

IN THE HIGH COURT OF FIJI AT LABASA

CIVIL JURISDICTION

CASE NUMBER: **HBC 43 of 2017**

BETWEEN: **MERESIANA VUGA FRANCIS**

PLAINTIFF

AND: **VITESH PRASAD**

1st DEFENDANT

AND: **DALIP CHAND & SONS LIMITED.**

2nd DEFENDANT

Appearances: *Mr. Sarju Prasad for the Plaintiff.*

Mr. Ami Kohli for the Defendants.

Date/Place of Judgment: *Tuesday 14 March 2023 at Suva.*

Coram: *The Hon. Madam Justice Anjala Wati.*

JUDGMENT

Cause

1. The plaintiff Meresiana Vuga Francis ("***Meresiana***") was severely injured in a motor vehicle accident on 28 December 2016 at the traffic crossing light in the main town of Labasa.

2. She was a fare paying passenger in a bus Registration Number HA 260. The bus was driven by the 1st defendant Vitesh Prasad ("**Vitesh**"). The 2nd defendant Dalip Chand & Sons Limited ("**Dalip Chand**") is the owner of the bus.
3. On the day in question, at about 9am, the bus stopped at the traffic light in Labasa Town. Meresiana alighted from the said bus. She was crossing the road when the bus collided with her.
4. Meresiana brings an action for damages for negligence against the driver of the motor vehicle Vitesh and the owner of the vehicle Dalip Chand.
5. The position of both the defendants' is that the accident happened solely or partly due to the negligence or recklessness of the plaintiff in that she:
 - *Alighted from the bus at a place where she was not supposed to and when it was unsafe to do so;*
 - *Failed to keep any proper lookout whilst crossing;*
 - *Failed to approach and cross at a safe place with caution;*
 - *Failed to ensure that the her presence was known to the driver of the Bus;*
 - *Failed to ensure that the driver of the vehicle could see the plaintiff in sufficient time to avoid the collision;*
 - *Crossing in front of a moving Bus on a Busy Main Street;*
 - *Failed to take proper precautions for her own safety;*
 - *Failed to take heed the risks of crossing in front of a moving bus on a busy road;*
 - *Failed to take any steps to avoid the consequences of any act or omission of the defendants.*

Issues and Determination

6. The first issue for me to decide is the cause of the accident, was it wholly or partly due to the negligence of Meresiana or Vitesh. If the accident was caused wholly or partly due to the negligence of Vitesh, then what are the damages that are payable to Meresiana?
7. Obviously the first aspect of the exercise is to determine how the accident happened

A. Cause of Accident

(i) The Evidence

8. As it is expected, there are different versions of how the accident happened. Meresiana has her one version substantiated by the witnesses she produced in Court and Vitesh has his other version. I will summarise the material evidence of all the witnesses who testified on the cause of the accident.
9. The first person to testify on the cause of the accident was Meresiana. In her evidence in chief she said that she boarded the bus on 28 December 2016. At the pedestrian crossing near the Vodafone, she informed the driver that she will get down there. The driver agreed and said yes. She asked the driver to stop. He stopped the bus. She clearly said that she told the driver that she wanted to get off the bus.
10. Two i-Taukei lady's got off before her. She was carrying her granddaughter. She also got off the bus. After getting down from the bus, she started to cross at the crossing in front of the bus. The traffic lights were green when she started to cross the road and still green when she was crossing. She had only taken two footsteps when the bus moved forward.
11. She got frightened that the bus might bump her and she would die then and there. She then turned back and the bus bumped her. She fell down when she got bumped.

by the bus. Her granddaughter fell as well but she pushed the child towards the footpath.

12. When she fell, the bus came forward and the tyre of the bus was about to run over her left leg. She heard a female voice calling to stop the bus. She asked the bus to reverse. When the bus reversed, she pulled her leg.
13. One another lady asked her whether she could stand up. She said she could not. The lady then carried her to the car with her granddaughter and took her to the hospital. The car took her to the emergency section of the hospital. She went to the emergency room in a trolley. She was admitted upon arrival.
14. In cross-examination, Meresiana denied that at the crossing she got off the bus by herself without asking the driver. She maintained that she had asked the driver to get off and he agreed that she could.
15. Meresiana further clarified that she was crossing from the Vodafone side to Takia Hotel side. At that time the crossing light was green. On the crossing light, there was a symbol of a person crossing. Other people were crossing too.
16. She agreed in cross-examination that she gave a statement to the police where she said that when she went to cross the road, the light became red to green. That was the crossing light that she referred to. That green light was for people to cross. The light remained green until she turned around because the bus had started moving. When the crossing light became green, the traffic light became red. It was red for the bus to stop. It had only taken her 2 seconds to cross that the bus hit her.
17. Before she alighted from the bus she was sitting on the second seat behind the driver. When the bus stopped she walked down the steps and got out of the bus. She had

taken 3 steps to cross. The bus driver ought to have seen her as when she walked down the bus she had turned right then crossed.

