

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action: HBC No. 01 of 2017

BETWEEN:

DAVID FRANK SIMMONS of Fiji Sugar Corporation Limited Compound, Labasa, Diesel Fitter at FSC Labasa in his personal capacity and as the Administrator of the Estate of **REGINALD BERNARD SIMMONS** late of FSC Compound, Labasa in the Republic of Fiji Islands, Student, Deceased, Intestate.

PLAINTIFF

AND:

JAINAND SHARMA of Coquru, Labasa, Bus Driver.

FIRST DEFENDANT

DALIP CHAND & SONS LIMITED a limited liability Company having its registered office at Ritova Street, Labasa.

SECOND DEFENDANT

BEFORE:

Hon. Justice Kamal Kumar

COUNSEL:

Mr S. Sharma for the Plaintiff

Mr A. Kohli for the Defendants

DATE OF HEARING: 5 October 2017

DATE OF JUDGMENT: 21 March 2019

JUDGMENT

Introduction

1. On 3 January 2017, Plaintiff as Administrator of the Estate of Reginald Bernard Simmons caused Writ to be issued with Statement of Claim claiming for special damages, general damages, punitive, exemplary damages, interest and costs arising out of alleged injuries sustained by Reginald Bernard Simmons resulting in his death in a road accident on 6 February 2015 (**“the accident”**).
2. On 17 January 2017, and 7 February 2017, Defendants filed Acknowledgement of Service and Statement of Defence respectively.
3. On 28 February 2017, Plaintiff filed Reply to Statement of Defence.
4. On 30 March 2017, Plaintiff filed Summons for Directions and on 20 April 2017, being the returnable date of the Summons, Order in terms of the Summons was made by Master of the Court.
5. On 2 and 15 May 2017, Plaintiff and Defendants filed their Affidavit Verifying List of Documents respectively and on 31 May 2017, parties were directed to complete Pre-Trial Conference (**“PTC”**) and file PTC Minutes by 2 June 2017. This matter was adjourned to 5 June 2017.
6. On 5 June 2017, Plaintiff filed PTC Minutes and this matter was adjourned to 20 June 2017, for Plaintiff to file Order 34 Summons and Copy Pleadings.
7. On 12 June 2017, Plaintiff filed Order 34 Summons and Copy Pleadings.
8. On 20 June 2017, this matter was adjourned for trial on 5, 6 October 2017.
9. Trial concluded on 6 October 2017, when parties were directed to file submissions, which directions they complied with and this matter was adjourned for Judgment on Notice.

Issues for Determination

10. Following issues are for determination in this proceedings:-
 - (i) Whether 1st Defendant owed duty of care to Reginald Bernard Simmons, Deceased?
 - (ii) If so, whether 1st Defendant breached the duty of care?
 - (iii) If so, whether Reginald Bernard Simmons was contributory negligent?
 - (iv) What is the question of damages?

Whether First Defendant Owed Duty of Care to the Plaintiff

11. It is trite law and it is apparent from submissions by the parties that a road user owes a duty to other road users whether it be other drivers, passengers, pedestrians, joy riders or horse riders and is not to be negligent.
12. It is therefore not in dispute that First Defendant as driver of the Bus Registration No. HB370 owed a duty to the Plaintiff who was a pedestrian.
13. Plaintiff's first witness was Plaintiff himself (PW1).
14. During examination in chief Plaintiff gave evidence that:-
 - (i) He is the father of Reginald Bernard Simmons and the Administrator of the Estate of Reginald Bernard Simmons pursuant to Letters of Administration No. 59337 (Exhibit "P3");
 - (ii) Reginald Bernard Simmons (hereinafter referred to as "**Reginald**") was born on 6 September 2007 (Exhibit P1) and died on 6 December 2015 (Exhibit P2);
 - (iii) On 6 February 2015, the date of accident ("**DOA**") he was at work at Fiji Sugar Corporation Ltd having started at 7.00am and Reginald went to school;

