

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**CIVIL JURISDICTION**

**Civil Action No. HBC 218 of 2012L**

**BETWEEN** : **THE SUN INSURANCE COMPANY LIMITED** a limited liability company duly incorporated under Companies Act (Cap 247, Laws of Fiji) having its registered office at 1<sup>st</sup> floor, Front Building, Rodwell Road, Suva, Fiji.

**PLAINTIFF**

**AND** : **SOROJINI** of Qeleloa, Nadi, Housewife as the Administratrix of the Estate of **PARAS SHIWAN NAIKER** aka **PARAM SHIWAN NAIKER**

**FIRST DEFENDANT**

**AND** : **SHANKAR GENERAL HAULAGE LIMITED** a limited liability company having its registered office at 1 Foster Road, Walu Bay, Suva.

**SECOND DEFENDANT**

**AND** : **SACHINE SANJEEL REDDY** of Lomolomo, Lautoka, Driver.

**THIRD DEFENDANT**

**Appearances** : **Mr. Ashnil Narayan with (Ms.) Shinnal Lata for the plaintiff**  
: **No appearance for the first defendant**  
: **No appearance for the second defendant**  
: **The third defendant appeared in person**

**Hearing** : **Friday, 04<sup>th</sup> October, 2019.**

**Ruling** : **Friday, 31<sup>st</sup> January, 2020.**

**RULING**

**(A) INTRODUCTION**

- i) The first defendant is the plaintiff in High Court Civil Action Number HBC 109 of 2012/L. The action was instituted on 16<sup>th</sup> May 2012 against the second and third defendants on behalf of the estate of 'Paras Shivan Naiker' aka 'Param Shivan Naicker' (the deceased).

- ii) The deceased was a passenger in the motor vehicle registration number DN 414 which involved in a collision with motor vehicle registration number DX 256 (the truck) on 29<sup>th</sup> January, 2012 on the Queens Road, at Sabeto, Nadi.
- iii) The second defendant is and was the owner of the truck which was at the time of the collision driven by the third defendant. The third defendant was at that time an employee of the second defendant.
- iv) The current matter is an originating summons filed by the third party insurer of the second and third defendants seeking, inter alia, a declaration from this court that *'the plaintiff is not obliged to provide an indemnity to satisfy any judgment which the first defendant may obtain against the second and third defendants in respect of the collision involving motor vehicles DN414 and DX256 on the Queen's Road, at Sabeto, Nadi on 29<sup>th</sup> January, 2012, due to the breach of a condition of the compulsory third party motor vehicle insurance policy issued by the plaintiff in respect of the use of motor vehicle number DX256, when at the material time the third defendant, being the driver thereof, was driving under the influence of intoxicating liquor'*.
- v) The plaintiff's originating summons, dated, 12<sup>th</sup> October 2012 initially came up for hearing on 23/01/2019 [after several adjournments] after the time – frame for completion of the pleadings being set on 02<sup>nd</sup> November 2012.

**(B) THE AFFIDAVITS FILED**

- i) By 'originating summons' dated 12<sup>th</sup> October 2012, the plaintiff company is seeking to avoid indemnification of the second and third defendants pertaining to an insurance policy.
- ii) The plaintiff's originating summons is supported by an affidavit of "Thomas Naua", the claims manager, employed by the plaintiff company.
- iii) The second and third defendants had filed two affidavits in response to the affidavit in support of "Thomas Naua", sworn on 24<sup>th</sup> September 2012.
- iv) Both reply affidavits have been sworn by the third defendant on behalf of the second defendant.

**(C) THE PRELIMINARY OBJECTION**

- i) At the commencement of the hearing before the court on 23/01/2019, counsel for the plaintiff raised two preliminary objections to the two affidavits in response filed by the second and third defendant sworn on 13<sup>th</sup> April 2013 and 15<sup>th</sup> May 2013.
- ii) Counsel for the plaintiff submitted that;

- *The affidavits are irregular and produces no authority or resolution to swear the affidavits.*
- *The affidavits are not properly sworn and contains scandalous contents in breach of order 41, rule 5 of the High Court Rules, 1988.*

(iii) After the hearing of the plaintiff's preliminary objections, the court upheld the preliminary objection and made the following orders:

- (a) The paragraph 8 and 9, (a), (b) and (c) of the reply affidavit of the third defendant sworn on 15/05/2013 are expunged.
- (b) In the interest of justice, the court grants leave to the third defendant to file and serve a supplementary affidavit (within 14 days from the date of the ruling) to submit the letter of authority.

