

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

HBC NO. 67 OF 2016

BETWEEN : BHAGWATI of Varavu, Ba, Domestic Duties as the Executrix and Trustee of the ESTATE OF JAI RAM SHARMA late of Varavu, Ba.

PLAINTIFF

AND : SUSHILA DEVI SINGH of Namosau, Ba, Fiji, Domestic Duties and RITA SINGH now of Waiwaka Terrace, Merrilands, New Zealand, Bank Officer as the Executrices and Trustees of the Estate of Dewendra Singh of Namosau, Ba, Fiji, Bussinessman; Deceased, Testate trading as FIJI TRANSPORT COMPANY at Namosau, Ba and FIJI TRANSPORT COMPANY LIMITED a limited liability company having its registered office in Ba, Fiji and carrying on its business from 47 Namosau Road, Ba.

FIRST DEFENDANTS

AND : AL JAMEER ALI of Rarawai, Ba, and Driver.

SECOND DEFENDANT

AND : BA TOWN COUNCIL a statutory body duly constituted under the provisions of the Local Government Act Cap 125.

THIRD DEFENDANT

Before : A.M. Mohamed Mackie- J

Appearances : Ms. N. Samantha for the Plaintiff

: Mr. Faiz Ali Khan with Ms. Devi for the Defendants

Trial on : 4th September 2018 and 17th September 2018.

Written Submissions: On 19th October 2018 by both the parties.

Date of Judgment : 6th February 2019

JUDGMENT

A. INTRODUCTION

1. This is an action arising out of a fatal accident, which occurred on 15th October 2013 at King's Road, Yalalevu, Ba, where the passenger transport Bus bearing Registration number FD004 owned by the First defendant and driven by the 2nd defendant collided with the deceased, who was engaged in cleaning and collecting rubbish on the King's highway as an employee of the 3rd defendant Town Council.
2. As a result of the collision, the victim suffered severe injuries and, admittedly, died at the scene of the accident itself.
3. The Plaintiff, being the Widow, as the Executrix and Trustee of the Estate of the deceased JAI RAM SHARMA, instituted this action on 21st April 2016 by way of her writ of Summons and the Statement of Claim (SOC). The action is brought for the benefit of the dependents of the deceased under Compensation to Relatives Act and for the benefit of the deceased's estate under the Law Reform (Miscellaneous Provisions) (Death & Interest) Act . She holds the Probate Number 54956 issued by the High Court of Fiji on 6th March 2014.

B. PLAINTIFF'S CLAIM:

4. The Plaintiff alleges that the second defendant driver, being the employee and within the course of his employment under the First defendant, was negligent by;
 - a. Driving the bus at a high speed , which was excessive in all the circumstances,
 - b. Failing to keep any or any proper look-out to have any or any sufficient regard for workers and pedestrians who might reasonably be expected to be on the road.
 - c. Causing or permitting the said vehicle to go in such a position of the road thereby colliding with the deceased.

- d. Failing to stop, slow down, swerve or in any other manner maneuver, manage or control the said vehicle so as to avoid the collision.
5. The Plaintiff also rely on the doctrine of *res ipsa loquitur*.
6. **Against the Third Defendant , the Plaintiff alleges that;**
 - a. It failed to provide safe system of work.
 - b. Failed to provide any warnings/signs/notices/marks to indicate the presence of its workers in the process of collecting refuse on the highway for the information of motorists.
 - c. Failed to provide a safe or reasonably safe work environment as the circumstances required
 - d. Failed to provide any or any adequate supervision of its workers on the highway
 - e. Failed to provide, have available or make arrangement for a person to control traffic for the safety of its workers on the highway.
7. Accordingly, the Plaintiff prays for general damages under the said Acts, special damages, interest and cost together with other reliefs as seems just and expedient.
8. The defendants by their joint statement of defence, while admitting the averments in paragraphs 1 to 4 of the SOC and the occurrence of the accident on 15th October 2013, denied the alleged negligence on the part of the Second and Third defendants and, particularly, took up the position that the said collision was caused due to the sole and/ or contributory negligence of the deceased. Accordingly, the defendants moved for the dismissal of the action with cost on indemnity basis.

C. AGREED FACTS:

- 1) The Plaintiff is the widow and Executrix and Trustee of the Estate of Jai Ram Sharma (the deceased) of Varavu, Ba, and brings this action for the benefit of the dependents of the deceased under the Compensation to Relatives Act and for the benefit of the deceased's estate under the Law Reform (Miscellaneous Provisions)

(Death and Interest) Act by virtue of Probate Number 54956 issued by the High Court of Fiji on 6th March 2014.

- 2) The First defendants operate public service vehicles out of Ba under the name and style of Fiji Transport Company and hold public service vehicle licenses from the Land Transport Authority in the name of the First and/or second named first defendants.
- 3) At all material times the First and/or the Second named First Defendants were the owner/s of a bus registration number FD 004.
- 4) The bus was licensed as a public service vehicle driven by the second defendant in the course of his employment as the servant and/or agent of the first and/or second named first defendants.
- 5) The third defendant was at all material times a local authority charged with various statutory functions including cleaning of roads and collection of refuse within the municipality of Ba and was the deceased's employer.
- 6) On the 15th October, 2013 the deceased was employed by the third defendant and was at work when a collision occurred with the first defendant's bus and the deceased, resulting in the deceased's death.
- 7) The 3rd defendant failed to provide any warnings/signs/notices/markers of the presence of its workers in the process of collecting and cleaning refuse on the highway for the information of motorists.
- 8) The 3rd defendant failed to provide, have available or make arrangements for a person to control motor traffic on the highway whilst its workers were cleaning rubbish on the highway.
- 9) The Deceased was engaged in collecting and cleaning the refuse during the course of his employment with the 3rd defendant.
- 10) The Deceased was 45 years of age at the time of death.
- 11) The highway on which the deceased was cleaning rubbish was a single lane road on either side.

12) **AGREED ISSUES**
ON LIABILITY

- 1) Whether the collision was caused by the sole and/or combined negligence of the defendants?
- 2) Whether the collision was caused and/or contributed to by the Deceased?

In Particular:

- 3) Whether the 3rd defendant provided a safe system of work to the Deceased?
- 4) Whether the 3rd defendant failed to provide a safe or reasonably safe work environment as the circumstances required?
- 5) Whether the 3rd defendant failed to provide any adequate supervision of its workers on the highway?
- 6) Whether the deceased suddenly come on towards the middle section of the road without regard to his own safety and without regard to an oncoming bus driven by the 2nd defendant?
- 7) Did the deceased try to cross the main highway and if so whether the deceased took all precautionary measures while crossing the road?
- 8) Whether the 2nd defendant failed to keep a proper look-out of the deceased coming on to the road to clean rubbish?
- 9) Whether the 2nd defendant took all measures to avoid the said collision?
- 10) What is the proportion of liability against the 3rd defendant, the deceased, and the 1st and 2nd defendants?

On Quantum, if any

- 11) Whether the deceased was a contract worker with the 3rd defendant and only worked as and when required?
- 12) What was the hourly and average yearly pay of the deceased?

