

**IN THE HIGH COURT OF FIJI**  
**AT LABASA**  
**CIVIL JURISDICTION**

**Civil Action HBC No. 20 of 2017**

**BETWEEN:**                    **TARAIVINI REKIBULU NAWAQA** by her next friend and  
father **TEVITA ROKOQICA NAWAQA** of Naodamu Rental  
Board, Sales Representative.

**PLAINTIFF**

**AND:**                            **DHARMEND RAO**, of Vunivau, Labasa, Taxi Driver.

**1<sup>ST</sup> DEFENDANT**

**NARENDRA PRASAD** of Salusalu Street, Labasa, Taxi  
Owner.

**2<sup>ND</sup> DEFENDANT**

**JASWANT JAI SINGH** of Bangladesh, Bulileka, Labasa,  
Taxi Driver.

**3<sup>RD</sup> DEFENDANT**

**JOJI KAULEKA** of Wailevu, Labasa, Retired

**4<sup>TH</sup> DEFENDANT**

**BEFORE:**                    **Hon. Justice Kamal Kumar**

**COUNSELS:**                **Mr S. Raramasi and Mr A. Sen (18/5/18) for the**  
**Plaintiff**

**Mr A. Ram and Mr A. Kumar for 3<sup>rd</sup> and 4<sup>th</sup> Defendants**

**DATE OF HEARING:**      **17 and 18 May 2018**

**DATE OF JUDGMENT: 21 March 2019**

## **JUDGMENT**

### **Introduction**

1. On 17 March 2017, Plaintiff caused Writ to be issued with Statement of Claim against 1<sup>st</sup> to 4<sup>th</sup> Defendants claiming for special damages, general damages, interest and costs arising out of injuries sustained by Taraivini Rekibulu Nawaqa in a motor vehicle accident on 26 May 2016.
2. On 21 June 2017, and 14 July 2017, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed Acknowledgement of Service and Statement of Defence respectively.
3. On 10 August 2017, Plaintiff filed Reply to Statement of Defence of 3<sup>rd</sup> and 4<sup>th</sup> Defendants.
4. On 30 October 2017, Plaintiff with 3<sup>rd</sup> and 4<sup>th</sup> Defendants were directed to file Affidavit Verifying List of Documents ("**AVLD**") and exchange documents and this matter was adjourned to 14 November 2017, for mention.
5. On 3 November 2017, AVLD of Plaintiff was filed.
6. On 14 November 2017, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were directed to file AVLD by 17 November 2017, with parties to exchange documents by 22 November 2017.
7. On 17 November 2017, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed AVLD.
8. This matter was next called on 27 November 2017, when parties were directed to convene Pre-Trial Conference ("**PTC**") and file Minutes by 11 December 2017.

9. On 12 December 2017, parties were directed to hold PTC and file Minutes of PTC by 30 January 2018, and this matter was adjourned to 5 February 2018.
10. Minutes of PTC was filed on 27 December 2017.
11. On 18 January 2018, Plaintiff filed Order 34 Summons and Copy Pleadings.
12. On 5 February 2018, this matter was listed for trial on 17 and 18 May 2018.
13. On 1 February 2018, Plaintiff entered Default Judgment against 1<sup>st</sup> and 2<sup>nd</sup> Defendants on liability with damages to be assessed.
14. Trial concluded on 18 May 2018, when parties were directed to file Submissions and this matter was adjourned for Judgment on Notice.

### **Issues to be Determined**

15. The issues that needs to be determined are as follows:-
  - (i) Whether 3<sup>rd</sup> Defendant owed duty of care to the Plaintiff?
  - (ii) Whether 3<sup>rd</sup> Defendant breached duty of care owed to the Plaintiff;
  - (iii) Whether 3<sup>rd</sup> Defendant's breach caused Plaintiff injuries which resulted in Plaintiff suffering pain, special and general damages?
  - (iv) What is the quantum of damages?

