

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. HBC 5 of 2014

BETWEEN:

MOHAMMED ALI of Batinikama, Labasa, Salesman

PLAINTIFF

AND:

SAIRUL NISHA of Valebasoga, Labasa, Businesswoman

1ST DEFENDANT

DALOMO HOLDINGS LIMITED a limited liability Company
having its registered office at Valebasoga, Labasa

2ND DEFENDANT

RAMESH PRASAD of Siberia, Labasa, Driver

3RD DEFENDANT

MAHEND PRASAD of Batinikama, Labasa, Taxi Proprietor

4TH DEFENDANT

COUNSEL:

Mr S. Prasad and Miss V. Preetika for the Plaintiff

Mr K. Ratule for 1st and 2nd Defendants

Mr S. Sharma for 3rd and 4th Defendants

6. It is noted with concern that the then Master granted 1st and 2nd Defendants leave to file Statement of Defendant **WITHOUT**:
 - (i) Any Formal Application by 1st and 2nd Defendants to set aside default judgment set aside; or
 - (ii) Hearing Counsel for the Plaintiff who was not present on 9 June 2014; and
 - (iii) Setting aside the default judgment.
7. On 16 June 2014, 1st and 2nd Defendants filed Application by Summon to join 3rd and 4th Defendants as parties and on 25 July 2014, order in terms of the Application was granted by then Master and Plaintiff was directed to file and serve Amended Writ of Summons.
8. This matter was adjourned to 8 August 2014, 25 August 2014, 4th February 2015, 6 March 2015, 16 March 2015 and 24 April 2015, (Almost ten (10) months from 16 June 2014) for Plaintiff to file Amended Writ of Summon.
9. On 24 April 2015, this matter was called before the current Master who directed Plaintiff to file Amended Writ of Summon by 3.30pm on that day and adjourned this matter to 29 May 2015.
10. Plaintiff again failed to file amended Writ of Summon as directed and on 29 May 2015, Plaintiff was directed to file amended Writ of Summons by close of business on that day and this matter was adjourned to 8 June 2015, for mention.
11. On 29 May 2015, Plaintiff filed Amended Writ of Summons.
12. On 8 June 2015, 1st and 2nd Defendants were granted leave to filed Amended Defence within fourteen (14) days and this matter was adjourned to 7 July 2015.
13. On 7 July 2015, 1st and 2nd Defendants were directed to file Amended Statement of Defence to Amended Statement of Claim by close of business on that day and serve it by 10 July 2015 and this matter was adjourned to 27 July 2015.

14. On 10 July 2015, 1st and 2nd Defendants filed Amended Statement of Defence.
15. On 27 July 2015, Plaintiff was directed to file Reply to Amended Statement of Defence within fourteen (14) days and this matter was adjourned to 13 August 2015.
16. On 13 August 2015, time for filing of Reply to Amended Statement of Defence was extended until 14 August 2015 and this matter was adjourned to 27 August 2015.
17. On 17 August 2015, Plaintiff filed Reply to Amended Statement of Defence of 1st and 2nd Defendants.
18. On 27 August 2015, this matter was adjourned to 17 September 2015 for further directions.
19. On 17 September 2015, Plaintiff and 1st and 2nd Defendants were directed to file Affidavit Verifying List of Documents (“**AVLD**”) and exchange documents and this matter was adjourned to 9 October 2015, for further directions.
20. On 9 October 2015, parties were directed to file AVLD and exchange documents within seven (7) days failing which defaulting party was to pay \$250.00 costs to other party.
21. On 15 October 2015, AVLD of 1st and 2nd Defendants was filed.
22. On 28 October 2015, Plaintiff informed Court that Plaintiff intends to amend his claim when Master granted time until 29 October 2015, for Plaintiff to file Application for Leave to Amend Statement of Claim and ordered Plaintiff to pay \$200.00 costs to Defendants within seven (7) days.
23. On 29 October 2015, Plaintiff filed Application by way of Summons to Amend the Statement of Claim and on 6 November 2015, Plaintiff was granted time to serve the Summons on 3rd and 4th Defendants and this matter was adjourned to 20 November 2015.
24. On 25 November 2015 Plaintiff filed AVLD.

25. This matter was next called on 26 November 2015 when Plaintiff was granted further seven (7) days to serve Amended Statement of Claim on 3rd and 4th Defendants and this matter was adjourned to 4 December 2015.
26. On 4 December 2015, Plaintiff was granted further fourteen (14) days to serve the Summons on 3rd and 4th Defendants and this matter was adjourned to 18 January 2016.
27. On 18 January 2016, Plaintiff's Counsel informed Court that all Defendants were been served with the Summons and 4th Defendant appeared in person and sought time to arrange legal representation when this matter was adjourned to 2 February 2016.
28. On 2 February 2016, Mr. S. Sharma appeared for the 3rd and 4th Defendants when parties were directed to file Affidavit and Application for Leave to Amend Statement of Claim was adjourned to 24 February 2016, to fix hearing date.
29. On 24 February 2016, order in terms of Application to Amend Statement of Claim was made by consent when Plaintiff was directed to file Amend Statement of Claim within fourteen (14) days and this matter was adjourned to 31 March 2016.
30. On 31 March 2016, 1st and 2nd Defendants were directed to file Amended Statement of Defence by 1 April 2016, with Plaintiff to file Reply to Statement of Defence by 11 April 2016, and this matter was adjourned to 12 April 2016, for further direction.
31. On 4 April 2016, 1st and 2nd Defendants filed Amended Statement of Defence.
32. On 12 April 2016, Plaintiff was granted further time to file Reply to Statement of Defence and this matter was adjourned to 29 April 2016.
33. On 29 April 2016, Plaintiff was directed to file Reply to Amend Statement of Defence by 2 May 2016 and parties were directed to comply with Order 25 Rule 8 of High Court Rules and this matter was adjourned to 27 May 2016.

34. On 2 May 2016, Plaintiff filed Reply to Amend Statement of Defence (2) of all the Defendants.
35. On 27 May 2016, 3rd and 4th Defendants was directed to file AVLD and parties were directed to exchange documents and this matter was adjourned to 17 June 2016.
36. On 3 June 2016, 3rd and 4th Defendants filed AVLD.
37. On 17 June 2016, 1st and 2nd Defendants were granted leave to file Supplementary AVLD and this matter was adjourned to 15 July 2016.
38. On 15 July 2016, 1st and 2nd Defendants were directed to file Supplementary AVLD by close of business on that day with parties to exchange documents within seven (7) days and this matter was adjourned to 1 August 2016, for mention.
39. On 15 July 2016, 1st and 2nd Defendants filed Supplementary AVLD.
40. On 1 August 2016, parties were directed to have Pre-Trial Conference (“**PTC**”) and file minutes of PTC within fourteen (14) days and this matter was adjourned to 16 August 2016.
41. On 16 August 2016, parties were granted further seven (7) days to file Minutes of PTC failing which PTC was to be held before the Master on 26 August 2016.
42. On 26 August 2016, parties were directed to file Minutes of PTC by close of business on that day and this matter was adjourned to 30 August 2016 for review.
43. Minutes of PTC was filed on 29 August 2016.
44. On 30 August 2016, Court directed Plaintiff to file Order 34 Summon and Copy Pleading by 2 September 2016 and adjourned this matter to 8 September 2016.
45. On 2 September 2016, Plaintiff filed order 34 Summons and Copy Pleadings.