- (iv) After school Reginald at about 3.40pm left home for a party at witness sister's (Reginald's Aunty) house in Waiqele with his sister (Reginald's Aunty), Matilda (Reginald's sister), David (Reginald's brother), Samuela and Rusiate (Reginald's cousins);
 - (v) They all went to Labasa Bus Stand to catch Airport bus to Waiqele;
 - (vi) On DOA after finishing work at 4.00pm he went to Labasa Market at about 4.45 or 4.50pm when his sister called and informed him that Reginald had an accident and was taken to hospital;
 - (vii) He then ran to the hospital and saw his son who died on his way to hospital;
 - (viii) One month after DOA he visited place of accident and spoke to lot of people;
 - (ix) Road is tarsealed road with two lanes, with one going towards Airport and other towards Town with double mark in the middle of the road;
 - (x) There is slight descend for about 300m where the accident took place and the road is very narrow which can be crossed by taking six to seven steps;
 - (xi) At the hospital he was informed by Police Officer that Bus Registration No. HB370 driven by 1st Defendant and owned by 2nd Defendant hit his son and that 1st Defendant was in hospital.
15. Plaintiff was not cross-examined by Defendants Counsel.
16. Plaintiff called Matilda Suzanne Simmons of Quarters 12, FSC Compound, Labasa, Student as his second witness (“**PW2**”).
17. PW2 during examination in chief gave evidence that:-

- (i) She was born on 6 June 2004, attends Labasa Primary School; David Simmons is her father, Reginald was her brother and in 2015 she was in Class 6 whilst Reginald was in Class 2;
- (ii) On DOA she went to school with Reginald and after school they came home and left for Waiqele with her two brothers, aunty Jasmine and two cousins by bus to go to her Aunt's;
- (iii) When they arrived at Waiqele they got out off the bus when Reginald crossed the road and was hit by a bus which was over-speeding;
- (iv) Reginald gout of the bus first and was followed by her with her small brother;
- (v) When they got off the bus Reginald crossed the road while she was standing outside their bus;
- (vi) Reginald was hit by a bus which was over-speeding and Reginald after being hit was brought into the middle of the left hand side of the road;
- (vii) When Reginald was bumped he was on the left hand side of the road;
- (viii) When Reginald was hit she heard a big bang and after that the bus stopped when passengers told driver that he bumped someone;
- (ix) She could tell bus was going at a speed because she could feel the wind;
- (x) She did not cross the road because she was waiting for her aunty Jasmine and at that time she was standing in front of her bus;
- (xi) When Reginald crossed the road she saw the road was clear;
- (xii) She did not cross the road because she was holding onto her little brother and waiting for her aunty Jasmine to come out of the bus;
- (xiii) Weather was fine and sunny;

(xiv) Later she came to know that the bus registration number HB370 was driven by Jainand.

18. During cross-examination PW2:-

(i) Agreed that on DOA, they (her, her 2 brothers, 2 cousins and Aunty Jasmine) they were going to attend party at Aunty Matilda's place in Waiqele;

(ii) She could not remember bus number she was travelling in;

(iii) She was sitting in the front portion of the bus on the left hand side with Reginald sitting in the middle portion of the bus and right behind her;

(iv) Stated that her aunty Jasmine was sitting in front of her on the left hand side with her brother David while her two cousins were sitting right at the back seat;

(v) Stated that she came out of the bus first when she had to pass her aunty and her brother and was followed by Reginald;

(vi) Stated that her aunty followed Reginald who was followed by her cousins;

(vii) Stated there was a difference of few minutes from the time she came out of the bus and her cousins came out;

(viii) Stated that she was not holding Reginald;

(ix) Stated that her aunty told her to get out of bus and wait for her which she did after getting off the bus;

(x) Stated that she was waiting outside the bus which was parked on the side of the road;

(xi) Stated that she was standing outside the bus towards front of the bus and beside the bus;

- (xii) Stated that she got off the bus through front door;
- (xiii) Agreed that from where she was standing she would not be able to see towards Waiqele clearly because the bus was blocking;
- (xiv) Agreed that at some stage Reginald crossed the bus in front of the parked bus;
- (xv) Stated that she saw Reginald crossing and did not say anything because she saw the road was clear;
- (xvi) Stated that she did not see the other bus coming from Waiqele;
- (xvii) Agreed that she did not say anything, because she did not see any need to stop Reginald;
- (xviii) Stated that when she heard the sound she realized Reginald was hit because the bus went fast;
- (xix) Stated that she heard passengers yelling somebody has been hit;
- (xx) Stated that she saw Reginald had fallen in the middle of the road and on the left hand side;
- (xxi) Stated the bus that bumped was coming fast;
- (xxii) Stated that only reasons she said bus was fast is because she felt the wind;
- (xxiii) Stated that bus stopped from where was standing in Court and straight to market and not going over bridge to market;
- (xxiv) Stated that she did not hold Reginald's hand because she was holding her small baby brother;
- (xxv) Agreed that Reginald should not have crossed the road and should have waited for her aunty.