- 13) What would be an appropriate multiplier?
- 14) What would be the appropriate deduction for the deceased's personal expenditure? In particular, how much was the deceased spending in bus fares, grog, himself every week?
- 15) Whether payments made by the 3rd defendant to the deceased widow and children in the sum of \$24,000.00 through the Labour Office under the Workmen's Compensation Act was a discharge for all or any claims under the Workmen's Compensation Act or otherwise as pleaded by the 3rd defendant?
- 16) Whether the alleged statements given by the widow or children was a discharge of any claims under the Workmen's Compensation Act or otherwise as pleaded?
- 17) Whether the alleged written statement is binding on the Plaintiff?
- 18) Whether the alleged statement was obtained on erroneous advice provided by Ministry of Labour who misrepresented the legal effect of alleged statement/settlement which the 3rd Defendant knew or ought to have known?
- 19) Whether the statements were obtained without the opportunity or benefit of independent legal advice?
- 20) **IN THE ALTERNATIVE**, whether the \$24,000 payments made by the 3rd defendant to the deceased's estate is a set-off of any claims assessed by this Honourable Court at common law against the 3rd defendant.
- 21) Whether the 3rd defendant is entitled to seek indemnity costs against the Plaintiff?
- 22) Whether the Plaintiff is entitled to interest on damages pursuant to the Law Reform (Miscellaneous Provisions) (Death and Interest) Act, Cap 27 and also continuing losses to the estate?
- 23) Whether the Plaintiff is entitled to loss and damages, if so then the quantum of damages and apportionment between the Defendants?

E. ORAL EVIDENCE : (In Brief)

9. Plaintiff called following witnesses in support of her claim.

PW-1: Parmod Singh of Yalalevu, Ba.

- a. According to this witness, he resides on the right side of the road leading toward Ba. The accident had occurred on the opposite side (left side) of the road that leads to Lautoka. When he was asked to tell about the accident, he started saying that whatever report he gave to the police is what he is going to tell the court. He says that half past 10 in the morning on the day in question he was standing near his gate, where the Town council staffs were working. He saw they were collecting sugar cane and the victim came towards his wall and returned towards the Service Station on the opposite side. He saw the Fiji transport bus FD 004 was coming very fast from Ba towards Lautoka, it exhausted the brakes which made a loud noise and the accident occurred. He says he saw the deceased on the other side, the bus was too fast, over speed, tried to stop and stopped near the Moto junction. He further said that it was 50 km zone, the speed of the bus was 70 to 80 plus km, although, he is a driver with 20 years' experience, after seeing this accident, he never renewed his driving license. He went on saying that after the accident he ran towards the place of accident and found the deceased was covered with blood. The deceased was under the left hand side step axle and wheel, victim was stuck in that and he was initially standing 4 chains away from that place of accident.
- b. Under cross examination he confirmed that there are 3 lanes, out of which one lane (the extreme left one) is dedicated to turn towards Moto. He still maintained that the bus came very fast (vide page-8), but admitted that he didn't see the actual collision as the bus was very fast and at a different angle. (Vide page- 9). He continued to say the bus was fast and admitted the accident occurred on the middle of the road and stated "**...it's not that I didn't see anything; if I had not seen, what would I have come here for?**" (Vide page 10).
- c. In re-examination he confirmed he did not see the impact but he heard the loud sound and passengers shouting. He maintained that he was standing on the opposite side when the bus hit the deceased.
- d. His evidence is found to be prompt, consistent and corroborating with his statement to the Police as to what really happened on the day of the accident. It was tendered as Exhibit P6.

PW-2: Nemani Tubananitu

- e. PW-2, who being a passenger in the same bus and seated in the middle thereof, stated that he never saw anything that day as he was inside the bus; but heard the passenger sitting in front shouting. He then stood up, looked around and

never saw anything except seeing the bus was still moving and the driver was trying to control it. (Vide page 16). His attention was drawn by the shouting of the passengers seated in the front, but the bus went a little bit further and stopped. (Vide page 17).

- f. Under cross examination he admitted that he didn't see the impact and only saw the driver was trying to control the bus after the passenger's shouting. He too confirmed that the bus was on the middle of the road.
- g. His evidence is corroborated by his statement to the Police that was tendered as Exhibit P5.

PW-3: Filimoni Nale

- h. PW-3 was a co-worker with the deceased and 4 others. His evidence in chief was that on 15th October 2013, he was working on the road with Ami Chand and Poate, and they were brooming the road facing towards Ba, while the victim was picking up rubbish along with another worker called Satish from the drain along the road, at a distance of around 30 yards in the direction of Lautoka from where they were brooming on the same lane.
- i. When asked as to what happened next, his response was *"The bus went past and it was on such a speed. I can feel the high speed of the bus because of the wind that it took that day; and I mentioned to my friend that bus was going on such a speed, My Lord. I heard something and when I turned back, I saw one in our uniform overall was lying on the road"* (Vide page 21). He continued by saying that he heard the sound of the impact, ran to the scene of the accident and saw the victim lying against the front Tyre close to the entrance of the bus.
- j. Under cross examination he maintained that he could feel the bus was speeding since he felt the wind and he does not feel this wind from every big vehicle that goes past him whilst he is on the road. In re-examination he explained further that he had been working on the road for the past 25 years and was able to clearly differentiate the wind given off by the bus as "strong wind". He also advised the Court that there was a 50 km/hour sign board. He also mentioned that the deceased's eye sight was blurry but he could not confirm how and if he had undergone any operation. He further confirmed that the deceased was supposed to cross the road to drop the rubbish on the other side of the road, which was the collection point. His attention was drawn to his police statement where he had told the speed of the bus as about 50 to 70 km but before me was seen agreeing to the suggestion made by the defence counsel that it was 50 km. (vide page 28), but later stated it was just above 50km (vide page 30) . When the witness was asked about any safety equipment, he said no such equipments are given, but they are given overall wearing.

PW-4: Ami Chand

- k. PW-4 was one of the workers, who also was engaged in brooming together with PW-3 at the time of the incident. He recalled that the deceased and one other worker, Satish were picking up rubbish behind them in the direction of Lautoka. He repeatedly advised the Court that the bus in question FD004 was travelling very fast and he heard the sound of impact after 2-3 minutes after the bus went passing him. He said he inquired with the other worker, Nale about the sound and discovered that the deceased had got into an accident. He explained that the deceased was lying in front of the Tyre, near the left hand side step. He further confirmed that he knew the bus was speeding as he has been working on the road for many years and is able to indicate when a particular vehicle is speeding.
- l. In cross examination, it was put to him that all heavy vehicles give off wind as they go past. However, PW-4 maintained that only few big vehicles give wind when it goes past and not all big vehicles. He said he remembered telling the Police that the bus was speeding and that he said the bus was travelling somewhere between 50-70 km/hour. In re-examination, he confirmed that the road was clear before the accident.

