudden application of the brakes would have made his vehicle tumble. However, the 2nd Plaintiff's vehicle HB 608, bumped the Defendant's vehicle on his right side when the Defendant's vehicle was stationary at the median lane on his path. Obviously, and it is common knowledge and this court had taken Judicial notice of the fact that the load with the Freezer and fish on ice pushed the 2nd Defendant's vehicle HB608 further downhill and eventually bumped into a concrete bus shelter and coming to a standstill, causing extensive damage to his vehicle and injuries to him. Therefore, the **2nd Plaintiff was substantively negligent** in his driving and should blame himself for the **damages and injuries sustained by him**.

However, there is evidence and admission on the part of the Defendant that he came onto the road and stopped his vehicle EQ335 at the median lane when the 2nd Plaintiff's vehicle

HB 608 driven on his extreme right of the road, came and hit the Defendant's vehicle EQ335 causing damage to both vehicles EQ335 and HB 608 respectively. The Defendant should not have stopped at the median lane rather should have stopped some distance away from the median lane to allow the 2nd Plaintiff's vehicle pass by. Although there is no evidence before this court that the 2nd Plaintiff when he had approached the Defendant's vehicle EQ335 as to where he was positioned then, that in that very spur of the moment, the 2nd Plaintiff got confused and endeavoured to avoid the collision with the Defendant's vehicle but did not succeed in doing so. Therefore, I find for this reason that the **Defendant should be held liable for the contributory negligence** to the accident on the day in question.

70. Bearing above in mind, I therefore find that the **2nd Plaintiff is liable for the injuries and the damages to his own vehicle HB 608 and the Defendant's vehicle EQ335, caused by the 2nd Plaintiff's own negligence.** However, the Defendant had contributed negligently to the injuries sustained by the 2nd Plaintiff and further, caused the damages to his own vehicle EQ335 and the 2nd Plaintiffs vehicle HB608 accordingly.
71. This finding of **negligence against the 2nd Defendant and the contributory negligence** against the Defendant is based on the principle of the "**balance of probability**". It will be noted that the Defendants traffic case was determined by the Magistrate's Court in terms of the principle of "**Beyond any Reasonable Doubt**".
72. The finding of the **Contributory negligence of the Defendant** after taking into consideration all the witnesses' evidence together with the damages caused to the vehicles involved in the motor vehicle accident and the written and oral submissions furnished to court, and in the circumstances, I **apportion and fix the Defendant's liability of contributory negligence to the accident at 30%.**
73. The Court must therefore, now decide whether the **2nd Plaintiff and the Defendant are entitled to damages on the principle of the "balance of probability"**. If the 2nd Plaintiff and the Defendant are both entitled because of one's **negligence and the others contributory negligence**, the court must then assess the damages to be paid (if any) to the 2nd Plaintiff and the Defendant accordingly.

General Damages for pain and suffering

74. **Salmond (Salmond & Heuston on Law of Torts, Twentieth Edition at 517) states that:-**

"General Damages is that kind of damages which the law presumes to follow from the wrong complained of and which, therefore, need not be expressly set out in the plaintiff's pleadings."

75. Reference is made to the Labasa Divisional Hospital Medical Report [Exhibit - P7] of the 2nd Plaintiff - Kamlesh Chand.
76. He was an inpatient for the period 25th November 2016 to 27th November 2016.