(iv) Regrettably, the third defendant did not comply with the above order (b).

**(D) THE CONSIDERATION AND THE DETERMINATION**

(1) The relevant policy condition is as follows:

*"The person insured shall not use the motor vehicle nor shall the owner permit or suffer any person to use such motor vehicle;*

- (a) .....
- (b) .....
- (c) .....
- (d) *whilst any such person as aforesaid*

*(i) is under the influence of intoxicating liquor."*

(2) Therefore, the issues to be determined between the plaintiff and the second and third defendants are;

- (i) was the third defendant under the influence of intoxicating liquor whilst driving vehicle no. DX 256 (the truck) on the 29<sup>th</sup> January, 2012 on the Queens road, at Sabeto, Nadi.
- (ii) whether the plaintiff is entitled to avoid liability to provide indemnity to the second and/or third defendants in respect of the claim by the first defendant under the policy on the ground that the third defendant was under the influence of intoxicating liquor

thereby causing the collision on 29<sup>th</sup> January, 2012 in breach of clause 1(d) (i) of the conditions of the policy.

- (3) **The expression ‘under the influence of intoxicating liquor’ in exemption clauses in insurance policies has been held to mean ‘under such influence as to disturb the quiet, calm and intelligent exercise of faculties’<sup>1</sup>.**

**The onus of proving on the balance of probabilities that the driver (the third defendant) was under the influence of intoxicating liquor is on the insurer (the plaintiff).**

- (4) PC 3025 Shalwin said in his police statement (annexure marked TN-6 referred to in the affidavit of Thomas Naua, claims manager employed by the plaintiff, sworn on 24/09/2012) when came upon the scene the third defendant (the driver of the truck) came out of the vehicle asserting that **it was not his fault**. He was staggering and noticed the smell of beer on his breath. The smell of beer coming from the third defendant and his stagger are two signs of visible intoxication. Visible intoxication means a state of intoxication accompanied by a perceptible acts or series of actions which present signs of intoxication. **The fundamental point which this court is concerned to high light is this; The odor of an alcoholic beverage on the breath and the stagger are related to the ingestion of alcohol than to impairment.** These are not all of the possible signs. If a person shows just one or two of these signs that does not necessarily mean the person is intoxicated. But if a person shows a combination of several signs, or has sudden change in behavior, that could be an indication that the person is intoxicated. Remember, that intoxication can result from the use of drugs other than alcohol. There was no evidence of bloodshot eyes, flushed face, blank stare, and dazed look, loud noisy speech, making irrational statements, aggressive or belligerent. **Evidence of an alcoholic beverage on the breath is merely one factor, namely the consumption and it is not a sign of gross impairment.** The smell of beer and stagger does **not** necessarily mean (1) his mind was affected by alcohol (2) he was incapable of driving or (3) exercising effective control over the vehicle. A person is “under the influence of intoxicating liquor” if he has consumed such a quantity of intoxicating liquor as disturbs the balance of his mind for the quiet, calm, intelligent exercise of his faculties<sup>2</sup>.

More importantly, his assertion to PC 3025 Shalwin “**this is not my fault**” was powerful evidence that;

- (1) his mind was not affected by alcohol;
- (2) he was able to make a sound judgment;
- (3) his mind was working in the way a sober person would.

<sup>1</sup> *London v British Merchants Insurance Company Ltd* (1961) (1) WLR 798

*Mair v Railway Passengers Assurance Company Ltd* (1877) 37 LT356

*Cassidy v State Government Insurance Office* (1965) WAR 81

*Cory v Club Motor Insurance* (1969) Vic Rp 22; (1969) VR 189

<sup>2</sup> *Cox J in Forbes v Australian Associated Motor Insurance Ltd*, (1990) 12 MVR 165 at 170

- (4) he was perfectly well aware of his surroundings.
- (5) he was oriented to person, place and time

Besides, his assertion was the reaction of a person [whose mind was not affected by alcohol] immediately after an accident. His speech was not slurred.