18. The 2nd witness for the plaintiff to testify on the cause of the accident was one Sakiusa Matana. He was also a passenger in that bus. He remembers that Meresiana travelled in the same bus. He knows Meresiana.
19. Sakiusa testified that near the Takia Hotel, at the traffic light, some i-Taukei passengers asked the driver if they can get off at the pedestrian crossing. The traffic light turned from orange to red and the bus stopped. Meresiana also wanted to get off. She asked the driver if she can get off and he agreed. She also got off. The driver of the bus was talking through the window to someone from Takia Hotel side. That person was on the footpath.
20. Meresiana was with one small girl about 1 year old. Meresiana was crossing the road and the light turned red. Meresiana turned back as the driver had moved the bus. When Meresiana turned, she pushed the child towards the footpath. The bus then bumped her. One lady shouted for the bus to stop. It did. She told the driver to stop. She ran outside. She lifted the child. Meresiana was brought out by two ladies. She took the child and gave to the old lady to go to the hospital. Meresiana got injured. They lifted her, put her in a taxi and took her to the hospital.
21. In cross-examination, Sakiusa stated that some passengers had asked the driver to get off at the pedestrian crossing. One i-Taukei man in particular asked if he could get off and the driver said for them to get off and cross fast. The driver knew that they wanted to cross as the other people had signaled using their hand to him that they will be crossing. One i-Taukei man had specifically said that he wanted to get off and cross to go to the Max Value.

22. The i-Taukei man had gotten off the bus and crossed. The bus did not stay on the crossing for long. Sakiusa said that he only got off the bus due to the accident. When the accident happened, the traffic light was red.
23. The 3rd witness for the plaintiff was Laisa Lewatu. She was going towards R.B. Patel. She had reached Post Fiji Shop when she saw an accident on the crossing light near Vodafone. She had passed Post Fiji and was near Amrit Arcade. She heard the people shouting and saying reverse. She saw a Bus on the road and someone underneath the bus. The light at the pedestrian crossing was green so she crossed. Other people were still crossing at the time. Since the light was still flicking green, she crossed to see what happened.
24. She clarified that she did not see the accident. Meresiana's leg was on the crossing. The witness said that she lifted her leg and made her sit on the footpath. When the bus moved back, she stopped one taxi. Another lady helped her to put Meresiana in the taxi and took her to the hospital. Some other lady carried the granddaughter to the taxi.
25. She was there at the hospital when the doctors took her to the emergency room. The doctors told her to bring the granddaughter for medical check-up.
26. The witness said that she stayed with Meresiana in the hospital until afternoon and came back with the granddaughter to the village and informed Meresiana's son about what had happened.
27. In cross-examination, she testified that when she heard the shouting, her attention was brought to the accident. It took her about one minute to arrive at the accident scene. When she started crossing, the pedestrian light was green. She saw on the light a man walking and it was flicking. It took her 2 seconds to cross the road.

28. Before crossing, she waited for the light to turn green. Before it was red. She does not know at what intervals pedestrian crossing is allowed.
29. When she reached, she did not hear anyone say that the driver crossed in red light. There were cars and taxis parked on both sides of the road. There was traffic coming from Market to Naseakula. It is possible that if the bus travelled on red light, it would be visible to traffic from market to Naseakula. Other pedestrians will also be concerned that the bus was crossing on the red light.
30. She says that she knows one Sakiusa Matana. He never told her how the accident happened. She did not know that he was there in the bus and at the scene of the accident.
31. In the Village that night, she did not ask or discuss about the accident. She did not ask Meresiana about who all were in the bus. She heard from her husband that Sakiusa Matana was in the bus. She heard this from him when Meresiana was in the hospital. She heard in on New Year's Eve.
32. The plaintiff's 4th witness was Dr. Maloni Bulanauca. Dr. Maloni is the Head of the surgical department. His evidence was confined to the issue of injuries sustained by the plaintiff. I will address his evidence later.
33. The 5th witness of the plaintiff was one Makareta Baya, a retired hospital employee. She stated that she saw the accident on the day in question. She was standing near the Popular Tea Room. She saw Meresiana get off the bus.
34. Makareta testified that Meresiana had walked from the bus to the crossing. When she was crossing, the bus bumped her. Meresiana would have taken about 3 steps when she was bumped by the bus. People ran. She was standing. She shouted as well but did not do anything else. She then saw a man came and carried Meresiana. Meresiana

was with her grandchild. After the bus hit her, she did not know what happened to the grandchild.

35. She does not know who picked her from underneath the bus. She saw one male ran and helped her. She does not know anything about the colour of the light. She just saw the accident. Meresiana was taken to the hospital.

