IN THE COURT OF APPEAL, FIJI

ON APPEAL FROM THE HIGH COURT

Civil Appeal No. ABU 0024 of 2018

(High Court Civil Action No. HBC 59 of 2016)

BETWEEN: **AWADH NARAYAN**

Appellant

AND: **RAKESH ROSHAN**

1st Respondent

AND: **PARMOD ENTERPRISES LIMITED**

2nd Respondent

Coram: Basnayake JA
Dr. Almeida Guneratne, JA
Jameel, JA

Counsel: Mr. A. Sen for the Appellant
Mr. A Kohli for the 1st and 2nd Respondents

Date of Hearing: 13 September 2019

Date of Judgment: 4 October 2019

JUDGMENT

Basnayake JA

[1] I agree with the reasoning and conclusions arrived at by Jameel JA.

Almeida Guneratne, JA

[2] I agree with the conclusions and reasons in the Judgment of Jameel, JA.

Jameel, JA

Introduction

[3] This is an appeal from the Judgment of the High Court of Fiji at Labasa, dated 15 March 2018. In an action commenced by writ, the Appellant claimed damages on the death of his 18 year-old son, who died as a result of an accident which took place at the Labasa Bus stand, when the bus under the control of the 1st Respondent, rolled backwards collided with a stationary bus, and crushed the deceased, when he was crossing between the two buses.

[4] The essence of this appeal is against the assessment of damages and the finding that the deceased contributory negligence, and the refusal to award damage for pain and suffering.

The Pleadings

[5]. By Statement of Claim dated 7 October 2016, Awadh Narayan ("**the Appellant**"), the father of the deceased, and Administrator of the estate of the deceased Vivek Narayan ("**the deceased**"), claimed damages against the 1st and 2nd Respondents, arising from the death of his son, caused by the negligence of the 1st Respondent, who was employed under the 2nd Respondent. The Appellant alleged that on 31 August 2015, the deceased was walking across the Labasa Bus Stand, when the 1st Respondent reversed his bus so negligently that he caused the same to strike and, or crush the deceased against another bus that was parked behind. He alleged that the accident occurred due solely to the negligence of the 1st Respondent, and that as a consequence of the said collision, the deceased sustained severe injuries, and died hours later, in the Labasa Hospital.

Damages claimed

[6] The Appellant claimed damages under the Law Reform (Miscellaneous Provisions) Death and Interest Act 1935 for the benefit of the estate of the deceased, and in the alternative, damages under the Compensation to Relatives Act 1920, General Damages, Punitive and Exemplary Damages in a sum of $ 20,000.00, Special Damages in sum of $11,750.00, Indemnity costs in a sum of $30,000.00, and interest.

[7] In the Defence, the Defendants admitted the incident, and that the deceased was crushed when he was walking between two buses. However, the 1st Respondent denied negligence, and also denied that he reversed the said bus, and that the deceased died as a result of getting crushed between two buses, one of which was driven by the 1st Respondent. The Respondents pleaded that the accident was caused due to the sole, or contributory negligence of the deceased.

Statement of Agreed Facts

[8] The Statement of Agreed Facts set out in the Minutes of Pre-Trial Conference, are reproduced below:

> *"1. The plaintiff is the father and administrator in the estate of Vivek Narayan, late of Tovata, Labasa, who died intestate on 31st August 2015. Letters of Administration were granted to the plaintiff on 7th day of June 2016.*
> *2. The plaintiff brings this action for the benefit of the deceased's estate under the Law Reform (Miscellaneous Provisions), Death and Interest Act Cap 27 for the benefit of the dependents of the deceased pursuant to Compensation to Relatives Act. (At trial plaintiff reserves his right to prove his claim only under Law Reform (Miscellaneous Provisions), Death and Interest Act (Cap 27).*
> *3. At all material times, the 1st Defendant was the driver of bus registration PEL. 111.*
> *4. At all material times the 2nd Defendant was the owner of bus registration PEL, 111.*
>
> *5. That the liabilities of the 1st Respondent has been taken over by the 2nd Respondent who was at all material times the employer of the 1st defendant and (sic) such the 2nd defendant is liable for this claim and/or the 1st defendant was in the course of his employment with the 2nd defendant and was a servant /agent of the 2nd defendant.*

6. On or about the 31st day of August 2015 at Labasa Bus Stand in Labasa Town, the deceased was walking across the said bus stand when he was crushed between two buses.

7. the deceased was 18 years of age at the time of accident and was a Form 7 student of Khalsa College.

8.The 1st defendant has been charged with the Occasioning Death by Dangerous Driving; contrary to section 97(2)(c) and 114 of the Land Transport Act No.35 of 1998.

[9] At the commencement of the trial, the defendants admitted that out of the two buses that collided with each other, it was only bus bearing registration number PEL111 that moved (i.e. the bus driven by the 1st Respondent), and that at all material times, the other bus remainded stationary.

The Trial before the High Court

[10] Three witnesses gave evidence on behalf of the Appellant, and the 1st Respondent gave evidence on his behalf.