46. On 8 September 2016, this matter was listed for trial on 28, 29 and 30 November 2016.
47. On 19 September 2016, Plaintiff filed Application for Mareva Injunction.
48. On 12 October 2016, being returnable date of Application for Mareva Injunction it was struck out due to non-appearance for and on behalf of Plaintiff.
49. On 17 October 2016, Plaintiff first fresh Application for Mareva Injunction which was heard on 26 October 2016 and dismissed.
50. Trial proceeded on 28 November 2016 and on 29 November 2016, trial was adjourned to 20 January 2017, for continuation.
51. Trial concluded on 20 January 2017, when parties were directed to file Submissions and this matter was adjourned for Judgment on Notice.

Issues to be Determined

52. The issues that need to be determined are as follows:
 - (i) Whether 1st Defendant and/or 3rd Defendant owed duty of care to the Plaintiff?
 - (ii) Whether 1st Defendant and/or 3rd Defendant breached duty of care owed to the Plaintiff?
 - (iii) Whether 1st Defendant and/or 3rd Defendant breach caused Plaintiff injuries which resulted in Plaintiff suffering pain, special and general damages?
 - (iv) What is the quantum of damages?

Documentary Evidence

53. Documents forming part of Agreed Bundle of Documents dated and filed on 21 November 2016 were tendered and marked as Exhibits P1 to P9 whereas Rough Sketch Plan of scene of accident was tendered and marked as Exhibit "1D1".

Whether 1st and/or 3rd Defendant owed duty of care to Plaintiff

54. It is well settled that drivers owe duty of care to other road users, be it another driver, passenger in vehicles, pedestrian, jay walker or joy rider.

55. The 1st Defendant being driver by motor vehicle Registration No. DHL 786 (**"MV DHL786"**) and 3rd Defendant being driver of motor vehicle Registration No. LT 355 (**"Taxi"**) owed a duty of care to Plaintiff who at material time was a passenger in the Taxi.

Whether 1st and/or 3rd Defendant breached duty of care owed to Plaintiff

56. Plaintiff (PW1) during his evidence-in-chief gave evidence that:-

- (i) On 24 July 2011, the date of accident (**"DOA"**), after finishing work at 4.00pm, went to Jim's Service Station with a friend and from there he took Taxi driver by Ramesh Prasad and owned by Mahesh Chand;
- (ii) On 24 July 2011, accident took place between MV DHL786 and Taxi at Batinikama, Labasa;
- (iii) Prior to accident he saw MV DHL786 coming from opposite direction (Batinikama to Town) in the middle of the road and at a high speed;
- (iv) MV DHL786 came on towards its right side and bumped almost in the middle of bonnet of the Taxi;
- (v) After hitting the Taxi MV DHL786 went upto four or five feet over the drain into a farm;
- (vi) When he saw MV, DHL786 he put both his hands on Taxi's dashboard;

- (vii) After the accident he was unconscious and was taken to hospital;
 - (viii) When asked how he knew MV DHL786 went onto the field when he was unconscious, he stated that he saw the scene;
 - (ix) Ramesh Chand was driving on right side of the road and then went on his side;
 - (x) 1st Defendant was at fault and accident would have been saved if she stopped the vehicle or gone on correct side and/or gone next to the drain.
 - (xi) When it was put to him that how could he say 1st Defendant was at fault when she was acquitted by Magistrates Court he said that she was driving on wrong side at high speed and turned right and hit taxi on right side.
 - (xii) There was a power pole and if MV DHL786 would have gone next to drain it would not have hit the pole because it was on other side of drain and next to the tramline.
 - (xiii) Coming from Batinikama side pole comes before the accident scene.
 - (xiv) When asked why Taxi's tyre marks are shown on sketch plan (Exhibit 1 D2 – Document No. 2 Agreed Bundle of Documents) when Taxi was driven on its correct side he stated that Taxi was driven in the middle lane, on correct side.
 - (xv) When asked what he had to say about the sketch plan he stated his understanding is that sketch plan is not right.
 - (xvi) When asked as why no tyre marks are shown for MV DHL786 he stated that may be she did not apply the brakes.
 - (xvii) He fainted and gained conscious at Hospital's Emergency Room.
57. During cross-examination by Counsel for 1st and 2nd Defendants, Plaintiff (PW1):-
- (i) Stated that he gave Statement to Police after the date of accident.

- (ii) Agreed that road from Jim's Service Station to Batinikama is gravel road with no markings to notify drivers.
- (iii) Stated that accident took place after the bend but on straight road.
- (iv) When it was put to him that Taxi was not travelling on correct side of road, he stated on correct side.
- (v) Confirmed that tyre marks on sketch plan are of the Taxi;
- (vi) When asked if it is true that the Taxi collided with MV DHL786, he stated that he did not agree.
- (vii) Agreed that after accident he fainted and was taken to hospital.
- (viii) Agreed that when sketch plan was made he was not present.
- (ix) Agreed that sketch plan shows position of vehicles.
- (x) Disagreed to suggestion that what he said in examination-in-chief is not correct and his vehicle collided with MV DHL786.
- (xi) Agreed that he said other vehicle was coming at a speed in the middle of the road and in his Statement given to Police on 9 August 2011, there is no mention of speed of vehicle.
- (xii) Disagreed with suggestion that speed issue was an afterthought.
- (xiii) Stated that when he held dashboard he kept looking forward.
- (xiv) When it was put to him that when he was looking forward, he was not aware as to what side his vehicle was, he stated that Taxi was being driven on correct side when going to Batinikama.
- (xv) Agreed that if what he is saying is correct then sketch plan should be different.

- (xvi) When he was asked if he would agree that as per sketch the Taxi hit front passenger side of oncoming vehicle, he stated that he does not agree and stated the van hit.
 - (xvii) When asked as how he can explain tyre marks of the Taxi he stated they have travelling on correct side of the road.
 - (xviii) Stated that he is aware that Sairul Nisha was charged with careless driving and acquitted by Magistrates Court.
 - (xix) Stated that he did not read the judgment of Magistrates Court when paragraph 25 of that Judgment was referred to him.
 - (xx) Stated that sketch plan is wrong and he was in the Taxi and sketch plan was drawn after.
 - (xxi) Agreed that Taxi driver signed the sketch plan.
 - (xxii) When it was put to him that Taxi came from wrong side to correct side he said “no” taxi was driving on correct side.
58. Plaintiff’s Counsel did not re-examine him.
59. PW1 during cross-examination by Counsel for 3rd and 4th Defendants.
- (i) Agreed that after the accident he did not accompany Investigating Officer to scene of accident; he was never requested to go to the scene; he was not asked about position of vehicle or tyre marks; and sketch plan was drawn in his absence.
 - (ii) He stated that he was not shown the sketch plan after it was drawn.
 - (iii) Agreed that when he boarded the Taxi the driver drove the Taxi on left hand side and that there is slight bend before the place of accident.
 - (iv) Agreed that after the bend there is 400 metre stretch.

