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**IN THE COURT OF APPEAL, FIJI**  
**ON APPEAL FROM THE HIGH COURT OF FIJI**

**CIVIL APPEAL NO. ABU0083 OF 1998S**  
**(High Civil Appeal No. HBC0004 of 1997)**

**BETWEEN:**

**PUNJA AND SONS LIMITED**  
**SHIRI RAM**

*Appellants*

**AND:**

**APISAI MALANI**  
**NAZMEEN**  
**MOHAMMED TAZIM**

*Respondents*

**Coram:**

**The Hon. Sir Maurice Casey, Justice of Appeal**  
**The Hon. Mr. Justice Savage, Justice of Appeal**  
**The Hon. Sir David Tompkins, Justice of Appeal**

**Hearing:**

**Wednesday 24 November 1999, Suva**

**Counsel:**

**Mr. R. Krishna for the Appellants**  
**Mr. R. P. S. Chaudhary for the First Respondent**  
**Mr. A. K. Narayan for the Second and Third Respondents**

**Date of Judgment:**

**Friday, 26 November 1999**

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**JUDGMENT OF THE COURT**

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The appellants have appealed against the judgment of Lyons J, delivered on 16 October 1998, in an action for damages for personal injury arising out of a motor accident.

**Factual background**

On 15 March 1995 the first respondent Apisai Malani, the plaintiff in the High Court, was one of several passengers travelling in a taxi from Ba to Lautoka. The taxi was driven by the third respondent, Mohammed Tazim in the course of his employment by the second respondent Nazmeen. The taxi approached Lovu Flats along a straight stretch of road approaching Lautoka. It was following a slow moving 3-tonne van. The taxi was travelling at

approximately 75 to 80 km an hour. It was about 4.30 p.m. The road was wet. It was drizzling.

Behind the taxi was a van driven by the second appellant Shiri Ram, the third defendant in the High Court. The van was owned by the first appellant, the first defendant in the High Court. Ram was acting in the course of his employment by the first appellant.

In the course of an overtaking movement initiated by Shiri Ram there was a collision between the van driven by Shiri Ram and the taxi driven by Tazim. After the collision the vehicles went to the right side of the road. The taxi hit a culvert. Malani received significant personal injuries.

### The decision in the High Court

The following is a summary of the factual findings made by the Judge.

He preferred the evidence of Tazim and Malani to that of Shiri Ram where there was a conflict.

Tazim had decided to overtake the 3-tonne van travelling in front of the taxi. Tazim indicated his intention to overtake by using his indicator. Shiri Ram did not see the taxi's indicator because he was not looking. The taxi was substantially in the opposite or overtaking lane before it was hit by the van.

Shiri Ram was negligent. His actions were by far the major contributor to the accident. He chose to undertake the manoeuvre of overtaking two vehicles at one time on a wet

road. He failed to keep a proper lookout and to notice the indicator of the taxi.

He negated contributory negligence on Tazim's part. He held that Tazim did all a reasonable and prudent driver could do and all that could be expected of him. It followed that Shiri Ram was totally responsible for the accident.

He assessed damages as follows:

General damages for pain and suffering and loss of amenities	\$25,000.00
Interest at 3.5% on \$10,000 being past loss	\$ 1,432.00
Loss of employment opportunities	\$12,500.00
Special damages	\$ 60.00

Judgment was entered against the first and second appellants for \$38,992.00 At a later hearing costs were awarded against the appellants in favour of Malani, Nazmeen and Tazim.

#### The appeal on liability

Mr Krishna for the appellants submitted that the Judge erred in holding that Shiri Ram was totally liable for the accident. The Judge, he submitted, failed to direct his mind to the important issue of which driver's manoeuvre caused the danger situation to arise which in turn caused the accident. He submitted that the evidence showed that a dangerous situation was created by Tazim in proceeding to overtake the three ton van while he knew or ought to have known that the taxi he was driving was being overtaken by the van driven by Shiri Ram. He

submitted that the Judge was wrong to find that the collision occurred when both vehicles were in their incorrect, that is the overtaking, lane.

He founded these submissions on that part of Tazim's evidence in which he said that "one of my tyres was on the centre line" and later that the right-hand side was on the line. This, Mr Krishna submitted, clearly indicates that the impact occurred when the taxi was moving from its correct to incorrect side of the road, a situation entirely consistent with the version of the accident given by Shiri Ram.

It is clear both from the judge's notes of the evidence and the judgment that the Judge did not interpret the evidence that way. There was other evidence to support the Judge's conclusion that the impact occurred in the overtaking lane. Malani, the plaintiff, who was in the front seat of the taxi, said that when the taxi was just beside the vehicle it was overtaking, the vehicle came from behind and hit them. That would place the taxi well within the overtaking lane.

This is entirely a factual issue. When the Judge had the benefit of seeing and hearing the witnesses an appellate Court will be slow to interfere with findings of fact based on demeanor and credibility of witnesses unless there are convincing and compelling reasons for doing so: *Benmax v Austin Motor Company Limited* [1955] 1 All ER 326. We do not find any convincing or compelling reasons for differing from the Judge's finding of fact that the accident occurred on the incorrect or overtaking lane.

The appellants face similar difficulties in endeavouring to challenge the finding by the Judge that Tazim was not guilty of contributing negligence. If, as the Judge found,

Tazim had commenced the overtaking manoeuvre and had in good time signalled his intention to do so, and that Shiri Ram, who saw or should have seen the overtaking movement commenced by the taxi, nevertheless proceeded to attempt to overtake both the taxi and the three ton van, it was certainly open to the Judge to conclude that Tazim had not to any degree contributed to the accident that followed. Shiri Ram was the driver of the following car. It was primarily his obligation to ensure that the overtaking movement he was commencing could be safely executed, and in order to be sure, to watch carefully the leading car. On a Judge's factual finding Shiri Ram failed in his duty. On the actions of Tazeem the Judge said:

*"Tazeem (sic) was driving at a reasonable speed. He wished to overtake. Looking ahead, it was safe for him to do so. He looked into his rear view mirror. He saw Ram some way back. He put on his indicator. He then turned his vision to the front - as he should. He considered that Ram was far enough back to see what Tazim was doing. I don't doubt this. Tazim was perfectly entitled to think that Ram being four car lengths back (or thereabouts) would see his indicator. He then pulled out to pass the three ton truck.*

*What he did not know was that Ram had decided to pass, not only his taxi but the three ton van as well. Obviously, after seeing Ram in the rear-view mirror, Ram had pulled out and driven into Tazim's "blind spot" over his right hand shoulder. That is usually referred to as that area between the peripheral vision of a person looking forward and the view that the driver gets from rear view mirror.*

*The question is - was this highly dangerous and foolish action of Ram reasonably foreseeable by Tazim (or the reasonable prudent driver in his position)? I think not. Tazim must be entitled to expect a following driver to act prudently. Overtaking drivers cannot be expected to take their eyes off the vehicle in front and look over their right shoulder into the "blind spot" in anticipation that some foolish driver is attempting to pass two cars at once - and on a wet road.*

*After having checked his rear view mirror and indicating, Tazim, particularly on a wet road, probably put his attention on what lay in front of him. He had to watch for some movement up front. He had no cause, nor would it have been prudent of him to look away over his right shoulder. Even in the second or so that would take, anything could occur in front of him which, in these driving conditions would need his immediate response."*

Mr Krishna submitted that the Judge erred in having regard to what he called the "blind spot" without evidence before the Court about it. We do not accept this submission. The Judge is entitled to take into account his own general knowledge of driving conditions. Any driver will be aware that there is an area that is not visible through the rear vision mirror nor is it visible to a driver looking ahead with normal peripheral vision. It is a well known phenomenon to which the Judge could properly have regard.

On the findings of fact made by the Judge, the conclusion that Tazim was not guilty of any degree of contributing negligence is clearly one to which the Judge could properly arrive. We have not been persuaded that there are sufficient grounds to justify this Court disturbing the findings or conclusions of fact made by the Judge.

It follows that the appeal on liability cannot succeed.

### **Damages**

The appellants' challenge to the damages award is limited to the award of \$12,500 for loss of employment opportunity. Mr Krishna accepted that some allowance should be made under this heading, but it should have been approximately one-half of the amount allowed by the Judge.

Malani was born on 15 January 1949. Thus at the time of the hearing in October 1998 he was aged 49. As a result of the accident he suffered injuries to his face and to his pelvis. He had a fracture of the upper and lower ramus of the pubic bone. Medical evidence established that in September 1996 he was suffering severe lower backache, a painful right hip, he was walking with a definite limp, he had a 2cm shortening over the right leg, was suffering osteoarthritis over the right hip joint and wasting of the calf muscle. The prognosis was of hip stiffness and shortening, backache due to the stiffness and shortening, and post concussion headaches.

Malani was employed by the Lautoka hospital as a gardener. He was continued on after the accident, but is now able only to do light work. At the time of the hearing his rate of pay was \$2.81 per hour. He works 44 hours per week. That is equivalent to an annual wage of \$6,429.00 It is unclear whether these figures are before or after tax. The Judge's assessment therefore represents in broad terms about 2 years' earnings. His immediate superior at the hospital said that labourers such as Malani are employed until aged 60 but can be re-employed after that age.

As the Judge observed Malani is an unskilled and unestablished worker. He does not have any permanent tenure. He could be laid off at any time. If he were to be put back on the employment market he would suffer considerably.

The task facing the Judge was to make an assessment of the possibility of an earnings loss sometime in the future, attributable to his injuries. We accept that with the permanent disabilities he has there must be a possibility, if not a likelihood, that he in the future

will be able to earn less than would have been the case had he not suffered these injuries. If, as could be the case, he were put off from his present position, it is highly likely that he will have considerable difficulty in finding other employment, given the extent of his disabilities and lack of any skills other than for manual labour. When he reaches 60, there must be real chance that the hospital will choose not to continue his employment, because he is able to do only light work. Some significant award for the possible future loss of earnings was undoubtedly justified.

Damages under this head cannot be assessed mathematically. The Judge's task is to arrive at a reasonable assessment having regard to all the relevant factors. This Court will interfere with the Judge's assessment of damages only if it is satisfied that the damages as assessed are disproportionate and unreasonable. As Barwick CJ said in *Wilson v Peisley* (1975) 50 Al JR 207 at 209:

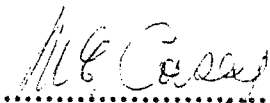
*"The less ponderable the elements of the damages under consideration, the less likely will there be a case for setting aside an award by the Judge who has not overlooked any significant fact at the end of a trial not blemished by error or irregularity."*

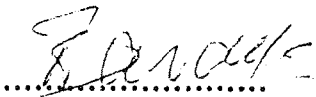
The elements to be considered in assessing damages under this heading are certainly imponderable. <sup>The</sup> A Judge has not acted on any improper basis nor did he overlook any significant fact, when he made an assessment that amounts to about two years' earnings. We are not persuaded that there are any grounds for varying the award.

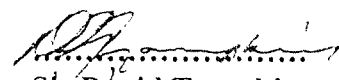
### **The result**

The appeal is dismissed. Malani is entitled to costs against the appellants which

we fix at \$800.00 inclusive of disbursements. Nazmeen and Tazim are also entitled to costs against the appellants which we fix at the same amount.

  
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Sir Maurice Casey  
Justice of Appeal

  
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Mr Justice Savage  
Justice of Appeal

  
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Sir David Tompkins  
Justice of Appeal



**Solicitors:**

Messrs. Krishna and Company, Lautoka for the Appellant  
Messrs. Chaudhary and Associates, Lautoka for the First Respondent  
Messrs. A.K. Narayan and Company, Ba for the Third Respondent