[11] The learned Judge believed the testimony of the two witnesses who testified on behalf of the Appellant. The first witness Parnil Prasad, a passenger in the bus driven by the 1st Respondent, testified that the bus was scheduled to leave the Bus Stand at 2.00 p.m. According to Parnil Prasad, upon him alighting the bus, the 1st Respondent requested him to change $200.00 into 20 cent coins. He therefore got off the bus and retuned with the coins, which he handed to the 1st Respondent. The 1st Respondent was seated in the driver's seat, and then started counting the money, whilst the engine of the bus was running. The witness was seated beside the driver, and was aware that the driver had not begun the journey. Moments later, the witness realized that the bus was moving, however, for an instant he thought it was another bus in the background that was moving. He then heard a loud noise and people shouting.

[12] The second witness Rupeni Dani, a porter who worked on a daily basis at the Labasa Bus Stand, testified that from where he was seated on the other side of the road, had a clear view

of the buses lined up at the Bus Stand. He said that he clearly saw the bus driven by the 1st Respondent, which was the first bus lined up, and he saw the Dalip bus parked behind the first bus. All buses were lined up one behind the other, and were awaiting their respective turns to depart. He testified that the distance between the bus driven by the 1st Respondent, and the bus behind it, was the largest gap at that time between the parked buses. He then saw the bus PEL 111 initially the moving backwards. Initially it moved slowly, it then gathered momentum, and rolled back very fast and collided with the bus parked behind it. It all took approximately 30 seconds after the bus gathered momentum.

[13] The 1st Respondent, testified on his behalf. His evidence was sketchy. He said that although he was seated in the driver's seat, he was concentrating on the passengers alighting the bus, and was unaware of the bus moving backwards, that the movement of the bus backwards was unintentional, and that the bus rolled backwards due to the incline of the road. He also admitted that he was aware of the incline of the road, as he had parked in the same place the previous day.

The Findings of the High Court

Negligence of the 1st Respondent

[14] The learned Judge found that at the time of the accident the 1st Respondent had one year's experience as a driver, he was fully aware of the surroundings of the scene of the accident, as he used to park the said bus in the same place several times a day after running the bus on the same route. Despite having knowledge of the incline of the road, had failed to apply the hand brakes, and also failed to properly apply the foot brakes, and failed to keep the stationary bus effectively under his control. The learned Judge found that there was a gap of about 8 meters between the 1st Respondent's bus and the bus parked behind it, that even after the collision occurred, the 1st Respondent was unaware that it was his bus that had moved backwards. He continued to believe instead that it was the bus parked behind his bus that had moved forward, and caused the collision.

[15] After the accident, the 1st Respondent did not get off the bus to ascertain what had happened, did not report the accident to the Police, but waited inside the bus for approximately fifteen

minutes, and drove off on his usual routine journey. His failure to report the accident to the Police, prevented an immediate investigation of the scene of the accident and this failure was not sufficiently explained. He had failed to exercise the level of responsibility expected of a driver driving a large passenger bus, and had been inattentive to his surroundings and the other users of the bus stand. All of this evidence, taken in conjunction with the admission of the 1st Respondent that he was totally unaware that his bus was moving backwards, and was not in full control of such a large vehicle, led the learned Judge to unhesitatingly arrive at this finding that the 1st Respondent was negligent. The firm, and correct conclusion of negligence, on the part of the 1st Respondent, was probably best encapsulated in paragraph [38] of the judgement when the learned Judge said:

> *"[38] The evidence of the 1st Respondent that he was unaware of his vehicle moving a considerable distance of about 7-8 meters backwards proves that he was totally unaware of the movement, thus was not in full control of the vehicle with proper application of the devices at his disposal".*

[16] On an analysis of the evidence, the learned Judge found that the pedestrian crossing was obstructed by the buses being parked on it, the deceased had opted to cross the road from the place where there was the largest gap between the parked buses, and that in the circumstances, this was the logical and normal option to exercise. Thus, the learned judge did not fault the deceased for not having crossed the road on the pedestrian crossing. Indeed, that was not the material cause of the fatal collision, as the evidence eventually disclosed.

[17] Although, the learned judge, after a detailed analysis of the evidence, found the 1st Respondent negligent, the learned Judge proceeded to conclude that the deceased was contributorily negligent, and apportioned his negligence at 30%. It is this finding that was strongly contested by the Appellant, and I might say, at the outset, was not without justification.

[18] The learned Judge refused to award damages for pain and suffering on the basis that the deceased died without gaining consciousness, after the collision.

[19] The learned Judge gave judgment for the Plaintiff –Appellant awarded costs of $2500.00, and awarded damages as set out below, and made the following orders:

(a) *Special Damages in a sum of $6250.00, with interest at the rate of 3% from the date of the incident to the date of judgment;*

(b) *a sum of $3000.00 as damages under the Law Reform Miscellaneous Provisions) (Death and Interest) Act, with interest at the rate of 6% from the date of writ to the date of judgment;*

(c) *the damages awarded in a sum of $3000.00, be deducted from the sum of $60,000 awarded under the Compensation to Relatives Act.*

(d) *Contributory negligence on the part of the deceased was held to be 30% and the learned judge made order to deduct 30%, from the total damages awarded."*

The grounds of appeal

[20] Whilst I observe that ground 5 of the appeal contains what must be taken to mean an obvious typographical error, the grounds of appeal pleaded by the Appellant are reproduced below;

1) The Learned Trial Judge erred in law in failing to make a correct award to the appellant in accordance with the established principles of assessment of damages.