### **Agreed Facts**

16. Agreed facts as per Minutes of PTC are as follows:-
  - “1. *The Plaintiff is a minor born on 10<sup>th</sup> March 2008 and brings this action through her father and next-of-friend TEVITA ROKOQICA NAWAQA against the defendants for the damages of injuries sustained by her in a motor vehicle collision on the 26<sup>th</sup> day May 2016 when she was a*

*passenger in Taxi registration No. LT 4667/DW 303 which collided with taxi registration No. LT 5000/DM 114 at Vulovi, Labasa (Qawa Junction.)*

2. *At all material times the 1<sup>st</sup> Defendant was the driver of taxi registration No. LT 4667/DW 303.*
3. *At all material times the 2<sup>nd</sup> Defendant was the owner of taxi registration No. LT 4667/DW 303.*
4. *At all material times the 3<sup>rd</sup> Defendant was the driver of taxi registration No. LT 5000/DM 114.*
5. *At all material times the 4<sup>th</sup> Defendant was the owner of taxi registration No. LT 5000/DM 114.*
6. *That at all material times the 1<sup>st</sup> Defendant was driving the said taxi as servant and agent of the 2<sup>nd</sup> Defendant.*
7. *That at all material times the 3<sup>rd</sup> Defendant was driving the said taxi as servant and agent of the 4<sup>th</sup> Defendant.*
8. *Further, the 1<sup>st</sup> Defendant has been charged for the offence of Careless Driving contrary to Section 99(1) and 114 of Land Transport Act No. 35 of 1998 and paid a fine of \$200.00 as per Traffic Infringement Notice vide revenue receipt No. 6652298.”*

### **Documentary Evidence**

17. Following documents were tendered in evidence:-

<b><u>Exhibit No.</u></b>	<b><u>Document</u></b>
P1	Photocopy of Medical Report dated 28 June 2016, from Labasa Divisional Hospital.
D1	Photocopy of Record of Interview of Dharmend Rao, 1 <sup>st</sup> Defendant dated 8 November 2016.
D2	Photocopy of Record of Interview of Jaswant Jai Sing, 3 <sup>rd</sup> Defendant.
D3	Photocopy of Rough Sketch Plan of the scene of accident.

### **Whether 3<sup>rd</sup> Defendant owed duty of care to Plaintiff**

18. It is well settled that drivers owe duty of care to other road users, be it another driver, passenger in vehicles, pedestrian, jay walker or joy rider.
19. The 3<sup>rd</sup> Defendant being driver of motor vehicle Taxi Registration No. LT5000 (**"Taxi LT5000"**) owed a duty of care to Plaintiff who at material time was a passenger in the Taxi Registration No. LT4667 (**"Taxi LT4667"**) driven by 1<sup>st</sup> Defendant.

### **Whether 3<sup>rd</sup> Defendant breached duty of care owed to Plaintiff**

20. Taraivini Rekibulu Nawaqa of Naudamu, Labasa (**"PW1"**) during her evidence in chief gave evidence that:-
  - (i) She is ten (10) years old and attending Guru Nanak Primary School in Class 5;
  - (ii) On 26 May 2016, date of accident (**"DOA"**) she went to Vunivou with her uncle in Taxi by 1<sup>st</sup> Defendant (**"Rao"**);
  - (iii) She knows 1<sup>st</sup> Defendant personally but did not answer when asked how she knew him;
  - (iv) She travelled in 1<sup>st</sup> Defendant's Taxi before DOA who operated Taxi from Taxi Stand;
  - (v) On DOA she was travelling in 1<sup>st</sup> Defendant's Taxi with her elder sister, her aunty and uncle and boarded the Taxi at Naodamu;
  - (vi) She was sitting on left hand side at the back seat;
  - (vii) On her way to Vunivou, she was holding onto her bag and accident took place;
  - (viii) She did not know Taxi was involved in an accident;

- (ix) After the accident she went home and felt pain in her arm (right collar bone) and was taken to hospital by her father;
- (x) At hospital her arm was x-rayed and bandaged;
- (xi) She was released from the hospital the same day;
- (xii) She still suffers pain from injuries she suffered and usually when it rains or is cold;
- (xiii) Injury has affected her life in that she does not play games with her friends because she feels pain on her hand;
- (xiv) She cannot lift heavy objects or is afraid when travelling in motor vehicle nowadays.

