

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

CIVIL ACTION NO. HBC 55 OF 2010L

BETWEEN : MARIA VANI MARETA VUNISA of 19 Kouvula Road, Nakurakura,
Nadi, Student as the Administratrix of the ESTATE OF JOSEPH
SALAYAVI SAUCOKO VUNISA late of Kouvula Road, Nakurakura,
Nadi, Trainee Pilot, Deceased, Intestate.

SUBSTITUTED PLAINTIFF

AND : EMOSI NAWAIKALOU LUTU of 4 Vunivalu Road, Suva.

FIRST DEFENDANT

AND : RAWLINSON JENKINS LIMITED a limited liability company
having its registered office at Nina Towers, McGregor Road, Suva.

SECOND DEFENDANT

AND : THE NEW INDIA ASSURANCE CO. LTD a limited liability
company having its registered office at 2nd Floor, Harifam Centre,
Greig Street, Suva.

THIRD PARTY

Before : A. M Mohammed Mackie J.

Appearances : Mr R P Chaudhary for the Plaintiff
Ms M Fong for the First and Second Defendants
Mr R R Gordon for the Third Party

Date of Trial : 18 & 19 April 2018

Written Submissions: 22 June 2018 (Plaintiff), 21 September 2018 (1st & 2nd Defendants) and
02 July 2018 (Third Party)

Date of Judgment : 28 September 2018

J U D G M E N T

A. INTRODUCTION

- [01] This is an action commenced by way of writ of summons on 22nd March 2010. The original Plaintiff Josateki Tunisau Vunisa (*"the father"*), as the Administrator of the Estate of his deceased son Joseph Salayavi Saucoko Vunisa, by his 2nd Amended Statement of Claim dated 7th August 2013 prayed for, *inter-alia*, damages against the 1st and 2nd Defendants on account of the death of his said son involving in a Motor accident that occurred on Queens Road, Nawai, Nadi on 4th September 2007, when the passenger van bearing Registration No. LM188, in which the deceased was travelling as a passenger, was allegedly hit by the motor car bearing Registration No. DT357, admittedly, driven by the 1st Defendant and owned by the abovenamed 2nd defendant.
- [02] Prior to the filing of the 2nd Amended Statement of Claim as stated above, an application being made on behalf of the 1st & 2nd Defendants (formerly 2nd & 3rd Defendants) , by way of Summons for Third Party directions, following orders, along with few other ancillary orders, were made on 3rd June 2013, granting liberty to the Third Party to appear at the trial to be bound by the outcome of the trial and the question of liability of the Third Party to indemnify the Defendants to be determined at the trial of this action.
- [03] In the meantime, due to the death of the aforesaid original Plaintiff on 2nd September 2015, his daughter Maria Vani Mareta Vunisa, who claimed to be the new Administratrix of the Estate of Joseph Salayavi Saucoko Vunisa, was substituted in place of her father, the original Plaintiff, by order dated 27th January 2017 since her mother, who is the wife of the original Plaintiff, was and still said to be away from the shores of the Fiji Islands.

B. BACKGROUND & PLEADINGS

- [04] In the second Amended Statement of Claim (ASC), while averring the following statements in paragraphs 3,4,5,6,7 and 8 thereof , the Plaintiff narrates the particulars of the alleged negligence on the part of the 1st Defendant as shown in paragraphs (a) to (g) subsequent to paragraph 6 below.

"3. **THAT** at all material times the Second Defendant was the owner of a motor vehicle registered number DT357.

4. THAT at all material times the First Defendant was driving the said motor vehicle as the servant and/or agent of the Second Defendant in the direction of Suva on Queens Road, Nawai, Nadi.

5. THAT at all material times the Plaintiff was a passenger in motor vehicle number LM188 travelling in the direction of Nadi on Queens Road, Nawai, Nadi, driven by one Timoci Kaisuva. (The word "plaintiff" emphasized above should be read as the Deceased.)

6. THAT on or about the 4th day of September 2007 the First Defendant drove the said motor vehicle number DT357 so carelessly, negligently, recklessly and unskillfully on Queens Road, Nawai, Nadi that it collided with motor vehicle number LM188 in which the deceased was a passenger."