2) That the Judge erred in law and in fact in not awarding appropriate damages under the various heads as claimed and made the awards extremely conservatively in all the circumstances of the claim having regard to the very serious nature of the injuries which led to death of Vivek Narayan ('deceased").

3) The learned Trial Judge erred in failing to make an appropriate award for loss of future earning capacity.

4) The Learned Trial Judge erred in law and in fact in failing to consider the submissions made to him on behalf of the appellant together with the decided authorities on similar cases when making an appropriate award.

5) The learned Trial Judge erred in law and in fact in awarding appropriate damages for pain and suffering of the deceased.

6) *That the learned Trial Judge erred in law and in fact in holding and /or finding that the plaintiff/ appellant had contributed towards the accident when in fact he was crossing between two stationary buses.*

7) *That the learned Trial Judge erred in law and in fact in holding and/ or finding that the plaintiff/ appellant to be 30% contributorily negligent.*

8) *That the learned Trial Judge erred in law and in fact in reducing the total award of the plaintiff/ appellant by 30%.*

9) *That the learned Trial Judge erred in law and in fact in finding the plaintiff/ appellant to be 30% contributory negligent when the facts of the accident disclosed otherwise.*

10) *That the Appellant reserves the right to add, amend the grounds of appeal and adduce further evidence for the purpose of appeal once the same becomes available.*

11) *And such further and other grounds as the Appellant may be advised in due course upon receipt of the copy record of the proceedings.*

12) *Wherefore the appellant prays that the damages be re-assessed by the Appellate Court."*

Discussion of the grounds of appeal

[21] Grounds 1 to 5 challenge the award of the quantum awarded as damages, and also the failure to award damages under some heads of damage. Grounds 3 and 4 challenge specifically the failure of the learned Judge to award damages for pain and suffering. Grounds 6 to 9 challenge the finding of contributorily negligence on the part of the deceased. In view of the matters to be determined, it is convenient to first consider grounds 6, 7, 8 and 9.

Grounds 6, 7, 8 and 9- Error in finding Contributory Negligence of the deceased

[22] The essence of this ground of appeal is that findings of the learned Judge contained in paragraphs [42] and [43] of the judgment, wherein he found the deceased contributorily negligent, and apportioned 30% liability to the deceased, are inconsistent with the totality of the evidence that was before him.

[23] In determining this ground of appeal, it is necessary to examine the reasons expressed by the learned Judge for finding the 1st Respondent negligent. In arriving at the finding that the 1st Respondent was negligent, the learned Judge also referred to the conduct of the deceased, and found that by crossing between two stationary buses, the deceased had exercised the most logical and reasonable option. In this regard, the learned Judge concluded as follows:

> "*[39] The deceased who was 18 years had opted to cross the road from the place where there was the largest gap between the buses. The contention that (sic) accident happened as he did not cross the road from the pedestrian crossing does not absolve the (sic) high degree of negligence on the part of the 1st Defendant.*
>
> *[40] When the pedestrian crossing is obstructed by buses it is logical and quite normal to cross the road where there is (sic) largest gap of vehicles as the intention of the deceased was to get to the other side of the road where the bus stand is located"*
> *[41] The deceased had not used the pedestrian crossing as it was obstructed by other vehicles. Though there was no evidence that the pedestrian crossing was fully obstructed, the evidence was that the largest gap between the vehicles at the moment before the accident was between PEL111 and the vehicle behind it which was about 8 meters."*

[24] Having engaged in a careful analysis of the evidence before him, in his final conclusion however, the learned Judge goes on to state thus:

> "*[42] The witness who was on the ground explained that he observed the accident and it has taken about 30 seconds to collide. So a person who is walking in normal speed would not take more that a few seconds to walk the width of the bus.*
>
> *[43] If the deceased was careful, he would have certainly observed before he approached the bus. This indicates negligence on the part of the deceased as well. This negligence has to be considered with the age of the plaintiff and distractions and or the mind of a person at that busy hour crossing the road. So considering the circumstances I consider that contributory negligence was 30%."* (Emphasis added).

Was the finding of contributory negligence justified in the circumstances?

The "but-for" test

[25] Contributory negligence is a defence that can be raised by the defendant in order to have the damages claimed against him reduced. It does not negate the finding of negligence against the defendant. The burden of proof lies on the defendant to prove that the claimant was contributorily negligent, and that it was such negligence that was the real and effective cause of the damage. Thus, the burden of proof lies on the defendant to establish that the claimant failed to take reasonable care of his own safety, and thereby contributed to the damage or injury. Contributory negligence thus has two limbs; causation and foreseeability.

[26] The enquiry into whether the claimant failed to take care of his safety is to be judged objectively from the point of reasonable person in the position of the claimant, under the circumstances in which the accident occurred, and what he knew, or ought to have known in the circumstances. It is true that the reasonable person will be presumed to take into account the possibility that others around him may be careless. However, a defendant who pleads contributory negligence is required to establish that it was the claimant's negligence that finally caused his own damage or injury, and that the cause of the injury was the contributing factor of the claimant, which was caused by the danger or risk created by the claimant's carelessness**.**

Causation- the claimant's carelessness - the damage suffered

[27] In **Grayson v Ellerman Lines Ltd**. (1920) ACC 466 at 477 Parmour J described contributory negligence thus:

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

[28] In **Nasese Bus Company Limited v Chand [2013] FJCA 9;** ABU40.2011 (8 February 2013) Calanchini AP (as he then was) said:

> *"[44]. Contributory negligence applies only to the conduct of the Respondent. The question to be asked is whether there has been conduct on the part of the*

Respondent which has contributed to her damage. In other words, did the Respondent contribute to the accident in the sense that she did not look out for her own safety. The issue is not concerned with a breach of any duty of care to another person. It is simply an inquiry into whether the Respondent contributed to her injuries by her own disregard for her safety." [emphasis added]

[29] A finding by the trial judge that the worker was not contributorily negligent was affirmed in **J Blackwood & Son v Skilled Engineering** [2008] NSWCA 142, where a worker was injured using an unsafe method to clear a jam on an elevated conveyor line. The court said:

> '*it is not as though the Worker was injured by an act of carelessness for her own safety that was incidental to the performance of her duties - she was injured through performance of her duties in the precise way in which she had been instructed to perform them. Any assessment of what reasonable care for a plaintiff's own safety requires that plaintiff to do must take into account the practical opportunities for choice that the plaintiff has concerning his or her own safety. In the present case, the only practical choice that the plaintiff had, short of resigning, was to complain to people in authority about the inadequacy of the system, and seek to have it fixed. She complained more than once. Taking reasonable care of her own safety did not require her to take the further step of resigning when her complaints prove useless. The trial judge was right in holding that there was no contributory negligence.'* (Emphasis added).

[30] It was in evidence that the Labasa Bus Stand is an extremely and constantly busy place, where persons freely cross the road at all times, giving the distinct impression that it is understood, known, expected and anticipated by all users of the Bus Stand that, in reality, it is not uncommon for road rules to often be observed in the breach. This then, would be a circumstance to be taken into account by all persons using the Labasa Bus Stand, both pedestrians as well as drivers. Mr. Kohli, learned Counsel for the 1st Respondent, submitted that that a higher degree of care is expected by pedestrians and other users of the Labasa Bus Stand, and that the 1st Respondent's bus was not parked at the bus stand, but was parked on an adjoining street. However, the evidence revealed otherwise. In any event, nothing turns on this because as will be seen later on in this judgment, the causative factor of the collision, was not the deceased's conduct of crossing in the wrong place.

[31] In this case, the learned trial judge initially reasoned that the deceased has acted reasonably by crossing the road as he did. There was no evidence that, in the circumstances, he did not look out for his safety.

Causation- the claimant's failure to take care of himself must be the cause of the accident

[32] In **Barnet v Chelsea and Kensington Hospital** [1969] 1 QB 428, Barnett was admitted to hospital complaining of severe stomach ache, and vomiting. The nurse who saw him, telephoned the Doctor on duty who then instructed the nurse to send Barnett back home, and ask him to consult his GP in the morning. Barnet died five hours later, from arsenic poisoning. It was found that even if the Doctor had examined Barnet in hospital, Barnet would not have survived. It was held that the hospital was not liable as the failure to examine the patient was not the cause of his death, and there was nothing that the Doctor could have done to save him. Thus, the test is, would the accident have happened, but for the act or omission of the defendant. If the accident would have occurred even without any act or omission on the part of the defendant, then the defendant is not liable.

[33] In my judgment had the 1st Respondent not been negligent, the fact that the deceased walked between the buses would not have resulted in death. It was only because the bus under the control of the 1st Respondent, rolled backwards, and not duly controlled by the 1st Respondent thereby colliding with a stationary bus parked behind his bus, that caused severe injuries and resulted in the death of the deceased.

[34] The prudence test was adopted by this court in **Sun Insurance Company Ltd. V Qaqanaqele** [2016] FJCA 123; ABU 0035.2013 (30 September 2016), in which the father claimed damages arising to the estate, on the death of his five year old daughter who was knocked down and died as a result of the injuries arising from the negligence of the 2nd Respondent driver. Almeida -Guneratne JA, in a detailed analysis of the conduct expected of a motorist set out in the circumstances, what he described as *the competing factors* that are engaged in determining the negligence of a motorist. In his Lordships' view, although by driving a vehicle, the driver cannot be said to have assumed an abnormal risk, that did not absolve him from the special duty of care he owed to the girl who had been crossing the road.

He was bound to take "*all precautions*" to avoid the accident. Thus, this additional "precaution test" would, in my view also apply to a bus parked in a public Bus Stand, a place which is expected to be used by large numbers of persons. In regard to the conduct expected of the victim, the court found that the level of prudence to be imputed to a five-year-old girl was such that it made it incumbent on the motorist to exercise additional precaution upon seeing a child of such tender years. Thus, the age of the victim would be a relevant factor in determining whether he was contributorily negligent.

[35] Thus, in determining contributory negligence in his case, the question arises as to what was the degree of law expected of an 18-year-old boy, crossing the constantly busy Labasa Market Bus stand, was in my view of – one of a reasonable young man of that age, the circumstances in my judgment the deceased's conduct did not fall short of what was expected of a reasonable pedestrian in the circumstances. The learned Judge himself found that the deceased did what was most logical and reasonable in the circumstances. The deceased had therefore been both prudent, and reasonable.

Contributory negligence- the foreseeability test

[36] The Appellant relied on the dicta of Lord Denning in **Jones v Livox Quarries Ltd** (1952) 2 Q.B. 608 at 615 in which he said:

> *"Although contributory negligence does not depend on a duty of care, it does depend on foreseeability, just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that; if he did not act as a reasonable, prudent man, he might hurt himself: and in his reckonings he must take into account the possibility of others being careless."*

[37] Even adopting this stringent test, in my view since the 1st Respondent's bus was the first in the line of buses ready for departure, it could not have been foreseeable that it would ordinarily move backwards. Accordingly, there was no basis for the learned Judge's finding that the deceased was contributorily negligent.

[38] The Appellant also relied on **Nance v British Columbia Railway Co. Ltd**. [1951] A.C. 601, 611 which was followed with approval in **Gani v Chand** [2006] FJCA 65; ABU 0117.2005 (10 November 2006)

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

[39] Indeed, as the evidence revealed, and the learned Judge himself found, the deceased exercised the best option in the circumstances, when he crossed as he did, between the two buses stationary that had the largest gap between them. The significant matter was not from which point the deceased crossed the road, instead what was significant was, whether his choosing to cross between two stationary buses, one of which was the first in line for departure, and the other, stationary and 8 meters behind it, amounted to the taking of an unreasonable risk in the circumstances.

[40] Accordingly, Mr. Sen, learned Counsel on behalf of the Appellant contended that the learned Judge was in error when he concluded that the deceased had been contributorily negligent. For the reasons that will be set out below, I have no hesitation in agreeing with the submission that in view of the evidence that was before the learned Judge and his findings, it was not, with respect, open to him to have concluded that the deceased was contributorily negligent.

[41] In taking the facts of this case, 1st Respondent's bus was the first in the line of buses scheduled for departure, there was no bus immediately in front of the 1st Respondents' bus. The Dalip bus was parked about 8 meters behind the 1st Respondent's bus. Thus, to any reasonable onlooker or pedestrian seeking to cross the road, it is reasonable to presume that it would be the 1st Respondent's bus that would take off first, and that the Dalip bus parked behind it would have to await the departure of the 1st Respondent's bus. In such a situation,

it was not unreasonable for the deceased to have opted to cross between the 1st Respondent's bus and the bus parked immediately behind the 1st Respondent's bus.

[42] In this regard, in view of the evidence that was accepted by the learned Judge, it is in my judgment, clear that the deceased acted in a reasonable manner in the circumstances. The uncontradicted evidence was that the 1st Respondent had no control of the bus he was in charge of driving, the pedestrian crossing was blocked by a bus, there was a gap of about 8 meters between the two parked buses. It was not reasonable to expect the deceased who was crossing the road to keep his view fixated on two buses parked on the opposite side of the road, Instead, he was required to ensure that he kept a proper look out of the road he was crossing, not to keep his vision fixated on vehicles that were, evidently, stationary at the time he commenced crossing the road.

[43] The deceased was crushed between two buses because the 1st Respondent's negligence in failing to exercise due care of the bus under his care and control, resulted in the bus rolling backwards and colliding with a stationary bus. If the 1st Respondent had not been negligent, and had been in control of his bus, and instead moved forward in the Bus Stand, as he was required and expected to do, the fact that the deceased walked between the 1st Respondent's bus and the Dalip bus parked immediately behind the 1st Respondent's bus, would not have resulted in the collision. Thus, the fact that the deceased opted to walk between two stationary buses was not the cause of the collision. The collision was due solely to the negligence of the 1st Respondent. Therefore, there was no basis on which the deceased could have been held contributorily negligent.

[44] Accordingly, in the light of the evidence and his own findings that the deceased exercised the best option on the circumstances, it was not open to the learned Judge to also conclude as his Lordship did that; *"if the deceased had been careful, he would have observed the bus moving backwards*". This finding was inconsistent with both, the evidence before him, as well as his own reasoning thereon. Having found that the deceased had exercised the only logical and reasonable option available to him in the circumstances, by crossing between the largest gap between two stationary buses, one of which had obstructed the pedestrian

crossing, whilst keeping a proper lookout for other vehicles as well, it was not open to the learned Judge to have concluded that the deceased was contributorily negligent. On my view that part of the judgment therefore cannot stand and must be set aside. As I have already found, the deceased did not put himself in harm's way, and was not contributorily negligent. Therefore, grounds 6, 7, 8 and 9 are allowed.

Grounds 3 and 4 – Future Economic Loss

[45] In the Appellant's written submissions in the court below, the Appellant has based his calculation of future economic loss at the rate of $100.00 per week for 15 years, amounting to a sum of $78,000.00. The learned Judge awarded $3000.00.

[46] The principles relating damages for past and future economic loss of earnings in an action for damages arising from personal injuries, was set out by Lord Goddard in **British Transport Commission v Gourley]** [1956] AC 185 at page 206.

[47] When assessing future economic loss, the court will be required to predict as best as possible, future prospects, as well as what the future would have been like, without the injury. The court will have to consider the vicissitudes and uncertainties of life. In this case the deceased was a young man of 18 years, attending Form VI, and his ambition was to become an Agricultural Officer. Although the Appellant did not produce academic records of the deceased to establish his academic standing, it is reasonable to assume that the deceased could have been employed in some occupation, and he would have had a reasonable chance of employment. Even assuming he did not obtain a Tertiary level education, it is not unreasonable to assume that the deceased was capable of being employed. There was no evidence led that it would be impossible or unlikely that the deceased would have been able to secure employment. Accordingly, I find that in all the circumstances of this case it would not be just to exclude damages for future economic loss purely on the basis that the Appellant failed to produce specific evidence of income generation.

[48] Therefore, although there was also no evidence led to show that the deceased would have been precluded from gaining some form of income, I do not see a legal impediment to making

an informed guess, based on general presumptions that are reasonably permissible for this court to make.

[49] In regard to difficulties arising in assessing damages the court in **Attorney General of Fiji –v- Broadbridge** [2005] FJSC 4; (CBV 0005 of 2003S (8 April 2005) said:

> *"[69] Once the court accepts that the plaintiff has suffered a loss for which the defendant is liable, it will not allow difficulties in assessing the value of the loss to deprive the plaintiff of an award of damages. A plaintiff who has been deprived of earning capacity, whether in whole or in part, has lost the chance of exploiting that capacity to the full. Professor Luntz, in the text to which we earlier referred, observes that in most instances, the chance of so exploiting the capacity is high and this is reflected in the approach taken by the courts, which is usually to assume that it would have been exploited to the full, at least to the normal retirement age. That one hundred per cent probability is then discounted by the chances of its not being exploited due to the normal contingencies of life.* ***Malec*** *provides a useful illustration of just this approach.*
>
> *[70.] In other cases, where there is greater uncertainty as to whether the plaintiff would have gained a benefit had the injury not been sustained, it is necessary to evaluate the chance as best the court can. Courts typically allow damages for the possibility that the plaintiff will develop a particular condition in the future, which will require medical treatment, nursing or loss of income. In addition, courts are required to have regard to the benefits that might have been gained through additional qualifications, or promotions that are now no longer available."*

[50] In **Nasese Bus Company** (*supra*) , Calannchini AP as he then was, said:

> *[85]. In spite of the inconsistencies and shortfall in evidence Counsel for the Respondent urged the Court to follow the approach taken by this Court in* ***Attorney-General of Fiji and Kinijoji Katonivere –v- Jainendra Prasad Singh*** *(unreported civil appeal ABU 1 of 1998 delivered 21 May 1999). During the course of its judgment the Court (Tikaram P and Casey JA) said:*
>
> > *"The appellants submitted that there was no evidence to support the assessment made by His Lordship, and we agree that there was none to establish such an ascertainable future loss. Respondent's counsel accepted that he could only advance under this heading the prospect that the Plaintiff's earnings might drop if his disabilities (particularly the weakness of his arm) lead to his being ousted from his family business, or having to take a smaller share of its income. We think the risk of this happening justifies an award of damages, speculative though it must be.*

> [*86*]. *At the outset I am clearly of the view that this approach is consistent with the subsequent observations of the Supreme Court in its decision in* ***Attorney General –v- Broadridge*** *(supra) reference to which has already been made earlier in this decision. The Supreme Court has indicated that a flexible approach should be adopted in accordance with the circumstances of each particular case when assessing loss of earning capacity or loss of future earnings.*

[51] In my view, despite the paucity of specific evidence reflecting with mathematical accuracy of future economic loss, it is open to this court to make an assessment or as realistic a prediction as possible, of potential earning capacity of the injured or deceased, had the negligence of the defendant not intervened. What the court must do is to compensate the victim or his estate for the loss of chance in earning what he could have, had he not become incapacitated by the negligence of the defendant, or met with death as a result of the negligence of the defendant.

[52] In **Kumar v Pacific Transport Co Ltd [2018] FJCA 15; ABU0058.2014 (8 March 2018)** this court, awarded damages for future economic loss. Basnayake JA said:

> *[22] In* ***Martin v Howard*** *[1983] Tas R 188 at 201-201) Nettlefold stated that, "A category of cases which has a distinct bearing on this case is exemplified by such decisions in the High Court as* ***Hutchison v Sward*** *[1966] ALR 1021, , 39 ALJR 500; and* ***Wadd v Allsopp*** (1976) 10ALR 353, , 50 ALRJ 643. *The essential feature in that category of cases is that a young plaintiff has been seriously injured but, being young, his pre-accident capacity cannot be ascertained as the capacity of an established mature worker can be ascertained. You must endeavor to ascertain what his potential was as best you can and compare that with his potential in his injured state. The critical point is that what he is entitled to be compensated for is the loss of chance of achieving a greater level of reward during his working life than he is capable of achieving in his injured state. But there is a substantial difference between compensation for the loss of a chance and compensation for the destruction or impairment of a proven capacity".*
>
> *[23]* ***Hutchinson v Sward*** *(supra) is an appeal by an infant plaintiff from a judgment for damages in respect of personal injuries sustained by him as a result of the respondent's negligence. The appeal is against the award of 4000 Sterling Pounds on the ground that the amount awarded is inadequate. The appellant was nearly four years at the time of the accident. He had been left with a permanent and serious defect vision. It was argued for the plaintiff that the trial Judge failed to appreciate the extent of the effect which his disability would have upon his future life in so far as it related to his earning capacity. The court held that the plaintiff's very limited field of vision must, of necessity, have a serious effect on the range of occupation which will be open to him later in life though of course, any precise assessment of damages for this loss is impossible. The High Court of*

Australia while appreciating the difficulty of assessing damages under this head held that it should be not unsubstantial and increased the award to $16,000.