- (v) Agreed that just before the accident he could see other vehicle coming at high speed.
- (vi) When asked if the vehicle was coming on left, was there any way accident could have been avoided he stated that if van was on correct side no accident would have happened.
- (vii) Agreed that after the accident Taxi was on the left hand side in the drawn drain and the other vehicle crossed the drain and was on the embankment.
- (viii) Stated that when Taxi left town its speed would have been 40mphr.
- (ix) Stated prior to date of accident he hired that Taxi many times and agreed that Taxi driver was familiar with the road.
- (x) Agreed that if Taxi had gone on wrong lane, then Taxi and van would have gone on the right side, not on left side.

60. In re-examination PW1:-

- (i) Stated that other way accident could have been avoided was if driver of van would have stopped or gone on side of drain as post was far.
- (ii) When asked if there was any other way he did not answer.
- (iii) Stated that he hired the Taxi all the time and did not own it.

61. Sairul Nisha the 1st Defendant (“**DW1**”) during examination-in-chief gave evidence that:-

- (i) She is residing in Valebasoga and has been residing there for about ten (10) years and has been driving for ten (10) years.
- (ii) On 24 July 2011, she has been driving vehicle MV DHL786 from Batinikama towards Labasa Town while returning from her parents place.

- (iii) Zahida and Shoib were in her vehicle and she met an accident with Taxi No. LT 3551.
- (iv) Just before the accident she was travelling on her side of the road.
- (v) When she was returning from her parents and going towards town and when she reached a bend she saw Taxi No. LT 3551 coming on her side of the road.
- (vi) As soon as she saw the Taxi, she turned her vehicle towards right side thinking that if she went straight she will have a big accident because she had big vehicle.
- (vii) Also on her left hand side was a FEA post and that is why she could not turn left.
- (viii) As soon as she turned right the Taxi turned right as well and bumped her vehicle on the front passenger side.
- (ix) When she approached the bend the distance between her vehicle and Taxi was few meters (witness stated “from here to my lawyer”) and she was travelling at 35 to 40km/hr on gravel road.
- (x) If she would have gone straight instead of turning to right side there would have been a very big accident and Taxi driver and Taxi passenger would have died.
- (xi) She was driving a land cruiser.
- (xii) After the accident she came out of the van and ran to passenger side of Taxi and saw the passenger was her uncle.
- (xiii) After she saw him, her and Zahida pulled him out of the Taxi and his daughter and daughter-in-law were on the farm.
- (xiv) She stopped passing by Fiji Sugar Corporation (“**FSC**”) vehicle and sent him with his daughter-in-law to the hospital.

- (xv) Plaintiff was unconscious.
- (xvi) Next the taxi driver started arguing and fighting with her when she called her husband, who came.
- (xvii) Her husband came and called the Police and after that Police came.
- (xviii) When police came, they started to mark the scene of accident and interviewed her.
- (xix) Constable Archana then took her to the vehicle and said to her that it was not her fault.
- (xx) Police officers showed sketch plan at the scene of accident and she could not remember why she did not sign the sketch.
- (xxi) She was charged with the offence of careless driving and was acquitted.
- (xxii) Accident happened on the bend.
- (xxiii) When it was put to her that according to Plaintiff's evidence she was travelling on incorrect side of the road, she stated that he is lying and she was on correct side whilst Taxi was on the wrong side.
- (xxiv) Tyre marks of Taxi started from left lane coming towards right lane. (Batinikama to Labasa Town) which means Taxi was going from wrong lane to correct lane.
- (xxv) Just before the accident, she tooted the horn and turned her vehicle towards right.

62. During cross-examination DW2:-

- (i) Stated that when Police arrived Taxi driver Ramesh was at scene of the accident.

- (ii) When it was put to her that Ramesh's son-in-law came and took him to hospital she stated that she was busy with interview and did not see when Ramesh left.
- (iii) Stated that after she called her husband it took about five (5) to seven (7) minutes for him to come as he turned on the emergency light and came very fast.
- (iv) After her husband came, she explained to him what happened and then he called the Police.
- (v) Police came after fifteen (15) to twenty (20) minutes from time her husband rang.
- (vi) Agreed that lot of people gathered by that time.
- (vii) When it was put to her that Police came after half an hour she stated that she could not tell exactly but estimate is around fifteen (15) to twenty (20) minutes.
- (viii) When it was put to her that Ramesh did not look at passenger and asked what did Ramesh do she stated that Ramesh started talking to someone on phone, her, Zahida, Ali's daughter and daughter-in-law got him out of the Taxi and sent him to the hospital.
- (ix) When it was put to her that Ramesh also assisted the injured and helped to put passenger on van, she stated that Ramesh was talking on phone, roaming, not sitting down and arguing with her.
- (x) Stated that when her husband came Ramesh also argued with him.
- (xi) She did not see Ramesh leaving but saw a white car coming and Ramesh argued with her husband and left before Police came.
- (xii) She agreed with the sketch plan and when asked if 'bend' is at key 10, she stated she could not tell.

- (xiii) It started drizzling when Police came.
- (xiv) Constable Archana came in white van and when she came she started asking what happened and was writing down and she answered Police questions as to how accident happened.
- (xv) Agreed that she showed Police the side she was coming from, side Taxi was coming from and tyre marks of the Taxi.
- (xvi) Stated she was not sure if accident happened some meters away from the electric post on her left hand side.
- (xvii) Agreed that letter **“D”** in the sketch plan (**Exhibit “1 D1”**) says **“fixed point”** and letter **“C”** says **“point of impact”**.
- (xviii) Stated that post is where accident happened and if she turned that way she would have hit the post.
- (xix) When it was put to her that the post is out of road boundary she stated that now there is a big drain but at time of accident it was not that deep.
- (xx) Agreed that post was out of road and stated that it is near railway.
- (xxi) When it was put to her that if she would have been careful and slow she would have gone on left side of the road, she stated that when she saw the Taxi, she got confused, turned her vehicle to her right side and if she would have gone straight there would have been a big accident.
- (xxii) When it was put to her that the sketch plan does not show Taxi was on her way she stated that it shows Taxi is going from wrong lane to correct lane.
- (xxiii) When it was put to her that if she had not swerved her vehicle, there would have been no accident, she stated that when she turned right and if Taxi would have gone on its path (wrong lane) accident would not have happened.

- (xxiv) Agreed that when accident took place there was straight road behind her but was not sure about the length.
- (xxv) Did not agree to that suggestion because it was straight road she was speeding.
- (xxvi) When it was put to her that if she had stopped the vehicle accident would not have happened, she stated that she did not agree and stated that accident would have happened.
- (xxvii) Denied that when she saw the Taxi she lost control of her vehicle.
- (xxviii) Denied that she was travelling in middle of the road and stated that she was on her side.
- (xxix) Stated that if she would have gone to left she would have hit the post and if she had gone straight she would hit the Taxi.
- (xxx) Denied that accident happened due to her error of judgment.
- (xxxi) Stated that Taxi got damaged when it hit the land cruiser and went over the drain.
- (xxxii) When she was referred to sketch plan which she said was correct and asked why she did not sign it, she stated that accident happened in 2011, she does not know why she did not sign it.
- (xxxiii) Stated that her husband did not say not to sign.
- (xxxiv) Stated that she was cautioned interviewed on 9 November 2011.
- (xxxv) Denied accident happened because she was speeding.
- (xxxvi) Denied that she was speeding.
- (xxxvii) Stated that if she would have gone straight there would have been big accident, and if should have gone to left she would have hit the post and she went on right side because road at that side was clear.