**Therefore, I am not satisfied on the balance of probabilities that the third defendant was under the influence of liquor.**

One word more, the visible intoxication may also be misleading because most, if not all, of the studies suggest that a person's capacity to drive may be impaired at a **subclinical stage of intoxication**. Because of this shortcoming in visible intoxication, law enforcement authorities enlisted the aid of scientists to develop biochemical analyses which could ascertain levels of intoxication. The term intoxication is simply the effect of alcohol on the brain. The National Safety Council and the American Medical Association published reports concluding that particular blood alcohol levels should be considered as evidence presumptive of the presence or absence of the influence of alcohol on driving. These reports are discussed, among other places, in **Richardson, Modern Scientific Evidence**<sup>3</sup>. Intoxication is not always visible even to trained observers.<sup>4</sup>

The following passage of Rares J in "**Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No.4), Federal Court of Australia**"<sup>5</sup>, is illuminating.

*The first exclusion in the policy applies in respect of loss or damage caused while the insured car "is being driven by ....any person under the influence of intoxicating liquor". The wording does not require a nexus between the effect of the alcohol and the accident. Rather, it applies if the vehicle is being driven by a person "under the influence" at the time of the accident: cp Cory v Club Motor Insurance Agency Pty Ltd [1969]Vic Rp 22; [1969] VR 189 at 190 where Winneke CJ, Smith and Gowans JJ assumed this; Louden v British Merchants Insurance Co Ltd [1961] 1 All ER 705 at 706-707 per Lawton J; Ford v SGIC General Insurance Ltd [2000] SASC 206 at [24] per Debelle J. Thus, the exclusion requires the driving ability of the driver to be impaired at the time of the accident by the effect of intoxicating liquor: Ford [2000] SASC 206 at [24]. In Forbes v Australian Associated Motor Insurers Ltd (1990) 12 MVR 165 at 170, Cox J said:*

*"A person is "under the influence of intoxicating liquor" if he has consumed such a quantity of intoxicating liquor as disturbs the balance of his mind for the quiet, calm, intelligent exercise of his faculties: Mair v Railway Passengers Assurance Co Ltd (1877) 37 LT 356. Louden v British Merchants Insurance Co [1961] 1 WLR 798. Cassidy v State*

<sup>3</sup> (Second edition) Section 13.1 (1974)

<sup>4</sup> Intoxication Is Not always Visible ; An Unrecognized Prevention Challenge By John Brick and Carlton K. Erickson, University of Texas at Austin, 17<sup>th</sup> July 2008

<sup>5</sup> (2010) FCA 482

*Government Insurance Office [1965] WAR 81. Cory v Club Motor Insurance [1969] Vic Rp 22; [1969] VR 189.*"

Curiously, the leading authority on the policy wording "under the influence of intoxicating liquor" is still the judgment of Lord Coleridge CJ in *Mair v Railway Passengers Assurance Co (Ltd)* (1877) 37 LT 356 at 358 with whom, on this point, Denman J agreed at 359. The Lord Chief Justice elaborated on the distillation of his reasons made by Cox J in the passage I have quoted. He said that there was a point at which liquor impedes or disturbs the exercise of the intellect. He said that it is very difficult to ascertain precisely in the English language where that point is, and continued (*Mair* 36 LT at 358):

*"-to ascertain with precision where that ....but it is enough to say that there is a point, and it seems to me these words would be satisfied when the influence of intoxicating liquor is found in point of fact to be such as to disturb the quiet and equable exercise of the intellectual faculties of the man who has taken the liquor."*

Lord Coleridge CJ said that if the intoxication had been enough to contribute to the accident it would follow "a fortiori that it had arrived at the disturbing point", that would satisfy the exclusion in the policy of assurance there. In short, as Denman J summarized the liquor must exercise a disturbing influence on the quiet, calm, intelligent exercise of the faculties: *Mair* 37 LT at 359.