[53] In the written submissions of the Respondents in the court below, they have conceded that a sum of $3000.00 would be an appropriate sum to be awarded as damages under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act. This submission was based on two cases relied on by the Appellants, however, my search for those authorities proved unsuccessful. What I could however gather from the citations was that they were cases instituted in the 1970's and 1980's. Therefore could not have been reasonably regarded as a correct guide in determining damages in 2018. It appears to me that the learned Judge has awarded a sum of $3000.00 based purely on this concession on the part of the Appellants in the court below. There was no evidence that any particular factor would have prevented the deceased from being gainfully employed in the future. Thus, even assuming, that the deceased did not achieve his ambition of becoming an Agricultural Officer, it can safely be assumed that he would have been able to secure some form of employment, from which he could have earned $100.00 a week.

[54] For the reasons set out above, and in all the circumstances of this case, in my judgment, the sum of $3000.00 awarded as damages under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act, for future economic loss, or loss of expectation of life, must be varied. On the basis of the reasoning I have set out above, in my judgment a sum based on the expectation of earning $100.00 per week, even if the deceased could not have become an Agricultural Officer, as the Appellant claimed was his ambition, it is reasonable to estimate that the deceased could have earned $100.00 a week for 15 years grounds 3 and 4 of the appeal are allowed. I therefore award a sum of $78,000.00 for future economic loss.

Ground 5- Damages for Pain and suffering

[55] The learned Judge, for the following reasons, declined the claim for pain and suffering;

"*[51] In the present case the deceased died without gaining conscience (sic) few hours later. So no damage (sic) for pain and suffering is granted."*

[56] In **Kumar v Kumar** {2018] FJCA 2016 (6 July 2018), having considered the guiding principles to be applied for courts when assessing damages for pain and suffering, set out in **The Permanent Secretary for Health v Kumar**, Chandra RJA said:

> *In claiming damages for pain and suffering it would have been useful if the Appellant had led evidence as to the permanent nature of the disability that he had suffered, and in terms of a time period to establish for how long such discomfort would have to be endured, the period for which he would have to use crutches before being able to walk normally without such aids, the psychological effect that such discomfort had on him. Unfortunately, such evidence is not available in this case, although three doctors had given evidence on behalf of the Appellant.* (Emphasis added).

[57] It is clear that the court did not consider the paucity of evidence alone as a deterrent to the award for damages for permanent disability. His Lordship said further:

> *[44] In looking for a comparable case in Fiji, the High Court decision in **Asish Mudaiar v Rajesh Sharma and Another** (Civil action No.3 of 2012 – 4 April 2014) comes very close to the present case. In that case the Plaintiff, who was 34 years at the time of the accident suffered injuries by being crushed between two buses and thereby fracturing his right femur. The nature of the injury was such that the plaintiff had to undergo similar type of treatment of surgery, insertion of a rod, removal of rod etc. There was no permanent impairment assessment, but the Doctor had stated in his evidence that he may have put down such assessment in the range of 22% to 25%. The Plaintiff was awarded $60,000.00 for pain and suffering.*
>
> *[47] While it may be sufficient, on a practical basis to assess damages for pain and suffering or other non-pecuniary loss upon amounts awarded in previous cases, I am conscious, at the same time that, such an approach may not provide a conceptual basis for such awards in general terms in as much as one cannot find an explanation as to why awards vary in different jurisdictions in personal injury cases. In recent times, there has been an upward trend in the award of damages in personal injuries cases in Fiji as well.*
>
> *[48] It may not be possible, to look for an all-pervasive conceptual basis as to the awarding of compensation for non-pecuniary loss, for it necessarily will have to depend on such sums that are considered fair and reasonable compensation having regard to the socio-economic conditions of a particular jurisdiction. As Lord Morris said in **West v Shephard** (1964) AC 326 at 346:*

> *"Money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation .....as far as possible comparable injuries should be compensated by comparable awards ....."*

[58] Adopting the guidelines laid in by the Chandra RJA in **Kumar v Kumar** (*supra).* I am of the view that whilst claims and awards, for pain and suffering ought not to be exaggeratedly high, in view of the admittedly subjective nature of the decision to eventually be made by the court, denying damages for pain and suffering, must be premised on the presumption that the medical evidence is not the only factor to be considered. In my view, a subsequent medical report, cannot, in reality measure with accuracy, actual pain and suffering. This cannot by itself be a ground for denying damages for pain and suffering altogether. This would be more so in a case such as this, in which, despite prompt medical attention, the deceased succumbed to the brutally severe injuries five hours after the accident. In this context, it is significant that the Appellants did not, in the written submissions filed in the court below, challenge the claim for damages under the heading of pain and suffering.