63. In re-examination DW2:-
- (i) Stated that her husband came five (5) to seven (7) minutes after she called him.
 - (ii) Stated that she was travelling at 35 to 40km/hr.
 - (iii) Stated that she saw Taxi coming, they were at a distance from her to her lawyer.
 - (iv) Stated that post was FEA post and when she saw the Taxi she thought about turning left but saw the post.
 - (v) State that tyre marks are coming from right side of Taxi driver.
 - (vi) Agreed that it is coming from her side of the road.
 - (vii) Agreed that sketch plan shows Taxi hitting her vehicle and damages to her vehicle is on left side.
64. Zahid Zabeen Nisha of Batinikama, Labasa, Student (“**1DW2**”) in her evidence-in-chief gave evidence that:
- (i) She has been residing in Batinikama for two years and in 2011, she was residing at Valebasoga with her mother’s sister, (Sairul Nisha and her husband Mohammed Shamshood).
 - (ii) On 28 July 2011, she went to her grandmother’s place with her aunt, Sairul Nisha and her brother Zoheb Khan who is eighteen (18) years old.
 - (iii) She went to Batinikama at about midday and stayed there until about 4.30pm when she returned with her aunty in MV DH786.
 - (iv) She was sitting on front passenger seat and could see clearly what was around her.

- (v) As they were returning and her aunty came near the bend she saw Taxi LT3551 coming on their side of the road, being side her aunty was driving which was on their left hand side of the road.
- (vi) It was gravel road.
- (vii) When Aunty saw Taxi on same lane, to save accident she moved vehicle to other side of the road and at the same time taxi moved on the same lane.
- (viii) Taxi hit vehicle DH786 on the side she was sitting being front passenger side.
- (ix) When accident happened she went to see if her aunty was okay and helped her come out of vehicle.
- (x) Taxi driver started fighting with them.
- (xi) She then saw passenger in Taxi was badly injured and went quickly to him.
- (xii) Injured person's grand-daughter was there and helped the injured person.
- (xiii) They stopped a FSC van and helped injured person to go to hospital.
- (xiv) After injured person was taken to hospital, herself, her brother, her aunty and uncle (Mohammed Shamshood) and Police were there.
- (xv) She could not remember as to whether her uncle or Police came first.

65. During cross-examination 1DW2:-

- (i) Stated that they went to Batinikama to visit grand-parents and drop aunt's daughter.
- (ii) Stated that after dropping aunt's daughter they were going home at Valebasoga.
- (iii) Agreed that before the accident there is five hundred (500) meters of straight road.

- (iv) Denied that on that day Sairul Nisha was driving fast and stated that she does not know actual speed but thought it to be 35 or 40.
- (v) Stated that if aunty would have stopped the vehicle, accident would have happened as Taxi was very close.
- (vi) When asked if 1st Defendant could have stopped the vehicle she stated she could have but accident would have happened.
- (vii) Stated that there was an electric post on side of the drain.
- (viii) When it was put to her that accident happened past the electric post she stated no accident happened at their right hand side.
- (ix) When it was put to her that they had gone past the electric post she stated that she could not remember but if aunty would drive to left, vehicle would hit the post.
- (x) In reference to sketch plan ("**Exhibit 1D1**") agreed that key H is towards Namoli and key J reads 2.2m from tyre marks to edge of road.
- (xi) When it was put to her that if 1st Defendant wanted to go past she would have gone through, she stated she does not know.
- (xii) When it was put to her that Taxi was on correct side at time of impact and if aunty would not have moved to right there would be no accident she disagreed and stated that her aunty was first to move towards right, then Taxi came and bumped the vehicle.

66. In re-examination 1DW2:-

- (i) Agreed that she could see electric post on Exhibit 1D1.
- (ii) Stated that there was no space on the left to turn to.

67. Mohammed Shamsheed of Valebasoga, Labasa, Businessman ("**1DW3**") in examination-in-chief gave evidence that:-

- (i) He has been married to Sairul Nisha for thirteen (13) years and in 2011 he was residing at Valebasoga with his wife.
- (ii) On 24 July 2011, he was at Valebasoga at marriage ceremony of one Meboob and he went there alone but was with people from HFC Finance.
- (iii) He was at the wedding until he received call from his wife that Taxi came on wrong side and they had an accident when he got into his Hummer vehicle put his hazard on and reached site in five (5) to six (6) minute.
- (iv) Site is at Batinikama Road after third bridge at the bend.
- (v) At the site he met Taxi driver Ramesh and asked him as to why he was driving on the wrong side and they had a quarrel.
- (vi) He called Police and they came after twenty (20) minutes or half an hour and he was not sure.
- (vii) He showed Taxi's tyre marks to Ramesh and then called Police.
- (viii) Confirmed that position of vehicles was as shown in Exhibit 1D1 (Sketch Plan).
- (ix) The broken line in Exhibit 1D1 he thinks is tyre marks of the Taxi.
- (x) He saw the tyre marks on that day and that is why he had argument with Taxi driver.

68. During cross-examination 1DW4:-

- (i) Agreed that he said wife told him that she had head to head collision.
- (ii) Agreed that after collision the vehicle had gone on top of the drain.

69. Ramesh Prasad of Siberia, Labasa, Taxi Driver, the 3rd Defendant ("**3DW1**") being 3rd and 4th Defendants first witness during examination-in-chief gave evidence that:

- (i) He has been driving for thirty (30) years and has been driving Taxi for six (6) years.
- (ii) On 24 July 2011, he had an accident near Namoli, Batinikama.
- (iii) He drove the Taxi from Batinikama junction and was driving on left hand side.
- (iv) Mohammed Ali was only passenger in his Taxi, who was sitting in front left side and he has been doing his job for quite a long time.
- (v) He is familiar with the road.
- (vi) On 24 July 2011, Mohammed Ali sat in his Taxi and as soon as he crossed the bend he saw MV DHL786 coming at high speed which was being driven in the middle.
- (vii) When he saw vehicle coming in the middle he moved vehicle on left side on which he was driving.
- (viii) The other vehicle bumped the Taxi and it collided with Taxi on the right side.
- (ix) The vehicle swerved to right side, and if it swerved to left side accident would not have happened.
- (x) He was driving at 40km/hr.
- (xi) If van would have gone to its side, applied brakes, accident would not have happened.
- (xii) If van driver applied brake accident could have been avoided.
- (xiii) After the accident the Taxi was on the drain as the van was over the water in the drain.
- (xiv) He came out of the Taxi by himself and then opened passenger door and picked passenger up put him in a van and sent him to hospital.