PARTICULARS OF NEGLIGENCE

- a). Failing to slow down , control or swerve or so to manoeuvre the said motor vehicle as to avoid the said accident ;
- b). Failing to keep any or any proper lookout;
- c). Driving at a speed which was excessive in the circumstances;
- d). Failing to apply the brakes on the said motor vehicle in time or at all to avoid the said accident;
- e). Failing so to steer or control the said motor vehicle in time as to avoid the said accident;
- f). Driving on the incorrect side of the road;
- g). Driving onto the lane of the oncoming vehicle;

7. THAT as a result of the aforesaid accident the deceased suffered severe personal injuries resulting in his death on 5th day of September 2007 at Lautoka Hospital."

8. THE deceased lost the normal expectation of life and his Estate has suffered loss and damage."

[05] Accordingly, the Plaintiff prayed for:

- i. Damages under LAW REFORM (MISCELLANEOUS PROVISIONS) (DEATH AND INTEREST) ACT CAP 27.
- ii. Damages under COMPENSATION TO RELATIVE ACT CAP 29.
- iii. Funeral expenses in the sum of \$ 7,215.00 interest and cost.

- [06] In opposition, the 1st and 2nd Defendants in their Amended Statement of Defence (ASD), while denying the allegations of the Plaintiff, in paragraph 4 thereof, took up the position that it was the driver of the passenger van LM188, in which the deceased was travelling, drove it carelessly, negligently, and unskilfully on 4th September 2007, leading to the accident between LM188 and DT357 and the death of Joseph Salayavi Vunisa was a result of his own negligence by failing to wear the seat belt and/ or that of **Timoci Kaisuva**, the driver of the van LM188.
- [07] In other words, that the Defendants, in paragraph 4 of their ASD, have retaliated with the similar allegations of negligence targeting the driver of the van LM188, who is not a party to this action, but only a witness for the Plaintiff (PW-4). Accordingly, the Defendants have prayed for, *inter-alia*, that the action be struck out and/or for an order that the driver of LM188 Timoci Kaisuva was negligent.
- [08] In the meantime, the Defendants filing their Statement of Claim against the **Third party** averred, among other things, that in the event of finding them liable by the Court, they are entitled to be indemnified by the Third Party against the claim of the plaintiff for damages and all costs incurred by them in defending the action, as they claimed to have had a valid insurance policy for the car DT357 during the time material to the accident. Accordingly, the Defendants prayed for indemnity by the Third party, damages and costs.
- [09] The Third Party, in its Statement of Defence, took up the position that the Defendants are not entitled for any indemnity or insurance cover in relation to these proceedings and challenged the validity of the insurance cover relied upon by the Defendants, on various grounds. It was specifically stated that the Defendants did not have a valid Compulsory 3rd Party Policy (CTP) to cover the injuries or the death occurred to a 3rd party. Accordingly the Third Party prayed for various reliefs, including a declaration that the Third Party is not liable to indemnify the Defendants, damages and cost on solicitor/client indemnity basis.
- [10] However, I shall bear it in mind that the Third Party defence hereof will come into play and need to be considered only in the event the liability on the part of the Defendants is proved by the Plaintiff, particularly, by satisfying the

Court that the 1st Defendant drove the car DT357 carelessly, negligently, recklessly and unskilfully as alleged by the Plaintiff.

[11] The burden of proof is squarely on the Plaintiff by adducing convincing evidence and the Court will arrive at its final decision on the preponderance of evidence led by both the parties during the trial.

C. AGREED FACTS & ISSUES (Between the plaintiff and the defendants)

[12] As per the PTC held between the solicitors for the Plaintiff and the Defendants on 12th December 2013, the following facts and issues were agreed upon.

