

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 26 of 2011

BETWEEN : **TEMALESI TAWAKE**
PLAINTIFF

AND : **PARMENDRA SINGH**
FIRST DEFENDANT

AND : **THE COMMISSIONER OF POLICE**
SECOND DEFENDANT

AND : **ATTORNEY-GENERAL OF FIJI**
THIRD DEFENDANT

AND : **YASHMEEN KHANOUN BUKSH**
FOURTH DEFENDANT

AND : **ETIKA BILOLEVU JIKAU**
FIFTH DEFENDANT

BEFORE : **Hon. Justice Kamal Kumar**

COUNSEL : Mr. D. Singh for the Plaintiff
Mr. S. Raramasi for the First, Second and Third Defendants

DATE OF HEARING : 22 October 2013

DATE OF JUDGMENT : **20 October 2016**

JUDGMENT

Introduction

1. On 24 January 2011, Plaintiff filed Writ of Summons and Statement of Claim claiming for alleged injuries sustained by her as a result of an accident on 16 January 2008, at 8 Miles, Kings Road, Nasinu between motor vehicle registration Nos. GN042 and ET511.
2. On 4 and 22 February 2011, First, Second and Third Defendants filed Acknowledgement of Service and Statements of Defence respectively.
3. On 2 April 2011, Affidavit Verifying List of Documents was filed on behalf of the Plaintiff.
4. On 11 January 2013, (lapse of almost one and half years) Plaintiff filed Notice of Intention to Proceed.
5. On 18 January 2013, this matter was called before the then Master who on First, Second and Third Defendants request granted them fourteen (14) days to file Affidavit Verifying List of Documents.
6. At this stage I think it is appropriate to once again point out that there is no need for parties to file Affidavit Verifying List of Documents in a personal injury claim unless directed by the Judge on the grounds that discovery of documents in a personal injury claim is automatic. (Order 25 Rule 8 - High Court Rules)
7. On 23 January 2013, Affidavit Verifying List of Documents was filed on behalf of First, Second and Third Defendants.
8. On 13 February 2013, Minutes of Pre-Trial Conference ("**MPTC**") between Plaintiff and First, Second and Third Defendants was filed.
9. On 28 February 2013, Plaintiff filed Copy Pleadings and Summons to enter action for trial which was returnable on 15 April 2013.
10. This matter was next called before the then Master on 16 April 2013, who referred this matter to registry to allocate to a Judge for trial.
11. On 30 May 2013, this matter was called before this Court for the first time when Court made following enquiries:-
 - (i) Who was representing Fourth and Fifth Defendants?
 - (ii) Was any documents served on Fourth and Fifth Defendants?

- (iii) Was leave obtained to institute proceedings against the Fourth Defendant who appears to be residing overseas?
12. In response to above queries, Counsel for the Plaintiff informed the Court that Plaintiff will fix the pleadings and file Notice of Discontinuance. This matter was adjourned to 2 July 2013, for review.
 13. On 2 July 2013, Counsel for the Plaintiff informed the Court that Plaintiff will need to keep Fourth and Fifth Defendants on record to prove statutory liability as he needed to sort out issue regarding sketch plan.
 14. This Court struck out claim against the Fourth Defendant as the action was instituted without leave of the Court and stated that issue regarding sketch plan issue should have been sorted out at Pre-Trial Conference and not when action is ready for trial. This action was then fixed for trial on 22 and 23 October 2013 at 9.30am.
 15. On the same day (i.e. 2 July 2013), Plaintiff filed Notice of Discontinuance against Fourth and Fifth Defendants.
 16. On 16 October 2013, parties filed Agreed Bundle of Documents dated 15 October 2013.
 17. The trial commenced and completed on 22 October 2013, when by consent parties were directed to file Submissions and Reply to Submissions by 30 November 2013, and this action was adjourned for Judgment on Notice.
 18. Parties filed Submissions but did not file any Reply to either parties Submissions.

Agreed Facts and Documents

19. Parties had agreed to following facts as stated in the MPTC and amended on date of trial:-
 - “1. At all material times the 1st named Defendant was driving a Police Bus registration number GN 042 in the course of his employment with the 2nd Defendant as a servant and/or agent of the 2nd Defendant.
 2. At all material times the 2nd Defendant was the employer of the 1st Defendant and is vicariously liable for the acts and/or omissions of the 1st Defendant.