36. In cross-examination Makareta stated that she does not know that date, time and year of the accident. She was there when the accident happened. She stated that a lady had picked Meresiana up. The witness stated that when she saw Meresiana, she was facing towards Popular Tea Room coming from Takia side going towards crossing. She stated that the bus bumped Meresiana when she was crossing.

37. The final witness for the plaintiff who testified on the accident was Police Constable 4354 Kushal Naicker. He was the Investigating Officer of the accident. He stated that the driver of the vehicle was charged for dangerous driving causing grievous bodily harm.

38. In cross-examination, he testified that prepared the summary of facts which states as follows:

"On the 28th day of December, 2016 between 9.20am to 9.50am one Vitesh Prasad (Accused) aged 24 years, bus driver of Wailevu, Labasa drove a bus registration number HA 260 along Naseakula Road, Labasa town at the traffic pedestrian crossing in a manner which is dangerous to another person and caused grievous bodily harm to one Meresiana Francis (victim) aged 66 years, domestic duties of Wailevu, Labasa.

On the above date, time and place, Accused was proceeding along Nasekula road from Wailevu towards the Labasa Bus Stand. Upon reaching the traffic light crossing, the Accused stopped the bus as the light was red to allow pedestrians to cross the road.

Whilst stopping the bus, the passengers in the bus including the victim started getting out of the said bus. When the victim got off, the traffic lights turned green indicating the traffic to drive through the pedestrian crossing which at this point in time the victim crossed the road. The Accused without taking necessary precautions to ensure the safety of the victim, by looking to either side of the road collided with the victim resulting in the injuries as per medical report.

Matter was reported to police and PC 4354 was detailed to be the Investigation Officer. Initial enquiries conducted, rough sketch plan drawn and necessary measurements were taken. Later, the Accused was interviewed under caution and formally charged for one count of: Dangerous driving Causing Grievous Bodily Harm: Contrary to Section 97 (4) (c) and 114 of the Land Transport Act No. 35 of 1998...."

39. The Officer clarified that when he wrote in the statement "*upon reaching the traffic light crossing, the Accused stopped the bus as the light was red to allow pedestrians to cross the road. Whilst stopping the bus, the passengers in the bus including the victim started getting out of the said bus. When the victim got off, the traffic lights turned green indicating the traffic to drive through the pedestrian crossing which at this point in time the victim crossed the road...*" he obtained that information from Meresiana's statement.

40. He said that as an experienced person he can say that the traffic should stop about a few meters from the traffic light. The bus had stopped at the pedestrian crossing. He said that the pedestrians should not cross if the light says so. He said that he went to the Wailevu village to look for the witnesses. He did not come across any Sakiusa Matua. He said that there was no one in the bus that day from the village. He said that he could not find anyone in the village who was on the bus that day. He also stated that the victim Meresiana did not give any names of the people in the bus.

41. He further clarified that he could not recall where he went to the village. The Officer stated that they did their investigation and did not find anyone who had directly seen the accident. They said that they saw her after she got the accident. No one noticed the actual accident as it was a busy week. It was the festive season and a lot of movement was there.
42. The Police officer was asked whether he knew from any source that the driver had driven on the red light and he replied that it was green light when the driver drove.
43. In re-examination, the Officer stated that when he arrived at the pedestrian crossing, the bus was on the pedestrian crossing. The accident happened 1 meter into the pedestrian crossing.
44. He said he is not sure as to who told him that the green light had come on when the driver moved so in court, he took time and went through the statements. He said that it is not possible that the driver drove at the red light as he had stopped the bus to let the pedestrians cross.
45. He clarified that Police Officers in Wailevu Village also tried to ask and get a witness from the Village but no one saw the accident. He said that he did not interview each and every person. They only talked to a few people. It is possible that there was someone in the bus he could not find.
46. The defendant also gave evidence on how the accident happened. He stated in his examination in chief that the victim Meresiana boarded the bus at Wailevu Koro. When he arrived near the crossing at traffic light, there was a van in front of him. It was red light and the van crossed the red light. He stopped the bus. When he stopped the bus, no one told him that they wanted to get off the bus. However, some people got off the bus and Meresiana was one of them. She did not tell him or ask him that she

wanted to get off. She got off a little late. He saw her got off the bus. After that, he did not see where she went.

47. He feels that she was standing near the left corner of the steps. However he did not see her there. On the red light the pedestrians crossed and when the green light came he moved the bus. No one was at the pedestrian crossing at the time. As he went a little bit ahead, he heard people screaming and he stopped the bus. No one shouted from inside the vehicle. When he stopped, one man came and said from right side window that two people have been crushed. The man asked him to reverse. He reversed the bus a bit.
48. He went down to see. Meresiana was there. Half her body was on the footpath and the tyre had rubbed on her leg. Since he had reversed, her leg and body was free. She was freely on the footpath and road.
49. He could not have done anything to avoid her being stuck under the vehicle. He did all he could. He cannot get off the bus, see the passenger and then drive. It will not be practical.
50. The bus was not near the footpath. If she took two steps, she would be close to the edge of the bus. He did not see her on the crossing. He did not even see her trying to get to the crossing. The speed of the bus when he moved was about 4-5 km.
51. He had a proper lookout that is why he stopped at the crossing when the light was red. He could not give her any warning. There is no such type of warning. He followed all the driving procedures. He did not know whether she was stuck at the corner or in front of the bus.