- (xv) After that he sat on to road as he was blacked out and suffered injury on his head.
- (xvi) He did not talk to driver of the other vehicle or Mohammed Shamsheed.
- (xvii) He went to hospital in his daughter's vehicle.
- (xviii) If he had gone on her side, there would have been head on collision.
- (xix) Part of Taxi damaged was from middle to the radiator.
- (xx) Agreed that after the bend, there is about 400 to 500 meters of stretch.
- (xxi) The other vehicle would have driven at almost 60km/hr.
- (xxii) When Police arrived at the scene he was in hospital and was admitted for three (3) days.
- (xxiii) He signed sketch plan (Exhibit 1D1) after sixteen (16) days at home.
- (xxiv) When Police came at his place they showed him the sketch plan asked him to sign and told that they will charge her.
- (xxv) Police Officers did not explain contents of sketch plan to him.
- (xxvi) Distance from edge of lane van was in, and to FEA post was same as from him (witness box) and Court Officer's table.
- (xxvii) That is ample space for vehicle to go through.
- (xxviii) FEA post is located where accident occurred.
- (xxix) He had no option to avoid the accident and he tried to go on his side but she came that side.

70. During cross-examination by Counsel for Plaintiff 3DW1:

- (i) When it was put to him that according to sketch plan he was driving in the middle of the road, he stated that I would have driven in the middle of the road there would have been head on collision.
- (ii) Stated that he was never driving in the middle of the road or the wrong side.
- (iii) Stated that he was not taken to show site and did not see tyre marks.
- (iv) Stated that he could not remember dates he gave statement to Police or signed the sketch plan.
- (v) When it was put to him that he gave statement on 9 August 2011, and asked how long before or after that he signed the sketch plan he stated after two (2) weeks.
- (vi) When asked why did he sign the sketch plan, when he did not go to the site he stated that Police Officer told him that they will charge her.
- (vii) When it was put to him that apart from arguing with Sairul Nisha, he was arguing with her husband he stated that he did not say anything to him.
- (viii) Sated that he did not meet Mohammed Shams hood on that day as he went to hospital and they were at the scene.

71. During cross-examination by Counsel for 3rd and 4th Defendants 3DW1.

- (i) Stated that he said his vehicle landed on the left side of the road which is his correct side.
- (ii) Agreed that he signed sketch plan (Exhibit 1D1) and stated that he signed it when they brought it to his house.
- (iii) When it was put to him that WPC Archana explained sketch plan to him before he signed it, he stated that she told him to sign and they will charge her.

- (iv) Agreed that he gave evidence in Court and stated that he said the same thing.
- (v) Agreed to questions asked and answers given as witness in Magistrate Court case against Sairul Nisha in respect to last two (2) questions (page 61 of ABD - Exhibit P6) and first three (3) questions and answers on page 62 of ABD (Exhibit P6).
- (vi) When it was put to him that he never said to Magistrate that WPC Archana said for him to sign sketch plan and they will charge her, he stated that no one asked.
- (vii) Stated that Sketch is wrong.
- (viii) Agreed that he never said that in Magistrates Court and said everything is correct.
- (ix) Subsequently he agreed that sketch plan is correct.
- (x) Agreed that he signed the sketch plan.
- (xi) Agreed that broken lines on the sketch plan are tyre marks of Taxi he was driving.
- (xii) Agreed that fixed point is electricity post which is on the side other vehicle was coming from.
- (xiii) When it was put to him that on that day he was over speeding he stated that if so both of them would be dead.
- (xiv) When it was put to him that just because of over speeding he hit MV DHL786 on left hand side, he stated that he hit DHL786 on right hand side.
- (xv) Agreed that Land Transport Authority Report on page 25 of ABD (Exhibit 1DW1) shows damage to MV DHL786 on left hand side.

- (xvi) When asked where in report it says right hand side he stated that he is telling and not the report.
- (xvii) When asked if he is saying report is wrong he stated he could not say.
- (xviii) Agreed to what is stated at paragraphs 1 and 8 of page 29 of ABD (Exhibit P5) Part B in respect to damage to Taxi.
- (xix) When it was put to him that given damages sustained to his vehicle he was over speeding, he stated that he could not drive fast and other vehicle is high vehicle.

72. In re-examination 3DW1:-

- (i) Stated that he was not taken to scene of accident by Police officer before the proceedings in Magistrates Court.
- (ii) He did not see tyre marks after the accident.
- (iii) Agreed that the vehicle 1st Defendant was driving was land cruiser and higher vehicle.
- (iv) Stated that his Taxi is a station wagon and middle to left side of the Taxi collided.
- (v) When asked how did he feel when taxi collided he stated that she hit and she was over speeding.
- (iv) When it was put to him that he said he cannot drive fast he stated that its high van which came from straight road and was driving at high speed.

73. WPC3488 Archana Devi of FSC Lane, Labasa, Police Officer (“**3DW2**”) during examination-in-chief gave evidence that:-

- (i) She has been in Fiji Police Force for about twelve (12) years; is based at Labasa Police Station; and currently she is employed at Police Headquarters in Administration Section.

- (ii) She served in Traffic Department for six (6) years as Investigation Officer and her duties was to attend accident scene and conduct investigation.
- (iii) She has driving licence for six (6) years and is authorized driver for Fiji Police Force.
- (iv) She could recall attending scene of accident on 24 July 2011, at Batinikama Road but could not recall vehicle numbers.
- (v) Agreed the vehicle number involved were LT3551 and DHL786.
- (vi) Arrived at the scene of accident after about thirty (30) minutes.
- (vii) When she arrived at scene of accident Sairul Nisha, some members of public and Mohammed Shamshood were present there.
- (viii) Upon arrival at the scene, she drew sketch plan, took measurements and took statement from Sairul Nisha.
- (ix) Both vehicles were on the drain.
- (x) No witnesses were present at scene except for Sairul Nisha and passengers in her vehicle.
- (xi) She had conversation with Sairul Nisha when Sairul Nisha told her she was confused and that is why she swerved on other side and if only she had Hummer she would have crashed the Taxi.
- (xii) Point of impact is marked **“C”** in the sketch plan.
- (xiii) Tyre marks of Taxi LT3551 was identified to her by Sairul Nisha.
- (xiv) Upon arrival at the scene, she had conversation with Sairul Nisha and when she was drawing the rough sketch, Sairul Nisha told her that those were the tyre marks from taxi registration no. LT3551.
- (xv) That could be tyre marks of Taxi or possibly from other vehicle, since so many vehicle passed by before she arrived at the scene.

- (xvi) Asked if she could tell how accident happened after she visited scene and took statement she stated that it could be due to speeding of DHL786 or maybe driver of DHL786 did not take proper precaution.
- (xvii) Agreed that when she drew sketch plan Ramesh was not present.
- (xviii) When it was put to her that Sairul Nisha gave evidence in Court that if she stopped the vehicle, driver and passenger would have died, she stated the possibility is accident could have been saved.
- (xix) Post is fixed point which is far away from the drain with ample space and if she wanted she could have landed her vehicle in the drain.
- (xx) She took statement from Mohammed Ali well after the accident because he was admitted in the hospital.
- (xxi) Sairul Nisha said to her that when she saw the Taxi coming from the other side she assumed that Taxi could come in her lane and therefore she got confused and swerved vehicle on the other lane.