19. In re-examination PW2:-

- (i) Stated that there was no bus bay for the bus to park on side of road and that no portion of the bus was still on the road;
 - (ii) Stated there where she was standing on the side of the road, there was nothing else blocking her view completely to see Bus Registration No. HB 370 coming;
 - (iii) Stated that she could not recall how long Reginald was standing in front of the bus before he crossed;
 - (iv) Stated she saw Reginald standing in front of the bus.
20. Plaintiff called Jasmine Mariya Simmons of FSC Compound Labasa, Domestic Duties as his third witness (**PW3**).
21. PW3 during examination in chief gave evidence that:-
- (i) She is David Frank Simmons sister;
 - (ii) She could recall that on DOA she was going at her sister Matilda's place at Waiqele Airport Road with her nephews (2); Reginald, Reginald's sister Matilda and his brother David and Jacob by bus which they boarded at about 3.45pm;
 - (iii) When they reached their destination and the bus stopped Reginald went out of the bus first at which time she was still in bus waiting to get some space to get out of bus because the bus was full;
 - (iv) Reginald crossed the road after he got off the bus and at that time she was still in the bus;
 - (v) When she was in the bus another bus passed the bus she was in and the passing bus was driven very fast and was over-speeding;
 - (vi) There was no bus bay and her bus was parked on the left hand side of the road with some part of the bus on the road;

- (vii) When she got off the bus she saw her nephew Reginald was bumped and was in the middle of the road;
- (viii) Her niece Matilda told her that Reginald was bumped by bus registration number HB370;
- (ix) Bus registration No. HB370 stopped at quite a distance from where accident happened;
- (x) After she saw Reginald lying she took other children across the road and came back to pick him up;
- (xi) Her nephew called Police and Ambulance, when they stopped a three ton truck and took Reginald to hospital;
- (xii) She always told her niece and nephew to stay on side of the road when they get off the bus;
- (xiii) Matilda told her that Reginald was very excited and that when he saw road was clear he crossed the road;
- (xiv) She later came to know that Jainand was driver of bus registration number HB370 with whom she did not speak;
- (xv) Bus she was travelling stopped on left hand side of the road and the house they were supposed to go was on the right hand side;
- (xvi) She knows bus registration No. HB370 was travelling at high speed because it was travelling fast.

22. During cross-examination PW3:-

- (i) Stated that on DOA she was going to a party at Waiqele with young children and she was sitting in the front;
- (ii) Stated when their bus stopped she was waiting to get off because bus was full with people standing on the isle in front of her and beside her;

- (iii) Stated that she was standing in front right hand side and not on left hand side as stated by her niece;
- (iv) Stated she did not see Reginald running out of the bus and thought that he was going to his cousins at the back;
- (v) Matilda was sitting few seats behind her;
- (vi) Agreed that she did not see Reginald go past her;
- (vii) When asked as to when she told the children to wait outside the bus for her she stated that she always tell children to wait outside, and first time he crossed on his own;
- (viii) Stated that when she heard the sound of Reginald being hit she was still in the bus;
- (ix) Stated that her bus was parked, when she heard the sound the other bus was in front;
- (x) Stated that when she first saw the other bus it was beside her bus and passing her bus;
- (xi) Stated that few seconds would have passed between the time she saw the other bus and time she heard the sound;
- (xii) Stated that when the other bus came to a stop it was about 100 meters from her bus and it takes few minutes to travel 100 meters;
- (xiii) Stated that before she heard the sound she was concerned about the children;
- (xiv) Agreed that when she heard the sound, she was concerned as to what had happened;
- (xv) Agreed that bus she was sitting in was parked on side of the road and not in the middle of the road.