52. If she is near the face of the bus then she cannot be seen. The height of the bus is big and the height of the passenger is small. He did not permit her to get off at the pedestrian crossing.
53. If a pedestrian wants to cross, they have to wait for the light. On the red light, the drivers stop. If vehicle is approaching at red light, they should not cross.
54. In cross-examination, the driver stated that he has been driving the bus for 2 years. On the day in question, at the pedestrian crossing. He stopped at the stop line. When he approached the crossing, the traffic light was already red. No one asked to get off but mostly at the red light passengers start getting off. He tried to stop many times, but the passengers do what they want.
55. He was asked whether some passengers cross over in green light, he replied that they do cross in front of the bus. If they cross, and they can be seen crossing, he allows them to cross.
56. He admitted that when they get off the bus, it is his duty to see that they do not get injured. He has rear vision fitted right in front of both sides. If the passengers get off and go on the side and in front of the bus then they cannot be seen from the rear vision mirrors. They can be seen if they go behind.
57. If they go in front of the face of the bus then the passengers cannot be seen. The mirror is adjusted to see the top and the back part. The side mirror shows the passengers getting off the steps.
58. He will only be cautious where they are going if they can be seen. If a passenger gets off, that can be seen. If the passenger gets off and goes in front of the bus then the passenger cannot be seen in the side mirror. If a passenger goes on the pedestrian

crossing, he can be seen but if he or she crossed from near the face of the bus, they cannot be seen.

59. He said that he agrees from the rough and fair sketch plan as to where the accident took place. It shows that the pedestrian had started to cross the road and may have taken at least two steps. Since people cross at odd times, it was his duty to be careful.
60. When he got off the bus, Meresiana's back was towards the road. It is possible that the people would have moved Meresiana. She had fallen down because of the impact of the bus. That would be about two feet from the left edge of the bus. He did not see where Meresiana went. It would be possible that she would be crossing the road. It is his duty to see that at the pedestrian crossing, no one gets hurt. He did pay attention. He took all the precaution. He did not see her on the pedestrian crossing. So he did not take precaution.
61. He denied talking to anyone on the red light as alleged by Sakiusa Matana that he was talking to someone standing at the footpath at Takia Hotel side.

(ii). The Liability

62. It is necessary that a proper cause for the accident be ascertained. I find from the analysis of my evidence below that the accident happened wholly due to the negligence of the bus driver.
63. I will start from the rough and fair sketch plans which were tendered in as P-Ex- 7 and P-Ex- 8. The rough and fair sketch plans were not contradicted or impeached at the trial.
64. The fair sketch plan shows that the point of impact is point B. point B is where the blood spot is. The accident happened when the bus was travelling on the left hand

side towards the Labasa Market. The distance from the blood spot to the road edge is 1.5m.

65. The fair sketch plan shows that the Meresiana had started walking on the pedestrian crossing when the accident happened as the point of impact is on the pedestrian crossing and 1.5 m from the edge of the road. The distance of 1.5 indicates that she had taken more than 2 steps, almost close to 3 steps before she was bumped. This negates the driver's assertion that upon alighting from the bus, Meresiana must have stood in the front corner of the bus from where the driver could not see her and that she walked when the traffic light turned green.
66. Meresiana was already crossing the road when she was bumped. She was crossing when the pedestrian crossing light was green for her to go. If the light was red for her to stop, the bus would have started moving before she proceeded to cross. The evidence of Meresiana and the driver supports this finding because both say that there were people who alighted from the bus and had started crossing immediately. They would only do this if the pedestrian crossing light was green or else they would have to stop as the other vehicles would be moving on the pedestrian crossing if the pedestrian crossing light was red. It was a busy time. New Year was to start in 3 days' time and it is not expected that there would be a lull in the town and that there would not be other vehicles on the traffic/crossing light.
67. The driver was further negligent in stopping right at the pedestrian crossing. He testified that if someone is right in front of the bus or at the corner of the front left side then he cannot see due to the height of the bus and that the mirrors do not assist. If that is the case then a prudent driver will always stop a few meters before the pedestrian crossing. Even the police officer said that that is what the drivers should do, is to stop few meters before the pedestrian crossing.