PW-5: Bhagwati

- m. PW-5 is the Plaintiff and the wife of the deceased, who had been married to him for 29 years and is currently living with her two sons. She heard from the people on the day of accident, that her husband was involved in an accident. She went to Hospital to see only that her husband had died. She then informed her families and arranged for the funeral, collected money from her families and friends and used her savings too made from selling mangoes to arrange for the funeral. She informed the court that workers from Ba Town Council had collected \$500.00 and had given it to her. She spent \$200.00 on coffin, bought cloths for funeral and spent money on other funeral items. She advised that after the funeral, the 13 days ceremony was held at their place.
- n. She testified that the her husband had been working in Ba Town Council for five years and prior to that had worked in Rajendra's Supermarket. He worked 7 days a week and rarely took leave. He used to leave home at 6.30 am and reached back at 7.30 pm. The deceased gave all his money to her and the same would be used in grocery shopping for the whole family. She also paid the water and electricity bills for their house out of his wages. She confirmed that their other son was also working but he used his wages for the hire purchase payments only. She further confirmed that the deceased did not have any eye sight problems and he was wearing eye glasses before, but then he underwent some sort of medical treatment after which he stopped wearing them. She also said that this was before the deceased started working for Ba Town Council.

She confirmed giving a statement to the Ministry of Labour and signing and receiving the sum of \$24,000.00 from the Ministry of Labour. She stated that she studied only till Class 6 and could not read the statement provided to her and only signed as she was asked to.

- o. In cross examination, she confirmed that the deceased did not have any eye sight problems since working for Ba Town Council and he undergone some sort of medical treatment but not an eye operation. She also confirmed that the husband did not have a problem in keeping attention and had the bank card and the Money brought by the deceased with her and used to give him \$2 for his daily bus fare. She explained that because he feared he would lose the money he always asked for change. She said he did not have diabetes or pressure and used to drink grog with his friends, but she never gave him money for the grog, only his friends used to pay for it. She admitted the receipt of \$24,000.00 from Fazlin, being the compensation. In re-examination she explained that the deceased had worked in Vinod Patel for 4 years then at Basin for 2 years and thereafter at Rajendra's Supermarket for 6 years before he joined Ba Town Council. She said the money earned by her husband was used for the whole family.

PW-6: George Driver – Traffic Officer

- p. PW-6 has been a Traffic Officer for 20 years in the Traffic Department and is in charge of the traffic folders. He confirmed that the traffic case in relation to the deceased is still pending. He advised the court that the Traffic Officer who was in charge of the investigation and the file at that time was Sergeant, Riyaz Mohammed, who is currently serving in Sudan.
- q. PW-6 brought the Police file with him to Court. From his records, he confirmed that the rough sketch plan is found in file and it has been drawn by Sergeant Riyaz Mohammed. He confirmed having the fair sketch plan and its key also filed of his records. PW-6 was then shown photographs of the accident scene and he confirmed having the same in his files. He stated photographs were not taken by him, but taken by a police officer. He further confirmed the recording of caution interview of Al Jameer Ali. Objection was raised by the learned defence counsel as to its admissibility, but the court accepted this as evidence subject to consideration of weight. The rough sketch plan, fair sketch plan, photographs and the caution interview were tendered as exhibit "PE1", " PE2", " PE3", and " PE4" respectively.
- r. Under cross examination, PW6 was asked regarding the scene of the accident and questioned about the fault of the driver and deceased. He replied that he was not present at the scene of accident, nor took part in investigation, but spoke about his familiarity with the area and roads. He said that there were two main lanes and the third one on the left side is bit wider, which turn towards Moto Road. He further stated that they would only charge the driver of the bus,

where they have evidence and not otherwise. He confirmed that the witness statements of Jubeda Tabai and Atish Anand Sharma are in the file and same was shown to the Court.

PW7: Surend Prasad

PW-7 was the Witnessing Officer during the caution interview of the Second defendant, Al Jameer Ali. He confirmed that the caution interview was recorded in his presence and Al Jameer Ali exercised his rights. He also confirmed his signature on the pages of the caution interview.

- s. The caution interview was conducted on computer in English version. The interview was then printed, read over to Al Jameer Ali and then signed in his presence. He confirmed that the responses received by Al Jameer Ali were voluntary and he signed all the pages in the interview. He also stated that Jameer Ali was shown a copy of the sketch plan, taken at the accident site to which Al Jameer Ali agreed. He confirmed that he was present throughout the interview and the Accused was allowed time to rest. In cross examination PW7 confirmed that he was only a witnessing officer and did not conduct the interview. In re-examination he explained that it was normal procedure for him to be present there.

PW-8: Rama Karti, Police Officer

- t. PW-8 was the photographer from the Police Department, who took photographs of the scene of accident. She confirmed taking the photographs after the accident on 15th October, 2015. She explained that she received a call from Sergeant Riyaz Mohammed and soon after that she arrived at the accident scene to take the photographs. She also stated that the Sergeant Riyaz Mohammed was at the time drawing the sketch plan of the accident. At the scene, she saw the Police officers, investigating officers and the deceased lying under the Tyre with blood stains around him and the bus. She confirmed the Tyre marks shown on the photographs and described that these were left by the bus. She also advised that the left hand side of the bus was damaged.
- u. In cross examination, PW-8 explained that she was instructed to take the photographs, which she printed and gave the originals to Sgt Riyaz Mohammed. She confirmed that the deceased was in front of the left tyre of the bus.

PW-9: PC Isimeli Gavidu, Police Officer

- v. PW-9 stated that he was serving in the traffic department at Ba Police Station during the time material to accident. He has been in the Police

department for the past 17 years. He confirmed that the recording of the statement of Plaintiff's witness (PW-2) Nemani Tubananitu on 17th October 2013 and his handwriting therein. He was then shown a copy of PW-1's statement. He confirmed his handwriting and taking the witness statement of PW-1, Parmod Singh on 17th October, 2013. Both the statements were tendered as "Exhibit P5" and "Exhibit P6" respectively. .

- w. Under cross examination, PW-9 confirmed that he had not read the other witness statements and also was not involved in laying the charges against the accused. In re-examination he explained that he wrote what the witnesses had said.

10. Defendants called following witnesses 's witnesses:

DW1: Ranjini Narayan

- a. This witness, as the Claim Officer at New India Assurance, mainly spoke about the payment of \$ 24,000.00 made to the Plaintiff and her children under the Workmen Compensation Act. I find that her evidence will come into play only if the 3rd defendant is found to be liable. She was shown a copy of the Workman's Claim Policy issued by New India Assurance and the contents of the documents were confirmed by her. The Policy was then tendered as "Exhibit D1".
- b. She further confirmed that \$24,000.00 was paid to Ministry of Labour on behalf of Ba Town Council as compensation to the deceased's family. In respect to that, she was shown a cheque dated 17th February 2014 issued by New India Assurance to Ministry of Labor in the sum of \$24,000.00 receipt of which was confirmed by her. This was tendered as "DE2".
- c. DW-1 was then shown a copy of the payment voucher dated 25th July, 2014 paid to Bhagwati by the Ministry of Labour. She confirmed the same, which was then tendered as "DE-3"

DW-2: Jubeda Tabai

- d. According to DW-2 she was one of the passengers in the bus in question. When she was asked to describe as to what she saw and as to how the accident occurred, she said the victim was in front of Moto Road; already crossed and standing on the mark carrying one sack. The bus was bit far away and the driver having seen him beeped the horn but the victim seemed like didn't hear. Victim was looking on his opposite side; and he didn't look at the bus and was trying to go to the other side of the road. She further stated victim did not look at the

driver of the bus, that the driver tried to serve and also veered the bus on his right side, but the victim still kept on crossing.