21. Plaintiff's 2<sup>nd</sup> witness Dharmend Rao, the 1<sup>st</sup> Defendant ("**PW2**") during examination in chief gave evidence that:-

- (i) He has been driving Taxi for a living for ten (10) years and on DOA he was driving Taxi LT 4667 going from Town to Qawa, Vunivou, at 8.00pm through Vulovi Road which is tarsealed road;
- (ii) Weather was fine;
- (iii) Two vehicles were parked in front of him at Qawa Junction out of which fast one turned right and second one turned left when he saw a vehicle coming far and then he turned right;
- (iv) The other vehicle bumped the left hand back side of his Taxi after he turned and quarter of his Taxi was still on the tarsealed road;
- (v) He took precautionary measure by giving signal and turning right;
- (vi) The other car was Taxi LT5000;
- (vii) There were five (5) passengers inside his Taxi including the Plaintiff;

- (viii) When he turned into Qawa Road Taxi LT5000 was far away, he could make right turn;
- (ix) When he turned into Qawa Road there was space on left hand side of the road and Taxi LT5000 did not stop;
- (x) Driver of LT5000 used other (left) side of the road after the accident;
- (xi) LT5000 contributed to the accident.

22. During cross-examination PW2:-

- (i) Agreed that he is 1<sup>st</sup> Defendant in the action, there is claim against him and if Court finds him at fault he will have to pay damages;
- (ii) Stated that he agreed in examination in chief that other vehicle contributed to the accident;
- (iii) Accepted that it was his fault that accident occurred;
- (iv) Agreed that after accident he gave interview to Police and he was questioned about the accident (Exhibit D1);
- (v) Interview was taken by Isoa Rokobici on 8 November 2016, and his signature appears on Record of Interview;
- (vi) Read question and answers in respect to question 17 to 19 as follows:-

*“Q17. Before turning, did you give your right turn traffigator?”*

*Ans. Yes.*

*Q18. When you were giving your traffigator did you saw the oncoming vehicle LT 5000?”*

*Ans. No.*

*Q19. Why didn't you saw that oncoming vehicle?”*

*Ans. Because another vehicle in front of me.”*

- (vii) When asked where the vehicle in front was heading to he stated that it was turning into Qawa Road;
- (viii) When it was put to him that it was not turning into Qawa Road he stated that it was turning left into road opposite Qawa Road;
- (ix) Read question 21 to 27 from Exhibit D1 and the answers in following terms:-

*“Q21. Whilst the front vehicle turned in, did you saw the oncoming vehicle?”*

*Ans. Yes.*

*Q22. How far was this vehicle?”*

*Ans. About 40 meters*

*Q23. About 40 meters on that stretch would you assume the speed of that vehicle?”*

*Ans. It was 100km/hr and plus.*

*Q24. Whilst assuming that speed, did you know that you can safely turn in?”*

*Ans. Yes.*

*Q25. Then why did both vehicle collided?”*

*Ans. Because I turned slowly.*

*Q26. What is your experience in driving?”*

*Ans. About 19 years.*

*Q27. As an experienced driver on that situation which vehicle supposed to wait?”*

*Ans. Myself.”*

- (x) Stated that interview was recorded by Isoa at 1<sup>st</sup> Defendant’s home and he answered questions willingly and freely without any threat or force being used;
- (xi) Agreed that he was charged with careless driving and paid fine of \$200.00 as per Traffic Infringement Notice (TIN);



