

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 207 of 2012

BETWEEN : **JAN MOHAMMED SAKUR** of 18/22 Ratu Mara Road, Suva, Fiji.
Managing Director

PLAINTIFF

AND : **SAVENACA TABILAI and SINATE TABILAI** both of Lot 4, Caubati
Road, Nasinu. General Manager and Domestic Duties respectively

FIRST DEFENDANTS

AND : **SAVENACA (JNR.) TABILAI** of Lot 4, Caubati Road, Nasinu.
Occupation unknown

SECOND DEFENDANT

Appearance : **Mr. Daniel Singh for Plaintiff**
Ms. Prem Narayan for Defendants

Date of Hearing : **25th and 26th January, 2018**

Date of Judgment : **9th March, 2018**

JUDGMENT

INTRODUCTION

1. The Plaintiff instituted action for damages due to motor accident. The Plaintiff is presently 81 years old and he had met with an accident while crossing a wide road before a busy intersection of road at Samabula after 8 am on a week day. According to the Plaintiff he collided with a vehicle as soon as he got to the road from the pedestrian walkway. The Plaintiff was not able to explain how the accident happened, to impute negligence to the 2nd Defendant. The witness called by the Plaintiff said that he had seen the accident, but his evidence not only contradicts with the facts of the case, and also with Plaintiff's evidence materially. According to him the Plaintiff had collided with the driver's side of the vehicle. The manner in which accident happened and, place of the accident and other material evidence for the proof of the Defendant's negligence are not proved on balance of

probability. The Defendant in his evidence stated that Plaintiff had collided on the side of the vehicle near the mirror of the passenger side in the middle of the road on the inner lane of four lane road. The burden of proof is with the Plaintiff to prove negligence of the Plaintiff on balance of probability.

FACTS

2. Following facts are admitted in the Pre-trial Conference Minutes.

Plaintiff

- a. The Plaintiff was born on 20th December, 1936.
 - b. He was 74 years old at the time of the accident.
 - c. The Plaintiff has been a shareholder and Director of two commercial establishments dealing with motor parts and sale of used cars.
 - d. The location of said commercial entities are situated at Samabula.
 - e. 2nd Defendant is the son of 1st Defendant.
 - f. 1st Defendant is the registered owner of vehicle Registration No. EG 491.
 - g. On 10th September, 2010 the 2nd Defendant was driving the 1st Defendant's vehicle along Ratu Mara Road, heading towards Suva.
 - h. On 10.9.2010 the vehicle driven by the 2nd Defendant and Plaintiff collided and Plaintiff was injured.
3. Though accident was admitted there is no admission as to the place of collision of the vehicle. The Plaintiff state it was front and the 2nd Defendant state it was left side near side mirror.
4. At the hearing the Parties admitted that 2nd Defendant was discharged from the criminal traffic offence and the Plaintiff had not given evidence in the matter.
5. At the hearing both parties through evidence, admitted that it was a very busy time of the day on the location where the accident happened. There were rows of vehicles due to signal light controlled intersection. This accident had happened before approaching the traffic lights controlled intersection.
6. The exact location where the accident happened is disputed. No investigation or sketch prepared by the Police was produced.

7. The 2nd Defendant who was charged for traffic infringement was discharged of the offence and Plaintiff did not give evidence in the said matter.
8. It is admitted fact that the road was very busy and vehicles were gathered in to rows due to heavy traffic ahead of traffic light controlled intersection.
9. Both parties admitted at least there were two lanes on either side of the very wide section of the road where accident happened. According to the Defendant the accident happened at a stretch where there was an additional lane for turning the vehicles to a by road. This was not admitted by the Plaintiff.

ANALYSIS

10. The burden of proof in a civil action is with the Plaintiff. The Plaintiff gave evidence but according to him he had attempted to cross the road to go to the mosque at the opposite side of the road. He said that he had just entered the outer lane and started walking at a busy time and he was collided with a vehicle.
11. The Plaintiff could not say more than he met with an accident. He admitted that it was a busy time and the road was filled with vehicles approaching the intersection and they were lined up. According to the Plaintiff he was hit by a vehicle as soon as he entered main road from the pedestrian walkway or pavement. He admitted that there was a pedestrian crossing but for him it was too far and he had not used it.
12. According to the Plaintiff's eye witness the Plaintiff had crossed the first lane of the two lanes and was walking across inner lane when he collided with the vehicle. The Plaintiff in his evidence stated that he could not finish crossing the first lane and he was hit by a vehicle as soon as he entered main road to cross to the other side. The Plaintiff said that he was hit on the right hand side of his body with the driver's side of the vehicle.

13. In the cross-examination the Plaintiff said he took about four steps and then the accident happened. He admitted that there was a pedestrian crossing, but according to him it was too far.
14. The fact that pedestrian crossing is marked away from the very busy intersection is to prevent accidents and also to get a clear view of the vehicles as well as pedestrians and the Plaintiff had deliberately not used it putting himself in to an unnecessary risk, for the sake of his convenience.
15. The above negligence on the part of the Plaintiff is more considering that he was already 74 years old and had also gone through a major operation in heart and had already developed weakness in sight and also hearing. These are vital senses for protection of a person and when they are weak, such a person should always take special care of himself.
16. He said that after the accident he was thrown in air, but Plaintiff's eye witness never said that Plaintiff was thrown in air. This is a material contradiction as to the determination of manner or the speed of the vehicle collided. Apart from the Plaintiff's eyewitness the document marked P2 had described the accident from the narration of the Plaintiff and accordingly the plaintiff was rolled over on the main road after collision. This again is not stated by the Plaintiff in his evidence or by the eye witness who gave evidence for the Plaintiff.
17. According to P2 the plaintiff's right shoulder had collided with the vehicle and Plaintiff was thrown to the road. The vehicle is approaching from the right hand side and a person crossing the road should be looking straight or the side of the road vehicles are approaching. So if the collision point was right shoulder the point of impact was upper part of his body.
18. He said that Plaintiff fell on ground of the driver's side of the Defendant's vehicle. According to him the accident happened on the inner lane of the road. According to him the Plaintiff had already crossed the first lane and was in the middle of the road when there was a collision and collision was on the driver's side. This cannot happen from a person