As Lord Coleridge CJ recognized, and as experience teaches, it is very difficult to lay down a more precise explanation of when a person has arrived at the point or crossed the line between not being and being under the influence of intoxicating liquor. This was also the view of Stanley J with whom Townley J agreed in *Noonan v Elson* [1950] Qd R 215 at 219-220. There, Stanley J referred to a stage at which a person's power of effective control of the vehicle may become impaired through intoxicating liquor so that the person's behavior is "sufficiently abnormal to warrant a finding that he was then under the influence of liquor".

Like "drunkenness", the precise definition of the expression "under the influence of intoxicating liquor" is difficult to express and apply: cp *CAL No 14 Pty Ltd v Motor Accidents Board* (2009) [2009] HCA 47; 239 CLR 390 at 413[53] per Gummow, Heydon and Crennan JJ. Persons other than the individual whose condition is under scrutiny can only observe his or her behavior. But, as Gummow, Heydon and Crennan JJ said there, it is difficult for an observer to assess whether a person has reached the point denoted by the relevant expression.

And, different people react to the consumption of alcohol in different ways. Their reactions may depend upon their physique, how much they had to eat, how much and how quickly or slowly over a period they had consumed alcohol and the situation in which they are when the observation is made. Behavior suggestive of a person being "under the influence" may be more readily perceived if the person is in a serious situation, such as a business meeting or even a courtroom as

*compared to the same person being at a party or a pub. And, it is the observer's perception of the other person's behavior that often influences the conclusion that the observer reaches, which may or may not be an accurate assessment. Nonetheless, in reality persons are affected by alcohol in ways that cannot be ignored merely because it is difficult for a judge or jury to arrive at the consumption affected the person at the time of an event.*

- (5) PC 3401 Ajay Verma has conducted the breath analysis. The analysis showed 73 micrograms of alcohol in 100 milliliters of breath. (Annexure TN-8 referred to in the affidavit of Thomas Naua).

Those results are not evidence that the third defendant was under the influence of alcohol, or affected in any particular or general way by it or that he was incapable of driving or exercising effective control over the vehicle. Rather, the results are evidence that the third defendant's blood contained a particular level of alcohol. Most importantly, there is a prohibition against the use of the breath test or breath analysis. They are not for the purposes of any contract of insurance. Section 9 (2) of the Land Transport (Breath Tests and Analysis) Regulation 2000 excludes the evidence from breath analysis in contract of insurance cases. For the sake of completeness, Section 9(2) is reproduced below.

*“The fact that a person has undergone a breath test or submitted to a breath analysis and the result of a breath test or breath analysis are not, for the purposes of any contract of insurance, admissible as evidence of the fact that the person was at any time under the influence of or affected by alcohol or incapable of driving or of exercising effective control over a motor vehicle, but nothing in this regulation precludes the admission of any other evidence including evidence of a conviction under section 102(1), 103(1) or 105(1) of the Act to show any such fact”.*

- (6) Amit Raj at Qeleloa, (annexure marked AK-3 referred to in the affidavit of Anirudh Kumar sworn on 21/9/2012) Nadi says in his interview statement that the third defendant arrived at his residence in Maro, Sigatoka at 6.30 a.m. and told him that he wanted to drink beer. He then accompanied the third defendant to purchase (6) bottles of long neck Fiji Bitter beer. He further said that **they** drank out of one 'normal' beer glass, half a serving of the glass each time. **They** consumed the beer at a slow pace and consumed fish while drinking. He also told that **they** only consumed (4) out of (6) bottles of beer and the third defendant left his residence at about 11.00 a.m.

The defendant denied the account of the direct eye witness, Amit Raj as to obvious intoxication.

**Obvious intoxication** means that if someone has consumed a large number of drinks, it should be obvious that they are intoxicated.

There is no evidence as to;

- The number of beer glasses consumed by the third defendant (alcohol intake)
- At what time the first beer glass was consumed by the third defendant.
- At what time the final beer glass was consumed by the third defendant.