[12.1] AGREED FACTS

“

- i. *The Plaintiff is the lawful father of Joseph Salayavi Saucoko Vunisa and also the Administrator of the Estate of Joseph Salayavi Saucoko Vunisa pursuant to Letters of Administration number 49253 granted by the High Court on 7th December 2009. This agreed fact was amended at the commencement of the trial to the effect that the Plaintiff is the lawful sister of deceased Joseph Salayavi Saucoko Vunisa and is also the Administratrix of the said deceased.*
- ii. *At all material times the Second Defendant was the owner of motor vehicle registered number DT357.*
- iii. *At all material times the First Defendant was driving the said motor vehicle as the servant and agent of the First Defendant in the direction of Suva on Queens Road, Nawai, Nadi.*
- iv. *That at all material time the Deceased Joseph Salayavi Saucoko Vunisa was a passenger in motor vehicle number LM188 travelling in the direction of Nadi on Queens Road, Nawai, Nadi driven by one Timoci Kaisuva.*
- v. *That on or about the 4th September 2007 there was a collision between vehicle number DT357 driven by the First Defendant and vehicle number LM188 driven by the said Timoci Kaisuva on Queens Road, Nawai, Nadi.*
- vi. *The deceased Joseph Salayavi Saucoko Vunisa died as a result of the injuries received in the said accident.*
- vii. *That Mulpha International (SP) Limited was removed as a Defendant on 5th August 2013.*

viii. *That in the Pleadings between the Defendants and the Third Party the references to the parties are as follows:-*

- a) *Emosi Nawaikalou Lutu is referred to as the Second Defendant. He is the First Defendant in the Pleadings.*
- b) *Rawlinson Jenkins Limited is referred to as the Third Defendant. It is the Second Defendant in the Pleadings.”(This initial first defendant, namely, Mulpha International [S.P] Limited was discharged and then 2nd Defendant, Emosi Nawaikalou, was made the First Defendant).*

[12.2] AGREED ISSUES

“

- i) *Whether the accident happened due to the negligence of the First Defendant or*
- ii) *Whether the accident happened due to the negligence of Timoci Kaisuwa, the driver of motor vehicle number LM188.*
- iii) *Whether the deceased Joseph Salayavi Saucoko Vunisa was negligent in failing to wear seat belts.*
- iv) *The loss and damages, including special damages, if any, suffered by the Estate of the deceased.*
- v) *The quantum of damages and Compensation, if any, payable to the Plaintiff.”*

[13] At the pre-trial conference between the Solicitors of the Defendants and the Third Party, 09 issues have been agreed upon and I don't think those issues need to be reproduced here, in view of what I , by an in-depth scrutiny, have now justly conceived as the outcome of this action.

D. THE WITNESSESS & TRIAL

[14] At the two day trial held before me, the following were the witnesses for the Plaintiff:

- a. Ms. Vani Maia Mareta Vunisa, the substituted Plaintiff. (PW-1)

- b. Mr. Atil Narayan – General Manager of Fiji Link (*PW-2*)
- c. Mr. Rohit Chand, SGT 3119, from Nadi Police Station (*PW-3*)
- d. Mr. Timoci Kaisuva – driver of the van LM188 (*PW-4*)
- e. Mr. Apisai Tilivarua – driver of the Truck behind the LM188. (*PW-5*)
- f. Mr. Akuila Lalagavesi – a Pilot by profession. (*PW-6*)

[14.1] On behalf of the Defendants, only the 1st Defendant (*DW-1*) gave evidence, while the Third Party called an officer from the New India Insurance Company Limited (*T.P-1*)

[15] Out of the Plaintiff's six witnesses, *PW-4* and *PW-5* were the only eye witnesses to the accident. *PW-1* mainly testified on the funeral arrangements, related expenses incurred by her late Father, deceased's educational/extracurricular attainments, expenses incurred by them including the fees paid by the parents for his training, who was aspiring to become a Pilot according to her, having finished his training at the Advanced Aviation Flying School and the Pacific Flying School and had finally obtained his Commercial Pilot License. According to *PW-1* her brother had faced an interview at "PACIFIC SUN" on Friday the 13th July 2007 and had been selected as a trainee First Officer to commence his job on 3rd December 2007.

[16] *PW-2* and *PW-6* too gave evidence on the Plaintiff's Brother's attainments for his future career, his selection for the job in the aviation field, his prospects of promotions and salary increments that he would have earned, had he joined the career, if not for his sudden death.

[17] Thus, it is the oral evidence of the remaining witnesses *PW-4*, *PW-5* and that of the *DW-1*, together with the documentary evidence, particularly, the Judgment of the Magistrate's Court Case No: 3030/2007 marked as *DE-4* by the defence, on which this court will largely rely on for the adjudication on the question of liability.