- e. In her further evidence, she went on to say that the deceased was already standing on the white mark in the middle of the road when she first saw him from the bus. Then under cross examination, she was referred to her statement (Exhibit DE4) wherein she had stated that the deceased was just taking steps from the left hand side footpath to cross the road when the driver first beeped its horn. She could not confirm how long the bus took to stop after hitting the deceased. However, she emphasized that the bus stopped same time and later in cross examination stated that it only moved "a little bit" further. DW-2 in cross-examination stated further that the driver applied the brakes and whilst applying the brakes it went to the oncoming vehicle lane. She also advised the Court that the speed limit of the bus was 60-70 km/hr. She advised the court that she did not see the deceased's body after the accident; however in her statement to the police she has said she saw "the man was lying in front of the bus". When put to her that her statements are contradictory, she said "I am not sure if I saw". In view of the contradictions DW2's evidence should be treated with caution.

DW-3: Pandit Atish Anand Sharma.

- f. DW-3 gave evidence that he was travelling along the Kings Highway towards Ba town on 15th October, 2013 in his car when he saw the accident.
- g. In his evidence, he described that as his car approached the scene of accident; the deceased was standing on the mark to cross the road and looking at him. He said that the bus was a bit far when it first beeped its horn to the deceased. He then stated that the deceased was hit by the left hand side of the bus when he tried to cross the road. He said the deceased's leg got stuck in the Tyre of the bus and he was going along the Tyre as the bus was moving.
- h. Under cross examination, he stated that the Police statement was read over to him and translated to him as well. He admitted that the deceased was in the middle of the road and that he felt that he would cross the road. He stated further that he would have done the same thing as the bus driver if he was in that place. However, he admitted that after he saw the deceased on the middle of the road looking at him he slowed down his car to 20km/hour. He also admitted that there was nothing blocking his view and that both he and the driver had a clear view of the road. In examination in chief he said the deceased was crossing, while in cross examination he said the deceased was running.
- i. He was referred to his Police Statement on 18th October, 2013 in which he stated that the bus was 40 meters away from the deceased when it first tooted the horn. He then informed the court that the speed limit was between 50-60 km/hr. He

did not see any cones on the road. He agreed that the bus was far from the deceased when it tooted the horn. DW3 could not confirm when and where the bus had stopped after hitting the deceased since he had already past the bus by then. He confirmed that the deceased was hit by the front left side in line with front head light of the bus.

F. DOCUMENTARY EVIDENCE:

11. Apart from filing an Agreed Bundle of Documents (ABD), parties tendered and marked the following documents through the respective witnesses.

By the Plaintiff:

- i. PE-1. Sketch of the scene of accident.
- ii. PE-2. Key to the sketch.
- iii. PE-3. Photos of the scene of accident.
- iv. PE-4. Caution interview record of the 2nd defendant driver.
- v. PE-5. Witness statement to the police by PW-2, Nemani.
- vi. PE-6. Witness statement to the police by PW-1, Pramod Singh.

By the Defendants:

- i. DE-1. Photos of the scene of accident.
- ii. DE-2. Document number 1 in the ABOD.
- iii. DE-3. Document number 11 in the ABOD
- iv. DE-4. Witness statement by DW-2 Jubeda.
- v. DE-5. Witness statement by DW-3 Pundit Anand Sharma.

G. ANALYSIS:

12. The burden of proof is squarely on the Plaintiff to prove on preponderance of evidence that the accident in question occurred, the resultant injuries and the death were caused by the negligence of the defendants, particularly, owing to 2nd defendant's driving the said Bus as alleged in paragraph 6 (a), (b), (c) and (d) of the statement of claim and / or due to the Third defendant's failure to act in the manner stated in the second part of the paragraph 6 (a), (b), (c), (d) and (e) of the statement of claim. (Vide paragraphs 4 and 6 above for particulars)

13. Out of the whole evidence led by both the parties, it is the evidence of the plaintiff's witnesses, namely, **Pramod Singh (PW-1), Nemani Tubananitu (PW-2), Filimoni Nale (PW-3), Ami Chand (PW-4)** and that of the defendant's witnesses, namely, **Jubeda Tabai (DW-2) and Atish Anand Sharma (DW-3)**, all of whom were said to have been in the vicinity of the incident, will materially assist this court in determining the liability of the defendants.
14. Remaining witnesses for the Plaintiff, except for the plaintiff, **Baghwati (PW-1)**, were Police officers, namely, **Georg Driver (PW-6), Surend Prasad (PW-7), Rama Karti (PW-8) and Isimeli Gavidu (PW-9)**, who were not the eye witnesses to the incident. But, they have ably assisted the court in the ascertainment of certain vital facts, particularly, PW-6 spoke about the drawing of sketch plans by the investigation officer, **Riyas Mohammed**, and PW-8 spoke about taking of photographs of the scene of accident, while PW-7 confirmed about recording of caution interview of the 2nd defendant and PW-9 confirmed about recording of witness statements. PW-6 also confirmed about the existence of all those documents in the relevant file, which have become as part and parcel of the case record.
15. The first and foremost task before this court is to decide on the question of alleged liability of the defendants as called upon by the agreed issues No 1 and 2, which query as follows;
 1. *Whether the collision was caused by the sole and/or combined negligence of the defendants?*
 2. *Whether the collision was caused and / or contributed by the Deceased?*
16. In the event this court decides that the cause for the accident was the alleged negligence of the **Second** defendant, as particularized in the first part of paragraph 6 of the SOC, with or without the contributory negligence of the deceased and in the absence of negligence on the part of the Third defendant to any degree, the scrutiny of the evidence given by the defence witness, **Ranjini Narayan (DW-1)** and the consideration of the relevant provisions of the Workmen Compensation Act, will not be warranted.

17. As highlighted by the learned defence counsel at the trial, notably, none of the plaintiff's aforesaid material witnesses (**PW-1 to PW-4**) had, for their own eyes, seen the collision of the Bus in question with the victim. Conversely, they had seen most of the events that happened immediately prior to the accident and what were to be seen there after the accident.
18. Learned counsel for the defendants takes up the main defence through his argument about the plaintiff's failure to adduce any evidence to demonstrate as to how the accident occurred and to produce a single eye witness to the collision.
19. The above arguments of the learned counsel for the defendants, in my view, holds no water in the light of the unequivocal admission of the defendants about the collision in paragraph 2 of the Statement of Defence and in the agreed fact number 6 found in the minutes of pre-trial conference.
20. The above admission in the statement of defence and in the agreed issue number 6, as to the occurrence of collision, will, undoubtedly, absolve the plaintiff from adducing evidence of an eye witness to prove the very act of collision. It is to be noted that the evidence of the defense's main witness, **Pundit Atish Sharma (DW-3)**, who testified to the effect that he saw the very act of collision, seems to have escaped the attention of the learned defence counsel. This witness, in his examination in chief, under cross examination and re-examination, has clearly stated that he saw for his own eyes the very act of collision and how the victim struggled at that moment. Vide pages 124, 133.