23. Plaintiff called Ivin Ishwari of Nakawa, Savusavu, Corporal as his fourth witness (**PW4**).

24. PW4 during examination in chief gave evidence that:-

- (i) He is based at Savusavu Police Station, Traffic Department for one year and has been in Labasa Traffic Department for eleven (11) years;
- (ii) He could recall 6 February 2015, when he was based at Labasa Police Station and during month of February he was directed to caution interview Jainand Sharma by Investigation Officer, Rohit;
- (iii) Interview was conducted in Hindustani language and 1st Defendant was informed about the fatal accident for which interview was to be conducted;
- (iv) He translated the Caution Interview in English language (Exhibit P4A and P4B);
- (v) Read question 26, 27 and 29 in Caution Interview (Exhibit and answers to those questions in following terms:-

“Q26. You can’t see properly?”

Ans. Yes Sir.

Q27. Who told you to wear glasses?”

Ans. Doctor

Q29. Are you short sited or long sited?”

Ans. Short site.”

- (vi) Jainand Sharma told him that he was driving the “bus at 35 km/hr in answer to question 73 Jainand Sharma stated that if he would have stopped passengers in his vehicle would have been injured;
- (vii) After Caution Interview he went to scene of accidents;

- (viii) Road had double line, road condition was good with only one house on the right hand side and no houses on left hand side;
- (ix) There is slight hill before place of accident;
- (x) Read question 54 and 55 in Caution Interview with answers in following terms:-
 - “Q54. Why did you pull the exhaust brake?*
 - Ans. Because always one boy gets off at that place.*
 - Q55. The boy which you telling me that gets off that place usually sits in which bus?*
 - Ans. My bus.”*
- (xi) Suresh Chandra’s name appearing prior to question 32 must have been a typing error.

25. During cross-examination PW4:-

- (i) Agreed that when someone is caution interviewed he/she is a suspect, who becomes accused once charged and caution interview is crucial evidence;
- (ii) Agreed that when you caution interview, you will be in possession of all evidence including statements and sometimes statements are not recorded by Interviewing Officer and sometimes they are;
- (iii) Agreed that Interview is called Caution Interview because it is there to warn or caution suspect that interview may be used in evidence;
- (iv) When asked if 1st Defendant drove fast or at over speed he stated that he cannot answer;
- (v) Stated he could not say 1st Defendant was careless;

- (vi) When asked as to why he did not put to 1st Defendant that he overtook a bus when there was double line or was it his thought he stated that he had put that in question 70 which he read;
- (vii) When asked as to where does it say that 1st Defendant passed a bus when he should not have passed because of double line he stated that it is not there;
- (viii) Agreed that closest he came to say that was at question 79 which reads as follows:-
- “Q79. I put to you that through your carelessness you caused the death of this boy. What you can say about this?”*
- Ans. I can't say anything.*
- (ix) When asked if you cannot overtake when there is a double line he stated that it depends like if Tractor goes slow or vehicle you overtaking is parked;
- (x) When asked if going past a stationery vehicle is overtaking he stated he cannot say;
- (xi) Agreed that overtaking is going past another slower moving vehicle;
- (xii) Agreed that when vehicle is stationary you do not overtake it but can go past it;
- (xiii) Agreed that since there was not overtaking by 1st Defendant he was not careless;
- (xiv) Agreed that if from any of the Statements recorded he would have found any carelessness on part of 1st Defendant he would have put to him;

- (xv) Stated that she could not recall if he had any Statements to say 1st Defendant was driving at an excessive speed and agreed that if he had he would put to him;
- (xvi) When asked if he had any evidence to show that 1st Defendant was not having proper lookout he stated that he will need to look at the statement;
- (xvii) Agreed that if he had any evidence that 1st Defendant was not having proper lookout he would have put that to him;
- (xviii) Agreed that there was no evidence that 1st Defendant did not stop, swerve to avoid accident and if he had then he would put that to him;
- (xix) Stated that 1st Defendant was capable of driving;
- (xx) Stated that he could not recall someone saying Reginald ran across in front of parked bus all of a sudden;
- (xxi) Stated that he could recall taking Shaye Sharika Lal statement where she stated that “as we reached down the road just before Juicy Transport I saw Dalip Transport bus (Airport Trip) parked in front of one nurse Matilda’s house. Driver of our bus slowed down, saw the road was clear and went straight. Our bus was nearly parallel to the bus which was parked on left side of the road. Was about to pass parked bus, I saw a small boy running in front of parked bus trying to cross that road and that boy crossed white line the middle of the road but the front left of the bus hit the little boy”;
- (xxii) Agreed that on hindsight two buses were parallel to each other and this passenger sitting on the left-hand side saw the boy running;
- (xxiii) Stated that the height driver sat is high;
- (xxiv) Stated that he does not know height of the child;