68. If the driver had stopped few meters before the pedestrian crossing and not right at the pedestrian crossing than any person who walks in front can be seen, either it is a passenger who has alighted from the bus or anyone else who intends to cross.
69. The driver in this case was too close to the pedestrian crossing that anyone who used the crossing could not be seen as they would be crossing from right in front of the bus. I must repeat that Meresiana was within the crossing zone. She did not leave the crossing area when she was bumped which indicates that the driver did not stop a few meters before the pedestrian crossing.
70. The driver said that he proceeded when the traffic lights turned green. There is no evidence to refute that. However, there were passengers who were already crossing the road including Meresiana before the traffic light turned green. In that case, the bus driver ought to have allowed the ones who were already crossing to complete the crossing before he proceeded on the green light. The green light for him did not mean that he could mutilate anyone in front of the bus. It meant to proceed with care and that care was to allow the people on the crossing to clear the way for the driver.
71. The driver stated that Meresiana was the last one to get off the bus. He stated that others had alighted from the bus and had started crossing. If that was the case, a prudent driver will get that intuition that this passenger Meresiana would follow what others did and would monitor her. If she alighted from the bus, stood at the footpath or moved ahead on the footpath or behind, she could be seen. She did none of that. The only possibility left was that she was crossing the road. In that case, the driver ought to have waited for a few seconds before he moved the bus as soon as the light was green. He needed to do that as he himself had obstructed his own view in front of the bus by stopping right at the pedestrian crossing.

72. I do not find that Meresiana could have done anything to avoid the accident. She was crossing from a proper place on the road. She was following the traffic lights and she did what is normally expected of any passenger or pedestrian. I find that it was through the negligence of the driver of the bus that Meresiana got involved in the accident and suffered the injuries that she did.

B. Injuries sustained by the Plaintiff

73. On the nature of the injuries sustained by the plaintiff, Dr. Maloni Bulanauca gave evidence. He stated that there are 3 medical reports in respect of Meresiana. The first one was issued on 17 July 2017, the second on 28 March 2018 and the third one on 30 August 2018.

74. All the reports were tendered in evidence. Before I summarise the evidence of the Doctor in respect of the first report, it is important that I reproduce what the report states:

"Reference MSLH E/9

Date: 17/7/17

Meresiana Tuidravu NHN 120002437: D.O.B – 14/09/1950

Wailevu Village – Labasa: Phone 9080288

This lady is known to this facility under the care of the Surgical Department being an inpatient over the periods 28/12/16 to 06/01/17 and 08/02/17 to 10/02/2017.

Reasons for admission are:

- 1. 28/12/16 to 06/01/17: Left distal 1/3 tibia and fibula GA III fracture and Mild Head Injury secondary to MVA with abrasions to bilateral lower limbs. Treatment included neuro – observation, AB's (chloramphenicol, Flagyl), phenytoin (seizure prophylaxis), analgesia (Paracetamol, Ibuprofen, Morphine), IVF and 6 sessions of MUA and POP,*

wound wash and closure under anesthesia (28/12/16, 29/12/16, 30/12/16, 01/01/17, 03/01/17, 05/01/17).

2. 08/02/17 to 10/02/17: Right posterior thigh abscess secondary to infected hematoma residual from MVA on 28/12/16. Treatment accorded was analgesia (Paracetamol and Ibuprofen), AB's (Flucloxacillin, Chloramphenicol and Flagyl), IVF, and wound dressings with spontaneous drainage.

Follow – up reviews in Surgical SOPD were on 02/03/17 and 16/03/17 whereby she was clinically noted to proceed well with recovery and her wounds recovering.

On 06/07/17 she was assessed for functional capacity in the Surgical OPD. She was kempt and was walking unaided with a hint of an antalgic gait to the left lower limb. She had visible 3cm x 1cm scar to the left distal 1/3 lower limb and areas of hypopigmentation (20 – 25cm in diameter) of skin to bilateral knee regions (previous abrasions). She did not exhibit any major neurovascular deficit. ROM for both lower limbs were within normal range”.

75. The doctor provided an explanation on the report. He stated that the report shows the admission dates in numbers 1 and 2. He stated that GA III is a classification of the type of wound. The wound was at the bottom 1/3 of lower leg which is the closest area before the ankle joint.
76. It was explained that the patient had full wound laceration. The outside environment had directly contaminated the bone. There was also mild head injury. Abrasions were also noted.
77. The medical report states the treatment that was administered on the patient. The abbreviation AB means antibiotics. Medication for pain was also given. Medication was also given to lessen the chances of fits.