- (xii) Stated that he did not go to Court;
- (xiii) Accepted that he was at fault in the accident;
- (xiv) Stated that when vehicle was coming fast, the approaching vehicle has right of way;
- (xv) Vulovi Road is two kilometers straight stretch road with a Service Station towards Town end and Vunivou Birdge towards one end;
- (xvi) Agreed that if you would stand on one end you could see Vunivou Bridge;
- (xvii) Agreed that if at night a car is approaching you would see it at quite a distance;
- (xviii) Agreed that traffic going straight would be allowed to go because he was crossing their path;
- (xix) Agreed that when he parked before going into Qawa Road he saw vehicle coming;
- (xx) Did not agree that it is open stretch speed limit would be 80 km/hr;
- (xxi) Stated that speed limit was 50 km/hr;
- (xxii) Stated that there is no written sign for speed limit;
- (xxiii) Agreed that if speed limit is not written applicable National Road Speed Limit is 80 km/hr;
- (xxiv) Stated that there are cane fields on both sides of the road;

23. During re-examination PW2:-

- (i) Stated that he was involved in the accident with somebody else;
- (ii) Stated that Taxi LT5000 was far away so he could turn.

- (iii) Agreed that there was cane farm settlement. Counsel for 3<sup>rd</sup> and 4<sup>th</sup> Defendants objected and stated that he said there was one house and cane farm;
  - (iv) Stated that when he turned and looked left one car was 40 meters away;
  - (v) Stated that he said LT5000 was doing 100 km/hr because of the impact on his vehicle.
24. 3<sup>rd</sup> and 4<sup>th</sup> Defendants first witness was Isoa Rokobici of Wailevu Village, (“**3DW1**”) Labasa, Farmer, during examination in chief gave evidence that:-
- (i) In 2016, he was a Police Officer (PC 4719);
  - (ii) On 8 November 2016, he took 1<sup>st</sup> Defendant’s interview (Exhibit D1) and Record of Interview reflect questions and answers correctly;
  - (iii) PC Petero was the Investigating Officer (“**IO**”) for the case;
  - (iv) According to caution interview 1<sup>st</sup> Defendant was at fault and 1<sup>st</sup> Defendant admitted that he turned his vehicle;
  - (v) He was the Interviewing Officer and the IO must have taken statements from witness.
25. During cross-examination 3DW1:-
- (i) Stated that he visited scene of accident with IO who took the measurements;
  - (ii) Stated that he was authorised to interview 1<sup>st</sup> Defendant and he put the allegation in respect to accident between Taxi LT4667 and Taxi LT5000;
  - (iii) Stated that according to IO both drivers were caution interviewed;
  - (iv) Stated that he has been in the Police Force for 10 years with 3 years in Traffic Department before retirement;
  - (v) Did not agree when it was put to him that both drivers are liable;

- (vi) Stated that according to Record of Interview he asked 1<sup>st</sup> Defendant if he saw another vehicle, he said “Yes it was about 40m, then he turned in and when he turned, he turned slowly”;
- (vii) Did not agree when it was put to him that accident took place due to 1<sup>st</sup> Defendant turning slowly;
- (viii) Did not agree that Taxi LT5000 was traveling at high speed and collided with Taxi LT4667 and stated that Taxi LT5000 tried to avoid the accident by turning to his right;
- (ix) Agreed that Taxi LT4667 turned in Qawa Junction and according to Record of Interview (Exhibit D1) he turned slowly;
- (x) Did not agree when it was put to him that driver of Taxi LT5000 should have exercised care;
- (xi) Disagreed with suggestion that he is saying drivers can drive anyhow and agreed they have to take special care;
- (xii) Disagreed when it was put to him that driver of Taxi LT5000 did not exercise due care and that Taxi LT5000 also contributed to the accident;
- (xiii) Stated that Taxi LT5000 was 40m away from Taxi LT4667 when it turned to turn into Qawa Road and 1<sup>st</sup> Defendant assumed that Taxi LT5000 was coming at 100 km/hr;
- (xiv) Stated that he cannot recall brake marks in sketch plan that was drawn by IO;
- (xv) Agreed that taking into consideration of brake marks it took a while for Taxi LT5000 to stop.