77. He was referred from Dreketi Health Centre on 25th November 2016 whilst involved in a vehicle road accident.
78. His admission diagnosis was 'head injury for neuro-observation, 6th to 8th left ribs fractures (undisplaced without pneumothorax) and musculoskeletal injuries (tender abrasions) to left chest wall, left shoulder and bilateral knees. His treatment included neuro-observation, IVF, analgesia (Morphine, Ibuprofen and Paracetamol) and Cloxacillin.
79. He was again reviewed on 15th December 2016 when he did not show signs of residual head injury.
80. Last documented review was on 23rd February 2017 where he presented with continuing chest pain attributed to the fracture ribs that showed healing without pneumothorax. No surgical intervention was required and he daily advised on conservative treatment.
81. The medical evidence reveals that the 2nd Plaintiff was admitted for at least a period of 03 days. The substantive injury he received was the 6th and 8th left ribs. He was treated and discharged after 03 days of admission, again reviewed on 15th December 2016 when he did not show signs of residual head injury.
82. On his final review on 23rd February 2017, he presented with continuing left chest wall pain because of fracture to his ribs that showed healing without pneumothorax. No surgical intervention was required and he daily advised on conservative treatment.
83. The Plaintiff's statement of claim stated that further particulars of injury would be provided at discovery and before trial.
84. However, (PW6) Ravuama Rajiwa was called as a witness to give evidence in Court. He added the 2nd Plaintiff had chest pains. Both knees had injuries and severe pain towards lungs. It will take two years for the injuries to heal. Injuries could become risky if doing heavy work and will have pains during cold weather. Apart from above, no further particulars of injuries were furnished.
85. No doubt, **there is no relationship between pain and money**. Hence, this court must award some amount arbitrarily but reasonable in nature.
86. Taking in to consideration all above and the principles applicable to assessment of damages, I assess the **General Damages** for pain and suffering in the current circumstances to the **2nd Plaintiff - Kamlesh Chand in the total sum of \$15,000** and no more (Less 30% liability for contributory negligence- which will be calculated towards the final Judgment).

Special Damages in the sum of \$32,100 for the First Plaintiff - Ami Chand.

87. He owned vehicle registration no. HB608 involved in the accident. Initially HB608 had collision with Defendant's vehicle registration no. EQ335, before ending up hitting the bus shelter and sustained vehicle damages which he now claim at \$32,100.
88. Evidence is that the vehicle chasis of HB608 was broken and cannot be repaired.
89. Purchased from Asco Motors for \$62,500 and sold it for \$15,000 after accident.
90. There is no evidence before this Court whether the vehicle HB608 was insured or not and whether the First Plaintiff claimed for insurance entitlement (if any). Further, whether the 1st Plaintiff's vehicle HB 608 was valued after the accident to ascertain the correct valuation.
91. (PW4) Dharmend Prasad told Court that he recalls that the First Plaintiff bought HB608. Current valuation at \$47,000. After accident unrepairable, chasis crumbled; right hand side sustained damages, beyond repair.
92. The 2nd Plaintiff - Kamlesh Chand has been found by this court to be **substantially negligence that caused the Motor Vehicle accident on the day in question.**
93. Taking into consideration above together with the evidence tendered into Court by witnesses and written submission, I assess the **special damages** to the **First Plaintiff - Ami Chand in the total sum of \$12,000 only** (Less 30% which will be calculated towards the final Judgment)

Special Damages for the Second Plaintiff - Kamlesh Chand in the sum of \$7,200

94. The 2nd Plaintiff - Kamlesh Chand is claiming. a sum of \$7,200 for special damage as follows:

(1) Transportation and Mediation	-	\$1,000
(2) Nursing Care for 1 month	-	\$1,000
(3) Loss of earnings for 6 months	-	<u>\$5,200</u>
Total		<u>\$7,200</u>

- The 2nd Plaintiff is a farmer and Yaqona dealer and was earning a sum of \$200 per week and by reasons of the said accident, he was not able to work for six (6) months.
- Further, as a result of this accident, and the said injuries as aforesaid, the 2nd Plaintiff suffered socially, psychologically, physically, distress with pain, chronic instability of right leg, limitation in mobility, earning and social well-being an loss of earning capacity.
- The 2nd Plaintiff suffers extensive pain especially during cold season by reasons of the matters complained hereinabove.

95. No doubt the 2nd Plaintiff as a result of the aftermath of this accident, was admitted for 03 days. Two (2) of his left ribs were broken. He suffered pain and according to him was **immobile for one month**. The broken ribs gave him pain.
96. In his evidence in chief, he told Court that he suffered \$5,200 loss of earnings for not working for 6 months, visited the hospital and incurred expenses up to **\$1,000 in medication**.
97. However, according to the **Medical Report tendered into evidence as Exhibit - P2**, it showed that his reviews on 15th December 2016 did **not show signs of residual head injury**. Subsequent review of 23rd February 2017 showed that the 2nd Plaintiff **presented with continuing left chest pain attributed to the fractured ribs that showed healing without pneumothorax**. He was advised of conservative treatment.
98. Lord Diplock LJ in **Ilkiw v. Samuels and Others** [1963] 1 WLR 991 at page 1006 stated that:-

"Special damages, in the sense of a monetary loss which the Plaintiff has sustained up to the date of trial, must be pleaded and particularised... In my view, it is plain law - so plain that there appears to be no direct authority because everyone has accepted it as being the law for the last hundred years - that you can recover in an action only special damage which has been pleaded, and, of course, proved."

99. Further, in 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."

100. In absence of any documentary proof on the 2nd Plaintiff's
- Loss of earnings of \$5,200 for 6 months
 - Visited hospitals apart from the date (25/11/2016 to 27/11/2016, 15/02/2016 and 23/02/2017)
 - There is no further evidence if he visited the Hospital on other dates.
 - On \$1,000 expenses in medication. There is no evidence to substantiate that the 2nd Plaintiff - Kamlesh Chand was immobile for one (1) month.
101. In light of above, this Court will accede to and grant the special damages to the 2nd Plaintiff as follows:-
- Loss of earnings for the period for - \$2,000
[25/11/2016 to 27/11/2016 and [15/12/2016 - 23/02/2017)
until his last visit to the hospital for review.
 - For Transport and medication - \$1,000

• Nursing care for 1 month	-	\$ 500
• Total sum		<u>\$3,500</u>

Interests

102. Interests on the total sum of Judgment to be paid at 5% calculated from the date of Judgement to the payment in full.

Costs

103. Each party to bear their own costs of the proceedings at the discretion of this Court.

104. It will be noted that this Court had arrived at a finding that the 2nd Plaintiff - Kamlesh Chand was **substantively negligent** in his driving on the day in question that caused this accident.

105. The Court on the other hand found **contributory negligence** on the part of the Defendant - Krishneel Raul Deo and has apportioned and fixed the **Defendant's contributory negligence at 30%**. The Defendant's counter-claim succeeds in part.

106. Therefore, the total sum of Judgment in Principal is awarded to the Plaintiff as follows-

General Damages	---	\$35,000;
Special Damages to the 1 st Plaintiff	---	\$15,000
Special damaged to the 2 nd Plaintiff	---	<u>\$ 3,500</u>
Total	---	<u>\$53,500.</u>

107. The Defendant's contributory negligence only succeeds in part and is apportioned and fixed at 30%.

108. There is no evidence tendered to this court to establish to the court that the Defendant's vehicle EQ335 was insured. However, the Bundle of Documents of the Plaintiff's shows that a formal notice was written to Sun Insurance Company Limited on 20th February 2019 formally notifying the insurers that at all material times the third party insurers covered Defendants vehicle Registration No. EQ335 as it appeared in the LTA Search that was conducted. Therefore, the Plaintiff's put Sun Insurance Company Limited on notice that the Plaintiff's will file and commence with a civil claim to recover the damages to the vehicle together with the injuries sustained by the 2nd Plaintiff accordingly.

109. Taking into consideration the **Defendants contributory negligence apportioned and fixed at 30%**, the total sum awarded to the 1st and 2nd Plaintiff's for damages and injuries will now be reduced by **30% of the Defendant's contributory Negligence** accordingly.

110. The **Total General and Special Damages claim** now stands awarded to the Plaintiff's in the sum of **\$37,450** as follows:

$$\frac{30 \times \$53,500}{100} = \$16,050$$

Therefore, $\$53,500 - \$16,050 = \underline{\$37,450}$.

FINAL ORDERS:

- i) Judgment for *General Damages* @ \$35,000 less 30% (\$10,500) for contributory negligence = **\$24,500**
- ii) Judgment for the 1st Plaintiff for special Damages @ \$15,000 less 30% (\$4,500) for contributory Negligence = **\$10,500**.
- iii) Judgment for the 2nd Plaintiff for Special Damages @ \$ 3,500 less 30% (\$1,050) for contributory Negligence = \$ **2,450**.
- iv) Interest to be paid @ 5% per annum until the full Judgment sum of **\$37,450** is paid.
- v) Each party to bear their own costs at the discretion of this court accordingly.
- vi) The Defendant's Counterclaim succeeds in part and is therefore apportioned and fixed at 30% only.

Dated at Suva this 27th Day of February, 2024.




VISHWA DATT SHARMA
JUDGE

cc: *Maqbool & Company, Labasa*
Gibson & Company, Labasa.