78. On the same day of the accident the patient was put on nil by mouth to take her to the operation theatre. She was put under anesthetic so that her wounds can be washed and her bones straightened.
79. The medical report indicate the dates on which she was taken to the Operation Theatre for her wounds to be thoroughly cleaned and washed.
80. The doctor stated that on 6/7/17 he saw the patient. She was assessed for functional capacity at the clinic. He noted that the patient had a limp which indicated that she had pain. The patient has a 3cm x 1cm scar down at the distal at about 1/3 of the lower limb at the original area of the wound. She had healed abrasions but the skin looked lighter than the rest of the body. The term ROM in the medical report stands for Range of Motion. There was no obvious nerve injury. She was moving her ankle and lower leg in the expected range.
81. The second report reads:

"Reference: MSLH E/9

Date: 28/03/18

Medical Report: Meresiana Tuidravu

NHN: 120002437

DOB: 14/09/1950

The above mentioned patient was admitted at Labasa Hospital from 28/12/16 to 06/01/17 for left leg open fracture Anderson Gustilo Type III Weber Type C secondary to a motor vehicle accident near the pedestrian crossing at the traffic light in Labasa Town.

The patient had got off the bus while other people were crossing the road. Afterwards she was hit by the bus so she fell on the tarsealed road and the bus tyre had rolled over her leg.

On presentation to the hospital she was noted to have bruises and abrasions on the left lower shoulder, bilateral knee and distortion of distal leg with an open wound.

The patient had initial resuscitation done and treated with antibiotics analgesia and multiple surgeries:

- 28/12/16 *Wound wash and debridement left leg open fracture*
- 29/12/16 *Wound wash*
- 30/12/16 *Wound wash*
- 1/1/17 *Wound wash*
- 3/1/17 *Wound wash*
- 5/1/17 *Wound wash and closure of left leg open fracture*

Upon discharge the patient had refused a full leg cast.

The patient was again admitted from 8/2/17 to 10/2/17 for an infected hematoma of the right thigh secondary to the initial motor vehicle accident. She was treated with incision and drainage and she was followed up in surgical clinic and subsequently discharged..."

82. The Doctor explained the 2nd report. He stated that the patient was readmitted on 8/2/17 to 10/2/17. She had a boil at the back of her thigh. This is the same area which had abrasions from her first admission. She had an infected hematoma. He explained that when a person gets injured, the bleeding can be contained in the soft tissue. One way that it happens is that the body reabsorbs the blood and it gets infected. A cleaning up is required which is called drainage. This was done on the 2nd admission. The abscess was as a result of the motor vehicle accident. The medical report shows follow up reviews.

83. The third report reads:

"Reference

Date: 30/08/2018

The above named presented to Labasa Hospital on 29/08/18 for whole person impairment assessment (WPI%) after being deemed achieved maximum medical improvement with Dr. Alipate Natoba (Orthopedic Surgeon) on 16/08/18.

She is ambulating with some preference to the right side yet without any debilitating pain or need for walking aid. She is able to help with household chores and tending to the garden.

Scar measuring 3 x 5cm is noted to be tethered and adhered at the anterior distal left lower leg – corresponding to her initial injury. The WPI for the skin scar is approximated to 7%.

She has mal-alignment at the fracture site to 10 degrees which equates to 8%WPI.

Combined WPI % is therefore 14%."

84. The 3rd report was also explained by the doctor. He stated that it has a typographical error. The 8% WPI should be 6% instead. The total WPI should be 13% instead of 14%.
85. The doctor explained that he went through Dr. Alipate Natoba, the Orthopedic Surgeon to see if the patient received maximum medical improvement from where she will not deteriorate or improve. Once that is ascertained that the percentage WPI can be calculated.
86. On his assessment he found that the patient was walking with some preference to the right side which is an apprehension or perception of some injury by patient. She did not show any pain or need for aid when walking. She stated that she was able to do household chores and tending to the garden. The doctor said that he did not make that observation.

87. There was a 3 x 5cm scar on her leg. The term tethered and adhered means natural scarring as a result of the wound. In deep wounds, it can adhere and have dent.
88. The doctor stated that he referred to Permanent Impairment GuideBook. The assessment of the scar was 7%. The maximum is 9%. Mal-alignment means that the bones are no longer as straight as before the injury. The deviation can be seen through several x-rays.
89. To assess the WPI for the mal-alignment, the American Medical Association Impairment Guideline was used. 6% WPI was allocated.
90. The doctor explained that the patient had broken bones on the lower leg. Her pain on the graph of 1 to 10 would be from 5 to even 10.
91. The doctor was cross-examined on his evidence. He stated that when the patient came in, she would have had unbearable pain. The patient was given Paracetamol, Ibuprofen and Morphine to double the effect of the strength. Generally, the pain goes away with time and if it comes back, drugs are again administered.
92. The doctor clarified that there are no clear cut answers as to when the pain will go away without the drugs. However, it will take minimum of 6 months.
93. The doctor went onto testify that in the beginning a full cast is to avoid any pressure on the bones however a continued full cast will not heal the wound so normally a cast is put after a month or 6 weeks.
94. The patient had refused a full cast. In a full cast, a cement is put around. In the patient's case, she had a half cast. In fracture a lot of swelling is expected. If there was full cast, it will be rigid. Swelling will happen and the pressure with full cast can cause internal pressures blocking nerves and blood vessels.