The third defendant was a young man, aged 28 at the time of the accident. He denied that he was under the influence of liquor at the time of the accident. He says he lost control of the truck driven by him due to a technical fault of the truck. He says that he is not responsible for the crash.

It is important to bear in mind that most regular consumers of alcohol have acquired some tolerance to some of the effects of alcohol, so that a tolerant drinker would require more alcohol than a non-tolerant drinker in order to obtain the same effect. There was no iota of evidence as to whether the third defendant was an alcoholic (who presumably had more tolerance to alcohol) or an occasional drinker (who would presumably have little or no tolerance to alcohol)

I gather from the evidence that the accident had occurred on 29/01/2012 **at 11.00 a.m at Sabeto bridge, Queens Road, Lautoka.** Amit Raj stated in his statement that the third defendant left his residence **at Qeileoa, Nadi at about 11.00 a. m.** Is it possible for the third defendant to be present at two different places at the same time? Absolutely no, unless and until he separates his mind from his body.

Deo Raj, the father of Amit Raj and the shop owner Shiri Narayan flatly contradicts the evidence of Amit Raj. Deo was staying with his son and said in his statement that the third defendant came to their residence at about 8.30 a. m and left home about 11.30 a. m. (Annexure AK-1 referred to in the affidavit of Anirudh Kumar sworn on 21.09.2012).

Shiri said in his statement that Amit came with an Indian person to buy beer twice on 29.01.2012. He said at about 10.00 a.m they came for the second time and purchased four (04) bottles of long neck. (Annexure AK-2 referred to in the affidavit of Anirudh Kumar sworn on 21.09.2012.) In the statement of Amit there is no mention about buying four bottles at about 10.00 a. m.

The questions that concern this Court are; (1) what is the precise intake of beer (2) What is the precise time of third defendant's arrival? (3) What is the precise time of his departure? The question that I ask myself is whether Amit Raj's narrative of events on the day of the accident was a reconstruction of events or too good to be true? I do not consider Amit Raj as a reliable witness about the third defendant's alcohol consumption. The evidence of Amit could provide no proper basis for any reliable finding of fact on above mentioned highly material substantive factual questions. In the proper exercise of the discretion, no court is bound to accept evidence which is inherently and intrinsically improbable and contradictory and the evidence which is inherently and intrinsically improbable and contradictory will never provide a foundation for any cogent finding of fact. To my mind, there is nothing more frustrating to a tribunal of fact than to be



presented with evidence which is inherently and intrinsically improbable, contradictory and opposed in substance .

As a general rule, it takes the body about an hour to fully process a drink. Everyone's bodies process alcohol differently, depending on age, gender, weight, and a variety of other factors.

As stated above, there is no evidence as to;

- The number of beer glasses consumed by the third defendant (alcohol intake)
- At what time the first beer glass was consumed by the third defendant.
- At what time the final beer glass was consumed by the third defendant.
- whether the third defendant was an alcoholic (who presumably had more tolerance to alcohol) or an occasional drinker (who would presumably have little or no tolerance to alcohol)

Therefore, it is difficult for me to arrive at an assessment of (1) the third defendant's alcohol intake (2) whether the alcohol he had consumed had time to be absorbed into his blood before the accident, and (3) the degree to which that consumption affected him at the time of the accident. The amount of alcohol absorbed into the blood of the third defendant when the accident occurred depended on when and how much alcohol the third defendant actually had consumed in the period preceding the accident.

It will be important to bear in mind that the effect of the intoxicating liquor on the behavior of the person will vary depending on when he or she last drank alcohol and how much he or she had consumed. If the alcohol was consumed just before the accident, there may not have any sufficient time for it then to have had any or any disturbing effect on the person. As I said, there is no evidence on a number of relevant factors.

It is also important to bear in mind that most regular consumers of alcohol have acquired some tolerance to some of the effects of alcohol, so that a tolerant drinker would require more alcohol than a non-tolerant drinker in order to obtain the same effect. There was no iota of evidence as to whether the third defendant was an alcoholic (who presumably had more tolerance to alcohol) or an occasional drinker (who would presumably have little or no tolerance to alcohol)

Any layman can observe that there is usually a time lag between the consumption of intoxicating liquor and the obvious loss of self-control by the consumer. But unless the drinker takes some steps to eliminate the liquor from his stomach the processes of ingestion into the blood stream will go on and varying results may be manifested before the liquor is eliminated from the body by natural process.