[18] Apart from the above, I will also be making use of the statements of the eye witnesses made to the Police after the accident, and the rough sketch of the scene of the accident drawn by the Police Officer, who investigated the accident and inspected the scene, which are numbered as 4, 5, 6, 7 and 9 respectively in the Agreed Bundle of Documents (ABoD) and were sometimes referred to by all the learned counsel for the parties during the trial.

E. SUBMISSIONS

[19] The learned counsel for the plaintiff in his helpful written submissions, among other things, states that the:

“speed of the Van LM188 did not cause the accident and the driving of it was not necessarily dangerous in the circumstances. The accident was caused by the first Defendant Emosi, driving on to the wrong lane and colliding with Timoci’s vehicle (Van LM-188). Timoci did not create the dangerous situation leading to the accident, he did not drive into the path of the first Defendant’s vehicle and Timoci was quite clear on the main issue as to how the accident happened”. Learned counsel specifically states that *“Timoci’s so called “speeding” over 10 kmph of the speed limit was certainly not the cause of the accident”.* (Emphasis mine)

[20] In relation to the above argument, the learned counsel for the Plaintiff has drawn my attention to a paragraph in Chandar Pal v Reginam (1974) 20 FLR 1 which is a High Court’s decision on an appeal from a criminal conviction in the Magistrate’s court. The court stated in page 2.

“Where death has resulted from a traffic accident it is necessary for the prosecution , on a charge of causing death by dangerous driving , to show that the accused’s dangerous driving was a real cause of the accident and something more than de minimis (R.v. Henning [1971] 3 All E.R 134) and to establish the accused’s dangerous driving it is necessary for the prosecution to show that there was some fault on his part causing a situation which viewed objectively , was dangerous (R.v. Gosney [1971] 3All E.R. 220)”

The Court further stated on page 3:-

"A very different situation when a driver is simply proceeding, albeit at a fast speed, on his correct side of the road with a clear and unobstructed view ahead, and a vehicle approaching from the opposite direction suddenly cut across his path."

[20.1] It is really on the above decision and purely on the evidence of PW-4 and PW-5, that the learned Counsel for the Plaintiff argues in his submissions that it was the 1st Defendant Emosi Lutu's sudden driving into the lane of Timoci's van that really caused the accident.

[20.2] The counsel has also addressed the Court on various issues such as the propriety of Magistrate's Court decision, by which the 1st Defendant was acquitted, the law regarding tort jointly by two more, the issue of seat belt and on damages.

[21] The learned counsel for the Defendants also has filed helpful submission dealing, among other things, with the question of liability, third party indemnity and has emphasized that the 1st Defendant cannot be held liable for the tragedy on the alleged negligence on his part and it is the driver of LM188 who should be held liable. It is also the position of the learned counsel that, if by any chance the Defendants are found to be liable, they should be indemnified by the Third Party.

[22] The Learned Counsel for the Third Party also has filed an exhaustive submissions dealing with the question of indemnity, which may warrant my consideration only in the event if this Court finds that the Defendants are liable to the Plaintiff on account of the alleged negligence on the part of the 1st Defendant.

[23] I will not reproduce the lengthy evidence of the witnesses fearing verbosity; however, will refer to the salient parts of it as and when necessary.

F. ANALYSIS

[24] SCENE OF THE ACCIDENT

[24.1] The learned Counsel for the Plaintiff heavily relied on the evidence of the *PW-4* and *PW-5*, who were the eye witnesses to the accident, in order to prove the alleged negligence of the 1st Defendant driver of the car DT357 and thereby to place the liability on both the 1st and 2nd Defendants. The oral evidence of the other witnesses for the Plaintiff (*PW-1*, *PW-2*, *PW-3* and *PW-6*) and the documentary evidence led by marking (*PE-1* to *PE-15*) documents, had absolutely no role in deciding the question of liability. The rest of the documents from number 10 to 21, found in the ABoD, were also on the family/personal details of the deceased, his attainments, expenses incurred on his education, including fees paid to the flying schools and thus make no contribution in deciding the liability.