26. During re-examination 3DW1:-

- (i) Read question 22 and answer in Exhibit D1 which is in following terms:-  
“Q22. How far was this vehicle?”

*Ans. About 40 meters.”*

- (ii) Stated that 1<sup>st</sup> Defendant was supposed to wait and it was Taxi LT5000's right of way;
- (iii) Agreed that if a vehicle is to turn and crossing line of another vehicle, it is another vehicle to wait before that vehicle crosses the line;
- (iv) Agreed that in this instance 1<sup>st</sup> Defendant's vehicle turned without waiting;
- (v) Stated that Taxi LT5000 had damage but cannot remember any damages to its tyre.

27. 3<sup>rd</sup> Defendant during examination in chief gave evidence that:-

- (i) On 26 May 2016, at around 8.20pm to 8.30pm, he was driving Taxi LT5000 along Vulovi Road on his way to Town from Vunitu;
- (ii) Visibility was dark, he could see the road with switched on light and was driving at 40 km/hr;
- (iii) Vulovi Road is tarsealed with two lanes and when you are about to reach Sowasowa stretch there is a bend in Qawa Junction;
- (iv) Sowasowa Road is a straight stretch which is about 2 km to a bridge;
- (v) Bridge is not clear from Sowasowa Road as it is far;
- (vi) On DOA he was driving at 40 km/hr and there were potholes with road condition not good and as soon as he entered Sowasowa Road he saw a blue taxi turn into Qawa Road and when he came closer to Qawa Junction as soon as Blue Taxi turned another white car crossed when they had an accident;
- (vii) He did not know that white Taxi would turn;

- (viii) As soon as he saw one vehicle turn and another one coming he applied the brake and turned towards right and hit the second vehicle at the back;
- (ix) As soon as he saw another vehicle coming he applied brake and turned towards right;
- (x) He hit the other vehicle at the back;
- (xi) His Taxi sustained about \$3,000.00 worth of damage, with damages to engine, fender, bumper, lights and windscreen and front left hand side tyre burst;
- (xii) He had applied the brakes and after accident his Taxi kept on moving and stopped at a distance;
- (xiii) It was night time, he was going straight and other Taxi should have waited;
- (xiv) After the accident he was interviewed by Police;
- (xv) Driver of Taxi LT4667 was at fault and was charged.

28. During cross-examination 3<sup>rd</sup> Defendant:-

- (i) Stated that he does not have photos to show damage to his Taxi;
- (ii) Stated that it was large impact and there was force as he was coming at 40km/hr;
- (iii) When it was put to him that brake marks prior to accident goes to 18m he stated that he was going down;
- (iv) Stated that if you driving on road and something crossed road it takes your mind almost 2 seconds to react;
- (v) Agreed that brake marks for LT5000 after accident goes for 50m and brake mark appears after you apply the brakes;

- (vi) Agreed that width of Vulovi Road is 7m (24 ft);
- (vii) Stated that width of his Taxi is about one and half meters and only one Taxi can go on one line;
- (viii) Agreed that 80% of 1<sup>st</sup> Defendant's Taxi was carriageway off when his Taxi hit 1<sup>st</sup> Defendant's Taxi;
- (ix) Agreed that as Public Service Vehicle driver there is a greater responsibility to other road users and the obligation is to drive at correct speed;
- (x) Agreed that if you drive at 50km/hr you would not stop that far and will stop at lesser distance;
- (xi) Stated that after the accident, engine of Taxi LT5000 stopped, speed reduced and he had no control;
- (xii) Stated that he applied brakes and agreed that brakes were functioning;
- (xiii) When it was put to him that he is telling Court that he drove at 40km/hr and then stopped at 68m he stated it was dark, he applied the brake but car kept on going;
- (xiv) When asked if it is not true that his applying brake at 68m is evidence of fact that he was driving at 140 km/hr and not 40 km/hr he stated "No" he was driving at 40 km/hr;
- (xv) When it was put to him that he was driving at more speed he did not answer;
- (xvi) Stated he was going towards right when he hit the back of the Taxi LT4667;
- (xvii) Stated that he tried to swerve towards right but hit at the back of Taxi LT4667;
- (xviii) Stated that he did not see 1<sup>st</sup> Defendant giving indicator to turn right;