[59] In the statement of eye witness Rupeni Dani (RHC 91, at page 92) made to the Police on the day of the accident he stated as follows:

> "*...the Parmod bus was still rolling where the Fijian was bumped by the Parmod bus and he trapped between the bus, where I can saw(sic) the foot of the boy not touching the ground. Then I told the driver of the Parmod bus that a Fijian boy was trapped inside. Then the driver moved the bus in front and the boy walk(sic) towards us about two to three steps and fell down. We take the boy to a nearby taxi and the taxi driver took the boy to the hospital"*

The medical evidence

[60] In the Medical Examination Form (RHC 98), column D (11), the Examining Doctor has recorded his observations as in the following words:

> "*Unresponsive on presentation, there appeared to have suffered lots of internal injuries.*

[61] Under the heading Prognosis, Recommendations and Follow Up", the Doctor had recorded the following words"

> "*Patient succumbed at 7.30 p.m. approximately 1 hr post operation"*

[62] Witness Rupeni Dani's statement to the Police almost contemporaneously with the accident, was not challenged by the Appellants.

[63] Mr Kohli, learned Counsel for the Respondents drew the attention of the court to the following evidence of Rupeni Dani, eye witness for the Appellant, (RHC 65);

> "*Was the pedestrian crossing blocked?*
> *It was blocked.*
> *I ran to pick up the boy who was crushed we wanted to make him speak, to know his name. He couldn't speak, we wanted to make him stand, he could not stand. His upper body fell down. We picked him up and got a taxi and asked him to drop at hospital."*

[64] In his statement to the Police, witness Rupeni Dani said that the moment the collision occurred, the deceased was caught between the two buses, and was literally swept off his feet, and suspended between the buses until the 1st Respondent, reacted to the shouting by the onlookers, and eventually moved his bus forward. Witness Rupeni Dani did not say that the deceased was unconscious, what he said was that the deceased did not respond when questioned. There is a distinction between not responding and being rendered unconscious. In my judgment, on a close consideration of this evidence, it was not open to the learned judge to conclude either; that the deceased was rendered unconscious immediately upon the collision, or that death was instantaneous and that therefore the deceased suffered no pain. On the contrary, in my view, it is reasonable to conclude that the impact of the collision led to such excruciating pain, that the deceased was rendered incapable of even responding to questions. That did not necessarily mean that he was unconscious instantaneously upon the collision. The fact that the deceased succumbed to his injuries on the very day of the accident, despite attempts to save him, unequivocally establishes the serious nature and gravity of the injuries. He was admitted to the Intensive Care Unit of the Labasa Hospital, shortly after the collision. However, even prompt, and I might add, almost immediate medical attention could not save the life of a healthy young man.

[65] I am conscious of the careful consideration that an appellate court must engage in, before setting aside the factual findings of the trial judge. However, despite this constraint, in my

judgment, on a consideration of the evidence before the learned Judge, there was no basis to conclude that the deceased lost consciousness immediately upon the collision taking place. Therefore, the exclusion of damages for pain and suffering on the basis that the deceased became unconscious immediately upon the collision, was an error of fact, amounting to and an error of law, which this court is entitled to correct. Accordingly, grounds 1, 2, 3 and 4 are allowed. I therefore award a sum of $30, 000.00 as damages for pain and suffering.

[66] Grounds 10 and 11 are vague and are therefore dismissed. It is not necessary for this court to consider the ground 12.

[67] Submissions were made by Mr. Sen seeking punitive damages. Whilst it is true that the 1st Respondent was both negligent and irresponsible, I am not convinced that the evidence before the lower court entitles this court to make a finding on the matter. That will be left for another occasion.

The Orders of the Court are:

1. *The appeal of the Appellant is allowed in part.*

2. *The judgment of the court dated 15 March 2018, awarding special damages of $6250.00 to the Appellant, is affirmed.*

3. *The judgment of the High Court dated 15 March 2018, awarding costs of $2000.00, is affirmed*

4. *The judgment of the High Court dated 15 March 2018, finding the deceased was contributorily negligent to an extent of 30%, is set aside, and the following orders are made in its place:*

    a. *The Appellant is awarded damages in the sum of $ 108,000 ($30,000.00 for pain and suffering, and $78,000.00 for future loss of earnings).*

b. *Interest is awarded on $6250.00 (special damages) at the rate of 3% from the date of the accident to the date of judgment.*

c. *Interest is awarded on $108,000.00 general damages ($30, 0000.00 for pain and suffering and loss $78, 000.00 of future earnings) at the rate of 6% from the date of service of the writ to the date of judgment.*

5. *The Respondents are ordered to pay within 28 days from the date of this judgment, the costs of the proceedings in the Court below which the learned Judge fixed at $2500.00, and the costs of appeal which are fixed at $5000.00.*

.....

Hon. Justice Eric Basnayake

JUSTICE OF APPEAL

COURT OF APPEAL FIJI

.....

Hon. Justice Almeida Guneratne

JUSTICE OF APPEAL

.....

Hon. Justice Farzana Jameel

JUSTICE OF APPEAL