Amit Raj's testimony (the eye witness accounts), even if accepted, it **does not** establish obvious intoxication. His evidence **does not** include important factors (listed below) to establish obvious intoxication in order to prove the impairment in the ability to drive.

- The precise alcohol intake of the third defendant (the number of beer glasses consumed by the third defendant.)
- At what time the first beer glass was consumed by the third defendant.
- At what time the final beer glass was consumed by the third defendant.
- whether the third defendant was an alcoholic (who presumably had more tolerance to alcohol) or an occasional drinker (who would presumably have little or no tolerance to alcohol)

As a general rule, it takes the body about an hour to fully process a drink. Everyone's bodies process alcohol differently, depending on age, gender weight, and a variety of other factors. A person is "under the influence of intoxicating liquor" if he has consumed such a quantity of intoxicating liquor as disturbs the balance of his mind for the quiet, calm, intelligent exercise of his faculties<sup>6</sup>.

- (7) Next, Associate/Professor Ponnu S. Goundar formed the opinion that the third defendant's blood alcohol concentration is high and he is not capable of driving with proper driving skills (annexure TN-9 referred to in the affidavit of Thomas Naua sworn on 24/09/2012).

I do not feel persuaded by Professor Goundar's opinion. No blood sample test was conducted by him to determine the blood alcohol level. **His opinion as to the third defendant's condition rests upon the breath analyzer result.** He had estimated blood alcohol content (BAC) based on breath alcohol. The breathalyzer reading is converted into an estimate of how much alcohol would be in the third defendant's blood. He says;

*"The above person was tested by breath analyser the result was 73 micrograms in 100ml of breath. This was conducted 2 hours after the accident. When this was computed to blood alcohol concentration and this was 160 micrograms/100ml of blood. The breathalyzer test was carried out well after he was taken in by the police."*

As stated, section 9 (2) of the Land Transport (Breath Tests and Analysis) Regulation 2000 excludes the evidence from breath analysis in contract of insurance cases. There is a prohibition against the use of the breath test or breath analysis. They are not for the purposes of any contract of insurance. For the sake of completeness, Section 9(2) is reproduced below.

*The fact that a person has undergone a breath test or submitted to a breath analysis and the result of a breath test or breath analysis are not, for the purposes of any contract of insurance, admissible as evidence of the fact that the person was at any time under the influence of or affected by alcohol or incapable of driving or of exercising effective control over a motor vehicle, but nothing in this regulation precludes the admission of any other evidence including evidence of a*

<sup>6</sup> Cox J in *Forbes v Australian Associated Motor Insurance Ltd*, (1990) 12 MVR 165 at 170

*conviction under section 102(1), 103(1) or 105(1) of the Act to show any such fact.*

(8) His opinion was not formed on an examination of the third defendant. As stated, no blood sample test was conducted by him to determine the blood alcohol level. There is no medical evidence asserting that the third defendant has been under the influence of liquor at 11.00 a.m on 29/01/2012 to a sufficient extent to render him unfit to exercise proper control over the movements of a motor vehicle.

(9) **With respect, I do not feel persuaded by Professor Goundar's opinion.** His opinion is one of fact and degree based on the reading of breath test analysis. He had used the results of the breath test analysis to demonstrate the blood alcohol level that the third defendant would be likely to have had at an earlier time. Aside from the prohibition against admissibility in section 9(2), how accurate are breathalyzer analysis readings? In fact, reliable scientific studies show that breathalyzer has a 50% margin of error when compared to blood test. A breathalyzer actually cannot measure the blood alcohol content because it cannot measure a driver's blood. Breathalyzer readings are not accurate and should not be used as conclusive proof that a driver was under the influence of liquor. Blood tests or urine samples are accurate than breath tests. A whole host of factors affect breathalyzer blood alcohol reading. A breathalyzer cannot account for all of those factors. Simply put, there is no way to input someone's age, emotional state and medication into a breathalyzer before analyzing blood alcohol content. As a general rule, it takes the body about an hour to fully process a drink. Everyone's bodies process alcohol differently, depending on age, gender, and a variety of other factors. **A diagnosis of driving impairment should not be limited to the blood alcohol content (BAC). There are number of factors which confer immunity from the impairment produced by alcohol intoxication. The fundamental point which this court is concerned to underline is that Proff. Goundar has not considered a number of important factors (listed below) to determine the effects of alcohol. The following factors should be considered in addition to blood alcohol content (BAC) in order to understand the driving impairment produce by alcohol intoxication.**