[24.2] It is to be noted that the Plaintiff's counsel for reason best known to him did not rely much on the document number 09 in the ABoD, which is the sketch of the scene of the accident marked at the Magistrate's Court trial. This sketch in fact paints a thousand words. When this document is carefully and objectively scrutinized, I find that it reveals certain vital unspoken facts, which in my view are material in deciding the issue of liability. I will discuss the importance of it later in this judgment.

[24.3] Though, there was an attempt by the learned counsel for the Plaintiff to produce the said sketch through *PW-3* Police Sergeant, it turned to be a futile exercise as the witness was not competent to speak on it, he being an officer who took **no part** in the investigations and inspection of the scene or preparation of it. Thus, he was a short-lived witness in the box and no contribution could be made by his evidence to the Plaintiff's case.

[24.4] It is also to be noted that the relevant Police Constable 3376 Nilesh, who conducted the investigation & inspection of the scene of the accident and drew the sketch, according to the *PW-3*, was not called by the Plaintiff before this court. According to *PW-3*, the said Constable Nilesh is currently serving at Sabeto Police Station. He would have

been a crucial and competent witness to speak on the sketch, in order to assist the resolution of the issue of liability, had he been called and provided and had anything to say in favour of the Plaintiff. The inference I can safely draw is that , had he been called ,his evidence would have been inimical to the Plaintiff's case in deciding, among other things, the exact point on the road, where the collision had actually taken place. Failure on the part of the Plaintiff to call this witness gives rise to a *Jones v Dunkel* inference that any evidence that it would have called would not have assisted the Plaintiff.

[24.5] Strangely, the said sketch was not put even to the PW-4 or PW-5. Had it been put to them, they probably would have spoken on it, if there was any point favouring the Plaintiff's case. In my view, this was not done since their evidence before me would have materially contradicted with the contents of it. However, the PW-4 has accepted the correctness of the sketch before the Magistrate. Though, this sketch was not formally proved before me by calling the author of it, the same has already been accepted and acted upon by the learned Magistrate. When the contents therein are carefully and objectively scrutinized in conjunction with the oral evidence placed before me , it throws ample light for the easy comprehension of the circumstances that led to this accident, particularly, the manner in which the van LM188 had been driven, which appears to have been the root cause for the occurrence of this tragedy.

[25] SUBMISSIONS ON THE SPEED

[25.1] With the above observations in mind, I shall proceed to consider the submissions made by the learned counsel for the Plaintiff with regards to the speed of PW-4 Timoci, the driver of the van, in which the deceased travelled, by referring to the Judgment in *Chandar Pal v Reginam* (1974) 20 FLR 1- supra. With all due respect, I beg to disagree with the learned Counsel on this vital point for the reasons discussed below.

[25.2] On perusal of the quoted paragraph in the said judgment, it becomes clear that the speeding is justified only under the circumstances where the sudden cut across or obstructions takes place when the driver was

on his correct side of the road with a clear and unobstructed view ahead.

- [25.3] By relying on the above judgment, the learned Plaintiff's counsel tacitly admits that the van driver *PW-4* Mr. Timoci was in fact speeding during the time material to the accident. However, he cannot justify Timoci's speed by equating the facts and the circumstances of the accident in the said case to those of the case at hand. The cut across or obstruction has to be necessarily a sudden one, that occurred when the driver was driving in the way expected of him albeit speeding.
- [25.4] *PW-4* Timoci's evidence is that the accident occurred on the long stretch of the road **after passing the bend**. According to his evidence under cross examination before the learned Magistrate he has stated that he saw the oncoming car **first** 500 meters away. He tooted the horn and flicked the head light from about 500 meters away. He also has admitted before the Magistrate that he was travelling between 70-80 kmph despite the speed limit for Minibus is 60 kmph. He tried to avoid when the other vehicle was 50 to 80 meters away. However, he has not spoken about any **sudden cut across or obstruction** when he was driving, on the long stretch of the road as he claims.
- [25.5] If he had seen the car **first** 500 meters away coming on his lane and if the car was only 50-80 meters away when he tried to avoid the collision as per the evidence before the learned Magistrate, in my view, the appearance of the oncoming car could not have been a sudden one and he has had enough time and opportunity to avoid the collision. Timoci's position on these vital points contradicts with that of his left-hand side passenger Mohamed Hazrath Khan, who was *PW-1* before the Magistrate's Court.
- [25.6] Mohamed Hazrath Khan has clearly stated that the oncoming vehicle was slowly changing the lane and it was slowly moving and the van LM188, in which he was travelling, was doing 80 kmph. He says he saw the 1st Defendant's car TD 357 clearly 5 meters away. The evidence of *PW-4* and *PW-5* before me clearly contradicts with that of Mohamed Hazrath Khan (*PW-1*) in the Magistrate's Court. When Timoci says in his evidence before the Magistrate to the effect that he saw the car first 500 meters away, then he tooted the horn and flicked