- (xix) When it was put to him that 18m plus two (2) seconds he could have gone on right hand side because it was clear he stated that he was going on his right hand side and hit on edge of Taxi;
- (xx) Stated that Police asked him about his Taxi brake marks;
- (xxi) When it was put to him that there is no question about his Taxi's tyre marks in his Record of Interview he stated that he cannot recall;
- (xxii) Stated that his recollection of events was better at time of interview than time of giving evidence as he slightly forgot;
- (xxiii) When it was put to him that he was the person who could have saved the accident he stated that he tried to save but he came in front;
- (xxiv) Denied that he substantially contributed to accident because he was driving at high speed and stated that he was not at high speed.

29. During re-examination 3DW2:-

- (i) Stated that when he was about 40m away in the stretch he saw one car turning and when tried to go from behind that vehicle, another car turned in and that is why accident happened;
- (ii) Stated that when he saw Taxi come into his path he applied brake and move towards right to save accident;
- (iii) Stated that he was not successful in avoiding the accident and by the time he stopped accident happened;
- (iv) Stated that front left hand side tyre of his Taxi he was driving burst;
- (v) Stated that, if he continued to go his path there would be head-on collision;
- (vi) Stated the option he had when car came on his path was to apply the brakes and turn right;

- (vii) Stated that accident did not occur due to his fault and he was going straight.
30. 3<sup>rd</sup> and 4<sup>th</sup> Defendants third witness was Petero Baivicawa of Korovou Police Station, Police Officer (3DW3).
31. 3DW3 during examination in chief gave evidence that:-
- (i) He was the Investigating Officer in respect to accident between Taxi LT4667 and Taxi LT5000 and he interviewed driver of Taxi LT5000 during investigation and subsequently;
  - (ii) Driver of LT4667 was Dharmen Rao;
  - (iii) 3<sup>rd</sup> Defendant gave interview freely without force or threat and Record of Caution Interview reflects questions answered by him (**Exhibit D2**);
  - (iv) As part of investigation he attended scene of accident and made rough sketch plan (**Exhibit D3**);
  - (v) In reference to 18m brake mark he stated that when he went to scene of accident he identified brake/tyre marks and determined point of impact due to broken glass and what both drivers identified;
  - (vi) 50m tyre mark is of only one tyre mark of Taxi LT5000;
  - (vii) According to him accident occurred when Taxi LT5000 heading towards Labasa with Taxi LT4667 heading towards Vunivou, Qawa Road and while both vehicles were travelling with Taxi LT5000 heading towards Labasa Taxi LT4667 turned towards Qawa Road which resulted in collision;
  - (viii) It was Taxi LT5000's right of way;
  - (ix) Driver of LT4667 was charged and he paid a fine of \$200.00 for careless driving.
32. During cross-examination 3DW3:-