- The rate of ingestion or elimination of alcohol.
- The third defendant's immunity or tolerance to alcohol
- Whether or not he had taken food.
- The age and the weight of the consumer and his general fitness.
- The state of the consumer's condition in regard to fatigue.
- whether the third defendant was an alcoholic (who presumably had more tolerance to alcohol) or an occasional drinker (who would presumably have little or no tolerance to alcohol)
- **The metabolic tolerance.**

**The above factors should be considered with the blood alcohol level to determine the presence or absence of the effects of alcohol on driving.** One factor that clearly complicates the identification of driving impairment by alcohol intoxication is **metabolic tolerance**. Enzyme activation increases alcohol degradation and reduces the time during

which alcohol is active in the body, thereby reducing the duration of alcohol's intoxicating effects<sup>7</sup>.

**Taylor on Principles and Practice of Medical Jurisprudence**<sup>8</sup>, quoting at page 541 the report of the specially appointed Committee of the British Medical Association on "Tests for Drunkenness":

*There are no tests universally applicable for determining the amount of alcohol which would render a person incapable of carrying on his occupation in a proper manner, as the effect of alcohol varies within wide limits in different individual and in the same individual under different conditions*

Most regular consumers of alcohol have acquired some tolerance to some of the effects of alcohol, so that a tolerant drinker would require more alcohol than a non-tolerant drinker in order to obtain the same effect.

The effect of alcohol depends on the alcohol and the person taking it – that is the quantity of alcohol consumed, and the type of liquor, and the time when it was taken. These would have a bearing on the effect of the alcohol. The time between when each quantity of drink was taken would also be important. The age of the consumer and his general fitness would also determine the effect. Another important factor would be the state of his condition in regard to fatigue and also his immunity or tolerance to alcohol, and as to whether or not food had been taken.

Therefore, based on all the above reasons I am not persuaded by the opinion of Proff. Goundar.

## **[E] CONCLUSION**

- (1) I find and hold that the plaintiff has failed to prove on a balance of probabilities (the requisite standard of proof) that the third defendant was under the influence of intoxicating liquor whilst driving motor vehicle No. DX 256 (the truck) on 29/01/2012 at 11.00 a.m on the Queens Road, at Sabeto, Nadi.
- (2) It therefore follows, that the plaintiff is not entitled to avoid liability to provide indemnity under the policy to the second and third defendants in respect of the claims of the first defendant on the ground that the third defendant had breached clause 1(d)(i) of the conditions of the policy.
- (3) Consequently, the plaintiff is liable to satisfy any judgment entered against the second and third defendants in the Civil Action No. HBC 109 of 2012L.

---

<sup>7</sup> Misra P, Lefevre A, Ishii H, Rubin E, Lieber C (1971) Increase of ethanol, meprobamate and pentobarbital metabolism after chronic ethanol administration in man and in rats. *Am J Med* 51:346-351

<sup>8</sup> 10<sup>th</sup> ed. (1948)

[F] **ORDERS**

- (i) I dismiss the Originating Summons filed on 12/10/2012.
- (ii) I decline to grant the declarations sought.
- (iii) I order the plaintiff to pay costs which I summarily assess at \$1,500.00 to the third defendant.
- (iv) The costs to be paid within seven days (07) from the date of the ruling.

  
21/01/2020  
**Jude Nanayakkara**  
[Judge]



**At Lautoka**  
**Friday, 31<sup>st</sup> January, 2020**