95. In the patient's case, the medical preference was a full cast which she refused so half cast was done for her. Even if she had a full cast, the time period for the healing would be the same. Even if metal is put, it will take 6 to 8 months to deal with the pain and rehabilitation. The recovery period with the full cast will generally be the same. Her fracture was more than one and not dispersed from the column.
96. The wound had opened because of the outside environment. The bone does not have much cushion in that area.
97. On 17/7/17 the patient had walked into the consultation room and that is what he had seen. The patient was not ready for assessment. Typically 1 or 1 ½ years is given before a final assessment is done. The doctor said that he observed that the patient was having pain and a limp. She can sit and make roti. She can sit and sell vegetables but will have difficulty in lifting the produce. It is possible that she can sell 15 to 20 parcels of roti a day.
98. When the doctor was asked whether a scar can inhibit performance he stated that it can pull on the joint. One can feel tightness. There will be lose nerve endings. One cannot have good sensation over the scar. So people can have hot or cold injuries over the scar. The scar also has a cosmetic effect.
99. If there was full cast, the degree of mal-alignment that the patient has would be similar. There will not be a big difference.
100. On 8/2/17 she had abscess. She was admitted for the second time. She was discharged on 10/2/17. She was again seen on 2/3/17 and then on 16/3/17. After that she was seen on 6/7/17 when she was assessed for her functional capacity. Then she was seen on 16/8/2018 which was 13 months after to be assessed for permanent impairment. In between 6/7/17 to 16/8/17 there are no records of the patient attending any clinics.

101. In re-examination, it was re confirmed by the doctor that it is still possible that the patient has pain after 6 or 8 months. After finishing the surgical matters, the patient is discharged from the hospital. The patient can still go to the outpatient or see the private doctor for pain and medication. The patient can also self-administer over the counter pain medication.

102. I do not find that the evidence of the Doctor could be impeached to any extent. I accept the evidence of the doctor and find that the defendants are liable, amongst other things, for the injuries sustained by the plaintiff.

C. Assessment of Damages

(i). Special Damages

103. The plaintiff had testified that she had spent the following sums of monies for her injuries, treatment and medical reports:

a. Approximately \$1000 in travelling to and from hospital from time of accident till the time of hearing. She has spent this money to see her doctors and lawyer. She stated that no receipts have been provided by anyone for spending on travel.

b. \$54.50 for medical report as evidenced by P-Ex- 2 being receipt Number 954422 from Labasa Hospital issued on 20 March 2017.

104. None of her evidence on her claim for travel expenses and medical report was challenged. The medical report clearly establishes that the plaintiff has made over 20 trips to and from her home to visit the hospital post her first admission at the hospital. I accept that she needed to take a taxi for her travel. It would be unfair to expect her to take a bus given her severe injuries causing her pain and discomfort in her legs.

105. She lives in Wailevu Village and it would cost her approximately \$30.00 to and from the hospital. Apart from that she needed to see her lawyer to make the claims. She had to make a claim for the injuries that she has sustained.
106. I find it appropriate that she be compensated for her trips to the hospital and her counsel. I award her claim for \$1000. This amount was not challenged by any one of the defendant's.
107. I will also award her a sum of \$54.50 that she paid for her medical report. The total award on special damages is \$1054.50. I will also award 3% interest on this sum from the date of the accident (28 December 2016) till the date of hearing (3 and 4 December 2018) being for a period of 2 years.
108. The interest calculates to \$63.28 for 2 years as follows:

- $3/100 \times 1054.50 = \$31.64 \text{ per annum} \times 2 \text{ years} = \underline{\$63.28}$

(ii). Loss of Earnings

109. The plaintiff's evidence was that prior to the accident, she sold roti parcels. She used to sell the same at the village. She sold about 15 to 20 parcels a day. One parcel would sell at \$1.00.
110. She testified that she used to plant vegetables too. She sold those vegetables as well. She has a table beside her house from where she sold the vegetables. She would make about \$50 - \$60 per day from selling her roti parcel and vegetables.
111. She says that now she cannot sell roti parcels or her vegetables. She feels the pain in her legs. She feels the pain still when she walks. She cannot stand straight or walk straight.

112. In cross-examination she stated that she made \$15 - \$20 per day from selling roti parcel and \$20 per day from selling vegetables.
113. The plaintiff's witness Sakiusa Matana stated that before the accident Meresiana used to sell roti parcels, fruits and vegetables at the roadside. She used to earn about \$15-\$20 per day from roti parcels. She used to sell her parcels at \$1.00. He did not give evidence on her income from sale of the vegetables. He however said that her granddaughter used to go around the village and sell as well.
114. The witness Laisa Lewatu stated that that before the accident, Meresiana used to sell roti parcels and vegetables from her table at the village. She used to make 15 parcels of roti. She would sell one parcel at \$2.00. She would sell her vegetables for \$25 and roti parcel for \$15.00. She does not sell anymore.
115. The evidence of the plaintiff and her witnesses establish that she had been selling food parcels and vegetables from a table near her house in Wailevu Village. That evidence could not be contradicted. I therefore accept that the plaintiff did sell roti parcels and vegetables for her living.
116. I find that now she has problems with standing up and walking straight. She has a limp in her gait. I cannot find from the evidence that she can still wake up in the morning and continue her business of cooking and selling food and plant vegetables and sell the produce. She can to some extent assist in some household chores but she cannot do cooking and planting on a large scale alone to earn a living. Her ability to do that has diminished due to the accident.
117. I find that she needs to be compensated for not being in a position to earn a living for herself. I need to work out what she earned from her sales. The important aspect is to work out her profits from the sale. There are different versions of what she earned from her sales. I will accept her evidence from the cross-examination that she would

earn about \$35 - \$40 per day from sale of both the roti parcels and her vegetables. I will rely on the minimum amount of \$35 per day to work out her loss of earnings to give account for the fact that sales from produce is not often the same. It fluctuates as well. From that sum of \$35, at least \$10.00 should be discounted for her expenses like buying the flour, oil and other ingredients to cook. Her profit from the sale would therefore be about \$25 per day.

118. I will work out her earnings for only 5 days in a week and not 7 as she also needed time to plant her vegetables. She cannot be selling full time if she did not set aside time to plant her vegetables. At the rate of \$25 a day, she would be earning \$125 per week.

119. I need to work out the multiplier in this case. She was 66 years old when she had the accident. If she was selling roti and vegetables, it can be safely said that she could continue that until 70 years old. She therefore had about 4 years to continue earning her money. I will therefore pick a multiplier of 3 years given the fact that she would receive this money in a lump sum form which she can invest and earn interest on. She can derive more money from this award compared to her weekly earnings which she would have spent on her day to day living. There would be less savings in the weekly earnings.

120. I calculate the loss of earning to \$19, 500 as follows:

- $\$125 \times 52 \text{ weeks} = \$6, 500 \text{ per year} \times 3 \text{ years} = \underline{\$19, 500}$

121. I find that there should be interest on this amount at the rate of 6% from the date of the accident till the date of the hearing which is 2 years. The interest calculates to:

- $6/100 \times \$19, 500 = \$1, 170 \text{ per year} \times 2 \text{ years} = \underline{\$2, 340}$.

(iii). Pain and Suffering

122. The plaintiff was 66 years old. When she fell on the tarsealed road and got injured, there is no doubt that she would have suffered immense pain. The doctor also stated that she would have had severe pains. She was administered with very strong pain killers and analgesic drugs to manage her pain. A strong drug like morphine was also administered. That shows that she was in immense pain.
123. She was on pain killer drugs for several days. Although she managed her pain with the drugs, she suffered as well with the pain and had to undergo an added act of having drugs. The doctor noticed that she was in pain even after six months post the accident. The doctor testified that the pain could even be beyond 6 months.
124. Her inability to use her leg fully is life - long. She has a limp in her leg which inhibits full performance or activity. She still has pain from the fracture which is not fully aligned. The scar on her lower leg can also pull and stretch and that is also painful according to the doctor.
125. I find that her pain was extreme when she suffered the accident and that given her future permanent disability of 13%, she will still suffer pain in future which she needs to manage on her own with pain killer drugs. I find that an award of \$45,000 for past and future suffering is justified in her case.
126. To add to the award, there should be an interest of 6% from the date of the writ (9 October 2017) to the date of the hearing (3 and 4 December 2018) for a period of 1 year. The interest calculates to as follows:

- $6/100 \times 45,000 = \underline{\$2,700}$

Final Orders

127. In the final analysis, I find that the 1st and the 2nd defendants are liable for the accident caused by the 1st defendant. I therefore allow the plaintiff's claim.

128. I order the defendants to pay to the plaintiff a sum of \$70, 660 (rounded up) in special and general damages inclusive of interest on the same. The specific award and interest calculation under each head is tabulated below.

129. I further order the defendants to pay to the plaintiff a sum of \$5,000 in costs for the proceedings.

130. The liability of the defendants are joint and several. The amount awarded shall be paid within a month from the date of the judgment.

TABLE OF DAMAGES AND INTERESTS

DAMAGES	AWARD	INTEREST	TOTAL
A. Special	\$1, 054.50	\$63. 28	\$1,117.78
B. General			
1. Pain and Suffering	\$45,000	\$2,700	\$47,700
2. Loss future Income	\$19,500	\$2,340	\$21,840.
			\$70,657.78



Anjala Wati

Hon. Madam Justice Anjala Wati

Judge

14.03.2023

To:

1. Sarju Prasad Esq. for the Plaintiff.
2. Messrs Kohli & Singh for the Defendants.
3. File: Labasa HBC 43 of 2017.