- (i) Stated that they investigated accident properly before giving any instructions;
- (ii) In reference to Exhibit D3 agreed that 18m and 50m line is from LT5000 where it started from;
- (iii) Stated that he did not mark the distance from point of impact to side of road;
- (iv) Agreed that 50m brake mark goes straight after impact and then turns right;
- (v) Stated road was tarsealed road and condition was dry;
- (vi) Stated that he cannot give estimate of stopping distance of vehicle if travelling at 100km/hr;
- (vii) Stated that as Traffic Officer he cannot tell the distance as he was not at scene of accident during the accident, and that it could be 40m to 50m if travelling at 100km/hr;
- (viii) Stated that relevance of tyre mark is to show that it was trying to avoid the accident and could not tell if it had anything to do with speed;
- (ix) Agreed that Taxi LT5000 swerved after the accident;
- (x) Stated that he cannot recall if he asked 3<sup>rd</sup> Defendant as to why he did not swerve the vehicle before the impact and agreed that it was an important question;
- (xi) Stated that he cannot recall asking 3<sup>rd</sup> Defendant as to why there is 68m of tyre mark, and agreed that it was relevant question;
- (xii) Stated that he cannot say if he will believe a person if he says he is travelling at 50km/hr with tyre marks of 70m;

- (xiii) Stated that after interview, gave Traffic Infringement Notice to 1<sup>st</sup> Defendant who did not contest and paid \$200.00 fine to Land Transport Authority (“LTA”);
  - (xiv) Agreed that in civil cases either party can be held at fault;
  - (xv) Stated that he could not recall if he obtained LTA report as there is none in file and he could say that if LTA Report was obtained whether it will be in file or kept separately.
33. During re-examination 3D3W:-
- (i) Read question 45 and answer of 3<sup>rd</sup> Defendant’s Interview (Exhibit D2):-  
*“Q45. What happened when that vehicle turn towards Qawa Junction?  
Ans. I apply the brake but that vehicle stopped and I tried to save my vehicle by pulling the steering to the right side of the road which result my vehicle collided with that vehicle.”*
  - (ii) Agreed that point of impact is quarter of the road;
  - (iii) Stated that collision with Taxi LT 4667 was on back side of the vehicle and he could not recall whether back was damaged.

**Courts Analysis of Evidences, Demeanour of and Determination**

- 34. Accident between Taxi LT4667 driven by 1<sup>st</sup> Defendant and Taxi LT5000 driven by 3<sup>rd</sup> Defendant took place on 26 May 2016, at Qawa Junction, Vulovi Road, Labasa.
- 35. Plaintiff, Taraivini Rekibulu Nasaqa was a passenger in Taxi LT4667.
- 36. Accident took place when Taxi No. LT4667 attempted to turn into Qawa Road and Taxi LT5000 was coming from Vunitu towards Qawa Junction.

37. This Court accepts 3<sup>rd</sup> Defendant's evidence that he saw a Blue Taxi turn into Qawa Road and when he was trying to go past Blue Taxi then he saw Taxi LT4667 turning behind it.
38. This Court finds that Taxi LT 4667 should have waited at the junction to see the road is clear before taking right turn to enter Qawa Junction rather than following Blue Taxi in which Plaintiffs father and family were travelling.
39. 3<sup>rd</sup> Defendant (Taxi LT5000) turned to avoid the accident by applying the brake and if he had not done so there is possibility that there could have been more damage to Taxi LT4667 and Plaintiff would have been severely injured as she was sitting on left hand side at the back seat of Taxi LT4667.
40. Much has been said about:-
  - (i) Taxi LT4667 almost entering Qawa Road when accident took place;
  - (ii) Taxi LT5000 stopped at about 50m from point of impact as evidenced by Rough Sketch Plan (Exhibit D3).
41. The fact that brake marks prior to accident is 18m suggest that Taxi LT4667 took right turn to enter Qawa Road when Taxi LT5000 was almost 18m away from the junction.
42. By the time Taxi LT5000 travelled for 18m after applying the brake Taxi LT4667 was close to Qawa Road or almost entered Qawa Road.

This Court takes note of the fact that width of half road is 3m.
43. The fact that Taxi LT4667 was partly in Qawa Road (Approximately - 80%) and partly in Vulovi Road is not disputed.
44. Court accepts 3<sup>rd</sup> Defendant's evidence that at time of accident Taxi LT5000's front left hand tyre burst, engine went off and he lost control of Taxi LT5000.
45. 3DW3 testified that there is only one tyre mark for 50m after the accident.