3. *The 3rd Defendant is sued pursuant to Sections 3(1)(1) and 12(2) of the State Proceedings Act for and on behalf of the 2nd Defendant.*
 4. *On 16th January 2008, there was a collision between the said motor vehicle driven by the 1st Defendant and which the Plaintiff was a passenger and driven by the 5th Defendant.”*
20. The parties agreed that the documents listed in the Agreed Bundle of Documents dated 15 October 2013, be tendered and marked as Exhibits 1 to 17.

Issues to be Determined

21. The issues that need to be determined are:-
- (i) Whether the First Defendant as driver of the Police Bus owed a duty of care to the Plaintiff and other road users?
 - (ii) If so, whether the First Defendant breached that duty of care?
 - (iii) If First Defendant did breach the duty of care then whether said breach caused Plaintiff's alleged injuries?
 - (iv) Whether Plaintiff is entitled to claim special and general damages as pleaded in the Statement of Claim?
 - (v) If so, what is the quantum of such damages?
 - (vi) Whether Plaintiff is entitled to interest and costs of this action?

Whether First Defendant owed a duty to the Plaintiff and other road users?

22. It is well established that one road user owes duty of care to other road users be it drivers, passengers, pedestrians or jaywalkers.
23. It therefore, goes without saying that the First Defendant being driver of Police Bus Registration No. GN042 owed a duty of care to other road users including the Plaintiff who was a passenger in Taxi No. LT5111.

Whether First Defendant breached the duty of care owed to the Plaintiff

24. Plaintiff gave evidence and called three witnesses namely:-
- (i) Etika Bilolevu Jikau of Lot 9 Vatutale, Wainikoso, Technician (“**PW1**”);
 - (ii) Meliki Logaulu of Lot 5 Stage 2 Matanikorovatu Road, Makoi, Domestic Duties (“**PW2**”);

(iii) Isikeli Wawanavanua Limanatini of Lot 9 Qiwa Lane, Muanikoso Housing, Makoi, Carpenter (**"PW3"**).

25. The witnesses relevant to this issue are Plaintiff, PW1 and PW2.

26. PW1 during his examination in chief gave evidence that:-

- (i) He was born on 20 March 1986, his level of education is upto Form 6 level and he obtained Trade Certificate in Electronics from Training and Productivity Authority of Fiji (TPAF).
- (ii) He was involved in motor vehicle accident and recalled the date of accident (**"DOA"**) as 16 January 2008.
- (iii) On DOA he was driving Taxi Registration No. LT5111 and make of the vehicle was Toyota Caldina.
- (iv) Accident took place close to Makoi Health Centre at around midnight.
- (v) He was travelling towards Nausori with a female passenger and the bus was travelling towards Suva.
- (vi) Before the accident he saw the bus seconds away when it was two meters away.
- (vii) He was travelling at 50 to 60 km/hr and he had Taxi's light on low beam whereas the Bus' light was on high beam.
- (viii) The collision took place around the middle of the road.
- (ix) He could not recall at what speed bus was travelling but stated that it was fast.
- (x) Road was gravel and dusty and agreed that it was being re-constructed.
- (xi) When asked if he did anything to try and avoid the accident he stated that he tried to apply the brake.
- (xii) He managed to apply the brake but it was too late.
- (xiii) Front right hand of the taxi collided with the front of the bus.
- (xiv) After the accident he blacked out.
- (xv) He was charged with the offence of Dangerous Driving Causing Bodily Harm, he pleaded guilty to the charge in November 2008, was convicted and sentenced to nine (9) months imprisonment suspended to eighteen (18) months.

- (xvi) He pleaded guilty to get rid off his chest as case was going for three (3) weeks.
- (xvii) He answered “No” to the question as whether he pleaded guilty because he was at fault.
- (xviii) He just wanted to get it off his chest.
- (xix) According to him the accident was caused by the speed of the bus.
- (xx) When asked as to where the accident took place was flat or upon the hill he stated that he was driving uphill and bus was coming down hill.

27. During cross-examination PW1:-

- (i) Stated that on day in question he was driving Taxi Registration No. LT51111 and at that time he did not have licence to drive taxi.
- (ii) Agreed that he was not competent to drive a taxi.
- (iii) When it was put to him that he was charged with two (2) counts, he stated that he was charged with three (3) or four (4) counts and was advised by Nasinu Court that he has been pardoned in three counts and is convicted on only one count.
- (iv) When he was asked as to whether he agreed that the reason he was charged, was that he was at fault, he first answered “Yes my Lord” but withdrew the answer and stated he was not at fault.
- (v) When asked that after Police Investigation they found him to be at fault he stated that they accused him to be the one at fault.
- (vi) He only pleaded guilty because he knew that he will not win.
- (vii) When it was put to him that accident did not take place in the middle of the road but he went on the other side of the road and collided with the bus he stated that is what he was told of that by the Police after the accident.
- (viii) Denied that the main reason he saw the bus two (2) meters away was because he was sleeping.
- (ix) When he was travelling uphill towards 8 miles he could see vehicle coming from other side and he saw three (3) vehicles passed before the bus and he was in position to see vehicles from other direction.
- (x) When it was put to him that he said he saw the Bus two (2) meters away he stated that he was not sleeping because he was asking the passenger

about her exact address who was not responding when he saw her sleeping. He also stated that passenger said Narere and he wanted to know which road in Narere.

- (xi) When it was put to him that he said to Police that he went outside the road and bumped the bus he stated that he was not sure.
- (xii) Agreed that his passenger was sleeping but stated that he was not sure whether passenger was in a position to tell the Court how the accident happened.
- (xiii) He was told that owner of the Taxi was an Indian Lady but was later told that she was the daughter of the real owner.
- (xiv) He did not know if Owner of the Taxi was Yashmeen Khanoun Buksh.
- (xv) He did not know who was named as Fourth Defendant.
- (xvi) His cousin gave him authority to drive the Taxi.
- (xvii) When asked if he agreed that owner of the Taxi should be responsible for his claim he stated that he is not aware of any law.

28. In re-examination PW1 stated that he had Group 2 Provisional Licence.

29. During evidence in chief PW2 gave evidence that:-

- (i) She could recall accident between a bus and a taxi in 2008.
- (ii) The accident took place about midnight near Nasinu Police Station.
- (iii) When the accident took place she was in a car with her husband and they were going to fill fuel at Mobil Service Station at Makoi.
- (iv) The taxi was in front of their car driving up the hill towards Nausori and their car was behind the taxi.
- (v) She saw the driver and a iTaukei woman in the car.
- (vi) When asked how the accident happened she stated that she heard an explosion coming from the bus and then saw the bus come on the other side of the road.
- (vii) Next thing that happened was that, her husband stopped the car and ran to see the taxi.
- (viii) Her husband came back, and told her that the driver and the lady were both unconscious and saw that the lady was covered in blood.

- (ix) When she was asked if her husband said anything about the lady she stated that he said she was dead.
 - (x) Her husband went back to check the taxi but the Police surrounded the taxi. They chased him away.
30. During cross-examination PW2 stated that she did not have driving licence and agreed that she heard loud explosion.
31. When she was asked at to how soon after she heard the explosion, the accident happened she stated that it happened so quickly.
32. During examination in chief PW3 gave evidence that:-
- (i) He could recall accident between the bus and the taxi in 2008.
 - (ii) The accident happened around midnight near Nasinu Police Station, Makoi.
 - (iii) At that time he was on the right hand side coming up towards Nausori and the taxi was on his left.
 - (iv) When he first saw the bus it was on his right coming towards Suva.
 - (v) The accident happened after the bus came and crashed taxi on the left hand side of the road.
 - (vi) He was about thirty (30) yards away from the collision point.
 - (vii) He did not hear any explosion before the accident.
 - (viii) He saw accident happen which was followed by sound of accident.
 - (ix) He was standing and watching.
 - (x) The road was full of dust as it was being constructed by Roads Department and as such he could not see anything clearly.
 - (xi) The Police Officers did not say anything to him.
33. During cross-examination, PW3:-
- (i) Stated that the bus he referred to was Police Bus.
 - (ii) Stated that he did not give Statement to Police and the reason he did not do so was that at that time Police were chasing people.
 - (iii) Stated that he did not know people involved in the accident.
 - (iv) Agreed that he stated that the bus crashed onto the taxi on the left side of the road.

- (v) Stated that the bus was on the left side of the road which is towards Wainikoso side of the road.
 - (vi) When it was put to him that it was correct to say that he did not know how the accident happened he answered "Yes".
34. In re-examination PW3:-
- (i) When it was put to him that bus was going downhill he answered "Yes".
 - (ii) When he was asked as to which side accident happened "taxi side or bus side" he stated taxi side.
35. Plaintiff during evidence in chief gave evidence that:-
- (i) She recalled that on 16 January 2008, at midnight when she was returning from work and going home in the taxi.
 - (ii) Taxi was driven by a iTaukei boy and she did not see how the accident happened.
36. During cross-examination Plaintiff:-
- (i) Agreed that she is taking action against driver of the bus, Attorney-General of Fiji and Commissioner of Police.
 - (ii) Agreed that on date of accident she boarded the Taxi Registration No. LT5111 with her friends from outside O'Reilly's Nightclub and the taxi was driven by Etika Bilolevu Jikau.
 - (iii) Agreed that after she dropped her friends at Raiwaqa and Vatuwaqa she travelled down in the taxi towards Narere.
 - (iv) Stated that before she left Vatuwaqa she pulled seat belt and put it on.
 - (v) Stated that on the way music was on in the taxi.
 - (vi) Stated that on the way she fell asleep and did not know how the accident happened.
 - (vii) When it was put to her that she claimed that Police Driver was unskillful and negligent she stated she does not know.
 - (viii) When it was put to her that how could she claim that Police driver was negligent she stated that she does not know anything.
 - (ix) When it was put to her that there was a responsibility on the Taxi driver she stated that she does not know and she does not know anything about the accident.

- (x) When it was put to her that she claimed Police bus driver was driving at excessive speed, was driving on incorrect side of the road and failed to keep proper look out and take due care and attention she stated that she does not know.
 - (xi) When it was put to her that she mentioned in her claim that the driver failed to swerve she stated that she does not know and does not know where that is coming from.
 - (xii) Agreed that she did not know anything about how the accident took place.
37. In re-examination when she was asked as to whether music came from the radio or driver was singing she stated that music came from the radio.
38. For First, Second and Third Defendants only First Defendant gave evidence.
39. First Defendant in his evidence in chief gave evidence that:-
- (i) He has been a member of the Fiji Police for eight (8) years and is based at Police Mobile Response Unit.
 - (ii) In 2008, he was stationed at Police Mobile Force and was doing operation duties, driving mobile patrols and was escorting transfer of monies.
 - (iii) On 15 January 2008, at 11.55pm he was assigned to drive Police Bus on mobile patrol.
 - (iv) After he was assigned to drive the bus on patrol he checked the Bus and then boarded the team for mobile patrol.
 - (v) The condition of the bus was up-to-date and after he checked the Bus, the team of twelve or thirteen Police Officers boarded the Bus.
 - (vi) He was driving Police Operations Bus used in mobile operation duties and it carried sixteen (16) passengers and was red in colour.
 - (vii) That night they were supposed to do patrol in the City and when he left Police Mobile unit gate he turned left hand towards the City.
 - (viii) On Wainikoso Road, he took an outer lane and saw a vehicle coming from opposite direction, going towards Nausori.
 - (ix) Vehicles towards Nausori were coming in three (3) rows.
 - (x) When he was going down he saw that a taxi came and suddenly turned and hit right side of the bus.

- (xi) From the impact he fell down on the engine cover and bus was still moving.
- (xii) He suddenly stood up and applied both hand and foot brakes and managed to stop the bus.
- (xiii) Accident happened on the left outer lane.
- (xiv) Impact of the taxi and the fact that bus seat is only a bucket seat with no seat belt caused him to fall on the engine cover.
- (xv) Before the accident happened he was travelling at 25 to 30 km/hr as he only pulled out and was travelling in third gear.
- (xvi) He tried his best to save accident by turning to the left and front left tyre of the bus went on the footpath.
- (xvii) In response to the question as to whether he could have managed to save the accident he stated that it was so fast and he fell on the engine cover.
- (xviii) After the accident, Police Officers started to direct traffic, he saw the taxi that was involved in the accident and the driver and passenger that was in the taxi.
- (xix) They then called for the Fire Brigade and Ambulance and after that the driver and the passenger were conveyed to the hospital.
- (xx) Police Officers from Nasinu Police Station came and took the measurements and carried out the investigation.
- (xxi) During the course of the investigation he gave statement to Police and confirmed Exhibit 1 as the Statement given by him.
- (xxii) He was not charged for any offence but came to know that the driver of the taxi was charged for three (3) counts.

39. During cross-examination the First Defendant:-

- (i) In reference to Statement he gave to Police (Exhibit 1) confirmed that as true.
- (ii) Confirmed that he gave evidence that he managed to stop the bus by using hand and foot brakes.
- (iii) When he was referred to line 30 in Exhibit 1 he stated that he used hand and foot brake and that the exhaust brake was on fulltime.

- (iv) He has been driving the bus from 2006, when with Police Force and he had been working for the Police Force for one and half years at the time of accident.
- (v) He is quite familiar with the bus he was driving and it was run on diesel and has foot, hand and exhaust brakes.
- (vi) A bus that runs on diesel has cable brake as it's hand brake.
- (vii) When you pull the hand brake the cable expands the brake line and pushes it to the drum of the brake and stops the vehicle.
- (viii) Exhaust brake reduces the speed but does not stop the vehicle outright.
- (ix) He drew sketch plan of scene of accidents when there was a need as he is not in the traffic department.
- (x) Author of the sketch plan writes his/her name at the bottom right hand corner of the plan to identify who drew the plan.
- (xi) In reference to Exhibit 9 he stated that it does not say who drew the plan.
- (xii) In reference to Exhibit 10 he stated that it does not show who drew the plan or who wrote the key.
- (xiii) He does not know who drew the sketch plan.
- (xiv) Purpose of rough sketch plan is to draw the place of accident, obtain drivers signatures and person drawing plan sign it.
- (xv) In this instance, rough sketch was drawn on the spot and measurements were taken on the spot.
- (xvi) Final sketch plan is drawn as soon as you reach the Station.
- (xvii) When he turned to avoid the accident the front left tyre of the bus went on the footpath and came back on the road.
- (xviii) When it was put to him that if taxi collided at front right angle should the bus have moved towards the left shoulder, he stated that bus is higher than the taxi and the taxi came onto the bus, bumped and swung onto the road.
- (xix) When there was an impact by the taxi he cut to the left on the footpath and that is when taxi came out from the bumper.

- (xx) When it was put to him that if he had cut to left when taxi struck him his path would be to the left, he stated that as he said before that after the impact he fell on engine cover while the bus was still in motion, but he managed to stop it with hand brakes and foot brakes and if he was sitting on the steering wheel he could have parked the bus on the same lane.
- (xxi) When it was put to him that in his Statement he said the foot brake failed he stated that it was hard, so he applied hand brake.
- (xxii) He could not stop the bus going downhill on hand brake and exhaust brake because it was on third gear and he would not be able to stop if bus is going downhill on running gear.
- (xxiii) If he would not have stopped the bus where it stopped, the bus would have landed over the cliff.
- (xxiv) He did not see the sketch plan and Statement just before the trial.
- (xxv) In reference to Exhibit 8 he agreed that taxi driver did not make a U-Turn and Suresh Chand is incorrect in this regard.
- (xxvi) He was not working with Mohammed Taiyab as Mohammed Taiyab was based at Nasinu Police Station and he was based at Police Mobile Division which is about 25 to 30 meters away from Nasinu Police Station.
- (xxvii) He had no idea if taxi driver was convicted when Taiyab wrote the report.
- (xxviii) After the accident only time he only became aware that taxi driver was convicted was when he met the driver at the Court in the morning he was giving evidence.
- (xxix) There was street light at place of accident.
- (xxx) The Police Statement is written in his own handwriting.
- (xxxii) His Statement was recorded at Police Mobile Conference Room which is about 55 to 60 meters from scene of accident.
- (xxxiii) He left scene of accident after 3.00am.
- (xxxiiii) When asked as to how long did it take him to go to the place where his interview was conducted from scene of the accident he stated that after

the accident they arranged for the tow truck and was at the scene waiting for tow truck to tow bus to their garage.

- (xxxiv) In reference to Exhibit 2 he stated that Tupou was seated right next to him.
- (xxxv) He had no idea as what is the length of the bus and that there was a speed limit on the bus which is 50km/hr.
- (xxxvi) In third gear the speed limit of the bus is 30 km/hour and it is a six speed (gear) bus.
- (xxxvii) It is a big bus which carries sixteen passengers but he does not know the weight of the bus.
- (xxxviii) The bus is Police riot bus and that bus was used during George Speight Coup.

40. During re-examination, First Defendant stated that:-

- (i) There were three (3) brakes in the bus and all were in good condition.
- (ii) Rough sketch plan (Exhibit 9) was drawn by officers from Nasinu Police Station and he had no contribution in drawing of the rough sketch plan.
- (iii) He did not take part in taking measurements and that the place of accident was very close to the Station and as a result lot of Police Officers came at the scene of accident.
- (iv) He met both occupants of the taxi on the day he was giving evidence.

41. After careful analysis of the evidence and the submissions of the parties I make following findings:-

- (i) PW1, the taxi driver was evasive in answering questions and it appeared that he was trying to assist Plaintiff to obtain some compensation because of his negligence.
- (ii) PW1 was negligent in his driving and as a result his taxi went on the lane the bus was coming. It is PW1's own evidence that before the accident he was not sleeping but was trying to get exact address from Plaintiff who at that time was sleeping.
- (iii) PW2's evidence is also questionable for following reasons:-
 - (a) She gave evidence that she was travelling in car driven by her husband which was behind the taxi;

- (b) She saw taxi driven by a iTaukei man driving the taxi and iTaukei lady sitting in the car;
 - (c) Plaintiff's evidence was that she lay back on the front passenger seat and was sleeping, hence, if Plaintiff was laid back on the seat then how could PW2 see that the passenger was a iTaukei lady.
 - (d) It is also doubted if PW2 could see that taxi was being driven by an iTaukei man.
 - (e) PW2's evidence was that the bus came on taxi's lane and hit the taxi. If this is so, then how did her husband save this car when according to PW2 their car was behind the taxi and she could see the passengers.
 - (f) Her evidence was that after the accident her husband stopped the car and went out.
 - (g) If the bus came at a speed as per PW2's evidence on taxi's lane then it is obvious that the car she was travelling in could have been involved in the accident.
 - (iv) PW2 also stated that she heard explosion from the bus before the accident, when PW1 and PW3 stated that they did not hear any explosion.
 - (v) As such I do not give much weight to PW2's evidence.
 - (vi) When PW2 was asked in cross-examination if it was correct to say that she did not know how accident happened she answered "Yes".
 - (vii) The First Defendant's evidence was credible.
42. I note that Plaintiff's Counsel emphasized on Mohammed Taiyabi's statement (Exhibit 7) that PW1 was at "fault" when he was not convicted by the Court.
43. The Court takes judicial note of the fact Police Officers only charge a person for traffic offence when they are of the view that the accident happened because of that person's **fault**. This does not mean that the person who Police Officer say is at "fault" is guilty of the offence that person is charged with. It is not unusual or out of practice for a Police Officer to state whether orally or in writing that a person is at "fault".
44. Having considered the evidence and Submissions filed this Court finds that First Defendant drove the vehicle with due care and attention as is expected of a

reasonable driver under the circumstances of the case and was not negligent when accident took place.

45. I therefore have no alternative but to dismiss Plaintiff's claim and strike out this action.

Costs


46. I have taken into consideration the fact that Plaintiff called four witnesses and gave evidence herself, Plaintiff suffered severe injuries and has to go through pain and suffering and expenses. Defendants called only First Defendant as their witness. I also take into consideration that the Defendants evidence was only on issue of liability.

Orders

47. I make following orders:-

- (i) Plaintiff's claim is dismissed and this action is struck out;
- (ii) Each party do bear their own costs.




K. Kumar
JUDGE

At Suva

20 October 2016

Daniel Singh, Esquire for the Plaintiff

Office of the Attorney-General for First, Second and Third Defendants