who is crossing a road from the left hand side of the road from a vehicle that is approaching from the right hand side.

19. There is no proof of evidence on balance of probability as to the manner in which the accident happened. What is proved is that Plaintiff had collided with a moving vehicle and he had collided on to the side of the vehicle.
20. The Plaintiff's evidence is that he collided with the driver's side of the vehicle but this could happen only if he was crossing the road from the opposite side of the road.
21. The facts that are not in dispute are that the accident happened on the main road and Plaintiff had started crossing the main road from the left side walkway. The directions are given from a person looking at the intersection ahead of the accident.
22. According to the Plaintiff's evidence as soon as he entered the main road he collided with the vehicle. But according to the Plaintiff's eye witness the Plaintiff had completely crossed the first lane of two lanes on the side of the road.
23. According to the Plaintiff when he started crossing the road there was no vehicle in the vicinity and the road was clear. According to the eye witness the Plaintiff had already crossed the outer lane and already vehicles are moving in inner lane.
24. This is a section of a road which is wide and clear. so how could a vehicle approach the Plaintiff suddenly, considering that it was a busy time and already vehicles are lined up to approach major intersection to arrive main city Suva, at busy time.
25. The vehicle that was involved in the accident was approaching the main intersection to enter Suva and already there were vehicles lined up. In such a scenario there is less or no possibility of driving fast so that a person hit would be thrown in air, as stated by the Plaintiff. This was not a position stated by the eye witness called by the Plaintiff, or Plaintiff's own account of the incident that is recorded in P2.

26. According to the eye witness who gave evidence, the Plaintiff had crossed the first lane and had entered the second lane when the Defendant's vehicle collided on the Driver's side of the said vehicle. As stated earlier the contradiction on material things such as the point of impact of the vehicle and place of impact on the road are all material facts to arrive at a determination as to the negligence of the 2nd Defendant.
27. The fact that an accident happened and the Plaintiff was injured were not sufficient to impute that there is proof of negligence on the part of the 2nd Defendant. The Plaintiff must prove negligence on balance of probability.
28. Not only had the eye witness called by the Plaintiff but also Plaintiff both contradicted *per se* and also *inter se* on material facts. Their testimony failed to prove the negligence of the 2nd Defendant, on the balance of probability.
29. The Plaintiff who is a very successful entrepreneur, who still engages in business matters, in court gave evidence, but he could not state how he got collided with the vehicle. He was evasive and stated that as soon as he entered road he met with the accident. On vital issues in cross examination he said he does not understand or that it was the job of the Police. The Plaintiff had a valid driving licence at that time.
30. He also said that when he entered the main road there was no vehicle on that side. This cannot be accepted as correct position on the analysis of Plaintiff's evidence as well as 2nd Defendant's evidence. He also said he collided with the driver's side of the 2nd Defendant's vehicle. Again this cannot happen.
31. According to the evidence of 2nd Defendant the accident happened on the inner lane and he was driving slowly due to the heavy traffic approaching capital city Suva. He was heading to Suva with his mother on the passenger seat in front. He had already passed the pedestrian crossing about 100m before the point of impact. According to him the impact was on the left hand side near to the mirror of passenger side. He said he was concentrating on the traffic ahead and did not see any person appearing from the outer lane. It was a busy time

time and after he heard a sound he had stopped the vehicle and had got down and walked to the passenger side and had seen a person sitting on the road and had taken him in to his vehicle to the Police station.

32. From the evidence presented by both parties the road was busy and traffic was moving slowly at that time. It was a very busy time after 8 am on a week day and lot of vehicles are approaching the intersection controlled by traffic lights. Soon after the collision plaintiff's eye witness who was a body guard to VIP had arrived and had allowed the victim to be taken in the car that involved in the accident. If any person thought that the fault was with the driver of the vehicle this would not have been allowed by the said eye witness. His evidence in the court is contrary to his behaviour at that time. The Plaintiff's businesses places were in the vicinity and there would not have been any difficulty in obtaining a vehicle to take him to the hospital.
33. So, the subsequent behaviour of the Plaintiff and also the said eye witness indicates that that none of them thought that it was Defendant's fault, though both of them gave evidence to the contrary at the trial.
34. Considering the evidence given by the Plaintiff and also eye witness who gave evidence for the Plaintiff, the Plaintiff had failed to prove negligence of the 2nd Defendant on the balance of probability. The writ of summons and the statement of claim is struck off. Considering the circumstances of the case no cost awarded.

FINAL ORDERS

- a. The action is dismissed.
- b. No costs.

Dated at Suva this 9th day of March, 2018



Deepthi Amaratunga
Justice Deepthi Amaratunga
High Court, Suva