the head-light and it was only 50 -80 meters distance when he tried to avoid the collision, his subsequent position and his counsel's argument that the car appeared before him suddenly cannot be accepted.

- [25.7] The evidence of Hazrath Khan before the Magistrate clearly shows that the oncoming car appeared to his view at a distance of 5 meters. In his Police statement he says "..... *I could not identify anything else because I was holding the handle and closing the eyes....*" His this reaction, in my view, would have been due to the fear generated by the sudden appearance of the car at a short distance of 5 meters, which, undoubtedly, would have been eventuated due to Timoci's overtaking PW-5 Apisai's Truck right at the bend and at a high speed. When Timoci's evidence before the Magistrate and his statement to the Police, are considered in the light of the contents of the Sketch Plan, it clearly shows that PW-4 Timoci's van has overtaken the truck of the PW-5 right at the bend at high speed, probably, over 80 kmph.
- [25.8] If this court is to believe the evidence of Timoci before the Magistrate that he had seen the car first at a distance of 500 meters away and again the distance was 50 to 80 meters when he tried to avoid the accident, he cannot claim that the appearance of the car TD357 was a sudden one. Thus, the above case law authority cited by the learned counsel does not assist Plaintiff's case.
- [25.9] The Police sketch shows that the collision has taken place just after the bend and on the middle of the road, where all the drivers are expected to drive on their left in order to avoid this type of accidents. The M.C. Judgment also confirms that the impact had occurred in the middle of the road. The PW-4 Timoci's evidence that he travelled on his left lane, he applied the brake and he could not avoid the collision is unacceptable. He has not applied the brake at all. Had he applied the brake in time, he could have avoided the collision, tumbling and landing of the van 42.6 meters away or minimized the impact and probably it could have saved the precious life of a talented young man, who would have flown the flag of Fiji in the high sky during his much anticipated career as a Pilot.

[26] When Timoci was asked during the examination in chief (vide page 32 of the copy record) as to on which lane the accident happened, his answer was "*On the far left of my lane Sir.*" This contradicts with what is shown in the sketch plan. His evidence that he did not apply the brake in order to avoid the head-on collision cannot be accepted.

[27] He, having admitted before the Magistrate that his speed was 70 to 80 kmph, before me tried to change that stance by telling that his speed was 60 to 70 kmph. (Vide pages 33 & 37 of the copy record).

[28] Further, in same page 37 under cross examination Timoci was asked as follows:

"Q. Further to that, before the accident occurred, you overtook another vehicle on the bend, isn't that correct?

A. Yes.

Q. would you agree that is dangerous behavior, negligent driving behavior; over-taking another on the bend?

A. That carrier was driving little bit slowly."

[29] By his answer to the first question above, PW-4 Timoci has admitted that he overtook the truck at the bend. The answer to the second question too fortifies the above admission. Subsequently, he tried to change his stance, which was sufficient to ruin his credibility. On the other hand, his evidence that he overtook the truck on a stretch quite long before the bend becomes invalidated, when the evidence of PW-5 is closely analysed. Though, PW-5 Apisai during his evidence was audible , prompt in answering and he appeared to be a disinterested witness as the learned counsel commented in his submissions, his evidence has to be taken with a pinch of salt, particularly, in relation to his evidence on Timoci's overtaking and the point of collision.

[30] It is to be observed that, if Timoci had overtaken PW-5 Apisai's truck at the stretch quite before the bend, as Timoci and Apisai say, with Apisai's admitted speed of 50 to 60 km/hr and that of Timoci 70-80 km/hr , it could

not have been simply possible for Apisai to have maintained a distance of two cars between his truck and the ill-fated van of Timoci, when the collision occurred. Therefore, it is clear that, as admitted by Timoci in his evidence, the overtaking has, undoubtedly, taken place exactly on the bend, which made it possible for PW-5 Apisai, who was running just behind the van to be so close to the point of collision and to see the collision with his own eyes.

- [31] In fairness to PW-5 Apisai, I must say that he has spoken the truth on a very vital point, which in my view throws light in the resolution of the main issue before me as to what exactly caused this accident and whom to be blamed for the debacle. In his examination in chief at the end of page 48 and at the beginning of page 49, his evidence, with regard to the said important point, is as follows.

"I came pass the by-pass from Bavu. There the Minibus overtook my vehicle, my lord; before the bend; while I was at the back, the minibus managed to go by pass the bend. When I was about to go around the bend, facing the long stretch of the road, I saw one vehicle coming towards us.... (Page 48).

...My Lord, I can see the vehicle that was coming; it was going on the left hand side; towards the passenger's side. All of a sudden I saw the vehicle right back inside, straight towards the van, my lord. The car was speeding really fast". (Page 49).

- [32] The above point in his evidence, where he says that the 1st Defendant's car was going towards his left and all of a sudden came towards right side, has been firmly maintained by him, when he was specifically cross examined on this point by counsel for the Defendant and Third Party. Vide- 4th and 5th questions and answers thereto in page 53, Answers to 1st and 7th questions in page 54, Answer to 4th question in page 56 and Answers to questions 2,3,4&5 in page 61.

- [33] When the above vital fact is carefully analysed, it, undoubtedly, makes one to pose a reasonable question as to why the 1st Defendant should have veered his car to his left side and again all of a sudden to come toward his right side as PW-5 says. Without prejudice to my other findings, it is my considered

decision arrived at by safely inferring that sudden veering of the 1st Defendant towards his left was, inevitably, necessitated by none other than the driver of LM188, who had just overtaken the *PW-5* Apisai's truck right at the bend at high speed and was still running largely on the 1st Defendant's lane that leads to Suva.

- [34] Undoubtedly, it was due to the sudden appearance of the speeding van at the bend, the 1st Defendant, being puzzled, was forced to instantly veer his car towards his left and come back to his right as confirmed by *PW-5* Apisai. It was due to this conduct of the van driver Timoci the first Defendant could not avoid the front right corner of his car being collided with the right side back wheel of the van, which part was, apparently, still on the middle of the road during Timoci's attempt to veer his high speeding van towards his left.
- [35] In other words, the driver of the van LM188, who was, admittedly, overtaking the truck at the bend at a high speed, in his unsuccessful attempt to avoid the collision with the car, suddenly veered to his left even without applying the brake and this alone was sufficient to cause the collision and tumble the van 3 times, finally it to be landed at a point 42.6 meters away from the point of collision.
- [36] Thus, it is clear that it was none other than the driver of LM188, namely, Timoci, who laid the foundation for this accident by overtaking a truck on the bend at an excessive speed and only he had the opportunity to avoid it by timely application of brake. Alternatively, Timoci should have driven on his left lane, which part of the road at the bend was wider as per the sketch. The 1st Defendant had only a very limited role to play, which he performed by veering his car towards his left and came back to his right as affirmed by Apisai and still he could not avoid the collision for no fault on his part. In my view, he cannot be found fault for this accident and to the tragic consequences of it.

[37] There is no independent evidence to show that the 1st Defendant had in fact been travelling towards the lane of the van LM188 crossing the line on the middle of the road. The most important witness for the plaintiff, being the Police officer, who conducted the scene inspection and investigation, was not called by the Plaintiff, though he was said to be available.

[38] It appears that the right back part of the van, driven by Timoci, was still around the middle of the road after Timoci's negligent, careless and reckless act of overtaking at the bend.

[39] The most shocking fact that makes any one to raise concern is the tumbling of the van 3 rounds after collision and finally landing at a point 42.6 meters away from the point of collision. This clearly demonstrates the speed at which Mr Timoci was driving the van at the time material to the accident. Had the car been driven by the 1st Defendant at high speed and in the manner alleged by the Plaintiff's witnesses, the van, which is comparatively bigger and heavier than the car and with 5 passengers on board, would not have tumbled 3 times and landed 42.6 meters ahead towards Nadi.