46. This Court finds that tyre mark of 50m is that of the rim of busted tyre and not the actual brake mark.

It is to be noted that this does not mean 3<sup>rd</sup> Defendant did not apply the brake after the accident as was his evidence.

47. This Court accepts the evidence of PW..... and 3DW3 the Investigative Officer.

48. 1<sup>st</sup> Defendant did not dispute that Police Interview was conducted fairly, without any force or threat.

49. 1<sup>st</sup> Defendant as appears from Record of his Caution Interview (Exhibit D1) admitted and acknowledged that he was at fault.

50. 1<sup>st</sup> Defendant by failing to file Notice of Intention to Defend and Statement of Defence is deemed to have accepted the allegation of negligence against him and liability.

51. The fact that 1<sup>st</sup> Defendant failed to file Notice of Intention to Defend he could not give notice of contribution to the 4<sup>th</sup> Defendant under Order 16 Rule 8 of the High Court Rules which provide as follows:-

*“O.16r8.-(1) Where in any action a defendant who has given notice of intention to defend-*

*(a) claims against a person who is already a party to the action any contribution or indemnity; or*

*(b) claims against such a person any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or*

*(c) requires that any question or issue relating or connected with the original subject-matter of the action should be determined not only as between the plaintiff and himself but also as between either or both of them*

*and some other person who is already a party to the action;*

*then, subject to paragraph (2), the defendant may, without leave, issue and serve on that person a notice containing a statement of the nature and grounds of his claim or, as the case may be, of the question or issue required to be determined.*

*(2) Where a defendant makes such a claim as is mentioned in paragraph (1) and that claim could be made by him by counterclaim in the action, paragraph (1) shall not apply in relation to the claim.*

*(3) No acknowledgement of service of such a notice shall be necessary if the person on whom it is served has acknowledged service of the writ of originating summons in the action or is a plaintiff therein, and the same procedure shall be adopted for the determination between the defendant by whom, and the person on whom, such a notice is served of the claim, question or issue stated in the notice as would be appropriate under this Order if the person served with the notice were a third party and (where he has given notice of intention to defend the action or is a plaintiff) had given notice of intention to defend the claim, question or issue.”*

52. This Court after analysing the evidence, demeanour of witnesses and submissions finds that 3<sup>rd</sup> Defendant did not drive Taxi LT 5000 negligently and exercised all due care and attention that is required of a prudent and reasonable driver under the circumstances of the case.

### **Conclusion**

53. This Court finds that 3<sup>rd</sup> Defendant did owe duty of care to Plaintiff.
54. 3<sup>rd</sup> Defendant did not breach that duty of care.

55. Since, Plaintiff has entered Judgment by Default against 1<sup>st</sup> and 2<sup>nd</sup> Defendants for failure to file Notice of Intention to Defend and Statement of Defence, damages will need to be assessed against them.
56. Plaintiff will now need to file Notice of Assessment of Damages against 1<sup>st</sup> and 2<sup>n</sup> Defendants and serve the Notice on them to give them an opportunity to appear at the hearing on Assessment of Damages.

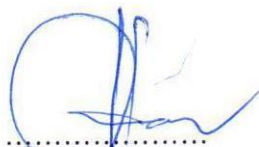
**Cost**

57. This Court takes into consideration that trial lasted for two (2) days with Counsel making Oral Submissions and that Plaintiff is a ten year old student.

**Order**

58. This Court makes the following Orders:-
- (i) Plaintiffs claim against 3<sup>rd</sup> and 4<sup>th</sup> Defendants is dismissed and struck out;
  - (ii) Plaintiff, 3<sup>rd</sup> and 4<sup>th</sup> Defendants bear their own cost of the proceedings.



  
K. Kumar  
**JUDGE**

**At Suva**

21 March 2019

**MAQBOOL & CO. for the Plaintiff**

**GIBSON & CO. for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants**