IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0025 of 2019
[High Court at Suva Case No. HBC 296 of 2014]

BETWEEN	:	**PAPALAMA**
		Appellant
AND	:	**ASHOK PRASAD**
		1st Respondent
	:	**VICTORIA WINES & SPIRITS LIMITED**
		2nd Respondent
	:	**AVENAI MOKOBULA DAUBITU**
		3rd Respondent
Coram	:	**Lecamwasam, JA** **Jameel, JA** **Gunawansa, JA**
Counsel	:	**Mr. D. Singh for the Appellant** **Mr. R. Singh for the 1st and 2nd Respondents** **3rd Respondent not present and unrepresented**
Date of Hearing	:	**13 September 2022**
Date of Judgment	:	**30 September 2022**

JUDGMENT

Lecamwasam, JA

[1] This appeal is preferred by the Appellant being aggrieved by the judgment of the High Court at Suva dated 23rd November 2018 on the following grounds of appeal;

*'**Grounds of Appeal:***

1. *THAT the Learned Trial Judge erred in law and in fact in stating the Plaintiff's witness said the speed of the truck was high when the recorded version of the transcript of notes of evidence show otherwise.*
2. *THAT the Learned Trial Judge erred in fact in holding that the deceased driver's truck had gone more towards his right when a clear inference to that contrary can be inferred that accused driver was attempting to overtake the Mini Van and the tray of his truck came obliquely onto the path of the truck driven by the deceased driver as the recorded version of the transcript of notes of evidence at trial will show.*
3. *THAT the Learned Trial Judge erred in law and in fact in not holding that the case of **Scott v London and St Katherine Docks Company** (1865) 3H & C 595 actually applied a favour of the Appellant in terms of the principles and evidence adduced at the trial.*
4. *THAT the Learned Trial Judge erred in law and in fact incorrectly in not holding that the case of **Ng Chun Pui -v- Lee Chuen Tai** [1988] RJR 298 applied in favour of the Appellant in terms of the evidence adduced at trial.*
5. *THAT THE Learned Trial Judge erred in fact and in law in not drawing an inference that sudden movement of the parked vehicle onto the road and the attempted overtaking by the accused driver contributed to the accident and that blame should have been apportioned between the 1st Defendant and the 3rd Defendant.*
6. *THAT the Learned Trial Judge erred in fact and in law in holding that the maximum of res ipsa loquitur is not applicable to the facts of this case when evidence clearly pointed to contrary and an obvious inference was glaringly discernable that the accident was caused and contributed by the both the 1st and 3rd Defendant.*
7. *THAT the Learned Trial Judge erred in law and in fact in allowing the 3rd Defendant to withdraw from the proceedings without following the correct procedure in law.*
8. *THAT the Learned Trial Judge erred in law and in fact in holding that the deceased was responsible for the accident and if the deceased had driven at moderate speed with heavy load then the accident not have happened when the recorded transcript version of the notes of evidence at trial discloses otherwise.*
9. *THAT the Learned Trial Judge did not record in his handwriting vital evidence adduced at trial and also omitted to note down crucial evidence adduce by the Plaintiff as the full recorded version of the transcript of evidence will disclose, resulting in a substantial of miscarriage of justice.'*

[2] The learned counsel for the appellant informed court at the stage of arguments that he will rely only on 2, 5, and 6 of the grounds of appeal thereby abandoning the remainder of the grounds raised.

[3] A brief account of the factual background is as follows: On the day of the accident, the deceased driver, i.e. the husband of the Plaintiff/Appellant, had been driving a truck laden with cement from Suva to Lautoka on Queens Road. The vehicle had collided at a right-hand bend near the Wellesley Resort junction with the vehicle driven by the 1st Respondent and owned by the 2nd Respondent, which had been travelling from Sigatoka to Suva. The accident resulted in the vehicle driven by the 1st Respondent, namely Wine 2, being damaged on the right side of the rear of the tray. The accident also caused the vehicle driven by the deceased to veer on to the left of the road and topple into a ditch causing the death of the driver. As per the evidence, first responders to the site of the accident found the driver fully covered by the cement he was transporting, but could not disentangle the deceased from the vehicle.

[4] The Appellant, as the next of kin of the deceased, instituted action to claim for damages for the loss of her spouse. The learned High Court Judge decided against the Appellant. This court is now called upon to determine whether the conduct of the 1st and 3rd Respondents resulted in or contributed to the accident. Such an obligation requires detailed scrutiny of the evidence available.

[5] It is revealed in evidence that the minivan driven by the 3rd Respondent which was transporting passengers from Sigatoka to Suva had stopped at the Wellesley junction on the bend at which the above accident occurred, to drop-off some passengers. Wine 2 had attempted to overtake this minivan which was stationary, and suddenly moved forward without a warning signal, prompting the 1st Respondent to swerve towards the center of the road. In doing so, it had collided with the oncoming vehicle of the deceased, the husband of the Appellant.

[6] The above account was given in evidence by Mr. Jolame, a villager travelling on foot from the direction of Suva towards the Wellesley junction. He had been walking on the left side of the road and had witnessed the accident from about 40 meters away. This witness was a passerby unknown to any of the parties to the matter at hand. Therefore, even though he was called as a witness for the Appellant, there was no apparent reason

for him to be partial towards any of the parties could be fathomed. As such, there is no reason to not consider him an unbiased, impartial, and reliable witness or discredit his evidence which furnishes a complete picture of the incident that occurred.

[7] The counsel for the 1st Respondent suggested that the deceased drove the cement truck leaning more towards the right of the road and oncoming traffic despite there being enough space on the left side of the cement truck. The counsel further suggested that if he had leant more towards the left of the road, the accident could have been prevented. However, the evidence of the 1st Respondent at p.187 of the High Court record clearly states that two trucks had been parked on the curb which therefore would have prevented the deceased from driving further on the left side of the road. It is pertinent to mention that these two trucks were parked right on the same bend of the road where the accident occurred.

[8] As revealed in the evidence of Mr. Jolame, the speed limit on the road near the Wellesley junction was 30KMPH (*p.152 of HCR*) which the defense did not dispute or challenge. The 1st Respondent admits in his evidence that he had been driving at a speed of 60KMPH on that stretch of road at the time of the accident, well over the permitted speed limit. The learned High Court judge had unfortunately overlooked this important element in the evidence of the 1st Respondent together with the fact of the two trucks being parked on the curb towards the left side of the cement truck causing some obstructions to the smooth flow of traffic on the bend. The disregard for road safety rules by the 1st Respondent points to negligence on his part.

[9] The 1st Respondent had not admitted that he had crossed over the centerline of the road. On a careful examination of the circumstances surrounding the accident, it can safely be inferred that in order to avoid Wine 2 from colliding with the passenger van, he would have had to veer to the right and towards oncoming traffic, possibly even crossing the centerline of the road.

[10] It is also alleged that the deceased driver of the cement truck drove at an excessive speed. In the absence of police reports or any other observations from the authorities, this court has to rely on the evidence of eye-witnesses to determine the veracity of this assertion. Under cross-examination, Mr. Jolame, the only reliable witness to the incident categorically stated that the deceased was not speeding and there was no space for the deceased to avoid the accident *(p.155-158)*. Further, the accident had occurred within close proximity of a bridge and just after the deceased had descended the Matanipusi hill. It could be inferred from this evidence that the deceased, who was familiar with the route, had not sped down the hill, as it would have been imprudent for his own safety, especially as he was next heading towards a bend.

[11] Also, had the deceased been driving at an excessive speed as suggested by the defense, given the dimensions of the truck and the load it was carrying, my conclusion is that the collision would have caused the truck to end up in the opposite side of the road from the side on which he was driving, i.e. on the right side of the road. However, in this case, the collision had caused the truck to be pushed back further towards the left side of the road, causing it to knock down a post and topple into a ditch. This suggests that the force which emanated from the collision was of such a magnitude that it caused the truck of the deceased laden with cement to be pushed back towards the same side on which it was driven, which could only be possible if the 1st Respondent, driving a smaller vehicle had been driving at a considerably higher speed so as to cause such force.

[12] Given the lack of cogent evidence to suggest that the deceased was driving at a higher speed apart from the assertions of the 1st Respondent, and the admission of the 1st Respondent in evidence of driving at double the speed permitted on the bend of the road where the accident occurred, I am satisfied that the 1st Respondent driving Wine 2 at an excessive speed, collided with the truck of the deceased when it swerved to avoid colliding with the passenger van of the 3rd Respondent.

[13] No sketch or a police report containing observations of the police officers who responded to the accident has been produced before the court, which would have been of

considerable value in arriving at a conclusion regarding whether the 1st Respondent had crossed the centerline of the road. However, a careful scrutiny of the available facts leads to the conclusion that the 1st Respondent had caused the accident, contributed by the conduct of the 3rd Respondent. Conduct of the 3rd Defendant triggered the events leading to the accident.

[14] Even though the 3rd Respondent had escaped the scene of the accident, his contribution should be taken into account, since the evidence clearly establishes that he had pulled the passenger van on to the main road without signaling his intention to do so, thereby causing the 1st Respondent to swerve to the right of the road.

[15] Therefore, I am satisfied that both the 1st and 3rd Respondents are liable for the accident which caused the death of the husband of the Appellant. The issue of contributory negligence does not arise in this matter. On the strength of the Law Reform (Contributory Negligence and Tortfeasors) Act 1946 as amended, an apportionment of liability in case of contributory negligence will only arise where a person suffers damages as result partly of his or her own fault and partly of the fault of another person. In the absence of evidence to the contrary, the deceased is not found to have contributed to the collision in any manner.

[16] In coming to this conclusion, I have carefully perused the written submissions filed by the parties and the authorities tendered.

[17] Accordingly, I answer the cumulative grounds of appeal retained by the Appellant in the affirmative. I hold that the 1st and 3rd Respondents are liable for damages. I further hold that the 2nd defendant is liable on the basis of being the owner of the vehicle, WINE 2, which was an agreed fact at the pre-trial conference (*page 60*).

[18] On the basis of the above, I hold that the 1st, 2nd and 3rd Respondents are individually liable to pay damages and order that this case be remitted back to the High Court for the assessment of damages in respect of the Respondents.

Jameel, JA

[19] I agree with the reasons, conclusions and orders proposed by His Lordship, Lecamwasam JA.

Gunawansa, JA

[20] I agree with the conclusion reached by the reasoning behind them and the proposed orders by His Lordship, Lecamwasam JA.

Orders of the Court:

1. *Appeal allowed.*
2. *The judgment of the High Court is set aside.*
3. *The case to be remitted to the High Court for the assessment of damages in relation to the 1st-3rd Respondents.*
4. *1st-3rd Respondents to pay FJ$7,500.00 (at the rate of $2,500.00 each) to the Appellant.*

COURT OF APPEAL FIJI

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Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL

.....
Hon. Madam Justice F. Jameel
JUSTICE OF APPEAL

.....
Hon. Mr. Justice A.A. Gunawansa
JUSTICE OF APPEAL