In page 135 of the copy record, the witness states as follows:

Judge: *You did see the actual impact?*

Witness: *Yes, My Lord. I saw; that's why I am telling My Lord; whatever I have seen with my own eyes. I can't forget that scene, my lord; it is still clear in my mind after 5 years"*

Vide page 141:

Q. *One last question Mr. Sharma; you said you were the only eye witness. What makes you think that you were the only eye witness?*

A. *My Lord, I was going from in front, and I saw a clear view of what had happened. It's only me who can see it clearly. Even the driver couldn't have seen where he got bumped. , bumper or light .it's only me who saw it clearly.*

21. In view of the above, the learned defence counsel's argument, that there was no eye witness to the collision fails and this need not necessarily debilitate the plaintiff's case.
22. Subsequently, the learned defence counsel moved to challenge the evidence of the Police witnesses, namely, PW-6 **Georg Driver**, PW-7 **Surend Prasad**, PW-8 **Rama Karti** and PW-9 **Isimeli Gavid**. It is in evidence and has to be borne in mind that none of them were present at the scene of accident or took part in the scene inspection or investigation except for PW-8, who took few photographs of the scene of the accident on the request of the investigation officer **Sgt. Riyas Mohamed**, who is now said to be serving in Sudan.
23. However, the existence of both the rough and fine sketch plans of the scene of accident has been proved by the PW-6, while recording of the caution interview has been confirmed by the PW-7. Further, taking of Photographs of the scene of the accident has been confirmed by the PW-8 and the recording of the statement of two other witnesses has been confirmed by the PW-09. All these documents are now part and parcel of the record and the admission of those documents as evidence and the oral evidence of the relevant Police officers on those documents will not prejudice the defendants.
24. Moreover, it is my considered view that, in deciding the liability, this court would largely rely on the oral evidence of civil witnesses, brought by both the parties. The objection raised by the learned defence counsel for the admissibility of the sketches and the caution interview records, cannot withstand since those documents could not have taken the Second defendant by surprise or prejudiced him since they are said to be the part of the Magistrate's court proceedings as well and he has been privy to those documents. In this regard this court is guided by the decision in *Lata v Nasib FJHC 571[2015]HBC 244 of 2006 (5th August 2015)*

25. For reasons best known to him, the 2nd defendant opted not to give evidence before this court. Had he given evidence, he would have been at a better position to explain as to what exactly happened. This court is at liberty to draw an adverse inference against him that he is in an attempt to suppress certain vital facts that would go against him if he opts to give evidence. It appears that certain revelations and admissions made by him at the caution interview hold him back from getting into the witness box. The common law principle of “adverse inference” formulated in *Jones V Dunkel* HCA 8; (1959) 101 CLR 298 guides me in this regard.

Is the 3rd Defendant Liable?

26. Before discussing any further to decide on the alleged liability of the Second defendant, let me interpose to consider the limited evidence available against the Third defendant to decide whether it had also acted negligently (combined negligence) to cause the tragedy, owing to its alleged failures as particularized under sub paragraphs (a), (b), (c), (d) and (e) of the 2nd part of paragraph 6 of the SOC.

27. It is alleged that the 3rd defendant failed to provide;

- a. safe system of work,
- b. Warnings/signs/ notices/ markers of the presence of workers in the highway,
- c. Safe or reasonably safe work environment as the circumstances required,
- d. Any or any adequate supervision of its workers at the highway, and
- e. A person to control traffic for the safety of its workers on the highway.

28. Admittedly, the 3rd defendant, during the time material, was a local authority charged with various statutory functions including cleaning and collection of refuses from the roads within the Town council limits of Ba. It is also an admission that the deceased was an employee of the 3rd defendant, and was at work within the course of his employment when the collision occurred. Vide agreed facts number 5, 6 and 9.

29. It is undisputed evidence that the deceased had worked for the council for

about 5 years prior to the incident, mostly working on all 7 days in the week for an average weekly salary of \$101.05 as agreed by the parties prior to the trial.

30. The 3rd defendant also went to the extent of admitting the facts that it failed to provide any warnings/signs/notices/markers on the highway and to have available or make arrangement for a person to control motor traffic on the highway. Vide agreed facts 7 and 8.
31. The most suitable answers to the agreed issue number 3, 4 and 5 raised in relation to the 3rd defendant will, once and for all, decide whether the 3rd defendant was negligent or not for the accident occurred and the resultant death of the deceased Jai Ram Sharma.
32. One of the statutory duties the 3rd defendant is expected to perform, among other things, is the cleaning and collection of refuses from the roads within the Town Council limits of Ba. Undoubtedly, it is a routine work, which is performed regularly at specified intervals. In this case, it is in evidence that the cleaning and collection of refuse is attended on this highway twice a week.
33. It is a commonly known fact that the cleaning and collecting of refuse on the road is not a job or duty performed by the Town Council workers being stationed at a fixed place on the road. It is a duty performed by the workers being on move, which is generally known as a mobile work. Under these circumstances, it is highly impracticable to have or display warnings/signs/notices or markers, unless the work is at a fixed place on the road or at the vicinity and that too for a specified period of time.
34. On the other hand, instances like constructions/repairs/maintenance, particularly, with digging the earth or by causing obstructions on the road may necessarily require such precautionary and safety measures. The question whether such safety measures should be taken or not and, if needed, what are the prescribed safety measures that should be taken, necessarily, depends on the type of work done, the time period to be taken for it and the surrounding circumstances.

35. It is also highly impracticable to have a person to control the traffic on the road when the Town Council workers are engaged in this type of mobile work, unless it is a work that falls under the category specified above. No evidence adduced by the Plaintiff to show that generally Traffic-Wardens or Supervisors are engaged to be present or move with the workers when they clean and collect refuse on the road. It is the duty of the plaintiff to establish that such an arrangement is in practice.
36. It was in evidence of PW-3 Filimoni Gale, that the deceased was wearing the overcoat. When the court asked PW-3, during his cross examination (in page 31), whether any safety equipment was provided, he answered to the effect that the deceased was wearing overcoat. In page 33 of the copy record, this witness has stated further that it was *"a bit orange in colour and there is a white line on the back; sort of a reflector"*. .
37. Even the defence witness (DW-2) Jubeda Tabai in her statement to Police has stated that the victim was wearing a reflector jacket and in re-examination too (page 114) she confirmed it. DW-3 too in his statement to the police has stated that the deceased was wearing Ba Town Council Overall, without any reflector. It is to be noted that PW-3 Nemani, in his evidence refers to the reflector on the back side of the overcoat of the deceased. According to DW-3 Pundit Sharma, what he has seen is the deceased standing on the line of the road facing and looking at him. Thus, there could not have been any possibility for him to see the reflector on the back side of the overcoat worn by the deceased.
38. Therefore, it can be safely assumed that the jacket was with the reflector on the back side of the deceased, which could have been easily and clearly seen by the bus driver as a warning sign or an indicator about the presence of the worker on the road. This, in my view, is a sufficient compliance of safety regulations.
39. It is the duty of the plaintiff to prove that the deceased was not wearing a reflector jacket, provided by the employer Ba Town Council, which would have served as safety sign. As per the evidence adduced, I am satisfied that the deceased was wearing the reflector Jacket, which has served as safety

equipment. The plaintiff could not have expected from the 3rd defendant anything more than the above measures for the safety of her deceased husband. As I observed above, having a supervisor in place or providing supervision by the 3rd defendant in any other manner is also impracticable given the nature of the work performed by the employees of the council as road cleaner cum collector of refuse.