74. During cross-examination by Counsel for 1st and 2nd Defendants 3DW2:-

- (i) Agreed that Sairul Nisha did not sign the sketch plan and days later she took same sketch plan to Ramesh Prasad when he agreed to the sketch plan drawn by her and signed it.
- (ii) She used the same sketch plan signed by her and Ramesh Prasad in Magistrates Court and it is correct.
- (iii) Letter “O” in the sketch plan shows width of the road which is five (5) meters and half of it would be 2.5 meters.
- (iv) Agreed that tyre marks was of vehicle LT3551 and tyre marks with stretch of 6.3 meters refers to tyre marks of Taxi from where it began and to where it ends.

- (v) Agreed that tyre marks of LT3551 is going from its wrong lane to correct lane.
- (vi) She denied when it was put to her that on that day it was Taxi travelling on wrong lane as per sketch plan.
- (vii) Agreed that she drew the sketch plan same day and according to what she saw.
- (viii) Agreed that electric post was fixed point and 1st Defendant vehicle was travelling on its own lane.
- (ix) When it was put to her that when 1st Defendant saw the Taxi she swerved to the wrong side of the road she stated it could be.

75. During cross-examination by Counsel for Plaintiff 3DW2:-

- (i) Stated that she got instructions to attend to accident and it took her around thirty (30) minutes to reach scene of accident.
- (ii) Agreed that there could have been many other vehicles travelling in between.
- (iii) Stated that when she reached scene of accident three of four vehicles were parked there.
- (iv) Stated that there are possibilities that other vehicles had gone past before she reached.
- (v) Agreed that it could be possible that if so many vehicles passed, tyre marks she took are tyre marks of other vehicles.
- (vi) Agreed that it could be possible that information Sairul Nisha gave about tyre marks was to suit her own case.
- (vii) Agreed that when he interviewed 3rd Defendant she made up her mind and told 3rd Defendant that she will charge Sairul Nisha.

- (viii) Agreed when it was put to her that she told Ramesh that sketch plan was drawn as he had to sign it and he understood that sketch plan was drawn to charge Sairul Nisha and then he signed the sketch plan.
- (ix) Did not agree that there was finding by bench (Magistrates Court) that sketch plan was wrong.
- (x) Agreed that there could be human error in drawing the sketch.
- (xi) Agreed that sketch shows distance of 2.2metres from edge of road to where tyre marks was and 2.2 metres is little over seven (7) feet.
- (xii) Agreed that width of DHL786 could be about 4.5 feet and there was enough space for 1st Defendant to go through if she would have travelled on her correct side.
- (xiii) Agreed that if Sairul Nisha drove carefully there would have been no accident.
- (xiv) Stated that fixed point is far away from drain and agreed that it is far away from edge of road.
- (xv) Agreed that under no circumstances there was fear of hitting fixed point if she had gone safely in her own lane.
- (xvi) Agreed that there would have been no accident if Sairul Nisha had not gone on her wrong side.
- (xvii) Agreed that it is a straight road from where accident happened to bridge of about 500metres.
- (xviii) Agreed that on a straight road there is a propensity that people would over speed.
- (xix) Agreed that speeding is highest cause of motor accident in Fiji and stated that position of DHL786 was on embankment when she arrived.

- (xx) Agreed that rear left part of that vehicle was slightly hanging on the embankment.
- (xxi) When it was put to her that would mean the vehicle was speeding, she stated that possibilities are there.
- (xxii) When it was put to her that accident of this seriousness would result as a result of speeding she stated it could be.
- (xxiii) Stated that she did not see any tyre marks of vehicle driven by Sairul Nisha.
- (xxiv) When it was put to her that obviously she did not apply the brakes she stated “maybe”.
- (xxv) Stated that Sairul Nisha said that she did not apply the brake.
- (xxvi) Agreed that if she was going at a reasonable speed she could have stopped her vehicle.
- (xxvii) When it was put to her that she made no effort to stop the vehicle she stated “maybe”.
- (xxviii) Agreed that in six (6) years with Police she would know what KE17 Toyota Corolla would be and in older models it is smallest of four (4) door vehicle with tyre size of thirteen (13).
- (xxix) Agreed that she had seen DHL786 which is Toyota land cruiser wagon and largest model in Toyota model vehicle with large tyres being number seventeen (17).
- (xxx) Agreed that when face to face DHL786 was much higher vehicle than LT3551.
- (xxxi) Agreed that she saw damage to the vehicle with LT3551 which sustained damages to right side fender, right side suspension plate and majority of damage to DHL786 was on extreme left hand side.

- (xxxii) When it was put to her that, because of speed she did not stop there and landed on the embankment she stated that she does not know at what speed she was driving.
- (xxxiii) Agreed that damage of this kind can only occur because of speed.
- (xxxiv) When court sought clarification if it can occur if vehicle fell in a drain she stated yes there is possibility.
- (xxxv) Stated that Toyota Corolla (Taxi) was badly damaged compared to vehicle driven by Sairul Nisha (DHL786).
- (xxxvi) Agreed that when she saw vehicles landed on position whereby front left of Taxi was touching front right of DHL786 and that could be reason left fender of DHL786 was damaged.
- (xxxvii) When asked if she would agree that accident was caused due to excessive speed by Sairul Nisha she stated it could be the reason but she was not present at time of accident.

76. During re-examination 3DW2:-

- (i) Stated that she found Taxi badly damaged when she found Taxi in the drain.
- (ii) Stated that she found pieces of glasses in the drain and not on the road.
- (iii) When asked if big vehicle would have come with force would it land before or after the drain she stated she could not say.

77. Court sought following clarification from the 3DW2:-

- (i) According to Sairul Nisha when she swerved towards right after seeing Taxi on her side, could it be that she thought if she swerved towards right she would save the accident if Taxi continued going on its right side witness answered, it could be.

(ii) No questions were asked arising from the clarification when Counsel were given opportunity to do so.

78. After analyzing the evidence and demeanour of witnesses this Court makes following findings of facts:-

(i) Just prior to accident 3rd Defendant being driver of Taxi Registration No. LT3551 (hereinafter referred as **“the Taxi”**) was driving the Taxi on the right side of the road instead of left side as in evidenced by:-

(a) The sketch plan, page 21 of ABD (Exhibit “1D1”).

(b) The evidence 3rd Defendant gave in traffic case against 1st Defendant clearly show that he was at fault.

(c) 3rd Defendant during cross-examination in traffic case admitted that the sketch plan was signed by him, it is correct and sketch plan was explained to him when he signed it.

(d) The relevant question and answers in traffic case are as follows (Page 61 of ABD – Exhibit “1D1”):-

Mr. Ratule: Is this your signature on the sketch map?

Witness: Yes Sir.

Mr. Ratule: So you after you had seen the sketch map you had a for whatever was on the sketch map was correct?

Witness: Yes sir.

Mr. Ratule: Are you sure witness that everything is on the sketch map is correct?

Witness: Yes Sir.

Mr. Ratule: And that you are explained everything that was on the sketch map?

Witness: Yes Sir.