[40] There has not been any direct collision or impact on any passenger in the van. Everybody escaped with minor injuries except for the deceased, who was seated right behind the driver and thrown out through the window due to the tumbling of the van, which was caused, predominantly, due to overtaking at the bend at an excessive speed and sudden veering of the van towards the left by the driver of it (LM188).

[41] The learned Magistrate has found that the accident occurred at the middle of the road. The decision of the learned Magistrate acquitting the 1st Defendant has not been appealed against and the same remains intact. There is no sufficient evidence to hold that the 1st Defendant is liable for the accident. Had Timoci driven his van on the left lane of his road, he need not have attempted to take his van further towards his left. He deliberately lied that he was driving on his left lane. However, had he applied the brake on time, this

accident could have been avoided or the severity of it could have been diminished and this unfortunate death could also have been avoided.

[42] It is my well-considered finding that the overtaking of the truck by the van LM188 had taken place almost at the bend and the collision occurred just after the bend, solely due to the aforesaid faults on the part of the driver *PW-4* Timoci. Though, it appears in the sketch, that the collision has taken place at a point slightly towards the left from the middle line of the road, this Court cannot conclusively decide the culpability of the 1st Defendant on this point alone, without convincing evidence, preferably by calling the Police officer, who did the site inspection and drew the sketch.

[43] The stance taken by the 1st Defendant during his evidence before me, that he cannot recall the accident, except for remembering to have driven into a pothole and finally colliding with a wall near a culvert, bit away from the scene of the accident, cannot be accepted. The accident is an agreed fact. However, his above stance at the trial will not bolster the Plaintiff's case.

G. CONCLUSION

[44] For the reasons adumbrated above, I arrive at the conclusion that the Plaintiff in this case has not proved on preponderance of evidence that the accident pertaining to this case occurred due to the negligence of the 1st Defendant or due to any other reason on his part as alleged by the Plaintiff. Accordingly, the issue (i) is answered negatively.

Though, the entire evidence before me, points the finger on the driver of the van LM188, for the occurrence of the accident solely owing to his negligence, I shall not proceed to answer the issue number (ii) and pass any judgment on him, as he was not a party or a Defendant and was only a witness in this action.

As the van LM188, being an old model vehicle at the material time, was not equipped with seat belt for passengers in the rear seats, the deceased cannot

be found fault for the alleged contributory negligence for not wearing the non-existent seat belt. Hence, the issue number (iii) is answered negatively.

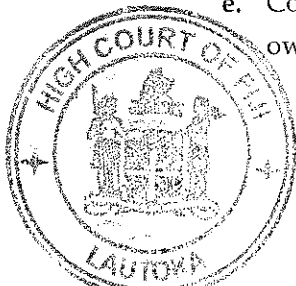
Since, this court does not find the Defendants liable, the necessity to decide on the damages and quantum of it does not arise.

Since the court has found that the Defendants are not liable to the Plaintiff, the necessity to decide on the question of indemnity between the Defendant and Third party does not arise. Hence, the issues between the Plaintiff and the Third Party need not be answered.

Third party has not adduced evidence to prove the counter claim against the 2nd Defendant, except for calling evidence to prove that there was no TPC cover with the Defendants to claim damages for injury or death of a 3rd party person. In any event, the evidence of this defence witness doesn't warrant consideration in view of the outcome above.

[45] FINAL OUTCOME

- a. Plaintiff's action fails and the same is hereby struck out.
- b. No liability found against the Defendants.
- c. Since no liability is found, this court makes no adjudication on the claim of the Defendants against the Third party.
- d. The counter claim by the Third Party against the Second Defendant is dismissed.
- e. Considering the circumstances, no costs ordered and parties shall bear their own costs.



At Lautoka

A. M Mohammed Mackie
JUDGE

28 September 2018

Solicitors:

For the Plaintiff: M/s. Chaudhary & Associates, Barristers & Solicitors

For the First and Second Defendants: M/s. Jamnadas & Associates, Barristers & Solicitors

For the Third Party: M/s. Gordon & Company, Barristers & Solicitors