40. It is my considered decision that the plaintiff cannot have had a valid cause of action against the 3rd defendant on the alleged failures of it as particularized under paragraphs 6 (a) to 6 (e) of the SOC.
41. It is my finding, that the 3rd defendant had reasonably fulfilled its duty of providing safe system and environment of work as the circumstances required. Therefore, no liability can be imposed on the 3rd defendant and the agreed issues number 3, 4 and 5 should necessarily attract answers favorable to the 3rd defendant. Accordingly, issue number 3 is answered affirmatively and the issues number 4 and 5 are answered negatively.

Is the Second Defendant (Driver) Liable?

42. In paragraph 6 of the SOC, the plaintiff alleges that the 2nd defendant was negligent by (a) driving at a speed, which was excessive in all the circumstances (b) failing to keep any or any proper look out or to have or any sufficient regard for the workers on the road (c) Causing or permitting the said vehicle to go in such a position of the road thereby colliding with the deceased (d) failing to stop, slow down. Swerve or in any bother manner maneuver, manage or control the said vehicle so as to avoid the collision. Permitting the said vehicle. The plaintiff also rely on the doctrine of *res ipsa loquitur*
43. There is unchallenged evidence before me that the speed limit of the area, where the tragedy occurred, is 50 km zone. The 2nd defendant in his caution interview had admitted the presence of 50 km sign board. All the civil witnesses called by the plaintiff, namely, PW-1, PW-2, PW-3 and PW-4 have confirmed that the bus was travelling at a high speed. This evidence has withstood the lengthy cross examination of the learned defence counsel. Even the DW-2 Jubeda, under her cross examination states that the speed of the bus

was 60 to 70 km/h (**vide page 119**). Had the bus been driven at 50 km /h speed, undoubtedly, this accident could have been avoided.

44. The 2nd defendant driver, in his caution interview, has admitted that the bus was running on its 5th gear. This would not have been possible if he had been running 45 to 50 km/h since the 5th gear is generally used when the speed is over 60km/h. He further said that he saw the deceased first at 200 meters distance and for the second time at the distance of around 70 – 80 meters. This distance, in my view, was sufficient for him to reduce the speed to the level what the circumstances demanded or to stop the bus.
45. The evidence of the PW-3 and PW-4 was that the wind generated by the passing bus helped them in deciding the speed of the bus. As per their evidence they had been working on the road for about 25 years. Thus, their evidence on the speed of the bus cannot be disbelieved or disregarded and it has more weight than that of the DW-3 who was seated in his car 70 meters ahead of the bus. Since the bus had travelled passing PW-3 and PW-4 they should have been at a better position to gauge the speed. DW-2 Jubeda too in her cross examination confirmed that the speed was 60 to 70 km/h. (**vide page 119**).Therefore, I accept the evidence led on behalf of the plaintiff that the 2nd defendant was driving the bus at a speed, which was excessive in the circumstances.
46. More importantly, I find that the sketch plan marked PE-1 confirms that the bus, after the impact, had stopped only at a point 17.7 meters away from the point of collision. PW-2 Nemani in his evidence has confirmed that the driver in his attempt to slow down the bus applied the brake only after the collision. The driver has had enough distance and time to have the speed of bus controlled or stop it. Had the driver been attentive, no necessity would have arisen at all for the passengers to shout. This shows that the driver's attention was elsewhere when the deceased was crossing the road.
47. The Tyre marks on the road as shown in photographs marked as PE-3 and DE-1 speak for itself to show what would have been the speed the bus was travelling at before the accident occurred. Had it been driven at 45 to 50 km/h as the 2nd defendant stated in the caution interview or at 50 to 60 km/h as

stated by DW-3, the Tyre marks to the extent of 13.1 meter could not have got engraved on the road? The driver has admitted slamming the brake and the reason for the mark was due to his using tap brake method to control the bus.

48. The driver has further admitted in page 13 of the caution interview that he turned a blind eye to the deceased. On being suggested that it was owing to his high speed, his focus on the train line was necessitated, he has admitted that he put his full consideration on the train line. His contention that he did not speed cannot be accepted.
49. The driver in his caution interview has also admitted that the rough sketch plan was drawn in his presence and he signed it. The caution interview or the contents of its report also has not been challenged and no contrary evidence whatsoever was adduced by the 2nd defendant.
50. The accident occurred in broad daylight when the road was fairly empty. According to DW-3, it was after the accident the congestion was created. 2nd defendant has had a clear vision of the road. He admits that his attention at the time material was on the train line.
51. It has been proved that the 2nd defendant driver, after seeing the deceased for the 2nd time at a distance of 70 to 80 meters, as he had admitted in the caution interview, was focusing his attention on the train line and obviously this had distracted his attention from the deceased, who was crossing the road. It is clear that it was when the Second defendant was suddenly veering the bus towards his right on being alerted by the shouting of passengers, the front left corner of the bus has collided with the deceased. Unfortunately, the driver was too late and could not avoid the deceased being hit by his bus purely due to his over speed.
52. The witnesses called by the plaintiff, were found to be disinterested, prompt in their answers and trustworthy. The credibility of the plaintiff's witnesses was not impeached. I also find that the evidence of DW-2 and DW-3 was of immense use in deciding the contributory negligence on the part of the deceased, which I shall discuss below.

53. Careful scrutiny of the entire evidence led at the trial, leads me to inescapable conclusion that the 2nd defendant was negligent as particularized in paragraph 6 (a) to 6(d) of the SOC, when he drove the bus bearing number FD004 on the day in question and collided with the deceased, which immediately caused his death as alleged by the plaintiff.

H. **CONTRIBUTORY NEGLIGENCE:**

Whether the Deceased Contributed for this Accident?

54. The principle in respect to issue on contributory negligence was stated in *Gani v. Chand & Ors.* [2006] Civil Appeal No. ABU0117 of 2005 (10 November 2006) by Fiji Court of Appeal as follows:

*“The basic principle of contributory negligence is that, when a court is awarding damages to the plaintiff for injuries caused by the defendant, it may reduce the award if the plaintiff can be shown to have contributed to the injury by some negligence on his part. However, whilst the liability of the defendant arises from a duty towards the plaintiff, the assessment of contributing negligence is not based on a similar duty on the plaintiff towards the defendant. It was explained by Lord Simons in *Nance v. British Columbia Electric Railway Co. Ltd* [1951 AC 601, 611:*

“The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the plaintiff to take due care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the injury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff’s claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.

...this, however, is not to say that in all cases a plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully.”

55. In *Sungravure Pty Ltd v Meani* [1964] HCA 16; (1964) 110 CLR 24 at 36-37 and *Bankstown Foundry Pty Ltd v Braistina* [1986] HCA 20; (1986) 160 CLR 301 310, it was decided that a person will be guilty of contributory negligence if he

or she ought reasonable to have foreseen that, if he or she did no act as a reasonable and prudent person, he or she would be exposed to risk of injury. In *Commissioner of Railways v Rupercht* [1979] HCA 37; [1979] 142 CLR 563 at 577 it was held that an employee should not be held guilty on contributory negligence unless when he acted (or failed) this was done with full appreciation of danger. Carelessness by an employee due to confusion, fatigue, natural slackening of attention or preoccupation with what he was doing, was not to be regarded as contributory negligence.

56. The plaintiff has been successful in establishing negligence on the part of the 2nd defendant. The burden of proving the alleged contributory negligence is on the defendant. *Ei incumbit probatio qui dicit, non qui negat*, which means - He who asserts, not he who denies, must prove.
57. The defendant, in paragraph 4 of the statement of defence, has pleaded that the said collision was caused due to the sole and or contributory negligence of the deceased Mr. Sharma. The alleged contributory negligence is particularized as follows;
 - i. *Failing to keep any lookout or to have any sufficient regard to the vehicles that might reasonably be expected to be on the public road where he was collecting refuse.*
 - ii. *Failing to keep the said lookout in the light of the fact that the road he was clearing rubbish in was a single lane road on either side.*
 - iii. *Failing to have regards to his own safety or the safety of the traveling public.*
 - iv. *Suddenly coming onto the middle of the road to clean rubbish thereby colliding with the bus.*
58. Accordingly, the agreed issues number 2, 6 and 7 have been formulated for the adjudication in this regard.
59. DW-2 , who was a passenger in the 3rd front seat of the ill-fated bus, stated that she saw the deceased, having already crossed the lane that leads to Moto road, was standing on the mark(line) that separated that lane and the bus lane toward Lautoka. She said *"He was carrying one sack in his right hand. When the bus was bit away, the driver saw him and beeped the horn but the victim seemed like he didn't hear, kept crossing the road and the driver veered*

the bus to his right hand side". She further confirmed that the victim was looking on his opposite side and he didn't look at the bus.

60. DW-2 in her cross examination was contradicted with her statement to the police , where she had told the police that the victim was taking steps to the road from the foot path on the left side of the road. In deciding the contributory negligence, this need not be considered as a major contradiction since it was still wrong on the part of the victim to cross the road irrespective of the fact whether he crossed from the foot path (extreme left) or from the line that divided the bus lane and the lane that leads to the Moto Road. However, it has to be borne in mind that for the victim to stand on the line, he should have first stepped in to the Moto lane from the foot path.
61. The DW-3 , who was in his car on the right lane driving towards Ba around 70 meters ahead from the bus , has in his evidence confirmed this position that the victim was standing on the line and looking at him and not at the bus that was coming toward the victim. DW-3 also confirmed that the victim was carrying the sack on his right shoulder. From this, an inference can be drawn that since the sack was on the right shoulder, the victim could not have been in a position to turn his head towards his right side from where the bus was approaching towards him at a high speed.
62. It is also in evidence that the victim, when crossing the road, did not follow the basic rule of looking at the both sides of the road. The plaintiff has not led any contrary evidence to show that the victim had taken sufficient precaution for his own safety in order to avoid any contribution on his part. Accordingly, on the evidence adduced by the defence, I am satisfied that the victim did contribute at a certain degree for the accident that claimed his life as a result. This need not have absolved the 2nd defendant from his duty of care toward the victim. Thus, the issues number 2, 6 and 7 should be answered in favor of the defendant.
63. Since the court has found that the 3rd defendant is not liable, the issues 15 to 20 need not be answered. However, I am of the view that awarding of a summarily assessed cost from the Plaintiff unto the 3rd defendant would do

justice, since the 3rd defendant was made to defend an action devoid of a valid cause of action.

QUANTUM OF DAMAGES

64. The plaintiff claims general damages under Compensation to Relatives Act (CRA) and the Law Reform (Miscellaneous provisions) (Death and Interest Act, Cap 27, Special damages to the volume of \$9811.00 together with interest and Costs.
65. Deceased was 45 year of age at the time of the death. He had been working at the 3rd defendant council seven days of the week for 5 years. Parties have agreed that the weekly average salary was \$101.05. It is in evidence that he spent \$2 a day for the bus fare and the rest was given to the plaintiff for the household expenses.
66. The deceased was said to be healthy and used to assist the plaintiff in cultivation of vegetables in home garden. Though, the learned defence counsel raised an issue with regard to the deceased's eye sight, during the trial, it did not carry any weight to defense's case. However, this was not in pleadings or in the form of an issue before the court. Also there was no evidence to the effect that the deceased was a smoker or in the habit of usually drinking alcohol.
67. The deceased has left behind the plaintiff wife and three children, 2 males and a female, who are now grown up. Plaintiff and children have received \$24,000.00 under the Workmen Compensation Act. Though, the 3rd defendant had given \$500.00 for the funeral expenses, the plaintiff would, undoubtedly, have incurred a substantial amount as expenses on the funeral and subsequent rituals. Having all the above in mind, I proceed to decide the quantum of damages as follows.

Special Damages

68. The Plaintiff has claimed funeral expenses, loss of earnings and legal expenses under special damages.

68.1. Funeral Expenses

Section 11 of the Law Reform (Miscellaneous Provisions) (Death & Interest) Act allows damages to be awarded in respect of funeral expenses incurred by the party for whose benefit the action is brought. The plaintiff herself is a beneficiary, Executrix and Trustee of the Estate of the deceased Jai Ram Sharma. She is therefore entitled to claim for funeral expenses. In Fiji, some courts have awarded funeral expenses even in the absence of specific supporting evidence contrary to the general rule for strict proof with regards to special damages.

The plaintiff claims \$4,000.00 as funeral expenses. She admits to have received \$500.00 from the 3rd defendant in this regard. I follow the approach of Pathik J in *Moli v Bingwor [2003] FJHC 279* and award \$3,000 for funeral expenses.

68.2. Loss of Earnings

Loss of earning is also considered to be 'special damages' which must be specifically pleaded, readily quantifiable and be capable of being strictly proved. This can include not only the expenses incurred out of pocket but also the loss of earnings incurred down to the date of trial as per Lord Goddard –J.

What the deceased would have possibly earned out of his employment, had he lived up to the date of trial, is pleaded as 'loss of earnings' being the part of the special damages. Parties have agreed on the deceased's average earnings per week as \$101.05.

I am satisfied that as pleaded and proved, the plaintiff's claim for "loss of income" is a claim for 'special damages' .

I am fortified by the dictum of Lord Goddard when he said in *British Transport Commission v. Gourley (1956) A.C. 185* at p.206:

"In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damages, which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation. Secondly, there is general damages which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like, and, of the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future."

The above principles have been applied in *Chand v Bahadur* [1996] FJLaw Rp 25; [1996] 42 FLR 170 (16 September 1996) and *Deo v Kumar & ors* [2011] FJHC 438; HBC 037.2008(29 July 2011).

The accident in this case occurred on 15th October 2013 and the trial concluded on 17th September 2018. The agreed average earning was \$101.05.

*From 15 th October 2013 to 31 st December 2013	-	10 weeks
*From January 2014 to December 2017 (4 years)	-	208 weeks
* From January 2018 to September 2018 (8-1/2 months)		<u>34 weeks</u>
Total		<u>252 weeks</u>

252 weeks X \$ 101.05 = \$ 25, 464.60 (subject to deduction of transport and personal expenses)

68.3 Legal Expenses for Probate:

The relevant documents in the ABOD confirm the obtaining of probate and the expense incurred in relation to it. There is no dispute on this between the parties. Accordingly, \$500.00 is awarded plaintiff has

69. General Damages:

The plaintiff has opted for the assessment of general damages to be done under Law Reform (Miscellaneous provisions) (Death and Interest) Act Cap 27. Learned Counsel relies on the principles from the case of *Prasad v Hakim*[2008] FJHC 359 ;HBC370.2006(19 December 2008) and the decision of His Lordship, Fitiaki –J in *Hari Pratap v Attorney General of Fiji and Anor Suva High Court Civil action No. HBC 95 of 1986*.

As I alluded above, the deceased was at the age of 45 at the time of his demise. He was healthy and continuously working for 5 years with no complaints about his fitness to work. He has left behind the plaintiff wife and 3 children.

As guided by series of authorities, I make it a point to use an appropriate multiplier and to deduct a reasonable sum from weekly salary, being the travelling and personal expenses of the deceased.

It was the evidence of the plaintiff that she used to give 2 Dollars a day to the deceased for transport, which makes 14 Dollars per week. This would have left only \$87.05 as the net income in the plaintiff's hand. The deceased being a matured and hardworking person with 3 children, it is unlikely for him to have brought the entire pay packet intact and handed over to the plaintiff. Hence, I decide to deduct a further sum of \$7.05 per week to make the net weekly income a round figure of \$80.00. Taking all the circumstances into consideration, I decide that using a multiplier of 10 years is appropriate.

$\$101.05 - \21.05 (\$14 for Transport expenses - \$ 7.05 personal expenses) = \$80.00 per week net income X 52 week = \$4160.00 X 10 years \$41,600.00.

70. **Costs**

The plaintiff seeks costs in the sum of \$15,000.00. The accident occurred in October 2013 and the action was filed in April 2016. Plaintiff, having obtained a sum of 24,000.00 from the 3rd defendant as full and final settlement in relation to the purported cause of action against the 3rd defendant, filed this action including the third defendant too as a party after the expiry of the cool down period allowed by the relevant Act and thereby made the action to prolong causing delay, expenses and the 3rd defendant to incur unnecessary cost.

Hence, awarding \$10,000.00 as summarily assessed costs, being the 2/3rd of the pleaded cost of \$15,000.00 would do justice. At the same time awarding of reasonable costs to the 3rd defendant from the plaintiff is also justifiable.

71. **Interest:**

Through the scrutiny various decided cases; I find that our courts have ordered interest on the adjudged sum at the rate of 3% on special damages and 6% on general damages. I accordingly order the 1st and 2nd defendants to pay interest of 3% on special damages and 6% on general damages for 5 years from the date of the accident (15th October 2013 till 15th October 2018.)

72. Before I conclude, it must be put on record that a reasonable amount should be deducted from the total damages awarded on account of the contributory negligence of the deceased. This court has come to the finding that the deceased contributed for this tragedy by being negligent as stated in the statement of defence when he crossed the road, by failing to follow the prescribed procedure in crossing the road as confirmed by the DW-2 and DW-3. I assess the degree of contributory negligence at 10%. This amount should be deducted from the total amount of damages being awarded.

I. **CONCLUSIONS:**

73. The plaintiff did not prove that the 3rd defendant was negligent when it employed the deceased for the cleaning and collection of refuse from Kings Road, Yalalevu, Ba on the day of the accident in this case.

The plaintiff has proved that on the 13th of October 2013, the 2nd defendant driver by driving the Bus bearing No; FD004 on King's Road, Yalalevu, Ba, as pleaded in paragraph 6 (a), (b), (c) and (d) of the SOC, collided with the deceased **Jai Ram Sharma** and caused his death.

The 1st defendants, being the employer of the 2nd defendant, are vicariously liable to pay the plaintiff's damages and other payments hereby ordered.

The deceased, Jai Ram Sharma, by crossing the road in the manner pleaded in paragraphs 5(i). (ii) (iii) and (iv) of the Statement of Defence, contributed for this accident, which this court assess as 10%.

74. **Summary of awards:**

A. **Special Damages**

a. Funeral Expenses	\$ 3,000.00
b. Loss of Earnings (after deductions.).....	\$20,160.00
c. Legal Expenses.....	<u>\$500.00</u>
d. Total Special Damages.....	\$23,660.00.

B. General Damages (after deductions).....	<u>\$41,600.00</u>
C. Total damages (Special + General).....	<u>\$65,260.00</u>
D. Less 10% for contributory Negligence	<u>\$6,526.00</u>
E. Total Net damages (special + general)	<u>\$58,734.00</u>
F. Add interest on special damages of \$23,660.00X3%X 5 years ...	\$ 3,549.00
G. Add interest on general damages of \$41,600.00X6%X5years....	\$ 12,480.00
H. Cost	<u>\$10,000.00</u>
I. Total Payable.....	<u>\$ 84,763.00</u>

I. FINAL ORDERS:

- A. The plaintiff's action against the 1st and 2nd defendants succeeds.
- B. The action against the 3rd defendant fails and stands dismissed.
- C. Plaintiff is entitle for a sum of \$ 23,660.00 as special damages and for a further sum of \$41,600 as general damages, totaling to \$65,260.00 as damages.
- D. The plaintiff is entitled for 3% interest on special damages, which is \$3,549.00.
- E. The plaintiff is entitled for 6%interest on general damages, which is \$12,480.00.
- F. The 1st and 2nd defendants shall pay unto the plaintiff a sum of \$10,000.00 being the summarily assessed costs.
- G. The plaintiff shall pay unto the 3rd defendant \$1,500.00 being the summarily assessed costs.
- H. A sum of \$6,526.00, being the 10% of the total damages payable, is deducted on account of contributory negligence of the deceased.
- I. The total sum finally payable by the 1st and 2nd defendants unto the plaintiff shall be \$84,763.00.



At Lautoka

6th February, 2019

A.M. Mohammed Mackie

Judge