Mr. Ratule: And that means you are saying also that WPC Archana on that particular day before you signed she had explained the whole arrangement of where your vehicle was where my client’s vehicle was..... and all that?

Witness: Yes Sir.

Mr. Ratule: Thank you.

- (ii) 3rd Defendant and its passenger the Plaintiff contradicted each others evidence when Plaintiff said in his examination-in-chief that 3rd Defendant was driving in the middle lane meaning middle of the road when 3rd Defendant stated in his examination-in-chief that he was driving on his side and it was 1st Defendant who was driving in the middle of the road.
- (iii) This Court finds Plaintiff's evidence as to how accident took place lacks credibility.
- (iv) Much has been said by Counsel for Plaintiff during cross-examination of 1st Defendant that the Learned Magistrate in traffic case asked if the 'sketch plan' was wrong.

With due respect to Counsel for Plaintiff who appeared to confuse or mislead the 1st Defendant, Learned Magistrate never made such a finding. In fact during cross-examination of 3rd Defendant in the traffic case the learned Magistrate enquired if sketch plan was wrong. The learned Counsel for Plaintiff should know that Court published its finding when it delivered the judgment.

- (v) The learned Magistrates finding in traffic case was in Judgment delivered on 9 February 2014. At paragraphs 25 and 26 of the Learned Magistrate's judgment, he stated as follows:-

"25. According to the sketch map, it is very clear that the taxi driver, the victim has not driven his car by using his proper side. The victim also agreed with the sketch plan and he placed his signature to verify the map. Therefore, he also agreed that he was not driving his vehicle in correct lane. If he was able to drive his vehicle in the correct lane, the tyre marks indicated as "G" should be visible in the left hand of the sketch map.

26. *Therefore, it is clearly visible to this court that the victim has driven his vehicle on his right hand side lane until passing the Batinikama bend and as soon as he saw the van was coming in the same side to his opposite direction, he turned his taxi to his left hand side lane. The tyre marks are clearly visible from right hand side lane to left hand side lane. The accused saw the victim's vehicle and she also turned her vehicle to avoid the accident".*

79. Much has been said during the cause of evidence that 1st Defendant should have stopped her vehicle DHL786 or swerved towards left or went straight ahead.
80. It has been said time and again by this Court that when a driver is faced with a situation like the one in this case, in that Taxi LT3551 was coming on the wrong lane the driver of other vehicle needs to make a very quick decision to avoid the accident and under the circumstances the driver of DHL786 in this instance thought it prudent to turn towards right to avoid head on collision and to avoid hitting the electric post on her left side. The action taken by 1st Defendant was at the spur of the moment to avoid the accident as such it does not amount to negligence.
81. It was also been said by Plaintiff and 3rd Defendant in their evidence that 1st Defendant was over speeding. This Court cannot accept that evidence without any proof that 1st Defendant was speeding. It is apparent that it was just made up to pass the blame on 1st Defendant for reason known to Plaintiff, 3rd Defendant or their Counsel.
82. No evidence was led or question asked as why 3rd Defendant did not stop Taxi No. LT3551 if he was driving at a slow speed.
83. This Court after considering the above facts and analyzing of evidence given in Court finds that the accident on 24 June 2011, between vehicle registration number LT3551 and DHL786 was caused due to the sole negligence of 3rd Defendant.
84. The Court therefore holds 3rd Defendant liable and 4th Defendant as owner of Taxi vicariously liable.

Whether 3rd Defendants breach caused injury to Plaintiff

85. There is no dispute that injury sustained by Plaintiff was caused by the accident.

Special Damages

Medical Expenses

86. Plaintiff (PW1) during examination-in-chief gave evidence that:-

- (i) He came to doctor/hospital;
- (ii) He did not keep receipts.
- (iii) They have spent about \$1,000.00.
- (iv) Plaintiff is to claim \$100.00 for medical expenses in his Statement of Claim.
- (v) Plaintiff's evidence was not challenged in cross-examination. Court finds \$100.00 claimed in Plaintiff's Statement of Claim is justified and awards Plaintiff \$100.00 for medical expenses.

Private Doctor

87. No evidence has been adduced by Plaintiff as to what he paid and for what purpose he visited private doctor.

88. Also he did not even provide the name of private doctor or produce any receipt.

89. This Court finds that Plaintiff's claim for \$170.00 for private doctor has not been established.

90. Plaintiff's claim for private doctor expenses of \$170.00 is refused.

Travelling Expenses

91. Plaintiff's claim \$200.00 for travelling expenses is justified given that Plaintiff had to attend hospital for quite some time. Court orders \$200.00 for travelling expenses.
92. Hence the total claim allowed for special damage is \$300.00 which is made up as follows:-

Medical Expenses	\$100.00
Travelling Expenses	\$200.00
Total	<u>\$300.00</u>

General Damages

93. Plaintiff claims damages for pain and suffering, loss of amenities of life and loss of future earnings.
94. Plaintiff in his Statement of Claim claimed five hundred dollars (\$500.00) for loss of earning.
95. It appears that Solicitors for the Plaintiff picked this figure from thin air and inserted it in the Statement of Claim for the sake of it.
96. This is so because, Plaintiff in his evidence very clearly stated that he did not lose any pay from date of accident till he returned to work.
97. The evidence was corroborated by Mr. Abdul Mohammed Munaf, Plaintiff's employer.
98. Hence Plaintiff's claim for loss of earning is refused.

Pain and Suffering

99. Plaintiff during examination-in-chief gave evidence that:-

- (i) He got unconscious soon after the accident and when he gained conscious when he was in the emergency room.
- (ii) He saw doctor setting his face and he had four (4) broken teeth, with two (2) being inside and two (2) sticking out.
- (iii) He had injuries on both his hands, both legs, two (2) teeth sticking out, two (2) teeth inside the gum, skin got cut and was pulled over left side of his cheek.
- (iv) He had about twenty five (25) to thirty (30) stitches after which shape of his face was out.
- (v) Right side of his nose was swollen and because he was wearing seat belt his back pain in cold weather.
- (vi) From emergency room he was taken to the ward where he was admitted and was put on drips.
- (vii) He was then taken for x-ray and then back to ward and was put on drips.
- (viii) On the second day he was taken to theatre where they cleared his mouth, set his jaw, put stitches, took out two (2) teeth from inside his mouth and two (2) teeth sticking out.
- (ix) His lower jaw is not in proper shape as his gum is very bad and crooked.
- (x) He spoke to doctor about dentures and was advised that it cannot be made as it would fall out because his upper gum is all crooked.
- (xi) He does not feel well, day by day is getting weak, he cannot go outside in the sunlight as his head pains and sometimes whole body pains.
- (xii) He did not have a medical card until day of accident.
- (xiii) He stays home, rests and has tablet which he carries with him all the time to relieve his pain.

- (xiv) He is not able to eat meat and hard sweets.
- (xv) Before accident he was fit and after accident shape of his face changed, nose is swollen and pushed to one side.
- (xvi) Prior to accident he was doing social/religious work as he was president of Batinikama Markaaz (Mosque) and used to look after weddings and big occasions but now he feels weak.