- (xxv) Stated that he was not really sure if driver will be able to see if all of a sudden a child comes and hits side of the bus;
- (xxvi) Agreed that as a driver he will be looking in front while overtaking;
- (xxvii) Disagreed when it was put to him that having answered "Yes" to previous question, the driver was not at fault;
- (xxviii) Stated that if he was the driver he would be going at 35 km/hr or 20 km/hr;
- (xxix) Stated that 1st Defendant did not take precaution like pressing the horn;
- (xxx) Agreed that supposing sketch plan was drawn right width of road would be twenty-one (21) feet with half of road being eleven and half (11½) feet;
- (xxxi) When it was put to him that width of the bus is seven (7) feet he stated that he cannot say;
- (xxxii) Agreed that distance from center of road and point of impact is 1.2 meters taking into consideration distance between center of road and edge of parked bus is 2 meters;
- (xxxiii) Agreed that first the driver would see the boy, when he is passing the parked bus;
- (xxxiv) Agreed that if driver spots a person even if driving at 20 km/hr he would have half a second to react either to stop bus or apply the brakes;
- (xxxv) When it was put to him that supposing he was there would he be able to do anything in half a second he answered "No".

26. During re-examination PW4:-

- (i) Stated that if he was driver of bus registration No. HB 370 he would have stopped the bus when he heard the sound;
 - (ii) Stated that in regards to pedestrian he would have slowed the bus to see that nobody is coming from left, right or in front;
 - (iii) Stated that he would have pressed the horn to alert passengers and drivers that another vehicle is coming.
27. PW4 in clarification stated that speed limit at place of accident is 80 km/hr as it is open zone. No question was asked by Counsel from clarification sought by Court when they were given an opportunity to do so.
28. 1st Defendant during examination in chief gave evidence that:-
- (i) On 6 February 2017, he was driving 2nd Defendant's bus travelling towards Waiqele Airport and at Waiqele when passing a parked bus he came to know that there was an accident;
 - (ii) Agreed that when he stopped the bus he found out that one (1) young boy was injured who subsequently died;
 - (iii) Denied that the boy died because of his negligence;
 - (iv) He was driving at 35 km/hr;
 - (v) When going down the hill he slowed down the bus and looked at rear vision mirror to see if one staff nurse Matilda's son who travels in his bus few times a week and resides there was in the bus or not;
 - (vi) Since he did not see him and no one rang the bell to stop the bus he continued travelling;
 - (vii) While passing a parked bus and reaching about one (1) feet in front of parked bus he heard a loud noise;
 - (viii) When he heard the noise he swerved his bus to right and then children in his bus shouted that there is an accident;

- (ix) He then parked the bus at a distant of about 70 to 75 meters on the left hand side;
- (x) People who travel in his bus are both old and young and bus does not have seat belts;
- (xi) People do not sit consciously and are relaxed and therefore if he applied brake straightaway then students in his bus would have got injured;
- (xii) There was no need for him to apply the brake suddenly;
- (xiii) He has been driving bus on that road for 10 to 12 years and this type incident has never happened before;
- (xiv) When passengers get off a bus, they wait for bus to leave and then they cross the road if road is clear;
- (xv) He carries students and has never come across students crossing in front of his bus when it is parked;
- (xvi) He uses glasses for reading and have no difficulty in seeing at a distance without glasses;
- (xvii) Precaution he would have taken if he had seen the boy he would have turned his bus;
- (xviii) He had 10 to 15 students in the bus and prior to accident no one shouted for him to watchout;
- (xix) Students started shouting accident, accident after he heard the sound;
- (xx) In his view those guiding children in other bus should have held childrens' hand and crossed road when road was clear.