100. During cross-examination by Counsel for 1st and 2nd Defendants, Plaintiff (PW1):-

- (i) Stated that he did complain to doctor about back pain because of wearing seat belt and they gave medication.
- (ii) Stated that no report is provided about back pain.

101. During examination-in-chief PW2 (Medical Officer), gave evidence that:

- (i) He recalled seeing Plaintiff who was admitted at Labasa Hospital from 24 July 2011 to 27 July 2011, and not 29 July 2011.
- (ii) In reference to Exhibits P4 (medical Report) he stated that mild to moderate heard injury secondary trauma is from what patient told him on that day (6 March 2014) as the original file is lost. What is said means there is impact acceleration and de-acceleration and movement of brain tissue itself.
- (ii) Mild to moderate means they are moving at a scale used clinically. If a person has a scale of 15 is more conscious level and if it is 10 and below it would be severe. Between 10 – 13 it will be moderate; 15 out of 15 means one is fully conscious. When he wrote mild to moderate he got it from computer system (PATIS) which had already placed a ICD classification on Plaintiff which is mild to moderate.
- (iii) It is possible for people to get unconscious with that type of injury.

- (iv) The original folder of patient went missing and could not be located and he prepared report from paper trail and note from PATIS with records from the register.
- (v) In respect to item No. 2 on Exhibit P4 the wound was cleared and laceration was stitched.
- (vi) They do not go by number of stiches but length of stitches and in this case he cannot give dimension because registry did not have it.
- (vii) Laceration is cut which can expose lower skin and jaw
- (viii) There is other form of anesthesia called local anesthesia and general anesthesia was used because laceration would have been deep and lengthy.
- (ix) Using general anesthesia does not necessary imply gravity of injury but allows good chance to look properly and if local anesthesia is applied and by chance patient is overdosed it can cause seizure and heart rhythm problem.
- (x) Alveolar is where teeth sets on and that part is broken as in other words it is a fracture of jaw.
- (xi) Symphysis is lower middle portion of chin.
- (xii) Report says extractions of four (4) upper mandible teeth but he is not sure it is so because dental records show lower mandible teeth.
- (xiii) It could be possible that Plaintiff cannot get dentures because his upper gum are crooked.
- (xiv) Plaintiff could have difficulty eating hard food like biscuit etc.
- (xv) In reference to item No. 4 on Exhibit 4 (Medical Report), abrasion means it is not full thickness wound to soft tissue and skin could have been taken

off as thorax seen on upper limb and upper thorax words convalescence was uneventful refers to recovery of injury after operation.

- (xvi) Patients who suffer such injury can have headaches which they can properly define for neurologist to operate.
- (xvii) Concurrence can cause headache after lengthy trauma.
- (xviii) Global headache is described to having primary reason as head injury and it can happen anytime.
- (xix) It is not uncommon for person wearing seat belt to have back ache.
- (xx) When it was put if pertinent back injury he stated that seat belt can crush specially lower back lumber.
- (xxi) With injury like Plaintiff suffering level of pain after he gained conscious would be 8, 9 or 10 within a range of 1 to 10.

102. In **Singh v. Pene** (Supra), Plaintiff had somewhat similar injuries to that caused to Plaintiff in this instant.

However, the details of injuries not being published in the judgment fully this Court cannot say what exactly was nature of the injury and what Plaintiff in Singh's case went through after the accident.

103. In **Singh v. Pene** (Supra), Court found that Plaintiff in that case had three teeth extracted, and suffered head injury and nasal bone fracture and after such finding Court awarded Plaintiff \$20,000.00 for pain and suffering.

104. In this instant, this Court finds that:-

- (i) Plaintiff did suffer severe injury to his jaw which resulted in his two teeth sticking out and two teeth being stuck in the gum;
- (ii) Plaintiff did suffer pains to his back, head and leg when he gained consciousness because of the nature of the accident;

(iii) Plaintiff's upper gum got crooked and had laceration which have to be stitched;

(iv) Plaintiff was in severe pain when he gained consciousness.

105. In the view of this Court's finding and the medical evidence before the Court, it is just and fair to award a sum of \$40,000.00 (forty thousand dollars) for pain and suffering.

Loss of Amenities of Life

106. Plaintiff's evidence was that he is not able to eat hard food such as meat and hard sweets and PW2's evidence confirmed this. Plaintiff also stated that he used to be President of Batinikama Markaz which he gave up because of the injuries he suffered.

107. This Court awards Plaintiff a sum of \$2,000.00 for loss of amenities of life.

Loss of Future Income

108. Plaintiff at time of trial was sixty-seven (67) years old.

109. Plaintiff was employed at the time of trial and therefore is not just and fair to any damages for loss of future income.

Costs

110. This Court takes into consideration that:-

(i) Trial lasted for two and half days;

(ii) Plaintiff gave evidence and called the Medical Officer as only witness;

(iii) 1st Defendant gave evidence herself and called her husband (Director of 2nd Defendant) and her niece as witnesses;

- (iv) 3rd Defendant gave evidence himself and called the Investigating Officer as the witness;
- (v) All parties filed Submissions.

Conclusion

111. This Court holds that:

- (i) 1st and 3rd Defendants owed a duty of care to the Plaintiff.
- (ii) The 3rd Defendant breached duty of care owed to the Plaintiff.
- (iii) Plaintiff's injury was caused as a result of the accident and breach of duty of care by 3rd Defendant;
- (iv) 4th Defendant is vicariously liable for 3rd Defendant's negligence.

112. 3rd and 4th Defendants are to pay the Plaintiff a sum of \$53,645.00 in special and general damages including interest up to the date of Judgment which said sum is made up as follows:

Special Damages [paragraph 92]	\$ 300.00	
Interest at 6% per annum from 24/7/11 (<i>date of Accident</i>) to 10/7/18 (<i>date of Judgment</i>) (2544 days)	<u>\$ 125.00</u>	
		<u>\$ 425.00</u>
 General Damages		
Pain and Suffering	\$40,000.00	
Loss of Amenities of Life	<u>2,000.00</u>	
Interest at 6% per annum from 28/1/14 (<i>date of Writ of Summons</i>) to 10/7/18 (<i>date of Judgment</i>) (1625 days)	42,000.00	
	<u>\$11,220.00</u>	
		<u>\$ 53,220.00</u>
Total		<u>\$53,645.00</u>

Orders

113. I make following Orders:

- (i) 3rd and 4th Defendants, jointly and severally do pay Plaintiff the sum of Fifty Three Thousand Six Hundred Forty-five Dollars (\$53,645.00) including interest;
- (ii) 3rd and 4th Defendants, jointly and severally do pay Plaintiff cost of this action assessed in the sum of \$4,000.00 within thirty (30) days from date of this Judgment;
- (iii) Plaintiff's claim against 1st and 2nd Defendant is dismissed and struck out;
- (iv) Plaintiff do pay 1st and 2nd Defendants costs assessed in the sum of \$1,500.00 within thirty (30) days from date of this Judgment.


K. Kumar
JUDGE



At Suva

10 July 2018

Sarju Prasad, Esquire for Plaintiff

Gibson & Co. for 1st and 2nd Defendants

Samusamuvodre Sharma Law & Co. for 3rd and 4th Defendants