29. During cross-examination 1st Defendant:-

- (i) Stated that he has been driving bus on full time basis for 10 to 12 years and prior to that he was driving cane truck for 17 years on part-time basis;
- (ii) Agreed that as PSV driver he has responsibility to drive safely;
- (iii) Stated that on DOA he left bus stand at about 3.50pm and did not know if parked bus left before him;
- (iv) Agreed that before reaching parallel to parked bus he had to descend a small hill;
- (v) Agreed that he applied exhaust brake expecting one of his student passengers to get off his bus which passenger was not there;
- (vi) Denied that after switching off exhaust brake, he drove the bus at same pace he was going because when exhaust brake is switched off in diesel engine vehicle, it takes time to take normal speed;
- (vii) Stated that you have to travel for about 100 meters after switching off exhaust brakes for heavy goods vehicle to go back to normal speed of 60 km/hr;
- (viii) Stated that he did not expect the student who was to be in his bus to be in the other bus;
- (ix) Agreed that the house he referred to was on the right hand side;
- (x) When it was put to him there was only one house belonging to the nurse he stated that there are three or four (4) houses after you descend the hill with two of those houses on left hand side;
- (xi) Stated that when a bus stops, some passengers are expected to get off the bus;
- (xii) Stated that before passing the parked bus he did not press the horn;

- (xiii) Stated that when he heard the loud sound he felt something broke in his bus;
- (xiv) Stated that when he heard the sound he swerved the bus towards right and stopped on his side;
- (xv) When it was put to him that when he heard the sound he could have stopped the bus at 20 or 30 meters he stated that he would not and if he did he would have blocked the road;
- (xvi) Stated that from his point of view, if he hears something on left he swerves to right and then goes on his side and that is his immediate reaction;
- (xvii) Agreed that he said road was clear before passing the parked bus and no vehicle was coming from the opposite direction;
- (xviii) Stated that he did not apply brake immediately after hearing sound for safety of his passengers;
- (xix) When it was put to him that for safety of his and other bus passengers it was prudent to toot the horn to alarm them he stated that it is not necessary to toot the horn everytime and the other bus had stopped;
- (xx) When it was put to him that as a prudent driver he should have reduced his speed in anticipation that somebody will cross the road he stated that he never thought;
- (xxi) Stated that before passing the parked bus he did not notice a student pedestrian in front of parked bus;
- (xxii) Stated that he was cautious, was driving at slow speed, road was clear and he took precaution;
- (xxiii) Stated at 35 km/hr if he applied brake, there was possibility that his passengers would have got injured and this happened with him earlier;

- (xxiv) Denied that he was driving in a speedy manner and that is why he stopped in front;
- (xxv) Denied that he failed to have proper look out before passing the parked bus and hitting the deceased;
- (xxvi) Denied that he could see the boy because he is short sighted;
- (xxvii) When it was put to him that he failed to swerve the bus to avoid the accident he stated that why should he swerve the vehicle when he did not see the child and when road was clear.

Analysis and Finding

30. After analysing the evidence this Court makes following findings of facts:-

- (i) On DOA after school Reginald with his aunty, sister, brother and two cousins left in Labasa Airport bus to his aunty Matilda's place at Waiqele for a party;
- (ii) Bus Registration No. HB370 being driven by 1st Defendant was also on its way to Waiqele with students;
- (iii) At Waiqele, and opposite Reginald's aunty Matilda's house, the bus Reginald was travelling stopped for Reginald, his aunty, sister, brother and cousin to get off the bus ("**the Parked Bus**");
- (iv) Bus No. HB379 at that time came downhill and at about 35 km/hr;
- (v) This Court accepts 1st Defendant's evidence that he slowed down his bus expecting that Matilda's son to be in the bus and would be getting off but on DOA he was not travelling in the bus;
- (vi) This Court also accepts 1st Defendants evidence that since he could not see Matilda's son in his rear vision mirror and no one rang the bell he continued driving;

- (vii) As soon as the parked bus stopped Reginald got off the bus followed by his sister and younger brother and tried to cross the road from front of the parked bus;
 - (viii) When Reginald tried to cross the road Bus No. HB370 was parallel to the parked bus and going past the parked bus;
 - (ix) There is no way 1st Defendant could have seen Reginald or his sister standing in front of the parked bus when he drove Bus No. HB370 past the parked bus or prior to that;
 - (x) Also, there was no way Reginald and his sister Matilda (“**PW2**”) could have seen Bus Registration No. HB370 until after the accident from where they were standing after getting off the parked bus;
 - (xi) Parked bus was not parked at the bus bay but on side of the road with part of it on the road itself;
 - (xii) Speed limit in the area where accident took place was 80 km/hr and 60 km/hr for buses;
 - (xiii) 1st Defendant prior to accident was driving within the normal speed;
 - (xiv) This Court does not accept PW2 and PW3 and PW4s’ evidence that 1st Defendant was speeding and finds that to be an assumption on their part or just a guess work or an after-thought.
31. Much had been said about there being a double line in the middle of the road which prohibits overtaking by vehicle.
32. In this instant 1st Defendant was not overtaking any vehicle but going past a parked bus which is not prohibited as was the evidence of PW4 (the Traffic Officer).
33. Counsel for both parties relied on **Sun Insurance Company Ltd v. Qaqanaqele** [2016] FJCA123; ABU 3J of 2013 (30 September 2016).

34. Brief facts and finding in **Sun Insurance** case is:-
- (i) A 5 year old girl was hit while crossing the road;
 - (ii) Driver should have seen the girls older brother going across the road and cautioning her which should have put the driver on guard;
 - (iii) No evidence was led to show that the girl suddenly jumped on the road. The girls mother's evidence in Courts view suggested quite contrary;
 - (iv) Driver of vehicle was driving at normal speed.
35. At paragraph 30(iii) of Appeal in Suva Insurance case Court of Appeal stated as follows:-
- “30-(iii) Viewing the matter from that perspective, it is my view that, even though he may have been driving at a speed within the limits of the law he, as a motorist, was required to reduce his “normal speed” and taken all precautions to avoid the accident. That view, to my mind would represent the other side of the coin of what Asquith, L.J had propounded. That is, when it comes to children of tender years using a road, a motorist must eliminate any risk of injuring them by exercising additional precaution by reducing even the normal speed he was driving at.”*
36. At paragraph 27 of the Judgment, Court of Appeal emphasized the need for motorists to exercise more care when they see a child crossing the street and stated as follows:-
- “27. If the 1st defendant could not have observed and guarded against the deceased child's infirmity, I cannot help but state that, he could not have been regarded as a motorist competent to drive a vehicle.”*
37. This Court accepts Defendants Submission that the fact in **Sun Insurance** case is distinguishable.

38. The distinguishing facts are:-

- (i) In **Sun Insurance** case Court made a finding based on victim's mother's evidence that driver saw the victim crossing the road and victims older brother cautioning the victim whereas in this instant case the 1st Defendant did not see Reginald cross the road or Reginald standing in front of the parked bus;
- (ii) In the instant case there was no evidence that Driver saw Reginald any time prior to the accident and he only came to know that there was an accident when passengers in his bus started shouting "accident, accident";
- (iii) Driver in **Sun Insurance** case did not take part in the proceedings and only evidence Court heard was of victims mother whereas in this instant 1st Defendant took part in the proceedings and availed himself to be examined and cross-examined.

39. Having analysed the evidence, demeanour of witnesses, documentary evidence and closing submissions this Court finds that 1st Defendant at time of accident drove Bus Registration No. HB370 with all due care and attention that is required of a prudent driver under the circumstances of the case. Hence, this Court holds that accident was caused not due to 1st Defendant's negligence.

40. This Court whilst taking note the sadness of the incident, cannot hold 1st Defendant liable in negligence for the accident.

Conclusion

41. This Court finds that the 1st Defendant as driver did owe duty of care as all road users do but did not in any way breach that duty of care in this case.

42. This action therefore is to be dismissed and struck out.

Costs

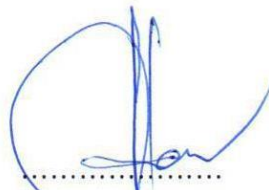
43. This Court takes into consideration that trial lasted for two (2) days, both parties filed Submissions and the fact that Plaintiff had suffered a lot due to death of beloved one.

Orders

44. This Court makes following Orders:-

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




K. Kumar
JUDGE

At Labasa

21 March 2019

SAMUSAMUVODRE SHARMA LAW for the Plaintiff

KOLHLI & SINGH for the Defendants